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Desperate Times Call for Desperate Measures: Reclassifying Drug Possession Offense in Response to the Indigent Defense Crisis

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NOTES

DESPERATE TIMES CALL FOR DESPERATE MEASURES: RECLASSIFYING DRUG POSSESSION OFFENSES IN RESPONSE TO THE INDIGENT DEFENSE CRISIS

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INTRODUCTION

Indigent defense in America "is in a chronic state of crisis."[1] The persistence of severe underfunding and excessively large caseloads have resulted in serious concerns regarding both the quality of indigent representation and the ability of indigent defenders to comply with their ethical and professional responsibilities to clients.[2] Despite decades of debate and study, the indigent defense crisis remains one of this nation's most pressing criminal justice problems.[3] This Note is concerned with one aspect of this long-standing crisis—the excessive caseloads that overburden indigent defenders. It argues that, in the current economic climate,[4] proposals aimed at resolving the indigent defense crisis must acknowledge the inherent unlikelihood that adequate funding will materialize.[5] Indeed, such proposals should focus on ways to maximize available resources.[6] The proposals to date recognizing the need to reduce

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1. OFFICE OF JUSTICE PROGRAMS & BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, IMPROVING CRIMINAL JUSTICE SYSTEMS THROUGH EXPANDED STRATEGIES AND INNOVATIVE COLLABORATIONS 5 & n.20 (1999), http://www.sado.org/fees/icjs.pdf.

2. *See, e.g.*, Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1045-1103 (2006) (framing the indigent defense crisis as a problem of funding, caseloads, compensation, access to and quality of representation, and ethics and professional responsibility concerns).

3. Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 465 & n.10 (2007) ("For years, indigent defense advocates have clamored for more funding to address the crisis."); NORMAN LEFSTEIN & ROBERT L. SPANGENBERG, NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 50-51 (2009), http://www.constitutionproject.org/pdf/139.pdf [hereinafter JUSTICE DENIED] (reviewing the types of studies that organizations have conducted to document and address the indigent defense crisis).

4. *See, e.g.*, Catherine Rampell, *Public Jobs Drop amid Slowdown in Private Hiring*, N.Y. TIMES, Oct. 9, 2010, at A1; *Latest Developments—Economic Crisis and Market Turmoil*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit_crisis/index.html (last updated Oct. 3, 2011).

5. *See* Hashimoto, *supra* note 3, at 461, 485-88 (calling on states to "recogniz[e] that indigent defense systems must operate in a world of limited resources"); *see also* Monica Davey, *In Missouri, State Budget Problems Take Toll on Lawyers for the Indigent*, N.Y. TIMES, Sept. 10, 2010, at A15 (exploring the mounting difficulties indigent defenders face in the current economic climate).

6. *See* Hashimoto, *supra* note 3, at 461, 487-88 (explaining that "[s]tates should reduce the number of cases streaming into [indigent defense] systems" in order to "free[ ] up resources").

excessive caseloads without additional cost have argued for the decriminalization of nonserious misdemeanors.[7] But, these proposals have failed to account for the deficiencies of such an approach: decriminalization of minor crimes can be largely cost-prohibitive and, even where successfully implemented, has failed to achieve the desired effect.[8] This Note suggests a more useful category of offenses for what it terms "reclassification."[9] It argues that, in order to reduce the appointment rates of indigent defenders, states should reclassify simple possession of all illicit narcotics as a civil infraction subject to a fine.[10]

Part I of this Note reviews a criminal defendant's constitutional right to counsel and describes the indigent defense crisis. Part II discusses current reclassification proposals aimed at reducing the burden on indigent defense systems and explains why these suggestions ultimately fail to address the crisis in a meaningful way. It then proposes reclassification of criminal drug possession offenses as a workable solution to the overburdening problem. Part III outlines how a state can implement a drug possession reclassification and discusses the collateral consequence implications of such an approach, arguing that reclassification efforts should include protective measures designed to avoid these consequences. Finally, Part IV considers the political viability of this Note's proposal.

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7. *See, e.g.*, ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 27-28 (2009), http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf; JUSTICE DENIED, *supra* note 3, at 198-99.

8. *See infra* Part II.B.1.

9. This Note uses the term "reclassification" rather than the commonly used "decriminalization." *See, e.g.*, Backus & Marcus, *supra* note 2, at 1125. The shift in terminology is intended to avoid any negative implications that may be associated with the latter term. *See, e.g.*, Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 721-22 (2005) (discussing legal moralist notions and their role in the creation of vice crimes, such as drug possession laws).

10. *See infra* Part II.B.2.

I. THE INDIGENT DEFENSE CRISIS

A. The Right to Counsel and Indigent Defense Systems

The right to counsel in criminal cases is a fundamental and essential component of the American justice system.[11] The Supreme Court has declared it an "obvious truth" that a person "too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[12] Although fundamental, the right to counsel does not apply in all criminal proceedings.[13] Currently, indigent defendants are entitled to a lawyer in federal proceedings,[14] in certain pretrial proceedings,[15] in state felony proceedings,[16] in state misdemeanor proceedings in which actual imprisonment[17] or a suspended jail sentence[18] is imposed, in state juvenile proceedings,[19] and in the defendant's first appeal of right.[20] Indigent defendants are not entitled to representation prior to being formally charged with a

11. *See, e.g.*, U.S. CONST. amend. VI; Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."); ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 22 (2004) [hereinafter GIDEON'S BROKEN PROMISE], *available at* http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/indigent_defense_systems_improvement/gideons_broken_promise.html ("The right to counsel is one of the most sacred principles enshrined in our nation's constitution.").

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

13. *See* Paul Marcus, *Why the United States Supreme Court Got Some (But Not a Lot) of the Sixth Amendment Right to Counsel Analysis Right*, 21 ST. THOMAS L. REV. 142, 160 & n.126 (2009) ("[I]t is a common misconception that all criminal defendants in the United States are entitled to assisted counsel if they cannot afford to hire a lawyer.").

14. U.S. CONST. amend. VI; Johnson v. Zerbst, 304 U.S. 458, 463 (1938).

15. GIDEON'S BROKEN PROMISE, *supra* note 11, at 22 ("[T]he right to counsel attaches at ... line-up identifications, arraignment, preliminary hearings, plea negotiations, and the entry of a guilty plea." (footnotes omitted)).

16. *Gideon*, 372 U.S. at 342 (extending the Sixth Amendment's right to assistance of counsel to such proceedings via the Fourteenth Amendment).

17. GIDEON'S BROKEN PROMISE, *supra* note 11, at 22 (citing Argersinger v. Hamlin, 407 U.S. 25, 37 (1972)).

18. *Id.* (citing Alabama v. Shelton, 535 U.S. 654, 662, 674 (2002)).

19. *Id.* (citing *In re* Gault, 387 U.S. 1, 41 (1967)).

20. *Id.* (citing Douglas v. California, 372 U.S. 353, 355-57 (1963)).

crime,[21] in minor cases in which no imprisonment is imposed,[22] nor in discretionary appeals.[23] Although not available in every instance, a poor person's right to counsel remains centrally important to the American criminal justice system.[24]

Indigent defense systems are the vehicles through which state and local governments provide constitutionally mandated legal services to qualifying criminal defendants.[25] These systems generally follow one of three delivery models—public defender programs,[26] assigned counsel programs,[27] and contract attorney programs.[28] State and local governments employ these models "either singly or in combination,"[29] funding their chosen systems with state and county monies, court costs, and other user fees.[30] No matter which model a state or locality employs, its indigent defense system is intended to provide competent representation when such representation is constitutionally required.[31] Unfortunately, many of our nation's indigent defense systems fall far short of this goal.[32]

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21. Kirby v. Illinois, 406 U.S. 682, 689-90 (1972).

22. Scott v. Illinois, 440 U.S. 367, 373-74 (1979); *see infra* notes 139-44 and accompanying text (discussing the constitutionality of the actual imprisonment standard).

23. Ross v. Moffitt, 417 U.S. 600, 616 (1974).

24. *See, e.g.*, GIDEON'S BROKEN PROMISE, *supra* note 11, at 22.

25. *See id.* at 2.

26. A public defender program comprises "[a] salaried staff of full-time or part-time attorneys that render criminal indigent defense services through a public or private nonprofit organization, or as direct government paid employees." CAROL J. DEFRANCES & MARIKA F.X. LITRAS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INDIGENT DEFENSE SERVICES IN LARGE COUNTIES, 1999, at 2 (2000), http://bjs.ojp.usdoj.gov/content/pub/pdf/idslc99.pdf.

27. Assigned counsel are appointed "from a list of private bar members who accept cases on a judge-by-judge, court-by-court, or case-by-case basis." *Id.*

28. Contract attorneys are "[n]on-salaried individual private attorneys, bar associations, law firms, consortiums or groups of attorneys, or nonprofit corporations that contract with a funding source to provide court-appointed representation in a jurisdiction." *Id.*

29. *Id.*

30. Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 41 (1995).

31. *See* GIDEON'S BROKEN PROMISE, *supra* note 11, at 2.

32. *See, e.g.*, Emily Chiang, *Indigent Defense Invigorated: A Uniform Standard for Adjudicating Pre-Conviction Sixth Amendment Claims*, 19 TEMP. POL. & CIV. RTS. L. REV. 443, 447-50 (2010).

B. The Indigent Defense Crisis

America's indigent defense systems are in crisis.[33] Each year, "thousands ... are processed through America's courts ... either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation."[34] Although the right to a lawyer may be constitutionally mandated, it remains an empty promise for many defendants.[35]

The scope of the problem is staggering. Across the country, indigent defense systems lack adequate funding.[36] As a result, offices are often understaffed[37] with attorneys who are overwhelmed by impossibly large caseloads.[38] These same attorneys are undercompensated for their labor[39] and often lack basic resources, such as modern office equipment,[40] access to legal databases,[41] and vital investigative assistance.[42] Attorneys in such a position have little incentive to stay, and high turnover rates create indigent defense systems staffed with young, inexperienced lawyers.[43]

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33. *E.g.*, GIDEON'S BROKEN PROMISE, *supra* note 11, at 38 ("[I]ndigent defense in the United States remains in a state of crisis."); *see also* Marcus, *supra* note 13, at 152 (describing these systems "in a word" as "broken").

34. GIDEON'S BROKEN PROMISE, *supra* note 11, at v.

35. *Id.*

36. *E.g.*, Backus & Marcus, *supra* note 2, at 1045 ("By every measure in every report analyzing the U.S. criminal justice system, the defense function for poor people is drastically underfinanced.").

37. *See, e.g.*, JUSTICE DENIED, *supra* note 3, at 50-51.

38. *E.g.*, *id.* at 68 (pointing to representative examples, including Miami, where "average public defender caseloads ... have risen in the past three years from 367 to nearly 500 felonies and from 1380 to 2225 misdemeanors"). The caseload problem is the aspect of the crisis that this Note seeks to address. *See infra* Part I.C.

39. *E.g.*, GIDEON'S BROKEN PROMISE, *supra* note 11, at 9 ("[I]nadequate compensation for indigent defense attorneys is a national problem."); *see also* Backus & Marcus, *supra* note 2, at 1062 (pointing to Baton Rouge, Louisiana, where defenders earn "between $18,000 and $35,000 annually").

40. *See, e.g.*, GIDEON'S BROKEN PROMISE, *supra* note 11, at 10 (noting an historic lack of such equipment in Washington State).

41. *E.g.*, JUSTICE DENIED, *supra* note 3, at 97 ("[I]n Caddo Parish, Louisiana, ... some public defenders ... did not have computers, and their secretary had ... to rely instead on the courthouse's equipment.").

42. *E.g.*, *id.* at 94 ("Often, however, defense attorneys are denied the use of experts or investigators due to limited funds.").

43. *E.g.*, Hashimoto, *supra* note 3, at 474.

