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## Systematizing Public Defender Rationing

# SYSTEMATIZING PUBLIC DEFENDER RATIONING

IRENE ORITSEWEYINMI JOE<sup>†</sup>

## ABSTRACT

Under-resourced public defenders have little choice but to respond to overwhelming caseloads by prioritizing certain clients—picking which cases will receive comprehensive defense representation and which will not. This practice, termed “triage” given its similarities to medical care in emergency rooms and army battlefields, is a necessary part of current public defender practice. But how public defenders are deploying the practice is problematic and undermines the very goal public defenders seek to advance. More specifically, the common public defender triage strategy of focusing on a particular understanding of the Sixth Amendment’s effective assistance of counsel mandate actually limits the ability of public defenders to provide effective assistance of counsel. This “perversity effect” of public defender triage practice has gone unnoticed in both the criminal procedure literature and the literature on the legal profession.

This Article puts this problem into sharp relief by examining four very different public defender attorney distribution schemes: DuPage County, Illinois; Orleans Parish, Louisiana; Santa Barbara County, California; and the Atlanta Judicial Circuit, Georgia. Across these disparate offices, I show how the public defender triage system’s formalistic approach to right to counsel compromises the overall ability of public defenders to provide effective assistance of counsel. This Article uncovers the need for a more comprehensive approach to triage, and charges public defender institutions with making resource allocation decisions more effective by elevating them from the individual public defender to the institutional level.

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## INTRODUCTION

Public defender Colleen Polak spends a typical workday running up and down a set of courthouse stairs—“in and out of four [different Missouri state] courtrooms.”<sup>1</sup> Ms. Polak’s physical exertion is necessary for her to simultaneously represent clients in ten different legal matters.<sup>2</sup> She works weekends in the hopes of providing each of her clients with effective defense representation, but she acknowledges that she makes difficult prioritization decisions that leave some clients without the attention they deserve.<sup>3</sup>

Public defender Ed Olexa’s typical caseload for his Pennsylvania Public Defender Office results in a quadruple booking on one particular court morning.<sup>4</sup> This means he represents four clients who are scheduled

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1. Erik Eckholm, *Public Defenders, Bolstered by a Work Analysis and Rulings, Push Back Against a Tide of Cases*, N.Y. TIMES, Feb. 19, 2014, at A10

2. *See id.*

3. *Id.*

4. John Rudolf, *Pennsylvania Public Defenders Rebel Against Crushing Caseloads*, HUFFINGTON POST (June 16, 2012, 11:18 AM), [http://www.huffingtonpost.com/2012/05/30/pennsylvania-public-defenders\\_n\\_1556192.html](http://www.huffingtonpost.com/2012/05/30/pennsylvania-public-defenders_n_1556192.html). Olexa works for the Luzerne County Defenders Office, which is considered “one of the most troubled [public defender offices] in the state” of Pennsylvania. *Id.* His caseload of 120 clients at a time, most of whom face felony charges, is described as a typical caseload for the office in “a 2011 report commissioned by the Pennsylvania legislature.” *Id.*

to appear at the same time before four different judges.<sup>5</sup> Not only does Olexa have to decide between enjoying an evening off the night before court or organizing his case files, but he also has to choose which of the four clients' matters he will prioritize when the court sessions begin in the morning.<sup>6</sup>

When the Supreme Court issued its opinion in *Gideon v. Wainwright*,<sup>7</sup> guaranteeing counsel for the nation's poor defendants, it could not possibly have foreseen that such difficult resource allocation decisions would become a permanent fixture in public defender offices throughout the nation.<sup>8</sup> At the time *Gideon* was decided, there were only about 150,000 defendants facing felony charges in need of representation.<sup>9</sup> In the fifty years that have passed since the decision was handed down, the number of individuals embroiled in the criminal justice system has ballooned to such a level that there are approximately 2.2 million people in prison, on probation, or on parole.<sup>10</sup> There has not been a similar increase in funding, so public defenders are constantly tasked with representing more individuals than their limited resources support. The prevalence of excessive caseloads supports the common understanding that this nation is suffering from an indigent defense crisis.<sup>11</sup> The public defender function, made up of the institutions and the public defenders themselves, was created to ensure fairness in the criminal justice system.<sup>12</sup> Insufficient resourcing, however, has created a public defender system that is commonly described as unfair, struggling, and even broken.<sup>13</sup> Public defender stakeholders wage a constant battle for resources and often find their cries unheard by state legislators.<sup>14</sup>

5. *Id.*

6. *See id.* Olexa comments, "My choice last night was to watch 'American Idol' or get my files in order." *Id.*

7. 372 U.S. 335 (1963).

8. *See id.* at 335 (providing in the case syllabus that "Sixth Amendment to federal Constitution providing that in all criminal prosecutions the accused shall enjoy the right to assistance of counsel for his defense is made obligatory on the states by the Fourteenth Amendment, and that an indigent defendant in criminal prosecution in state court has right to have counsel appointed for him").

9. Heather Baxter, *Gideon's Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341, 349.

10. *See* Anthony Zurcher, *Report: US Prison Rates an 'Injustice'*, BBC NEWS: ECHO CHAMBERS (May 2, 2014), <http://www.bbc.com/news/blogs-echochambers-27260073>. In 1973 there were approximately 200,000 Americans in prison, and by the year 2009 there were about 1.5 million Americans in prison and approximately 750,000 more housed in local jails. *Id.*

11. *See, e.g.*, Linda Chiem, *Fla. High Court Says Public Defenders Can Shed Caseload*, LAW360 (May 23, 2013, 4:23 PM), <http://www.law360.com/articles/444476/fla-high-court-says-public-defenders-can-shed-caseload>; John P. Gross, *The Truth About How Public Defenders Handle Excessive Caseloads*, NAT'L ASS'N FOR PUB. DEF. (Jan. 22, 2015), <http://publicdefenders.us/?q=node/673>.

12. *See* Richard Klein, *The Role of Defense Counsel in Ensuring a Fair Justice System*, NAT'L ASS'N CRIM. DEF. LAW. (June, 2012), <https://www.nacdl.org/champion.aspx?id=24996>.

13. *See* NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 50-52 (2009) [hereinafter JUSTICE DENIED], <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf>. Even the nation's former chief prosecutor, Attorney General Eric Holder, has commented on the system's failure to

Often forgotten in the justifiable movement for adequate resources is that public defenders and their institutions also wage a simultaneous battle in managing their responsibilities with the available resources. These defenders try to ease the burden of compliance by adopting resource distribution schemes that reflect what they deem are their most important obligations. The order of priority given to these obligations is critical because the resulting schemes determine whether limited resources are effective or not.<sup>15</sup> Decisions about which client matters are given attention first, which client matters are given attention at all, and everything in between are comparable to triage decisions that physicians use in emergency rooms or on army battlefields. Unlike in the medical field, however, individual public defender triage practice is not guided by a formal prioritization scheme.<sup>16</sup> Instead, individual public defenders, like Colleen Polak and Ed Olexa, as well as the public defender institutions that manage attorneys like them, process clients using primarily ad hoc decisions focused on complying with the Sixth Amendment mandate for effective assistance of counsel.<sup>17</sup> On its surface, this practice seems to be all that is required and necessary for indigent defense stakeholders. A closer look at the costs associated with such a single-minded focus for the distribution of limited resources reveals a very different reality.

As this Article demonstrates, despite their best intentions, the triage schemes that public defenders use to manage the burden of providing effective assistance of counsel, despite inadequate resourcing, compound the problems by creating an environment where arbitrary decisions and resource fatigue continue to limit access to the attorney resource. This point is particularly salient because public defenders handle the vast majority of criminal cases, as high as 80% in some jurisdictions.<sup>18</sup> The meaning of the Sixth Amendment lives or perishes at the fingertips of public defenders facing overwhelming caseloads with insufficient re-

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provide effective assistance of counsel. Eric Holder, Att'y Gen., Attorney General Eric Holder Speaks at the American Bar Association's National Summit on Indigent Defense (Feb. 4, 2012) (transcript available at

<http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html>) ("Across the country, public defender offices and other indigent defense providers are underfunded and understaffed. . . . [T]he basic rights guaranteed under Gideon have yet to be fully realized.").

14. See, e.g., Jennifer Burnett, *Justice in Jeopardy: Budget Cuts Put State Public Defense Systems Under Stress*, CAPITOL IDEAS, July–Aug. 2010, at 16–17; Bill Rankin, *Georgia Legislative Proposals Could Gut Public Defender Reforms*, S. CTR. FOR HUM. RTS (Mar. 1, 2015), [https://www.schr.org/resources/georgia\\_legislative\\_proposals\\_could\\_gut\\_public\\_defender\\_reforms](https://www.schr.org/resources/georgia_legislative_proposals_could_gut_public_defender_reforms).

15. Resource exhaustion is a serious concern for any organization saddled with limited resources.

16. L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2632–33 (2013).

17. *Id.* at 2631–33; John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1221–22 (1994).

18. See, e.g., Editorial, *Federal Oversight on Public Defense*, N.Y. TIMES (Sept. 7, 2013), <http://www.nytimes.com/2013/09/08/opinion/sunday/federal-oversight-on-public-defense.html> (explaining that Orleans Public Defenders is responsible for 80% of the criminal cases in Orleans Parish).

sources. This Article provides new insight on the procedures these attorneys currently use to meet the constitutional and professional obligations of their practice.

Part I of this Article details the constitutional and professional rules public defenders and public defender administrators must abide by when managing their overwhelming caseload with insufficient resources. Part II discusses the individual and institutional responses to the inadequate resourcing plaguing public defender services. Part III provides concrete examples with an analysis of four different public defender institutions and the way each distributes its attorney expertise resource. Part IV provides an explanation of the consequences that result from the triage schemes the institutions use and identifies the institution with the most satisfying, albeit less than ideal, approach. This approach provides a bandage, rather than a panacea, for system funding decisions, but it remains a critical consideration for those seeking to improve the administration of public defender resources.

### I. GUIDING COUNSEL IN UNDER-RESOURCED REGIMES

In *Gideon*, the Supreme Court reasoned that the Sixth Amendment guarantee of the effective assistance of counsel was fundamental and essential to a fair system of justice.<sup>19</sup> The Court noted that government agents use substantial resources to prosecute individuals and that our nation's "noble ideal[s]" of fairness could be achieved only if the state provides the "guiding hand of counsel at every step of the proceedings" to those defendants who cannot afford it.<sup>20</sup> In this real world of insufficient funding, however, public defender resources rarely keep pace with the resources dedicated to the government's prosecutorial function.<sup>21</sup> In the more than fifty years that have passed since the *Gideon* decision, many federal, state, and local governments have struggled with providing the quality of representation guaranteed under the Court's interpretation of the Sixth Amendment in *Gideon* and its resulting progeny. State fund-

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19. *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963). The Court used its opinion in *Powell v. Alabama*, 287 U.S. 45 (1932), regarding the historical data of the right to counsel to support its finding. *Gideon*, 372 U.S. at 342–43, 345.

20. *Gideon*, 372 U.S. at 344–45 (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)).

21. See, e.g., ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 1, 3 (2002) [hereinafter ABA PRINCIPLES], [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf) ("There [should be] parity between defense counsel and the prosecution with respect to resources . . . ."); THE SPANGENBERG GROUP, A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA 34 (2004), <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/va-report2004.pdf> ("Average pay in the offices is \$64,000 for [prosecutors] and \$46,000 for assistant public defenders."); see also Lawrence Herman, *Gideon and the Golden Thread*, 99 IOWA L. REV. 2015, 2030 (2014) (advocating for creation of a State Department of Justice that would ensure parity between public defenders and prosecutors with regards to pay, staff services, and other tools necessary for investigation and representation); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 225–30 (2004) (arguing for resource parity).

ing decisions on the staff and resources necessary to ensure effective representation vary widely from state to state, and the general standard of practice for all poor persons facing criminal charges has failed to keep pace with the growing complexity and volume of criminal litigation in many jurisdictions.<sup>22</sup>

According to national guidelines, public defenders should only handle “150 felonies; 400 misdemeanors; 200 juvenile [delinquency matters]; 200 mental health cases; or 25 appeals” each calendar year.<sup>23</sup> In the nation’s largest 100 counties, public defenders routinely handle an average of 530 cases annually, which can consist of cases exclusive to one genre or a mixed caseload.<sup>24</sup> This finding means that, on average, even if a defender works every single day without taking breaks for weekends or holidays, that defender cannot devote even one full day each year exclusively to each case on her docket.

Although larger counties are often the focus of national attention, the public defender crisis is no less dire in smaller counties. For example, individual public defenders in the fifty-seven New York counties outside New York City averaged 680 cases in the year 2013, more than 150% of

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22. See Darryl K. Brown, *Epiphenomenal Indigent Defense*, 75 MO. L. REV. 907, 909–10 (2010). States have full authority to reduce already limited funds dedicated to indigent defense services through a variety of practices because there is minimal constitutional regulation. *See id.* at 908. States will often cover state budget shortfalls for other agencies by setting low hourly rates for attorneys who represent indigent clients, requiring attorneys to provide pro bono services to the poor, imposing fee caps on certain types of cases, reducing the amount available for expert assistance, or even redefining the criteria for qualifying for indigent defense services in order to reduce the amount of persons who are held to be in need of public defender services. *See id.* at 928–29. Change of party control or key committee leadership can also affect discretionary funding of public defender programs. *Id.* at 929. Indigent defense has been described as epiphenomenal because “it is [the] secondary effect of . . . political events and variations [in state funding], rather than a stable function of constitutional and statutory mandates that closely tie it to the criminal justice system’s other components.” *Id.* at 908. Until dependence on uncontrollable funding mechanisms changes, “indigent defense . . . will [always] have long periods of inadequate service [and] systemic crises that are [only] periodically interrupted by reform efforts . . . prompted by litigation or intervention . . . [by] state bar associations, [legislatures or] state judiciaries.” *Id.* Brown’s conclusion is that legislatures should establish some type of parity between the funds allocated to law enforcement, the prosecutorial function, and the probation or incarceration methods. *See id.* at 925–28. If his conclusion were adopted, indigent defense systems would be more stable and, as a result, more effective. Many of the resource issues plaguing indigent defense systems would also cease to exist.

23. JUSTICE DENIED, *supra* note 13, at 66. The National Advisory Commission on Criminal Justice Standards and Goals established these guidelines in a 1973 report. *Id.* As noted in the above reference, these caseload numbers are dated, the numbers “were never empirically based” and were intended “for a public defender’s office and not necessarily for each individual attorney in that office.” *Id.* (quoting NAT’L ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS & GOALS, COURTS 43 (1973)). These numbers do remain the accepted guideposts for public defender practice. *See id.* at 66–67. The caseload limits ascribed have been adopted by the American Council of Chief Defenders, a section of the National Legal Aid and Defender Association that includes the heads of public defender programs throughout the United States. AM. COUNCIL OF CHIEF DEFS., AMERICAN COUNCIL OF CHIEF DEFENDERS STATEMENT ON CASELOADS AND WORKLOADS 3 (2007).

