

Notes

LESSONS FROM NEW ORLEANS: A STRONGER ROLE FOR PUBLIC DEFENDERS IN SPURRING INDIGENT DEFENSE REFORM

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ABSTRACT

Excessive caseloads prevent public defenders from fulfilling their ethical obligations and curtail criminal defendants' right to the effective assistance of counsel. Despite this ethical and constitutional dilemma, legislators have been reluctant to provide adequate funds for indigent defense. And because of the separation of powers, courts have been unable to force legislators' hands. Against this backdrop, criminal defendants in states that choose not to adequately fund indigent defense face a serious risk of wrongful conviction.

The Orleans Public Defenders Office (OPD) provides a case study of public defenders playing a stronger role in spurring legislative reform. In response to a funding crisis in Louisiana, the OPD refused to take new cases beyond constitutionally permissible workloads. This refusal resulted in criminal defendants being put on waiting lists for representation, which garnered national attention, gave rise to class action lawsuits against the state, and created a threat to public safety. These are governance problems that legislators prioritize over funding indigent defense. The OPD's refusal to take new cases has been somewhat successful: in response to this crisis, the state legislature has provided additional funds to public defenders' offices in the state.

Public defenders are in a unique position to put pressure on legislators. By refusing to take new cases that would cause their workloads to be excessive, public defenders can both maintain their

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obligations to the profession and ensure constitutional representation for their clients.

INTRODUCTION

Criminal defendants have a constitutional right to the effective assistance of counsel,¹ and criminal defense lawyers have an ethical obligation to provide competent representation.² But these two fundamental principles come into conflict when public defenders' excessive caseloads make competent representation impossible.³

In public defenders' offices with particularly heavy caseloads, a public defender may have only a few hours to devote to each client.⁴ The public defenders in New Orleans work long hours investigating and trying cases and visiting their clients in jail. But they have a "pervading sense that they can never do enough."⁵ One New Orleans public defender, Lauren Anderson, has had to tell defendants, "Not only can I not help, but nobody from my office can help you, either."⁶ Public defenders like Anderson, while "juggling 300 or more cases at once," are often not able to adequately investigate their cases or visit their clients, who, if arrested in Orleans Parish, are sometimes jailed more than 250 miles away.⁷ While defendants wait for representation,

1. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."); *Gideon v. Wainwright*, 372 U.S. 335, 339–40 (1962).

2. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2015) ("A lawyer shall provide competent representation to a client. Competent representation requires . . . preparation reasonably necessary for the representation.").

3. See NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS* 14 (2009) ("[C]rushing workloads make it impossible for many defenders to effectively represent clients. Too often, counsel is unable to spend sufficient time on each of their cases. This forces even the most competent and dedicated attorneys to run afoul of their professional duties."); Tina Peng, *I'm a Public Defender. It's Impossible for Me to Do a Good Job Representing My Clients*, WASH. POST (Sept. 3, 2015), https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken—its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8_story.html [<https://perma.cc/C7UL-3SHU>] ("The American Bar Association recommends that public defenders not work on more than 150 felony cases a year. In 2014, I handled double that.").

4. See, e.g., Peng, *supra* note 3 (describing the work conditions at the Orleans Public Defenders Office (OPD)).

5. Jed Lipinski, *The Trials and Travails of a New Orleans Public Defender*, NOLA.COM (Mar. 30, 2016, 8:45 AM), http://www.nola.com/crime/index.ssf/2016/03/new_orleans_public_defender_trials_and_travails.html [<https://perma.cc/E873-LMZF>].

6. *Id.*

7. *Id.*

stories can change and important evidence can disappear.⁸ And without lawyers to investigate these leads, defendants face a serious risk of wrongful conviction.

Excessive caseloads and severe underfunding of public defenders' offices systematically deprive criminal defendants of their right to effective counsel. These are well-documented problems,⁹ and the need for reform is not new.¹⁰ The harder question is how that reform should happen.

One route is reform through the political process. State legislatures allocate funds to public defenders' offices, and in a perfect world, the head of a given public defenders' office could simply explain the conundrum to the legislature and urge it to allocate more funds to public defense.¹¹ In practice, though, representation for criminal

8. For a description of a case that was taken by a private attorney in New Orleans who was able to uncover exculpatory evidence in Houston, Texas, evidence which the OPD would not have been able to retrieve due to its excessive caseloads, see Scott Greenfield, *Cross: Derwyn Bunton, Fighting for the Poor of New Orleans*, MIMESIS LAW (Aug. 3, 2016), <http://mimesislaw.com/fault-lines/cross-derwyn-bunton-fighting-for-the-poor-of-new-orleans/11837> [<https://perma.cc/L6G8-5FBB>] (“I realized my office could not guarantee the timely retrieval of this important evidence before it was erased or otherwise destroyed. This would have left an innocent man to face trial for his life for what was labeled an act of ‘domestic terror’ by the mayor of New Orleans.”).

9. See NORMAN LEFSTEIN, AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 12 (2011) (“There is abundant evidence that those who furnish public defense services across the country have far too many cases, and this reality impacts the quality of their representation, often severely eroding the Sixth Amendment’s guarantee of the right to counsel.”); NAT’L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 7 (2009), <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf> [<https://perma.cc/J75P-VJZB>] [hereinafter JUSTICE DENIED] (“[T]he country’s current fiscal crisis . . . ha[s] severe adverse consequences for the funding of indigent defense services, which already receives substantially less financial support compared to prosecution and law enforcement. Undoubtedly, the most visible sign of inadequate funding is attorneys attempting to provide defense services while carrying astonishingly large caseloads.”); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1045 (2006) (“By every measure in every report analyzing the U.S. criminal justice system, the defense function for poor people is drastically underfinanced.”); Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 826 (2009) (“Systematic underfunding of criminal defense representation in the state courts persists, resulting in repeated and widespread breakdowns in defense representation in many states.” (footnote omitted)).

10. JUSTICE DENIED, *supra* note 9, at 50 (“Since the U.S. Supreme Court’s *Gideon* decision in 1963, several organizations have conducted national studies of indigent defense over several decades. Invariably, these studies conveyed a grim view of defense services in criminal and juvenile cases, pointing out many problems in providing counsel across the country.”).

11. Greenfield, *supra* note 8 (“[T]he best and longest-lasting change comes at the legislative level. So ultimately the best solution is the one where OPD and other system stakeholders and

defendants is not a top priority for legislatures.¹² State governments commonly spend three times as much on prosecutions as on public defense, and “no state has ever enacted a statute that requires automatic increases in the size of defender programs when prosecutions increase.”¹³

In some instances, courts have exercised their “inherent authority” and “supervisory jurisdiction” to remedy systemic constitutional violations of the right to counsel. Although the separation of powers has limited courts from ordering additional funds, these types of judicial interventions have had some success in changing legislative priorities.¹⁴

Another potential solution is class action litigation. It has had some success in spurring legislatures to fund public defense.¹⁵ Lawsuits provide indigent defendants a route to vindicate their Sixth Amendment rights on a class-wide basis when states fail to provide adequate representation. In New York, for example, indigent criminal defendants brought a class action lawsuit, and the parties reached a significant settlement with the state that required structural reform, which included additional funding for indigent defense.¹⁶

decision makers reform our user-pay criminal justice system in Louisiana.”). Indeed, the National Right to Counsel Committee provided a number of recommendations to ensure that states comply with the Constitution. Its first recommendation was that “legislators should appropriate adequate funds so that quality indigent defense services can be provided.” JUSTICE DENIED, *supra* note 9, at 11, 183.

12. See Steven N. Yermish, *Ethical Issues in Indigent Defense: The Continuing Crisis of Excessive Caseloads*, 33 CHAMPION 22, 22 (2009) (“In the face of severe government revenue shortfalls, indigent defense has been a favorite target for cost savings at the expense of the constitutional rights of the poor in our courtrooms.”); Julia O’Donoghue, *Inadequate Representation: No More Money Expected for Public Defenders*, NOLA.COM (Apr. 18, 2016, 4:06 PM), http://www.nola.com/politics/index.ssf/2016/04/public_defender_funding.html#incart_most_shared-crime [<https://perma.cc/DZK7-ZRRX>] (“While hundreds of poor people wait in jail to be appointed a lawyer, a judge . . . threatens to release defendants and suits are filed challenging the constitutionality of Louisiana’s criminal justice system, lawmakers say they have no plans to increase funding for an office designed to protect basic legal rights.”).

13. LEFSTEIN, *supra* note 9, at 23.

14. For further discussion of indigent defense reform through the judiciary, see *infra* Part III.A. *But see* Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1733 (2005) (“[T]hese decisions have been unable to facilitate long-term, sustainable reform of the indigent defense system.”).

15. See generally Margaret A. Costello, *Fulfilling the Unfulfilled Promise of Gideon: Litigation as a Viable Strategic Tool*, 99 IOWA L. REV. 1951, 1962–68 (2014) (providing examples of class action lawsuits that were successful at “raising public awareness and precipitating legislative reform”).

