

# UNSHACKLING THE SIXTH AMENDMENT: HOW FEDERALISM FREES OUR CONSTITUTIONAL HOSTAGES OF THE WAR ON DRUGS

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*“Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory. . . .”*

Justice Louis Brandeis

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#### PRELUDE

Linda looked forward to spending the weekend with her son.<sup>1</sup> Truthfully, she anticipated the time with her grandchildren much more-so. Her “sweetpea” and “pumpkin” were lights of joy and hope to a woman surviving during the darkest period of her fifty-nine years. The prolonged cancer that stole her husband, Robert, also wreaked havoc on Linda’s financial security and her own health. A six-hour drive to California remained as Linda’s geographical obstacle and kept her from the solace of family. Final check of the necessities: clothes (check), toiletries (check), phone charger (check), blood pressure pills (check), marijuana (check).

Yes, Linda legally owned a Nevada-issued medical marijuana card, which allowed her to legally possess and consume marijuana purchased from a licensed cannabis retailer.<sup>2</sup> In 2016, the citizens of Nevada also voted to legalize recreational marijuana, but the structure and procedures were not yet in place to allow purchase without a medical card, whether Nevada-issued or one issued by another medical marijuana state.<sup>3</sup> Similarly, Linda’s destination also voted to move from solely medical to recreational marijuana, but the Golden State had also yet to effectuate the move in practice.<sup>4</sup> Thus, since California dispensaries only allowed patients with California-issued cards,<sup>5</sup> Linda made sure to procure her medicine before she left.

Hours later, Linda sat not with her family, but behind bars where she faced a federal felony for transporting a Schedule I Controlled Substance across state lines.<sup>6</sup> The FBI agent that Linda rear-ended in the chain-reaction crash on the interstate seemed as uninterested in her medical marijuana card as he appeared irrational in avenging his fallen steed. This subject is one of many Linda would like to discuss with a lawyer. If one finally showed up that is, because, despite

<sup>1</sup> Linda and her story is fiction. The laws which affect her are fact.

<sup>2</sup> NEV. REV. STAT. § 453A.140 (2015).

<sup>3</sup> Chris Kudialis, *Las Vegas Marijuana Laws: Answers to Questions on Recreational Weed in Nevada*, LAS VEGAS SUN (Jan. 3, 2017, 2:00 AM), <https://lasvegassun.com/news/2017/jan/03/some-answers-for-your-questions-on-recreational-ma/> [https://perma.cc/EUF5-UG2N].

<sup>4</sup> Kathy Park, *Clearing Up Cannabis Confusion in California: What You Need to Know*, KCRA (Jan. 2, 2017, 9:57 PM), <http://www.kcra.com/article/clearing-up-cannabis-confusion-in-california-what-you-need-to-know/8555949> [https://perma.cc/4RDE-E4HA].

<sup>5</sup> See Lisa Rough, *Which U.S. States Accept Out-of-State Medical Marijuana Authorizations?*, LEAFLY (Jun. 16, 2017), <https://www.leafly.com/news/cannabis-101/which-us-states-accept-out-of-state-medical-marijuana-authorizati/> [https://perma.cc/V5EG-QF7S].

<sup>6</sup> 21 U.S.C. § 812 (2012).

promises of due process<sup>7</sup> and speedy trials,<sup>8</sup> Linda started to feel more forgotten and lost in time. She desperately needed her court-appointed attorney to provide her with the effective assistance of counsel the United States Constitution guarantees.<sup>9</sup>

#### INTRODUCTION TO THE WAR ON DRUGS'S ASSAULT ON THE CONSTITUTION

The War on Drugs has faced harsh criticism beyond the legally-possible, factually-plausible tragedy of the Prelude, both for failing to cure the ills it purports to battle, as well as for the collateral devastation left in its wake.<sup>10</sup> Though analysis of the many possible benefits to ending the War on Drugs extends far beyond the scope of this work, examples of just a few include addressing the following: mass incarceration,<sup>11</sup> disproportionate enforcement of drug laws against the poor and minorities,<sup>12</sup> the financial cost to taxpayers,<sup>13</sup> black market violence,<sup>14</sup> penalizing instead of treating the disease of addiction,<sup>15</sup> stunted advancement in medical research,<sup>16</sup> disenfranchisement,<sup>17</sup> and lost economic op-

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<sup>7</sup> U.S. CONST. amend. XIV.

<sup>8</sup> U.S. CONST. amend. VI.

<sup>9</sup> See *infra* Part I.

<sup>10</sup> Matthew Boesler & Ashley Lutz, *32 Reasons Why We Need to End the War on Drugs*, BUS. INSIDER (July 12, 2012, 11:45 AM), <http://www.businessinsider.com/32-reasons-why-we-need-to-end-the-war-on-drugs-2012-7?op=1/#e-war-on-drugs-is-insanely-expensive-1> [<https://perma.cc/X8YQ-P78J>].

<sup>11</sup> Grace Wyler, *Mass Incarceration in America*, VICE (July 25, 2014, 7:15 AM), [https://www.vice.com/en\\_us/article/mass-incarceration-in-america](https://www.vice.com/en_us/article/mass-incarceration-in-america) [<https://perma.cc/YZQ4-RXZV>].

<sup>12</sup> Erik Kain, *The War on Drugs is a War on Minorities and the Poor*, FORBES (June 28, 2011, 10:07 PM), <https://www.forbes.com/sites/erikkain/2011/06/28/the-war-on-drugs-is-a-war-on-minorities-and-the-poor/> [<https://perma.cc/8KC5-BMNC>].

<sup>13</sup> Jeffrey Miron & Katherine Waldo, *The Budgetary Impact of Ending Drug Prohibition*, CATO INST. (Sept. 27, 2010), <https://www.cato.org/publications/white-paper/budgetary-impact-ending-drug-prohibition> [<https://perma.cc/795W-5QDJ>].

<sup>14</sup> Jay Stooksberry, *Want to Reduce Gun Violence? Halt the War on Drugs*, NEWSWEEK (Aug. 16, 2016, 6:30 AM), <http://www.newsweek.com/want-reduce-gun-violence-halt-war-drugs-488879> [<https://perma.cc/4GJM-TJVG>].

<sup>15</sup> Jack Cole, *End the Prohibition of Heroin: A Cop's Experience Tells Him the Drug War Is Doing More Harm Than Good*, BOS. GLOBE (Aug. 24, 2014), <http://www.bostonglobe.com/opinion/2014/08/24/end-prohibition-heroin/GRq3TO2RwX3IWDYTjY8UPO/story.html> [<https://perma.cc/ZTV7-W3J5>].

<sup>16</sup> Nicole Flatow, *Drug Prohibition Stifles Medical, Scientific Advances, Researchers Find*, THINKPROGRESS (June 12, 2013, 9:30 PM), <https://thinkprogress.org/drug-prohibition-stifles-medical-scientific-advances-researchers-find-8a76c4d85216/> [<https://perma.cc/9VES-VH2W>].

<sup>17</sup> Anthony Papa, *The War on Drugs: Voter Suppression by Another Name*, DAILY KOS (Apr. 29, 2015, 2:16 PM), <http://www.dailykos.com/story/2015/4/29/1380986/-The-War-on-Drugs-Voter-Suppression-by-Another-Name> [<https://perma.cc/RFB9-8A4Q>].

portunities.<sup>18</sup> To this non-exhaustive list of arguments in favor of ending the War on Drugs, we must also add preservation of the Sixth Amendment.

Public defenders across America struggle to provide the effective counsel mandated by the Constitution.<sup>19</sup> In many instances, the restricted supply of public service attorneys also lack the resources necessary to manage their assigned caseload in a manner consistent with the Sixth Amendment right to effective counsel.<sup>20</sup> An overwhelming demand on these public defenders arises from criminal drug charges, collectively known as the War on Drugs.<sup>21</sup> As Peter Rodino, former chairman of the House Judiciary Committee, expressed thirty years ago, “[w]e have been fighting the war on drugs, but now it seems to me the attack is on the Constitution of the United States.”<sup>22</sup>

This Note suggests an unsurprising solution to the many problems surrounding the constitutional intersects of the War on Drugs and the Sixth Amendment right to effective counsel. Part I offers a brief history of the Sixth Amendment right to effective counsel to refresh memories of the critical role public defender offices play in our judicial system. Part II outlines recent public defender statistics and case studies that illuminate the severity of today’s public defense supply crisis. Part III reveals how the immense demand of the War on Drugs directly and indirectly restrains public defense. Part IV examines the additional complexities and conflicts resulting from the evolving state of drug laws and policies that negatively affect public defense. Part V explores the topics of drug laws and public defense in light of the federalist principle of states’ rights.

Finally, the Conclusion asserts that the War on Drugs’s demand on the limited public defense supply results in systemic Sixth Amendment violations addressed by a simple solution rooted in federalism. Specifically, the United States should re-schedule substances to remove federal prohibitions and allow states to more freely experiment with their drug policies and criminal justice systems. Should states desire to continue the War on Drugs within their border, they still must be held accountable for providing the effective counsel required by the Constitution, otherwise their proscriptive drug laws should be stricken as unconstitutional. Further, the federal government can establish a national position by regulating the transport of substances across borders and conditioning funds to states for public defense and law enforcement based upon compliance with federal recommendations. Doing so would marry drug laws and public de-

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<sup>18</sup> Daniel Indiviglio, *Would Ending The Drug War Stimulate Economic Growth?*, ATLANTIC (Feb. 8, 2010), <https://www.theatlantic.com/business/archive/2010/02/would-ending-the-drug-war-stimulate-economic-growth/35524/> [<https://perma.cc/W3CR-X36X>].

<sup>19</sup> See *infra* Part II.

<sup>20</sup> *Id.*

<sup>21</sup> See *infra* Part III.

<sup>22</sup> Steven Wisotsky, *Policy Analysis No. 180: A Society of Suspects: The War on Drugs and Civil Liberties*, CATO INST. (Oct. 2, 1992), <https://www.cato.org/publications/policy-analysis/society-suspects-war-drugs-civil-liberties> [<https://perma.cc/PU32-2SCQ>].

fense under complementary, federalist principles instead of imposing upon states a standard shackled by national policies and underfunding.

### I. HISTORY: THE SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL

The Sixth Amendment to the United States Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.”<sup>23</sup> Courts maintain a duty to assign counsel when the accused is unable to employ counsel of their own choosing.<sup>24</sup> An inability to employ counsel due to indigence requires the court to assign counsel for all federal prosecutions.<sup>25</sup> Originally a guarantee only for federal offenses, the Sixth Amendment right to counsel now extends to many state criminal prosecutions as well.<sup>26</sup> Specifically, the Supreme Court first extended Sixth Amendment protections to state capital cases,<sup>27</sup> then to state felony cases,<sup>28</sup> and finally to state misdemeanors in which the accused faces potential jail time.<sup>29</sup> Further, the Supreme Court established a test to determine when the assistance of counsel is so ineffective that it still violates the Sixth Amendment right.<sup>30</sup> Additionally, surrounding circumstances can make a trial so inherently unfair as to justify a presumption of ineffective counsel without requiring an inquiry into actual performance.<sup>31</sup>

#### A. Counsel for Capital Cases

The infamous “Scottsboro Boys” trial first established the court’s duty to ensure counsel for the accused under extreme circumstances.<sup>32</sup> Nine African Americans from Tennessee accused in Alabama of raping two white women were “appointed all the members” of the local bar.<sup>33</sup> However, no individual lawyer was named or designated to actually represent the accused until the morning of the one-day trial.<sup>34</sup> On appeal, after the accused were found guilty and sentenced to death, the Supreme Court reversed.<sup>35</sup> Due to the overall cir-

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<sup>23</sup> U.S. CONST. amend. VI.

