IS IT POSSIBLE TO BE AN ETHICAL PUBLIC DEFENDER?

RAYZA B. GOLDSMITH[∞]

ABSTRACT

The notion that there exists a crisis of public defense is not controversial. While much of the analysis has ended with the dire need for greater funding of public defense systems, this paper argues that the role of public defenders is misunderstood by the rules that guide their ethical conduct. While the American Bar Association's Model Rules, Defense Function and Prosecutor Function may not be enforceable by the courts, they serve as an important starting point in understanding the ways in which the profession views the function of public defenders. And yet, the rules contradict one another, they conflict with the more widely enforceable constitutional standards that govern adequate counsel in criminal cases, and they ignore the functional realities of practicing criminal law, including poor funding. This paper explores the shortcomings in the rules and argues that the rules can, and should, be modified for the benefit of public defenders and the clients they serve. Though the rules do not create black letter law for public defenders to follow, they reflect the conception of the role of public defenders in the criminal justice system, and a reimagining would serve as a helpful exercise in shaping a more ideal environment to nurture a thriving system of public defense.

[∞] Rayza Goldsmith, J.D., New York University School of Law 2018, is a public defender in New Jersey. Thank you to the editorial staff of the *N.Y.U. Review of Law & Social Change*, particularly Gina Bull, Efosa Akenzua, Hana Alicic and Nicolas Shump, for their tireless effort to make this piece the best it could be. I am grateful to Professor Erin Murphy for her wisdom and guidance at the early stages of this piece.

INTRODUCTION

Scholars have spent decades analyzing the effect of *Gideon v. Wainwright*,[1] describing the case in dramatic detail in their introductions only to demonstrate the countless limitations of the right to counsel in criminal cases in the United States.[2] A consensus of defense-minded commentators would also agree that the rights afforded criminal defendants under the Sixth Amendment are wanting, in large part due to the inability of defense attorneys, particularly public defenders, to provide adequate defense. A lack of resources is largely to blame.[3] Funding for public defender offices is of dire concern, but this paper argues that the so-called crisis of public defense goes beyond insufficient funding. The role of the defense

1. 372 U.S. 335 (1963).

2. *See, e.g.*, Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 Yale L.J. 2236 (2013); Colleen Cullen, *Mo' Money, Fewer Problems: Examining the Effects of Inadequate Funding on Client Outcomes*, 30 Geo. J. Legal Ethics 675 (2017) [hereinafter *Mo' Money, Fewer Problems*]; Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an* Ex Ante *Parity Standard*, 88 J. Crim. L. & Criminology 242 (1997) [hereinafter *The Case for an* Ex Ante *Parity Standard*]; L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 Yale L.J. 2626 (2013); Anthony C. Thompson, *The Promise of* Gideon: *Providing High-Quality Public Defense in America*, 31 Quinnipiac L. Rev. 713 (2013); Ellen C. Yaroshefsky, *Duty of Outrage*: *The Defense Lawyer's Obligation to Speak Truth to Power to the Prosecutor and the Court When the Criminal Justice System is Unjust*, 44 Hofstra L. Rev. 1207, 1207 (2016) [hereinafter Duty of Outrage].

3. *Mo' Money, Fewer Problems*, *supra* note 2, at 677.

attorney is not adequately conceived of or appreciated in the legal profession, despite its critical role in the American justice system. This failure is no more evident than in the American Bar Association's ("ABA") ethical guidelines, including the *ABA Model Rules of Professional Conduct* ("Model Rules")[4] and the *ABA Standards for Criminal Justice: Defense Function* ("Defense Function").[5]

It is nearly impossible for public defenders, and perhaps defense attorneys more generally, to function "ethically" under the ABA rules. The rules themselves, failing to account for the demands of defense work, provide conflicting instructions to defense counsel on what constitutes an ethical defense. Moreover, facially, these unenforceable ABA rules demand more from defense counsel than do constitutional standards of adequate defense. But because the rules cannot stand up to the realities of the criminal defense landscape, state ethical rules, enacted largely based on the ABA's promulgated standards, provide far fewer protections against unethical attorney conduct than the Constitution theoretically could—particularly because enforcement of ethical standards is done outside of the ordinary judicial process.[6]

What results is a set of rules that fails to adequately guide the practice of ethical defense. This paper will argue that the contradictions inherent to the rules, as well as their general lack of enforceability and bite, reflect a failure of our justice system to shape the role of public defenders. The argument proceeds in four parts: Part I highlights some of the most pressing contradictions among the Model Rules, Defense Function, and the *ABA Standards for the Criminal Justice: Prosecution Function* ("Prosecution Function").[7] Part II provides a non-exhaustive explanation of the contradictions and inadequacies among the ABA's ethical rules and the constitutional standards as they have been developed by the Supreme Court. Part III discusses the legal landscape of criminal defense, and the rules' failure to account for critical realities such as inadequate funding and implicit bias. Finally, in Part IV, I assess what these inconsistencies mean for the role of the public defender in the criminal justice system, and how to correct the most pressing contradictions to improve defense practice for clients and more accurately and fully signal the role of the defense function in the system.

The ethical rules' failure to adequately define and guide the role of public defenders in the American criminal justice system is important. Clearer, more realistic rules are necessary to equip public defenders with the resources they need to best serve their clients. Such rules would provide a critical framework for measuring the limitations on what public defenders can and should do in the service of

4. MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2016) [hereinafter MODEL RULES].

5. CRIMINAL JUSTICE STANDARDS FOR THE DEF. FUNCTION (AM. BAR ASS'N 2015) [hereinafter DEF. FUNCTION].

6. *See* MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT r. 10 (AM. BAR ASS'N 2017).

7. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION (AM. BAR ASS'N 2015) [hereinafter PROSECUTION FUNCTION].

clients. Ethical rules are necessary to promote important consideration of and conversation about the best way to handle tough situations in an incredibly difficult job. The rules are important, even if oft ignored, and deserve a rethinking and reconsideration in order to bring them in step with themselves, the Constitution, and the context to which they are applied.

A quick final note that this piece is meant to be more practical than historical, and thus will limit analysis to current ethical doctrine. It also focuses solely on the ABA Model Rules, the Defense Function, and, briefly, the Prosecution Function.

I.
THE ETHICAL RULES ARE SELF-CONTRADICTORY

A. The Classic Case: The Trilemma

The idea that the Model Rules, the Defense Function, and other ethical rules contradict each other is not a new one. Monroe H. Freedman, considered the "founder of legal ethics as an academic field,"[8] first identified the trilemma faced by defense attorneys counseling clients.[9] The trilemma, as defined by Freedman, "refers to three ethical obligations bearing on lawyer-client confidentiality, all of which a lawyer cannot simultaneously obey when faced with client perjury."[10] These ethical requirements include: (1) the duty to investigate;[11] (2) the duty to inform the client of the lawyer's obligation to keep communications confidential;[12] and (3) the lawyer's duty to reveal confidential information to the court if they know the client committed perjury[13] (or the duty of candor).

It is not possible for a defense attorney to comply with each of these requirements.[14] Instead, the trilemma presents a defense attorney with the following options:

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8. Matt Schudel, *Monroe H. Freedman, Scholar of Legal Ethics and Civil Liberties, Dies at 86*, WASH. POST (Feb. 28, 2015) (quoting Prof. Abbe Smith), https://www.washingtonpost.com/national/monroe-h-freedman-scholar-of-legal-ethics-and-civil-liberties-dies-at 86/2015/02/28/9e9c562a-beb3-11e4-8668-4e7ba8439ca6_story.html?utm_term=.d9a0942323c9 [https://perma.cc/PU6X-BLSX]; *see also* Elkan Abramowitz & Sean Nuttall, *Ethics in Criminal Defense: The Continued Relevance of Monroe Freedman*, *in Understanding Ethics in Criminal Defense*, INSIDE THE MINDS 67 (Aspatore 2015), Westlaw 7299819.

9. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1469 (1966) [hereinafter *Three Hardest Questions*].

10. Monroe H. Freedman, *Lawyer-Client Confidentiality: Rethinking the Trilemma*, 43 HOFSTRA L. REV. 1025, 1025 (2015) [hereinafter *Rethinking the Trilemma*].

11. DEF. FUNCTION 4-4.1; MODEL RULES r. 1.1 cmt. 5 ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.").

12. MODEL RULES. r. 1.6(a).

13. MODEL RULES r. 3.3(a)(3).

14. *See* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 155 (5th ed. 2016) [hereinafter UNDERSTANDING LAWYERS' ETHICS] ("A moment's reflection makes it clear that a lawyer cannot do all of those things—know everything, keep it in confidence, and reveal it to

> If we forgo the first duty (seeking all relevant information), we would be adopting the model of intentional ignorance.[15] If we sacrifice the second duty (maintaining confidentiality), clients would quickly learn that their lawyers could not be trusted and would withhold damaging information; again, the result is intentional ignorance. Only by limiting the third duty —by allowing lawyers to be less than candid with the court when necessary to protect clients' confidences—can we maintain the traditional lawyer-client model.[16]

In other words, an attorney who chooses to investigate and remind the client that communications are confidential fails to adhere to the duty of candor; however, an attorney who chooses not to investigate and thus does not know whether the client is committing or has committed perjury does not fail the duty of candor, but has lapsed in their obligation to investigate thoroughly.[17] The trilemma could potentially present itself in other scenarios beyond client perjury. For example, an attorney who believes their client, unbeknownst to the court, is a fugitive from another state will be tasked with deciding whether to ask their client if they are in fact a fugitive, conduct an investigation, or inform the court. This scenario is likely to present itself if a court asks an attorney if a client has any outstanding warrants.

The trilemma is a clear and well-known example of how it is not possible to simultaneously abide by every ethical rule. The ABA recognizes this problem and has found lawyer-client confidentiality can trump candor to the court.[18] However, it is unclear if the ABA would go so far as to condone lying, or if it merely accepts withholding of information from the court.[19] As a result, this acknowledgment fails to resolve the trilemma. Even if it does condone withholding information from the court, it is unlikely the ABA would permit lying to the court merely to salvage attorney-client confidentiality.

The ABA also disapproves of intentional ignorance, but nonetheless permits it based on the structure of the Model Rules.[20] Returning to the above example,

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the court over the client's objections. To resolve this trilemma, therefore, one of the three duties must give way.").

15. *See id.* at 153 ("[T]he lawyer puts the client on notice that the lawyer would prefer not to know certain kinds of facts and/or that the lawyer can be expected to pass on to the judge or the other party information that the client would prefer to keep confidential").

16. *Id.* at 155.

17. *Rethinking the Trilemma*, *supra* note 10, at 1026 ("My view is that the lawyer cannot give effective assistance of counsel without knowing as much as possible about a client's case, that clients will frequently withhold critical information from the lawyer unless the lawyer promises confidentiality, and that the lawyer should not then violate her promise of confidentiality if the client testifies perjuriously.").

18. *Id.* at 1024 (citing UNDERSTANDING LAWYERS' ETHICS, *supra* note 14, at 185–86).

19. *When Is It Okay for a Lawyer to Lie?*, ABA AROUND THE ABA, (Dec. 2018), https://www.americanbar.org/news/abanews/publications/youraba/2018/december-2018/when-is-it-okay-for-a-lawyer-to-lie—/ [https://perma.cc/ZW4B-YSYU].

20. UNDERSTANDING LAWYERS' ETHICS, *supra* note 14, at 154–55, 169.

the ABA might begrudgingly permit a lawyer to refrain from asking their client about an out-of-state warrant to avoid the need to lie to the court. This is particularly contradictory, given that the Defense Function identifies a duty to investigate;[21] fulfilling this duty would render intentional ignorance impossible. Faced with these contradictions, Freedman and Abbe Smith unabashedly advocate in favor of attorneys presenting testimony they know to be false when faced with the trilemma.[22]

While the trilemma is a prominent example of conflict among the Model Rules and other ethical guidelines, there are many other less-explored conflicts. This paper will go on to identify additional weaknesses and contradictions.

B. The Rule Requiring Zealous Advocacy

Though today its only appearance in the Model Rules is found in the comments to Model Rule 1.3, zealous advocacy is an important legal tenet and among the most important rules governing ethical lawyer conduct.[23] The "ethic of zeal is a 'traditional aspiration' that was already established in Abraham Lincoln's day, and continues today to be 'the fundamental principle of the law of lawyering' and 'the dominant standard of lawyerly excellence.'"[24] Of course, zealousness is limited or constrained by other ethical rules, as well as the law.[25] But what happens when the other rules are so constraining as to make zeal impossible to effectuate? This section will argue that a number of ethical rules do not merely limit zealous advocacy but transform it from a standard to an unattainable ideal.

Before identifying those ethical rules that conflict with the duty of zealous advocacy, it is important to understand what is meant by zealousness. Looking first to the rules, zeal appears in the comments to Model Rule 1.3 on diligence .[26] The rule is sparse, but the comments on the meaning of diligence shed some light on what is meant by zeal. First, a lawyer "should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer,

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21. DEFENSE FUNCTION 4-4.1(a) ("Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges").

22. UNDERSTANDING LAWYERS' ETHICS, *supra* note 14, at 153.

23. *See* UNDERSTANDING LAWYERS' ETHICS, *supra* note 14, at 71 ("The ethic of zeal is pervasive in lawyers' professional responsibilities because it informs all of the lawyer's other ethical obligations").

24. *Id.* at 67 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. D (2000); CHARLES WOLFRAM, MODERN LEGAL ETHICS 578 n. 73 (1986) (internal citations omitted); L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909 (1980); Monroe Freedman, *Abraham Lincoln—Lawyer for the Twenty-First Century?*, LEGAL TIMES, Feb.12, 1996, at 26)).

25. MODEL RULES pmbl. & scope cmt. 9 ("These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."); *see also* Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 672 (1978).

26. MODEL RULES r. 1.3 cmt. 1 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."[27] Furthermore, a lawyer "must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client."[28] Notably for our purposes, the comments also prescribe that "[a] lawyer's work load must be controlled so that each matter can be handled competently."[29] Though more descriptive than the rule, the comments are not particularly helpful in defining what is meant by "commitment and dedication" and "zeal."

Scholars disagree on zeal's definition and how it applies to the representation of clients, specifically criminal defendants. The famous words of Lord Henry Brougham are oft cited[30] in conversations about zealous advocacy:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.[31]

Anita Bernstein, borrowing from Sylvia Stevens' two-part definition, explains that zeal is comprised of two themes: what Bernstein calls "partisan commitment," defined as "commitment to one side (rather than to a neutral search for truth)," and "passion."[32]

Commentators also suggest how zealous advocacy should appear in practice. For example, what must an attorney do in the case of an elderly Black client charged with driving under the influence who has cancelled several appointments to meet because of responsibilities at home?[33] Michelle S. Jacobs asserts that the Model Rules are ambiguous, but that zealous advocacy requires the attorney to visit the client at home. According to her rationale:

> [If] the client is a corporate executive with a busy schedule, none of us would find it unusual or extraordinary for the lawyer to go to the client's office to accommodate the corporate client's schedule. Yet, with an indigent client, the initial reaction would be to

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27. *Id.* cmt. 1.