16. Stipulation and Order of Settlement at 5–9, *Hurrell-Harring v. State*, No. 8866-07 (N.Y. Sup. Ct. Oct. 21, 2014), [https://www.ils.ny.gov/files/Hurrell-Harring%20Final%20Settlement%](https://www.ils.ny.gov/files/Hurrell-Harring%20Final%20Settlement%20)

The Orleans Public Defenders Office (OPD) provides a troubling case study of these different routes to reform. The excessive caseloads at the OPD pose an ethical dilemma for public defenders, impinge on indigent criminal defendants' right to counsel, and have created a threat to public safety. Public defenders in New Orleans have resorted to putting clients on a waiting list for representation.¹⁷ A court has ordered the release of several criminal defendants charged with serious felonies because the state had denied them representation.¹⁸ And the American Civil Liberties Union (ACLU) and the Southern Poverty Law Center have filed class action lawsuits on behalf of the unrepresented indigent criminal defendants, alleging that the defendants have been deprived of their Sixth Amendment right to counsel and Fourteenth Amendment rights to due process and equal protection.¹⁹

Although the perfect solution to these problems remains unclear, the OPD's refusal to accept new cases represents one starting point. And this response may have been effective—the Louisiana legislature recently increased funding for public defenders' offices.²⁰

This Note argues for a stronger institutional role for public defenders in spurring legislative reform. When criminal defendants go unrepresented, the appropriate remedy is release. This creates a public safety problem, which ranks higher than funding for indigent defense on most legislators' lists of priorities. By refusing cases to maintain manageable caseloads, public defenders can both fulfill their ethical

20102114.pdf [https://perma.cc/8NEQ-8YSJ]; see also Victoria Bekiempis, *How New York Is Finally Helping Poor Defendants*, NEWSWEEK (Oct. 22, 2014, 11:47 AM), <http://www.newsweek.com/new-york-ttk-landmark-public-defense-case-278889> [https://perma.cc/4FLZ-ZL8W] (describing the *Hurrell-Harring* litigation and the benefits of the settlement with the state); Press Release, N.Y. Civil Liberties Union, Settlement Begins Historic Reformation of Defense in New York State (Oct. 21, 2014), <http://www.nyclu.org/news/settlement-begins-historic-reformation-of-public-defense-new-york-state> [https://perma.cc/ZS7R-P5RR] (describing how the *Hurrell-Harring* settlement agreement implemented new funding and other measures for public defense).

17. For further discussion of the OPD's response to budget shortages, see *infra* notes 166–75 and accompanying text.

18. See, e.g., Martha Neil, *Due to Lack of Counsel, New Orleans Judge Freezes Cases Against 7 Inmates and Orders Their Release*, A.B.A. J. (Apr. 8, 2016, 4:00 PM), http://www.abajournal.com/news/article/due_to_lack_of_counsel_new_orleans_judge_freezes_cases_against_7_inmates [https://perma.cc/U89F-6V4Z] (describing a New Orleans judge's order releasing inmates “charged with serious felonies—including rape and second-degree murder—because they have been held for months without access to counsel”).

19. For further discussion of the class action lawsuits, see *infra* Part IV.C.3.

20. For further discussion of the Louisiana legislature's response to the state's indigent defense crisis, see *infra* notes 213–17 and accompanying text.

obligations and play a political role in putting pressure on legislatures to adequately fund indigent defense.

This Note proceeds in four parts. Part I provides background on the Sixth Amendment right to counsel. Part II details the ethical rules implicated by excessive caseloads. Part III analyzes two possible routes to reform: reform through the courts and reform through class action lawsuits. Part IV is a case study of the New Orleans public defenders' office. It reveals a gap between the constitutional rights of the indigent accused and the practical realities facing underfunded public defenders' offices. It uses the OPD as a model for a stronger role for public defenders in orienting legislative priorities toward funding indigent defense.

I. THE SIXTH AMENDMENT RIGHT TO COUNSEL

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”²¹ In *Gideon v. Wainwright*,²² the Supreme Court observed that “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.”²³ The Court pronounced that lawyers “are necessities, not luxuries,” and held that the Sixth Amendment right to counsel is a fundamental right that applies to the states.²⁴

The scope of the right to counsel has expanded over the years.²⁵ Nine years after *Gideon*, the Court extended the obligation to provide attorneys to those charged with misdemeanors for which imprisonment is a real possibility.²⁶ In subsequent years, the Court has held that “the right to counsel [means] the right to effective assistance of counsel,”²⁷ and that “[a]n accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the

21. U.S. CONST. amend. VI.

22. *Gideon v. Wainwright*, 372 U.S. 335 (1963). For a fascinating and in-depth account of *Gideon*, see generally ANTHONY LEWIS, *GIDEON'S TRUMPET* (1964).

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

24. *Id.*

25. See JUSTICE DENIED, *supra* note 9, at 22–27 (providing an account of the expansion of the Sixth Amendment right to counsel).

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

27. *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986).

trial is fair.”²⁸ The Court has further expanded the right to counsel to apply “once adversary proceedings have commenced,”²⁹ at a defendant’s initial court appearance,³⁰ to representation during a first appeal of a conviction,³¹ and to appeals of guilty pleas.³²

Most recently, in *Missouri v. Frye*³³ and *Lafler v. Cooper*,³⁴ the Court held that the Sixth Amendment guarantees the right to effective assistance of counsel before trial at all “critical stages,” including plea bargaining.³⁵ The Court’s holdings in *Frye* and *Lafler* are implicated in the public defender context because a public defender who has not had time to meet with her client cannot adequately advise the client about a plea bargain.³⁶

In theory, *Gideon* and the subsequent expansion of the right to counsel provide substantial structural protections for indigent defendants.³⁷ Yet although the right to counsel has expanded, there has been near unanimous agreement that the “promise” of *Gideon* has been denied to many criminal defendants.³⁸ In a report titled *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, the American Bar Association (ABA) details the results of several studies,

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

29. *Brewer v. Williams*, 430 U.S. 387, 401 (1977).

30. *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 213 (2008).

31. *Douglas v. California*, 372 U.S. 353, 357 (1963).

32. *Halbert v. Michigan*, 545 U.S. 605, 610 (2005).

33. *Missouri v. Frye*, 566 U.S. 134 (2012).

34. *Lafler v. Cooper*, 566 U.S. 156 (2012).

35. *Lafler*, 566 U.S. at 170 (“[C]riminal justice today is for the most part a system of pleas, not a system of trials. . . . As explained in *Frye*, the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences.”); *Frye*, 566 U.S. at 143 (“[P]lea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.”).

36. For an argument that *Lafler* and *Frye* have a limited impact on plea bargaining because of poorly structured indigent defense services, see Cynthia Alkon, *The U.S. Supreme Court’s Failure to Fix Plea Bargaining: The Impact of Lafler and Frye*, 41 HASTINGS CONST. L.Q. 561, 576–82 (2014).

37. In *Gideon*, the Court explained that an indigent criminal defendant “requires the guiding hand of counsel at every step in the proceedings against him,” because, “[w]ithout it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.” *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

38. David Rudovsky, *Gideon and the Effective Assistance of Counsel: The Rhetoric and the Reality*, 32 L. & INEQUALITY 371, 372 (2014) (“[T]here is near unanimous agreement that the ‘promise’ of *Gideon* has been systematically denied to large numbers of criminal defendants.”).

concluding that “those who furnish public defense services across the country have far too many cases,” which “severely erod[es] the Sixth Amendment’s guarantee of the right to counsel.”³⁹ Former Attorney General Eric Holder summed up the empty promise of *Gideon* in an address to the National Summit on Indigent Defense in 2012:

Ever since the Supreme Court’s landmark decision in *Gideon v. Wainwright* – handed down fifty years ago next March – it has been settled law that the Constitution requires defendants in criminal cases to be provided with legal counsel, even if they cannot afford an attorney. Yet, as we come together this afternoon – in jurisdictions here in Louisiana and across the country – the basic rights guaranteed under *Gideon* have yet to be fully realized. Millions of Americans still struggle to access the legal services that they need and deserve – and to which they are constitutionally entitled. And far too many public defender systems lack the basic tools they need to function properly.⁴⁰

In a comprehensive study on indigent defense forty years after *Gideon*, the ABA Standing Committee on Legal Aid and Indigent Defendants concluded “that inadequate compensation for indigent defense attorneys is a national problem, which makes the recruitment and retention of experienced attorneys extraordinarily difficult.”⁴¹ The ABA committee described the indigent defense system as one that “lacks fundamental fairness” and “places poor persons at constant risk of wrongful conviction.”⁴²

Much ink has been spilled about the causes of the failure to fulfill *Gideon*’s promise. Some scholars blame the structure of *Gideon* for its “unfunded mandate” on the states.⁴³ Others suggest that institutions—

39. LEFSTEIN, *supra* note 9, at 12; *see also id.* at 12–19 (detailing results of previous studies).

40. Eric Holder, Jr., Attorney Gen., Speech to the American Bar Association’s National Summit on Indigent Defense (Feb. 4, 2012), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-american-bar-association-s-national-summit-indigent> [<https://perma.cc/Q32V-NCTY>] (italics added).

41. AM. BAR ASS’N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 9 (2004).

42. *Id.* at 38; *see also* Eve Brensike Primus, *Effective Trial Counsel After Martinez v. Ryan: Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604, 2606 (2013) (“Everyone knows that excessive caseloads, poor funding, and a lack of training plague indigent defense delivery systems throughout the states.”).

43. *See, e.g.*, Erwin Chemerinsky, *Lessons from Gideon*, 122 YALE L.J. 2676, 2680 (2013) (“The Court imposed an unfunded mandate on state governments without any enforcement mechanism”); *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-569, *INDIGENT DEFENSE: DOJ COULD INCREASE AWARENESS OF ELIGIBLE FUNDING AND BETTER DETERMINE THE EXTENT TO WHICH FUNDS HELP SUPPORT THIS PURPOSE* 17 (2012) (“[T]wo-thirds or more of the survey respondents who were recipients of the DOJ formula grants for which

namely, legislatures and the courts—are to blame for choosing not to adequately fund indigent defense and refusing to take activist measures to implement *Gideon*'s promise.⁴⁴ But all can agree that underfunded indigent defense systems and overworked public defenders have limited the effectiveness and the practical reach of *Gideon* and its progeny.⁴⁵

II. ETHICAL OBLIGATIONS

A. *ABA Model Rules of Professional Conduct Relating to Excessive Caseloads*

Excessive caseloads for public defenders implicate several of the ABA's Model Rules of Professional Conduct (Model Rules). Although the Model Rules are not binding on the states, and there are some minor variations among the state rules,⁴⁶ all of the state rules of professional conduct require "competent" representation and define competence according to the Model Rules' definition.⁴⁷

The Model Rules regarding competence and diligence directly target the quality of legal services. The Model Rules require lawyers to provide competent representation, to exercise diligence, and to communicate with clients about their cases. The Supreme Court has said that the core of the Sixth Amendment right to counsel is the "opportunity for a defendant to consult with an attorney to have him

indigent defense was not a required use or Tribal Courts TPA distributions reported that they did not allocate funding for indigent defense, partly because of other competing priorities, such as law enforcement needs.").

