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IMPROVING THE INDIGENT DEFENSE CRISIS THROUGH DECRIMINALIZATION*

“The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done.”¹ The constitutional right to the assistance of counsel in criminal prosecutions is one of the many safeguards contained within the Sixth Amendment designed to protect the fundamental human rights of life and liberty.² Unfortunately, for indigent defendants that safeguard of life and liberty operates as a mere platitude today. Stephen Bright, founder of the Southern Center for Human Rights, has bleakly summarized the crisis of indigent defense, noting that while the right to counsel is widely celebrated, it is not actually observed with equal force.³

Over the past half-century, the right to counsel has been greatly expanded and solidified doctrinally.⁴ Two guiding principles stand at the foreground of that expansion. First, the right to counsel provides that if an individual is too poor to afford his own defense, the state must furnish a lawyer to represent him.⁵ Second, the right to counsel includes the right to *effective* assistance – not just the presence of an individual who happens to be a lawyer standing alongside the accused.⁶ Unfortunately, while the Supreme Court has repeatedly stood in strong defense of the right to counsel and expounded on its vitality to the criminal

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1. *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) (internal quotation marks omitted).

2. *See id.*

3. Stephen B. Bright, *Turning Celebrated Principles Into Reality*, THE CHAMPION, Jan./Feb. 2003, at 6, http://library.law.yale.edu/sites/default/files/turning_principles_into_reality_gideon_at_40_-_champion.pdf [<https://perma.cc/2TEC-9C52>] (“No constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel.”).

4. *See Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

5. *Gideon*, 372 U.S. at 344.

6. *Strickland*, 466 U.S. at 685-86.

justice system and the necessity of a fair trial,⁷ the promises of *Gideon* and *Strickland* have disappointingly gone unfulfilled.⁸

The problem is easy to identify. Public defenders are perpetually forced to deal with unmanageable caseloads far exceeding professional guidelines.⁹ *Gideon*'s promise has gone unrealized for over half a century because public defenders have persistently been crippled in their pursuit of justice due to tremendous caseloads and funding deficits.¹⁰ The never-ending inadequacies of public defense has led some scholars to somberly describe criminal defense in the United States as being in a "permanent state of crisis."¹¹ The most troubling aspect of this permanent crisis is that the problem could not be any more salient. Since *Gideon* was decided, at least one major independent report has been released every five years documenting the inadequacies of indigent defense.¹²

Despite the overwhelming evidence of the state of crisis in which indigent defense finds itself in year after year, state legislatures have been largely unresponsive to repeated pleas from both public defenders and legal scholars for increased funding.¹³ Public defenders suffer from excessive caseloads and insufficient resources.¹⁴ If the public refuses to help our defenders on the back-end through increased funding, the alternative is to reduce caseloads on the front-end of the criminal

7. *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972); *Gideon*, 372 U.S. at 344-45; *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

8. See Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2063-64 (2000) [hereinafter *Gideon's Promise*].

9. *Id.*

10. Anthony C. Thompson, *The Promise of Gideon: Providing High-Quality Public Defense in America*, 31 QUINNIPIAC L. REV. 713, 713-14 (2013).

11. Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an "Ex Ante" Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 246 (1997); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1045 (2006) ("By every measure in every report analyzing the U.S. criminal justice system, the defense function for poor people is drastically underfinanced.").

12. DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 64 (1999); see also *Gideon's Promise*, *supra* note 8, at 2064; Thompson, *supra* note 10, at 723.

13. See Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 430 (2009); Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 465 (2007) (noting that for years, indigent defense advocates have pled for more funding, but "those pleas [have] fallen on deaf ears").

14. Hashimoto, *supra* note 13, at 465.

justice system.¹⁵ Any conversation about defense caseloads should focus on the misdemeanor dockets. In 2009, the National Association of Criminal Defense Lawyers (“NADL”) issued a report that estimated approximately 10.5 million misdemeanor prosecutions occur annually.¹⁶ Misdemeanors make up approximately 80% of most state dockets, and the typical encounter between the average American and the criminal justice system is through the misdemeanor gateway.¹⁷ According to data collected by the Court Statistics Project, for 2015, thirty-three states and the District of Columbia reported data consistent with NADL’s estimation in 2009.¹⁸ Decriminalization of certain misdemeanors has been recognized as a way to lower defender caseloads and save defender offices millions of dollars.¹⁹

Public defender caseloads are currently over-inflated with low-level, non-violent crimes, so decriminalizing certain misdemeanors would effectively reduce the caseloads of public defenders, allowing them to actually provide their remaining clients with the effective assistance of counsel guaranteed by the constitution.²⁰ Two offenses are prime candidates for such decriminalization efforts: driving with a suspended license and marijuana offenses. By removing marijuana offenses and driving with a suspended license from criminal dockets, public defenders

15. *Contra id.* (arguing that the solution to the indigent defense crisis is to reduce the right to counsel for misdemeanor offenses allowing defenders to focus their efforts on their felony clients where defenders can be more effective).

16. NAT’L ASS’N OF CRIM. DEF. LAWYERS, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS* 11 (2009), <https://www.nacdl.org/criminal-defense.aspx?id=20188&libID=20158> [<https://perma.cc/7L7V-M26V>] [hereinafter *MINOR CRIMES*].

17. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 *VAND. L. REV.* 1055, 1063 (2015).

18. See Court Statistics Project, *2015 Criminal Caseloads – Trial Courts*, http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Criminal [<https://perma.cc/D79C-5VPL>] (Select data year “2015”; then select chart/table “Statewide Misdem. Caseloads and Rates”; Do not select an individual state) (The thirty-four jurisdictions reported around 9.5 million misdemeanors out of over 12 million total crimes. Of these reporting jurisdictions, misdemeanors made up a collective 77% of all crimes in these jurisdictions).

19. Natapoff, *supra* note 17, at 1073.

20. See Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 *U.C. DAVIS L. REV.* 277, 294 (2011) (“Although excessive workloads are cause for concern in both the felony and misdemeanor context, individuals facing misdemeanor charges are more likely to suffer the consequences of the workload strain.”).

will have more time and resources to allocate to their remaining clients, getting the nation one step closer to honoring the demands of the Sixth Amendment so that justice can “still be done.”

Part I of this comment will briefly summarize the current state of indigent defense. Part II will briefly summarize the different strategies of decriminalization and their respective strengths and weaknesses. Part III will explain why marijuana charges and driving with a suspended license are prime candidates for decriminalization. Finally, Part IV will discuss what policy makers should be mindful of when undertaking decriminalization efforts.

I. THE CURRENT STATE OF INDIGENT DEFENSE

Even well before *Gideon* guaranteed the right to counsel to indigent defendants, Justice Hugo Black simply stated, “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”²¹ Even after *Gideon*’s mandate, there has been no shortage of legal critics lamenting that the structural inadequacies of public defense in America have continued to negatively impact indigent defendants.²² Excessive caseloads severely limit a public defender’s capabilities resulting in representation that is neither competent nor diligent.²³ As long as public defenders are crippled by unmanageable caseloads, they will be systemically incapable of providing the same level of service that would be expected of private counsel, and Justice Black’s warning will be forgotten and obsolete.²⁴

The right to counsel has continued along a parabolic trajectory, expanding on an upward trajectory providing protections for more and more Americans before being caught and slowly pulled back down to a more limited function. First, the United States Supreme Court held in *Powell v. Alabama*²⁵ that

21. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

22. See generally Thompson, *supra* note 10; Andrew E. Taslitz, *Trying Not to Be Like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?*, 45 TEX. TECH L. REV. 315, 316-19 (2012); Cara H. Drinan, *Getting Real About Gideon: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309, 1331 (2013).

23. NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 6 (2011).

24. See *id.* at 6-7.

25. 287 U.S. 45 (1932).

under limited circumstances, the appointment of counsel for indigent defendants in a capital case was required under the due process clause of the Fourteenth Amendment.²⁶ Thirty years later, Justice Black's admonition against treating indigents separately in the criminal law context was heeded, and *Gideon* extended the holding of *Powell*, this time finding a constitutional mandate in the Sixth Amendment right to counsel, incorporating the indigent's right to counsel for felony cases.²⁷ The scope of the right to counsel continued to expand, covering a multitude of situations such as juvenile delinquency proceedings²⁸ or a first direct appeal of a conviction.²⁹ Ultimately, the right to counsel reached its peak when the Supreme Court declared that the right to be represented by counsel expanded to all criminal cases resulting in imprisonment and the loss of liberty, including misdemeanors.³⁰ However, the right to counsel has subsequently been undermined, reducing the impetus for states to honor the constitutional mandate.³¹ Currently, for the right to counsel to attach, there must be "actual imprisonment" rather than "the mere threat of imprisonment."³² This means that the right to counsel

26. *Id.* at 71 (limiting the right to be appointed counsel to indigents in capital cases who are ignorant, feeble-minded, illiterate, or the like).

27. *Gideon*, 372 U.S. at 344.

28. *In re Gault*, 387 U.S. 1, 36-37 (1967).

29. *Douglas v. California*, 372 U.S. 353, 357 (1963).

30. *Argersinger*, 407 U.S. at 37 (1972); *see also* *Alabama v. Shelton*, 535 U.S. 654, 658 (2002) (holding that the right to counsel applies even where a defendant is given a suspended sentence subject to revocation because the revocation would result in imprisonment). It is important to note that the right to counsel in misdemeanor cases is often not respected, and many misdemeanants end up being prosecuted without ever being offered the ability to exercise their constitutional right to the assistance of counsel. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1341-43 (2012); Roberts, *supra* note 20, at 311-12. One of the most outrageous refusals to recognize the right to counsel in misdemeanor cases is found in the words of Chief Justice Jean Hoefler Toal of the Supreme Court of South Carolina, who stated publicly at a meeting of the State Bar:

"*Alabama v. Shelton* [is] one of the more misguided decisions of the United States Supreme Court, I must say. If we adhered to it in South Carolina we would have the right to counsel probably . . . by dragooning lawyers out of their law offices to take these cases in every magistrate's court in South Carolina, and I have simply told my magistrates that we just don't have the resources to do that. So I will tell you straight up we [are] not adhering to *Alabama v. Shelton* in every situation." MINOR CRIMES, *supra* note 16, at 15, n.35 (alterations in original).

31. *See* Alexandra Natapoff, *Gideon Skepticism*, 70 WASH. & LEE L. REV. 1049, 1066 (2013).