28. *Id.*

29. *Id.* cmt. 2.

30. *See, e.g.*, Monroe H. Freedman, *In Praise of Overzealous Representation – Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct,* 34 Hofstra L. Rev. 771, 771 (2006) [hereinafter *In Praise of Overzealous Representation*]; Brooks Holland, *Anticipatory Self-Defense Claims as a Lens for Reexamining Zealous Advocacy and Anti-Bias Disciplinary Norms*, 49 Tex Tech L. Rev. 89, 105 (2016).

31. 2 TRIAL OF QUEEN CAROLINE 3 (1821).

32. Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165, 1170–75 (2006).

33. Michelle S. Jacobs, *Legal Professionalism: Do Ethical Rules Require Zealous Representation for Poor People*, 8 ST. THOMAS L. REV. 97, 99 (1995).

> dismiss the notion of a visit to the client as being impractical and inappropriate.[34]

While there is no clear definition of zealous advocacy, nor its application, defense-minded commentators indicate that devotion to the client can require action that jeopardizes compliance with other ethical rules,[35] or at least going above and beyond expectations.[36] Despite the lack of definitional clarity, it is apparent from its placement in the Model Rules that zeal entails a baseline compliance with the duty of diligence, including dedication to the client and a manageable workload. With this general understanding of "zeal," we turn to some of the contradictions between zeal and other ethical obligations imposed by the rules.

1. Duty of Candor

The duty of zealous advocacy clearly conflicts with the attorney's duty of candor to the court. The trilemma highlights the difficulty in complying with the duty of candor in addition to other ethical rules. Beyond Model Rule 3.3's bar on offering false evidence or testimony, the duty of candor provides that "[a] lawyer shall not knowingly: make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."

Admittedly, the Defense Function acknowledges the unique role defense attorneys play in the criminal justice system, and thus tempers their duty of candor to the tribunal.[37] Standard 4-1.4(a) states, in part: "defense counsel's duty of candor may be tempered by competing ethical and constitutional obligations. Defense counsel must act zealously within the bounds of the law and applicable rules to protect the client's confidences and the unique liberty interests that are at stake in criminal prosecution."[38] That language is of little help in resolving potential conflicts among various ethical rules and the duty of candor. It is unclear what additional leeway the Standard allows defense attorneys, given that they are still confined to all other applicable rules. Standard 4-1.4(b) goes on to clarify that:

> Defense counsel should not knowingly make a false statement of fact or law or offer false evidence, to a court, lawyer, witnesses, or third party. It is not a false statement for defense counsel to suggest inferences that may reasonably be drawn from the evi-

34. *Id.*

35. *In Praise of Overzealous Representation* at 772 ("Yet there are circumstances in which zealous representation, which embraces the ethical requirements of competence and confidentiality, can require a lawyer to make a false statement to a court or to a third person, or to engage in other conduct involving dishonesty, fraud, deceit, or misrepresentation.").

36. *See id.* (defining zealous representation as "entire devotion to the interests of the client," devotion which can even justify violating other ethical rules in its service).

37. DEF. FUNCTION 4-1.4.

38. *Id.*

> dence. In addition, while acting to accommodate legitimate confidentiality, privilege, or other defense concerns, defense counsel should correct a defense representation of material fact or law that defense counsel knows is, or later learns was, false.[39]

Standard 4-1.4, taken as a whole, essentially allows for false inferences made by defense counsel in service of a legitimate defense, but not much else. Defense counsel still must avoid making knowingly false statements to the tribunal and is still required to correct false representations of material fact.

The rules appear to caution against defense counsel making false statements to the court in any context outside of a "legitimate" defense.[40] But a defender working zealously to protect a client's interests might not want to reveal information to the tribunal, even if not in the service of a "legitimate" defense. Would a zealous defender reveal to the tribunal that their client lied to the police about their name? Would they conceal a client's out-of-state record where the tribunal and prosecution mistakenly believe the client does not have previous convictions? These falsehoods do not necessarily contribute to a "legitimate" defense, but revealing them to the court could nonetheless be incriminating, or otherwise prove detrimental to the client. It is unclear what zeal means in such a context: does zealous advocacy truly require a defense attorney to withhold such information from the tribunal? What does the duty of candor require?

Despite Standard 4-1.4, defense attorneys are in practice held to a high standard of candor to the tribunal, leading to conflicts with zealous advocacy. In one particularly stark example, Monroe Freedman raises the practice of certain judges asking defense counsel, in an effort to speed up adjudication of criminal cases, "Come on, let's move this along. Did he do it or didn't he?"[41] As Freedman explains, much of the time, the honest reply would be, "yes, my client is guilty."[42] That response clearly satisfies the duty of candor, which illustrates how the duty can require[43] counsel to betray the client's confidences and jeopardize their case.

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39. *Id.*

40. There is no clear definition of "legitimate" defense. However, intuitively, it would seem to apply to both justification defenses and defenses that negate an element of the offense. But even that line is murky, as evidenced by the discussion below. For example, a broad definition of "legitimate" defense would include any statement made to the tribunal in the service of the client's interests. A narrower definition might only include statements that serve a legal defense, but exclude statements made that merely make a client look better in the eyes of the court. A narrow definition may not include a defense attorney answering "I do not know" when asked where a client is, when the attorney actually knows that the client left the state without permission and may or may not return. Thus, how "legitimate" defense is defined, and by whom, can have a significant impact on what actually constitutes an acceptable false statement, and by extension what constitutes ethical conduct by a defense attorney.

41. *In Praise of Overzealous Representation*, *supra* note 30, at 773.

42. *Id.*

43. MODEL RULES r. 3.3, cmt. at 2 (elucidating the extent to which an attorney may mislead under Model Rule 3.3: "Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that

Freedman's example may seem far-fetched, but it is easy to imagine this scenario playing out in a judge's chambers, even if not on the record.[44] More common is a subtler version of the same question: "well, what does your client have to say about this?" A defender may not want to answer that question candidly if it is against the interests of their client to do so.

The duty of candor, taken to its logical extreme, commands defense attorneys to eschew "zealous advocacy." Even if the definitions of zeal and candor are uncertain, these requirements are in tension with one another, and over the course of their careers representing clients in criminal cases, many lawyers will be required to choose between the two. An attorney who always chooses candor, regardless of the stakes, may not be effectively zealous. And an attorney who always chooses zeal might violate the duty of candor to such a degree that it erodes the tribunal's confidence in the attorney's trustworthiness.[45] This outcome is particularly worrisome given the common perception that lawyers, including public defenders, are dishonest.[46] Neither extreme is therefore preferable. Candor and zeal both have a role to play in the defense of clients, but without greater context or exploration of their meaning, the rules present them in tension with one another, and fail to provide adequate guidance to defense attorneys seeking to abide by the ethical rules and best represent their clients. Indeed, these duties naturally confuse the defense attorney's understanding of their responsibilities under the rules.

2. Duty of Loyalty

The ABA Standards specify that defense attorneys owe a "duty of loyalty"[47] to their clients. Formerly, the Defense Function contained commentary explaining that "[t]he basic rule that must guide every lawyer is that the lawyer's total loyalty is due each client in each case; the lawyer must never permit the pressing of one

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the lawyer knows to be false.").

44. I have had this scenario play out in my own practice. For example, I represented a client who was released from custody into an inpatient drug program. A violation of the program's rules could have resulted in the client being sent back to state prison. After the client was released to the program, but before the terms of his probation could be solidified, he was removed from the program. While discussing the terms of his probation in chambers with the judge, the judge jokingly asked me whether my client had been kicked out of the program. "Yes" would have been the most truthful answer, but also the most harmful to my client, who had already been accepted to another drug treatment program and was on the waitlist for a third. The judge's question, which unlike in Freedman's example was actually quite appropriate, clearly put the duty of candor and duty of zealous advocacy and confidentiality at odds with one another.

45. For example, a lawyer who is known to judges as honest might be more believed in accusing a prosecutor of a *Brady* violation. That lawyer may be more likely to succeed on motions filed to remedy the violation. A lawyer known for making fatuous or even false claims about clients' innocence may be disbelieved even when telling the truth about a client's innocence.

46. This perception exists among public defender clients as well as the public more generally. *See, e.g.*, Jay Sterling Silver, *Professionalism and the Hidden Assault on the Adversarial Process*, 55 OHIO ST. L.J. 855, 876 (1994); Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 184 (1983).

47. DEF. FUNCTION 4-1.3(b).

point or one case to be guided or influenced by the demands of another case."[48] There is no reason to believe that definition has changed for the Defense Function's latest edition.[49] The meaning of the duty of loyalty is enhanced by Standard 4-1.7(b) governing conflicts of interest. It holds that "[d]efense counsel should not permit their professional judgment or obligations regarding the representation of a client to be adversely affected by loyalties or obligations to other, former, or potential clients." Taking the Model Rules and Defense Function together, there is a strong sense that loyalty to the client is a rudimentary, and fundamentally important, duty of defense counsel. Moreover, lawyers whose loyalties and obligations to one client interfere with commitments to another are faced with a "conflict of interest" under the Standard.[50]

Defense attorneys, and public defenders in particular, represent many, sometimes excessive numbers of, clients simultaneously and over the course of a career.[51] Public defender caseloads are often much higher than those of other defense lawyers.[52] If it is indeed the case that loyalties or obligations to other clients can constitute a conflict of interest, public defenders are in grave danger of violating the duty against conflicts of interest.[53] They are inevitably faced with loyalties and obligations to numerous clients at the same time. For example, if the duty of zealous advocacy entails finding time to visit a sickly client's home to discuss the case, as Jacobs might instruct, or requires "entire devotion to the interests of the client," as Freedman explains, then it might be hard to be both zealous and entirely loyal to every single client.[54] A defender cannot go to a client's home each time their child is home sick or they do not have access to a ride. There is simply not enough time in the day.

A duty of loyalty that prohibits defense counsel from allowing "their profes-

48. DEF. FUNCTION 4-3.5, cmt. (3d ed. 1993); *see also* Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 Val. U. L. Rev. 911, 920–21 (2005) [hereinafter *Ethical Manifesto*] ("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.").

49. The 2015 edition of the Defense Function was published without commentary. According to the ABA, "work is underway" to add commentary. *Defense Function*, AM. BAR ASS'N., https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition-TableofContents.html [https://perma.cc/NK7A-7G2A] (last visited Apr. 17, 2018).

50. *See Ethical Manifesto*, *supra* note 48, at 920.

51. *See infra* Section IV.A.

52. *E.g.*, Erik Eckholm, *Public Defenders, Bolstered by a Work Analysis and Rulings, Push Back Against a Tide of Cases*, N.Y. TIMES (Feb. 18, 2014), https://www.nytimes.com/2014/02/19/us/public-defenders-turn-to-lawmakers-to-try-to-ease-caseloads.html [https://perma.cc/X9BH-RHQV].

53. *See, e.g.*, Heidi Reamer Anderson, *Funding* Gideon*'s Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest*, 39 HASTINGS CONST. L.Q. 421 (2012).

54. *See* Jacobs, *supra* note 33, at 97; *In Praise of Overzealous Representation*, *supra* note 30, at 773.

sional judgment or obligations regarding the representation of a client to be adversely affected by loyalties or obligations to other, former, or potential clients"[55] is admirable. It seeks to ensure that defense attorneys are singularly focused on a given client as they work on their behalf. But a duty that strong is hard to achieve when attorneys invariably represent more than one client and are also instructed to work zealously on behalf of each one. Never mind that public defenders often represent hundreds of clients at the same time, not just one or two.[56] It is hard to understand how a public defender could possibly act loyally and zealously on behalf of every client when they are representing one hundred at a time, all of whom require varying degrees of attention. In that regard, the duty of loyalty and the duty of zeal convey opaque messages to defense attorneys as to their actual obligations to each client in light of their responsibilities to numerous clients. Evidently, a strong duty of loyalty—one that goes so far as to interpret conflicting obligations as conflicts of interests—poses a problem when paired with the duty of zealous advocacy.

3. Withdrawal

A discussion of zealous representation merits at least quick reference to the rules governing withdrawal. Under the Model Rules, a lawyer is ethically required to withdraw from representation that "will result in the violation of the rules of professional conduct or any other law."[57] Moreover, "[a] lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion."[58] The clear inference from the rules[59] is that failure to comply with those rules, including zeal, candor, and loyalty, should be dealt with through withdrawal. And yet, withdrawal in every case is impractical and counterproductive. The rules do not contemplate *how* to determine whether withdrawal is necessary, *when* to withdraw, or *how* compromised the attorney should be before moving forward with withdrawal. There are often financial incentives for contract public defense agencies to refrain from

55. DEF. FUNCTION 4-1.7(b).

56. *See, e.g.*, NAT'L RIGHT TO COUNSEL COMM'N, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 7 (2009), http://constitutionproject.org/wp-content/uploads/2012/10/139.pdf [https://perma.cc/45TS-VS8R] ("Undoubtedly, the most visible sign of inadequate funding is attorneys attempting to provide defense services while carrying astonishingly large caseloads . . . Sometimes the defenders have well over 100 clients at a time, with many clients charged with serious offenses, and their cases moving quickly through the court system."); *see also* Richardson & Goff, *supra* note 2, at 2631 ("Defender offices are chronically underfunded, resulting in crushing caseloads.").

57. MODEL RULES r.1.16.

58. *Id.* cmt. 1.

59. The Defense Function provides little guidance as to what poses a non-waivable conflict, but explains that where a non-waivable conflict requiring withdrawal exists, "defense counsel should decline to proceed further, or take only minimal actions necessary to protect the client's interests . . ." DEF. FUNCTION 4-1.7(a).

withdrawing.[60] Moreover, there may be unintended consequences if withdrawal is pursued.[61]

In other words, because the withdrawal rule is toothless, it does not adequately remedy the failures of the other rules to provide meaningful standards. Withdrawal is presented as a solution to some of the problems contemplated by the Model Rules. But if the Model Rules and the Defense Function lack force, and public defenders and defense attorneys more broadly are not living up to the rules' standards, is withdrawal truly a solution? Withdrawal is in tension with the other rules where it exists as an unsatisfactory, and yet singular, form of relief for overburdened attorneys and underrepresented clients.

C. Defense and Prosecution Parity

The ethical rules' texts do not always distinguish between the prosecution role and the defense role. In fact, the ABA has established that parity between defenders and prosecutors under the rules is a worthwhile effort. The Ten Principles dictate as black letter that "[t]here is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner

60. "Indigent defense contracts that require the contracting attorney to pay conflict counsel are not uncommon . . . As discussed in Section III.C.1, this type of contract creates a financial disincentive for the contracting attorney to acknowledge a conflict of interest and seek withdrawal. Since conflict lawyers are paid out of the lump sum of money received by the contracting attorney, the contract penalizes the contracting attorney for withdrawing from a case." Jacqueline McMurtrie, *Unconscionable Contracting for Indigent Defense: Using Contract Theory to Invalidate Conflict of Interest Clauses in Fixed-Fee Contracts*, 39 U. MICH. J.L. REFORM 773, 796 (2006). The ABA has evidently recognized the potential for this problem. ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-3.3(b)(vii) (3d ed. 1992) ("Contracts for services should include. . . a policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses."). It is easy to see how a system in which organizations or law firms submit bids to contract with a city or state to provide defense services could create a disincentive to withdraw in order to maximize efficiency and live up to the terms of the contract. *See, e.g.*, Meredith Anne Nelson, *Quality Control for Indigent Defense Contracts*, 76 CALIF. L. REV. 1147, 1150–51 (1988).

