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# An Ethical Manifesto for Public Defenders

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# Lecture

## AN ETHICAL MANIFESTO FOR PUBLIC DEFENDERS†

Monroe H. Freedman\*

There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.<sup>1</sup>

The basic rule that must guide every lawyer is that the lawyer's total loyalty is due *each* client in *each* case.<sup>2</sup>

In 1961, Clarence Earl Gideon was charged by the State of Florida with the felony of entering a poolroom with the intent to commit a misdemeanor. At the beginning of his trial, Gideon asked for a lawyer to represent him, but his request was denied. Forced to conduct his own trial, Gideon was convicted and sentenced to five years in prison.

In response to Gideon's subsequent habeas corpus petition, the Supreme Court held that before a state can imprison an indigent person as a felon, due process requires that the state provide him with "the guiding hand of counsel at every step in the proceedings against him."<sup>3</sup> For without that guiding hand of counsel, the Court recognized, "though [the accused] be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."<sup>4</sup>

Anthony Lewis celebrated the decision in Gideon's case in his masterful book, *Gideon's Trumpet*. The celebration, however, was premature, because the constitutional ideal is too often betrayed by courtroom realities. As Stephen Bright, Director of the Southern Center for Human Rights has said, "No constitutional right is celebrated so

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† I use "Manifesto" in the dual sense of a declaration of fundamental principles and a call to action.

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<sup>1</sup> *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

<sup>2</sup> ABA Standards Relating to the Defense Function, 4-3.5, Commentary (emphasis added).

<sup>3</sup> *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (quoting *Powell v. Alabama*, 287 U.S. 45, 68 (1932)); see also *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972) (holding that counsel is constitutionally required in misdemeanor cases in which imprisonment is a possible sentence).

<sup>4</sup> *Gideon*, 372 U.S. at 345.

much in the abstract and observed so little in reality as the right to counsel."<sup>5</sup>

One way the states have purported to meet their constitutional obligation to provide counsel to poor people accused of crimes has been through court-appointed lawyers. However, the paltry compensation paid for these services has generally been inadequate to attract competent lawyers.<sup>6</sup> In addition, judges have too often selected court-appointed lawyers precisely because the lawyers are incompetent, and can be counted on to move the courts' calendars quickly by entering hasty guilty pleas in virtually all cases.<sup>7</sup> In those few cases in which the accused insists on his right to trial by jury, the trials typically move rapidly because the court-appointed lawyers generally file no motions, conduct no investigations, and do little to impede the speedy disposal of the case from charge, to guilty verdict, to imprisonment.<sup>8</sup>

For example, an extensive study under the auspices of NYU Law School's Center for Research in Crime and Justice found that New York's court-appointed lawyer system has failed to provide any semblance of effective assistance of counsel to indigent defendants.<sup>9</sup> The lawyers are paid on the basis of vouchers for the time spent on each case. There is therefore every incentive for the lawyers to record faithfully, if not to

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<sup>5</sup> Stephen B. Bright, *Gideon's Reality: After Four Decades, Where Are We?* CRIM. JUST. 5 (Summer, 2003); DEBORAH L. RHODE, *Presumed Guilty: Class Injustice in Criminal Justice*, in ACCESS TO JUSTICE (2004); Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169 (2003).

<sup>6</sup> Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1386-1388 (2004); RHODE, *supra* note 5, Ch. 6; Bright, *supra* note 5, at 5; The Spangenberg Group, *Rates of Compensation Paid to Court Appointed Counsel in Non-Felony Cases at Trial: A State-by-State Overview* (ABA, 2003); ABA, *Criminal Justice in Crisis: A Report to the American People and the American Bar on Criminal Justice in the United States: Some Myths, Some Realities, and Some questions for the Future* 5 (1988) [hereinafter ABA, *Criminal Justice in Crisis*]; ABA, *Gideon's Broken Promise: America's Quest for Equal Justice* (2004) [hereinafter *Gideon's Broken Promise*].

<sup>7</sup> Klein, *supra* note 6 *passim*. The study I am relying on was conducted in 1988, but nothing has changed. See Thomas F. Liotti, *Does Gideon Still Make a Difference?* 2 N.Y. CITY L. REV. 105 (1998); Editorial, *Poor Defendants, Poor Lawyers*, N.Y. TIMES Aug. 23, 2002.