32. *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (holding that just because a crime may be punishable by fine and/or imprisonment, the defendant is not entitled to counsel

can be ignored if the court and prosecution are willing to forego the option of imprisonment for an offense.³³ While the “actual imprisonment” doctrine has its critics, the truly fatal blows to the right to counsel have arisen in the effective assistance of counsel line of cases.³⁴ In *Powell* and *Gideon*, the Court discussed the vital role of defense counsel with lofty language eloquently defending the necessity of counsel for indigents, but *Strickland* undermined the aspirations of *Powell* and *Gideon* by creating a disparagingly low bar for attorney competence.³⁵ The result is the right to the assistance of an attorney without a meaningful way to measure if the presence of the attorney actually impacted the process for the defendant in any manner.³⁶

With these general principles in mind, I can now turn to the actual state of crisis indigent defense finds itself in year after year. As noted above, there is no shortage of legal scholars or independent reports documenting the problem of overburdened public defenders, so an in-depth discussion of such reports here would add little to the growing conversation.³⁷ Instead, it would be more useful for the purposes of this comment to reserve the discussion to three factors shaping indigent defense: (1) misdemeanor dockets across the nation have exploded, resulting in reduced efficiency of public defenders; (2) legislatures and the political process as a whole are largely unresponsive to repeated pleas for increased funding; and (3) structural lawsuits are ineffective and unreliable means of forcing states to increase indigent defense spending.

unless imprisonment is being sought by the state or will certainly result from the conviction). *But see* Paul Marcus, *Why the United States Supreme Court Got Some (but not a lot) of the Sixth Amendment Right to Counsel Analysis Right*, 21 ST. THOMAS L. REV. 142, 149-51 (2009) (detailing how some jurisdictions go beyond the “actual imprisonment” standard and provide the right to counsel to a much broader scope of criminal cases than that required under the federal constitution).

33. Roberts, *supra* note 20, at 311.

34. *See infra* Part I.B.3 and accompanying footnotes discussing *Strickland*.

35. Natapoff, *supra* note 31, 1066 (“*Strickland skepticism*,” the conclusion that *Strickland*’s low bar for attorney competence has effectively gutted the substantive right to counsel . . .”).

36. *See* Roberts, *supra* note 20, at 315 (“[T]he *Strickland* test offers little concrete guidance to lower courts analyzing actual claims of ineffective assistance and to defense attorneys regulated by its Sixth Amendment holding.”).

37. For an updated list of different independent publications discussing indigent defense, visit <https://www.nacdl.org/criminaldefense.aspx?id=20188&libID=20158> [<https://perma.cc/NR8V-YVSV>].

A. Misdemeanor Caseloads

For the past couple of decades, the widely accepted professional standard for caseload limits for a full-time public defender has been 150 felonies, 400 misdemeanors, 200 juvenile cases, 200 mental health cases, or 25 appeals per year.³⁸ However, misdemeanor defenders across the nation repeatedly handle caseloads in extreme excess of the guidelines.³⁹ The most notorious example is the New Orleans Public Defender Office, which reported that its attorneys handle approximately 19,000 cases per year, greater than forty-seven times the recommended amount, which only allows the attorneys to spend a *total* of *seven minutes* per case.⁴⁰ Public Defenders in Minnesota have reported only having an average of twelve minutes per client to handle each case in court, which does not allow for any additional research or other paperwork on behalf of the defender.⁴¹ While the situations in New Orleans and Minnesota are far worse than the rest of the nation, those jurisdictions are not alone, as several other offices also reported annual misdemeanor caseloads of up to 3,000.⁴²

The amount of misdemeanor cases in the United States is staggering. Estimates show that approximately 2 million felony cases are filed each year compared to 10 million misdemeanor cases.⁴³ At first glance, one might suggest that misdemeanors should of course be much more common than felonies because most Americans are not dangerous criminals, and only the worst behavior is reserved for designation as felonious. However, the

38. MINOR CRIMES, *supra* note 16, at 21. Also, it is important to note that the guidelines themselves might be too high because the guidelines assume that the defender is a full-time litigator and that the defender works in close proximity to the courthouse.

39. *Id.*

40. *Id.*

41. See Jessica Mador, *A Public Defender's Day: 12 Minutes Per Client*, MINN. PUB. RADIO (Nov. 29, 2010), <http://minnesota.publicradio.org/display/web/2010/11/29/public-defenders> [<https://perma.cc/H7N9-A398>].

42. *Id.*; see also Maureen Dimino, *Misdemeanor Courts Are in Need of Repair*, CHAMPION, June 2009, at 36, 39 (summarizing survey data of public defender misdemeanor caseloads as follows: 2,000 misdemeanors per year in Chicago, Atlanta, and Miami; 1,200 in Dallas; 1,500-3,000 in Tennessee; 2,500 in Utah; 927 in Grant County, Washington); Roberts, *supra* note 20, at 279-80 (noting contract defense attorneys in Detroit, Michigan average 2,400 to 2,800 misdemeanors a year, an amount in excess of the standard guideline by 500%).

43. See Natapoff, *supra* note 17, at 1063.

more accurate answer is likely that the process of overcriminalization has caused the number of misdemeanor offenses to skyrocket.

Overcriminalization is the process of the state inappropriately abusing the power to impose criminal sanctions on conduct that does not rise to the level of harmfulness or culpability warranting such sanctions.⁴⁴ There are many separate factors fueling overcriminalization. First, the political process forces politicians to appear “tough on crime” by moving to expand the penal code on claims that such actions will reduce overall crime and deter other illegal behavior.⁴⁵ Second, the rhetoric surrounding this “tough on crime” stance has essentially eroded the harm principle, so it is only getting easier to continue to capture more and more behavior under the umbrella of the penal law.⁴⁶ Third, law enforcement is incentivized to enforce minor crimes in order to build their record and seek professional advancement.⁴⁷ Lastly, the judiciary has failed to check overcriminalization for multiple reasons, including “the anxiety of appearing to be a *Lochner*-esque super-legislature”⁴⁸ The result is criminal codes that are both overly broad, criminalizing a wide range of behavior, and overly deep, providing for criminal liability for the same action several times over under multiple different statutes.⁴⁹

Behavior that was traditionally viewed as “undesirable” or “poor manners” has increasingly been removed from the realm of

44. Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 713-16 (2005) (noting that the decision to label behavior as criminal is to make “a critical moral judgment” about conduct and the perpetrator, and the ability for the state to deprive an individual of his liberty, along with collateral consequences, is a remedy not found in any other area of the law); see also Douglas Husak, *Reservations About Overcriminalization*, 14 NEW CRIM. L. REV. 97, 100-02 (2011) (arguing punishments under the criminal law are unique from other sanctions under the law because they contain an expressive element “designed to censure and to stigmatize” the offender).

45. Luna, *supra* note 44, at 718-20.

46. See *id.* at 718, 720.

47. *Id.* at 723-24 (“Although law enforcers are generally charged to ‘do justice,’ they are not neutral and detached entities within the legal system, wholly indifferent to outcomes in particular cases or net results over time. Like all other professionals, police and prosecutors seek the personal esteem and promotion that accompany success, typically measured by the number of arrests for the former and convictions for the latter.”).

48. *Id.* at 724.

49. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512-19 (2001).

social norms into the criminal sphere.⁵⁰ The plethora of “criminal behavior” that legislative bodies have felt compelled to attach criminal sanctions to includes: unleashed pets, failure to use a seatbelt, putting one’s feet up on a subway seat, lying across or otherwise taking up two subway seats, riding bicycles on sidewalks, sleeping in a cardboard box, and even *feeding the homeless*.⁵¹

In 2011, the New York City courts were clogged with more than 20,000 arraignments for “theft of services,” which is commonly charged for turnstile jumping.⁵² Around the country, defender offices report that petty, nonviolent offenses such as public drunkenness, obstructing a walkway, or driving without a license are frequently charged and eat up much of the defenders’ time.⁵³ Overcriminalization is problematic because it actually *creates* crimes rather than merely acknowledging certain, already recognized as morally blameworthy, behavior as criminal.⁵⁴

The expansion of the substantive scope of criminal codes is only half of the story. It is actually police and prosecutors who decide to what extent any given law is enforced.⁵⁵ In New York City, 20,000 individuals were not arraigned because turnstile jumping was a crime – they were arraigned because a police

50. See MINOR CRIMES, *supra* note 16, at 25.

51. *Id.* For an excellent survey of city ordinances aimed at making the act of being homeless a crime, including ordinances making it a misdemeanor to sit down in certain public places, see NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 16-29 (2015), https://www.nlchp.org/documents/No_Safe_Place [<https://perma.cc/7XN2-6JPT>].

52. CRIMINAL COURT OF THE CITY OF NEW YORK, ANNUAL REPORT 30 (2011), <http://www.nycourts.gov/courts/nyc/criminal/annualreport2011/pdf>. [<https://perma.cc/4CYM-V94Q>].

53. See THOMAS GIOVANNI & ROOPAL PATEL, GIDEON AT 50: THREE REFORMS TO REVIVE THE RIGHT TO COUNSEL 5 (2013), http://www.brennancenter.org/sites/default/files/publications/Gideon_Report_040913.pdf [<https://perma.cc/P2EU-YPJR>].

54. Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 538-39 (2012) (“In addition to the ever-expanding number of criminal statutes, standard critiques of overcriminalization also bemoan the broad scope of modern criminal codes. Contemporary criminal codes reach conduct that, in previous generations, would not have been subject to punishment. The classic example is so-called regulatory offenses. These offenses punish conduct that is *mala prohibita*, or wrongful only because it is illegal, and may allow punishment where ‘consciousness of wrongdoing be totally wanting.’ With the proliferation of regulatory offenses, infractions that in prior generations might not even have resulted in civil fines or tort liability are now subject to the punishment and stigma of the criminal law.”).

55. Stuntz, *supra* note 49, at 521 (“Legislators speak, but police and prosecutors control the volume.”).

officer arrested them, and a prosecutor proceeded with the prosecution.⁵⁶ Police officers appreciate the broadening of criminal codes because “quality of life” offenses, crimes focused at low-level street behavior, reduce the investigative burden on officers before they may conduct searches and arrests on the street.⁵⁷ Prosecutors are motivated to work efficiently and produce high conviction rates, and the broadening of the criminal law allows prosecutors to meet those goals.⁵⁸ Overcriminalization creates new crimes and overlapping crimes that allow for charge-stacking which in turn greatly enhances a prosecutor’s bargaining ability when negotiating pleas, which produces more convictions at a substantially diminished cost.⁵⁹

The result is excessive caseloads that have given rise to a practice referred to as “meet ‘em and plead ‘em” where a defender’s only communication with a client is often a hurried conversation only a few minutes before a court appearance.⁶⁰ The sheer speed through which misdemeanor courts must operate given the voluminous caseloads has also been described as “[an] ‘assembly line,’ ‘cattle-herding,’ and ‘McJustice’”⁶¹ A counter-argument might be made that a petty offense does not require a sophisticated legal defense, so a public defender does not need a large swath of time to devote to misdemeanor cases; however, the problem arises on the systemic level because as long as a case is active, a defender still has to attend arraignments and other hearings and file and argue various motions.⁶² Non-violent, low-level offenses clog the criminal justice system and distract public defender resources from more serious crimes.⁶³

56. James C. McKinley Jr., *For Manhattan Fare Beaters, One-Way Ticket to Court May Be Over*, N.Y. TIMES (Jun. 30, 2017), <https://www.nytimes.com/2017/06/30/nyregion/subway-fare-beating-new-york.html> [<https://perma.cc/J5S5-5MZ9>].

