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"It's Not You, It's Your Caseload": Using *Cronic* to Solve Indigent Defense Underfunding

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NOTE

"It's Not You, It's Your Caseload": Using *Cronic* to Solve Indigent Defense Underfunding

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In the United States, defendants in both federal and state prosecutions have the constitutional right to effective assistance of counsel. That right is in jeopardy. In the postconviction setting, the standard for ineffective assistance of counsel is prohibitively high, and Congress has restricted federal habeas review. At trial, severe underfunding for state indigent defense systems has led to low pay, little support, and extreme caseloads—which combine to create conditions where lawyers simply cannot represent clients adequately. Overworked public defenders and contract attorneys represent 80 percent of state felony defendants annually. Three out of four countywide public defender systems and fifteen out of twenty-two statewide public defender systems operate with yearly caseloads that are significantly higher than the ABA recommends.

This Note argues that courts should utilize the procedural ineffectiveness presumption that the Supreme Court made available in United States v. Cronic *to find state defense counsel carrying caseloads above the ABA-recommended maximums constitutionally ineffective. Thus, defendants could not be tried until caseloads in the locality fell within the maximums. This would incentivize state and local legislatures to spend more money on indigent defense.*

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Introduction

Frederick Bell was arrested in October 2016 in Louisiana after police officers alleged "they found drugs in his car during a traffic stop."[1] He says he met with his attorney, a public defender, for five minutes after his arrest.[2] In November, Mr. Bell saw his attorney again, in court, where he was told about his plea offer.[3] His trial was set for April 2017.[4] On March 10th, less than a month before trial was set to begin, he still had not discussed his case with his attorney.[5]

Mr. Bell's circumstances are not unusual. The lack of adequate funding for indigent defense is well known and well documented. Extreme caseloads stemming from inadequate funding prompted the director of the Missouri State Public Defender System to appoint[6] the governor to a capital case in 2016.[7] In Mississippi, the NAACP Legal Defense and Educational Fund conducted an in-depth survey of indigent defense in 2003.[8] The report revealed that indigent defendants in state court were waiting for months in jail before being ushered through mass guilty pleas (groups of defendants that plead guilty together with little or no legal consultation).[9] In Louisiana, indigent defendants wait weeks, months, and possibly years for an available public defender to take their case.[10] The lucky ones, like Frederick Bell, wait to be

1. Debbie Elliott, *Public Defenders Hard to Come By in Louisiana*, NPR (Mar. 10, 2017, 5:29 PM), https://www.npr.org/2017/03/10/519211293/public-defenders-hard-tocome-by-in-louisiana (on file with the *Michigan Law Review*).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. All that Missouri law requires for a defense attorney is to be a lawyer in "good standing" with the state bar. *See Employment*, Mo. St. Pub. Defender, http://www.publicdefender.mo.gov/employment/employment.htm [https://perma.cc/K8BT-6X4T].

7. Kristen Taketa, *Missouri's Head Public Defender Assigns Case to Gov. Nixon, Cites Overburdened Staff*, St. Louis Post-Dispatch (Aug. 3, 2016), http://www.stltoday.com/news/local/state-and-regional/missouri-s-head-public-defender-assigns-case-to-gov-nixon/article_37809be0-b7ee-56b4-b478-bf8dfe01720f.html [https://perma.cc/YZ7H-B3BA]. The storm of litigation surrounding the public defense crisis in Missouri has led, most recently, to a ruling from the Missouri Supreme Court forbidding the State Public Defender System from refusing cases without judicial approval. Jennifer Moore, *Public Defender 'Perplexed' By High Court Ruling on Caseloads*, KSMU (Oct. 25, 2017), http://ksmu.org/post/public-defender-perplexed-high-court-ruling-caseloads#stream/0 [https://perma.cc/5AQT-HB2V].

8. NAACP Legal Def. & Educ. Fund, Inc., Assembly Line Justice (2003), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/indigentdefense/ms_assemblylinejustice.authcheckdam.pdf [https://perma.cc/885S-XMJP].

9. *Id.* at 9.

10. *See* Lauren Zanolli, *Louisiana's Public Defender Crisis Is Leaving Thousands Stuck in Jail with No Legal Help*, Vice (May 13, 2016, 1:20 PM), https://news.vice.com/article/louisianas-public-defender-crisis-is-leaving-thousands-stuck-in-jail-with-no-legal-help [https://perma.cc/6W5R-2C3R].

contacted by their lawyers while out on bond; the unlucky ones wait in jail.[11] On February 6, 2017, the Southern Poverty Law Center filed a class action suit on behalf of plaintiffs denied a meaningful defense in Louisiana.[12] The pleading alleges that chronic underfunding has led to a *complete failure* of the indigent defense system in the state, denying defendants equal protection, due process, and the basic right to effective assistance of counsel.[13]

Systemic underfunding leads to high caseloads managed by too few attorneys. In 2000, more than 80 percent of people charged with felonies in state court in the United States were indigent.[14] In 2007, three out of every four county-funded[15] public defender offices in the country faced caseloads higher than the maximum ABA recommendations (150 felonies or 400 misdemeanors per full-time attorney per year).[16] Fifteen out of twenty-two state[17] defender systems also operated with caseloads that exceeded national standards.[18] That same year, individual lawyers in Florida faced caseloads of over 500 felonies and 2,225 misdemeanors.[19] In Tennessee, six attorneys were responsible for over 10,000 misdemeanor cases.[20] On February 17, 2017, the ABA Standing Committee on Legal Aid and Indigent Defendants released a

11. Elliott, *supra* note 1.

12. The suit was filed in conjunction with the Lawyers' Committee for Civil Rights Under Law, Davis, Polk, & Wardell LLP, and Jones Walker LLP. *SPLC, Allies File Lawsuit over Louisiana Broken Public Defender System*, Southern Poverty L. Ctr. (Feb. 6, 2017), https://www.splcenter.org/news/2017/02/06/splc-allies-file-lawsuit-over-louisianas-broken-public-defender-system [https://perma.cc/AZ8V-72K8].

13. Verified Petition for Class Certification and Declaratory and Injunctive Relief, Allen v. Edwards, No. 655079 (La. 19th Jud. Dist. Ct. Feb. 6, 2017), https://www.courthousenews.com/wp-content/uploads/2017/02/JOSEPH-ALLEN.pdf [https://perma.cc/F9R4-ABCM].

14. Caroline Wolf Harlow, Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 179023, Defense Counsel in Criminal Cases 1 (2000), https://www.bjs.gov/content/pub/pdf/dccc.pdf [https://perma.cc/A3Q6-H8XX].