<sup>24</sup> *Powell v. Alabama*, 287 U.S. 45, 59–60 (1932).

<sup>25</sup> *Johnson v. Zerbst*, 304 U.S. 458, 459, 468 (1938).

<sup>26</sup> The 6th Amendment is incorporated via the 14th Amendment’s Due Process Clause, U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”).

<sup>27</sup> *Powell*, 287 U.S. at 73.

<sup>28</sup> *Gideon v. Wainwright*, 372 U.S. 335, 336–37, 342–43 (1963).

<sup>29</sup> *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

<sup>30</sup> *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

<sup>31</sup> *United States v. Cronin*, 466 U.S. 648, 662 (1984).

<sup>32</sup> *Powell*, 287 U.S. at 73; see also Matthew C. Heise, *The Scottsboro Boys Trials and Judge Horton’s Ex Parte Meeting: History’s Verdict*, 7 DARTMOUTH L.J. 208, 208–09 (2009).

<sup>33</sup> *Powell*, 287 U.S. at 56.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 73.

cumstances surrounding the case—the defendants’ youth and illiteracy, a hostile public audience, lack of nearby support from any family or friends, and the looming penalty of death—the necessity of counsel was held to be so vital that failing to make an effective appointment was a denial of due process.<sup>36</sup> However, the Court at this point did not yet answer whether the right to assigned counsel in this manner for indigent defendants extended to non-capital cases.<sup>37</sup>

### B. *Counsel for Federal Cases*

Five years after the Scottsboro trial, the Supreme Court mandated appointed counsel for all federal prosecutions where the accused neither obtained counsel nor waived their Sixth Amendment right to counsel.<sup>38</sup> Like the Scottsboro nine, the accused in *Johnson v. Zerbst* lacked education, funds, and nearby family and friends, but these defendants were charged with a non-capital offense.<sup>39</sup> The Court pointed to the “humane policy of the modern criminal law” as providing indigent defendants with appointed counsel in all federal criminal proceedings.<sup>40</sup> The Sixth Amendment right to counsel is a necessary safeguard against unjust or arbitrary deprivation of the fundamental rights of life and liberty.<sup>41</sup> The Court declared the Sixth Amendment to be a constant admonition that justice will not be done if this safeguard is lost.<sup>42</sup>

### C. *Counsel for State Felony Cases*

Next, the landmark *Gideon v. Wainwright* extended the right of appointed counsel for indigent defendants in all state felony cases.<sup>43</sup> Under Florida state law at the time, a court could only appoint counsel for a defendant charged with a capital offense.<sup>44</sup> As Gideon was charged with breaking and entering with an intent to commit larceny, the judge denied the defendant’s request for legal assistance, leaving Gideon to act as his own counsel.<sup>45</sup> The Supreme Court reversed Gideon’s guilty judgment and proclaimed the Fourteenth Amendment incorporated to the states the Sixth Amendment’s guarantee of counsel as a fundamental right essential to a fair trial.<sup>46</sup>

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<sup>36</sup> *Id.* at 71.

<sup>37</sup> *See id.* at 73.

<sup>38</sup> *Johnson v. Zerbst*, 304 U.S. 458, 467–68 (1938).

<sup>39</sup> *See id.* at 459.

<sup>40</sup> *Id.* at 463.

<sup>41</sup> *Id.* at 462.

<sup>42</sup> *Id.*

<sup>43</sup> *Gideon v. Wainwright*, 372 U.S. 335, 339, 342 (1963).

<sup>44</sup> *Id.* at 337.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 344–45.

*D. Counsel for All Potential Incarceration*

A decade after *Gideon*, the Supreme Court further broadened Sixth Amendment protections to include state misdemeanors in which the accused faces jail time.<sup>47</sup> Jon Argersinger, an unrepresented indigent defendant charged in Florida with carrying a concealed weapon, faced potential imprisonment of up to six months for a misdemeanor.<sup>48</sup> Florida found Argersinger guilty, but the Supreme Court overturned the conviction, rejecting the argument that the Sixth Amendment intended to retract the right to counsel in petty offenses still punishable by imprisonment.<sup>49</sup> In what the Court termed “assembly-line justice” due to hasty adjudication of the high volume of misdemeanor cases, the Court acknowledged that inadequate attention is frequently given to the defendant, thus endangering the fundamental right to a fair trial.<sup>50</sup>

Additionally, the *Argersinger* Court announced the need for counsel at the plea stage.<sup>51</sup> An unrepresented defendant is less likely to be fully aware of the prospect of being incarcerated or being treated fairly by prosecutors.<sup>52</sup> As a result, an accused that lacks counsel may not know precisely what entering a guilty plea entails.<sup>53</sup>

Similarly, the Supreme Court has concluded that the Sixth Amendment right to counsel applies to all “critical stage[s]” after formal charges are filed in criminal prosecutions,<sup>54</sup> such as: arraignments,<sup>55</sup> post-indictment interrogations,<sup>56</sup> post-indictment pretrial lineups,<sup>57</sup> preliminary hearings,<sup>58</sup> the accused’s first appearance in front of a judicial officer after a formal charge is made,<sup>59</sup> and the first appeal of a defendant’s right,<sup>60</sup> including the first-tier of discretionary appeals.<sup>61</sup> Finally, the Court held the Sixth Amendment mandates that each of these critical stages requires “effective” assistance of counsel,<sup>62</sup> a topic discussed next.

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<sup>47</sup> *Argersinger v. Hamlin*, 407 U.S. 25, 36–37 (1972).

<sup>48</sup> *Id.* at 26.

<sup>49</sup> *Id.* at 30–31.

<sup>50</sup> *Id.* at 36.

<sup>51</sup> *Id.* at 34.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Kirby v. Illinois*, 406 U.S. 682, 690 (1972).

<sup>55</sup> *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961).

<sup>56</sup> *Massiah v. United States*, 377 U.S. 201, 206 (1964).

<sup>57</sup> *United States v. Wade*, 388 U.S. 218, 236–37 (1967).

<sup>58</sup> *Coleman v. Alabama*, 399 U.S. 1, 9–10 (1970).

<sup>59</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, 194 (2008).

<sup>60</sup> *Evitts v. Lucey*, 469 U.S. 387, 393–94 (1985).

<sup>61</sup> *Halbert v. Michigan*, 545 U.S. 605, 606 (2005).

<sup>62</sup> *Lafler v. Cooper* 132 S. Ct. 1376, 1385 (2012).

*E. Standard for Ineffective Counsel*

In *Strickland*, the Supreme Court determined the assistance of counsel could be so ineffective that it violates the Sixth Amendment.<sup>63</sup> For a Sixth Amendment violation premised on ineffective assistance of counsel to warrant reversal, the defendant must show a reasonable probability that his counsel's deficiency led to a different result in the proceeding.<sup>64</sup> Continuing, a reasonable probability is one sufficient to undermine public confidence in the outcome.<sup>65</sup> With an ultimate focus on fairness, courts should be concerned whether a result is unreliable due to a breakdown in the adversarial process on which our justice system relies to produce just results.<sup>66</sup> With the right to counsel recognized as the right to *effective* counsel, it follows that simply appointing a lawyer to be present at trial for the accused is not enough to satisfy the Sixth Amendment's guarantee.<sup>67</sup>

*F. Presumption of Ineffective Counsel*

On the same day *Strickland* was decided, the Supreme Court held in *United States v. Cronin* that surrounding circumstances can "justify a presumption of ineffectiveness."<sup>68</sup> With this presumption, a Sixth Amendment claim can be sufficient even without an evaluation of counsel's actual performance.<sup>69</sup> The Court reasoned that surrounding circumstances may be of such magnitude that the likelihood of any lawyer, competent or otherwise, providing effective counsel is so diminutive that a presumption of ineffectiveness is appropriate.<sup>70</sup>

The aforementioned Scottsboro case was highlighted as a model example where surrounding circumstances made the trial so inherently unfair as to warrant a presumption of ineffectiveness without evaluation of actual performance.<sup>71</sup> The *Cronin* Court reminded that the Scottsboro defendants were designated counsel in a manner "so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid."<sup>72</sup> However, the Court refused to create a per se rule of circumstances that would give rise to the presumption of ineffectiveness.<sup>73</sup>

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<sup>63</sup> *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

<sup>64</sup> *Id.* at 694.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 696.

<sup>67</sup> *Id.* at 685–86.

<sup>68</sup> *United States v. Cronin*, 466 U.S. 648, 662 (1984).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 659–60.

<sup>71</sup> *Id.* at 660–61.

<sup>72</sup> *Id.* at 660.

<sup>73</sup> *Id.* at 661.



## II. CRISIS: STRUGGLING STATES OF PUBLIC DEFENSE

In 2013, the 50th anniversary of *Gideon*, former Attorney General Eric Holder described the current state of public defense as one in crisis.<sup>74</sup> In a census of twenty-two states between 1999 and 2007, the caseload of public defenders increased an average of 20 percent while the number of public defenders increased by only 4 percent.<sup>75</sup> The extreme shortfall between the supply of public defense resources versus the caseload demand produces startling results, such as the public defenders assigned to New Orleans misdemeanor courts that are afforded an average of seven minutes for each client.<sup>76</sup>

With limited public defenders, pretrial detainees awaiting representation clog the jails, judges are unable to clear dockets, detention costs rise, and, ultimately, states face a Constitutional crisis for failing to provide the Sixth Amendment counsel necessary for a fair trial.<sup>77</sup> Many states—including New York, Louisiana, California, Idaho, Pennsylvania, and Utah—have already been sued over such Constitutional violations.<sup>78</sup>

The recent crop of systemic challenges follow the lead of *Hurrell-Harring v. State of New York*, in which twenty indigent plaintiffs argued that New York's failure to adequately fund and staff their public defense offices violated the Sixth Amendment right to effective counsel.<sup>79</sup> Citing *Cronic*, New York's highest court held that plaintiffs can bring Sixth Amendment claims over the surrounding circumstances of systemic deficiencies in public defense, which lead to severe adversarial imbalances and breed unreliable judgments.<sup>80</sup> Ultimately, *Hurrell-Harring* settled before trial when the state agreed to fully fund and staff indigent defense in the five defendant counties.<sup>81</sup> In the remainder of this Part, I examine four states primed for systemic Sixth Amendment violation suits due to a deficient supply of public defense resources for their indigent client demand.

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<sup>74</sup> Dylan Walsh, *On the Defensive*, ATLANTIC (June 2, 2016), <https://www.theatlantic.com/politics/archive/2016/06/on-the-defensive/485165/> [https://perma.cc/2SZF-ZV5T].

