

FUNDING THE UNFUNDED NON-MANDATE: AN EQUAL JUSTICE  
CASE FOR ADEQUATE FUNDING OF PUBLIC DEFENSE

BY JAY C. HAUSER\*

**Abstract.** Federal and state courts have failed to fully address inadequate funding for public defenders as a hurdle to the right to effective assistance of counsel—as opposed to the right to mere assistance of counsel. Courts view denials of this right as due process violations and embark on individualistic analyses. However, precedent indicates that equal protection, which is inherently comparative and provides for a more systemic lens, also comes into play with the right to be represented by an attorney when facing the full weight of the criminal justice system. By reframing the issue and moving the discussion from due process to equal protection, advocates seeking relief for public defender offices and their clients can take advantage of—and reframe courts’ understanding of—studies demonstrating that, as currently funded, public defenders cannot adequately represent their clients in line with their ethical obligations.

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## INTRODUCTION: STATING THE PROBLEM

Approximately thirty years ago, New Orleans public defender Mark Teissier filed a “Motion for Relief to Provide Constitutionally Mandated Protection and Resources,”<sup>1</sup> or as *Time* put it, “he filed suit against himself.”<sup>2</sup> Alleging that the lack of adequate funding for public defense within his section of New Orleans Criminal District Court unconstitutionally deprived his clients of reasonably effective assistance of counsel, he noted that within an eight-month period, he represented 418 defendants, typically received no investigative support or funds for expert testimony, and worked in an inadequate law library.<sup>3</sup> His motion made it all the way up to the Louisiana Supreme Court, which determined that indigent defendants within Mr. Teissier’s section routinely went without effective assistance of counsel.<sup>4</sup> However, because the court decided that the true inquiry in the case was “whether an *individual* defendant has been provided with reasonable effective assistance,”<sup>5</sup> the remedy for the deprivation was individual—a rebuttable presumption of ineffective assistance for Mr. Teissier’s clients alone.<sup>6</sup> If, on remand, after hearing individual motions by Mr. Teissier’s clients, a trial court found that they were not receiving effective assistance and could not order any other appropriate remedy, the trial court, as a last resort, was instructed to not permit prosecutions until effective assistance was provided.<sup>7</sup> The court noted that “because this Court should not lightly tread in the affairs of other branches of government and because the legislature ought to assess such measures in the first instance,” it would “decline at this time” to “employ more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel.”<sup>8</sup>

Evidently, the *Peart* decision did not turn out to be a panacea. A 2017 study, based on the informed opinions of seasoned Louisiana criminal defense lawyers, found that in order to provide representation that complies with the Louisiana Public Defender Board Trial Court Performance Standards, the ABA Standards for Criminal Justice, and the Louisiana Rules of Professional Conduct, Louisiana’s public defense system would need approximately 1,769 full-time public defenders.<sup>9</sup> In 2016, the equivalent of 363 full-time public defenders worked in the Louisiana public defense system—a mere twenty percent of the defenders needed to comply with professional norms and ethics rules.<sup>10</sup> In other states, the results of similar studies yield similar results. In Rhode Island, public defenders were found to be able to handle thirty-six percent of their total workload in compliance.<sup>11</sup>

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<sup>1</sup> State v. Peart, 621 So.2d 780, 784 (La. 1993).

<sup>2</sup> Jill Smolowe, *The Trials of the Public Defender*, 141 TIME 13, 48 (1993).

<sup>3</sup> *Peart*, 621 So.2d at 784.

<sup>4</sup> *Id.* at 790.

<sup>5</sup> *Id.* at 788.

<sup>6</sup> *Id.* at 791.

<sup>7</sup> *Id.* at 791-92.

<sup>8</sup> *Id.* at 791.

<sup>9</sup> THE AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS & POSTLETHWAITE AND NETTERVILLE, APAC, THE LOUISIANA PROJECT: A STUDY OF THE LOUISIANA PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 2 (2017) (hereinafter *The Louisiana Project*).

<sup>10</sup> *Id.* at 21.

<sup>11</sup> BLUM SHAPIRO, THE AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS & THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE RHODE ISLAND PROJECT: A STUDY

In Colorado, while public defenders are mostly in compliance with their handling of first-degree felony cases, that compliance is at the expense of almost every other type of case public defenders handle.<sup>12</sup>

The Colorado study is indicative of the important concept of triage in public defense. The term is a purposeful reference to emergency rooms: due to limited resources, health care providers give the gravest cases priority and attention at the expense of others.<sup>13</sup> A similar system occurs in public defender offices, where some clients are pled out or tried haphazardly and others receive zealous advocacy.<sup>14</sup> The *Peart* opinion unknowingly described this phenomenon in passing, noting, “[t]hat Peart himself could receive effective assistance, while Teissier’s other clients do not, reflects the fact that indigent defenders must select certain clients to whom they give more attention than they give to others.”<sup>15</sup>

Armed with the 2017 Louisiana study and the triage problem, the Chief Indigent Defender in the East Baton Rouge Parish’s public defender office, in *State v. Covington*, moved to reduce caseloads by withdrawing from current representations and declining new ones.<sup>16</sup> On appeal, the Louisiana Supreme Court noted that *Peart* requires an individual, fact-specific analysis for how an attorney handled a specific case, rather than considering other cases or their overall workload.<sup>17</sup> According to the majority, the Louisiana study only defined how many hours of work a public defender should put in per case (depending on the type).<sup>18</sup> The study did not provide the case-specific information *Peart* requires, and the movant did not provide other information that would satisfy this burden.<sup>19</sup> Therefore, the court denied relief.<sup>20</sup>

Although the court in *Peart* recognized the problem, it did very little to address it. Its remedy, based on individual determinations for each client’s case, was hamstrung from the beginning by the individualized findings requirement.<sup>21</sup> The Louisiana Supreme Court’s decision demonstrated this in the clearest terms possible.<sup>22</sup> The root of the problem is not the actions of individual public defenders, but inadequate funding for indigent defense. It is a systemic problem, one that courts, blinded by a focus on individual determinations under an individualistic understanding of the right to counsel, has failed to understand, let alone grant a remedy to address in full.

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OF THE RHODE ISLAND PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 26 (2017).

<sup>12</sup> Compare RUBIN BROWN & THE AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, THE COLORADO PROJECT: A STUDY OF THE COLORADO PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 22 (2017) with *id.* at 23.

<sup>13</sup> See, e.g., L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2632 (2013).

<sup>14</sup> See *id.* (“However, most PDs do not work in an ideal environment. They cannot realistically provide each client with zealous and effective advocacy. PDs are forced by circumstances to engage in triage, i.e., determining which clients merit attention and which do not.”)

<sup>15</sup> *Peart*, 621 So.2d at 785 n.4.