15. State public defense systems are usually either funded at the county or state level. For example, New York has countywide public defender offices (along with a slew of nonprofits that serve New York City specifically), while Colorado has a statewide system (public defenders are assigned to branch offices in different cities but are all part of the same "office"). Holly R. Stevens et al., Ctr. for Justice, Law & Soc'y at George Mason Univ., County and Local Expenditures for Indigent Defense Services: Fiscal Year 2008, at 5, 17, 48–49 (2010), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf [https://perma.cc/9H76-HNFH] (surveying funding for indigent defense state by state).

16. Laurence A. Benner, Am. Constitution Soc'y for Law & Policy, When Excessive Public Defender Workloads Violate the Sixth Amendment Right to Counsel Without a Showing of Prejudice 1 n.2 (2011), https://www.acslaw.org/files/BennerIB_ExcessivePD_Workloads.pdf [https://perma.cc/PN7V-XE4L]. The ABA maximums are based on recommendations made by the National Advisory Commission on Criminal Justice Standards and Goals (NAC) in 1973. *See infra* Section II.B.

17. *See supra* note 15.

18. Benner, *supra* note 16, at 1 n.2.

19. *Id.* at 1.

20. *Id.*

report[21] that showed that, in order to "reasonably handle" the 150,000 cases assigned to public defenders each year, Louisiana would need 1,769 full time attorneys.[22] Currently, it has 363.[23]

In spite of alarming caseloads in many localities, significantly less money is often allocated to indigent defense than to the corresponding prosecutors' offices.[24] In New York City, the 2016 budget for the city's five district attorneys was $331.4 million.[25] The 2016 budget for public defense was $250.6 million, over $80 million less.[26] And in Washtenaw County, Michigan, the 2016 adopted budget allocated $2.9 million to the public defender and $5.9 million to the prosecuting attorney, a discrepancy of $3 million.[27] The discrepancies in funding between prosecution and defense are legal: states get to allocate funding however they choose. The numbers are particularly egregious, however, in light of the fact that public defense budgets pay for lawyers, investigators, and, in some offices, social workers and civil attorneys.[28] Prosecutors' offices, in contrast, pay for lawyers and victim's advocates, but investigation is conducted by local, state, and sometimes federal law enforcement—all entities with their own working budgets. There is no federal or state law that mandates "adequate" levels of indigent defense

21. Postlethwaite & Netterville, APAC & Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants, The Louisiana Project (2017), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.authcheckdam.pdf [https://perma.cc/5TX7-5NH7].

22. Malia Brink, *Still Under Water: Louisiana's Public Defense System in Crisis*, Crim. Just., Summer 2017, at 45, 45.

23. *Id.*

24. Some scholars have identified lack of parity as the root of the problem. *See* Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants, Ten Principles of a Public Defense Delivery System 1 (2002), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf [https://perma.cc/E4JJ-GXQL] ("There [should be] parity between defense counsel and the prosecution with respect to resources . . . ."); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 Iowa L. Rev. 219 (2004) (arguing for resource parity, but suggesting it may come from legislative action without court intervention).

25. Ellen Eng, Council of the City of N.Y., Fin. Div., Report on the Fiscal 2016 Preliminary Budget: The District Attorneys and Office of Special Narcotics Prosecutor 1 (2015), https://council.nyc.gov/budget/wp-content/uploads/sites/54/2015/06/fy2016-da.pdf [https://perma.cc/MRK4-RAK7].

26. Eisha N. Wright, Council of the City of N.Y., Fin. Div., Report on the Fiscal 2016 Preliminary Budget: Courts and Legal Aid Society/Indigent Defense Services 2 (2015), https://council.nyc.gov/budget/wp-content/uploads/sites/54/2015/06/fy2016-courts.pdf [https://perma.cc/D6CW-5FSW].

27. Washtenaw Cty., 2014–17 Budget Summary (2013), http://www.ewashtenaw.org/government/departments/finance/budget/final-budget-2014-2017 [https://perma.cc/QYZ3-RPR8].

28. Offices that model the "holistic" approach to public defense often have social workers and housing, immigration, family law, and public benefits attorneys on staff. *See, e.g.*, *Holistic Defense, Defined*, Bronx Defenders, https://www.bronxdefenders.org/holistic-defense/ [https://perma.cc/96AY-6FBD].

funding. The lack of funding mandates means no real, enforceable limit on caseloads for defense attorneys, regardless of the national ABA maximums.

Chronic underfunding and high caseloads in indigent defense matter because they are tied to effective assistance of counsel. Practitioners and professors who specialize in criminal defense agree that underfunding leads to too few lawyers,[29] excessive caseloads,[30] delays in meeting with clients,[31] and assembly-line guilty pleas.[32] Constitutionally effective assistance is impossible when attorneys face caseloads like those in Florida, Tennessee, or Louisiana.

The Supreme Court has recognized the right to an attorney since 1932[33] and the right to effective assistance since 1984.[34] In the current ineffective assistance of counsel landscape, however, there is no way to allege that chronic underfunding directly leads to ineffective assistance. There's a gap between the violation of the right and the remedy. Defendants are forced to plead ineffective assistance on a case-by-case basis after the fact, even though most are represented by trial attorneys with caseloads that are too high for effective representation of any individual client.

This Note seeks to close that gap. Part I lays out the current landscape for ineffective assistance claims. Part II proposes that state courts use the framework for procedurally ineffective assistance recognized by the Supreme Court in *United States v. Cronic*[35] to find counsel procedurally ineffective when caseloads are higher than the national ABA maximums. Part III describes how procedural ineffectiveness claims would incentivize state and local governments to bring caseloads into compliance with the ABA maximums and fleshes out counterarguments to the proposal.

I. Background: The Right to (Effective Assistance of) Counsel

In 1962, a man in a Florida jail cell wrote a note to the justices of the United States Supreme Court.[36] He was serving a five-year state sentence on

29. Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 Conn. L. Rev. 85, 92–93 (2007).

30. *Id.* at 93–94.

31. *Id.* at 94–95.

32. *Id.* at 95–96.

33. Powell v. Alabama, 287 U.S. 45 (1932).

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

35. 466 U.S. 648 (1984). Lack of adequate preparation could be presumed if the attorney's caseload exceeded the maximums recommended by the ABA. The presumption alone would be enough for a procedural ineffectiveness claim to be granted with no need to examine the prejudice prong in *Strickland*.