44. See Carol S. Steiker, *Gideon at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2701 (2013) (advocating for "mov[ing] the political actors who control the power of the purse . . . and the shape of the substantive criminal law to allocate the resources and make the institutional changes that are necessary to fix what in many jurisdictions is a failing system of indigent defense").

45. See, e.g., KAREN HOUPPERT, CHASING *GIDEON*: THE ELUSIVE QUEST FOR POOR PEOPLE'S JUSTICE 251 (2013) ("Almost everyone in all parts of the criminal justice system across the United States acknowledges deep flaws in the way representation is provided to poor people."); Mark Walsh, *Living Up to the Gideon Ideal*, 99 A.B.A. J. 45, 46 (2013) (noting that although the decision was "being celebrated on its 50th anniversary, one report after another over the years has documented the nation's failure to truly live up to the ideal of *Gideon*").

46. MORTIMER D. SCHWARTZ, RICHARD C. WYDICK, REX R. PERSCHBACHER & DEBRA LYN BASSETT, PROBLEMS IN LEGAL ETHICS 40 (6th ed. 2003) ("Each state has a set of ethics [rules] that govern[s] the lawyers in the state. In addition, some states have special statutes that govern the conduct of lawyers . . ."); JUSTICE DENIED, *supra* note 9, at 35 n.81 ("The three states in which the ethical rules are most dissimilar in format from the ABA Model Rules are California, Maine, and New York.").

47. JUSTICE DENIED, *supra* note 9, at 35–36.

investigate the case and prepare a defense for trial.”⁴⁸ So the Model Rules relating to the “core” of the Sixth Amendment’s right to counsel are especially important.

Lawyers are required to take time to thoroughly prepare for each case. Rule 1.1 provides that “[a] lawyer shall provide competent representation to a client.”⁴⁹ The next sentence of the rule describes “competent representation” as requiring “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”⁵⁰

The Model Rules also require lawyers to control their caseloads. A lawyer must “act with reasonable diligence and promptness in representing a client.”⁵¹ And “[a] lawyer’s work load must be controlled so that each matter can be handled competently.”⁵² Although the Rules do not prescribe a formula for determining whether a workload is excessive, the number of cases, case complexity, “the availability of support services, the lawyer’s experience and ability, and the lawyer’s nonrepresentational duties” are factors that a lawyer should consider when deciding whether to take on a new case.⁵³

A lawyer must consider the impact that taking on a new representation may have on a current client.⁵⁴ A lawyer “shall not represent a client” if representation “will result in violation of the rules

48. *Kansas v. Ventris*, 556 U.S. 586, 590 (2008) (“The core of this right has historically been, and remains today, the ‘opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial.’” (quoting *Michigan v. Harvey*, 494 U.S. 344, 348 (1990))).

49. MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 2015).

50. *Id.*

51. *Id.* r. 1.3.

52. *Id.* r. 1.3 cmt. 2.

53. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-441, at 4 (2006) [hereinafter Formal Op. 06-441]. An American Bar Association (ABA) report on the public defense delivery system states:

Counsel’s workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney’s nonrepresentational duties) is a more accurate measurement.

AM. BAR ASS’N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2 (2002) [hereinafter TEN PRINCIPLES].

54. MODEL RULES OF PROF’L CONDUCT r. 1.3 (AM. BAR ASS’N 2015); *see id.* r. 1.16(a)(1) (stating that a lawyer “shall not represent a client” if “the representation will result in violation of the rules of professional conduct or other law”).

of professional conduct or other law.”⁵⁵ And lawyers may not “avoid appointment” to represent indigent defendants except for “good cause.”⁵⁶ Comment 2 to Rule 1.3 specifically states that a lawyer’s ability to “handle the matter competently” is considered good cause.⁵⁷

Excessive caseloads can also create conflicts of interest.⁵⁸ The ABA has recognized this type of conflict in situations where excessive caseloads force a lawyer “to choose among the interests of various clients, depriving at least some, if not all clients, of competent and diligent defense services.”⁵⁹ Every additional case an overburdened public defender takes on creates a significant risk that the lawyer will not have the time to provide competent representation. This materially limits the public defender’s responsibilities to other clients.

Supervisory lawyers have a duty to ensure that subordinate lawyers provide competent and diligent representation. A lawyer with managerial authority “shall make reasonable efforts” to ensure that all lawyers conform to the Model Rules.⁶⁰ And subordinate lawyers (in the public defender context, line-level public defenders) cannot escape their duties just because they were assigned excessive caseloads by their superiors. Subordinate lawyers are bound by the Model Rules “notwithstanding that the lawyer acted at the direction of another person.”⁶¹ Excessive caseloads pose problems both for supervisory lawyers who continue to accept cases in excess of a manageable workload, and for subordinate lawyers who are unable to manage their caseloads.

Constitutional protections have been buttressed by the Model Rules. But for lawyers with unwieldy caseloads, adherence to the rules of professional conduct may be impossible. Excessive caseloads limit a lawyer’s ability to investigate her clients’ innocence or any mitigating circumstances. And the failure to provide competent representation

55. *Id.* r. 1.16(a)(1). Under Rule 1.16, an exception allows a court to order a lawyer to continue representation “notwithstanding good cause for terminating the representation.” *Id.* r. 1.16(c).

56. *Id.* r. 6.2(a).

57. *Id.* r. 6.2(a) cmt. 2.

58. For an example of heavy workloads forcing attorneys to choose between clients, see *supra* notes 4–7 and accompanying text.

59. AM. BAR ASS’N, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS 5 (2009) [hereinafter EIGHT GUIDELINES].

60. MODEL RULES OF PROF’L CONDUCT r. 5.1 (AM. BAR ASS’N 2015).

61. *Id.* r. 5.2.

can render counsel “constructively absent” at critical stages of a proceeding.⁶²

B. The ABA’s Response to Public Defenders’ Excessive Caseloads

The ABA addressed excessive caseloads by promulgating a set of principles and standards.⁶³ One principle states that “[d]efense counsel’s workload is controlled to permit the rendering of quality representation”; another demands “parity between defense counsel and the prosecution with respect to resources” and that defense counsel be “included as an equal partner in the judicial system.”⁶⁴

More recently, prompted by the “endemic problem of excessive caseloads for state public defenders,”⁶⁵ the ABA responded by issuing a formal ethics opinion.⁶⁶ The ABA opinion is consistent with previous state bar ethics opinions that instruct public defenders not to take on

62. For an argument that excessive caseloads render counsel “constructively absent,” see LAURENCE A. BRENNER, AM. CONSTITUTION SOC’Y L. & POLICY, WHEN EXCESSIVE PUBLIC DEFENDER WORKLOADS VIOLATE THE SIXTH AMENDMENT RIGHT TO COUNSEL WITHOUT A SHOWING OF PREJUDICE 2 (2011).

63. In 1992, it published its third edition of the *ABA Standards for Criminal Justice: Providing Defense Services*. AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES (3d ed. 1992). These standards “cover all of the important elements related to the structure of public defense programs, such as securing the independence of the defense function, assigned counsel programs, contract defense services, public defender programs, eligibility for defense services, and waiver of counsel.” JUSTICE DENIED, *supra* note 9, at 32.

Hoping to condense the standards, in 2002, the ABA published *Ten Principles of a Public Defense Delivery System*. See generally TEN PRINCIPLES, *supra* note 53 (condensing the standards published in the *ABA Standards for Criminal Justice: Providing Defense Services*). The Ten Principles are as follows: (1) “The public defense function, including the selection, funding, and payment of defense counsel, is independent.” (2) “Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.” (3) “Clients are screened for eligibility and defense counsel is assigned and notified of appointment, as soon as feasible after clients’ arrest, detention, or request for counsel.” (4) “Defense counsel is provided sufficient time and a confidential space within which to meet with the client.” (5) “Defense counsel’s workload is controlled to permit the rendering of quality representation.” (6) “Defense counsel’s ability, training, and experience match the complexity of the case.” (7) “The same attorney continuously represents the client until completion of the case.” (8) “There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the judicial system.” (9) “Defense counsel is provided with and required to attend continuing legal education.” (10) “Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.” *Id.* at 1.

64. *Id.*

65. Peter A. Joy, *Rationing Justice by Rationing Lawyers*, 37 WASH U. J.L. & POL’Y 205, 219 (2011).

66. Formal Op. 06-441, *supra* note 53.

more cases than they can handle competently⁶⁷ and to decline additional cases when excessive caseloads interfere with their ability to provide competent representation.⁶⁸

In the opinion, the ABA defines excessive caseloads and discusses what lawyers should do when faced with them:

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 to represent that client, or, if representation has not yet begun, she must decline the representation.

A lawyer's primary ethical duty is owed to existing clients. Therefore, a lawyer must decline to accept new cases, rather than withdraw from existing cases, if the acceptance of a new case will result in her workload becoming excessive. When an existing workload does become excessive, the lawyer must reduce it to the extent that what remains to be done can be handled in full compliance with the Rules.⁶⁹

Note that the test for whether a lawyer's caseload is excessive is a subjective one. It requires lawyers to take action to reduce their caseloads, and, if caseloads remain excessive, "move to withdraw as counsel in existing cases to the extent necessary to bring the workload down to a manageable level."⁷⁰

The opinion also explains supervisors' responsibility to ensure that caseloads are manageable. It requires supervisors to monitor the workloads of subordinate lawyers to ensure that workloads are appropriate.⁷¹

In 2009, the ABA expanded on its ethics opinion by adopting *Eight Guidelines of Public Defense Related to Excessive Workloads*,

67. See, e.g., Ariz. Comm. on the Rules of Prof'l Conduct, Formal Op. 01-06 (2001) (suggesting that public defenders should not take on too many cases at once because that may result in incompetent representation); Va. Standing Comm. on Legal Ethics, Op. 1798 (2004) (acknowledging the ethical problems related to excessive caseloads for public defenders).

