DESPERATE MEASURES: PROTECTING THE RIGHT TO COUNSEL IN TIMES OF POLITICAL ANTIPATHY

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"I would not subtract anything from the praise that is due to philanthropy, but merely demand justice for all who by their lives and works are a blessing to mankind."[1]

-Henry David Thoreau

I. INTRODUCTION: FIGHTING FOR THE STATUS QUO

Of all the enumerated protections within the United States Constitution, perhaps none have fallen shorter of their ideals than the Sixth Amendment right to effective assistance of counsel for indigent criminal defendants.[2] Since 1963, when the Supreme Court fully applied the Sixth Amendment to the states in the seminal case of *Gideon v. Wainwright*,[3] state indigent defense

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1. HENRY DAVID THOREAU, WALDEN, AND ON THE DUTY OF CIVIL DISOBEDIENCE 63 (Barnes & Noble Classics 2003) (1854).

2. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."). This right will be referred to in this Article as the "Right to Counsel."

3. 372 U.S. 335 (1963) (finding that effective assistance of counsel was fundamentally necessary to a fair trial).

systems have been hobbled by persistent underfunding of defense counsel, excessive defender caseloads, and the underlying culture of political ambivalence that causes both.[4] As a result, the *Gideon* decision has never been fully implemented, and America's criminal justice systems today very much resemble what the *Gideon* Court attempted to cast off—that is, a court system where defendants' likelihood of being wrongfully convicted depends more on their finances than the substantive merits of their case.[5]

The Right to Counsel is a cornerstone of criminal procedure, befitting its status as a fundamental right. For the roughly ninety-five percent of criminal defendants nationwide who are represented by assigned counsel,[6] the appointment of their attorney is the most vital juncture in the justice process. In the words of Justice Stevens, "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."[7] No provision in the Constitution better reflects the practical implementation of due process, equal protection, and the presumption of innocence—in this way, the Right to Counsel is directly interwoven with the exercise of American ideals of liberty and equality.[8]

Such platitudes, however, stand in stark contrast to the reality of indigent criminal defense in America today, where the underfunding and overworking of public counsel offices causes a domino effect of procedural problems that frequently deprive defendants of their full panoply of rights. Time and resource constraints force most defenders to treat representation as an assembly-line process, spending the bare minimum effort required

4. *See generally* NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 80–84 (2009), http://constitutionproject.org/pdf/139.pdf [hereinafter JUSTICE DENIED] (explaining the lack of political independence of indigent defense providers because of pressure from funding sources and improper selection and assignment of counsel).

5. Powell v. Alabama, 287 U.S. 45, 69 (1932) (explaining that the complexities of the law necessitate the assistance of counsel for even innocent defendants to be able to establish their innocence), *aff'd by Gideon*, 372 U.S. at 345.

6. Laurence A. Benner, *Eliminating Excessive Public Defender Workloads*, 26 CRIM. JUST., Summer 2011, at 24, 25.

7. United States v. Cronic, 466 U.S. 648, 654 (1984).

8. Bennett H. Brummer, *The Banality of Excessive Defender Workload: Managing the Systemic Obstruction of Justice*, 22 ST. THOMAS L. REV. 104, 126 (2009) (listing Constitutional functions and purposes implicated by the Sixth Amendment, including "ensuring 'fundamental human rights of life and liberty,'" "implementing the presumption of innocence," and "promoting the equality of rich and poor before the law").

to end each case at the expense of pursuing witnesses or evidence that could exonerate the defendant, or else to face inescapable conflicts of interest that would require them to pick and choose which clients to serve.[9] Public defenders' inability to spend any time communicating with most of their clients leaves huge swaths of defendants essentially unrepresented for months at a time, having no input in their own defense and often meeting their attorneys for the first time right before trial.[10] As a result, over ninety percent of defendants prosecuted ultimately accept plea bargains, frequently entering into them spontaneously, either without having been advised by an attorney or on the advice of attorneys who had little time to seriously consider their case or formulate a defense.[11] The result is a rash of wrongful or unnecessary convictions that go against both the letter and spirit of the Right to Counsel, filling prisons with nonviolent convicts and depriving defendants of their liberties and property with virtually no recourse.[12]

The root of these problems has always been primarily political. Because *Gideon* left no guidelines for actually achieving its mandate, many states have been reluctant to put the Right to Counsel fully into practice, resulting in a patchwork of indigent criminal defense systems at the mercy of their funding bodies.[13] The vast majority of jurisdictions cannot or do not fully fund their public defense counsel, rendering it functionally impossible for defenders to adequately represent increasingly high numbers of

9. Heather Baxter, *Too Many Clients, Too Little Time: How States are Forcing Public Defenders to Violate Their Ethical Obligations*, 25 FED. SENT'G REP. 91, 91 (2012) [hereinafter Baxter, *Too Many Clients*].

10. Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L.J. 2150, 2162–64 (2013); *see also* Anthony C. Thompson, *The Promise of* Gideon*: Providing High-Quality Public Defense in America*, 31 QUINNIPIAC L. REV. 713, 721–22 (2013) (discussing the failures of public defender systems).

11. David A. Perez, *Deal or No Deal? Remedying Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L.J. 1532, 1539 (2011); *see also* SEAN ROSENMERKEL, MATTHEW R. DUROSE & DONALD J. FAROLE, JR., BUREAU OF JUSTICE STATISTICS IN U.S. DEP'T OF JUSTICE, NCJ 226846, FELONY SENTENCES IN STATE COURTS, 2006–STATISTICAL TABLES 25 tbl. 4.1 (2009), https://www.bjs.gov/content/pub/pdf/fssc06st.pdf (calculating the total percentage of felons convicted by guilty plea in 2006 as ninety-four percent).

12. Bright & Sanneh, *supra* note 10, at 2169–71 (describing incidents of lawyer incompetence in indigent representation and the high bar for an ineffective assistance of counsel claim).

13. *See generally* JUSTICE DENIED, *supra* note 4, at 53–55 (explaining the funding for indigent defense models).

clients while still meeting their professional obligations.[14] Nearly forty percent of county-based public defense offices cannot afford vital investigators, and about three-quarters exceed the American Bar Association's (ABA) maximum recommended caseload standards.[15] Even as arrests continue to rise nationwide, many jurisdictions have actually decreased indigent defense funding, and defenders still almost universally make far less money—while working more cases—than prosecutors.[16] Jurisdictions that leave indigent defense spending partly or wholly to individual counties are even worse off, frequently taking advantage of the lack of available counsel to entice or encourage defendants to waive their right to representation or to compel defenders to settle cases en masse.[17] Sadly, although the public supports equal rights and due process in theory, that sentiment has not been reflected given the longstanding failures of America's indigent defense field.[18]

Accordingly, the most direct and permanent solutions to indigent defense issues are also largely political. There is a desperate need for federally enforced public counsel hiring, funding, conduct, and caseload standards, as well as dedicated causes of action for defendants whose attorneys do not meet such standards.[19] Yet despite having both a constitutional and moral duty to ensure all defendants get the full use of their fundamental rights, Congress has long considered helping accused criminals to be a very low legislative priority, and the public's inability to uniformly speak up all but ensures things will stay that way.[20] The ABA and other professional legal organizations have attempted to

14. *Id.* at 59–64 (explaining the existence of massive funding disparities among many state public defense systems and how funding has often stagnated or declined even as costs have gone up).

15. DONALD J. FAROLE, JR. & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS IN U.S. DEP'T OF JUSTICE, NCJ 231175, COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007, at 1 (2010), https://www.bjs.gov/content/pub/pdf/clpdo07.pdf.

16. *See* Benner, *supra* note 6, at 2.

17. JUSTICE DENIED, *supra* note 4, at 59–64 (explaining the existence of massive funding disparities among many state public defense systems, and how funding has often stagnated or declined even as costs have gone up).

18. Heather Baxter, Gideon*'s Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341, 381 [hereinafter Baxter, Gideon*'s Ghost*] (highlighting poll results indicating that the vast majority of Americans "believe that the quality of justice a person receives should not be determined by [their finances]").

19. JUSTICE DENIED, *supra* note 4, at 200–01 (advocating for the federal government to recognize its constitutional duty to apply the Sixth Amendment by creating a regulatory body to oversee state indigent defense services).

20. *Id.*

fill the vacuum by promulgating standards for indigent defense providers, but their reach has been limited while state participation remains voluntary.[21] Thus, while the judiciary itself is not blameless in its failure to effect lasting reforms,[22] state and federal legislatures share the bulk of the responsibility for indigent defense issues in two respects: firstly, by continuing to promote the over-policing, overzealous prosecutions, and strict sentencing laws that cause increasingly excessive defender caseloads; and secondly, by neglecting to adequately fund defender offices or set procedural standards that allow defenders to do their jobs without compromising the defendants' rights or the lawyers' ethical duties.[23] The lives of countless criminal defendants hang in the balance, persistently threatened by these fundamentally unbalanced systems, which in turn are held hostage by the whims of elected legislators.

Presently, the situation for indigent criminal defense is only likely to get worse before it gets better, as the Trump Administration walks back on a decade of progress by disparaging due process, encouraging over-policing, vilifying minority groups, and mandating strict sentences for many low-level offenders.[24] By perpetuating the failed "war on drugs" and Nixonian "tough-on-crime" policing that has overstuffed prisons and stigmatized defendants for years,[25] the current Administration empowers state

21. *Id.* at 32–34 (summarizing ABA efforts to regulate the indigent defense field); *see also* AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 1 (2002), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf [hereinafter TEN ABA PRINCIPLES] (promulgating principles necessary to design a public defense system).

22. Brummer, *supra* note 8, at 186–87 (describing a general apathy toward justice among many public defenders with excessive caseloads and arguing that this willingness to settle for less-than-ideal service is in large part perpetuating excessive caseload problems). *But see* JUSTICE DENIED, *supra* note 4, at 65 (arguing overall that state public defenders cannot be expected to always be able to provide adequate representation under the present conditions, and that fully implementing the right to counsel at the state level requires adequate funding and legislative support).

23. *See generally* JUSTICE DENIED, supra note 4, at 11–13 (summarizing recommendations for states and the federal government).

24. Mirko Bagaric, Gabrielle Wolf & William Rininger, *Mitigating America's Mass Incarceration Crisis Without Compromising Community Protection: Expanding the Role of Rehabilitation in Sentencing*, 22 LEWIS & CLARK L. REV. 1, 18 (2018); James Cooper, *United States, Mexico, and the War on Drugs in the Trump Administration*, 25 WILLAMETTE J. INT'L L. & DIS. RES. 234, 286, 289 (2018).

