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## Louisiana's Criminal Defense Dilemma: Working toward a Disaster Resistant Future

Tyler Duffy

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# Louisiana’s Criminal Defense Dilemma: Working toward a Disaster Resistant Future

*Tyler Duffy\**

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## INTRODUCTION:

Imagine a place where the attorneys charged with defending the vast majority of those accused of a crime were detrimentally reliant on fees gathered from the convictions of those accused.<sup>1</sup> Now imagine another

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\* Born and raised in Florida, Tyler plans to move back to Central Florida when he graduates. Tyler is incredibly family oriented, his hobbies include reading, drawing, and playing sports. He's looking forward to working for the State Attorney's office in his home county and refining his litigation skills. Tyler would like to dedicate this note to his grandmother Judy, his grandmother Sandy,

place where one woman serves as the only public defender, paralegal, and secretary in the office.<sup>2</sup> Finally, picture yourself as an indigent person assigned counsel for a crime that could potentially carry a life sentence, you meet the attorney assigned to you and learn that they don't even practice criminal law<sup>3</sup>; it's probably not long before the panic sets in. Unfortunately, these places are not hypotheticals, they are painful realities plaguing the parishes of Louisiana. Each story exposes a concerning reality of the Louisiana criminal defense system, each parroting the same basic premise: public defenders are overworked and underpaid and that spells disaster for the quality of their work product.

The examples highlighted above show that relatively rural<sup>4</sup> and more urban areas<sup>5</sup> each face challenges. Even Orleans Parish, Louisiana's most populous parish has dealt with budgetary and manpower issues. In 2012 the Louisiana Public Defender Board (LPDB) commissioned a report documenting the problems faced by the Orleans Public Defenders Office (OPDO).<sup>6</sup> This funding problem persists, and it has led to public defense offices acting as revolving doors for young attorneys. If the Constitution

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and his father Sean who have each been inspirations to him and who he misses dearly.

1. Julie O'Donoghue, *Louisiana Public Defenders Expect to Need at Least \$4 Million More in Funding*, LOUISIANA ILLUMINATOR (Mar. 23, 2021), <http://www.louisianaweekly.com/louisianas-public-defender-system-will-stay-in-place/> [https://perma.cc/5H97-WZWE].

2. Eli Hager, *When There's Only One Public Defender in Town*, THE MARSHALL PROJECT (Sept. 9, 2016), <https://www.themarshallproject.org/2016/09/09/what-happens-when-there-s-only-one-public-defender> [https://perma.cc/2JK7-KJDH].

3. Eli Hager, *Louisiana Public Defenders: A Lawyer with a Pulse Will Do*, THE GUARDIAN (Sept. 8, 2016), <https://www.theguardian.com/us-news/2016/sep/08/louisiana-public-defender-crisis> [https://perma.cc/GCH6-LVVE].

4. Hager, *supra* note 2, refers to East Feliciana Parish which, as of 2019, was estimated by the Census to have a population of around 19,000 people; <https://www.census.gov/quickfacts/fact/table/eastfelicianaparishlouisiana/PST045219> [https://perma.cc/6CT7-8LS3].

5. Hager, *supra* note 3, refers to Caddo Parish which as of 2019 was estimated by the Census to have a population of around 240,000 people; <https://www.census.gov/quickfacts/caddoparishlouisiana> [https://perma.cc/RV7E-5CVH].

6. Ernie Lewis & Dan Goyette, *Report on the Evaluation of the Office of the Orleans Public Defenders*, LA. PUB. DEFENDER BD. (July 2012), <http://lpdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/Report%20on%20the%20Evaluation%20of%20the%20Office%20of%20the%20Orleans%20Public%20Defenders.pdf> [https://perma.cc/8AXF-FWQH].

and the interests of justice were taken seriously, funding would be more than adequate and concerns over staff retention would cease. The sad truth is public defenders often work with lackluster resources which leads to lackluster representation for indigent defendants in Louisiana.

This disadvantage for indigent defendants is true in times of relative prosperity and worsens during times of spontaneous disaster such as Hurricane Katrina<sup>7</sup> and the COVID-19 crisis<sup>8</sup>. It is an unmistakable truth that funding representation of indigent defendants has been an afterthought to Louisiana Congressmen and women falling short of the promises made by the 14<sup>th</sup> Amendment of the United States Constitution, and the State of Louisiana in its constitution.<sup>9</sup>

This comment will first argue that Louisiana regularly falls short of meeting the promises of both the United States and Louisiana constitutions by not providing for adequate counsel even during times without spontaneous emergency.<sup>10</sup> Second, it will argue that the State of Louisiana responded poorly when it came to protecting indigent populations contained within its jails and prisons during the Hurricane Katrina and Covid-19 crises. These poor responses meant that access to representation for some was even more sparse than in times of relative prosperity. Finally, this comment will argue that there are ways in which the State of Louisiana and the federal government can fix the system, such as giving the public at large a stake in electing head public defenders, lobbying the federal government to provide funding for Gideon's promise<sup>11</sup> and legalizing recreational marijuana as many other states have done to cut the incarceration rates of low-level drug offenders and benefit from significant tax revenues.

This Comment falls into two parts. First, Part I discusses the historical and legal background behind indigent defense provision in both the United States and Louisiana. Second, Part I will discuss the potential models for indigent defense provision and the status of funding for public defenders throughout the state. Third, Part I will explain Louisiana state law, both

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7. See generally, Daniel Kotler, *Private: Indigent Defense Washed Away by Katrina*, EXPERT FORUM: LAW AND POLICY ANALYSIS (Oct. 20, 2006), <https://www.acslaw.org/expertforum/indigent-defense-washed-away-by-katrina/> [<https://perma.cc/CYY4-R8GC>].

8. See generally Jacquelin DeRobertis, *Public Defenders Face Funding Crisis for Sixth Year in a Row, Report Says*, THE ADVOCATE (Feb. 1, 2020), [https://www.theadvocate.com/baton\\_rouge/news/courts/article\\_8387cd38-4531-11ea-a791-d7d207a19e71.html](https://www.theadvocate.com/baton_rouge/news/courts/article_8387cd38-4531-11ea-a791-d7d207a19e71.html) [<https://perma.cc/6ZKG-WYF8>].

9. LA. CONST. art. 1 §13.

10. *State v. Peart*, 621 So. 2d 780, 789-90 (La. 1993).

11. As the right to an attorney has been colloquially termed.

statutory and jurisprudential, surrounding the subject. Fourth, Part I discusses Louisiana's response to spontaneous emergencies and the ways those emergencies have affected both the people who need representation and those who represent them. Finally, Part I discusses the disparate resources available to public defenders when compared to their prosecutorial counterparts.