68. Joy, *supra* note 65, at 218-19; see, e.g., S.C. Ethics Advisory Comm., Op. 04-12 (2004) ("A public defender may not undertake or maintain a caseload that results in the attorney violating [the] ethical obligation[] of competence . . .").

69. Formal Op. 06-441, *supra* note 53, at 4-5 (2006) (footnotes omitted).

70. *Id.* at 9.

71. *Id.* at 8 ("If a supervisor knows that a subordinate's workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action . . . the supervisor himself is responsible for the subordinate's violation of the Rules of Professional Conduct.").

which operates as a “detailed action plan . . . to which those providing public defense should adhere as they seek to comply with their professional responsibilities.”⁷²

Relevant here, Guideline 6 urges public defenders to withdraw from current cases when workloads are excessive and to file motions asking courts to stop assigning new cases when necessary.⁷³ The Comment to Guideline 6 outlines a “mandatory duty” for lawyers to take “corrective action” to avoid violations of the Model Rules.⁷⁴ “When [public defenders] file motions requesting that assignments be stopped and that withdrawals be permitted, their prayer for relief should be accorded substantial deference because [they] are in the best position to assess the workloads of their lawyers.”⁷⁵

If a motion to withdraw or to have a court stop assigning new cases is denied, Guideline 7 instructs public defenders to “resist judicial directions” that “improperly interfere” with their ethical obligations to provide competent representation.⁷⁶ In passing Guideline 7, the ABA was concerned with the independence of public defenders’ offices and the potential for courts to “micro-manage the operations of defense programs.”⁷⁷ Although a court may sanction a lawyer for refusing to represent a client based on a belief that competent representation is not possible, the Guidelines recommend that refusal is nonetheless the proper action.⁷⁸ This seems to suggest that public defenders should ignore court orders. This guideline runs counter to the ABA’s formal

72. EIGHT GUIDELINES, *supra* note 59, at 1. The Introduction to the Guidelines provides a summary of its recommendations:

Guideline 1 urges the management of public defense programs to assess whether excessive workloads are preventing their lawyers from fulfilling performance obligations; and Guidelines 2, 3, and 4 relate to the need for continuous supervision and monitoring of workloads, training of lawyers respecting their ethical duty when confronted with excessive workloads, and the need for management to determine if excessive workloads exist. Guidelines 5 through 8 address the range of options that public defense providers and their lawyers should consider when excessive workloads are present. As set forth in Guideline 6, depending on the circumstances, it may be necessary for those providing public defense to seek redress in the courts, but other choices may be available, as suggested in Guideline 5, before this step is required.

Id.

73. *Id.* at 3.

74. *Id.* at 12.

75. *Id.* at 13.

76. *Id.* at 3.

77. *Id.* at 13 (citing *In re Certification of Conflict in Motions to Withdraw*, 636 So. 2d 18, 21–22 (Fla. 1994)).

78. *See id.* (“When motions to stop the assignment of new cases and to withdraw from cases are filed, [public defenders] resist judicial directions . . . that improperly interfere with their professional and ethical duties in representing their clients.”).

opinion that says, “If the public defender is not allowed to withdraw from representation, she must obey the court’s order while taking all steps reasonably feasible to insure that her client receives competent and diligent representation.”⁷⁹ This conflicting guidance poses yet another ethical dilemma for public defenders.

III. POSSIBLE ROUTES TO REFORM

Indigent defense reform is badly needed. The most direct route to reform is for state legislatures to provide adequate funding, or for Congress to provide additional financial support to the states. But a shift in legislative priorities is unlikely.⁸⁰ In 1979, the ABA endorsed the creation of an independent, federally funded program to help state and local governments discharge their obligation to provide counsel for indigent defendants.⁸¹ Yet since then, “there is no sign that the federal government will help or that state and local governments are ensuring adequate funding willingly.”⁸²

A. Reform Through the Judiciary

Only a few courts have addressed the constitutional and ethical issues associated with excessive caseloads on a system-wide basis. Courts have taken at least three different approaches: (1) implementing a rebuttable presumption of ineffective assistance of counsel and issuing a warning to the legislature, (2) adopting a cooperative approach, and (3) following the ABA’s recommendations by allowing public defenders to withdraw from cases.⁸³

1. *Rebuttable Presumptions and Warnings to the Legislature.* New Orleans public defenders have struggled with overwhelming caseloads since at least 1993. In *State v. Peart*,⁸⁴ Leonard Peart was charged with serious felonies, including aggravated rape and attempted first-degree

79. Formal Op. 06-441, *supra* note 53, at 6.

80. For further discussion, see *supra* note 12 and accompanying text.

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

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

83. For further discussion of these three approaches, additional analysis of some of these decisions, and a comparison with the federal system, see Jessica Trieu, *The Federal Budget Crisis and Its Unintended Ethical Consequences: How Will Judges, Prosecutors, and Public Defenders Meet Their Ethical Obligations?*, 27 GEO. J. LEGAL ETHICS 917, 925–31 (2014).

84. *State v. Peart*, 621 So. 2d 780 (La. 1993).

murder.⁸⁵ Peart's court-appointed lawyer had represented 418 defendants in a seven-month period.⁸⁶ Due to these constraints, the public defender filed a "Motion for Relief to Provide Constitutionally Mandated Protection and Resources."⁸⁷ At a hearing on the motion, the trial court found that Peart's attorney was not able to provide clients with effective assistance of counsel, primarily because of his excessive caseload.⁸⁸ The court ruled that the state's indigent defense funding system was unconstitutional as applied in New Orleans.⁸⁹ It ordered that the attorney's caseload be reduced and directed the Louisiana legislature to provide additional funds "to pay additional attorneys, secretaries, paralegals, law clerks, investigators, and expert witnesses."⁹⁰

This sweeping order did not survive on appeal. The Louisiana Supreme Court held that the funding statute was constitutional and, citing separation-of-powers concerns, reversed the lower court's order to the legislature to fund indigent defense programs.⁹¹ Despite its ruling in favor of the state, the Louisiana Supreme Court declared that the indigent defense system "faced a crisis" and implemented a rebuttable presumption that indigent defendants represented by New Orleans public defenders were receiving ineffective assistance of counsel.⁹² 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.⁹³

In addition to implementing the seemingly strong medicine of a rebuttable presumption of ineffective assistance of counsel, the Louisiana Supreme Court warned the legislature:

If legislative action is not forthcoming and indigent defense reform does not take place, this Court, in the exercise of its constitutional and inherent power and supervisory jurisdiction, may find it necessary to employ more intrusive and specific measures it has thus far avoided

85. *Id.* at 784.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 785.

91. *Id.* at 791 ("We decline at this time to undertake these more intrusive and specific measures because this Court should not lightly tread in the affairs of other branches of government and because the legislature ought to assess such measures in the first instance.").

92. *Id.* at 790–91.

93. Joy, *supra* note 65, at 218.

to ensure that indigent defendants receive reasonably effective assistance of counsel.⁹⁴

After *Peart*, in 1994, the Louisiana legislature “increased funding for public defenders by \$5 million and created a task force to study the situation in order to remove the rebuttable presumption.”⁹⁵ This funding “did not keep up with inflation keep up with inflation or increasing caseloads” in subsequent years.⁹⁶

In 2005, twelve years after *Peart*, the Louisiana Supreme Court heard *State v. Citizen*.⁹⁷ There, the trial court had appointed counsel to represent Adrian Citizen, who was charged with first-degree murder.⁹⁸ The parish was unable to provide Citizen an attorney, and the trial court ordered the parish to set aside \$200,000 for indigent defense.⁹⁹ On appeal, the Louisiana Supreme Court cited and repeated its earlier warning in *Peart*, pointing out “the obvious deficiencies in funding from the State to satisfy its constitutional mandate.”¹⁰⁰ The court urged the legislature to create a state task force to “work diligently to formulate specific recommendations.”¹⁰¹ And the court nudged the legislature to produce a plan to address the funding and caseload issues by a specific date.¹⁰²

Despite this additional warning, the Louisiana Supreme Court reversed the lower court’s order, again citing separation-of-powers concerns.¹⁰³ It held that if a trial judge determines that adequate funding is not available, the judge may prohibit the state from going forward with a prosecution until the judge determines that appropriate funding is likely to be available.¹⁰⁴

94. *Peart*, 621 So. 2d at 791.

95. JUSTICE DENIED, *supra* note 9, at 120 n.79. For an in-depth description of the changes in indigent defense policy in Louisiana after *Peart* and *State v. Citizen*, 898 So. 2d 325 (La. 2005), see Richard Drew, *Louisiana’s New Public Defender System: Origins, Main Features, and Prospects for Success*, 69 LA. L. REV. 955, 961–76 (2009).

96. Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85, 104 (2007) (citing Pascal F. Calogero, Jr., *The State of Indigent Defense in Louisiana*, 42 LA. B.J. 454, 457–58 (1995)); see also Drew, *supra* note 95, at 961–76 (collecting sources and detailing the history of Louisiana public defense funding after *Peart*).

97. *State v. Citizen*, 898 So. 2d 325, (La. 2005).

98. *Id.* at 327.

99. *Id.* at 329.

100. *Id.* at 336.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 338–39.