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Lorelei Laird, *Starved of Money for Too Long, Public Defender Offices Are Suing—and Starting to Win*, ABA J. (Jan. 1, 2017, 4:10 AM), [http://www.abajournal.com/magazine/article/the\\_gideon\\_revolution/](http://www.abajournal.com/magazine/article/the_gideon_revolution/) [https://perma.cc/2XSL-UJNN].

<sup>79</sup> *Hurrell-Harring v. State*, 930 N.E.2d 217, 217 (N.Y. 2010).

<sup>80</sup> *Id.* at 225–28.

<sup>81</sup> Laird, *supra* note 78.

*A. Down in the Bayou*

In New Orleans, Louisiana, 85 percent of cases involve an indigent client unable to afford counsel and are thus reliant on public defenders.<sup>82</sup> However, because so few attorneys are available after a budget cut forced a hiring freeze, the public defender's office began denying serious felony cases and created an indefinite wait list.<sup>83</sup> As of May 2016, the wait list still numbered in the hundreds even after 348 cases were refused.<sup>84</sup> Will Snowden, one public defender with a lightened caseload thanks to the wait list, expressed gratitude about being able to provide more effective counsel, but lamented the cost:

It's at the price of people sitting in jail for three months, two months, four months, whatever it may be, without a lawyer. And I hate for that to be the cost of doing better work for the clients that I have, but then there are clients who nobody is doing any work for. And that's where the injustice lies, that these people, case, their defense is literally just passing away with the passing of time.<sup>85</sup>

However, after seven waitlisted indigents brought a habeas corpus petition claiming the wait list violated their Constitutional rights, a judge ordered the release of the men pending state appeal.<sup>86</sup> The court wrote, "The defendants' constitutional rights are not contingent on budget demands, waiting lists and the failure of the Legislature to adequately fund indigent defense."<sup>87</sup>

Louisiana's public defense crisis is not limited to the unique metropolitan concerns of New Orleans. As of April 2016, thirty-three of Louisiana's forty-two public defender offices were maintaining wait lists or refusing cases because of staffing and budget shortfalls combined with extremely high case-loads.<sup>88</sup> More drastically, the Plaquemines Public Defenders Office announced it would be furloughing its lawyers and shutting down due to a lack of funds to meet the demands of its parish.<sup>89</sup> As a result, more defendants were left without counsel and moved to a wait list.<sup>90</sup> Statewide, thousands sit in jail with no foreseeable legal counsel.<sup>91</sup>

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<sup>82</sup> Mori Rothman, *Wait List Grows as Public Defenders Refuse Cases in New Orleans*, PBS: NEWSHOUR (May 1, 2016, 5:13 PM), <http://www.pbs.org/newshour/bb/wait-list-grows-as-public-defenders-refuse-cases-in-new-orleans/> [<https://perma.cc/GSQ2-FVEG>].

<sup>83</sup> *Id.*

<sup>84</sup> Lauren Zanolli, *Louisiana's Public Defender Crisis Is Leaving Thousands Stuck in Jail with No Legal Help*, VICE NEWS (May 13, 2016, 10:20 AM), <https://news.vice.com/article/louisianas-public-defender-crisis-is-leaving-thousands-stuck-in-jail-with-no-legal-help> [<https://perma.cc/7Y4L-H7ME>].

<sup>85</sup> Rothman, *supra* note 82.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Zanolli, *supra* note 84.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Della Hasselle, *A Public Defense Crisis in Louisiana: 33 of 42 Public Defenders' Offices Restricting Client Services Due to Funding Shortfalls*, GAMBIT (May 25, 2016, 3:49 PM),

### B. *Tarnished Golden Standard*

Similarly, public defenders in Fresno County, California, are so overburdened by crushing caseloads that the American Civil Liberties Union (ACLU) filed a lawsuit against California and Fresno County alleging inadequate representation violating the Sixth Amendment right to counsel.<sup>92</sup> In Fresno County, public defenders are assigned up to four times the recommended client number.<sup>93</sup> As a result, attorneys rarely have time to discuss the basic circumstances of their client's arrest or evidence for an effective defense.<sup>94</sup>

One of the lawsuit's plaintiffs, Peter Yopez, spent nearly a month in jail before seeing a public defender.<sup>95</sup> Yopez then bounced through nine separate public defenders between the time of his initial arraignment and final sentencing; some of these public defenders told Yopez they did not have enough time for his case and then advised him to plead guilty despite strong exculpatory evidence.<sup>96</sup> Emma Andersson, a Staff Attorney for ACLU's Criminal Law Reform Project, commented, "The presumption of innocence is the keystone of our criminal justice system, and it is profoundly compromised for the most vulnerable defendants when the public defense system is failing."<sup>97</sup> Even Fresno County's District Attorney condemned the public defense crisis as "bog[ging] down the entire justice system."<sup>98</sup>

### C. *Show Me the Money*

In Missouri, the crisis reached a point where the Public Defender Director sued his own Governor over funding restrictions that further burdened the state's public defenders.<sup>99</sup> In 2014, the American Bar Association (ABA) released a study of Missouri's Public Defender System that concluded a 75 percent increase in the number of public defenders was needed just to reach a basic level of quality for the number of cases.<sup>100</sup> Despite these results, Governor Jay Nixon, formerly Missouri's Attorney General, repeatedly vetoed and blocked

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<http://www.bestofneworleans.com/blogofneworleans/archives/2016/05/25/a-public-defense-crisis-in-louisiana-33-of-42-public-defenders-offices-refusing-clients-due-to-funding-shortfalls> [<https://perma.cc/74YQ-L7CN>].

<sup>92</sup> *ACLU Sues Over Failing Public Defense System in Fresno County, California*, ACLU (July 15, 2015), <https://www.aclu.org/news/aclu-sues-over-failing-public-defense-system-fresno-county-california> [<https://perma.cc/S4RK-DK2N>].

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> See Camila Domonoske, *Overworked and Underfunded, Mo. Public Defender Office Assigns Case—to the Governor*, NPR (Aug. 4, 2016, 12:34 PM), <http://www.npr.org/sections/thetwo-way/2016/08/04/488655916/overworked-and-underfunded-missouri-public-defender-assigns-a-case-to-the-governor> [<https://perma.cc/WH84-VF5N>].

<sup>100</sup> Walsh, *supra* note 74.

beneficial measures like caseload caps and additional funding, both of which would have lessened the burden facing state public defenders.<sup>101</sup> Not to be outdone, Public Defender Director, Michael Barrett, exercised a state provision that allowed him to draft Governor Nixon—a member of the Missouri Bar—as a lawyer to take over a case for an indigent client.<sup>102</sup> In a notification letter to the Governor, Barrett began by reminding Nixon that his Governor’s office vetoed relief to overburdened public defenders in an indigent defense system operating under significant stresses while ranked 49th in the nation in terms of funding.<sup>103</sup>

Unfortunately, Louisiana, California, and Missouri are indicative of—not exceptions to—a nationwide crisis.<sup>104</sup> Norman Lefstein, an expert in indigent defense and dean emeritus at McKinney School of Law at Indiana University, acknowledged that the situation in Louisiana is not unusual because the Sixth Amendment right to effective counsel is breached every day the courts are in session all over the United States.<sup>105</sup> Similar to the suit against Fresno County, the ACLU has brought actions against Idaho, New York, Washington, Michigan, and Louisiana, alleging systemic failures to provide effective counsel.<sup>106</sup>

#### D. *Born to Battle*

Finally, in Nevada, a 2013 study by the Sixth Amendment Center concluded that serious problems exist, especially in rural areas of the state, ensuring counsel for poor individuals facing a potential loss of liberty.<sup>107</sup> Specifically, “[t]he indigent accused may sit in jail for several weeks or even months, waiting to speak to an attorney.”<sup>108</sup> Once the state does appoint counsel, that defendant is likely to be one of several hundred other defendants vying for the attention of that same attorney at the same time.<sup>109</sup> Addressing the systemic deficiencies in Nevada’s current ability to meet the Constitutional requirements of the Sixth Amendment and *Gideon*, Nevada Supreme Court Justice Michael Cherry stated, “Nevada’s rural counties simply cannot shoulder the state’s obligations under the Sixth Amendment of the U.S. Constitution any longer.”<sup>110</sup>

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<sup>101</sup> Domonoske, *supra* note 99.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> See, e.g., *id.*; Hasselle, *supra* note 91; Walsh, *supra* note 74.

<sup>105</sup> Walsh, *supra* note 74.

<sup>106</sup> *Id.*

<sup>107</sup> SIXTH AMEND. CTR., RECLAIMING JUSTICE: UNDERSTANDING THE HISTORY OF THE RIGHT TO COUNSEL IN NEVADA SO AS TO ENSURE EQUAL ACCESS TO JUSTICE IN THE FUTURE iii (2013).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Press Release, Kristina Pickering, Chief Justice, Supreme Court of Nev., Nevada Supreme Court Study Paints Grim Pictures of Indigent Defense Services in Rural Counties (Mar. 22, 2013), [http://sixthamendment.org/wp-content/uploads/2013/03/nv\\_supremecourt\\_pressrelease\\_032013.pdf](http://sixthamendment.org/wp-content/uploads/2013/03/nv_supremecourt_pressrelease_032013.pdf) [<https://perma.cc/CDH4-75DR>].

This statement becomes even more devastating in light of a single fact concerning Nevada's longstanding history of ensuring justice equality for the poor. Almost one hundred years before *Gideon*, Nevada became the first state in the nation to appoint attorneys for all criminal matters, including misdemeanors, making it one of the bedrock principles upon which the state established its identity.<sup>111</sup>

Before moving on to examine factors that significantly feed the public defense crisis, just a quick reminder that the purpose of the Sixth Amendment right to effective counsel is to protect all individuals against potential governmental tyranny by ensuring that the least financially secure among us are protected. As Jonathan Rapping, president and founder of the Gideon's Promise advocacy organization noted, "If we believe in equal justice, then the single most important thing to do is make sure poor people have the kinds of lawyers richer people would have."<sup>112</sup> Yet, *Gideon's* promise of effective counsel does not just encompass providing lawyers of comparable skills and abilities. The surrounding circumstances must also allow these highly competent, knowledgeable, and passionate public defenders the opportunity and resources to provide the zealous advocacy necessary to comply with the Sixth Amendment. Still, increasing the potential for "rich people" public defenders by expanding the pool of full-time public defenders does, at least, partly address the supply side of the burden equation.

Unfortunately, estimates based upon recommended caseload maximums for public defenders reveal that almost 7,000 more public defenders are needed just to address the current caseload.<sup>113</sup> In the meantime, current public defenders face a reality where "[t]here isn't time to uncover the facts, to marinate in them, to do the research necessary," according to Derrick Carson, Chief Public Defender in Concordia Parish, Louisiana.<sup>114</sup> Even more unsettling is Carson's ultimate characterization of the entire scenario: "It becomes like herding cattle."<sup>115</sup> Keep this dehumanization of indigent defendants to lower-than-second-class citizens in mind as we turn next to the demand side of the defense burden equation.