Defendants who rely on these systems may not have access to them at all, as strains on the justice system as a whole can combine to frustrate the appointment of indigent defenders. Courts facing large dockets and costs often fail to properly notify qualifying defendants of their right to counsel and may even pressure them to waive that right.[44] Prosecutors, who are themselves overburdened with excessive caseloads,[45] may speak with defendants despite ethical obligations to neither advise nor negotiate with an unrepresented defendant, with such conversations often resulting in guilty pleas.[46] Defendants who are informed of their right and choose not to waive it often face lengthy pre-appointment delays that can severely prejudice their cases and incentivize them to plead guilty rather than to continue waiting.[47] And those defendants who patiently endure these pressures and lengthy delays may still end up pleading guilty, as defense attorneys with insufficient time and resources regularly encourage their clients to plead guilty in order to "expedite the movement of cases."[48] With so many deficiencies plaguing the process, few indigent defendants receive the effective assistance of counsel that the Constitution and the Supreme Court have guaranteed them.[49]

America's indigent defense systems have been in crisis for decades.[50] This enduring dilemma has attracted considerable

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44. JUSTICE DENIED, *supra* note 3, at 88-89. Courts commonly apply such pressure "by informing [defendants] that a request for a lawyer would delay their case or release from jail, or that refusing a plea offer would result in a harsher sentence in the future." *Id.* (attributing such approaches to "[c]oncerns over cost of movement of the court's docket").

45. Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 266-74 (2011).

46. JUSTICE DENIED, *supra* note 3, at 89.

47. *Id.* at 85-87.

48. *Id.* at 50; *see also* GIDEON'S BROKEN PROMISE, *supra* note 11, at 16 (describing these attorneys as "meet 'em and plead 'em" lawyers).

49. *See, e.g.*, Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 MO. L. REV. 771, 778-79 (2010) ("A lawyer can be smart, dedicated, and experienced, but too much work will prevent even the best lawyer from providing clients with ethical, effective assistance of counsel."); Laurence A. Benner, *Eliminating Excessive Public Defender Workloads*, CRIM. JUST., Summer 2011, at 33 (arguing that the underfunding of indigent defense and resulting excessive caseloads violate the Sixth Amendment); *see also supra* notes 11-24 and accompanying text (discussing an indigent criminal defendant's constitutional right to counsel).

50. *See, e.g.*, JUSTICE DENIED, *supra* note 3, at 50 ("Since the U.S. Supreme Court's *Gideon* decision in 1963, several organizations have conducted national studies of indigent defense....

scholarly attention for nearly as long.[51] And yet, the problem persists.[52] Professor Erica Hashimoto, one of the more recent voices to join this discussion, suggests the principal reason behind the inefficacy of the proposals to date: Scholars have routinely argued for more money, and these cries have regularly "fallen on deaf ears."[53] Despite some progress,[54] indigent defense has been and continues to be "woefully under-funded."[55] And the problem is expected to worsen.[56] In 2009, twenty-two states with full financial responsibility for their systems faced "mid-year budget shortfalls."[57] As state budgets contract, indigent defense systems become increasingly popular candidates for further cuts.[58] In light of these deficits, it is increasingly unlikely that proposals demanding additional fiscal resources will gain support.[59] Proper indigent

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Invariably these studies conveyed a grim view of defense services.").

51. *See generally* Chiang, *supra* note 32, at 447-50 (providing a representative review of the criticisms of the indigent defense systems from 1951 to present).

52. *See* JUSTICE DENIED, *supra* note 3, at 52.

53. Hashimoto, *supra* note 3, at 465. For a recent example of a demand for increased funding, see Gershowitz & Killinger, *supra* note 45, at 297, 299-301, arguing "for a major influx of money to properly fund the criminal justice system."

54. *See, e.g.*, Backus & Marcus, *supra* note 2, at 1103-22 (reviewing other reforms states have implemented to improve their systems); JUSTICE DENIED, *supra* note 3, at 55-57 (outlining past and current state efforts to increase state indigent defense funding).

55. Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85, 87 (2007).

56. Forthcoming budget cuts are expected to further undermine indigent defense systems across the country. *See* JUSTICE DENIED, *supra* note 3, at 59 ("[F]unding shortages are guaranteed to worsen, given the country's economic condition."); *see also id.* at 59-60 (reviewing those indigent defense systems that recent budget cuts have most severely affected).

57. *Id.* at 59.

58. *E.g.*, Gershowitz & Killinger, *supra* note 45, at 299 ("[P]ublic defenders' offices are an attractive target for cuts in cash-strapped times."); *see also* Robert P. Mosteller, *Failures of the American Adversarial System To Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative Fairness*, 36 N.C. J. INT'L L. & COM. REG. 319, 330 n.36 (2011) ("In this time of budget shortfalls, cash strapped states and localities must choose which important services to limit or eliminate. It is hard to believe that providing indigent defense services will win out in the competition for scarce dollars when competing against such popular and socially valuable services as public schools, medical care, and highways, to name a few."); Suzanne E. Mounts & Richard J. Wilson, *Systems for Providing Indigent Defense: An Introduction*, 14 N.Y.U. REV. L. & SOC. CHANGE 193, 200-01 (1986) (discussing "the political vulnerability of defense systems" and attributing it, in part, to politicians' desire to appear "tough on crime" (internal quotation marks omitted)).

59. *See* Chiang, *supra* note 32, at 444 ("Funding for public defense services is rarely ... popular ... and as state and county budgets contract, the inclination to underfund ... indigent

defense reform requires measures capable of implementation without increased strain on state and local budgets.[60] Thankfully, one aspect of the indigent defense crisis is ripe for such reform—the crushing caseloads that overburden indigent defense providers.[61]

C. Excessive Caseloads: A Leading Cause of the Problem

Excessive caseloads are a fundamental component of the indigent defense crisis. Reports and journal articles addressing the crisis routinely discuss the caseload problem,[62] with many arguing that it represents "the most visible sign of inadequate funding."[63] In short, excessive caseloads are a national problem,[64] one that demands a national solution.

1. What Is "Excessive"?

Scholars often frame excessiveness as either a failure to comply with some numerical caseload limit[65] or as an inability to meet the standard obligations of the profession.[66] This Part will examine these approaches in turn.

a. Excessiveness by the Numbers

When defining excessiveness by the numbers, most scholars rely on the National Advisory Commission's (NAC) 1973 proposed case-

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defense systems can become nearly irresistible.").

60. *See* Hashimoto, *supra* note 3, at 487-89.

61. *See* GIDEON'S BROKEN PROMISE, *supra* note 11, at 17-18 (discussing the excessive caseloads of several states).

62. *See, e.g.*, *id.*; Backus & Marcus, *supra* note 2, at 1053-59; Hashimoto, *supra* note 3, at 468-75; JUSTICE DENIED, *supra* note 3, at 65-70.

63. JUSTICE DENIED, *supra* note 3, at 7; *see also* Erika E. Pedersen, Note, *You Only Get What You Can Pay For:* Dziubak v. Mott *and Its Warning to the Indigent Defendant*, 44 DEPAUL L. REV. 999, 1004 (1995) ("The direct result of this underfunding is an inability to hire enough attorneys, resulting in overburdened case loads." (footnote omitted)).

64. *See* JUSTICE DENIED, *supra* note 3, at 65 (noting that excessive caseloads are "a problem virtually everywhere in public defense throughout the United States").

65. *See, e.g.*, Joy, *supra* note 49, at 778.

66. *See, e.g.*, JUSTICE DENIED, *supra* note 3, at 65-66.

load limits.[67] The NAC recommends that a full-time public defender carry no "more than 150 felonies; 400 misdemeanors; 200 juvenile court cases; 200 mental health cases; or 25 appeals" per year.[68] If an attorney carries the maximum in one of these categories, he is not to handle cases from any of the others.[69] Although most scholars and national organizations have accepted "the value of these numerical limits as a rough benchmark for determining excessive caseloads,"[70] one recent report cautions against relying on these figures as the only measure.[71] This report points to other measures of excessiveness, such as an attorney's failure to comply with the ethical and professional requirements of representation.[72]

b. Excessiveness by the Quality of Representation

In measuring excessiveness by quality of representation, scholars look to two generally accepted standards—the National Legal and Defender Association (NLADA) guidelines and the American Bar Association (ABA) ethics standards.[73]

The NLADA guidelines require defense attorneys "to make sure that [they have] sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter."[74] The guidelines command an attorney who does not possess these to decline cases and also to withdraw from cases if it

67. NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, COURTS 276 (1973); *see, e.g.*, Backus & Marcus, *supra* note 2, at 1054; Gershowitz, *supra* note 55, at 93.

68. JUSTICE DENIED, *supra* note 3, at 66.

69. Backus & Marcus, *supra* note 2, at 1054.

70. GIDEON'S BROKEN PROMISE, *supra* note 11, at 17-18; *see, e.g.*, MINOR CRIMES, *supra* note 7, at 21 ("[T]hese standards have withstood the test of time as a barometer against which full-time indigent defender caseloads may be judged.").

71. JUSTICE DENIED, *supra* note 3, at 66 ("Because the NAC standards are 35 years old and were never empirically based, they should be viewed with considerable caution.").

72. *See id.* at 65-66.

73. The following review draws from the framework provided by the National Right to Counsel Committee. *Id.* at 32, 65-66.

74. NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 1.3(a) (2006) [hereinafter PERFORMANCE GUIDELINES], *available at* http://www.nlada.org/Defender/Defender_Standards/Defender_Standards/Performance_Guidelines.

becomes apparent that he cannot provide adequate representation to his clients.[75]

The ABA outlined similar ethics standards in a 2006 ethics opinion in which it held that "[t]he obligations of competence, diligence, and communication under the [Model Rules of Professional Conduct] apply equally to every lawyer," including indigent defense providers.[76] The ABA described these obligations as including

> the responsibilities to keep abreast of changes in the law; adequately investigate, analyze, and prepare cases; act promptly on behalf of clients; ... control workload so each matter can be handled competently; and, if a lawyer is not experienced with or knowledgeable about a specific area of the law, either associate with counsel who is knowledgeable in the area or educate herself about the area.[77]

A lawyer incapable of fulfilling these basic responsibilities should consider whether his or her caseload is to blame, factoring into such a determination "not only the number of cases, but also ... such factors as case complexity, the availability of support services, the lawyer's experience and ability, and the lawyer's nonrepresentational duties."[78]

Both the NLADA guidelines and the ABA ethics standards focus on the quality of indigent defense representation.[79] Both enumerate a defense provider's professional and ethical obligations.[80] And both require attorneys unable to satisfy these duties to affirmatively decline or withdraw from representation.[81] In short, an indigent

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75. *Id.*

76. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441, at 9 (2006) [hereinafter ABA Opinion].

77. *Id.* at 3.

78. *Id.* (citing ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2-3 (2002), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.authcheckdam.pdf).

79. *See, e.g.*, PERFORMANCE GUIDELINES, *supra* note 74, Guideline 1.3(a); ABA Opinion, *supra* note 76, at 1, 9.

80. *See, e.g.*, PERFORMANCE GUIDELINES, *supra* note 74, Guideline 1.3(a); ABA Opinion, *supra* note 76, at 1-3, 9.

81. *See, e.g.*, PERFORMANCE GUIDELINES, *supra* note 74, Guideline 1.3(a); ABA Opinion, *supra* note 76, at 4-5, 9.

defense attorney's caseload may be excessive when it interferes with the quality of representation he or she is capable of providing.

2. No Matter How You Measure It, Indigent Defender Caseloads Are Excessive

By every measure, indigent defender caseloads are "astonishingly large."[82] Scholars and national organizations have been tracking excessiveness by the numbers for years.[83] In 2003, testimony at ABA public hearings revealed the presence of excessive caseloads in states across the country, including Illinois, Louisiana, Maryland, Montana, Nebraska, New York, Oregon, Pennsylvania, Rhode Island, Virginia, and Washington.[84] Summarizing this testimony, the ABA found that indigent defense caseloads often exceed the NAC's recommended limits.[85] In Rhode Island, felony caseloads surpassed these limits "by 35-40%[,] and misdemeanor caseloads exceed[ed these] standards by 150%."[86] Caseloads in one Pennsylvania county almost doubled from 1980 to 2000 without "corresponding increase[s] in staff or resources."[87]

More recent reviews of indigent defender caseloads have drawn the same conclusion—caseloads "remain shockingly high" when compared to the NAC limits.[88] In a 2006 empirical study of indigent defender caseloads, Professors Mary Sue Backus and Paul Marcus found that caseloads in excess of the NAC's recommended limits are a persistent problem, pointing to several state and county caseloads as representative examples.[89] They noted that, "[b]y 2001 the Clark County (Nevada) Public Defender Office had juvenile caseloads at

82. JUSTICE DENIED, *supra* note 3, at 7.

83. *See, e.g.*, sources cited *supra* notes 58-59.