Part II envisions a future in which Louisiana remedies its history of insufficient public defense provision. First, Part II will describe British attitudes toward criminal defense, and how those attitudes may be replicated by implementing elections of head public defenders. Second, Part II will suggest lobbying the federal government to fulfill its moral obligation to assist in funding. Finally, Part II will explain how marijuana can become Louisiana's next cash crop, perhaps lucrative enough to fully fund Louisiana's criminal defense system.

#### I: INDIGENT DEFENSE PROVISION: PAST AND PRESENT

The status of state-funded indigent defense in Louisiana has been everchanging since its inception. This section will explain how Louisiana went from its early days as a member of the Union, where there was no state-provided criminal defense, to its modern model of state criminal defense provision. It will review the potential models for providing criminal defense, evaluate the state and federal requirements for doing so, and determine whether the current system is as effective as it can be.

##### *A. Historical Perspective:*

From the Sixth Amendment to *Strickland v. Washington*<sup>12</sup>, what it means to have competent counsel, and what a right to counsel looks like has changed overtime. That progression for the most part has been toward increased rights of the accused, yet jurisprudence has not totally solved the problem of indigent defense. This subsection shows that present jurisprudential standards are a step in the right direction, but those standards still burden defendants with proving their counsel's performance was insufficient.

The Sixth Amendment of the Constitution<sup>13</sup> contains a variety of protections afforded to those who have been accused of a crime. Such protections include, but are not limited to, a "speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been

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12. *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

13. U.S. CONST. AMEND. VI.

committed . . . [and] to have the Assistance of Counsel for his defense.”<sup>14</sup> The 14<sup>th</sup> Amendment extended these protections to the states via the Privileges and Immunities Clause.<sup>15</sup> Louisiana itself provides for similar protections in its own Constitution, a clear sign that at least through rhetoric, the state takes seriously the rights afforded to those accused of a crime.<sup>16</sup> These constitutional guarantees have created general requirements enforced mainly through a Due Process Clause analysis.

In *Powell v. Alabama*<sup>17</sup>, the United States Supreme Court first explored what it means to have competent counsel. In that case, the Court determined that Due Process requires adequate time to prepare a case with counsel.<sup>18</sup> *Johnson v. Zerbst*<sup>19</sup> extended this right to counsel from capital punishment cases exclusively, to any criminal charges levied against a person in federal courts.<sup>20</sup> The right to counsel hit a bump in the road when the court decided in *Betts v. Brady*<sup>21</sup> that the right did not extend through the Due Process Clause of the 14th Amendment to state courts.<sup>22</sup> However, less than twenty years later, the court (quite rightly) overturned *Betts* in *Gideon v. Wainwright*.<sup>23</sup> As the seminal case in ‘right to counsel’ jurisprudence, *Gideon* proclaimed that the provision of counsel was an absolute right, because even the most learned amongst non-lawyers are still not privy to the rules of the court and without representation, risk being sentenced for crimes they were otherwise innocent of committing.<sup>24</sup>

As the majority opinion in *Strickland v. Washington*<sup>25</sup> points out, simply having a lawyer present is not enough.<sup>26</sup> While in its dicta

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14. *Id.*

15. U.S. CONST. AMEND. XIV.

16. LA. CONST. art. 1 § 13 (providing for explanation of the reason for detention and assistance of counsel at each stage of a criminal proceeding.).

17. *Powell v. Alabama*, 287 U.S. 45 (1932).

18. *Id.* at 71.

19. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

20. *Id.* at 469.

21. *Betts v. Brady*, 316 U.S. 455 (1942).

22. *Id.* at 473.

23. *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963).

24. *Id.* at 345.

25. *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

26. *Id.* at 685 (“That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.”).

*Strickland* touts the necessity of experienced and dedicated counsel, it sets forth a steep test for those who wish to challenge the performance of a defense attorney.<sup>27</sup> The two pronged test requires both a showing of deficiency on the part of the attorney, and a showing that the deficiency resulted in prejudice that changed the outcome of the case.<sup>28</sup> This test measures performance based on “reasonableness under prevailing professional norms,” but those norms serve only as guides and not as hard and fast rules.<sup>29</sup> In practice, this has sometimes meant that uninspiring performances are upheld as reasonable because judges are given significant discretionary power when making these determinations.<sup>30</sup>

It is exceedingly difficult for many defendants to show that there case would have reached a different outcome had the supposed inaction not occurred.<sup>31</sup> It does not help that there is a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.”<sup>32</sup> Though it should be noted that the Supreme Court is increasingly influenced by ABA standards in making these reasonableness determinations, which have resulted in more compelling defense performances and lessened the number of ineffective counsel claims.<sup>33</sup>

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27. Heather Baxter, *Gideon’s Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, MICH. ST. L. REV. 341, 347 (2010).

28. *Id.*

29. *Strickland v. Washington*, 466 U.S. 668, 689 (1984); Robert R. Rigg, *The T-Rex without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77, 82 (2007).

30. *Id.*; See Richard Klein, *The Constitutionalizing of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1447 (1999). Detailing a case in which a defense attorney was found to have provided effective assistance of counsel while showing signs of sleeping during trial.

31. *State v. Taylor*, 18-126 (La. App. 5 Cir. 10/17/18), 258 So. 3d 217, 220. Defendant’s claim for ineffective assistance of counsel was dismissed despite receiving 25 years for heroine distribution when his defense attorney did not file a motion to reconsider because the sentence was within the statutory limits, the same trial judge would have reviewed the sentence and likely would not have deviated, and courts routinely check such sentences regardless of a formal motion; *State v. Parks*, 07-655 (La. App. 5 Cir. 01/22/08), 977 So. 2d 1015, 1027 (Ineffective assistance of counsel claim was denied despite defense counsel’s failure to object to or question a forensic scientist on the discrepancy in descriptions of a cocaine filled vessel and on the chain of custody.).

32. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

33. *Id.* at 97-98.

*B. Types of indigent defense models:*

State funded public defense can and does take several forms. To understand indigent defense standards and why indigent defense is so hard for states like Louisiana to get right, it helps to understand how indigent defense is provided.

Throughout the United States, jurisdictions use three models for indigent defense provision: the public defender model, the contract counsel model, and the assigned counsel model.<sup>34</sup> The public defender model centers on a designated group of lawyers whose full-time duties are to serve indigent defendants.<sup>35</sup> These offices act like law firms focused solely on defense of indigent persons. Contract counsel models retain private attorneys to counsel a specific number of cases each year in which they are paid per case or via a lump sum.<sup>36</sup> Assigned counsel models, on the other hand, retain private attorneys on an as needed basis, in which they are compensated hourly or by case.<sup>37</sup>

Public defenders offices are most useful in large urban areas where massive population centers create larger demands for criminal legal services.<sup>38</sup> For more sparsely populated areas however, the assigned counsel or contract counsel models appear more useful because retaining full-time public defenders can be incredibly financially burdensome.<sup>39</sup> In Louisiana there is a mix of both full-time public defender offices and contracted practitioners who take conflicts of interest cases.<sup>40</sup> Conflicts of interest often arise when public defense offices are asked to defend multiple defendants accused of the same crime, or crimes arising out of the same fact pattern.<sup>41</sup>

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34. Baxter, *supra* note 27 at 349.