25. Bagaric, Wolf & Rininger, *supra* note 24, at 3–4; Cooper, *supra* note 24, at 252; Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1779 (2016).

legislatures to place personal interests over the protection of civil rights and all but ensures that the political justification for starving indigent defense systems will remain.[26] Those states that respect the rule of law and a functioning adversarial process are largely on their own.[27]

After enduring more than fifty years of this sort of hostility, and with no end in sight, the time is ripe for defenders to relieve themselves of the notion that outside help is coming and attempt to find new ways to improve the quality of representation they are capable of providing without additional funding or federal aid. Even the smallest ground-level changes could amount to vast improvements in any given defendant's life, and every lawyer's constitutional duties create no exception for a lack of public support. While the judiciary alone may be unable to fix the deep-seated cultural attitudes that cause such political apathy in the first place, the situation is far from hopeless. There are still many ways indigent defense attorneys can better utilize the tools at their disposal to enhance their representation in this current environment without having to deprive other clients.

The object of this Article is to attempt to identify and propose the sort of practical, internal, and apolitical changes that the indigent criminal defense field could implement right now in order to highlight and mitigate the harms caused by representation issues in the short term, assist defenders in managing their caseloads, and ultimately lay the framework for future reforms by shifting public opinion toward a renewed commitment to protecting defendants' rights. Other works addressing the shortcomings of state indigent defense systems tend to come to similar conclusions about how the underlying factors that create indigent defense issues could be allayed—in large part if only Congress or many state legislatures were to suddenly recognize the practical value in enforcing the Sixth Amendment and decide to become "smart on crime" by promoting uniform workload standards, decriminalization, and adequate funding and

26. *See* Norris Z. McManus, *The National Crisis of the Public Defender System*, THE CRIME REP. (Nov. 15, 2018), https://thecrimereport.org/2018/11/15/the-national-crisis-of-the-public-defender-system/.

27. Bright & Sanneh, *supra* note 10, at 2155–56 (explaining the merits of an adversarial system of justice and why ineffective counsel undermines courts' ability to actually discern the truth behind each matter).

organization.[28] While this Article recognizes the merits of the political solutions, it is also predicated on the assumption that expecting these things to actually occur to any significant degree right now is overly idealistic. The American political environment today is more conducive to hindering, not helping, indigent defense attorneys, and prior reforms obtained through litigation have been limited and inconsistent at best;[29] this dynamic renders it necessary for defenders to abandon the pretense of large-scale outside help and do all they can on their own to continue living up to the ideals of justice and the Constitution's mandate.

For a systemic problem, focusing only on small-scale, localized improvements to public defense systems may seem like putting a bandage on an open wound. However, the alternative of leaving things as they are and merely hoping for outside factors to fix state-level indigent criminal defense would be a disservice to all the defendants whose lives are being overturned, and whose rights are being tacitly or overtly denied, by a defense bar stacked against both them and the attorneys who genuinely want to help them. The entire country ultimately bears the consequences of every miscarriage of justice. While not everyone is in a position to prevent wrongful convictions, those who are would do well to reconsider the role they play in others' lives and attempt to ensure that their actions accord with the principles they wish to serve. Thus, this Article is targeted to all stakeholders in the criminal defense field, with particular respect to indigent defense attorneys, courts, and prosecutors, so as to encourage them to reexamine the importance of ensuring clients get their duly effective counsel and consider new ways of promoting—and accomplishing—the same.

This Article consists of three parts. Part II begins by discussing the importance of the Right to Counsel itself and the scope of the problems facing indigent criminal representation in state courts today, including the extent, causes, and consequences of public defense underfunding and excessive caseloads. Part III addresses prior attempts to implement *Gideon* and why they have largely failed to effectuate the decision, rendering it necessary for defenders to protect the Right to Counsel without political

28. *See Texas Smart-On-Crime Coalition*, ACLU OF TEXAS, https://www.aclutx.org/en/campaigns/smart-crime (last visited Feb. 10, 2019) (explaining the purpose of creating the Texas Smart-On-Crime Coalition, as well as the ways in which the organization attempts to achieve its mission).

29. *Id.*

assistance. This Part discusses the merits of significant prior reforms, including the organization of state assigned-counsel systems, ABA efforts to limit the scope of representation problems, the prospect of new judicial remedies obtainable through litigation, as well as the obstacles preventing clients from seeking remedies for deprivation of effective assistance of counsel.

Hence, as this Article is predicated on the conclusion that defenders should not expect a resurgence of public interest in the criminal justice system to spur legislative action anytime soon, Part IV identifies several potential procedural improvements to be made in state indigent defense systems and proposes structural changes to state courts, bar organizations, and defense offices that could be adopted to streamline their practice and provide better service to defendants within the realities of their work environment today. In particular, this Part advocates for defenders or bar associations to see excessive caseloads distributed more evenly among different sources of counsel in a jurisdiction by incentivizing more judicial discretion and attorney participation in case assignments; to expand the role of non-lawyers in the representation process by reducing attorneys' supervisory duties with respect to certain types of particularly trained non-lawyers; to adopt a practice of preemptively informing defendants about available remedies for ineffective counsel even before the representation is concluded; to involve defendants in the discovery process and allow them to assist with their own cases when possible; and to embrace their roles as guardians of the Right to Counsel by making every effort to raise public awareness of representation issues both in and out of the workplace.

II. WHY INDIGENT REPRESENTATION ISSUES ARE WORTH FIXING

America's criminal justice system is vast, and any changes to criminal process serve to broadly impact American society as a whole. Yet the scale of the criminal justice system also highlights its primary weakness: it depends on many interrelated parts and parties, all functioning properly with a good faith interest in justice, in order to consistently deliver sound results.[30] In this way, deprivation of effective counsel is a cyclical problem—while it may

30. Brummer, *supra* note 8, at 114–20.

not always change the outcome of a given case, it warps the purpose and legitimacy of the criminal process itself, perpetuating entrenched shortcomings and harming people far outside the sphere of each individual matter.

A. Since Its Inception, the Right to Counsel Has Become an Indispensable Part of Criminal Procedure

Despite its importance to the justice process, the substantive right of criminal defendants to have a lawyer assigned to them developed fairly recently in America. Initially, the Sixth Amendment was construed only to prevent the denial of the right to have counsel present at trial—the idea of appointment of counsel was largely dismissed for its implications for state sovereignty.[31] Most of the development of the Right to Counsel occurred in the twentieth-century, when the United States Supreme Court began to determine that the appointment of counsel was constitutionally necessary in certain types of cases, such as those punishable by death, but the Court stopped short of broadly applying it to the states.[32] The prevailing mentality was that defendants could still defend themselves sufficiently well without an attorney, and in any case, states simply could not be expected to provide and fully fund attorneys for every single individual charged with a crime.[33]

It was not until *Gideon v. Wainwright*[34] that the Supreme Court found that due process necessitates defendants in state courts be afforded counsel when they cannot afford any themselves. In *Gideon*, the Supreme Court incorporated the Sixth Amendment into the Fourteenth Amendment's Due Process Clause and applied it to the states in a unanimous decision

31. Bill Piatt, *Reinventing the Wheel: Constructing Ethical Approaches to State Indigent Legal Defense Systems*, 2 ST. MARY'S J. LEGAL MAL. & ETHICS 372, 379 (2012) (evaluating the development of the Bill of Rights to conclude that the original purpose of the Sixth Amendment was not to guarantee the appointment of counsel, but rather to prevent the denial of counsel to defendants who could already afford it themselves).

32. *Id. See also* Powell v. Alabama, 287 U.S. 45, 71 (1932) (finding that a state's denial of counsel in a capital case in which the facts of the case made it impossible for defendants to get a fair trial without counsel amounted to a violation of the defendant's Fourteenth Amendment right to Due Process), *aff'd by* Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

33. *Contra* Betts v. Brady, 316 U.S. 455, 462 (1942) (deferring to judicial tradition by holding that defendants could effectively represent themselves and states could appoint counsel at their own discretion), *overruled by Gideon*, 372 U.S. at 339.

34. 372 U.S. at 344 (finding that effective counsel was fundamentally necessary to a fair trial).

recognizing the importance of counsel to the justice process, the innate procedural unfairness of forcing laypeople to defend themselves, and the necessity of having a functioning adversarial system in order to find the truth behind each matter.[35] In doing so, *Gideon* set an ambitious mandate that strongly corroborates many of the principles that have long been implicit in the Constitution—particularly in its acknowledgement of the practical value to be had in fairness, equality, and respect for every individual's contributions to society:

> That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. 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. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[36]

Since this landmark ruling, the scope of defendants' Right to Counsel has only been expanded, reaching the logical level of pervasiveness that *Gideon*'s sweeping language would suggest.[37] Subsequent decisions have embedded the Right to Counsel further into criminal procedure, entitling the defendant to counsel during police questioning or at the earliest stage in the proceedings, as well as to cases involving juveniles, misdemeanors, and a defendant's first appeal.[38] The requirement that the representation be "effective" has also been effectuated, but subsequent litigation[39] established a strong presumption of competent representation. Defendants have a difficult burden of proof to demonstrate ineffective counsel and have rarely succeeded

35. *Id.* at 345.

36. *Id.* at 344.

37. *See generally* JUSTICE DENIED, *supra* note 4, at 22–27 (discussing the expansion of the Right to Counsel).

38. *Id.* at 5, 26–27; Carrie Dvorak Brennan, *The Public Defender System: A Comparative Assessment*, 25 IND. INT'L & COMP. L. REV. 237, 240 (2015).

