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***1169 CRIMINAL NEGLIGENCE: INDIGENT DEFENSE FROM A LEGAL ETHICS PERSPECTIVE**

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Most criminal defendants in the United States cannot afford to pay for a lawyer's services, and as a result their lawyers are government funded. Unfortunately, some state and local governments drastically under-fund indigent defense services. Criminal defense lawyers serving in these jurisdictions typically carry grossly excessive caseloads and are therefore severely restricted in how much time they can devote to individual clients. Commentators have targeted the under-funding of indigent defense systems as a problem of criminal justice, constitutional law, and civil rights. [FN1]

That is certainly true, but the under-funding of indigent defense also raises a serious and inadequately recognized problem of professional ethics: the systemic neglect of indigent defendants by their appointed lawyers. [FN2] The legal profession's ethics rules establish standards for representation. However, many lawyers for indigent defendants engage in a practice that systematically violates these professional norms. They do not serve all their clients with *1170 "diligence" [FN3] and "thoroughness," [FN4] conduct "adequate preparation," or give matters the "required attention." [FN5] Such criminal defense lawyers do not keep clients "reasonably informed," do not "comply with [their clients'] reasonable requests for information," [FN6] do not consult with clients about how the lawyer will pursue their objectives, [FN7] and do not explain matters to clients so that they can make "informed decisions." [FN8]

This Article argues that the institutional response to this problem of systemic neglect of indigent clients has been wholly inadequate--either ignoring it or exacerbating it. This Article takes as its point of departure a recent Georgia Court of Appeals decision, *Heath v. State*. [FN9] The decision overturned a criminal defendant's conviction because his court-appointed lawyer had been "neglectful" in failing to undertake an investigation, conduct legal research, or meet with his client over the course of more than a year before arranging for his client to plead guilty. As this Article discusses, even though this lawyer's inattentive representation clearly failed to meet the demands of the rules of professional conduct, his representation of Heath was not only typical of how he represented all his indigent clients but also typical of how indigent defendants are frequently represented throughout Georgia and the country.

When criminal defense lawyers neglect their indigent clients, they are rarely called to account. As this Article describes, as a practical matter the constitutional right to competent counsel rarely affords a remedy when a criminal defense lawyer does little more than encourage the client to plead guilty. Moreover, as 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. *1171 Prosecutors, courts, and disciplinary agencies do not respond helpfully to the problem. Prosecutors are more apt to exploit defense lawyers' shortcomings than to compensate for them. Judges rarely intercede. Disciplinary agencies generally look the other way. This Article concludes that each of these institutional players has a responsibility to attempt to ameliorate, not exacerbate or ignore, the problems of systemic neglect of indigent defendants.

I. A Case Study in Neglect: Heath v. State

To understand the problem of systemic neglect, it is important to look at how lawyers operating within these systems actually represent individual clients. But aside from court appearances, what criminal defense lawyers do, or fail to do, in any individual case is ordinarily undocumented. In most criminal cases, the defendant pleads guilty. The visible aspects of the defense lawyer's work may be limited to appearing with the defendant at an arraignment, a guilty plea proceeding, and a sentencing, all of which may take a matter of minutes. In many cases, all three occur in a single proceeding: Accompanied by a newly-appointed attorney, the defendant may appear in court within a short time of being arrested in order to be arraigned, plead guilty, and be sentenced. Whether defense lawyers spend minutes or hours on a particular case outside court proceedings will not be evident. Their meetings and conversations with clients are confidential. Their investigations, legal research, and plea negotiations take place outside the courtroom and, thus, outside the public eye. It is hard for clients themselves, much less for the public, to know most of what happens from the time the lawyer is assigned to represent an indigent defendant until the time the defendant pleads guilty.

The privacy cloaking most of the defense lawyer's work makes it difficult to show, in the context of individual cases, precisely how economic considerations affect defense representation. There are rare exceptions, however. Sometimes, in particular, the nature and quality of a criminal defense lawyer's work becomes the subject of a judicial decision. These decisions serve as case studies, opening a window onto indigent defense.

This Article employs as its starting point one such decision, that of the Georgia Court of Appeals in *Heath v. State*, [FN10] which allowed a criminal defendant to withdraw his guilty plea as a remedy for his lawyer's neglect. Richard Heath, the defendant, was in a truck that collided head-on with an *1172 automobile whose three teenage occupants were injured in the accident. A grand jury indicted Heath on eighteen counts, fifteen of which were for the crime of serious injury by vehicle. Another was for driving under the influence of alcohol, a crime of which Heath had been convicted four times previously. Because Heath could not afford a lawyer, he was assigned Jason Shwiller, one of four lawyers paid \$36,000 a year to represent indigent criminal defendants in Paulding County, Georgia. [FN11] Following Shwiller's advice, Heath pled guilty to four counts and was sentenced to fifteen years' imprisonment. However, he then retained new counsel and sought to withdraw his plea, arguing that Shwiller had represented him ineffectively. Finding that "[t]he record is replete with evidence of the total lack of any meaningful assistance provided to Heath by Shwiller," the court of appeals held that Heath should be allowed to withdraw his guilty plea. [FN12]

The court's opinion summarizes Shwiller's steps leading to Heath's guilty plea and sentencing. When he met his lawyer, Heath said that he had no memory of the collision but that a coworker might have been driving the truck at the time. Heath provided the name of the coworker and said that he might possibly be found in Indiana. [FN13] No doubt Heath expected Shwiller to locate the coworker and learn from him whether Heath had been the driver. If Heath was not the driver, or even if there was serious cause for doubt, Shwiller might persuade the

prosecutor to drop the charges or defend Heath successfully at trial. But to look for the coworker, Shwiller would have to apply to the court for funds to hire a private investigator. In the course of representing approximately 300 indigent defendants since becoming a contract defense attorney in 1997, Shwiller had never once done so. Nor had he ever taken a case to trial before a jury. In Heath's case, he was disinclined to make an exception. [FN14]

Over time, Heath became concerned about Shwiller's inattention and spoke with his niece about the problem. According to Heath's niece, she telephoned Shwiller and urged him to locate Heath's coworker. Shwiller replied "that he had so many cases on his load, that if he looked into every nook and cranny there was to this case, that he would never get anything done," and that Heath "was nothing but a drunk" whose "only option . . . was to say that he was *1173 guilty." [FN15] Shwiller suggested that the niece try to locate Heath's coworker on her own. [FN16]

Nor did Shwiller conduct any legal research. Although there may have been reason to question whether the injuries suffered by those involved in the accident were "serious" within the meaning of the criminal law under which Heath was charged, Shwiller did not believe a jury would "'hassle over the exact lettering of the words' of the statute." [FN17]

More than a year after Heath's arraignment, without having again met with Heath in person, Shwiller received a plea offer from the prosecution. If Heath pled guilty to three counts of serious injury by vehicle and one count of driving under the influence of alcohol, the prosecution would recommend a prison sentence of between four and fifteen years. Shwiller advised his client that he could expect to be sentenced at the lower end of that range. Upon Shwiller's advice, Heath pled guilty. [FN18]

Shwiller did not prepare for the sentencing hearing by reviewing victim impact evidence that would be provided to the sentencing judge because he did not "have the stomach" to do so. At the hearing, Shwiller told the judge, "[t]here's nothing I can say to excuse what Mr. Heath has done. There's no good spin that I can put on it. He consumed a great deal of alcohol, he drove on Georgia's road and caused a terrible tragedy." [FN19] The judge imposed the heaviest sentence he could: fifteen years in confinement.

II. Indigent Defendants' Rights As Clients

It is reasonable to ask what someone like Heath who is charged with a crime would want from an assigned lawyer. [FN20] But this may be a hard question to answer. One might assume that in general terms, a client in Heath's position would want the lawyer's help in deciding what to do, would want his lawyer to devote time and attention to his case, and would want his lawyer to be on his *1174 side and act in his best interest. [FN21] These would certainly be reasonable desires. But even on a level of generality, it is hard to know what defendants want. Different defendants may have different desires. [FN22]

From an ethics perspective at least, the more important question is what someone like Heath who is charged with a crime would have a right to expect from an assigned lawyer. This is an easier question to answer, because rules of professional conduct define clients' rights vis-à-vis their lawyers. And the answers should be important to criminal defense lawyers, because they have a professional responsibility to represent clients consistently with the ethics rules.

One's instinct might be to say that under the rules of professional conduct, the indigent client has the right to

essentially the same things as a paying client in a criminal case. This is true in one crucial respect. An assigned lawyer cannot argue that less is required of her because her caseload is excessive. Neither privately retained lawyers nor court-appointed lawyers may take on more cases than they can competently handle. [FN23]

***1175** For ethics purposes, however, there is a significant difference between paying clients and indigent defendants. As a practical matter, the indigent client does not have the same ability to define the scope of the representation and to determine its objectives. Suppose, for example, that Heath had the financial ability to retain a lawyer. The terms of the representation would be a matter of agreement between him and his lawyer, [FN24] and these terms could be defined with greater or lesser specificity. Heath and his lawyer might simply agree that the lawyer will represent Heath in connection with the pending charges. But alternatively, Heath and his attorney might stipulate that the representation will include extensive independent investigation, such as locating and interviewing Heath's coworker in another state to develop evidence that Heath might not have been the driver. The lawyer might reasonably demand and receive a greater fee for undertaking such investigation.

In the case of assigned counsel, in contrast, the client can neither offer counsel more money to conduct a more extensive representation nor fire the lawyer for conducting only a minimal representation. Even though Model Rule 1.8(f) states that a lawyer who accepts compensation from someone other than the client shall not permit that arrangement to interfere “with the lawyer's independence of professional judgment or with the client-lawyer relationship,” in reality for appointed counsel the terms of the representation are implicitly set by the court that is responsible for assigning counsel. For example, it is typically the court, not the indigent client, who decides whether a case warrants the use of an investigator.

Ethics rules require the lawyer to accede to the client's decision whether to plead guilty or whether to invoke or waive a constitutional right at trial. [FN25] But otherwise, ethics rules are unclear about what steps a lawyer must take to carry out the general terms of a representation. They clearly do not require a lawyer to do everything that even a paying client wants, but afford lawyers some discretion to decide how to conduct the representation. [FN26] Thus, if Heath directed his appointed lawyer to attempt to locate his coworker, the lawyer ***1176** would not necessarily have an ethical obligation to do so; Heath's remedy would normally be to change to a lawyer who would follow that direction. Because indigent defendants like Heath cannot choose their lawyer, they are much less able than paying clients to influence what tasks their lawyers will perform.