35. *Id.*

36. *Id.*, at 350.

37. *Id.*

38. Michael S. Woodruff, *The Excessive Bail Clause: Achieving Pretrial Justice Reform Through Incorporation*, 66 RUTGERS L. REV. 241, 297 (2014).

39. *Id.*

40. Nicholas Chrastil, *With Increased City Funding, Public Defenders Avoid Worst Possible Outcome, but Not out of the Woods Yet, New Orleans' Chief Defender Says* (Nov. 30, 2020), <http://www.louisianaweekly.com/with-increased-city-funding-public-defenders-avoid-worst-possible-outcome-but-not-out-of-the-woods-yet-new-orleans-chief-defender-says/> [<https://perma.cc/7WZ9-J89T>].

41. § 32:15. Conflicts of interest, 1 Criminal Trial Techniques.



*C. State Law and Jurisprudence*

With a historical framework of indigent defense in America and an understanding of the models used to implement indigent defense, this section develops Louisiana's own historical framework. This framework shows Louisiana's failed response to *Gideon*, its decision to fund indigent defense through traffic tickets, and attempts to fix these shortcomings.

It wasn't until 1966, three years after *Gideon v. Wainwright*<sup>42</sup> was decided, that Louisiana finally enacted an indigent defense provision mechanism funded by a new tax provision on criminal convictions.<sup>43</sup> The initial indigent defense system was purportedly improved upon when the State of Louisiana added traffic ticket fines to the sources of income used to provide public defense in 1974.<sup>44</sup> Despite providing a new revenue source, this new law was problematic for the State of Louisiana as there was an inherent disparity between parishes when it came to funding, and the stream of funding was apt to fluctuate.<sup>45</sup>

Louisiana has a total of 42 judicial districts, 13 of those 42 have little if any access to interstate highway systems.<sup>46</sup> The majority of each judicial district's funding comes from the district itself in the form of these traffic tickets and other fees assessed upon criminal convictions, any state funding received acts as a modest supplement.<sup>47</sup> The traffic ticket funding model is not for use solely by public defenders, local district attorneys and sheriffs are each respectively given 12% of each traffic ticket paid.<sup>48</sup> Almost one fourth of the potential funds are allocated before public defenders can take their cut.<sup>49</sup>

This system has served as a financial nightmare and presents a serious ethical problem. Use of criminal conviction fines and fees to fund indigent

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42. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

43. Austin N. Priddy, *Rethinking Indigent Defense in Louisiana*, 89 TUL. L. REV. 491,496 (2014).

44. *Id.* at 497; *Louisiana DAs Use Diversion Traffic Tickets to 'Openly Violate' Ethics Laws, Complaint Says*, THE ADVOCATE (June 19, 2018), [https://www.theadvocate.com/baton\\_rouge/news/article\\_c8c42824-73e1-11e8-bb06-0be0227bfe0f.html](https://www.theadvocate.com/baton_rouge/news/article_c8c42824-73e1-11e8-bb06-0be0227bfe0f.html) [<https://perma.cc/U49V-CQ7A>] (Louisiana's reliance on traffic tickets in recent years has made it the only state so reliant as it has proven to be a problematic funding source.).

45. *Id.* at 498.

46. Mary Grace Richardson, "License, Registration, and State Funding, Please": *Overhauling Louisiana's Traffic-Ticket Funding Scheme of Public Defenders*, 79 LA. L. REV. 590, 597 (2019).

47. *Id.* at 596.

48. LA. REV. STAT. § 15:571.11 (2018).

49. *Id.*

defense is sometimes referred to as a “users pay” system, emphasizing the fact that those who are charged, and ultimately convicted, are the people who primarily fund the criminal defense system.<sup>50</sup> This is a concerning thought since indigent defendants are, by definition, those who are least capable of paying. Having to pay simple court fines can cause additional legal and civil rights issues as those who are poor can end up spending more time in jail because of their inability to pay, thus creating a vicious cycle.<sup>51</sup>

In *State v. Peart*, a public defender based in New Orleans had an overwhelming caseload of over 400 clients during a seven month period.<sup>52</sup> 400 clients is far and above the suggested limitations within one year’s time let alone a seven month period.<sup>53</sup> He petitioned for relief, and the Louisiana Supreme Court ultimately found that the state’s provision of public defense was inadequate, but denied the trial court’s decision which would have ordered the legislature to provide additional funding.<sup>54</sup> The Louisiana Supreme Court felt that making such an order would overstep its constitutional mandate and muddle in the function of the legislature.<sup>55</sup> Later, in *State v. Covington*, the Court held that ineffective assistance of counsel must be determined on a case by case basis, thus reinstating the district court level opinion that issues related to chronic underfunding can only be dealt with by the state’s legislature.<sup>56</sup> In the case of *State v. Wigley*<sup>57</sup>, the Louisiana Supreme Court denounced the practice of cost

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50. *Public Defenders Should Not Be Forced to Rely on Fines and Fees*, LA. BUDGET PROJECT (Feb. 20, 2020), <https://www.labudget.org/2020/02/public-defenders-should-not-be-forced-to-rely-on-fines-and-fees/> [https://perma.cc/T3VB-595U].

51. *Id.*; Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1485 (2016). (Describing the cyclical effect various criminal justice fees have on people being locked up or threatened with larger fines/fees because of the inability to pay.)

52. Malia Brink, *Still Underwater: Louisiana’s Public Defense System in Crisis* 32 CRIM. JUST. 45, 45 (2017-18).

53. American Council of Chief Defenders Statement on Caseloads and Workloads, American Council of Chief Defenders (Aug. 24, 2007), [https://jjie.org/wpcontent/uploads/2018/08/ls\\_sclaid\\_def\\_train\\_caseloads\\_standards\\_ethics\\_opinions\\_combined.authcheckdam.pdf](https://jjie.org/wpcontent/uploads/2018/08/ls_sclaid_def_train_caseloads_standards_ethics_opinions_combined.authcheckdam.pdf) [https://perma.cc/L5U5-EYDC].

54. *State v. Peart*, 92-0907 (La. 1993), 621 So. 2d 780, 791-92.

55. *Id.*

56. *State v. Peart*, 92-0907 (La. 1993), 621 So.2d 780, 783; *State v. Covington*, 2020-00447, 9, (La. Dec. 11, 2020).