57. Stuntz, *supra* note 49, at 539 (“The Fourth Amendment requires that arrests be supported by probable cause to believe the arrestee has committed a crime. Street stops must be supported by reasonable suspicion of crime. In both instances, the operative word is ‘crime.’ If that word includes enough behavior, if crime is defined broadly enough, police can stop or arrest whomever they wish.”).

58. *See id.* at 537-38.

59. *Id.* at 536-37.

60. Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 975 (2012).

61. Natapoff, *supra* note 17, at 1064.

62. GIOVANNI & PATEL, *supra* note 53, at 5.

63. *Id.*

Perhaps the most obvious problem with excessive caseloads is that they prevent public defenders from fulfilling their ethical obligations.⁶⁴ Several scholars have argued that heavy caseloads force public defenders to violate a number of rules of professional conduct.⁶⁵ Most notably, a public defender repeatedly experiences concurrent conflicts of interest⁶⁶ when he is forced to divide his time amongst the hundreds of clients currently assigned to him.⁶⁷ The conflict of interest does not necessarily arise out of the fact that a defender's clients will have competing interests but rather that the defender is not able to perform his duties with the level of diligence⁶⁸ and competence⁶⁹ required of counsel.⁷⁰ Of course, putting aside the rules of professional conduct, the United States Supreme Court has made it clear that "the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests."⁷¹ Yet, despite the clear instructions laid down by both the rules of professional conduct and the Supreme Court, public defenders repeatedly find themselves forced to choose which clients will receive effective legal assistance.⁷²

64. LEFSTEIN, *supra* note 23, at 27.

65. *Id.*; Heidi Reamer Anderson, *Funding Gideon's Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest*, 39 HASTINGS CONST. L.Q. 421, 442-48 (2012).

66. A concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client . . ." MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2016).

67. Anderson, *supra* note 65, at 443.

68. MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 2 (AM. BAR ASS'N 2016) ("A lawyer's work load must be controlled so that each matter can be handled competently.").

69. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2016) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

70. LEFSTEIN, *supra* note 23, at 27-29.

71. *Glasser v. United States*, 315 U.S. 60, 70 (1942).

72. *See* NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 69 (2009), <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf> [<https://perma.cc/2AEK-8V5D>] [hereinafter JUSTICE DENIED] (quoting Missouri State Public Defender Deputy Director).

B. The Impossibility of Funding

Increasing funding for public defense is not a politically feasible solution. In fact, state legislatures have exacerbated the problem by continuing to cut public defense budgets despite constantly rising caseloads.⁷³ The problem is twofold. First, funding amongst prosecution and defense functions is heavily slanted in favor of prosecution and law enforcement.⁷⁴ Second, the political reality is that most Americans and their elected representatives are unwilling to spend money to help “criminals” avoid punishment.⁷⁵

1. Funding Gaps

There is a large disparity in the funding and staffing of prosecutors’ offices and defense offices across the nation. The American Bar Association has noted that national standards specify that in the pursuit of fairness, government spending on prosecution and indigent defense functions should be equivalent.⁷⁶ Former U.S. Attorney General Janet Reno was a strong proponent of this view arguing that the strength of the entire criminal justice system depends on the strength and adequacy of each “leg” of the system including indigent defense.⁷⁷

The current system is not as fair as Janet Reno or the national guidelines would call for. The most recent national census conducted by the Bureau of Justice Statistics reports that in 2007,

73. *See id.* at 68.

74. *See infra* Part I.B.1.

75. *See infra* Part I.B.2.

76. AM. BAR ASS’N, BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE 13 (2004), http://texaswcl.tamu.edu/reports/2004_ABA_Gideon's_Broken_Promise.pdf [<https://perma.cc/RX4M-2KBN>].

77. OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, REPORT OF THE NAT’L SYMPOSIUM ON INDIGENT DEFENSE: IMPROVING CRIMINAL JUSTICE SYSTEMS THROUGH EXPANDED STRATEGIES AND INNOVATIVE COLLABORATIONS xiii (1999) (“My experiences as a prosecutor and as Attorney General have taught me just how important it is for every leg of the criminal justice system to stand strong. Indigent defense is an equally essential element of the criminal justice process, one which should be appropriately structured and funded and operating with effective standards When the conviction of a defendant is challenged on the basis of inadequate representation, the very legitimacy of the conviction itself is called into question. Our criminal justice system is interdependent: if one leg of the system is weaker than the others, the whole system will ultimately falter.”).

state prosecutors' budgets nationwide were \$5.8 billion.⁷⁸ Conversely, state and local public defender offices operated on a budget of only \$2.3 billion in 2007.⁷⁹ Additionally, state prosecutors' offices enjoyed approximately 25,000 attorneys and 25,000 support staff⁸⁰ compared to the 15,000 attorneys and 10,000 support staff employed by defenders' offices.⁸¹ If the inequality were not apparent enough, it is certainly worth noting that the figures for prosecutors' offices are indeed *undervalued*. The 2007 Census of State Court Prosecutors excluded offices of municipal attorneys or county attorneys who appear in lower courts of limited jurisdiction.⁸² Those previously mentioned figures, which already greatly exceeded the resources of defenders' offices, do not totally account for the full amount of prosecution expenditures.

States cannot dismiss the inequality in funding as a symptom of budgetary shortfalls because the federal government offers grants to help fund criminal justice efforts at the state level.⁸³ One grant, the Edward Byrne Memorial Justice Assistance Grant Program, gave states \$287 million in 2012 to go toward criminal justice purposes.⁸⁴ States award more than 60% of those funds to law enforcement and only a small portion to prosecutors and defenders.⁸⁵ However, even within that small amount there is approximately a 7 to 1 ratio between funding given to prosecutors and funding given to defenders.⁸⁶

It may be argued that excessive caseloads weigh down the entire criminal justice system. After all, if public defenders are having to defend so many cases, obviously the prosecutors are having to push those cases forward in the first place. However,

78. STEVEN W. PERRY & DUREN BANKS, U.S. BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2007 STATISTICAL TABLES 1 (Dec. 2011), <https://www.bjs.gov/content/pub/pdf/psc07st.pdf> [<https://perma.cc/L69E-CGF4>].

79. LYNN LANGTON & DONALD J. FAROLE, JR., U.S. BUREAU OF JUSTICE STATISTICS, PUBLIC DEFENDER OFFICES, 2007-STATISTICAL TABLES, Table 1 (Jun. 22, 2010), <http://bjs.gov/content/pub/pdf/pdo07st.pdf> [<https://perma.cc/53DL-WRDH>].

80. PERRY & BANKS, *supra* note 78, at 4 tbl.2.

81. LANGTON & FAROLE, JR., *supra* note 79, at 2.

82. PERRY & BANKS, *supra* note 78, at 1.

83. GIOVANNI & PATEL, *supra* note 53, at 4.

84. *Id.*

85. *Id.*

86. *Id.* (noting that in 2010, states allocated \$13.8 million of grant money to prosecutors, but only \$1.9 million to public defenders).

the data explicitly refutes this notion that the rising tide raises all ships. The public defenders' offices are carrying the lion's share of these massive caseloads. Prosecutors' offices across the nation receive more than two-and-a-half times as much funding as defenders' offices. The "assembly-line," "McJustice" form of criminal justice that has developed does not weigh on prosecutors in the same manner that it cripples public defenders.

2. *Political Landscape*

There is little public support for increasing indigent defense funding.⁸⁷ "Television and the media, along with strict anti-crime policies, have all contributed to the public perception that individuals who commit crimes are dangerous 'others' not deserving of any protection."⁸⁸ The political hostility to strengthening indigent defense is not a new phenomenon. During a hearing on the crisis of indigent defense funding held during the 1982 Annual Conference of the National Legal Aid and Defender Association, one witness eloquently summarized the political landscape acknowledging that there is "no popular solution" to indigent defense funding because helping criminal defendants is not a high priority for the public.⁸⁹ Over thirty years later, a popular solution has yet to emerge.

The political process is heavily slanted against indigent defendants through systemic disenfranchisement. "Indigent defendants represent the archetypical 'discrete and insular

87. For a general discussion of the political backlash to effective representation of criminal defendants, see *Gideon's Promise*, *supra* note 8, at 2066-68.

88. Thompson, *supra* note 10, at 714-15.

89. AM. BAR ASS'N, GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING 15-16 (1982), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/indigentdefense/gideonundone.authcheckdam.pdf [<https://perma.cc/54UH-WMGC>] ("There is no popular solution to this question of indigent defense funding People are sick and tired of paying for programs they don't believe in Today, the indigent defendant in Massachusetts faces a system that's determined to arrange for his arrest, provide for his prosecution and require his incarceration if convicted. There is less determination to pay any money for his effective representation in court. The legislature is faced with a shortage of funds. It's a question of priority as to which programs are going to get funded. A program for funding the representation of a man that's accused of breaking into your house is not going to go through What I'm asking you all here today as members of the bar is to realize this is a very very unpopular subject. There is no public support whatsoever Legislators in a democracy have to be elected. We can't expect much support from them. The last line of defense rests with the bar.").

minority'"⁹⁰ People accused of crimes are generally removed from the political process because they usually come from "poor and alienated" social groups or they have legally been disenfranchised because of a felony conviction.⁹¹ What results is that legislators must respond to the general electorate which demands that politicians be "tough on crime;" meanwhile, the unpopular and silent constituency of criminal defendants continues to go ignored.⁹²

A great example of how public defense is seen not as a constitutional mandate but rather as yet another agency seeking public funds is illustrated in Missouri's fight between former Governor Jay Nixon and Michael Barrett, the director of Missouri's public defender system.⁹³ In 2014, Barrett presented the Missouri General Assembly with empirical evidence based partly on tracking Missouri defenders' time usage that showed Missouri public defenders were unable to devote as much time to their cases as prevailing professional norms would suggest.⁹⁴ For example, for noncapital murder cases, Missouri defenders reported spending an average of 84.5 hours per case whereas experts suggested the professional norm would be 106.6 hours.⁹⁵

Persuaded by the empirical evidence, the Missouri General Assembly approved a \$3.47 million funding increase for the Missouri Public Defender's Office.⁹⁶ However, Governor Jay Nixon vetoed the legislation, and although his veto was overridden, he simply refused to distribute the funds.⁹⁷ When the

90. Drinan, *supra* note 13, at 430.

91. *Id.*

92. *Id.*

93. See Katie Reilly, *Missouri's Governor Cut Funding to the State's Public Defenders. So They Assigned Him a Case*, TIME.COM (Aug. 4, 2016), <http://time.com/4439083/missouri-public-defender-governor-jay-nixon/> [<https://perma.cc/29DA-FG7L>].