24. SCOTT WALLACE & DAVID CARROLL, NAT’L LEGAL AID & DEF. ASS’N, THE IMPLEMENTATION AND IMPACT OF INDIGENT DEFENSE STANDARDS 4–5 (2003).



the recommended limit for the highest caseload allowance.<sup>25</sup> Smaller counties, with numbers such as those in the New York studies, are included in systemic litigation efforts in order to convey to a statewide authority that public defense practice throughout a particular state fails to meet acceptable representation standards.<sup>26</sup> Because the Sixth Amendment only requires effective assistance of counsel, and not the optimal assistance of counsel that an attorney could provide to one client if the attorney had unlimited resources, litigation meant to increase funding for public defender systems has proven inconsistently successful.<sup>27</sup> Public defenders faced with these finite and limited resources must then limit the amount of effort and work they put into individual cases so they can accommodate the needs of their other clients. Both the individual attorneys and public defender institutional leadership make these decisions regarding resource rationing, focusing on the attorney's management of cases at the micro-level of client representation.

### A. The Theory Guiding Public Defender Triage Practice

Legal scholarship has proposed solutions to the problems inherent in public defender triage practice by identifying principles for the scope of public defender representation and developing theoretical frameworks for individual attorneys to make triage decisions more fairly.<sup>28</sup> The avail-

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25. Michael Virtanen, *Report Details NY Indigent Defense Caseloads*, WASH. TIMES (Sept. 24, 2014), <http://www.washingtontimes.com/news/2014/sep/24/report-details-ny-indigent-defense-caseloads/>.

26. Press Release, N.Y. Civil Liberties Union, *Settlement Begins Historic Reformation of Public Defense in New York State* (Oct. 21, 2014) [hereinafter NYCLU Press Release], <http://www.nyclu.org/news/settlement-begins-historic-reformation-of-public-defense-new-york-state> (acknowledging that the five New York counties chosen for the class-action lawsuit, "Ontario, Onondaga (Syracuse), Schuyler, Suffolk and Washington[,] . . . were chosen because their public defend[er] systems" differ in the size of the communities they serve but were all emblematic of the problems with New York state's public defense mechanism).

27. See Rodger Citron, Note, *(Un) Luckey v. Miller: The Case for Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481, 486–87 (1991); Vidhya K. Reddy, *Indigent Defense Reform: The Role of Systemic Litigation in Operationalizing the Gideon Right to Counsel* 19 (Wash. Univ. Sch. of Law, Working Paper No. 1279185, 2008).

28. See, e.g., Carol S. Steiker, *Gideon at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2700–01, 2704–10 (2013) (providing strategies for moving political actors who control monetary policies, the organization and administration of indigent defense services, and the substantive criminal law to allocate the resources and make the institutional changes necessary to fix failing systems). The institutional changes Steiker addresses concern training and oversight of public defenders and improving the norms associated with indigent defense practice. See *id.* at 2704–10; see also Jonathan A. Rapping, *National Crisis, National Neglect: Realizing Justice Through Transformative Change*, 13 U. PA. J. L. & SOC. CHANGE 331, 333 (2009–2010) (setting forth that "meaningful indigent defense reform" is only possible if system actors recruit and train "a new generation of public defenders [who are] equipped with the tools . . . to resist [the] pressures" of the existing inadequate culture of representation and are able to remain in the job long enough to become defender leaders); Robin G. Steinberg, *Beyond Lawyering: How Holistic Representation Makes for Good Policy, Better Lawyers, and More Satisfied Clients*, 30 N.Y.U. REV. L. & SOC. CHANGE 625, 627–28 (2006) (arguing that "holistic" representation, a client-centered and community-oriented approach to criminal defense, is an effective and critical solution for broken criminal justice systems). See generally John B. Mitchell, *In (Slightly Uncomfortable) Defense of "Triage" by Public Defenders*, 39 VAL. U.L. REV. 925 (2005) [hereinafter Mitchell, *Defense*]; John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215 (1994) [hereinafter Mitchell, *Redefining*] (provid-

able scholarship attempts to provide an ethical framework for individual public defenders to use when rationing resources.<sup>29</sup> The majority of this limited scholarship informs public defender systems about the most appropriate way for individual attorneys to conduct a triage practice, and a more limited amount has been written on the effect of triage on client rights.<sup>30</sup> There is even less scholarship available suggesting that public defenders must reject triage or risk providing unconstitutional and unprofessional representation to indigent persons.<sup>31</sup> Although this scholarship has enhanced the conversation about public defender triage, it fails to fully consider the role an institution assumes in effecting individual public defender triage decisions. Legal scholarship is mostly silent about the institutional design of public defender offices and how an administration's allocation of limited resources might contribute to the further reduction of those resources.<sup>32</sup>

Part of the difficulty with establishing particular triage schemes among clients is that such an activity so clearly calls into question the Sixth Amendment mandate to provide effective assistance to all clients. The very nature of choosing to provide one particular client resources to which that client is entitled at the expense of another client suggests that attorneys are failing to comply with professional and ethical requirements of competent and effective advocacy. Despite this problem, legal scholarship has set forth suggested protocol for public defender administrators and individual public defenders to consider.

One of the most comprehensive resource-rationing guidelines for public defenders identifies three types of individual client representation: (1) messenger representation—"merely convey[ing] [any plea offers] from the prosecution without any real analysis or counseling;" (2) pattern representation—"quickly categorizing cases legally, factually, strategically, and predictively by [finding] certain . . . recurring patterns" from previous cases; and (3) focus representation—pushing the rules and creating deeper narratives for a client's defense.<sup>33</sup> The support for this triage model arises from the claim that the Sixth Amendment permits pattern

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ing a theoretical framework for individual public defenders to use when rationing resources amongst clients with competing significant claims and arguing that public defenders should prioritize serious cases, followed by cases that implicate the system protection function of the criminal defense attorney, and finally cases to which the defender has a personal attraction).

29. For a focus on institutional behaviors, see Darryl K. Brown, *Defense Attorney Discretion to Ration Services and Shortchange Some Clients*, 42 BRANDEIS L.J. 207, 215 (2004) (proposing resource allocation rules that are guided by the twin principles of priority to factual innocence and a harm-reduction principle).

30. See *infra* notes 33–40 and accompanying text.

31. See *infra* notes 41–45 and accompanying text.

32. See Brown, *supra* note 29, at 213–14 (discussing institutional design in his article regarding rationing defense entitlements); see also Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 895–906 (2009) (discussing institutional design from a prosecutorial view); cf. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 42 (2010).

33. Mitchell, *Redefining*, *supra* note 28, at 1292–93, 1302.

representation and, in some situations, messenger representation for an individual client and that the public defender's dilemma comes forth in choosing which clients or cases receive focused representation.<sup>34</sup> It concludes that priority should go first to cases that are deemed "serious" because of harsh and unjust punishments or collateral consequences, then to cases involving the defenders primary historical purpose of protecting the system and "making the screens work," and lastly, to cases that resonate with the individual defender for personal reasons.<sup>35</sup> Proponents of this triage scheme argue that the order of priority is reflective of both the historical purpose and current best use of the public defender function.<sup>36</sup>

Criticism of this proposed representation scheme focuses on the central truth that each client is entitled to effective representation and that the proposed scheme does little to prevent unfair bias from taking root in a defender's practice.<sup>37</sup> If every indigent person is entitled to the effective assistance of counsel, a public defender will find it difficult to properly and formally decide, at the outset of a case, which clients will receive the focused type of representation, without relying, to some extent, on unconscious bias.<sup>38</sup> In other words, formal triage schemes may help reduce public defender frustration and wholly deficient representation by helping public defenders feel like professionals, but they do little to reduce the potential for bias to affect arbitrary decisions and thus ren-

34. *See id.* at 1292–94, 1302.

35. *Id.* at 1288–90. Examples for this first category include clients who a defender believes are innocent or clients who are facing capital punishment. If the defender's limited resources allow, then the defender should take cases that inculcate the public defender's historical purpose because they involve suppression issues or state misconduct. The least priority for any remaining resources would go to cases that resonate with the individual public defender for personal reasons. *See id.* at 1302. These would include cases where the defender has formed an attachment with a client because the defender views the defense work as helping the client turn his or her life around.

Other forms of scholarship discuss the appropriateness of triage in terms of how resources can be distributed fairly. All ethical theories for justifying and guiding ethical choices of distribution fall under the single, large concept of distributive justice. Distributive justice differs from other justice aims by ensuring that people receive a "fair share" of the available goods. *See* JOHN RAWLS, *A THEORY OF JUSTICE* 259 (1971). Theories of distributive justice are concerned with how to fairly allocate scarce resources among individuals with competing needs or claims and how the total amount of goods to be distributed can be distributed in a manner that produces a just pattern. *See id.* at 265–67. Because any goods, and in fact primary goods, include basic liberties and opportunities, distributive justice principles are useful in finding solutions to the problems that plague under-resourced systems. Procedural justice focuses on the process in which goods are delivered, requiring that a fair process is used in deciding what is distributed. *See id.* at 84–86. Restorative justice, also known as corrective justice, focuses on returning something back to the way it should be. Retributive justice focuses on what constitutes a fair and proportional punishment. *See id.* at 313–14. This Article does not include a robust analysis of distributive justice theory or a discussion of the other forms of justice but does adopt the proposition that indigent defendants are entitled to a fair share of resources under the Sixth Amendment. This Article then focuses on how limited resources can be distributed more fairly.

36. Mitchell, *Redefining*, *supra* note 28, at 1220–22.

37. *See* Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U.L. REV. 911, 918–20 (2005).

38. *See id.* at 916.

der the process unfair for clients.<sup>39</sup> Whether a client appears innocent to a defender, or whether the defender believes the state engaged in misconduct against a client from a particular type of community, will depend heavily on that defender's perception of innocent behavior or unacceptable police conduct in certain environments.<sup>40</sup> These criticisms might be the reason no public defender office in the nation has formally adopted this resource-rationing scheme.<sup>41</sup> Formally adopting this sort of scheme may reduce the anxiety or stress that individual public defenders feel when having to make informal triage decisions on their own, but it also provides a clear case for review for any enterprising litigant looking to challenge his conviction or quality of representation.

Avoiding the inevitable influence of bias in prioritization decisions is the basis of another body of scholarship suggesting that public defenders should never engage in triage.<sup>42</sup> This scholarship suggests that public defenders should stop searching for acceptable strategies to provide clients with less than what they are constitutionally entitled to, and instead, inform the court when they are unable to provide counsel without incorporating triage decisions in their practice.<sup>43</sup> Monroe Freedman, a preeminent legal ethics scholar, set forth this analysis and conclusion in his article, *An Ethical Manifesto for Public Defenders*.<sup>44</sup> Although social science had not popularized the term "implicit bias" at the time of publication, Freedman draws on the formative literature by arguing a central problem of any triage scheme is that lawyers will make decisions about which clients will receive which level of representation through a lens that is affected by the lawyer's own background and preconceived notions.<sup>45</sup> Such behavior or actions would undermine the role of the public

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39. Conversely, other scholars stress the need for defenders and defender leaders to refrain from ranking cases based on the perception of factual innocence. See, e.g., Richardson & Goff, *supra* note 16, at 2644. "Given the limited time defenders have to prioritize cases, innocence determinations [could] only be speculative [guesses] based on inadequate information"—exactly the type of circumstances where implicit bias takes root. *Id.* These scholars argue that triage standards ought to be based instead upon criteria that are objectively measurable and not subject to interpretation. See, e.g., *id.* In other words, defender offices could "prioritize cases based on custody status, with in-custody clients being given priority." *Id.* Alternatively, cases could be prioritized randomly or based upon speedy trial deadlines. *Id.* Public defender institutions would then supplement these triage schemes with established accountability measures that would not rely on individual attorney subjective judgments and would drastically reduce the potential of implicit bias. See *id.* at 2645.

40. For community explanation see Grizzard, *The Dominant White Response to Baltimore Shows Why Black Residents are Justified in their Anger*, DAILY KOS (Apr. 28, 2015, 11:30 AM), <http://www.dailykos.com/story/2015/04/28/1380944/-The-Dominant-White-Response-to-Baltimore-Shows-Why-Black-Residents-are-Justified-in-their-Anger>; see also Jon Swaine, Oliver Laughland & Jamiles Lartey, *Black Americans Killed by Police Twice as Likely to be Unarmed as White People*, GUARDIAN (June 1, 2015, 8:38 AM), <http://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis>; and *The Counted: People Killed by Police in the US*, GUARDIAN, <http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> (last visited Dec. 29, 2015) (interactive map).

41. See Richardson & Goff, *supra* note 16, at 2632.

42. See, e.g., Freedman, *supra* note 37, at 914.

43. See, e.g., *id.* at 919–21.

44. See *id.*

45. *Id.* at 916.

defender in establishing a fair process for indigent persons charged with criminal offenses. Freedman suggests that public defenders instead use professional disciplinary rules to avoid any triage methods.<sup>46</sup>

Of most import to Freedman's analysis is the lawyer's duty to investigate a case. Freedman argues that if a lawyer is unable to fulfill his obligation to investigate a case or charge, then the lawyer is ethically required to reject the appointment.<sup>47</sup> If the lawyer is ordered to maintain representation by either his supervisor or the court, then the lawyer should notify the appropriate disciplinary board.<sup>48</sup> The lawyer should also put forth on the record his inability to give competent representation because of the conflict of interest inherent to an overwhelming case-load.<sup>49</sup> The lawyer should then go no further than to inform the client of any plea offers made by the prosecution, without advising the client whether to accept, fully explaining to the client the lawyer's limited involvement and detailing all the lawyer would have done should he have not been conflicted out of the representation.<sup>50</sup>

The scholarly insight to both engage in formal triage, and to refrain from triage by refusing to represent those clients that would require prioritization decisions by the defender, explore the micro-level triage decisions about every public defender's representation of their individual clients. The insight overlooks the central role of the administrative allocation of these limited resources. There are triage schemes that are better suited towards maintaining and supporting a fair distribution of limited resources because they focus on what injects or maintains fairness for the clients of a public defender institution.<sup>51</sup> Choosing certain clients to receive focused representation is unfair to those that receive only pattern or messenger representation, especially considering how easy it would be for unconscious bias to affect those decisions.<sup>52</sup> Refusing to represent

46. *See id.* at 918–21.

47. *See id.* at 919–21.

48. *Id.* at 921.

49. *Id.* at 921–22.

50. *See id.* at 922.