39. *See* Strickland v. Washington, 466 U.S. 668, 687, 689 (1984) (holding that, for a defendant to succeed on an ineffective assistance of counsel claim, a two-pronged test must be satisfied).

in post-conviction claims for a new attorney.[40] The inconsistency and impracticability of ineffective-counsel defenses is perhaps the biggest hurdle today for the development of any real remedies for deprivation of effective counsel.[41]

Despite providing a clear and decisive mandate fully imposing the Sixth Amendment on the states, *Gideon* left no guidelines for its implementation, and this open-endedness has been the principal cause of most of the disproportionate application or outright denial by states—particularly with respect to the legislative "power of the purse."[42] *Gideon* also left to states the discretion to decide what income level constitutes an "indigent" client, prompting both Congress and many state courts to set forth factors to be considered in determining indigence; such differing standards inevitably have resulted in disproportionate application of the term.[43] In this way, despite being a fundamental right, the fact that *Gideon*'s implementation is so intertwined with the political branches of government demonstrates how much actually achieving its mandate depends on appearing politically-beneficial to support—that is, making sufficient defense funding and regulation matters the public will vote for and elected officials will be likely to act on.[44]

B. Ineffective Indigent Defense Systems Harm More than Just Defendants

The extent of the societal harms directly or indirectly implicated by ineffective indigent representation warrant proportionately widespread and decisive action to redress them. Though the most direct and profound harms of receiving ineffective representation are borne by the defendants themselves, failure to support state indigent defense systems also harms defense

40. JUSTICE DENIED, *supra* note 4, at 41–42.

41. *Infra* pt. III.

42. *See generally* JUSTICE DENIED, *supra* note 4, at 10–11, 50–53 (discussing insufficient funding as a problem that contributes to the need for reform of indigent defense systems in the wake of *Gideon*).

43. Amanda Myra Hornung, *The Paper Tiger of* Gideon v. Wainwright *and the Evisceration of the Right to Appointment of Legal Counsel for Indigent Defendants*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 495, 517–20 (2005) (explaining the disparities among different states' tests for indigency).

44. *See* Baxter, Gideon*'s Ghost*, *supra* note 18, at 354, 364 (discussing the role of public support in political decision-making and "politics as usual" as a factor for contributing to the inhibition of indigent defense system reform).

attorneys, the reputation of the legal profession, and the American public as a whole.

The principal risk to defendants, of course, is that inadequate representation will result in a wrongful conviction. America still produces wrongful convictions at an alarming rate,[45] and while most cannot be definitively attributed to ineffective counsel, the quality of the defendant's representation is nearly always a factor.[46] The mere fact that anyone has been convicted of crimes they did not commit should signify that our criminal justice system is not perfect, and thus any efforts that would tend to prevent such miscarriages of law again in the future should be taken; one would think ensuring both sides have competent lawyers would be a good starting point.

A less-certain, but likely more prevalent, problem is that ineffective representation often forces innocent defendants to plead guilty due to their attorneys' inability to effectively defend them.[47] Over ninety percent of defendants prosecuted ultimately accept plea bargains, oftentimes entering them spontaneously, on the advice of attorneys who had little time to seriously gather evidence or formulate a defense for each case.[48] It is not uncommon for defenders to have dozens of cases pending each day and spend mere minutes with each client before trial.[49] As a result, defenders are often forced to approach cases that do not seem promising at first impression from the mindset of seeking plea deals, rather than acquittals; coupled with the massive disparity in resources and bargaining power between defenders and prosecutors,[50] this

45. *See* Newark Ctr. for Sci. & Soc'y at Univ. of Cal. Irvine, Univ. of Mich. Law Sch. & Mich. State Univ. Coll. of Law, *Cases*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited Feb. 10, 2019) (documenting more than two-thousand known wrongful convictions in America since 1989).

46. JUSTICE DENIED, *supra* note 4, at 44–47 (inferring from the results of studies regarding exonerated felons that, while exactly which cases would have been decided differently with effective counsel cannot be determined, the fact that failure to investigate vital evidence was the most frequent cause of wrongful convictions strongly suggests that many such felons would not have been found guilty with more effective counsel).

47. Thompson, *supra* note 10, at 732.

48. Perez, *supra* note 11, at 1539 (explaining that the Sixth Amendment's right to counsel should attach to "every critical stage of the prosecution . . . because ninety-five percent of convictions end in plea bargains").

49. *Id. See also* Bright & Sanneh, *supra* note 10, at 2164–65 ("Many poor people do not see a lawyer until moments before the court proceeding in which their cases are resolved.").

50. Bright & Sanneh, *supra* note 10, at 2152, 2156–59 (describing how prosecutorial discretion and access to investigative resources gives prosecutors significant leverage in settlement negotiations relative to defense attorneys).

tendency reduces all too much of state criminal procedure to "a system of pleas, not a system of trials,"[51] with the Right to Counsel providing "a guarantee of little more than a companion at arraignment."[52]

Yet even companionship has not always been provided in practice, since the lack of procedural safeguards regarding the manner of actually assigning attorneys often puts defendants making consequential decisions before a court without first receiving an attorney.[53] Despite being entitled to receive a requested attorney within a reasonable time after "the initiation of adversary judicial proceedings,"[54] and before any "critical stages" of a criminal proceeding,[55] some judges all but take advantage of defendants' lack of representation by processing them as quickly as possible to clear the cases from their dockets.[56] Whether the defendants received any advising beforehand is an afterthought.[57]

Even when counsel is provided, an overworked attorney may actually be worse for a defendant than no attorney at all. When excessive caseloads cause defenders to decline or withdraw from cases to avoid conflicts of interest, those cases must be delayed or transferred to another attorney.[58] Incarcerated defendants will then sit in prison at the taxpayers' expense until an attorney is available, disrupting their lives and risking the loss of jobs, property, and social opportunity with no judicial recourse.[59] This time spent awaiting trial causes defendants to receive effectively

51. Lafler v. Cooper, 566 U.S. 156, 169 (2012).

52. Stephanie L. McAlister, *Between South Beach and a Hard Place: The Underfunding of the Miami-Dade Public Defender's Office and the Resulting Ethical Double-Standard*, 64 U. MIAMI L. REV. 1317, 1351 (2010).

53. *See* Michigan v. Jackson, 475 U.S. 625, 632 (1986) (holding that a defendant's request for counsel is presumed at every critical stage of the prosecution), *overruled by* Montejo v. Louisiana, 556 U.S. 778, 797 (2009) (holding that the *Jackson* bright-line rule is unnecessary to ensure involuntary confessions are not erroneously admitted at trial).

54. *Jackson*, 475 U.S. at 629–30 n.3.

55. Coleman v. Alabama, 399 U.S. 1, 7 (1970) (defining "critical stages").

56. *See* Bright & Sanneh, *supra* note 10, at 2156–57 (observing that some judges give prosecutors disproportionate control over trial procedure or outright accept their recommendations). *See also id.* at 2162–63 (recounting instances of judges encouraging unrepresented defendants to plead guilty and noting that unrepresented defendants plead guilty more often).

57. *Id.* at 2162.

58. Baxter, *Too Many Clients*, *supra* note 9, at 94–95.

59. Bright & Sanneh, *supra* note 10, at 2161–62, 2172. *See* Cara H. Drinan, *Getting Real About* Gideon*: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309, 1336 (2013) (quoting a public defender who says defenders have to prioritize legal representation and justice for people currently in custody, while representation of those not in custody will have to be delayed).

longer sentences, potentially serving even more time than the highest possible sentence they could have received if convicted.[60] In this way, having an underequipped system punishes defendants for exercising their right to an attorney by strongly incentivizing them to waive that right and accept an otherwise-contestable conviction for the sake of convenience and expediency.[61]

Indigent defense underfunding also greatly harms the attorneys themselves, doing much to impede and discourage lawyers from working in what should be one of the noblest fields in the profession. The abundance of work and lack of support renders the modern public defense field difficult, demanding, and unwelcoming to new attorneys, and offers few opportunities for career advancement.[62] The unfriendly work environment becomes a vicious cycle, discouraging new attorneys from working in indigent defense and often leading to a perception within the legal profession that public defense is a dead-end career suitable mainly for fresh law school graduates and naïve idealists.[63] Compounding this stigma is the way ineffective counsel serves to harm the public's perception of the legal profession. Lawyers are already broadly distrusted in America today,[64] yet in the criminal justice system, where the stakes are often higher and more permanent than other areas of law, state bars seem content to let these

60. Bright & Sanneh, *supra* note 10, at 2160–62 (describing the divergent experiences in criminal defense between clients who can afford their own attorneys and those who are assigned counsel).

61. *Id.* at 2162–63.

62. *See generally* Brummer, *supra* note 8, at 185 (discussing the negative, lasting implications of underfunding public defenders and the limitations this has on representation and heavy caseloads).

63. *See* Baxter, Gideon*'s Ghost*, *supra* note 18, at 350–51 (attributing the fact that many indigent clients do not take their public defenders seriously to the high turnover rate at public defenders' offices, which often results from the low salaries that tend to attract recent law school graduates looking to gain trial experience).

64. The theme of attorneys being generally greedy, duplicitous, amoral, or corrupt has been recurrent in books, television, and films for decades. In recent years, however, the degree to which the public conflates these perceptions with reality seems to have reached critical mass. *See* Megan Brenan, *Nurses Again Outpace Other Professions for Honesty, Ethics*, GALLUP (Dec. 20, 2018), https://news.gallup.com/poll/245597/nurses-again-outpace-professions-honesty-ethics.aspx (finding that only nineteen percent of Americans find lawyers' honesty and ethical standards to be high or very high); *see also* Hannah Pollack, *Doctors, Military Officers, Firefighters, and Scientists Seen as Among America's Most Prestigious Occupations*, THE HARRIS POLL tbl. 2a (Sept. 10, 2014), https://theharrispoll.com/when-shown-a-list-of-occupations-and-asked-how-much-prestige-each-job-possesses-doctors-top-the-harris-polls-list-with-88-of-u-s-adults-considering-it-to-have-either-a-great-deal-of-prestige-45-2/ (finding that thirty-one percent of adults would discourage a child from pursuing the legal profession).

misconceptions spread. This sort of brain-drain builds upon itself, rendering entrenched problems all the more difficult to address, and thus adding urgency to efforts to make the field more attractive for new lawyers.

Ironically, it is the attorneys' own ethical duties and their inability to compromise them that represent one of the biggest burdens to the overworked defender. The ABA Model Rules of Professional Conduct make no exception for indigent defense; all attorneys are equally bound by their professional standards regardless of caseload.[65] Furthermore, excessive caseloads directly implicate a variety of professional rules, including the basic duties of competence, diligence, professional advising, communications, and avoidance of conflicts of interest.[66] Conflicts of interest in particular are a primary concern, since the detection and prevention of potential issues through constant workload evaluations strains resources further, which in turn creates even more potential conflicts.[67] Oftentimes, the only way the conflict can be resolved is by declining new cases or transferring them to another attorney when available.[68] Moreover, all attorneys have an independent professional obligation to render effective, zealous, conflict-free counsel;[69] "the basic requirement of due process in our adversarial legal system is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law."[70] Yet in practice, not only are these essential elements of effective representation frequently unmet, but ethical violations in general are both more prevalent and harder to alleviate among indigent defenders compared to

65. Baxter, *Too Many Clients*, *supra* note 9, at 94.

66. *Id. See also* MODEL R. PROF'L CONDUCT 1.1, 1.3, 1.4, 1.7, 2.1, 8.4 (AM. BAR ASS'N 2018) (requiring lawyers to provide competent representation, to act diligently, to communicate promptly with clients, to avoid conflicts of interest, to act as an advisor, and to avoid all misconduct).