57. *State v. Wigley*, 92-1503 (La. 1993), 624 So. 2d 425, 429 (‘to require that attorneys represent indigents with no recompense while bearing the expenses of the representation, when the attorneys must maintain their own practices and

cutting on capital defense by appointing private defense counselors without pay.<sup>58</sup> Just as indigent defendants have a right to counsel, the Louisiana Supreme Court affirmatively stated that those who perform indigent defense work have a right to compensation for their work, at least in the form of expenses incurred.<sup>59</sup>

Issues within the Louisiana criminal justice system and with public defense came to a head during Hurricane Katrina.<sup>60</sup> Indigent defendants, most of whom were charged with minor crimes, faced poor housing conditions within Orleans Parish jails and prisons amidst the crisis.<sup>61</sup> Hurricane Katrina was a catalyst for change, prompting the state to create the Louisiana Public Defender Board whose main purpose was to enforce “statewide performance standards and administer the state indigent defense fund.”<sup>62</sup> This system has tried to centralize the process of Public Defense and elevate standards while improving planning, hiring, and training processes.<sup>63</sup> Another essential function of the Board is its ability to hire and fire head public defenders in each judicial district.<sup>64</sup>

#### *D. The Impact of Natural and Man-Made Disasters on the Problem*

The provision of indigent defense in Louisiana is imperfectly funded. This funding mechanism is not enough for normal conditions in the state, and the problem is exacerbated when unforeseen tragedies occur, whether they be health disasters like COVID-19 or man-made disasters such as

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continue to meet their other professional and financial obligations in today's changed legal marketplace, "is so onerous that it constitutes an abusive extension of their professional obligations." . . . "the profession must be relieved of this burden and . . . the burden must pass to the citizens.").

58. Cohen, Ben, Calvin Johnson, & William P. Quigley. *An Analysis of the Economic Cost of Maintaining a Capital Punishment System in the Pelican State*, 21 LOY. J. PUB. INT. L. 1, 28 (2019).

59. *State v. Wigley*, 624 So. 2d 425, 428 (La. 1993).

60. *A Report on Pre- and Post- Katrina Indigent Defense in New Orleans*, S. CTR. FOR HUM. RIGHTS (Mar. 2006), 15-16 (discussing the decrease in funding, and a staggering number of attorney layoffs which resulted) <https://www.schr.org/files/post/katrina%20report.pdf> [<https://perma.cc/Z3WU-8W34>].

61. Brandon L. Garrett & Tania Tetlow, *Criminal Justice Collapse: The Constitution After Hurricane Katrina*, 56 DUKE L.J. 127, 128 (2006).

62. Richard Drew, *Louisiana's New Public Defender System: Origins, Main Features, and Prospects for Success*, 69 LA . L. REV. 955, 955 (2009).

63. Brink, *supra* note 52 at 46; *What We Do*, LA. PUB. DEFENDER BD <http://lpdb.la.gov/About/What%20We%20Do.php> [<https://perma.cc/JMQ6-NDMP>] (last visited Mar. 11, 2021).

64. Drew, *supra* note 62 at 976.

shootings. The 2016 shooting of officers and catastrophic flooding in Baton Rouge led to a decrease in the number of traffic citations and thus lessened the indigent defense funding available.<sup>65</sup> Since law enforcement shifted its concern towards public safety instead of more menial matters like traffic citations, public defense funding ultimately suffered.<sup>66</sup> The Louisiana Public Defense Board was thereafter forced to divert funds that were meant to go to other parishes, towards East Baton Rouge.<sup>67</sup>

In February of 2020, at the beginning of the COVID-19 pandemic, eight of the 42 public defenders offices in the state were listed as being in ‘restriction of services,’<sup>68</sup> meaning they were limited in their abilities to adequately represent indigent clients. The designation signals an attempt to match expenditures with revenues and to assure attorneys are fulfilling their ethical duties to clients. As of March 2021, that number had risen to 13 of the 42 judicial districts being under the ‘restriction of services’ designation.<sup>69</sup> Yet during the pandemic, public defenders took on an additional role, acting as liaisons between incarcerated persons and their loved ones.<sup>70</sup> During the pandemic, those who were incarcerated faced limits on their ability to communicate with the outside world, 30 minutes of free communication each week, and in some instances only by phone call or E-mail.<sup>71</sup> Because of the uncertainty during this time, it is easy to

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65. DeRobertis, *supra* note 8.

66. *Id.*

67. *Id.*

68. *Id.*

69. Louisiana Judicial Districts Under Restriction of Services, LA. STATE BAR ASS’N, <https://www.lsba.org/CJC/CJCOverview.aspx> [<https://perma.cc/RNR4-J4GY>], (last viewed March 19, 2021).

70. *Id.*

71. <https://doc.louisiana.gov/imprisoned-person-programs-resources/offender-information/> [<https://perma.cc/G5W8-85SK>] (last visited Mar. 15, 2021) (The Louisiana prison system prepared to phase in in-person visitations on March 13, 2021.) (The prison system website only mentions telephone and E-mail communication methods, not video-calling); Avi Asher-Schapiro, *Locked up during COVID-19: Costly phone calls strain families*, REUTERS, <https://www.reuters.com/article/us-usa-prisons-tech/locked-up-during-covid-19-costly-phone-calls-strain-families-idUSKCN26E3DQ> [<https://perma.cc/8A6Z-YNCV>] (Stating that inmates are given 30 minutes of free phone time per week); *Inmate Visitation Rules*, JEFFERSON PARISH SHERIFF’S OFFICE, <https://jpso.com/272/Inmate-Visitation-Rules> [<https://perma.cc/E6FB-9VNK>] (last visited Mar. 15, 2021), (At this jail, in person visitations were discontinued as of 2017, giving way to video calling only); ‘Visitation’, Orleans Parish Sheriff’s Office, [https://www.opso.us/index.php?option=com\\_content&view=article&id=379&Itemid=794](https://www.opso.us/index.php?option=com_content&view=article&id=379&Itemid=794) [<https://perma.cc/2D8P-ZTY2>] (last

imagine the added stress this restricted communication created for those involved.<sup>72</sup>

While public defenders continued to work for and support those charged with crimes, they themselves faced the ever looming threat of lowered pay, or layoffs.<sup>73</sup> Two outcomes came of these layoffs, public defenders continued to represent their clients without compensation (an uncommon sight), or hundreds perhaps thousands were at least temporarily left without representation.<sup>74</sup> Without proper representation, issues like unnecessary plea bargaining could arise and inmates could ultimately be left without advocates to monitor their conditions in jail or prison.

Beyond the immediacy of the pandemic, these conditions created concerns for the longer lasting effects of the pandemic on public defenders and their role in the system. Cases like *Powell*, show us that a trial cannot commence for an indigent defendant if there is no counsel to assist a client.<sup>75</sup> The speedy trial provisions could not be masked by a pandemic at that point, they would have to be addressed, otherwise the state is left with a problem of violating constitutional and state provisions and setting itself up for a low-quality justice system and perhaps a bevy of lawsuits.