Even so, ethics rules do not give lawyers untrammelled discretion to decide how to represent an indigent defendant. Although the rules do not specify all the tasks that a lawyer must perform and how much time to devote to them, the rules do describe in general terms how a representation must be conducted. Ethics rules require competent representation, which encompasses the “thoroughness and preparation reasonably necessary for the representation,” [FN27] including “analysis of the factual and legal elements of the problem.” [FN28] They demand “reasonable diligence,” which means that a lawyer must “act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.” [FN29] They require lawyers to communicate with their clients, keeping them current, answering their questions, and helping them make informed decisions, so that the clients can participate effectively in the representation. [FN30]

As Heath's case illustrates, a lawyer does not live up to these standards by simply advising the client to accept a plea offer. To begin with, Shwiller failed to communicate adequately with Heath. As the case progressed, he was obligated to update Heath on developments and answer his questions, but failed to do so. Further, he did not enable Heath to make an “informed decision” whether or not to plead guilty because he did not diligently attempt to acquire the information that would reasonably go into Heath's decision. [FN31] An

informed decision required answers to at least three questions, none of which were adequately explored by Shwiller. First, was Heath guilty of the crimes charged? If he was innocent, he might be disinclined to plead guilty, regardless of the risks of going to trial. Second, what was the likelihood that a zealous defense would lead to an acquittal? If he had a reasonable prospect of acquittal, Heath might go to trial even if he was guilty; if not, he might accept *1177 a favorable plea offer even if he was innocent. [FN32] Third, what sentences was the court likely to impose if Heath accepted the prosecution's plea offer or if he were convicted after a trial? If the difference was small, Heath might be more willing to take his chances on going to trial.

To answer these questions, Shwiller had to conduct an “analysis of the factual and legal elements of the problem” [FN33] based on investigation and research. This would include determining whether the driver of the truck was responsible for the collision, looking for Heath's coworker in order to find out whether Heath was in fact the driver, ascertaining how badly those involved in the accident were injured in order to determine whether their injuries were legally “serious,” and determining what sentences were imposed in comparable cases following guilty pleas and convictions after trial. Because Shwiller did none of this, he could not himself know whether it was in Heath's interest to plead guilty for any reason other than that he could not rely on his lawyer to defend him zealously at trial; nor could Shwiller assist Heath in making an informed decision whether to accept the prosecution's plea offer.

Shwiller also failed to meet his responsibility to “act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.” [FN34] This required, first, some assurance that if Heath went to trial, Shwiller would defend him zealously, since Heath would otherwise have no prospect for success even if he had a viable defense, and he would have to plead guilty. Additionally, once Heath decided to accept the prosecution's plea offer, this required Shwiller to try to persuade the judge to sentence him leniently. But Shwiller displayed a total lack of commitment to Heath's case. His failure to investigate made it plain that he was uninterested in even exploring the possibility of a defense, and his remarks at the sentencing hearing reflected indifference to Heath's plight.

The decision in Heath does not explore the effect of Shwiller's neglectfulness on Heath. But the ethics rules assume that ethical lapses have costs for clients, and it is easy to imagine that this was so in Heath's case. His anxiety must have mounted as over a year passed and his lawyer never met with him and evidently performed no work on the case. Because Shwiller was *1178 so obviously uninterested, as well as unwilling and unprepared to defend the case at trial, Heath must have envisioned no choice but to accept the prosecution's plea offer, despite harboring doubts whether he was in fact guilty. Heath must have felt frustrated, uncertain whether he might have secured a better result with a lawyer who was attentive and devoted to his defense. In the end, his decision to plead guilty would not have been the product of a reasoned weighing of options but of resignation and despondency.

In sum, the ethics rules ordinarily require much more from a criminal defense lawyer than simply urging his indigent client to accept the prosecution's plea offer. They certainly did in Heath's case. Therefore, unless Heath's case is aberrational, there is a huge chasm between what ethics rules demand and how lawyers actually represent indigent defendants. But as discussed in Part III, the evidence suggests that Heath's experience is not at all aberrational in jurisdictions such as Georgia where indigent defense is drastically under-funded and poorly administered, and may be typical of systemic neglect of indigent defendants found throughout the country.

III. Heath Writ Large: The National Epidemic of Neglect

It is particularly likely that many lawyers functioning in under-funded defense systems will systemically fail to represent clients diligently in accordance with the rules of professional conduct. One problem is that if indigent defense representation is not adequately funded, it is difficult to attract qualified lawyers. [FN35] But as discussed below, even if lawyers are technically qualified to represent criminal defendants, they may systematically neglect indigent clients regardless of how the defense system is structured.

States and localities generally fulfill their constitutional obligation to provide lawyers to indigent criminal defendants [FN36] in one or more of the *1179 following ways: [FN37] (1) by establishing panels of lawyers who are appointed to represent individual defendants for a fee, [FN38] (2) by contracting with individual lawyers or law firms to handle all or some portion of criminal cases in the jurisdiction, [FN39] or (3) by funding public defenders offices staffed by full-time employed lawyers. [FN40] In Georgia, for example, a small percentage of counties fund public defenders offices, but most use either a panel system or a contract system. [FN41] Where the panel system is employed, some counties pay lawyers a fixed fee per case. Most pay an hourly fee but impose a cap on how much can be earned on each case. [FN42] In counties using contract attorneys, the terms vary. One county pays lawyers \$1,000 a month to handle 325-350 drug court cases a year, while another pays \$39,000 to each of six lawyers to handle felony, misdemeanor, and magistrate cases with no limit to the number of cases. [FN43]

Panel lawyers who are paid low fixed fees or whose hourly rates are capped at a low amount obviously have an economic incentive to take on a large volume of low-paying cases and handle each one quickly. If the jurisdiction pays \$300 for representing a defendant who pleads guilty, a lawyer might be *1180 able to make a good living if cases take only fifteen minutes, [FN44] but not if hours are spent interviewing and counseling the client, requesting and reviewing disclosures by the prosecution, investigating and researching, and negotiating with the prosecutor. Panel lawyers who are paid hourly fees that are appreciably lower than fees they receive from their private clients will have a slightly different economic incentive: to maximize the hours they spend on behalf of paying clients and to squeeze their court-appointed work into their remaining time.

When indigent defense is provided by public defenders offices or by contract lawyers such as Shwiller, inadequate funding usually means that lawyers will carry excessive caseloads. [FN45] In the public defenders office, there will be too few staff attorneys to handle all the cases assigned to the office, as well as too little time and resources for training and supervision. Lawyers will find it difficult to devote sufficient time to all their cases while still keeping current with their caseloads. The same problem arises where the contract system is underfunded, because the jurisdiction's cases will be divided among too few contract lawyers. This was the problem Shwiller identified in his conversation with Heath's niece. "[H]e had so many cases on his load," Shwiller said, "that if he looked into every nook and cranny . . . he would never get anything done" [FN46]

Criminal defense lawyers may request continuances when they do not have time to meet with their clients and handle other aspects of the representation, but they cannot deal with heavy caseloads exclusively by delay, because speedy trial rules require courts to keep cases moving. Therefore, lawyers are tempted to economize on their time by encouraging many or all clients to plead guilty at the earliest opportunity and limiting the amount of time spent in consulting with the client and in performing other tasks before a guilty plea is *1181 entered. [FN47] Probably the most common strategy is to engage in triage: pleading out the overwhelming majority of cases quickly in order to conserve time to investigate and defend a small number of cases. [FN48] The alternative, which was evidently Shwiller's approach, is to encourage all clients to plead guilty regardless of the prospects for a defense. [FN49]

That a poorly funded defense system in Georgia leads to neglectful lawyering was recently confirmed by the Chief Justice's Commission on Indigent Defense, [FN50] based on its own investigation and on a study conducted by *1182 the Spangenberg Group. [FN51] Of nineteen representative Georgia counties studied, [FN52] none was found to "provide sufficient funds to assure quality representation to all indigent defendants." [FN53] The Commission concluded that "[t]here is not enough money currently allocated within Georgia to the provision of constitutionally-mandated criminal defense," [FN54] and that the problem was most severe in counties using panel and contract attorneys. [FN55]

Systemic neglect of indigent clients is not universal, [FN56] but neither is it exclusive to Georgia. In a number of states, including Arizona, [FN57] Connecticut, [FN58] *1183 Florida, [FN59] Illinois, [FN60] Indiana, [FN61] Iowa, [FN62] Louisiana, [FN63] Minnesota, [FN64] Montana, [FN65] New York, [FN66] and Mississippi, [FN67] as well as Georgia, [FN68] defense lawyers and defendants have documented the problem in legal challenges to inadequately funded criminal-defense systems. [FN69] Professional organizations in various jurisdictions have also called attention to the problem. [FN70] Recently, a committee of the Texas state bar commissioned a survey of defense lawyers, prosecutors, and judges that revealed an indigent criminal defense system in crisis. [FN71] Given "the economics of the modern law practice," which requires lawyers to pay for *1184 office space, a secretary, and law books, "the fees provided in Texas often fall well short of covering overhead expenses, let alone allowing the defense attorney to earn a living." "Not surprisingly," the report found, "this low level of compensation often translates into a disincentive to provide maximum performance" and a corresponding "incentive to quickly plead the case." [FN72]

The media in different parts of the country have also called attention to the problem. In 2001, the New York Times studied New York City's criminal courts, in which lawyers assigned from panels were paid \$40 for in-court work and \$25 for out-of-court work--reportedly the second-lowest rate in the nation. [FN73] Based on its analysis of the prior year's court files and criminal cases, the newspaper reported that

[f]rom the felony courts to the misdemeanor mills and the parole-violation trailers on Rikers Island, defendants frequently get assembly-line representation from lawyers who may spend only a few minutes on each case. For their part, the lawyers complain that they are overworked and underpaid in a system under pressure to produce a high volume of quick guilty pleas. [FN74]

These studies suggest that a lack of diligence, as in the Heath case, is pervasive among criminal defense lawyers who function in poorly-funded *1185 indigent defense systems, [FN75] and that the problem is not confined to low-level criminal courts where the criminal process is so onerous that defendants have a powerful incentive to plead guilty at the earliest opportunity regardless of the possibility for a successful defense. [FN76] One commentator has characterized this method of criminal defense as "meet-them-and-plead them," [FN77] another as "routinized non-adversarialness." [FN78]

IV. How the Constitutional Case Law Lowers Professional Standards

The Supreme Court has recognized that the Sixth Amendment right to counsel includes a right to "effective assistance of counsel," that is, a right to be represented competently. [FN79] If the constitutional right meant that criminal *1186 defense lawyers had to comport with the ethics rules and that, if they failed to do so, criminal defendants would receive a remedy, the constitutional case law would perform a salutary regulatory function in at least two respects. First, by upholding claims where lawyers served unethically, courts would impose an indirect sanction for ethical shortcomings. Although a judicial decision that the defendant was represented inef-

fectively would not result in direct punishment for the defense lawyer, it would have a cost for a lawyer who cared about his reputation. Therefore, if the constitutional doctrine were coextensive with the ethics rules, lawyers would have an incentive to act ethically to avoid judicial determinations that they had not done so. Second, ineffectiveness claims would serve as a vehicle by which courts could apply open-textured ethics rules to concrete cases and thereby articulate what is expected of lawyers not only constitutionally but ethically.