<sup>16</sup> *State v. Covington*, 2020-00447 (La. 12/1/20), 318 So. 3d 21, 22.

<sup>17</sup> *Id.* at 23.

<sup>18</sup> *Id.* at 25.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 27.

<sup>21</sup> *Peart*, 621 So.2d at 791-92.

<sup>22</sup> See *Covington*, 318 So. 3d at 27.

Recognizing that, compared to the Due Process Clause, the Supreme Court envisions disparities more as Equal Protection Clause violations,<sup>23</sup> this paper will attempt to reconstruct and reframe the right to effective assistance of counsel. By detailing a more equal protection-focused equal justice framework, this paper will demonstrate how courts can better see systemic issues. Section II will summarize the Court's current jurisprudence on the right to counsel and ineffective assistance of counsel. Section III will discuss the inner workings and outer bounds of the Court's potentially more profitable equal justice framework. Section IV will combine the two lines of cases to find a comparative, systems-based approach to assessing funding's relationship to ineffective assistance of counsel. Finally, Section V will provide an example of how this line of argument could work in practice and discuss how it must be framed in light of *Covington*.

## I. THE DEVELOPMENT OF THE RIGHT TO COUNSEL AND EFFECTIVE ASSISTANCE OF COUNSEL

### *A. From Powell to Gideon*

A complete understanding of the development of the constitutionally-mandated right to publicly funded counsel must begin with the story of the Scottsboro Boys and the case of *Powell v. Alabama*.<sup>24</sup> The story begins with seven white boys, two white girls, and nine Black boys riding on a freight train passing through Alabama.<sup>25</sup> Following a fight, the white boys walked back to the station and alleged the Black boys, ages 13 to 20, had thrown them off the train. The station master then called ahead, arranging for the Black boys to be removed at the next stop.<sup>26</sup> The two white girls told the responding sheriff's posse that the Black boys had sexually assaulted them, causing the boys to be arrested and taken to the jail in Scottsboro.<sup>27</sup> While in custody, a lynch mob of hundreds gathered outside of the jail, opposed by armed guards sent by the state and eventually leading to the boys being moved to a nearby jail for safekeeping during the course of trial.<sup>28</sup> Before the trial, local papers took the side of the alleged victims—the white girls on the train, treating their accusation as truth and describing the alleged incident as “the most atrocious ever recorded in this part of the country. . . .”<sup>29</sup> During the trial, a crowd of anywhere from five to ten thousand gathered outside of a courthouse fortified by armed guards.<sup>30</sup>

On the day the trial was set to begin, an issue emerged within the courtroom—the status of the defendants' legal representation.<sup>31</sup> The trial judge appointed all members of the local bar to represent the defendants at arraignment, but did not explicitly state if they were to represent the

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<sup>23</sup> See *infra* Section IV (pp. 15-22).

<sup>24</sup> *Powell v. Alabama*, 287 U.S. 45 (1932).

<sup>25</sup> *Id.* at 50-51; Michael J. Klarman, *Powell v. Alabama: The Supreme Court Confronts “Legal Lynchings,”* in CRIMINAL PROCEDURE STORIES 1 (Carol S. Steiker ed., 2005).

<sup>26</sup> *Powell*, 287 U.S. at 50-51; Klarman, *supra* note 25, at 1.

<sup>27</sup> Klarman, *supra* note 25, at 1.

<sup>28</sup> *Id.* at 1-2.

<sup>29</sup> *Id.* at 3.

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

<sup>31</sup> *Powell*, 287 U.S. at 53-54.

defendants at trial.<sup>32</sup> At the same time, the defendants' families sent a Tennessee attorney, unfamiliar with Alabama criminal procedure, unprepared for the case, and only intending to serve as a second chair, to look after the defendants' interests.<sup>33</sup> Therefore, when the case was called, no one answered for the defendants.<sup>34</sup> Following a discussion of these circumstances between the presiding judge, a local attorney, and the Tennessee attorney, it was decided that the local attorney would assist the Tennessee attorney.<sup>35</sup> The Tennessee attorney had less than thirty minutes to meet with his clients before the trials began.<sup>36</sup>

The Supreme Court took notice of these dire circumstances, writing:

The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them. It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. . . . The record indicates that the appearance was rather pro forma than zealous and active. . . .<sup>37</sup>

The Court held that in capital cases, where a defendant cannot furnish their own representation, and, due to ignorance, illiteracy, or another mitigating factor, cannot adequately defend themselves, the presiding court has a duty to assign counsel as a matter of due process.<sup>38</sup> Moreover, this duty goes unsatisfied if the court, like in the case of the Scottsboro boys, assigns counsel in a manner that prevents them from adequately preparing a defense.<sup>39</sup> As the Court explained in *Powell*, if the average layman, lacking legal training, would struggle to prepare a successful defense and present it in a legally sufficient manner, even less can be said of an "ignorant and illiterate" defendant.<sup>40</sup> Thus, the due process right to be heard would do very little if it did not include a right to be heard while represented by counsel.<sup>41</sup>

While rooted in due process rather than equal protection, *Powell v. Alabama* establishes the Court's specific concern for society's most vulnerable going without effective assistance of counsel.

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<sup>32</sup> *Id.* at 56.

<sup>33</sup> *Id.* at 57; Klarman, *supra* note 25, at 3.

<sup>34</sup> *Powell*, 287 U.S. at 53.

<sup>35</sup> *Id.* at 53-56.

<sup>36</sup> Klarman, *supra* note 25, at 4.

<sup>37</sup> *Powell*, 287 U.S. at 57-58.

<sup>38</sup> *Id.* at 71.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 69.

<sup>41</sup> *Id.* at 68-69.

Six years later, in *Johnson v. Zerbst*, the Court, in finding that that the Sixth Amendment served as a jurisdictional bar for federal courts to hear cases unless a defendant has the assistance of counsel or has waived that right, cited somewhat similar concerns.<sup>42</sup> It described the Sixth Amendment as “embod[ing] a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.”<sup>43</sup> In *Johnson*, the Court expanded the logic of *Powell*, clarifying that even for the average defendant, the disparity between an unrepresented defendant and a trained prosecution is too much to accept.

Finally, in the oft-discussed *Gideon v. Wainwright*, the Court incorporated its previous holding in *Johnson* to the states by way of the Fourteenth Amendment’s Due Process Clause, explicitly grounding its analysis in *Powell*.<sup>44</sup> However, unlike in *Powell* and *Johnson*, where it is subtext, the Court in *Gideon* brought an equality-based concern about separate justice systems divided by wealth to the forefront.<sup>45</sup> The Court first noted that both the government and defendants who can afford to do so invariably hire lawyers to represent their interests.<sup>46</sup> The Court understood this to indicate that counsel in criminal court is a necessity.<sup>47</sup> It then wrote:

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals *in which every defendant stands equal before the law*. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.<sup>48</sup>

In other words, if the Court’s notions of fairness are to mean anything, they must come with a degree of ensured equality, regardless of wealth.