67. Baxter, *Too Many Clients*, *supra* note 9, at 94 (quoting *In re Edward S.*, 92 Cal. Rptr. 3d 725, 747 (Cal. Ct. App. 2009), which noted that "a conflict of interest is inevitably created when a public defender is compelled by his or her excessive caseload to choose between the rights of the various indigent defendants he or she is representing").

68. *Id.* at 93–95.

69. *See generally id.* at 91–94 (discussing "relevant ethical rules relating to indigent defense by applying them to an ineffective assistant of counsel case"); *see also* MODEL R. PROF'L CONDUCT 1.1.

70. Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985).

other legal professionals.[71] As a result, lawyers entering the indigent defense field with an honest public-service mindset are strongly tempted to set their principles aside to meet the constraints of the work environment.[72]

The public as a whole bears some costs as well, though only economic costs, such as the costs of housing prisoners, are easily quantifiable. America already has a larger per capita prison population than nearly any other nation, and its taxpayers bear those costs,[73] despite American prisons' poor records on redirection, rehabilitation, and prevention of recidivism.[74] Moreover, convicts are deprived of many other opportunities to contribute to society for the rest of their lives, as a criminal conviction can foreclose future opportunities to receive jobs and public benefits and can revoke voting rights or immigration status as well.[75] Mandatory minimum sentencing laws only make things worse, limiting courts' sentencing discretion for the sake of promoting quick decisions on long incarcerations, and systemic racism in policing and sentencing has filled American prisons disproportionately with minority convicts, further disrupting affected families and communities.[76]

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71. *See* Primus, *supra* note 25, at 1799–1800 (observing, in particular, that "the judiciary has stood by for decades while . . . [attorneys] who routinely violate their ethical duties to their clients continue to take on indigent defense cases").

72. For example, the Florida Supreme Court urged trial courts to take appointment of appellate counsel seriously because:

> [a] perfunctory appointment of counsel without consideration of counsel's ability to fully, fairly, and zealously advocate the defendant's cause is a denial of meaningful representation which will not be tolerated. The gravity of the charge, the attorney's skill and experience and counsel's positive appreciation of his role and its significance are all factors which must be in the court's mind when an appointment is made.

Wilson, 474 So. 2d at 1165.

73. E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUSTICE STATISTICS IN U.S. DEP'T OF JUSTICE, NCJ 250229, PRISONERS IN 2015 1 (2016), https://www.bjs.gov/content/pub/pdf/p15.pdf; Chris Mai & Ram Subramanian, *The Price of Prisons: Examining State Spending Trends, 2010–2015*, VERA INST. JUST., May 2017, at 1, 8 tbl. 1, https://storage.googleapis.com/vera-web-assets/downloads/Publications/price-of-prisons-2015-state-spending-trends/legacy_downloads/the-price-of-prisons-2015-state-spending-trends.pdf; Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POLICY INITIATIVE (June 2018), https://www.prisonpolicy.org/global/2018.html.

74. *See* JUSTICE DENIED, *supra* note 4, at 71 (identifying areas in which crime has decreased even as arrests have gone up and connecting the increases to deliberate "tough-on-crime" policies).

75. *Id.* at 72.

76. Bright & Sanneh, *supra* note 10, at 2154–56.

The underfunding of state indigent defense systems also harms the reputation of the criminal justice system itself. The public often perceives defenders as less qualified or competent than other legal professionals. One defender observed that his clients, when asked at arraignment if they have an attorney, would frequently respond, "No, I have a public defender."[77] This sort of perception renders defenders unpopular or disrespected in the eyes of the public, and it opens them to ridicule or vilification by political and media figures who can easily portray them as unscrupulous for defending accused criminals.[78] This not only hurts the morale of the attorneys, but it also feeds a vicious cycle where every failure to do their job adequately with the funding at hand serves as political justification for further budget cuts; if defenders do well, the thinking goes, then they don't need more funding, and if they do poorly, they don't deserve more funding.[79]

Lastly, such criminal justice shortcomings also damage America's international credibility and influence, hampering national efforts to promote equal justice and democracy worldwide.[80] America's unwillingness to provide adequate counsel is fundamentally a cultural problem that reflects our criminal justice priorities. When people—both inside and outside the country—see our lack of enthusiasm for a fair criminal process, their perceptions of the criminal justice system are influenced in ways that can come full circle to ultimately harm themselves and the nation as a whole.[81] In this way, denial of effective counsel harms even defendants who are not represented by assigned counsel, as do the resultant regressions of other aspects of criminal law and policy both here and abroad.

77. Piatt, *supra* note 31, at 387.

78. Primus, *supra* note 25, at 1769–71.

79. *Id.* at 1183–89.

80. See Brummer, *supra* note 8, at 107–12 (exploring the consequences of public defender excessive caseloads and emphasizing that they erode the integrity, credibility, and moral authority of our legal system).

81. *Id.*

III. STATE ASSIGNED-COUNSEL SYSTEMS AND PRIOR REFORMS: HOW PAST EFFORTS TO IMPROVE INDIGENT REPRESENTATION HAVE LEFT DEFENDERS WITH THE INITIATIVE TO ACT

It can be disheartening to realize how far America still has to go in order to see *Gideon* fully implemented, even though more than fifty years have passed since it was decided. States have yet to settle on any one uniform type of indigent criminal defense system, let alone one that can handle a modern volume of cases.[82] Legal scholars and professional organizations, to the extent that they agree on indigent representation being a problem, have no realistic means of compelling state legislatures to intervene.[83] Litigation concerning the requisite level of effectiveness for counsel has largely come to an impasse, leaving defendants with no feasible manner of post-conviction remedy for deprivation of counsel.[84] And as state sensibilities shift, even the most successful legislative remedies may be reversed if they fail to capture the public's favor.[85] Thus, for the most part, defenders remain the only force in any given justice system both able and willing to look out for defendants' interests.

A. The Organization of State Public Defense Systems Render Them Innately Susceptible to Political Influence

Effective counsel begins with the process that controls and assigns counsel. Without adequate procedural checks to ensure defendants can fully exercise their rights, backed by sufficient funding and justice-minded judges and prosecutors willing to ensure the process operates properly, defendants remain vulnerable to exploitation at every step.[86] Yet due to their innate lack of independence and oversight, even the better indigent defense systems are predisposed to hold the quality of the actual representation as the least important factor in their operations.

82. Piatt, *supra* note 31, at 384.

83. *But see* JUSTICE DENIED, *supra* note 4, at 130 (explaining that while the appropriation of funds is normally a legislative task that the judiciary has no control over, "some courts have declared an inherent authority to compel the legislature to provide adequate appropriations in order to ensure that the judicial branch remains viable").

84. *See id.* at 129 ("On balance, however, it is undoubtedly difficult to achieve systematic indigent defense reform when issues are litigated in post-conviction proceedings.").

85. *Id.* at 154–55 (describing obstacles encountered when legislators attempted reform).

86. Brummer, *supra* note 8, at 113–17.

Thus, defendants are reduced to collateral as their attorneys are forced to jockey with one another to appease judges, acquire new cases, maintain the flow of work, and keep their jobs.

All states have formed their indigent defense systems around some variation of three broad categories.[87] The most common format is the public defender model, in which courts assign cases to a dedicated public defense office, staffed by attorneys working as full- or part-time salaried employees, that provides most of the defense services in a jurisdiction.[88] Another type is the contract model, where jurisdictions contract with individually bidding attorneys or offices to take cases, usually in bulk for a flat rate.[89] Both contract and public defender models are usually accompanied by a secondary source of private attorneys serving as "conflict counsel" when the primary defender's office cannot accept the case due to a conflict of interest.[90] Lastly, assigned-counsel models appoint private attorneys on a case-by-case basis, usually from a registry of local counsel that attorneys can sign up for voluntarily.[91] Many states use hybrid systems to at least some degree, with assigned attorneys usually serving as conflict counsel to a jurisdiction with another primary defense service; very few jurisdictions use discretionary assigned-counsel as their primary arrangement.[92]

Unfortunately, the tripartite nature of the U.S. Government leaves the court systems tethered to the legislature for funding.[93] Every type of indigent defense system is subject to political influence in other ways as well. Public defender models inescapably deal with political influence in hiring defenders; not only are judges individually involved in the hiring of house counsel, but jurisdictions are overseen by a political appointee in the form of a chief public defender who handles the hiring and training of individual attorneys, as well as their training and general work-distribution.[94] Due to this hierarchy that is unique to public defender models, it is not uncommon for one jurisdiction's public defenders to have radically different agendas or priorities than

87. Piatt, *supra* note 31, at 384.
88. *Id.* at 385.
89. *Id.* at 392.
90. *Id.* at 386.
91. *Id.* at 388.
92. *Id.* at 395.
93. JUSTICE DENIED, *supra* note 4, at 130.
94. Piatt, *supra* note 31, at 385.

another's.[95] Internal disagreements concerning indigent defense standards can lead to disputes among defenders themselves, or discourage other attorneys from working in indigent defense in that area.[96] In this way, while public defender models are the most widely-used and financially-efficient type of indigent defense system, their functionality still hinges upon having independent and justice-minded leadership.[97]

By their very nature, assigned-counsel systems are necessarily always subject to judicial favoritism or undue influence because of courts' unilateral discretion in deciding which attorney will be assigned when the defendant requests one, coupled with the lack of any way to scrutinize that decision.[98] While some level of discretion is present—and likely necessary—in all indigent defense systems, unfettered discretion in case assignment leaves defendants with no way to prevent courts from assigning lawyers based on factors other than their competence.[99] To prevent the appearance of favoritism, many jurisdictions that assign attorneys individually make their selections through a randomly generated "lottery" or rotating "wheel" of attorneys, but even having these mechanics in place does not prevent a court from making its own decisions regardless of the selection process.[100] The typical lack of centralized training or standards for registered attorneys in an assigned-counsel system also provides fewer safeguards against attorney incompetence than a public defender model, further incentivizing judges to appoint attorneys they know personally instead of choosing someone more appropriate from the registry.[101] Moreover, because private defenders in an assigned-counsel system depend upon the courts for the success of their practice, they are also encouraged to appeal to judges directly for appointments, further removing the quality of the representation from the equation of where cases should go.[102]

95. *Id.* at 388, 390–91.
96. *Id.* at 388 (recounting instances of public defender strikes and protests).
97. *Id.* at 385.
98. *Id.* at 389–92.
99. *Id.* at 391.
100. *Id.*
101. *Id.* at 390.
102. Baxter, Gideon*'s Ghost*, *supra* note 18, at 364–65 (describing instances of discretionary assignment of counsel limiting indigent defense reforms by encouraging both judges and defenders to rely on one another for case assignment and job appointments).