94. AM. BAR ASS'N, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 23-24 (2014), https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/lis_sclaid_5c_the_missouri_project_report_authcheckdam.pdf [<https://perma.cc/JC8T-BN5W>].

95. *Id.*

96. See Dylan Walsh, *On the Defensive*, THE ATLANTIC (Jun. 2, 2016), <https://www.theatlantic.com/politics/archive/2016/06/on-the-defensive/485165/> [<https://perma.cc/4D6A-JSVH>].

97. See *id.*; Lorelei Laird, *Starved of Money for Too Long, Public Defender Offices are Suing – and Starting to Win*, ABA JOURNAL (Jan. 1, 2017), <http://www.abajournal.com>

next fiscal year rolled around, Governor Nixon actually cut the budget of the public defender's office by \$3.47 million, the same amount as the original increase.⁹⁸ The Governor then approved \$4 million for State Fairground improvements, \$52 million for a new state park, and a staggering \$998 million for a new football stadium.⁹⁹ While the Missouri General Assembly accepted Barret's empirical evidence that his office was not fulfilling its constitutional obligations to its clients, Governor Nixon saw the office as merely another agency simply competing for a piece of the state budget.¹⁰⁰ As long as indigent defense is viewed in this way, funding will never be adequately supplied because "helping criminals" is just not as popular of a cause as football stadiums or state parks.

3. Structural Litigation

Realizing the political process is unfavorable to criminal defendants, advocates have begun to turn to the courts, claiming the structural inadequacies in public defense deprived indigent defendants of the right to effective assistance of counsel.¹⁰¹ Structural lawsuits claim that the manner in which states are choosing to fulfill the mandate from *Gideon* to provide indigent defendants with counsel still falls short of the additional requirement set forth in *Strickland* that defendants have access to *effective* assistance of counsel.¹⁰² Claims of ineffective assistance of counsel under *Strickland* require a defendant to show (1) that his counsel's representation fell below an objective standard of reasonableness and (2) the defendant was prejudiced as a result of such deficiency.¹⁰³ The general argument is that when states

/magazine/article/the_gideon_revolution/ [https://perma.cc/MR6W-Y7H2] (noting this was legal under state law because revenues did not match projections).

98. Walsh, *supra* note 96.

99. *Id.*

100. See Reilly, *supra* note 93.

101. For an excellent summary of structural litigation, see generally Drinan, *supra* note 13.

102. See *id.* at 432-33.

103. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). It is important to note that many scholars have criticized *Strickland* as being "toothless" and a meaningless standard. See Drinan, *supra* note 22, at 1318; George C. Thomas III, *When Lawyers Fail Innocent Defendants: Exorcising the Ghosts that Haunt the Criminal Justice Systems*, 2008 UTAH L.

force public defenders to represent too many clients at once, individual clients fail to receive the proper guidance required of counsel.¹⁰⁴

However, legal scholars have begun to comment that the era of structural litigation is “waning” despite the fact that there have been some success stories for defendants in such suits.¹⁰⁵ There are two major problems that prevent reliance on structural litigation as the solution to the indigent defense crisis.

First, public defenders are often not insulated from political pressures, and that lack of independence prevents defender offices from challenging the status quo for fear of retaliation such as being fired or having their budgets cut.¹⁰⁶ Norman Lefstein begins his book *Securing Reasonable Caseloads* with the story of “Pat,” an assistant public defender who realized he was ineffective because of his caseloads. Pat asked his superiors about seeking to withdraw from some of his cases, but Pat was informed that he lacked authority to file a motion to withdraw and requesting such authority would result in his termination.¹⁰⁷ When caseloads become unmanageable, leadership in defender offices are hesitant to seek withdrawal from new cases or decline further appointment because of fear that the elected officials they ultimately answer to will either have them fired¹⁰⁸ or completely

REV. 25, 43 (discussing the “foggy mirror” test and stating, “[i]f you place a mirror in front of defense counsel during trial and it fogs, counsel is in fact effective.”).

104. The prejudice standard under *Strickland* is relaxed in conflict of interest claims. Where an actual conflict exists, such as through joint representation, the defendant only needs to show an “adverse effect” which is easier to satisfy than “prejudice.” See generally Anderson, *supra* note 65, at 438-42.

105. Drinan, *supra* note 22, at 1330-31. But see Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 706 (2007) (arguing that making structural changes to how ineffective assistance claims are brought could help defendants bring more claims and receive more favorable review from appellate courts).

106. See Lorelei Laird, *When Public Defenders Become Plaintiffs*, ABA JOURNAL (Jan. 2017), http://www.abajournal.com/magazine/article/when_public_defenders_become_plaintiffs/the_gideon_revolution (quoting David Carroll of the Sixth Amendment Center in Boston stating, “You’re very rarely going to see a public defender system bring a lawsuit . . . Unless that system has independence, they’re always going to be afraid to sort of stick their head above the bunker.”); see also Backus & Marcus, *supra* note 11, at 1069-72 (discussing the lack of independence for many defender offices).

107. LEFSTEIN, *supra* note 23, at 2-3.

108. *Id.* at 22.

disband the office of the public defender and privatize the system.¹⁰⁹

Second, there is doubt about the effectiveness of structural litigation as a strategy.¹¹⁰ One structural litigation commenter soberly explains that these suits are very expensive and often fail to actually improve the plight of public defenders and their clients even in spite of favorable decisions by the courts.¹¹¹ Ultimately, the problem lies in enforcement because even if a court holds that funding for indigent defense is constitutionally inadequate, the legislature has to willingly increase funding for indigent defense, and proponents of indigent defense will still have to fight for that funding each year as the budget is decided.¹¹² Appeals to the courts are unreliable solutions to the problems of indigent defense.¹¹³ Advocates of indigent defense cannot expect to receive help from the courts as long as indigent defendants remain unpopular.¹¹⁴

* * *

The Brennan Center for Justice has put forth three recommendations on how to best reform indigent defense in America: (1) removing certain low-level crimes from the criminal justice network; (2) increasing funding for public defense; and (3) increasing the effectiveness of defenders by increasing training and providing social worker support staff.¹¹⁵ However, as noted above, state legislatures and the public at large, are generally unreceptive to calls to increase spending on “criminals.” Increasing funding through any means is not likely to gain any

109. Laird, *supra* note 97.

110. Drinan, *supra* note 22, at 1331-32.

111. *Id.*

112. *Id.* at 1332 (“Judicial victories still require legislative funding to breathe life into the court’s holding – funding that must be fought for annually and funding that, history tells us, will be inadequate. There is simply little money to be had in many jurisdictions, and legislators may rationally choose to spend it on issues other than indigent defense – whether that choice is constitutional or not.”).

113. *But see* Laird, *supra* note 97 (discussing several recent systemic lawsuits that have received favorable dispositions for defenders or indigent defendants).

114. Donald A. Dripps, *Up from Gideon*, 45 TEX. TECH L. REV. 113, 122-23 (2012) (arguing that indigent defense advocates will never receive support from the courts until a “political identity” is established that will capture the courts’ sympathies).

115. GIOVANNI & PATEL, *supra* note 53, at 8-9.

political momentum as long as politicians can accuse one another of being “soft on crime.” Therefore, only a “supply and demand” solution is available.¹¹⁶ Increasing the “supply” of public defenders or increasing their effectiveness both require input by the state. Increased training is not without expense. For that reason alone, increased training, hiring more assistants and investigators, or investing in specialized education programs are no more feasible as solutions than the primary request of asking for more funding. A supply side solution will not work.

The remaining option is to reduce the caseloads of public defenders on the front end. There are competing approaches for how to reduce the caseloads of defenders. One option is to reduce the right to counsel for misdemeanors so that defenders can focus on more serious felony offenses.¹¹⁷ Another option is to do the exact opposite.¹¹⁸ Some have argued that defense rationing should be skewed in favor of misdemeanors in an attempt to crash the system.¹¹⁹ If defenders focus their resources on litigating misdemeanors rather than letting the hasty plea bargaining system decide everything, then the strain on the courts would force prosecutors, police officers, and legislators to decriminalize low level crimes.¹²⁰ As the analysis to follow explains, the most politically viable option is to seek official decriminalization at the legislative level – a strategy which is growing increasingly popular in the political arena.¹²¹

116. Dripps, *supra* note 114, at 123-31 (comparing alternative solutions such as reducing the “demand” for public defenders by limiting the caseloads of defenders or increasing the “supply” of representation such as by allowing representation by lay persons or making public defense a new type of career path separate in licensing and training from traditional legal education).

117. See generally Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461 (2007).

118. Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1099-1100 (2013).

119. *Id.*

120. *Id.* (“More misdemeanor trials, or fewer guilty pleas at an early court appearance, would impose serious strain on the criminal justice system. If these costs filter down, prosecutors would be forced to decline prosecution in more cases. This may, in turn, affect law enforcement, potentially leading the police to exercise discretion in deciding whom they actually put through the system. Finally, making the system bear more of the true costs of adjudicating misdemeanor arrests would, hopefully, give legislators a concrete reason (and perhaps some political coverage) to decriminalize and to refrain from creating more minor criminal offenses.”).

121. Natapoff, *supra* note 17, at 1069.

II. DEFINING DECRIMINALIZATION

Misdemeanor decriminalization, in whatever form, has increasingly been considered as a politically feasible solution to the indigent defense crisis.¹²² Defendants, the state, and the system all seem to come out on top from decriminalization efforts.¹²³ Defendants are able to escape the burdens of the criminal justice apparatus including stigma and the collateral consequences that come from a criminal record.¹²⁴ The State consequentially can generally expect decriminalization efforts to serve as an effective cost-saving measure.¹²⁵ The system as a whole also reaps the rewards because decriminalization can reduce the burdens of mass incarceration and help soothe racial disparities.¹²⁶ However, it is imperative to have some sort of working definition of what exactly “decriminalization” is, and what it is not.

Scholars differ as to how decriminalization should be conceptualized and categorized.¹²⁷ Professor Alexandra Natapoff argues that there are three categories when discussing decriminalization.¹²⁸ First, there is a distinction between the terms “decriminalization” and “legalization.”¹²⁹ Legalization is a complete “roll-back” of the state’s regulatory authority for certain activities, but decriminalization is focused on either reducing or eliminating criminal sanctions for conduct that is still regulated.¹³⁰ Second, decriminalization itself can be broken down into two different forms.¹³¹ “Full decriminalization” takes place when an offense is completely removed from the criminal context and reclassified as a civil offense.¹³² “Partial decriminalization” occurs when an offense remains criminal in

122. *Id.*

123. *Id.* at 1071-77.

124. *Id.* at 1071-72.

125. *Id.* at 1072-74.

