UNEQUAL ASSISTANCE OF COUNSEL

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I. INTRODUCTION

There is now, and has always been, a double standard when it comes to the criminal justice system in the United States. The system is stacked against you if you are a person of color or are poor, and is doubly unjust if you are both a person of color and poor. The potential counterweight to such a system, a lawyer by one's side, is unequal as well. In reality, the right to counsel is a right to the unequal assistance of counsel in the United States.

The unequal treatment based on the color of one's skin is reflected by the racial disparity throughout the criminal justice system in which minority racial groups are involved in the criminal justice system as suspects and defendants at rates greater than their proportion of the general population. This is illustrated by the "driving while black" phenomenon in which law enforcement officers initiate traffic stops against persons of color and subject them to searches at a higher rate than whites, even though law enforcement is more likely to find contraband on white drivers than persons of color.[1]

The racial disparities throughout the criminal justice system start with the juvenile justice system. In 2004, African American youth were 17% of the population for their age group, but accounted for 46% of juvenile arrests, and 31% of referrals to juvenile courts.[2] The racial disparities continue to incarceration, where 38% of prison and jail inmates are African American,[3] when African Americans comprise just 13% of the population of the United States.[4]

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1. *See infra* notes 10–12, 25–27, and accompanying text.

2. Howard N. Snyder, Off. of Juv. Just. & Delinquency Prevention, *Juvenile Arrests 2004*, JUV. JUST. BULL., 1, 9, (Dec. 2006), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/214563.pdf.

3. William J. Sabol & Heather Couture, *Prison Inmates at Midyear 2007*, BUREAU OF JUST. STAT. BULL., (U.S. Dep't of Justice), 7, tbl. 9, (June 2008), *available at* http://www.bjs.gov/content/pub/pdf/pim07.pdf.

4. Roberto Suro, et al., *The American Community—Blacks: 2004*, AM. CMTY. SURV. REP. (U.S. Census Bureau), at 1 (Feb. 2007), *available at* http://www.census.gov/prod/2007pubs/acs-

The Sixth Amendment promises the effective assistance of counsel to every person accused of a crime where incarceration is a possible punishment.[5] This guarantee suggests that everyone, rich and poor, is equal before the law. But the reality of the criminal justice system is much different for the majority of those charged with crimes. If one does not have the financial means to hire effective counsel, or is poor and not lucky enough to have a well-funded, effective public defender or appointed counsel, the defendant's right to counsel is unequal. This disparity is driven largely by the wealth of the accused and falls most harshly on people of color, who are twice as likely as whites to live in poverty[6] and are accused of crimes at rates much higher than their proportion of the population. As a result, class and race are largely determinative of the lawyer, and often the amount of justice one receives.

In this article, I explore how unequal assistance of counsel contributes to unequal justice. Part II begins with a brief overview of racial disparities in the ways laws are enforced. The initial step in the criminal justice system, whether the police stop someone, can lead to arrest, charges, and the need for a lawyer. Part III analyzes the systemic barriers to effective assistance of counsel at the state level, which is driven largely by excessive caseloads and an ineffective assistance of counsel standard that tolerates bad lawyering. In Part IV, I recommend strategies for achieving more effective assistance of counsel, which emphasize the ethical imperative to provide meaningful assistance of counsel, the importance of data collection by public defender systems, and systemic litigation that positions assistance of counsel claims prior to trials.

II. RACE AND THE ENFORCEMENT OF LAWS

A stark illustration of unequal justice in the United States is found in the Department of Justice (DOJ) report of its civil rights investigation into the Ferguson Police Department (FPD) and the municipal court in Ferguson, Missouri.[7] The investigation, triggered after a police officer shot and killed Michael Brown, an unarmed 18-year-old African American,[8] found that the police department and court engaged in a "pattern and practice" of discrimination against African Americans.[9] As data from the DOJ

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5. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

6. Carlos Gradin, *Poverty Among Minorities in the United States: Explaining the Racial Poverty Gap for Blacks and Latinos*, SOC'Y FOR THE STUDY OF ECON. INEQUALITY, Paper No. 2008-96, at 2 (Oct. 2008), *available at* http://www.ecineq.org/milano/WP/ECINEQ2008-96.pdf.

7. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015), *available at* http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [hereinafter *DOJ Ferguson Report*].

8. Julie Bosman & Emma G. Fitzsimmons, *Grief and Protests Follow Shooting of a Teenager*, N.Y. TIMES, Aug. 10, 2014, at A1.

9. *DOJ Ferguson Report*, *supra* note 7, at 15.

investigation of the Ferguson police and municipal court demonstrate, when police focus on people of color in enforcing the law, the crime rates for people of color will be higher.

The DOJ found that the FPD both disproportionately targeted African Americans for traffic stops and searches and disproportionately used force against them.[10] From 2012-2014, 85% of persons subject to vehicle stops were African American, as were 90% of those receiving citations and 93% of those arrested, while only 67% of the population in Ferguson was African American.[11] After controlling for non-race based variables such as the reason police initiated vehicle stops, data from this same two-year period show that police searched African Americans at twice the rate of white drivers, even though African Americans were "found in possession of contraband 26% less often than white drivers, suggesting officers are impermissibly considering race as a factor when determining whether to search."[12] Police charged some offenses, such as Manner of Walking in Roadway and Failure to Comply, almost exclusively against African Americans.[13] The DOJ report demonstrates that this pattern of targeting African Americans is also present in the police use of force, where "90% of documented force used by the FPD officers was used against African Americans."[14]

The DOJ also found that the municipal court practices disproportionately harm African Americans. Among other practices, the court was 68% less likely to dismiss cases and 50% more likely to issue arrest warrants against African Americans.[15] Further, African Americans accounted for 92% of cases in which arrest warrants were issued.[16] Of those arrested for outstanding municipal court warrants, 96% were African American.[17]

The DOJ investigation determined that the disparate impact of police and court practices on African Americans could not be explained by the difference in crime rates by people of different races, but rather was due in part to an "unlawful bias against and stereotypes about African Americans."[18] Evidence of racial bias included emails circulated by Ferguson officials, including police supervisors and court supervisors, which stereotyped racial minorities as lazy,[19] unable to hold a steady job,[20] and as criminals.[21]

10. *Id.* at 4–5.

11. *Id.* at 4.

12. *Id.*

13. *Id.* ("For example, from 2011 to 2013, African Americans accounted for 95% of Manner of Walking in Roadway charges, and 94% of all Failure to Comply Charges.").

14. *Id.* at 5.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 72 ("A June 2011 email described a man seeking to obtain 'welfare' for his dogs because they are 'mixed in color, unemployed, lazy, can't speak English and have no frigging clue who their Daddies are.'").