### III. SHACKLES: DRUG LAWS RESTRAIN EFFECTIVE PUBLIC DEFENSE

In a familiar refrain, a 1990 article exploring the War on Drugs's impact on the courts quoted District Judge Lucius Benton of Texas as saying they were

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<sup>111</sup> SIXTH AMEND. CTR., *supra* note 107.

<sup>112</sup> Walsh, *supra* note 74.

<sup>113</sup> Jaeah Lee et al., *Charts: Why You're in Deep Trouble If You Can't Afford a Lawyer*, MOTHER JONES (May 6, 2013, 10:00 AM), <http://www.motherjones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts> [<https://perma.cc/XZ8M-WVMF>].

<sup>114</sup> Walsh, *supra* note 74.

<sup>115</sup> *Id.*

“just running them through here like cattle.”<sup>116</sup> At that time, “the number of drug cases [had already] increased by 270 percent” over the previous decade.<sup>117</sup> This staggering explosion in volume left judges and lawyers—both defense and prosecution—attributing to the War on Drugs the “unintended consequences” of overwhelming public defenders, substantially shifting the balance of power to prosecutors, and “impairing the quality of justice.”<sup>118</sup>

The demand from drug cases both directly and indirectly restrains the ability of public defenders to provide the effective counsel the Constitution mandates, while deferred resources reinforce the disparity shackles on public defenders against their better-supplied prosecutorial adversaries. The direct restraint manifests in the overwhelming number of cases involving indigent clients charged with drug offenses, a situation abetted by vastly disproportionate drug law enforcement against the poor, i.e. those less able to afford counsel and who thus need public defender assistance.<sup>119</sup> Indirectly, public defense is restrained by a limited-resource judicial system taxed at every point of administration with diminished time for critical stages such as plea-bargaining.<sup>120</sup> Finally, the time, effort, and funds spent elsewhere—whether on law enforcement, prisons and other corrections, or especially the prosecution—are all resources unavailable to alleviate the public defense crisis and thus enable the adversarial advantage.<sup>121</sup>

#### A. *The Direct Restraint of Increased Caseloads*

One restraint on effective public defense is the seemingly endless number of individuals charged with low-level offenses—such as drug violations—whom public defenders are most frequently called upon to represent.<sup>122</sup> Nationwide, public defenders represent 80 percent of criminal defendants,<sup>123</sup> and drug violations constitute the single highest category of arrests with a new ar-

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<sup>116</sup> Michael Tackett, *Drug War Chokes Federal Courts: Assembly-line Justice Perils Legal System*, CHI. TRIB. (Oct. 14, 1990), [http://articles.chicagotribune.com/1990-10-14/news/9003260217\\_1\\_drug-cases-marshals-and-public-defenders-new-drug-laws](http://articles.chicagotribune.com/1990-10-14/news/9003260217_1_drug-cases-marshals-and-public-defenders-new-drug-laws) [<https://perma.cc/F2S5-VQB2>].

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> See Kain, *supra* note 12.

<sup>120</sup> NAT'L DRUG INTELLIGENCE CTR., U.S. DEP'T JUST., NATIONAL DRUG THREAT ASSESSMENT 2010 (2010), <https://www.justice.gov/archive/ndic/pubs38/38661/drugImpact.htm> [<https://perma.cc/767U-KVMP>].

<sup>121</sup> See Lee et al., *supra* note 113.

<sup>122</sup> THOMAS GIOVANNI & ROOPAL PATEL, BRENNAN CTR. FOR JUST., 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](http://www.brennancenter.org/sites/default/files/publications/Gideon_Report_040913.pdf) [<https://perma.cc/W5NK-JU2H>].

<sup>123</sup> Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, 24 CRIM. JUST. 3, 6 (2009), [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_cjmag\\_24\\_3\\_primus.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_24_3_primus.authcheckdam.pdf) [<https://perma.cc/3BJQ-QB4E>].

rest made every twenty-one seconds.<sup>124</sup> This rate produces approximately one and a half million drug arrests each year.<sup>125</sup> Over 80 percent of these drug violations are for simple possession, and half of those are for marijuana.<sup>126</sup> Regarding their share of the total number of arrests for all offenses, drugs crimes increased from less than 4 percent in 1973 to almost 14 percent in 2015.<sup>127</sup>

Incarceration statistics also clearly illuminate the War on Drugs's expanding contribution to the criminal caseload weight. First, while the number of criminal offenders within each major category of offenses increased between 1995 and 2003, the number incarcerated for drug offenses accounted for the single largest percentage of the growth.<sup>128</sup> Of the 1,316,409 people serving a sentence in a state prison at the end of 2014, over 200,000 of these prisoners had a drug charge as their most serious offense.<sup>129</sup> Among those serving time in a United States federal prison on the date of September 30, 2015, a drug offense was the most serious charge for almost half of all inmates.<sup>130</sup>

The arrest and incarceration statistics become even more striking when combined with the knowledge that public defenders have seen their share of the total caseload increase as well. The share of felons in large counties who used public defenders increased between 1992 and 1996 from 59 percent to 68 percent.<sup>131</sup> To remind, public defenders represent about 80 percent of all criminal defendants nationwide.<sup>132</sup> Although white-collar crimes have seen their defendants represented by private counsel to a higher degree, public defenders represent a higher percentage of drug offenders.<sup>133</sup> Continuing, the National Association of Criminal Defense Lawyers reported there were over 10,000,000 misdemeanor prosecutions in 2006 alone.<sup>134</sup> Again, the vast majority of these

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<sup>124</sup> Matt Ferner, *One Marijuana Arrest Occurs Every 42 Seconds in U.S.: FBI Report*, HUFFINGTON POST (Apr. 15, 2014), [http://www.huffingtonpost.com/2012/10/29/one-marijuana-arrest-occu\\_n\\_2041236.html](http://www.huffingtonpost.com/2012/10/29/one-marijuana-arrest-occu_n_2041236.html) [https://perma.cc/3W2E-792M].

<sup>125</sup> *Crime, Arrests and U.S. Law Enforcement*, DRUG WAR FACTS, <http://www.drugwarfacts.org/cms/Crime> [https://perma.cc/5FLQ-MJRN] (last visited Oct. 7, 2017) (aggregating data from <https://ucr.fbi.gov/crime-in-the-u.s/>).

<sup>126</sup> *See id.*

<sup>127</sup> *See id.*

<sup>128</sup> *Prisons and Drugs*, DRUG WAR FACTS, [http://www.drugwarfacts.org/cms/Prisons\\_and\\_Drugs](http://www.drugwarfacts.org/cms/Prisons_and_Drugs) [https://perma.cc/9W3N-LSMV] (last visited Oct. 7, 2017) (citing PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUST. STAT. BULL., U.S. DEP'T JUST., PUB. NO. NCJ 215092, PRISONERS IN 2005 (2006)).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> CAROLINE WOLF HARLOW, BUREAU OF JUST. STAT., U.S. DEP'T JUST., SPECIAL REPORT NCJ 179023: DEFENSE COUNSEL IN CRIMINAL CASES (2000), <https://www.bjs.gov/content/pub/ascii/dccc.txt> [https://perma.cc/E548-5CQZ].

<sup>132</sup> Primus, *supra* note 123.

<sup>133</sup> HARLOW, U.S. DEP'T JUST., *supra* note 131.

<sup>134</sup> GIOVANNI & PATEL, *supra* note 122, at 5.

defendants needed the assistance of an effective public defender because they could not afford private counsel of their own.<sup>135</sup>

Prosecutors nationally are also overburdened with excessive caseloads, yet, in a perverse twist, an overburdened state further detracts the defense.<sup>136</sup> Prosecutors are unable to timely bring cases to trial, resulting in many defendants remaining incarcerated for months or even years if they are unable to post bail.<sup>137</sup> The oft-terrible incarceration conditions then lead defendants to accept less-than-favorable plea bargains than what might be afforded with a timely trial and effective counsel.<sup>138</sup> Even worse, some who are innocent of the crimes for which they are accused plead guilty just to end their incarceration.<sup>139</sup>

### B. *The Indirect Restraint of a Taxed System*

The War on Drugs impacts the entire criminal justice system by taxing the stretched-thin resources at every stage in the process, from arrest to adjudication, and incarceration to post-release supervision.<sup>140</sup> Jeff Whitacre, Commissioner of an Ohio county whose Public Defender Office handled 2 percent more cases in 2014 than 2013—a year which saw the all-time high number of cases for the office—correctly remarked that the public defender is one of many branches in the judicial system feeling the weight of the War on Drugs.<sup>141</sup>

One of the critical stages adversely affected by this pressure from the War on Drugs is plea-bargaining. With almost 90 percent of criminal defendants ending their cases by pleading guilty without a full trial, the primary justification for seeking bargains is typically said to be efficiently minimizing stress on both the process and the players in the criminal justice system.<sup>142</sup> However, critics argue that plea bargains give an unfair advantage to prosecutors who use it as a tool to undermine the Sixth Amendment.<sup>143</sup> Many prosecutors strong-arm drug defendants with coercive tactics that put an enormous pressure on them to accept a plea offer they cannot afford to refuse.<sup>144</sup> The historically low rate of

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<sup>135</sup> *Id.*

<sup>136</sup> Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 263 (2011).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 263–64.

<sup>139</sup> *Id.* at 264.

<sup>140</sup> See NAT'L DRUG INTELLIGENCE CTR., U.S. DEP'T JUST., *supra* note 120.

<sup>141</sup> Andy Ouriel, *Drugs to Blame for Public Defender Record Caseload*, SANDUSKY REGISTER (Mar. 3, 2015, 10:30 AM), <http://www.sanduskyregister.com/story/201503030004> [https://perma.cc/624U-YZYC].

<sup>142</sup> Alejandra de la Fuente, *Plea Bargaining: Coercion or Choice?*, INNOCENCE PROJECT OF FLORIDA: PLAIN ERROR (Jan. 23, 2013, 3:09 PM), <http://floridainnocence.org/content/?p=8304> [https://perma.cc/5XX8-8MEJ].

<sup>143</sup> *Id.*

<sup>144</sup> *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, HUMAN RIGHTS WATCH (Dec. 5, 2013), <https://www.hrw.org/report/2013/12/>



federal drug defendants going to trial—only 3 percent—likely reflects an unbalanced criminal justice system fertile for systemic ineffective assistance of counsel.<sup>145</sup> When the *Argersinger* Court extended the Sixth Amendment right to effective counsel to include the critical pleading stage, the Court noted that the volume of cases “may create an obsession for speedy dispositions, regardless of the fairness of the result.”<sup>146</sup>

Ultimately, the focus on nonviolent, low-level offenses like drug possession clogs the criminal justice system and diverts criminal justice resources, especially from public defenders.<sup>147</sup> Although representing these drug-charge clients often does not individually consume much time, cumulatively the sheer volume of cases taxes resources on a systemic level.<sup>148</sup> While each case remains open, public defenders, prosecutors, judges, and other judicial officers attend arraignments and other hearings, negotiate pleas, file and argue motions, and complete any other necessary work to manage the assembly-line of concurrent cases.<sup>149</sup> As stated in a 2013 paper published by the Brennan Center for Justice for the 50th anniversary of *Gideon*, “simple possession of drugs may be the most frequent charge that saps public defense and other criminal justice resources. . . .”<sup>150</sup>

### C. *The Adversarial Restraint of Deferred Resources*

Finally, the War on Drugs deepens the chasm between the financial resources potentially available for public defense versus those accessible to the prosecution by displacing funds to criminalize—instead of understanding and treating—drug use, abuse, and addiction.<sup>151</sup> The Drug Policy Alliance estimates that, over a four-decade period, taxpayers in America have spent one trillion dollars on the War on Drugs.<sup>152</sup> When accounting for state and local spending, the annual cost reaches over fifty billion dollars.<sup>153</sup> Meanwhile, the lack of funds available for public defenders restrains their ability to conduct basic in-

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05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead [https://perma.cc/C4TS-6EF4].