126. Natapoff, *supra* note 17, at 1074-77.

127. Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 675 (2015) (listing several different conceptions of “decriminalization” among legal scholars).

128. Natapoff, *supra* note 17, at 1065-67.

129. *Id.* at 1066.

130. *Id.*

131. *Id.* at 1067.

132. *Id.*

nature, but the possibility of imprisonment is removed as a punishment.¹³³

For the purposes of this comment, I will adopt a competing framework of decriminalization that identifies four separate strategies for decriminalization efforts: substitution, de facto decriminalization, pure decriminalization, and reclassification.¹³⁴ Each strategy comes with its own separate benefits and costs.¹³⁵ If society is to adopt a policy, it needs to be able to fully apprise the expected gains and consequences of that path of action before acting.

Substitution involves replacing criminal sanctions with non-punitive responses as illustrated through drug courts and other diversion strategies.¹³⁶ De facto decriminalization arises when police and prosecutors simply choose not to enforce certain offenses due to budget constraints or moral opposition to the law.¹³⁷ Pure decriminalization can also be titled legalization, where all legal regulation of a conduct is lifted.¹³⁸ Lastly, reclassification involves shifting an offense from the criminal realm to the civil realm, where the conduct is still regulated and discouraged, but criminal penalties are replaced with civil fines.¹³⁹

Substitution efforts such as drug courts have been highly praised as an invaluable tool to divert non-violent drug offenders away from incarceration and toward treatment.¹⁴⁰ However, diversion efforts have been criticized for focusing solely on the sanction aspect of criminalization and still leaving individuals,

133. Natapoff, *supra* note 17, at 1067.

134. Woods, *supra* note 127, at 683.

135. *Id.* at 683-96 (discussing four separate ways states have approached decriminalization).

136. *Id.* at 683-84.

137. *Id.* at 686-89 (noting however, de facto decriminalization raises several serious concerns about inconsistent, selective enforcement of laws against unpopular minorities).

138. *Id.* at 689; Natapoff, *supra* note 17, at 1065.

139. See Woods, *supra* note 127, at 693; see also Natapoff, *supra* note 17, at 1067 (defining this strategy as “full decriminalization”).

140. See The Hon. Seth W. Norman et. al., *Drug Court Success: Outcomes and Cost Savings of an Innovative Residential Drug Court Treatment Program for Felony Offenders*, TENN. BAR ASS’N (Mar. 1, 2015) (“A significant body of literature has been developed to suggest that drug courts are effective, particularly at reducing recidivism and containing costs. Meta-analyses comparing the outcomes of multiple drug courts have found significant reductions in crime and recidivism for program participants.”).

particularly within minority communities, subject to stigmatization and other harms from overpolicing.¹⁴¹

De facto decriminalization serves as a way for law enforcement officials to exercise their discretion and avoid the strict penalties the law may call for if the official believes the sanctions are disproportionate to the reality of the offense.¹⁴² However, decriminalizing offenses purely through law enforcement discretion poses a risk of “inconsistent, selective, and discriminatory enforcement of criminal laws.”¹⁴³

Full legalization obviously presents the greatest benefit for those who might traditionally be subject to regulation. Once a conduct is legalized,¹⁴⁴ there is nothing for the state to regulate, so the interaction between the citizen and the government should be eliminated. However, legalization is limited in its application because certain conduct will always need to be regulated and restricted in some manner. For example, driving while intoxicated needs to be regulated in some form. Even if the offense is considered civil rather than criminal,¹⁴⁵ there are certainly robust state interests in public safety that require state control over the conduct in some form.

Lastly, reclassification offers the benefit of removing criminal sanctions for certain conduct while still providing the state the power to regulate the behavior. This approach is a middle-ground short of legalization that may appease those who are strongly opposed to lessening restrictions on certain

141. Woods, *supra* note 127, at 683-86.

142. Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 802-06 (2012) (discussing examples of “prosecutorial decriminalization” such as treating minor possession of marijuana as a civil offense, failing to strictly enforce three-strike laws, or not prosecuting teens engaged in sexting for child pornography offenses).

143. Woods, *supra* note 127, at 687; *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (holding that a police officer may arrest an individual when he has probable cause that the individual has committed a crime, even if the crime suspected is a minor one such as failing to wear a seatbelt). For a related criticism that underenforcement of the criminal law has a discriminatory effect and undermines respect for the legal system, *see generally* Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715 (2006).

144. The term “legalized” here means that there is no regulation expressly prohibiting conduct rather than a law affirmatively stating that conduct is now legal.

145. Wisconsin is the only state in the nation where the first offense for drunk driving (termed Operating While Intoxicated) is not a criminal offense. WIS. STAT. ANN. §§ 346.63, 346.65(2) (West 2017).

conduct.¹⁴⁶ However, the shortcoming of reclassification is that reclassifying an offense as a “civil” offense does not eliminate the risk of abuse or stigmatization by the police.¹⁴⁷

No individual strategy of decriminalization is a “one size fits all” solution. Each approach has its own strengths and weaknesses. This is a good thing because flexibility is needed when deciding upon a policy. As explained below, some strategies will work better for certain offenses than they will for others. The best strategy is dependent upon careful consideration of the specific conduct targeted for decriminalization.

III. HOW DECRIMINALIZING MARIJUANA POSSESSION AND DRIVING WITH A SUSPENDED LICENSE CAN HELP

Marijuana possession and driving with a suspended license are prime candidates for decriminalization within the context of this comment because of the disproportionate share of misdemeanor dockets which these offenses make up and the relative feasibility of removing these offenses from the criminal system.¹⁴⁸ Because different jurisdictions give different crimes different titles, working definitions should be established for the crimes being discussed here.

First, the term “marijuana offenses” should be read as simple possession.¹⁴⁹ Drug trafficking is an altogether separate type of crime from simple drug use with different political and economic

146. See Kaitlin C. Gratton, Note, *Desperate Times Call for Desperate Measures: Reclassifying Drug Possession Offenses in Response to the Indigent Defense Crisis*, 53 WM. & MARY L. REV. 1039, 1042 n. 9 (2012) (specifically using the term “reclassification” rather than “decriminalization” in order to avoid negative connotations associated with decriminalization so as to not alienate readers opposed to reducing the scope of prohibited behavior).

147. See *infra* Part III.C discussing *Virginia v. Moore*, 553 U.S. 164, 178 (2008).

148. ROBERT C. BORUCHOWITZ, DIVERTING AND RECLASSIFYING MISDEMEANORS COULD SAVE \$1 BILLION PER YEAR: REDUCING THE NEED FOR AND COST OF APPOINTED COUNSEL 2-3 (2010), http://www.acslaw.org/sites/default/files/Boruchowitz_-_Misdemeanors.pdf [<https://perma.cc/AC3M-5VKV>].

149. Unfortunately, a precise or shared definition of “simple possession” is virtually nonexistent because there is large disagreement among states about whether marijuana possession should be a felony or a misdemeanor in the first place and what amount of marijuana transforms misdemeanor possession to felony possession. Compare MO. ANN. STAT. § 579.015 (West 2017) (making it a felony to possess thirty-five grams or more marijuana), with ARK. CODE ANN. § 5-64-419 (2016) (requiring four ounces or more of marijuana to establish felony possession).

pressures. This comment is limited to removing possession of marijuana from the criminal realm, but the problems of distribution, manufacturing, and transportation of marijuana remain for others to address.

Second, clarity is also necessary when discussing “driving with a suspended license.”¹⁵⁰ Specifically, the primarily targeted offense is the offense of driving with a suspended license when the underlying suspension is based on the inability or failure to pay some other fine or fee. Arguments can be made that the sanctions related to the suspension of driver’s licenses for other reasons such as driving while intoxicated are also too severe and should be decriminalized to some extent.¹⁵¹ However, the political reality is that licenses suspended based on unpaid fines carry a separate level of culpability and risk to society than licenses suspended based on reckless driving.¹⁵² Therefore, the politically feasible option would be to limit the discussion to driving with a suspended license based on unpaid fines or fees and leave suspensions based on other reasons for future discussions.

It is appropriate to consider the separate crimes of marijuana possession and driving on a suspended license simultaneously because each crime represents a substantial share of the misdemeanor docket, and each offense carries a separate type of culpability with one being the use of an illicit substance for a psychological effect and the other being a resistance to administrative controls and safety regulations. A marijuana user is illegally consuming a product with the hope to achieve some psycho-active, hallucinogenic effect. An unauthorized driver is ignoring an administrative or adjudicatory determination that the individual is not fit to operate a motor vehicle. The former is a drug crime, and the latter is a traffic violation. Normatively, these

150. Driving with a suspended license can be criminalized in many forms. For example, the offense exists in three separate statutes in the state of Arkansas. ARK. CODE ANN. § 5-65-105 (2016) (suspension for drunk driving); ARK. CODE ANN. § 27-16-303 (2014 & Supp. 2017) (general statute for suspended license based on traffic history); ARK. CODE ANN. § 27-19-304 (2014) (specialty provision with limited application for the Motor Vehicle Safety Responsibility Act).

151. *E.g.*, in Arkansas, driving on a suspended license related to driving while intoxicated results in a mandatory minimum of ten days imprisonment. ARK. CODE ANN. § 5-65-105 (2016).

152. *See* MINOR CRIMES, *supra* note 16, at n. 118 (noting suspensions based on driving history can be viewed as a public safety issue).

offenses carry separate levels of culpability and moral stigmatization. This distinction is important when considering what policy options are available for each offense.

A. Share of Misdemeanor Dockets

Marijuana possession and driving with a suspended license have a substantial impact on misdemeanor caseloads across the nation. In some jurisdictions, driving with a suspended license, possession of marijuana, and minor in possession of alcohol cases can make up between 40% to 50% of misdemeanor caseloads.¹⁵³ Unfortunately, it is difficult to be completely accurate when describing the “data” of misdemeanors because of problems with underreporting¹⁵⁴ and ambiguity with how crimes are classified and reported.¹⁵⁵ Even with these problems, there is still some reliable data illustrating the burdens marijuana possession and driving with a suspended license cases put on courts.