Contract models are similarly vulnerable to political influence and favoritism due to the role of political branches in arranging attorneys, though they also tend to centralize more power in the defenders' hands instead of the courts'.[103] County governments usually initiate the contracts on their own, but leave the courts to distribute cases among contracted defenders.[104] Besides creating the appearance of a patronage relationship, contract systems incentivize attorneys to essentially bid against one another for the cheapest possible service, dragging the quality of representation down overall.[105] Without any formal standards for conduct or attorney qualifications in setting terms, a contract system leaves the representation entirely in the hands of contracting attorneys—though this can also be an advantage to a competent, well-equipped criminal defense office.[106]

What, then, would be the most ideal public defense system, one completely free from political influence? The ABA examined this question in 2002 with the publication of its *Ten Principles of a Public Defense Delivery System*[107] in an attempt to inspire the public and state legislatures to confront the inadequacies of their own indigent defense priorities. Its conclusions, which have become widely accepted and correlate with other industry studies,[108] bear repeating here for the sake of contrasting them with how state indigent defense systems actually function:

> 1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.
>
> 2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.
>
> 3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.

103. Piatt, *supra* note 31, at 392–93 (crediting the rise in contract models with a reduction in public defender caseloads).

104. *Id.* at 392–95.

105. *Id.* at 394.

106. *Id.*

107. TEN ABA PRINCIPLES, *supra* note 21, at 1.

108. JUSTICE DENIED, *supra* note 4, at 33 (characterizing the *TEN ABA PRINCIPLES* as being widely accepted in public discussions of the indigent criminal defense field).

> 4. Defense counsel is provided with sufficient time and a confidential space within which to meet with the client.
>
> 5. Defense counsel's workload is controlled to permit the rendering of quality representation.
>
> 6. Defense counsel's ability, training, and experience match the complexity of the case.
>
> 7. The same attorney continuously represents the client until completion of the case.
>
> 8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.
>
> 9. Defense counsel is provided with and required to attend continuing legal education.
>
> 10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.[109]

Unfortunately, no system used by any state today meets all of these factors, and many fail all of them to at least some extent.[110] As such, in most jurisdictions, only the defenders alone are in a position to resist attempts by their leadership to drag down their ability to serve their clients, though that may not always be possible when excessive caseloads and underfunding are factors. Interestingly, though, there is a bright spot on the horizon for at least the funding aspect of public defense independence. In a series of recent cases, some state courts have circumvented politics by determining that their judiciaries have the inherent power to compel the legislature to appropriate sufficient funds for indigent defense when it will not.[111] While other states have found that their courts categorically lack this authority,[112] this may prove to be an

109. TEN ABA PRINCIPLES, *supra* note 21, at 1.

110. Baxter, *Too Many Clients*, *supra* note 9, at 94.

111. JUSTICE DENIED, *supra* note 4, at 130–34 (explaining the Mississippi, Louisiana, New Mexico, and Oklahoma Supreme Courts have all found that their courts have the inherent authority to enforce the Right to Counsel by ordering the expenditure of state funds).

112. *Id*. at 132–34 (explaining that while the Florida Supreme Court found that it lacks authority to compel the legislature to appropriate funds for indigent defense at all, New Hampshire, at least, determined that it is the judiciary that bears the burden of seeing the

important route for litigation in the future. But until such time as all states adopt an adequately funded indigent defense framework that allows cases to go where they need to, it is individual defenders who must lead the charge for defendants' rights themselves by placing the integrity of the process above their own convenience or the courts'.

B. Without Federal Involvement, the Reach of Practical State Standards Remains Localized and Participatory

The basic sources of the problems facing indigent defense are not new, and industry insiders have fought to raise awareness and inspire action for decades.[113] The blowback from concerned stakeholders has at times gotten through to those in a position to change these systems, resulting in much legislation over the years as well as internal attempts at regulating indigent defense by the ABA and other organizations.[114] Yet despite the Right to Counsel stemming from the U.S. Constitution, the ambiguity of *Gideon* and the nature of federalism itself demand that states retain the freedom to decide how to implement the Sixth Amendment so long as they meet its baseline requirements.[115] In this way, all progress toward the development of better indigent criminal defense systems has remained localized, limited, and revocable as political priorities shift.[116]

In many cases, otherwise successful state-level actions to standardize indigent defense systems have either failed to pass, been ignored by other jurisdictions despite the systems' effectiveness, or been undone after taking effect by budget cuts or policy changes. For instance, Mississippi has repeatedly failed to pass increases in indigent defense spending since 1998, and today its public defender offices remain among one of the most underfunded and inadequate systems among all the states.[117] Similarly, after Connecticut increased its defense funding and

Right to Counsel enforced, though it also could not compel the state legislature to comply with its ruling and appropriate funds).

113. Peter A. Joy, *Unequal Assistance of Counsel*, 24 KAN. J.L. & PUB. POL'Y 518, 531 (2015).

114. *See generally id.* (describing how unequal assistance of counsel for black people and poor people leads to unequal justice); Primus, *supra* note 25, at 1800–02.

115. JUSTICE DENIED, *supra* note 4, at 132.

116. Thompson, *supra* note 10, at 725–26.

117. JUSTICE DENIED, *supra* note 4, at 154.

imposed new caseload restrictions in response to litigation, these changes were undone due to budgetary cuts in the 2008 recession and were never reinstated.[118] Many such changes were made in response to reports from state-authorized independent oversight commissions, formed to report on the function and effectiveness of their defense systems.[119] But while some of these commissions remain active to this day, they have been limited to advisory roles, so legislatures have no obligation to act on their recommendations no matter how bad things get.[120]

In contrast with state solutions, legal industry organizations have been largely uniform in their calls for improvements to indigent defense services; though since these calls usually amount to more advocacy than action, they have succeeded mainly in setting goals for the achievement of *Gideon*, and not actually helping attain them.[121] The ABA has long recognized the shortcomings of the indigent defense field, and it has, on multiple occasions, attempted to unify the priorities of the legal profession through the issuance of national standards for criminal justice that specifically address the role of public defenders.[122] The first such effort came in 1992 with its *ABA Standards for Criminal Justice Providing Defense Services*, which, among other things, called for sustaining compliance with the Rules of Professional Conduct and set caseload standards that recommended a maximum of 150 felony cases, 400 misdemeanors, or 200 juvenile cases per attorney at once.[123] These standards later formed the basis of the ABA's *Ten Principles of a Public Defense Delivery System* in 2002.[124]

Other legal organizations have put forth similar standards, and all have recognized that state indigent defense systems suffer similar problems. The National Legal Aid and Defender Association (NLADA) in 1994 published its *Performance Guidelines for Criminal Defense Representation*, a comprehensive

118. Thompson, *supra* note 10, at 724.
119. JUSTICE DENIED, *supra* note 4, at 148, 152.
120. *Id.* at 157–58.
121. *Id.* at 32.
122. *Id.*
123. AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES 72 (3d ed. 1993) [hereinafter ABA, STANDARDS] (listing the National Advisory Commission's recommended caseload maximums for felonies, misdemeanors, juvenile cases, mental commitment cases, or appeals per year).
124. *Id.*; TEN ABA PRINCIPLES, *supra* note 21, Introduction.

set of internal guidelines that have also gained wide acceptance.[125] More recently, in 2009, NLADA's National Right to Counsel Committee and The Constitution Project, an independent nonprofit commission comprised of defenders and scholars, produced *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*,[126] probably the most comprehensive examination of all aspects of the representation crisis to date. Yet despite a resurgence of interest in effectuating *Gideon* in 2010—two years before the fiftieth anniversary of the decision—that produced little more than renewed awareness among defenders, no other major nationwide studies into the state of the Right to Counsel are presently underway.[127]

Today, ABA reports persist in addressing the breadth of the problems and proposing solutions, but even the most optimistic reports acknowledge that more funding is needed.[128] While individual states have a variety of differing standards at present, the disproportionate application of the Right to Counsel renders further deprivation of defendants' rights inevitable until federally imposed standards are at last developed.[129] It falls on individual attorneys—on both sides of every case—to stand above and beyond what their jobs require of them in order to ensure the integrity of the criminal process.

C. Defendants Face Unreasonably High Burdens for Proving Ineffective Counsel

On an individual basis, deprivation of effective counsel would be manageable if defendants could reliably prove when their counsel was ineffective on appeal in order to reverse their wrongful convictions or seek new trials. However, when the Supreme Court addressed what exactly constitutes "effective" counsel in the 1984

125. NAT'L LEGAL AID & DEF. ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEF. REPRESENTATIONS 1 (Defender Services Advisory Group 2015) (1994), https://www.fd.org/sites/default/files/cja_resources/federal-adaptation-of-nlada-performance-guidelines-for-criminal-defense-representatives_0.pdf ("These standards should be used to assist appointed counsel in providing services that are consistent with the generally accepted practices of the legal profession.").

126. JUSTICE DENIED, *supra* note 4.

127. Thompson, *supra* note 10, at 727–29.

128. Benner, *supra* note 6, at 32.

129. JUSTICE DENIED, *supra* note 4, at 58.

case *Strickland v. Washington*,[130] it instead created what is perhaps the largest barrier to ineffective counsel remedies for defendants: an extremely high burden of proof to overcome a strong presumption of competence on the defender's part.[131] While *Strickland* remains in place, most remedies obtainable through litigation will likely remain inconsistent and limited in scope.[132]

In *Strickland*, the Court set forth a two-pronged test for demonstrating the ineffectiveness of assigned counsel:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[133]

Removing any ambiguity that this test requires defendants to prove their attorney's conduct was actually what caused their conviction, *Strickland*'s 8-1 majority also held "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[134] Additionally, *Strickland* established that counsel is held to a "reasonably effective assistance" standard[135] and is presumed competent, requiring the defendant to affirmatively prove otherwise.[136]

To illustrate how difficult this test is to meet, one need look no further than the ridiculous situations it has produced, where clients have been denied remedies for conduct by their attorneys

130. 466 U.S. 668, 696 (finding that a defendant seeking post-conviction relief for ineffective counsel bears "the burden of showing that the decision reached would reasonably likely have been different absent the errors").