<sup>145</sup> *Id.*

<sup>146</sup> *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972).

<sup>147</sup> GIOVANNI & PATEL, *supra* note 122, at 5.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> See *How to Safely Reduce Prison Populations and Support People Returning to Their Communities*, JUST. POL’Y INST. 1 (June 2010), [http://www.justicepolicy.org/images/upload/10-06\\_FAC\\_ForImmediateRelease\\_PS-AC.pdf](http://www.justicepolicy.org/images/upload/10-06_FAC_ForImmediateRelease_PS-AC.pdf) [https://perma.cc/9XD3-C4RD] [hereinafter *How to Safely Reduce Prison Populations*].

<sup>152</sup> Matt Sledge, *The Drug War and Mass Incarceration by the Numbers*, HUFFINGTON POST (Apr. 8, 2013, 7:34 AM), [http://www.huffingtonpost.com/2013/04/08/drug-war-mass-incarceration\\_n\\_3034310.html](http://www.huffingtonpost.com/2013/04/08/drug-war-mass-incarceration_n_3034310.html) [https://perma.cc/TCT2-LSYK].

<sup>153</sup> *Id.*

vestigations or employ expert witnesses, both of which are necessary for an effective defense.<sup>154</sup>

The obscene amount spent on the War on Drugs does not appear to be sound policy in light of the difficulties faced by public defenders in providing effective counsel, especially against disproportionately better-funded prosecutions. The total spending of state prosecutors exceeded that of public defenders by over three billion dollars in 2007 alone.<sup>155</sup> In California, the annual budget for prosecutors was about three hundred million dollars more than for public defenders.<sup>156</sup> Additionally, as of 2008, American taxpayers spent fourteen times more on corrections than on public defense.<sup>157</sup>

Perhaps even more distressing, the financial windfall of prosecutors over their public defense adversaries persists in the face of more cost-effective alternatives to addressing concerns surrounding illicit drugs.<sup>158</sup> For example, treating drug addiction within communities is considered to be a very cost-effective way to prevent crimes.<sup>159</sup> The cost of incarceration exceeds the more humane approach of treatment by approximately twenty thousand dollars per person per year.<sup>160</sup> Further, the Washington State Institute for Public Policy produced a study that found that every dollar spent on drug treatment yielded almost twenty dollars in savings related to crime in the community.<sup>161</sup> On the other hand, prisons were found to yield only thirty-seven cents in public safety per every dollar spent.<sup>162</sup>

Knowing the public defense struggle to achieve the Constitutionally-mandated standard of effective counsel, the financial disadvantage public defenders face against their State adversaries, and policymakers' reckless abandon towards prioritizing the more-costly and less-effective path of punishment over treatment, one must pause to question the War on Drugs's true intent. In his article on the erosion of a range of civil liberties under the War on Drugs, Paul Finkelman did not mince words: "The whole conduct of the war on drugs appears to be aimed at crippling the defense capabilities of the accused."<sup>163</sup> Finkelman observed that, although public defenders are highly knowledgeable about criminal law, their offices are so underfunded and overworked that they are rarely likely to have the proper resources necessary to defend the indigent

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<sup>154</sup> Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1441 (1993).

<sup>155</sup> Lee et al., *supra* note 113.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> See generally *How to Safely Reduce Prison Populations*, *supra* note 151.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 8.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Finkelman, *supra* note 154, at 1440.

accused against the government.<sup>164</sup> Moving forward, this troubling situation will only worsen as the War on Drugs continues.<sup>165</sup>

#### IV. CONFLICT: ADMINISTRATION OF AN EVOLVING WAR ON DRUGS

Drug laws and policies within the United States at both the state and the federal level are in constant flux. In the 2016 elections, four states (California, Maine, Massachusetts, and Nevada) voted to legalize adult recreational marijuana.<sup>166</sup> An additional four states (Arkansas, Florida, Montana, and North Dakota) voted to approve marijuana for medicinal purposes.<sup>167</sup> Marijuana's sole ballot measure defeat of the election season occurred in Arizona, whose citizens narrowly declined to expand their medicinal allowance to adult recreation.<sup>168</sup> As a result, more than half the states and the District of Columbia currently have laws legalizing marijuana, whether for recreation or solely for medicinal purposes.<sup>169</sup>

##### A. *Past and Present Evolutions*

Despite the moves by individual states to decriminalize marijuana, the Supreme Court held that Congress may still criminalize the production and use of homegrown marijuana as a federal offense even when states allow the legal use for medicinal purposes.<sup>170</sup> Further, the Drug Enforcement Administration (DEA) announced in 2016 that marijuana will remain classified as a Schedule I drug under the Controlled Substance Act.<sup>171</sup> One effect of such classification requires the Food and Drug Administration (FDA) to declare that marijuana has no medical use.<sup>172</sup> Thus, states that allow medicinal use—or even legal recreational use—of marijuana do so in defiance of federal law.<sup>173</sup> Additionally, physicians who prescribe medicinal marijuana to patients struggling with the pains of terminal illnesses in states that allow this treatment are also in violation of federal law.<sup>174</sup>

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<sup>164</sup> *Id.* at 1441.

<sup>165</sup> *Id.*

<sup>166</sup> Katy Steinmetz, *These States Just Legalized Marijuana*, TIME (Nov. 10, 2016), <http://time.com/4559278/marijuana-election-results-2016/> [<https://perma.cc/QP36-Q6NQ>].

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *See generally* Gonzales v. Raich, 545 U.S. 1 (2005).

<sup>171</sup> Donna Leinwand Leger, *Marijuana to Remain Illegal Under Federal Law, DEA Says*, USA TODAY (Aug. 11, 2016, 5:54 PM), <http://www.usatoday.com/story/news/2016/08/11/dea-marijuana-remains-illegal-under-federal-law/88550804/> [<https://perma.cc/4LDT-V8RJ>].

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Ericka L. Adler, *Conflict Between State, Federal Marijuana Laws Puts Prescribers at Risk*, PHYSICIANS PRAC. (Mar. 5, 2014), <http://www.physicianspractice.com/blog/conflict-between-state-federal-marijuana-laws-puts-prescribers-risk> [<https://perma.cc/FE7T-YG3U>].

However, the Ninth Circuit recently held that federal judges should stop prosecutions for conduct authorized in state medical marijuana laws by enforcing section 542 of the Consolidated Appropriations Act.<sup>175</sup> The court announced that section 542 prohibits the Department of Justice (DOJ) from spending funds on “actions that prevent the Medical Marijuana States’ giving practical effect to their state laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”<sup>176</sup> Still, this decision comes from only a single federal circuit. Not coincidentally, seven of the nine states within the Ninth Circuit’s jurisdiction, including more than half of the nation’s recreational marijuana states, allow conditional marijuana use.<sup>177</sup>

This conflict between federal and state law generates cases that stress an already stretched-thin judicial system in which public defense gets the short resource stick. In addition to scenarios of the type mentioned above, the potential for absurd dilemmas became apparent in a recent congressional hearing on the potential complications of decriminalizing marijuana possession in the District of Columbia, a city policed by both federal and local law enforcement agencies.<sup>178</sup> The subcommittee asked whether, under the proposed decriminalization, a marijuana possessor with one foot on city property and another on federal property would be punished under state or federal law.<sup>179</sup> The Assistant Chief of D.C.’s Metropolitan Police Department stated that he would enforce state law, which makes possession of less than one ounce of marijuana subject to a \$25 civil fine post-decriminalization.<sup>180</sup> On the other hand, the Acting Chief of

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<sup>175</sup> *United States v. McIntosh*, 833 F.3d 1163, 1176–79 (9th Cir. 2016).

<sup>176</sup> *Id.* at 1176.

<sup>177</sup> See *Map of the Ninth Circuit*, U.S. CTS. NINTH CIR., [https://www.ca9.uscourts.gov/content/view.php?pk\\_id=0000000135](https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000135) [<https://perma.cc/YJT2-EA5A>] (last visited Oct. 18, 2017) (map of the states that make up the United States Ninth Federal Circuit); see also *Marijuana Overview*, NAT’L CONF. OF STATE LEGISLATURES (Aug. 30, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx> [<https://perma.cc/LCH7-KL44>] (indicating that Alaska, California, Oregon, Nevada, and Washington permit conditional marijuana use); *Medical Cannabis Program*, STATE OF HAWAII, DEP’T HEALTH, <http://health.hawaii.gov/medicalcannabis/> [<https://perma.cc/7MJ6-QNWU>] (last visited Oct. 18, 2017) (indicating that Hawaii allows for conditional marijuana use); *Dispensaries*, ARIZ. DEP’T HEALTH SERVICES, <http://www.azdhs.gov/licensing/medical-marijuana/index.php#dispensaries-home> [<https://perma.cc/6XTV-VZER>] (last visited Oct. 18, 2017) (indicating that Arizona permits conditional marijuana use).

<sup>178</sup> David S. Joachim, *Review of Marijuana Law Exposes List of Conflicts Between Jurisdictions*, N.Y. TIMES (May 9, 2014), <https://www.nytimes.com/2014/05/10/us/review-of-marijuana-law-exposes-list-of-conflicts-between-jurisdictions.html?mcubz=0> [<https://perma.cc/FJ9M-XFLU>].

<sup>179</sup> *Mixed Signals: The Administration’s Policy on Marijuana, Part Three: Hearing Before the H. Subcomm. on Gov’t Operations of the H. Comm. on Oversight and Gov’t Reform*, 113th Cong. 1–7 (2014) (statement of Rep. John Mica, Chairman, S. Comm. On Gov’t Operations).