36. Jaeah Lee et al., *Charts: Why You're in Deep Trouble if You Can't Afford a Lawyer*, Mother Jones (May 6, 2013, 10:00 AM), http://www.motherjones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts/ [https://perma.cc/G9KR-RLAL].

charges of breaking into a pool hall and petty larceny.[37] He represented himself at trial because he couldn't afford a lawyer.[38] A year later, in 1963, that note led to the requirement that a lawyer be appointed for all felony defendants[39] in state court, even those who lack the ability to pay.[40]

This Part will discuss the underpinnings of the constitutional right to counsel and the standard for ineffective assistance of counsel claims. Defense attorneys, per the Supreme Court, are "necessities, not luxuries."[41] Implicit within *Gideon v. Wainwright*, the case described above, are the ideas that guilt should not be determined by poverty and that the guarantee of counsel is necessary to prevent the miscarriage of justice.[42] *Gideon* relied on an egalitarian conception of the adversarial system: the Sixth Amendment requires a lawyer for all felony defendants because it requires that two sides zealously advocate to protect the principle of innocent until proven guilty.[43]

Gideon didn't write on a clean slate. Though it was the first case to interpret the Sixth Amendment as providing a right to counsel for defendants in state court, it wasn't the first to find a constitutional right to counsel. *Powell v. Alabama* was the first case to identify a constitutional right to counsel, relying on the Due Process Clause of the Fourteenth Amendment.[44] Nine young black men were accused of raping two white women.[45] The three trials took one day, and all nine men were sentenced to death.[46] The lawyers appointed to represent them did not consult with any of their clients.[47] The Court held that the convictions could not stand.[48] The right to counsel encompassed more than a lawyer during trial[49]—it included a lawyer during the "critical period of the proceedings . . . when consultation, thoroughgoing investigation and preparation were vitally important."[50]

Powell's conception of the right to counsel stands diametrically opposed to current state indigent defense systems across the country. Clients are met just before arraignment or go unrepresented in arraignments, defendants choose between lawyers with incredibly high caseloads or no lawyer at all,

37. *Id.*

38. Gideon v. Wainwright, 372 U.S. 335, 337 (1963).

39. Later cases extended this to misdemeanor defendants as well. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972).

40. Previously, the Supreme Court held the Sixth Amendment was not incorporated to the states, so the rights contained were only applicable to federal defendants in federal court proceedings. Betts v. Brady, 316 U.S. 455 (1942), *overruled by Gideon*, 372 U.S. at 339.

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

42. *See id.*

43. *Id.*

44. 287 U.S. 45, 71 (1932). *Powell* is called the "Scottsboro Boys" case.

45. *Id.* at 48–49.

46. *Id.* at 49–50.

47. *Id.* at 49–50, 56.

48. *Id.* at 73.

49. *Id.* at 57.

50. *Id.*

and judges function like machines, processing 100 defendants a day.[51] The Court in *Powell* stated that the right to counsel was one of the "immutable principles of justice [that] inhere in the very idea of free government"[52] and that the duty to assign counsel was not discharged if the circumstances precluded effective aid in the preparation for and trial of the case: the "critical stages."[53] The lack of meaningful representation in *Powell* was a denial of due process in the eyes of the Court.[54] The Supreme Court has not found that situation again, yet public defenders see those impossible cases every day. When every lawyer available for an indigent defendant is dealing with caseloads above the ABA maximums, the chance that any of them could provide "effective" assistance is negligible. We live in a world that the justices who decided *Powell* would find unacceptable.[55]

In the decades following the recognition of the right to counsel, the Supreme Court recognized that the Sixth Amendment also requires that counsel be "effective." In 1984 in *Strickland v. Washington*, the Court held the standard for attorney performance is one of "reasonably effective assistance."[56] To prove ineffectiveness, the Court articulated a two-part test. The defendant must show that his[57] attorney's performance fell below an objectively reasonable standard of effectiveness[58] and that the error (or errors) was so prejudicial that, but for it, the result would be different.[59] The Court

51. *See e.g.*, Norman S. Fletcher, Opinion, *Georgia's Dangerous Rush to Execution*, N.Y. TIMES (Dec. 5, 2016), http://www.nytimes.com/2016/12/05/opinion/georgias-dangerous-rush-to-execution.html (on file with the *Michigan Law Review*).

52. 287 U.S. at 71 (quoting Holden v. Hardy, 169 U.S. 366, 389 (1898)).

53. *Id.*

54. *Id.* at 71.

55. Following *Powell*, in *Griffin v. Illinois* the Supreme Court again stressed the importance of equality and the centrality to our constitutional system of a meaningful defense—including the right to an appeal, regardless of income. *See generally* Griffin v. Illinois, 351 U.S. 12 (1956). The plurality reasoned that while states were not constitutionally required to provide appellate review the Due Process Clause and Equal Protection Clause protected prisoners from invidious discrimination if states did. *Id.* at 18 (plurality opinion). Thus, states had an affirmative duty to remedy inequalities preventing indigent defendants from accessing the appellate process: access to an appeal, if appeals existed, could not be dependent upon one's ability to pay. *Id.* at 19. In a sense, the decision imposed an affirmative duty on the government even in the absence of proof that the inequalities being remedied were ones the government had created. Justice Black said that within a criminal system a state "can no more discriminate on account of poverty than on account of religion, race, or color." *Id.* at 17. He went on to say, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.* at 19.

56. 466 U.S. 668, 679–80 (1984).

57. The vast majority of criminal defendants are male. For U.S. residents born in 2001 (turning 18 in 2019), Bureau of Justice Statistics estimates indicate that one in nine men and one in fifty-six women will serve some term of incarceration. *Criminal Justice Facts*, SENT'G PROJECT (2017), https://www.sentencingproject.org/criminal-justice-facts/ [https://perma.cc/93YG-KWTG].

58. *Strickland*, 466 U.S. at 680–83.

59. *Id.* at 683–85.

stressed the importance of the totality of circumstances in assessing effectiveness and the strong presumption that counsel's conduct fell within reasonable bounds.[60] Since *Strickland,* the Court has consistently held that the Sixth Amendment right to counsel requires not only the assistance of defense counsel at trial but also "effective" assistance at "all 'critical' stages of the criminal proceedings."[61] "[T]he right to counsel is so fundamental to a fair trial," the Court has stated, that "the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits."[62]

The *Strickland* standard is hard to meet. It requires a showing of unreasonable conduct by defense counsel and a showing that said unreasonable conduct was a but-for cause of the conviction, plea, or sentence.[63] Later precedent has further ratcheted up the prejudice prong. In *Harrington v. Richter* the Court held the "likelihood of a different result must be substantial, not just conceivable."[64] Implicitly, *Strickland* and its progeny require defendants to be able to prove either a serious procedural defect (e.g., a misdemeanor plea not taken)[65] or their actual innocence. This concern was explicitly addressed in *Kimmelman v. Morrison*, where the Court held that the failure to make a timely motion to suppress (a motion unrelated to actual innocence) was deficient performance under *Strickland*.[66] The Court noted that the Sixth Amendment effective-assistance guarantee does not depend on guilt or innocence.[67]

The Sixth Amendment doesn't equivocate. If it is not interpreted to provide the same protections for the wrongly accused and the guilty, then our system is deeply flawed. Lack of funding for trial-level defense,[68] a nearly insurmountable legal standard for constitutional ineffectiveness,[69] and statutory impediments to federal habeas review[70] combine to ensure that only the

60. *Id.* at 680–83.

