# Rationing Justice by Rationing Lawyers

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## INTRODUCTION

The number of lawyers in the United States continues to increase, but low and middle-income persons still find it difficult, if not impossible, to afford legal assistance. National and state surveys reveal that more than 80 percent of the civil legal needs of the poor go unmet,[1] as do a majority of the needs of middle-income persons.[2] Legal representation can often dramatically increase a person's ability to win at trial or to negotiate a favorable outcome,[3] and the lack of access to lawyers effectively closes the courthouse doors for millions.

On the surface, the situation for those charged with criminal offenses is different. Anyone facing possible jail or prison time for a criminal matter is entitled to a lawyer, and the government is

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1. *See* LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL NEEDS OF LOW-INCOME AMERICANS 16–18 (2009), *available at* http://www.lafla.org/pdf/justice_Gap09.pdf.

2. The last national study of legal needs found that 61 percent of the legal needs of middle-income households are not being handled by the justice system. AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS, MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 21 (1994), *available at* http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/ABALegalNeedsStudy.pdf.

3. There is no comprehensive research on the overall effects of having legal representation on outcomes, but studies of several practice areas support the claim that legal representation increases a party's chances of winning at trial or negotiating a favorable outcome. For example, Russell Engler discusses studies of housing, family, small claims, social security disability appeals, unemployment, immigration, and other legal cases where having a lawyer increased success rates. *See* Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 46–66 (2010).

obligated to provide that lawyer if the accused cannot pay.[4] But, as this Article analyzes, there are serious issues about the quality of such legal representation when courts accept as effective assistance of counsel legal representation that falls below any reasonable standard.[5]

For example, courts have rejected ineffective assistance of counsel claims in death penalty cases where defense counsel slept through portions of the trial,[6] or where counsel was under the influence of alcohol, drugs, or otherwise mentally impaired during trial.[7] This indifference is further represented by a criminal justice system that continued to appoint a lawyer to defend indigent clients even though the bar had reprimanded him sixteen times,[8] and the lawyer would not even interview clients in jail or return client phone calls.[9]

In upholding a death sentence, a federal judge commented on the Catch-22 that many poor defendants face because of the very low legal standard for effective assistance of counsel. The Judge stated 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

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4. *See infra* notes 26, 39–46 and accompanying text.

5. In this Article, I build upon some ideas appearing in a previous article. *See* Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 MO. L. REV. 771 (2010).

6. *See, e.g.*, *Ex Parte* McFarland, 163 S.W.3d 743, 751–60 (Tex. Crim. App. 2005) (en banc) (rejecting ineffective assistance of counsel claim that included defense counsel sleeping); David R. Dow, *The State, the Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691, 694–95 (1996) (describing the case and execution of Carl Johnson whose defense counsel slept during trial and whose "ineptitude . . . jumps off the printed page" of the trial transcript).

7. *See, e.g.*, Berry v. King, 765 F.2d 451, 454 (5th Cir. 1985) (holding drug use by defense counsel irrelevant to an ineffective assistance of counsel claim); Fowler v. Parratt, 682 F.2d 746, 750 (8th Cir. 1982) (finding no evidence of ineffective assistance although defense counsel admitted to being an alcoholic and having blackouts during trial); People v. Garrison, 765 P.2d 419, 440 (Cal. 1989) (en banc) (holding that defendant failed to prove ineffective assistance of counsel although defense counsel was an alcoholic and consumed large quantities of alcohol each day of the trial); *see generally* 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 (1996) (describing how courts reject ineffective assistance of counsel claims when lawyers use drugs, alcohol, or are otherwise mentally impaired during trial).

8. *All Things Considered: Not Enough Money or Time to Defend Detroit's Poor*, (NPR radio broadcast Aug. 17, 2009), *available at* http://www.npr.org/templates/story/story.php ?storyId=111811319.

9. *Id.*

then proceeded to explain why he would nevertheless uphold the death sentence:

> The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel. . . . Consequently, 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.[10]

As Stephen Bright has argued, caring about the quality of justice system we have for indigent criminal defendants is not about being soft or tough on crime. It is about equal justice under the law.[11] It is an issue that everyone, especially members of the legal profession, should care about. It is about whether we have a justice system that inspires confidence in its decisions of guilt or innocence. It is about whether we can have a criminal justice system where a public defender, who is subject to the same ethics rules as every other licensed lawyer, has the ability to say "I can't take on another case and represent my clients ethically," and the courts will actually listen.

In recent years, the media has emphasized how the criminal justice system at the state level is in crisis because of the enormous caseloads burdening many state public defenders.[12] This crisis occurs because there is not enough funding to support the amount of lawyers needed to serve the number of clients. Due to excessive caseloads, our society rations justice by rationing lawyers in almost every state.

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10. Riles v. McCotter, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring). Judge Rubin points out that the constitutional standard of effective assistance of counsel is so low that courts may not reverse even when a judge finds the representation to be less than effective as a practical matter, but cannot say so as a matter of law.

11. Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683, 710 (2010).