Unfortunately, the racial disparities in the criminal justice system that operates in Ferguson, Missouri, occur elsewhere in Missouri and in other parts of the United States. The ArchCity Defenders, a holistic indigent criminal and civil legal services nonprofit,[22] issued a *Municipal Courts White Paper*, after observing sixty different municipal courts in St. Louis County, Missouri, and obtaining sworn statements from clients and others during the investigation.[23] In approximately half of the courts studied, researchers found that individuals who were disproportionately poor and minorities were jailed for the inability to pay fines, refused access to the courts if they were with children or family members, and mistreated by court personnel, prosecutors, and judges.[24] While the *White Paper* focused on St. Louis County, there is evidence that similar problems exist elsewhere. Throughout the state, the Missouri Attorney General has found that "blacks were 66% more likely than whites to be stopped based on their respective proportions of the Missouri driving-age population 16 and older."[25]

Without studying every municipal court in every state, it is impossible to say conclusively whether the types of problems found in St. Louis County exist elsewhere. However, there is evidence that at least some of these problems do exist in other states.

At the national level, a DOJ report released in 2011 found that African American, Hispanic, and white drivers were stopped at similar rates, but that African American drivers were three times more likely to be searched than white drivers and twice as likely as Hispanic drivers.[26] Once stopped, police arrested African American drivers at approximately twice the rate of white and Hispanic drivers.[27] Data also show that police stop and frisk persons of color at a rate disproportionate to whites.[28]

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20. *Id.* ("A November 2008 email stated that President Barack Obama would not be President for very long because 'what black man holds a steady job for four years.'").

21. *Id.* ("A May 2011 email stated: 'An African-American woman in New Orleans was admitted into the hospital for a pregnancy termination. Two weeks later she received a check for $5,000. She phoned the hospital to ask who it was from. The hospital said, 'Crimestoppers.'").

22. *Our Mission & Story*, ARCHCITY DEFENDERS, http://www.archcitydefenders.org/who-we-are/our-mission-story/.

23. *Municipal Courts White Paper*, ARCHCITY DEFENDERS 2, http://03a5010.netsolhost.com/WordPress/wp-content/uploads/2014/08/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf.

24. *Id.* at 1–3.

25. MO. ATTORNEY GEN., 2013 VEHICLE STOPS EXECUTIVE SUMMARY, http://ago.mo.gov/divisions/litigation/vehicle-stops-report/vehicle-stops-report---2013-executive-summary (last visited April 17, 2015).

26. Christine Eith & Matthew R. Durose, BUREAU OF JUSTICE STATISTICS, *Contacts Between Police and the Public, 2008*, 1 (Oct. 2011), *available at* http://www.bjs.gov/content/pub/pdf/cpp08.pdf.

27. Police arrested African American drivers 4.7% of the time while arresting white drivers at the rate of 2.4% and Hispanics at the rate of 2.6%. *Id.* at 9, tbl.13.

28. The Leadership Conference, *Restoring a National Consensus: The Need to End Racial Profiling in America* 5 (2011) *available at* http://www.civilrights.org/publications/reports/racial-

African Americans made up approximately 13% of the United States population in 2013,[29] but comprised 29% of the persons arrested for a property crime and 39% of persons arrested for a violent offense.[30] Disparities in arrest rates are found in most categories of crimes.[31]

These disparities are not explained by the assumption that African Americans commit crimes at higher rates. For example, a study surveying drug use among secondary school students from 1975-2011 found that white students were more likely than African American students to have abused an illegal substance within the past month, while African American youth were arrested for drug crimes at twice the rate of white youth.[32] The disparities in drug activity and arrest rates are also present in adult populations. "[I]n Seattle in 2002, for instance, African Americans constituted 16% of observed drug dealers for the five most dangerous drugs but 64% of drug dealing arrests for those drugs."[33] Nationwide in 2006, African Americans used drugs at a rate only slightly higher than their percentage of the population, but represented 35% of those arrested for drug offenses, and 53% of drug convictions.[34] In 2004, African Americans comprised 45% of drug offenders in prison.[35]

Arrest rates, therefore, are not the same as offending rates. Arrest rates reflect a combination of crimes that the police observe themselves leading to an arrest and reported crimes that police investigate and close with an arrest.[36] Higher crime rates among people of color are in part a result of law enforcement policies that target them.

Once arrested and charged, the accused needs a lawyer to navigate the criminal justice system. When the accused is unable to afford to hire a lawyer, much depends on the quality of legal assistance the government provides through a public defender or appointed lawyer.[37]

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profiling2011/racial_profiling2011.pdf.

29. Suro, et. al., *supra* note 4, at 1.

30. FED. BUREAU OF INVESTIGATION, CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, *Crime in the United States, 2013*, tbl. 43A, (2013) http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-43.

31. *See id.*

32. *Report of the Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System*, THE SENTENCING PROJECT 3–4 (Aug. 2013), *available at* http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf.

33. *Id.* at 4.

34. *Reducing Racial Disparity in the Criminal Justice System*, THE SENTENCING PROJECT 6 (2008), *available at* http://www.sentencingproject.org/doc/publications/rd_reducingracial disparity.pdf.

35. *Id.*

36. *Id.* at 5.

37. State and local governments use a variety of systems to provide public defense, ranging from state-wide public defender systems, to county or local public defender systems, to lawyers and law firms that contract with, or appointed by, courts or other governmental entities to represent defendants unable to pay for retained counsel. *See* Stephen D. Owens et al., U.S. Dep't

III. SYSTEMIC BARRIERS TO EFFECTIVE ASSISTANCE OF COUNSEL

In a legal system that disadvantages the poor and people of color, the promise of effective assistance of counsel in criminal cases becomes even more important. This promise is undermined in two interrelated ways, however. First, public defenders and other appointed counsel at the state and county levels are usually underfunded and overworked, leading to a largely "meet 'em and plead 'em" legal representation for the poor.[38] Second, the legal standard for ineffective assistance of counsel after conviction requires the defendant to prove both objective unreasonable performance of the defense lawyer *and* prejudice to the defendant due to the substandard performance.[39]

These two systemic barriers to more equality in the criminal justice system are well known and often lamented by many familiar with the workings of publicly provided defense at the state level.[40] In contrast, funding for public defense at the federal level, through the Criminal Justice Act (CJA),[41] and better funding for public defense by some jurisdictions demonstrate that effective assistance of counsel for those unable to hire their own lawyers is attainable.[42] Of course, ensuring quality, effective counsel for the poor does not eliminate all of the disadvantages of poverty and race in the criminal justice system. But without effective assistance of counsel, the accused is denied even the hope of some chance of justice and fairness.