### *B. Strickland and Cronin*

In a footnote to its decision in *McMann v. Richardson*, a case dealing with allegedly coerced guilty pleas in a petition for habeas relief<sup>49</sup>, the Court, citing a line of cases going all the way back to *Powell*, made a key observation: “[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.”<sup>50</sup> Fourteen years later, this footnote would serve as a jumping-off point for *Strickland v. Washington* and *United States v. Cronin*, the two cases that define a court’s inquiry

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<sup>42</sup> *Johnson v. Zerbst*, 304 U.S. 458, 467-68 (1938).

<sup>43</sup> *Id.* at 462-63.

<sup>44</sup> *See Gideon v. Wainwright*, 372 U.S. 335, 341 (1963).

<sup>45</sup> *Id.* at 344.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* (emphasis added).

<sup>49</sup> *McMann v. Richardson*, 397 U.S. 759, 760 (1970)

<sup>50</sup> *McMann*, 397 U.S. at 771 n.14 (1970) (citing *Reece v. Georgia*, 350 U.S. 85, 90 (1955); *Glasser v. United States*, 315 U.S. 60, 70 (1942); *Avery v. Alabama*, 308 U.S. 444, 446 (1940); *Powell v. Alabama*, 287 U.S. 45, 59 (1932).

into ineffective assistance of counsel claims.<sup>51</sup>

Under *Strickland*, a court's inquiry proceeds in two parts. In part one, a defendant must show that their counsel's performance was deficient, falling below an "objective standard of reasonableness," as defined by "prevailing professional norms."<sup>52</sup> This performance assessment must be made from the perspective of counsel at the time of the representation and with consideration of all the circumstances.<sup>53</sup> While the first inquiry has to do with professional norms, publications like American Bar Association Standards for Criminal Justice are merely to be considered as guidelines rather than dispositive answers.<sup>54</sup> As the Court explained, "[n]o 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."<sup>55</sup> The second inquiry asks whether, considering all of the evidence before the factfinder, it is reasonably likely that the defense counsel's error impacted the outcome of the case, prejudicing the defendant.<sup>56</sup> Critically, however, the Court noted that courts embarking on a *Strickland* inquiry can approach the two prongs in either order and decline to reach the second if the first is insufficient.<sup>57</sup> More specifically, courts do not need to rule on reasonableness if they find that counsel's alleged failures did not prejudice the defendant.<sup>58</sup> The Court clearly stated its reason for this clarification, explaining that "[c]ourts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result."<sup>59</sup>

*Cronic*'s inquiry is best defined as a shortcut through *Strickland*. Instead of delving into the trial record to determine if the defense counsel's alleged failure did, in fact, prejudice the defendant, it asks if the failure is so extreme as to allow a court to presume prejudice.<sup>60</sup> The Court in *Cronic* cited *Powell* as an example of this kind of failure.<sup>61</sup> It characterized *Powell* as a case where, although physically present at trial, a fully competent attorney, due to the surrounding circumstances—in that case, the short notice that counsel was given to prepare to represent the defendants—would very likely be incapable of providing effective assistance.<sup>62</sup>

## II. EQUAL JUSTICE AND ITS OUTER LIMITS

At the same time that the Supreme Court was fleshing out the right to counsel under the Sixth Amendment and Due Process Clause of the Fourteenth Amendment, it was also developing an

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<sup>51</sup> See *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *United States v. Cronic*, 466 U.S. 648, 654 (1984).

<sup>52</sup> *Strickland*, 466 U.S. at 687-88.

<sup>53</sup> *Id.* at 688-69.

<sup>54</sup> *Id.* at 688.

<sup>55</sup> *Id.* at 688-89.

<sup>56</sup> *Id.* at 692-95.

<sup>57</sup> *Id.* at 697.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Cronic*, 466 U.S. at 659-60.

<sup>61</sup> *Id.* at 660-61.

<sup>62</sup> *Id.*

Equal Protection Clause-based framework for equality in the criminal justice system. *Griffin v. Illinois*<sup>63</sup> and *Douglas v. California*<sup>64</sup> served as the two hallmark cases of this burgeoning framework. The later decisions in *San Antonio Independent School District v. Rodriguez*<sup>65</sup> and *Ross v. Moffitt*<sup>66</sup> defined its limits. Nevertheless, the Equal Protection Clause can still have a place in ensuring equal justice between the rich and the poor.

#### A. *Griffin and Douglas*

The petitioners in *Griffin v. Illinois* sought to overturn their state court armed robbery convictions on direct appeal.<sup>67</sup> In order to do so, they were required to provide the appellate court with materials that could likely only be created by referencing a full stenographic transcript of the lower court proceedings.<sup>68</sup> Except for indigent defendants sentenced to death, all defendants, regardless of indigency, were required to purchase the transcript.<sup>69</sup> Referring to the requirement as a form of invidious discrimination, the Court found that it violated both equal protection and due process,<sup>70</sup> even though there is no constitutionally guaranteed right to appellate review.<sup>71</sup> Remarking that providing equal justice, regardless of wealth or status, is a timeless issue, the Court explained that both due process and equal protection analyses emphasize that all defendants must “stand on an equality before the bar of justice in every American court.”<sup>72</sup> Because the ability to pay has no bearing on guilt or innocence, a state criminal court cannot discriminate on the basis of poverty, in the same way it cannot discriminate on the basis of religion or race.<sup>73</sup> In its strongest language, the Court noted that “[t]here is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance.”<sup>74</sup> At the same time, while the lower court *may* require that the petitioners be provided a transcript, *Griffin’s* holding only requires that indigent defendants be provided some means of obtaining “adequate and effective appellate review.”<sup>75</sup> Those means do not necessarily have to include a full stenographic transcript.<sup>76</sup>

In *Douglas v. California*, the indigent petitioners, who were convicted of multiple felonies,

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<sup>63</sup> *Griffin v. Illinois*, 351 U.S. 12, 18-19 (1956).

<sup>64</sup> *Douglas v. California*, 372 U.S. 353, 355 (1963).

<sup>65</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 13 (1973).

<sup>66</sup> *Ross v. Moffitt*, 417 U.S. 600, 611-612 (1974).

<sup>67</sup> *Griffin*, 351 U.S. at 13.

<sup>68</sup> *Id.* at 13-14.

<sup>69</sup> *Id.* at 14.

<sup>70</sup> While the court did not go into much detail about how equal protection and due process separately came into play in *Griffin*, it later treated *Griffin* and *Douglas* as more in line with an equal protection analysis. See *infra* p. 11-12 and note 76.