In Texas, drug offenses make up 20% of the entire misdemeanor criminal docket, and over three-fourths of those

153. BORUCHOWITZ, *supra* note 148, at 1.

154. Natapoff, *supra* note 30, at 1321 (“[T]his arena is plagued by underreporting.”).

155. Woods, *supra* note 127, at 743 and accompanying text. What is misdemeanor simple possession in Arkansas is reported as felony possession of a controlled substance in Missouri. Compare MO. ANN. STAT. § 579.015 (West 2017) (making it a felony to possess thirty-five grams or more marijuana) with ARK. CODE ANN. § 5-64-419 (2016) (requiring four ounces or more of marijuana to establish felony possession). In Missouri, what might otherwise be considered simple possession of marijuana is categorically thrown in with felony possession of a controlled substance, so it is impossible to look at caseload data in Missouri and actually figure out how many of the reported felony possession cases actually involve simple possession cases. MO. ANN. STAT. § 579.015 (West 2017). Because states are free to choose how to classify and penalize marijuana possession, it is impossible in some circumstances to look at a reported conviction and determine if the underlying conduct was merely possession of a small amount of marijuana or something more serious such as trafficking. See Natapoff, *supra* note 17, at 1058; see generally *Moncrieffe v. Holder*, 569 U.S. 184, 206 (2013) (holding it is impossible to determine if a conviction under Georgia law for “possession with intent to distribute” actually required proof of more than simple possession to qualify the conviction as an aggravated felony for immigration proceedings). In *Moncrieffe*, the defendant had pled guilty to felony possession with intent to distribute for having 1.3 grams, or two to three cigarettes, of marijuana in his car. *Id.* at 188. This is a perfect example of the dilemma of identifying “simple possession” data. The defendant was in possession of an extremely small amount of marijuana, but Georgia will report his conviction as felony trafficking of a controlled substance. *Id.* For empirical purposes, identifying hard numbers of marijuana possession prosecutions is extremely difficult given the wide variation in how states classify and report crimes.

drug cases are possession of marijuana cases,¹⁵⁶ meaning possession of marijuana makes up approximately 15% of the entire misdemeanor criminal docket in the state of Texas.¹⁵⁷ In New York City, criminal possession of marijuana in the 5th degree¹⁵⁸ has decreased in charging frequency, but still remains one of the most frequently charged offenses at arraignment.¹⁵⁹ In 2010, 5th degree possession was the number one most frequently charged misdemeanor offense with a little more than 40,000 total charges out of 272,400 total misdemeanors, but by 2015, 5th degree possession fell to being only the sixth most frequently charged misdemeanor in New York City with only approximately 15,000 total charges out of 222,579 total misdemeanors.¹⁶⁰ In Missouri, misdemeanor possession of marijuana made up at least¹⁶¹ approximately 14% of all drug related prosecutions and approximately 9% of the entire misdemeanor docket in Fiscal Year 2015.¹⁶² Misdemeanor possession was the twelfth most

156. In Texas, possession of less than four ounces is a misdemeanor. TEX. HEALTH & SAFETY CODE ANN. § 481.121 (West 2017).

157. OFFICE OF COURT ADMINISTRATION, ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2015 (2015), <http://www.txcourts.gov/media/1308021/2015-ar-statistical-print.pdf> [<https://perma.cc/SLK3-JGGF>].

158. N.Y. PENAL LAW § 221.10 (McKinney 2017) (criminalizing possession of marijuana in public and the marijuana is burning or open to public view or possessing substances containing marijuana with an aggregate weight of more than twenty-five grams).

159. OFFICE OF THE CHIEF CLERK OF NEW YORK CITY CRIMINAL COURT, CRIMINAL COURT OF THE CITY OF NEW YORK: ANNUAL REPORT 2015 29-30 (2016).

160. *Id.* at 25, 29.

161. It is impossible to tell how many additional incidents of possession were prosecuted as felony distribution or felony possession. This is especially true since passing a marijuana cigarette to a friend is felony distribution in Missouri. MO. ANN. STAT. § 195.211 (West 2017) (felony distribution or delivery of less than five grams of marijuana). The actual percentage of simple possession cases in Missouri is likely higher than calculated.

162. There were 1,335 charges filed at the circuit level for violations of MO. REV. STAT. § 195.202(3) (West 2016) (possession of up to thirty-five grams of marijuana). OFFICE OF STATE COURTS ADMINISTRATOR, MISSOURI JUDICIARY CRIMINAL SYSTEM SELECTED DRUG CHARGES FILED AND DISPOSED: CIRCUIT LEVEL FISCAL YEAR 2015 (2016), https://www.nycourts.gov/COURTS/nyc/criminal/2015_crim_crt_ann_rpt_%20062316_fnl2.pdf [<https://perma.cc/7ZV3-5Q3A>]. There were 8,006 charges filed for the same offense at the associate level. OFFICE OF STATE COURTS ADMINISTRATOR, MISSOURI JUDICIARY CRIMINAL SYSTEM SELECTED DRUG CHARGES FILED AND DISPOSED: ASSOCIATE LEVEL FISCAL YEAR 2015 (2016), <https://www.courts.mo.gov/file.jsp?id=100723> [<https://perma.cc/44EG-EG56>]. A total of 64,651 drug related charges were filed at both levels. See OFFICE OF STATE COURTS ADMINISTRATOR, MISSOURI JUDICIARY CRIMINAL SYSTEM SELECTED DRUG CHARGES FILED AND DISPOSED: CIRCUIT LEVEL FISCAL YEAR 2015 (2016), https://www.nycourts.gov/COURTS/nyc/criminal/2015_crim_crt_ann_rpt_%20062316_fnl2.pdf [<https://perma.cc/7ZV3-5Q3A>]; OFFICE OF

frequently charged drug offense at both the associate level and the circuit level.¹⁶³

Driving on a suspended license is also a heavy contributor to misdemeanor caseloads. Driving on a suspended license 3rd degree was the fifth most frequent misdemeanor in New York City with slightly more than 15,000 total charges in 2015.¹⁶⁴ In Little Rock, Arkansas, driving without a license or on a suspended license makes up approximately 12-20% of all tickets in a given year.¹⁶⁵ One report found that in Grand Traverse County, Michigan, driving with a suspended license made up about 10% of all cases.¹⁶⁶ For public defenders in the State of Washington, driving with a suspended license based on unpaid fines has been found to make up around one-third of all misdemeanors throughout the entire state.¹⁶⁷ In the city of Longview, Washington, the public defender's office is essentially forced to

STATE COURTS ADMINISTRATOR, MISSOURI JUDICIARY CRIMINAL SYSTEM SELECTED DRUG CHARGES FILED AND DISPOSED: ASSOCIATE LEVEL FISCAL YEAR 2015 (2016), <https://www.courts.mo.gov/file.jsp?id=100723> [<https://perma.cc/44EG-EG56>]. A total of 102,003 misdemeanors were filed in the state during Fiscal Year 2015. OFFICE OF STATE COURTS ADMINISTRATOR, 2015 ANNUAL REPORT – SUPPLEMENT: TABLE 26 CIRCUIT COURT, FY 2015 CRIMINAL CASES FILED, DISPOSED AND PENDING (2016), <https://www.courts.mo.gov/file.jsp?id=96415> [<https://perma.cc/J3ER-2CS6>]; OFFICE OF STATE COURTS ADMINISTRATOR, MISSOURI JUDICIARY CRIMINAL SYSTEM SELECTED DRUG CHARGES FILED AND DISPOSED: ASSOCIATE LEVEL FISCAL YEAR 2015 (2016), <https://www.courts.mo.gov/file.jsp?id=100723> [<https://perma.cc/ARA5-D9LH>].

163. OFFICE OF STATE COURTS ADMINISTRATOR, 2015 ANNUAL REPORT – SUPPLEMENT: TABLE 19 CIRCUIT DIVISIONS, FY 2015: TOP FIFTY STATE CHARGES FILED (2016), <https://www.courts.mo.gov/file.jsp?id=96452> [<https://perma.cc/C798-G5TM>]; OFFICE OF STATE COURTS ADMINISTRATOR, 2015 ANNUAL REPORT – SUPPLEMENT: TABLE 20 ASSOCIATE DIVISIONS, FY 2015: TOP FIFTY STATE CHARGES FILED (2016), <https://www.courts.mo.gov/file.jsp?id=96415> [<https://perma.cc/MM5E-Z5YA>].

164. OFFICE OF THE CHIEF CLERK OF NEW YORK CITY CRIMINAL COURT, CRIMINAL COURT OF THE CITY OF NEW YORK ANNUAL REPORT 2015 29 (2016), https://www.nycourts.gov/COURTS/nyc/criminal/2015_crim_crt_ann_rpt_%20062316_fnl2.pdf [<https://perma.cc/8TFJ-VH7F>].

165. Alexis Rogers, *New Law Can Help Suspended Drivers Get License Back & Keep Money*, KATV (Jan. 12, 2016), <http://www.katv.com/news/local/new-law-can-help-suspended-drivers-get-license-back-keep-money> [<https://perma.cc/YQ9C-CLGN>].

166. MINOR CRIMES, *supra* note 16, at 26.

167. JOANNE I. MOORE & DAVID K. CHAPMAN, WASHINGTON STATE OFFICE OF PUBLIC DEFENSE: DRIVING WHILE LICENSE SUSPENDED 3RD DEGREE SURVEY OF COURTS OF LIMITED JURISDICTION 1 (2008), http://www.opd.wa.gov/documents/0056-2008_DWLS3Survey.pdf [<https://perma.cc/5FJY-WHX7>]; MINOR CRIMES, *supra* note 16, at 29 (noting pre-filing diversion for one municipal court would reduce the defender's misdemeanor caseload by 46%).

dedicate one of its five attorneys to work full-time on suspended license cases.¹⁶⁸

For Fiscal Year 2015 in Missouri, a first offense of driving with a suspended license was only punishable by a fine of \$300,¹⁶⁹ so public defenders did not need to be appointed to handle those cases.¹⁷⁰ During that time, a total of 13,289 charges were filed for first offenses of driving with a suspended license.¹⁷¹ If those offenses were still Class A misdemeanors punishable by up to a year in prison,¹⁷² the burden of public defenders would potentially be extended to covering an additional 13% of the entire misdemeanor docket.¹⁷³

B. Benefits

There are several direct and indirect benefits that will result from decriminalization. For example, the thesis of this entire comment is that reducing the caseloads of public defenders will allow public defenders to spend more time on their remaining cases, in theory, providing a higher level of representation than

168. DRIVEN TO FAIL: THE HIGH COST OF WASHINGTON'S MOST INEFFECTIVE CRIME – DWLS III, ACLU 9 (2017) [hereinafter DRIVEN TO FAIL]. The office is forced to spend \$135,000 annually defending suspended license cases. *Id.*

169. MO. ANN. STAT. § 302.321 (West 2016); H.B. 111, 96th Gen. Assemb., Reg. Sess. (Mo. 2011).

170. *See supra* Part I describing the extent of the right to appointed counsel.

171. OFFICE OF STATE COURTS ADMINISTRATOR, 2015 ANNUAL REPORT – SUPPLEMENT: TABLE 19 CIRCUIT DIVISIONS, FY 2015: TOP FIFTY STATE CHARGES FILED (2016), <https://www.courts.mo.gov/file.jsp?id=96452> [https://perma.cc/C798-G5TM]; OFFICE OF STATE COURTS ADMINISTRATOR, 2015 ANNUAL REPORT – SUPPLEMENT: TABLE 20 ASSOCIATE DIVISIONS, FY 2015: TOP FIFTY STATE CHARGES FILED (2016), <https://www.courts.mo.gov/file.jsp?id=96415> [https://perma.cc/MM5E-Z5YA].