A. Problems with Public Defense Systems

The history of the right to counsel in the United States illustrates how the wealth of the accused, and usually the person's race, tip the scales of justice against the poor. Initially, the right to counsel was available only for the

of Justice, Technical Report, *Indigent Defense Services in the United States, FY 2008-2012 – Updated*, BUREAU OF JUSTICE STATISTICS, at 1 (Morgan Young & Jill Thomas eds., July 2014), *available at* http://www.bjs.gov/content/pub/pdf/idsus0812.pdf.

38. *See* Stephen B. Bright, *The Right to Counsel in Death Penalty and Other Criminal Cases: Neglect of the Most Fundamental Right and What We Should Do About It*, 11 J.L. SOC'Y 1, 17 (2010).

39. *See infra* notes 86–93 and accompanying text.

40. I have written about some of these issues previously, and this article expands on some of that work, which cites to many commentators who also considered this issues. *See* Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 MO. L. REV. 771 (2010); Peter A. Joy, *Rationing Justice by Rationing Lawyers*, 37 WASH. U.J. L & POL'Y 205 (2011).

41. Criminal Justice Act of 1964, Pub. L. No. 88-455, 62 Stat. 684 (codified as amended at 18 U.S.C. §3006A (2006)).

42. *See, e.g.*, Barbara Allen Babcock, *The Duty to Defend*, 114 YALE L.J. 1489, 1493 (2005) (describing the D.C. Public Defender Services as a "model agency"); Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 90–93 (1995) (describing the effectiveness of the D.C. Public Defender Services); Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 260 (2012) ("Philadelphia has a reputation for having one of the best public defender offices").

defendant who could afford to retain counsel.[43] The first expansion of the right to counsel occurred in 1932 when the Supreme Court decided the famous Scottsboro Boys case, *Powell v. Alabama*.[44] There, the Court held that there was a constitutional right to government-provided counsel in capital cases in state courts.[45] In 1938, in *Johnson v. Zerbst*,[46] the Court extended the right to appointed counsel for those unable to afford counsel when charged with a federal crime that carried the possibility of incarceration as punishment.[47] The Court reasoned that the assistance of counsel is "an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty."[48]

Twenty-five years after the Supreme Court recognized that anyone facing the possibility of incarceration for a federal offense had a right to government-provided counsel if too poor to retain a lawyer, the Court incorporated the right to counsel to the states in *Gideon v. Wainwright.*[49] In deciding *Gideon*, the Court recognized for the first time that a fair trial and due process required that the accused facing felony charges in state court must have the right to a lawyer even if the defendant could not afford to hire a lawyer.[50] After *Gideon*, the right to counsel was expanded in a series of Supreme Court cases. Today, the right to government-provided counsel for the poor extends to whenever one faces possible incarceration in misdemeanor cases,[51] juvenile matters,[52] probation revocation hearings,[53] and in the first state appeal as a matter of right.[54]

The possibility of incarceration and the resulting loss of liberty in a criminal case are required for the fundamental right to a lawyer at the government's expense. Thus the Court has held that there is no right to counsel at government expense in a criminal case if the possible penalty is a fine and not incarceration.[55] Additionally, the Court has held that the right to

43. Betts v. Brady, 316 U.S. 455, 461–62 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963); *see also* JAMES J. TOMKOVICZ, THE RIGHT TO ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 2–3 (2002).

44. Powell v. Alabama, 287 U.S. 45 (1932). Nine African American teenagers, known as the Scottsboro Boys, were accused of raping two white women in 1931, convicted in trials lasting a day, and juries imposed the death penalty. *Id.* at 49.

45. *Id.* at 71.

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

47. *Id.* at 467–68.

48. *Id.* at 467.

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

50. *Id.* at 343–44.

51. Argesinger v. Hamlin, 407 U.S. 25, 40 (1972).

52. *In re* Gault, 387 U.S. 1, 29–32 (1967).

53. Alabama v. Shelton, 535 U.S. 654, 658 (2002).

54. Douglas v. California, 372 U.S. 353, 356–57 (1963).

55. Scott v. Illinois, 440 U.S. 367 (1979).

counsel does not apply to incarceration for non-criminal matters, such as civil contempt for nonpayment of child support.[56]

The cases denying lawyers for the poor lawyers demonstrate that the right to counsel in the United States is very limited even when a person has a legal problem that ultimately results in periods of incarceration. This is especially true for failure to pay traffic fines, as illustrated in the DOJ report of the police and municipal court in Ferguson, Missouri.[57] For example, an African American woman received two citations and was fined $151 plus fees by the Ferguson Municipal Court for parking illegally on one occasion in 2007.[58] She was experiencing financial difficulties and could not pay, yet the court charged her with seven Failure to Appear offenses for missing court dates or payments on her fine between 2007 and 2010.[59] Each time a Failure to Appear offense was issued, the court also issued an arrest warrant.[60] As a result, she was arrested twice between 2007 and 2014 and ultimately spent six days in jail.[61] As of December 2014, she successfully paid $550, but still owed $541 in fines and fees stemming from the single parking ticket that would have cost her $151 plus fees if she was originally able to pay it.[62] Even more troubling is the fact that she did not have the right to a lawyer at the expense of the city or state before she spent six days in jail for failure to pay her fine and for missing court dates.

Many commentators argue that the Supreme Court has defined the right to counsel at the government's expense too narrowly for the poor and that there is a need for a "Civil Gideon."[63] This argument is supported by the fact that approximately 80% of the civil legal needs of the poor in the United States go unmet.[64] Persons are left to fend for themselves when facing loss of housing due to foreclosures or evictions, loss of child custody rights, denials of unemployment compensation or public benefits, and other similarly important legal rights affecting their lives.

In many other countries, the right to counsel is more robust. More than thirty-five years ago, the European Court of Human Rights held that free

56. Turner v. Rogers, 562 U.S. 1002 (2011).

57. *DOJ Ferguson Report*, *supra* note 7.

58. *Id.* at 4.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *See, e.g.*, Laura Abel, *A Right to Counsel in Civil Cases: Lessons from* Gideon v. Wainwright, 40 CLEARINGHOUSE REV. J. OF POVERTY L. & POL'Y 271 (2006); Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants,* 10 GEO. J. ON POVERTY L. & POL'Y 1 (2003); Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 LOY. L.A. L. REV. 913 (2009); Russell Engler, *Pursuing Access to Justice and Civil Right to Counsel in a Time of Economic Crisis*, 15 ROGER WILLIAMS U. L. REV. 472 (2010).