12. *See, e.g.*, Erik Eckholm, *Citing Workload, Public Defenders Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1 (reporting that public defender offices in at least seven states were refusing new cases or engaging in litigation over excessive caseloads); Janice Gregorson, *Public Defenders File Grievance Over Workload*, POST-BULLETIN (Rochester, Minnestoa), Apr. 14, 2010 (stating that fourteen public defenders in Minnesota grieved excessive caseloads and some refused new cases); Scott Michels, *Facing Budget 'Crisis,' Public Defenders May Refuse Cases*, ABC NEWS, June 13, 2008, http://abcnews.go.com/TheLaw/story?id=5049461&page=1 (reporting on public defender offices nationwide with excessive caseloads).

More than forty years ago, the National Advisory Commission on 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.[13] But hearings and studies reveal that these caseload limits are exceeded in almost every jurisdiction in the United States.[14] Data collected by the Department of Justice's Bureau of Justice Statistics demonstrate that 70 percent of county-based public defender offices exceed these caseload guidelines,[15] and fifteen of nineteen reporting state public defender programs exceeded the maximum caseload guidelines.[16]

Some of the most excessive caseloads were imposed on six attorneys in Tennessee who handled over 10,000 misdemeanor cases in 2006, and public defenders in Dade County, Florida, who averaged

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13. 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.

14. In 2003, testimony at ABA hearings demonstrated that public defender caseloads in many states exceeded maximum caseload limits at times by more than 150 percent. 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* THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL, REPORT OF THE NATIONAL RIGHT TO COUNSEL COMMITTEE 67–70 (Apr. 2009), *available at* http://www.constitutionproject.org/pdf/139.pdf [hereinafter JUSTICE DENIED]. 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.

15. DONALD J. FAROLE, JR. & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT, COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007, 1, 8–10 (Georgette Walsh & Jill Duncan eds., Sept. 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf.

16. LYNN LANGTON & DONALD J. FAROLE, JR., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT, STATE PUBLIC DEFENDER PROGRAMS, 2007, 1, 12–14 (Georgette Walsh & Jill Duncan eds., Sept. 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/spdp07.pdf.

nearly 500 felonies and 2,225 misdemeanors per lawyer in 2008.[17] No wonder public defense of the accused is sometimes referred to as "assembly-line justice."[18]

The national problem of case overloads for state public defenders is present in Missouri, where 368 lawyers handled 84,616 cases in 2010, or an average of 229 felonies, misdemeanor, and other cases per attorney.[19] According to the national caseload guidelines, the Missouri Public Defender System is short 125 lawyers.[20] Missouri ranks fifteenth in the nation in the number of prisoners incarcerated,[21] and forty-ninth in the nation on per capita expenditures on indigent defense—just $5.20 per citizen.[22] The average cost-per-case in Missouri for representation by the State Public Defender is just $376.00,[23] and state public defenders are drowning in cases. By every objective measure, caseloads are beyond the breaking point.

In a speech at the Seventy-Fifth Anniversary of the Legal Aid Society of New York, Judge Learned Hand coined the famous phrase that inspired the title for this Article: "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."[24] While that statement applies to all of the legal needs for the poor, Judge Hand directed the warning specifically at the lack of lawyers for those accused of crimes in state courts.[25] Without

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17. JUSTICE DENIED, *supra* note 14, at 68.

18. "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).

19. STATE OF MO. PUB. DEFENDER COMM'N, FISCAL YEAR 2010 ANNUAL REPORT, ASSURING THE PUBLIC DEFENSE 1 (Oct. 1, 2010), *available at* http://www.publicdefender.mo.gov/about/FY2010AnnualReport.pdf [hereinafter MPD 2010 ANNUAL REPORT].

20. *Id.* at 1.

21. Heather C. West et al., U.S. Dept. of Justice, Bulletin, *Prisoners in 2009*, BUREAU OF JUSTICE STATISTICS, 1, 16, (Georgette Walsh & Jill Duncan eds., Dec. 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf.

22. MPD 2010 ANNUAL REPORT, *supra* note 19, at 1.

23. *Id*.

24. *"Thou Shalt Not Ration Justice,"* THE LEGAL AID SOCIETY, http://www.legal-aid.org/en/homes/thoushaltnotrationjustice.aspx (quoting Learned Hand) (last visited Oct. 11, 2011).

25. Irving R. Kaufman, *The Second Circuit: Reputation for Excellence*, 63 A.B.A. J. 200, 203 (1977).

effective, ethical representation no one accused of a crime in this country has real access to justice.

This Article focuses on the crisis in Missouri's public defender system due to excessive caseloads and how the rationing of lawyers limits access to justice for the accused. The Article proceeds in four parts: Part I discusses the Sixth Amendment and its importance to the accused; Part II briefly analyzes why the current standard for ineffective assistance of counsel contributes to the problem of excessive caseloads for state public defenders; Part III focuses on the ethical obligations of public defenders facing excessive caseloads; and Part IV outlines what needs to occur in order to improve the justice system for the accused.