61. Montejo v. Louisiana, 556 U.S. 778, 786 (2009) (quoting United States v. Wade, 388 U.S. 218, 227–28 (1967), and Powell v. Alabama, 287 U.S. 45, 57 (1932)). The Court has also held that failure to communicate official plea offers to a defendant facing felony charges was ineffective assistance, and that the error was prejudicial because the defendant then pled guilty to a felony, rather than a misdemeanor. Missouri v. Frye, 566 U.S. 134 (2012).

62. Evitts v. Lucey, 469 U.S. 387, 395 (1985).

63. Lafler v. Cooper, 566, U.S. 156 (2012); *Frye*, 566 U.S. 134; *Strickland*, 466 U.S. 668.

64. 562 U.S. 86, 112 (2011).

65. *Frye*, 566 U.S. 134.

66. Kimmelman v. Morrison, 477 U.S. 365 (1986). In *Kimmelman*, though the performance by the attorney was found to be deficient, the question of prejudice was remanded to the court below.

67. *Id.* at 379–80.

68. *See e.g.*, Benner, *supra* note 16.

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

70. *See, e.g.*, 28 U.S.C. § 2254 (2012). This statute, part of the Antiterrorism and Effective Death Penalty Act, restricts federal habeas review to state decisions "contrary to, or involv[ing] an unreasonable application of . . . federal law, as determined by the Supreme Court of the United States." *Id.* In doing so, it removes the ability of federal courts sitting in habeas to

"actually innocent" and those who have faced egregious procedural defects have a way to vindicate their Sixth Amendment rights. The *Strickland* analysis does not take into account any of the systemic or structural deficiencies that plague indigent defense systems or the criminal justice system at large. Failure to interview certain witnesses, delays in interviewing others, and lack of diligence in obtaining a criminal defendant's pretrial release have not been found to be constitutionally ineffective assistance[71] in spite of the relationship of all of these factors to lack of time devoted to the case by defense counsel. This is not the system envisioned by the text of the Sixth Amendment or by the Court that decided *Powell* or *Kimmelman*.[72]

II. The Road Not Taken: Procedurally Ineffective Assistance

The *Strickland* standard combined with inadequate funding for indigent defense is a toxic cocktail. Defense attorneys across the country are overwhelmed by enormous caseloads that hinder constitutionally effective assistance, yet the high bar for proving ineffective assistance precludes meaningful recourse for their clients.[73] State defendants are stuck: their lawyers cannot provide the quality of representation necessary to keep them out of jail or prison, but aren't so ineffective as to merit a new trial. Further, Congress and the Supreme Court have reduced the ability of federal courts sitting in habeas to review state convictions for error.[74] Without meaningful error correction on the back end, adequate funding for trial counsel (to ensure that errors don't occur in the first place) is critical. This Note proposes that obtaining adequate funding for state indigent defense requires judicial decisionmaking that induces state legislatures to solve the problem themselves.

This Part describes a proposal for a different kind of ineffective assistance claim, one that would empower judges to find counsel ineffective even before trial. Section II.A first describes *United States v. Cronic*, a case where the Supreme Court considered a *procedural* ineffective assistance of counsel claim. This Section argues that the Court in *Cronic* gave litigants and judges a weapon to combat extreme caseloads. It then lays out other cases where courts have recognized claims that hint at such a procedural ineffectiveness bar. Section II.B asserts that courts should treat the ABA caseload maximums as a strict limit for effective assistance in the context of a procedural ineffective assistance claim.

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correct errors at the state level and restricts their review only to the truly egregious cases that are wrong as a matter of law.

71. United States v. Decoster, 624 F.2d 196 (D.C. Cir. 1976). In dissent, Judge Bazelon relied on the ABA Standards Relation to Defense Function, and emphasized his inability to accept a system that "conditions a defendant's right to a fair trial on his ability to pay for it." *Id.* at 264 (Bazelon, J., dissenting).

72. *Kimmelman*, 477 U.S. 365; Powell v. Alabama, 287 U.S. 45 (1932).

73. *Strickland*, 466 U.S. 668.

74. *See, e.g.*, § 2254.

A. United States v. Cronic

On the same day that the Supreme Court decided *Strickland v. Washington* they also decided a companion case, *United States v. Cronic*.[75] *Cronic*, like *Strickland*, dealt with an ineffective assistance of counsel claim. *Cronic*, however, arose in a pretrial context rather than in a habeas proceeding.[76] The question in *Cronic* dealt with the adequacy of defense counsel's trial preparation.[77] The defense attorney in *Cronic* only had twenty-five days to prepare for trial. In contrast, the prosecution, a team of U.S. attorneys, had already spent four-and-a-half years preparing.[78] Cronic argued that the Court should find that counsel's performance in his case was ineffective because twenty-five days simply wasn't enough time to adequately prepare.[79] In addition, Cronic argued that twenty-five days was particularly egregious in light of *Powell*, which recognized the time between arraignment and trial as particularly important.[80]

The Supreme Court rejected this argument. Twenty-five days to prepare, the Court said, did not amount to a finding of procedurally ineffective assistance.[81] The Court recognized, however, that there was some subset of cases (like *Powell*)[82] where *no lawyer* in the situation could *possibly provide* effective assistance of counsel.[83] The Court established the standard for making a successful pretrial ineffective assistance claim, holding that the presence of certain systemic factors (or absence of necessary systemic factors) could lead to constructive denial of counsel and the presumption of procedurally ineffective assistance.[84] The Court stated that structurally sound indigent defense systems require the early appointment of qualified attorneys with sufficient time and resources to provide competent representation in order to create a true adversarial criminal trial.[85] The Court explicitly recognized the degree to which ineffective assistance of counsel affects the fair-trial right

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

76. *Id. Strickland* dealt with a postconviction federal habeas claim of ineffective assistance of counsel. 466 U.S. at 668. Now, *Strickland* covers postconviction ineffective assistance claims, and *Cronic* governs pretrial ineffective assistance claims. The vast majority of ineffective assistance of counsel claims are brought postconviction, so the vast majority are governed by *Strickland*.