<sup>71</sup> *Id.* at 18.

<sup>72</sup> *Id.* at 17 (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)).

<sup>73</sup> *Id.* at 17-18.

<sup>74</sup> *Id.* at 18.

<sup>75</sup> See *id.* at 19-20.

<sup>76</sup> See *id.* at 20.

sought counsel for their direct appeals to the California District Court of Appeal.<sup>77</sup> Under a California criminal procedure rule, before granting assistance of counsel to an indigent appellant, the appellate court may investigate the record to determine if the assistance of counsel would help the reviewing court or the appealing defendant.<sup>78</sup> Citing to *Griffin* and taking care to note that equal protection does not require “absolute equality,” the Court held that the initial pass through the record before deciding to grant counsel, as well as the potential result of an indigent defendant going through their one appeal as of right without the assistance of counsel, are contrary to both the equal protection guarantee against invidious discrimination and the due process guarantee of fair procedure.<sup>79</sup> The majority’s opinion ends with the following explanation of the California rule’s impact:

The present case, where counsel was denied petitioners on appeal, shows that the discrimination is not between “possibly good and obviously bad cases,” but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot. There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appears as of right, enjoys the benefit of counsel’s examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.<sup>80</sup>

#### B. *San Antonio and Ross*

Unlike the previously discussed cases, *San Antonio Independent School District v. Rodriguez* dealt not with criminal justice, but with public school financing. The district court ruled in favor of petitioners, parents of children in the poorest school district in the San Antonio area, based on the Equal Protection Clause, holding that unequal per-student funding from local, state, and federal sources discriminated along two dimensions—the disbursement of education and wealth as a suspect classification.<sup>81</sup> The Supreme Court disagreed with both theories.<sup>82</sup> There is no right to education explicitly or implicitly found in the Constitution, nor was the funding disparity similar to the denials of the right to vote at issue in cases like *Harper v. Virginia State Board of Elections*.<sup>83</sup> In addition, the Court declined to recognize a cognizable wealth discrimination claim, explaining that in its previous cases, those alleging discrimination “shared two distinguishing characteristics: because of their impecuniness they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.”<sup>84</sup> In *San Antonio*,

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<sup>77</sup> *Douglas*, 372 U.S. at 353-54.

<sup>78</sup> *Id.* at 355.

<sup>79</sup> *Id.* at 355-57.

<sup>80</sup> *Id.* at 357-58.

<sup>81</sup> *San Antonio*, 411 U.S. at 4-6, 11-12, 15-17.

<sup>82</sup> *Id.* at 18.

<sup>83</sup> *Id.* at 34, 34 n.74.

<sup>84</sup> *Id.* at 20.

the respondents could not point to “any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level.”<sup>85</sup> Furthermore, because the respondents’ children were still receiving an education, albeit one arguably of a poorer quality, there was no absolute deprivation.<sup>86</sup>

While *San Antonio* was a major setback to many equity-minded causes, the equal justice inquiry was explicitly not one of them. In developing its “unable to pay” and “absolute deprivation” standard, the Court began with *Griffin* and *Douglas*, citing positively to them as a “proper starting point.”<sup>87</sup> Moreover, the Court relied on a line of equal justice cases going back to *Douglas* to support the proposition that “where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.”<sup>88</sup> To this day, courts still discuss and rule based on the relationship between *Griffin* and its progeny and *San Antonio*.<sup>89</sup>

*Ross v. Moffitt*, decided the year after *San Antonio*, serves as an example of the level of equality required by the equal justice framework.<sup>90</sup> In *Ross*, the respondent challenged the denial of counsel during a discretionary appeal to the North Carolina Supreme Court and a petition for a writ of certiorari to the United States Supreme Court, arguing that these procedures violated *Douglas*.<sup>91</sup> Indeed, in *Douglas*, the Court explicitly did not reach the right to counsel on discretionary appeals.<sup>92</sup> Here, the question was resolved and it was determined that neither the Due Process Clause nor the Equal Protection Clause affords the right to counsel for discretionary appeals.<sup>93</sup> For the due process analysis, the Court explained that unlike in trial courts, defendants are not dragged into court and in need of protection from the state.<sup>94</sup> Instead, appealing defendants initiate the proceedings.<sup>95</sup>

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<sup>85</sup> *Id.* at 22-23.

<sup>86</sup> *Id.* at 23.

<sup>87</sup> *Id.* at 20-21.

<sup>88</sup> *Id.* at 24, 24 n.57.

<sup>89</sup> *See, e.g.*, *Wright v. Fam. Support Div. of Mo. Dep’t of Soc. Servs.*, 458 F. Supp. 3d 1098, 1108 (E.D. Mo. 2020) (explaining that “[t]he test in [*San Antonio*] establishes the threshold requirements for determining whether a class of indigent individuals is subject to heightened scrutiny” and “[i]f these requirements are met, then the Court must determine whether the class falls within the confines of the *Griffin* line of cases”); *Mendoza v. Keane*, No. 04 CV 585 (ARR), 2006 WL 3050872, at \*8 (E.D.N.Y. Oct. 23, 2006), *aff’d*, 330 F. App’x 215 (2d Cir. 2009) (including *San Antonio* in a list of cases, including *Griffin* and *Douglas*, where “state laws and procedures [] created barriers to the exercise of [the right to counsel] by indigent defendants”).

<sup>90</sup> *Ross v. Moffitt*, 417 U.S. 600 (1974). For another example, *see Britt v. North Carolina*, 404 U.S. 226 (1971), where the Court determined that for a retrial in a small town involving the same judge, counsel, and court reporter and taking place one month after the first trial, the defendant was not entitled to a free transcript of the first trial. Instead, adequate alternatives, like defense counsel informally requesting the court reporter to read back his notes, were good enough to survive an equal protection challenge. *Id.* at 229.

<sup>91</sup> *Ross*, 417 U.S. at 602-05.

<sup>92</sup> *See Douglas*, 372 U.S. at 356 (internal citation omitted) (“We need not now decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court after the District Court of Appeal had sustained his conviction, or whether counsel must be appointed for an indigent seeking review of an appellate affirmance of his conviction in this Court by appeal as of right or by petition for a writ of certiorari which lies within the Court’s discretion.”).

<sup>93</sup> *Ross*, 417 U.S. at 609.

<sup>94</sup> *Id.* at 610-11.