131. *Id.* at 689.

132. Robin Adler, *Enforcing the Right to Counsel: Can the Courts Do It? The Failure of Systemic Reform Litigation*, 2007 J. INST. JUST. & INT'L STUD. 59, 60–62 (describing the *Strickland* standard as a substantial bar to reform through litigation).

133. *Strickland*, 466 U.S. at 687.

134. *Id.* at 694.

135. *Id.* at 687.

136. *Id.* at 688.

that would, in private practice, likely be professional malpractice. For example, in one case, a defendant whose attorney slept through part of the trial was unable to overturn his conviction due to ineffective counsel because he could not prove that the attorney would have done better if he were fully awake during the proceedings.[137] Similarly, defenders have shown up to court while intoxicated, failed to present any evidence, ignored vital precedent, and fundamentally misunderstood the legal issues present in their cases, yet because it could not be established that they would have done any better absent the egregious conduct, their clients were unable to demonstrate that the counsel was "ineffective" per the current standards.[138] Moreover, even when this burden has been met, the most defendants will receive is a new trial after what is usually years of litigation.[139] The folly of the *Strickland* decision is that it effectively forces defendants to show the representation they received was sufficiently poor as to affect the outcome of their trial, yet it does not then give them any assurances against the same outcome reoccurring, instead leaving them to simply roll the dice again with a different—not necessarily better—attorney.[140]

With the *Strickland* barrier intact, other avenues of indigent defense reform litigation on the nationwide scale have largely come to dead ends. Subsequent cases, most notably *Strickland*'s sister case *United States v. Cronic*,[141] have clarified that situations exist where a defender's conduct can be presumed ineffective,[142] such as

137. McFarland v. State, 928 S.W.2d 482, 505–06 (Tex. Crim. App. 1996).

138. Thompson, *supra* note 10, at 737.

139. Adler, *supra* note 132, at 60–61.

140. *Id.*

141. 466 U.S. 648, 659–60 (1984). Though *Cronic* itself dealt with a post-conviction claim, its third presumption has been used in arguments for pre-conviction ineffective assistance of counsel claims as well. *See* Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988) (setting forth the standard of proof for prospective relief in a pre-conviction ineffective counsel claim); JUSTICE DENIED, *supra* note 4, at 112–13 (interpreting *Luckey* to apply to pre-conviction class action claims).

142. *Cronic*, 466 U.S. at 659–60. The Court explained three situations where ineffective counsel is presumed:

> [I]f the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . [Finally,] when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate. . . .

Id.

when the defendant is functionally denied counsel entirely, but because the underlying presumptions of competence must still be effectuated, defendants have rarely prevailed with this defense.[143] A few state courts have also preemptively addressed public defender caseload and underfunding problems, finding the systems themselves unconstitutional when they do not provide adequate funding, but this has not stopped them from relapsing into the same conditions.[144] Litigants for pre-conviction ineffective assistance of counsel claims have seen some success recently, particularly in cases of egregious violations, but they still face high financial barriers of entry, and the impact of such claims remain narrow in scope.[145] While litigating ineffective counsel on an individual level is too costly and inefficient to effect large-scale change, class-action motions for ineffective counsel can sometimes allow clients to get around the initial monetary hurdle barrier, as well as effect change on a larger scale.[146] Trying to sue defenders directly under federal malpractice statutes is also a non-starter because, despite functionally being state agents, public defenders are not typically considered to be acting under color of state law in the course of their services.[147]

As such, the most promising reforms obtainable through litigation are likely court-imposed standards for indigent defense. Previously, state courts have alleviated representation problems by imposing caseload limitations and pay increases and by lowering the burden of proof for a *Strickland* claim.[148] However, thus far, state remedies obtained through litigation remain narrow in scope and weak in enforcement, and they have still failed to address the underlying reasons why underfunding and excessive caseloads exist in the first place.[149]

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143. Hornung, *supra* note 43, at 512–13.

144. *See, e.g.*, Lauren S. Lucas, Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1738, 1742–43 (2005) (citing an Oklahoma Supreme Court case in which the court found a $3,200 statutory cap on attorneys' fees for public defenders unconstitutional, but which failed to implement oversight or enforcement mechanisms).

145. Vidhya K. Reddy, *Indigent Defense Reform: The Role of Systemic Litigation in Operationalizing the* Gideon *Right to Counsel* 1, 18 (Wash. Univ. Sch. Law, Working Paper No. 1279185, Oct. 7, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1279185.

146. *Id.*

147. Hornung, *supra* note 43, at 532–33.

148. *Id.* at 536–39.

149. Lucas, *supra* note 144, 1731–32; *see also* Adler, *supra* note 132, at 67–70 (describing state judicial responses to excessive caseload problems in different jurisdictions).

IV. THE NEED FOR INTRA-JUDICIAL REFORM: PROMOTING ACCESS TO JUSTICE WITH OR WITHOUT LEGISLATIVE ASSISTANCE

Indigent criminal defense in America fails to live up to its expectations on many fronts, and while most of the industry's problems could be mitigated by additional financial and regulatory support, that may not be an option at present. Yet any criminal case is shaped by much more than the laws and resources governing it—it is the efforts of the attorneys on the ground, and the court procedures governing the case, that ultimately amount to whether the defendant's constitutional rights are satisfied. In this way, criminal procedure affords many different ways for all parties involved to contribute to the efficiency and legitimacy of the case within their own individual roles. The courts have a significant ability to influence the circumstances defenders work in, from attorney assignment to sentencing.[150] State bar associations may still self-regulate local practitioners, and their bolstering the attractiveness and accessibility of the public defender profession can go a long way toward setting the stage for legislative reforms. And defenders, for their part, need to consider novel ways of reducing excessive caseloads and finding better ways to serve their clients within the constraints of their workloads.

A. State Courts and Bar Associations Can Play a Role in Distributing Excessive Defender Caseloads, Incentivizing Attorney Participation, and Inspiring Passion for Public Service

Judicial discretion is perhaps the most efficient way of shrinking excessive caseloads before they arise. Courts could preempt potential representation issues right out of the gate by taking the workloads, capabilities, and reputations of the individual defenders into account when assigning them clients, including being more flexible in delaying or rescheduling cases as necessary when defense counsel needs more time to adequately prepare.[151] Most jurisdictions use several different sources of counsel, and the courts' discretion to choose where to send cases is

150. Baxter, Gideon*'s Ghost*, *supra* note 18, at 364.

151. JUSTICE DENIED, *supra* note 4, at 82–84 (explaining that, while the process of appointment of counsel should be fairly tailored to discourage the appearance of favoritism or patronage, most courts still lack a uniform system of defender assignment).

very broad, yet courts rarely take the present caseloads of the attorneys into consideration when assigning counsel, except in the case of conflicts of interest.[152] Courts could actually be said to have an interest in assigning cases to the overburdened attorneys, since they would be more likely to dispense with the case quickly to clear it off the docket.[153]

This mentality of treating cases as an assembly-line process rather than the monumentally life-altering events they are is a disservice to defendants who haven't even been convicted yet, and it breeds judicial apathy and disinterest in justice.[154] Achieving a functioning adversarial system requires a willingness to put the well-being of every defendant before the convenience of the court. Prosecutors and judges must remember that their role is not to merely sentence every person brought before them, but to find the truth behind each criminal accusation, guarantee the fundamental rights of the defendants involved, and serve the public and the rule of law.[155] Indeed, the point of an adversarial system is to provide the best structure to accomplish these ideals, and all parties involved should remember this dynamic at the outset of a case, as well as how inadequate defense counsel undermines the relative parity adversarial systems need to function.[156] Finders of fact are also arbiters of truth, and the courts must place the administration of justice over the convenience of their own dockets.[157]

While courts are the primary avenue for preventing cases from going to overworked or underequipped attorneys, state bar associations and local chapters of the Federal Bar Association can also become involved in the process by promoting new monetary and non-monetary incentives to encourage more attorneys to work in indigent defense. When public defenders withdraw as counsel or

152. Drinan, *supra* note 59, at 1314 (describing instances such as a state prosecutor playing a part in the assignment and funding of counsel).

153. Primus, *supra* note 25, at 1774–75.

154. Bright & Sanneh, *supra* note 10, at 2152.

155. *Id.* at 2155–56.

156. *See generally id.* at 2156–60 (describing the tendency of prosecutors to abuse broad discretionary power to deny representation to all but the wealthiest defendants).

157. Primus, *supra* note 25, at 1774 ("Often, the judges before whom these attorneys appear are the ones who assign the cases, and they do so not on the basis of how zealous the defender's representation is but based on how quickly the defender will dispose of his cases and clear the judge's docket."); *see also* Andrew M. Siegel, *When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy from a Land Time Forgot*, 32 AM. J. CRIM. L. 325, 355–56 (2005) (describing the detrimental consequences of a system where prosecutors can control their dockets).

deny cases due to conflicts and no other source of representation is available, clients inevitably just wait until an attorney is available, backing up court dockets and leaving incarcerated defendants to sit in jail at the taxpayers' expense.[158] With the client's consent, defenders could instead work with state and local legal organizations to take preemptive steps to offer their cases to another attorney who can get to it right away; if successful, this would likely speed up the process and potentially provide better representation than the originally assigned, overworked attorney, being better for all involved.[159]

To allow cases assigned to an overburdened defender to more easily get to another attorney, courts, local bar associations, or indigent defense offices should adopt a practice of publishing or advertising these cases, or otherwise informing local defense attorneys of available cases.[160] Local bar associations should then redistribute the funding allocated to the public defender to other attorneys who are willing to take the case.[161] A hybrid public defender model with pay on a case-by-case basis would work best to entice new attorneys to take on overflow cases, since those attorneys will already have systems in place for private attorneys to take cases from public defenders via a registry of conflict counsel. Thus, when the public defender's office has a case it has not started yet, the money allocated for the case could go freely to another attorney who could get to it sooner and provide the sort of attention that the public defender could not, resulting in quicker—and likely better—representation for no more money.