84. JUSTICE DENIED, *supra* note 3, at 67 (citing GIDEON'S BROKEN PROMISE, *supra* note 11, at 18 n.165).

85. GIDEON'S BROKEN PROMISE, *supra* note 11, at 18.

86. *Id.* (citing *Are We Keeping the Promise?: Hearing on the Right to Counsel 40 Years After* Gideon v. Wainwright *Before the ABA Standing Comm. on Legal Aid & Indigent Defendants* (2003) [hereinafter *Keeping the Promise*] (testimony of John Hardiman, Chief Public Defender, Office of the Rhode Island Public Defender)).

87. *Id.* (citing *Keeping the Promise, supra* note 86 (testimony of Lisette McCormick, Executive Director, Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System)).

88. Hashimoto, *supra* note 3, at 471.

89. *See* Backus & Marcus, *supra* note 2, at 1054-56.

about seven times the NAC recommended limit," with each division carrying caseloads of almost 1500 juvenile cases.[90] "In Louisiana, [each] public defender in Rapides Parish ... ha[d] a caseload of 472 clients."[91] And things were not much better in Minnesota and Fairfax County, Virginia, where annual caseloads exceeded 900 and 400 cases per attorney, respectively.[92] A 2009 report provides the most recent statistics available regarding indigent defender caseloads, finding excessive caseloads in many states, including Nevada,[93] Kentucky,[94] and Missouri.[95] The numbers paint a clear picture—indigent defenders across the country are carrying excessive caseloads when measured against the NAC's nationally recognized limits.

Setting the numbers aside, the quality of indigent defense representation is subpar, at best.[96] Attorneys across the United States lack "sufficient time, resources, knowledge and experience to offer quality representation" to indigent defendants.[97]

Indigent defenders have reported that overwhelming caseloads leave them without enough time for their clients.[98] In 2005, a Louisiana public defender told a judge, "[I]f you divide the number of hours in a day by the number of cases [I have,] I would be allowed to devote eleven minutes to each [client, and] it's just not humanly possible for me to do that."[99] Nevada attorneys reported experienc-

90. *Id.* at 1055.

91. *Id.*

92. *Id.* at 1055-57.

93. JUSTICE DENIED, *supra* note 3, at 68 (noting that caseloads remain high in Clark County and Washoe County, where annual attorney caseloads average 364 and 327 "felony and gross misdemeanor cases," respectively).

94. *Id.* (citing Burton Speakman, *Public Defenders Face Budget Problems*, DAILY NEWS (Bowling Green, Ky.), Mar. 23, 2008) (explaining that, in 2008, Kentucky's Department of Public Advocacy reported "caseloads ... exceed[ing] NAC standards by 40%").

95. *Id.* at 69-70 (noting that, in one Missouri county, "public defenders have been averaging 395 cases a year").

96. *See, e.g.*, GIDEON'S BROKEN PROMISE, *supra* note 11, at 7 ("Taken as a whole, glaring deficiencies in indigent defense services result in a fundamentally unfair criminal justice system."); *cf.* Benner, *supra* note 49, at 24 ("Today, our criminal justice system has broken faith with [its] basic premise and forgotten its primary mission, often operating under a presumption of guilt in which processing the 'presumed guilty' as cheaply as possible has been made a higher priority than concern for the possibility of innocence.").

97. PERFORMANCE GUIDELINES, *supra* note 74, Guideline 1.3(a).

98. *See, e.g.*, Backus & Marcus, *supra* note 2, at 1055-57.

99. *Id.* at 1055 (alterations omitted) (quoting State v. Bell, 896 So. 2d 1236, 1240 (La. Ct. App. 2005)).

ing "a more than 50% decrease in the amount of time available ... to dispose of a case" between 1993 and 2001.[100] In Knox County, Tennessee, one public defender reported that her caseload averaged "approximately 14 people per day," and six attorneys with over 10,000 misdemeanor cases among them, reported "averaging just less than one hour per case."[101] Kentucky's Department of Public Policy reported caseloads that allow "attorneys an average of less than four hours per case."[102] And in Missouri, 2004 caseloads demanded that public defenders "dispose of a case every 6.6 hours of every working day."[103] These examples and others like them[104] show that indigent defense providers do not have enough time to "offer quality representation."[105]

The increasing complexity of criminal cases further exacerbates the challenges resulting from a defender's time shortage. As one report briefly notes, developments in science and technology and the enactment of criminal laws accounting for such developments have increased the need for "specialized training and greater time" in indigent defense cases.[106] Pointing to the use of DNA and other forensic evidence, the advent of computer- or Internet-based crimes, and the creation of sexually violent predator laws, the report concludes that these cases "are a significant burden on a defender's time, requiring not only specialized knowledge but often also the review of thousands of pages of discovery and the use of experts."[107]

In addition to facing the overwhelming burdens resulting from voluminous and complex cases, many indigent defenders lack the monetary resources required to provide quality representation.[108] Funding shortages not only create overwhelming caseloads but also

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100. *Id.*

101. JUSTICE DENIED, *supra* note 3, at 68.

102. *Id.* (citing Speakman, *supra* note 94).

103. *Id.* at 69 (quoting SPANGENBERG GROUP, ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM 7 (2005), http://members.mobar.org/pdfs/legislation/spangenberg.pdf) (internal quotation marks omitted).

104. *See, e.g.*, MINOR CRIMES, *supra* note 7, at 21 (providing further caseload statistics).

105. PERFORMANCE GUIDELINES, *supra* note 74, Guideline 1.3(a).

106. JUSTICE DENIED, *supra* note 3, at 76.

107. *Id.* (citing AM. COUNCIL OF CHIEF DEFENDERS, STATEMENT ON CASELOADS AND WORKLOADS 7 (2007), http://www.nlada.org/DMS/Documents/1297703004.49/Caseloads%20Report%20Final.pdf).

108. *See, e.g.*, GIDEON'S BROKEN PROMISE, *supra* note 11, at 7.

frequently result in a scarcity of adequate support services.[109] Without proper funding, indigent defenders lack access to "resources for training, research, and basic technology, as well as the indispensable assistance of investigators, experts, and administrative staff."[110] For example, assigned counsel in Michigan reported unreasonable caps on fees available to hire investigators and expert witnesses.[111] In New York, some public defender offices have little or no access to online legal research, and one large office even lacked updated copies of New York's penal law.[112]

The burdens resulting from insufficient time and resources, as well as from the increasing complexity of criminal cases, often fall to attorneys who lack the experience necessary to cope with them.[113] For instance, "a statewide survey of [California] judges and indigent defense attorneys ... found 'a statistically significant correlation between having an excessive caseload and using attorneys with less than three years of experience' to handle serious felony and 'three-strikes' cases."[114] Additionally, excessive caseloads often produce a high turnover rate in indigent defense offices, because overwhelmed attorneys often burn out after only a few years.[115] Attorney burnout in turn "creat[es] offices that are bottom heavy with inexperienced lawyers more prone to mistakes and inefficiencies in case management."[116] Thus, many inexperienced lawyers face the daunting task of handling voluminous and complex caseloads with insufficient time and resources.

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109. *Id.*

110. *Id.*

111. *Id.* at 10 (citing *Keeping the Promise*, *supra* note 86 (testimony of Frank Eaman, Attorney, Bellanca, Beattie & DeLisle, Harper Woods, Mich.)).

112. JUSTICE DENIED, *supra* note 3, at 97 (citing SPANGENBERG GROUP, STATUS OF INDIGENT DEFENSE IN NEW YORK 51 (2006), http://www.courts.state.ny.us/ip/indigentdefense-commission/SpangenbergGroupReport.pdf).

113. *See, e.g.*, *id.* at 69 ("Excessive caseloads within a defense program ... increase the likelihood that inexperienced attorneys will be forced to handle serious cases for which they are not fully qualified.").

114. *Id.* (alterations omitted) (quoting LAURENCE A. BENNER ET AL., SYSTEMIC FACTORS AFFECTING THE QUALITY OF CRIMINAL DEFENSE REPRESENTATION 28 (2007), http://www.ccfaj.org/documents/reports/prosecutorial/expert/Benner%20Systemic%20Factors.pdf).

115. Hashimoto, *supra* note 3, at 474.

116. *Id.*; *see also* JUSTICE DENIED, *supra* note 3, at 65.

When these problems persist, the quality of representation suffers.[117] In its *Eight Guidelines on Public Defense Related to Excessive Workloads*, the ABA enumerates the various forms of inadequate representation that are attributable to the excessive caseload problem, including the failure to comply with duties fundamental to representation.[118] The *Guidelines* specifically mention "the failure of lawyers to interview clients thoroughly soon after representation begins and in advance of court proceedings," as well as the failure to file motions and memoranda, to conduct legal research and necessary investigations, to visit crime scenes, and "to participate in [needed] defense training programs."[119] Scholars have argued that these "deficiencies in representation"[120] can result in conflicts of interest between existing clients,[121] as well as in undesirable indigent defense policies, such as those "encouraging guilty pleas to save resources."[122] In sum, because attorneys carrying excessive caseloads often lack "time, resources, knowledge and

117. The quality of representation may be viewed as both a measure of excessive caseloads and as the primary effect of excessive caseloads. *Compare* ABA Opinion, *supra* note 76, at 1-5, 8-9, *and* PERFORMANCE GUIDELINES, *supra* note 74, Guideline 1.3(a), *with* Hashimoto, *supra* note 3, at 473. Regardless of whether framed as a measure or as an effect, inadequate representation demands an immediate and effective remedy.

118. *See* ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS 4 (2009), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.authcheckdam.pdf [hereinafter EIGHT GUIDELINES]; *see also* GIDEON'S BROKEN PROMISE, *supra* note 11, at 14 (quoting Strickland v. Washington, 466 U.S. 668, 688-91 (1984)) (listing these basic duties as "advocating for the defendant's cause; demonstrating loyalty to the client; avoiding conflicts of interest; consulting with the defendant on important decisions; keeping the defendant informed of important developments; conducting reasonable factual and legal investigations or making 'a reasonable decision that makes particular investigations unnecessary;' and bringing to bear the necessary skills and knowledge").

119. EIGHT GUIDELINES, *supra* note 118, at 5.

120. Hashimoto, *supra* note 3, at 473.

121. EIGHT GUIDELINES, *supra* note 118, at 5 (citing *In re* Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender, 561 So. 2d 1130, 1135 (Fla. 1990)) ("[A]n excessive number of cases create a concurrent conflict of interest, as a lawyer is forced to choose among the interests of various clients, depriving at least some ... of competent and diligent defense services.").

122. *See, e.g.*, Hashimoto, *supra* note 3, at 473 ("[A]s a public defender becomes attuned to his work, the guilty plea may tend to become his almost instinctive response to all but the most serious or exceptional cases." (quoting Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1254 (1975))).

experience,"[123] they regularly "fail to provide adequate representation for most, if not all, of their clients."[124]

Whatever the measure used, indigent defender caseloads are excessive. These caseloads far exceed the NAC's recommended limits and prevent such attorneys from providing quality representation to clients who have a constitutionally mandated right to the effective assistance of counsel.[125] This is a crisis in its own right,[126] one that demands an immediate and effective solution.

II. RECLASSIFICATION AS A SOLUTION TO EXCESSIVE CASELOADS

Like all other aspects of the indigent defense crisis, the excessive caseload problem waits for a solution from a society that appears to have nothing to give.[127] Unlike the other factors contributing to the indigent defense crisis, however, the excessive caseload problem can be addressed without the allocation of additional funds.[128] Several scholars have observed that decreasing the appointment rates of indigent defenders in criminal cases may reduce caseloads.[129] To accomplish this, lawmakers must first limit the appointment of counsel in state proceedings to only those defendants who have a constitutionally mandated right to counsel.[130] Then, they must reclassify certain offenses, removing all penalties that trigger the right to counsel.[131] Reclassification proposals to date have all suggested nonserious misdemeanors as the category of cases most appropriate for such reform.[132] This Part examines these proposals and ultimately argues that they do not provide the needed solution —one that is nationally accessible and capable of being imple-

123. PERFORMANCE GUIDELINES, *supra* note 74, Guideline 1.3(a).

124. Hashimoto, *supra* note 3, at 475; *see also* GIDEON'S BROKEN PROMISE, *supra* note 11, at 16 (explaining that the "failure to deliver adequate defense services to the poor" is widespread).

125. *See supra* notes 36-49 and accompanying text.