77. The exact critical stage identified in *Powell*. *Powell*, 287 U.S. at 56–58 (1932).

78. *Cronic*, 466 U.S. at 649. While *Strickland* was an ineffective assistance of counsel claim coming out of state court (the federal court was sitting in habeas), *Cronic* dealt with an ineffective assistance of counsel claim at the federal level, thus the U.S. attorneys' involvement.

79. *Id.* at 652.

80. *Powell*, 287 U.S. at 57.

81. *Cronic*, 466 U.S. at 665.

82. *See supra* note 54 and accompanying text.

83. *Cronic*, 466 U.S. at 658–67.

84. *Id.* at 659–62 (citing *Powell*, 287 U.S. 45, as one such case).

85. *Id.* at 655–58.

of the accused.[86] Though procedural ineffectiveness was rejected in the context of *Cronic*, the underlying premise, that there are systemic factors that could preclude *any lawyer* from providing effective assistance, still stands.[87]

Since *Cronic*, courts have recognized that lack of adequate preparation and investigation can be a constitutional bar to effective assistance of counsel at sentencing. In *Wiggins v. Smith* and *Williams v. Taylor* the Supreme Court held that failure to investigate mitigation evidence and failure to introduce it constitutes ineffective assistance at capital sentencing.[88] The petitioner in *Wiggins* was convicted and sentenced to death for a 1988 murder.[89] At his capital sentencing hearing his defense attorneys did not offer *any* evidence of his abusive childhood as mitigation.[90] The Court reasoned that counsel's failure to prepare a social history report[91] was ineffective assistance.[92] In *Williams*, also a murder case, defense counsel failed to investigate petitioner's "nightmarish" childhood.[93] Further, counsel did not introduce any evidence of Williams's excellent behavior while incarcerated nor evidence that Williams was "borderline mentally retarded."[94] Defense counsel that fails to investigate is not what the Constitution demands.[95]

Using a similar analysis, the Supreme Judicial Court of Massachusetts held that there was a high likelihood that indigent defendants would not receive effective assistance of counsel because of lost opportunities for prompt pretrial investigation stemming from high caseloads.[96] Further, it stated that courts are obligated to fashion prospective protections for constitutional rights in order to avoid harms that would be "irremediable . . . if not corrected."[97] When read within the *Cronic* framework, these cases could establish a way for courts to find that indigent defense systems marked by excessively high caseloads that lead to failures to investigate and prepare result in procedurally ineffective assistance.

Though the facts in *Cronic* did not rise to a constitutionally ineffective level, *Cronic* was decided in 1984. The 25 days Cronic's lawyers had to prepare for his case dwarfs the 59 minutes, 32 minutes, and 7 minutes that public defenders in Atlanta, Detroit, and New Orleans spent respectively on

86. *Id.* at 658.

87. *Id.* at 666–67.

88. *See, e.g.*, Wiggins v. Smith, 539 U.S. 510 (2003) (failure to investigate); Williams v. Taylor, 529 U.S. 362 (2000) (failure to investigate and introduce available mitigation evidence).

89. *Wiggins*, 539 U.S. at 514–15.

90. *Id.* at 524–26.

91. In Maryland, the state Wiggins was convicted in, a social history report was common practice in capital cases. *Id.* at 524.

92. *Id.*

93. *Williams*, 529 U.S. at 395.

94. *Id.* at 395–96.

95. *Wiggins*, 539 U.S. at 533–36.

96. Lavallee v. Justices in Hampden Superior Court, 812 N.E.2d 895, 904–05 (Mass. 2004).

97. *Id.* at 905.

each case on average in 2017.[98] In 2007, only one-quarter of countywide public defender offices and four out of 17 state-wide offices had caseloads that fell within the ABA maximums.[99] Courts could walk through the procedural-ineffectiveness door that *Cronic* left open and find that attorneys with excessively high caseloads are procedurally incapable of providing constitutionally effective assistance. This would result in mistrials (if challenged posttrial) and dismissals (if challenged pretrial). The inability to effectively prosecute alleged criminals could incentivize localities to fund indigent defense at levels high enough to hire the attorneys necessary to bring caseloads back down.

B. *The ABA Maximums As a Bar to Excessive Caseloads*

If *Cronic*'s procedural ineffectiveness framework is to have any teeth, there needs to be hard limits to caseloads that courts can use as a rule. This poses a problem: there aren't many available. The ABA Criminal Justice Standards state (unhelpfully), "[d]efense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations."[100]

The only hard numbers routinely accepted in the field are the maximum annual caseloads created by the National Advisory Commission on Criminal Justice Standards and Goals (NAC) in 1973 and adopted by the ABA. The limits are: 150 felony cases, 400 misdemeanor cases, 200 juvenile cases, or 25 appeals per full-time attorney.[101] As of 2001, NAC is the only national body that has quantified an annual maximum.[102] The commission was appointed by the administrator of the Law Enforcement Assistance Administration and was made up of "elected officials, law enforcement officers, corrections officials, community leaders, prosecutors, judges, and defense attorneys."[103] Though the standards were created in 1973, the ABA has noted that those

98. *See* Lee et al., *supra* note 36.

99. *Public Defender Offices Nationwide Receive Nearly 5.6 Million Indigent Defense Cases in 2007*, Bureau Just. Stat. (Sept. 16, 2010), https://www.bjs.gov/content/pub/press/spdpclpdo07pr.cfm [https://perma.cc/KN4P-THVF]. The year 2007 is the last year with Bureau of Justice Statistics numbers. New numbers should be released sometime in 2018.

100. ABA Standards for Criminal Justice: Prosecution Function and Defense Function § 4-1.3(e), at 126 (3d ed. 1993).

101. Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants, *supra* note 24, at 5 n.19; *National Advisory Commission on Criminal Justice Standards and Goals, the Defense (Black Letter)*, Nat'l Legal Aid & Defender Ass'n, http://www.nlada.org/defender-standards/national-advisory-commission/black-letter [https://perma.cc/5UJZ-N8SC].

102. Bureau of Justice Assistance, U.S. Dep't of Justice, NCJ 185632, Keeping Defender Workloads Manageable 8 (2001), https://www.ncjrs.gov/pdffiles1/bja/185632.pdf [https://perma.cc/X6WB-9LDR].