61. For example, withdrawal can signal to the court or a future attorney that a client is going to commit perjury. *See, e.g.*, Brian Slipakoff & Roshini Thayaparan, *The Criminal Defense Attorney Facing Prospective Client Perjury*, 15 GEO. J. LEGAL ETHICS 935, 940 (2002) ("Given the nature of the Court's opinion, it is understandable that courts have (mistakenly) interpreted *Nix* as holding that a lawyer may never allow a client to testify when she has reason to know the client will commit perjury, and that when a client intends to lie, withdrawal is the only possible response."); People v. Gadson, 24 Cal. Rptr. 2d 219, 224, n.5 (Cal. Ct. App. 1993) ("[W]e note that permitting defense counsel to withdraw does not necessarily resolve the problem. That approach could trigger an endless cycle of defense continuances and motions to withdraw as the accused informs each new attorney of the intent to testify falsely. Or the accused may be less candid with his new attorney by keeping his perjurious intent to himself, thereby facilitating the presentation of false testimony. Lastly, there is the unfortunate possibility that the accused may find an unethical attorney who would knowingly present and argue the false testimony. Thus, defense counsel's withdrawal from the case would not really solve the problem created by the anticipated perjury but, in fact, could create even more problems."). One can also imagine a reputational consequence, if word spreads across the jail or jurisdiction that a particular attorney is known for withdrawal.

in the justice system."[62] The comments idealistically expand on this notion:

> No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system. This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.[63]

In the ABA's contemplation of ethical representation, parity is deemed important to defense work, and yet achieving actual parity in the system requires more than a line in a rule.

In important respects, the rules do not actually provide or convey parity. An exploration of some of the contradictions between ethical standards for prosecutors and defenders and the standards to which prosecutors are held demonstrates that defense attorneys' compliance with the rules is complicated by the lack of parity.

1. Rules Against Lying

While prosecutors may lie to potential witnesses about their identity or how they plan to use any information, defense attorneys may not. Turning first to the rules guiding defense attorneys, the Model Rules explicitly state that truthfulness is of primary importance for attorneys. Model Rule 4.1[64] holds: "[i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person . . ." In the context of eliciting information from witnesses, including the defendant, it is worth noting that this rule applies to statements of fact. Whether something constitutes a statement of fact is guided by convention.[65] Defense counsel is governed by additional standards for ethical in-

62. ABA STANDING COMM. ON LEGAL AID AND 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/SJ4R-YEA5]. In the comments, it is explained that this should include "parity of workload, salaries, and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense." *Id.* at 3.

63. *Id.* at 3.

64. *See also* cmt. 1 ("[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.").

65. *Id.* cmt. 2 ("This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an

vestigation. Standard 4-4.2 states, "[d]efense counsel should not use illegal or unethical means to obtain evidence or information, or employ, instruct, or encourage others to do so."

Rules regarding the responsibilities of non-lawyers also reveal important discrepancies between the expectations of defense attorneys and prosecutors. Model Rule 5.3(b) requires a supervising lawyer to "make reasonable efforts to ensure" that the non-lawyer's "conduct is compatible with professional obligations of the lawyer." Thus, a lawyer whose investigator engages in deceit could be held responsible for said violation.[66] Under Model Rule 8.4(a), a lawyer who hires an investigator who uses deceit could be held liable.[67] It is also misconduct for a lawyer to "knowingly assist or induce another" to violate the Rules of Professional Conduct.[68] Viewing these rules in combination, a defense attorney who personally engages in an undercover or otherwise deceptive investigation, either personally or through an investigator, is liable under the Model Rules. For example, a paralegal for a public defender's office who lies about their identity to a potential witness could be acting unethically under the rules and jeopardize the attorney's professional reputation.

The Prosecution Function belies the discrepancy in its tentative language around candor: "[t]he prosecutor should not make a statement of fact or law, or offer evidence, that the prosecutor does not reasonably believe to be true, to a court, lawyer, witness, or third party, except for lawfully authorized investigative purposes."[69] In other words, prosecutors may lie for lawfully authorized investigative purposes. Defense attorneys do not have the benefit of such an exception,[70] putting them at a clear disadvantage.

Prosecutors also benefit from collaboration with police and informants, who do indeed engage in deceit to obtain information, in conducting investigations. While the Prosecutor Standard explains that prosecutors and law enforcement personnel are independent entities,[71] law enforcement plays an enormous role in prosecutor investigations and case development.[72] In fact, the Prosecutor Standard and

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acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.").

66. Kevin C. McMunigal, *Investigative Deceit*, 62 HASTINGS L.J. 1377, 1381–82 (2011).

67. *Id.* at 1382.

68. MODEL RULES r. 8.4(a).

69. PROSECUTION FUNCTION 3-1.4(b).

70. *See* MODEL RULES r. 4.1.

71. PROSECUTION FUNCTION 3-3.2(a) ("The prosecutor should maintain respectful yet independent judgment when interacting with law enforcement personnel.").

72. *See, e.g.*, Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C.D. L. REV. 1591, 1646 (2014) ("Practically, however, police officers can and do conduct investigations that implicate Fourth Amendment rights without prosecutors.") (citations omitted); Bruce A. Green, *Developing Standards of Conduct for Prosecutors and Criminal Defense Lawyers*, 62 HASTINGS L.J. 1093, 1095 (2010) ("Prosecutors regularly interact with crime victims and other witnesses in the course of investigations and trial preparation") (citation omitted); *see also*

the Prosecutorial Investigations Standard explicitly outline and endorse the role of law enforcement in prosecutorial investigations.[73] For example, "[p]rosecutors may exercise supervision over law enforcement personnel involved in particular prosecutions when in the best interests of justice and the public."[74] Part Two of the Prosecutorial Investigations Standards outlines and sanctions the use of undercover investigations, and specifically assigns discretion to prosecutors over the types of investigations conducted in a given case.[75]

While defense attorneys are governed by ordinary ethical rules and standards regarding deceit, the rules clearly consider and allow for deceit in prosecutorial investigations in the form of police investigation and undercover informants.[76] A prosecutor's team may elicit information through lying about their identity and motives whereas a defense team may not. Police departments use fake social media accounts for many purposes, including collecting evidence, identifying suspects, and confirming alibis.[77] Meanwhile, public defenders have no similar ability to use fake accounts to investigate state witnesses or case theories, making it much harder to stumble upon witness lies or to elicit material that could be helpful at trial.

The implications of this are stark. Take, for example, a prosecutor who tells a potential adverse witness that they are only trying to help. That tactic is much more likely to elicit information from a witness than a defense attorney who has to tell an adverse witness that they represent the defendant in a criminal case. Even where the witness is not adverse, prosecutors already possess a greater degree of credibility in our justice system—an assertion to any witness that their reasons for

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McMunigal, *supra* note 66, at 1379 ("The recognition that prosecutors regularly supervise police and informants who engage in deceit makes many lawyers uncomfortable with a categorical prohibition."); *id.* at 1382–83 ("The prosecutor's relationship with police or informants who engage in deceit does not fall quite so easily within all of these provisions as does the relationship between a private lawyer and a private investigator. Nonetheless, the language in both Rules 5.3 and 8-4(a) is broad enough to make prosecutors ethically liable for investigative deceit by police and informants. Police officers who operate undercover, for example, are not 'employed or retained' by prosecutors. They are employed by the police department, not the district attorney's office. But police and informants used by police and prosecutors can easily be said to be 'associated' with the prosecutor, thus triggering liability under Rule 5-3.").

73. *See generally* PROSECUTION FUNCTION; STANDARD ON PROSECUTORIAL INVESTIGATIONS (AM. BAR ASS'N 2014) [hereinafter PROSECUTORIAL INVESTIGATIONS], https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Pros_Investigations.authcheckdam.pdf [https://perma.cc/VS3M-RS9E].

74. PROSECUTION FUNCTION 3-3.2(c).

75. *See, e.g.*, PROSECUTORIAL INVESTIGATIONS 2.1(a) ("The prosecutor should have wide discretion to select matters for investigation"); *id.* 2.3(c) ("In deciding whether to use or to advise the use of undercover law enforcement agents or undercover operations, the prosecutor should consider potential benefits, including . . . the character and quality of evidence likely to be obtained. . . .").

76. *Contra* McMunigal, *supra* note 66, at 1384 (explaining that the rules call for ethical liability for prosecutors "associated with police and informants" who engage in deceit, under a strict reading of Model Rules 5.3 and 8.4).

77. *Undercover Policing in the Age of Social Media*, POLICING PROJECT (Dec. 17, 2018), https://www.policingproject.org/news-main/undercover-policing-social-media [https://perma.cc/4X8K-GQ24].

inquiring are innocent could produce much more valuable information than the same, truthful assertion by defense counsel.[78] In contrast, the public generally holds more complex views of public defenders.[79] The rules' approval of prosecutors misleading witnesses during the course of an investigation hands a meaningful advantage to prosecutors from the start. The rules against lying only meaningfully apply to defense counsel and reveal a great failure of parity between defense and prosecution under the rules.

2. Rules Governing Publicity

The rules reinforce defense attorneys' unequal opportunity to publicly present their cases. Model Rule 3.6 outlines the general responsibilities of attorneys in managing trial publicity. Most notably, the rule allows for statements regarding: "(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved; (2) information contained in a public record; (3) that an investigation of a matter is in progress."[80] Attorneys may generally warn the public regarding danger related to the behavior of an individual involved "when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest."[81] The rules thus allow only for the presentation of basic information.

There are specific exceptions to the rule against extrajudicial statements in criminal cases. Prosecutors, for example, may provide to the public:

> the identity, residence, occupation and family status of the accused; if the accused has not been apprehended, information necessary to aid in apprehension of that person; the fact, time and place of arrest; and the identity of investigating and arresting officers or agencies and the length of the investigation.[82]

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78. *See, e.g.*, Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152, 207 (2017); Bruce A. Green & Fred C. Zacharias, *Regulating Prosecutors' Ethics*, 55 VAND. L. REV. 381, 449 (2002) ("Implicit in any deference to prosecutorial decision-making is the notion that, at least sometimes, we can trust prosecutors to behave ethically. We get this notion from two sources. First, as government officials, we hope and expect that prosecutors will serve the government's interests, which in the law enforcement context include 'justice.' Second, we know that lawyers who choose careers in law enforcement rather than the more lucrative private sector often make that choice because of a desire to serve the public. Although we may not always trust the balance individual prosecutors strike in individual cases, we do have some confidence in their general motivations.") (citation omitted).

79. *See generally* NAT'L PUB. OP. SURVEY CONDUCTED FOR THE RIGHT TO COUNSEL NAT'L CAMPAIGN, AMERICANS' VIEWS ON PUBLIC DEFENDERS AND THE RIGHT TO COUNSEL 7 (2017), *available at* https://staticl.squarespace.com/static/55f72cc9e4b0af7449dal 543/t/594826d8ff7c50d4cb6a 8ff0/1497900982642/BRS+Report.pdf [https://perma.cc/2NDF-7249] ("On the one hand, 61% believe public defenders are generally well-qualified and about 53% see them as experienced. Yet, 53% believe public defenders do not take much interest in their clients, and 50% believe public defenders generally provide inadequate legal representation.").

80. MODEL RULES r. 3.6(b)(1)-(3).

81. *Id. (*b)(6).

82. *Id.* (b)(7)(i)-(iii).

Despite appearances, that type of data is harmful—it may incriminate an individual in the public eye and reveal sufficient personal information to endanger the defendant or their family members. For example, it is common for prosecutor's offices to issue press releases announcing the arrest of a suspect, which typically includes the suspect's name, the charges against the individual, and sometimes a gratuitous statement about the importance of making a swift arrest. The public announcement of an arrest for a sexual assault, for example, will no doubt embarrass both the defendant and their family, and the allegations can serve to turn a community against the individual before the opportunity for a defense investigation or trial. Implicitly, this type of information is deemed "necessary to inform the public," because prosecutors otherwise have a special duty to "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused."[83] However, it is self-evident that such information could taint a subsequent proceeding.[84]

The Defense and Prosecution Functions equivalently require counsel to avoid making or condoning public statements that will have a "substantial likelihood" of "prejudicing a criminal proceeding."[85] Yet, similar to the deceptive investigations described above, prosecutors are aided by and often connected with law enforcement officials, who also comment on ongoing investigations and pending trials to the media.[86] The type of information reported to the media regarding criminal defendants has the potential to not only prejudice the case at bar, but generally produce a public disproportionately concerned about crime.[87] Meanwhile, a defense attorney who may be inclined to comment to the public on the police's illegal search of their client, for example, could be barred from doing so, even though such information could redeem the individual in the public's eyes.

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83. MODEL RULES r. 3.8(f).

84. One example of how this could play out is in jury selection. Though during voir dire jurors will likely be asked whether they have seen news coverage of the case, simply seeing an article in the local paper may not be enough to strike that juror. Potentially more devastating is the possibility that a juror does not remember seeing news coverage that they in fact did see, and that coverage subconsciously works its way into a juror's mind.

85. DEF. FUNCTION 4-1.10(c); PROSECUTION FUNCTION 3-1.10(c).

86. *See, e.g.*, Michelle Hunter, *Man Shot by JPSO Detective Booked on Attempted Murder, Drug Charges*, Times Picayune (Feb. 5, 2018), http://www.nola.com/crime/index.ssf/2018/02/man_shot_by_jpso_detective_boo.html [https://perma.cc/SKM7-ZBCC] ("Sanders is accused of crashing into two Sheriff's Office vehicles before accelerating towards another detective who opened fire because he was in fear for his life, Lopinto said. The detective fired six times, striking Sanders in the shoulder."); Rocco Parascandola & John Annese, *Man Nearly Kills Rival After Alleged Threesome in Brooklyn*, N.Y. DAILY NEWS (Feb. 5, 2018), http://www.nydailynews.com/new-york/nyc-crime/man-saves-girlfriend-killing-attacker-article-1.3799219 [https://perma.cc/E8ND-CFF4] ("The 54-year-old attacker told cops he walked in on another man, 31, sexually assaulting his girlfriend, 30, in the couple's second-floor apartment in East Flatbush at about 6:45 p.m. Sunday, sources said.").

87. *See, e.g.*, Aaron Katersky & Emily Shapiro, *Queens Jogger Murder Suspect Allegedly Told Police He Got 'Madder and Madder' and 'Strangled Her'*, ABC News (Apr. 18, 2017), http://abcnews.go.com/US/queens-jogger-murder-suspect-allegedly-told-police-madder/story?id=46860502 [https://perma.cc/KS3Y-H7BY].