126. Hashimoto, *supra* note 3, at 475.

127. *See, e.g.*, JUSTICE DENIED, *supra* note 3, at 59.

128. *See* Hashimoto, *supra* note 3, at 485-88.

129. *Id.*; *see, e.g.*, MINOR CRIMES, *supra* note 7, at 27-28; Backus & Marcus, *supra* note 2, at 1125.

130. *See* Hashimoto, *supra* note 3, at 497-98.

131. *See, e.g.*, *id.* at 498-99.

132. *See, e.g.*, MINOR CRIMES, *supra* note 7, at 27-28.

mented at little or no cost to the states.[133] Instead, this Note argues that reclassification efforts should take a bright line approach and attack the caseload problem at one of its primary sources: the overwhelming number of state drug possession prosecutions.[134]

A. When the Right to Counsel Does Not Apply: Amending Appointment Statutes To Conform with Supreme Court Precedent

The right to counsel does not apply in every state criminal proceeding.[135] Currently, states can decline to appoint an attorney (1) prior to filing formal charges,[136] (2) in minor cases in which no imprisonment is imposed,[137] and (3) in discretionary appeals.[138] This Note focuses its proposal on the second of these categories, arguing that states should reclassify drug possession cases as minor offenses for which imprisonment may not be ordered. Before exploring this argument, it is necessary to briefly review the constitutionality of denying indigent defendants appointed counsel when they are not sentenced to a form of imprisonment.

In interpreting the Sixth Amendment's right to counsel[139] and the incorporation of that right against the states,[140] the Supreme Court adopted what some jurists and scholars have called the "actual imprisonment standard."[141] First enumerated in the Court's 1972 decision in *Argersinger v. Hamlin*, the actual imprisonment standard demands that "no person ... be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[142] The Court clarified this standard in two subsequent cases: *Scott v. Illinois*[143] and *Alabama*

133. *See infra* Part II.B.1.
134. *See infra* Part II.B.2.
135. *See* Marcus, *supra* note 13, at 160-62.
136. Kirby v. Illinois, 406 U.S. 682, 689-90 (1972).
137. Scott v. Illinois, 440 U.S. 367, 373-74 (1979).
138. Ross v. Moffitt, 417 U.S. 600, 616, 618-19 (1974).
139. U.S. CONST. amend. VI.
140. *See* Gideon v. Wainwright, 372 U.S. 335, 340, 342-45 (1963).
141. *See, e.g.*, Nichols v. United States, 511 U.S. 738, 757 (1994) (Blackmun, J., dissenting); *Scott*, 440 U.S. at 382 (Brennan, J., dissenting); Marcus, *supra* note 13, at 145.
142. 407 U.S. 25, 37 (1972).
143. 440 U.S. 367, 368-69 (1979) (rejecting the argument that indigent defendants are entitled to counsel when merely threatened with the possibility of imprisonment).

v. Shelton.[144] Based on these decisions, states may constitutionally deny indigent defendants court-appointed counsel so long as those defendants are not sentenced to an actual or suspended term of imprisonment.[145] Although the actual imprisonment standard has been the subject of both judicial[146] and scholarly[147] criticism, it remains the baseline standard in right to counsel inquiries. States seeking to address the deficiencies of their indigent defense systems can thus employ this standard to help ease the burden of excessive caseloads.

Despite the Supreme Court's enumerated standard, the vast majority of states offer court-appointed counsel to indigent defendants, even in cases in which it is not constitutionally required.[148] In 2009, forty-six states provided counsel in "all, or virtually all, criminal cases,"[149] with only four states requiring "a sentence of actual imprisonment for a defendant to be entitled to court-appointed counsel."[150] In light of these broad appointment practices, before a state may employ the Supreme Court's actual imprisonment standard to reduce caseloads, it must "amend relevant statutes so that defendants have a right to counsel only when they are constitutionally entitled to it—that is, when they actually receive sentences of imprisonment or probation enforceable by imprisonment."[151]

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144. 535 U.S. 654, 658 (2002) (holding that a suspended sentence that may "end up in the actual deprivation of a person's liberty" may not be imposed unless the defendant was accorded "'the guiding hand of counsel.'" (quoting *Argersinger,* 407 U.S. at 40)).

145. *See* Hashimoto, *supra* note 3, at 497.

146. *See, e.g.*, *Argersinger*, 407 U.S. at 47 (Powell, J., concurring) ("Nor can I agree with the new rule of due process, today enunciated.... It seems to me that the line should not be drawn with such rigidity.").

147. *See, e.g.*, Marcus, *supra* note 13, at 187 ("The Supreme Court's limitation of the constitutional right to cases in which imprisonment is actually to be imposed made little sense thirty years ago, and it makes even less sense today.").

148. *See* Hashimoto, *supra* note 3, at 498.

149. Marcus, *supra* note 13, at 164 & n.140 (listing all states that "provide counsel in criminal cases" and the statutes authorizing such provision).

150. *Id.* at 165 & n.146 (listing the four states that currently follow the actual imprisonment standard: Alabama, Kansas, Michigan, and South Carolina).

151. Hashimoto, *supra* note 3, at 498-99. Although most states do not currently favor the actual imprisonment standard, those faced with overwhelming caseloads and scarce resources may wish to rethink their current approach to indigent defender appointment practices, as doing so will allow them to address the caseload problem without sacrificing limited resources.

It is important to note that bringing state appointment practices in line with *Argersinger* will not bring caseloads down to acceptable levels. Rather, it is the first step to achieving this

Once states have aligned their appointment statutes with the actual imprisonment standard, they may employ that standard to reduce excessive indigent defense caseloads by simply removing the possibility of actual or suspended terms of imprisonment from certain statutes.[152] The *Argersinger* Court itself contemplated the possibility of such reclassification, stating that, in adopting the actual imprisonment standard, it did not intend to "sit as an ombudsman to direct state courts how to manage their affairs" and recognizing that "[how] crimes should be classified is largely a state matter."[153] The Court even suggested that "[o]ne partial solution to the problem of minor offenses may well be to remove them from the court system" altogether.[154] Many scholars have since adopted this suggestion, proposing the reclassification of "certain non-serious misdemeanors" as a means of reducing indigent defender caseloads.[155]

B. Reclassify What?: The Class of Cases Most Appropriate for Reclassification

In recent years, scholars have become increasingly supportive of reclassification as a solution to the excessive caseload problem.[156] Most seem to agree that "removing ... cases from the criminal docket"[157] would not only reduce caseloads but would also allow the resulting "savings to be used to fund other defense expenses."[158] This Note agrees with this characterization, but questions the category of cases most appropriate for reclassification.

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aim. *See id.* at 497-99 (recognizing that taking this step will help to reduce caseloads but also acknowledging that states will need to further reduce the number of cases requiring appointment).

152. *See, e.g.*, *id.* at 499-500.

153. Argersinger v. Hamlin, 407 U.S. 25, 38 (1972).

154. *Id.* at 38 & n.9.

155. Backus & Marcus, *supra* note 2, at 1125; *see, e.g.*, MINOR CRIMES, *supra* note 7, at 27-28; Hashimoto, *supra* note 3, at 499-500; JUSTICE DENIED, *supra* note 3, at 198-99. *But see* Marcus, *supra* note 13, at 187 (arguing against the actual imprisonment standard).

156. *See, e.g.*, sources cited *supra* note 155.

157. Backus & Marcus, *supra* note 2, at 1125. Although this approach is becoming increasingly accepted, not all agree with limiting a defendant's access to counsel pursuant to *Argersinger*. *See* Marcus, *supra* note 13, at 187.

158. JUSTICE DENIED, *supra* note 3, at 199; *see also* MINOR CRIMES, *supra* note 7, at 26-27; Hashimoto, *supra* note 3, at 496.

1. Minor Crimes

Proponents of reclassification universally focus on "minor offenses"[159] or "nonserious misdemeanors,"[160] defining these as "crimes that [are] currently ... punishable by imprisonment but for which an actual sentence of imprisonment [is] only rarely ... imposed."[161] Minor traffic offenses, public intoxication, possession of an open container of alcohol, and possession of drug paraphernalia are commonly cited examples of such crimes.[162] Others include "feeding the homeless, riding a bicycle on the sidewalk, fish and game violations, and public urination."[163] Scholars proposing reclassification of these "minor crimes" argue that such offenses clog court dockets and drain defense resources that could be better employed in more serious cases.[164] Although reclassification of these offenses may indeed alleviate some of the burden on indigent defenders in certain jurisdictions, the proposals to date fail to recognize the many shortcomings of such an approach.

The primary problem with a minor crimes reclassification is that, by definition, it cannot be implemented without imposing substantial costs on states that are already coming up short.[165] Even those who propose minor crimes reclassification acknowledge that each state must "undertake a systematic review of misdemeanor offenses"[166] to determine those offenses for which imprisonment is an available punishment but is rarely used.[167] Thus, to implement a minor crimes reclassification, a state must conduct an individualized review of its own criminal code.[168] A nationwide standard regarding specific crimes is impossible because states take widely

159. *E.g.*, Hashimoto, *supra* note 3, at 499.

160. *E.g.*, Backus & Marcus, *supra* note 2, at 1125; JUSTICE DENIED, *supra* note 3, at 198; *see also* MINOR CRIMES, *supra* note 7, at 27 (focusing on "misdemeanor crimes [that] do not involve significant risks to public safety").

161. Hashimoto, *supra* note 3, at 496; *see also* JUSTICE DENIED, *supra* note 3, at 198-99.

162. *E.g.*, Hashimoto, *supra* note 3, at 499.

163. MINOR CRIMES, *supra* note 7, at 28.

164. *See, e.g.*, *id.* at 26-27; Hashimoto, *supra* note 3, at 496; JUSTICE DENIED, *supra* note 3, at 199.

165. *See* sources cited *supra* note 4.

166. MINOR CRIMES, *supra* note 7, at 28.

167. Hashimoto, *supra* note 3, at 496.

168. *See* MINOR CRIMES, *supra* note 7, at 28.

divergent approaches to the punishment of minor crimes.[169] To illustrate, "public intoxication, possession of an open container of alcohol, and possession of drug paraphernalia are all punishable by imprisonment in some jurisdictions but only by a fine in others."[170] Although a nationwide reclassification standard for these crimes would reduce caseloads in jurisdictions with laws currently authorizing imprisonment, such a standard is unlikely to have a meaningful impact on caseloads in jurisdictions that already classify such offenses as punishable by a fine only. Such an approach would simply fail to provide a solution to the excessive caseload problem in these fine-only jurisdictions. Because a national standard for minor crimes reclassification is unlikely to alleviate caseload burdens in all jurisdictions, states interested in pursuing an effective minor crimes reclassification must proceed individually.

Proposals recommending individual state reviews have not suggested the means by which such reviews may be accomplished. However, one state's recent reclassification experience is instructive. The Hawaii House of Representatives passed a concurrent resolution in 2004 calling for a review of the state's criminal offenses for the purpose of a minor crimes reclassification.[171] In January 2005, Hawaii's Legislative Reference Bureau (the Bureau) issued a report detailing its efforts to comply with the resolution.[172] To determine the scope of the problem, the Bureau began with a search of the entire Hawaii Revised Statutes for all statutes that "denominate[d]" or "define[d]" a "misdemeanor or petty misdemeanor."[173] This initial review produced over 350 statutes requiring further review for possible reclassification.[174] Based on the sheer volume of minor offenses identified, the Bureau recommended "a simpler, more practical approach," one in which "the judiciary takes the initiative to periodically identify those offenses that, despite the possibly serious penalties, are routinely and consistently being disposed of with

169. Hashimoto, *supra* note 3, at 499.

170. *Id.* (footnotes omitted).

171. EDWIN L. BAKER, LEGISLATIVE REFERENCE BUREAU, DECRIMINALIZATION OF NONSERIOUS OFFENSES: A PLAN OF ACTION, at iv (2005), *available at* http://www.state.hi.us/lrb/rpts05/decrim.pdf.

172. *Id.* at iii.

173. *Id.* at 2.

174. *Id.* at 2-3 & n.2.

fines."[175] Two approaches emerge from this narrative—a wholesale review of the state's criminal code and a vesting of discretion in state judiciaries to recommend crimes for reclassification. States seeking to reclassify minor crimes could follow either of these approaches; however, significant problems exist in both.