51. For suggested triage schemes that focus on a fair distribution of the limited resources, see Mitchell, *Redefining*, *supra* note 28. For another suggested triage scheme that would reduce the incidence of implicit bias, see Richardson & Goff, *supra* note 16,

52. See Mitchell, *Redefining*, *supra* note 28, at 1280–81; see also Michelle Maiese, *Distributive Justice*, BEYOND INTRACTABILITY (June 2013), <http://www.beyondintractability.org/essay/distributive-justice>. Defining the class that receives a particular resource can prove rather difficult. With regards to the resources of a public defender office, the class can be the attorney, the clients, the investigators, the social workers, or any other types of administrative or support staff. Even if one was to limit the class to the clients receiving representation, i.e. resources, from the public defender offices, such a classification may not be simplistic enough to evaluate distributive justice outcomes. In addition to the general class of all clients, clients can be further grouped based on a number of different factors including, but not limited to, (1) the number of charges the clients faces, (2) the type of charge the client faces, (3) if the client has a codefendant, (4) the severity of the potential punishments that the client faces, and (5) whether or not the client is a multiple offender and to what level of multiple offender status the client can be assigned. Many public defender offices place clients in class groups based on the com-

any client is also problematic in that it prevents those clients who would benefit from pattern or messenger representation from receiving even that little representation.<sup>53</sup> Also, with regards to either suggested solution, it is difficult for public defenders to know upon case assignment if their caseload is overwhelming or if they will need to engage in triage to manage a client's case. Often, the amount of work that is necessary for a particular case does not become evident until the case is complete, and public defenders and public defender institutions may overcorrect, at the outset, to the detriment of scores of clients who will have to wait for disposition of their cases.<sup>54</sup> The proposals in legal scholarship regarding triage practice fail to consider what should be the fundamental goals of public defender practice—providing effective assistance, preserving the limited resources where possible, and ensuring fairness in the criminal justice system for the nation's poor defendants. The constitutional and professional rules that govern public defender representation provide support for considering each of these fundamental goals.<sup>55</sup>

### *B. The Rules Governing Public Defender Triage Practice*

Individual attorneys, and the public defender institutions that house many of them, do not have unbounded freedom to determine the methods and means of their triage practice. Rather, they must comply with a number of constitutional and professional rules that guide the standard of practice. Although the U.S. Constitution provides a basic framework, state constitutions provide the legal and structural definitions for the delivery of defense services for individual states.<sup>56</sup> The American Bar Association (ABA) provides context for these legal definitions by providing overarching standards to which indigent defense must ascribe.<sup>57</sup>

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plexity of each particular case. *See, e.g.*, ERNIE LEWIS & DAN GOYETTE, REPORT ON THE EVALUATION OF THE OFFICE OF THE ORLEANS PUBLIC DEFENDERS 27–28 (2012), <http://pdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/Report%20on%20the%20Evaluation%20of%20the%20Office%20of%20the%20Orleans%20Public%20Defenders.pdf>. Different public defender offices, however, hold differing assessment of what levels of severity should be assigned to which class of cases. These public defender offices then assign more experienced attorneys to represent clients who have more complex cases. *See, e.g., id.* For purposes of this Article, the class will be defined as the general class of “all clients” assigned to the individual public defender office. This definition is being used in order to avoid the differing penalty assessments a public defender office may give to the class of cases they receive.

53. *See Mitchell, Defense, supra* note 28, at 930.

54. It may seem better for the system to overcorrect for situations involving life and liberty such as a public defender representation, but the costs of continuing engagement for indigent defendants cannot be ignored. Missed time at work or with family and the stress of not having a resolution are difficult to measure but can have a profound effect on an individual's quality of life and can sometimes be avoided with pattern or messenger representation.

55. For a thorough discussion of the constitutional and professional obligations for public defender practice, see discussion *infra* Section I.B.

56. *See, e.g.*, 7 ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, GUIDE TO JUDICIARY POLICY: REPRESENTATION UNDER THE CJA § 210 (2015); ALA. CODE § 15-12-5 (2015); IOWA CODE § 815.9–11 (2015); LA. REV. STAT. ANN. § 15:147(A) (2013).

57. STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES § 5-1.1–5-1.6 (AM. BAR ASS'N 3rd ed. 1992).

### 1. Federal and State Constitutional Requirements

While *Gideon* may have secured the right to counsel for the nation's indigent defendants, it did not provide guidance for state or local governments to use in establishing, funding, or training the responsible attorneys. As a result, public defender services are provided in a variety of ways. Some states responded to *Gideon*'s mandate by leaving the issue up to the local courts, and these courts, in large part, fulfilled their task by coordinating with private attorneys on an ad hoc basis to serve indigent clients.<sup>58</sup> This type of system is commonly referred to as the "assigned counsel model."<sup>59</sup> Other states responded by creating statewide or local offices of public defenders.<sup>60</sup> The remaining states opted to contract with individual lawyers, legal partnerships, or nonprofit legal organizations under formal arrangements—usually a fee per case or lump fee for agreeing to assume responsibility for all cases.<sup>61</sup>

Regardless of the type of indigent defense system a state uses, there is always one particular individual, occupying a particular office, who is authorized to develop, oversee, and manage indigent defense services.<sup>62</sup> This person, or a similarly situated person, is responsible for keeping the service-delivery mechanism financed and advancing the agency's goals in an efficient and effective manner. This person will also dictate the distribution scheme for certain limited resources, whether it be financing, administrative assistance, or anything else associated with the representation of an indigent defendant.<sup>63</sup> In a widely decentralized court-appointed system, for example, state court judges control the funds used to finance indigent defense services.<sup>64</sup> Although the judges control the purse, someone within the court administrative office is usually responsible for overseeing the quality and type of attorneys assigned cases, managing the available funds, and providing the funding mechanism with reports about the needs and performance of the indigent defense delivery services.<sup>65</sup> This administrator will usually use some system, not necessarily previously determined, to decide which cases receive what type of resources and how much of the resources are dedicated to a particular function.<sup>66</sup> These decisions will also ordinarily be guided by statutory or constitu-

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58. Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 *LAW & CONTEMP. PROBS.* 31, 32–33 (1995).

59. *See id.*

60. *Id.* at 36.

61. *Id.* at 34.

62. *See id.* at 33, 37–40.

63. *See id.*

64. *See id.* at 40–41.

65. Such reports and formal standards are required whenever services are financed through public funds. *See, e.g.*, Jessa DeSimone, Comment, *Bucking Conventional Wisdom: The Montana Public Defender Act*, 96 *J. Crim. L. & Criminology* 1479, 1505–07 (2006) (describing the fiscal reports and standards required under the Montana Public Defender Act).

66. *See id.* at 33.

tional authority but will also be subject to the professional and ethical rules adopted by a particular state.

## 2. Professional and Ethical Rules for Legal Practice

Federal and state constitutional rules only provide an outline, or minimal standard, for the adequate provision of services. It is up to the ABA and other professional organizations to provide context to the frame by detailing more specific requirements for the behavior and practice of their members. In 1983, the ABA adopted the Model Rules of Professional Conduct (Model Rules) which, although frequently amended, is the set of professional and ethical rules most used and adopted by state bar associations.<sup>67</sup>

Public defenders are required to follow the same professional and ethical standards promulgated by their governing state bar association as other attorneys. Thus, in any jurisdiction that is following the Model Rules, public defenders must comply with the preamble, setting forth that attorneys must be zealous advocates, and Rule 1.1, prescribing competence.<sup>68</sup> Competence is defined by the ABA as the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>69</sup> These Model Rules are simply reflecting the historical understanding of the lawyer’s role as a professional who is both retained but also a necessary representative for the individual.<sup>70</sup> Subsequent to *Gideon*, the Court cautioned that “if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.”<sup>71</sup>

The ABA’s Providing Defense Services guidelines focus more specifically on defense representation.<sup>72</sup> It considers limiting outside control over the defender program its primary goal and orders defender programs to refrain from accepting workloads that interfere with rendering quality

67. MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 1983); Jessica R. John, Note, *I Gotta Get Out of this Case: Withdrawal from Representation as a Public Defender*, 10 B.U. PUB. INT. L.J. 152, 155 (2000).

68. MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 1983).

69. *Id.*

70. See ABA Comm’n on Advertising, *A Re-Examination of the ABA Model Rules of Professional Conduct Pertaining to Client Development in Light of Emerging Technologies*, ABA (July 1998),

[http://www.americanbar.org/groups/professional\\_responsibility/resources/professionalism/professionalism\\_ethics\\_in\\_lawyer\\_advertising/ethicswhitepaper.html](http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising/ethicswhitepaper.html) (describing how changing technology affects legal marketing).

71. *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

72. These guidelines were approved by the ABA House of Delegates in August 1990, published in 1992, and are considered the black letter law standards for criminal justice. For a description, see *Quick Guide to National Standards for Indigent Defense*, NAT’L LEGAL AID & DEFENDER ASS’N, <http://nlada.net/library/articles/quick-guide-national-standards-indigent-defense> (last visited Sept. 17, 2015).



legal representation.<sup>73</sup> These standards have not been adopted by any state regulatory agencies, so they are not clearly enforceable rules for public defender institutions to use as either a shield or sword in managing their caseloads.<sup>74</sup> Instead, these institutions must develop their own schemes for managing overwhelming caseloads fairly and effectively, and use the standards as persuasive authority. The manner in which public defenders practice triage, detailed in the following part, differs by jurisdiction.

## II. PUBLIC DEFENDER APPROACHES TO TRIAGE PRACTICE

Because of the lack of resources, public defenders develop schemes for providing indigent defense that enable them to more closely comply with the constitutional, statutory, professional, and ethical rules placed on their practice. The nature of criminal defense representation is that a limitless amount of time and effort could hypothetically be dedicated to each individual case. An ideal criminal defense attorney would successfully seek out numerous opportunities to interview opposing witnesses, investigate the backgrounds of these witnesses and the area in which the charged offenses allegedly occurred, conduct extensive legal research, litigate every potential constitutional and statutory issue before the court, obtain substantial funds for expert witness testimony, thoroughly prepare the defense's own witnesses, and engage in extensive plea negotiations.<sup>75</sup> Attorneys would also have sufficient time to develop a relationship with each individual client so they could obtain important information from the clients to assist in the trial preparation, pretrial release, and plea-bargaining efforts.<sup>76</sup>

Given that legal resources are predominantly finite and limited, such an idealized version of public defender practice is unrealistic.<sup>77</sup>

73. STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES § 5-5.3 (AM. BAR ASS'N 3rd ed. 1992).

74. See Spangenberg & Beeman, *supra* note 58, at 37–41. Strategic decisions regarding office organization are thought to have the potential to drastically change a consistently criticized criminal justice system into one that is more reflective of the values espoused by the 4th, 5th, 6th, and 14th Amendments. It is this fact that led the American Bar Association to include structural guidance in its *Ten Principles of Defense Delivery*. See ABA PRINCIPLES, *supra* note 21, at 2.

75. See Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 631 (1986); Richardson & Goff, *supra* note 16, at 2632.

76. See Todd A. Berger, *After Frye and Lafler: The Constitutional Right to Defense Counsel Who Plea Bargains*, 38 AM. J. TRIAL ADVOC. 121, 155–56 (2014). This type of client-involved representation has gained popularity under the moniker “client-centered” representation. See DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 17–18 (1991). Client-centered representation can best be summed up as having four requirements: “(1) the duty of zealous and loyal representation [for the client]; (2) the duty to advocate for the client’s [case]; (3) the duty to thoroughly study and prepare; and (4) the duty to communicate with the client. Jonathan A. Rapping, *You Can’t Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL’Y REV. 161, 164 (2009).

77. The harsh reality is that resource constraints are a pervasive problem for all facets of the criminal justice system. Prosecutors, judges, and corrections officials also struggle with fulfilling

Even in resource-rich environments, dedicating resources, such as time and effort, to one client limits the amount of those resources available for another client. Thus, any legal representation, even for civil lawyers and private criminal defense attorneys, naturally involves a certain degree of targeted distribution.<sup>78</sup> For overwhelmed public defenders who have very little control over their caseloads or client allocations, this targeted distribution practice becomes something more akin to triage or rationing by which some clients receive very little, if any, defense representation so that others can receive an amount deemed sufficient to adequately handle their case.<sup>79</sup>

The lack of adequate funding leads to a dearth of available resources and public defender systems, where even the most committed and skilled of public defenders are faced with the difficult task of repre-

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their obligations despite insufficient resources. Even privately funded defense attorneys must prioritize the work they conduct on behalf of a client. These other system players differ from indigent defense providers in the solutions they have available to combat funding problems. Corrections officials often successfully petition for increased funding through support of "tough on crime" legislators. Private attorneys can choose whether to accept new clients or certain responsibilities for a particular client. Judges control their dockets and can decide how and when they expend effort towards their workload each day. Prosecutors exercise the most control in the criminal justice system because they decide how many cases are pending at a given moment. Prosecutors can also use different case acceptance schemes for limiting or reducing their caseloads. Prosecutors can employ one of six different charging policies or philosophies in exercising their duties: "(1) a transfer policy [where there is no screening of the facts alleged in a charging instrument and the case is simply prosecuted upon receiving information from the police]; (2) a unit policy [where individual assistant prosecutors make decisions on which cases go forward in a] highly decentralized [and independent manner]; (3) a legal sufficiency policy [where] (charges are [only] filed if the elements of a crime are [clearly] present [in the allegations]); (4) a system efficiency policy [where] (charges are filed if the elements . . . are present without any obvious problems, [this approach] emphasizes early dispositions and continuous docket movement); (5) trial sufficiency policy [where] (charges are only filed if conviction at trial is very likely); and (6) a defendant rehabilitation policy [where] (cases are prosecuted only if a defendant [is determined to be unsuitable] for rehabilitation or treatment. Mitchell, *Redefining*, *supra* note 28, at 1269 n.172 (5th, 10th, 12th, and 14th alterations in original). Differences in charging policies affect the rates of case acceptance or dismissal and the resulting overall caseload that a prosecutor is responsible for managing. *See id.*

78. There is a small but significant body of scholarship regarding triage in the civil poverty law context. *See, e.g.*, Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529 (1995) (describing "the shortcomings of legal work on behalf of the poor" resulting from large caseloads and inadequate resources); Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475 (1999) (suggesting ethical principles for screening potential clients); *see also* Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 281, 360-61 (1982).

79. *See, e.g.*, Mitchell, *Defense*, *supra* note 28, at 926; Mitchell, *Redefining*, *supra* note 28, at 1241-42. In the public defender realm, triage often involves lawyers who are "forced to spend their own money or to . . . ignor[e] some issues, lines of investigation, and defenses because of the lack of adequate compensation and resources." Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty are at Stake*, 1997 ANN. SURV. AM. L. 783, 790. The medical community has three terms commonly used to refer to the distribution of medical resources to patients: (1) triage, (2) rationing, and (3) allocation. Kenneth V. Iserson & John C. Moskop, *Triage in Medicine, Part I: Concept, History, and Types*, 49 ANNALS EMERGENCY MED. 275, 275 (2007). Allocation is "the broadest of the 3" and "describes the distribution of both medical and nonmedical resources and does not necessarily imply that the resource being distributed is scarce" or cannot accomplish all of its required objectives. *Id.* Rationing "implies that the available resources are not sufficient to satisfy all needs or wants" and that "some system or method is being used to guide this distribution." *Id.* Triage "refer[s] to any decision about allocation of a scarce . . . resource." *Id.*

senting significantly more people than the available resources make entirely possible.<sup>80</sup> Individual public defenders and public defender administrators recognize that their exorbitant caseloads do not absolve them from using every tool at their disposal to advance a fair criminal process for their clients. State criminal courts in many overburdened systems closely mirror the chaos that is present on army battlefields.<sup>81</sup> The courtrooms are filled with people constantly streaming in or standing about, and the public defenders have an endless flow of cases and people to manage.<sup>82</sup> Public defenders use triage to make this chaos more manageable. The attorneys identify which cases or clients are most “deserving” of their attention and quickly obtain plea agreements or proceed to trial less than ideally prepared for the others.<sup>83</sup> This action frees or reserves the limited resources at the attorney’s disposal for the case the attorney has prioritized. In other words, this public defender triage practice can deny certain clients core defense functions, such as factual investigation into guilt or innocence, in order to focus attention on the clients the individual public defender or the public defender office deems more of a priority. Triage occurs at both the individual and institutional levels, each with their own unique characteristics as described below. Individual public defenders and public defender institutions use a variety of factors to guide their triage practices, but they have yet to adopt a model that takes into account legal, resource-based, and bias-reducing requirements.