#### *E. The Disparate Current Status of Criminal Justice Funding*

It has oftentimes been stated that funding for indigent defense in Louisiana is inadequate. This subsection shows how that inadequacy translates to staffing problems in public defender offices. This subsection will also compare the difference in resources available to public defenders and prosecutors.

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visited Mar. 15, 2021), in person visitation was suspended; however, attorneys were allowed to utilize the onsite Video Visitation Center.

72. Chrastil, *supra* note 40.

73. *See generally*, Matt Sledge, New Orleans Public Defenders Announce Furloughs as Officials Project \$800,000 Shortfall, NOLA.COM (Apr. 20, 2020 at 5:51 PM), [https://www.nola.com/news/coronavirus/article\\_54f5513c-8359-11ea-9fc2-b3099eaae489.html](https://www.nola.com/news/coronavirus/article_54f5513c-8359-11ea-9fc2-b3099eaae489.html) [<https://perma.cc/EMA2-ZGT2>]; Debra Weiss, *Public Defenders in this State are Told to Slash Budgets as Traffic-Ticket Funding Plummets*, ABA JOURNAL (Apr. 9, 2020 at 2:53 PM), <https://www.abajournal.com/news/article/public-defenders-are-told-to-slash-budgets-as-traffic-ticket-funding-plummets> [<https://perma.cc/ML5Y-XPE7>].

74. Weiss, *supra* note 73.

75. *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

Louisiana currently only employs one fifth the number of public defenders suggested by American Bar Association's standards.<sup>76</sup> Despite an ongoing staffing problem, the state public defense offices still managed to see an alarming 40 person drop in full-time equivalent attorneys between 2014 and 2016.<sup>77</sup> That 40 person drop was significant for a workforce which began with only 403 attorney,<sup>78</sup> and should have been closer to 1,700 according to ABA standards.<sup>79</sup> The issue is and primarily has been the model of funding, fees gathered from traffic violations are simply inadequate and cannot support the need for indigent criminal defense in Louisiana.<sup>80</sup> Funds raised from traffic fines stay in each district and state money acts only as a supplemental fund.<sup>81</sup> What this ultimately means is that those judicial districts with access to the interstate highway system have a distinct advantage in the revenue game over those in more rural districts who rely on whatever supplemental funds they are allocated.<sup>82</sup>

There is a natural comparison between the resources available to those at the public defenders' offices and those at the district attorneys' offices in the state. Part of the reason this funding conversation matters is because of the clear disparity that exists between prosecutorial spending and spending by public defenders. There has been a relatively small change in public defense expenditure compared to six years earlier. In 2013, public defenders had a total of \$65,397,129 in total expenditures, and by 2019, that amount had only increased to \$69,391,794.<sup>83</sup> In 2013, there was a

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76. *Id.*

77. Postlethwaite & Netterville, APAC and the American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *The Louisiana Project: A Study of the Louisiana Defender System and Attorney Workload Standards* (Feb. 2017). [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_louisiana\\_project\\_report.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.pdf) [<https://perma.cc/EDK7-QYC3>].

78. *Id.*

79. Hager, *supra* note 2.

80. Malia Brink, *Still Underwater: Louisiana's Public Defense System in Crisis*, 32 CRIM. JUST. 45, 46 (2017-18).

81. Richard Drew, *Louisiana's New Public Defender System: Origins, Main Features, and Prospects for Success*, 69 LA. L. REV. 955, 977 (2009).

82. Dylan Walsh, *On the Defensive*, THE ATLANTIC (June 2, 2016), <https://www.theatlantic.com/politics/archive/2016/06/on-the-defensive/485165/> [<https://perma.cc/79ZM-6N5F>].

83. *A Review of Public Defense Funding in Louisiana*, LA. STATE BAR ASS'N (Aug. 2013), <https://www.lsba.org/documents/CJC/PublicDefenderFundingPP.pdf> [<https://perma.cc/9FUV-UKQK>]; *Louisiana Public Defender Board 2019 Annual Report*, LA. PUB. DEFENDER BD. (Jan. 2019), <http://lpdb.la.gov/>

spending rate of \$2.14 dollars by district attorneys' offices for every public defendant dollar, yet 85% of all criminal cases are taken by public defenders.<sup>84</sup> More recent numbers could not be found, but there is no indication that prosecutorial spending has significantly waned. That \$2.14 dollar figure doesn't even take into consideration the police resources and expenditures available to district attorneys. An overbearing workload in combination with a sheer lack of funds makes for a losing battle from the get-go.

A contributing factor to the budgetary problems previously explained is the negative public perception of indigent defendants and their public defenders. Politicians in the past realized there is more political clout in voting for increased compensation and funding for public servants who do not defend criminals.<sup>85</sup> Attitudes have changed and now two-thirds of the American voting public believe government money should be used to fund indigent defense.<sup>86</sup> Louisiana needs to capitalize on this shift in public perception of indigent defense and apply appropriate funding.

## II: CHANGING MINDSETS AND FINDING SOLUTIONS

Scholarship, anecdotal evidence, and empirical evidence all seem to show that an underfunded and overworked public defense system is a net negative for Louisiana. Innocent people plead guilty or are wrongly convicted, money is wasted, and constitutional guarantees are not adequately fulfilled. Louisiana must start looking outward to systems that have garnered higher levels of success and try to replicate their attitudes and processes. A system cannot be fixed without change, the key is determining what must be changed and how best to effectuate that change.

The British system of justice served as a template for America's system; as such, present day Britain can offer critical ideals related to indigent defense which Louisiana should strive to replicate. This section will explain how to apply these ideals in a distinctively Louisianan and American style by making Head Public Defenders elected positions and creating a federal stake in indigent defense funding. This section will also explore the various benefits that could come from legalizing marijuana.

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Serving%20The%20Public/Reports/txtfiles/pdf/2019%20LPDB%20Annual%20Report.pdf [https://perma.cc/2PQP-WU8D].

84. *Id.*

85. Baxter, *supra* note 27 at 355.

86. Bryan Furst, *A Fair Fight: Achieving Indigent Defense Resource Parity*, BRENNAN CTR. FOR JUST. (Sept. 9, 2019), [https://www.brennancenter.org/sites/default/files/publications/2019\\_09\\_Defender%20Parity%20AnalysisV7.pdf](https://www.brennancenter.org/sites/default/files/publications/2019_09_Defender%20Parity%20AnalysisV7.pdf) [https://perma.cc/55LA-NP44].

*A. Thinking like the British: Their attitudes towards Indigent Defense*

England has always served as a model for American culture, government, and legal structure. This subsection shows how England's attitude towards indigent defense in the modern day is a valuable model for fixing the problems Louisiana faces.