A wholesale review of a state's criminal code is costly and time consuming. It requires, first, that researchers identify all crimes classified as either misdemeanors or petty offenses for which imprisonment is available as a punishment.[176] Next, researchers must determine the typical penalties imposed for convictions under each of the identified statutes.[177] Specifically, they must identify those statutes that authorize imprisonment as a punishment but under which imprisonment is rarely imposed.[178] To accomplish this, they must review a representative number of cases decided under each identified statute.[179] After completing such a review, the Bureau in Hawaii recommended against this approach because it was cost prohibitive: "Ideally, and to be theoretically consistent, the full body of Hawaii law would be studied to purge it of this baggage but the lack of resources is not unique to the judicial branch."[180] As Hawaii's experience suggests, the costs associated with a wholesale review of a state's criminal code undermine the purpose behind reclassification—to relieve the burden on indigent defenders and other actors at minimal to no additional cost to the state.[181]

Instead of conducting a costly and time consuming review of its criminal code, a state may opt to vest its judiciary with the discretion to recommend offenses for further study and eventual reclassifi-

175. *Id.* at v.

176. *Id.* at 2 & n.2.

177. *Id.* at 2-3.

178. Hashimoto, *supra* note 3, at 496.

179. *See* BAKER, *supra* note 171, at 3 (noting that the Hawaii judiciary "was able to extract some offense statistics" but "was not able to extract a sampling of sentencing decisions for [all] offenses").

180. *Id.* at v. Although Hawaii concluded that further review was cost prohibitive, it did not document the precise figures associated with the effort. Telephone Interview with Edwin L. Baker, Legislative Researcher, Legislative Reference Bureau (Feb. 28, 2011) (sharing his individual experience with Hawaii's reclassification efforts, but not speaking on behalf of the Bureau).

181. *See* Hashimoto, *supra* note 3, at 461, 487-89.

cation.[182] Although such an approach would reduce the cost of a state's reclassification efforts, it too is unlikely to achieve the state's goals in undertaking them. Again, Hawaii's experience is instructive. In its 2008 decriminalization act, Hawaii adopted the procedures that the Bureau recommended in 2005.[183] Proponents of the state's minor crimes reclassification predicted that this procedure would facilitate review of "additional statutes ... in coming legislative sessions."[184] But such a review has not occurred—the Hawaii judiciary has not provided the Bureau with another list of statutes to consider for reclassification.[185] Although this failure may be the result of confusion regarding the entity in which the Hawaii legislature vested discretionary review power,[186] the point remains that further reclassification efforts have not occurred under the discretionary review system.[187] The problem with relying on a discretionary system, then, appears to be that those entities with discretionary review power may opt not to exercise it.

Hawaii's experience highlights the many shortcomings of minor crimes reclassification. Given the disparity of state approaches to minor crimes, states interested in such a reclassification must proceed on an individualized basis, either by conducting a wholesale review of their criminal codes or by vesting their judiciaries with the discretion to recommend crimes for reclassification. The first approach is expensive and time consuming. The second has failed to effect meaningful reclassifications. In order for states to employ reclassification as a solution to the excessive caseload problem, they must look beyond minor crimes for a more effective class of cases.

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182. *See* BAKER, *supra* note 171, at v. Vesting such power in the judiciary is preferable because judicial actors' routine participation in the criminal justice system allows them to develop a working knowledge of sentences imposed for minor crimes. *Cf. id.* (suggesting this would be a "simpler, more practical" approach).

183. *See* MINOR CRIMES, *supra* note 7, at 27; *see also* BAKER, *supra* note 171, at v.

184. MINOR CRIMES, *supra* note 7, at 27.

185. Telephone Interview with Edwin L. Baker, *supra* note 180.

186. *Id.*; *see also* 2008 Haw. Sess. Laws 279, 279-80, 283-84 (describing the judiciary's duty to identify offenses appropriate for reclassification, as well as the Bureau's duty to provide lists of potential offenses to the judiciary for review).

187. Telephone Interview with Edwin L. Baker, *supra* note 180.

2. Drug Possession Offenses

Reclassifying state drug possession offenses would significantly reduce excessive indigent defender caseloads. Scholars have been documenting the connection between these offenses and excessive caseloads for over twenty years.[188] To this day, drug possession crimes are considered "high volume offenses,"[189] that place substantial burdens on state resources.[190] Further, because of the relative unanimity among states in their approach to illicit drugs,[191] states interested in reclassification can adopt the solution that this Note proposes without extensive or discretionary review of their criminal codes.[192]

Unlike minor misdemeanors, drug possession offenses have a historic and demonstrable connection to excessive defender caseloads. In 1990, the federal government explicitly addressed the connection between drug prosecutions and caseloads in a proposal to shift prosecutions of such offenses from federal courts to the states.[193] In its report, the Federal Courts Study Committee (Committee) defined the "unprecedented numbers of federal narcotics prosecutions" as its "most pressing problem[]."[194] It observed that federal criminal filings had increased by more than 50 percent since 1980 and that drug filings had fueled this upsurge, growing 280 percent in the same period.[195] According to the Committee, drug filings accounted for more than one quarter of all new criminal cases in 1989, with this figure as high as two-thirds in some districts.[196] These drug

188. *See, e.g.*, Timothy R. Murphy, *Indigent Defense and the U.S. War on Drugs: The Public Defender's Losing Battle*, CRIM. JUST., Fall 1991, at 14, 16.

189. Gershowitz, *supra* note 55, at 116; *see also* Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 243 (2007).

190. *See generally* JEFFREY A. MIRON, THE BUDGETARY IMPLICATIONS OF DRUG PROHIBITION 23-40 (2010), http://www.economics.harvard.edu/faculty/miron/files/budget%202010%20Final.pdf (providing a state-by-state review of arrests and expenditures related to drug prohibition).

191. *See* DAVID BOYUM & PETER REUTER, AN ANALYTIC ASSESSMENT OF U.S. DRUG POLICY 10 (2005) (describing the tendency of state legislatures to criminalize drug-related activity through the enactment of stringent drug laws and the imposition of increasingly serious penalties for such offenses).

192. *See infra* Part III (detailing that solution).

193. FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 35-36 (1990), http://www.fjc.gov/public/pdf.nsf/lookup/repfcsc.pdf/$file/repfcsc.pdf.

194. *Id.* at 35.

195. *Id.* at 36.

196. *Id.*

cases composed 44 percent of the federal criminal trials and 50 percent of the federal criminal appeals that same year.[197] Given the overwhelming burden that these cases placed on federal courts, the Committee pleaded that "[t]he federal system must not be overwhelmed with cases that could be prosecuted in the state courts."[198] The Committee recommended that future "[f]ederal drug enforcement strategy ... target [only] the relatively small number of cases that state authorities [could not] or w[ould] not effectively prosecute."[199] But the states were not faring much better. During the same period, Timothy Murphy of the National Center for State Courts observed that states had witnessed "dramatic increase[s] in drug cases," which placed "increasingly heavy burdens" on indigent defense systems.[200] In 1993, Professor Paul Finkelman argued that the burdens on indigent defender offices had resulted from American drug policy and that they had "hampered ... [a]ccess to justice for the poor."[201] Both the Committee and its contemporary scholars recognized the causal link between drug prosecutions and excessive caseloads. This link has not abated over time.

Drug prosecutions remain "high volume offenses" in state criminal courts across the country.[202] Although earlier discussions of this link did not discriminate between drug possession offenses and other drug crimes, recent data suggests that possession offenses are responsible for a significant portion of state criminal proceedings.[203] The FBI's annual Uniform Crime Reports (UCR) provide statistics related to "drug abuse violations."[204] The UCR defines such violations "as state and/or local offenses relating to the unlawful possession, sale, use, growing, manufacturing, and making of narcotic drugs including opium or cocaine and their derivatives, marijuana,

197. *Id.*

198. *Id.* at 37.

199. *Id.*

200. Murphy, *supra* note 188, at 16.

201. Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1444 (1993).

202. Gershowitz, *supra* note 55, at 116.

203. *See Arrests—Crime in the United States 2009*, FED. BUREAU OF INVESTIGATION (Sept. 2010), http://www2.fbi.gov/ucr/cius2009/arrests/index.html [hereinafter *FBI Statistics*].

204. *Enforcement—Drugs and Crime Facts*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (Aug. 31, 2011), http://bjs.ojp.usdoj.gov/content/dcf/enforce.cfm [hereinafter *BJS Statistics*] (citing *Uniform Crime Reports*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/ucr (last visited Jan. 20, 2012)).

synthetic narcotics, and dangerous nonnarcotic drugs such as barbiturates."[205] This definition is sufficiently broad in its inclusion of various illicit drugs, as well as sufficiently narrow in its focus on only state and local offenses, to demonstrate the impact that drug possession offenses are having on state criminal proceedings.[206] The 2009 report noted that "law enforcement made an estimated 13,687,241 arrests (except[ing] traffic violations)" in that year.[207] Drug abuse violations motivated more arrests than any other offense, resulting in approximately 1,663,582 arrests.[208] Arrests for drug possession accounted for about 82 percent of these arrests.[209] Based on these numbers, state drug possession offenses were responsible for approximately 10 percent of state and local arrests made in 2009.[210]

Arrest rates are not exactly equivalent to prosecution rates, but arrest data is relevant to show the number of cases that require, at minimum, some form of legal process before they may be dismissed or otherwise adjudicated.[211] Although recent statistics are not available regarding drug possession defendants' average indigency rates, the U.S. Department of Justice released analogous statistics for 1996 felony drug defendants.[212] Indigent defense attorneys represented approximately 81 to 84 percent of these defendants.[213] This figure may not correlate exactly with state drug possession

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205. *Id.*

206. But this definition may be overbroad in one respect—its inclusion of sale and manufacturing, offenses that are not included in this Note's proposal. *See infra* text accompanying notes 224-28. Despite this possible overbreadth, the following figures provide a rough but useful picture of drug possession offenses as "high volume" crimes. Gershowitz, *supra* note 55, at 116.

207. *FBI Statistics*, *supra* note 203.

208. *Id.*

209. *Id.*

210. This number was obtained by multiplying the percentage of drug possession arrests (0.82) by the total number of drug abuse violation arrests (1,663,582) and then dividing the resulting figure (1,364,137.24) by the total number of arrests in 2009 (13,687,241) and rounding the resulting figure to the nearest percentile (approximately 10 percent).

211. *See, e.g.*, Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 336-39, 346 (1942).

212. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES 5 tbl.7 (2000), http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf. These statistics represented those defendants charged in "the [n]ation's 75 largest counties." *Id.*

213. *Id.*

offenders,[214] but it parallels commonly accepted estimates of the rates at which state indigent defense providers are appointed in criminal cases.[215] Based on these numbers, indigent defenders are appointed in roughly 80 percent of state drug possession cases, which account for approximately 8 percent of all state and local criminal prosecutions.[216] Although this number represents a very rough estimate, it demonstrates that drug possession cases continue to place "heavy burdens ... on indigent defender offices."[217]

Reclassifying drug possession as a nonjailable offense would relieve these burdens in an immediate and effective way because states generally take comparable approaches to their treatment of illicit drugs.[218] As a recent assessment of U.S. drug policy observes, state "[l]egislatures have enacted progressively tougher statutes, criminalizing more drug-related activities and imposing steadily increasing penalties for those convicted."[219] In short, states are tough on drug crime.[220] Almost every state prohibits the "possession or use of any 'recreational drug,'"[221] including "opium or cocaine and their derivatives, marijuana, synthetic narcotics, and dangerous nonnarcotic drugs such as barbiturates."[222] This near unanimity allows for a national, bright line standard for possession reclassification instead of the individualized reviews required in the minor crimes context.[223]

Scholars and states alike have begun to recognize possession reclassification's potential as a tool for reducing indigent de-

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214. The disconnect arises because state drug possession offenders may also include those charged with misdemeanor drug offenses.

215. *See* Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913, 1915-16 (2007) (citing William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 32 (1997)) (stating that more than 80 percent of criminal defendants receive "a free lawyer").

216. *See supra* notes 207-13 and accompanying text.

217. Murphy, *supra* note 188, at 16.

218. *See* BOYUM & REUTER, *supra* note 191, at 10.

219. *Id.*

220. JUSTICE DENIED, *supra* note 3, at 70.

221. NATIONAL SURVEY OF STATE LAWS 189 (Richard A. Leiter ed., 6th ed. 2008) (conducting a fifty-state survey of state laws regulating cocaine).