103. *Id.*

numbers "have proven resilient over time."[104] The guideline numbers have been cited as a maximum that "should in no event be exceeded."[105]

Additionally, if anything, the standards are now too high. John Gross, of the National Association of Criminal Defense Lawyers, told *Mother Jones* that "[m]any [defense attorneys] don't consider [the NAC standards] to be realistic if you expect quality representation . . . . These standards were established . . . when . . . criminal cases were a lot less complex."[106] On average, *Mother Jones* estimates that a state public defender would need 3,035 work hours (a year and a half) to do a single year's work.[107]

The lack of other available standards and the fact that the ABA maximums are over forty years old both provide obvious counterarguments to this proposal. The lack of alternative standards, however, doesn't mean that the ABA guidelines aren't accurate. Some benchmark is necessary. Though this proposal would transform ABA recommended maximums into hard limits, reliance on these recommendations isn't entirely without precedent: a majority of the Supreme Court used ABA standards as a strict rule in determining the professional norms to assess the reasonableness of defense counsels' behavior in *Wiggins v. Smith* and *Williams v. Taylor*.[108] Additionally, Justice Kennedy, dissenting in *Rompilla v. Beard*, accused the majority of relying on ABA guidelines as a bright-line rule.[109]

Finally, though the ABA maximums haven't been updated, change needs to start somewhere. These are the numbers we have. They might even be too high, based on the complexity of modern cases.[110] Systemic effectiveness should be evaluated by whether attorneys' caseloads fall within the national recommendations and by whether those attorneys were appointed with enough time to participate fully in the critical stages of the proceedings.[111] Effective assistance of counsel should be about whether states have truly met their procedural obligation to their citizens in providing indigent defense; it shouldn't be about whether the actual, substantive performance by counsel was inadequate and whether that inadequacy was prejudicial.[112]

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104. ABA Standards for Criminal Justice: Providing Defense Services § 5-5.3 cmt., at 72 (3d ed. 1992).

105. Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants, *supra* note 24, at 2.

106. *See* Lee et al., *supra* note 36.

107. *Id.*

108. *See Wiggins*, 539 U.S. 510, 522, 524 (2003); *Williams*, 529 U.S. 362,396 (2000).

109. 545 U.S. at 396, 400 (Kennedy, J., dissenting).

110. *See* Lee et al., *supra* note 36.

111. *See generally* Powell v. Alabama, 287 U.S. 45 (1932). The court discussed how important investigation and preparation was to the mounting of an effective defense, and how failure to appoint counsel with enough time to do said investigation did not meet the standards set by the Sixth Amendment.

112. Hurrell-Harring v. New York, 930 N.E.2d 217, 224–26 (N.Y. 2010).

Time to complete "consultation, thoroughgoing investigation and preparation [is] vitally important."[113] Caseloads above the maximum national recommendation do not allow for that investigation or that preparation,[114] and they constructively deny defendants their Sixth Amendment right to effective assistance of counsel.

III. Procedurally Ineffective Assistance and Adequate Indigent Defense Funding

The constructive denial of counsel for indigent defendants in state court stems directly from lack of funding. "Poor training, perverse incentives, and massive caseloads [among many other consequences] all stem from the lack of resources devoted to criminal defense."[115] "[F]unding is conceivably related to every other problem in indigent defense."[116]

This Part describes how the use of *Cronic*'s procedural ineffectiveness framework by courts would incentivize state legislatures to devote more resources to indigent defense, surveys state cases where litigants and courts have already attempted to do so, and discusses some of the counterarguments to such a regime.

Recognizing procedural ineffectiveness for caseloads higher than the ABA maximums would bootstrap adequate indigent defense funding onto the effective assistance of counsel guarantee of the Sixth Amendment.[117] If assistance of counsel is procedurally ineffective when caseload limits aren't adhered to, then states and counties must adhere to those caseload limitations, risk a constant threat of mistrials (if the claim was brought in a habeas context), or risk an inability to try the defendant in the first place (for pretrial claims). Mistrials and the inability to go to trial ensure that there will be waste in criminal justice systems. These outcomes require prosecutors to either let a defendant go free or retry the case. The strain this would place on criminal justice systems would incentivize states and counties to allocate enough funding to indigent defense systems to maintain an adequate number of attorneys (or prosecute far, far, fewer crimes) in order to ensure that attorneys maintain caseloads in accordance with the ABA maximums.

Litigants are attempting to bring attention to extreme caseloads, the importance of adequate funding for state indigent defense systems, and judicial options for incentivizing it. In 2016, the ACLU of Utah filed a class action against the state of Utah for a failure to meet Sixth Amendment obligations

113. *Powell*, 287 U.S. at 57.

114. Lack of adequate preparation is ineffective assistance in this paradigm. Linking lack of preparation to a condition of impossibly high caseloads is an extension of the logic of *Powell* and bootstraps high caseloads onto the existing violation of lack of preparation.

115. Dennis E. Curtis & Judith Resnik, *Grieving Criminal Defense Lawyers*, 70 Fordham L. Rev. 1615, 1620 (2002).

116. Kyung M. Lee, *Reinventing* Gideon v. Wainwright*: Holistic Defenders, Indigent Defendants, and the Right to Counsel*, 31 Am. J. Crim. L. 367, 373 (2004).

117. *See generally* Strickland v. Washington, 466 U.S. 668 (1984); Gideon v. Wainright, 372 U.S. 335 (1963).

with regard to indigent defendants.[118] The complaint alleged that the state had failed to provide constitutionally adequate legal representation in violation of the Sixth and Fourteenth Amendments.[119]

State courts have also begun to recognize systemic failures. In *State v. Peart*, the Louisiana Supreme Court grappled with the state's overburdened and underfunded public defender system.[120] The court found that Louisiana had a "general pattern" of "chronic underfunding of indigent defense programs in most areas of the state" and that Louisiana's system of funding indigent defense through criminal- and traffic-ticket assessments was an unstable and unpredictable approach.[121] The court further noted that the underfunding that resulted from that system "ha[d] serious consequences."[122] These consequences included "excessive caseloads and insufficient support [for attorneys]."[123] Additionally, the court relied on the ABA maximums in its assessment regarding caseloads.[124]

The Louisiana Supreme Court found that the conditions in the trial court "routinely violate[d] the standards on workload; initial provision of counsel; investigation; and others"[125] (all of which relate to funding). Mr. Peart's case was remanded for a retrial,[126] and the Louisiana Supreme Court ordered the trial court to "apply a rebuttable presumption that indigents are not receiving assistance of counsel sufficiently effective to meet constitutionally required standards."[127] The court found that "because of the excessive caseloads . . . indigent defendants . . . are generally not provided with the effective assistance of counsel the Constitution requires."[128] Finally, the court stated:

> If legislative action is not forthcoming and indigent defense reform does not take place, this Court, in the exercise of its constitutional and inherent power and supervisory jurisdiction, may find it necessary to employ the more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel.[129]

State v. Peart is an example of a state court acknowledging gross inadequacies in the provision of indigent defense. It's also an example of a way

118. *See* Memorandum Decision and Order Granting Defendants' Motion to Dismiss at 25, Remick v. Utah, No. 2:16-cv-00789, 2018 WL 1472484 (D. Utah Mar. 23, 2018), ECF No. 78 (dismissed on standing grounds) (noting, in spite of the dismissal, that Utah's system of indigent defense was "cause for concern").