<sup>8</sup> There are, of course, a minority of court-appointed lawyers who provide highly competent and zealous representation. One example is Abe Fortas, who was appointed by the Supreme Court to represent Clarence Gideon in his appeal. However, those lawyers are likely to be among those who recognize that the generality of court-appointed lawyers do not provide competent representation.

<sup>9</sup> See, e.g., Chester Mirsky & M. McConville, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581 (1987). This research was conducted in 1987, but there is no reason to believe that circumstances have changed—at least not for the better—since that time.

exaggerate, the time they have spent. Yet the vouchers reveal the following statistics:

#### Interviewing and counseling

No time recorded for interviewing and counseling the client in 75% of the homicide cases, or in 82% of other felony cases;<sup>10</sup>

#### Discovery

No time recorded for discovery in 92% of the homicide cases or in 93.6% of other felony cases;<sup>11</sup>

#### Investigation

No time recorded for investigations in 72.8% of the homicide cases or in 87.8% of other felonies;<sup>12</sup> and

#### Pre-Trial Motions

No time recorded for written pre-trial motions in 74.5% of the homicide cases or in 80.4% of other felonies;<sup>13</sup>

The same study nevertheless concluded that this system of court-appointed lawyers "must be understood as a success from the perspective of those who designed the system and now maintain it," that is, "to make the criminal law a more effective means for securing social control at minimal expense to the state and to the private bar . . . by compelling guilty pleas and by other non-trial dispositions."<sup>14</sup>

The other means of providing lawyers to poor people has been through public defender and legal aid offices.<sup>15</sup> There, the problem has been not so much the incompetence of the lawyers, but the fact that the offices typically are seriously underfunded. This has produced

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<sup>10</sup> *Id.* at 758.

<sup>11</sup> *Id.* at 761.

<sup>12</sup> *Id.* at 762.

<sup>13</sup> *Id.* at 767.

<sup>14</sup> *Id.* at 876-77, 902.

<sup>15</sup> Legal aid offices are private organizations that contract with the government to provide legal assistance to poor people; public defenders, like prosecutors, are funded directly by the government.

overloading of the individual lawyers with far more clients than any lawyer could competently represent.<sup>16</sup>

Prior to *Gideon*, for example, the New York City Legal Aid Society "pioneered a prosecutorial method of extracting guilty pleas."<sup>17</sup> After *Gideon*, the Society could no longer "explicitly support this non-adversarial model of criminal defense."<sup>18</sup> However, despite a series of unsuccessful strikes by Legal Aid lawyers attempting to improve the legal services being provided, the City and the Society have succeeded in forcing the lawyers to maintain, in most respects, the pre-*Gideon* style of non-adversarial representation.<sup>19</sup>

This wide-spread, chronic problem<sup>20</sup> has produced a serious, scholarly suggestion that public defenders engage in systematized triage. John B. Mitchell, a dedicated and experienced criminal defense lawyer and clinical law professor,<sup>21</sup> has proposed that we "redefine the Sixth Amendment" to allow public defenders to engage in triage, that is, to routinely decide which cases should receive full representation and which should receive only cursory attention.<sup>22</sup> Mitchell's article is particularly distressing because it is thoughtful, erudite, and well-written.

Mitchell begins with the depressing but undeniable reality that public defenders are already rationing their resources among clients, deciding which clients they will fight for and which clients will be denied effective assistance.<sup>23</sup> His concern is that these decisions are being made "randomly and haphazardly, if at all."<sup>24</sup> He proposes instead "an ethics of reality"<sup>25</sup> — what he claims to be "a coherent, ethical

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<sup>16</sup> "The entire criminal justice system is starved for resources." ABA, *Criminal Justice in Crisis*, *supra* note 6; ABA, *Gideon's Broken Promise*, *supra* note 6. The explicit reference is to both federal and state jurisdictions.

<sup>17</sup> Mirsky & McConville, *supra* note 9, at 894.

<sup>18</sup> *Id.* at 894 (emphasis added).

<sup>19</sup> *Id.* at 894-99.

<sup>20</sup> See *supra* note 9.

<sup>21</sup> Mitchell previously wrote one of the most important articles in the field of criminal justice. See John B. Mitchell, *The Ethics of the Criminal Defense Attorney — New Answers to Old Questions*, 32 STAN. L. REV. 293 (1980).