The Model Rules are not responsible for prosecutor and law enforcement control of the narrative, but they reinforce the norm that the State can and should control the dissemination of factual background on a criminal case, violating a defendant's privacy and establishing a high public bar for the defense team to overcome.[88] The lack of news articles about *Brady* violations, unlawful stops and seizures and other police misconduct can hurt a criminal defendant individually and creates a climate that is generally more favorable to the prosecution and law enforcement.[89] Meanwhile, the news climate for defense attorneys is often harsh.[90] This makes it harder for defense counsel to present a case in a fair, unbiased context.

The lack of parity between the rules guiding prosecutor and defense counsel conduct reinforces the unique difficulty for defense counsel in complying with ethical rules. Prosecutors are afforded special privileges that prejudice defendants and complicate the role of defense counsel, despite the ABA's emphasis on parity. This is yet another way in which the rules complicate each other, making the defense counsel's role that much more difficult to ethically execute.

D. The Role of the Rules

The ethical rules are not in step with one another. Not only is it impossible to be in complete accord with all of the rules simultaneously, but the rules also grant different privileges to defense attorneys and prosecutors. Thus, it is almost impossible to abide by the rules at the same time and be an equal player in the system. This matters, because the rules set a baseline for attorney conduct. If the guidelines are not clear, public defenders cannot be expected to act in accordance with the rules.

Without prescribing conduct in all situations, the rules create a floor *and* ceiling for appropriate conduct, guiding ethical behavior in a field rife with potential ethical conflicts. To the extent that they forbid conduct tinged with moral impropriety, they affirm public defenders' instincts and logically limit zeal taken to the

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88. *See, e.g.*, Elizabeth Sun, *The Dangerous Racialization of Crime in U.S. News Media*, CENTER FOR AMERICAN PROGRESS (Aug. 29, 2018, 9:03 AM), https://www.americanprogress.org/issues/criminal-justice/news/2018/08/29/455313/dangerous-racialization-crime-u-s-news-media/ [https://perma.cc/784W-7FG8].

89. The frequency of police and prosecutorial misconduct is extreme yet is reported on less often than ordinary crime. *See, e.g.*, *The Recidivists: New Report on Rates of Prosecutorial Misconduct*, FAIR PUNISHMENT PROJECT (Jul. 13, 2017), http://fairpunishment.org/new-report-on-rates-of-prosecutorial-misconduct/ [https://perma.cc/CCN5-M7CQ]; Tom Jackman, *Study Finds Police Officers Arrested 1,100 Times per Year, or 3 per Day, Nationwide*, WASH. POST (June 22, 2016), https://www.washingtonpost.com/news/true-crime/wp/2016/06/22/study-finds-1100-police-officers-per-year-or-3-per-day-are-arrested-nationwide/?noredirect=on&utm_term=.4b9ee5fd3269 [https://perma.cc/HAN2-6GB9].

90. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 358 (2001) ("Just listen to any radio talk show and you can hear defenders denigrated, derided, and denounced. To many, the work defenders do is inherently disreputable.") [hereinafter *Good Person and a Good Prosecutor*].

utmost extreme. The rules confirm a public defender's instinct that there are certain things that a defense attorney must do to properly represent a client. On the other hand, public defenders, in consideration of their personal lives, can appreciate that there are ethical limits to the efforts they can put into their cases.

This reality is borne out by more thoughtful questioning of the various rules. For example, the duty of candor has an important role to play in the ethical guidelines. It would probably *feel* ethically questionable to continuously lie to the court, even if the rules did not explicitly state that doing so is a violation. And yet, to the extent that the rule conflicts with the duty of zeal and duty of loyalty, a permanent bar does not seem ideal. Indeed, clients need to be able to present full defenses and be protected from the release of highly incriminating or prejudicial information.[91]

Querying how an ideal system might deal with this could be a helpful exercise for amending the rules to properly shape ethical behavior. The rules could, for example, take a more solid stance on the trilemma—rather than merely stating that defense counsel has a tempered duty of candor, the rules could specify that defense counsel does not owe a duty of candor where it conflicts with the duty of loyalty. That fix would tackle the problem of the trilemma and clarify what might be meant by the Defense Function's reference to a tempered duty of candor.[92]

Moreover, the Defense Function could be brought in step with the Prosecution Function on the subject of candor during investigations. In doing so, the specific instructions to defense counsel under the Defense Function would read: "defense counsel should not make a statement of fact or law, or offer evidence, that defense counsel does not reasonably believe to be true, to a court, lawyer, witness, or third party, except for lawfully authorized investigative purpose."[93] Of course, they would also need to define "lawfully authorized investigative purposes," but that is not impossible. This would not only achieve greater parity between the rules guiding prosecutors and public defenders, but also provide leeway to defenders to present information to witnesses that is plausibly true without invoking the ethical rules, beyond statements that go directly to the client's defense.

II.
THE ETHICAL RULES ARE UNDERMINED BY CONSTITUTIONAL STANDARDS

A. The Constitution's Low Bar

There is no question that the Constitution demands less of criminal defense attorneys and prosecutors than do the ethical rules.[94] The consequences of this

91. *See generally* Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 Mo. L. Rev. 771, 773–74 (2010) (discussing the evolution of the right to counsel).

92. DEF. FUNCTION 4-1.4.

93. *See* PROSECUTION FUNCTION 3-1.4(b).

94. *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 436–37 (1995) (explaining that *Brady* requires

disparity can be dire for clients, regardless of whether they plead guilty or go to trial,[95] because they can only expect the protection of the Constitution's lower standards, not that of the ethical rules.

Much of this section deals with the constitutional standards for effective assistance of counsel. Before diving in, it should be noted that it is not a given that *ethical* representation and *effective* representation are the same thing. Indeed, ethical representation implies representation that conforms to the ethical rules, whereas effective assistance of counsel refers to a constitutionally defined floor for representation that satisfies the Sixth Amendment's requirement that criminal defendants be provided with a lawyer. In this Article, I do not argue that effective representation and ethical representation are equivalent. Instead, I identify how the Constitution effectively supersedes the ethical rules by blessing weaker protections than those otherwise required by the ethical rules. [96]

Scholars often take for granted that the constitutional standards are lower than the ethical rules and have yet to catalogue the many ways in which public defenders are shortchanged by courts' failure to provide meaningful constitutional standards by giving the term "effective assistance" little value. This section will provide a sampling of some of the constitutional standards' shortcomings, as well as an analysis of how they dismantle the efficacy of the ethical rules. Specifically, this section addresses the impact of effective assistance of counsel claims on the ethical rules, particularly those concerning competent and candid advice, conflicts of interest, and zealous representation. There is also brief reference to the discrepancy between the Constitution and ethical rules' handling of discovery rules. These problems disadvantage and complicate the work of defense attorneys, and especially public defenders. Analysis of these issues does not lead to a clear-cut solution, but rather points to the need for stricter constitutional standards and more client-centered enforcement of the ethical rules.

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less of the prosecution than do the ABA Standards for Criminal Justice); Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1170 (2003) [hereinafter *Criminal Neglect*] ("[A]s a normative matter, because constitutional decisions demand so little from criminal defense lawyers, the case law tends to undermine the dictates of the ethics codes rather than reinforce them.").

95. Lafler v. Cooper, 566 U.S. 156, 174 (2012) (finding defendant who pled guilty based on counsel's deficient advice properly raised ineffective assistance of counsel claim under *Strickland v. Washington*); Missouri v. Frye, 566 U.S. 134, 145 (2012) (holding "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea"); *see also* Clara H. Drinan, Lafler *and* Frye*: Good News for Public Defense Litigation*, 25 FED. SENT'G REP. 138, 138 (2012) ("[T]he Supreme Court confirmed that the Sixth Amendment right to counsel applies to the plea negotiation process and held that prejudicial error can flow from ineffective plea advice.").

96. *Criminal Neglect*, *supra* note 94, at 1186 ("The odds are too low that a client who pleads guilty will ever prevail on an ineffective assistance claim both for practical reasons and because the case law is so much less demanding than the ethics rules. Further, by establishing low expectations of lawyers on a constitutional matter, the case law has the unintended effect of obscuring professional standards that appear to be more demanding.").

B. Effective Assistance of Counsel

The test for ineffective assistance of counsel claims was established by the Supreme Court in *Strickland v. Washington*.[97] Under *Strickland*'s two-prong test, the defendant must show (1) "that counsel's representation fell below an objective standard of reasonableness,"[98] and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[99]

In explaining the first prong, the *Strickland* Court actually makes reference to the Defense Function, indicating that it is relevant to whether representation fell below the objective standard of reasonableness, but not dispositive.[100] Since *Strickland*, the Court has cited to ABA "standards and the like"[101] for guidance on objective reasonableness.[102]

Merely consulting the Model Rules and other ABA standards for guidance on reasonableness is already an admission that they are not law. By definition, courts can choose to follow the guidance of the existing professional norms, or not, depending on how it suits their interpretation of a given circumstance or what the law should be. As such, it should come as no surprise that the Supreme Court has explicitly rejected the notion that the Model Rules or ABA standards and guidelines dictate how a court should rule on an ineffective assistance of counsel claim.[103]

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97. 466 U.S. 668 (1984).

98. *Id.* at 688.

99. *Id.* at 694.

100. *Id.* at 668–89 ("In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice . . . are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.").

101. Padilla v. Kentucky, 559 U.S. 356, 366 (2010).

102. *See, e.g.*, *id.* at 367 ("Although they are 'only guides,' and not 'inexorable commands', these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.") (internal citations omitted).

103. Bobby v. Van Hook, 558 U.S. 4, 8–9 (2009) ("To make matters worse, the Court of Appeals (following Circuit precedent) treated the ABA's 2003 Guidelines not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel 'must fully comply.'. . . What we have said of state requirements is *a fortiori* true of standards set by private organizations: '[W]hile states are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.'" (internal citations omitted); Kyles v. Whitley, 514 U.S. 419, 436–37 (1995); Cone v. Bell, 556 U.S. 449, 477–78 (2009) (Roberts, C.J., concurring) ("[I]t is clear that the lower courts should analyze the issue under the *constitutional* standards we have set forth, not under whatever standards the American Bar Association may have established.").

On the other hand, the second prong (or the prejudice prong), is nearly impossible to satisfy.[104] Even in the most extreme cases, where counsel was drunk, high, or otherwise impaired, courts have found that defense counsel's deficient performance satisfied the test for effectiveness under *Strickland*, because the defendant could not show the conduct actually impacted the result of their case.[105] Under the *Strickland* test, the Supreme Court has repeatedly condoned problematic representation that does not meet established ethical standards, finding it nonetheless reasonable.[106] Alternatively, courts can and do find conduct unreasonable under the first prong, but decline to find prejudice under the second prong.[107] Lower courts have dismissed ineffective assistance claims on both prongs.[108]

Even Supreme Court justices have acknowledged the *Strickland* standard's ironic ineffectiveness. For example, Justice Blackmun famously wrote:

> "[t]en 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.'"[109]

Effective assistance of counsel is different than assistance of counsel that satisfies ethics rules. Nevertheless, court cases governing effective assistance of counsel have implications for the application of the ethical rules. Without fail, the rules tend to provide a much higher bar to clear than does the Constitution, effec-

104. *See, e.g.*, Kellsie J. Nienhuser, *CRIMINAL LAW—Prejudiced by the Prejudice Prong: Proposing a New Standard for Ineffective Assistance of Counsel in Wyoming after* Osborne v. State, 2012 WY 123, 285 P.3d 248 (Wyo. 2012), 14 WYO. L. REV. 160 (2014).

105. *See, e.g.*, Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 427 (1996).

106. *See, e.g.*, Van Hook, 558 U.S. at 11–12 (rejecting reliance on ABA guidelines and standards in determining reasonableness, and holding counsel's "decision not to seek more" mitigating evidence from defendant's background in penalty phase was not ineffective) (internal citations omitted); Bell v. Cone, 535 U.S. 685, 702 (2002) (declining to find state court's application of *Strickland* objectively unreasonable where defense counsel waived closing argument and failed to re-call defendant's mother in penalty phase).

107. *See, e.g.*, Lockhart v. Fretwell, 506 U.S. 364, 372 (1993) (holding defendant suffered no prejudice from counsel's deficient failure to raise a *Collins* objection to the penalty-phase introduction of an aggravating factor duplicating an element of the offense); Burger v. Kemp, 483 U.S. 776, 785 (1987) ("We also conclude that the asserted actual conflict of interest [defense counsel's partner was appointed to represent another defendant in their later trial], even if it had been established, did not harm his lawyer's advocacy.").

108. *See generally* Thomas J. Marlow, *Ineffective Assistance of Counsel or How I Can Satisfy the Sixth Amendment and Still Not Help My Client*, 3 CAP. DEF. DIG. 29, 30 (1990) (discussing cases).

109. McFarland v. Scott, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting).

tively invalidating the rules in the eyes of the legal profession and thus their potential application.[110] Comparing the Model Rules and the Defense Function directly with constitutional decisions highlights not only the inadequacy of the constitutional interpretations of effective assistance, but also the wide discrepancy between the role of defense counsel envisioned by the ABA and the role actually shaped by the Constitution.

1. Competent and Candid Advice

The Model Rules instruct attorneys to act as their clients' advisors. Model Rule 2.1 explains that "a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." Of course, Model Rule 1.3 also compels lawyers to "act with reasonable diligence and promptness in representing a client." Harkening back to the discussion on zeal,[111] defense attorneys are expected, under the Model Rules and Defense Function, to provide clients with sound, thoughtful representation that considers their needs.

Courts that throw out claims of ineffective assistance of counsel under the prejudice prong often disregard legal advice that obviously violates these ethical rules. For example, immediately after *Strickland* was decided, in *Hill v. Lockhart*,[112] the Court found counsel's erroneous advice regarding parole eligibility failed *Strickland's* prejudice prong. Specifically, the Court found determinative the facts that:

> Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial. He alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty.[113]

Perhaps under Model Rule 2.1, counsel should have properly advised petitioner of his parole eligibility, and yet, because the Court found no prejudice, assistance was effective.

2. Zealous Representation and Other Murky Questions

Even when the ethical rules do not obviously counsel against a finding of

110. *See, e.g.*, 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."); William S. Geimer, *A Decode of* Strickland*'s Tim 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.").

111. *Supra* Section II.2.

112. 474 U.S. 52 (1985).