## I. THE SIXTH AMENDMENT AS A REVOLUTIONARY CONCEPT

The Sixth Amendment was a revolutionary concept when the founders included it in the Bill of Rights.[26] In Alexis de Tocqueville's *Democracy in America*, he observed that from its founding, one of the unique features of American society was that the "power of lawyers" offered the poor the possibility of equal justice against powerful or affluent adversaries.[27] What amazed de Tocqueville in the 1830s was the transformative role lawyers played in this country.[28]

This robust role for lawyers derives from the Bill of Rights and especially the Sixth Amendment. Early English common law prohibited the accused facing charges that carried the penalty of death—including felonies such as robbery, murder, or treason—from retaining a lawyer to assist with the defense.[29] Without counsel, prosecutions were swift, punishment certain, and the authority of the

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

27. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 279 (Henry Reeve trans., 1875).

28. *Id*. at 282–84.

29. WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8–9 (1955); JAMES J. TOMKOVICZ, THE RIGHT TO ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 2–3 (2002).

state unquestioned.[30] The accused could hire counsel only if facing misdemeanors such as libel or battery, for which the penalties were incarceration or loss of property.[31]

When the framers of the U.S. Constitution inserted the Sixth Amendment into the Bill of Rights, the right to counsel in England was still limited to misdemeanors and, because of the Treason Act of 1695, treason cases.[32] In practice, English judges often permitted retained counsel to play some limited role in felony cases.[33]

For the first 150 years of our nation, the courts interpreted the Sixth Amendment as a right confined to federal cases, and guaranteed only that the accused could retain counsel.[34] This meant that the poor were on their own, and consequently there was little justice for them in criminal proceedings.

The right to counsel, as we understand it today, began to expand in the early 1930s when the Supreme Court decided *Powell v. Alabama*,[35] the famous Scottsboro Boys case, which guaranteed the right to government-provided counsel in capital cases in state courts.[36] Not long after establishing the right to counsel in state capital cases, the Court in *Johnson v. Zerbst*[37] extended the right to appointed counsel for all federal crimes where incarceration was a possible punishment. It reasoned that assistance of counsel is "an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty."[38]

Twelve years after Judge Hand's speech, a unanimous U.S. Supreme Court decided *Gideon v. Wainwright.*[39] Here, the Court recognized for the first time that the accused facing felony charges in

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30. TOMKOVICZ, *supra* note 29, at 3–4. Some commentators have also argued that the common law practice to deny counsel to the accused was in part justified by the more active role that judges played in trials of that era. *Id*. at 5.

31. BEANEY, *supra* note 29, at 8–9; TOMKOVICZ, *supra* note 29, at 3.

32. BEANEY, *supra* note 29, at 9; TOMKOVICZ, *supra* note 29, at 6–7.

33. TOMKOVICZ, *supra* note 29, at 8–9.

34. Betts v. Brady, 316 U.S. 455, 461–62 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963); *see also* TOMKOVICZ, *supra* note 29, at 20–21.

35. 287 U.S. 45 (1932).

36. *Id*. at 71. For an excellent history of the Scottsboro case, see Stephan Landsman, *History's Stories*, 93 MICH. L. REV. 1739 (1995).

37. 304 U.S. 458, 467–68 (1938).

38. *Id*. at 467.

39. 372 U.S. 335 (1963).

state court had the right to counsel if the accused could not afford to hire a lawyer.[40] Twenty-three states supported Clarence Gideon in his quest for legal representation, recognizing that if the criminal justice system is to be fair, then lawyers must assist poor people.[41] Missouri was one of the supporting states, and Thomas Eagleton, then Attorney General of Missouri and the state's top lawyer and prosecutor, signed the amicus brief.[42]

After *Gideon,* the accused's right to counsel under the Sixth Amendment expanded. A series of Supreme Court decisions found that the right to counsel for the poor also applied when one faced possible deprivation of liberty through a jail or prison sentence in misdemeanor cases,[43] juvenile matters,[44] other cases involving possible incarceration (such as probation revocation hearings),[45] and in the first state appeal as a matter of right.[46]

While the right to counsel attaches when there is possible loss of liberty in criminal cases, the right to counsel does not attach to criminal cases where the penalty is a fine.[47] More recently, the Supreme Court in 2011 held that the right to counsel does not apply to incarceration for non-criminal matters such as civil contempt for nonpayment of child support.[48]

Thanks to *Gideon* and the cases that followed, public defenders or court-appointed private attorneys represent those unable to afford a privately retained lawyer, a situation present in approximately 80 percent of criminal cases.[49] While *Gideon* established that an indigent

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40. *Id*. at 343–44.

41. Brief for the State Government as Amici Curiae Supporting Petitioner, Gideon v. Cochran, 370 U.S. 908 (1962) (No. 155), *cert. granted sub nom* Gideon v. Wainwright, 372 U.S. 335 (1963), *available at* http://www.nacdl.org/public.nsf/GideonAnniversary/pleadings/$FILE/State_Govt_Amicus.pdf.

42. *Id*.

43. Argersinger v. Hamlin, 407 U.S. 25, 36–37 (1972).

44. *In re* Gault, 387 U.S. 1, 29–31 (1967).

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

46. Douglas v. California, 372 U.S. 353, 356–57 (1963). *Douglas* was a companion case to *Gideon* decided on the same day, March 18, 1963. *Id.* at 353; *Gideon*, 372 U.S. at 335.