<sup>180</sup> *Id.*

the United States Park Police stated that he would enforce federal law, which makes the same possession a jailable offense with a potential \$5000 fine.<sup>181</sup>

Likewise, the federal-versus-state conflict produces non-criminal litigation, which, again, compounds the overall burden on the judicial system as a whole.<sup>182</sup> For example, the Colorado Supreme Court ruled against Colorado citizen Brandon Coats in his wrongful termination suit against his former employer, Dish Network.<sup>183</sup> Dish Network, which is headquartered in Colorado, fired Coats for his legal use of marijuana despite Colorado's "lawful" activities statute which prohibits employers from firing employees based upon engagement in lawful activities off company property during nonworking hours.<sup>184</sup> The Colorado state court held that this Colorado statute did not protect a Colorado citizen abiding by Colorado laws because *federal* laws rendered the lawful activity as unlawful.<sup>185</sup> Adding insult to injury, Coats is a quadriplegic registered for medical marijuana, and only used the substance at home, outside of working hours.<sup>186</sup>

Further, the ongoing development, understanding, and opinions of existing drugs, as well as the frequent creation of new drugs, will only add to the conflict inherent in a system where the federal government can proscribe this type of private activity that individual states allow. For example, recent research suggests that lysergic acid diethylamide (LSD), which is categorized as a Schedule I Controlled Substance with no accepted medical use in the United States, may in fact offer positive, medicinal purposes.<sup>187</sup> At the other end of the spectrum, dangers surrounding synthetic marijuana—which goes by a variety of other names, like "spice" and "K2"—raise the same fears and motivations in the War on Drugs, which, in turn, leads to federal criminalization, and thus an increase in the caseload demand on public defense.<sup>188</sup> Synthetic drugs also add additional legal nuance and complexity, as manufacturers can sometimes avoid

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<sup>181</sup> *Id.*

<sup>182</sup> John Hudak, *The Conflict Between Federal and State Marijuana Laws Claims a Victim*, NEWSWEEK (June 20, 2015, 4:47 PM), <http://www.newsweek.com/conflict-between-federal-and-state-marijuana-laws-claims-victim-345099> [<https://perma.cc/AP5N-93PC>].

<sup>183</sup> *Coats v. Dish Network, L.L.C.*, 303 P.3d 147, 149 (Colo. App. 2013).

<sup>184</sup> COLO. REV. STAT. § 24-34-402.5 (2016).

<sup>185</sup> *Coats*, 303 P.3d at 150–51.

<sup>186</sup> *Id.* at 149.

<sup>187</sup> Kashmiri Gander, *How 'Micro-Dosing' LSD Helped a Woman to 'Improve Her Mental Health and Save Her Marriage'*, INDEPENDENT (Jan. 27, 2017, 11:26 AM), <http://www.independent.co.uk/life-style/lsd-microdosing-help-woman-ayelet-waldman-drug-mental-health-save-marriage-psychedelic-a7547576.html> [<https://perma.cc/59TD-SLFJ>].

<sup>188</sup> Elisabeth Garber-Paul, *Synthetic Marijuana: Everything You Need to Know About the Drug K2*, ROLLING STONE (July 13, 2016), <http://www.rollingstone.com/culture/features/synthetic-marijuana-everything-you-need-to-know-about-k2-drug-spice-20160713> [<https://perma.cc/UD2T-5LVH>].

prosecution by tweaking formulas and switching to varieties that are not exactly illegal.<sup>189</sup>

Recently, much attention has been directed towards kratom, a pain-relieving plant from Southeast Asia, with parallels drawn between it and marijuana.<sup>190</sup> Though some claim that kratom is effective in battling opioid addictions,<sup>191</sup> others express concern regarding kratom's own addictive properties and other health-related dangers.<sup>192</sup> In a familiar refrain, the DEA announced its intent to categorize the active materials in the plant as Schedule I substances because kratom "has a high potential for abuse, has no currently accepted medical use in treatment in the United States, and has a lack of accepted safety for use under medical supervision."<sup>193</sup> Should the DEA decide to effectively make kratom federally illegal, its action would strip the states of their sovereign right to rule themselves, place non-conforming states in violation of federal law, and add weight to the overall caseload demand, even though individual states are already taking actions as they best see fit.<sup>194</sup>

#### B. Administration Currently in Session(s)

Adding an additional level of uncertainty, the 2016 Presidential election results brought a change in party—and thus, priorities—at the Executive branch with the victory of Donald Trump.<sup>195</sup> Any transition at the top will result in at least marginal change and the proverbial growing pains therewith, though the swing's magnitude increases greatly when not just the President, but the controlling party also switches.<sup>196</sup> Additionally, the current administration's un-

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<sup>189</sup> Leon Neyfakh, *What Is the Deal With Synthetic Marijuana?*, SLATE (July 15, 2016, 12:35 PM), [http://www.slate.com/articles/news\\_and\\_politics/crime/2016/02/synthetic\\_marijuana\\_is\\_a\\_weird\\_and\\_confusing\\_drug\\_here\\_s\\_what\\_you\\_need\\_to.html](http://www.slate.com/articles/news_and_politics/crime/2016/02/synthetic_marijuana_is_a_weird_and_confusing_drug_here_s_what_you_need_to.html) [https://perma.cc/D6M9-W5C2].

<sup>190</sup> Jacob Sullum, *Is Kratom the New Marijuana?*, REASON, Jan. 2017, at 8, <http://reason.com/archives/2016/12/30/is-kratom-the-new-marijuana> [https://perma.cc/3H36-UPJT].

<sup>191</sup> See Saskia de Melker & Melanie Saltzman, *If Kratom Helps Opioid Addicts, Why Might DEA Outlaw It?*, PBS: NEWSHOUR (Jan. 15, 2017, 1:18 PM), <http://www.pbs.org/newshour/bb/kratom-help-treat-opioid-addiction/> [https://perma.cc/55JK-KVYY].

<sup>192</sup> See Alan Schwarz, *Kratom, an Addict's Alternative, Is Found to Be Addictive Itself*, N.Y. TIMES (Jan. 2, 2016), <https://www.nytimes.com/2016/01/03/us/kratom-an-addicts-alternative-is-found-to-be-addictive-itself.html> [https://perma.cc/A9TD-PHL5].

<sup>193</sup> Press Release, Drug Enforcement Admin., DEA Announces Intent to Schedule Kratom (Aug. 30, 2016), <https://www.dea.gov/divisions/hq/2016/hq083016.shtml> [https://perma.cc/2QA5-XWSL].

<sup>194</sup> See Ben Adams, *Why Are States Rushing to Ban Kratom?*, MERRY JANE (June 30, 2016), <https://www.merryjane.com/news/why-are-states-rushing-to-ban-kratom> [https://perma.cc/WMR5-BDCC].

<sup>195</sup> Stephen Collinson, *The Ultimate Triumph: President Trump*, CNN: POLITICS (Nov. 9, 2016, 12:50 PM), <http://www.cnn.com/2016/11/08/politics/election-day-2016-highlights/> [https://perma.cc/R7QX-BAV3].

<sup>196</sup> *Id.*

precedented nature generates an extra air of unpredictability and potential conflict.<sup>197</sup>

Regardless, the history of Jeff Sessions, Attorney General of the United States—America’s top lawyer and chief law enforcement officer in charge of the DOJ—provides insight on the expected direction of drug policy over the next few years.<sup>198</sup> Sessions is a staunch opponent of legalizing marijuana and criticized his predecessors at the DOJ for not vigorously enforcing the federal ban nationwide.<sup>199</sup> When questioned at his Senate confirmation hearings about conflicts with state drug laws, Sessions evaded the issue by saying only that he would not commit to never enforcing federal law.<sup>200</sup>

Drug policy reformers such as Ethan Nadelmann, the Executive Director at the Drug Policy Alliance, consider Sessions to be a nightmare for reform and someone who will more strictly enforce existing drug laws.<sup>201</sup> Sessions’s recent action rescinding former President Obama’s memo to phase out the federal government’s use of private prisons justifies Nadelmann and other reformers’ concerns.<sup>202</sup> This rescission likely began an expansive rollback of the more relaxed criminal justice policies enacted under the Obama administration, such as those directed against seeking mandatory minimums for nonviolent drug offenders,<sup>203</sup> and not challenging marijuana legalization in Colorado and Washington.<sup>204</sup> Sessions further provided evidence of a justice policy reversal via his May, 2017, memo directing federal prosecutors to seek the most severe charges and sentences possible.<sup>205</sup>

<sup>197</sup> *Id.*

<sup>198</sup> Eric Lichtblau & Matt Flegenheimer, *Jeff Sessions Confirmed as Attorney General, Caping Bitter Battle*, N.Y. TIMES: POLITICS (Feb. 8, 2017), <https://www.nytimes.com/2017/02/08/us/politics/jeff-sessions-attorney-general-confirmation.html> [<https://perma.cc/URZ8-N72Y>].

<sup>199</sup> James Higdon, *Jeff Sessions’ Coming War on Legal Marijuana*, POLITICO (Dec. 5, 2016), <http://www.politico.com/magazine/story/2016/12/jeff-sessions-coming-war-on-legal-marijuana-214501> [<https://perma.cc/C3L3-BRNA>].

<sup>200</sup> Eric Boehm, *Sessions Offers Unclear, Useless Answers on Marijuana During Confirmation Hearing*, REASON: HIT & RUN BLOG (Jan. 10, 2017, 5:52 PM), <http://reason.com/blog/2017/01/10/sessions-offers-unclear-useless-answers> [<https://perma.cc/9KET-X7UU>].

<sup>201</sup> Tana Ganeva, *Jeff Sessions’s Ridiculous Anti-drug Crusade*, WASH. POST (Nov. 21, 2016), <https://www.washingtonpost.com/news/the-watch/wp/2016/11/21/jeff-sessions-ridiculous-anti-drug-crusade/> [<https://perma.cc/2G5E-RHSM>].

<sup>202</sup> Matt Dean, *Sessions Signals Support for Private Prisons, Rescinds Memo Meant to Phase Out Their Use*, FOX NEWS: POLITICS (Feb. 23, 2017), <http://www.foxnews.com/politics/2017/02/23/sessions-signals-support-for-private-prisons-rescinds-memo-meant-to-phase-out-their-use.html> [<https://perma.cc/SR7W-HCCB>].

<sup>203</sup> *Id.*

<sup>204</sup> Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t. Just., to All United States Attorneys, U.S. Dep’t. Just. 3 (Aug. 29, 2013) (on file with U.S. Dep’t Just.) <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/YY4K-6PQF>].

<sup>205</sup> Memorandum from Jeff Sessions, Att’y Gen., U.S. Dep’t. Just., to All Federal Prosecutors 1 (May 10, 2017) (on file with the Office of the Att’y Gen.) <https://assets.documentcloud.org/documents/132756857467-jeff-sessions-attorney-general-memo-to-all-federal-prosecutors-1-20170510.pdf>.

On the same day as Sessions's rescission of the Obama memo, White House Press Secretary Sean Spicer further confirmed the legitimacy of reformers' concerns by stating in a press conference that action on marijuana use is a question best suited for the DOJ.<sup>206</sup> However, he also stated that he believes the United States will see "greater enforcement of it."<sup>207</sup> Lest we brush off such talk as hollow, Spicer also previously stated that the White House was "going to strip federal grant money from the sanctuary cities and states that harbor illegal immigrants."<sup>208</sup> Soon after this threat, President Trump signed an executive order that allows for exactly that to vindictively punish non-conforming cities and states.<sup>209</sup>

But what exactly does President Trump think of drug laws and enforcement? In the 90's, Trump appeared to call for legalizing all drugs, though he has since expressed support only for medical marijuana.<sup>210</sup> While campaigning as the Republican nominee, Trump stated that an administration under his watch would "do" medical marijuana.<sup>211</sup> He also indicated that states would retain authority to address the issue of legalization within their borders.<sup>212</sup> However, he also said that Colorado now has "a lot of problems" as a result of decriminalizing marijuana.<sup>213</sup>

#### V. DEFENSE: THE LABORATORIES OF DEMOCRACY

The federalist principle of "states' rights" implicates a simple yet sublime idea: within fifty laboratories of democracies, i.e. the fifty states in the Union, experimental ideas producing bad results can be tossed without damaging the

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ud.org/documents/3719247/Jeff-Sessions-s-criminal-charging-policy.pdf [https://perma.cc/3T64-EB86].