113. *Id.* at 60.

ineffective assistance of counsel, they prompt questions that are far more necessary and sophisticated than those prompted by the *Strickland* test. Recently, for example, in *Barahona v. United States*, the District of Maryland deemed reasonable counsel's failure, during opening statements, to object to:

> [T]he characterization of the drug trafficking organization as being from Mexico and to the attorney's request that the jury consider the motives of the government's witness, a Mexican drug dealer living in a cartel-controlled part of Mexico, as Petitioner is often thought to be Mexican.[114]

In reasoning the second prong, the District Court found:

> Even had Ms. Amato's behavior as counsel been outside the bounds of reasonable conduct, Petitioner fails to show any prejudice. It is "not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Rather, a defendant must show a "reasonable probability"—a probability "sufficient to undermine confidence in the outcome"—that but for counsel's unreasonable performance, "the result of the proceeding would have been different." Petitioner offers only the conclusory assertion that "the racially/ethnically biased or prejudiced theme undoubtably [sic] influenced jury deliberations against" him. This speculation falls far short of showing that, had Ms. Amato objected to the opening statements or moved for a mistrial, there is a reasonable probability that the outcome of his trial would have been different. Therefore, Petitioner's claim fails under the second prong of *Strickland*.[115]

This example is instructive, because it demonstrates not only how the Constitution can undermine the ethical rules but also the lack of clarity that the rules provide in murky ethical circumstances. Turning first to the Constitution's preemption of the ethical rules, the first obvious point is that the Constitution governs whether or not the attorney's conduct was acceptable in this case. Of course, the client could attempt to file a separate ethics complaint, but in the District Court, the Constitution prevails. And under the Constitution, it would be very hard to show that the attorney's conduct fell below an objective standard of reasonableness—while the attorney's failure to object may have permitted racial bias to infect the proceedings, courts will typically construe such a decision as strategic, exempt from questioning under *Strickland*.[116] For example, a court considering

114. Brahona v. United States, No. CR RWT-15-3658, 2017 WL 3172791, at *4 (D. Md. July 26, 2017), *appeal dismissed*, 707 F. App'x 782 (4th Cir. 2018).

115. *Id.* at *5 (citing *Strickland*, 466 U.S. at 693–94).

116. *See, e.g.*, Cullen v. Pinholster, 563 U.S. 170, 193 (2011) (construing fact that counsel only called the defendant's mother as a witness, and failure to call other witnesses during the penalty phase, as reasonable strategy focused on evoking sympathy for the mother).

the matter could find that choosing not to object might draw less attention to the issue, or the attorney did not want to appear obstructionist. Moreover, given the difficulty in proving prejudice, it is easy to understand why the District Court declined to find ineffective assistance of counsel under the constitutional standards that currently exist.

The question of whether this conduct violates the ethical rules is far more complicated. The rule requiring zealous representation would seem to require an objection to the invocation of racial animus. And yet, Abbe Smith might argue that in fact, if it would have been possible for such racial animus to *aid* the client, it might be wiser for the lawyer herself to play on the jury's bias.[117] But even if a lawyer, in acting zealously on behalf of an individual client, invokes race to make their case, they may be violating other ethical standards. For example, the rules governing conflicts of interest would caution against playing on stereotypes if those same characterizations could hurt future clients.[118] The question of what the ethics rules would require is understandably murky, given the contradictions and lack of rigor identified earlier, but the questions are never asked because the *constitutional* standards appear to have been met.

In *Bell v. Cone*,[119] the Supreme Court declined to overrule the Tennessee Supreme Court's determination that counsel's waiver of closing argument was "a tactical decision about which competent lawyers might disagree"[120] and thus not unreasonable.[121] Here, again, the ethical standards prompt tougher questions than

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117. Abbe Smith, *"Nice Work If You Can Get It": "Ethical" Jury Selection in Criminal Defense*, 67 FORDHAM L. REV. 523, 529–30 (1998-1999) ("I am a client-centered criminal defense advo cate, a partisan, and committed to representing my clients with devotion and zeal. In my view, I have no obligation as an attorney to fight cultural stereotypes unless they are being used against my client, or to serve the interests of the broader community, unless this somehow also serves my client.").

118. *See* MODEL RULES r. 1.7(a) (defining conflict of interest as representation of one client that "will be directly adverse to another client").

119. 535 U.S. 685 (2002).

120. *Id.* at 702.

121. The Court's rationale, under the first prong of *Strickland*, included the following:

> In this case, we think at the very least that the state court's contrary assessment was not "unreasonable." After respondent's counsel gave his opening statement discussing the mitigating evidence before them and urging that they choose life for his client, the prosecution did not put on any particularly dramatic or impressive testimony. The State's witnesses testified rather briefly about the undisputed facts that respondent had prior convictions and was evading arrest.
>
> When the junior prosecutor delivered a very matter-of-fact closing that did not dwell on any of the brutal aspects of the crime, counsel was faced with a choice. He could make a closing argument and reprise for the jury, perhaps in greater detail than his opening, the primary mitigating evidence concerning his client's drug dependency and posttraumatic stress from Vietnam. And he could plead again for life for his client and impress upon the jurors the importance of what he believed were less significant facts, such as the Bronze Star decoration or his client's expression of remorse. But he knew that if he took this opportunity, he would give the lead prosecutor, who all agreed was very persuasive, the chance to depict his client as a heartless killer just before the jurors began

the constitutional standard, which allows for any decision that could be deemed tactical to be reasonable. The standard of zealous representation might prefer a closing argument. But if it does not, it at least demands a better rationale for failure to present a closing argument. While perhaps clearly not constitutionally "ineffective" under *Strickland*, the question of whether defense counsel's conduct was ethical under the Model Rules and Defense Function is harder to answer.

The same problem is implicated in *Florida v. Nixon*,[122] in which the attorney's failure to obtain express consent for his legal strategy from his client was assessed under the first prong for deficient performance, and deemed "tenable."[123] The Court specifically noted that the lower court erred in moving on to a prejudice analysis, holding that "[a] presumption of prejudice is not in order based solely on a defendant's failure to provide express consent to a tenable strategy counsel has adequately disclosed to and discussed with the defendant."[124] While it may pass constitutional muster, assessed under the ethical rules, the attorney's conduct is questionable at best, regardless of the Court's determination that counsel's assistance was effective. Comment 2 to Model Rule 1.4 requires that the lawyer secure the client's consent prior to taking action, "unless prior discussions with the client have resolved what action the client wants the lawyer to take." That seems to leave open whether or not the ethical rules require *express* consent where the attorney believes they have obtained prior consent.

The ethical rules do not necessarily require more or less from defense attorneys than does the *Strickland* test, and thus the Constitution.[125] In the *Nixon* case, for example, the rule requiring consent does not specify express consent, leaving open the inquiry into ethics in addition to the inquiry into effectiveness. But the question of what the ethical rules require is often subsumed by the constitutional question, rendering the ethical question meaningless to the courts. Meanwhile, even when the ethical rules are used to establish proof that the lawyer's conduct

> deliberation. Alternatively, counsel could prevent the lead prosecutor from arguing by waiving his own summation and relying on the jurors' familiarity with the case and his opening plea for life made just a few hours before. Neither option, it seems to us, so clearly outweighs the other that it was objectively unreasonable for the Tennessee Court of Appeals to deem counsel's choice to waive argument a tactical decision about which competent lawyers might disagree.
>
> We cautioned in *Strickland* that a court must indulge a "strong presumption" that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight. Given the choices available to respondent's counsel and the reasons we have identified, we cannot say that the state court's application of *Strickland's* attorney-performance standard was objectively unreasonable. The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

Id. at 701–02 (internal citations omitted).

122. 543 U.S. 175 (2004).

123. *Id.* at 178–79.

124. *Id.* at 179.

125. *See* discussion *supra* p. 27.

fell below an objective standard of reasonableness under the first prong of *Strickland*, courts invariably condone unethical behavior through *Strickland*'s prejudice prong. It is difficult to expect "ethical" behavior among defense attorneys when the court's analysis focuses merely on actual prejudice, which is hard to prove.[126] Moreover, ineffective behavior comes with heavier consequences for attorneys, and yet, as we have seen, effective behavior is often easier to achieve. Thus, the Supreme Court, acknowledging that the ABA does not dictate its determination of reasonableness, has approved of otherwise unethical behavior—specifically, less than competent representation and advice—as reasonable or otherwise not prejudicial. The problem is only reinforced by the Supreme Court's rejection of the ABA rules as a standard for attorney conduct.[127]

3. Conflicts of Interest

Another way in which the ethical standards are undermined by the constitutional standards is in the treatment of conflicts of interest. The Supreme Court imposes a lower standard on defendants bringing ineffective assistance claims based on conflict of interest than those based on the *Strickland* test. Defendants need only show an "adverse effect" rather than "actual prejudice" resulting from the conflict.[128] The Model Rules impose a duty to avoid conflicts of interest. Model Rules 1.7 and 1.8 specifically address duties to current clients.[129] They note

126. A finding of prejudice requires an extreme, and tangible, showing by a petitioner that the outcome would have been different but for the attorney's incompetence. *See, e.g.*, Lee v. United States, 137 S. Ct. 1958, 1967–68 (2017) (holding that the defendant was prejudiced by his attorney's failure to advise him that a guilty plea would result in deportation, even absent a defense, where the defendant was reassured by counsel that the judge's warning during the plea colloquy that his plea could result in deportation was merely standard, and thus proceeded with the plea). *But see, e.g.*, Premo v. Moore, 562 U.S. 115, 130 (2011) (refusing to find prejudice where defendant pled guilty after his attorney failed to file a motion to suppress his confession to the police, where the defendant had made a second, admissible confession to two witnesses); Smith v. Spisak, 558 U.S. 139, 151 (2010) (agreeing that counsel's closing argument that described defendant's "sick" and "twisted" and "demented" mind and went into great detail about the gruesome crime was constitutionally inadequate, but failing to find prejudice).

127. "To make matters worse, the Court of Appeals (following Circuit precedent) treated the ABA's 2003 Guidelines not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel 'must fully comply.' *Strickland* stressed, however, that 'American Bar Association standards and the like' are 'only guides' to what reasonableness means, not its definition. . . . [W]e have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.'" Bobby v. Van Hook, 558 U.S. 4, 8–9 (2009) (internal citations omitted).

128. *See, e.g.*, Glasser v. United States, 315 U.S. 60, 76 (1942) ("The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."); Anderson, *supra* note 53, at 441–42 ("For general ineffective assistance claims, the defendant must show that the constitutionally infirm representation caused 'actual prejudice.' If a conflict of interest (at least one involving joint multiple representation) is involved, the defendant need only demonstrate an 'adverse effect' on his counsel's representation, a burden that is much easier to satisfy than 'actual prejudice.' Thus, whether an excessive caseload qualifies as a conflict of interest significantly affects whether a post-hoc ineffective assistance of counsel claim is likely to succeed.").

129. MODEL RULES r. 1.7(a) ("Except as provided in paragraph (b), a lawyer shall not represent

that "[i]f a lawyer feels as though his duty (of loyalty, diligence, confidentiality, or another) to one client conflicts with his duty to another person or client, or with his personal interests, then he may face a conflict of interest."[130] The Defense Function also addresses conflicts of interests that arise for defense counsel.[131] Among other things, Standard 4-1.7 says defense counsel "should not permit professional judgment or obligations regarding the representation of a client to be adversely affected by loyalties or obligations to other, former, or potential clients . . ."[132] Heidi Reamer Anderson is among a number of scholars who argue that public defenders' excessive caseloads should be viewed as a conflict of interest that violate the ethical rules.[133]

According to Anderson, there are two ways to view excessive caseloads as an unethical conflict of interest. First, an excessive caseload can constitute a "current client conflict" as described by the Model Rules above, wherein a public defender's ability to represent a client is "materially limited" by obligations to hundreds of other clients.[134] The other conflict that arises out of excessive caseloads is personal, wherein the client's interest in "competent, diligent and conflict-free representation" conflicts with the "lawyer's interest in self-preservation."[135] The Supreme Court has declined to construe this type of conflict as a violation of *Strickland's* test, despite the clear indication from the Court that conflicts of interest are to be treated differently from other attorney deficiencies, given that defendants need only show an "adverse effect."[136]

The Model Rules and Defense Function explicitly demand more from attorneys than does the Constitution. While the Model Rules insist that lawyers "shall not represent a client if the representation involves a concurrent conflict of interest,"[137] the Constitution merely requires an inquiry into the lawyer's assistance, with the standard determined by the type of conflict. With conflicts produced by

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a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."); MODEL RULES r. 1.7(b) ("Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client"); MODEL RULES r. 1.8 (addressing specific rules guiding conflicts of interest among current clients).

130. MODEL RULES r. 1.7 cmt. 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests.").

131. DEF. FUNCTION 4-1.7.

132. DEF. FUNCTION 4-1.7(b).

133. *See* Anderson, *supra* note 53, at 443.

134. *Id.*

135. *Id.* at 444.

136. *Supra* note 117.

137. MODEL RULES r. 1.7(a).

excessive caseloads, courts are merely required to do a *Strickland* analysis to determine whether the conflict caused actual prejudice.[138] In other words, the rules conflict with the constitutional standard for conflict of interest because the latter is not as comprehensive as the rules.

4. Returning to the Trilemma

Finally, it is worth returning to Freedman's trilemma[139] once more, this time in the context of the Constitution. In *Nix v. Whiteside*,[140] the Supreme Court held that a defense lawyer did not violate his client's Sixth Amen dment rights by threatening to reveal the client's perjury. The Court held, though, that when defense counsel dissuaded part of his client's testimony that was untruthful by saying he would inform the court, his conduct "fell within the wide range of professional responses to threatened client perjury acceptable under the Sixth Amendment."[141] The Court in *Nix* was interpreted by many to say that there is an ethical requirement to reveal a client's perjury.[142] Though the Court merely seemed to find the threat to inform the court "acceptable," within a matter of weeks of the *Nix* Court's decision, a number of experts actively criticized the notion that a defense attorney may have an ethical duty to report perjury.[143] If that is the case, there is a huge contradiction between the Model Rules prescribing the duties of loyalty and competence, the Model Rule requiring candor to the court, and the constitutional dictates on attorneys. Even if not the case, the Supreme Court's finding in *Nix* is problematic. A threat to destroy attorney-client privilege is not only unethical, but it destroys the trust that makes the relationship function. While the Constitution might actually *require* a defense attorney to reveal client perjury,

138. *See* Anderson, *supra* note 53, at 433.

139. *See generally Three Hardest Questions*, *supra* note 9, at 1469.

140. 475 U.S. 157 (1986).

141. *Rethinking the Trilemma*, *supra* note 10, at 1028 (quoting *Nix*, 475 U.S. at 166).

142. *Id.* at 1029. Moreover, Freedman asserts that Chief Justice Burger misstated the law pertaining to client perjury. *Id.* n. 32 (citing Norman Lefstein, *Reflections on the Client Perjury Dilemma and* Nix v. Whiteside, 1 CRIM JUST. 27, 28 (1986)). Among other things, the Majority, penned by Chief Justice Burger, averred, "[p]lainly, that duty [of loyalty] is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law. This principle has consistently been recognized in most unequivocal terms by expositors of the norms of professional conduct since the first Canons of Professional Ethics were adopted by the American Bar Association in 1908. *Nix*, 475 U.S. at 166. Chief Justice Burger went on to cite to the Model Code of Professional Responsibility (1980), the Iowa Code of Professional Responsibility for Lawyers (1985), and the Model Rules of Professional Conduct (1983) for the idea that the ethical rules prohibit attorneys from proffering known perjurious testimony and require "disclosure of perjury that [the] client intends to commit or has committed." *Id.* at 166–68. Brent Appel, who argued for the State of Iowa before the Supreme Court, later said that "if the lawyer does not 'know for sure' that a witness's testimony is false, the lawyer should present the evidence to the court." *Rethinking the Trilemma*, *supra* note 10, at 1029 (citing David O. Stewart, *Drawing the Line at Lying*, 72 A.B.A. J. 84, 88 (1986)).