172. The law was amended in 2011 from a Class A misdemeanor to a fine only offense. *See* H.B. 111, 96th Gen. Assemb., Reg. Sess. (Mo. 2011).

173. *See* OFFICE OF STATE COURTS ADMINISTRATOR, 2015 ANNUAL REPORT – SUPPLEMENT: TABLE 26 CIRCUIT COURT, FY 2015 CRIMINAL CASES FILED, DISPOSED AND PENDING (2016), <https://www.courts.mo.gov/file.jsp?id=96415> [https://perma.cc/J3ER-2CS6] (There were a total of 102,003 misdemeanors filed in fiscal year 2015.); OFFICE OF STATE COURTS ADMINISTRATOR, 2015 ANNUAL REPORT – SUPPLEMENT: TABLE 19 CIRCUIT DIVISIONS, FY 2015: TOP FIFTY STATE CHARGES FILED (2016), <https://www.courts.mo.gov/file.jsp?id=96452> [https://perma.cc/C798-G5TM]; OFFICE OF STATE COURTS ADMINISTRATOR, 2015 ANNUAL REPORT – SUPPLEMENT: TABLE 20 ASSOCIATE DIVISIONS, FY 2015: TOP FIFTY STATE CHARGES FILED (2016), <https://www.courts.mo.gov/file.jsp?id=96415> [https://perma.cc/MM5E-Z5YA].

would be permitted under the current caseloads.¹⁷⁴ In Texas, the decriminalization of marijuana would remove the need to appoint counsel for 15% of the entire misdemeanor docket.¹⁷⁵ When Missouri decriminalized driving with a suspended license, it successfully avoided having to provide counsel for 13% of its misdemeanor docket.¹⁷⁶ Given that approximately 80% of all criminal defendants are eligible for public representation,¹⁷⁷ reducing caseloads overall will certainly have a substantial impact on relieving the caseloads of public defenders.

In addition, there are collateral benefits that can be expected. Depending on the decriminalization strategy adopted, the collateral consequences of a misdemeanor conviction could be eliminated or reduced. Misdemeanors carry harsh collateral consequences that follow misdemeanants around affecting employment prospects, restricting voting rights, eliminating eligibility for loans or public benefits, and causing other stigmatizing harms.¹⁷⁸ Reducing an individual's exposure to the misdemeanor process by decriminalizing his conduct can prevent the individual from being convicted in the first place and having those collateral consequences attach.

Furthermore, the entire criminal justice system can benefit financially from decriminalizing marijuana possession and driving on a suspended license. One report estimated that nationwide decriminalization of marijuana possession and driving on a suspended license could save over \$2 billion.¹⁷⁹ Another report calculated the costs to prosecute a single charge of marijuana possession range from \$1,577 to as high as \$7,000 resulting in statewide annual expenditures on marijuana possession arrests

174. *Contra* David Rudovsky, *Gideon and the Effective Assistance of Counsel: The Rhetoric and the Reality*, 32 LAW & INEQ. 371, 385 (2014) (arguing that reforms that reduce caseloads of public defenders would have no impact because state legislatures would accordingly reduce funding for defense services as caseloads decline).

175. See ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2015 (2015), *supra* note 157, at 1.

176. See BORUCHOWITZ, *supra* note 148 (13,289 charges filed for first offense driving with a suspended license divided by 102,003 total misdemeanors filed equals approximately 13%).

177. Primus, *supra* note 105, at 687-88; *cf.* GIOVANNI & PATEL, *supra* note 53 (“[R]esearchers estimate that anywhere from 60 to 90 percent of criminal defendants need publicly-funded attorneys, depending on the jurisdiction.”).

178. Natapoff, *supra* note 30, at 1323-27; Roberts, *supra* note 20, at 297-303.

179. BORUCHOWITZ, *supra* note 148, at 4.

and adjudication anywhere between \$78 million to \$364 million.¹⁸⁰ In Missouri, the legalization of marijuana would not only eliminate the need to appoint counsel in 9% of all misdemeanor cases, but the state would no longer need to spend over \$49 million enforcing marijuana possession laws.¹⁸¹ Driving with a suspended license is also burdensome to enforce. One report estimates the expense of prosecuting a single case of driving with a suspended license to range from \$568 to \$1,107.¹⁸² The state of Washington spent approximately \$42 million enforcing driving with a suspended license charges in 2015.¹⁸³

Another collateral benefit of the legalization or decriminalization of certain minor crimes may arise in the form of increased racial equality. Legalizing possession of marijuana is one example of where racial disparities in the criminal justice system might be softened. The American Civil Liberties Union looked at national arrest data for 2010 and found that across the nation, African Americans were 3.73 times more likely to be arrested for marijuana possession than white individuals.¹⁸⁴ At the individual state level, the African American arrest rate grew as high as 8.34 times more likely to be arrested than whites at the top of the spectrum and still remained more than double the arrest rate of whites at the lowest end of the spectrum.¹⁸⁵ If marijuana is legalized in a state, then the police have no authority to arrest anyone for that activity regardless of race.

Unfortunately, suspended licenses also have a notably disproportionate impact on minority communities. Seattle's City Attorney reported that even though African Americans make up only 8% of the city's population, they make up over 40% of all

180. KATHLEEN KANE-WILLIS ET AL., PATCHWORK POLICY: AN EVALUATION OF ARRESTS AND TICKETS FOR MARIJUANA MISDEMEANORS IN ILLINOIS 3 (2014), <http://www.roosevelt.edu/~media/Files/pdfs/CAS/ICDP?PatchworkPolicyFullReport.ashx> [<http://perma.cc/2L96-QQLY>].

181. ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS 160 (Jun. 2013), <https://www.aclu.org/files/assets/1114413-mj-report-rfs-rel1.pdf> [<https://perma.cc/58QG-NHEV>] [hereinafter THE WAR ON MARIJUANA].

182. See DRIVEN TO FAIL, *supra* note 168, at 8.

183. *Id.* at 9.

184. THE WAR ON MARIJUANA, *supra* note 181, at 9.

185. *Id.* at 18.

driving with a suspended license 3rd degree charges.¹⁸⁶ A less obvious, but more insidious, form of the racial disparity surrounding suspended licenses is illustrated by the unacceptable practices in Ferguson, Missouri. The U.S. Department of Justice found a system that disproportionately targets poor minorities by using traffic citations, ultimately leading to suspended licenses for inability to pay, as means to generate revenue and force a cycle of indebtedness to the city.¹⁸⁷ It cannot be said that legalizing marijuana and decriminalizing driving on a suspended license would guarantee that the police no longer disproportionately arrest African Americans for every other crime that remains on the books, but it would at least reduce one source of racial inequality which is a step in the right direction.¹⁸⁸

C. Hidden Dangers

There is, however, an unconsidered “dark side” of decriminalization that is often overlooked.¹⁸⁹ Incomplete decriminalization efforts, such as reducing the offense to a non-jailable misdemeanor, can be a dangerous solution because once the threat of imprisonment is removed from an offense, the right to counsel no longer attaches even though many of the same collateral consequences of a criminal conviction occur when the punishment is a mere fine.¹⁹⁰ Furthermore, it is far too common that municipalities unfairly target minority populations with various fines and fees as a source of revenue which actually deepens racial divides.¹⁹¹ When individuals cannot afford to pay

186. *Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors: Before the S. Comm. On the Judiciary*, 114th Cong. 13 (2015) (testimony of Professor Robert C. Boruchowitz at 13).

187. *See generally* CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEP’T (Mar. 4, 2015). This type of systemic inequality is not unique to Ferguson, MO. *See also* LAWYERS’ COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 19 (2015) (finding a disproportionate impact of traffic citations and license suspensions among African Americans in San Francisco).

188. Professor Natapoff has argued that the current structure of the misdemeanor process has strong racial biases that have institutionalized the concept of trapping racial minorities in the criminal justice system and presuming guilt for minorities. *See* Natapoff, *supra* note 30, at 1368-72.

189. Natapoff, *supra* note 17, at 1077-93.

190. *Id.* at 1078.

191. *Id.* at 1100.

their fines, they may still end up in prison for failure to pay.¹⁹² Most importantly, even though an offense may be a “nonjailable civil offense,” an individual may still be arrested and held in a jail cell.¹⁹³

While hidden risks do indeed lie in the decriminalization process, they are not unique to decriminalization. It cannot be said that racial minorities are only disproportionately targeted once decriminalization occurs. Racial minority groups have historically been the target of the criminal justice system in the first place.¹⁹⁴ The problem with racial disparities likely lies in policing efforts rather than with the structure of the law itself.¹⁹⁵ Incarcerations for failure to pay fines can also be remedied. Affirmative defenses for inability to pay can easily be incorporated to protect indigent defendants.¹⁹⁶ However, while some may argue that such affirmative defenses go ignored by local courts,¹⁹⁷ that is a separate problem from the actual policy of decriminalization. A court’s refusal to honor a statutory affirmative defense goes to deeper issues of judicial authority and appellate review for miscarriages of justice which is an entirely separate discussion.

The strongest criticism against decriminalization is the fact that a nonjailable offense can still result in arrest and imprisonment.¹⁹⁸ In fact, the Supreme Court has explicitly upheld the six-day incarceration and strip search of a man arrested for the “civil” offense of contempt for failure to pay a fine, a nonjailable offense under applicable state law.¹⁹⁹ What is perhaps the most troubling is that states seemingly lack the authority to limit the behavior of their police officers. Custodial arrests for

192. *Id.* at 1081.

193. *Id.* at 1080.

194. Natapoff, *supra* note 17, at 1070.

195. *Id.*

196. *See, e.g.*, ARK. CODE ANN. § 16-13-703(c)(1) (2010) (stating a defendant may show that the default was not attributable to a purposeful refusal to obey the sentence or a failure on behalf of the defendant to make a good-faith effort to obtain the funds to pay the fine).

197. *See, e.g.*, Shawnya Meyers, *Arkansas Cancer Patient Sent to “Debtors Prison” Over Bounced Checks, Spurs ACLU Lawsuit*, 5NEWS (Aug. 25, 2016), <http://5newsonline.com/2016/08/25/arkansas-cancer-patient-sent-to-debtors-prison-over-bounced-checks-spurs-aclu-lawsuit/> [https://perma.cc/8ZW8-D3EL].

198. *See* Natapoff, *supra* note 17, at 1079.

199. *Florence v. Board of Chosen Freeholders*, 566 U.S. 318, 323, 339 (2012).

nonjailable offenses do not violate the Fourth Amendment's prohibition against unreasonable seizures, even when state law *expressly prohibits* arrests in such situations.²⁰⁰ This is a frightening proposition. A state can provide clear statutory guidance to police officers not to arrest individuals for certain minor offenses, but a police officer's disregard of such laws is fine as far as the Fourth Amendment is concerned.