<sup>206</sup> Roberta Rampton, et al., *White House Sees Greater Enforcement on Recreational Marijuana*, REUTERS (Feb. 23, 2017), <http://www.rawstory.com/2017/02/white-house-sees-greater-enforcement-on-recreational-marijuana/> [https://perma.cc/YHR9-C9EQ].

<sup>207</sup> *Id.*

<sup>208</sup> Henry Grabar, *The Siege of Sanctuary Cities Has Begun*, SLATE (Jan. 25, 2017, 8:11 PM), [http://www.slate.com/articles/business/metropolis/2017/01/trump\\_s\\_siege\\_of\\_sanctuary\\_cities\\_has\\_begun.html](http://www.slate.com/articles/business/metropolis/2017/01/trump_s_siege_of_sanctuary_cities_has_begun.html) [https://perma.cc/WZT7-VL66].

<sup>209</sup> *Text of Trump's Executive Order on Interior Immigration Enforcement*, FOX NEWS: POLITICS (Jan. 25, 2017), <http://www.foxnews.com/politics/2017/01/25/text-trump-executive-order-on-enhancing-public-safety-in-interior-united-states.html> [https://perma.cc/LWT9-UA6C].

<sup>210</sup> Tobias Coughlin-Bogue, *Trump Might Not Stop Legalization, but the Pot Industry Might Become Whiter*, STRANGER (Nov. 16, 2016), <http://www.thestranger.com/news/2016/11/16/24692827/trump-might-not-stop-legalization-but-the-pot-industry-might-become-whiter> [https://perma.cc/4KFY-NURY].

<sup>211</sup> Chris Conrad, *What Attorney General Sessions Will Do About Cannabis Is Still Unclear*, ALTERNET (Feb. 13, 2017, 1:57 PM), <http://www.alternet.org/drugs/what-attorney-general-sessions-do-cannabis-unclear> [https://perma.cc/7Q24-XMYU].

<sup>212</sup> *Id.*

<sup>213</sup> Coughlin-Bogue, *supra* note 210.



nation, while successful ones can be propagated and nationalized.<sup>214</sup> Republicans—the current dominant party—have enthusiastically supported states’ rights on a variety of issues.<sup>215</sup> The more controversial topics debated in light of states’ rights to experiment range from voter identification<sup>216</sup> to abortion<sup>217</sup> to “transgender bathroom laws.”<sup>218</sup>

This section explores the arguably less-controversial topics of marijuana prohibition and public defense in the light of federalism. First, the semi-permissive federalism around marijuana laws sees positive experimentation results despite being stunted by prohibitive national drug laws and policies. Next, the forced federalism of public defense struggles under the current framework to produce the effective assistance of counsel the Sixth Amendment requires. The Conclusion which follows suggests a complimentary blending of the two inextricably-linked experiments.

#### A. *The Recreational Marijuana Experiment*

Despite what is said and done in and around Washington, D.C., both Colorado and Washington already provide evidence of drug decriminalization’s positive impact in multiple arenas, including the judicial system.<sup>219</sup> Most relevant to this Note are the specific benefits of unclogging the courts via fewer drug arrests, and financial gains through reduced costs and increased tax revenue.<sup>220</sup>

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<sup>214</sup> Bob Ewegen, *50 Laboratories of Democracy*, DENVER POST (Sept. 28, 2007, 11:27 AM), <http://www.denverpost.com/2007/09/28/50-laboratories-of-democracy/> [https://perma.cc/HPJ5-Q48J].

<sup>215</sup> Stephen Wolf, *Republicans Now Dominate State Government, with 32 Legislatures and 33 Governors*, DAILY KOS (Nov. 14, 2016, 10:09 AM), <http://www.dailykos.com/story/2016/11/14/1598918/-Republicans-now-dominate-state-government-with-32-legislatures-and-33-governors> [https://perma.cc/VE6B-ZKG5]; see also Mallory E. SoRelle & Alexis N. Walker, *Both Democrats and Republicans Care About ‘States’ Rights—When It Suits Them*, WASH. POST (June 23, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/23/both-democrats-and-republicans-care-about-states-rights-when-it-suits-them/?utm\\_term=.e79e08799501](https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/23/both-democrats-and-republicans-care-about-states-rights-when-it-suits-them/?utm_term=.e79e08799501) [https://perma.cc/69M2-RYHU].

<sup>216</sup> See Manny Fernandez & Eric Lichtblau, *Justice Dept. Drops a Key Objection to a Texas Voter ID Law*, N.Y. TIMES (Feb. 27, 2017), <https://nyti.ms/2INrGKB> [https://perma.cc/Y2X6-3ZUG].

<sup>217</sup> See *Brady Stands for States Rights, the Unborn*, TEX. INSIDER (Feb. 21, 2017), <http://www.texasinsider.org/brady-stands-for-states-rights-and-the-unborn/> [https://perma.cc/NS7F-LBHM].

<sup>218</sup> See Z. Byron Wolf, *States’ Rights for Bathrooms, but Not for Marijuana*, CNN: POLITICS (Feb. 24, 2017, 5:46 PM), <http://www.cnn.com/2017/02/24/politics/states-rights-marijuana-bathrooms/> [https://perma.cc/PTY9-H3L2].

<sup>219</sup> Ron Chusid, *Benefits Seen Two Years After Legalization of Marijuana in Colorado*, MODERATE VOICE (Jan. 5, 2016), <http://themoderatevoice.com/212305/> [https://perma.cc/RL7M-V3Q9].

<sup>220</sup> *Id.*

The results within these categories in the short time since Colorado and Washington legalized recreational marijuana are remarkable.<sup>221</sup>

Looking first to Colorado, the Drug Policy Alliance released a comprehensive report that provides data from the Judicial Branch of Colorado comparing marijuana charges and arrests before and after the 2012 passage of Amendment 64, the state's recreational marijuana bill.<sup>222</sup> This report revealed that marijuana arrests drastically plummeted, as one would expect, in Colorado after the passage of Amendment 64, with marijuana-related charges decreasing by about 80 percent.<sup>223</sup> Additionally, and perhaps more surprising to some readers, *all* drug-related charges—not just marijuana—decreased by 23 percent, which underscores the implications of marijuana legalization for general criminal justice reform.<sup>224</sup> Currently, data tracking the direct effect of this dramatic decrease in drug charges on the caseloads of public defender offices in Colorado is unavailable. However, because drug violations categorically account for the largest portion of arrests in America,<sup>225</sup> and public defenders take a higher percentage of drug cases,<sup>226</sup> we can safely infer that Colorado public defenders have seen their caseload demand significantly lessened.

In addition to the reduced costs of adjudicating eight thousand fewer marijuana cases per year, Colorado has also seen financial benefits in the form of tax revenue.<sup>227</sup> Thanks to over one billion dollars in marijuana-related sales on the Colorado books for 2016, the state pulled in almost two hundred million dollars in tax revenue.<sup>228</sup> “The system is working,” stated Mason Tvert, Communications Director for the Marijuana Policy Project, regarding marijuana being properly tested, labeled, and legally sold to adults by licensed businesses instead of illicitly on the street.<sup>229</sup>

Similarly, since Washington passed its recreational marijuana legislation, I-502, marijuana sales have generated over eighty million dollars in tax revenue while the state saved millions previously wasted on arresting and punishing marijuana offenses.<sup>230</sup> Specifically, filings in court for low-level marijuana of-

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<sup>221</sup> *Id.*

<sup>222</sup> Jon Gettman, *Marijuana Arrests in Colorado After the Passage of Amendment 64*, DRUG POLICY ALLIANCE (Mar. 24, 2015), [http://www.drugpolicy.org/sites/default/files/Colorado\\_Marijuana\\_Arrests\\_After\\_Amendment\\_64.pdf](http://www.drugpolicy.org/sites/default/files/Colorado_Marijuana_Arrests_After_Amendment_64.pdf) [https://perma.cc/2AEB-SPSX].

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> Ferner, *supra* note 124.

<sup>226</sup> HARLOW, U.S. DEP'T JUST., *supra* note 133.

<sup>227</sup> Trey Williams, *Marijuana Tax Revenue Hit \$200 Million in Colorado as Sales Pass \$1 Billion*, MARKETWATCH (Feb. 12, 2017, 12:59 PM), <http://www.marketwatch.com/story/marijuana-tax-revenue-hit-200-million-in-colorado-as-sales-pass-1-billion-2017-02-10> [https://perma.cc/78KD-6VQ9].

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Status Report: Marijuana Legalization in Washington After 1 Year of Retail Sales and 2.5 Years of Legal Possession*, DRUG POL'Y ALLIANCE (July 5, 2015), <http://www.drugpoli>

fenses by adults dropped 98 percent in the time since voters approved the initiative.<sup>231</sup> Since each individual arrest and prosecution for marijuana possession costs Washington between one and two thousand dollars in police, prosecution, defense, and court expenses, the state is now saving millions of dollars simply by no longer adjudicating low-level marijuana offenses at the pre-initiative levels.<sup>232</sup> Meanwhile, additional data shows that violent crime rates declined over the same period, while traffic fatalities and youth rates remained steady.<sup>233</sup> As a result, Washington voters continue to support their decision to legalize recreational marijuana.<sup>234</sup>

On the same day that Secretary Spicer commented on seeing greater enforcement of federal prohibitions on medical marijuana, Quinnipiac University released a poll showing that 93 percent of those surveyed support medical marijuana and 59 percent support legalizing marijuana for recreational purposes in the United States.<sup>235</sup> Additionally, the poll found that 71 percent of Americans oppose the enforcement of federal prohibition laws in those states where marijuana is legal, whether for medical or recreational use.<sup>236</sup> Also of note, every demographic grouping in the poll supported this federalist position regarding marijuana laws.<sup>237</sup> Based upon public opinion and the positive results examined for Colorado and Washington, the federal government should not frustrate the people's will and instead defer to the concept that states maintain police power over laws that protect the welfare, safety, and health of individuals within their borders.<sup>238</sup>

#### B. *The Public Defense Experiment*

Because *Gideon* did not dictate exactly how governments must operate to ensure the Constitutional right to effective counsel, a “chaotic and patchwork landscape” of widely disparate methods and results emerged across the nation.<sup>239</sup> For example, states may use independent commissions, non-independent commissions, partial commissions, or even no commissions to

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cy.org/sites/default/files/Drug\_Policy\_Alliance\_Status\_Report\_Marijuana\_Legalization\_in\_Washington\_July2015.pdf [https://perma.cc/GH3H-2ZN2].

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> Press Release, Quinnipiac University, Republicans Out of Step with U.S. Voters on Key Issues, Quinnipiac University National Poll Finds; Most Voters Support Legalized Marijuana 2 (Feb. 23, 2017), <https://www.mpp.org/wp-content/uploads/2017/02/Quinnipiac-Poll-Feb-2017.pdf> [https://perma.cc/K3A8-WYD7].