64. Ethan Bronner, *Right to Lawyer Can Be Empty Promise for Poor*, N.Y. TIMES, March 15, 2013, at A1.

counsel for low-income persons was a human right and necessary for them to have meaningful access to the courts.[65] Many countries have established the right for free civil counsel for the poor through their statutes or constitutions, and the United States lags behind.[66] While the justice gap for the poor in civil matters is not the focus of this article, it is important to acknowledge that access to the courts for the poor in civil matters, and in criminal matters where the potential penalty is a fine and not incarceration, is often foreclosed. The lack of lawyers for the poor in civil matters and minor criminal matters involving fines is occurring at the same time that little is being done to make the right to counsel truly meaningful for the accused in criminal matters involving the possibility of incarceration.

In the federal criminal justice system, the right to counsel means more. In February 1963, the *Report of the Attorney General's Committee on Poverty and the Administration of Justice*[67] (*Allen Report*) found that those too poor to afford to hire effective defense counsel were denied equal justice, which jeopardized "the proper functioning of the rule of law in the criminal area and that, therefore, the interests and welfare of all citizens are in issue."[68] In response to the *Allen Report*, Congress enacted the Criminal Justice Act in 1964.[69] In doing so, Congress acknowledged that adequate representation in federal court required a system that adequately compensated lawyers providing public defense services and that provided the accused with other necessary defense services, such as investigators and, when necessary, funds for expert witnesses.[70] The passage of the CJA and its subsequent amendments created a system of federal public defenders and CJA panel attorneys who are widely recognized as providing effective assistance of counsel.[71]

65. Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A) (1979).

66. National Coalition for Civil Right to Counsel, *International Perspective on Right to Counsel in Civil Cases*, *available at* http://civilrighttocounsel.org/about/international_perspective. Some of the countries that recognize a civil right to counsel for those who cannot afford to hire a lawyer are Australia, Brazil, Canada, Madagascar, South Arica, and New Zealand. *Id.*

67. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF JUSTICE (1963) [hereinafter the ALLEN REPORT]. The Report is commonly referred to as the *Allen Report* after the Chair of the Committee, Francis A. Allen.

68. *Id.* at 10.

69. Criminal Justice Act of 1964, *supra* note 41.

70. Committee to Review the Criminal Justice Act, *Report of the Committee to Review the Criminal Justice Act*, 52 CRIM. L. REP. 2265, 2271 (1993).

71. *See, e.g.*, J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1127 (2014) (stating that "the federal public-defender system obviously constitutes the gold standard"); *cf.* Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* 3 (2007), *available at* http://www.nber.org/papers/w13187.pdf (finding that defendants represented by federal public defenders are convicted less often and receive shorter sentences than defendants represented by CJA panel attorneys). Although the CJA brought about a strong system of federal public defenders and panel attorneys, some argue that defendants in federal courts today are not better off than they were before the CJA because of increased pretrial detention, longer pretrial detention, and changes in federal laws that result in fewer trials and a shift in power from judges to prosecutors. *See, e.g.*, Rachel E. Barkow, *Federalism and the*

While public defense in the federal criminal justice system appears to be working, public defense in most states, counties, and municipalities is not working because of inadequate funding. [72] These state and local public defense systems are responsible for 95% of criminal prosecutions, so their inadequacies are far reaching.[73]

The lack of funding for public defense in the United States stands in stark contrast to what is available in other countries. For example, both the United States and the United Kingdom have adversarial systems of justice, but the United States budgets only .0002% of its per capita gross domestic product (GDP) on public defense while the United Kingdom spends .20% of its per capita GDP on public defense.[74] In contrast, the United States budgets twice as much for prosecution than public defense, while United Kingdom spends approximately four times more on public defense than prosecution.[75] In 2008, for every dollar spent on public defense, the United States taxpayers spent nearly fourteen dollars on corrections.[76]

As a result of inadequate funding of public defense in the United States, there are excessive caseloads, lack of funds for expert witnesses and investigators, and extremely low pay rates for court-assigned lawyers and contract defense services resulting in the poor quality of public defense.[77] These factors contribute to public defense systems in which lawyers rarely see

Politics of Sentencing, 105 COLUM. L. REV. 1276, (2005); David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 YALE L.J. 2578 (2013); Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System*, 67 WASH. & LEE L. REV. 1569 (2010).

72. Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L.J. 2150, 2153 (2013) [hereinafter Bright & Sanneh, *Fifty Years of Defiance*]; *see also* AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE 38 (2004) [hereinafter ABA, GIDEON'S BROKEN PROMISE], *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.

73. Bright & Sanneh, *Fifty Years of Defiance, supra* note 72, at 2153; *see also* ABA, GIDEON'S BROKEN PROMISE *supra* note 72, at 38.

74. Amanda Petteruti & Jason Fenster, *Finding Direction: Expanding Criminal Justice Options by Considering Policies of Other Nations*, JUST. POL'Y INST., at 51 (Apr. 2011), *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/finding_direction-full_report.pdf.

75. *Id.*

76. Kate Taylor, *System Overload: The Costs of Under-Resourcing Public Defense*, JUST. POL'Y INST. 1, 6 (July 2011), *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf.

77. *See* THE CONSTITUTION PROJECT, NAT'L RIGHT TO COUNSEL COMM, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 52–70 (2009), *available at* http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf [hereinafter JUSTICE DENIED]; Norman Lefstein & Georgia Vagenas, *Restraining Excessive Defender Caseloads: The ABA Ethics Committee Requires Action*, CHAMPION, Dec. 2006, at 10, 10–12.

their clients, and clients are often simply processed through the criminal justice system, receiving what some have called "assembly-line justice."[78]

Key to an effective public defender is a manageable caseload.[79] In 1973, the National Advisory Commission on the Criminal Justice Standards and Goals set the following caseload guidelines for full-time public defenders: a maximum of 150 felonies, *or* 400 misdemeanors, *or* 200 juvenile cases, *or* 200 mental health matters, *or* 25 appeals per year.[80] Since then, hearings and studies reveal that inadequate funding of public defense in most states means that these caseload limits are exceeded in almost every jurisdiction.[81]

Data collected by the DOJ's Bureau of Justice Statistics in 2007 demonstrate that approximately 73% of county-based public defender offices exceed these caseload guidelines,[82] and fifteen of nineteen reporting state public defender programs exceeded the maximum caseload guidelines.[83] An earlier report commissioned by the Bureau of Justice Statistics found: "Every day, defenders try to manage too many clients. Too often, the quality of services suffers. At some point, even the most well-intentioned advocates are

78. The phrase "assembly-line justice" is often used to explain the unequal treatment the poor often receive in the criminal justice system. The Kerner Report, investigating the causes of civil rights disturbances in the mid-1960's, stated: "The belief is pervasive among ghetto residents that the lower courts in our urban communities dispense 'assembly-line' justice; that from arrest to sentencing, the poor and uneducated are denied equal justice with the affluent . . . ." NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, THE 1968 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 337 (1968).