<sup>22</sup> John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215 (1994). Mitchell directs his argument to the representation of defendants in the lower criminal courts; as a practical matter, however, it applies no less to lawyers handling major felony cases.

<sup>23</sup> *Id.* at 1220.

<sup>24</sup> *Id.* at 1222.

<sup>25</sup> *Id.* at 1222 n.27.

approach" for deciding which clients will receive the lawyer's full representation ("focus") and which will receive perfunctory attention ("pattern representation").

As Mitchell defines these terms, focus representation "roughly approximates the effort one would expect from a good attorney with a reasonable caseload," while pattern representation means hastily categorizing cases factually and legally by reference to previous, apparently similar, cases.<sup>26</sup> As Mitchell acknowledges, "[w]ith the high volume of cases, [these] triage decisions must be made quickly, with relatively minimal information."<sup>27</sup>

Ironically, this description of pattern representation is strikingly similar to the inquisitorial system of judging, as criticized in an article written by Professor Lon Fuller and adopted by a Joint Conference of the ABA and the AALS.<sup>28</sup> As Fuller explained, the problem with an inquisitorial system is precisely the pattern approach by judges that Mitchell urges public defenders to adopt:

What generally occurs in practice is that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is waiting for the case, and without awaiting further proofs, this label is promptly assigned to it. It is a mistake to suppose that this premature cataloguing must necessarily result from impatience, prejudice or mental sloth. Often it proceeds from an understandable desire to bring the hearing into some order and coherence, for without some tentative theory of the case there is no standard of relevance by which testimony may be measured. But what starts as a preliminary diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention.<sup>29</sup>

Fuller concluded, therefore, that an adversary presentation by advocates on both sides seems "the only effective means for combatting

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<sup>26</sup> *Id.* at 1239.

<sup>27</sup> *Id.* at 1262.

<sup>28</sup> Lon L. Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 34 (1971); Joint Conference on Professional Responsibility, *Report*, 44 ABA J. 1159 (1958). For more on this subject, see FREEDMAN & SMITH, *UNDERSTANDING LAWYERS' ETHICS* §2.10 (2004).

<sup>29</sup> Fuller, *supra* note 28, at 34.

this natural human tendency to judge too swiftly in terms of the familiar that which is not yet known."<sup>30</sup>

Under Mitchell's proposal for pattern representation, there is, of course, no possibility of any adversary presentation at all, because it is the putative advocate herself who is called upon to "judge too swiftly in terms of the familiar that which is not yet known,"<sup>31</sup> or, as Mitchell says, to decide "quickly, with relatively minimal information."<sup>32</sup> In addition, what will be principally known to the lawyer will come from police reports, which can have a powerful influence on a decision that is being made hastily.<sup>33</sup> Moreover, the lawyers who will be making the pattern judgments will necessarily be affected by their own backgrounds and preconceptions, without the mitigating influence of fact investigation.

Indeed, Mitchell recognizes—but does not resolve—these difficulties in his article. For example:

[Mitchell] and a team of students represented a man accused of two assaults. He was physically powerful, minimally educated, and black. The students were slight, white, and educated. The prosecution offered what seemed to be a good deal and things looked bad in the police reports. The students wanted to have the client take the deal and were annoyed at his resistance. In discussions, they clearly thought he was a violent thug who was lucky to get the deal. The client in turn was angry and kept telling the students that they "weren't on his side." He was right. They had hardly even investigated.<sup>34</sup>

That is a typical illustration of how pattern representation works. In that case, however, the client actually got full, rather than pattern, representation, and the case took a markedly different turn:

When [the students did conduct fact investigation], the prosecution's case fell apart. More importantly, as they

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<sup>30</sup> *Id.*

<sup>31</sup> Mitchell, *supra* note 22, at 1262.

<sup>32</sup> *Id.* But see *Chandler v. Warden Fretag*, 348 U.S. 3, 10 (1954) (holding that if a defendant does not receive sufficient opportunity to consult with counsel, "the right to be heard by counsel would be of little worth").

<sup>33</sup> This aspect of the problem is illustrated from European practice in FREEDMAN & SMITH, *supra* note 28, at 31-32.