### A. Individual Attorney Triage

Although triage has become an accepted policy and procedure in the medical community, there is currently “no systemic ethic or approach for guiding” triage in public defender practice.<sup>84</sup> Instead, individual public

80. Former Attorney General Eric Holder ascribed the deficiencies in public defenders to funding as well when he commented that the failure of the nation to fully realize the mandates under *Gideon* are due in large part to the reality that “[a]cross the country, public defender offices and other indigent defense providers are underfunded and understaffed.” Holder, *supra* note 13.

81. See Mitchell, *Redefining*, *supra* note 28, at 1242.

82. Mitchell, *Redefining*, *supra* note 28, at 1240–41. Misdemeanor courts in Florida routinely process with a guilty plea “in three minutes or less.” John R. Emshwiller & Gary Fields, *Justice is Swift as Petty Crimes Clog Courts*, WALL ST. J. (Nov. 30, 2014, 10:33 PM), <http://www.wsj.com/articles/justice-is-swift-as-petty-crimes-clog-courts-1417404782>. District court judges in Detroit have an average of “100 misdemeanor cases on [their] docket” each day, about “one every four minutes.” *Id.* “In a Houston courtroom,” defendants would approach the judge “in groups of . . . nine” to enter a plea and receive a sentence, some “in less than 30 seconds.” *Id.*

83. Richardson & Goff, *supra* note 16, at 2632. Whether or not a client is more “deserving” depends primarily on the defender’s personal assessment. See discussion *supra* Section I.B (discussing implicit bias in public defender triage); see also Mitchell, *Redefining*, *supra* note 28, at 1241.

84. Mitchell, *Redefining*, *supra* note 28, at 1247; Richardson & Goff, *supra* note 16, at 2632. Charts providing a continuum of triage scenarios and rules for administering medical attention are studied and learned by medical students and then followed by these students when they become licensed doctors. See Iserson & Moskop, *supra* note 79, at 276. Triage has become an accepted policy and procedure in the medical context when it comes to emergency caregiving and other environments deprived of abundant, or even adequate, resources. The presence of these policies and training demonstrate the amount of attention medical researchers have paid to discerning the best method of providing services as consistent with the Hippocratic Oath as possible when overwhelming need and limited resources render strict adherence to the Hippocratic Oath impossible. See Erich

defenders incorporate triage into their practice informally and, often, on an ad hoc basis.<sup>85</sup> The informal nature of this resource-rationing creates ethical and professional practice problems and undermines the historical purpose of the defense attorney. Individual public defenders like those identified in this Article's introduction, Polack and Olexa, engage in specific triage decisions whereby they focus their attention on particular clients at the expense of others. They have little choice but to do so when they are faced with multiple clients in need at the same time. These types of prioritization decisions are problematic because they do not consider all of the fundamental goals of the public defender and, thus, limit the fair process for the individual clients.

### *B. Institutional and Organizational Design*

Public defender institutions customarily respond to overwhelming caseloads in one of three ways. A public defender office can decline any appointments that bring its caseloads up to a level that would render effective assistance of counsel impossible.<sup>86</sup> There has been some judicial and legislative support for this type of action in states where the public defenders office declined appointment of cases upon reaching a number the office considered untenable.<sup>87</sup> Such action, however, is usually met with opposition, or even outright rejection, by a court or funding authority.<sup>88</sup> For example, the Missouri Supreme Court recently held "that the [Missouri Public Defender] [C]ommission has the authority to declare [itself] unavailab[le]" for case appointment if caseloads are excessive.<sup>89</sup> Within three days of the court's opinion, the Missouri Association of

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H. Loewy, *Oaths for Physicians – Necessary Protection or Elaborate Hoax?*, 9 MEDGENMED 7, 7 (2007). Although the Hippocratic Oath is not a legal requirement, almost 98% of doctors swear to it or a similar code of professional and personal conduct when graduating from medical school. *See id.*; Robert D. Orr et al., *Use of the Hippocratic Oath: A Review of Twentieth Century Practice and a Content Analysis of Oaths Administered in Medical Schools in the U.S. and Canada in 1993*, 8 J. CLINICAL ETHICS 377, 379 (1997). Regardless of the specific title of the oath, it provides general and moral guidance for each graduate during his or her practice of medicine. *See Loewy, supra.* Although the Sixth Amendment cannot properly be considered a discretionary oath, the oaths medical students take upon graduation to preserve life whenever possible do place an ethical and moral mandate on their practice much like the guarantee of effective assistance of counsel places on public defenders.

85. Triage occurs when micro-allocation decisions are made about specific individuals on the direct representation or contact level. *See Tremblay, supra* note 78, at 2482. There is a large body of literature concerning the rationing of resources defined as triage, but the literature is primarily concerned with the healthcare industry.

86. *See* Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 501.

87. *See, e.g.*, Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES (Nov. 8, 2008), [http://www.nytimes.com/2008/11/09/us/09defender.html?\\_r=0](http://www.nytimes.com/2008/11/09/us/09defender.html?_r=0) (providing that public defender offices in seven states were refusing to accept new case appointments or suing to limit them).

88. *See id.*; *see also* Pub. Def., Eleventh Judicial Circuit of Fla. v. State, 115 So.3d 261, 264–65 (Fla. 2013).

89. David Carroll, *MO Supreme Court Rules that Public Defense Commission Can Decline Cases*, SIXTH AMEND. CTR. (Aug. 7, 2012), <http://sixthamendment.org/mo-supreme-court-rules-that-public-defense-commission-can-decline-cases/>.

Prosecuting Attorneys responded with a press statement declaring that the public defender system is not in a caseload crisis, using a U.S. Department of Justice report as support for its assertion that the court's decisions were erroneous.<sup>90</sup>

"A second approach [public] defender [institutions can use when faced with overwhelming caseloads] is to bring a civil rights action alleging that, due to excessive caseload[s]," the program cannot provide effective assistance of counsel.<sup>91</sup> Despite the prevalence of complaints about public defender institutions, few public defender institutions have exercised this option.<sup>92</sup> Although the last fifteen years have witnessed massive institutional change to correct system-wide public defender deficiencies, very few have been the result of civil rights litigation. Since the year 2000, twelve states have enacted new legislation governing the provision of indigent defense services: "North Carolina in 2000; Oregon and Texas in 2001; Georgia in 2003; Virginia in 2004; Montana, North Dakota, and South Carolina in 2005; . . . Louisiana in 2007;" Alabama in 2011; and New Mexico and Michigan in 2013.<sup>93</sup> Ten of the twelve states experienced new legislation that established a statewide commission agency, headed by either a state public defender or state director with authority over all indigent defense services in the state.<sup>94</sup> The remaining two, Georgia and Texas, enacted statutes that created commissions with

90. See Mo. Ass'n of Prosecuting Att'ys, Statement of MAPA President Bob McCulloch in Response to Supreme Court of Missouri Opinion in Public Defender Case (Aug. 3, 2012), <http://sixthamendment.org/wp-content/uploads/2012/08/MAPA-Response-to-Public-Defender-Caseload-Decision.pdf>; see generally State ex. rel. Mo. Pub. Def. Comm'n v. Waters, 370 S.W.3d 592 (Mo. 2012).

91. Mounts, *supra* note 86, at 502.

92. See *id.* at 502–03; see, e.g., NYCLU Press Release, *supra* note 26 (describing New York litigation); discussion *infra* notes 96, 128 (describing Georgia litigation).

93. Norman Lefstein, *The Movement Towards Indigent Defense Reform: Louisiana and Other States*, 9 LOY. J. PUB. INT. L. 125, 126 (2008) (footnotes omitted); see also David Carroll, *A Birds-Eye View of Independent Commissions in the 50 States*, SIXTH AMEND. CTR. (Apr. 9, 2013) [hereinafter Carroll, *50 States*], <http://sixthamendment.org/a-birds-eye-view-of-independent-commissions-in-the-50-states/>; David Carroll, *Alabama Reforms Spark Expanded Use of Public Defender Model*, SIXTH AMEND. CTR. (Feb. 22, 2013), <http://sixthamendment.org/alabama-reforms-spark-expanded-use-of-public-defender-model/>; David Carroll, *Michigan Passes Public Defense Reform Legislation*, SIXTH AMEND. CTR. (June 19, 2013), <http://sixthamendment.org/michigan-passes-public-defense-reform-legislation/>. "Prior to [the year] 2000, twenty-eight states [had] enacted legislation that established . . . [a] statewide entity responsib[le] for [governing or providing] indigent defense services." Lefstein, *supra*, at 125. Five of these states enacted their legislation in the 1990s: "Arkansas, Louisiana, Nebraska, Oklahoma and South Carolina." *Id.* at 125 & n.3. Alaska, Connecticut, Hawaii, Indiana, Iowa, Kansas, Kentucky, Nevada, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, New Mexico, Ohio, Wisconsin, Wyoming, West Virginia, and Vermont enacted their legislation in the 1970s and 1980s. *Id.* at 125 & n.4. The remaining twenty-two states had a state appellate commission or agency with authority over indigent defense services "or, in some cases, no statewide structure . . . [for] indigent defense." *Id.* at 126. Eight of the twenty-eight states with indigent defense legislation enacted before the year 2000 had state commissions or boards that exercised "only partial authority over indigent defense services." *Id.* The entity created by legislation in the remaining twenty states had full authority over the provision of indigent defense services in the state and all but one of these state indigent defender systems "was headed by a [single] staff person with the title of state public defender." *Id.* For additional state information, see Carroll, *50 States*, *supra*.

94. See Carroll, *50 States*, *supra* note 93.

only partial authority over indigent defense services.<sup>95</sup> This renewed effort to improve criminal defense services for the poor in these states can be attributed to a number of different instigators, but in large part, studies on the shortcomings of each state's indigent defense system and litigation, or the threat of litigation, caused legislatures to recognize that the systems in their jurisdictions needed thorough and extensive reform.<sup>96</sup>

Some public defender offices use a third approach to overwhelming caseloads, which is "more [aptly] described as a nonresponse."<sup>97</sup> This approach to exorbitant caseloads is simply "making do," and "depend[s] on [S]ixth [A]mendment challenges on appeal or collateral relief . . . to remedy any specific instances of ineffective representation."<sup>98</sup> It is this third response that is the focus of this Article. Academics develop standards and guidelines for providing effective assistance of counsel, despite the prevalence of extraordinarily high caseloads.<sup>99</sup> Practitioners develop personal guidelines for managing caseloads and will sometimes document the actions or resources that are missing from their representation to aid their clients in any resulting appellate briefs.<sup>100</sup> These responses prove disappointing, however, because of the difficulty in prevailing on

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95. *Id.*

96. For example, the state of Georgia's most recent reform efforts can be traced to a 1988 Eleventh Circuit decision in *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988). At the time of the litigation in *Luckey*, Georgia used a county-based system of indigent defense. *See id.* at 1013. In *Luckey*, the Eleventh Circuit recognized that the *Strickland-Cronic* standard for reversal of individual conviction was "inappropriate for a civil suit seeking prospective relief" because the Sixth Amendment protects rights that are not necessarily conveyed through the outcome of a particular trial. *Id.* at 1017. The appellate court held that the appropriate standard was to look at "the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law." *Id.* (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)). The Eleventh Circuit declined to exercise its equitable jurisdiction to hear the case on the grounds of *Young* abstention, which prevents federal courts from issuing rulings that would interfere with ongoing state criminal prosecutions, but the portion of the ruling concerning prospective relief led to a wave of injunction-centered Section 1983 civil class action suits. *Id.* at 1015-16.

These suits, which arose in a number of states including Georgia, Montana, and Louisiana, sought broad reform of state and local indigence systems alleging that indigent defendants were denied constitutionally guaranteed counsel because of a number of deficiencies like excessive caseloads, lack of resources and support staff, inadequate facilities, and lack of standards and oversight. None of these lawsuits resulted in a detailed injunctive order by a court, but they did assist in moving states down the road towards reform. For example, the 1999 Consent Order issued with Fulton County, GA, encouraged threats of other lawsuits in Georgia. Reddy, *supra* note 27, at 21. In 2003, the Georgia State Legislature responded in part to legislative efforts by passing the Georgia Indigent Defense Act. *Id.* at 21-22. Similarly, *White v. Governor Martz*, was filed in 2002 asserting a claim against Montana's indigent defense system. No. CDV 02-133, 2002 Mont. Dist. LEXIS 1897, at \*2 (1st Jud. Dist. Ct. of Mont. Dec. 3, 2002). The American Civil Liberties Union agreed to postpone the lawsuit until the state of Montana could pursue a legislative solution. *See* Reddy, *supra* note 27, at 49. The suit was withdrawn when the state passed the Montana Public Defender Act in 2005. *Id.*

97. Mounts, *supra* note 86, at 502.

98. *Id.* Public defenders use a variation to the nonresponse option by making an affirmative record in a systematic fashion of each individual case where ineffective representation has occurred. *Id.*

99. *See* discussion *supra* Section I.A.

100. *See* discussion *supra* Section II.A.

Sixth Amendment claims. These responses have resulted in little systemic, long-lasting relief.<sup>101</sup>

### 1. Limiting the Public Defender Responsibility

Some of the public defender offices that use a making do approach to insufficient resources have either semi-formally or formally incorporated triage principles into their institutional organization and design. The historical focus on institutional design triage for public defender offices has been on either limiting the types of cases an office will accept responsibility for or restricting the degree of representation by individual attorneys. These solutions have proven ineffective for a number of reasons. First and foremost, funding allocations closely follow the decisions that public defender administrators make, limiting the extent of their responsibility.<sup>102</sup> An indigent defendant is still entitled to state-funded representation, even when an institutional defender office declines to assume responsibility for that client's case.<sup>103</sup> The state must still pay for that client's representation, whether or not the client receives representation from a local nonprofit or a private attorney selected by the courts. Payment for this representation will come from the funds allocated to the indigent defense function.<sup>104</sup> Thus, declining to represent certain types of cases or charged offenses does little to reduce the strain on the limited

101. See EMILY M. WEST, INNOCENCE PROJECT, COURT FINDINGS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN POST-CONVICTION APPEALS AMONG THE FIRST 255 DNA EXONERATION CASES 1 (2010), [http://www.innocenceproject.org/files/Innocence\\_Project\\_IAC\\_Report.pdf](http://www.innocenceproject.org/files/Innocence_Project_IAC_Report.pdf). This 2010 report examines the role of ineffective assistance of counsel claims in the first 255 people exonerated through DNA evidence. *Id.* at 3. There are now 334 exonerated persons, but the report does not include an analysis of the 79 people exonerated since the report was commissioned. See *The Cases: DNA Exoneree Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/cases-false-imprisonment> (last visited Jan. 1, 2016). Of these first 255 DNA exonerations, 54 raised ineffective assistance of counsel claims (about 1 in 5). WEST, *supra*, at 3. Approximately 81% of these ineffective assistance of counsel claims were rejected. *Id.* Only 7 of the 54 who raised such claims had their ineffective assistance of counsel claims granted (6 had convictions reversed and 1 received new counsel). *Id.* In 3 of the remaining 51, the reviewing court found that the performance was deficient but not prejudicial or remanded the case to lower courts for further review. *Id.* There has been great variation in the substance of the ineffective assistance of counsel claims brought by these exonerated persons, but the most common claim asserted in the appellate briefings was failure to present defense witnesses, failure to have some type of expert testing done, failure to object to prosecutor's evidence, and failure to interview witness in preparation for trial or cross examine witnesses. *Id.* at 4.