47. Scott v. Illinois, 440 U.S. 367, 373–74 (1979).

48. Turner v. Rogers, 79 U.S.L.W. 4553 (U.S. June 20, 2011).

49. A comprehensive study of indigent defense systems found that public defenders and appointed counsel represent 82 percent of the more than 4.2 million state felony cases in the one hundred most populous counties in the United States. *See* Carol J. DeFrances & Marika F. X. Litras, U.S. Dep't of Justice, Bulletin, *Indigent Defense Services in Large Counties, 1999*,

person has the right to appointed counsel, the key issue today is the quality of representation that appointed counsel provides to the poor.

## II. WHY THE INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD DOES NOT PROTECT AGAINST BAD LAWYERING

When *Gideon* was decided, the standard for ineffective assistance of counsel in federal courts was very limited. Courts required that "the circumstances surrounding the trial shocked the conscience of the court and made the proceedings a farce and a mockery of justice."[50] This "farce and mockery" standard began to change in the 1970s. First, the Supreme Court stated in dicta that "the right to counsel is the right to the effective assistance of counsel."[51] Circuits adopted this language, and the idea of effective assistance of counsel took hold.[52] In 1973, ten years after *Gideon*, Judge Bazelon wrote for a panel of the D.C. Circuit and held in *United States v. DeCoster*[53] that "a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate."[54] By 1983, all of the circuits had adopted this new standard.[55]

*DeCoster* provided a roadmap both for measuring whether counsel was competent and for how to allocate the burden of proof.[56] First, the decision stated that courts should compare defense counsel's actions to the American Bar Association (ABA) Standards for the Defense Function in order to determine if counsel acted

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BUREAU OF JUSTICE STATISTICS, 1 (Ellen Goldberg & Rhonda Keith eds., Nov. 2000), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/idslc99.pdf. There are approximately 3,100 counties and independent cities in the United States, and the one hundred most populous accounted for 42 percent of the population in 1999. *Id.* at 2.

50. Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir. 1945); *see also* Trapnell v. United States, 725 F.2d 149, 151 (2d Cir. 1983) (citing to cases from all circuits adopting the "farce and mockery" standard).

51. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

52. *See, e.g.*, Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970) (per curiam) (holding that the defendant was entitled to "counsel reasonably likely to render and rendering reasonably effective assistance.").

53. 487 F.2d 1197 (D.C. Cir. 1973).

54. *Id*. at 1202.

55. The Second Circuit was the last federal circuit to replace the "farce and mockery" standard with the "reasonably competent assistance" of counsel standard. *Trapnell*, 725 F.2d at 155.

56. *DeCoster*, 487 F.2d at 1202–04.

competently.[57] If the court finds a substantial violation of any of the Standards, then the burden shifts to the government to show lack of prejudice to the defendant.[58]

Shifting the burden of proof to the government is critical to a meaningful effective assistance of counsel standard. Judge Bazelon reasoned that the burden of proof had to be shifted to the government to prove lack of prejudice once substandard representation took place for two reasons. First, the government must prove guilt, and requiring a defendant to prove prejudice after proving counsel was not competent is tantamount to requiring the defendant to prove innocence.[59] Second, "proof of prejudice may well be absent from the record precisely because counsel has been ineffective."[60] Judge Bazelon noted that many failures to act, such as failures to investigate the case or interview or call witnesses, are absent from the record when counsel renders inadequate assistance.[61]

In *Strickland v. Washington*,[62] the Supreme Court reversed this burden shifting approach and held that ineffective assistance of counsel claims require the defendant to prove both objectively unreasonable performance by the lawyer *and* prejudice. The Court defined prejudice as a reasonable probability that the lawyer's inadequate performance adversely affected the outcome of the case.[63] As Judge Bazelon pointed out, requiring the defendant to prove prejudice after demonstrating unreasonable performance by the defense lawyer is a very difficult, and at times, an impossible

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57. *Id.* at 1203. The ABA issued the Criminal Justice Standards in 1968. AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE (3d ed. 2006) (1968), *available at* http://www.abanet.org/crimjust/standards/home.html [hereinafter ABA CRIMINAL JUSTICE STANDARDS]. Chief Justice Warren Burger described them as "the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history." *Id.* More than 120 United States Supreme Court opinions and approximately 700 federal circuit court opinions have cited to Standards. Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 11 (2009).

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

59. *Id*.

60. *Id*.

61. *Id*.

62. 466 U.S. 668 (1983).

63. *Id*. at 687–88, 694.

burden.[64] In his dissent in *Strickland*, Justice Thurgood Marshall echoed Judge Bazelon's concerns, noting that "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 precisely because of the incompetence of defense counsel."[65]

In a lecture, Judge Bazelon explained that judges are reluctant to reverse convictions on grounds of inadequate assistance of counsel because of the widely held belief "that most criminal defendants are guilty anyway," what he termed the "'guilty anyway' syndrome."[66] In recent years, many DNA exonerations demonstrate that one cost of ignoring inadequate representation is the conviction of innocent persons whose lives are ruined because they did not have competent legal assistance.[67] As former Attorney General Janet Reno observed, "[i]n the end, a good lawyer is the best defense against wrongful conviction[s]."[68]

The "guilty anyway" syndrome may have laid the foundation for *Strickland*, and because of *Strickland* only the most outrageous conduct by defense counsel warrants a new trial. For example, a lawyer has to be so inept so as to admit a client's guilt without the