222. *BJS Statistics*, *supra* note 204.

223. *See, e.g.*, *supra* text accompanying notes 171-74.

fender caseloads.[224] The question, then, is how to achieve this reclassification.

III. RECLASSIFICATION: CRAFTING A STATUTE THAT WORKS

Reclassification of drug possession offenses can have a meaningful impact on state indigent defender caseloads. However, achieving such a reform entails several important considerations, including not only how to reclassify, but also what, if any, penalties should be set, and how to circumvent the collateral consequences traditionally associated with drug possession convictions.

A. Reclassification: What It Means and How To Do It

This Note proposes reclassification that eliminates criminal penalties for drug use and possession but retains such penalties for the retail sale and manufacture of drugs.[225] Such reclassification is distinct from legalization, which removes manufacture and sale penalties[226] in favor of "a system in which a substance is taxed and regulated like alcohol or tobacco."[227] This Note envisions reclassified drug possession laws that would "treat possession of small amounts of [currently illicit drugs] like a traffic violation, with violators subject to a citation and a small fine."[228] Under such a reclassification, drug possession would be a civil infraction rather than criminal offense.[229]

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224. *See* Gershowitz, *supra* note 55, at 116 (suggesting that "[a]nother possibility ... for legislatures to keep indigent defense funding static" would be to "decriminalize high volume offenses (such as drug possession), which would reduce the number of criminal cases and, in turn, the need for defense counsel," but dismissing the idea as "implausible" without further consideration); Alex Kreit, *The Decriminalization Option: Should States Consider Moving from a Criminal to a Civil Drug Court Model?*, 2010 U. CHI. LEGAL F. 299, 299, 325 ("[I]n the midst of the recession, many [states] are thinking about options to reform ... a bloated and ineffective approach to drug polic[ies]."). The remainder of this Note argues against Gershowitz's dismissal of possession reclassification. *See infra* Parts III, IV.

225. Kreit, *supra* note 224, at 325 (citing Douglas Husak, *Predicting the Future: A Bad Reason To Criminalize Drug Use*, 2009 UTAH L. REV. 105, 105).

226. *See* MIRON, *supra* note 190, at 2 (reviewing the economic implications of the two models without advocating that states should adopt either approach).

227. Kreit, *supra* note 224, at 325.

228. *Id.* (citing Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL. L. REV. 383, 403-05 (1995)).

229. *See* JUSTICE DENIED, *supra* note 3, at 198.

Several states have already reclassified marijuana possession laws.[230] One of the states to do so most recently is Massachusetts, where voters approved a marijuana reclassification ballot initiative with 65 percent of the vote.[231] The Massachusetts statute serves as the model for this Note's proposed drug possession reclassification. The relevant part of the statute reads:

> Notwithstanding any general or special law to the contrary, possession of one ounce or less of marihuana shall only be a civil offense, subjecting an offender who is eighteen years of age or older to a civil penalty of one hundred dollars and forfeiture of the marihuana, but not to any other form of criminal or civil punishment of disqualification.[232]

Massachusetts's approach is desirable for several reasons. First, it specifies that offenders are to be subject only "to a civil penalty of one hundred dollars and forfeiture of the marihuana."[233] This language makes clear that drug possession is a civil, rather than a criminal offense and specifies a reasonable penalty for such infractions. Although lawmakers reclassifying drug possession offenses do not have to fix the penalty at $100, this amount appears to be reasonably low, while still high enough to generate substantial revenues for states that reclassify their drug possession laws.[234] Because a reclassification statute would still prohibit drug posses-

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230. *See* Kreit, *supra* note 224, at 325; Robert MacCoun et al., *Do Citizens Know Whether Their State Has Decriminalized Marijuana? Assessing the Perceptual Component of Deterrence Theory*, 5 REV. L. & ECON. 347, 351-53 & tbl.1 (2009) (detailing those states that have reclassified marijuana possession laws). This Note argues for reclassification of all illicit drug possession, not just marijuana possession. However, marijuana possession reclassifications are instructive.

231. Kreit, *supra* note 224, at 325.

232. MASS. GEN. LAWS ch. 94C, § 32L (2011) (effective Dec. 4, 2008). The statute provides additional requirements for juvenile offenders. *See id.* This Note acknowledges that such an approach makes sense, but it is not concerned with enumerating juvenile offender-specific penalties. Such matters are largely outside of its scope.

233. *Id.*

234. For example, data reveal that there were approximately 165,300 felony drug convictions in state courts in 2006. SEAN ROSENMERKEL ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES, tbl.1.1 (rev. 2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf. Were each offense subject to a $100 fine, they could have generated approximately $16,536,000 in revenue for state and local governments.

sion, the forfeiture requirement seems appropriate. Second, the Massachusetts approach specifies that the offender shall not be subject "to any other form of criminal or civil punishment or disqualification,"[235] thereby clearly reclassifying the offense as a purely civil infraction. Third, it specifies the amount of marijuana an individual may possess without exposing himself to criminal penalties.[236] Reclassification efforts should specify appropriate personal-use standards, either through the designation of specific amounts for each currently illicit substance, or through the establishment of a general guideline. States seeking to enumerate drug-specific limits should look beyond the "one ounce" line drawn in the marijuana context,[237] as that amount may not be appropriate for other currently illicit substances. States designating drug-specific limits must therefore develop standards regarding what amounts accurately embody a personal-use standard for each substance. An alternative approach would be to adopt a broad personal-use standard, like the one Portugal implemented in 2001, which "defines [personal-use quantity] as an amount sufficient for ten days' usage for one person."[238] Either standard would appropriately cabin drug possession reclassifications.

States should model their possession reclassifications after the marijuana reclassifications undertaken to date, especially the recent Massachusetts reclassification. They should specify that offenders will be subject only to a civil penalty, should fix the amount of the penalty at $100 or less, and should mandate forfeiture of the substance. Such reclassifications should also clearly remove all criminal penalties currently associated with drug possession. Further, they should enumerate either drug-specific personal-use standards or a broad personal-use standard, like that adopted in Portugal, in order to clearly define the amount of currently illicit drugs that will no longer be subject to criminal sanctions. Under this model, reclassified drug possession offenses would no longer result in actual or suspended terms of imprisonment and would therefore no longer

235. MASS. GEN. LAWS ch. 94C, § 32L.

236. *Id.* ("one ounce or less").

237. *See, e.g.*, *id.*

238. Kreit, *supra* note 224, at 326 (citing GLENN GREENWALD, CATO INSTITUTE, DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES (2009), http://www.cato.org/pubs/wtpapers/greenwald_whitepaper.pdf).

constitutionally mandate the appointment of counsel to indigent offenders cited for such possession.[239]

B. Collateral Consequences: Insulating Those Cited Under a Reclassified Drug Possession Statute from the Usual Consequences of Drug Possession Convictions

Successful reclassification of state drug possession offenses will necessarily deprive all indigent defendants of the "guiding hand of counsel"[240] whenever they are cited for such offenses. Arguably, the most significant criticism of this deprivation is that "[e]ven minor cases may ... carry dire collateral consequences" of which offenders would not be aware without the assistance of counsel.[241] It is true that important collateral consequences normally follow drug possession convictions. However, the existence of such consequences should not preclude reclassification as a solution to the indigent defense crisis. Rather, states should shape reclassification efforts so as to shield those currently vulnerable to such consequences from the collateral repercussions that might follow a citation under reclassified drug possession statutes.

1. Traditional Collateral Consequences

Collateral consequences are a real concern in drug possession cases. For instance, even a minor drug conviction can "forever preclude welfare benefits, public housing, student-loans, voting, government services, hundreds of different types of jobs requiring licensing," and can lead to mandatory deportation for an immigrant.[242] In a report on collateral sanctions, the ABA summarized the devastating effects collateral consequences can have in a typical drug possession case:

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239. *See supra* notes 140-45 and accompanying text (discussing the actual imprisonment standard).

240. Powell v. Alabama, 287 U.S. 45, 69 (1932).

241. Marcus, *supra* note 13, at 189.

242. Backus & Marcus, *supra* note 2, at 1076 (citing WASH. DEFENDER ASS'N, BEYOND THE CONVICTION: WHAT DEFENSE ATTORNEYS NEED TO KNOW ABOUT COLLATERAL AND OTHER NON-CONFINEMENT CONSEQUENCES OF CRIMINAL CONVICTIONS (2005)).

> Consider a first offender who pleads guilty to felony possession of marijuana. This offender may be sentenced to a conventional term of probation, community service, and court costs. Unbeknownst to this offender, and perhaps to any other actor in the sentencing process, as a result of his conviction he may be ineligible for many federally-funded health and welfare benefits, food stamps, public housing, and educational assistance. His drivers license may be automatically suspended, he may no longer be eligible for certain employment and professional licenses, and he may be unable to obtain life or automobile insurance. He will be precluded from enlisting in the military, possessing a firearm, or obtaining a security clearance. If the child of an elderly parent, he may be disqualified from serving as a court-appointed guardian, or as executor of his parent's estate. If a citizen, he may no longer have the right to vote and serve on a jury; if not, he will become immediately deportable. In a case like this, the real punishment is imposed through the collateral consequences of the guilty plea that may only gradually become clear.[243]

This example demonstrates that all reclassification efforts must account for the collateral consequences that traditionally follow a conviction for drug possession, because the defendant will no longer be advised of such consequences.[244]

The existence of collateral consequences should not preclude drug possession reclassification efforts altogether, but rather should shape the reforms that states undertake. As the ABA's review of potential collateral consequences makes clear, even a simple marijuana offense can produce real and dire consequences for individual defendants.[245] This fact, however, has not prevented several states from reclassifying their marijuana possession laws.[246] Legislatures

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243. ABA SECTION OF CRIMINAL JUSTICE, REPORT TO THE HOUSE OF DELEGATES, at R4-5 (2003), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am03101a.authcheckdam.pdf [hereinafter COLLATERAL SANCTIONS] (recommending that the ABA adopt standards subsequently published in ABA, STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 4-5 (3d ed. 2004), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_standards_collateralsanction withcommentary.authcheckdam.pdf).

244. MINOR CRIMES, *supra* note 7, at 28.

245. *See* COLLATERAL SANCTIONS, *supra* note 243, at R4-5.

246. *See supra* note 230 and accompanying text.

undertaking future reclassification efforts should look to these states for guidance in drafting drug possession laws that protect those who violate them from the harsh collateral repercussions that currently accompany drug possession convictions.[247]

2. How States Can Insulate Offenders from Collateral Consequences

The harsh reality of collateral consequences in the drug possession context, coupled with the dire necessity to reduce excessive indigent defender caseloads, demands that lawmakers find a way to insulate drug possession defendants from collateral consequences while simultaneously removing their right to counsel.[248] Although states are powerless to eliminate federal consequences for violations of state drug laws, they can adopt a combination of protective measures that will insulate an offender from all state collateral consequences and inform him of the remaining federal repercussions.

First and foremost, states that choose to reclassify drug possession laws in accordance with this proposal should simultaneously waive all related, state-imposed collateral consequences. Removing these repercussions altogether would certainly nullify any threat such consequences currently pose to indigent drug offenders. Second, such states should include a bar in their reclassified statutes against disqualification from state services and opportunities based on an offender's drug possession. Massachusetts built such a bar into its marijuana law, explicitly mandating that:

> Except as specifically provided in [the Act,] neither the Commonwealth nor any of its political subdivisions or their respective agencies, authorities or instrumentalities may impose any form of penalty, sanction or disqualification on an offender for

247. *See, e.g.*, MASS. GEN. LAWS ch. 94C, § 32L (2011).

248. Notably, collateral consequences may also contribute to the increasing burden on indigent defender caseloads. *See* MINOR CRIMES, *supra* note 7, at 34 ("Th[e] vast array of collateral consequences has a dramatic impact on the work of the defender: (1) it adds to the research and advocacy that must be done in each case...; (2) it changes the cost-benefit analysis in accepting a plea bargain; and (3) it places the client at greater risk of unforeseen harm if the defender [does not] properly advise the client of the impact of the decision to plead guilty or proceed to trial.").