The case law performs neither function. Defense lawyers who neglect their indigent clients because of financial or caseload pressures are not deterred by the possibility that a court will review their work and conclude that they served a client incompetently. 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 as a constitutional matter, the case law has the unintended effect of obscuring professional standards that appear to be more demanding.

From a practical perspective, few defendants who plead guilty will later have the motivation and ability to seek redress based on their lawyers' deficiencies. A defendant who prevails does not go free, but must face the charges that were pending before he pled guilty. Some will already have served their sentences by the time relief might be granted and would prefer not to begin anew. Those who would still be serving prison sentences may be reluctant to re-experience the anxiety of facing criminal charges and to take the risk that the outcome will be harsher than before. Even a defendant who would like to withdraw his plea may lack access to the information needed to establish his ineffectiveness claim and, except in capital cases, will rarely have a lawyer to assist in the effort. [FN80] This is one of the respects in which Heath's *1187 experience was unusual. He received such a lengthy prison sentence that he apparently considered it desirable to begin the criminal process anew, and he was able to secure the assistance of a local lawyer in seeking redress. [FN81]

The doctrinal obstacles for a defendant who pleaded guilty are even more daunting. The constitutional case law does not afford a remedy whenever the defense lawyer was not competent as a matter of professional ethics. A defendant who was convicted at trial must show both that his lawyer's performance "fell below an objective standard of reasonableness" [FN82] and that he was prejudiced, which means "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [FN83] Arguably, the bar should be lower for a defendant who pleaded guilty, because the state has not made the same investment of resources and there has not been a formal adjudication of guilt in an adversarial proceeding. But the Supreme Court, willing to take guilty pleas at face value [FN84] and recognizing the institutional interest in finality, has made no allowances for a defendant such as Heath who pleads guilty. To establish prejudice, he must ordinarily show "that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." [FN85]

A defendant such as Heath may have suffered because his lawyer failed to live up to professional expectations [FN86] but he will nevertheless have great difficulty proving to a court's satisfaction that he was "prejudiced." In Heath's case, for example, defense counsel performed poorly in several respects, but the prosecution argued, not in a way that mattered in a legal sense. For example, over the course of more than a year between Heath's arraignment and guilty plea, Shwiller never met with Heath. Further, Shwiller failed to conduct any investigation, including into the possibility that Heath was innocent *1188 because it was his coworker who had driven the truck in the collision. The case law provides, however, that "[a]n attorney does not have an obligation to undertake an investigation which, in his reasoned judgment, does not have promise." [FN87] Even if the trial court had concluded that Shwiller was unreasonable in eschewing promising avenues of factual inquiry, Heath would have had to persuade the court that a diligent lawyer would have learned something that would

have dissuaded him from pleading guilty. [FN88] For example, Heath may have been expected to show that if Shwiller had investigated diligently, he would have uncovered evidence that Heath's coworker was the driver. [FN89] Some decisions suggest that even if Heath had shown this, he would not be entitled to relief, because by pleading guilty, a defendant waives any claim that counsel investigated or prepared inadequately. [FN90]

Shwiller also gave Heath bad advice when he predicted that Heath would be sentenced leniently. But it is generally difficult for a defendant to show that his lawyer's incorrect or incomplete advice made a difference. [FN91] In cases like Heath's, courts typically find that there was no prejudice because defendants are not entitled to rely on a lawyer's prediction about the sentence that will be imposed. [FN92] And while the harsh sentence may have been affected by Shwiller's failure to make an adequate argument at the sentencing hearing, it was apparently difficult for Heath to prove that the sentencing decision was affected by the defense lawyer's lack of zeal.

An unfortunate byproduct of the Sixth Amendment doctrine is the diminution of standards for indigent defense practice. Although the Supreme Court has acknowledged that ethics rules impose obligations on criminal *1189 defense lawyers that may demand more than the constitutional standard, [FN93] criminal defense lawyers may nevertheless misread the judicial decisions as expressing their view of how to represent indigent clients. What these decisions seem to teach a criminal defense lawyer is that he need hardly communicate with an indigent client and may quickly "plead out" the client without conducting enough investigation and research to ascertain the likelihood of prevailing at trial. The danger is that for lawyers immersed in a practice of systemic neglect, the minimal requirements of the Sixth Amendment will supersede the professional standards expected of all lawyers.

What makes the decision in Heath remarkable is that the Georgia Court of Appeals chose to make a very different statement: that neglect by indigent defenders is constitutionally as well as professionally unacceptable. The court found that Shwiller's failure to investigate, conduct research, and meet with Heath during the thirteen-month period from arraignment until the guilty plea constituted such a "total lack of any meaningful assistance" that Heath need not prove in any specific way that he was prejudiced. [FN94] Relying on a U.S. Supreme Court decision stating that prejudice can be presumed when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," the Georgia court concluded: "As Shwiller's neglectful representation constitutes no representation at all, Heath should be entitled to a presumption of prejudice in this case." [FN95]

Doctrinally, the decision was far from unassailable, leading the prosecution to ask the state Supreme Court to overturn the decision, lest the decision be invoked by countless other indigent defendants who were neglected in similar ways by Shwiller or other assigned lawyers. [FN96] Of course, the prosecution's *1190 worry that Heath would affect a large number of other cases underscores the very problem identified by the Georgia Chief Justice's Commission: that indigent defendants in Georgia are routinely denied meaningful legal assistance.

In sum, the decision in Heath is the rare and welcome exception. But for the most part, the constitutional decisions do not encourage defense lawyers to give clients as much time and attention as ethics standards expect. If anything, the decisions interpreting the Sixth Amendment reinforce the tendency of lawyers in underfunded indigent defense systems to severely restrict the amount of time spent on individual cases.

V. The Inadequacy of Institutional Responses to the Problem of Neglect

How should government institutions respond to the problem of neglect by criminal defense lawyers? Most obviously, state and local governments should adequately fund indigent defense systems. Other institutions that can speak knowledgeably about the problem and that have an interest in promoting ethical practice within the criminal justice system should encourage them to do so. Prosecutors' offices, the judiciary and attorney disciplinary committees are each capable of encouraging reform and each has an institutional interest in doing so. But as discussed below, these institutions often fail in the role.

A. Prosecutorial Exploitation

In a jurisdiction where defense lawyers systemically fail to serve their indigent clients diligently because the defense system is inadequately funded, the prosecutors' offices can take various steps to ameliorate the problem. But prosecutors rarely do so, and are just as likely to exploit the problem.

Where appointed lawyers, like Shwiller in the Heath case, are known to never conduct investigations that might uncover exculpatory evidence, prosecutors might perform a rigorous investigative and screening function to ensure that innocent defendants are not charged. But prosecutors are not legally required to perform these roles and most do not. Ordinarily, police control the criminal investigation. Neither the police nor the prosecutor has any legal obligation to conduct an investigation directed at the discovery of ***1191** evidence helpful to the defense. [FN97] Although some have argued that prosecutors should screen cases more rigorously, [FN98] prosecutors have only a minimal obligation to do so, [FN99] and need not be particularly familiar with the investigation and the evidence when charges are brought. The prosecutorial screening function is less rigorous in the United States than in other jurisdictions [FN100] precisely because of the presumed role of defense lawyers in conducting investigations and testing the prosecution's case in the adversary process. [FN101] This presumption, however, is often unfulfilled in the case of indigent defendants.

Likewise, the failure to investigate means that defense lawyers have limited information on which to base their advice to the client about whether or not to plead guilty and to employ in plea negotiations. Prosecutors might compensate for these limitations by providing the fruits of their investigation to the defense. But prosecutors have no obligation to do so, [FN102] and few voluntarily employ an "open file" system. [FN103]

Far from compensating for defense lawyers' inadequacies, prosecutors seek in various ways to exploit them. Prosecutors often pressure defendants to ***1192** plead guilty soon after they are arrested, before their attorneys have had an opportunity to conduct an investigation, by making offers of leniency that will be taken off the table if not quickly accepted. [FN104] Some prosecutors couple the short deadline with a requirement that the defendant relinquish the constitutional right to receive disclosures from the prosecution, a practice that the Supreme Court recently upheld. [FN105] These so-called "fast-track" policies take advantage of defendants whose appointed defense lawyers do not investigate as soon as a case is assigned and who are reluctant to try cases. Prosecutors thereby preserve time and resources while denying indigent defendants an opportunity to learn of possible weaknesses in the prosecution's case.

It is wrong for prosecutors to exploit systemic neglect by pressuring defendants to plead guilty quickly. Rather, prosecutors should seek ways to call attention to the problem and ameliorate it. A prosecutor is said to be a "a minister of justice and not simply . . . an advocate." [FN106] Prosecutors must "seek justice," [FN107] which includes an obligation "to see that the defendant is accorded procedural justice." [FN108] Given prosecutors' role, it has been recognized that they are obligated to call the courts' attention to defense lawyers' professional lapses, such as impermissible conflicts of interest that undermine the fairness of criminal proceed-

ings. [FN109] Similarly, if there is a systemic failure of defense lawyers in the jurisdiction to represent their clients as diligently as ethics rules demand, prosecutors should call public attention to the problem and encourage *1193 the legislature to take steps, including appropriating sufficient funds, to address it.