Now, twelve years later, criminal defendants in Louisiana continue to await trial without representation. A criminal district court in New Orleans recently ordered the release of seven unrepresented criminal defendants charged with felonies because they had been denied the right to counsel.¹⁰⁵

2. *Cooperative Approach.* In *State ex rel. Missouri Public Defender Commission v. Pratte*,¹⁰⁶ the Supreme Court of Missouri considered the case of a public defenders' office facing inadequate resources. The approach taken there is an example of the courts, prosecutors, and public defenders working together to address excessive caseloads.¹⁰⁷

Before the Missouri high court weighed in on the issue, the Missouri Senate issued a report about public defense in the state. The report found that "the probability that public defenders are failing to provide effective assistance of counsel and are violating their ethical obligations to their clients increases every day."¹⁰⁸ In response to the report, the Missouri Public Defender Commission enacted a regulation that limited the number of cases each public defender district and individual lawyer could take, set a yearly hour maximum for each lawyer, and required that a district be placed on "limited availability" status if the number of hours needed to handle its caseload was greater than the number of available attorney hours.¹⁰⁹ In 2009, two years after the implementation of this rule, every Missouri public defenders' office was over its calculated capacity.¹¹⁰

Addressing this issue, the Supreme Court of Missouri held that the proper remedy for an excessive caseload under the regulation is for the public defender to "certify the office as having 'limited availability' once its maximum caseload is exceeded for three consecutive months."¹¹¹ Once the certification occurs, the public defender notifies the presiding judge and prosecutors of the impending unavailability of

105. See *State v. Bernard*, No. 528-021, slip op. at 11 (La. Crim. Dist. Ct., Orleans Parish Apr. 8, 2016) (granting the release of the defendants without dismissing their charges).

106. *State ex rel. Mo. Pub. Def. Comm'n v. Pratte*, 298 S.W.3d 870 (Mo. 2009).

107. For further discussion of Missouri's cooperative approach, see Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 MO. L. REV. 771, 788–89 (2010).

108. *Pratte*, 298 S.W.3d at 877–78.

109. See *id.* at 878–79 (describing limited availability status as occurring when a public defenders' office exceeds its maximum caseload for three consecutive months).

110. *Id.* at 880.

111. *Id.*

services.¹¹² The public defender, prosecutor, and presiding judge then confer to agree on measures to reduce demand for public defender services, including

the prosecutors' agreement to limit the cases in which the state seeks incarceration; determining cases or categories of cases in which private attorneys are to be appointed; a determination by the judges not to appoint any counsel in certain cases (which would result in the cases not being available for trial or disposition); or in the absence of agreement by prosecutors and judge to any resolution, the rule authorizes the public defender to make the office unavailable for any appointments until the caseload falls below the commission's standard.¹¹³

This approach allows public defenders, judges, and prosecutors to solve the problems of excessive caseloads in a cooperative manner. By allowing for cooperation, this approach was thought to “promise[] some degree of relief,” while still recognizing that the public defender system must be able to limit case intake.¹¹⁴

Although this cooperative approach sounds like an ideal solution, it has not proven effective in practice. In 2010, all attempts to reach agreements with prosecutors and judges were unsuccessful.¹¹⁵ The Missouri Supreme Court appointed a special master to investigate the matter, who concluded that the procedure prescribed in *Pratte* would simply not resolve Missouri's increasing caseloads and limited resources.¹¹⁶

3. *The ABA Approach.* In *Public Defender, Eleventh Judicial Circuit v. State*,¹¹⁷ the most recent state high court case addressing the issue of excessive caseloads, the Florida Supreme Court held that the public defenders' office could withdraw from a case “based on excessive caseload or underfunding that would result in ineffective representation of indigent defendants.”¹¹⁸ Because the Florida Supreme Court's approach allows courts to grant withdrawal motions

112. *Id.* at 887.

113. *Id.* (footnotes omitted).

114. Joy, *supra* note 107, at 789.

115. Professor Peter Joy provides an extensive discussion of the results of and problems with Missouri's approach in Joy, *supra* note 65, at 220–25.

116. *Id.* at 221.

117. Pub. Def., *Eleventh Judicial Circuit v. State*, 115 So. 3d 261 (Fla. 2013).

118. *Id.* at 282.

from public defenders with excessive caseloads, it is consistent with the ABA's formal opinion.¹¹⁹

There, the public defender for the Eleventh Judicial Circuit filed motions seeking to be relieved of the obligation to represent twenty-one defendants in noncapital felony cases, claiming that excessive caseloads caused by underfunding prevented the office from meeting its obligation to the defendants.¹²⁰ The lower court certified the question of whether a Florida statute, which prohibited a trial court from granting a motion for withdrawal by a public defender because of a conflict caused by underfunding or an excessive caseload, was an unconstitutional violation of an indigent defendant's right to counsel.¹²¹

The Florida Supreme Court described the conditions at the Dade County Public Defender's office in stark terms. The office engaged in a routine practice of "meet and greet" pleas—public defenders "serve[d] as mere conduits for plea offers."¹²² The lawyers lacked adequate time to investigate cases.¹²³ And the office "triage[d]" its cases by giving priority to the cases of defendants in custody.¹²⁴

Although the Florida Supreme Court held that the funding statute was constitutional on its face, it also held that a statute prohibiting any withdrawal would infringe on the court's "inherent authority" to ensure adequate representation of indigent defendants.¹²⁵ Because of the limited amount of time public defenders had to meet with and advise their clients about pleas, the court found that the public

119. For an argument that the Florida approach is consistent with the ABA formal ethics opinion, see Trieu, *supra* note 83, at 930.

120. *Pub. Def., Eleventh Judicial Circuit*, 115 So. 3d at 265.

121. *Id.* at 264–65 (quoting FLA. STAT., § 27.5303(1)(d) (2007)).

122. *Id.* at 278. The Florida Supreme Court further described the situation at the Public Defender's office:

Witnesses from the Public Defender's office described "meet and greet pleas" as being routine procedure. The assistant public defender meets the defendant for the first time at arraignment during a few minutes in the courtroom or hallway and knows nothing about the case except for the arrest form provided by the state attorney, yet is expected to counsel the defendant about the State's plea offer. In this regard, the public defenders serve "as mere conduits for plea offers."

Id.

123. *Id.* ("The witnesses also testified that the attorneys almost never visited the crime scenes, were unable to properly investigate or interview witnesses themselves . . . and were often unprepared to proceed to trial when the case was called.")

124. *Id.* ("The witnesses also described engaging in 'triage' with their cases—giving priority to the cases of defendants in custody, leaving out-of-custody defendants effectively without representation for lengthy periods subsequent to arraignment.")

125. *Id.* at 282.

defenders' office had demonstrated cause to withdraw.¹²⁶ It determined that if the statute prohibiting trial courts from granting motions to withdraw from "conflicts arising from underfunding, excessive caseload or the prospective inability to adequately represent a client" were to be interpreted "as prohibiting *any* motion to withdraw based on excessive caseloads or underfunding, then [the statute] would violate the courts' inherent authority to ensure adequate representation to defendants."¹²⁷ Instead, the court interpreted the statute to not apply if it "preclude[d] a public defender from filing a motion to withdraw based on excessive caseload or underfunding that would result in ineffective representation of indigent defendants nor [if it] preclude[d] a trial court from granting a motion to withdraw under those circumstances."¹²⁸ The court announced a duty to intervene when excessive caseloads amount to "nonrepresentation and therefore a denial of the actual assistance of counsel guaranteed by *Gideon* and the Sixth Amendment."¹²⁹ Although it provided room for courts to intervene, the Florida Supreme Court did not describe how a court should determine the circumstances under which a motion to withdraw should be granted.¹³⁰

B. Class Action Litigation

Class action litigation allows criminal defendants to seek remedies for systemic violations of their right to counsel.¹³¹ One example is the litigation in *Hurrell-Harring v. State*, which began in 2007 with a class action complaint filed by the New York Civil Liberties Union on behalf of indigent criminal defendants in New York.¹³² The complaint alleged

126. *Id.* at 279.

127. *Id.* at 282.

128. *Id.*

129. *Id.* at 278–79.

130. Instead, the Florida Supreme Court remanded the case to the trial court to make the determination. It seems likely, though, that if a public defender, consistent with ABA Formal Opinion 06-441, "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," under the court's reasoning in *Public Defender, Eleventh Judicial Circuit v. State*, the court should allow withdrawal. Formal Op. 06-441, *supra* note 53, at 4.

131. See generally Costello, *supra* note 15 (advocating for class action litigation as a strategy to remedy right-to-counsel violations and describing several examples of such litigation).

132. See Amended Class Action Complaint at 1, *Hurrell-Harring v. State*, No. 8866-07 (N.Y. Sup. Ct. Apr. 28, 2008) ("This civil rights lawsuit is brought to remedy the State of New York's persistent failure to guarantee meaningful and effective legal representation to indigent people accused of crimes, as required by the New York State Constitution and laws and the United States

that the defendants “face[d] a severe and unacceptably high risk of not receiving meaningful and effective assistance of counsel.”¹³³ The plaintiffs sought injunctive relief requiring the state “to provide a system of public defense consistent with the Constitution and laws of the State of New York and the United States Constitution.”¹³⁴

The plaintiffs were successful in the trial court, and the state appealed to the Appellate Division, where it prevailed in a 3–2 decision holding that the complaint was not justiciable on separation-of-powers grounds.¹³⁵ The plaintiffs appealed to the New York Court of Appeals, which reversed and remanded to the trial court for a hearing on the merits.¹³⁶ In a 4–3 decision, the court held that the complaint set forth a “constructive denial of the right to counsel by reason of insufficient compliance with the constitutional mandate of *Gideon*.”¹³⁷

The case gained widespread attention, and the United States Department of Justice filed a statement of interest in support of the plaintiffs.¹³⁸ In 2011, a three-judge panel of the Appellate Division, Third Department granted the plaintiffs’ motion for class

Constitution.”). For further discussion of the complicated procedural history of the *Hurrell-Harring* litigation, see LEFSTEIN, *supra* note 9, at 183–86.