<sup>34</sup> Mitchell, *supra* note 22, at 1267.

got to know the client, they found him to be a man of great integrity and decency who was trying his best in the violent world in which he lived.<sup>35</sup>

In view of the insuperable difficulties of the precipitate judgments required by triage, Mitchell's proposed priorities for making triage decisions are unrealistic (and probably not dissimilar from the unsystematized decisions that are made in practice already, in both misdemeanor and felony cases). For example, his top priority would go to "the factually innocent."<sup>36</sup> However, the defendant in the illustration quoted above was factually innocent, but none of the defense lawyers believed he was innocent until after fact investigation had been conducted—an investigation that never would have happened under pattern representation. Moreover, as Mitchell also acknowledges, as soon as defendants learn the rules of triage, they will have a powerful incentive to provide information—inaccurate if necessary—that will buy them focus representation.<sup>37</sup>

How then does Mitchell justify pattern representation under the *Gideon* ideal of the Sixth Amendment? One answer is that he does not. As the title of his article makes clear, he is "Redefining the Sixth Amendment." Unfortunately, however, Mitchell also makes common cause with those judges who have already reduced the Sixth Amendment to constitutional hypocrisy. As he says:

In short, the Sixth Amendment does not require focus [*i.e.*, "the effort one would expect from a good attorney with a reasonable caseload"]. If it did, literally every lower court criminal system in the country would be constitutionally wanting. In practice, the Sixth Amendment stands as a symbol for the vague notion that representing accused criminals is not a bad thing, and serves as a check at the most extreme boundaries of attorney competence.<sup>38</sup>

Here Mitchell cites *Strickland v. Washington*.<sup>39</sup> In *Strickland*, the Supreme Court held that in order to be "ineffective" under the Sixth

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<sup>35</sup> *Id.* at 1267-68.

<sup>36</sup> *Id.* at 1288.

<sup>37</sup> *Id.* at 1265. Next in Mitchell's order of priorities for focus representation are those defendants facing extreme sentences or collateral legal consequences like deportation; cases involving systemic injustices, including important evidentiary and procedural issues; and cases involving "concrete injustice," which Mitchell defines vaguely as cases that "touch the heart and gut." *Id.* at 1289-1290.

<sup>38</sup> *Id.* at 1254.

<sup>39</sup> 466 U.S. 668 (1984).



Amendment, a lawyer must have fallen below “prevailing professional norms,” with a “*presumption* that counsel’s conduct falls within the *wide range* of reasonable professional assistance.”<sup>40</sup> Moreover, that presumption is a strong one, to which courts are directed to be “highly deferential.”<sup>41</sup>

Furthermore, under *Strickland*, even grossly incompetent lawyering is not enough to establish ineffective counsel. In addition, the lawyer’s incompetence must have caused “prejudice” to his client, meaning that there must be a “reasonable *probability* that, but for counsel’s unprofessional errors, the result of the proceeding *would* have been different.”<sup>42</sup> Thus, even a reasonable possibility that an innocent person might have been wrongly convicted because of his lawyer’s established incompetence is not enough to justify a new trial.

There is, of course, wide scholarly agreement that *Strickland* has neither discouraged incompetent representation nor prevented wrongful convictions.<sup>43</sup> Mitchell’s reliance on *Strickland*, reveals, therefore, how his promotion of triage encourages public defenders to prostitute the ideal of *Gideon v. Wainwright*.<sup>44</sup>

If triage, along with pattern representation, is an unethical response of public defenders to under-funding, overloading, and the resulting incompetent representation, what then is the ethical response? In order to answer that question, we should review the kind of representation that is required of lawyers by accepted professional disciplinary rules

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<sup>40</sup> *Id.* at 688-89 (emphasis added).

<sup>41</sup> *Id.* at 689-90.

<sup>42</sup> *Id.* at 694 (emphasis added).

<sup>43</sup> McFarland v. Scott, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting) (“Ten years after the articulation of [the *Strickland*] standard, practical experience establishes that the *Strickland* test, in application, has failed to protect a defendant’s right to be represented by something more than ‘a person who happens to be a lawyer.’”); *Strickland v. Washington*, 466 U.S. 668, 685 (1984); *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 930 n.37 (2003); Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 346 (2002) (“[A]ll who have seriously considered the question agree that *Strickland* has not worked either to prevent miscarriages of justice or to improve attorney performance.”); William S. Geimer, *A Decode of Strickland’s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 94 (1995) (“*Strickland* has been roundly and properly criticized for fostering tolerance of abysmal lawyering.”); Kim Taylor-Thompson, *Tuning Up Gideon’s Trumpet*, 71 FORDHAM L. REV. 1461, 1465 (2003) (“[T]he ruling has proved disabling to the right to effective assistance of counsel in practice.”).