79. Taylor, *supra* note 76, at 11.

80. The National Advisory Committee on Criminal Justice Standards and Goals, *Standards for the Defense*, *Standard 13.12: Workload of Public Defenders*, NLADA, *available at* http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense#thirteen twelve. The National Legal Aid and Defender Association (NLADA) adopted these guidelines in 1984. NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline III-6 (1984), *available at* http://www.nlada.org/Defender/Defender_Standards/Negotiating_And_Awarding_ID_Contracts#threesix.

81. In 2003, testimony at ABA hearings demonstrated that public defender caseloads in many states exceeded maximum caseload limits at times by more than 150%. *See* AM. BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 17–18 (Dec. 2004), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf. Since 2003, the already excessive caseloads have increased. *See* JUSTICE DENIED, *supra* note 77, at 67–70. In Tennessee, six attorneys handled over 10,000 misdemeanor cases in 2006, and the average caseload for public defenders in Dade County, Florida was nearly 500 felonies and 2,225 misdemeanors per lawyer in 2008. *Id.* at 68.

82. Donald J. Farole, Jr. & Lynn Langton, U.S. Dep't of Justice, Special Report, *County-Based and Local Public Defender Offices, 2007*, BUREAU OF JUSTICE STATISTICS, at 1, 8–10 (Georgette Walsh & Jill Duncan eds., Sept. 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf.

83. Lynn Langton & Donald J. Farole, Jr., U.S. Dep't of Justice, Special Report, *State Public Defender Programs, 2007*, BUREAU OF JUSTICE STATISTICS 1, 12–14 (Georgette Walsh & Jill Duncan eds., Sept. 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/spdp07.pdf.

overwhelmed, jeopardizing their clients' constitutional right to effective counsel."[84]

Excessive caseloads mean that defense counsel are often unable to meet with clients until days or weeks after being assigned, fail to conduct factual investigations, and rarely research applicable law. One study found that in Tennessee six attorneys handled over 10,000 misdemeanor cases in 2006, and the average caseload for public defenders in Dade County, Florida, was nearly 500 felonies and 2,225 misdemeanors per lawyer in 2008.[85] Caseloads like these make effective lawyering practically impossible.

In theory, an indigent defendant receiving substandard legal representation contributing to a conviction should have an avenue for relief by asserting an ineffective assistance of counsel claim. In reality, such claims are almost impossible to prove due to an incredibly high judicial standard for evaluating the claims.

B. Problem with the Ineffective Assistance of Counsel Standard

A solution for excessive public defense caseloads and resulting poor lawyering would be a more realistic standard for measuring ineffective assistance of counsel. After conviction, a defendant has to prove both objectively unreasonable performance by the lawyer *and* prejudice according to *Strickland v. Washington*.[86] The Court has defined prejudice as a reasonable probability that the lawyer's inadequate performance adversely affected the outcome of the case.[87] In considering defense counsel's performance, the Court stated that it is "highly deferential" to defense counsel.[88] The deference given defense counsel combined with the almost impossible prejudice burden have led courts to reject ineffective assistance of counsel claims in capital cases where defense counsel slept through portions of the trial,[89] or have been under the influence of alcohol, drugs, or otherwise mentally impaired at trial.[90]

Justice Thurgood Marshall's dissent in Strickland has proven prophetic as he cautioned "it may be impossible for a reviewing court to confidently ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer" and that "evidence of injury to the defendant may be missing from the record

84. The Spangenberg Group, *Keeping Defender Workloads Manageable*, U.S. DEP'T OF JUSTICE 2 (2001), *available at* https://www.ncjrs.gov/pdffiles1/bja/185632.pdf.

85. JUSTICE DENIED, *supra* note 77, at 68.

86. Strickland v. Washington, 466 U.S. 668 (1984).

87. *Id.* at 687, 694.

88. *Id.* at 689–90.

89. *See, e.g.*, *Ex Parte* McFarland, 163 S.W.3d 743, 751–60 (Tex. Crim. App. 2005) (en banc) (rejecting ineffective assistance of counsel claims including defense counsel sleeping).

90. *See*, *e.g.*, Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 455–63 (1996) (describing cases in which courts reject ineffective assistance of counsel claims when lawyers use drugs, alcohol, or are otherwise mentally impaired during trial).

precisely because of the incompetence of defense counsel."[91] For example, defense counsel's failure to interview or call witnesses, explore a possible alibi, or adequately investigate and prepare the case are absent from the record when counsel renders inadequate assistance.

The high bar that *Strickland* sets led one judge, in rejecting an ineffective assistance of counsel claim in a death penalty case, to state that he believed "a sufficient showing ha[d] been made that trial counsel did not provide this accused with the quality of defense essential to adequate representation in any serious felony case" but that "[t]he Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel."[92] The judge observed that this meant that "accused persons who are represented by 'not-legally-ineffective' lawyers may be condemned to die when the same accused, if represented by effective counsel, would receive at least the clemency of a life sentence."[93]

As a result of the *Strickland* standard, only the most outrageous conduct by defense counsel leads to a new trial. Even if a lawyer is so inept as to admit a client's guilt without the client's consent, the reviewing court has to conclude that there was no tactical reason to admit guilt before finding that the lawyer was ineffective.[94] In other words, the defense lawyer's conduct has to be more shocking than a lawyer who admits guilt of the accused, sleeps at trial, or conducts a trial under the influence of alcohol, drugs, or some other impairment.[95] Commentators have strongly criticized the *Strickland* standard as effectively foreclosing most ineffective assistance of counsel claims.[96]

One judge explained that judges are reluctant to grant claims of ineffective assistance of counsel and reverse convictions because there is a widespread belief "that most defendants are guilty anyway" resulting in a "'guilty anyway' syndrome."[97] In spite of this guilty anyway syndrome, there have been 325 post-conviction DNA exonerations in the United States that prove that guilt in every case should not be assumed even after conviction.[98] Over 200 of the

91. 466 U.S. at 710 (Marshall, J., dissenting).

92. Riles v. McCotter, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).

93. *Id.* Judge Rubin points out that the constitutional standard of effective assistance of counsel is so low that courts may not reverse even when the legal representation was less than effective as a practical matter, but ineffective as a matter of law.

94. *See* People v. Diggs, 223 Cal. Rptr. 361, 368–69 (Cal. Ct. App. 1986).