133. Hurrell-Harring Amended Class Action Complaint, *supra* note 132, at 5. The complaint also provides extensive descriptions of the systemic failures of the New York public defense system. *See id.* at 4 (detailing an extensive list of deficiencies, including restrictive client-eligibility standards, a lack of standards for attorney supervision and monitoring, and a lack of attorney training and resources for support staff, among other failures); *see generally* COMM’N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2006) (detailing the findings of a commission with the responsibility to “examine the effectiveness of indigent criminal defense services across the State, and consider the alternative models of assigning, supervising, and financing assigned counsel compatible with New York’s constitutional and fiscal realities”).

134. Hurrell-Harring Amended Class Action Complaint, *supra* note 132, at 103.

135. Hurrell-Harring v. State, 883 N.Y.S.2d 349, 351, 355 (N.Y. App. Div. 2009).

136. Hurrell-Harring v. State, 930 N.E.2d 217, 228 (N.Y. Ct. App. 2010).

137. *Id.* at 225.

138. Statement of Interest of the United States at 1, Hurrell-Harring v. State, No. 8866-07 (N.Y. Sup. Ct. Oct. 21, 2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/09/25/hurrell_soi_9-25-14.pdf [<https://perma.cc/CQT4-UB66>]. It states:

It is the position of the United States that constructive denial of counsel may occur in two, often linked circumstances: (1) When, on a systemic basis, lawyers for indigent defendants operate under substantial structural limitations, such as a severe lack of resources, unreasonably high workloads, or critical understaffing of public defender offices; and/or (2) When the traditional markers of representation—such as timely and confidential consultation with clients, appropriate investigation, and meaningful adversarial testing of the prosecution’s case—are absent or significantly compromised on a system-wide basis.

Id.

certification,¹³⁹ and the day before the case was set to go to trial in 2014, the parties reached a settlement agreement.¹⁴⁰ In the settlement agreement, the state agreed to assume responsibility for funding and oversight of indigent defense in five of its sixty-two counties.¹⁴¹ The settlement ensures that every poor criminal defendant will have a lawyer at his or her first court appearance.¹⁴² It requires New York to hire enough lawyers, investigators, and support staff to ensure that all poor criminal defendants have lawyers with the time and support necessary to vigorously represent their clients.¹⁴³ It provides for the setting of caseload standards that will substantially limit the number of cases any lawyer can carry, and requires the state to spend more than \$4 million to increase attorney communications with poor criminal defendants.¹⁴⁴ The settlement also mandates the creation of eligibility standards for representation, and it provides that the plaintiffs will receive detailed reports allowing them to monitor compliance with the agreement.¹⁴⁵

The *Hurrell-Harring* settlement agreement was successful in forcing the state to provide funding for indigent defense and to remedy systemic Sixth Amendment violations. The main drawback to this strategy, though, is that it takes time. The complaint in *Hurrell-Harring* was filed in 2007, and a settlement was not reached until 2014. All the while, the plaintiffs remained in jail, and indigent criminal defendants continued to receive inadequate representation.

IV. ORLEANS PUBLIC DEFENDERS: AN OFFICE IN CRISIS

The OPD is in crisis. The office represents more than 85 percent of the criminal defendants in New Orleans,¹⁴⁶ and it was assigned over 20,000 cases in 2015.¹⁴⁷ That year, the OPD handled nearly 10,000 misdemeanors, nearly 8,000 felonies, 220 cases designated Life

139. *Hurrell-Harring v. State*, 914 N.Y.S.2d 367,372 (N.Y. App. Div. 2011).

140. *Hurrell-Harring Stipulation and Order of Settlement*, *supra* note 16, at 5–9; N.Y. Civil Liberties Union, *supra* note 16 (describing the settlement agreement).

141. *Hurrell-Harring Stipulation and Order of Settlement*, *supra* note 16, at 5–9.

142. *Id.* at 5.

143. *Id.* at 8.

144. *Id.* at 10–11.

145. *Id.* at 11–12, 14–15.

146. Transcript of Court Proceedings at 45, *Louisiana v. Wroten*, No. 520-385 (La. Crim. Dist. Ct., Orleans Parish Nov. 20, 2015) [hereinafter *Wroten Transcript*].

147. *Id.* at 52.

Without Parole, and two capital cases.¹⁴⁸ Each of the OPD's sixty staff attorneys is assigned to hundreds of cases at a time.

A. *Unreliable Funding Structure for Indigent Defense*

In New Orleans, funding for public defense is not a high priority: in 2015, "citizens appropriated nearly \$200 million dollars" for law enforcement and the district attorney, but only \$1.5 million for the OPD.¹⁴⁹ The budget crisis at the OPD is attributable to the funding mechanism the state has put in place.¹⁵⁰ Almost two-thirds of funding for Louisiana public defenders comes from a "user pay" funding mechanism: traffic cameras, tickets, and statutory fees.¹⁵¹ The statutory fees include a \$45 public defender's fee assessed whenever a defendant is convicted after trial, pleads guilty or no contest, or forfeits a bond.¹⁵² Because the fee is not assessed if a defendant is found not guilty, the OPD gets "paid to lose."¹⁵³

The funding structure is necessarily unreliable because the amount of money collected in traffic tickets each year varies unpredictably.¹⁵⁴ If sheriffs choose to reduce traffic enforcement, public defender revenues drop. The OPD has "no control over these revenue streams, their collection, or disbursement."¹⁵⁵ Funding can be reduced for reasons like "severe weather, elections and other political vagaries, judicial action, reductions in road traffic, and the lack of

148. The exact numbers are: 9,513 misdemeanors, 7,911 felonies, 8 capital cases, and 2,690 revocations. ORLEANS PUB. DEF., 2015 ANNUAL REPORT (2017), <http://www.opdla.org/images/files/2015-annual-report.pdf> [<https://perma.cc/5ZQP-5AGZ>].

149. *Id.*

150. For more background on the origins of the state funding structure and an insightful critique of the criminal-justice system in post-Katrina New Orleans, much of which remains relevant to the problems the OPD faces today, see Brandon L. Garrett & Tania Tetlow, *Criminal Justice Collapse: The Constitution After Hurricane Katrina*, 56 DUKE L.J. 127, 145–54 (2006).

151. LA. PUB. DEF. BD., LPDB 2014 ANNUAL BOARD REPORT 1, 22 (2015) [hereinafter LPDB ANNUAL REPORT]; John Burkhart, *The Crisis in Public Defense Funding: The Approaching Storm & What Must Be Done*, 62 LA. BAR J. 360, 361 (2015); see also Wroten Transcript, *supra* note 146, at 33–34 (criticizing the "user pay" system and indicating that up to half of the OPD budget is made up of fines and fees).

152. LPDB ANNUAL REPORT, *supra* note 151, at 26.

153. *If You Can't Afford a Lawyer*, REVEAL (Dec. 3, 2016), <https://www.revealnews.org/episodes/if-you-cant-afford-a-lawyer> [<https://perma.cc/59ZS-WKPC>].

154. See LPDB ANNUAL REPORT, *supra* note 151, at 22 ("Law enforcement can unilaterally reduce traffic enforcement. Traffic cases can be diverted so that no proceeds reach the public defender in the district. . . . Further, district offices are entirely reliant upon their counterparts in the criminal justice system to collect and remit the fines . . . needed to operate their respective offices.").

155. *Id.* at 1.

interstate or major highways in a particular jurisdiction.”¹⁵⁶ Due to this unreliable funding mechanism, in its 2014 Annual Report, the Louisiana Public Defender Board (LPDB)¹⁵⁷ presciently warned of an impending “systemic failure” in the Louisiana public defense system.¹⁵⁸

The LPDB recommended that the state “[r]estructure” its criminal-justice funding scheme.¹⁵⁹ The board urged the legislature to create a task force to study more reliable measures and develop recommendations to ensure adequate funding for the criminal-justice system.¹⁶⁰

B. OPD’s Response to the Budget Crisis

The unreliability of the OPD’s funding structure is evidenced by the 2015 projections for revenue being short by more than \$300,000, as well as the state’s reduction of OPD funding by \$700,000 for 2016.¹⁶¹ OPD attorneys’ workloads are beyond manageable levels.¹⁶² And New Orleans maintains a trial rate well above the state and national averages.¹⁶³

Further complicating the problem, the Orleans Parish district attorney boasts a case-acceptance rate of over 90 percent.¹⁶⁴ Unlike the OPD, the New Orleans district attorney “cannot let budget constraints affect [his] ability to operate.”¹⁶⁵

In a letter to criminal-justice stakeholders in New Orleans providing an overview of a proposed “restriction of services plan,” OPD Chief Defender Derwyn Bunton noted that the funding crisis

156. *Id.* at 22.

157. The Louisiana Public Defender Board (LPDB) is the state board charged with oversight of local public defenders’ offices. The LPDB was created by the Louisiana legislature in 2007 in response to widespread problems in the quality and consistency of legal representation for Louisiana’s indigent residents. *Id.* at 1. Its mission statement states, “Through its commitment to performance standards, ethical excellence, data-driven practices and client-centered advocacy, the LPDB oversees the delivery of high quality legal services.” *Mission and Vision*, LA. PUB. DEF. BD., <http://lpdb.la.gov/About/Mission%20and%20Vision.php> [<https://perma.cc/8S9D-6BEQ>].

158. LPDB ANNUAL REPORT, *supra* note 151, at 23 (“We expect at least 25 of 42 district offices will lack the funds to cover their expenses during the coming fiscal year, FY16 . . .”).

159. *Id.* at 3.

160. *Id.*

161. Letter from Derwyn Bunton, Chief Dist. Def., Orleans Public Defenders, to New Orleans Criminal Justice Stakeholders (June 18, 2015) (on file with the *Duke Law Journal*).

162. ORLEANS PUB. DEF. OFF., RESTRICTION OF SERVICES PLAN: FISCAL YEAR 2016, at 4 (2015) [hereinafter RESTRICTION OF SERVICES PLAN].

163. *Id.*

164. *Id.*

165. *If You Can’t Afford a Lawyer*, *supra* note 153.