B. Judicial Impassivity

Trial judges may not know precisely how much time any particular defense attorney devotes to any particular representation, but they are certainly aware in general terms how conscientiously lawyers represent their clients. [FN110] Judges in jurisdictions where indigent defense is drastically under-funded cannot avoid knowing that lawyers are devoting minimal amounts of time to individual cases. But there is nothing to suggest that trial judges criticize lawyers, replace them, or otherwise intercede when it is evident that lawyers are neglecting their clients. Some published decisions suggest that trial courts are less concerned about the systemic lack of diligence than about the occasional problem of excessive zeal, as reflected in excessive or baseless motion practice. [FN111]

Judges' reluctance to hold lawyers accountable for shortchanging their clients might be explained in any number of ways. Judges may believe that their professional role as neutral arbiter forecloses policing lawyers' practice. [FN112] They may fear that casting doubts on lawyers' level of dedication and the quality of their work will undermine clients' confidence in their lawyers or undermine the public perception of lawyers. Or they may even encourage early guilty pleas to promote judicial economy.

Nor do trial courts adopt practices to compensate for defense lawyers' limitations. Conceivably, judges might screen cases before accepting guilty pleas to ensure that innocent defendants are not convicted. But judges would *1194 be limited in what role they could play, since they do not have their own investigative resources. In practice, many judges rely entirely on the defendant's admission of guilt or on the prosecution's representation that he has a triable case. Some judges require prosecutors to describe the evidence that would be offered at trial, in least in general terms, but judges are not themselves in a position to evaluate the credibility of the prosecution's evidence or to assess the strength of the prosecution's proof relative to evidence that might be offered by the defense.

Judges might also take steps to ensure that defendants are well advised before pleading guilty. But in practice, whatever advice judges provide tends to be perfunctory, directed primarily at ensuring that the defendant understands the rights that he is relinquishing by pleading guilty. There may be a number of good reasons why judges are reluctant to assume more substantial advice-giving responsibilities. To effectively counsel the defendant, they need more of an understanding of the prosecution's case and of possible defenses than they may feel they have time and resources to acquire.

Even more than prosecutors, however, the judiciary has an institutional responsibility to promote diligent practice by criminal defense lawyers. Therefore, it is important for courts to find ways, consistent with the judicial role, to address the problem caused by systemic neglect of indigent defendants. [FN113] Most obviously, the judiciary can promote reform by documenting the problems caused by inadequate funding in both individual cases, as the Georgia court of appeals did in *Heath*, and on a systemic level, as the Georgia Chief Justice did in establishing a Commission on Indigent Defense.

Moreover, judges can initiate a colloquy at guilty plea proceedings that will both remind lawyers of their ethical obligation diligently to represent each client and encourage lawyers to meet their obligation. It should be

possible, without intruding into attorney-client confidences or subverting the attorney-client relationship, for a judge to obtain a rough measure of whether the lawyers appearing before them at guilty plea proceedings are representing clients diligently. For example, a judge can ask how long ago the lawyer was assigned to the matter, how many times the lawyer met with the client and for how long, and the extent of discovery provided by the prosecution. Over time, *1195 the colloquy will publicly expose lawyers who consistently engage in a “meet-them-and-plead-them” practice. It may also justify some measures by the court to address the problem in particular cases. A judge is not obligated to accept a guilty plea when the defense lawyer evidently has had insufficient time for investigation and analysis, has devoted little time to counseling, and has received little information from the prosecution. If it appears that a defense lawyer is representing clients in an assembly-line fashion or that the prosecution is exploiting the defense's lack of resources, a judge can adjourn the proceedings in order to allow more time for defense counsel to gather and convey the information needed for the defendant to make an informed decision whether to plead guilty.

C. Disciplinary Indifference

For criminal defense lawyers, unlike many other lawyers, the only available regulatory mechanism is the attorney disciplinary process. But disciplinary agencies seem reluctant to bring proceedings against a criminal defense attorney such as Shwiller in the Heath case who defends his neglect of his client by pointing to inadequate funding.

Professional discipline is not the exclusive way in which lawyers are regulated. [FN114] Lawyers who engage in misconduct may be penalized in various other ways, formal and informal, depending on the nature of their practice. For example, clients may sue their lawyers for malpractice or breach of their fiduciary duty, or they may simply take desired legal business elsewhere.

For criminal defense lawyers who simply “meet and plead” their indigent clients, however, the possible penalties are few. It would be almost impossible for aggrieved criminal defendants to prevail in a malpractice action, assuming they could find a lawyer to take their cases, because of doctrinal barriers. [FN115] *1196 Nor can indigent defendants regulate their lawyers informally by threatening to find another lawyer because they generally have no ability to retain counsel of choice and in any case their business is not lucrative enough to be missed. [FN116] The under-regulation of indigent defense practice puts a premium on self-regulation, but not all lawyers have proven up to the task. [FN117]

The absence of alternative regulatory mechanisms has led Dennis Curtis and Judith Resnik to argue that disciplinary agencies should bring proceedings against criminal defense lawyers who represent indigent clients inadequately, [FN118] and “disciplinary committees, in turn, [should] be willing to find violations and to punish lawyers, including those who work under admittedly difficult conditions.” [FN119] Yet disciplinary agencies traditionally have not tackled the problem of neglect by lawyers operating in under-funded indigent defense systems. In Georgia as elsewhere, criminal defense lawyers have been disciplined for neglecting paying clients, [FN120] but disciplinary agencies rarely initiate disciplinary charges against lawyers such as Shwiller who shortchange their indigent defendants. This may seem curious, since most criminal defendants are indigent and, as the Chief Justice's Commission noted, paying clients are generally better served than indigent ones. [FN121]

Disciplinary agencies' seeming indifference to the problem can be explained in many different ways. They may consider it unfair to punish individual lawyers who serve clients inadequately when the entire system of *1197 indigent defense seems built on the premise of client neglect. They may fear that a threat of sanction will

drive lawyers out of indigent defense practice, which could lead the courts to press unwilling lawyers into service to fulfill the constitutional mandate. Or they may reason that courts have the primary responsibility for addressing the problem, and that the courts' silence constitutes tacit approval of the way lawyers practice.

Certainly, it would seem unfair to punish lawyers who do the best they can under difficult circumstances. Consider, for example, the work of the Office of the State Appellate Defender in Chicago, which was the subject of federal litigation in the early 1990s. [FN122] The office responded to under-funding by handling cases on a first-come-first-served basis and attempting to do an adequate job in each, with the result that the office had an ever-increasing backlog of cases. In cases decided in 1994, the average delay from the office's appointment to the filing of its opening brief was close to seventeen months, and the average delay from the office's appointment to an appellate court decision was almost two-and-a-half years. [FN123] The delays had costs for clients. The court found that if the backlog continued to grow as expected, forty-five percent of prisoners would completely serve their sentences before the appellate court decided their appeals. [FN124] In some of those cases, the convictions would presumably be reversed outright. [FN125] Thus, some defendants would be deprived of their liberty unnecessarily. [FN126] Lawyers for paying clients who delayed filing appellate briefs for such long periods of time might be subject to sanction. [FN127] But, in fact, allowing cases to pile up was better than the alternatives available to the office. [FN128] A second possible way for state appellate *1198 defenders to keep up with their caseloads would have been to cut down on the amount of time devoted to each appeal. The lawyers could have saved time by reviewing trial records less closely, challenging fewer potential errors on appeal, researching less thoroughly, and writing less carefully. Obviously, the quality of work would have suffered. Predictably, some defendants would be unsuccessful or less successful on appeal as a result, because meritorious claims would have been presented unpersuasively or overlooked entirely. Quite fairly, the Chicago appellate defenders were neither disciplined nor subject to ethical opprobrium by the court. [FN129]

Even where defense lawyers are not making the best of a bad situation, disciplinary agencies may envision practical and legal difficulties in seeking sanctions. In disciplinary proceedings, the typical "neglect" case involves an obvious and complete failure to do something mandated by rule or court order, such as a failure to appear at a scheduled proceeding or to file papers when they are due. [FN130] But that is not the problem of indigent defense lawyers such as Shwiller. Shwiller met the minimal mandates of his appointment by simply showing up at Heath's arraignment, guilty plea, and sentencing. His lapses involved intermediate, unseen steps--counseling, investigation, research, and preparation--not ultimate, public ones. For the Georgia court to conclude that Shwiller was neglectful in not meeting often enough with Heath and in not conducting investigation or research, it needed to learn about aspects of the representation for which there was no public record and consider the reasons for Shwiller's omissions. Then it had to make a subjective judgment about whether it was unreasonable in the context of Heath's case for Shwiller to have failed to do more. As a practical matter, disciplinary agencies may be disinclined to expend resources on cases where the lawyer's lack of diligence *1199 is not an obvious matter of public record. And because disciplinary agencies have not traditionally brought such cases, disciplinary agencies may conclude that the ethics rules cannot serve as the basis for sanctioning lawyers such as Shwiller who showed up in court but did not perform their out-of-court work diligently.

Perhaps it is understandable why disciplinary agencies decline to initiate proceedings against individual criminal defense lawyers who do next to nothing for their clients. But the silence of disciplinary agencies may be misread to suggest that overburdened defense lawyers are complying with professional standards. This would be truly unfortunate, since a function of the disciplinary process is to promote compliance with ethical standards. At least in cases such as Heath's, where the record has already been made and a court has found that the lawyer was "neglectful," disciplinary agencies should initiate proceedings in order to establish what it

means, as a matter of professional ethics, for a criminal defense lawyer to provide competent and diligent representation, to keep the client reasonably informed, and to enable the client to make an informed decision. Further, disciplinary agencies who are aware of systemic neglect by criminal defense attorneys should promote institutional reform by documenting the problem and calling public attention to it in other ways, including by issuing or contributing to reports on the subject. Of all the relevant institutions, disciplinary agencies have the keenest interest in exposing how the inadequacy of funding for criminal defense contributes to the systemic neglect of indigent clients.

Conclusion

Given the demonstrated fragility of professional norms when economic incentives push in the opposite direction, there is a need to alter the system of economic incentives for appointed defense lawyers by increasing funding for indigent defense. Prosecutors, courts, and disciplinary agencies should strongly urge legislatures to provide the necessary funding. To make the case, they should draw upon the information available to them to document the impact of under-funding on the quality of representation. Additionally, prosecutors and courts should seek ways to ameliorate the problem, and prosecutors should resist the temptation to exploit it. Otherwise, a significant number of criminal defense lawyers will continue to represent indigent clients on a systematic basis in a manner that falls short of the ethical standards, and their clients--and justice--will continue to suffer as a result.