95. *See* Kirchmeier, *supra* note 90 and accompanying text.

96. *See, e.g.*, Erwin Chemerinsky, *Lessons from* Gideon, 122 YALE L.J. 2676, 2688–91 (2013); David Cole, Gideon v. Wainwright *and* Strickland v. Washington*: Broken Promises*, *in* CRIMINAL PROCEDURE STORIES 101 (Carol S. Steiker ed., 2006).

97. David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L.REV. 1, 26 (1973).

98. *DNA Exonerations Nationwide*, INNOCENCE PROJECT, http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide (Feb. 7, 2007, 12:00 AM).

exonerees were African American,[99] demonstrating that a system in which many presume guilt disproportionately affects innocent persons of color.

The difficult *Strickland* standard and the "guilty anyway" syndrome produce a criminal justice system that accepts excessive caseloads for lawyers defending the poor, resulting in unequal assistance of counsel. In order to work toward equal justice, the system needs to change and the following section discusses some strategies for bringing about positive change.

IV. STRATEGIES FOR MORE EFFECTIVE ASSISTANCE OF COUNSEL

The obvious solution to the present crisis in public defense at the state and local levels is adequate funding to achieve manageable caseloads and effective lawyering, but state and local governments have not responded to this need. Over thirty-five years ago, the American Bar Association (ABA) advocated for a federally funded program to help state and local governments provide sufficient public defense services.[100] Since then, there is no sign that the federal government will help or that state and local governments are ensuring adequate funding willingly.

Another solution would be a more meaningful ineffective assistance of counsel standard. Before the Supreme Court decided *Strickland*, many federal courts used a different standard. These courts followed the reasoning in *United States v. DeCoster*,[101] which established that reviewing courts should measure the competency of defense counsel according to the ABA Standards for Criminal Justice.[102] If a court found a substantial violation of any of the ABA Standards, *DeCoster* shifted the burden of proof to the government to show lack of prejudice to the defendant.[103]

In reaching its decision, the *DeCoster* court reasoned that a proper allocation of the burden of proof is critical to a meaningful effective assistance of counsel standard.[104] By allocating the burden of proof to the government, the *DeCoster* court relieved the defendant of the very heavy burden of proving prejudice, which the court reasoned was almost the equivalent of requiring the

99. *Id.*

100. Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 841 (2004).

101. United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973).

102. *Id.* at 1203. In 1968, the ABA issued its first version of Standards for Criminal Justice. *Standards for Criminal Justice,* AM. BAR ASS'N, (3d ed. 2006) (1968), *available at* http://www.abanet.org/crimjust/standards/home.html [hereinafter ABA CRIMINAL JUSTICE STANDARDS]. The ABA Standards for Criminal Justice are relied upon by judges, prosecutors, defense counsel, and legal commentators frequently. *See* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 10 (2009).

103. *DeCoster*, 487 F.2d at 1204.

104. Placing the burden of proof on the defendant would require the defendant to establish innocence when counsel has most likely failed to create a sufficient record from which the reviewing court could make such a determination. *Id*.

defendant to prove innocence.[105] Allocating the burden of proof to the government also recognized that "proof of prejudice may well be absent from the record precisely because counsel has been ineffective."[106]

In establishing the *Strickland* standard, the Court created conditions in which unequal assistance of counsel can thrive with little or no recourse for those adversely affected. Since *Strickland*, the Court has not shown any signs of revisiting the test it established. Indeed, it has raised the prejudice standard even higher by requiring the "likelihood of a different result must be substantial, not just conceivable."[107] As a practical matter, seeking post-conviction review of poor lawyering is rarely an effective remedy. For example, a study of over 2,500 ineffective assistance of counsel claims in California during a ten-year period found that only 4% of the claims were successful.[108]

The absence of adequate funding for public defense has led to excessive caseloads and poor lawyering, and the absence of a meaningful ineffective assistance of counsel standard means that there is usually no remedy for the poor lawyering. In the face of these obstacles, the only solutions are to resist business as usual and seek change. That has occurred and is occurring, and there are important lessons from these efforts for improving public defense systems.

A. The Ethical Imperative to Seek Meaningful Assistance of Counsel

Every public defender program and every public defender or appointed counsel has an ethical imperative to strive to provide meaningful, effective assistance of counsel to each client. Excessive caseloads trigger ethical concerns. The ABA Model Rules of Professional Conduct, followed in some fashion in every state, require competent representation.[109] The ethics rules also state, "A lawyer's workload must be controlled so that each matter can be handled competently."[110]

The ABA Standing Committee on Ethics and Professional Responsibility recognized the problems of excessive caseloads and the effect on competent lawyering, and it issued an ethics opinion on the subject.[111] Consistent with the state court cases and state ethics opinions that had addressed the issues,[112]

105. *Id.*

106. *Id.*

107. Harrington v. Richter, 559 U.S. 86, 112 (2011).

108. Laurence A. Benner, *The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 265, 323–24 (2009).

109. Model Rules of Prof'l Conduct R. 1.1 (2014) [hereinafter MODEL RULES].

110. *Id.* at R. 1.3 cmt. 2.

111. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441 (2006) [hereinafter Formal Op. 06-441].

112. *See, e.g.*, Joy, *Rationing Justice by Rationing Lawyers*, *supra* note 40, at 217–19, nn. 74–85 (discussing state ethics opinions and cases addressing ethical obligations of public defenders with excessive caseloads).

the ABA opinion concluded: "If a lawyer believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the representation of a client, she must not continue the representation of that client or, if representation has not yet begun, she must decline the representation."[113] In addition, the ABA opinion discussed what a public defender should do after receiving excessive appointments through a public defender office.[114]

The opinion also makes clear that there are ethical responsibilities for lawyers who supervise other public defenders or who have managerial responsibilities for a public defender's office or indigent defense system to ensure that all defenders maintain manageable caseloads. Those steps include transferring an overworked lawyer's non-representational duties to others in the office and reallocating cases within the office to balance workloads.[115] If those steps do not provide appropriate relief, the supervising and managerial lawyers should support a lawyer's effort to withdraw from representation and, if the court will not permit withdrawal, provide whatever resources are necessary to assist the lawyer in client representation.[116]

The ethics opinion sets out a roadmap both for individual public defenders or appointed counsel and for the supervising and managing lawyers. It makes clear that all involved lawyers have an ethical duty to ensure effective assistance of counsel.