> possessing an ounce or less of marihuana. By way of illustration rather than limitation, possession of one ounce or less of marihuana shall not provide a basis to deny an offender student financial aid, public housing or any form of public financial assistance including unemployment benefits, to deny the right to operate a motor vehicle or to disqualify an offender from serving as a foster parent or adoptive parent.[249]

This approach should guide lawmakers in future drug possession reclassifications. Following Massachusetts's lead, reclassifications should enumerate, with the greatest possible specificity, those state actors who are barred from imposing "any form of penalty, sanction, or disqualification" on the basis of a reclassified drug possession citation.[250] Reclassifications should also provide specific examples of activities and state assistance from which an offender may not be disqualified, as well as a disclaimer that any such list is representative rather than exhaustive.[251] Incorporating such a bar against disqualification[252] is one way to protect offenders without providing them an attorney.

Third, states reclassifying their drug possession laws should build reporting waivers into these statutes, prohibiting any citations issued under the reclassified statutes from being reported to state criminal records databases or to federal authorities.[253] Again, Massachusetts provides a useful example. The state law declares that "[i]nformation concerning the offense of possession of one ounce or less of marijuana shall not be deemed 'criminal offender record information,' 'evaluative information,' or 'intelligence information' as those terms are defined in ... the General Laws and shall not be recorded in the Criminal Offender Record Information system."[254] Future drug possession reclassifications should adopt Massachusetts's twofold approach by first redefining offenses cited under such statutes so as to remove all designations that may trigger state and federal reporting mechanisms, and then prohibit-

249. MASS. GEN. LAWS ch. 94C, § 32L.
250. *Id.*
251. *See id.*
252. A bar that defines who is prohibited from acting and when that prohibition applies.
253. *See* MASS. GEN. LAWS ch. 94C, § 32L.
254. *Id.*

ing "information concerning the[se] offense[s]" from being "recorded in" the state's criminal records databases.[255]

Fourth, states reclassifying drug possession offenses should include a disclosure waiver in their final statutes. Such a waiver would allow an offender to deny receiving a drug possession citation without legal consequence. West Virginia's first possession conditional discharge statute provides a good example of such a waiver.[256] Referring to a dismissal upon "fulfillment of the terms and conditions" imposed on a first-time drug offender, the West Virginia statute states that:

> Discharge and dismissal under this section shall be without adjudication of guilt and is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime.... The effect of the dismissal and discharge shall be to restore the person in contemplation of the law to the status he or she occupied prior to arrest and trial. No person as to whom dismissal and discharge have been effected shall be thereafter held to be guilty of perjury, false swearing, or otherwise guilty of a false statement by reason of his or her failure to disclose or acknowledge his or her arrest or trial in response to any inquiry made of him or her for any purpose.[257]

Applying this disclosure waiver to the possession reclassification context, reclassified drug offenses must explicitly declare that they are not to be treated as an arrest, nor as a conviction for any purpose under state law, nor "for purposes of disqualification or disabilities imposed by law upon conviction of a crime."[258] Such statutes should further clarify that an offender cited under them should be treated as though such a citation had never occurred for all purposes other than enforcement of the penalties enumerated in the reclassification statute.[259] Finally, such statutes should specifi-

255. *Id.*

256. *See* W. VA. CODE § 60A-4-407 (2011).

257. *Id.*

258. *Id.* The statement regarding disqualification and disabilities is redundant when coupled with bars against disqualification, as proposed above. *See supra* text accompanying notes 251-55. States may wish to combine these provisions to avoid potential duplicity problems.

259. *See* W. VA. CODE § 60A-4-407(a)-(b).

cally permit offenders to deny ever having received a drug possession citation and should explicitly prohibit any form of perjury or false statement findings—or any other punishments, sanctions, or disqualifications—related to such denials.[260]

Lastly, states should require disclosure of all remaining collateral consequences, including federal consequences, to the offender in an attachment to the written citation. Shifting the disclosure responsibility to the state ensures that an offender will be notified of any potential consequences to which he may be subjected without relying on a defense attorney to complete the notification. States could model such a notice requirement after comparable requirements in the traffic citation context. Washington State's abandoned vehicle statute is instructive.[261] The statute requires an officer to

> append to the notice of infraction, on a form prescribed by the department of licensing, a notice indicating the amount of costs incurred as a result of removing, storing, and disposing of the abandoned vehicle, less any amount realized at auction, and a statement that monetary penalties for the infraction will not be considered as having been paid until the monetary penalty ... has been paid and the court is satisfied that the person has made restitution in the amount of the deficiency remaining after disposal of the vehicle.[262]

Washington's notice requirement is detailed and tailored to the circumstances giving rise to the notice.[263] It also vests authority in a related regulatory body to codify the statute's requirements in a form notice, and it clearly delineates what is required to satisfy the notice's terms.[264] Following this lead, possession reclassification statutes can enumerate specific collateral consequences to which offenders may still be subject, including all federally imposed consequences.[265] States should vest drafting and review authority in related regulatory bodies to develop the notice language, as well as

260. *See id.*
261. *See* WASH. REV. CODE § 46.63.030(3)-(4) (2011).
262. *Id.* § 46.63.030(4).
263. *See id.* § 46.63.030(2)-(4).
264. *See id.* § 46.63.030(4).
265. The notice could be framed as "if, then" statements; for example, "If you have a prior conviction for 'x,' then you may be subject to 'y' consequences."

to amend that language whenever potential exposure changes. Finally, such notice should specify the offender's options—either paying the fine and potentially triggering the enumerated consequences or contesting the citation to avoid those consequences. By requiring such notification, states put offenders on notice of all remaining collateral consequences and thus provide them with an opportunity to make an informed decision regarding whether to pay the fine or to contest the citation. Adopting this measure would shift the informational burden from the offender to the state.[266] Indigent defense attorneys who currently shoulder this burden would no longer be required to inform offenders of the consequences of their decisions.

Reclassification efforts that adopt all of the above-listed protective measures should effectively shield future drug possession offenders from many, if not all, collateral consequences. By waiving state-imposed consequences and explicitly prohibiting all state actors from seeking to disqualify an offender based on a drug possession citation, the reclassified statute removes all collateral consequences accruing against the offender at the state level.[267] Protective measures that remove all designations that trigger state and federal reporting, and that specifically prohibit the recording of drug possession citations in criminal record databases, will greatly impede the imposition of federally imposed collateral consequences.[268] A statutory right to deny the citation without legal consequence further frustrates remaining collateral consequences.[269] Requiring detailed notification of all remaining collateral consequences puts the offender on notice of their existence, thus informing his response to the citation in the absence of counsel. States adopting these

266. *See supra* notes 257-58 and accompanying text.

267. This must be true because waiving state-imposed collateral consequences does away with such consequences at the state level, and prohibiting state actors from disqualifying offenders effectively ties the hands of those who would seek to impose such consequences. *See generally* MASS. GEN. LAWS ch. 94C, § 32L (2011) (effective Dec. 4, 2008); W. VA. CODE § 60A-4-407 (2011).

268. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2008, at 2-11 (2009), http://www.ncjrs.gov/pdffiles1/bjs/grants/228661.pdf (reviewing the complexity of state criminal records databases and the instances of state criminal records reporting).

269. A state statutory right to deny drug possession citations may not save an offender from federal perjury or false statement charges. Therefore, such disclosure waivers may not be sufficiently insulating in their own right.

measures in the context of a drug possession reclassification are poised to significantly reduce the burden that such cases place on their indigent defense systems.

IV. POLITICAL VIABILITY OF DRUG POSSESSION RECLASSIFICATION AS A SOLUTION TO THE INDIGENT DEFENSE CRISIS

There is no question that drugs are controversial.[270] Scholars, politicians, and the general public have long debated the utility of drug prohibitions.[271] In this context, "[c]riticism of American drug policy has often come at a high price."[272] As a result, even those who willingly acknowledge the potential benefits of drug possession reclassifications are quick to dismiss them as "implausible" particularly "[i]n a political world that prizes being tough on crime."[273] As one observer notes, "[t]he biggest obstacle to change is decades' worth of rhetoric."[274] This Note does not seek to resolve this controversy. Rather, it argues that the traditional controversy surrounding American drug policy should not preclude attempts to change that policy[275] but should instead shape such efforts. Recognizing drug prohibitions as a controversial topic, this Note seeks to reframe the discussion to avoid the question of whether American drug policies have failed.[276] Removing this central question from the ongoing controversy would permit open discussion and allow for a balancing of drug policy benefits and burdens. Given the growing acceptance of marijuana reclassifications and the advent of noncon-

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270. *See, e.g.*, William L. White, *Foreward* to GARY L. FISHER, RETHINKING OUR WAR ON DRUGS: CANDID TALK ABOUT CONTROVERSIAL ISSUES, at ix (2006).

271. *See id.*

272. *Id.* at x (pointing to potential financial repercussions, "political harassment, and professional scapegoating" as examples of the risks associated with such criticism).

273. Gershowitz, *supra* note 55, at 116.

274. JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT 238 (2001).

275. Indeed, historically controversial movements have achieved political salience despite such controversy. *See, e.g.*, Linda F. Smith, *Access to Justice in Utah: Time for a Comprehensive Plan*, 2006 UTAH L. REV. 1117, 1177 (describing the civil rights movement as an example of such a controversy); *cf.* GRAY, *supra* note 274, at 247 ("Artur Schopenhauer said it best: 'All truth passes through three stages. First, it is ridiculed. Second, it is violently opposed. Third, it is accepted as self-evident.'").

276. *See, e.g.*, GRAY, *supra* note 274, at 217.

ventional remedies to constitutional violations in the criminal context, the time is ripe for such a shift.

A. Reframing the Debate: Forgetting About Failure and Focusing on Collateral Consequences

Discussions of American drug policy have traditionally centered on the issue of success. The debate occurs between "those who contend, on the one hand, that the War on Drugs has been totally ineffective" and those who argue, "on the other hand, that it has been effective in preventing some amount of hypothetical consumption at the margin."[277] Those who challenge American drug policies attack them as futile drains on government resources.[278] These challengers often point to strains on state criminal justice systems as evidence that drug policies have failed.[279] Such criticism prompts impassioned defenses, such as those arguing that drug prevention "spares families the anguish of watching a relative slip into the grasp of addiction and protects society from many risks, such as those created by workers whose mental faculties are dulled by chemicals."[280] To overcome ongoing rhetoric, participants should disregard the success question altogether. The issue is not whether American drug policy has done any good, but whether the good it has done outweighs the harm that it causes. Lawmakers seeking to employ drug possession reclassification should introduce their proposals by arguing that their indigent defense systems are broken[281] and that drug policies have had a hand in breaking them, not because these policies are failing to achieve their intended

277. Seth Harp, Note, *Globalization of the U.S. Black Market: Prohibition, the War on Drugs, and the Case of Mexico*, 85 N.Y.U. L. REV. 1661, 1668-70 (2010).

278. *See* FISHER, *supra* note 270, at 10 ("[T]he United States has spent ... billion[s] to reduce the supply of illicit drugs in this country and to reduce the demand for these substances.... There are data that would suggest that this money has not produced the desired results.").

279. STEVEN B. DUKE & ALBERT C. GROSS, AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS, at xviii, 8 (1993) ("Our conclusion [is] that much of the drug-war artillery is worthless and in many cases counterproductive.... This comprehensive process of intensive criminalization ... undermines our criminal justice process.").

280. FISHER, *supra* note 270, at 99 (quoting THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY (2002), http://www.ncjrs.gov/pdffiles1/ondcp/192260.pdf).

281. *See* Marcus, *supra* note 13, at 152-53.

purpose,[282] but because they have resulted in a significant number of drug possession prosecutions requiring indigent defense services.[283] Reframing the discussion in this way will allow participants to shift the central comparison from measuring the drug policy's purported success against its supposed failure to measuring that success against its own collateral consequences.[284] This shift may finally allow participants to come together in an open discussion of American drug policy.

B. The Time Is Now: Evidence that America Is Ready for an Unconventional Solution to the Indigent Defense Crisis

America is ready to engage in such a reframed debate and is particularly poised to consider an unconventional solution to the indigent defense crisis. Traditional calls for more money have "fallen on deaf ears"[285] and will continue to do so given the country's current economic climate.[286] Reclassification proposals concerning nonserious misdemeanors are either too costly or totally discretionary.[287] Additionally, such proposals lack the uniformity needed to achieve a national solution to the ongoing crisis.[288] Although drug policy has been the subject of a longstanding, impassioned debate, recent shifts in public opinion and in national jurisprudence[289] suggest that the opportunity may be ripe to pursue drug possession reclassification as a solution to the indigent defense crisis.