“compromises the OPD’s ability to provide mandated legal services, brings higher costs in our criminal justice system, and ultimately puts public safety at risk.”¹⁶⁶ Bunton announced that, if the excessive caseloads continued, the office would “place appointed clients on a waitlist for representation” so attorneys could manage their caseloads.¹⁶⁷ And if the excessive caseloads continued for “an extended length of time,” the OPD would “begin refusing new case appointments.”¹⁶⁸

In response to these budget shortages and excessive caseloads, in July 2015, the OPD initiated a “restriction of services plan.”¹⁶⁹ The plan describes the dilemma as a “triangle” of public defense.¹⁷⁰ This refers to a three-way balancing of the constitutional obligation to provide competent effective counsel, the ethical obligations of the profession, and the obligation to comply with state professional standards.¹⁷¹

The plan entails a hiring freeze, office-wide furloughs and a caseload-monitoring program. It also eliminated representation for capital cases and began refusing to contract for new noncapital cases.¹⁷² The OPD expected that public defenders’ caseloads would rise once the plan went into effect.¹⁷³

In addition to the plan, the OPD launched a crowdfunding campaign to help cover its costs.¹⁷⁴ The campaign raised around \$85,000 from thirty-six states and twelve countries.¹⁷⁵

C. *Implications of the Restriction of Services Plan*

Once the OPD is appointed to a case, it takes weeks to assign it to an available OPD lawyer, leaving defendants on a waiting list for

166. Letter from Derwyn Bunton, *supra* note 161, at 2.

167. *Id.*

168. RESTRICTION OF SERVICES PLAN, *supra* note 162, at 4.

169. *Id.* at 2.

170. *Id.* at 4.

171. *Id.* at 4–5.

172. See Letter from Derwyn Bunton, *supra* note 161, at 2 (providing an overview of the Restriction of Services Plan).

173. RESTRICTION OF SERVICES PLAN, *supra* note 162, at 2.

174. In response to the crowdfunding campaign, John Oliver quipped that “nobody should be in jail because a Kickstarter didn’t meet its goal.” *Last Week Tonight with John Oliver: Public Defenders* (HBO television broadcast Sept. 13, 2015), <https://www.youtube.com/watch?v=USkEzLuzmZ4> [<https://perma.cc/QGL7-NAZB>].

175. ORLEANS PUB. DEF., *supra* note 148.

representation.¹⁷⁶ Since the plan went into effect, funding cuts have caused the OPD to lose seventeen felony attorneys and a total of thirty-seven staff positions.¹⁷⁷ As of March 2017, the office has sixty total attorneys, with fifty-one “line attorneys” who take on a full caseload and work between sixty and sixty-five hours per week.¹⁷⁸ The office has only thirteen investigators to handle the entire OPD caseload.¹⁷⁹

1. *Criminal District Court Hearing on Caseloads.* In response to its excessive caseloads, the OPD requested that the New Orleans criminal district courts stop appointing it to new cases.¹⁸⁰ Testimony from a district court hearing on the request demonstrates the dilemma facing the OPD.¹⁸¹ At the hearing, the OPD put on testimony from the state public defender, the chief public defender for Orleans Parish, and legal ethics experts. The hearing testimony indicated that, under its current caseloads, the OPD’s practices violate the Louisiana Rules of Professional Conduct¹⁸² regarding competence, diligence, communication with clients, confidentiality of information, conflicts of interest, declining or terminating representation, responsibilities of

176. See Ken Daley, *Judge: Patience Running Out on Orleans Public Defenders’ Unavailability*, NOLA.COM (Apr. 4, 2016, 2:25 PM), http://www.nola.com/crime/index.ssf/2016/02/judge_warns_patience_running_o.html [https://perma.cc/PAN3-57H5] (describing statements from a New Orleans judge to the OPD chief of trials, including, “[y]our office needs to step up to the plate and start finding attorneys for these clients,” and setting a deadline for the OPD to appoint an attorney to a case); Richard Fausset, *New Orleans Puts Poor on ‘Waiting List’ for Lawyers, Suit Alleges*, N.Y. TIMES (Jan. 15, 2016), <http://www.nytimes.com/2016/01/16/us/new-orleans-public-defender-lawsuit.html> [https://perma.cc/7DHB-HZPG] (“The steps, which vary from office to office, include instituting waiting lists and hiring freezes, and refusing some new cases.”).

177. Email from Lindsey Hortenstine, Commc’ns Dir., Orleans Public Defenders, to author (Mar. 13, 2017, 09:27 EST) (on file with the *Duke Law Journal*).

178. *Id.*

179. *Id.*

180. Note that the OPD requested that the court stop appointing the OPD to new cases, rather than announce that the office would no longer take any new cases. The OPD was also not seeking to withdraw from its currently pending cases at the hearing; instead, it sought “a prospective remedy,” asking that “this Court does not appoint future cases to our office.” Wroten Transcript, *supra* note 146, at 7. This distinction is significant, because the OPD has the authority to refuse to take new cases altogether, yet it chose to request judicial relief.

181. *Id.*

182. The Louisiana Rules of Professional Conduct are substantially similar to the Model Rules. See, e.g., Dane S. Ciolino, *Rule 1.1.: Competence*, LA. LEGAL ETHICS, <https://lalegaethics.org/louisiana-rules-of-professional-conduct/article-1-client-lawyer-relationship/rule-1-1-competence> [https://perma.cc/7W6P-ELEN] (stating, in a section titled “Model Rule Comparison,” that “[t]his rule is substantially similar to ABA Model Rule of Professional Conduct 1.1”); see generally LA. RULES PROF’L CONDUCT (adopting an essentially identical structure to that of the Model Rules of Professional Conduct).

managers and supervisory lawyers, and responsibilities of a subordinate lawyer.¹⁸³

These ethical violations impact the constitutional rights of nearly all of the criminal defendants in New Orleans. Professor Ellen Yaroshefsky, a legal ethics expert, reviewed affidavits of OPD attorneys and testified about the problems at the OPD.¹⁸⁴ She explained that the office does not operate consistently with the rules¹⁸⁵ and recommended that the OPD not take future cases.¹⁸⁶ She observed that OPD lawyers “have gotten to the point where there’s a systemic violation of the rules of professional conduct.”¹⁸⁷ OPD lawyers have to “make a decision of triage; and triage is a conflict of interest and that’s a systemic problem in this office.”¹⁸⁸ From the witness stand, Yaroshefsky described the conditions at the OPD: “You’re not operating a justice system here. You’re operating a processing system.”¹⁸⁹

By juggling too many cases and engaging in “triage” to decide how to allocate time and resources, OPD lawyers operate under continuous concurrent conflicts of interests: each new case a public defender takes on above a manageable caseload materially limits that lawyer’s ability to recommend or carry out an appropriate course of action for other clients.¹⁹⁰ With regard to competence, the lawyers do not have sufficient time to meet with and counsel clients.¹⁹¹ With regard to diligence, the lawyers lack the time and resources to adequately investigate cases.¹⁹²

183. See generally Wroten Transcript, *supra* note 146 (describing the problems caused by excessive caseloads at the OPD).

184. *Id.* at 70.

185. *Id.* at 76.

186. *Id.* at 75.

187. *Id.* at 72.

188. *Id.*

189. *Id.* at 72.

190. See *id.* at 87–88 (“[T]he entire operation of the OPD, operates with a conflict of interest. . . . [W]ith the number of cases that they have . . . they’re simply not able to adequately provide competent counsel to the vast majority [of their clients].”).

191. See *id.* at 114 (“If you’re not even able to see your client until the day before trial, particularly a mentally ill client, it’s nearly impossible to prepare adequately for whatever kind of hearing you have and certainly for trial.”).

192. See *id.* at 77–78 (“They can’t investigate cases. They can’t serve subpoenas and so they haven’t done what is necessary to be a diligent lawyer.”); *id.* at 91 (“It’s a systemic problem It can’t be a system where the courts, among other actors, just expect lawyers are going to stand up without doing any work essentially because they can plead guilty and put people through a plea mill”); see also BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, INDIGENT

2. *Court Order Releasing Unrepresented Defendants.* After the hearing, the court did not relieve the OPD from taking new cases. The court did, however, offer (fleeting) relief to some unrepresented indigent criminal defendants by ordering their release.¹⁹³ These defendants were charged with serious felonies, including second-degree murder, first-degree rape, and armed robbery with a firearm.¹⁹⁴ They had been incarcerated without the assistance of counsel for between 81 and 138 days.¹⁹⁵ The state has appealed the release order, so, for now, the defendants remain incarcerated. But the court's pronouncement that "defendants' constitutional rights are not contingent upon budget demands, waiting lists, and the failure of the legislature to adequately fund indigent defense" strikes at the heart of the problem caused by the OPD's excessive caseloads.¹⁹⁶

In its order releasing the defendants, the court criticized the state legislature's failure to fund public defense. The court noted that the public defenders' lack of preparation and the absence of pretrial investigation "raise[d] serious concerns" about the defendants' access to effective assistance of counsel.¹⁹⁷ It found that the "defendants' attorneys have demonstrated that they cannot effectively represent their clients without adequate funding and resources."¹⁹⁸ The court "ha[d] no difficulty concluding [that] the defendants' constitutional right to assistance of counsel [was] being violated."¹⁹⁹ Because of the "absence of a date certain" for when sufficient funding for indigent defense would be available, the court held that the New Orleans indigent defense system violated the Sixth and Fourteenth Amendments.²⁰⁰

DEFENSE SERIES # 4, KEEPING DEFENDER WORKLOADS MANAGEABLE 5 (2001) ("If a judge with responsibility for appointing counsel . . . recognizes that overwhelming caseloads may jeopardize a defendant's right to competent representation of counsel, it is the judge's responsibility to identify and rectify the situation.").

193. *State v. Bernard*, No. 528-021, slip op. at 11 (La. Crim. Dist. Ct. Apr. 8, 2016).

194. *Id.* at 7–8.

195. *Id.*

196. *Id.* at 10.

197. *Id.* at 9.