B. The Importance of Data

In response to their legal and ethical obligations to clients, many public defender programs have been engaging in program-wide strategies to ensure effective assistance of counsel. In many instances, these strategies involve

113. Formal Op. 06-441, *supra* note 111, at 4.

114. The opinion states:

> When a lawyer receives appointments as a member of a public defender's office or law firm, the appropriate action to be taken by the lawyer to reduce an excessive workload might include, with approval of the lawyer's supervisor:
>
> - transferring non-representational responsibilities within the office, including managerial responsibilities, to others;
> - refusing new cases; and
> - transferring current case(s) to another lawyer whose workload will allow for the transfer of the case(s)."

Id. at 5. "If the supervisor fails to provide appropriate relief, the lawyer should continue to advance up the chain of command within the office until either relief is obtained or the lawyer has reached and requested assistance or relief from the head of the public defender's office." *Id*. at 6. "If appropriate relief is not secured within the public defender's office or system, the lawyer may appeal to the governing board of the public defender's office, and, if no relief is obtained, file a motion with the trial court requesting to withdraw from the number of cases needed to provide 'competent and diligent representation to the remaining clients.'" Joy, *Rationing Justice by Rationing Lawyers*, *supra* note 40, at 220 n.88.

115. Formal Op. 06-441, *supra* note 111, at 5.

116. *Id.* at 5–6.

litigation to achieve manageable caseloads. Fundamental to this litigation, though, is the need for public defender programs to have sufficient data about workloads and the time needed to provide effective lawyers.

An example of the importance of data to mount a successful campaign for change is the efforts of the Missouri State Public Defender (MSPD) to establish ethical, manageable caseloads. MSPD brought three writs of prohibition seeking to refuse appointments in certain categories of cases due to having excessive caseloads.[117] As a result of this litigation, the Missouri Supreme Court established procedures for MSPD requiring any office exceeding its maximum caseload for three consecutive months to "notify the presiding judge and prosecutors" and attempt to "agree on measures to reduce the demand for public defender services."[118] If there was no agreement, the Missouri Supreme Court stated that the office could refuse to accept more cases.[119]

Within a year of the Missouri Supreme Court's decision, MSPD's efforts to reach agreements with judges and prosecutors to reduce demand for public defender services failed.[120] The rejected efforts included actions such as prosecutors agreeing to limit the cases in which the state would seek incarceration, judges identifying cases or categories of cases in which private attorneys would be appointed, or judges identifying cases for dismissal.[121] When some MSPD offices began to refuse to take more cases, a court denied the request and MSPD filed another writ of prohibition.[122] The Missouri Supreme Court supported MSPD's position, and ruled that the trial court had exceeded its authority by ordering a public defender to take an additional case when the office had followed the proper procedures to establish that the lawyers in the office had exceeded their capacity to provide constitutionally required effective assistance of counsel.[123]

In spite of these victories, the MSPD came under fire by the both the Missouri State Auditor and the National Center for State Courts for utilizing the National Advisory Commission (NAC) Standards and not developing its own data to determine acceptable caseloads.[124] The NAC Standards were not

117. State *ex rel.* Mo. Pub. Defender Comm'n v. Pratte, 298 S.W.3d 870, 881–85 (Mo. 2009).

118. *Id.* at 886–87. Measures include prosecutors agreeing to limit the cases in which the state seeks incarceration, judges identifying cases or categories of cases in which private attorneys will be appointed, or judges determining cases for dismissal. *Id.* at 887.

119. *Id.*

120. *See* Eva Dou, *Public Defenders Prepare to Turn Away Cases, Citing Work Overload*, COLUMBIA MISSOURIAN, Oct. 1, 2010; Angela Riley, *St. Louis County Public Defender's Office Exceeded Caseload Maximum*, MO. LAW. WKLY., May 12, 2010.

121. *Id.*

122. State *ex rel.* Mo. Public Defender Commission v. Waters, 370 S.W.3d 592, 593 (Mo. 2012).

123. *Id.* at 612.

124. Thomas A. Schweich, Mo. State Auditor, Rep. No. 2012-129, Missouri State Public Defender 11 (2012), *available at* http://auditor.mo.gov/repository/press/2012-129.pdf; Mark

based on empirical study,[125] and the Missouri State Auditor noted that the NAC Standards do not differentiate between the different types of felonies or cases such as probation revocation matters that the MSPD handles.[126] The Missouri State Auditor raised concerns that the NAC Standards were too old and broad, and not sufficiently geared to the MSPD experiences.[127]

In light of these criticisms, the ABA and the MSPD engaged in a project to establish workload standards in Missouri and to create a blueprint for workload studies elsewhere.[128] A national certified public accounting firm conducted the study using a business forecasting tool called the Delphi method, which involves a series of surveys administered to a group of experts with structured feedback to the experts at each stage.[129] The findings of the study demonstrate that lawyers with the MSPD spend less time on each type of case than the time reasonably required when compared with the time they should be spending. The findings show: 1) for murders, a lawyer should spend an average of 106.6 hours on each case, but MSPD lawyers actually spend an average of 84.5 hours; 2) for serious felonies, a lawyer should spend an average of 47.6 hours, but MSPD Lawyers spend an average of 8.7 hours; 3) for sex felonies, a lawyer should spend an average of 64 hours, but MSPD lawyers spend an average of 25.6 hours; 4) for less serious felonies, a lawyer should spend 25 hours, but MSPD lawyers spend an average of 4.4 hours; and 5) for misdemeanors, a lawyer should spend 11.7 hours, but MSPD lawyers spend about 2.3 hours.[130]

The ABA and MSPD study provides a methodology and step-by-step guidance to other public defender systems seeking to replicate this study. This type of data is necessary for public defender systems to document the effects of excessive caseloads and the time lawyers have to represent clients. In addition, the National Legal Aid & Defender Association has prepared a paper that identifies additional data the public defender offices should collect to assist in improving operations and advocacy on behalf of clients and public defender programs.[131] Much of this data, including time spent on different types of

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Morris, *Missouri's Public Defense Lawyers Are Overworked, Bar Association Study Finds*, KAN. CITY STAR, Aug. 17, 2014, *available at* http://www.kansascity.com/news/local/crime/article1242731.html.

125. NORMAN LEFSTEIN, AMERICAN BAR ASSOCIATION, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 44–45 (2011).

126. Schweich, *supra* note 124, at 13–15.

127. *Id.* at 16.

128. Rubin Brown, *The Missouri Project: A Study of the Missouri Public Defender System and Attorney Workload Standards* (2014), *available at* http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.authcheckdam.pdf.

129. *Id.* at 9. Researchers at the Rand Corporation developed the Delphi method in 1962, and it has been used by health care, education, information systems, transportation, engineering, and other industries. *Id.* at 9–10.

130. *Id.* at 21.