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64. *See Decoster*, 487 F.2d at 1204. While placing an extremely difficult burden on the defendant, requiring a showing of prejudice reflects a realist view that lawyers cannot perform perfectly in every trial. Requiring the defendant to show that the outcome was likely affected by defense counsel's performance saves the government time and money on a second trial that appears likely to arrive at the same result. The prejudice requirement is also consistent with the justice system's interest in finality of judgments, which one finds in the Federal Rules of Evidence and the Federal Rules of Criminal Procedure. The "harmless error" standard provides that erroneous rulings admitting or excluding evidence will not trigger reversal unless there is a showing that "a substantial right of the party is affected." FED. R. EVID. 103(a). The Federal Rules of Criminal Procedure state that any error "that does not affect substantial rights must be disregarded." FED. R. CRIM. P. 52(a).

65. *Strickland*, 466 U.S. at 710 (Marshall, J., dissenting).

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

67. A study of the first sixty-two DNA evidence exonerations showed that bad lawyering was the cause or contributing cause of a wrongful conviction in seventeen of the cases. BARRY SHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT app. at 263 (2000).

68. OFFICE OF JUSTICE PROGRAMS, U.S. DEPT. OF JUSTICE, NAT'L SYMPOSIUM ON INDIGENT DEFENSE 2000: REDEFINING LEADERSHIP FOR EQUAL JUSTICE vii (2000).

client's consent *and* the court has to conclude that there was no tactical reason to admit guilt.[69] In other words, the defense lawyer has to be even more outrageous than one who sleeps, is under the influence of alcohol or drugs, or is otherwise mentally impaired during trial representation.[70]

The *Strickland* standard and the "guilty anyway" syndrome combine to produce a criminal justice system that accepts excessive caseloads resulting in poor lawyering. When judges, prosecutors, and even some defense lawyers accept excessive caseloads as a normal part of the criminal justice system, they essentially pretend that indigent defendants receive the same constitutional protections as defendants who are able to retain effective private counsel or defendants fortunate enough to be assigned to public defenders with manageable caseloads.

## III. ETHICAL OBLIGATIONS OF PUBLIC DEFENDERS FACING EXCESSIVE CASELOADS

The first ethics rule in all but one state requires competent representation.[71] The ethical requirement of competence means not just being qualified and experienced to handle a case but also having enough time to devote to the case. The rules state that a lawyer "should not accept representation in a matter unless it can be performed competently, promptly . . . and to completion."[72] And, a "lawyer's work load must be controlled so that each matter can be

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

70. *See supra* notes 6–7 and accompanying text.

71. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation." MODEL RULES OF PROF'L CONDUCT R. 1.1 (2006) [hereinafter MODEL RULES]. The duty of competence includes "adequate preparation." *Id*. at R. 1.1, cmt. 5. California is the only state that has not modeled its lawyer ethics rules after the ABA Model Rules of Professional Conduct. *See* Am. Bar Ass'n Ctr. for Prof'l Responsibility, *About the Model Rules*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Oct. 11, 2011). The California Rules of Professional Conduct state, "[a] member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." CAL. RULES OF PROF'L CONDUCT R. 3-110(A) (2011).

72. MODEL RULES, *supra* note 71, at R. 1.16 cmt. 1.

handled competently."[73] When the lawyer has so many client cases that her "representation of one or more clients will be materially limited by the lawyer's responsibilities to another client," a conflict of interest exists.[74] Unlike a private lawyer or law firm that has control over the number of client cases they accept, the individual public defender and the public defender system may have little control over their client caseload.

This lack of control creates an ethical dilemma for the public defender because having too many cases is not an excuse for violating ethical obligations.[75] An Arizona ethics opinion explained: "[t]here can be no question that taking on more work than an attorney can handle adequately is a violation of a lawyer's ethical

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73. *Id*. at R. 1.3 cmt. 2. Another comment to Rule 1.3 provides that 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." *Id*. at R. 1.3 cmt. 1.

74. *Id*. at R. 1.7(a)(2). *See, e.g*., *In re* Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender, 561 So.2d 1130, 1135 (Fla. 1990) (per curiam) ("When excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created.").

75. A contract lawyer with a public defender office who had over 250 active cases was suspended from practice for inattention to his clients. *In re* Martinez, 717 P.2d 1121, 1122 (N.M. 1986). The New Mexico Supreme Court stated:

> As licensed professionals, attorneys are expected to develop procedures which are adequate to assure that they will handle their cases in a proficient fashion and that they will not accept more cases than they can manage effectively. When an attorney fails to do this, he or she may be disciplined even where there is no showing of malicious intent or dishonesty. The purpose of attorney discipline is not to punish the attorney but to insure [sic] that members of the public can safely assume that the attorney to whom they entrust their cases is worthy of that trust.

*Id*. at 1122; *see also* Nebraska *ex rel.* Neb. State Bar Ass'n v. Holscher, 230 N.W.2d 75, 80 (Neb. 1975) (being "extremely busy with criminal prosecutions" does not excuse a failure to know and follow the law).