<sup>95</sup> *Id.*

Beginning with citations to *San Antonio* and *Griffin*, the Court explained that the Equal Protection Clause does not require absolute equality or equalized economic conditions, and it does not tolerate distinctions lacking in reason that prevent indigents the ability to present their claims.<sup>96</sup> In contrast to *Douglas*, the respondent had the benefit of counsel to look over his claim for a first appeal, providing him, at the very least, a record of the trial court’s proceedings, a brief by appellate counsel, and an opinion by the appellate court.<sup>97</sup> According to the majority, those materials, supplemented by a *pro se* brief, were enough for the North Carolina Supreme Court to decide if it would review the case.<sup>98</sup> Moreover, unlike lower court review or trial proceedings, the decision to grant or deny an appeal to the North Carolina or United States Supreme Court does not consider if there was “a correct adjudication of guilt.”<sup>99</sup> Instead, other factors, like the public interest in the legal issue, come into play.<sup>100</sup>

### III. FUNDED, EFFECTIVE ASSISTANCE UNDER AN EQUAL JUSTICE FRAMEWORK

The advantage of the equal justice framework over the traditional due process analysis is that it contains a greater focus on equal protection, which has a more comparative lens. As the *Ross* majority explained, “[d]ue process emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated” while “[e]qual protection, on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.”<sup>101</sup> By recreating the outcomes of the *Powell* line under equal justice, one can reframe the issue. There are no systemic barriers that prevent a defendant who can afford retained counsel—who, in turn, has either control over their workload or recourse for refusing a case<sup>102</sup>—from receiving *effective* assistance of counsel. At the same time, a similarly situated defendant who must rely on a public defender—whose workload is out of their control and set by the number of prosecutions—is faced with systemic barriers that relegate them to only receiving constitutionally impermissible *ineffective* assistance.

#### A. A Right to Counsel Located Under Equal Justice

A right to counsel resembling the one in *Gideon* can be found under the *Griffin-Douglas* equal justice framework in two ways. First, *Gideon*, especially when read in comparison with *Powell*, can be understood as applying this framework, thus embracing its inner and outer bounds. Second, even absent *Gideon*, the right to counsel exists under the *Griffin-Douglas* line.

In terms of constitutional location, the equal justice line of cases and the more traditional right to counsel cases (*Powell* through *Gideon*) both blend the logics of equal protection and due process. Professor Brandon L. Garrett, using a framework he developed with Professor Kerry

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<sup>96</sup> *Id.* at 611-12.

<sup>97</sup> *Id.* at 614-15.

<sup>98</sup> *Id.* at 615.

<sup>99</sup> *Id.* (quoting *Griffin*, 351 U.S. at 18).

<sup>100</sup> *See id.*

<sup>101</sup> *Id.* at 609 (internal quotations omitted).

<sup>102</sup> While, in a law firm setting, workload is set by partners who may not necessarily be involved in the representation, the decision to take on a case is still made internally.

Abrams, suggested that *Griffin* and *Douglas* are “intersectional rights” cases, meaning that the action at issue violated more than one provision of the Constitution in a manner that they must be “read to inform and bolster one another.”<sup>103</sup> Under this framework, examples of intersectional rights include penumbra cases like *Griswold v. Connecticut*, “fundamental rights equal protection” cases like *Zablocki v. Redhail*, and Justice Kennedy’s majority opinions in LGBTQ+ rights cases like *Romer v. Evans*, *Lawrence v. Texas*, *United States v. Windsor*, and *Obergefell v. Hodges*.<sup>104</sup> Professor Garrett cited to the Court’s comments in *Ross*, where the majority noted the conceptual differences between the Equal Protection Clause and the Due Process Clause<sup>105</sup> and stated that neither “provide[] an entirely satisfactory basis for the result[s] reached” in *Griffin* and *Douglas*.<sup>106</sup> He posited that, unlike in *Ross*, the Court in *Griffin* and *Douglas* engaged in an intersectional rights analysis.<sup>107</sup>

Professor Garrett’s characterization of *Griffin* and *Douglas* is in line with subsequent descriptions of the decisions by the Supreme Court. In *San Antonio*, the Court characterized *Griffin* and *Douglas* as suspect classification equal protection cases.<sup>108</sup> Soon after, in *Maher v. Roe*, the Court, in explaining that financial need alone does not create a suspect class, noted that its “subsequent decisions have made it clear that the principles underlying *Griffin* and *Douglas* do not extend to legislative classifications generally” because they “are grounded in the criminal justice system, a governmental monopoly in which participation is compelled.”<sup>109</sup>

Although officially placing their holdings under only the Due Process Clause, the Court, by the time it decided *Gideon*, was implicitly using an intersectional rights analysis incorporating due process and equal protection to find a right to counsel. Under *Ross*, due process deals with fairness between the individual and the state, and has no regard for how similarly situated individuals are treated.<sup>110</sup> Equal protection, on the other hand, focuses only on how similarly situated individuals are treated differently.<sup>111</sup> In *Powell*, the Court only engaged in due process analysis, placing an emphasis on the fact that the defendants, due to their *particular and individual* circumstances—their “ignorance and illiteracy”—were not similarly situated to the average defendant.<sup>112</sup> Even though *Powell* employed language about the layperson’s lack of legal skill, it did not afford a right to counsel to them.<sup>113</sup> It only afforded a right to counsel to the defendants, as aggravating circumstances made fairness impossible for the Scottsboro Boys without the assistance of counsel.<sup>114</sup> In contrast, while *Gideon* imported the due process analysis and language about a layperson’s lack of skill from *Powell*,<sup>115</sup>

<sup>103</sup> Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397, 416-17 (2019).

<sup>104</sup> Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1331 (2017).

<sup>105</sup> See *supra*, Section IV.

<sup>106</sup> Garrett, *supra* note 101, at 420.

<sup>107</sup> *Id.* at 421.

<sup>108</sup> See *San Antonio*, 411 U.S. at 20-21 (discussing *Griffin* and *Douglas* as useful precedent in the suspect classification section of the majority opinion).

<sup>109</sup> *Maher v. Roe*, 432 U.S. 464, 471, 471 n.6 (1977).

<sup>110</sup> *Ross*, 417 U.S. at 609.

<sup>111</sup> *Id.*

<sup>112</sup> *Powell v. Alabama*, 287 U.S. 45, 69 (1932)

<sup>113</sup> *Id.* at 69-71.

<sup>114</sup> *Id.* at 71.

<sup>115</sup> *Gideon*, 372 U.S. at 344-345.

it did not rely on the aggravating particular and individual circumstances in *Powell*, going so far as to stop quoting *Powell* the sentence before it mentions “the ignorant and illiterate.”<sup>116</sup> Instead, it divided defendants into two classes—those who could afford counsel and those who could not—and emphasized that a disparity between them goes against the “noble ideal” that “our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.”<sup>117</sup> In short, *Gideon* expanded *Powell* by incorporating equal protection into the equation, thus turning it into an intersectional rights case similar to *Griffin* and *Douglas*.