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> See Jorge E. Galva et al., *Public Health Strategy and the Police Powers of the State*, 120 PUB. HEALTH REP. 20, 20 (2005).

<sup>239</sup> *In Your State*, GIDEONAT50.ORG, <http://gideonat50.org/in-your-state/> [https://perma.cc/2LFS-6BEL] (last visited Oct. 7, 2017).

administer and oversee their public defense systems.<sup>240</sup> Additionally, state funding varies from 100 percent supported by the National Legal Aid & Defender Association (NLADA) and ABA criminal justice standards down all the way to 0 percent.<sup>241</sup> Further, while some states maintain binding statewide or jurisdiction-specific workload standards, others adhere to non-binding workload suggestions or even no workload limits at all.<sup>242</sup> Finally, some jurisdictions also contract out indigent clients to private attorneys, but the same restraints remain, if not amplified.<sup>243</sup>

Regardless, one consistency does exist among all states: a shared absence of the federal funding they need to provide the effective assistance of counsel that the federal Constitution mandates.<sup>244</sup> Because of this, only three reasonable paths exist for addressing the public defense crisis wherein state laws do not conflict with federal law. First, the federal government can drastically increase public defense funding as needed for states to deliver Constitutionally mandated effective assistance of counsel per the caseload demand generated with current federal criminal laws and policies. Alternatively, the federal government can renege on its promise of Constitutionally protected individual liberties by redefining the Sixth Amendment right to effective counsel to a lesser standard for the states. Or, third, the federal government can modify certain federal criminal laws and policies to reduce the caseload demand to levels where reasonable funding enables public defenders in the states to provide the effective assistance of counsel required of them. Experimenting with this third option is likely the most fruitful and palatable route, even before we entered the current era of economic austerity and federal program cuts.<sup>245</sup>

#### CONCLUSION

The federal government shackles resource-strapped public defenders via the failed War on Drugs without supplying the funds necessary to provide ef-

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<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> Laurence A. Benner, *When Excessive Public Defender Workloads Violate the Sixth Amendment Right to Counsel Without a Showing of Prejudice*, AM. CONST. SOC'Y FOR L. AND POL'Y 12–13 (2011), [https://www.acslaw.org/files/BennerIB\\_ExcessivePD\\_Workloads.pdf](https://www.acslaw.org/files/BennerIB_ExcessivePD_Workloads.pdf) [<https://perma.cc/QAH5-GBP2>]. The privatization of indigent defense by awarding contracts to the lowest bidders frequently results in even fewer resources available per defendant, thus further decreasing the potential effectiveness of counsel. For example, one contract defender stated that he typically spent about thirty seconds with most clients before they pled guilty at their initial court appearance.

<sup>244</sup> Will Isenberg & Tom Emswiler, *Federally Fund Public Defenders*, BOS. GLOBE (June 19, 2016), <https://www.bostonglobe.com/ideas/2016/06/18/defenders/I8SmrquickUVXo3PmYztcN/story.html> [<https://perma.cc/BTL5-HBDM>].

<sup>245</sup> Rick Newman, *Trump Plans to Cut Funding for Most Government Agencies*, YAHOO! FINANCE (Feb. 27, 2017), <http://finance.yahoo.com/news/trump-plans-to-cut-funding-for-most-government-agencies-160756646.html> [<https://perma.cc/AJ8L-RNMT>].

fective assistance of counsel as mandated by the United States Constitution. With a history of flexing authority over state marijuana laws,<sup>246</sup> expectations of even greater enforcement,<sup>247</sup> and threats of future de-funding as punishment for not conforming to executive mandates,<sup>248</sup> the federal government unduly coerces states into maintaining costly drug laws which generate demands they cannot afford to meet per Constitutional standards.

As a result, the War on Drugs breeds a systemic violation of the Sixth Amendment by creating pervasive surrounding circumstances where the likelihood of effective counsel is so diminutive, a presumption of ineffectiveness is appropriate. The argument that structural deficiencies created by the government can cause systemic—not just individualized—Constitutional violations so severe to warrant extraordinary remedies is not a unique or novel idea.<sup>249</sup> In fact, the ACLU's complaint against Fresno County alleged that structural deficiencies "systematically denied" indigent defendants their Constitutional right to effective counsel at every critical stage of the criminal process.<sup>250</sup> Additionally, because an estimated twenty-seven million Americans used illicit drugs in 2014, the systemic violation created by the War on Drugs would reach an absurd degree if states simply followed the path of strict, indiscriminate drug law enforcement.<sup>251</sup> Instead, the United States should end federal drug prohibition and commit to repairing the structural deficiencies from the surrounding circumstances of the War on Drugs and which cause systemic Constitutional violations.

Though this Note's Author suggests the best long-term solution to addressing the public defense crisis is to end the federal prohibition of every controlled substance in the manner described below, this Note focuses primarily on ending marijuana prohibition as the first major step. Three sets of facts beyond the many debated benefits of marijuana use justify this narrowing to the recommended solution. First, marijuana accounts for the highest number of users and

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<sup>246</sup> See *Gonzales v. Raich*, 545 U.S. 1, 6–15 (2005).

<sup>247</sup> Rampton et al., *supra* note 206.

<sup>248</sup> *Text of Trump's Executive Order on Interior Immigration Enforcement*, *supra* note 209.

<sup>249</sup> See *Brown v. Plata*, 131 U.S. 1910, 1928–29 (2011) (holding that overcrowded California prisons violated the Eighth Amendment ban on cruel and unusual punishment and ordering the release of around 46,000 convicted criminals to remedy the structural deficiency).

<sup>250</sup> Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief Under Cal. Const. Art. I § 15, U.S Const. Amds. 6 and 14, Cal. Penal Code §§ 987, 1382, 859B at 2, *Phillips v. State* (Fresno Cty. Super. Ct. July 14, 2015) (No. 15 CE CG 02201),

[https://www.aclu.org/sites/default/files/field\\_document/file\\_stamped\\_phillips\\_v\\_state\\_of\\_california\\_complaint.pdf](https://www.aclu.org/sites/default/files/field_document/file_stamped_phillips_v_state_of_california_complaint.pdf) [<https://perma.cc/Q3DM-ZNA3>].

<sup>251</sup> Sarra L. Hedden et al., *Behavioral Health Trends in the United States: Results from the 2014 National Survey on Drug Use and Health*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN., Sept. 2015, at 1, <https://www.samhsa.gov/data/sites/default/files/NSDUH-FRR1-2014/NSDUH-FRR1-2014.pdf> [<https://perma.cc/KPB2-2EAD>] (an estimated 22.2 of the 27 million illicit drug users were current marijuana users).

the highest number of arrests.<sup>252</sup> Consequently, marijuana is the single drug whose legalization would theoretically make the largest immediate impact upon resources and caseloads. Next, marijuana currently enjoys overwhelmingly favorable public support for de-criminalization.<sup>253</sup> Therefore, ending marijuana prohibition is likely to be welcomed by the majority of citizens while being politically advantageous to those making the suggested change. Finally, a majority of states have already proactively initiated the de-criminalization experiment and provided data that supports ending federal prohibition.<sup>254</sup> Accordingly, lawmakers could carefully study the evolving condition of public defense in the recreational marijuana states, especially those with documented public defense struggles like Nevada and California. Thus, ending federal prohibition of marijuana is the best solution because it affects the highest number of people while making an immediate impact on structural deficiencies simply by acknowledging a path already trodden by individual pioneering states.

Since additional funding necessary to prevent Sixth Amendment violations under current national policy appears unlikely at best, the federal government must at minimum declassify marijuana as a Schedule I substance. Under a new classification—one that could later be used for other illicit substances—the federal government can declare these drugs to be dangerous, recommend state prohibition, and still regulate interstate commerce that involves the substances. Federal trafficking laws specific—and limited—to marijuana crossing state borders would remain reasonable measures to achieve the compelling government interests that revolve around illicit drug smuggling. Individual states could then decide on their local drug policies without fear of being in conflict with federal law. Then, those states that take on the additional demand of waging the War on Drugs within their borders must supply public defense funding sufficient to ensure free exercise of the Sixth Amendment right to effective counsel.

Additionally, the federal government could still promote and endorse anti-drug policies via Congressional authority under the Taxing and Spending Clause of the Constitution in a manner similar to its use of highway funding to encourage a minimum drinking age for alcohol.<sup>255</sup> For example, businesses in the marijuana industry could pay a yearly fee for a permit to be a licensed seller. These fees would create and replenish a federal public defense coffer. Then, to encourage states to prohibit drug use, Congress could condition federal funding for public defense—pulled from the federal public defense coffer—on state proscriptive laws.

In this hypothetical arrangement, a recreational marijuana state like Nevada would not receive federal funding and their marijuana businesses would pay

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<sup>252</sup> *Crime, Arrests and U.S. Law Enforcement*, *supra* note 125.

<sup>253</sup> Press Release, Quinnipiac University, *supra* note 235.

<sup>254</sup> Steinmetz, *supra* note 166.

<sup>255</sup> See *South Dakota v. Dole*, 483 U.S. 203, 208–09 (1987) (establishing a 5-point rule for conditional spending).

into the federal public defense coffer, but the state would still benefit by no longer shouldering the War on Drugs's burden. On the other hand, a state with neither recreational nor medical marijuana would receive a share of funding apportioned from the federal public defense coffer based upon the state's population. Finally, states with medical-only marijuana would also be entitled to a share of the federal funding, but perhaps not the entire share they would receive with full prohibition. Consequently, the additional demand a state voluntarily places on itself to conform to a desired federal policy would be offset by the supply of additional funds provided by the federal government and obtained from the non-conforming states.

Returning to Linda from the Prelude, the above hypothetical scenario still places her in jail. Without alternative federal action—such as authorizing interstate transport of small amounts of marijuana between the recreational states—Linda has still broken federal law. However, she is now much more likely to receive the effective assistance of counsel the Constitution promises. This distinction should underscore that the purpose here is not to impede law enforcement. Instead, the goal is to prevent the surrounding circumstances of the War on Drugs from causing systemic Sixth Amendment violations.

As previously stated, this Note primarily focused on a single prohibited drug, yet this choice was simply because the effects, enforcement, and legislation surrounding marijuana are better known and documented. Further, since marijuana's usage is much more prevalent, it harbors the potential for making the highest impact. Still, the same logical conclusions are easily extrapolated onto other drugs. Thus, for the many reasons discussed, this Note recommends, as a long-term solution, that the United States reserves laws regarding the personal consumption, possession, cultivation, and local distribution of all controlled substances to the state laboratories of democracy. However, these laws must not give state governments a pass to violate Constitutional rights. As established by both text and history, these fundamental rights include the Sixth Amendment right to effective counsel. Citizens of the various states should not accept a hostile federal government allowed to demand a standard for protecting individual rights against government oppression while simultaneously waging a war which leaves a devastated landscape barren of these same rights. Accordingly, the United States should rescue the Sixth Amendment from the War on Drugs by releasing the states it holds hostage.

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