143. *Id.*

the rules are ambiguous at best, with some indication that the ABA accepts defense attorneys concealing client perjury.[144] The Supreme Court in *Nix* further complicated the already messy understanding of client perjury.

5. Summary

The constitutional standards guiding attorney conduct and the ethical rules dictated by the Model Rules are distinct. The ethical rules arguably hold defense attorneys to a higher standard. And yet, the rules are largely subsumed by the constitutional standards. This not only lowers the bar on attorney conduct, but stifles needed conversations about the ethical practice of defense lawyering.

C. Discovery Rules

The Constitution's rules pertaining to discovery, particularly as they relate to prosecutors producing evidence to defense counsel, present problems for parity akin to those presented by the ethical rules. Moreover, the Constitution's requirements are—yet again—noticeably less stringent than the ethical rules, presenting further conflict with the rules. Indeed, if the rules contemplate a discovery scheme that is far more open than that used in practice, they are both irrelevant and unenforceable.

The Constitution's discovery requirements were established by the Supreme Court in *Brady v. Maryland*[145] and its progeny. The Supreme Court held in *Brady* that the prosecutor has an obligation to disclose all *materially* exculpatory evidence, defined as evidence that would "tend to exculpate him or reduce the penalty."[146] In *U.S. v. Bagley*,[147] the Court clarified that evidence withheld by the government is only "material" under *Brady* when there is a reasonable probability that, had the evidence been disclosed, the proceeding would have produced different results.[148] Finally, in *Kyles v. Whitley*,[149] the Court refined the standard further, holding that the *Bagley* materiality definition turns on the cumulative effect of suppression of various pieces of evidence, not the materiality of each piece of evidence individually.[150]

Even with that high bar for "material" discovery, proving that exculpatory evidence was suppressed is not enough, on its own, to warrant a new trial. In *U.S. v. Agurs*,[151] the Court articulated this test for "material": whether the inappropri-

144. *Id.* at 1024 (citing UNDERSTANDING LAWYERS' ETHICS, *supra* note 14, at 185–86).

145. 373 U.S. 83 (1963).

146. *Id.* at 87.

147. 473 U.S. 667 (1985).

148. *Id.* at 681.

149. 514 U.S. 419 (1995).

150. *Id.* at 436 ("The fourth and final aspect of *Bagley* materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item.").

151. 427 U.S. 97 (1976).

ately suppressed evidence creates a reasonable doubt about guilt that did not previously exist.[152] In so doing, the Court rejected a standard that would reverse a conviction where the jury might have returned a different verdict. Instead, the Court found that a new trial based merely on the fact that inappropriate suppression occurred is unwarranted—instead, courts must determine whether a new trial is appropriate based on the character of the evidence suppressed.[153] In *Agurs*, the Court ultimately determined based on the facts of the case that a new trial was not warranted, rather than ordering a new trial solely based on the prosecutor's failure to disclose.[154]

These holdings, strictly requiring the disclosure of evidence only where it is material to the case's outcome, stand in stark contrast to the discovery mandates articulated in the ethical rules. Model Rule 3.8(d) directly instructs prosecutors on the issue of disclosure, requiring:

> [T]imely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal . . .

The ABA, elaborating on this standard, notes that the duties expressed in this rule are separate from the obligations imposed by the Constitution, or any other statute or rule.[155] It also reiterates that a prosecutor must turn over any "evidence and information favorable to the defense as soon as reasonably practicable."[156] Finally, Model Rule 3.4 also contains language relevant to a prosecutor's disclosure obligations. It instructs that lawyers should not:

> [U]nlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act . . .[157]

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152. *Id.* at 112–13.

153. *Id.* at 107.

154. In *Agurs*, defendant was accused of stabbing the victim to death at a motel. After trial, in which a jury convicted Agurs of murder, the defense filed a motion for a new trial arguing that the prosecutor failed to disclose the victim's prior criminal record, which could have supported the defense's self-defense theory. The Court upheld the trial court's finding that the victim's criminal record did not contradict any evidence offered by the prosecutor and discussed approvingly the trial judge's "unqualified opinion that the respondent was guilty." The Court held that since the arrest record was not requested prior to trial, and the trial judge's "appraisal of the record was thorough and entirely reasonable," the failure to discover the victim's criminal record did not deprive Agurs of due process. *Id.* at 113–14.

155. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009).

156. *Id.*

157. MODEL RULES r. 3.4(a).

This instruction is explored in greater detail in the comments.[158]

It is easy to see where the Model Rules' standard is more favorable to the defense. The Constitution requires disclosure only of "material" evidence, where material evidence is defined as that information for which there is a reasonable probability that, had disclosure occurred, the proceeding would have yielded different results. Meanwhile, the ABA requires disclosure of all information "favorable" to the defense, or all information that "tends to negate the guilt . . . ."[159] While the Constitution requires that the evidence actually impact the results, the Model Rules require that the information is merely favorable.

In contrasting the constitutional discovery requirements to the ethical guidelines, one must also look to the Court's own assessment of the rules' pertinence to its holdings:

> We have never held that the Constitution demands an open file policy (however such a policy might work out in practice), and the rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate.[160]

Indeed, Justice Roberts, concurring in *Cone v. Bell*, clarified that the ABA standards do not inform the constitutional standards:

> In considering on remand whether the facts establish a *Brady* violation, it is clear that the lower courts should analyze the issue under the *constitutional* standards we have set forth, not under whatever standards the American Bar Association may have established. The ABA standards are wholly irrelevant to the disposition of this case, and the majority's passing citation of them should not be taken to suggest otherwise.[161]

Thus, the Supreme Court acknowledges that the Constitution demands less of prosecutors than do the rules. Ethical violations may be enforceable through the ABA as an ethics investigation, but not through the Constitution.[162]

As a result, the ethical rules governing discovery are rendered more or less obsolete. The courts must enforce the Constitution's lower standards, not the requirements mandated under the rules, and so public defenders can expect, at most, disclosure of evidence that is material under *Brady*, though even that is not a

158. *Id.* cmt. 1 ("The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.").

159. Formal Op. 09-454 (2009), *supra* note 155; MODEL RULES r. 3.8(d).

160. Kyles v. Whitley, 514 U.S. 419, 437 (1995).

161. Cone v. Bell, 556 U.S. 449, 477–78 (2009) (internal citations omitted).

162. Model Rules r. 10 *supra* note 4 (discussing disbarment, suspension, probation, reprimand, admonition, restitution, and limitation of future practice).

given.[163] Appreciating that the prosecution is aided in its investigations by the State, including the police department, and has the power to deceive during the course of investigations,[164] this also has implications for parity—the prosecution will inevitably accrue more incriminating evidence about the defendant, without any meaningful requirement to turn much of it over.[165]

The rules are written with the assumption that turning over favorable evidence is the ethical standard.[166] But what does this mean for defenders who are forced to reckon with a constitutional standard that merely requires disclosure of "material" evidence? First and foremost, it means the rules are out of step with reality. They enforce a regime that lacks parity in access to information among prosecutors and defenders. And it forces public defenders to comply with other ethical standards, such as zealous advocacy, without access to full information; and with candor to the court, without the expectation that prosecutors will be equally forthcoming. In this way, the rules contradict both the realities of defense and the standards under the Constitution thus making them more or less unenforceable. This is undoubtedly problematic for public defenders seeking to act ethically under the rules.

III.
THE ETHICAL RULES FAIL TO ACCOUNT FOR THE REALITIES OF PUBLIC DEFENSE

Beyond the contradictions that exist among the rules, and between the rules and the Constitution, the rules are also not fully compatible with the realities of public defense. Most prominent are the huge resource issues that leave public defenders massively underfunded. That, compounded with excessive caseloads, means that there are not enough public defenders to do the work, and not enough time in the day to get the work done. Moreover, when defenders are making necessary choices about how to allocate time and resources, their choices are inevitably infected by implicit bias, which tangibly affects clients' defenses. This section argues that the rules, though they contemplate these problems, do not do enough to recognize their significance. As such, the rules also fail to guide defenders in the world in which we operate. Instead, they provide guideposts that are largely irrelevant to the working environment of many defense attorneys, particularly

163. *See, e.g.*, Beth Schwartzapfel, *Defendants Kept in the Dark About Evidence, Until It's Too Late*, N.Y. TIMES (Aug. 7, 2017), https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html [https://perma.cc/GT9B-6PXE].

164. *See supra* Section II.C.1.

165. *See Good Person and a Good Prosecutor*, *supra* note 90, at 385 (discussing the prosecutor's power to direct investigations); *id.* at 390 ("The desire to win inevitably wins out over matters of procedural fairness, such as disclosure. It is remarkable from the standpoint of both fairness and efficiency how reluctant most prosecutors are to provide meaningful discovery in advance of trial, and how little the situation has changed in the past forty years. The concealment of exculpatory evidence by prosecutors remains a serious problem.").

166. MODEL RULES r. 3.8.

public defenders.

A. Inadequate Funding and Excessive Caseloads

Discussion of public defenders' funding has transcended academia and has reached the public eye.[167] There is no question that chronic underfunding of public defender offices across the country has burdened attorneys, who are forced to handle massive caseloads without the time or resources to adequately attend to each client.[168] Yet, one would never know of this problem simply by looking at the Model Rules or Defense Function. The lawyering contemplated by the ABA fails to take into account the funding crisis, as well as the resulting excessive caseloads.

The Model Rules and the Defense Function contemplate the potential for unreasonably high caseloads and address the issue, albeit vaguely. Model Rule 1.3, discussing diligence, briefly addresses caseloads in the comments. It dictates that "a lawyer's work load must be controlled so that each matter can be handled competently."[169] Equally non-specific is the Defense Standard for appropriate workload:

> Defense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations. A defense counsel whose workload prevents competent representation should not accept additional matters until the workload is reduced, and should work to ensure competent representation in counsel's existing matters. Defense counsel within a supervisory structure

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167. *See, e.g.*, Debbie Elliot, *Public Defenders Hard To Come By In Louisiana*, NPR (Mar. 10, 2017), https://www.npr.org/2017/03/10/519211293/public-defenders-hard-to-come-by-in-louisiana [https://perma.cc/Z6BZ-UFN]; Derwyn Bunton, Opinion, *When the Public Defender Says, 'I Can't Help'*, N.Y. TIMES (Feb. 19, 2016), https://www.nytimes.com/2016/02/19/opinion/when-the-public-defender-says-i-cant-help.html [https://perma.cc/SC6T-ENBA]; Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES (Nov. 8, 2008), https://www.nytimes.com/2008/11/09/us/09defender.html [https://perma.cc/E9FM-6R5R] [hereinafter *Public Lawyers Reject New Cases*]; Campbell Robertson, *In Louisiana, the Poor Lack Legal Defense*, N.Y. TIMES (Mar. 19, 2016), https://www.nytimes.com/2016/03/20/us/in-louisiana-the-poor-lack-legal-defense.html [https://perma.cc/S975-2B7Q]; Matt Ford, *A 'Constitutional Crisis' in Missouri*, THE ATLANTIC (Mar. 14, 2017), https://www.theatlantic.com/politics/archive/2017/03/missouri-public-defender-crisis/519444/ [https://perma.cc/8ZZL-D28D].

168. *See, e.g.*, NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 7 (2009), http://constitutionproject.org/wp-content/uploads/2012/10/139.pdf [https://perma.cc/45TS-VS8R] ("Undoubtedly, the most visible sign of inadequate funding is attorneys attempting to provide defense services while carrying astonishingly large caseloads . . . Sometimes the defenders have well over 100 clients at a time, with many clients charged with serious offenses, and their cases moving quickly through the court system."); *see also* Richardson & Goff, *supra* note 2, at 2631 ("Defender offices are chronically underfunded, resulting in crushing caseloads.").

169. MODEL RULES r. 1.3, cmt. 2.

> should notify supervisors when counsel's workload is approaching or exceeds professionally appropriate levels.[170]

Neither the Model Rules nor the Defense Function define what constitutes "excessive size" or how a lawyer's workload can be controlled such that it can be "handled competently." Though black letter rules can prove limiting—attorneys of all kinds need flexibility to conduct their work in the context of their jurisdiction and field[171]—without more specific guidance as to what constitutes an excessive workload, it is difficult to enforce limits. It is easy, for example, for lawmakers to turn a blind eye to inadequate funding and high caseloads when there is no objective standard identifying the point at which a workload becomes excessive. The Florida legislature's passage of a law barring public defenders from withdrawing from cases because of excessive workload highlights this issue.[172]

Excessively high caseloads are a barrier to quality representation.[173] The increased reliance on guilty pleas is often attributed to public defenders' excessive caseloads.[174] Excessive caseloads are also often to blame for investigative failures that can be fatal to a client's case.[175] Many take for granted the problems associated with excessive caseloads because they are so myriad that it is impossible to identify them all by name.[176] Needless to say, it is well understood that excessive caseloads so limit the time a public defender can dedicate to a given client, that in many ways, their representation is diminished.

The failure to more clearly define disproportionate workload and what rises to the level of "excessive," is therefore a barrier to zealous advocacy. Zealous advocacy, however it is defined, requires the most of an attorney for each and every client.[177] That bumps up against the harsh reality that many public defenders are perilously short on time as a result of their mountainous caseloads.[178] Indeed,

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170. DEF. FUNCTION 4-1.8.

171. *See generally* Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation*, 37 IND. L. REV. 21, 24 (2003) ("[I]t seems that each of the [ethical] models either prescribes to the lawyer a particular decision to be applied to a given ethical dilemma or does not obligate the lawyer to demonstrate the exercise of thoughtful ethical discretion. Thus, the models all appear to fall short of their stated goal: ultimately permitting but not requiring that the individual lawyer engage in ethical deliberation and analysis.").

172. FLA. STAT. ANN. § 27.5303(1)(d) (West 2014) ("In no case shall the court approve a withdrawal by the public defender or criminal conflict and civil regional counsel based solely upon inadequacy of funding or excess workload of the public defender or regional counsel."); *see also* Anderson, *supra* note 53, at 429.

173. See Joy, *supra* note 90, at 771.

174. Anderson, *supra* note 53, at 422.

175. Jerold H. Israel, *Excessive Criminal Justice Caseloads: Challenging the Conventional Wisdom*, 48 FLA. L. REV. 761, 763 (1996).

176. *See, e.g.*, Norman Lefstein, *Excessive Public Defense Workloads: Are ABA Standards for Criminal Justice Adequate*, 38 HASTINGS CONST. L.Q. 949 (2011) [hereinafter *Excessive Public Defense Workloads*].

177. *Supra* Section I.B.