Unlike public defenders, legal service lawyers are able to control their caseloads to ethical practice levels by refusing to accept new cases and clients. The ABA Standing Committee on Ethics and Professional Responsibility approved of this approach reasoning that a "lawyer's obligations to provide competent and diligent representation under Model Rules 1.1 and 1.3 imposes a duty to monitor workload, a duty that requires declining new clients if taking them on would create a 'concomitant greater overload of work.'" ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-399 (1996); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 347 (1981).

obligations."[76] Nor is it an excuse that other public defenders in the same jurisdiction have excessive caseloads.[77]

A lawyer may be disciplined for the failure to research the law, perform an investigation, advise a client on possible defenses, or to take other necessary steps to provide competent representation.[78] Waiving a client's right to a speedy trial as a way to balance the demands of too many cases is an option, but only if the waiver is "supported by the express or implied consent of the client himself."[79]

Some state courts and bar ethics authorities have recognized that the only ethical solution to excessive caseloads is for public defenders to decline cases. One of the first cases is *State v. Peart*,[80] in which the Louisiana Supreme Court found that due to "excessive caseloads and insufficient support," indigent clients of a public defender in New Orleans were "generally not provided with effective assistance of counsel. . . ."[81] Given the excessive caseloads, the Louisiana Supreme Court adopted a rebuttable presumption that the indigent defendants in New Orleans were receiving constitutionally ineffective assistance of counsel.[82] The rebuttable presumption placed the burden on the state to prove that defense counsel was effective before the trial judge could permit a case awaiting trial to proceed. Shortly after the ruling, the Louisiana legislature increased indigent defense spending in order to remove the presumption of ineffective assistance of counsel.[83]

State bar ethics opinions that have addressed this issue take the position that when excessive caseloads interfere with the ability to provide competent representation, the public defender should decline

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76. Ariz. Comm. on the Rules of Prof'l Conduct, Formal Op. 90-10 (1990).

77. At least one court has found that the customary unethical practice among other lawyers is not an excuse to violate the ethics rules. Ky. Bar Ass'n v. Hammond, 619 S.W.2d 696, 699 (Ky. 1981).

78. *See, e.g.*, Fla. Bar v. Morales, 366 So.2d 431, 432–33 (Fla. 1978) (per curiam) (disbarring defense lawyer for negligent and incompetent representation of a client); *In re* Lewis, 445 N.E.2d 987, 989–90 (Ind. 1983) (disbarring lawyer for, among other reasons, inadequate preparation in the representation of two defendants); Office of Disciplinary Counsel v. Henry, 664 S.W.2d 62, 64–65 (Tenn. 1983) (suspending lawyer for mishandling cases).

79. People v. Johnson, 606 P.2d 738, 744 (Cal. 1980).

80. 621 So.2d 780 (La. 1993).

81. *Id*. at 790.

82. *Id*. at 791.

83. JUSTICE DENIED, *supra* note 14, at 120 n.79.

additional cases.[84] These opinions are consistent with other cases and ethics opinions that emphasize that a lawyer must not take on more cases than can be handled competently.[85]

The endemic problem of excessive caseloads for state public defenders prompted the ABA Standing Committee on Ethics and Professional Responsibility to issue an ethics opinion on the subject.[86] Consistent with the state court and state ethics opinions, the ABA opinion concluded that, "[i]f 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."[87] To ensure that all defenders maintain manageable caseloads, the ABA opinion also discusses what a public defender should do after receiving excessive appointments through a public defender office,[88] and the ethical

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84. *See, e.g.*, Wis. Prof'l Ethics Comm., Formal Op. E-84-11 (1984) (stating that a public defender should decline new matters when the caseload interferes with the competent representation of clients), *aff'd*, Wis. Prof'l Ethics Comm., Formal Op. E-91-3 (1991); S.C. Ethics Advisory Comm., Op. 04-12 (2004) (declaring that all lawyers, including public defenders, may not have caseloads that lead to ethics violations).

85. *See, e.g.*, Ariz. Comm. on the Rules of Prof'l Conduct, Formal Op. 90-10 (1990) (stating that a public defender office must take action to ensure the workloads of attorneys so that they can "competently and diligently represent the number of persons assigned"); Ariz. Comm. on the Rules of Prof'l Conduct, Formal Op. 01-06 (2001) (declaring that a lawyer may not enter into an indigent defense contract that might induce the lawyer to curtail services due to compensation structure); Nat'l Legal Aid and Defender Ass'n, Ethics Op. 03-01 (2003) (averring that a public defense agency is prohibited from accepting cases beyond capacity of agency's lawyers to provide competent representation); Va. Standing Comm. on Legal Ethics, Op. 1798 (2004) (stating that lawyers, including prosecutors, may not take on more cases then they can handle); State v. Alvey, 524 P.2d 747, 751–53 (Kan. 1974) (per curiam) (disciplining lawyer for violating the ethics rules by taking on more legal work than can be handled); State v. Gasen, 356 N.E.2d 505 (Ohio Ct. App. 1976) (reversing contempt against criminal defense lawyers who refused appointments due to inability to effectively represent defendants); Zarabia v. Bradshaw, 912 P.2d 5, 8 (Ariz. 1996) (en banc) (finding excessive caseload for contract attorney raised colorable question concerning ability to provide ethical representation to clients).

86. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441 (2006).

87. *Id.*

88. 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:

responsibility of a lawyer who supervises other public defenders or who has managerial responsibilities for a public defender's office or indigent defense system.[89]

The Missouri State Public Defender System (MSPD) is attempting to follow its ethical obligations. A 2009 Missouri Supreme Court decision, *State ex rel. Missouri Public Defender Commission v. Pratte*,[90] outlined the procedures to follow. In *Pratte*, the Supreme Court of Missouri stated that once a public defender office exceeds its maximum caseload for three consecutive months, the head public defender in the office is required to "notify the presiding judge and

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- 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*. If the supervisor in the public defender office does not provide appropriate relief, then the opinion advises the lawyer "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*. 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." *Id.*

89. The supervising and managerial lawyers within the public defender office must take the steps necessary to ensure that each subordinate lawyer's workload is not excessive so that each lawyer is able to provide competent, ethical representation of clients. *Id*. Those steps include transferring the lawyer's non-representational duties to others in the office and reallocating cases within the office to balance workloads. *Id*. 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. *Id.*

90. 298 S.W.3d 870 (Mo. 2009). In *Pratte*, the Supreme Court of Missouri considered three writ of prohibition proceedings brought by the Missouri Public Defender Commission seeking to refuse appointments from trial judges in certain categories of cases as contrary to a Commission rule adopted to control its caseload. *Id*. at 870, 881–85. The rule required public defenders to decline cases where an indigent defendant had at some point retained private counsel or allowed them to decline probation violation cases when an office had exceeded its maximum allowable caseloads. *Id*. at 881, 884. The Supreme Court of Missouri denied the two writs reasoning that "the rule cannot authorize the public defender to decline *categories* of cases that the statute requires the public defender to represent." *Id*. at 884. The court made permanent a third writ involving a judge who sought to appoint a public defender "in his private capacity" in a probation violation case, reasoning that under state law a public defender does not have a "private capacity" as a lawyer and the judge could not require the public defender to take the case on that basis. *Id*. at 885–86.

prosecutors" and attempt to "agree on measures to reduce the demand for public defender services."[91] 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.[92] The Missouri Supreme Court stated that if there is no agreement with the prosecutors and the judge, then the remaining remedy was for "the public defender to make the office unavailable for any appointments until the caseload falls below the commission's standard."[93]

In 2010, all MSPD attempts to reach agreements with prosecutors and judges were unsuccessful in some jurisdictions.[94] When some offices got to the point of refusing to take more cases, a new round of litigation ensued.[95] The Missouri Supreme Court appointed a Special Master, retired Judge Miles Sweeney, who investigated the matter and determined that there is "not enough time in the day to properly represent all the defendants assigned, but the defender must adequately defend clients because there is no immunity from the profession's ethical requirements nor from civil liability for legal malpractice."[96] He concluded that in refusing new cases the MSPD followed the procedures outlined by the Missouri Supreme Court, but he stated that the procedures outlined in *Pratte* simply would not resolve Missouri's increasing caseload and limited resources issues.[97] He noted that the procedures "cannot compel" judges to expedite case

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91. *Id*. at 886–87.
92. *Id*. at 887.
93. *Id*.
94. In 2010, public defender offices across the state started certifying that they were exceeding their maximum caseloads. 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.
95. Maria Altman, *Public Defender Case Goes to Mo. Supreme Court*, KRCU NEWS, June 22, 2011, http://krcu-news.blogspot.com/2011/06/public-defender-case-goes-to-mo-supreme.html.
96. J. Miles Sweeney, Report of the Special Master, *MSPD v. Hon. John Waters and Hon. Mark Orr*, 5, *available at* http://bloximages.newyork1.vip.townnews.com/stltoday.com/content/tncms/assets/v3/editorial/c/f1/cf153220-3eda-11e0-b344-0017a4a78c22/4d64458c17795.pdf. Sweeney submitted the report to the Missouri Supreme Court in February 2011. Allison Retka, *Public Defender Report Sent to Missouri Supreme Court*, MO. LAW. MEDIA, Feb. 4, 2011, http://findarticles.com/p/articles/mi_7992/is_20110204/ai_n56850115/.
97. Sweeney, *supra* note 96, at 3–4.

management or to appoint private counsel or require prosecutors "to file fewer cases, ask for less jail time, or initiate diversion programs.[98]

Special Master Sweeney stated that alternatives exist, including volunteer attorney programs or contract attorneys, but cautioned that these were not long-term, viable solutions, particularly in rural communities that do not have a large number of attorneys to fill in when the public defender staff is overloaded.[99] He opined that short of devoting more resources to public defenders, or compelling judges and prosecutors to implement measures to reduce cases for which public defenders are needed, reforming the Missouri Criminal Code to equalize penalties for similar crimes could reduce caseloads.[100]

## IV. STRATEGIES FOR KEEPING CASELOADS WITHIN ETHICAL LIMITS

So, what is to be done in Missouri? Special Master Sweeny suggested that the entire criminal code in the state of Missouri be revised. Presumably, such a revision might reduce the number of criminal offenses or remove the possibility of incarceration for some offenses, thereby reducing the number of poor people who require public defenders.