In 1949, fourteen years before *Gideon v. Wainwright* was decided in the United States, British Parliament passed the Legal Advice and Assistance Act which provided criminal defense representation to anyone who had insufficient means or in situations where the court felt it was in the interest of justice.<sup>87</sup> The British people and their government approach indigent defense differently than the United States. In Britain, the indigent defense system is highly respected, and prosecution and defense have more parity.<sup>88</sup> A report comparing the cost of legal aid in criminal and civil trials, commissioned by the British Government during the mid to late 1990's suggested that "defendants must "receive a fair hearing" and the defense must be "on an equal footing with the prosecution."<sup>89</sup> Britain took those values to heart and has a demand-led system where the government has a duty to provide funding as needed in a particular year.<sup>90</sup>

Britain feels international pressures, as does the United States, but because of state sovereignty, individual states have sometimes chosen to ignore these pressures. Particularly, the British are influenced by the European Court on Human Rights, its founding treaty the European Convention on Human Rights 'provides that a person has a right to "legal assistance" to defend himself and "to be given it free when the interests of justice so require."<sup>91</sup> This is not to say that Britain's exact model is what is needed in the State of Louisiana, but that its basic ideas towards indigent defense would be a marked improvement from the state's current attitude.

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87. Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 862 (2004).

88. U.S. Department of Justice Report; Expert Working Group Report: International Perspectives on Indigent Defense, 13, (September 2011).

89. Lefstein, *supra* note 87 at 867.

90. *Id.* at 870.

91. *Id.* at 871.



*B. Achieving a British level of engagement and giving the people a stake in public defender accountability*

Analysis of the British attitude towards indigent defense is only valuable if those attitudes and initiatives are replicated in some fashion. This subsection describes how to go about putting head public defenders and prosecutors on a level playing field. Specifically, having publicly elected head public defenders in each judicial district similar to that of judges and district attorneys in the State of Louisiana.

Unlike their district attorney counterparts, head public defenders in Louisiana are not elected, but rather, appointed by the Louisiana Public Defender Board.<sup>92</sup> The idea of more elected positions may seem a dubious proposition. Americans have long had mistrust and distaste for the performances of certain popularly elected institutions, such as Congress, at the national level.<sup>93</sup> But, Americans are more engaged with local representatives. Based on this engagement, many Americans see local officials as honest and caring individuals who are receptive to their concerns.<sup>94</sup> Allowing elections of public defenders could change perceptions and allow citizens to feel a closer connection with these defenders and the work they do.

There is a problem with the fact that judges, district attorneys, and head public defenders are treated differently. The former positions are elected while the latter is not. The main reason prosecutors are elected is because they are endowed with so much power. Prosecutors are the primary decision makers in using state resources and applying state criminal laws, and they accept broad mandates that allow ample discretion.<sup>95</sup> At the state level, America began seeing elected judges early after the country's founding.<sup>96</sup> The call for the election of judges arose

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92. Louisiana Governmental Auditor Guide, LA. LEGIS. AUDITOR (Oct. 20, 2020), <https://www.la.gov/lagag.nsf/bdcb79123307274c8625813000748590/42e6a459492e1d76862580d4005358e6?OpenDocument#:~:text=District%20attorneys%20receive%2012%25%20of,various%20other%20local%20government%20agencies> [https://perma.cc/CRJ5-99TP].

93. JOHN GRAY GREER, BUT, I., AND MARK TWAIN. "ELECTED OFFICIALS." PUBLIC OPINION AND POLLING AROUND THE WORLD: A HISTORICAL ENCYCLOPEDIA 1 (2004): 220, 224.

94. *Id.*

95. Ronald F. Wright, *Public Defender Elections and Popular Control Over Criminal Justice*, 75 MO. L. REV. 803, 806 (2010).

96. Glenn R. Winters, *Selection of Judges--An Historical Introduction*, 44 TEX. L. REV. 1081, 1082 (1966).

more out of a populist belief in exercise of the people's will than out of any particular logic for electing such officials. Perhaps the elections of public defenders can serve a different purpose, such as creating a public stake in the selection process and generating discourse about the position and its role in the community. Instead of the current system where an unelected state board controls appointment and dismissal, the people could decide on a cyclical basis.

An election cycle can cause candidates to have substantive debates about the goals of the office.<sup>97</sup> Thankfully, other states have implemented elections of head public defenders, and Louisiana can learn from these systems while avoiding their pitfalls. For example, when elections were subject to partisan voting, there were instances where single parties would dominate each cycle and virtually disenfranchise groups through the primary voting process.<sup>98</sup> Accordingly, Florida proposed to enact a bill that made such elections non-partisan.<sup>99</sup> Creating non-partisan elections gives the entire community a voice in the debate on public defense priority regardless of political affiliation, recentring the discussion around ideas and not identity. The purpose of instituting elections is to give the people (all people) a voice in setting the priorities for the criminal justice system.

### *C. Federal Funding of the Unfunded Mandate*

Funding is the central theme in the indigent defense dilemma. Funding determines the longevity and motivation of individual public defenders, the number of public defenders, and the resources available to mount each defense. This subsection contemplates federal participation in funding the previously unfunded mandate.

An unfunded mandate is “an obligation that a government or agency perform some task that is required by a superior government or legislature but for which funding is not provided.”<sup>100</sup> Though this term tends to be used in relation to legislative actions, it may apply in this context as well. While the promise of appointed counsel is an affirmative right, it is largely unfunded by the federal government.<sup>101</sup> State police funding is not an

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97. Wright, *supra* note 95 at 818.

98. *Id.*

99. Andrew Pantazi, *Should Florida Prosecutors and Public Defenders Have Political Parties?*, THE FLA. TIMES UNION (Jan. 18, 2017), <https://www.jacksonville.com/news/2017-01-18/should-florida-prosecutors-and-public-defenders-have-political-parties> [<https://perma.cc/334H-M7Y9>].

100. *Unfunded Mandate*, WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION (2012).

101. Furst, *supra* note 86.

enumerated right under the Constitution,<sup>102</sup> yet police agencies receive a notable amount of funding from federal programs while public defense organizations currently do not.<sup>103</sup> For example, the Edward Byrne Memorial Justice Assistance Grant (JAG) Program is the leading program for federal criminal justice funding to the states.<sup>104</sup> That program allows for a variety of criminal justice funding purposes, but does not mention support of public defense entities as one of those purposes.<sup>105</sup> In Louisiana alone, several state and parish law enforcement organizations utilized this program to receive several million dollars in supplemental funding to state and parish allocations in 2019,<sup>106</sup> all while the Louisiana state budget utterly lacked any federal funding allocations for public defense.<sup>107</sup>

Unfortunately, funding programs and federal legislation addressing the struggles of funding and supporting state indigent defense organizations are few and far between. One effort which recently attempted to turn that tide, was the colloquially named EQUAL Defense Act.<sup>108</sup> This act expressly sought to protect fair trial and due process rights and create reasonable workload limits.<sup>109</sup> The EQUAL Defense Act also

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102. Instead that funding and execution falls under each state's sovereign police powers.