<sup>44</sup> I use the word “prostitute” to signify the corrupt mocking of an ideal.

and standards.<sup>45</sup> And as these rules and standards are catalogued, we should keep in mind what “pattern representation” means for substantial numbers of hapless defendants—having their cases hastily labeled and plea-bargained out by their lawyers with virtually no fact investigation or legal research.<sup>46</sup>

In contrast to pattern representation, professional standards insist that in criminal litigation, as in all other matters, information is essential to a lawyer’s decisions and actions.<sup>47</sup> The lawyer who is ignorant of the facts of the case, therefore, cannot serve the client effectively.<sup>48</sup> Accordingly, defense counsel should conduct a prompt fact investigation, exploring all leads to evidence that might prove relevant to the case.<sup>49</sup>

This duty to conduct fact investigation is incumbent on the defense lawyer even when her client admits facts that appear to constitute guilt, and even though the client expresses a desire to plead guilty.<sup>50</sup> The reason is that the defendant’s belief that he is guilty may be based on misconceptions about the law or about what is in his own best interests,<sup>51</sup> and his admissions may not take into account relevant defenses, mitigating circumstances, rules of evidence, or constitutional issues.<sup>52</sup> For example, a woman charged with killing her husband assumed that she was guilty of murder because she was ignorant of the law relating to self-defense.<sup>53</sup> Only a lawyer who knows all of the relevant facts is in a position to make decisions relating to guilt, lesser offenses, or innocence. That decision, therefore, is the lawyer’s responsibility, not the client’s.

Under no circumstances, therefore, should defense counsel recommend to a defendant acceptance of a guilty plea unless appropriate investigation and study of the case has been completed, including an

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<sup>45</sup> In many instances in what follows, quotation marks have been omitted, and paraphrasing has been used, for the sake of readability.

<sup>46</sup> Mitchell, *supra* note 22, at 1262, 1293.

<sup>47</sup> ABA STANDARDS RELATING TO THE DEFENSE FUNCTION, Std. 4-3.2, Commentary [hereinafter DEFENSE FUNCTION].

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* Std. 4-4.1(a); *see also* MODEL RULES OF PROF’L CONDUCT R. 1.1, cmt. 5.

<sup>50</sup> DEFENSE FUNCTION Std. 4-4.1(a).

<sup>51</sup> It is not uncommon for an accused to be misinformed about the law and tactics by “jail-house lawyers.”

<sup>52</sup> *Id.* Std. 4-4.2, Commentary.

<sup>53</sup> *See* FREEDMAN & SMITH, *supra* note 28 at 160.

analysis of controlling law as well as the evidence that is likely to be introduced at trial.<sup>54</sup>

Moreover, the principles underlying the ABA's Model Rules require that the lawyer carry out these obligations zealously, in order to protect and pursue all of a client's legitimate interests.<sup>55</sup>

In order to allow zealous investigation and research, defense counsel is forbidden to carry a workload that interferes with this minimum standard of competence,<sup>56</sup> or one that might lead to the breach of other professional obligations.<sup>57</sup> "The basic rule . . . is that the lawyer's total loyalty is due to *each* client in *each* case."<sup>58</sup> This basic rule is violated whenever there is a significant *risk* that the lawyer's ability to consider, recommend or carry out an appropriate course of action for a client will be materially limited as a result of the lawyer's responsibilities to other clients.<sup>59</sup> Thus, whenever a lawyer accepts one too many clients—to say nothing of 20, 50, or several hundred too many clients—she is involved in a conflict of interest, because total loyalty cannot be given to each client in each case. What follows from that is that any new client who presents a conflict of interest "must be declined."<sup>60</sup>

Moreover, a lawyer is required to withdraw from a case if the representation will result in a violation of the rules of professional conduct or other law.<sup>61</sup> Indeed, if a lawyer finds that she has failed to provide effective representation, she is required to explain her failure of competence to the defendant and to seek to withdraw from the case,

<sup>54</sup> DEFENSE FUNCTION Std. 4-6.1(b); ABA STANDARDS RELATING TO PLEAS OF GUILTY Std. 14-3.2(b) [hereinafter PLEAS OF GUILTY].