Such a system would be applicable to contract models as well, though terms for overflow counsel would have to be decided at the outset. Contracting jurisdictions should have the representation crisis at the forefront of their considerations, and they should emphasize flexibility in allowing defenders to reallocate cases

158. *See* Bright & Sanneh, *supra* note 10, at 2161–62.

159. *See* AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS, Guideline 5 (2009), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.pdf (suggesting that public defenders should consider reassigning cases to different lawyers to avoid workloads that are or are about to become excessive).

160. *Id.*

161. *See* ABA, STANDARDS, *supra* note 123, Standard 5-1.6 ("Under no circumstances should the funding power interfere with or retaliate against professional judgments made in the proper performance of defense services.").

when the complexity of the case demands more time than the initially-assigned defender can afford to provide.

In either case, all jurisdictions should also move toward paying defenders on a case-by-case basis, rather than the hourly salary most public defender and contract models use.[162] An hourly salary often serves to either underpay defenders for their work or incentivize them to dispense with cases too quickly, further discouraging systemic improvements.[163] Case-by-case payment affords greater flexibility, as it will naturally vary to reflect the caseloads and type of case, and it would not encourage lackluster performance or inadequate investigation of cases any more than excessive caseloads already do.[164]

B. State Bar Associations Should Emphasize Providing Inspiration and Recognition for Indigent Defense Attorneys

A public-service mindset is a given for attorneys willing to dedicate themselves to defense of the poor, but much more can be done to afford them the respect and recognition they deserve. Attorneys in all fields can advocate for indigent clients in their own ways, by drawing media attention to representation problems and by advocating for policing, prosecutions, and sentencing that emphasizes restraint and respect for human dignity.[165] Bar associations should also attempt to do more to promote the virtues of defenders, honor them for their efforts, and counteract the harmful public perceptions of the field. While saluting public defenders is no substitute for adequately paying them, having the judiciary afford them the prestige they deserve should at least help with morale, and this will likely trickle down to the clients.[166]

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162. *Contra id.* at Standard 5-2.4.

163. Primus, *supra* note 25, at 1774 (describing how defenders paid by hourly salary often have a financial stake in receiving as many cases as possible, since courts will assign counsel based on the speed with which the case will be settled and removed from the docket).

164. *See id.*; *see also* Catherine Greene Burnett, Michael K. Moore & Allan K. Butcher, *In Pursuit of Independent, Qualified, and Effective Counsel: The Past and Future of Indigent Criminal Defense in Texas*, 42 S. TEX. L. REV. 595, 628 (2001) (explaining that a low hourly rate "translates into a disincentive to provide maximum performance on the part of the defense counsel").

165. *See* JUSTICE DENIED, *supra* note 4, at 209 (recommending that the judiciary try to focus sustained media attention on the shortcomings of indigent defense, so as to inspire public action and facilitate the conditions where further political reforms are feasible).

166. Brummer, *supra* note 8, at 184–85 (suggesting that defenders should not expect the same level of compensation as attorneys in private practice or other fields, but that

This sort of recognition could also be expressed through reducing defenders' professional obligations in a way that reflects the service they already do. In particular, Rule 6.1 of the ABA Model Rules of Professional Conduct obligates attorneys to attempt to perform at least fifty hours of pro bono service to indigent clients in addition to their regular workloads.[167] While this is not an absolute requirement, the obligation to try has surely influenced at least some overworked defenders' decisions, even though they already serve poor clients in the course of their jobs.[168] To separate them from the expectation of being bound by this Rule, future revisions of Rule 6.1 should include a comment interpreting the definition of "pro bono" service to include assigned criminal defendants, regardless of how the attorney is being paid for it or whether the client paid any fees to the court in connection with being assigned counsel. While defenders should not compromise their professional responsibilities under any circumstances, relieving them of the obligation to try to serve additional clients pro bono—potentially at the expense of current clients—would be a sort of official acknowledgement of the work they already do.

C. Indigent Defense Attorneys Should Rely More Heavily on Non-Lawyer Staff in the Representation Process

A well-trained legal assistant is less costly and can often assist just as well as more attorneys in representing indigent defendants. With the changing nature of indigent defense work in America today, clients and attorneys alike would benefit from allowing many hands to lighten the work of representation.[169] To conserve

respecting their service and encouraging a passion for justice would do much to alleviate problems with motivation).

167. MODEL R. PROF'L CONDUCT 6.1 (AM. BAR ASS'N 2018) (encouraging lawyers to perform at least fifty hours of pro bono service per year; the representation of an indigent criminal defendant does not count as pro bono service when the attorney is being compensated for the case); *see also id.* at cmt. 1 ("Every lawyer, regardless of professional prominence or professional workload, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.").

168. *E.g.*, Kim MacQueen, *Pro Bono Goes Stagnant: Report Sets Goals to Revitalize the Profession's Provision of Free Services to the Poor*, FLA. BAR NEWS (Jan. 1, 2009), https://www.floridabar.org/the-florida-bar-news/pro-bono-goes-stagnant/ (explaining that government attorneys are already overwhelmed by work as a public defender, so adding pro bono clients would be unethical).

169. Drinan, *supra* note 59, at 1335–36 (advocating for increased use of nonlawyers in the representation process by contending that the extent of excessive caseloads today

funding, defenders should consider using money that would ordinarily go toward hiring more attorneys to instead seek out experienced legal assistants and law clerks. In addition, employing a wider variety of staff, including dedicated discovery attorneys, caseworkers, and even on-staff social workers, would serve to speed up discovery and necessitate less centralized coordination and supervision.[170]

Ethical concerns, particularly those relating to unauthorized practice of law and supervision of non-lawyer staff, are a primary bar to the hiring of more non-lawyers at present.[171] To acknowledge the increased training and autonomy many non-lawyer legal workers already possess, state bars should relax enforcement of attorneys' procedural supervisory duties with respect to highly trained or experienced non-lawyers, since such duties are already factored into the effectiveness of the representation and may also come at the expense of the more basic duties of competence and diligence.[172] Indeed, in practice, state bar associations often decide against sanctioning public defenders in the course of their work, in a tacit acknowledgement of the conditions they face.[173]

Furthermore, professionalism rules do not distinguish between non-lawyers of differing qualifications, even when some employees have significantly more training. In particular, several professional organizations certify highly-trained paralegals and legal secretaries; these programs require significant baseline legal

necessitates a "triage" process for indigent defense, with decisions made about what cases to pursue at the outset, and different types of specialists each fulfilling a limited role in the representation process, rather than simply more attorneys working distinctly of one another).

170. *E.g.*, Melanca Clark & Emily Savner, *Community Oriented Defense: Stronger Public Defenders*, N.Y.U. SCH. L. BRENNAN CTR. FOR JUST., 2010, at 2, 45 (describing a public defender model that brings experts together from a variety of disciplines to address all of the indigent defendant's needs).

171. *See* MODEL R. PROF'L CONDUCT 5.1 (AM. BAR ASS'N 2018) (regarding attorneys' supervisory responsibilities concerning subordinate lawyers); MODEL R. PROF'L CONDUCT 5.3 (regarding supervisory responsibilities for non-lawyers; in particular, "a lawyer shall be responsible for conduct of [a non-lawyer] that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer"); MODEL R. PROF'L CONDUCT 5.7 (applying the Rules of Professional Conduct to "law-related services" adjacent to the actual practice of law).

172. MODEL R. PROF'L CONDUCT 5.1, 5.3, 5.7; *see also* MODEL R. PROF'L CONDUCT 1.1 1 (AM. BAR ASS'N 2018) (general duty of competent representation); MODEL R. PROF'L CONDUCT 1.31 (AM. BAR ASS'N 2018) (promptness and diligence in representing a client).

173. Baxter, *Too Many Clients*, *supra* note 9, at 99 n.65.

training and continuing education, likely comparable to a legal intern or perhaps even a new law school graduate.[174]

Non-lawyers do not all fill the same roles in public defense offices, or in any law office; the law should not continue to treat them as though they do. State bars should issue new guidelines differentiating certified and non-certified legal assistants by interpreting the Rules of Professional Conduct to give certified legal assistants, or those with an equivalent threshold of experience, supervisory authority over subordinate staff, thus requiring only legal assistants to work directly under attorney supervision to satisfy their supervisory duties.[175] This would not only better reflect the realities of the indigent defense field today, where less centralized supervision is essentially a necessity, but would also afford much more autonomy in how each case is handled, and ultimately more efficient representation.

Lastly, defenders should not be too proud to ask their own clients for help if the clients are willing and able to. Defendants have access to a great deal of evidence that would be time-consuming for their attorney to seek out alone, including medical records and family histories. Even incarcerated defendants might still be able to assist by asking friends or family members to collect evidence for them. Moreover, defendants confident in their own innocence would likely be enthusiastic about helping their cases however they could. More directly involving defendants in their own cases could speed up the discovery process, facilitate closer communication with counsel, and perhaps even leave them with a better impression of the legal profession, regardless of the outcome of their case.[176]

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174. *See Accreditation of the NALA Certification Program*, Nat'l Ass'n of Legal Assistants, https://www.nala.org/certification/certified-paralegal-program/accreditation-nala-certification-program (last visited Feb. 10, 2019) (describing NALA as a professional association for legal assistants, offering certification programs and continuing education for legal assistants and paralegals); *see also A History Worth Celebrating,* Nat'l Ass'n of Legal Secretaries, https://www.nals.org/page/history (last visited Feb. 10, 2019) (describing the history of NALS as an association of legal professionals that offers certifications for individuals in legal support roles).

175. MODEL R. PROF'L CONDUCT 5.3(b) ("[A] lawyer having *direct supervisory authority* over the nonlawyer shall make *reasonable efforts* to ensure that the person's conduct is compatible with the professional obligations of the lawyer.") (emphasis added).

176. *See generally* MODEL R. PROF'L CONDUCT 1.4 cmt. 5 1 (AM. BAR ASS'N 2018) ("The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.").