In his February 2010 State of the Judiciary address to the Missouri General Assembly, Missouri Supreme Court Chief Justice Ray Price offered up two possible alternatives: "The solution to this problem is relatively simple: either increase the public defender's funding or tell the public defender who to defend and who not to defend within the limits of their funding."[101] The first alternative, more funding for the MSPD, is an obvious solution, but this requires state legislators and the governor to be concerned about justice for the poor rather than continuing to remain indifferent. This requires them to be motivated to find a solution. It will likely take the Supreme Court of Missouri to act consistent with its *Pratte* decision when it revisits the public

98. *Id.* at 4.
99. *Id*. at 8–10.
100. *Id*. at 11.
101. Ray Price, Jr., *Chief Justice Delivers 2010 State of the Judiciary Address*, 66 J. MO. BAR 68, 69 (Mar./Apr. 2010).

defender caseload issues in deciding the case pending before it.[102] This is possible if the Missouri Supreme Court follows the approach taken by the Louisiana Supreme Court in *Peart.* Thus, once a public defender demonstrates an excessive caseload, the trial judge would be required to shift the burden of proof to the prosecution to demonstrate that the defense is able to provide adequate representation of counsel before a matter proceeds to trial.[103] Reallocating the burden of proof to the prosecution could spur the Missouri legislators to action, just as the *Peart* decision did in Louisiana.

The second option Chief Justice Price identified was for the Missouri General Assembly to evaluate whether less serious crimes should continue to carry the penalty of incarceration.[104] If fewer crimes carried the possibility of jail or prison, there would be fewer persons entitled to public defenders. Chief Justice Price connected this option to the dramatic rise in the number of nonviolent offenders imprisoned in Missouri. In 1994, shortly after he joined the Missouri Supreme Court, the number of nonviolent offenders in Missouri prisons was 7,461.[105] In 2010, the number of nonviolent offenders in Missouri prisons was 14,204—almost double.[106] The number of new commitments for nonviolent offenses in 1994 was 4,857, and by 2009 it exceeded 7,220 per year, again, almost doubling.[107]

Reducing the number of offenses for which a person may be incarcerated will not only help address the problem of excessive caseloads for public defenders, but it will also help generate savings for taxpayers. Each year, it costs Missouri $16,432 per person incarcerated. The state currently spends $233.4 million a year to incarcerate nonviolent offenders, and this does not count the investment in the ten prisons it takes to hold these individuals at $100 million per prison.[108] Chief Justice Price noted that the 1994 appropriations to the Department of Corrections totaled $216,753,472. In 2010, Department of Corrections' appropriations

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102. *See supra* notes 90–93 and accompanying text.
103. *See supra* notes 80–83 and accompanying text.
104. Price, *supra* note 101, at 69.
105. *Id*. at 70.
106. *Id*.
107. *Id*.
108. *Id*.

were $670,079,452, an amount that basically tripled in sixteen years.[109] Chief Justice Price told the legislature that some offenses, especially those involving defendants with drug and alcohol problems, might be better, and more cost-effectively addressed through treatment options rather than by incarceration.[110]

By October 2011, the Missouri General Assembly had not yet heeded Chief Justice Price's call for either more funding for the MSPD or a reduction in the number of nonviolent offenses for which incarceration is warranted. The Missouri Supreme Court, too, had yet to rule in the MSPD case seeking the ability to refuse new cases when caseloads are excessive. In an amicus brief supporting the MSPD, the ABA emphasized that the number of cases each public defender has must not prohibit the public defender from fulfilling the ethical obligations owed to each client.[111] Until either the lawmakers or the courts act, access to justice for the poor in Missouri will continue to be limited. The final chapter has yet to be written in the effort of Missouri's public defenders to provide effective, ethical representation to each client.

## CONCLUSION

Justice Hugo Black stated in the *Gideon* decision that "lawyers in criminal courts are necessities, not luxuries."[112] Nearly fifty years after *Gideon*, many indigent defendants are finding that though they have lawyers, it is still a luxury to have a lawyer with the ability, time, and resources to represent them in an ethically competent manner.

Guaranteeing each individual's Sixth Amendment right to counsel is a fundamental principle that should unite everyone in our society, including prosecutors and public defenders. While the adversary system may divide prosecutors and defenders in the courtroom, each

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109. *Id*.

110. Price, *supra* note 101, at 70.

111. Brief for American Bar Association as Amicus Curiae Supporting of Relators at 14, State *ex rel*. Mo. Pub. Defender Comm'n v. Waters & Orr, No. SC91150 (Mo. Sept. 3, 2010), *available at* http://www.abanow.org/wordpress/wp-content/files_flutter/1305296616robinson hackathorn_v_watersorr.pdf.

112. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

prosecutor has an overarching duty to seek justice—including procedural justice for the accused.[113] That obligation has not changed since *Gideon*, when so many states' attorneys general joined in asking the Court to order states to provide counsel for those too poor to pay. Today, the call for equality in the criminal justice system requires the recognition that justice is not possible when excessive caseloads for public defenders deny competent, ethical representation to the poor.

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113. MODEL RULES, *supra* note 71, at 3.8 cmt. 1.