102. See HOLLY R. STEVENS ET AL., THE SPANGENBERG PROJECT, STATE, COUNTY AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008 5 (2010), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_expenditures\\_fy08.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf).

103. There is an argument amongst the attorneys that constitute the public defense bar that a client cannot ever permanently waive his right to state funded counsel. See, e.g., Jack Healy, *Utah Court Strips Criminal of Right to Counsel, and Some Lawyers Object*, N.Y. TIMES, Jan. 29, 2015, at A18.

104. The state has an obligation to provide counsel to indigent defendants risking incarceration with few exceptions. Each state has the freedom to decide how it will dispense the funds allotted to fulfill that obligation but they must still fulfill the mandate. There has been concern about how states fund certain methods. See NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS 9 (2013), <https://www.nacdl.org/reports/gideonat50/rationingjustice/>.

resources. It simply encourages the funding authority to reallocate the funds deemed necessary for representation of those cases or charged offenses from the public defender organization to the newly obligated mode of representation.<sup>105</sup>

For example, some offices, such as the Orleans Public Defenders in New Orleans, Louisiana, respond to limited funding by declining to handle juvenile cases and farming that responsibility out to a regional nonprofit.<sup>106</sup> This differs from other public defender offices in the same state, such as the Baton Rouge Public Defenders Office in Baton Rouge, Louisiana, which handles both adult and juvenile cases.<sup>107</sup> As a consequence, the state funding authority distributes the funds deemed necessary for juvenile representation to the organizations that assumed responsibility for juvenile representation, whether it was the nonprofit in the case of Orleans or the Baton Rouge Public Defender Office example.<sup>108</sup> Declining to represent certain types of cases in response to insufficient funding actually proves an ineffective solution to triage needs because the public defender institution loses the funding that would ordinarily be dedicated to that legal responsibility.<sup>109</sup> Shrinking the pool of available resources

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105. Cf. Stephen J. Schulhofer & David D. Friedman, *Reforming Indigent Defense: How Free Market Principles Can Help to Fix a Broken System*, POL'Y ANALYSIS, Sept. 1, 2010, at 11–13 (suggesting that states provide various options for fulfilling its mandate to provide counsel to the nation's poor defendants).

106. LEWIS & GOYETTE, *supra* note 52, at 3, 6.

107. LA. PUB. DEF. BD., LPDB 2014 ANNUAL BOARD REPORT 382 (2015), <http://lpdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/2014%20LPDB%20Annual%20Report.pdf>; *About Us*, EAST BATON ROUGE OFF. PUB. DEFENDER, <http://www.ebrpublicdefender.org/contact/> (last visited Jan. 1, 2016).

108. *See id.* at 19, 52–53. The same analysis holds true for capital cases. Until the year 2013, the Orleans Public Defenders also declined to assume responsibility for representing indigent people charged with capital offenses. *See* LEWIS & GOYETTE, *supra* note 52, at 6. Capital cases that arose in the parish were handled by a statewide nonprofit organization. *Id.* The Baton Rouge Public Defenders did assume responsibility for capital cases and the difference in funding amounts reflected that as the capital funds were taken from a different pot of money. It is true that both juvenile and capital cases require specialized skills. Recent Supreme Court case law has used newly available research on adolescent development to require additional responsibilities of both lawyers and courts dealing with juveniles facing certain adult charges. *See, e.g.*, Michael Barbee, Comment, *Juveniles Are Different: Juvenile Life Without Parole After Graham v. Florida*, 81 MISS. L.J. 299, 317 (2011). Supreme Court jurisprudence underscores the claim that “death is different.” *See, e.g.*, *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (“[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice.”); *Furman v. Georgia*, 408 U.S. 238, 286–87 (1972) (Brennan, J., concurring) (explaining that the death penalty is a “unique punishment in the United States”). The American Bar Association has also issued death penalty guidelines requiring defense attorneys to possess a certain level of experience or ability in order to assume responsibility for a death penalty case. *See generally* ABA, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003). Individual states may also adopt their own more guidelines. *See, e.g.*, State Bar of Tex., *Guidelines and Standards for Texas Capital Counsel*, 69 TEX. B.J. 966 (2006). These national and state-specific standards are such that newer public defender offices may not have any attorneys with the necessary skill to handle those types of cases.

109. The LPDB Annual Board Report provides the funding information for the 42 separate public defender districts in Louisiana. *See* LA. PUB. DEF. BD., *supra* note 107, at 19, 52–53. The allocation of funds to each district differs by the responsibilities for which each district assumes responsibility.



the institution can draw from to meet its constitutional and professional obligations only makes compliance harder.

There has been an increased call for public defender offices to focus their limited resources on one particular class of cases as a means of effectively dealing with insufficient resources.<sup>110</sup> These various triage suggestions usually encourage public defender administrators to focus their limited resources on felony charges, usually capital cases, or on those clients who are likely innocent, at the expense of misdemeanor charges.<sup>111</sup> There is “a small but vibrant literature” suggesting the opposite as a means to “crash the system” or call attention to the unfairness of mass incarceration and inadequate funding by encouraging every indigent defendant to challenge the charges against them to the fullest extent possible.<sup>112</sup> The same problem presents itself for offices that might choose either of these methods as triage schemes to improve the quality of their practice. Every indigent person, whether facing misdemeanor or felony charges, is entitled to state- or local-funded representation, and the public defender funding authority will undoubtedly distribute the resources in the manner it sees fit to the organizations or entities that assume responsibility for these excluded cases.<sup>113</sup>

## 2. Retracting the Scope of Representation

There are also significant drawbacks to limiting the scope of defense representation as a method of triaging cases. Best practices encourage a more comprehensive legal practice than those that limit the representation to a certain level or quality.<sup>114</sup> Shifting to a model of representation that is incompatible with the model deemed best for the client implicates a public defender’s constitutional and professional obligations. For example, some offices make triage decisions about whether they will

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110. See Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 808 (2004) [hereinafter Brown, *Rationing*]; Brown, *supra* note 29, at 207–08.

111. See Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 467 (2007) (arguing that counsel in misdemeanor cases do not provide as significant of a benefit to their clients as counsel in felony cases and that state should reduce counsel appointment in misdemeanor cases to save available resources for felony cases).

112. Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1096–97 (2013). Critics have responded to this and similar proposals by claiming they are unrealistic and tantamount to trading the best interests of both the clients facing felony charges and those facing misdemeanors for the hope of system reform. See *id.* Not only would felony clients not receive any assistance but also some misdemeanor clients would be better served through a quick guilty plea. See *id.*

113. The Louisiana Public Defender Board, the statewide regulatory agency for indigent defense in the state of Louisiana, has promulgated a Restriction of Services Protocol that outlines how public defender institutions facing limited resources should reduce their responsibilities. See, e.g., Press Release, La. Pub. Def. Bd., Calcasieu Parish Implements Service Restriction, <http://lpdb.la.gov/Serving%20The%20Public/Media/txtfiles/pdf/Recent%20Media/July%2027%202012%20-Calcasieu%20PDO%20Restricts%20Services.pdf> (last visited Jan. 1, 2016) (identifying the withdrawal from 400 felony cases as the least harmful to the continuation of public defender services within the jurisdiction).

114. For a discussion of holistic advocacy and vertical representation, see, *infra* Section II.B.2.

be a holistic office, which means looking beyond the criminal charge to other challenges a client faces that may affect their quality of life or chances of reoffending, or whether they will be an office that only focuses on the criminal charge at hand.<sup>115</sup> The Bronx Defenders in New York is perhaps the most well known example of a holistic public defender office.<sup>116</sup> The “innovative, holistic, and client-centered” advocacy that the Bronx Defenders practice includes criminal defense services, civil legal services, social work support, and immigration advocacy.<sup>117</sup> Other offices in New York operate under different parameters, choosing to focus their efforts on the criminal charge directly affecting the client.<sup>118</sup> Holistic representation is certainly more expensive and many offices limit their representation to the criminal charge at hand in acknowledgment of their limited resources.<sup>119</sup>

Holistic representation, however, is gaining awareness and popularity as an effective, albeit costly, solution to the troublesome growth of the criminal justice system.<sup>120</sup> Mass incarceration has become a source of constant news attention as both legislators and citizens become aware that the cost of incarceration is both financially and morally untenable.<sup>121</sup> Communities are decimated by the lack of stable parenting available

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115. Orleans Public Defenders trains and requires their attorneys representation in a holistic manner. See *Our Work*, ORLEANS PUB. DEFENDERS (May 22, 2015), <http://www.opdla.org/what-we-do/our-work>. Their client-centered advocacy model includes a client services coordinator as well as community partners to assist in improving client's life experience. See *id.* The Baton Rouge office limits their practice to the criminal charge and any issues that relate specifically to the criminal charge. The costs of operation at both offices differ drastically but are not clearly divided among funds dedicated to the criminal charge and those dedicated to the more expansive client-centered advocacy.

116. See generally DAVID FEIGE, *INDEFENSIBLE: ONE LAWYER'S JOURNEY INTO THE INFERNO OF AMERICAN JUSTICE* (2006) (describing the first few years of his employment with the Bronx Defenders in New York).

117. *Our Mission and Story*, BRONX DEFENDERS, <http://www.bronxdefenders.org/who-we-are/> (last visited Sept. 18, 2015).

118. Any of the five counties cited in the recent ACLU lawsuit regarding the state of New York indigent defense could be examples of public defender offices that do not practice holistic advocacy. See NYCLU Press Release, *supra* note 26.

119. Holistic advocacy has expanded in the last decade. For an example of another innovative public defender office that practices holistically. See *Our Vision and Mission*, NEIGHBORHOOD DEFENDER SERV. HARLEM, <http://www.ndsny.org/index.php/about-us/our-vision-and-mission/> (last visited Sept. 18, 2015). The director of the office, Robin Steinberg, travels to educate other public defenders on the benefits of holistic advocacy and provide guidelines for implementing holistic advocacy in their individual jurisdictions. See *Robin Steinberg*, BRONX DEFENDERS, <http://www.bronxdefenders.org/staff/robin-steinberg/> (last visited Jan. 1, 2016).

120. See Robin Steinberg, *Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 963 (2013).

121. See, e.g., Editorial, *End Mass Incarceration Now*, N.Y. TIMES, May 25, 2014, at SR10; Adam Gopnik, *The Caging of America: Why Do We Lock up So Many People?*, NEW YORKER (Jan. 30, 2012), <http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america>; Elizabeth Gudrais, *The Prison Problem*, HARV. MAG. (Mar.-Apr. 2013), <http://harvardmagazine.com/2013/03/the-prison-problem>; Chris Hedges, *Why Mass Incarceration Defines Us as a Society*, SMITHSONIAN MAG. (Dec. 2012), <http://www.smithsonianmag.com/people-places/why-mass-incarceration-defines-us-as-a-society-135793245/>.

because of incarceration.<sup>122</sup> Children often find themselves subject to the welfare or delinquency system because a parent is absent due to recurring, or a significant length of, incarceration.<sup>123</sup> Any public defender office that declines to practice holistically in order to manage limited resources may find itself expending more resources in the long term as it deals with both reoffending clients and the children who may follow in their parents' footsteps.<sup>124</sup> Additionally, even if an offender's child does not require indigent criminal defense services in the future, a broken home may require more state support in other noncriminal justice related areas, such as housing, unemployment, or medical care.<sup>125</sup> All of these methods of state-supported care further reduce state budget amounts available for resourcing indigent defense.

The ABA has also encouraged holistic advocacy as a model of representation for effective public defense delivery systems.<sup>126</sup> The ABA holds the primary responsibility for establishing the legal profession's ethical standards.<sup>127</sup> Declining to practice holistically may help an office and its attorneys more easily provide the cursory or surface-level representation that is facially required to pass constitutional muster, but it will make it fall short in meeting any other description of defense advocacy that includes collateral circumstances and community improvement. Nonholistic advocacy also calls into question whether or not a defender office is complying with the ABA's requirements for effective and competent advocacy.<sup>128</sup>

122. See Robin Steinberg, *Addressing Racial Disparity in the Criminal Justice System Through Holistic Defense*, CHAMPION, July 2013, at 51.

123. See Katy Reckdahl, *Mass Incarceration's Collateral Damage: The Children Left Behind*, NATION (Dec. 16, 2014), <http://www.thenation.com/article/mass-incarcerations-collateral-damage-children-left-behind/>.

124. Participatory defense, defense representation that includes input and effort by family members and communities, has grown in popularity because of the role it may play in reducing recidivism. Janet Moore et al., *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1281–83 (2014–2015).

125. See Reckdahl, *supra* note 123.

126. Holistic advocacy has become a frequent part of ABA publications and conference seminars. See, e.g., *Four Pillars of Holistic Defense*, CTR. FOR HOLISTIC DEF., [http://www.americanbar.org/content/dam/aba/administrative/criminal\\_justice/FourPillars\\_HolisticDefense.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/FourPillars_HolisticDefense.authcheckdam.pdf) (last visited Sept. 6, 2015); Am. Bar Ass'n Standing Comm. on Pro Bono & Pub. Serv. et al., *Request for Proposals*, ABA, [http://www.americanbar.org/content/dam/aba/events/legal\\_services/2014/04/equal-justice-conference/2015\\_rfp\\_guidelines.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/legal_services/2014/04/equal-justice-conference/2015_rfp_guidelines.authcheckdam.pdf) (last visited Sept. 6, 2015); Dan Wiessner, *Reuters Legal: ABA Urges Criminal Defense Lawyers to Embrace Holistic Approach*, BRONX DEFENDERS (Aug. 7, 2012), <http://www.bronxdefenders.org/bxd-in-the-news-aba-urges-criminal-defense-lawyers-to-embrace-holistic-approach-reuters-legal/>.

127. See *Center for Professional Responsibility*, ABA, [http://www.americanbar.org/groups/professional\\_responsibility.html](http://www.americanbar.org/groups/professional_responsibility.html) (last visited Jan. 2, 2016).