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282. *See* FISHER, *supra* note 270, at 10.

283. *See supra* Part II.B.2. Arguably, the high number of drug possession prosecutions and the strain that these place on government resources are evidence that our policies are immensely successful in promoting the detection and prosecution of drug offenses. In short, we have been so successful in implementing these policies that our nation's criminal justice systems have lost the ability to keep pace.

284. Others have proposed reframing drug policy discussions. However, these proposals generally suggest recasting drugs as a social or medical problem. *See, e.g.*, Andrew D. Black, Note, *"The War on People": Reframing "The War on Drugs" by Addressing Racism Within American Drug Policy Through Restorative Justice and Community Collaboration*, 46 U. LOUISVILLE L. REV. 177, 177-79 (2007).

285. Hashimoto, *supra* note 3, at 465.

286. *See* sources cited *supra* note 58; *see also* JUSTICE DENIED, *supra* note 3, at 59 (noting that pre-existing "funding shortages are guaranteed to worsen, given the country's economic condition").

287. *See supra* Part II.B.1.

288. *See supra* Part II.B.1.

289. *See* White, *supra* note 270, at ix-x.

1. Shifting Attitudes Toward American Drug Policy

States across the nation are reevaluating their positions with respect to marijuana possession. Two states have effected marijuana reclassifications in the last three years.[290] Fourteen states and the District of Columbia have passed laws approving the use of medical marijuana, with at least five more states closely examining such measures.[291] Still others, most notably California, have considered legalizing the recreational use of marijuana and taxing its sale like alcohol.[292] Although legalization attempts have been largely unsuccessful to date, advocates for reform continue to push for reevaluation of marijuana possession laws.[293]

Recent polls suggest that the American public is increasingly receptive to such proposals.[294] Although the current move toward marijuana reform signals a promising environment for future debates concerning American drug policy, it by no means indicates that America is ready and willing to embrace reclassification of all

290. *See* CONN. GEN. STAT. § 21a-279 (2011); MASS. GEN. LAWS ch. 94C, § 32L (2011); *see also* William M. Welchland & Donna Leinwand, *Slowly, States Are Lessening Limits on Marijuana*, USA TODAY, Mar. 8, 2010, http://www.usatoday.com/news/nation/2010-03-08-marijuana_N.htm (discussing shifts in public opinion regarding marijuana use and legalization).

291. Daniel J. Pfeifer, *Smoking Gun: The Moral and Legal Struggle for Medical Marijuana*, 27 TOURO L. REV. 339, 339-40 (2011) (listing those states that have legalized medical marijuana as Alaska, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington and noting that "Maryland and Arizona have approved legislation favorable to the use of medical marijuana, but have not legalized its use" and that "New York, Illinois, Delaware, South Dakota, ... and Kansas are in the process of considering medical marijuana laws" (footnotes omitted) (internal quotation marks omitted)).

292. Chris Grygiel, *State House Committee Kills Pot Legalization Bill*, SEATTLE POST-INTELLIGENCER (Jan. 20, 2010, 1:58 PM), http://blog.seattlepi.com/seattlepolitics/2010/01/20/state-house-committee-kills-pot-legalization-bill/; Justin Scheck, *California Voters Reject Bid To Legalize Marijuana*, WALL ST. J., Nov. 3, 2010, http://online.wsj.com/article/SB10001424052748704506404575592694047663552.html.

293. *McKay Joins Push To Make Pot Legal*, SEATTLE TIMES, June 21, 2011, at A1 (describing recent efforts in the State of Washington to bring the legalization question to voters); *Marijuana Legalization Underway in Colorado*, DENVER POST, July 7, 2011, http://www.denverpost.com/breakingnews/ci_18430153 (describing efforts to amend the Colorado state constitution to permit the recreational use of marijuana).

294. *See* Welchland & Leinwand, *supra* note 290 (describing the growing popular and political support for marijuana reform).

drug possession.[295] This Note recognizes that its proposal will be unconventional, perhaps even radical, in the eyes of many readers. However, one recent Supreme Court decision indicates that such a proposal may become tenable when proffered in response to prolonged constitutional violations in the criminal context.

2. The Move Toward Unconventional Remedies for Constitutional Violations in the Criminal Context

In its recent *Brown v. Plata* decision, the Supreme Court considered what it termed "serious constitutional violations in California's prison system," specifically the failure of California state prisons to provide adequate medical treatment to prisoners suffering from severe mental illness and serious medical conditions, in violation of their Eighth Amendment rights.[296] The Court upheld a three-judge panel's ruling that imposed a population limit on California's prison system, effectively ordering the release of 37,000 prisoners.[297] The Court found that the panel's decision did not violate the Prison Litigation Reform Act of 1995, a federal statute authorizing the early release of prisoners under certain conditions.[298] Although both the existence of a federal statute and the central role of the judiciary in issuing the *Brown* injunction distinguish the case from this Note's proposal, the reasoning the Court employed in sustaining the population cap speaks directly to

295. Even if states are unwilling to accept this Note's proposal as a solution to the indigent defense crisis, ongoing budget cuts may necessitate a reduction in their enforcement of drug crimes. *See, e.g.*, Bill Norton, *Budget Cuts Are 'Legalizing Drugs,' Thomson DA Says*, AUGUSTA CHRON., May 19, 2011, http://chronicle.augusta.com/latest-news/2011-05-19/budget-cuts-are-legalizing-drugs-da-says (reporting Georgia District Attorney Dennis Sanders's statement that the state's budget cuts have resulted in "fewer arrests and fewer offenders jailed for drug offenses," effectively "legaliz[ing] drugs in Georgia"). States faced with the prospect of unavoidable reductions in drug enforcement laws can proactively determine the scope of such reductions by adopting this Note's proposal. In doing so, they can prioritize future criminal justice expenses, rather than idly allowing the practicalities of the budget constraints to dictate future enforcement practices.

296. 131 S. Ct. 1910, 1922, 1926 (2011) ("[T]he State conceded that deficiencies in prison medical care violated prisoners' Eighth Amendment rights.").

297. *Id.* at 1922-23. The Court recognized that "the required population reduction could be as high as 46,000 persons," but accounted for the 9,000 prisoners that had been removed "during the pendency of th[e] appeal." *Id.* at 1923.

298. *Id.* at 1922-23, 1948 app. A.

the viability of future proposals designed to address serious constitutional violations in the criminal context.

In upholding what one Justice deemed "the most radical injunction issued by a court in our Nation's history,"[299] the *Brown* majority emphasized that violations of California prisoners' Eighth Amendment rights were both severe and ongoing;[300] that they were caused, at least in part, by the overcrowding of state prisons;[301] and that absent a reduction in prison population, proposed remedies were unlikely to be effective.[302] The Court also emphasized the role of California's persistent and "unprecedented budgetary shortfall" in limiting the availability of less severe remedies.[303] That five Supreme Court Justices were willing to uphold an order effecting the release of thousands of convicted criminals as a viable remedy to persistent Eighth Amendment violations in California prisons may indicate a nascent receptiveness to nontraditional remedies for long-standing constitutional deficiencies in the criminal context.[304] Given the similarities between California's prison crisis and the indigent defense crisis, it is likely that America's indigent defense systems also require a nontraditional solution.

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299. *Id.* at 1950 (Scalia, J., dissenting).

300. *Id.* at 1922 (majority opinion) ("[V]iolations in California's prison system ... have persisted for years.").

301. *Id.* at 1923 ("Efforts to remedy the[se] violation[s] have been frustrated ... by the long-term effects of severe and pervasive overcrowding.").

302. *Id.* at 1922, 1939 ("After years of litigation, it became apparent that a remedy for the constitutional violations would not be effective absent a reduction in the prison system population.... Without [such] a reduction ... there will be no efficacious remedy for the unconstitutional care of the sick and mentally ill in California's prisons.").

303. *Id.* at 1939 ("The common thread connecting the State's proposed remedial efforts is that they require the State to expend large amounts of money absent a reduction in overcrowding. The Court cannot ignore the political and fiscal reality behind this case. California's Legislature has not been willing or able to allocate the resources necessary to meet this crisis.").

304. "It is ... worth noting the peculiarity" of the *Brown* majority's holding. *Id.* at 1952 (Scalia, J., dissenting); *see also* Josh Blackmun, *What Do* McDonald v. Chicago*,* Brown v. Plata*, and* Ashcroft v. al-Kidd *Have in Common?*, CONCURRING OPINIONS (June 1, 2011, 12:17 AM), http://www.concurringopinions.com/archives/2011/06/what-do-mcdonald-v-chicago-brown-v-plata-and-ashcroft-v-al-kidd-have-in-common.html (identifying the common thread as "the Court's recognition that liberty yields both positive and negative social costs," describing *Brown v. Plata* as an instance in which the Court decided that society should bear the social cost, and suggesting that how the Court balances liberty and social costs "differ[s] in different constitutional contexts").

Like California's prisons, America's indigent defense systems are "broken beyond repair."[305] Indigent defender caseloads are dangerously excessive,[306] resulting in what many have argued are persistent, nationwide violations of defendants' Sixth Amendment right to effective assistance of counsel.[307] The time has come for lawmakers to provide a meaningful solution to this longstanding crisis. The legal profession can no longer "ignore the political and fiscal reality" facing our country's indigent defense systems.[308] States have "not been willing or able to allocate the resources necessary to meet th[e] crisis," and "absent a reduction in" excessive caseloads, "there will be no efficacious remedy for the unconstitutional" treatment of our nation's indigent defendants.[309] If courts, including the Supreme Court, are willing to release individuals who have been convicted of crimes and on whom states have expended considerable resources to prosecute and incarcerate, the time has come to consider nontraditional solutions on the front end, specifically the reclassification of drug possession offenses.

CONCLUSION

Desperate times call for desperate measures. Our country's indigent defense system is failing those individuals it was implemented to protect. Given the current economic climate, there is scant chance that the funding needed to remedy the indigent defense crisis will

305. *Brown*, 131 S. Ct. at 1927 (majority opinion); *see* Marcus, *supra* note 13, at 152 ("In spite of enormous sums of money being spent throughout the United States on tremendous numbers of cases, the system of providing counsel across much of our nation is, in a word, broken." (footnotes omitted)).

306. *See supra* Part I.C (discussing the excessive caseload problem).

307. *See, e.g.*, Hashimoto, *supra* note 3, at 475 ("Lawyers carrying caseloads that far exceed national standards cannot adequately consult with their clients or provide sufficient representation. Ultimately, those attorneys fail to provide adequate representation for most, if not all, of their clients, despite the constitutional right of those clients to effective assistance of counsel."); *see also* Benner, *supra* note 49, at 33 (arguing that such deficiencies violate the Sixth Amendment).

308. *Brown*, 131 S. Ct. at 1939; *see also* Hashimoto, *supra* note 3, at 465 ("For years, indigent defense advocates have clamored for more funding to address this crisis ... those pleas have fallen on deaf ears.").

309. *Brown*, 131 S. Ct. at 1939; *see also* Hashimoto, *supra* note 3, at 461 ("Recognizing that indigent defense systems must operate in a world of limited resources, states should reduce the number of cases streaming into those systems by significantly curtailing the appointment of counsel.").

materialize. States need to find solutions capable of implementation without the allocation of additional resources. Proposals suggesting minor crimes reclassifications fail to achieve this goal because they require a state either to conduct a substantial and costly review of its criminal code or to adopt a vesting system that will likely fail to effectuate meaningful reclassification.

Drug possession reclassification better satisfies the goals of undertaking a reclassification effort. By removing imprisonment as a punishment for drug possession, such reclassification eliminates the constitutional right to counsel in state possession cases. Given the demonstrated impact that these offenses have on state caseloads, such a reclassification would significantly reduce the burden on indigent defenders. Carefully crafted reclassification statutes that build in a combination of protective measures can achieve this goal while simultaneously shielding offenders from and alerting them to the harsh collateral consequences traditionally associated with drug possession convictions.

Reclassification is something that can and should be done to address the indigent defense crisis. To realize this proposal, lawmakers must avoid the American drug policy debate's traditional controversy by reframing the discussion. They must argue that the harm drug possession laws cause outweighs the benefits that they provide. There is a place for this argument to be made. States are talking about drug policy, and the Supreme Court has accepted arguments in favor of unconventional remedies to long-standing constitutional violations in the criminal context. The time is now. The remedy may be radical, but the problem is dire.

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