The line of judicial authority granting officers the power to arrest and jail those charged with committing minor offenses that have theoretically been removed from the criminal process does indeed give rise for concern. However, once again, these concerns speak more so to issues of local policing rather than the actual structures of the criminal code.²⁰¹ Even though police officers may have the authority to arrest for decriminalized offenses, it is up to state legislatures to make it a priority to reinforce a value system among its law enforcement members that the exercise of such authority is not going to be tolerated. An officer may not violate the Fourth Amendment when an arrest for a nonjailable offense is made in spite of state law, but that does not mean that the officer cannot violate local department protocol or other guidelines resulting in the officer's discipline or termination. Vigilant oversight of policing priorities by state legislatures is absolutely necessary in order to ensure that the values of a reformed criminal code are reflected in the everyday interactions between citizens and the law.²⁰²

IV. FUTURE DIRECTIONS

Going forward, policy makers should be cognizant that no one strategy of decriminalization will be effective for every offense being decriminalized. For a given offense, some strategies will be overly-broad and some will be under-inclusive.

200. *Virginia v. Moore*, 553 U.S. 164, 176 (2008).

201. See generally Woods, *supra* note 127 (arguing conversations of decriminalization should not focus exclusively on reducing sanctions but also on modifying policing of decriminalized offenses).

202. For an aggressive criticism of New York City's police enforcement of city ordinances regarding behavior on the subway, such as arresting individuals for taking up more than one seat, see Joseph Goldstein & Christine Haughney, *Relax, if You Want, but Don't Put Your Feet Up*, N.Y. TIMES (Jan. 6, 2012), <http://www.nytimes.com/2012/01/07/nyregion/minor-offense-on-ny-subway-can-bring-ticket-or-handcuffs.html> [<https://perma.cc/B7T4-84FH>].

The right tool needs to be chosen for the right job. Furthermore, policy makers should be mindful of public sentiment when determining whether or not it is time to finally roll back the reach of the criminal law. If legislatures are truly responsive to public opinion, the scope of the criminal law should ebb and flow with time, expanding at one time in one area and shrinking at another time in another area.²⁰³ Currently, public opinion calls for decriminalization of marijuana possession and driving with a suspended license.

A. Different Solutions for Different Conduct

Using the above-mentioned four-part framework for decriminalization, it is plainly obvious that not all four strategies are viable for both marijuana offenses and driving with a suspended license. Marijuana possession can be approached under any one of the four methods, but driving with a suspended license cannot. In fact, possession of marijuana has been tackled under each strategy across the nation as the states experiment with decriminalizing the substance.²⁰⁴ Some jurisdictions have chosen not to prosecute minor possession offenses.²⁰⁵ Others have reclassified possession of small amounts as fine-only civil violations.²⁰⁶ Some jurisdictions have even gone as far as fully legalizing the recreational use of marijuana.²⁰⁷ Any given strategy of decriminalization can be appropriate when discussing marijuana possession.

Some of those options are not available for driving with a suspended license. Pure decriminalization or legalization is never going to be an option for driving with a suspended license. As long as the suspension of one's driver's license is an available

203. Stuntz, *supra* note 49, at 527-28.

204. For an interactive map detailing state laws regarding marijuana, *see* <http://norml.org/states> [<https://perma.cc/JC8Z-ALJK>].

205. Woods, *supra* note 127, at 687-88 (detailing how the District Attorney for Dane County, Wisconsin promised not to prosecute anyone possessing less than one ounce of marijuana).

206. *See, e.g.*, MD. CODE ANN., CRIM. LAW § 5-601(c)(2)(ii) (West 2017) (possession or use of less than ten grams of marijuana is a civil offense subject to a civil penalty of one hundred to five hundred dollars).

207. NORML, *Legalization*, <http://norml.org/legal/legalization> [<https://perma.cc/QBD7-2XV5>] (eight states and the District of Columbia have legalized recreational use of marijuana).

sanction, the failure to honor that sanction will be penalized itself in some form even if through civil fines. In order to legalize driving on a suspended license, states would have to forfeit the power to revoke someone's driving privileges, and that is just not a very wise idea in the least. After all, some individuals are dangerous drivers who should not be allowed to operate motor vehicles for the safety of their fellow commuters.²⁰⁸ Alternatively, licenses may be suspended not because the individual is a hazard to public safety but because the individual has failed to pay fines or fees such as parking tickets or even failed to pay child support.²⁰⁹ In either case, the offense of driving with a suspended license is the offense of not honoring a court or other adjudicatory order somewhat comparable to contempt. Legalization is not a viable option for addressing driving with a suspended license. No matter what the reason is for the underlying suspension, the ability for the state to exercise some sort of regulatory control over driving privileges and being able to enforce those controls are important state interests that should be preserved.

For the same reasons, de facto decriminalization would also be highly inappropriate. What is the point of having a license if the actual test is whether or not the traffic officer on the scene is the one who gets to decide if you are fit to operate a motor vehicle? If a court suspends an individual's license for driving while intoxicated, and an officer chooses not to enforce that order when he pulls over an individual on a suspended license because of the officer's moral opposition to the sanction itself, then the executive branch is effectively undermining the authority of the judicial branch. Respect for the courts will be lost and the uniform administration of the law will suffer.

Driving with a suspended license is more narrowly constrained to be addressed through substitution or reclassification. Diversion programs have found moderate success in several jurisdictions.²¹⁰ Those jurisdictions have

208. See, e.g., ARK. CODE ANN. § 27-16-907 (2014) (allowing the Office of Driver Services to suspend the license of a driver for up to one year upon a showing that the driver is a habitual violator of traffic laws, is a habitually reckless or negligent driver, has been involved in an accident resulting in the death or personal injury of another, or for other cause).

209. MINOR CRIMES, *supra* note 16, at 26.

210. *Id.* at 28-29.

adopted relicensing programs which allow individuals to pay the underlying fines that caused the suspension of the license through a payment plan or through community service, and upon completion, the driving on a suspended license charge is dropped.²¹¹ Spokane, Washington adopted a relicensing program that even lifted the suspension on the participants' licenses *before* the fines were paid as long as they were participating in the diversion program.²¹² In 2004, the King County, Washington program reduced driving with a suspended license prosecutions by 84% and actually generated revenues of \$270,000 for the county within the first nine months of operation.²¹³ That sort of impact is phenomenal.

B. Public Sentiment

Furthermore, the tide of history suggests it is finally time to remove criminal sanctions from marijuana possession and driving with a suspended license. Currently, twenty-eight states have legalized the medicinal use of marijuana, and several others have allowed for the medicinal use of Cannabidiol (CBD), a non-psychoactive extract from cannabis plants with medicinal properties.²¹⁴ Taking things even further, eight states and the District of Columbia have completely decriminalized the recreational use of marijuana.²¹⁵ Among the states where marijuana remains an illegal substance, four states have reclassified marijuana and removed jail time as a punishment for possessing small amounts of marijuana.²¹⁶ The national trend is already pushing towards the decriminalization of marijuana possession.

The same historical pressure exists for decriminalizing driving with a suspended license. "Since 1970, twenty-two states

211. *Id.* at 28; *see also* BORUCHOWITZ, *supra* note 148, at 7-11 (summarizing and contrasting relicensing programs among several counties in Washington).

212. MINOR CRIMES, *supra* note 16, at 28-29.

213. *Id.* at 28.

214. NORML, *Medical Marijuana*, <http://norml.org/legal/medical-marijuana-2> [<https://perma.cc/EG8Z-6XG9>].

215. NORML, *Legalization*, <http://norml.org/legal/legalization> [<https://perma.cc/QBD7-2XV5>].

216. Marijuana Policy Project, *State Policy*, <https://www.mpp.org/states/> [<https://perma.cc/GE8H-2RA2>].

have decriminalized the bulk of minor traffic offenses by removing criminal penalties and reclassifying the offenses as noncriminal offenses.”²¹⁷ There were two primary motivations for the decriminalization of traffic offenses. First, there were concerns that it is unfair to impose criminal sanctions for minor traffic offenses given “their omnipresence and lack of severity.”²¹⁸ Second, state legislatures were driven by pragmatic concerns of cost-cutting because traffic violations were clogging court dockets, officers were forced to take time to appear in court to make traffic tickets “stick,” and as criminal offenses, the accused enjoyed the right to counsel which further exacerbated the expense of enforcing traffic tickets.²¹⁹ However, even among the wave of states moving traffic violations out of the criminal realm, driving with a suspended license remained a criminal offense.²²⁰

It is time to accept the fact that driving with a suspended license should be included among those traffic offenses that have been reclassified. Driving with a suspended license continues to clog up courts and force people to spend countless days in jail simply because of an inability to pay pre-existing court fines and fees.²²¹

V. CONCLUSION

Decriminalization of minor offenses is not a perfect solution. Decriminalization will not definitively end racism in America. Decriminalization will not suddenly bring public defender caseloads into compliance with standards. Decriminalization will not stop private citizens from being involuntarily dragged through the criminal justice system based on the discretion of law enforcement. Decriminalization is not a perfect solution to every problem with the American penal system. However, decriminalization *is* a step in the right direction.

217. Woods, *supra* note 127, at 698.

218. *Id.* at 701.

219. *Id.* at 701-02 (“Underlying these three concerns was a cost-benefit calculus centering on maintaining the infrastructure necessary to impose criminal sanctions.”).

220. *Id.* at 699.

221. *See, e.g.*, Rogers, *supra* note 165 (noting one woman spent 120 days in jail because of unpaid fines when the individual could not afford to pay the outstanding \$1,100).

Reducing public defender caseloads is the first step. After that, it has to be ensured that state legislatures do not use reduced caseloads as a justification for reducing public defense funding and essentially undoing any benefit gained from decriminalization. Also, discussions of police discretion and interaction with the public surrounding decriminalized offenses need to take place. Ultimately, the institution of poverty needs to be dismantled in order to prevent so many individuals from being trapped in a cycle of recidivism constantly entering and leaving the criminal justice system. These are all tall orders. Some of them may never truly be achievable, but we have to start somewhere. We have to walk before we can run.

There is an economic reality to criminal justice that state legislatures must face. States cannot continue to criminalize and punish behavior if the state cannot afford to enforce those sanctions in a way that does not run afoul of the United States Constitution. The states are obligated to provide effective assistance of counsel for every indigent defendant facing imprisonment. Currently, many states are falling short of that mandate. If legislatures are unwilling to raise defense funding in order to provide the competent level of assistance demanded by the constitution, then states must realize that they cannot afford to strictly punish certain minor offenses. It is time to stop the bleeding. It is time to take the right to counsel seriously and develop a solution to the crisis of indigent defense so that justice can still be done.

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