Moreover, a right to counsel exists under *Griffin* and *Douglas* independent of *Gideon*. As a preliminary matter: although *Griffin*, *Douglas*, and *Ross* all address the distribution of rights and procedures during the appellate process,<sup>118</sup> which is not mandated by the Constitution, nothing in their opinions limits their logic to constitutionally-optional proceedings.<sup>119</sup> The fact that *Griffin* and *Douglas* were decided under equal justice speaks only to the Court’s inability to fit the petitioners’ claims into traditional contours of due process, not the Court’s unwillingness to fit rights found under traditional due process into equal justice.

In fact, on its merits, the right to trial counsel fits cleanly into the *Griffin* and *Douglas* side of the equal justice line (as opposed to the *Ross* limitations). In both *Griffin* and *Douglas*, the Court’s concern centered around the impact of wealth on a court’s determination of cases on the merits.<sup>120</sup> That concern would be no different if the issue before the Court was a denial of effective trial counsel. Moreover, the *Douglas* court very explicitly extolled the benefits of counsel on appeal, mentioning “the benefit of counsel’s examination into the record, research of the law, and marshalling of arguments on his behalf. . . .”<sup>121</sup> If anything, these legal skills—research and comprehension, applying facts to law, and crafting a cogent argument—are *more* important at the trial level, where defense counsel has not yet had the issues winnowed down by a full trial and verdict. In fact, the focus on correctly determining guilt in lower courts and the benefits of previous assistance of counsel, along with the fact that defendants initiated appeals (the due process inquiry), were what distinguished the right to counsel on appeals as a matter of right in *Douglas* from the nonexistent one in discretionary appeals in *Ross*.<sup>122</sup> Finally, while equal protection does not require totally equal conditions, it does require “that indigents have an adequate opportunity to present their claims fairly within the adversary system.”<sup>123</sup> Simply put, there are no means of ensuring adequacy and fairness while still maintaining an adjudicatory, non-inquisitorial system that does not include a right to

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<sup>116</sup> Compare *id. with Powell*, 287 U.S. at 68-69.

<sup>117</sup> *Gideon*, 372 U.S. at 344.

<sup>118</sup> See *Ross*, 417 U.S. at 602-605 (right to counsel in discretionary appeals); *Douglas*, 372 U.S. at 353-356 (right to counsel in appeals granted as a matter of right); *Griffin*, 351 U.S. at 14-15 (provision of transcripts).

<sup>119</sup> See generally *Ross*, 417 U.S. at 600; *Douglas*, 372 U.S. at 353; *Griffin*, 351 U.S. at 12.

<sup>120</sup> *Douglas*, 372 U.S. at 357 (“The present case, where counsel was denied petitioners on appeal, shows that the discrimination is not between ‘possibly good and obviously bad cases,’ but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot.”); *Griffin*, 351 U.S. at 17-18 (“Plainly the ability to pay costs in advance bears no rational relationship to a defendant’s guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial.”).

<sup>121</sup> *Douglas*, 372 U.S. at 358.

<sup>122</sup> See *Ross*, 417 U.S. at 610-15.

<sup>123</sup> *Id.* at 612 (citations omitted).

counsel. To maintain fairness, anything less than adequate assistance would require either the judge or prosecutor to take a more active role in the defendant's argument. This responsibility would impact the judge's neutrality or create a conflict of interest for the prosecutor.

### B. *The Role of San Antonio*

While the right to counsel exists under *Griffin* and *Douglas*, any successful challenge to funding for the public defense must satisfy *San Antonio's* limits on wealth discrimination claims, which *Griffin* and *Douglas* informed.<sup>124</sup> Again, a successful claim must have an easily identifiable class of indigent individuals who could not pay for a benefit and were thus deprived of it.<sup>125</sup> Eric Wolf, in an article discussing indigent defense funding under state and federal law, identified *San Antonio* as a major limitation on funding challenges:

Indigent defendants are already singled out from the general population as being criminal defendants and as being poor enough to qualify for appointed counsel. However, a challenge to a county-based system of defense would still have to show that such a system provides defendants in poor counties with a quality of representation sufficiently far below that provided to defendants in rich counties to constitute discrimination.

...

[E]ven if indigent defendants in poor counties receive a low quality of representation, whether measured by a relative or an absolute standard, they still receive some representation. The courts are likely to be unsympathetic to claims by indigent defendants in poor counties that they get a lower quality of representation than similar defendants in rich counties.<sup>126</sup>

Wolf misapplied *San Antonio* to the right to counsel. First, he unnecessarily stuck too close to the inter-school district comparison logic the Court could not find to be an identifiable class,<sup>127</sup> going for an inter-county public defender comparison.<sup>128</sup> A class that is more identifiable and more reflective of the similar situation requirement in an equal protection analysis would be a comparison *within* a county between those that a court found to be indigent and entitled to a public defender and those with the funds to afford private counsel. More critically, Wolf misstates the benefit as simply the right to counsel.<sup>129</sup> As defined in *McMann* and refined in *Strickland* and *Cronic*, "the right to counsel is the right to the *effective* assistance of counsel."<sup>130</sup> Defining a right to the assistance of

<sup>124</sup> *San Antonio*, 411 U.S. at 20-21.

<sup>125</sup> *Id.* at 20-24.

<sup>126</sup> Eric Wolf, *The Theory and Application of Equal Protection: Developments in the Right to Counsel*, 5 WM. MITCHELL J. L. & PRAC. 1, 33-34 (2012).

<sup>127</sup> *See San Antonio*, 411 U.S. at 22-28.

<sup>128</sup> Wolf, *supra* note 124, at 33.

<sup>129</sup> *Id.* at 34.

<sup>130</sup> *McMann*, 397 U.S. at 771 n.14; *Strickland*, 466 U.S. at 686; *Cronic*, 466 U.S. at 654.

counsel without a measure of effectiveness does lead to Wolf's conclusion—because defendants are represented, they are only relatively, rather than absolutely deprived of a benefit.<sup>131</sup> In order to adjudicate if there is an absolute deprivation of a right to *effective* assistance of counsel due to inadequate funding, a reviewing court would need to define effectiveness at a systemic level and determine if public defenders are systemically ineffective. If they are, then there is an absolute deprivation due to insufficient funding.