103. Furst, *supra* note 86.

104. *Edward Byrne Justice Assistance Grant (JAG) Program Fact Sheet*, BUREAU OF JUST. ASSISTANCE, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/jag-fact-sheet.pdf> [<https://perma.cc/5A5F-XA2L>] (last visited April 4, 2022).

105. *Id.* (Suitable purposes for this funding include: “law enforcement; prosecution (and court; prevention and education; corrections and community corrections; drug treatment and enforcement; planning, evaluation, and technology improvement; crime victim and witness initiatives; and mental health programs and related law enforcement and corrections programs, including behavioral programs and crisis intervention teams.”).

106. *Awards*, BUREAU OF JUST. ASSISTANCE, (Over the years, a total of 150 grants and \$98,185,739 have been awarded.) [https://bja.ojp.gov/funding/awards/list?district=6&field\\_award\\_status\\_value=All&state=LA&field\\_funding\\_type\\_value=All&fiscal\\_year=&combine\\_awards=&awardee=&city=](https://bja.ojp.gov/funding/awards/list?district=6&field_award_status_value=All&state=LA&field_funding_type_value=All&fiscal_year=&combine_awards=&awardee=&city=) [<https://perma.cc/T24V-CSH7>] (last visited March 16, 2022).

107. *State Budget Fiscal Year 2019-2020*, <https://www.doa.la.gov/media/slcdv1eo/statebudgetfy20.pdf> [<https://perma.cc/A4JE-VRVW>] (last visited Feb. 20, 2022).

108. S. 1377, 116th Cong. (2019).

109. *Id.*

included lofty measures to fix issues of pay parity between public defenders and prosecutors, create funding to train public defenders, and support student loan repayment programs.<sup>110</sup> This bill was introduced in the Senate by then Senator Kamala Harris, who previously worked as a prosecutor in California. Despite coming from a prosecutorial background, the Senator noted in an interview that the criminal justice system too often fails to provide poor defendants a fair trial or Due Process rights.<sup>111</sup> In 2019 this bill failed to be enacted into law, but with the new Biden Administration, and new powers controlling the House and Senate, this act or one just like it could reasonably become reality.

As a Constitutional mandate, the federal government should feel a desire and a duty to assist in the funding of indigent defense. Instead, public defense organizations are relegated to the pursuit of begging and pleading with their states, private organizations, and what little resources are available through the federal government. In place of these resources, non-profit organizations such as the National Legal Aid & Defender Association have cropped up to provide support for public defender training and achievement.<sup>112</sup> The NLADA website provides a toolkit for accessing federal funding and private contributions to supplement lacking resources, however no such toolkit should be necessary in a world where the federal government takes its mandate seriously and begins to fund it adequately.<sup>113</sup> The State government, Louisiana Public Defenders, the National Legal Aid & Defender Association, and individuals should put pressure on Congress to pass a bill that helps fund and achieve adequate public defense systems in Louisiana and other needy parts of the country.

#### *D. Legalize Recreational Marijuana*

Finally, this subsection develops the most practical way Louisiana can generate new revenue, lessen caseloads, and fix the public defense problem. Louisiana has a long history of socioeconomic disparity based

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110. *See generally*, S. 1377, 116th Cong. (2019).

111. Kyung Lah, *Kamala Harris to Introduce Legislation Aimed at Aiding Public Defenders*, CNN (May 8, 2019), <https://www.cnn.com/2019/05/08/politics/kamala-harris-public-defender-bill> [<https://perma.cc/NZB4-QLX8>].

112. *About NLADA*, NAT'L LEGAL AID & DEFENDER ASS'N, <http://www.nlada.org/about-nlada> [<https://perma.cc/B6VN-7Z94>] (last visited Feb. 20, 2022).

113. *Accessing Federal Grants, Foundation Funds and Other Supplemental Resources: A Toolkit for Public Defenders*, NAT'L LEGAL AID & DEFENDER ASS'N (March 2020), <http://www.nlada.org/sites/default/files/pictures/Accessing%20Federal%20Grants.pdf> [<https://perma.cc/MM8V-MJ8Z>].

on race partly perpetuated by the continued war on drugs. Louisiana could take a huge step forward in various ways by legalizing recreational marijuana.

Legalizing recreational marijuana could ameliorate a host of socioeconomic issues that have plagued the state and the nation for decades. From a social standpoint, marijuana legalization could turn back the racial animus which prompted the policy and fix racial disparities in enforcement of those policies. The name “marijuana” itself derives from an effort to associate cannabis with Mexican immigrants.<sup>114</sup> The negative association that was attached to marijuana did not stop with those of Mexican heritage, but was used for impure intentions such as oppressing those of African, Hispanic, and Asian descent.<sup>115</sup> In the late 1800s and early 1900s, advocates for the criminalization of marijuana use pointed to marijuana as a catalyst for violent crimes such as rape and murder.<sup>116</sup> However, empirical studies in states that have legalized medical marijuana within the past decade or so have found notable decreases in violent crimes and crimes generally.

Marijuana has certainly had a racially skewed impact in Louisiana, so much so that a study released in early 2020 showed that Black people were 3.4 times more likely than their White counterparts to be arrested for marijuana use in the state.<sup>117</sup> Violent crime is not what drives the excessive prison populations in Louisiana. Instead, it is the war on drugs, specifically through the use of mandatory minimums. Second offenses for marijuana possession can carry minimums of six-month jail terms, while fourth offenses can have as severe a punishment as twenty years in prison.<sup>118</sup> There is one other statistic which raises concern when looking at the war on drugs in Louisiana. In 2018, 51% of all drug arrests in the state were made for marijuana possession, not distribution.<sup>119</sup> That fact combined with the realization that Black people are significantly more likely to be arrested for marijuana possession shows that Louisiana is both burdening

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114. Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789 (2019).

115. *Id.*

116. Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 UC DAVIS L. REV. 689, 690 (2016).

117. *New ACLU Report: Black People Three Times More Likely to get arrested for Marijuana in Louisiana*, LA. ACLU (April 19, 2020) <https://www.laclu.org/en/press-releases/new-aclu-report-black-people-three-times-more-likely-get-arrested-marijuana-louisiana> [<https://perma.cc/HE8M-BJHR>].

118. Courtney Harper Turkington, *Louisiana's Addiction to Mass Incarceration by the Numbers*, 63 LOY. L. REV. 557, 569 (2017).

119. *Supra* note 117.

its criminal defense system and propping up its penal system by attacking Black communities for marijuana possession. If the state were to legalize recreational marijuana, it could lift significant burdens plaguing the Black community and create the ability of public defenders to provide meaningful representation.

These laws are not mere abstract expressions, real people like Bernard Noble have felt the impacts of these harsh and disproportionate mandatory minimum rules.<sup>120</sup> Mr. Noble was sentenced to over thirteen years in a Louisiana prison for possession of a relatively small amount of marijuana.<sup>121</sup> Keep in mind what these mandatory minimums and disproportionate effects on Black people in Louisiana means for the system as a whole. In Louisiana, 85% of criminal defendants are considered indigent, while 70% of all prison inmates are Black.<sup>122</sup> This persistent fight against drugs affects mainly Black and poor persons, causing a strain on the caseload of public defenders and squeezing the already small budget for those public defenders.