D. When Compromised by Excessive Caseloads or an Inability to Provide Effective Representation, Defenders Should Inform Clients About Remedies for Ineffective Assistance of Counsel Pre-Conviction

When excessive caseloads force conflicts of interest by pitting clients against each other in the bid for an attorney's time, defenders may think that the only remedy is to decline further cases, delay the case to bid for time, or transfer it to another attorney when possible. Rather, the very duties of competent and diligent representation that would cause those conflicts in the first place would be better served helping the client get another source of counsel independently, rather than holding up both the attorney and the court system.[177]

"The problem is not that defenders are too willing to say their workload is excessive. To the contrary, they too often either refuse to recognize or admit it."[178] Such a mentality, while illustrative of defenders' noble inclination to silently bear the burdens of excessive caseloads, only makes things worse for the individual clients they seek to serve.[179] If defenders know they may not be able to handle assigned cases adequately, but circumstances beyond their control make them unable to delay or transfer, they should acknowledge their limits, prepare to mitigate damage, and tell clients their remedies ahead of time. Additionally, both defenders themselves and the local defense bar should implement a standard practice of informing clients about the possibility of ineffective representation when it exists and what remedies are available to the client.

While this would be a drastic step—asking defenders to outright tell clients they might not do a good job is a bitter pill to swallow—it would still be better than leaving clients to find out later on their own, after missing opportunities to notice and record evidence of attorney incompetence.[180] Moreover, such a tactic

177. *See* MODEL R. PROF'L CONDUCT 1.1 (general duty of competent representation); MODEL R. PROF'L CONDUCT 1.3 (promptness and diligence in representing a client).

178. Brummer, *supra* note 8, at 184.

179. *See generally id.* at 184–85 (explaining that defenders are often overwhelmed beyond their ability to provide competent representation).

180. JUSTICE DENIED, *supra* note 4, at 143 (encouraging overburdened defenders to disclose the ineffectiveness of their representation or their defense system ahead of time, and thus for external sources of counsel affiliated with indigent defense services in a

would only be used when resource constraints would force other ethical violations, but withdrawal as counsel is not permitted. Defenders must act in the best interest of each client, even when this means helping the client choose the best of several bad options.[181]

The defenders themselves should recognize when their ability to provide effective counsel is compromised, and whether they really are the best option presently available to the client.[182] Thus, clients should also be informed of alternatives to representation by their assigned counsel, including the options of waiving the Right to Counsel, whether other attorneys might be available, and how defendants can represent themselves.[183] While defenders should make sure to fully commit to representation until such time as their client discharges them, encouraging defendants to become more involved in furthering their own cases would likely filter out many cases that have little chance of succeeding, and may get clients better, more personalized representation as well.

E. All Attorneys Have a Responsibility to Embrace the Information Age and Advocate for Indigent Defense Reforms Through Media Communications

We live in increasingly interconnected times, where everyone with a computer can have a voice and even the strangest ideas can snowball into massive social movements. Defenders would be doing all their clients a disservice by focusing their efforts only on individual cases instead of the conditions that led them to be charged in the first place; the time is ripe for public communications to serve as a new form of advocacy adjacent to criminal procedure.[184] Indeed, in trying to uphold the integrity of

jurisdiction to play a role in the defense services by stepping in and receiving overflow cases from defenders when necessary).

181. *See* MODEL R. PROF'L CONDUCT 1.3 cmt. 1 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

182. MODEL R. PROF'L CONDUCT 1.3.

183. While the thought of a public defender abandoning their assigned case and asking the client to represent themselves may seem like an abdication of professional duty at the highest level, some research has shown that defendants may do just as well, if not better, representing themselves than relying on an overworked attorney. *See* Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 489 (2007) (observing that *pro se* misdemeanor defendants in federal courts received on average both fewer convictions and lighter sentences than defendants represented by assigned counsel).

184. JUSTICE DENIED, *supra* note 4, at 146.

the legal profession, defenders have more often been content to merely keep their heads down and put on a brave face for the public, rather than acting to affirmatively challenge the shortcomings of their jobs.[185]

A common thread among politically-derived indigent defense reforms is that they are highly reactive, typically adopted only after litigation or media coverage serves to highlight deficiencies among their defense systems.[186] While reactive reforms can reverse progress as often as they advance it, this reactive tendency also allows anyone to play a role in convincing policymakers to change their perceptions and act. Attorneys should avail themselves of every opportunity to tell their stories about their jobs and workplace conditions, the importance of their work, and the lives of those brought through the criminal justice system. In particular, they should raise these issues outside of exclusively academic or professional circles, since much of the debate surrounding indigent defense as a field has thus far remained largely internalized; defenders must not discount the value of public support in effectuating social change.[187]

Moreover, the broad significance of providing effective representation justifies making it a public issue. Lawyers on all sides of the criminal justice process, state and local bar associations, and other stakeholders should do all they can to draw media attention to inadequate indigent defense systems and inspire the public to action.[188] The indigent defense profession has firsthand knowledge about America's widespread deprivation of constitutional rights, and defenders should marshal that knowledge to find ways to compel the public to take an interest and intervene.

To ignite this sort of broader interest in expanding indigent representation, legal professionals and all stakeholders must stop giving Congress a free pass for ignoring the issue. The public

185. *But see* Phil McCausland, *Public Defenders Nationwide Say They're Overworked and Underfunded*, NBC NEWS (Dec. 11, 2017, 5:22 AM), https://www.nbcnews.com/news/us-news/public-defenders-nationwide-say-they-re-overworked-underfunded-n828111 (reporting that the director of the Missouri public defender's office believed he was assigned a case from another county as a form of reprisal for protesting the caseload and funding of the Missouri public defender's office).

186. JUSTICE DENIED, *supra* note 4, at 152–53.

187. Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 331–32 (2002).

188. JUSTICE DENIED, *supra* note 4, at 209.

supports equal justice and fair trials in principle,[189] but it is easy to obfuscate the issue and frame it solely as whether to give criminals more money. State and federal legislatures have both a moral and a constitutional duty to regulate public counsel funding, lawyer conduct, and caseload limits—the mere fact that unrepresented persons exist compels those who have taken an oath to uphold the Constitution to put it into practice.[190]

How to go about raising public awareness is not an easy subject to delve into—it depends heavily on matters of time and circumstance, and making a poor impression could only hurt the cause. Still, defenders would do well to reflect on what has and hasn't worked previously, and perhaps attempt to emphasize the importance of their work and the larger stakes involved, rather than simply reiterating individual miscarriages of justice when they occur. If arguments for the economic practicality of providing adequate representation do not work, attorneys should try to appeal to the public conscience through empathy and compassion; it might be as easy as simply asking people to consider what rights they would want to have if they were ever charged with a crime. Emphasizing the constitutional issues implicated by ineffective counsel or characterizing indigent defense as protection from abuses by the government could also be ways to draw support from more conservative voters who traditionally support being "tough on crime."[191] Though the public can be fickle and highly reactive, capturing the explosive force of a social movement may be just the lightning strike it takes to spur a new nationwide discussion of our criminal defense priorities, and when that occurs, it will be defenders who are able to lead the conversation going forward.

189. Baxter, Gideon*'s Ghost*, *supra* note 18, at 381 (highlighting poll results indicating that the vast majority of Americans believe the quality of justice a person receives should not be determined by their finances).

190. JUSTICE DENIED, *supra* note 4, at 209 (mentioning that drawing media attention to the issue of indigent defense makes it easier for legislators to act on reforms); *see also id.* at 200 (emphasizing that, as a federal constitutional right, the Sixth Amendment must be put fully into practice in all states, and Congress should thus support state indigent defense systems however necessary).

191. *See* Baxter, Gideon*'s Ghost*, *supra* note 18, at 382–83 (explaining the origins of "tough on crime" politics); Alysia Santo, *How Conservatives Learned to Love Free Lawyers for the Poor*, POLITICO (Sept. 24, 2017), http://www.politico.com/magazine/story/2017/09/24/how-conservatives-learned-to-love-free-lawyers-for-the-poor-215635 (framing the representation crisis as an issue of limiting government power and outlining conservative efforts for indigent defense reforms).

V. CONCLUSION: THIS ISN'T US

The Constitution represents a promise: a promise of equal justice under the law, fair and impartial court procedure, and a level of basic respect and dignity for all under its protection.[192] Access to an attorney ties these rights together and puts them into practice, granting our criminal justice process the credibility and moral authority it needs to function. Supporting indigent defense systems need not be seen as tantamount to taking a side in a war between lawbreakers and police. Rather, the very fact that our Constitution provides for assigned counsel at all signifies that the American ideals of justice innately honor human empathy and compassion, and that these should be reflected at all levels of legal practice.

It is shameful and embarrassing that any criminal justice system in the twenty-first century should so strongly stack the deck against those accused of even the most insignificant crimes. The U.S. Constitution imposes the Right to Counsel; compliance with its language and principles are minimum requirements for states, not options.[193] America stands apart from most other democracies through our thinly masked disrespect for the procedural safeguards that underlie an adversarial justice system. The world has advanced too far for any nation to continue to tacitly deny the importance of having access to an attorney when charged with a crime. Yet through the starvation of state indigent defense systems, political figures play God with the lives of countless individuals who all have limitless value to bring to society, and as ever, the legal profession stands as a bulwark against those who would use the law as a tool to elevate themselves over other human beings.

To be able to assert the rights we have been afforded as a foundation of our liberty is essential to the notion of justice, and to continue denying those rights systematically to others speaks contrary to the very heart of what America considers itself to be. This country was not designed to be "tough on crime," and trying to make it that way only delegitimizes the rule of law that protects us all. Furthermore, the overall lack of practical reasons to

192. *See* U.S. CONST. amend. V, VI, XIV (preventing government deprivation of the people's fundamental rights without fair and equal due process).

193. U.S. CONST. Amend. VI, XIV.

continue denying effective counsel, coupled with the sheer social and economic value to be gained from adequately financing indigent representation, far outweighs the relatively minor costs of restructuring, decriminalization, diversion, and prosecutorial leniency. There is no more likely explanation for defender underfunding than simply ingrained animus against the poor.

In the end, the only true obstacles to reform are internal. It can be all too easy to rationalize denying accused criminals the same basic rights and dignities we expect for ourselves, especially when they are painted as dangerous "others" or used as political props. Though it remains imperfect, the law is intended to respect defendants for their presumed innocence, their common humanity, and the value they bring to the world through their deeds, ideas, and all they can teach us about ourselves. If the public has not yet found the words to cry out for this change, it falls on those who have already sworn themselves to the pursuit of justice for the poor to stand up, save us from ourselves, and seek out new forms of advocacy wherever they lie, though we already ask too much of them.