### C. Defining Effectiveness

In both *Strickland* and *Cronic*, a reviewing court investigated an individual attorney's alleged ineffectiveness and embarked on a fact-specific inquiry focused on the attorney's actions. In *Strickland*, the court also examined the impact of those actions on the result.<sup>132</sup> In contrast, an inquiry into a claim that a state absolutely deprives indigent defendants of the effective assistance of counsel would instead focus on how the *state's* actions impact a public defender's ability to be effective for a particular group.<sup>133</sup> For instance, in *Douglas*, a case dealing with California's decision not to provide counsel to indigent defendants on appeal, the majority only discussed the two petitioners' stories as a means of providing procedural history rather than anything more substantial.<sup>134</sup> In developing the case's holding, the Court generalized and focused on California's treatment of indigent defendants on the whole rather than discussing if the petitioners needed counsel for their individual cases,<sup>135</sup>

At the same time, *Strickland's* definition of effectiveness—"reasonableness under prevailing professional norms," with written rules and standards serving as guidelines rather than precedents—is still instructive.<sup>136</sup> Although the Court has expressed concern about over-defining these norms,<sup>137</sup> the practicalities of predicting a budget for a public defender's office suggest that not every norm needs to be defined so precisely in an absolute deprivation inquiry. *Rompilla v. Beard*,<sup>138</sup> a case that followed the *Strickland* analysis, serves as a good example of this point. Referencing the duty to investigate under the ABA Standards for Criminal Justice while going through the effectiveness prong, the Court discussed a general duty to investigate as well as a specific duty under it to look at a prior conviction file in a death penalty case.<sup>139</sup> Applying *Rompilla*, while it can be predicted that an office will have cases to investigate and will thus require adequate funds to do that, there is no guarantee that the office will have a death penalty case where there will be a duty to look at a prior conviction file. In other words, as a matter of practicality, specific duties created from larger norms would have to fall into larger categories on a budget rather than show up as line items themselves.

The *Strickland* definition serves as a broad-strokes baseline for measuring individual

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<sup>131</sup> Wolf, *supra* note 124, at 34.

<sup>132</sup> See *Strickland*, 466 U.S. at 668; *Cronic*, 466 U.S. at 648.

<sup>133</sup> See *Strickland*, 466 U.S. at 668.

<sup>134</sup> See *Douglas*, 372 U.S. at 353-54.

<sup>135</sup> See *id.* at 354-58.

<sup>136</sup> *Strickland*, 466 U.S. at 688-89.

<sup>137</sup> See *id.* at 697 (suggesting that the prejudice inquiry is meant to "ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result").

<sup>138</sup> *Rompilla v. Beard*, 545 U.S. 374 (2005).

<sup>139</sup> See *id.* at 383-390.

effectiveness. The absolute deprivation inquiry asks if a state has provided enough resources to allow public defenders to comply with constant and predictable obligations like “investigat[ing] the circumstances of the case.”<sup>140</sup> It does not ask if the state has provided the total equality the Court decried throughout its discussions of equal justice.<sup>141</sup> It simply serves to provide minimum standards in line with the “adequate opportunity [for indigent defendants] to present their claims fairly within the adversary system.”<sup>142</sup>

#### IV. A BRIEF EXAMPLE

##### *A. Applying the Theory*

Two areas serve as the heavy lifts in applying this framework. First, a proponent must identify professional norms broad enough to be accounted for and translated into a predictable and objective measure of compliance. Then, the proponent must show that, at current funding levels, the public defender system in question is out of compliance. The 2017 study of Louisiana’s public defense system does exactly that.<sup>143</sup>

In the study, experts were tasked with coming to a consensus on the time needed to comply with professional obligations in different types of cases.<sup>144</sup> The study defined professional obligations in reference to the Louisiana Public Defender Board Trial Court Performance Standards, the ABA Standards for Criminal Justice, and the Louisiana Rules of Professional Conduct.<sup>145</sup> Specifically, the study referred to ABA Criminal Justice Standard for the Defense Function, 4-6.1(b), which encourages defense counsel to not recommend accepting a plea before “appropriate investigation and study of the matter has been completed,” as well as Louisiana Rules of Professional Conduct 1.1(a) (duty of competence), 1.3 (duty of diligence), 1.7(a)(2) (conflicts of interest between current clients), 1.16(a) (mandatory declination or termination of representation), and 6.2 (avoiding appointments to stay in compliance with the Rules of Professional Conduct).<sup>146</sup>

While still only guidance, the Supreme Court’s suggested distinction between relying on national and local standards, its previous reliance on both ABA standards and Rules of Professional Conduct to define norms, and the widespread acceptance of these basic obligations portend success in showing that the study measures compliance with professional norms. In *Nix v. Whiteside*, the Supreme Court explained some of its hesitation with “constitutionaliz[ing] particular standards of professional conduct”; doing so “intrude[s] into the state’s proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts.”<sup>147</sup> The Court did not find this concern to be warranted in *Nix*, as the issue in the case—whether an attorney acted

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<sup>140</sup> *Id.* at 387 (quoting 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.)).

<sup>141</sup> *See, e.g., Ross*, 417 U.S. at 612 (1974).

<sup>142</sup> *Id.*

<sup>143</sup> *See generally* The Louisiana Project, *supra* note 9.

<sup>144</sup> *Id.* at 16-19.

<sup>145</sup> *Id.* at 3-5.

<sup>146</sup> *Id.* at 4-5.

<sup>147</sup> *Nix v. Whiteside*, 475 U.S. 157, 165 (1986).

ineffectively by refusing to allow his client to perjure himself<sup>148</sup>—had been addressed by the Iowa Code of Professional Responsibility for Lawyers, the current Model Rules of Professional Conduct, and previous iterations of the Model Rules.<sup>149</sup> Here, the Louisiana study has the benefit of state standards like the Louisiana Public Defender Board Trial Court Performance Standards and the Louisiana Rules of Professional Conduct, minimizing these federalism concerns.<sup>150</sup> Furthermore, the Louisiana Rules specifically mentioned in the study use the exact same language as the Model Rules of Professional Conduct and have origins in the 1908 Canons of Professional Ethics.<sup>151</sup>

In addition, the Court has previously cited to ABA Criminal Justice Standards, particularly, defense’s counsel’s duty to investigate.<sup>152</sup> The difference between the duty to investigate cited by the Supreme Court’s opinion in *Rompilla* and the one referenced in the Louisiana study is only between the duty to investigate the case before recommending that a client accept a plea and investigating the case during trial.<sup>153</sup> The Supreme Court also relied on ABA Standards in other cases like *Wiggins v. Smith* and *Williams v. Taylor*.<sup>154</sup>

In short, participants in the Louisiana study relied on professional norms, in combination with their decades of experience, to develop expected time per case type as a measure of compliance.<sup>155</sup> By then multiplying those figures by the number of cases per type Louisiana public defenders provide representation for per year, the study calculated the number of hours that public defenders, as a whole, should be putting in to be compliant with these norms.<sup>156</sup> In total, the estimated annual workload of Louisiana’s public defenders should be approximately 3.7 million hours, which would require a staff of approximately 1,800 public defenders.<sup>157</sup> As of the time of the study, Louisiana only employed the equivalent of 363 full-time public defenders, demonstrating that they are not in compliance.<sup>158</sup>

#### B. (Re)framing the Issue Post-Covington

The relief sought in this type of equal justice claim is no different than what the Court had previously granted in *Gideon* and *Douglas*—an explicit requirement for counsel, albeit this time *explicitly effective*, accompanied by a mandate for legislatures to fund this requirement. However, as *Peart* demonstrated, courts are generally hesitant to grant relief this extreme absent a strong showing of necessity—especially in light of the intrusion into legislative control over funding it would entail.<sup>159</sup>

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<sup>148</sup> *Id.* at 160-63.