<sup>55</sup> MODEL RULES OF PROF'L CONDUCT pmb. ¶ 9; *see also id.* ¶ 2; R 1.3, cmt. 1; DEFENSE FUNCTION Std. 4-1.2, Commentary; Std. 4-1.3, Commentary; Std. 4-3.5, Commentary; Std. 4-8.6, Commentary.

<sup>56</sup> *See* DEFENSE FUNCTION Std. 4-1.2; MODEL RULES OF PROF'L CONDUCT R. 1.1.

<sup>57</sup> DEFENSE FUNCTION Std. 4-1.3(e); MODEL RULES OF PROF'L CONDUCT R. 1.3, cmt. 2.

<sup>58</sup> DEFENSE FUNCTION Std. 4-3.5, Commentary (emphasis added).

<sup>59</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2); R. 1.7( b) 1; R. 1.7, cmt. 8; *see also*, FREEDMAN & SMITH, *supra* note 28, at 269-70.

<sup>60</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 3; *see also id.* R. 6.2 (stating that there is good cause to decline an appointment when the representation is likely to result in violation of the Rules of Professional Conduct or other law); *id.* R. 6.2, cmt. 2; and DEFENSE FUNCTION Std. 4-1.6 (stating that there is good cause to decline an appointment when the lawyer cannot handle the matter competently); *Iacona v. United States*, 343 F. Supp. 600, 604 (E.D. Pa., 1972).

<sup>61</sup> MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1); *see* State ex rel. Escambia County v. Behr, 354 So.2d 974 (Fla. App. 1st Dist. 1978); *Ligda v. Super. Ct.*, 85 Cal. Rptr. 744 (Cal. App. 1970); *State v. Smith*, 681 P.2d 1374 (Ariz. 1984).

with an explanation to the court of the reason for her motion for leave to withdraw.<sup>62</sup>

These professional rules and standards make it clear that pattern representation, in which the lawyer hastily categorizes cases on the basis of insufficient information, is professionally unacceptable. What then is the ethical alternative to responding to the reality of under-funding and overloading by some form of triage?

First, a lawyer who is assigned to represent a client in a criminal case, and who is unable to give competent and unconflicted representation to that client, is ethically required to decline the representation.<sup>63</sup>

Second, if the lawyer's supervisor nevertheless orders her to take the case, the supervisor has committed a serious ethical violation,<sup>64</sup> and the lawyer has an ethical obligation to report the supervisor's unethical conduct to the appropriate disciplinary authority.<sup>65</sup>

Third, the lawyer may be required under rules of the court, and therefore under ethical rules, to obtain permission of the court to decline the assignment.<sup>66</sup> However, it would be an ethical violation for a judge to order the lawyer to undertake a case in which the lawyer would necessarily be violating both the Sixth Amendment and fundamental ethical rules relating to competent representation.<sup>67</sup> The lawyer would therefore be required to report the judge's unethical conduct to the appropriate judicial disciplinary authority.<sup>68</sup>

Fourth, the lawyer would be required to put on the record in the case the fact that, because of commitments to other clients, the lawyer cannot give competent, conflict-free representation to the new client.<sup>69</sup> This would establish a violation of the Sixth Amendment, because the entry of

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<sup>62</sup> DEFENSE FUNCTION Std. 4-8.6(c).

<sup>63</sup> MODEL RULES OF PROF'L CONDUCT R 1.7(a)(2).

<sup>64</sup> *Id.* R. 5.1(c)(1).

<sup>65</sup> *Id.* R. 8.3(a).

<sup>66</sup> *Id.* R. 1.16(c).

<sup>67</sup> CODE OF JUDICIAL CONDUCT, Canon 3(B)(2) ("A judge shall be faithful to the law. . . ."); *Id.* Canon 3(B)(7) ("A judge shall accord to every person who has a legal interest in a proceeding . . . the right to be heard according to law."); *Id.* Canon 3(B)(8) cmt. ("A judge must demonstrate due regard for the rights of the parties to be heard. . . .").

<sup>68</sup> MODEL RULES OF PROF'L CONDUCT R. 8.3(b).