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[FN1]. See, e.g., Stephen B. Bright, [Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake](#), 1997 *Ann. Surv. Am. L.* 783; Richard Klein, Symposium, *Gideon--A Generation Later: The Constitutionalization of Ineffective Assistance of Counsel*, 58 *Md. L. Rev.* 1433 (1999); Joe Margulies, *Resource Deprivation and the Right to Counsel*, 80 *J. Crim. L. & Criminology* 673 (1989); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 *Buff. L. Rev.* 329 (1995).

[FN2]. See, e.g., Dennis E. Curtis & Judith Resnik, [Grieving Criminal Defense Lawyers](#), 70 *Fordham L. Rev.* 1615 (2002); Michelle S. Jacobs, [Legal Professionalism: Do Ethical Rules Require Zealous Representation for Poor People?](#), 8 *St. Thomas L. Rev.* 97 (1995); Suzanne E. Mounts, [Public Defender Programs, Professional Responsibility, and Competent Representation](#), 1982 *Wis. L. Rev.* 473; see also Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* 60-64 (2000).

[FN3]. Model Rules of Prof'l Conduct R. 1.3 (2002) ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

[FN4]. *Id.* R. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the ... thoroughness and preparation reasonably necessary for the representation.").

[FN5]. *Id.* R. 1.1 cmt. [5].

[FN6]. *Id.* R. 1.4(a)(3) & (4).

[FN7]. *Id.* R. 1.2(a).

[FN8]. *Id.* R. 1.4(b).

[FN9]. 574 S.E.2d 852 (Ga. Ct. App. 2002), cert. granted, 2003 Georgia LEXIS 323 (Mar. 28, 2003). The case was argued in the Georgia Supreme Court on June 17, 2003. Bill Rankin, Landmark DUI Ruling Challenged; Frenzy of Appeals Seen: Conviction Reversal Aids Poor, but May Jam Courts, Prosecutor Argues, Atlanta J.-Const., June 18, 2003, at 1B. Early this year, Georgia adopted a law to reform its indigent defense system by establishing public defender offices in each of its 49 judicial districts. See Bill Rankin, Legal Aid for Georgia's Poor Still Has Big Gaps, Atlanta J.-Const., June 5, 2003, at B1.

[FN10]. 574 S.E.2d at 852.

[FN11]. *Id.* at 852-53; Bill Rankin, Indigent Defense Blasted; Lawyer Blamed As Guilty Plea Tossed, Atlanta J.-Const., Nov. 30, 2002, at 1A.

[FN12]. Heath, 574 S.E.2d at 854.

[FN13]. *Id.*

[FN14]. *Id.* at n.5.

[FN15]. *Id.* at 854.

[FN16]. Rankin, *supra* note 11.

[FN17]. Heath, 574 S.E.2d at 853-54.

[FN18]. *Id.* at 853-54.

[FN19]. *Id.* at 853-54 & n.6 (internal quotation marks omitted).

[FN20]. That is, of course, the question suggested by the Symposium for which this Article was prepared.

[FN21]. See, e.g., Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 *Law & Soc'y Rev.* 483, 498 (1988) (finding positive correlation between defendants' perception of the fairness of the criminal process and the amount of time they spent with their lawyers).

[FN22]. There have been a number of empirical studies examining clients' expectations and perceptions in the criminal justice system. See, e.g., Geoffrey P. Aslpert & Donald A. Hicks, Prisoners' Attitudes Toward Components of the Legal and Judicial Systems, 14 *Criminology* 461 (1977); Marcus T. Boccaccini, & Stanley L. Brodsky, *Characteristics of the Ideal Criminal Defense Attorney From the Client's Perspective: Empirical Findings and Implications for Legal Practice*, 25 *Law & Psychol. Rev.* 81 (2001); Marcus T. Boccaccini et al., *Client Relations Skills in Effective Lawyering: Attitudes of Criminal Defense Attorneys and Experienced Clients*, 26 *Law & Psychol. Rev.* 97 (2002); Casper et al., *supra* note 21; Tom R. Tyler, The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience, 18 *Law & Soc'y Rev.* 51 (1984).

[FN23]. See Model Rules of Prof'l Conduct R. 1.3 cmt. [2] (2002) ("A lawyer's work load must be controlled so that each matter can be competently handled."); ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 399 (1996) (opining that legal services lawyers will be required "to withdraw from some matters if funding and staff reductions greatly increase these lawyers' workloads, since maintaining an unmanageable case load violates the lawyer's duty ... to provide competent representation"); Mich. St. B. Ethics Comm., Informal Op. RI-252 (1996) (opining that disciplinary rules "require lawyers to monitor their workloads and decline new clients if taking them on would create overloads that make competent representation impossible"); Wis. St. B. Standing Comm. on Prof'l Ethics, Formal Op. E-84-11 (1984) (opining that an assistant public defender must decline new legal matters and, if necessary, withdraw from a sufficient number of cases to ensure adequate representation in the remaining matters; and that a lawyer may not accept an overly burdensome caseload if it interferes with his duty to render competent legal services to his clients); Charles W. Wolfram, *Modern Legal Ethics* 187 (1986); Mounts, *supra* note 2, at 500-02; see also N.Y. St. B.A. Comm. on Prof'l Ethics, Op. 751 (2002) (stating that "[a]lthough DR 6-101(A)(2) provides that the lawyer must undertake preparation that is 'adequate in the circumstances,' this refers to the circumstances of the particular representation. The relevant 'circumstances' would not include the excessiveness of lawyer's work load").

[FN24]. Cf. Model Rules of Prof'l Conduct, R. 1.2(c) (2002).

[FN25]. *Id.* at R. 1.2(a).

[FN26]. See *id.* at R. 1.2(a) & cmt. [1]; see generally Rodney J. Uphoff, [Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant's Tactical Choices](#), 68 U. Cin. L. Rev. 763 (2000); Roger J. Uphoff & Peter B. Wood, [The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study](#), 47 Kan. L. Rev. 1 (1998).

[FN27]. Model Rules of Prof'l Conduct, R. 1.1.

[FN28]. *Id.* R. 1.1 cmt [5].

[FN29]. *Id.* R. 1.3 & cmt. [1].

[FN30]. *Id.* R. 1.4(a)(3) & (4), (b) & cmt. [1].

[FN31]. *Id.* R. 1.4(b).

[FN32]. See, e.g., Albert W. Alschuler, *The Changing Plea Bargain Debate*, 69 Cal. L. Rev. 652, 714 (1981); Robert E. Scott & William J. Stuntz, [A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants](#), 101 Yale L.J. 2011, 2013 (1992).

[FN33]. Model Rules of Prof'l Conduct, R. 1.1 cmt. [1].

[FN34]. *Id.* R. 1.3 & cmt. [1].

[FN35]. See generally Louis D. Bilonis & Richard A. Rosen, [Lawyers, Arbitrariness, and the Eighth Amendment](#), 75 Tex. L. Rev. 1301 (1997); Stephen B. Bright, [Counsel for the Poor: The Death Sentence not for the Worst Crime but for the Worst Lawyer](#), 103 Yale L.J. 1835 (1994); Donald A. Dripps, *Criminal Law: Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. Crim. L. & Criminology 242 (1997); Bruce A. Green, [Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment](#), 78 Iowa L. Rev. 433

(1993).

[FN36]. See *Alabama v. Shelton*, 535 U.S. 654 (2002) (holding that indigent defendants have Sixth Amendment right to appointed counsel in cases that result in a suspended sentence); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (holding that indigent defendants have Sixth Amendment right to appointed counsel in cases that result in imprisonment for any length of time); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (recognizing indigent defendant's Sixth Amendment right to appointed counsel).

[FN37]. See generally David Allan Felice, *Justice Rationed: A Look at Alabama's Present Indigent Defense System with a Vision Towards Change*, 52 Ala. L. Rev. 975 (2001); Robert L. Spangenberg & Marea L. Beeman, *Indigent Defence Systems in the United States*, 58 Law & Contemp. Probs. 31 (1995). Cf. Peter W. Tague, *Ensuring Able Representation for Publicly-Funded Criminal Defendants: Lessons from England*, 69 U. Cin. L. Rev. 273 (2000) (discussing the English voucher system).

[FN38]. See Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 Ind. L.J. 363, 364-75 (1993); Ronald W. Schneider, Jr., Comment, *A Measure of Our Justice System: A Look at Maine's Indigent Criminal Defense Delivery System*, 48 Me. L. Rev. 335 (1996).

[FN39]. See Margaret H. Lemos, Note, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. Rev. 1808 (2000); Meredith Anne Nelson, Comment, *Quality Control for Indigent Defense Contracts*, 76 Cal. L. Rev. 1147 (1988).

[FN40]. See Lisa J. McIntyre, *The Public Defender: The Practice of Law in the Shadows of Disrepute* (1987); Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 Geo. L.J. 2419 (1996); David L. Wilson, Casenote, *Constitutional Law: Making a Case for Preserving the Integrity of Minnesota's Public Defender System: Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996), 22 Wm. Mitchell L. Rev. 1117 (1996).

[FN41]. Status of Indigent Defense in Georgia: A Study for the Chief Justice's Commission on Indigent Defense, Part I 28, 34, 40 (2002) [hereinafter Spangenberg Report], available at <http://www.georgiacourts.org/aoc/idchearings/idcreports.html>.

[FN42]. For example, lawyers in Chatham County are paid an hourly fee of \$60 for work in court and \$45 for work outside court, but the total payment is restricted depending on the severity of the alleged crime and on whether the defendant pleads guilty or stands trial. A lawyer whose client pled guilty to a misdemeanor would receive a maximum of \$265, while one whose client pled guilty to murder would receive a maximum of \$1,050. In some counties, as a practical matter, the hourly rates are ignored and lawyers are paid a flat fee--for example, in Baldwin County, \$200 for representing a defendant who pled guilty to a felony, unless life prison were involved, in which case the fee would be \$300. *Id.* at 32-33.

[FN43]. *Id.* at 35-36.

[FN44]. See *id.* at 33 (noting that in Clayton County State and Superior Courts, panel attorneys often opt to charge flat fees, in part "because attorneys can charge \$300 for a case which takes 15 minutes to plead").