<sup>149</sup> *See id.* at 166-71.

<sup>150</sup> The Louisiana Project, *supra* note 9 at 3.

<sup>151</sup> *See id.* at 4-5; MODEL RULES OF PRO. CONDUCT R. 1.1(a), 1.3, 1.7(a)(2), 1.16(a), 6.2 (AM. BAR ASS’N 2018); CANONS OF PRO. ETHICS CANON 4, 5, 6, 8, 15, 21 (AM. BAR ASS’N 1908).

<sup>152</sup> *Rompilla*, 545 U.S. at 387.

<sup>153</sup> *Compare id. with* The Louisiana Project, *supra* note 9 at 4.

<sup>154</sup> *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

<sup>155</sup> *See* The Louisiana Project at 16-19.

<sup>156</sup> *See id.* at 20-21.

<sup>157</sup> *See id.* at 21.

<sup>158</sup> *Id.*

<sup>159</sup> *See Peart*, 621 So.2d at 791 (“If legislative action is not forthcoming and indigent defense reform does not take

This self-imposed limitation turns the issue into framing the evidence and doctrine in a manner that gives the court the clarity, willpower, and assurance necessary to grant the requested remedy. In this regard, by connecting the right to counsel to broader Equal Protection Clause funding cases, proponents for funding can take advantage of *San Antonio* and *Ross*'s outer bounds to give reviewing courts more assurance that the admittedly radical relief sought is not constitutionally unprecedented—just another instance of courts requiring the government to pay for equal protection. Moreover, it gives courts the opportunity to fully understand the true significance of the evidence provided and use it to its fullest extent—something the Louisiana Supreme Court did not do in *Covington*.

The *Covington* majority failed to consider that, in light of the remedy sought, the individual findings requirement was just as inappropriate when first imposed in *Pearl* as it was in the case before them. When assessing Teissier's allegedly ineffective assistance, the court in *Pearl*, reading the phrase "ineffective assistance," decided to directly import the individualized inquiry used in *Strickland* claims, a mistake that the court in *Covington* continued to make, and a federal court is likely to make in the future.<sup>160</sup> However, unlike in *Strickland*, where a court looks closely at the actions counsel took on behalf of their (typically former) clients during previous proceedings to determine if that former client is entitled to individual habeas relief,<sup>161</sup> the defenders, due to continued inability to provide effective assistance, sought relief benefitting the defender's office (rather than an individual client) on behalf of their present and future clients as a whole.<sup>162</sup> There was never any need for an individualized determination when the relief directly benefitted the defender's office rather than the habeas petitioner.

Furthermore, even if the court still wanted an individual inquiry about attorney capacity when assessing a motion for prospective relief benefitting an office instead of a client, it would inevitably be a duplicative waste of court resources. Within a defender's office, the triaging of limited defender resources means that the court will hear the exact same facts and argument in every motion for either more resources or less client obligation. Briefly stated, Attorney A cannot devote more time to Defendant 1, because doing so would mean they have less time to represent Defendant 2. Furthermore, Attorney A cannot pass the case off to Attorney B, because doing so would mean that Attorney B has less time for Defendants 3 and 4. The names of the clients or defenders in this equation would change, but every other attorney in the office has the same issue. A systemic inquiry that looks at the office-wide problem (like the one discussed above), is more reflective of the problems and indicates a more appropriate solution.

Finally, while the *Covington* majority was technically correct when it described the Louisiana study's finding as not providing case-specific evidence,<sup>163</sup> the results of the study<sup>164</sup> actually provided

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place, this Court, in the exercise of its constitutional and inherent power and supervisory jurisdiction, may find it necessary to employ the more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel. . . . We decline at this time to undertake these more intrusive and specific measures because this Court should not lightly tread in the affairs of other branches of government and because the legislature ought to assess such measures in the first instance.").

<sup>160</sup> See *Pearl*, 621 So.2d at 787-88; *Covington*, 2020-00447 (La. 12/1/20), 318 So. 3d at 24.

<sup>161</sup> See generally *Strickland*, 466 U.S. 668.

<sup>162</sup> See *Pearl*, 621 So.2d at 784 (seeking "Constitutionally Mandated Protection and Resources"); *Covington*, 2020-00447 (La. 12/1/20), 318 So. 3d 21, 22 (seeking to withdraw from current appointments and decline future ones).

<sup>163</sup> See *Covington*, 318 So. 3d 21, 25.

more relevant information than an individual defendant's case ever could. The study's finding that the Louisiana public defense system operated at twenty-one percent of the capacity needed to provide all indigent defendants effective assistance necessarily demonstrated that many indigent defendants, even if not specifically named, go without effective assistance.<sup>165</sup> Thus, the defender's office was not in compliance with its obligation to provide effective assistance of counsel in *all* of its representations.

Notably, the dissent in *Covington* did not make the majority's mistakes. Noting the impracticalities of separate hearings and motions on individual cases and the obvious ineffectiveness of having, for instance, one investigator for 12,167 cases, the dissent rhetorically asked, "[w]hat more evidence should we require from public defenders before we provide some relief?"<sup>166</sup> They pointed out that absent the large-scale relief sought, the problems will continue and the expenses of ineffective assistance on human lives, especially marginalized human lives, will accrue.<sup>167</sup> Finally, harkening back to the equal justice framework, the dissent concluded by writing, "[t]here is no equal justice under law when an innocent poor man is assigned a lawyer who doesn't even have adequate access to a computer, but a guilty rich man can purchase an entire legal team who will secure his acquittal."<sup>168</sup>

## V. CONCLUSION

Given the inherent difficulty in selling support for a politically unpopular group—indigent defendants—to elected officials, recent litigation like that in Louisiana is the wise path forward. However, the fact that many judges are unelected is also a drawback in itself, as they are, for that reason, reluctant to rock the boat. Seeking the strong remedy needed to fix an underfunded public defense is an uphill battle. A reframing of the issue as one of systemic disparity is the only way forward able to show it in its true breadth and depth.

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<sup>164</sup> See generally The Louisiana Project, *supra* note 9.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 28 (Johnson, C.J., dissenting).

<sup>167</sup> *Id.* (Johnson, C.J., dissenting).

<sup>168</sup> *Id.* (Johnson, C.J., dissenting).