128. Some judicial districts have implemented solutions to the excessive caseload problems that make the criminal justice system unfair for poor defendants that have proven just as startling as the caseload averages. Courts in Mississippi and Georgia, for example, have recently faced significant media attention for incorporating solutions that are not consistent with the Sixth Amendment's mandate for effective assistance of counsel. See Campbell Robertson, *In a Mississippi Jail, Convictions and Counsel Appear Optional*, N.Y. TIMES, Sept. 25, 2014, at A15; Bill Rankin, *Lawsuit Tar-*

The same can be used for public defender institutions that respond to insufficient resources by practicing horizontal representation, as opposed to vertical representation. In horizontal representation, also referred to as “stage” representation, defenders are assigned to courtrooms rather than cases, and the attorney in a particular courtroom is responsible for any matters appearing in court on that day.<sup>129</sup> Some offices incorporate horizontal representation by limiting each defender to one stage of the proceeding, having “defender[s] . . . handle only one particular function, such as interviewing [a client or conducting a bail] or preliminary hearings.”<sup>130</sup> In an office that practices horizontal representation, a client will have contact with a minimum of two attorneys and can often receive representation by up to a half a dozen, or more, attorneys during the course of the criminal case.<sup>131</sup> Vertical representation differs from horizontal representation in that the client is represented by the same attorney throughout the entire criminal case, sometimes even on appeal.<sup>132</sup>

Horizontal representation is common in public defender jurisdictions, but vertical representation is more beneficial to an individual client. The continuity in representation that is a hallmark of vertical representation allows the client and attorney to build trust and openly communicate.<sup>133</sup> Horizontal representation can also lead to serious errors or even incompetent representation because it discourages personal responsibility and rests on the quality of transferred notes and other case information from attorney to attorney.<sup>134</sup> Similar to the discourse surrounding holistic representation, the ABA has promulgated that model public defender systems use vertical representation in their practice, and to do otherwise is a detriment to the client and the client’s right to the effective assistance of counsel.<sup>135</sup> Even the Bureau of Justice Assistance, under the

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gets *Georgia Public Defender Office*, ATLANTA J.-CONST., (Jan. 7, 2014, 5:38 PM), <http://www.ajc.com/news/news/local/lawsuit-targets-georgia-public-defender-office/ncfWm/>. These districts have been charged with engaging in “assembly line justice” whereby groups of defendants enter guilty pleas en masse or judges are allowed to remain on the bench even though they unconstitutionally withhold defense counsel from incarcerated clients for weeks in order to reduce the strain on public defender resources. See Robertson, *supra*; Rankin, *supra*. Judge Gordon explains his practice denying counsel to indigent defendants until after an indictment as a tool to prevent the public defenders from spending time and money investigating a case that may not even go forward. See Robertson, *supra*. The four counties named in the Georgia lawsuit were accused of processing adult defendants and allowing juveniles to go unrepresented in court proceedings. See Rankin, *supra*.

129. See Malcolm C. Young, *Providing Effective Representation for Youth Prosecuted as Adults*, BUREAU JUST. ASSISTANCE BULL., Aug. 2000, at 3, <https://www.ncjrs.gov/pdffiles1/bja/182502.pdf>.

130. Mounts, *supra* note 86, at 484.

131. *Id.*

132. Anne Bowen Poulin, *Strengthening the Criminal Defendant’s Right to Counsel*, 28 CARDOZO L. REV. 1213, 1254 (2006).

133. See *id.* at 1254–55.

134. *Id.* at 1255.

135. ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES § 5-6.2 (AM. BAR ASS’N 3rd ed. 1992). The majority of state public defender programs have written policies establishing at least some level of vertical representation. As per the 2007 census, 71 percent of the county-based public defender offices provided primarily vertical representation for clients in felony,

premise that vertical representation would not be possible in every jurisdiction, advised that each juvenile defender office attempt to incorporate some degree of vertical representation in its practice by assigning “[a] student, intern, or social worker . . . to [each] juvenile” client who would then be knowledgeable enough to brief any newly assigned attorneys.<sup>136</sup> Choosing to practice horizontal representation as opposed to vertical representation may reduce the need for individual public defenders to use triage to manage their caseload, but it also contradicts the best practices outlined by the governing authorities of the criminal justice system and places clients at risk of subpar, or even completely deficient, defense representation. Individual public defenders, and the institutions that house them, look to the constitutional and professional rules that are outlined in Section I(B) for governing principles.<sup>137</sup> As demonstrated in the previous section, limited resources force public defenders to engage in triage practice, but the way it is currently done at the individual and organizational levels leads to serious problems that implicate attorney burnout and arbitrary decision-making.<sup>138</sup>

Navigating the difficult terrain of providing quality representation in an environment that only guarantees funding for effective representation can be incredibly frustrating for enterprising public defender systems.<sup>139</sup> Not only does the individual defender lose the autonomy that is considered the hallmark of professionals by becoming a victim to forces outside of her control, but both the defender and the defender system also limit the effect individual practice can possibly have on criminal law and procedure. Much has been written about an indigent client’s perception of their free lawyer as being of a lesser quality, or less beholden to the client, than a lawyer the client would pay.<sup>140</sup> Public defenders are also at risk of adopting the same mindset when they informally incorporate tri-

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noncapital cases. DONALD J. FAROLE, JR. & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007, at 6 (2010), <http://www.bjs.gov/content/pub/pdf/clpdo07.pdf>; see also LYNN LANGTON & DONALD FAROLE, JR., BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: STATE PUBLIC DEFENDER PROGRAMS, 2007, at 8 (2010), <http://www.bjs.gov/content/pub/pdf/spdp07.pdf>.

136. Young, *supra* note 129.

137. See discussion *supra* Section I.B.1.

138. For implications of various public defender distribution decisions, see discussion *infra* Part III.

139. See, e.g., Tom Robertson, *Minnesota Lawyers Frustrated over Shortage of Public Defenders*, MINN. PUB. RADIO (Sept. 30, 2003), [http://news.minnesota.publicradio.org/features/2003/09/30\\_robertson\\_pdshortage/](http://news.minnesota.publicradio.org/features/2003/09/30_robertson_pdshortage/).

140. See, e.g., Morris B. Hoffman et al., *An Empirical Study of Public Defender Effectiveness: Self-Selection by the “Marginally Indigent,”* 3 OHIO ST. J. CRIM. L. 223, 230, 247 (2005); Floyd Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?*, 22 RUTGERS L.J. 361, 368–69 (1991); STEVEN K. SMITH & CAROL J. DEFANCES, BUREAU OF JUSTICE STATISTICS, INDIGENT DEFENSE 4 tbl.7 (1996), <http://bjs.gov/content/pub/pdf/id.pdf> (reporting the 69% of clients who paid for their representation through private funds met with their lawyer within a week of their arrest while only 47% of those who were represented by government-paid attorneys could claim the same).

age into their practice.<sup>141</sup> When the client is unable to pay for specific services or withhold payment for unacceptable service, it is easy to disregard the client's role as the primary recipient of a valuable service. That is an even stronger tendency when the defender trades upon the services one client may be entitled to in order to provide services to another client. As opposed to operating as a professional, who is rendering valued services, the defender is subject to forces beyond his control—the presence of other clients in need—with no professional rubric to use in determining which client receives which necessary services and when.<sup>142</sup> Failing to consider certain fundamental objectives of the public defense function further removes a public defender institution and its attorneys from a legal practice that complies with their constitutional and professional obligations.

Failing to consider how best to manage a resource so that it is perpetually available or capable of regenerating itself to maximum utility, only further contributes to the lack of available resources caused by an inadequate funding stream. While it is true that some resources may not be able to sustain themselves when they are not originally an adequate amount to achieve their objective, certain triage decisions are better for the maintenance of resources than others.<sup>143</sup> An enterprising public defender institution must make sure it adopts the triage system that is most beneficial to it in the long-term. The four public defender institutions detailed in the following sections have made four different decisions regarding the distribution of the limited attorney-experience resource and these decisions implicate their effectiveness in a variety of ways.

### III. FOUR APPROACHES TO DISTRIBUTING THE ATTORNEY RESOURCE

One very important public defender resource that is often in short supply in public defender institutions faced with overwhelming need and limited resources is attorneys with practice experience.<sup>144</sup> While it is true

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141. Professionalism is marked by civility in the practice of law. Haphazard approaches to providing subpar representation to client's who may have their life or liberty on the line implicates an attorney's understanding of his or her role in the legal process. See Michael Davis, *Professionalism Means Putting Your Profession First*, 2 GEO. J. LEGAL ETHICS 341, 342–44 (1988).

142. This is primarily because there are no formal public defender ethic guiding triage decisions. For different scholarly opinions, see discussion *supra* Section I.A. For different public defender institutional approaches, see discussion *supra* Section II.B.2.

143. Expert witness fees might be an example of resources that are too finite to sustain regardless of the triage scheme used. Dispensing those fees on a contractual basis instead of through individual hires could be considered a triage decision that proves more efficient.

144. See Rapping, *supra* note 76, at 173–74. The attrition rate for public defenders nationwide was 10% in 2007 with Virginia having the highest at 24%. LANGTON & FAROLE, *supra* note 135, at 18. Several scholars have advocated for public defender administrators to focus hiring on newer, inexperienced attorneys as a way to improve indigent defense. This follows from the fact that many of the public defender institutions that fall prey to the “ordinary injustice” claims set forth by authors such as Amy Bach are older attorneys who have become accustomed to the status quo. “Ordinary injustice” occurs when legal professionals become so used to inadequate and often appalling rights violations that they fail to see their role in providing such subpar representation. See AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT 2* (2009).

there is no consensus on the legal skills necessary for effective assistance of counsel, there are few system stakeholders who would argue that defender experience is not a valuable component.<sup>145</sup> The more experience a defender has, the better the defender is at making quick assessments of certain issues in cases, seeing general patterns to pursue, and developing an effective and efficient method for pursuing them.<sup>146</sup> Experience also enables a defender to more accurately evaluate how a particular decision-maker—prosecutor, judge, probation or parole officer, or jury—will treat a particular defense or explanation for certain types of conduct. It is for these reasons that few clients would reject an attorney with substantial practice experience in favor of an attorney with little or no experience.

The attorney is often considered the primary resource of a public defender institution.<sup>147</sup> Although subsequent case law has interpreted the Sixth Amendment mandate of effective assistance of counsel as including investigation, interpretation, or mitigation services, all of these fall under the umbrella of the right to an attorney.<sup>148</sup> The manner in which a public defender institution distributes attorneys with experience to clients is central to the ability of the client to obtain a fair criminal process. The more highly functioning public defender institutions used a combination of the three avenues for experience—training, guidance, or mentorship by a senior attorney, and completion of the defender’s own cases—as tools for evaluating or assigning experience levels to an attorney.<sup>149</sup>

145. See ABA PRINCIPLES, *supra* note 21, at 3. This is particularly true in newer public defender offices or systems. The dearth of experienced attorneys exists because new offices must engage in values-based recruitment in order to truly reform a broken or ineffective public defender office and establish an office culture that values client-centered representation. The reform-minded public defender leader must identify candidates who are the most receptive to the agency’s new and improved values and the values-based training that should accompany the change in mission. Once a leader has identified attorneys who are receptive to pursuing this change, the leader must instill these values and ensure that these lessons are reinforced and internalized through training. The experienced public defenders in broken systems are often unaware of the value and necessity of a client-centered approach to indigent defense representation because they were neither trained on nor practiced in such an environment. Those who study organizational change note that resistance from those who are asked to alter their approach or practice is a major problem in creating change. Accordingly, experienced public defenders in a broken system may see a commitment to change and a new client-centered form of representation as a comment on their competence. See Rapping, *supra* note 76, at 173–74.

146. A public defender can gain experience in a number of ways: training, guidance or mentorship by a more senior attorney, or completion of the defender’s own cases.

147. This claim is self-evident because indigent defense is about legal representation. Regardless of how important investigation, expert witness testimony, or administrative services may be to a successful defense team, there can be no effective assistance of counsel without an attorney. The Strickland standards for Sixth Amendment violations begin and end with the role, the function, and the ability of the attorney to provide representation. *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988).

148. See ABA PRINCIPLES, *supra* note 21, at 3.

149. The Public Defender Service of the District of Columbia is widely considered one of the best public defender offices in the country, serving as a model for indigent defense throughout the nation. See THE PUB. DEF. SERV. FOR THE D.C., ANNUAL REPORT 1–5 (2012) [hereinafter PDS ANNUAL REPORT], <http://www.pdsdc.org/docs/default-source/default-document-library/fy-2012-pds-annual-report.pdf?sfvrsn=0>. Their training program is expansive and can be accessed at PDS

Some offices that suffer from significant resource deficiency may disregard formal training programs and instead rely on the defender's own natural abilities or the informal guidance by other more senior attorneys.<sup>150</sup>

Public defender institutions primarily distribute attorney experience to clients in three ways. Some public defender offices pay little attention to the amount of experience an attorney has and simply assign clients or cases at random or through some type of scheduled pickup process for the attorney.<sup>151</sup> These institutions will often assign public defenders to a particular courtroom and hold that the public defender is responsible for any cases, regardless of severity, that are assigned to that courtroom.<sup>152</sup> Other public defender institutions use an attorney's experience level to guide case assignments.<sup>153</sup> These offices categorize the level of legal experience a particular client or charge requires for effective assistance of counsel and then assign those clients to attorneys who possess the requisite experience.<sup>154</sup> For example, a public defender office could decide that an attorney only needs six weeks of training in order to provide effective assistance of counsel for a client facing a simple misdemeanor charge.<sup>155</sup> A final group of public defender institutions distribute attorney experience in a form that mirrors attorney specialization, either in the particular stage of the proceeding or the particular type of case.<sup>156</sup> Such an institution may determine that homicide or rape cases are the exclusive domain of a certain group of attorneys.<sup>157</sup>

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*Training Programs*, PUB. DEFENDER SERV. FOR D.C., <http://www.pdsdc.org/professional-resources/pds-training-programs> (last visited Jan. 2, 2016).

150. See Rapping, *supra* note 28, at 331–33. For a discussion of ineffective public defender training models, see Rapping, *supra* note 76.

151. These type of distribution schemes will usually still consider separate public defender assignments for clients facing capital offenses so as to ensure compliance with the Supreme Court's description of "death as different" when it comes to the requirements of effective assistance of counsel.

152. See, e.g., *Public Defender Frequently Asked Questions/Client Assistance*, COUNTY DUPAGE, <https://www.dupageco.org/PublicDefender/30835/> (last visited Sept. 19, 2015) [hereinafter *Client Assistance*]. The DuPage and Will County Public Defender Offices in Illinois are two examples of public defender institutions that use this form of representation. *Id.*; *FAQ's: Can I Choose Which Assistant Public Defender I Want to Represent Me?*, OFF. WILL COUNTY PUB. DEFENDER, <http://www.willcountypublicdefender.com/faqs/112-can-i-choose-which-assistant-public-defender-i-want-to-represent-me> (last visited Jan. 12, 2016). The Orleans Public Defenders used this form as well before adopting a reformed approach where experience was taken into account in 2009. LEWIS & GOYETTE, *supra* note 52, at 40–41.

153. For a discussion of The Orleans Public Defenders as an example, see *infra* Section III.B.

154. For a discussion of The Orleans Public Defenders as an example, see *infra* Section III.B.

155. See PDS ANNUAL REPORT, *supra* note 149, at 5.

156. LA. PUB. DEF. BD., *supra* note 107, at 283. This form of specialization appears facially similar to horizontal representation but differs in that one attorney is responsible for an individual client's entire case and not just a particular portion of it.