[FN45]. Clark Cunningham has suggested to me that some public defenders may systematically neglect one category of clients while diligently representing other clients. For example, a lawyer may slight clients whose cases

seem likely to end in guilty pleas in order to free up time for clients whose cases go to jury trial. Excessive case loads, of course, increase the pressure on public defenders to secure quick guilty pleas in the overwhelming majority of cases in order to be able to maximize the time devoted to trials, but under funding may not be the only cause of such behavior. Many young lawyers go into a public defenders office with the primary goal of gaining trial experience and the culture of many offices may value trial work over effective representation on cases that end in pleas. (Some public defender programs, for example, require a certain number of jury trials for promotion.)

[FN46]. *Heath v. State*, 574 S.E.2d 852 (Ga. Ct. App. 2002) (internal quotation marks omitted), cert. granted, 2003 Georgia LEXIS 323 (Mar. 28, 2003).

[FN47]. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 33 & n.117 (1997).

[FN48]. Given limited resources, it might seem fair for defense lawyers to devote most of their efforts to the defendants who seem the most “worthy” in the sense that they are the ones who are most likely to be innocent and/or most likely to be acquitted at trial, or to other categories of cases where the societal interest in a vigorous defense is strongest. See generally John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. Cal. L. Rev. 1215 (1994) (discussing possible principles for defense lawyers to employ in deciding how to allocate limited resources). But such a policy derogates “the requirement that every criminal defendant receive adequate representation, regardless of guilt or innocence.” *Miranda v. Clark County*, 319 F.3d 465, 470 (9th Cir. 2003) (public defender's office may not allocate investigatory and legal resources provided to clients based on polygraph results).

Moreover, as Clark Cunningham has suggested to me, lawyers who ration most of their time to cases that go to trial are likely to neglect clients who are first time offenders, who have few prior convictions, or whose alleged crimes are minor. The defendant with an extensive criminal record charged with a major crime is unlikely to receive an attractive plea offer and may choose to go to trial because he or she has little to lose. Such a client, like all defendants, deserves a vigorous defense, of course. But the missed opportunity for effective representation may be tragic for the other, systematically neglected clients, because a committed and caring lawyer, through either traditional advocacy or by such approaches as pre-trial diversion and alternate sentencing, may have been able to save them from that critical first incarceration or actually turn them away from a life of crime at an early stage.

[FN49]. If one were unaware of Shwiller's history, one might surmise that he had engaged in triage: He sized up Heath's case as a lost cause in light of the charges, the prosecution's theory, and Heath's prior convictions, concluded that his client had no meaningful choice but to plead guilty, worked out the best deal he could for his client, and urged his client to take the deal, in order to conserve time for clients who might benefit from it. That is essentially how Shwiller later sought to explain his work. He concluded that Heath was the likely driver and that, given limited time and resources, it was not worth the effort to locate Heath's coworker. See Trisha Renaud, *Barnes Plan on Pro Bono Gets Cool Review*, *Fulton County Daily Rep.*, June 21, 2001 (noting that Shwiller stated that all the evidence pointed to Heath as being the driver; that Heath had not given him sufficient information to locate his coworker; and that “I did realistically everything I could to help him In the perfect world, we would have time and resources to chase down every conceivable lead any defendant could provide.... As you know, that's not the world we live in. That's unfortunate, but that's just the practical reality of life”). A lawyer in Shwiller's situation might have calculated that the coworker was unlikely to be found, and that even if he were, he would be unlikely to put himself at risk by admitting to having been the driver. Given Shwiller's track record, however, one might surmise that he would not have made time to investigate even if Heath's prospects seemed

brighter.

[FN50]. Report of the [Georgia] Chief Justice's Commission on Indigent Defense (Dec. 2002) [hereinafter Georgia Commission Report], available at <http://www.georgiacourts.org/aoc/idhearings/idcreports.html>. See also The Southern Center for Human Rights, "If You Cannot Afford a Lawyer": A Report on Georgia's Failed Indigent Defense System, available at <http://www.schr.org/reports/docs/jan.%202003.%20report.pdf>.

[FN51]. Spangenberg Report, *supra* note 41.

[FN52]. *Id.* at 3.

[FN53]. *Id.* at 91.

[FN54]. Georgia Commission Report, *supra* note 50, at 45.

[FN55]. See *id.* at 46, which states:

Panel or contract attorneys who are paid barely enough to cover their overhead are forced, in the words of the Spangenberg Report, "to make tough choices on how they handle their appointed cases: many admit they do not provide the same level of service that they do to retained clients; to do so would work a financial hardship on them. Often what suffers are client visits, either in or out of jail, investigation, legal research and zealous motions practice. The low compensation works as a disincentive for many attorneys to do the same level of work on appointed cases as they would in retained cases."

[FN56]. For positive depictions of criminal defense lawyers for the poor, see, for example, Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 *Geo. J. Legal Ethics* 401 (2001); Mitchell, *supra* note 48; Inga L. Parsons, "Making it a Federal Case:" A Model for Indigent Representation, 1997 *Ann. Surv. Am. L.* 837 (describing the Federal Defenders Division in New York City). One alternative model of criminal defense representation can be found in Georgia. The Georgia Justice Project (GJP) is a privately funded public defender program that represents a relatively small number of clients and takes a holistic approach to assist them in establishing crime-free lives as productive citizens. The staff and volunteers assist clients in all areas of their lives in addition to legal representation, such as providing counseling, employment, job training, and education. GJP's staff visits clients in prison if they are convicted and offers post-release support. See GJP website, <http://www.gjp.org/>, (last visited July 7, 2003); see also Bill Rankin, *Unusual Legal Aid Group Helps Turn Lives Around*, *Atlanta J.-Const.*, Dec. 2, 2002, at 1A (describing the GJP, which "provides legal representation and support often unheard of throughout the country").

[FN57]. See *Zarabia v. Bradshaw*, 1996 *Ariz. LEXIS* 17 (Feb. 13, 1996); cf. *State v. Smith*, 681 P.2d 1374 (Ariz. 1984).

[FN58]. See *Rivera v. Rowland*, 1996 WL 636475 (Conn. Super. Ct. Oct. 23, 1996) (denying motion to dismiss lawsuit alleging that criminal defendants were denied minimally adequate representation "due to high case loads and lack of sufficient resources"); Dana Tofig, *ACLU Drops Public-Defender Suit*, *Hartford Courant*, July 8, 1999, at A5 (discussing that ACLU filed a lawsuit in 1995 alleging that public defenders were handling more than 1,000 cases annually, but withdrew the lawsuit in 1999 after the state legislature authorized substantially more funding).

[FN59]. See [In re Public Defender's Certification of Conflict and Motion to Withdraw Due to Excessive Caseload and Motion for Writ of Mandamus](#), 709 So. 2d 101 (Fla. 1998) (approving lower court's order providing that, because of its excessive backlog of appellate cases, a public defender's office could accept no new cases until further order, and that the courts must appoint qualified attorneys from outside that office to represent indigent defendants on appeal); see also [Sheppard & White, P.A. v. City of Jacksonville](#), 827 So. 2d 925 (Fla. 2002).

[FN60]. See [United States ex rel. Green v. Washington](#), 917 F. Supp. 1238 (N.D. Ill. 1996).

[FN61]. See [Platt v. State](#), 664 N.E.2d 357 (Ind. Ct. App. 1996).

[FN62]. See Robert G. Rigg, [The Constitution, Compensation, and Competence: A Case Study](#), 27 Am. J. Crim. L. 1 (1999) (discussing [Parrish v. Denato](#), 262 N.W.2d 281 (Iowa 1978)).

[FN63]. See [State v. Peart](#), 621 So. 2d 780 (La. 1993).

[FN64]. See [Kennedy v. Carlson](#), 544 N.W.2d 1 (Minn. 1996), discussed in Wilson, *supra* note 40.

[FN65]. See Kate Jones, [Exoneration Highlights the Need for Indigent Defense Reform in Montana](#), *Champion*, Dec. 2002, at 45 (referring to lawsuit filed in Montana by ACLU alleging inadequate funding for indigent defense in seven counties).

[FN66]. See Jan Ackerman, [Accord Will Double Public Defender Staff](#), *Pittsburgh Post-Gazette*, May 13, 1998, at A1 (discussing settlement of class action lawsuit that would double the number of public defenders in Allegheny County and increase the number of investigators from one to at least thirteen).

[FN67]. See NAACP Legal Defense and Educational Fund, Inc., [Assembly Line Justice: Mississippi's Indigent Defense Crisis](#), Feb. 2003, available at [http:// justice.policy.net/relatives/21301.pdf](http://justice.policy.net/relatives/21301.pdf) [hereinafter *Assembly Line Justice*].

[FN68]. See [Luckey v. Harris](#), 860 F.2d 1012 (11th Cir. 1988).

[FN69]. See generally Rodger Citron, Note, [\(Un\)Luckey v. Miller: The Case for a Structural Injunction to Improve Indigent Defense Services](#), 101 Yale L.J. 481 (1991); Margaret H. Lemos, Note, [Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense](#), 75 N.Y.U. L. Rev. 1808 (2000); see also Sonia Y. Lee, Comment, [OC's PD's Feeling the Squeeze--The Right to Counsel: In Light of Budget Cuts, Can the Orange County Office of the Public Defender Provide Effective Assistance of Counsel?](#), 29 Loy. L.A. L. Rev. 1895 (1996); Note, [Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense](#), 113 Harv. L. Rev. 2062 (2000).

[FN70]. See, e.g., *Assembly Line Justice*, *supra* note 67, at 6, 16-17 ("Many lawyers for the poor struggle with excessive caseloads--several hundred felony cases per year for a single part-time defender. In Mississippi, there is no limit on the number of cases a court-appointed attorney may handle."); see also *supra* note 50 (citing Georgia reports).