119. *Id.*

120. 621 So. 2d 780 (La. 1993).

121. *Peart*, 621 So. 2d at 789.

122. *Id.*

123. *Id.* at 790.

124. *Id.* at 789.

125. *Id.* (citations omitted).

126. *Id.* at 791–92.

127. *Id.* at 783.

128. *Id.* at 790.

129. *Id.* at 791.

courts can mitigate any harms resulting from increased findings of ineffective assistance. In *Peart*, the court below was ordered to apply a rebuttable presumption[130] (rather than, for example, an irrebuttable presumption). *Peart* shows that state courts as early as 1993 were aware of the role they could play in reforming the provision of indigent defense. Further, *Peart* directly tied the constitutional ineffectiveness in Louisiana's indigent defense system to inconsistent funding.[131]

State courts have also looked at high caseloads in contract-based indigent defense systems. In *State v. Smith*, an Arizona case from 1984, a defendant alleged that his defense attorney "spent only two to three hours interviewing [him] and 'possibly' six to eight hours studying the case."[132] He was charged with sexual assault, and the severity of the sentence led the Arizona Supreme Court to expand the record to consider the adequacy of the Mohave County indigent defense system.[133] The court held that Mohave County's contract appointment system for indigent defense violated the Fifth and Sixth Amendments to both the United States and Arizona constitutions even without finding that Mr. Smith was ineffectively represented.[134]

Mohave County used contract attorneys, rather than a public defender system, for indigent defense. In the bid process for the contracts there was "[n]o limitation . . . on caseload or hours, nor . . . any criteria for evaluating ability or experience of potential applicants."[135] Contracts were assigned to the lowest bidder[136] in each category (the one exception being when the lowest bidder was facing discipline by the state bar).[137] The defense attorney in *Smith* handled 149 felonies, 160 misdemeanors, 21 juvenile cases, and 33 other cases in 11 months.[138] Further, that attorney handled all the Kingman city appointment cases and his own private civil practice.[139] The court stated that it was "obvious that the caseload of defendant's attorney was excessive, if not crushing."[140] The court continued, "[i]n making this determination we do not base our opinion on the standards alone, but also on our own experience as attorneys."[141]

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130. *Id.*

131. *Id.* at 789.

132. State v. Smith, 681 P.2d 1374, 1378 (Ariz. 1984) (in banc). This case was decided the same year as *Strickland*, so the court does not deal with the *Strickland* framework.

133. *Id.* at 1379.

134. *Id.* at 1381.

135. *Id.* at 1379.

136. Contract systems, generally, involve individual attorneys sending in bids to state courts for a certain number of defense cases per year. They are often used in lieu of a state or county public defender system. *See generally* Gershowitz, *supra* note 29.

137. *Smith,* 681 P.2d at 1379.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

Further, the court went on to note just why high caseloads are such a problem. The court stated, "[t]he insidiousness of overburdening defense counsel is that it can result in concealing from the courts . . . the nature and extent of damage that is done to defendants by their attorneys' excessive caseloads."[142]

Smith demonstrates that state courts are willing to reconsider the efficacy of many kinds of indigent defense delivery systems. It also shows that state appellate courts are aware that crushing caseloads are not always evident to them. Finally, it serves as an example of a state supreme court explicitly stating that "excessive, if not crushing" caseloads lead to a denial of the right to counsel in violation of the Sixth Amendment.[143] It ties underfunding to the problem—the contract system failed because it ensured that the lowest bidder received the contract with no regard for the different amounts of time necessary for preparation for different kinds of cases based on complexity.[144] The solution proposed in this Note would provide state courts with another tool to combat underfunding and the excessive caseloads that stem from it. Unlike the gymnastics the court had to do in *Smith*, employing the *Cronic* framework would provide a more direct jurisprudential route to examining excessive caseloads and underfunding. The broad applicability of the *Cronic* framework ensures that decisions like *Smith* could happen on a much broader scale to incentivize funding reform.

There are two obvious, practical counterarguments to this proposal. First, the sheer number of procedural ineffectiveness claims that could be brought might entirely cripple the criminal justice system in many states and counties. This can be addressed through limiting the procedural posture of these claims. A claim of procedural ineffectiveness based on a caseload above the ABA maximums could, theoretically, be brought either pretrial or in a habeas context.[145] In a habeas context, procedural ineffectiveness could function like a "step zero"[146] to the *Strickland* analysis. Before a court even considered whether the attorney's performance was reasonable or whether it prejudiced the case, the court would consider whether counsel had a caseload above the ABA maximum. If counsel did, that would trigger a presumption of prejudice, so all that the petitioner would have to prove is that counsel acted objectively unreasonably. Bringing these claims in a habeas context would allow defendants who have already been convicted to receive the benefit of the rule. It would also result in countless mistrials in nearly

142. *Id.* at 1381.

143. *Id.* at 1380.

144. *Id.* at 1379–81.

145. Assuming that data regarding the attorney's caseload at the time of representation was available.

146. For a discussion of the "step zero" analysis implemented in cases following *Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), see Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187 (2006). *See also* Barnhart v. Walton, 535 U.S. 212 (2002); United States v. Mead Corp., 533 U.S. 218 (2001); Christensen v. Harris Cty., 529 U.S. 576 (2000).

every state system. This would exponentially increase the numbers of successful ineffective assistance claims. On the one hand, that number of mistrials would provide a huge incentive to states to fund indigent defense systems better. On the other, it would grossly overwhelm those systems.

Limiting a procedural ineffective assistance claim to the pretrial procedural posture of *Cronic* itself would limit the amount of cases that could be brought[147] and thus would mitigate concerns about overwhelming state criminal justice systems. Rather than inducing mistrials after the fact, this would function as a bar to prosecution before trial ever occurred. It would still affect enough prosecutions to send a message but would avoid the sheer numbers of mistrials that could ensue if these cases were brought in a habeas context.