157. The public defender office in Lake Charles, Louisiana, uses this form of representation. For detailed information, see the Louisiana State Public Defender Report. *Id.*



### A. Courtroom Based Representation (DuPage County, Illinois)

Some public defender institutions, such as the one in DuPage County, Illinois, do not use experience to inform case assignments and instead require attorneys to handle any type of case or charge they are assigned. DuPage County uses a courtroom assignment model, where a particular defender is assigned to a particular judge or a specific courtroom.<sup>158</sup> That assigned public defender is then required to handle all clients or charged offenses in that section of court or before that particular judge.<sup>159</sup>

Defense representation is a skill that improves with experience, and failing to use experience to inform the assignment practice leaves a client at risk of obtaining subpar or ineffective representation.<sup>160</sup> Additionally, clients are not ordinarily assigned to a particular courtroom upon arrest.<sup>161</sup> Although an individual is able to retain a private attorney to represent him or her any time after being taken into custody, DuPage County does not currently provide a public defender to a similarly situated indigent defendant until formal charges have been filed.<sup>162</sup> In this county, the district attorney has thirty days, if the defendant is in custody, from the defendant's arrest to indict the individual or conduct a preliminary hearing that would replace the need for a formal indictment.<sup>163</sup> If the accused is out of custody, the district attorney has sixty days to complete either option.<sup>164</sup> This means that clients can remain in jail for thirty days without an attorney representing their interests. An enterprising public

158. *Client Assistance*, *supra* note 152. "There are 102 counties in Illinois and each county operates its criminal justice system independently." JUNAID AFEEF ET AL., POLICIES AND PROCEDURES OF THE ILLINOIS CRIMINAL JUSTICE SYSTEM 1 (2012), [http://www.icjia.org/assets/pdf/ResearchReports/Policies\\_and\\_Procedures\\_of\\_the\\_Illinois\\_Criminal\\_Justice\\_System\\_Aug2012.pdf](http://www.icjia.org/assets/pdf/ResearchReports/Policies_and_Procedures_of_the_Illinois_Criminal_Justice_System_Aug2012.pdf). Some indigent defender assignment systems use a "wheel" to assign cases whereby an attorney is selected through a lottery method and assigned to a case with little attention paid to the attorney's level of practice experience. See Bill Piatt, *Reinventing the Wheel: Constructing Ethical Approaches to State Indigent Legal Defense Systems*, 2 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 372, 388-90 (2012). These types of public defender systems do not have an attorney assigned to a particular courtroom and may just rely on the services of private counsel to accept appointments for all indigent clients. *See id.*

159. *See Client Assistance*, *supra* note 152. In some jurisdictions, such as the Lake Charles Public Defenders in Lake Charles, Louisiana, certain attorneys only represent clients facing misdemeanor offenses or city court charges. LA. PUB. DEF. BD., *supra* note 107, at 283. There are also attorneys who only handle certain types of cases such as sex offenses, drug offenses, mental health offenses or offenses risking the maximum punishment of life incarceration or death. *See id.*

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Counties throughout the state of Nevada have been cited for assigning attorneys to serious felony and murder cases for which the attorney is not qualified. Most recently, the 9th Circuit Court of Appeals allowed a defendant who was exonerated from death row after fourteen years to sue the Clark County (Las Vegas) public defender administrator for appointing an attorney just out of law school who had never handled a murder case to represent him on capital charges.

Gideon Reviewed: *The State of the Nation 40 Years Later*, NAT'L LEGAL AID & DEFENDER ASS'N, [http://www.nlada.org/Defender/Defender\\_Gideon/Gideon\\_Reviewed](http://www.nlada.org/Defender/Defender_Gideon/Gideon_Reviewed) (last visited Jan. 12, 2016).

161. *Cf. AFEEF ET AL.*, *supra* note 158, at 10 (explaining the court's role in the criminal process and noting that certain crimes are only adjudicated in certain courts).

162. *See id.* at 11.

163. *See id.* at 15.

164. *Id.*

defender office may assign an attorney at arrest, but if the process focuses on assigning representation by courtroom, every client may not have the same attorney at arrest that they will have assigned to them once charges have been formally filed.

Although not an entirely horizontal system of representation, this type of distribution scheme is counter to Principle 7 of the ABA's guide for an effective indigent defense delivery system. Principle 7 describes the ideal representation as being one where the same attorney represents the same client throughout the criminal proceedings.<sup>165</sup> As discussed previously, horizontal representation places a client at risk of having gaps in time without any representation. The importance of an attorney to a fair process is critical at every stage of the proceeding, and adopting a distribution scheme that allows for gaps in representation undermines a fair criminal process.

One popular argument used by proponents of this representation scheme is that there are moral implications to allocating scarce resources according to any system other than random selection.<sup>166</sup> Any allocation of resources should be equitable or just, and the targeted distribution of certain resources can easily move from equitable terrain to a favored mode of practice that relies on unconscious bias. Adopting a random distribution scheme, however, could also be considered morally objectionable. Acknowledging the special needs of certain clients or charges would, in fact, be considered necessary for an equitable distribution and a fair process in the criminal justice system. For example, an individual may need additional attention or resources in the form of expert witness assistance or scientific testing to ensure they are provided the same level of adequate and effective representation as an individual who does not need either. Ignoring the difference in station or existence could be considered a dereliction of duty to provide effective assistance of counsel.

#### *B. Minimal Standards Distribution (Orleans Parish, Louisiana)*

The Orleans Public Defenders in Louisiana uses a distribution scheme that provides clients with an attorney who possesses the minimal level of training or experience deemed necessary to protect the client's rights.<sup>167</sup> Charged offenses are placed into one of five categories ranging from those with the lowest potential punishment, up to six months in jail for misdemeanors such as simple possession of marijuana or curfew violations, to those with the highest sense of complexity.<sup>168</sup> Attorneys are

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165. See SIXTH AMENDMENT CTR., THE CRUCIBLE OF ADVERSARIAL TESTING: ACCESS TO COUNSEL IN DELAWARE'S CRIMINAL COURTS, at V (2014), [http://sixthamendment.org/6ac/6AC\\_delawarereport.pdf](http://sixthamendment.org/6ac/6AC_delawarereport.pdf). The entire state of Delaware actually practices horizontal representation. *Id.*

166. Tremblay, *supra* note 78, at 2484–85.

167. See LEWIS & GOYETTE, *supra* note 52, at 40–41.

168. See *id.* at 27–28.

assigned a class level based on the amount of criminal defense experience they have acquired.<sup>169</sup> The Level One attorneys are the attorneys with the least amount of experience in the office, usually less than one year, and represent clients facing misdemeanor charges.<sup>170</sup> The Level Five attorneys are those attorneys in the office with the highest amount of experience, at least four years, and represent clients facing the highest possible noncapital charges.<sup>171</sup> Levels Two through Four consist of attorneys with increasing amounts of experience and are assigned cases with corresponding increases in case complexity.<sup>172</sup> This system slightly mirrors the rotating courtroom assignment system used in jurisdictions like Santa Barbara County, but it differs in that public defenders are not rotated back through less serious offenses.

Once these less experienced attorneys achieve a modicum of success or skill in a certain class of cases, client demands encourage leadership to immediately move these attorneys “up the ladder” to handle more complex cases. It is hard to find fault in this system because hiring new attorneys to handle lower level misdemeanor cases, or any noncomplex cases that require little experience, is much more easily done than hiring attorneys qualified to handle the higher level and more complex felony cases.<sup>173</sup> When the facts and circumstances are simplistic or potential penalties are limited, the amount of experience an attorney has seems less important. Additional benefits of this type of approach are that it would ensure all clients receive a basic level of representation and also allows the attorneys to ease into representing defendants charged with more complex offenses and risking stricter punishments more comfortably.

If attorneys are also faced with constantly representing new and more complex cases, they are more likely to exist in a constant state of stress over learning new elements of a charge or investigative and representative techniques.<sup>174</sup> Disillusionment and fatigue may more easily take hold in public defender disposition or approach to the professionalism of the work. The benefits of financial and temporal investment in recruiting and training new attorneys cannot be fully realized if these new attorneys

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169. *See id.* at 9, 27–28. One could imagine that prosecutorial experience could be used in lieu of defense experience because of the trial skills that are developed on either side. Attorneys have to advise defense clients of constitutional rights, however, so the transfer may not be a clear match.

170. *See id.* at 12, 28 (stating that the OPD case assignment system “intend[s] to match the seriousness of the case with the practice level and experience of the attorney”).

171. *Id.* As noted earlier, Orleans Public Defenders did not historically accept capital cases and only recently established a small division to assume responsibility of a handful of defendants facing capital charges. *See id.* at 45.

172. *See id.* at 9.

173. More experienced public defenders may find it difficult to transition to a more client-centered form of representation. *See Rapping, supra* note 76, at 173–74. This may be due to a number of reasons including a lack of training in that area and a need to experience their previous defense work as acceptable and not deficient. *See id.*

174. *See* Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 L. & CONTEMP. PROBS. 81, 85–89 (1995).

leave their employment with the public defender's office in significant numbers because of the desire to seek the type of work they feel they can conquer or to develop a particular skill. Some attorneys may actually prefer a fast-paced movement through different levels of cases. This type of change ensures that the work will vary and the attorney will use different skills at different times. This pattern of growth will face the same eventual pitfall when the attorney reaches the highest level of representation. The only difference is the attorney will reach that stage sooner without nearly the same level of expertise as they would have obtained for less complex cases.

In such a scheme, all but the highest level of cases receive representation by an attorney with just the minimum level of experience necessary to represent their charges. The lower level misdemeanor clients do not have the benefit of representation by an attorney with years, or even decades, of experience, and the same holds true to varying degrees for the classes in between the lowest and highest classes. This result actually limits the influence a public defender office can potentially have on the criminal justice system or its community. In 2007, forty percent of the nation's criminal justice system was made up of low-level misdemeanor offenses with the smallest percentage of cases consisting of those facing the highest potential punishments, so the impact of representation in those cases has the most effect in a given community.<sup>175</sup> Preventing those clients from having access to attorneys with the highest levels of experience limits the potential impact that defense could have in improving the criminal justice system.

### C. Rotating Courtroom Assignment (Santa Barbara County, California)

The Santa Barbara County Public Defenders uses a rotation system for its attorney experience resource.<sup>176</sup> When newer and more inexperienced attorneys are first hired by the administration, they are first assigned less serious offenses.<sup>177</sup> Once they have achieved a certain level of experience, they become eligible to represent clients charged with higher-level offenses.<sup>178</sup> Only after having obtained a certain level of experi-

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175. LANGTON & FAROLE, *supra* note 135, at 10. The exponential growth of misdemeanor charges in the criminal justice system has been well chronicled in legal scholarship. See, e.g., Roberts, *supra* note 112, at 1090. This shift was based in large part on a zero-tolerance policing theory referred to as the "broken windows theory." *Id.* at 1091-92. The "broken windows theory" states that monitoring certain urban environments to prevent smaller offenses creates a sense of law and order that prevents serious crime from occurring. See *id.*

176. See Santa Barbara Cty. Grand Jury 1997-1998, *Final Report on Public Defender Department*, SANTA BARBARA CTY. GRAND JURY (June 1, 1998), <http://www.sbcgj.org/97-98/MPUBLICDEFENDER.html>.

177. See Santa Barbara Cty., *Deputy Public Defender I-III*, GOVERNMENTJOBS, [https://secure.governmentjobs.com/view\\_job.cfm?JobID=247066](https://secure.governmentjobs.com/view_job.cfm?JobID=247066) (last visited Feb. 15, 2016).

178. See *id.* As discussed in *supra* note 157, the distribution scheme in Lake Charles, Louisiana, occupies an area in between the courtroom assignment model of DuPage County and the rotating courtroom assignment model of Santa Barbara County. The Lake Charles Public Defenders assigns public defenders to individual courtrooms. It deviates from the courtroom assignment model

ence representing clients charged with low-level felony offenses are the attorneys allowed to represent clients charged with more serious felony offenses. The attorneys are then rotated through different types of cases at the discretion of the public defender administrator.

Even with this type of rotation system, there is no formal process for clients facing less serious misdemeanor charges to obtain representation by the more highly experienced attorneys in the office. This assignment process is a game of chance where the lower-level misdemeanor client might obtain representation by the more experienced person but that same client could also be assigned the least experienced person. In fact, because new hires are assigned only misdemeanor offenses, a misdemeanor client who is able to obtain representation by a more experienced attorney could still be considered the exception and not the rule.

#### *D. Practice Specializations (Atlanta Judicial Circuit, Georgia)*

Specialization is often preferable in the criminal defense context, especially when considering certain protected classes or characteristics of the available dispositions, such as juvenile representation, immigration consequences, or capital punishment.<sup>179</sup> These types of distribution schemes are supported by the general knowledge that certain types of cases, such as juvenile, sex offense, or capital cases, require specialized skills.<sup>180</sup> Holistic advocacy, done properly, actually rests on having specialized individuals on each defense team. Specialized distribution, however, has many of the same consequences as a more default, courtroom-based distribution scheme.

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by creating a “life without parole” specialization for attorneys who are assigned any life without parole cases that arise in the jurisdictions regardless of the courtroom to which the case is assigned. LA. PUB. DEF. BD., *supra* note 107, at 283. The office also has specific attorneys who are tasked with representing misdemeanors. *Id.* at 18. For each of these categories there is no elevation process but, instead, the attorneys are hired for a particular role be it misdemeanor attorney, courtroom specific felony attorney or a life without parole attorney, and the attorney is dedicated to that case subject matter for the entirety of their employment unless they apply for and are hired for another position. *See id.*

179. There may be an even more marked shift towards more specializations in the wake of *Padilla v. Kentucky*, 559 U.S. 356 (2010). In *Padilla*, the Court found that, for there to be a valid conviction, defense counsel must provide access to immigration advice. *See id.* at 374. This decision has tasked defense attorneys with a “responsibility to consult others and create an effective defense team.” Ronald F. Wright, *Padilla and the Delivery of Integrated Criminal Defense*, 58 UCLA L. REV. 1515, 1517 (2011). Before *Padilla*, public defender organizations experimented with various methods for delivering the best service to clients facing immigration consequences as a result of their criminal charges. *See id.* at 1531–33. Some of those methods involved contracting out the immigration work to specialists outside the organization; others entailed bringing the immigration expertise inside the organization, either through placing experts in a single state-level position or by sending immigration experts to local offices. *Id.* at 1532–33.

180. *See, e.g.*, *Miller v. Alabama*, 132 S. Ct. 2455, 2463–64 (2012) (discussing the importance of understanding adolescent development in the sentencing of a juvenile); *Graham v. Florida*, 560 U.S. 48, 78 (2010) (discussing the importance of understanding adolescent development in the sentencing of a juvenile).

The Superior Court of Fulton County, Georgia, divides all of the cases into one of three tracks: noncomplex, standard, and complex.<sup>181</sup> Noncomplex matters consist of “non-violent, lower level felony offenses including drugs, theft,” and property crimes, and “are ‘fast-tracked’ through the criminal justice process” with a sixty-three day timetable between arrest and final disposition.<sup>182</sup> Burglaries and aggravated assaults belong on the standard track.<sup>183</sup> The remaining cases, which range from terroristic threats to armed robbery, are in the complex division.<sup>184</sup> There is also a juvenile court division. Attorneys in the Fulton County Public Defenders Office are assigned to the particular divisions based on experience but do not necessarily transition between the divisions.<sup>185</sup>

Such a distribution scheme also does little in furtherance of ensuring a fair process for defendants by requiring a fair share of limited resources. Attorney burnout, which can also be thought of as “resource fatigue,” can occur much more readily when an attorney is tasked with representing the same type of case continuously or has no hope for improved assignments. Also, expertise in particular types of cases is complimented by new ideas and the fresh perspectives that may result from having an attorney, who does not specialize in a particular type of case or charge, responsible for the representation.

#### IV. RECLAIMING THE SIXTH AMENDMENT BY REASSESSING DISTRIBUTION

Although each of the four counties adopt certain distribution schemes to handle caseload concerns, each pays insufficient attention to the resource preservation and intrinsic fairness that are fundamental goals of the public defender practice. The discussion has provided important examples of how this failure undermines the overall public defender goal of providing effective assistance of counsel and a fair criminal process for the nation’s poor defendants. Incorporating resource preservation practices and system accountabilities to limit arbitrary decision-making are two critically important changes to make for the improvement of indigent defense delivery systems. Public defenders will find it difficult to accomplish their prescribed objectives without these changes.