[FN71]. Allen K. Butcher & Michael K. Moore, [Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas](#) (2000), available at [http:// www.uta.edu/pols/moore/indigent/last.pdf](http://www.uta.edu/pols/moore/indigent/last.pdf). See also Catherine Greene Burnett et al., In [Pursuit of Independent, Qualified, and Effective Counsel: The Past and Future of Indigent Criminal Defense in Texas](#), 42 S. Tex. L. Rev. 595 (2001); Rebecca Copeland, Comment, [Getting It Right from](#)

[the Beginning: A Critical Examination of Current Criminal Defense in Texas and Proposal for a Statewide Public Defender System, 32 St. Mary's L.J. 493 \(2001\).](#)

[FN72]. Butcher & Moore, *supra* note 71, at 15-16. The report continued:

As a defense attorney who practices in Bexar County observed “The pay scale is so low compared to the average hourly rate (legal fee) charged for representing a defendant that I believe the majority of court appointed attorneys look for the best plea bargain, settle it, and move on.” Another potential consequence is that the attorney may not work as hard as necessary simply because there is a need to meet economic obligations. A respondent from Bastrop noted that “I sometimes cringe when I get appointed to a felony case that will go to trial. I know that it will not be a financially viable endeavor for me. As such, I try to balance minimizing the work with ensuring that the defendant receives a fair trial. An attorney can't afford to neglect the rest of his practice to focus on any one case when he knows that the one case will barely cover his overhead.” Yet another attorney from Blanco County noted that indigents, perhaps ironically, suffer the consequences of the defense attorneys having to meet their own financial obligations. The attorney commented that “Practicing in a small rural county (approx 6,000 population) indigent defendants normally get the best defense I can afford. Unfortunately this is not always the best available or even the best I am capable of. Economics of survival dictate that you do what pays the bills first--occasionally at the expense of indigents.”

Id. (citations omitted).

[FN73]. Jane Fritsch & David Rhode, *Lawyers Often Fail New York's Poor*, N.Y. Times, Apr. 8, 2001, at A1. A substantial number of criminal defendants in New York City are represented by lawyers assigned from panels, although most are represented by lawyers on the staff of the Legal Aid Society or smaller public defenders services. See generally Chester L. Mirsky, *The Political Economy and Indigent Defense: New York City, 1917-1998*, 1997 *Ann. Surv. Am. L.* 891.

[FN74]. Fritsch & Rhode, *supra* note 73.

[FN75]. This is not to suggest that under-funding is the only reason for criminal defense lawyers to encourage quick guilty pleas. On the contrary, defense lawyers may have a professional incentive to do so even in more adequately funded systems. See, e.g., Abraham Blumberg, *The Practice of Law As a Confidence Game: Organizational Cooptation of a Profession*, 1 *Law & Soc'y Rev.* 15 (1967); see also *supra* note 45.

[FN76]. See Malcolm M. Feeley, *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* (1979). Feeley's study found that the high rate of guilty pleas in lower criminal courts was not confined to jurisdictions where defense lawyers carried excessive case loads, and was attributable to the punitive nature of the criminal process. In minor criminal cases, it would cost more, in the form of lost wages, for defendants to meet with their lawyers and appear on successive occasions in court than for them to pay whatever fine might be imposed. Feeley concluded that because “the cost of invoking one's rights,” for guilty and innocent defendants alike, “is frequently greater than the loss of the rights themselves, ... so many defendants accept a guilty plea without a battle.” *Id.* at 277.

Today, more so than at the time of Feeley's study, criminal convictions often have long-term collateral consequences that increase the “cost” of a guilty plea. For example, a conviction may result in the enhancement of future sentences or have adverse employment, housing or immigration consequences. Unless the defendant is adequately advised by the defense lawyer, the defendant may be unaware of these consequences, and thus overestimate the value of a quick guilty plea.

[FN77]. Associated Press, *Court Condemns Lax Service for Poor Clients*, *Chattanooga Times/ Chattanooga Free*

Press, Dec. 4, 2002, at NG2 (quoting Stephen Bright, director of the Southern Center for Human Rights, who viewed Shwiller's work as typical of Georgia's "'meet-them-and-plead-them' assembly-line way of processing people through the courts without any individual representation").

[FN78]. Lissa Griffin, [The Correction of Wrongful Convictions: A Comparative Perspective](#), 16 *Am. U. Int'l L. Rev.* 1241, 1266 (2001).

[FN79]. [Strickland v. Washington](#), 466 U.S. 668, 669 (1984). See also [Bell v. Cone](#), 535 U.S. 685 (2002); [Glover v. United States](#), 531 U.S. 198 (2001); [Williams v. Taylor](#), 529 U.S. 362 (2000); [Lockhart v. Fretwell](#), 506 U.S. 364 (1993); [United States v. Cronin](#), 466 U.S. 648 (1984). There is an extensive body of commentary on the right to effective assistance of counsel. See, e.g., Vivian O. Berger, [The Supreme Court and Defense Counsel: Old Roads, New Paths--A Dead End?](#), 86 *Colum. L. Rev.* 9 (1986); Dripps, *supra* note 35, at 242; Jeffrey Levins, Note, [Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel](#), 38 *Am. J. Crim. L.* 147 (2001); Kristina G. Van Arsdell, Note, [Burdine v. Johnson: The Fifth Circuit Wakes up, but the Supreme Court Refuses to Put the Sleeping Attorney Standard to Rest](#), 39 *Hous. L. Rev.* 835 (2002); Anne M. Voigts, Note, [Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and the Claims of Ineffective Assistance of Counsel](#), 99 *Colum. L. Rev.* 1103 (1999).

[FN80]. Even in capital cases, defendants in some jurisdictions, including Georgia, are not provided counsel to assist in raising claims in collateral proceedings and volunteer lawyers are not always available. See Michael Mello, [Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row](#), 37 *Am. U. L. Rev.* 513 (1988); Jennifer N. Ide, Comment, [The Case of Exzavious Lee Gibson: A Georgia Court's \(Constitutional?\) Denial of a Federal Right](#), 47 *Emory L.J.* 1079 (1998).

[FN81]. One newspaper account implied that there may have been some rivalry between Shwiller and Heath's new lawyer. See Rankin, *supra* note 11.

[FN82]. [Strickland](#), 466 U.S. at 687-88.

[FN83]. *Id.* at 694.

[FN84]. Although a guilty plea is an admission of guilt, an innocent defendant may make a reasoned decision to plead guilty. For example, he may conclude that the risk of an erroneous conviction is too great. Or he may conclude that even the cost of a successful defense would be too high, because a guilty plea would enable him to avoid prison but he would remain incarcerated while awaiting trial. See generally F. Andrew Hessick III & Reshma Saujani, [Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge](#), 16 *BYU J. Pub. L.* 189 (2002).

[FN85]. [Hill v. Lockhard](#), 474 U.S. 52, 59 (1985). See generally Bruce A. Green, [Judicial Rationalizations for Rationing Justice: How Sixth Amendment Doctrine Undermines Reform](#), 70 *Fordham L. Rev.* 1729, 1731-37 (2002) (describing how courts apply prejudice requirement in guilty plea cases).

[FN86]. See *supra* Part II.

[FN87]. [Harvey v. United States](#), 850 F.2d 388, 400 (8th Cir. 1988) (citing [Strickland](#), 466 U.S. at 691).

[FN88]. See, e.g., [Schone v. Purkett](#), 15 F.3d 785, 789-90 (8th Cir. 1994).

[FN89]. Similarly, Heath apparently could not persuade the trial court that he was prejudiced by Shwiller's failure to conduct legal research, because such research would have enabled Shwiller, for example, to argue successfully that the passengers' injuries were not "serious" within the meaning of the criminal law.

[FN90]. See, e.g., *Salazar v. Cockrell*, 2002 U.S. LEXIS 3022 at *13-14 (N.D. Tex. Feb. 4, 2002).

[FN91]. Green, *supra* note 85. For example, courts have rejected these claims "when the defendant failed to produce 'objective evidence' that the lawyer's bad advice affected his decision," when the defendant "expressed satisfaction with his lawyer's representation" at the guilty plea proceeding, when the judge advised the defendant correctly on the same subject as the lawyer's erroneous advice, when there were persuasive reasons why the defendant might have pled guilty wholly apart from the lawyer's erroneous advice, and when information omitted by the defense lawyer concerned consequences of pleading guilty that are merely "collateral." *Id.* at 1733-36.

[FN92]. *Id.* at 1736-37 & n.29 (citing cases).

[FN93]. *Strickland v. Washington*, 466 U.S. 688 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable, but they are only guides.").

[FN94]. *Heath v. State*, 574 S.E.2d 852, 854-55 (Ga. Ct. App. 2002), cert. granted, 2003 Georgia LEXIS 323 (Mar. 28, 2003).

[FN95]. *Id.* (quoting *United States v. Cronin*, 466 U.S. 646, 659 (1984)) (internal quotation marks omitted). For another decision where ineffectiveness in connection with a guilty plea was found prejudicial per se, see *Haynes v. Cain*, 272 F.3d 757 (5th Cir. 2001) (pleading a defendant guilty over his objection is tantamount to no assistance at all and therefore is per se prejudicial). Regarding findings of prejudice per se for wholly deficient representation at trial, see Matthew J. Fogelman, *Justice Asleep Is Justice Denied: Why Dozing Defense Attorneys De-mean the Sixth Amendment and Should Be Deemed per se Prejudicial*, 26 J. Legal Prof. 67 (2001/2002); Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Standard*, 75 Neb. L. Rev. 425 (1996).

[FN96]. See Trisha Renaud, *Justices Tackle Slipshod Lawyering*, *Fulton County Daily Rep.*, June 13, 2003 (reporting on Supreme Court oral arguments in the Heath case); Jonathan Ringel, *DA Wants High Court to Take Ineffective Counsel Appeal*, *Fulton County Daily Rep.*, Dec. 12, 2002.

[FN97]. Guidelines adopted by the American Bar Association do provide, however, that prosecutors should not deliberately overlook exculpatory evidence. ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function, Standard 3.3.11(c).

[FN98]. See, e.g., Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 *Stan. L. Rev.* 29 (2002).

[FN99]. See generally Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 *U. Ill. L. Rev.* (forthcoming 2003).

[FN100]. See, e.g., David T. Johnson, *The Japanese Way of Justice* 53, 98-99, 123-26 (2002) (describing that Japanese prosecutors define their principal mission as ascertaining the truth and control police investigations toward that end); John Leubsdorf, *Man in His Original Dignity* 81-85 (2001) (describing prosecutors' role in France).

[FN101]. Ironically, prosecutors play the most vigorous role in white-collar investigations, where in some ways prosecutorial screening is least necessary, because defendants typically have independent resources to devote to their defense. See generally Kenneth Mann, *Defending White-Collar Crime* (1985); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *Fordham L. Rev.* 2117 (1998).