The second practical counterargument is where the money would come from. This isn't insignificant. In New York state in 2013, it was estimated that the cost to bring upstate caseloads to a "manageable level" (with "manageable level" meaning within the ABA recommendations) would be $105 million.[148] The money would come from state budgets—which, by necessity, means money would be cut from services like police and fire departments, road repairs, and schools. Every entitlement program a state or local government creates, however, has this effect. Significantly, funding indigent defense systems adequately is one of few state entitlements demanded by the Constitution.[149] Further, though the funding necessary to make state indigent defense systems operate constitutionally within this framework is substantial, the results would save states money. Poor-quality public defense systems increase incarceration rates, and those increased rates lead to increased costs.[150] Between 1997 and 2007, the national cost of incarceration jumped from $43 billion to $74 billion, and the number of people incarcerated nationwide jumped from 1.7 million to 2.3 million.[151] That number, 2.3 million, has held steady through 2017.[152] Of those 2.3 million people, state

147. Rather than opening up all cases that have ever been decided to ineffective assistance claims, analogizing to *Cronic*'s *procedural posture* would limit the availability of this remedy to only pending cases.

148. N.Y. State Office of Indigent Legal Servs., Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York—2013 Update 13 (2014), https://www.ils.ny.gov/files/Estimate%20of%20the%20Cost%20of%20Compliance%20with%20Maximum%20National%20Caseload%20Limits%20in%20Upstate%20New%20York%20-%202013%20Update%209%2024%2014%20Final.pdf [https://perma.cc/CLC4-RLWZ].

149. Unlike, for example, public schools. There is no constitutional right to an education, but there is one to effective assistance of counsel in a criminal proceeding. U.S. Const. amend. VI.

150. Justice Policy Inst., System Overload 17–18 (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf [https://perma.cc/YYZ5-N76Q].

151. *Id.* at 17.

152. Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2017*, Prison Pol'y Initiative (March 14, 2017), https://www.prisonpolicy.org/reports/pie2017.html [https://perma.cc/83PZ-YYAF].

prisons and local jails hold 1.96 million.[153] Spending more on indigent defense would lead to lower rates of incarceration, which would actually save states money in the long run.

There is, however, another option for states and counties unable or unwilling to spend more on indigent defense. The same caseload reduction could be achieved through fewer prosecutions. On the one hand, a targeted approach to truly the "worst" offenders (focusing on serious felonies and abandoning low-level, nonviolent misdemeanors)[154] mitigates many of the problems commentators have identified with mass incarceration, the mechanical processing of misdemeanor defendants, and the criminal justice system writ large.[155] On the other, capping prosecutions is, in the eyes of many, a detriment to the public good because it cripples unfettered prosecutorial discretion.[156] States and counties could play with both increasing funding levels and creating prosecution caps as a way to bring caseloads down in a manner tailored to their budgets and the needs of their communities.

Conclusion

Giving defendants the option to bring pretrial ineffective assistance claims based on excessive caseloads—and giving courts the ability to grant relief—is necessary because indigent defense underfunding and corresponding caseloads make it impossible for lawyers to fulfill their Sixth Amendment obligations.[157] This proposal would allow courts to assess the constitutionality of indigent defense systems rather than limiting them to the review of any individual lawyer's performance. It would force states and counties to maintain adequate funding or risk not being able to prosecute criminals at all. In sum, it would transform the minimum amount of money that states

153. *Id.*

154. The percentage of state prison populations that is made up of nonviolent drug offenders varies. In 2015, only slightly more than 10 percent of New York state's prison population was in for drug crimes. In Oklahoma, it was above 25 percent. *Id.* According to the Bureau of Justice Statistics, through 2012 one in six people in state prison was incarcerated for a drug conviction nationally. E. Ann Carson, Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 247282, Prisoners in 2013, at 15 (2014), https://www.bjs.gov/content/pub/pdf/p13.pdf [https://perma.cc/6FZG-EZY6].

155. Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 Stan. L. Rev. 611, 613 (2014) (describing the rise of mass-misdemeanor justice and how it "upends standard notions of the purposes of criminal procedure and punishment and challenges our understandings about the social role of criminal law"). *See generally id.*

156. *See generally* Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 Temp. Pol. & C.R. L. Rev. 369 (2010) (arguing that prosecutorial discretion is essential for doing justice).

157. "About three out of every four county-funded public defender offices have attorney caseloads which exceed nationally recognized maximum caseload standards." Benner, *supra* note 16, at 1. Of course, not every system in the country is failing. Federal defender offices generally have the funding necessary to maintain manageable caseloads. David Rudovsky, Gideon *and the Effective Assistance of Counsel: The Rhetoric and the Reality*, 32 L. & Ineq. 371, 376 (2014).

and localities spend on criminal defense from a political question to a procedural one.[158]

Using the door left open by *Cronic* to find procedurally ineffective assistance of counsel when caseloads exceed the ABA maximums is just one of a slew of proposals to increase indigent defense funding.[159] It's one of few, however, that provides judges with a tool to create incentives for those funding increases, rather than relying on state legislatures to make better policy in a vacuum.[160] Empowering judges to do this is important. As Justice Brennan objected in *Wainwright v. Sykes*, "most courts, [the Supreme Court] included . . . have resisted any realistic inquiry into the competency of trial counsel."[161] As later decisions show, courts are starting to inquire.[162] Granting procedural ineffectiveness claims when defense attorneys have caseloads above the ABA maximums would give judges a tool to push back against a system that unfairly penalizes poor defendants for their inability to hire a private lawyer. It would be a step towards fulfilling the promises made by *Gideon v. Wainwright* and *Strickland v. Washington* and allow judges to take an active role in improving the quality of defense representation in their courtrooms.

158. *But see* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) (treating defense funding as a political question).

159. *See, e.g.*, EVE BRENSIKE PRIMUS, LITIGATION STRATEGIES FOR DEALING WITH THE INDIGENT DEFENSE CRISIS (2010), https://www.acslaw.org/files/Primus%20-%20Litigation%20Strategies.pdf [https://perma.cc/HJ7E-SZ6K] (proposing federal legislative initiatives to litigate systemic right to counsel violations); Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316 (2013) (arguing that integrating broader criminal justice reform principles into indigent defense reform will reaffirm *Gideon*'s constitutional value).

160. Another proposal that empowers judges is raising the burden of proof in criminal cases involving indigent defendants (making it harder to convict them). *See* Gershowitz, *supra* note 29.

161. 433 U.S. 72, 117 (1977) (Brennan, J., dissenting).

162. *See supra* Part III.