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181. See *About the Office of the Public Defender*, FULTON COUNTY, GA., <http://www.fultoncountyga.gov/fcpubd-about> (last visited Sept. 19, 2015); see also Matthew A. Sorensen, EVALUATION OF THE FULTON COUNTY SUPERIOR COURT’S CRIMINAL NON-COMPLEX CASE MANAGEMENT DIVISION 12 (2007), [http://www.ncsc.org/~media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2007/Sorensen\\_CriminalDCM.ashx](http://www.ncsc.org/~media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2007/Sorensen_CriminalDCM.ashx); cf. *Trial*, OFF. FULTON COUNTY DISTRICT ATT’Y, [http://www.atlantada.org/divisions/prosecution\\_units/trial.php](http://www.atlantada.org/divisions/prosecution_units/trial.php) (last visited Jan. 12, 2016).

182. *Trial*, *supra* note 181.

183. *Id.*

184. *Id.*

185. *About the Office of the Public Defender*, *supra* note 181.

On the surface, the Atlanta Judicial Circuit appears to use a distribution scheme that more closely aligns with the fundamental public defender goals of providing effective assistance of counsel while preserving resources and limiting arbitrary decision-making. It is deficient, however, because it fails to incorporate attorney advancement and could encourage attorneys to develop a rote style of representation as they represent the same type of cases repeatedly. An enterprising public defender institution may consider adopting a set amount of time for each attorney to stay in a particular division or level of representation in consideration of how much time it takes a particular attorney to master the skills needed for representing a particular class of cases. That public defender institution may also consider providing all attorneys with a mixed caseload or rotating attorneys in the most complex division through the less complex divisions to ensure those clients are provided with the most highly skilled attorneys. This move would ensure the attorneys are not facing significant burnout because of the difficulty managing cases at the mostly highly complex level. Regardless of how a defender approaches incorporating the three components of effective public defender triage, the institution must ensure that every case and client are afforded serious consideration and treated with importance.

In developing a triage scheme to “make do,” public defender institutions must consider more than just their legal constraints. Before the advent of public defenders, the criminal justice system was characterized by a government-resourced, prosecuting attorney opposing a lone defendant who was too poor to afford hiring an attorney with the defendant’s own personal financing.<sup>186</sup> Public defenders were created to inject fairness into a criminal justice process that was growing increasingly large and life determining.<sup>187</sup> In order to accomplish its objectives in light of limited resourcing, public defender institutions must make management decisions about work priorities.<sup>188</sup> The private sector refers to these types of institutional decisions as organizational strategies.<sup>189</sup> “An organizational strategy is a coherent [plan or] idea that: 1) [clearly defines] the purposes [or mission] of an [agency] and the value[s] [that] it is trying to [promote]; 2) identifies [all of] the sources of support . . . that [are necessary] to sustain its operations; and 3) describes how the [agency’s] resources . . . can best be [distributed] to accomplish the [agency’s purpose or mission].”<sup>190</sup> The failure of public defender institutions and the schol-

186. See ANTHONY LEWIS, *GIDEON’S TRUMPET* 7–8 (1964).

187. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); see also LEWIS, *supra* note 186.

188. MARK H. MOORE & BRYAN SHAHA, *ALTERNATIVE STRATEGIES FOR PUBLIC DEFENDERS AND ASSIGNED COUNSEL* 2 (2001), <http://www.nasams.org/DMS/Documents/1058361964.14/Alternate%20Strategies%20for%20Public%20Defenders.pdf>.

189. *Id.*

190. *Id.*; see generally CAIT CLARKE & CHRISTOPHER STONE, *BOLDER MANAGEMENT FOR PUBLIC DEFENSE: LEADERSHIP IN THREE DIMENSIONS* (2001), <https://www.ncjrs.gov/pdffiles1/bja/187768.pdf>.

arship that addresses the improvement of services comes from the single-minded focus on the legal constraints the institution must operate under.

A superficial view of national public defender systems may lead to the conclusion that a uniform approach to distribution practices would not work in every jurisdiction. It is true that, as discussed in Part III public defender services are provided in a variety of ways, and the system used for delivery will impact the ability any system has to incorporate the fundamental goals into its triage scheme. With the three customary models for the delivery of indigent defense services in mind, it is clear that the comprehensive distribution scheme is best used to determine the appropriate method of distributing resources to clients in staffed public defender offices. In these staffed, full-time offices, there is one individual familiar with each attorney's growth and supervision schemes that allow the distributors to witness the individual attorney's capabilities.<sup>191</sup> There is also one individual available to view outcomes of the distribution scheme and to ensure the practice remains consistent.<sup>192</sup>

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191. See Schulhofer & Friedman, *supra* note 105, at 6–8.

192. Much has been written about the deficiencies in the management associated with non-public defender office models of indigent defense representation. A public defender office, as opposed to an assigned counsel or contract program, has “a salaried staff of full or part-time attorneys who represent indigent defendants and are . . . government employees or [the employees of] a public, non-profit organization.” LANGTON & FAROLE, *supra* note 135, at 3. The 2007 Census of Public Defender Offices “was the first systemic, nationwide study of public defender offices.” *Id.* It collected “data on the staffing, caseloads, expenditures, standards and guidelines, and . . . training [programs or procedures of all of the existing state public defender programs in] 49 states and the District of Columbia” in the year 2007. *Id.* The only state not included in the study was Maine, which did not have a public defender office in 2007. *Id.*

In the assigned counsel model, courts usually have lists or “wheels” from which a private attorney is chosen for a particular case. Bill Piatt, *County Needs More Efficient Indigent Defense System*, SAN ANTONIO EXPRESS-NEWS (June 1, 2011, 12:01 AM), <http://www.mysanantonio.com/opinion/commentary/article/County-needs-more-efficient-indigent-defense-1403588.php>. An attorney's ability to get on the wheel will depend on the attorney's ability to fulfill certain requirements, including a certain level of experience. See *id.* This type of system does not lend itself to quality control and oversight. For example, under the current assigned counsel system in one Texas jurisdiction, qualified attorneys who have submitted applications to be one of the attorneys assigned to represent indigent clients have their names placed on a “wheel” of lawyers who are then assigned, in order, to a client by the presiding judge for that case. *Id.* In this Texas example, there are nearly 300 lawyers on the appointment list, and very little attention is paid to the specific quality of representation each attorney provides to his or her indigent client. *Id.* Additionally, any system that allows for the judges to control the appointment accepts the possibility that judges may manipulate the system in determining which attorneys are placed on the wheel or granted a case assignment. Judges may also manipulate through their control of the purse strings since they would hold the power to approve or deny payments for time spent working on a case or for experts or investigation for a particular client. See Brown, *Rationing*, *supra* note 110, at 833. In his article about rationing, Darryl K. Brown noted that judges and other funding allocators ration defense funds by assigning public defenders or court-appointed attorneys more cases than they can possibly handle. See *id.* at 812, 833–34. Courts also tend to give preferential treatment in attorney assignments to those attorneys who resolve cases quickly, often without motion practice or investigation or request for expert witness funds. *Id.* at 812. Even if a judge does not consciously manipulate this system there remains a strong potential for significant disparities in resources expended on a particular case depending on which judge is presiding over a defendant's case.

Contract models are not without criticism. One example of a contract model exists in San Mateo County, California, where the California Private Defender Program (PDP) has been in place since 1969 and holds status as the largest private defender program. Rachel Swan, *Private Defense*



Additionally, the majority of public defenders in the nation today work in large, complex organizations.<sup>193</sup> According to a national census conducted in 2007, there were 957 public defender offices operating in the United States, with 427 of those offices funded at the state level, and 530 controlled and primarily funded at the local or county level.<sup>194</sup> The sizes of these offices vary greatly. Public defender offices at the local or county level employ a median of 7 litigating attorneys but the 154 offices with the highest caseloads employed a median of 28 litigating attorneys per office.<sup>195</sup> Despite the prevalence of public defender offices, these offices remain organized according to plans that emphasize the individual responsibility of a single attorney for a single client. The most senior attorneys are then assigned to the most serious felony charges.<sup>196</sup> Because the majority of public defender systems are large organizations that practice vertical representation, incorporating distribution policies that reflect more effective triage schemes dedicated to fair shares of limited

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*Saves Public Money in San Mateo County*, EXAMINER (May 31, 2013), <http://www.sfexaminer.com/sanfrancisco/private-defense-saves-public-money-in-san-mateo-county/Content?oid=2350131>. In this public defender model, participating attorneys, and not the county, pay to maintain their own office space and practices. *Id.* When a judge determines that a defendant is indigent and in need of a state-funded attorney, the judge appoints the PDP. The PDP then assigns the case to one of its private attorneys. The overall benefits of such a system, including the amount of insight and supervision and the degree and method of accountability is unclear. *See id.* It is also unclear whether such privatization of the public defender function is more cost-effective because the PDP does not record the cost per defendant. *Id.* The PDP's annual defender budget of \$17 million is much lower than the \$34 million required for San Francisco's public defender's office when the San Francisco population is only about 12 percent larger than that of San Mateo County. *Id.* The difference in budget could reflect the reduction of best practices as defined by the ABA and other public defender system commenters that tend to require a more significant budget. For example, the San Francisco public defender office is able to provide services "linking defendants to social workers" and expunging criminal resources, none of which is available in San Mateo. *Id.* There are also incentive structures in private defender offices that may prove problematic. Peter A. Joy & Kevin C. McMunigal, *Does the Lawyer Make a Difference? Public Defender v. Appointed Counsel*, 27 CRIM. JUST. 46, 47 (2012). For example, in order to discourage lawyers from simply processing cases by obtaining guilty pleas, attorneys receive a high hourly legal rate which increases once a case goes to trial. *See id.* Absent adequate supervision, however, even an attorney who takes cases to trial may simply be processing cases for increased fees.

193. *See* LANGTON & FAROLE, *supra* note 135, at 3–4.

194. *Id.* at 3.

195. *See id.* at 4.

196. The classes assigned for cases can range from misdemeanor to capital cases and the particular positioning of the defendant can also play an integral role. Although an attorney may understand fully how to represent a misdemeanor charge, in some jurisdictions, enhanced sentencing for multiple offenses makes a client facing a "simple misdemeanor" the type of case usually reserved for a more experienced attorney because of the increased potential punishment. For example, in Louisiana, a simple marijuana conviction carries a maximum penalty of six months in jail. Editorial, *Should Louisiana Take the "High" Road*, CREOLE (Feb. 4, 2014), <http://www.thecreole.com/?p=22422>. A defendant charged with a simple marijuana first offense can receive a fine and inactive probation. This can also happen for the first few marijuana first convictions. It is at the discretion of the district attorney to charge a particular defendant with a multiple marijuana charge. *See* LA. CODE CRIM. PROC. ANN. art. 61 (2015) (providing the district attorney with "entire charge and control of every criminal prosecution instituted or pending in his district"). Until recently, a multiple marijuana convictions could carry up to life in prison as the maximum punishment. *See* Kevin Litten, *Bobby Jindal Signs Marijuana Bills that Reform Criminal Penalties, Medical Marijuana Access*, TIMES-PICAYUNE (June 29, 2015, 4:39 PM), [http://www.nola.com/politics/index.ssf/2015/06/bobby\\_jindal\\_marijuana\\_laws.html](http://www.nola.com/politics/index.ssf/2015/06/bobby_jindal_marijuana_laws.html).

resources is critical to achieving permanent changes in the delivery of indigent defense services. In this matter, equity and efficiency actually converge to create a better system for the nation's indigent people. It also creates a system that much more closely follows the mandate of the Sixth Amendment by considering resource preservation and fair distribution of limited resources to clients.

#### CONCLUSION

Individual public defender triage practice undermines the fair process public defenders are meant to ensure by depending on informal prioritization decisions and increasing the likelihood of public defender burnout. If a public defender institution envisions a fair criminal process, regardless of class, as its goal, then it must first develop a comprehensive scheme for distributing limited resources to indigent defendants that considers all of its constitutional and professional obligations. There is no system of services that can claim to be fair if it does not first fairly allocate the limited goods it provides to the individuals with competing needs or claims.<sup>197</sup> This is particularly true where unfair allocation exacerbates the ability of the resource to accomplish its intended objectives.

Recall that attorney expertise is not the only finite resource public defender offices must strategically distribute. Investigative services and administrative services are two more resources available at most public defender offices that are necessary to the effective assistance of counsel but are also severely limited in under-resourced institutions.<sup>198</sup> As with the attorney-experience resource, public defender administrators distribute these limited resources in a variety of ways. Some institutions distribute them using a team-based model, where the same investigator and administrative person are assigned to the same attorney and assume responsibility for each case an individual attorney possesses. Others assign investigators and administrative personnel independent of the attorney assigned to a particular case.<sup>199</sup> The methods used to distribute these other two limited resources are also critical to the ability of a client to receive a fair criminal process. Each of these limited resources can be

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197. Economists and philosophers both consider such decisions in their fields.

198. The importance of investigation cannot be overstated, and the ABA has listed quality investigation as one of the hallmarks of effective defense. See ABA PRINCIPLES, *supra* note 21, at 3. Quality investigation includes similar characteristics as quality lawyering, including experience or expertise. The lack of quality investigative services are present in many challenged systems and public defenders often bemoan the amount of administrative paperwork they are responsible for completing.

199. See, e.g., Steinberg, *supra* note 120, at 1003–07 (describing the advantages of a team-based approach to indigent defense). Nonteam based representation can occur when investigators are hired for cases on a contract basis or subject to approval by the court. For investigative deficiencies when investigators are subject to approval by the court, see Laurence A. Benner, *The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 288–89 (2009).

evaluated using the same analysis presented for distributing attorney experience.

In this era of limited resources and overwhelming need, reassessing public defender office structure is critical to maintaining some constitutionally and professionally acceptable representation in the indigent defense field. Undoubtedly, the primary problem of indigent defense is a problem of insufficient funding. This Article's overall thesis is not meant to diminish the importance of secure, stable, and sufficient funding. Neither is it meant to discount a review of mass incarceration and the role current crime classifications and police targets involving certain marginalized individuals may have on increasing the amount of people in need of public defender services. All of these reforms may be part of the continuing struggle to create a more just indigent defense system, but developing the best organizational strategies within these limits imposed by inadequate funding is also an important action.<sup>200</sup> Public defender administrators and legal scholars truly seeking permanent improvement of the nation's broken indigent defense system should focus on providing indigent defendants a fair share of the limited resources. This would help alleviate some of the stress in the overburdened system and help the public defender function regain its role of maintaining a fair criminal process for the nation's poor defendants.

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200. Neither is this Article meant to lessen the need for caseload caps. Caps on caseloads or standards that govern the number of cases an individual can properly oversee at one time are critical to maintaining effective assistance of counsel. If a defense system or defender leader does not impose case limits on an individual lawyer, case pressures will inevitably overwhelm the lawyer and compromise the quality of representation. Overwhelming caseloads can render even the most dedicated, experienced attorneys into a simple plea machine or a system processor who cannot spend more than a few minutes reviewing a client's case with an eye towards the easiest path of disposition.