198. *Id.*

199. *Id.*

200. *Id.* at 11 ("The absence of a date certain when proceedings are to begin and when adequate funding will be made available by the legislature for constitutionally mandated representation of defendants who cannot afford an attorney violates the Sixth Amendment right[s] to counsel and effective assistance of counsel and the Fourteenth Amendment Due Process Clause.").

3. *Class Action Lawsuits*. In response to the restriction of services plan, the ACLU filed a class action lawsuit in the Middle District of Louisiana on behalf of New Orleans's unrepresented indigent defendants who had been placed on a waiting list by the OPD.²⁰¹ The plaintiffs alleged that, by placing them on a waiting list for representation, the OPD (acting through Chief Defender Bunton) had violated their Sixth and Fourteenth Amendment right to assistance of counsel and the Fourteenth Amendment rights to due process and equal protection.²⁰²

The court criticized the broken indigent defense system, but ultimately dismissed the case on “comity and federalism grounds.”²⁰³ It said, “It is clear that the Louisiana legislature is failing miserably at upholding its obligations under *Gideon*. Budget shortages are no excuse to violate the United States Constitution.”²⁰⁴ Yet it concluded that this crisis was not able to surmount “the difficult federalism obstacles” associated with obtaining injunctive relief from a federal court.²⁰⁵ The court dismissed the case because any declaratory or injunctive relief by the federal court “would inevitably lead . . . [the court] to become the overseer of the Orleans Parish criminal court system, a result explicitly condemned by the United States Supreme Court in *Younger* and *O’Shea*.”²⁰⁶ As did the courts in the cases described above,²⁰⁷ the court punted the problem to the legislature: “Lasting relief will only come when the legislature locates an adequate source of funding for public defense offices.”²⁰⁸

The Southern Poverty Law Center has also recently filed a class action lawsuit against Louisiana Governor John Bel Edwards in state

201. See Class Action Complaint at 14–15, *Yarls v. Bunton*, No. 3:16-cv-31 (M.D. La. Jan. 14, 2016), 2016 WL 212997 (summarizing the plaintiffs’ claims for relief under the Sixth and Fourteenth Amendments).

202. *Id.* at 14. It is worth noting that the parties’ interests were not completely adverse. Because as the defendant, Bunton did not contend that his placing the plaintiffs on a waiting list was constitutional, there was “no disagreement as to liability.” *Yarls v. Bunton*, No. 16-31-JJB-RLB, 2017 WL 424874, at *3 (M.D. La. Jan. 31, 2017). The court noted that the “parties are aligned in seeking a judicial declaration . . . in an apparent attempt to place pressure on the Louisiana legislature to increase funds for public defense services.” *Id.* at *1 n.10. Because of this friendly party alignment, the court “at every turn . . . had to question the nature of its own power without the aid of the illumination that ‘concrete adverseness brings.’” *Id.* at *3.

203. *Yarls*, 2017 WL 424874, at *1.

204. *Id.* at *7 (footnote omitted).

205. *Id.* at *4.

206. *Id.* at *3.

207. See *supra* Part III.A.

208. *Yarls*, 2017 WL 424874, at *7.

court.²⁰⁹ The plaintiffs are seeking declaratory and injunctive relief, alleging that the state has violated their rights under the Sixth and Fourteenth Amendments.²¹⁰

* * *

The OPD remains in crisis. Criminal defendants in New Orleans are stuck on waiting lists for representation, and OPD attorneys still have unmanageable caseloads. Recognizing this crisis, the president of the ABA wrote a letter to Governor Edwards, urging him to adequately fund indigent defense in the state.²¹¹ The OPD chief defender wrote an op-ed in the *New York Times* describing the challenges the OPD faces: “[P]oor defendants have been left to represent themselves. And . . . judges have threatened public defenders with contempt for refusing to take a case.”²¹²

Yet counterintuitively, the actions taken by the OPD may have worked to reorient legislative priorities. The New Orleans City Council recently approved a new 2017 budget that funds the OPD “at or above 2016 levels in the final budget” while cutting funds for the Orleans Parish District Attorney’s Office.²¹³ And in response to the crisis, the Louisiana legislature has provided more funds for the OPD. Although the bill did not provide any net new money for public defense, it increased the percentage of funds allocated to district public defender offices like the OPD.²¹⁴ Yet in doing so, it diverted funds away from

209. Verified Petition for Class Certification and Declaratory and Injunctive Relief at 2–4, *Allen v. Edwards*, No. 655079 (La. Dist. Ct. Feb. 6, 2017), 2017 WL 1056616, at *2–4.

210. *Id.*

211. See Letter from Paulette Brown, President, Am. Bar Ass’n, to John Bel Edwards, Governor, La., at 4 (Mar. 30, 2016), http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2016mar30_louisianapublicdef_l.authcheckdam.pdf [<https://perma.cc/Q2S-V-NQLN>] (“This is a critical time for Louisiana with respect to public defense. . . . The ABA asks that you do everything in your power to ensure that Louisiana public defense is properly funded so that attorneys may meet their constitutional and ethical obligations.”).

212. Derwyn Bunton, Opinion, *When the Public Defender Says, ‘I Can’t Help,’* N.Y. TIMES (Feb. 19, 2016), <http://www.nytimes.com/2016/02/19/opinion/when-the-public-defender-says-i-cant-help.html> [<https://perma.cc/2G7B-MKM5>].

213. Greg LaRose, *New Orleans City Council Approves 2017 Budget, with More and Less for Criminal Justice*, NOLA.COM (Nov. 17, 2016, 7:15 PM), http://www.nola.com/politics/index.ssf/2016/11/new_orleans_city_council_appro_18.html [<https://perma.cc/FX8S-KNUM>]; 2017 Proposed Operating Budget, <http://nolacitycouncil.com/docs/resources/2017-Proposed-Operating-Budget-Book.pdf> [<https://perma.cc/T22Y-ZU8J>].

214. 2016 La. Sess. Law Serv. 571 (West); Julia O’Donoghue, *Lawmakers Look to Shift Money to Public Defenders—from Death Penalty Appeals*, NOLA.COM (Apr. 7, 2016, 6:35 PM),

capital defense programs in the state.²¹⁵ The OPD chief defender spoke out against the bill,²¹⁶ and the Louisiana District Attorney's Association supported it.²¹⁷ Although the bill has some serious defects (for example, reshuffling funds away from one class of criminal defendants to another), it shows a willingness by the legislature to respond to the indigent defense crisis in the state.

The OPD case study shows that public defenders can play a powerful institutional role in spurring legislative reform. The unreliable funding system created a budget shortfall, which caused public defenders' caseloads to rise beyond already unmanageable levels. In response, the OPD has refused cases to maintain ethically manageable workloads. These actions have left hundreds of people accused of serious crimes without representation. A public safety crisis resulted when a court released some of these unrepresented defendants. And the crisis has garnered national attention. Thus, by refusing new cases, the OPD has caused governance problems that keep the spotlight on public defense and put political pressure on legislators.

In addition to the forcing legislatures to respond, refusing new cases aligns with the ABA's recommendations²¹⁸ and public defenders' ethical obligations.²¹⁹ Rather than engaging in "triage" and working in a "processing system" for pleas, refusing to take new cases allows public defenders to maintain constitutionally permissible caseloads.

Had the OPD continued to take new cases, criminal defendants would have continued to receive inadequate representation. By operating under unmanageable caseloads, the public defenders would

http://www.nola.com/politics/index.ssf/2016/04/lawmakers_look_to_give_more_mo.html [https://perma.cc/2ENX-Q2SQ].

215. See O'Donoghue, *supra* note 214 (noting that House Bill 1137 diverts funds from "capital defense to local public defender offices").

216. See Louisiana House of Representatives, *Administration of Criminal Justice—Hearing on HB 818* (La. Apr. 7, 2016), http://house.louisiana.gov/H_Video/VideoArchivePlayer.aspx?v=house/2016/apr/0407_16_CJ [https://perma.cc/7W9K-FZLX] (testimony beginning at minute sixty-nine).

217. Karen Kidd, *DA Association Backs Bill Aimed at Troubled Louisiana Public Defender Board*, LA. REC. (Apr. 30, 2016, 12:11 PM), <http://louisianarecord.com/stories/510720184-da-association-backs-bill-aimed-at-troubled-louisiana-public-defender-board> [https://perma.cc/F3B4-PT47].

218. Formal Op. 06-441, *supra* note 53, at 4 ("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 . . .").

219. For further discussion of the ethical problems associated with excessive caseloads, see *supra* Part II.

have perpetuated an unjust and unconstitutional system. Instead, cognizant of budget constraints, they took actions to maintain their ethical obligations and their clients' right to the effective assistance of counsel.

Of course, refusing cases is not the perfect solution to the funding crisis.²²⁰ The Louisiana legislature still has not adequately funded public defense in the state, and criminal defendants in New Orleans remain on waiting lists for representation. This approach only creates pressure; it provides no immediate institutional reform. But it is a starting point. When criminal defendants are unrepresented both in a literal and political sense,²²¹ public defenders can and should play a role in the political process by refusing to take new cases.

CONCLUSION

The right to counsel is a fundamental tenet of the criminal-justice system. Yet that right is regularly denied to indigent criminal defendants who happen to be arrested in states that choose not to adequately fund public defense. Absent a crisis, indigent defense is not a top priority for state legislatures, and separation-of-powers and federalism concerns have prevented courts from forcing legislatures to take action. As the OPD case study shows, public defenders are in a unique position to put pressure on legislatures. By refusing to take new cases beyond ethical workloads, they can both maintain their obligations to the profession and ensure constitutional representation for their clients.

220. See Steiker, *supra* note 44, at 2701 (“There is clearly no silver bullet here; rather the answer . . . involves the long, slow, and concerted effort of all possible institutional actors.”).

221. See William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1975 (“A criminal justice system under the thumb of voters and politicians is a system prone to act on majoritarian prejudices.”).