[FN102]. In general, prosecutors are constitutionally required before trial to disclose exculpatory evidence and during trial to disclose evidence that might be used to impeach prosecution witnesses. See, e.g., *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1976); *Brady v. Maryland*, 373 U.S. 83 (1963). Statutes and rules imposing additional discovery obligations vary from jurisdiction to jurisdiction. But the prosecutor's discovery obligations do not arise immediately after charges are filed. Therefore, by offering a favorable plea offer that must be accepted immediately, prosecutors can avoid making disclosures. See *United States v. Ruiz*, 536 U.S. 622 (2002); see generally John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 *Emory L.J.* 437 (2001); Corinna Barrett Lain, *Accuracy Where It Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 *Wash. U. L.Q.* 1 (2002).

[FN103]. See Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 *Fordham L. Rev.* 391, 427 (1984).

[FN104]. See Roland Acevedo, Note, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 *Fordham L. Rev.* 987 (1995); Douglas D. Guidorizzi, Comment, *Should We Really "Ban" Plea Bargaining?: The Core Concern of Plea Bargaining Critics*, 47 *Emory L.J.* 753, 777-78 (1998). Cf. Note, *Breathing New Life into Prosecutorial Vindictiveness Doctrine*, 114 *Harv. L. Rev.* 2074 (2001).

[FN105]. *United States v. Ruiz*, 536 U.S. 622 (2002). See generally Shane M. Cahill, Note, *United States v. Ruiz: Are Plea Agreements Conditioned on Brady Waivers Unconstitutional?*, 32 *Golden Gate U. L. Rev.* 1 (2002); Erica G. Franklin, Note, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery" Waivers*, 51 *Stan. L. Rev.* 567 (1999).

[FN106]. ABA Model Rules, Rule 3.8, Comment [1] (2002).

[FN107]. *Id.* See generally Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 *B.C. L. Rev.* 923 (1996); Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 *Fordham Urb. L.J.* 607 (1999); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 *Vand. L. Rev.* 45 (1991).

[FN108]. ABA Model Rules, Rule 3.8, Comment [1].

[FN109]. See, e.g., *United States v. Cunningham*, 672 F.2d 1064, 1072 n.7 (2d Cir. 1982); *United States ex rel. Vriner v. Hedrick*, 500 F. Supp. 977, 983 (C.D. Ill. 1980); see generally Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility when Defense Counsel Has a Potential Conflict of Interest*, 16 *Am. J. Crim. L.* 323 (1989); Vanessa Merton, *What Do You Do When You Meet a "Walking Violation of the Sixth Amendment" if You're Trying to Put That Lawyer's Client in Jail?*, 69 *Fordham L. Rev.* 997 (2000).

[FN110]. In jurisdictions where panel lawyers are paid on an hourly basis and must account to the court for how they spend their time, judges should have a clear picture of how much time lawyers devote to defending indigent clients. Cf. Martha K. Harrison, Note, *Claims for Compensation: The Implications of Getting Paid when Appointed Under the Criminal Justice Act*, 79 *B.U. L. Rev.* 553 (1999).

[FN111]. See, e.g., [Young v. Ninth Judicial District Court, ex rel. County of Douglas](#), 818 P.2d 844 (Nev. 1991) (upholding imposition of \$250 fine imposed against criminal defense attorney for making pretrial motion, without adequate evidentiary support, accusing elected district attorney of seeking the death penalty in a murder trial for political reasons); [State v. Huskey](#), 82 S.W.3d 297 (Tenn. Crim. App., 2002) (overturning trial court's order removing defense counsel in retrial of death penalty case for filing excessive motions).

[FN112]. In general, judges have often proven unenthusiastic about the function of regulating the practice of lawyers who appear before them. On one hand, judges often prefer to leave the disciplinary function to the disciplinary authorities. See Bruce A. Green, [Conflicts of Interest in Litigation, the Judicial Role](#), 65 *Fordham L. Rev.* 71, 85 (1996). On the other hand, judges are often reluctant to notify disciplinary authorities of professional misconduct that may have occurred in their cases. See Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients and Professional Regulation*, 1976 *Am. B. Found. Res. J.* 917, 999-1014.

[FN113]. For an argument that courts should promote institutional reform through Sixth Amendment decision making, see Adele Bernhard, [Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services](#), 63 *U. Pitt. L. Rev.* 293 (2002).

[FN114]. See generally David B. Wilkins, [Who Should Regulate Lawyers?](#), 105 *Harv. L. Rev.* 799 (1992).

[FN115]. See e.g., [Wiley v. County of San Diego](#), 966 P.2d 983 (Cal. 1998) (holding criminal defendant must prove actual innocence of crimes charged to prevail in malpractice action); [Alampi v. Russo](#), 785 A.2d 65 (N.J. Super. Ct. App. Div. 2001) (stating that a client who pleads guilty to criminal charges cannot later pursue a malpractice action); [Stevens v. Bispham](#), 851 P.2d 556 (Or. 1993) (holding convicted defendant must successfully challenge the conviction through direct appeal or post-conviction processes, or must otherwise be exonerated of the offense, before bringing a legal malpractice suit against his lawyer); see generally Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 *BYU L. Rev.* 1, 29-41 (describing why “[c]riminal defense attorneys are virtually immune from civil liability”); Harold H. Chen, Note, [Malpractice Immunity: An Illegitimate and Ineffective Response to the Indigent-Defense Crisis](#), 45 *Duke L.J.* 783 (1996); Erika E. Pedersen, Note, [You Only Get What You Can Pay For: Dziubak v. Mott and Its Warning to the Indigent Defendant](#), 44 *DePaul L. Rev.* 999 (1995); David J. Richards, Note, [The Public Defender Defendant: A Model Statutory Approach to Public Defender Malpractice Liability](#), 29 *Val. U.L. Rev.* 511 (1994); Jeffrey H. Rutherford, Comment, [Dziubak v. Mott and the Need to Better Balance the Interests of the Indigent Accused and Public Defenders](#), 78 *Minn. L. Rev.* 977 (1994); Susan M. Treyz, Note, [Criminal Malpractice: Privilege of the Innocent Plaintiff?](#), 59 *Fordham L. Rev.* 719 (1991).

[FN116]. See Curtis & Resnik, *supra* note 2, at 1620 (observing that indigent clients in criminal cases “have little or no ability to monitor their own lawyers”).

[FN117]. Clark Cunningham has suggested to me that contract defender systems like the type illustrated by the Heath case that award public defender contracts to the lowest bid to represent all defendants for a set annual amount may sometimes attract only the least competent or most exploitive members of the local bar, because competent and conscientious lawyers are not interested in competing for work on such appalling terms. A drastically under-funded contract defender system thus may produce systemic neglect by systematically selecting bad lawyers rather than by systematically forcing good lawyers to do bad work. Such a situation is made even worse if disciplinary agencies turn a blind eye to systemic client neglect by such contract defenders, effectively collaborating with parsimonious state and local governments to grant a license for unethical practice to

lawyers as long as they are representing poor people.

[FN118]. Curtis & Resnik, *supra* note 2, at 1621-28.

[FN119]. *Id.* at 1626.

[FN120]. See, e.g., *In re Dickson*, 565 S.E.2d 455 (Ga. 2002); *In re McGee*, 540 S.E.2d 607 (Ga. 2001); *In re Keaton*, 2000 Ga. LEXIS 258 (Ga. Mar. 13, 2002).

[FN121]. Georgia Commission Report, *supra* note 50, at 46 (quoting Spangenberg Report, *supra* note 41).

[FN122]. *United States ex rel. Green v. Washington*, 917 F. Supp. 1238 (N.D. Ill. 1996).

[FN123]. *Id.* at 1256. The district court found that at the time of the lawsuit, the office was so backlogged that it would take close to two years for lawyers to begin working on the most recently assigned cases. *Id.* at 1247. For an analysis of the constitutional right to a timely appeal, see Marc M. Arkin, *Speedy Criminal Appeal: A Right Without a Remedy*, 74 Minn. L. Rev. 437 (1990).

[FN124]. *Green*, 917 F. Supp. at 1261.

[FN125]. See *id.* at 1247.

[FN126]. Even those whose appeals were unsuccessful might suffer, however. A forensic psychologist testified that prisoners focused their hope on the appeals process because it was “perceived as a possible way to regain liberty,” and that “[w]hen the appeal is delayed, the thwarting of that central hope creates a potential for great stress and emotional turmoil.” *Id.* at 1264.

[FN127]. See, e.g., *People v. Ebbert*, 873 P.2d 731 (Colo. 1994) (sanctioning lawyer for neglecting an appeal for over a year because of his drug use).

[FN128]. One possibility would have been to engage in the appellate equivalent of triage by filing a significantly greater number of Anders briefs--that is, briefs stating that the lawyer had not identified a single nonfrivolous argument to raised on appeal. This would have reduced the number of cases in which substantial briefs had to be filed. See *Anders v. California*, 386 U.S. 738 (1967). The problem with this approach, of course, is that it is ethically impermissible for a lawyer falsely to assert that there are no nonfrivolous issues to raise. Further, this tactic would risk angering the appellate court, which would be required to review the record to assure itself that no errors were committed, see *id.* at 744, and would be justifiably concerned if, on reviewing the record in cases where the appellate lawyers filed Anders briefs, it determined that nonfrivolous issues had repeatedly been overlooked.

[FN129]. An ethics expert, Dean Norman Lefstein, testified about the ethical implications of the appellate defenders' “first-in-first-out priority system” as compared with the alternative priority systems, giving cases priority where they seem to have a greater likelihood of success. He explained why alternatives raised ethical problems and explained why the office's choice was preferable. But there is no indication in the court's opinion that Lefstein also noted the ethical problem caused in all cases under the first-in-first-out system because of the length of anticipated delay. See *Green*, 917 F. Supp. at 1252-54.

[FN130]. See, e.g., *Wenc v. Statewide Grievance Comm.*, 1993 Conn. Super. LEXIS 1073, at *10 (“The classic

pattern presented by conduct violating Rule 1.3 is that of the lawyer who takes on a matter and then lets it slide, frequently missing a time limitations [sic], a court imposed deadline, or a court appearance.”); ABA Inf. Op. 1273 (1973) (“Neglect has been defined as indifference and a consistent failure to carry out the obligations which the lawyer has assumed to the client.”).

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