<sup>69</sup> See DEFENSE FUNCTION Std. 4-8.2(b), 8.6(c).

a guilty plea is a critical stage, regardless of whether the charge is a felony or a misdemeanor.<sup>70</sup>

Fifth, the lawyer would be required to inform the client of any plea offer from the prosecutor.<sup>71</sup> However, the lawyer would also be required to inform the client that her representation of the client cannot be performed competently<sup>72</sup> and, specifically, that she does not know enough about the case to give the client any legal advice.<sup>73</sup> Further, she would be forbidden to advise the client to accept the plea offer.<sup>74</sup>

Sixth, if the client chose to accept the plea offer, the lawyer would be required to put on the record that she has not advised the client with regard to the plea because to do so would violate her ethical obligations of competent and conflict-free representation.<sup>75</sup>

What would be accomplished if public defenders and other court-appointed lawyers did these things? They would establish compelling records of the extent to which the constitutional promise of *Gideon* is being broken. They would give individual clients grounds to attack their sentences directly<sup>76</sup> and collaterally.<sup>77</sup> They would establish the basis for class actions on behalf of their clients and other defendants who have similarly been denied the right to counsel. They would provide the news media with dramatic source material for informing the public about the failures of the administration of criminal justice. And they would make it more difficult for society and for the established bar to continue to deny due process and the effective assistance of counsel to indigent criminal defendants.

The purpose of this article, however, is not pragmatic or tactical. Entirely apart from consequentialist justifications, public defenders who took these steps would be doing nothing more or less than complying with their ethical obligations to their clients and to the administration of

<sup>70</sup> *Iowa v. Tovar*, 541 U.S. 77, 124 S.Ct. 1379, 1383, 1387 (2004).

<sup>71</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4; PLEAS OF GUILTY Std. 14-3.2(a).

<sup>72</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4; DEFENSE FUNCTION Std. 4-3.5(b).

<sup>73</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4.

<sup>74</sup> DEFENSE FUNCTION Std. 4-6.1(b); PLEAS OF GUILTY Std. 14-3.2(b).

<sup>75</sup> See DEFENSE FUNCTION Std. 4-8.2(b), 8.6(c).

<sup>76</sup> *Johnson v. United States*, 520 U.S. 461, 468-469 (1997) (noting that a total deprivation of counsel is a structural violation requiring reversal without harmless error analysis).

<sup>77</sup> See, e.g., *Kowalski v. Tesmer*, 125 S. Ct. 564, 568-69, 574 (2004), where the Supreme Court was unanimous in recognizing that criminal defendants who plead guilty without the benefit of counsel have the right to challenge their sentences and (at least after exhausting state remedies) to seek injunctions against the practice under 42 U.S.C. § 1983; see also *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

justice.<sup>78</sup> Even more important, by honoring their ethical obligations, public defenders would cease to be an essential part of a fraudulent cover-up of the denial of fundamental rights to countless poor people who are caught up in a criminal justice system that is unethical, unconstitutional, and intolerably cruel.<sup>79</sup>

Forty years of constitutional and ethical hypocrisy is enough.

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<sup>78</sup> “[A] lawyer should seek improvement of . . . the administration of justice and the quality of service rendered by the legal profession.” MODEL RULES OF PROF’L CONDUCT, pmb., ¶ 6.

<sup>79</sup> The principal objection to the suggestion that public defenders obey their ethical obligations, is that they would jeopardize their jobs. The concern has basis in fact. *See, e.g.*, Monroe H. Freedman, *Third World Justice*, LEGAL TIMES (Feb. 11, 1991). There are three responses to that objection. One is that earning a living for oneself and one’s family is indeed a moral responsibility. A second response, however, is that being a professional means putting your professional responsibilities, to your clients and to the administration of justice, above your own financial concerns. The third answer is that if you were to suggest to a prostitute that his or her lifestyle is illegal, immoral, and degrading, the answer would be, “I have to earn a living.” Unless the prostitute is spreading diseases, the same answer from a public defender is less deserving of sympathy, because the defender who is giving ineffective representation is causing a great deal more serious harm to other people than is the ordinary prostitute. This is a harsh indictment, so I should admit to complicity. As a law professor, with full knowledge of the pervasive ethical violations in public defender and legal aid offices, I have encouraged students to join those offices as “public interest” work.