178. *See, e.g.*, Richard A. Oppel, Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No*

they lack the time and resources to achieve the type of "passion" and "partisanship" described above,[179] wherein the attorney takes the time to visit a preoccupied client in their home.[180] Model Rules 1.7 and 1.8 governing conflicts of interest are also difficult to fulfill, where lawyers have no choice but to allocate their time among clients and personal needs.[181] This practice, commonly referred to as triaging, will be addressed in greater detail in Part B of this section. Because the ethical rules fail to adequately carve out a definition for adequate caseload, they tacitly sanction skyrocketing caseloads that effectively diminish defense attorneys' ability to advocate effectively and zealously.

A noteworthy ethics opinion issued in 2006 highlights the problem with the lack of guidance as to what "excessive caseload" actually means in practice.[182] ABA Formal Op. 06-441 instructs that all lawyers providing criminal defense representation to indigent clients owe all their clients a duty of diligence and competence.[183] According to the opinion, a lawyer facing excessive caseloads must cease accepting new clients by requesting a stop to new appointments or withdraw representation or receive assistance from the head of the defender program in ensuring that representation conforms to the Model Rules.[184] However, these "fixes" are unlikely to be effective because they require individual action and fail to address the problem on a systemic level.[185] Furthermore, it is self-evident that they fail to provide meaningful guidance to attorneys as to *when* they have reached the point where they need to address the problem.

The only official guidance alluded to under the rules comes from the National Advisory Commission on Criminal Justice Standards and Goals ("NAC Standards"), which promulgated caseload standards in 1973.[186] Specifically, the NAC

Time, N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html [https://perma.cc/WX6V-42YS] (hereinafter "*One Lawyer, No Time*"). This article asserted that one public defender in Louisiana "would have needed almost 10,000 hours, or five work-years, to handle the 194 active felony cases he had as of that April day, not to mention the dozens more he would be assigned that year." The analysis did not include a single death-penalty case on his roster, the most time-consuming type of case.

179. *Id.*

180. See Jacobs, *supra* note 33, at 99.

181. *See also* Anderson, *supra* note 53, at 428.

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

183. *Excessive Public Defense Workloads*, *supra* note 176, at 963 (citing ABA Formal Op. 06-441 at 4).

184. *Id.* at 963–64.

185. In 2016, Orleans Public Defenders began refusing cases, arguing they did not have the resources to take on all of the complex felony cases coming their way. The ACLU of Louisiana sued, arguing that the refusal denied clients their Sixth Amendment right to counsel. As of this writing, there is no resolution. Wilborn P. Nobles III, *ACLU Sues Orleans Public Defenders Office Over Refusal of Cases*, TIMES PICAYUNE (Jan. 15, 2016), https://www.nola.com/crime/2016/01/aclu_sues_orleans_public_defen.html [https://perma.cc/A2DR-DZMM]; s*ee also Federal Judges Ponder Case Challenging Public Defender Wait Lists*, TIMES PICAYUNE (Aug. 6, 2018), https://www.nola.com/crime/2018/08/public_defender_lawsuit_aclu.html [https://perma.cc/A83Z-ZNW4].

186. NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, TASK FORCE ON

recommended a public defender should not maintain an annual caseload of more than 150 felonies, 400 misdemeanors (excluding traffic), 200 juvenile court cases, 200 Mental Health Act cases, and 25 appeals.[187]

The ABA's Ten Principles of a Public Defense Delivery System (hereinafter "Ten Principles") specifically cites the NAC in its discussion of appropriate workload, and states in the comments that "[n]ational caseload standards should in no event be exceeded."[188] If these numbers are meant to supplement the Model Rules and Defense Function standards governing caseloads,[189] they do little to further zealous representation. In reality, the maximum numbers are typically regarded as the norm, not the upper extreme, and because they are unreasonably high, they prevent effective representation.[190] Attorneys juggling a caseload of 150 felonies and 400 misdemeanors cannot possibly adequately represent each of those clients.[191] Moreover, these guidelines have failed to provide a ceiling to public defender caseloads. As early as 2008, public defender offices were reporting average caseloads far exceeding the maximum limits expressed by the NAC.[192] Public defense offices in some jurisdictions report average felony caseloads as high as 500 per year and average misdemeanor caseloads around 2,225 per year.[193]

Even if the NAC Standards were adopted officially by the ABA,[194] they might still fail to provide meaningful ceilings to defender caseloads. They are often cited as if they have some authoritative force, but their frequent citation has

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COURTS, Standard 13.12 (1973) [hereinafter NAC STANDARDS]; *see also* NORMAN LEFSTEIN, AM. BAR ASS'N, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 43 (2011), https://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf [https://perma.cc/HZ84-UBD2].

187. NAC Standards 13.12.

188. ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2 (2002), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf [https://perma.cc/SJ4R-YEA5].

189. It should be noted that as of 2011, "no other national caseload numbers . . . have ever been recommended." *Excessive Public Defense Workloads*, *supra* note 176, at 43.

190. "The answer is that caseload numbers expressed as maximums all too frequently are regarded as the norm, i.e., the number of cases that a defense lawyer should be able to represent over a twelve-month period. Warnings about relying upon the numbers are soon forgotten, and public defense programs are reluctant to seek financial support to enable their lawyers to handle caseloads at any number below 'national standards,' even though the NAC numbers were never intended to be used as a nationwide measure of how many cases an individual lawyer should be able to handle each year." *Id.* at 48.

191. *One Lawyer, No Time*, *supra* note 178; *see also* STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS, AMERICAN BAR ASSOCIATION, THE LOUISIANA PROJECT: A STUDY OF THE LOUISIANA DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS (2017), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.pdf [https://perma.cc/V4GU-SNF7].

192. *Public Lawyers Reject New Cases*, *supra* note 167, at 72.

193. *Id.*

194. Though the NAC Standards have not been adopted in an official capacity, they are oft cited. Cullen, *supra* note 2, at 679.

not served to mitigate the problem.[195] It is unclear what would result from more enforceable caseload norms—lack of funding is the primary reason for high caseloads, but a cap would not automatically ensure greater funding.

All of this indicates that it is not possible for most public defenders to comply with numerous ethical rules due to inadequate funding and excessive caseloads.[196] Moreover, attorneys lack any guidance in understanding the line between excessive and appropriate caseloads because of the Model Rules and Defense Function's failure to adequately promulgate caseload standards.[197] The ethical rules are out of touch with the caseload problem faced by most public defenders, rendering them somewhat useless to shape ethical norms within public defense.

B. Implicit Bias

Implicit bias is another reality of public defense that is largely uncontemplated by the rules. Implicit bias refers to subconscious or unintentional associations people make about groups of people.[198] Implicit racial bias specifically refers to unintentional responses people make based on race.[199]

> Implicit stereotypes and attitudes result from the practice we get associating groups (e.g., blacks) with traits (e.g., criminality). This practice stems from repeated exposures to cultural stereotypes that are ubiquitous within a given society.[200]

Public defenders are not immune from this type of stereotyping and bias.[201] Implicit bias is a byproduct of the case triaging that public defenders reckon with as a result of excessive caseloads. Such bias, a reality of day-to-day life more generally, is commonplace in the work of public defenders, despite best intentions. The ethical rules' general failure to account for excessive caseloads results in the rules' greater failure to address the role that implicit bias plays in a public defender's work.

Public defense triage, the practice of "determining which clients merit attention and which do not,"[202] is inevitable for public defenders who cannot, or should

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195. *Id.*

196. *See generally* Richardson & Goff, *supra* note 2.

197. *Supra* note 174.

198. Richardson & Goff, *supra* note 2, at 2629.

199. *Id.*

200. *Id.* at 2630.

201. *See, e.g.*, Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012); Daniel Kelly & Erica Roedder, *Racial Cognition and the Ethics of Implicit Bias*, 3 PHILOSOPHY COMPASS 522 (2008); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1540 (2003-2004); s*ee also* Jeff Adachi, *Public Defenders Can Be Biased, Too, and It Hurts Their Non-white Clients*, WASH. POST. (Jun. 7, 2016), https://www.washingtonpost.com/posteverything/wp/2016/06/07/public-defenders-can-be-biased-too-and-it-hurts-their-non-whiteclients/?utm_term=.535ce9f8303e [https://perma.cc/F6WN-6BJT].

202. Richardson & Goff, *supra* note 2, at 2632 ("As one defender put it, 'The present M.A.S.H.

not, assign the same degree of attention to each case.[203] Implicit bias can infect every level of a public defender's judgments about their caseload. General studies about implicit bias have been interpreted to suggest that implicit bias can influence a public defender's evaluation of the evidence in their case.[204] For example, implicit bias can cause a public defender to interpret evidence in a Black client's case as more probative of guilt than the same evidence in a white client's case.[205] Implicit bias can also infect counsel's determination about a client's credibility, leading her to fail to follow up on leads or file needed motions.[206] Biased decision-making among public defenders can yield disastrous results for clients whose cases are not treated with the appropriate care or attention.[207]

It is easy to see how this practice is exacerbated by high caseloads, where public defenders are forced to make decisions about how and where to allocate more resources. When defense attorneys rely on snap judgments informed by implicit bias, clients of color and other marginalized groups are more likely to be given short shrift.

The Model Rules' and Defense Function's requirements of zealous advocacy and counseling against conflicts of interests—among other rules—should clearly caution against triaging defined by decision-making infected by implicit bias. Indeed, Defense Function Standard 4-1.6 prohibits improper bias. "Defense counsel should strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of defense counsel's authority."[208] Additionally, "[d]efense counsel should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of counsel's work."[209] The vagueness of this guidance renders it unhelpful in addressing the problem of triage. Triage can be traced back to a lack of resources and overburdened caseloads.[210] Without

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style operating procedure requires public defenders to divvy effective legal assistance to a narrowing group of clients, [forcing them] to choose among clients as to who will receive effective legal assistance.'").

203. *See generally* STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS, AMERICAN BAR ASSOCIATION, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 21 (2014), https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.pdf [https://perma.cc/V4GU-SNF7].

204. Richardson & Goff, *supra* note 2, at 2635.

205. *Id.* at 2636.

206. *Id.*

207. *See* Adachi, *supra* note 201 ("Past studies have suggested that attorneys may consider race in assessing the client's chances of conviction and may therefore be willing to recommend higher sentences to account for a biased system.").

208. DEF. FUNCTION 4-1.6(a).

209. DEF. FUNCTION 4-1.6(b).

210. L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 878 (2016-2017) (reviewing NICOLE VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT (2016)) ("These excessive caseloads impact defense lawyers, prosecutors, and judges alike, creating pressure on each of these courtroom actors to engage in triage – the process of allocating scarce resources.").

addressing those issues, triage is virtually unavoidable.[211] And if bias informs triage, then defense work will inevitably be infected by bias. The rules are ill-equipped to handle this problem without a primary acceptance of the practice of triage. It is not possible for public defenders to act without bias, and thus provide ethical representation, so long as triage is common practice.

IV.
PROPOSALS FOR IMPROVING ETHICAL PUBLIC DEFENSE

The Model Rules, Defense Function, and Prosecution Function contradict one another. They also lack the authority to supersede the less onerous dictates of the Constitution and the realities of public defense practice. Addressing this issue requires consideration of what the Model Rules currently accomplish and what they ideally might. The ethical rules should not prescribe all attorney behavior, because the work requires a kind of flexibility that black letter law stifles. On the other hand, if the rules are not even enforceable, it could diminish the importance of crafting the rules with specificity. The rules provide meaningful guidance to public defenders, despite their current flimsiness as tools for enforcing ethical norms in the courts. Moreover, there is room to amend the constitutional framework holding public defenders to black letter ethical norms.

Ultimately, this Article argues that the rules should be amended so as not to contradict each other and to more realistically express the role of defense attorneys in the criminal justice system. Moreover, the constitutional standards should be raised, while also adding *ex ante* accountability measures, so that ineffective assistance of counsel claims are not the only means for clients to hold attorneys accountable. However, this cannot happen without also increasing resources for defenders and improving accountability for prosecutors; this is because these rules do not exist in a vacuum and cannot provide meaningful guidance without acknowledging external factors that play into the defense role.

A. The Role of the Rules

The Model Rules can serve an important function for public defenders. Even when not strictly enforced, they have the potential to shape the work of defense attorneys, particularly public defenders, and help them navigate murky waters.[212] They could temper zeal where it can become obsessive and provide needed direction on basic standards, regardless of the client or the attorney. But largely because of the inadequacies described in earlier sections, the rules fail to meaningfully aid defenders and, even if they overcame these deficiencies, they are unenforceable in the courts—for better or for worse. This section outlines some of the ways in

211. *Id.* (quoting Richardson & Goff, *supra* note 2, at 2632) ("This reality means that for most [public defenders], the question is not 'how do I engage in zealous and effective advocacy,' but rather, 'given that all my clients deserve aggressive advocacy, how do I choose among them.'").

212. *Supra* Section I.B (discussing, for example, the ideal of zealous advocacy).

which a more optimal set of rules could guide public defenders, even where the courts fail to meaningfully enforce them.

1. Reimagining the Rules

The first step to making the ethical rules work for public defenders and to improve them as a guide is to re-write them such that they are more aligned with and directly address the realities of practice. Mostly importantly, the rules should take a solid position on some of the murkier questions posed by the rules. These include: what constitutes a conflict of interest, what is an excessive caseload, and whether it is ever acceptable to lie outright to the court.

The rules should take the position that conflicts of interest occur where caseloads are too high. Moreover, it should define excessive caseloads not by the ceiling set by the NAC years ago but based on best practices regarding how long it actually takes an attorney to work a homicide case, a felony case, and a misdemeanor case. Even if the rules do not do away with the trilemma, they should acknowledge its existence and provide more realistic parameters for attorneys. For example, the rules could be explicit in stating that where the duty of candor compromises the attorney's duty to investigate and inform the client of confidentiality, the duty of candor is the lowest priority.

In amending the rules, the ABA need not prescribe conduct for each and every potential scenario. Instead, the rules should contemplate scenarios that come up in practice, and work to present defenders with ethical solutions that are feasible. Where more straightforward guidance is required, such as what constitutes a conflict, the rules should be specific. As noted earlier in this paper, amending the rules will require contemplation of the role defense attorneys should play in the criminal justice system we have created and how the rules can best nurture that role.

2. Increased Parity

There is a significant issue of parity between prosecutors and defenders. The rules do not condone the same behavior for prosecutors and defenders. One big advantage prosecutors are afforded is that they benefit from "lawfully authorized investigative purposes" that condone lying.[213] Defenders do not have the benefit of such tactics, though perhaps they should.[214] A more equitable Defense Function might allow for the same amount of lying that is permitted for prosecutors. Some states have indeed adopted an approach similar to this, sometimes called the "symmetrical approach."[215] For example, Oregon amended its version of Rule 8.4 to read:

> [I]t shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the

213. *Supra* Section I.C.1.
214. *See* McMunigal, *supra* note 66, at 1391.
215. *Id.* at 1387–88.

> investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct.[216]

The rule explains that "'[c]overt activity,' as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge."[217] This rule does not condone all "covert activity"—it merely allows defenders to use such tactics where they believe unlawful behavior is occurring. Nevertheless, it is an example of how the rules could be expanded to allow for limited deceit, giving Oregon's rules somewhat greater parity. This is preferable to a form of parity that limits covert activity by prosecutors and defenders. Not only is covert activity an effective tool for gathering information, it is also baked into the criminal justice system for investigation, not just through lying to witnesses but also to criminal defendants under interrogation.[218]

While the Defense Function and Model Rules limit the extent to which defense attorneys may lie to coax a potential witness into making a statement, prosecutors are not similarly barred. Greater parity could potentially open up many more doors for public defenders. A more effective and meaningful set of ethical guidelines should incorporate greater parity.

3. Moderating Burnout

The ethical rules could also be used as a tool to moderate burnout. This is an expansion on the idea of the rules as a ceiling. Burnout, or "exhaustion of physical or emotional strength . . . usually as a result of prolonged stress or frustration,"[219] is common among public defenders, who express great degrees of empathy and heroism in a trying and overwhelming field of work.[220] The ethical rules certainly are not the only or even primary resource that public defenders turn to when the work becomes difficult. But they do limit the extent to which public defenders can act heroically on behalf of clients, as well as the extent to which empathy can factor in to a defender's work.[221] Thus, the rules, in shaping the contours of public

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216. OR. RULES OF PROF'L CONDUCT r. 8.4(b) (2015).

217. *Id.*

218. *See, e.g.*, Green v. Scully, 850 F.2d 894 (2d Cir. 1988) (holding that a direct or implied promise of help to a defendant under interrogation doesn't bar admission of confession); United States v. Fraction, 795 F.2d 12 (3d Cir. 1986) (defendant's confession deemed voluntary where the interrogator promised the defendant a lenient sentence in exchange for cooperation).

219. *Burnout*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/burnout [https://perma.cc/4P6C-MP92] (last visited Apr. 24, 2018).

220. *See generally* Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathetic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203 (2004).

221. For example, the fact that defenders may not outright lie on behalf of their clients does serve as a fundamental limitation on the defense attorney's role. Likewise, defenders' ability to be conflicted out of cases limits both the number of cases an attorney can take on and impacts some of the difficult decisions a defense attorney must make in the course of representation, like how to allocate loyalty.

defense practice, also can serve as a check on the type of conduct that might generate faster burnout.

4. The Rules Matter

Regardless of their enforceability, the ethical rules matter to the practice of public defense. Amending the rules to both better reflect the realities of public defense and avoid internal contradictions and shortcomings will better reflect the ideal role of the public defender in important ways. This paper does not attempt to identify all of the potential tweaks, but instead argues that doing so is more important for shaping ethical norms than it is for enforcing ethical behavior.

B. Addressing the Ex Post Problem

Though amending the rules would be sufficient to adapt ethical norms to the ideal practice of public defense, the Constitution's lower standards still present a problem for the enforcement of many ethical rules. One critical aspect of the Constitution's failure to meaningfully enforce effective behavior among defense attorneys is the fact that enforcement takes place *ex post*, at least as it relates to clients.[222] While there are sanctions that a lawyer could face for violating ethical rules,[223] ineffective assistance of counsel claims are raised after the client's conviction is assured through trial or plea. But "[t]he better approach would ask before proceedings commence whether the defendant's lawyer can effectively represent him."[224] One way of understanding the ethical rules is to ensure, *ex ante*, that attorneys are qualified and prepared to represent a given client. Yet, without a mechanism other than ineffective assistance of counsel claims and appeals for ensuring attorney competency with the courts, it is difficult to make *ex ante* judgments and anticipate certain problems before they arise. To be sure, ineffective assistance of counsel claims are still important, and also require attention and reform, but *ex ante* procedure could do more to bring the ethical rules in line with attorney practice than *ex post* ineffective assistance of counsel adjudication.

The *ex post* problem is already well acknowledged.[225] Yet, scholars bemoan both the legislative and judicial process for failing to achieve change.[226] Indeed, commentators have long noted an unwillingness among legislators to address this

222. *The Case for an* Ex Ante *Parity Standard, supra* note 2, 243 ("The key obstacle to reform lies in *Strickland's* inquiry into the effectiveness of counsel *after the fact*. It is all but ludicrous to ask a reviewing court to assess a record made by counsel to determine how counsel erred. As one might expect, this inquiry has done little to improve the quality of defense representation.").

223. MODEL RULES r. 10; *supra* note 4 (discussing disbarment, suspension, probation, reprimand, admonition, restitution, and limitation of future practice).

224. *The Case for an* Ex Ante *Parity Standard*, *supra* note 222, at 244.

225. *See id.* at 243 (suggesting the *ex post Strickland* inquiry should be accompanied by "an *ex ante* inquiry into whether the defense is institutionally equipped to litigate as effectively as the prosecution.").

226. *Id.*

problem on their own.[227] Thus, many structural recommendations have discounted the role of state legislatures, assuming their inadequacy in effecting structural change.[228] Many still pin their hopes upon favorable Supreme Court jurisprudence or state-by-state judicial safeguards.[229] That may be fair enough as a historical observation, but it fails to anticipate the changing political tides on criminal justice issues.[230] The need for systemic reform is front and center in the news,[231] and politicians are devoting more space in their platforms to addressing criminal justice.[232] If there is momentum to increase funding for public defense offices, capitalizing on that momentum to advocate for a fundamental restructuring of the role of public defenders within the ethical rules and state codes is both worthwhile and necessary. Despite the hesitance to rely on state legislatures to re-

227. *E.g.*, Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 699 (2007) ("[T]here is little reason to believe that local, state, or federal legislatures will choose to contribute sufficient funds to solve the problem ex ante. There is no lobby to argue for such changes. In fact, society disenfranchises most convicts, and the public is not exactly clamoring for greater safeguards for criminal defendants. The few legislators who have argued for such changes have done so at their own peril, and are frequently accused of being 'soft on crime' in subsequent electoral races. For these reasons, it is unrealistic to believe that legislatures will intervene—without judicial prodding—to solve the ineffectiveness problem by significantly increasing funding for defense at the trial level.").

228. *See, e.g.*, Thompson, *supra* note 2, at 762; *The Case for an* Ex Ante *Parity Standard*, *supra* note 222, at 243 ("And it is indeed the case that there is no prospect of legislative action to improve the situation.").

229. Donald A. Dripps, *Up from Gideon*, 45 TEX. TECH L. REV. 113, 122 (2012) ("The holy grail for advocates of effective defense representation is a Supreme Court ruling imposing caseload limits along the lines of the ABA Standard."). The Supreme Court of Hawaii expressly rejected *Strickland*. State v. Smith, 68 Haw. 304, 309 (1986) (explaining that to prevail on an ineffective assistance of counsel claim, defendant must show there were "specific errors or omissions . . . reflecting counsel's lack of skill, judgment or diligence" and that "these errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense."). New York's standard also differs from *Strickland*. Under New York law, "'[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation,' a defendant's constitutional right to the effective assistance of counsel will have been met." People v. Henry, 744 N.E.2d 112, 113 (2000) (quoting People v. Baldi, 429 N.E.2d 400, 405). New York's "meaningful representation" standard does not include *Strickland*'s prejudice requirement, but rather a "prejudice component which focuses on the 'fairness of the process as a whole rather than [any] particular impact on the outcome of the case.'" *Id.* at 114 (quoting People v. Benevento, 697 N.E.2d 584, 588 (1998)).

230. News articles announce that criminal justice reform is sweeping the country. *See, e.g.*, Patrisse Cullors, *Criminal Justice Reform Is Sweeping the Country. But Not L.A. County*, L.A. TIMES (Feb. 27, 2019), https://www.latimes.com/opinion/op-ed/la-oe-cullors-criminal-justice-reform-lacey-20190227-story.html [https://perma.cc/Z4QX-2W6K]. In fact, criminal justice reform is such a popular, hot button issue that even President Donald Trump is willing to tout criminal justice reform credentials. *See, e.g.*, Jamil Smith, *Criminal Justice Legislation Means Nothing Without Follow-Through*, ROLLING STONE (Mar. 21, 2019), https://www.rollingstone.com/politics/politics-features/criminal-justice-reform-problems-811322/ [https://perma.cc/J5ZR-PGHM] ("Trump [sung] the praises of his terribly flawed law as if it had finished the entire job of criminal justice reform").

231. *Id.*; *see also One Lawyer, No Time*, *supra* note 178.

232. Holly Harris, Opinion, *The American People Have Spoken: Reform Our Criminal Justice System*, THE HILL (Feb. 11, 2018), http://thehill.com/opinion/criminal-justice/373315-the-american-people-have-spoken-reform-our-criminal-justice-system [https://perma.cc/8APD-UNRJ].

direct criminal justice policy, there is actually a history of such involvement.[233] State legislatures are arguably a more appropriate forum than Congress for structural changes to the criminal justice system.[234] Such change could also prove more durable.[235]

Statutory reform specifically legislating ethical norms is not unprecedented; however, the legislation to date has gone in the wrong direction. In 2004, for example, the Florida legislature passed a statute barring public defenders from withdrawing from cases solely due to inadequate funding or excessive workload.[236] The implications of such a statute are concerning.

> The statute essentially forces a public defender to continue representing a client despite her personal belief that she cannot do so ethically because of an excessive caseload. Stuck in this position, public defenders must sacrifice some clients in the interest of others and, as documented elsewhere, often give some clients no effective representation at all.[237]

Nevertheless, the statute also demonstrates a willingness to use legislation to enforce or reject ethical norms. Such a willingness could be applied to statutorily define excessive caseloads as conflicts of interest—for example, empowering public defenders to withdraw under such a statute when caseloads get too high. Legislatures could also set limits on public defender caseloads and create mechanisms to account for overflow when offices can no longer handle additional clients.

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233. Capital punishment is one area in which state legislatures have had outsize influence. *See* Douglas A. Berman, *Foreword: Addressing Capital Punishment Through Statutory Reform*, 63 OHIO ST. L.J. 1, 2–3 (2002) ("The Supreme Court itself recognized and legitimized the centrality of legislative judgments in *Gregg v. Georgia*, wherein the Court relied heavily on the fact that so many state legislatures had re-enacted capital statutes following *Furman* to conclude that the death penalty does not transgress 'evolving standards of decency' said to be the touchstone of the Eighth Amendment's prohibition on cruel and unusual punishments. And the Supreme Court has subsequently reinforced the significance of legislative action by repeatedly asserting that state statutes are to be the first, and most important, consideration when gauging the 'standards of decency,' which are determinative of a punishment's constitutionality.").

234. The Supreme Court's concern about stepping on the boundaries of federalism also means that they are "institutionally inclined to set such constitutional floors as low as possible." *Id.* at 8–9 (citing Medina v. California, 505 U.S. 437, 442–44 (1992)) (asserting that interpretations of the Due Process Clause in criminal cases must show deference to "considered legislative judgments"); Harmelin v. Michigan, 501 U.S. 957, 996–1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (stressing principles of federalism and separation of powers to justify a very limited role for the Supreme Court in judging the proportionality of sentences) (additional citations omitted).

235. *See, e.g.*, *Up from* Gideon, *supra* note 229, at 123 ("The Court is in general sympathy with mainstream political opinion. Typically, it will move on behalf of disempowered groups after those groups have established a political identity, achieved some successes in the political realm, and won important lower court victories pursuant to a careful litigation strategy.").

236. FLA. STAT. ANN. § 27.5303(1)(d) (West 2014) ("In no case shall the court approve a withdrawal by the public defender or criminal conflict and civil regional counsel based solely upon inadequacy of funding or excess workload of the public defender or regional counsel."); *see also* Anderson, *supra* note 53, at 429.

237. Anderson, *supra* note 53, at 429–30.

This Article does not purport to address every potential substantive ethical change that can be enforced by statute, but suffice it to say that legislatures have the power to regulate public defense *ex ante*, without diving into every strategic detail *ex post* in an ineffective assistance of counsel posture.[238] Moreover, now more than ever there may be public and legislative will to devote more attention to criminal justice issues,[239] and that can come to include public defense. The notion that checklists or specific standards should be written into the rules is not a new one.[240] But it might be more prudent to focus not on creating boxes in the rules for public defenders to check off, but instead to prioritize certain aspects of representation and write them into statute.[241]

Statutory reform, connected to an improved funding mechanism, has the power to do more than just better resource public defenders offices—it could serve to bake the role of the defense attorney into the system, creating greater parity with prosecutors and increasing recognition for the unique role of defense attorneys in the criminal justice system.

Cleaning up the rules and by extension re-structuring the role of public defenders is important to improving what is being signaled about public defense. The Model Rules and other ABA guidelines express the role of public defenders and other defense attorneys to the rest of the profession and criminal justice system actors. Incorporating some of these rules into law would address the rules' shortcomings and their enforceability problem. Both pieces are important steps in the right direction.

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238. Legislatures could also create causes of action for criminal defendants concerned about effective assistance, such that those criminal defendants whose cases have not yet terminated can sue under state law, even though they ordinarily would not have standing to bring a claim before the conclusion of their criminal case. "Basically, before the defendant is charged, he has no standing to complain about indigent defense; after he is charged, his claims must be brought in the course of the criminal proceedings." *Supra* note 222 (citing several federal court cases dealing with this issue). Because ineffective assistance of counsel per se is not the topic of this paper, it is not worth exploring in great detail.

239. *See, e.g.*, Harris, *supra* note 232.

240. *See* Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 655 (1985-1986) ("Particularized standards which guide lawyers through every stage of the criminal proceeding, might actually diminish the number of inadequate representation claims. Such standards detailing the steps that ought to be taken in preparing a case would assist and guide the attorney through the preparation of the defense in a criminal trial, and would be especially useful to the novice attorney or the lawyer whose specialty is in another area of law, but who recently has taken on a criminal case.").

241. *Cf. id.* ("Particularized requirements would also enable defendants to understand what is involved in the defense of a case and might well enable them to more actively participate in the process that so vitally affects them. Through such standards, the trial judge would be able to monitor more effectively the quality of representation the defendant was receiving. Moreover, the lack of specific standards makes it more difficult to evaluate the competency of the representation provided. This in turn diminishes the likelihood of obtaining appellate relief for a defendant who had ineffective counsel at trial. The profession's failure to adopt particularized standards may be motivated, in part, by a concern that greater specification may increase the vulnerability of attorneys to malpractice actions.").

V.
CONCLUSION

Public defense is envisioned as a critical piece of the American criminal justice system. But because of the unique nature of public defense work, and criminal defense more generally, the profession does not accurately contemplate the role of the public defender in that system. The ethical rules guiding practice are contradictory, undermined by the Constitution, and inconsistent with the realities of public defense. In short, it is nearly impossible to be an ethical public defender under the rules. This is a crisis for public defenders, but it is just as important for clients and for the rule of law. While it would be nice if there were a quick fix, there is not one answer to such an embedded problem. Indeed, this paper has argued that the problem is due in large part to a flawed, but entrenched, understanding of the role of defense counsel. Nevertheless, an understanding that public defense is systemically misunderstood could prompt a re-imagining of the role by the profession that can hopefully clear the path to systemic appreciation for public defenders, and better counsel to clients.