As alluded to earlier, the positive effects of marijuana legalization are not just critical to the black community, but to Louisiana as a whole. The legalization of marijuana has been shown to reduce other crimes by significant margins. Alcohol consumption, which tends to cause more aggressive behavior, decreased as it was substituted for marijuana use in states that have legalized the drug.<sup>123</sup> Researchers believe this reduction in alcohol consumption may have contributed to the notable decrease in levels of rape and theft.<sup>124</sup> The study referenced above suggests that reduction in rates of rape and theft are both economically and psychologically driven.<sup>125</sup> When marijuana becomes legal, the supply chain reduces some of its risk associated costs, consumers increase

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120. Tamar Todd, *The Benefits of Marijuana Legalization and Regulation*, 23 BERKELEY J. CRIM. L. 99, 108 (2018).

121. *Id.*

122. Stanley Augustin, *Class Action Law Suit: Public Defender System Systematically Denies Poor People the Right to an Adequate Defense*, LAWYER'S COMMITTEE FOR CIVIL RIGHTS UNDER LAW (Feb. 6, 2017), <https://lawyerscommittee.org/class-action-lawsuit-louisianas-public-defender-system-systematically-denies-poor-people-right-adequate-defense/#:~:text=Eighty%2Dfive%20percent%20of%20people,crime%20in%20Louisiana%20are%20indigent> [https://perma.cc/CY4X-7W48].

123. Davide Dragone, et. al, *Crime and the Legalization of Recreational Marijuana*, IZA Discussion Paper Series, No. 10522, IZA INST. OF LAB. ECONS., 10 (2017).

124. *Id.* at 10-11.

125. *Id.* at 12.

consumption as supply increases, and again move away from alcohol or other drugs/substances that induce aggressive behavior.<sup>126</sup> Instead of aggressive behavior, marijuana tends to produce a soothing, and euphoric effect on the user.<sup>127</sup>

Another benefit to marijuana legalization is the ability of the state to exercise control over the manufacturing and distribution processes and generate revenue. From a consumer safety standpoint, marijuana legalization creates safe market places for consumers to purchase without the risk of being harmed during the transaction, or by faulty product.<sup>128</sup> If the state of Louisiana were to tax marijuana at both the manufacturing and sales stages, as Colorado has done, it stands to gain substantial yields. In Colorado, implementation of a 15% tax on manufacturers and a 10% tax on consumers, yielded \$2,000,000 of revenue in the first month alone.<sup>129</sup> At the state level, Colorado was able to raise more than \$75 million in revenue in 2014.<sup>130</sup> The state, through home rule laws, allowed localities to impose their own sales taxes which generated, if nothing else, mild revenue boosts.<sup>131</sup>

Through this tax provision, the states have an opportunity for oversight, taxation, and even to serve as market participants. The Internal Revenue Code provides for tax exemption of income derived from essential governmental functions.<sup>132</sup> The IRS in turn has precedential Revenue Rulings which found income derived from certain state operations of liquor stores was not subject to federal taxation under §115.<sup>133</sup> Just as states have a legitimate interest in regulating and selling alcohol to protect the health and safety of their citizens, minors in particular, they also have such an interest when regulating and selling marijuana, which likely means the essential governmental function test applies.<sup>134</sup> The essential governmental function test is subject to another IRS ruling that

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126. *Id.*

127. *Id.*

128. Edward M. Shepard & Paul R. Blackley, *Medical Marijuana and Crime: Further Evidence from the Western States*, 462 J. OF DRUG ISSUES 122 (2006).

129. David Blake & Jack Finlaw, *Marijuana Legalization in Colorado: Learned Lessons*, 8 HARV. L. & POL'Y REV. 359, 373 (2014).

130. Jeremy P. Gove, *Colorado and Washington Got Too High: The Argument for Lower Recreational Marijuana Excise Taxes*, 19 RICH. J. L. & PUB. INT. 67, 72 (2016).

131. *Id.*

132. 26 U.S. CODE § 115.

133. Benjamin M. Leff, *Tax Benefits of Government-Owned Marijuana Stores*, 50 UC DAVIS L. REV. 659, 669-70 (2016).

134. *Id.* at 672.

forbids both private inurement or substantial private benefit.<sup>135</sup> In essence, the federal government does not allow private entities to influence or benefit substantially under this status once it has been proved that the entity is run by a state government entity and serves a public purpose.<sup>136</sup> Thankfully, this shouldn't pose much of a problem in the absence of a high interest loan or a private interest in the state run business.<sup>137</sup>

The legalization of marijuana is a solid step in the right direction for various reasons; however, legalization is not magic. It cannot fix all aspects of the law enforcement struggle, economic or otherwise. Legalization even at the state level, would consist of a serious level of regulation, including limiting the age of consumption, the parties who can sell, and amounts that are legal to possess.<sup>138</sup> At the state level, most officers do not focus solely on drug enforcement, so while efforts and resources may be reallocated to other issues, this may not ultimately have much of an effect on law enforcement expenses.<sup>139</sup>

#### CONCLUSION

The criminal justice system, specifically indigent defense provision, has been recognized as essential in the United States. States like Louisiana have simply dropped the ball when it comes to providing adequate support to indigent criminal defendants. Despite notable efforts to improve upon the system in Louisiana, the state continues to falter. As seen in *Peart* and *Covington*, Louisiana cannot rely on its courts to create systemic changes to the indigent defense provision system. Instead, a push by the people and the legislature is desperately needed.

Upon inspection of the system as a whole, three main solutions can be implemented which can lead to lasting improvements. First, the state can change perspectives on public defenders by instituting elections in the same way district attorneys are elected. This solution admittedly is more of a symbolic gesture, one that provides perspective and strengthens the importance of public defense as an institution. Second, because indigent defense is required by the United States Constitution, the federal government should have a more vested interest in providing funding and assuring that provision by each state is truly adequate. A little bit of government funding could go a long way in supplementing the state and

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135. *Id.* at 676-77.

136. REV. RUL. 57-128.

137. *Id.*

138. Sam Kamin, *Colorado Marijuana Regulation Five Years Later: Have We Learned Anything at All*, 96 DENV. L. REV. 221, 238 (2019).

139. *Id.*



local efforts to ensure this constitutional promise is fulfilled. Third, the state can do as many other states have, legalize marijuana, and reap the tax benefits that may be able to support the struggling public defense system in the state. With this increased funding, the state of Louisiana will be able to beef up staffing, increase resources, and provide adequate criminal defense that meets constitutional expectations, and prevents unnecessary plea bargaining or wrongful convictions.