131. Marea Beeman, National Legal Aid & Defender Ass'n, *Basic Data Every Defender*

cases relative to time that should be spent to provide ethical, effective assistance of counsel, is especially important should a public defender system initiate litigation to challenge excessive caseloads.[132]

C. Importance of Systemic Litigation

Systemic litigation on behalf of public defender systems is also necessary, as the experience in Missouri demonstrates. While it is generally regarded as a last resort,[133] there is an ethical duty to refuse taking on cases when it will prevent competent representation of current clients or new clients.[134] If there is no other way to achieve manageable caseloads, litigation is required.

Even when litigation originates with a single public defender seeking to refuse additional cases, the litigation can lead to system-wide relief. For example, one of the first cases providing county-wide relief started when a single public defender in New Orleans filed a "Motion for Relief to Provide Constitutionally Mandated Protection and Resources" after being assigned to represent another client on top of the defender's caseload of seventy active felony cases.[135] In *State v. Peart*, the Louisiana Supreme Court found that excessive caseloads were leading to ineffective assistance of counsel, and that there would be a "rebuttable presumption" of ineffective assistance of counsel.[136] By adopting this rebuttable presumption, the ruling placed the burden on the government to prove that defense counsel was effective before a trial judge could permit a case to go to trial. This ruling prompted the Louisiana legislature to increasing funding for indigent defense in order to remove the presumption of ineffective assistance of counsel.[137]

Several commentators and studies have analyzed the importance of litigation, especially systemic litigation, and have discussed it in depth.[138]

Program Needs to Track (2014), *available at* http://www.nlada100years.org/sites/default/files/BASIC%20DATA%20TOOLKIT%2010-27-14%20Web.pdf.

132. Marea Beeman, ABA Standing Comm. Legal Aid & Indigent Defenders, *Using Data to Sustain and Improve Public Defense Programs* 22 (2012), *available at* http://texaswcl.tamu.edu/reports/2012_JMI_Using_Data_in_Public_Defense.pdf.

133. LEFSTEIN, *supra* note 125, at 162.

134. *See supra* Part IV. A.

135. State v. Peart, 621 So.2d 780, 784 (La. 1993).

136. *Id.* at 791.

137. JUSTICE DENIED, *supra* note 77, at 120 n.79.

138. *See, e.g.*, JUSTICE DENIED, *supra* note 77, at Chapter 1, at 103–46 ("How to Achieve Reform: The Use of Litigation to Promote Systemic Change in Indigent Defense"); LEFSTEIN, *supra* note 125, at 162–65 (discussing litigation in Arizona, Florida, Kentucky, Louisiana, Michigan, Missouri, New York, and Tennessee); Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427 (2009) (analyzing litigation aimed at prospective reform of indigent defense systems); Vidhya Reddy, *Indigent Defense Reform: The Role of Systemic Litigation in Operationalizing the* Gideon *Right to Counsel* (Wash. Univ. Sch. of Law in St. Louis Working Paper No. 1279185, 2008), *available at* http://ssrn.com/abstract=1279185 (tracing the development of litigation efforts to reform defense systems and advocating increased use of class action suits for injunctive relief).

Common to much of the litigation is the importance of raising the issue of the right to meaningful counsel before trial. When the effectiveness of counsel is raised before trial, the argument is that there is a basic denial of counsel under *Gideon* and not ineffectiveness of counsel under *Strickland*, which would first require conviction.[139] The basic denial of counsel occurs not only when counsel is not provided at a critical stage of a case such as at arraignment,[140] but also when counsel is appointed but is unavailable to their clients, unresponsive to their clients' requests, waived clients' important rights without their consent, or "ultimately appeared to do little more on their behalf than act as conduits for plea offers."[141]

Moving the inquiry into the quality of assistance of counsel prior to trial is essential to avoid the high hurdle of prejudice necessary to prove ineffectiveness of counsel post-conviction under *Strickland*. This strategy of alleging a basic denial of counsel prior to trial, used recently in New York in *Hurrell-Harring v. State*,[142] led to a favorable settlement which requires, among other provisions, that every indigent defendant be represented by a lawyer at his or her arraignment at which the judge sets bail, and the settlement establishes a mechanism to develop appropriate caseload standards.[143] It is likely that more public defender systems will be forced to engage in similar systemic litigation if states and local governments continue to inadequately fund public defense.

V. CONCLUSION

The Allen Report, which led to the reform of public defense at the federal level, stated that the lack of adequate funding of defense involved "not only the interests of accused persons" but involved "broader social interests" that "concern no less than the proper functioning of the rule of law in the criminal area."[144] That was true of public defense in the federal system in 1963, and it is true today in many states. Inadequate funding of public defense at the state and local levels is undermining procedural justice and the notion of rule of law in municipal, county, and other state courts.

139. *See, e.g.*, Hurrell-Harring v. State, 930 N.E.2d 217, 224–25 (N.Y. 2010) (finding *Strickland* inapplicable when complaint alleges the basic denial of counsel under *Gideon*); *see also* Emily Chiang, *Indigent Defense Invigorated: A Uniform Standard for Adjudicating Pre-Conviction Sixth Amendment Claims*, 19 TEMP. POL. & CIV. RTS. L. REV. 443, 460–64 (2010) (discussing several class actions employing this litigation approach).

140. *Hurrell-Harring*, 930 N.E.2d at 223.

141. *Id.* at 222.

142. *See generally* 930 N.E.2d 217 (N.Y. 2010).

143. Stipulation and Order of Settlement 5–9, Hurrell-Harring v. State, No. 8866-07 (Sup. Ct. N.Y. Oct. 21, 2014), *available at* http://www.nyclu.org/files/releases/10.21.14_hurrell harring_settlement.PDF.

144. FRANCES A. ALLEN ET AL., REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 10 (1963).

The fallout from inadequate funding for public defense is first and foremost a betrayal of the promise of equal rights under the law when one faces criminal charges. Those most adversely affected are low-income persons of color, who are also most likely to be targets for racial profiling by law enforcement. More than 2.2 million people are in U.S. prisons and jails,[145] and a disproportionate number of them, comprising 60% of people in prison, are persons of color.[146] African American men are 6.5 times more likely to be incarcerated than white men,[147] and this affects the wider community and not just the families of those men.

Having an effective lawyer to investigate, research, and defend one's case will not always counteract the disparate impact of police and court practices that disadvantage the poor and people of color, but having an overworked and ineffective lawyer virtually guarantees a lack of procedural justice. More troubling is having governments that ensure a system of unequal assistance of counsel and unequal justice by underfunding public defense.

145. THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 2 (2013), *available at* http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf.

146. *Id.* at 5.

147. WILLIAM J. SABOL ET AL., BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2008, at 2 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf.