

# DEPENDENT COUNSEL

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*Much has been written about the woeful underfunding of indigent defense and the tragic effects of that underfunding on the American criminal system. But indigent defense suffers from another, perhaps deeper problem: defense lawyers who are structurally dependent on prosecutors and judges. Because defense lawyers are typically repeat players in the criminal system, they form ongoing relationships with judges and prosecutors. These relationships force them to compromise the interests of some clients to protect the interests of others, or the interests of the lawyers themselves. In this Article, I define a novel category of common but seldom-litigated legal problems resulting from the relationships between defense attorneys, prosecutors, and judges. I then argue, using the results of interviews with defense attorneys across the country, that those problems expose deeper structural flaws in the American criminal system than previous scholarship, which has focused on chronic underfunding of indigent defense, can explain. The criminal system, I argue, corrupts the relationship between client and lawyer not merely by depriving her of the resources she needs to do her job, but also by extracting her cooperation in the prosecution and incarceration of her client. Finally, I chart two related ways forward: constitutional litigation of a right to counsel free from certain forms of corrupting pressure, and collective action to assert that right and resist constitutional violations.*

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## INTRODUCTION

Almost all defense attorneys represent more than one client. Their position representing multiple clients at once and over time may lead to compromising the interests of some clients to protect either the attorney’s own interests or the interests of their other clients. These compromises can frustrate attorneys’ ability to challenge pervasive unconstitutional practices. This Article is an attempt to understand how and why.

Start with the money-bail system, which has operated in violation of the Constitution for decades all over the country. The Constitution forbids jailing

people solely because they cannot pay money,<sup>1</sup> and it forbids jailing people pretrial unless the government satisfies the substantive and procedural requirements of the Due Process Clause.<sup>2</sup> So when the government arrests someone and says “I’ll release you only if you pay money,” and then jails the person when she cannot pay—this is how the money-bail system works—it violates both rules: It jails a person solely because she cannot pay money, and it jails her without any process or substantive justification, let alone the process and justification required by the Due Process Clause. Courts across the country have recently agreed that the money-bail system as it is practiced almost everywhere violates the Constitution.<sup>3</sup> Where a money-bail amount exceeds a defendant’s ability to pay it, the money-bail order becomes an order of detention. Therefore, the person is, at the very least, entitled to a hearing. This much should have been obvious for decades. But the hearings hardly ever happen because defense lawyers hardly ever request them. As a result, hundreds of thousands of people are jailed every year in violation of the Constitution without any court so much as hearing about it.

This is an example of a familiar tragedy.<sup>4</sup> American constitutional criminal procedure creates protective adversarial trial rights that disappear in practice because the government refuses to fund counsel with the resources to vindicate them.<sup>5</sup> The criminal-procedure system produces the overwhelming majority of convictions by guilty plea, rather than trial, by relying in part on illegal pretrial

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1. *Bearden v. Georgia*, 461 U.S. 660, 669 (1983); *Tate v. Short*, 401 U.S. 395, 398 (1971); *Williams v. Illinois*, 399 U.S. 235, 242 (1970).

2. *See United States v. Salerno*, 481 U.S. 739, 742 (1987).

3. *E.g.*, *Valdez-Jimenez v. Eighth Judicial Dist. Ct. in & for Cty. of Clark*, No. 76417, 2020 WL 1846887, at \*1 (Nev. 2020); *O’Donnell v. Harris County*, 892 F.3d 147, 161 (5th Cir. 2018) (“[P]retrial imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible.” (internal quotation marks and citations omitted)); *Schultz v. Alabama*, 330 F. Supp. 3d 1344, 1369 (N.D. Ala. 2018); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 312 (E.D. La. 2018); *see In re Humphrey*, 19 Cal. App. 5th 1006, 1029 (Ct. App. 2018), *review granted*, 417 P.3d 769 (Cal. 2018); *Brangan v. Commonwealth*, 80 N.E.3d 949, 961 (Mass. 2017); *State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014) (ruling on state constitutional grounds).

4. *See, e.g.*, William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 32 (1997).

5. *Id.* (“For the roughly eighty percent of defendants who receive appointed defense counsel, the case is ‘worth’ whatever price the state sets. The state, in turn, sets that price in a combination of two ways. The first is by funding public defenders’ offices, which are then given all or almost all the indigent cases in the relevant jurisdiction. The second is by fixing an hourly rate up to a fee cap for state-funded private counsel. At current funding levels, the effective price is low under either regime. This regime leads to two kinds of biases in the incidence and distribution of criminal defense litigation. In many, perhaps most cases, the existing funding system promotes underlitigation, with defense counsel failing to contest cases as aggressively as they should due to a lack of resources.” (footnotes omitted)).

detention,<sup>6</sup> which counsel do not have the resources to contest.<sup>7</sup> This also eliminates the protective force of many trial rights.<sup>8</sup> Add to this tragedy the unassailable fact that the broad discretion accorded to police<sup>9</sup> and prosecutors<sup>10</sup> is systematically exercised to the detriment of non-white people,<sup>11</sup> and you have the bleak picture that has become the broadly standard<sup>12</sup> view of the American criminal system.

I argue in this Article that the American criminal system suffers not only from the problem of underfunding, but also from another, perhaps deeper problem that ample public-defense funding cannot solve: defense attorneys who are structurally dependent on other criminal-system actors. The standard view fails to account for the fact that many comparatively well-resourced public-defender offices—offices whose attorneys are well trained, intelligent, and passionately committed to their clients—do not challenge the unconstitutional money-bail system. I meet with these lawyers frequently in my role as an attorney at Civil Rights Corps, a non-profit organization in Washington, D.C. that fights injustice and inequality in the criminal system through (among other things) structural litigation aimed at reforming the money-bail system. When I have recommended that public defense offices make demands for bail hearings as a standard practice, the reaction that I receive is often a variation of the following. The attorney looks over her shoulder or gets up to close the door. “That’s not gonna fly.” When I ask why, she offers some version or combination of the following reasons: the prosecutors will retaliate against all of the office’s clients by refusing to consent to continuances or offer plea bargains; the judges will retaliate against all of the office’s clients with high sentences, rejected plea bargains, and (in

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6. See Charlie Gerstein & J.J. Prescott, *Process Costs and Police Discretion*, 128 HARV. L. REV. F. 268, 273-74 (2015).

7. Cf. Stuntz, *supra* note 4, at 32.

8. See, e.g., Samuel R. Gross, *Errors in Misdemeanor Adjudication*, 98 B.U. L. REV. 999, 1010 (2018).

9. Cf. *Whren v. United States*, 517 U.S. 806, 811-14 (1996).

10. See *United States v. Batchelder*, 442 U.S. 114, 124 (1979).

11. E.g., Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 966 (2002) (arguing that Fourth Amendment doctrine reproduces racial inequalities); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 28-29 (2013) (“After controlling for the variables above, we found black men were still nearly twice as likely to be charged with an offense carrying a mandatory minimum sentence.”).

12. *But cf.* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 263 (2018) (“While it has become popular to identify the current moment as one of ‘bipartisan consensus’ on criminal justice reform, it is important to recognize how tenuous this consensus is and how much it relies upon different frames and different goals.” (footnote omitted)).

places where judges control the appointment of counsel) outright removal from the courtroom; and the office's boss won't allow the attorney to demand hearings because if she did the judges and prosecutors would get the boss fired. These structural threats can create cultures in which challenging the unconstitutional money-bail system is inconceivable.

The goal of this Article is to define and articulate a category of common but seldom-litigated legal problems; to explain the relationship between those problems and the familiar standard picture; and to chart two ways forward: constitutional litigation of a right (or rights) to independent counsel, and collective action to assert those rights and resist violations of other constitutional rights. In Part I, I explain the problem of dependent counsel and provide examples of the problem from, among other things, more than a dozen interviews with attorneys across the country. Counsel is "dependent," as I use the term, when a relationship with an adverse criminal-system actor, formed outside the scope of counsel's representation of an individual client, causes counsel to forgo actions in clients' interests or take action against those interests. Two criminal-system actors concern me here: prosecutors and judges. The problem stems from the fact that defense attorneys, prosecutors, and judges are all repeat players in a criminal system that treats their interactions as though they were (or should be) one-offs. In Part II, I discuss the relationship between the problem of dependent counsel and the more familiar problem of overburdened counsel. I argue that the problem of dependent counsel contributes to the problem of overburdened counsel because *independent* counsel can advocate for their own resources, whereas dependent counsel cannot. And sometimes dependent counsel actively undermine attempts to reform the criminal system in order to preserve their role in it.

In Part III, I discuss the doctrinal issues dependent counsel create. Drawing together First Amendment, Sixth Amendment, and Due Process principles, I argue that criminal defendants have a right to independent counsel and that lawyers have a right to be independent. I first argue that threats to the independence of counsel violate the Sixth Amendment rights of clients in at least two ways: they create unconstitutional conflicts of interest (between lawyers' interests and clients' interests, and between the duties lawyers owe to multiple clients) and they constitute deliberate government interference with the lawyer-client relationship. Next, I argue that lawyers' First Amendment rights are violated when advocacy on behalf of their clients is met with retaliation—against those lawyers themselves or their other clients—from prosecutors or judges, and I explain the centrality of First Amendment rights to independent criminal-defense practice. And, finally, I argue that judicial interference with counsel violates the Constitutional principle of judicial-executive incompatibility where judges have executive control over money that is used to pay for appointed counsel.

I close by connecting my constitutional arguments to the broader political problems afflicting the criminal system and by offering some thoughts on what independent counsel can do to protect clients that dependent counsel cannot: collective action. Lawyers need to come together to protect their clients' right to their lawyers' independence, and to protect their clients from the criminal system. The problems I identify in this Article drive a wedge between lawyers and their clients, forcing lawyers and policymakers to think of lawyers' interests as, in some respects, adverse to those of their clients. I hope to upend that narrative and recentralize the role of lawyers as advocates for their clients through the creation of independent public defenders and collective resistance to unconstitutional practices.

### I. THE PROBLEM OF DEPENDENT COUNSEL

Throughout the country, the relationship between defense attorneys and their clients is corrupted by institutions and actors whose interests are adverse to the interests of the defense attorneys' clients. In this Part, I explain why dependent counsel is a problem and define the criminal-system phenomena that constitute it. In Subpart A, I define what I mean by "dependency" in this Article. In Subpart B, I outline the methodology I use to understand the problem of dependency. In Subpart C, I explain how judges systematically interfere with the independence of defense counsel. And in Subpart D, I explain how prosecutors interfere similarly. Although prosecutors' interests are obviously opposed to defendants', judges' interests may be less obviously so, and so the coming pages address why judicial interference with defense independence is, in fact, interference.

#### A. Definitions of Dependency

This Subpart defines what I mean by "dependency" in the context of this Article. But first, a bit on what I do not address in this Article. The adversarial legal system relies on adversaries. This brings up familiar and tricky problems of what advocates are expected to do for their clients. Should they do everything they can for their clients within the bounds imposed by law? (What bounds are those, by the way?) Are they expected to act according to moral principles that govern all actors, or are they subject to unique rules owing to their roles as attorneys? (Is there such a thing as a morality that governs all actors, by the way?) A rich literature addresses these questions.<sup>13</sup> I do not. In

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13. See, e.g., Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 3 & n.2 (2005) (describing the "remarkably stable debate [that] has developed in legal ethics between those who argue that a lawyer should always act

this Article, I will mostly discuss influences on defense counsel that would violate any plausible conception of the role of a defense lawyer in an adversarial criminal system.<sup>14</sup> No need to worry, for now, about the nuances of how adversarial adversaries should really be, although I'll pause often throughout this Article to note places where these nuances will be unavoidable in practice.

In broad strokes, defense attorneys are “dependent,” as I briefly explained above, whenever their ability to do their jobs is threatened by their relationship with an institutional actor whose interests are adverse to those of the attorneys' clients, and where that relationship is formed outside the context of an individual representation.<sup>15</sup> The problem of dependency, then, is distinct from the broader problem of poorly funded and insufficiently supported counsel, which problem has been written about extensively.<sup>16</sup> Dependency, as a separate legal problem, requires that the source of ill performance be an actor whose institutional interests are adverse to the defendants' and that the actor visit harm outside the one-on-one contest of an adversarial criminal proceeding.

The problems of dependency and the problem of under-funding are related. One way that criminal-system actors visit harm on defense attorneys whose advocacy the other actors disfavor is through funding, as I explain below. But, as I define them, problems of dependency are distinct from those of underfunding. Where, for example, funding deficiencies stem from mere neglect by a state legislature, we don't necessarily have a problem of dependent counsel because the legislature is not, at least formally, adverse to the defendant.<sup>17</sup> And attorneys who are paid by their clients, rather than by the

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on the balance of first-order moral reasons as they would apply to a similarly situated nonlawyer actor, and those who believe that a lawyer is prohibited from taking into account certain ordinary first-order moral reasons because of some feature of the lawyer's role, such as the obligations of partisanship and neutrality” (quoting W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 367-72 (2004)).

14. Cf., e.g., David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 217 (arguing that attempting to silence the lawyers advocating against one's interests undercuts the “distinctive virtue” of the adversary system of justice).

15. I use “and” deliberately here: both conditions need to be present for an attorney to be “dependent” on my definition.

16. See, e.g., Stuntz, *supra* note 4.

17. To the extent that it is—the “state,” after all, is always the entity prosecuting the defendant in some sense—I'll ignore that for now. If a legislature responds to the particularly vigorous advocacy of a state-funded attorney by cutting funding, that may be a problem of dependency. For now, the broad outlines of the problem suffice. Dependency describes outside threats to attorneys' ability to do their jobs by institutionally adverse actors. Existing scholarship has noted the incentive problems generated by the State's obligation to pay for defenders whose goal is to frustrate the State's prosecutions. See Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting*

state, can be “dependent” by my definition as well. Indeed, some forms of dependency (I explain below) are more easily visited on them than on public defenders and appointed counsel.

A prosecutor or judge does not need to threaten attorneys explicitly to pose a threat to their independence. People respond to institutional pressure in subtle and often unconscious ways.<sup>18</sup> A lawyer who owes her job to the judge before whom she appears does not need to be warned about filing motions that burden the judge’s docket.<sup>19</sup> She simply does not do so, and indeed might fully believe that what she is doing is in her clients’ best interests.<sup>20</sup> Consider the well-documented relationship between doctors meeting a pharmaceutical representative and doctors prescribing expensive medication.<sup>21</sup> Doctors tend to claim that they are not influenced by pharmaceutical representatives.<sup>22</sup> And yet doctors who interact with pharmaceutical representatives prescribe expensive medications at a much higher rate than those who do not.<sup>23</sup> Influence is often unconscious.<sup>24</sup>

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*Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 80 (1993) (“The defendant has the incentive to choose a vigorous, effective advocate. . . [but a] public official who chooses for the defendant is likely to have . . . a weaker incentive to make the best choice.”).

18. Prosecutors likely respond to similar pressures, and they too may be deterred from advocating certain positions for this reason.

19. Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1773-74 (2016) (“New defenders quickly learn that the defender who is well-liked in the ‘courthouse family’ is the one who is efficient and doesn’t rock the boat or impede the workings of the assembly line machine. The message to a new defender is clear: go along and don’t fight too hard.”); SIXTH AMENDMENT CTR., THE RIGHT TO COUNSEL IN MISSISSIPPI, 31 (2018), <https://perma.cc/TCJ5-L8T8> (“Attorneys in judicially controlled indigent defense systems often, consciously or unconsciously, follow or adjust to the needs of each judge in each court, rather than focus on providing constitutionally effective services for each and every defendant. Fearing the loss of their job if they displease the judge who hires them, defense attorneys bring into their calculations what they think they need to do to stay in the judge’s favor.”).

20. Considering her clients as a group, she may not be wrong. It may be the case that all of her clients are better off in the aggregate if she forgoes some actions for one to protect the interests of another.

21. Ian Larkin et al., *Association Between Academic Medical Center Pharmaceutical Detailing Policies and Physician Prescribing*, 317 J. AM. MED. ASS’N 1785, 1785 (2017).

22. E.g., Freek Fickweiler et al., *Interactions Between Physicians and the Pharmaceutical Industry Generally and Sales Representatives Specifically and Their Association with Physicians’ Attitudes and Prescribing Habits: A Systematic Review*, BMJ OPEN, 1 (Sept. 27, 2017), <https://perma.cc/VH3J-KK5Q> (“The majority of the physicians do not believe that they are affected by pharmaceutical industry and PSR interactions.”).

23. E.g., Larkin, *supra* note 21.

24. The law recognizes this already, as I’ll discuss in detail below. See, e.g., *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) (“Bias is easy to attribute to others and difficult to discern in oneself.”); see also *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)

Finally, dependency is a question of degree, not kind. In some sense, all defense attorneys are dependent. As I discuss in more detail below, part of an attorney's job is to serve as an officer of the court, and, therefore, to promote meritorious arguments over unmeritorious ones.<sup>25</sup> And indeed, sometimes attorneys that I describe as "dependent" end up taking bold (and professionally risky) actions for their clients in ways that I say only independent counsel can.<sup>26</sup> So my definitions in this part both presume a baseline level of severity (the adverse interests and future consequences must be serious) and attorneys' baseline regard for their own long-term career prospects. Even then, I'm using "dependent" as shorthand for a range of the problems described in this Part.

## B. Methodology

In this Subpart, I describe how I set out to understand the problem of dependency. Threats to defense independence do not tend to announce themselves. As the following Subparts will show, problems of dependency are often subtle, private, or even unspoken. They are, as such, not knowable through reported data alone. And so although I rely on empirical studies, other scholarship, and public records where those things are available and helpful, this Article's factual descriptions are based in part on a series of interviews that Arjun Malik, an investigator at Civil Rights Corps, and I conducted with attorneys across the country, and on my own observations of criminal systems across the country.

Through these interviews, we sought to get a sense of the relationships between prosecutors, judges, and defense attorneys as those relationships play out in countless interactions, in thousands of courthouses, across a huge and diverse nation. By necessity, our sample was far too small to be representative, and so we did not attempt to choose our interview subjects at random; but we did not seek only people with negative experiences to report either. Instead, we reached out through people we know (personally and professionally) to ask for

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(holding that institutional financial conflicts of interest violate a defendant's constitutional due process rights where they would tempt an average judge to skew a case, not only where they do in fact tempt the judge in the case).

25. See *infra* text accompanying note 74; see also *Jones v. Barnes*, 463 U.S. 745, 752 (1983) ("One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases." (quoting Robert Jackson, *Advocacy Before the Supreme Court*, 25 *TEMPLE L.Q.* 115, 119 (1951))).

26. See *infra* Part III.A (discussing public defender who was fired (suggesting dependency) for filing a lawsuit on behalf of his clients (suggesting independence)).

defense attorneys willing to describe their interactions with prosecutors and judges. Ultimately, we spoke to more than a dozen attorneys across the country. When we spoke, we asked specifically about the problems described in this paper. The majority of respondents reported at least one interaction that this Article would characterize as “interference.” But plenty did not.

Perhaps unsurprisingly, several respondents chose to be reported by pseudonym or anonymously.<sup>27</sup> And, again perhaps unsurprisingly, those who did choose to be quoted by name had all left full-time defense practice. This alone tells us something: threats to defense independence can make it difficult to speak out about unconstitutional practices.

### C. Judicial Control of Defense Counsel

Judges interfere with the independence of counsel. To prove this, I must show that judges’ interests are adverse to defendants’ and that judges use their ongoing relationships with defense lawyers to prevent them from advocating for their clients.

Many jurisdictions lack any institutional public-defense office. Instead, local judges appoint individual attorneys to represent defendants, either ad hoc or from rotating lists.<sup>28</sup> Sometimes state law requires that the bench maintain lists from which they appoint attorneys in rotation, and sometimes state law requires that the bench specifically ensure that appointed attorneys are qualified to take the cases to which they are assigned. But often state law allows judges to appoint any member of the bar to a criminal case.<sup>29</sup> Some judges use this power to negotiate flat-fee contracts requiring one (or up to a few) attorneys to handle all the cases in their court for a single, flat fee;<sup>30</sup> other judges dole out appointments individually and attorneys are paid by the hour or by the case, or some combination of the two.<sup>31</sup>

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27. Some chose their own pseudonyms; others asked me to choose them.

28. *E.g.*, STEPHEN D. OWENS ET AL., U.S. DEP’T OF JUSTICE, INDIGENT DEFENSE SERVICES IN THE UNITED STATES, FY 2008-2012 (2014), <https://perma.cc/UV5K-EBK8>.

29. *E.g.*, SIXTH AMENDMENT CTR., THE RIGHT TO COUNSEL IN INDIANA vii (2016), <https://perma.cc/G4CE-EZER> (“The State of Indiana does not consistently require indigent defense attorneys to: a) have specific qualifications to handle cases of varying severity; or, b) have training to handle specific non-capital case types.”).

30. *E.g.*, Jo DePrang, *Poor Judgment*, TEX. OBSERVER (Oct. 12, 2015), <https://perma.cc/7MAV-V3WB> (describing Texas practice of flat-fee appointments).

31. SIXTH AMENDMENT CTR., TEXAS, <https://perma.cc/YJM4-2L58> (“[T]he choice remains with each trial judge as to whether to . . . appoint a private attorney.”).

### 1. Adverse interests: Why judges seek to control defense attorneys

At first glance, it might not seem obvious that judicial control over defense attorneys—at least within reason—is a problem. Judges, after all, are regarded as the legal system’s gold-standard neutral actor. They are supposedly umpires.<sup>32</sup> When the parties to a case cannot agree whether documents are privileged, for example, those documents are submitted to the court for review *in camera*<sup>33</sup>—the assumption being that judges can be trusted to determine whether the documents are privileged and to ignore them if the law requires it. Judges’ control over defense attorneys, then, might seem protective rather than invasive. Maybe their control over defense attorneys is like their review of documents *in camera*: protecting one side against unfair incursions by the other but remaining ever neutral.

I think this is wrong. Allowing the judge to control the defense function is like allowing the umpire to own the away team.<sup>34</sup> Judges, like umpires,<sup>35</sup> have interests of their own.<sup>36</sup> They are influenced by the courts’ finances. They are

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32. Cf. *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to Be Chief Justice of the United States, Hearing Before the Committee on the Judiciary of the United States Senate*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr.) (“I will remember that it’s my job to call balls and strikes, and not to pitch or bat.”).

33. 9 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 2458 (3d ed. 2019) (collecting cases for the proposition that “[w]hen the court believes it is appropriate to do so, it can examine requested documents *in camera* to determine whether they are protected by a privilege”).

34. NAT’L ASS’N OF CRIMINAL DEFENSE LAWYERS, *FEDERAL INDIGENT DEFENSE 2015: THE INDEPENDENCE IMPERATIVE* 8 (2015) (“[F]ederal judges act not as umpires between prosecution and defense but as team owners with enormous control over significant aspects of defense representation.”); DePrang, *supra* note 30 (quoting a Texas state senator: “There’s an inherent conflict in the judge being in control of who represents an indigent person . . . . You’re the referee and the manager of one team. It’s just inherently unfair. It’s common sense.”).

35. I take no position on whether judge-as-umpire metaphor holds. If judges are less impartial than umpires, this supports my point a fortiori. So, I can safely assume that judges act impartially in settings other than the ones I describe in this paper.

36. See, e.g., Brensike Primus, *supra* note 19, at 1791 (“And too often what those officials want is not zealous, client-centered advocacy but efficient processing of cases.”); Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 *YALE L.J.* 2150, 2168 (2013); Emanuel Celler, *Federal Legislative Proposals to Supply Paid Counsel to Indigent Persons Accused of Crime*, 45 *MINN. L. REV.* 697, 712 (1961) (It has been suggested that “public defenders ought not to be appointed by the district court before which it would be their duty to practice.”); Eric Holder, U.S. Att’y Gen., *Remarks at the Brennan Legacy Awards Dinner*, BRENNAN CTR. FOR JUSTICE (Nov. 17, 2009), <https://perma.cc/2648-5LD6> (“In some places judges assign cases to lawyers, which can influence the representation the lawyers provide.”); see also ABA *STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM* 2 (2002) (“Removing oversight from the judiciary ensures judicial independence

influenced by the desire to decrease their workload. And they are influenced by the desire for power. Each of these influences can cause them to disfavor the interests of criminal defendants.

To start, imagine you were recently arrested.<sup>37</sup> You wait days before a lawyer comes to see you, maybe weeks. You have no idea what's going on, or when you are going to be able to see your family again. When you finally meet your attorney, she immediately directs you to agree to a plea deal. Then you learn that she has been appointed by (and will be paid by) the person who is going to enter judgment against you, who would preside over the trial you are being asked to forego, and who will decide how long you will go to prison if you agree to the deal. It seems unlikely that you would be comforted by the mere notion that the person who will send you to prison is formally neutral in the proceedings.

Scholars and advocates have noted the sometimes-catastrophic results of this arrangement. In an arresting article, long-time human-rights advocate Steven Bright offers example after example of the shocking malpractice tolerated by the Texas bench, which enjoys more-or-less plenary control over the appointment of counsel in the Texas courts.<sup>38</sup> Judges in Texas have continued to appoint lawyers to death-penalty cases who regularly miss filing deadlines resulting in their clients' executions,<sup>39</sup> copy briefs wholesale from one case to another,<sup>40</sup> and even abandon their clients.<sup>41</sup> One such lawyer *twice* claimed to have missed a filing deadline in a capital case because "his attempt to file . . . after hours on the due date was frustrated by a broken time stamp machine."<sup>42</sup> His punishment? Receiving 406 felony appointments—more than twice the ABA-recommended limit<sup>43</sup>—from the judges of Harris County,

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from undue political pressures and is an important means of furthering the independence of public defense.”). And “adverse” here need not mean “not in the defendant’s long-term best interest.” A judge who thinks her actions are in the defendant’s best interest has adverse interests, as I use the phrase, whenever those interests are materially different from what the defendant, through his attorney, desires.

37. For an evocative description of the problem from this perspective, see Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOY. J. PUB. INT. L. 177, 179-80 (2008).

38. Steven B. Bright, *Independence of Counsel: An Essential Requirement for Competent Counsel and a Working Adversary System*, 55 HOUS. L. REV. 853 (2018).

39. *Id.* at 867-69.

40. *Id.* at 870-73.

41. *Id.* at 874.

42. *Id.* at 869.

43. See DOTTIE CARMICHAEL ET AL., TEX. INDIGENT DEF. COMM’N, GUIDELINES FOR INDIGENT DEFENSE CASELOADS v (2015) (noting 1973 standards of 150 felony cases per lawyer but explaining the limited empirical usefulness of this limit).

Texas, earning him \$372,685 in 2017.<sup>44</sup>

a. Docket pressure

The simple desire to move cases quickly is probably the most important facet of the judicial role that is opposed to defendants' interests. Much of the time—though not always—judges want to get cases resolved quickly and without extensive hearings.<sup>45</sup>

In many courtrooms, very few legal or factual issues are contested in any way. Particularly in limited-jurisdiction courts—that is, courts competent to hear only misdemeanors or other low-level crimes—the task of the whole system is managerial, not adjudicative.<sup>46</sup> After sitting through a mind-numbing half-hour's worth of a general-sessions court in Tennessee—general-sessions courts try misdemeanor cases and conduct initial pretrial proceedings in felony cases<sup>47</sup>—I asked a local attorney “why anyone would want to be a general sessions judge. All they do is stamp paperwork all day.” The attorney chuckled. “All day? They're on the golf course by 10:30 AM at the latest.” I had roughly the same experience in Tennessee, Nevada, Texas, and Oklahoma. Judges, like most humans, often would rather do something besides work.<sup>48</sup> Sometimes they don't even show up.<sup>49</sup>

Even conscientious and hardworking judges might want to dispose of cases quickly. There is empirical evidence that federal district judges seek to “minimize their workload.”<sup>50</sup> Some judges are evaluated, formally or informally, by the state or the public, on the speed with which they move their

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44. Bright, *supra* note 38, at 869 (citing TEX. INDIGENT DEF. COMM'N, INDIGENT DEFENSE DATA FOR TEXAS—STATEWIDE ATTORNEY CASELOAD REPORT, FISCAL YEARS 2015, 2016, 2017, <https://perma.cc/37XB-MRTD>).

45. Brensike Primus, *supra* note 19, at 1790 (“[J]udges have an interest in getting through their dockets.”).

46. See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 614 (2014).

47. TENN. CODE ANN. §§ 40-1-109, 16-15-401, 16-15-501 (West 2019).

48. See, e.g., Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1139 (2008) (“Judges and staffed courts orchestrate these proceedings.”); *id.* at 1141 (“[M]ost [participants in the system] have a strong interest in being some place other than in court.”).

49. See, e.g., DePrang, *supra* note 30 (detailing the antics of a judge who chronically and without explanation misses court).

50. Stephen J. Choi, Mitu Gulati & Eric A. Posner, *What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals*, 28 J.L. ECON. & ORG. 518, 518 (2012) (“Evidence from a dataset of federal district judges from 2001 and 2002 suggests that district judges adjust their opinion-writing practices to minimize their workload while maximizing their reputation and chance for elevation to a higher court.”).

dockets.<sup>51</sup> And surely others believe that justice delayed is justice denied: the sooner the defendants face judgment or are free from suspicion, the better for everyone involved. On this view, attorneys who gum up the works by invoking their clients' procedural rights might be getting in the way of good outcomes for everyone. Finally, many judges hear both criminal and civil cases, and although criminal cases are often treated as more time-sensitive than civil ones, this is not always true, and some judges may worry that time spent on criminal cases is time not spent ensuring that people's civil legal rights are vindicated.

Some judges have at least some interests that are aligned with defendants' interests. Good judges, for example, may want good lawyers in their courtrooms so that the judges can more easily understand the legal issues that come up. (More cynically, judges may want at least passably good lawyers in their courtrooms to minimize the risk of re-doing trials because of ineffective assistance of counsel.) Ambitious judges may even want good lawyers in their courtrooms to make novel and interesting arguments on which the judges can write novel and interesting opinions. And defendants themselves may have a vast range of interests at play in a criminal prosecution. It is of course dangerous to generalize here. But I do not need to: It is sufficient for my purposes to show that at least some judges have at least some interests that are adverse to defendants'; I need not show (and do not argue) that all judges' interests are all adverse to defendants'.

#### b. Money

Another conflict between the interests of judges and defendants is budgetary. In jurisdictions where judges control both judicial budgeting and the appointment of counsel in their courtrooms, their budgeting obligations are unavoidably adverse to those of the defendants who appear in their courtrooms seeking state-funded representation and litigation expenses.

This problem was described in detail in two reports<sup>52</sup> analyzing the federal judiciary's management of the appointment of counsel under the Criminal Justice Act (CJA). The CJA, like many regimes across the country, authorizes district judges to maintain panels of qualified attorneys to receive appointments. A judge speaking to the National Association of Criminal Defense Lawyers (NACDL) put it succinctly: "Giving judges the power to appoint or reappoint panel lawyers generates 'built in conflicts,' which make it

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51. DePrang, *supra* note 30 ("Guilty pleas are important because for some judges, speed is the name of the game, and nothing clears a case faster than a guilty plea. Trial court judges are assigned thousands of cases a year and are evaluated, formally and informally, on how quickly they dispose of them.")

52. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 34.

unlikely defense lawyers will ‘get in the face of a judge,’ which is ‘their job.’”<sup>53</sup> And “[o]ne lawyer who no longer receives appointments was told by others on the panel that the reason she was not receiving appointments was because she advocated too strongly and needed ‘to kiss the judge’s ass more.’”<sup>54</sup> According to the NACDL Report’s authors and federal defender David Patton,<sup>55</sup> many of these problems stem from the Administrative Office of U.S. Court’s administrative control of both federal indigent defense and the federal courts.<sup>56</sup> The money for indigent defense comes from the same fund as the rest of the judiciary’s expenses.<sup>57</sup> As a result, the defense function in the federal courts “is increasingly being treated as a ‘service to the courts’ like clerks, marshals, and interpreters.”<sup>58</sup>

c. Political power

Judges’ political interests can be adverse to defendants. These interests come in at least two forms: electability and, again, money. Particularly for elected judges—but maybe for non-tenured appointed ones as well—a reputation for convictions can be an asset in a conservative polity.<sup>59</sup> And there is evidence that judges appoint attorneys to cases in their courtrooms when those attorneys contribute to their reelection campaigns.<sup>60</sup> Some judges

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53. *Id.* at 37.

54. *Id.*

55. David Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL L. REV. 335, 335 (2017).

56. NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *supra* note 34, at 8-10, 19.

57. *Id.* at 19.

58. Bright, *supra* note 38, at 857 (quoting NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *supra* note 34, at 24, 35).

59. See, e.g., KATE BERRY, BRENNAN CTR. FOR JUSTICE, HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 5 (“Television ads portraying candidates as ‘tough on crime’ are likewise increasingly common.”); John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711 (2020) (arguing that the public is much more punitively inclined than recent scholarship has contended); David Carroll, *North Carolina’s Independence Issue Exposed*, SIXTH AMENDMENT CTR., (Nov. 13, 2014), <https://perma.cc/8A79-K83K> (“In states with elected judiciaries (as is the case in North Carolina), it is often the true that local bar associations and judges favor assigned counsel systems because judges can use appointments as a means of incurring campaign contributions from lawyers.”).

60. ALLAN K. BUTCHER & STEPHEN K. MOORE, STATE BAR OF TEXAS, MUTING GIDEON’S TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS 12 (2000) (“[R]oughly one-third of judges [when appointing counsel] sometimes consider whether the attorney is a political supporter (35.1 percent) or has contributed to their campaign (30.3 percent).”).

jealously guard the power of appointment,<sup>61</sup> and on the margins may encourage guilty pleas through some of the means I discuss in the next Subpart.

## 2. Means of control: How judges control defense attorneys

Judges use their ongoing relationships with defense attorneys to exercise control over them in two ways. Some judges control which attorneys are appointed to indigent-defense cases in their courtrooms, and those attorneys must seek approval from the judges for expenses, such as investigators and experts.<sup>62</sup> But all judges preside over multiple cases with the same attorneys, and judges can subtly use their conduct in cases to control attorneys' behavior in other cases. This "control" does not need to come in the form of a judge explicitly forbidding attorneys to engage in particular conduct, such as filing motions. Merely being subject to a judge's ongoing power can easily cause defense attorneys to, at the very least, shade their advocacy in ways that benefit the judge.<sup>63</sup> Means of control and influence can be subtle, even unspoken. And some means of spoken control don't really look like "control" either, but might be just as pernicious. Judges can and do harangue vigorous defenders and praise compliant ones.<sup>64</sup> In a courthouse culture in which the judge feels like the boss, this sort of pressure can influence attorney behavior.

First, judges can (and do) use their power over indigent-defense appointments in their courts to influence defense counsel.<sup>65</sup> And there is evidence that this process leads judges to choose attorneys for reasons unrelated to the quality of the defense they provide: In a Texas Bar Association survey, "[n]early half of the judges [surveyed in Harris County, Texas] (46.4 percent) report that their peers sometimes appoint counsel because they have a

61. See DALLAS CTY. COMMISSIONER'S COURT, Meeting of Jan. 15, 2019, *video recording available at* <https://perma.cc/JGN7-DU7G> (amended transcript on file with author).

62. Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1238 (1975).

63. See, e.g., Brensike Primus, *supra* note 19, at 1791.

64. Carrie Leonetti, *Painting the Roses Red: Confessions of a Recovering Public Defender*, 12 OHIO ST. J. CRIM. L. 371, 374-75 (2015); Alschuler, *supra* note 62, at 1237 ("[Public defenders] noted that although trial judges sometimes 'nudge' private defense attorneys to enter pleas of guilty, the judges subject public defenders to more severe forms of pressure . . . . Defenders who resist judicial suggestions [on plea bargains] . . . are frequently forced to endure abusive remarks from the bench.").

65. Alschuler, *supra* note 62, at 1238 (quoting a judge in Texas with appointment and removal power over public defenders: "I have a game plan on these things. When I hired my defender, I called him in and set down some little propositions he should follow . . . . For example, I made it clear that I didn't want him arguing with these people if they wanted to plead guilty.").

reputation for moving cases, *regardless of the quality of the defense they provide . . .*”<sup>66</sup>

A more nuanced problem of judicial control stems from judges’ role as repeat players who have ongoing interactions with defense attorneys across cases. In its starkest form, the problem looks like this: A defense attorney vigorously advocates for her clients (to the inconvenience and irritation of the judge) in a case. Later on, in another case, the attorney asks for a continuance to prepare for trial. The judge says “after what you did in that Jones case, you gotta be kidding me, counselor—trial begins this afternoon.”<sup>67</sup> That creates an obvious dependence problem: Defense attorneys are deterred from vigorously advocating for their current clients because they know that the judge will take it out on future clients.<sup>68</sup>

There is evidence that judges, in fact, exert influence in this way.<sup>69</sup> David Anderson,<sup>70</sup> a former public defender in St. Tammany Parish, Louisiana, was

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66. See, e.g., BUTCHER & MOORE, *supra* note 60 (emphasis in original). I currently represent an attorney who was kicked off appointed cases and blackballed from future cases because he dared to challenge routine constitutional violations in misdemeanor court. *Wiley v. Ewing*, No. 3:18-CV-00081, 2018 WL 7115180 (S.D. Tex. Dec. 17, 2018), *report and recommendation adopted*, 2019 WL 313432 (S.D. Tex. Jan. 24, 2019).

67. See Alschuler, *supra* note 62, at 1240 (“Indeed, power over sentencing and other judicial matters often gives judges an indirect power over the hiring, assignment, and firing of defenders . . . . An offended judge may simply complain to the chief defender about the attorney’s inadequacies, and the chief defender may conclude that the attorney is too abrasive to provide effective representation for his clients. Something like the Fort Worth system of defender selection may thus develop in practice despite the independence of the defender office in theory.”).

68. See *United States ex rel. McCoy v. Rundle*, 419 F.2d 118, 120 (3d Cir. 1969) (discussing a case where public defender had antagonized a trial judge, and “[i]n his anger the judge had handed out what counsel described as ‘really outrageous sentences.’ A more experienced lawyer was sent in . . . as the ‘fireman’ to ‘calm the judge down.’ . . . [O]ne whose eye must envisage many other untried cases as he seeks to bank the fires of a judge’s indignation is not likely to be able to stand up fully for the rights of a single client, whatever they may be and wherever they may lead him. The desire to appease an indignant trial judge who has already inflicted what seem excessively harsh sentences is magnified where an institutional law office represents many other defendants and is under pressure to subordinate the individual rights of one to the larger good of all.”).

69. See Brensike Primus, *supra* note 19, at 1790 (“A 2006 statewide survey of judges in Nebraska revealed that some judges ‘have “paid attorneys back” for too many trials or other offenses by not appointing them again.’” (quoting THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 84 (2009), <https://perma.cc/A7BC-6G2Q>)); Leonetti, *supra* note 64, at 381 (explaining an occasion when the author (a former defender) was reprimanded by a supervisor because the supervisor had “been getting calls from the U.S. Attorney’s Office that [the author was] difficult to deal with”).

70. Telephone interview with David Anderson (Jan. 24, 2019) (notes on file with author).

assigned to the same division of court for three years. Anderson reports that because he filed motions, asked for continuances, requested hearings, and refused to recommend guilty pleas, a judge of that division of court grew to intensely dislike him. The judge's displeasure manifested first in a middle-of-the-night voicemail on Anderson's boss's phone saying, "I've tried to shape Anderson's conduct by bending him, but if he continues to refuse to bend, I will break him." When Anderson did not break, the judge refused to hear cases in which he was counsel, causing Anderson's clients to wait in court for four straight days without anything happening in their cases. When the judge eventually returned to the bench, Anderson represented a client in a misdemeanor DUI case who was facing probation revocation for failure to pay fees. Off the record, Anderson told the judge that he would request a hearing on the person's indigence, as is obviously required by the Constitution. The judge said outright that "if you do that, there will be consequences."

Anderson did request a hearing, and there were consequences. After the hearing, the judge sentenced the client to jail for a probation violation because he did not pay fees. Anderson went to the Court of Appeals, which issued a writ requiring a finding that the person was able to pay—which, somehow, the judge had failed to make. The judge, to Anderson's face, called the writ "a fucking piece of horseshit" and told Anderson that his "clients were going to suffer the consequences of this." Anderson, worried that his clients could not get a fair hearing before this judge, agreed to be transferred to another division of the court.

Conflicts of this type raise serious constitutional issues. In *Edwards v. Lewis*,<sup>71</sup> the Supreme Court of Georgia held that an unconstitutional conflict of interest arose when a judge offered to change a local practice if the public defender would agree not to pursue claims based on that practice. The trial court in *Edwards* agreed to start summoning jurors based upon the most recent census (rather than an outdated census, which it had been using) only if the public defender office would agree not to challenge the composition of jury arrays that had been used up to that point.<sup>72</sup> This, the state supreme court held, created an unconstitutional conflict of interest where a defender serving as habeas counsel "thought the jury array issue was a strong one," but "was instructed by his superiors in the public defender's office not to pursue it because of the alleged agreement with the judges."<sup>73</sup> The kinds of conflicts I discuss in this Subpart may be just as impermissible as that in *Edwards*, even though they are not explicit.

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71. 658 S.E.2d 116, 117-18 (Ga. 2008).

72. *Id.* at 118.

73. *Id.*

Part of a lawyer's *proper* function is to serve as a repeat player tasked with ensuring that the legal system functions as it should. And part of that task is to ensure that—even within the space of non-frivolous arguments—meritorious arguments get priority over unmeritorious ones.<sup>74</sup> Lawyers are officers of the court as well as advocates.<sup>75</sup> So at least sometimes it might be proper for an attorney to forgo an unlikely-but-not-impossible argument in a client's case in the service of maintaining a reputation before the bench as a reasonable advocate whose arguments are generally meritorious. This might be true even though the benefit of that reputation accrues to future clients and to the attorney herself. In the doctrinal arguments in the next Part, I'll offer a distinction between permissible and impermissible interactions that is supported by Supreme Court precedent. But the question as a matter of morality and legal practice is a much harder one, and I do not answer it in this Article.

#### D. Prosecutorial Control of Defense Counsel

In this Subpart, I explain circumstances in which defense attorneys are structurally dependent on prosecutors. Because prosecutors' interests are paradigmatically adverse to defendants', to prove that prosecutors interfere with the independence of defense counsel, I need to show only that they routinely interfere with how defense attorneys do their jobs. I discuss three means by which prosecutors do that: exercising appointment authority over defense counsel, playing an attorney's clients against each other, and blacklisting or strong-arming attorneys.

What does it mean to "interfere" in this context? One premise of the adversary system is that prosecutors and defense attorneys will be working at cross purposes. Prosecutors may legitimately attempt to make defense attorneys' jobs harder—that is, they may work to convict the defense attorneys' clients while defense attorneys try to do the opposite.<sup>76</sup> The line between

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74. See Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2443 (1996) (discussing the conflicts inherent in representing multiple clients with diverse perspectives on a legal issue and advocating for a more coherent vision of the public-defender office); see also *Jones v. Barnes*, 463 U.S. 745, 752 (1983).

75. See Zacharias & Green, *supra* note 13, at 2 n.1.

76. The mere structure of repeat-player interaction itself may reinforce at least some subtle tendency for a defense attorney to be slightly sympathetic to the prosecution. "[T]he public defender and the prosecutor are trying cases against each other every day," one classic account has it. See Alschuler, *supra* note 62, at 1210 (quoting D. McDONALD, *THE LAW: INTERVIEWS WITH EDWARD BENNETT WILLIAMS AND BETHUEL M. WEBSTER* 10 (1962)). "They begin to look at their work like two wrestlers who wrestle with each other in a different city every night and in time get to be good friends. The biggest concern of the wrestlers is to be sure they don't hurt each other too much." *Id.*

permissible adversary conduct and impermissible interference, I argue, is crossed when prosecutors use their outside relationships with defense attorneys to make it easier to convict their clients.

1. Prosecutors who have appointment authority over defense counsel

In some places, prosecutors themselves appoint the defense attorneys who represent the people the prosecutor is prosecuting. In certain small counties, the county attorney may be tasked with both prosecuting everyone in that county and negotiating all of the contracts on the county's behalf, including the county's contract with a defense attorney to represent indigent defendants in that county.<sup>77</sup> In these places, the prosecutor quite literally controls the defense attorney in her court: the prosecutor can fire an attorney who makes prosecuting people more difficult.<sup>78</sup> Attorneys are forced to act accordingly.<sup>79</sup>

2. Playing an attorney's clients against one another

Prosecutors interfere with the independence of defense counsel by tying their actions in one case to the defense attorney's actions in another. This can range in severity. Sometimes it is as subtle as saying "I can't work with you here if you don't work with me there," where the implication is that the defense attorney needs to bargain more generously with the prosecutor in some other case. Sometimes it is more explicit. But the core problem is simple: when a prosecutor takes negative actions (or foregoes positive ones) in a case because the defense attorney takes negative actions (or foregoes positive ones) in a different case.

David Anderson reports an example of this problem.<sup>80</sup> According to Anderson, a St. Tammany Parish prosecutor had a remarkable plea-bargaining practice during Anderson's time there. This prosecutor explicitly offered plea deals in about a dozen unrelated cases at a time. All of the deals were contingent on each other, and specifically on one person *not* pleading guilty and instead going to trial. The prosecutor, Anderson reports, was explicitly interested in an easy trial win at least once every couple of months. So, he would insist that one defendant, usually someone who was potentially subject to a habitual-offender designation and thus a possible life sentence, go to trial so that the prosecutor could win publicly.

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77. ACLU OF UTAH, FAILING GIDEON: UTAH'S FLAWED COUNTY-BY-COUNTY PUBLIC DEFENDER SYSTEM 9 (2011).

78. *Id.* at 84.

79. *Id.*

80. Telephone interview with David Anderson, *supra* note 70.

Tied plea bargains of the kind Anderson describes are likely less common than milder forms of cross-case bargaining.<sup>81</sup> Frank Grimes,<sup>82</sup> a public defender in a Southern state, relates that a prosecutor once told him that the prosecutor could not agree to a continuance in one case unless Grimes agreed to a continuance in another.<sup>83</sup> Grimes reports that, based on his experience with other defense attorneys, this is very common. When Grimes told the prosecutor that his offer had created a conflict of interest for Grimes, the prosecutor immediately withdrew it. And Eve Brensike Primus, a former Maryland public defender and the author of an article I cite several times in this one,<sup>84</sup> reports a similar experience but without the happy ending of Grimes's:

The prosecutor would agree to a continuance in one case. Then when the prosecutor wanted a continuance in another case and I said that I was going to object, the prosecutor would say "but I agreed to your continuance request." When I then explained that I represent my client's interests and his interest was not in continuing this case because he was in jail pending trial and would like to get out, the prosecutor responded by saying, "oh, I see. Well, if that is the way that you are going to be, I won't be so nice about future continuance requests."<sup>85</sup>

### 3. Blacklisting and strong-arming

Prosecutors control defense attorneys by using the prosecution's case-related powers to blacklist and strong-arm disfavored attorneys. By "blacklist," I mean something like "take repeated negative actions against disfavored attorneys' clients with an eye to running the lawyers out of town or convincing them to cease an ongoing practice." By "strong-arm," I mean something like "threaten to take actions against future or other clients unless disfavored defense attorneys agree to do something or not to do something else." Appointed attorneys for the indigent can be blacklisted and strong-armed, but attorneys who are paid by their clients (they may also take appointed cases) are particularly susceptible to certain forms of blacklisting.

The prospect of blacklisting and strong-arming comes from the basic

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81. *E.g.*, Alschuler, *supra* note 62, at 1211 ("I have, however, seen no evidence whatever that public defenders engage in this kind of bargaining even in isolated instances.").

82. Telephone interview with Frank Grimes (Jan. 23, 2019) (notes on file with author). Frank Grimes is not his real name.

83. *Id.*

84. *See* Brensike Primus, *supra* note 19.

85. Email from Eve Brensike Primus, Yale Kamisar Collegiate Professor of Law, Univ. of Mich., to Charlie Gerstein, Adjunct Professor of Law, Georgetown University Law Center (June 6, 2019) (on file with author).

practice of repeat-player negotiation. It is a basic assumption of defense practice that to be an effective plea bargainer, defense attorneys must enjoy professionally courteous relationships with the individual prosecutors with whom the defense attorneys bargain.<sup>86</sup> The level of courtesy ranges quite a bit. Some private defense attorneys advertise their close relationships with prosecutors' offices, particularly when they used to work in those offices.<sup>87</sup> This isn't necessarily sinister, or even based on an obsequious personal relationship; defense attorneys who worked in a prosecutors' office are in a better position to know what the prosecutors are really looking for and to help their clients bargain for it, and clients might reasonably want that. But the practice creates a form of social capital, and threats to that social capital create opportunities for blacklisting and strong-arming. If defense attorneys must maintain at least passably good relationships with the prosecutor's office, threats to those relationships can be used to control them.

The Orleans Parish District Attorney's office has been the subject of several reports of blacklisting. One defender in New Orleans reports that when he sought a pre-charge preliminary hearing before a magistrate in a client's burglary case—these hearings were usually done only in murder and first-degree rape cases—the prosecutor said that if the defender did not withdraw the request, the prosecutor would charge the client (even though the prosecutor believed the client was innocent) and would punish the defender and his future clients.<sup>88</sup> And rumors have long circulated that the DA's office keeps a literal list of attorneys with whom prosecutors are directed never to plea bargain.<sup>89</sup> Names are added to the list for infractions like publicizing the DA's office chronic *Brady* violations.<sup>90</sup> Finally, and perhaps most egregiously, the DA's office indicted two public-defense investigators for weak charges, which were all ultimately unsuccessful.<sup>91</sup>

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86. See, e.g., Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 68 (1968) (“A defense attorney must enjoy good personal relations with the prosecutor's staff if he hopes to remain effective as a plea bargainer.”).

87. Cf., e.g., *Stay Tuned with Preet: Criminal Justice, Part 1: The Defense* (with Ben Brafman), PINEAPPLE STREET MEDIA (May 31, 2018) (interview with attorney Ben Brafman in which he discusses relationships with prosecutors).

88. Telephone interview with Armen Gilliam (Feb. 5, 2019) (notes on file with author); see also Email from Armen Gilliam to Charlie Gerstein, Adjunct Professor of Law, Georgetown University Law Center (June 12, 2019) (notes on file with author). Armen Gilliam is not his real name. Many thanks to Arjun Malik and Olevia Boykin for speaking with Gilliam on the phone.

89. The person who reported this asked to remain anonymous.

90. *Id.*

91. See, e.g., Aviva Shen, *New Orleans DA Bullies Public Defenders for Doing their Jobs*, THE APPEAL (Oct. 18, 2018), <https://perma.cc/KZ7C-LSCL> (“The Orleans DA's office has a pattern of treating robust defense investigation as criminal activity . . . . In December

“Strong-arming,” as I mean the phrase, is distinct from the ordinary strong-arming on which any plea-bargaining system relies. To get defendants to plead guilty, prosecutors threaten worse consequences for them if they do not plead guilty and offer inducements for them if they do. More charges or higher sentences are the standard threats, and fewer charges or lower sentences the standard inducements, but threats to indict (rather than proceed by information) or to call certain witnesses are generally permissible. The key distinction between “strong arming” as I use the phrase and ordinary plea bargaining is that the threats be made against attorneys’ *other* clients, or against the attorney herself.

## II. THE RELATIONSHIP BETWEEN DEPENDENT COUNSEL AND DEFICIENT COUNSEL

In the previous Part, I defined the problem of dependent counsel and explained its primary forms. In this Part, I chart the logical and practical relationship between the problem of dependent counsel and the much more commonly discussed problem of overburdened counsel. My goal is to show why tackling problems of dependent counsel can help solve problems of deficient counsel and thereby to justify the attention I’ve given in the previous pages to problems of dependent counsel. The core point is that stable, independent institutions can advocate for their own continued flourishing, whereas unstable, dependent institutions may not be able to—and sometimes do the opposite. Independent counsel can serve as advocates for increased resources and can more effectively withstand threats to their independence. Dependent counsel, on the other hand, might not only fail to resist threats to their independence and to their clients’ rights, but might actively cooperate in both threats.

### A. Independent Counsel Can Advocate for Their Own Competence

When lawyers are unburdened by threats arising from ongoing relationships with prosecutors or judges, they can advocate for increased resources for their work. I’ll return to this theme in Part V.A, where I argue that

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2014, OPD investigator Taryn Blume was charged with impersonating a peace officer, a felony that carried up to two years in prison. Blume had spoken with housing authority security officers about obtaining a report and had given them her OPD business card. One of the officers mistakenly told his supervisor she worked for the prosecutor’s office. Based on this moment of confusion, the DA spent nearly two years with more than ten prosecutors pursuing the case before they abruptly dropped the charges in January.”); Aviva Shen, *Prosecuted by Her Legal Counterpart: ‘It Destroyed My Life in So Many Ways’*, GUARDIAN (May 1, 2017), <https://perma.cc/CJN8-PTDH>.

institutionalized public defenders form the core of a stable system for the delivery of independent legal services to poor people charged with crimes, and that it is only by the strength of those institutions that lawyers can fight the systematic violation of their clients' rights. Here I'll note only some of the things that independent counsel have done to protect their own ability to do their jobs.

Start with money. Independent, institutional public-defense offices can influence their state legislatures to obtain lower caseloads and increased funding.<sup>92</sup> Some offices employ lobbyists who are tasked with advocating for the passage of (among others) bills that increase funding for the office.<sup>93</sup> But even offices without a formal lobbying presence can press for lower caseloads in other ways. By the definition in Part I, public defenders who negotiate from a position of strength can afford to rattle the power structure at least a little bit more than those who negotiate from a position of dependence.

And when caseloads become unmanageable, independent, institutional public defender offices can fight back by refusing to take on more cases.<sup>94</sup> This stems from an obvious point: institutional public defenders generally prefer lower caseloads; appointed counsel, at least financially, prefer *higher* caseloads. As a result, some institutional public defenders have defended their rights (and their clients' rights) not to be forced to commit malpractice by representing unreasonable numbers of clients.<sup>95</sup> As I'll discuss below, in Texas and Oklahoma, lawyers on appointed-counsel panels have advocated to maintain high caseloads.

Finally, independent counsel can sue. When caseloads became truly intolerable in Luzerne County, Pennsylvania, Albert Flora, Jr., the chief public defender, sued the county in state court representing a class of his clients. The court ruled that the county violated the Constitution.<sup>96</sup> When the county fired Flora because of his lawsuit, he sued in federal court, claiming that his

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92. Although appointed attorneys are barred from certain kinds of collective action to protect their interests, *see infra* note 103, there is no legal reason why they could not write a joint letter to the state legislature seeking increased funding. Absent the kinds of threats of disruption that an institutional office can promise, *see infra* Part V.A, this seems unlikely to succeed. And it may be difficult to organize groups of appointed attorneys in the first place.

93. *See, e.g., 79th (2017) Regular Sessions Lobbyists*, NEV. LEGISLATURE, LOBBYIST REGISTRATION AND REPORTING, <https://perma.cc/U9PJ-F9TL>.

94. Part V, *infra*, shows that dependent counsel *cannot* do this, or at least cannot do it as well.

95. *See generally* Stephen F. Hanlon, *Case Refusal: A Duty for a Public Defender and a Remedy for All of a Public Defender's Clients*, 51 IND. L. REV. 59 (2018) (discussing litigation resulting from public defenders refusing unreasonable caseloads).

96. *Kuren v. Luzerne County*, 146 A.3d 715, 724, 751-52 (Pa. 2016).

termination constituted illegal retaliation in violation of the First Amendment.<sup>97</sup> The parties ultimately settled the case for \$250,000,<sup>98</sup> but prior to the settlement, the United States Court of Appeals for the Third Circuit held that Flora had successfully pleaded a First Amendment claim,<sup>99</sup> a holding that set precedent for future funding lawsuits of the kind that Flora filed.<sup>100</sup> Other defenders have appealed orders requiring them to take on unreasonable caseloads and prevailed in state supreme courts.<sup>101</sup>

## B. Dependent Counsel May Reinforce Their Own Dependency

Dependent counsel have a much harder time fighting back against both excessive caseloads and other violations of their clients' rights. Worse, because they often have at least implicit institutional interests in the system that incarcerates their clients, dependent counsel may advocate *against* the interests of their clients and in favor of entrenching the system on which the lawyers rely for money and career success.

Almost by definition, dependent counsel cannot effectively refuse to take on new cases.<sup>102</sup> Appointed-counsel or contract systems exhibit this problem most starkly: efforts by appointed counsel to collectively refuse additional cases to secure higher pay violate federal antitrust laws.<sup>103</sup> So even in circumstances where appointed counsel eagerly desire to reduce workloads to manageable levels, federal law prohibits them from employing the most straightforward means of doing so and, therefore, they are forced to bid against one another in a marketplace where they compete on price (the attorney who can handle the most cases for the least money usually gets the contract) but not on quality of service. In jurisdictions where judges or other policymakers can contract with single attorneys to take all cases in their courts, competitive

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97. *Flora v. County of Luzerne*, 776 F.3d 169, 173-74 (3d Cir. 2015).

98. See Jennifer Learn-Andes, *Al Flora Weighs in on Litigation Resulting in His \$250,000 Settlement*, WILKES-BARRE TIMES LEADER (Aug. 29, 2018), <https://perma.cc/87C8-HQZ7>.

99. See *Flora*, 776 F.3d at 180-81.

100. See Learn-Andes, *supra* note 98.

101. See, e.g., Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 424-25 (1993) (discussing lawsuits by Florida public defenders and concluding “[t]he independent action taken by the Florida defenders, antagonizing the county officials who must appropriate the extra cost of appointed private counsel to replace the public defenders, was possible in part because public defenders in Florida are elected and therefore not dependent on county officials for the retention of their positions” (footnotes omitted)).

102. By “dependent,” here, I mean to indicate a severe burden on counsel’s independence. Minor burdens might not have the effect I’m discussing.

103. *FTC v. Super. Ct. Trial Lawyers Ass’n*, 493 U.S. 411, 427-28 (1990).

pressures can force attorneys to handle outrageous caseloads.<sup>104</sup>

Worse than not resisting extreme caseloads, dependent counsel in systems with individual appointments sometimes advocate *for* outrageous caseloads. The hourly rate in almost every jurisdiction is meager and compensation per case is capped.<sup>105</sup> To earn money, then, defense counsel must generally rely on the flat fee they earn by closing a case. For this reason, they have no meaningful financial incentive to work on their cases: with a low hourly rate and a per-case maximum allowable fee, it makes more financial sense to open and close another case—which can be done in fifteen or so minutes—than to work on an existing one.<sup>106</sup> Naturally, appointed counsel fight to protect their financial interests. Sometimes this takes the form of opposing the creation or expansion of institutional public-defense offices.<sup>107</sup> Sometimes it takes the form of actively lobbying against restrictions on their ability to take on yet more cases.<sup>108</sup> Attorneys reliant on quick guilty pleas for their living sometimes quite literally con their clients into pleading guilty.<sup>109</sup>

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104. *E.g.*, *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013) (finding that where county approved contracts by law firms to represent all indigent defendants in county “[t]he appointment of counsel was, for the most part, little more than a formality, a stepping stone on the way to a case closure or plea bargain having almost nothing to do with the individual indigent defendant”); *see also* Bright & Sanneh, *supra* note 36, at 2166 (2013) (“One contract defender repeatedly fought off low bidders by reducing his budget, which had been forty-one percent of the prosecutor’s budget in 2000, to only twenty-seven percent of the prosecutor’s budget in 2005. Yet in 2006, he was undercut by a bid that was almost fifty percent less than his by a firm employing even fewer lawyers spending even less time on each case.”).

105. *See, e.g.*, SIXTH AMENDMENT CTR., *supra* note 31.

106. *See* Alschuler, *supra* note 62, at 1262-63 (detailing financial exploits of appointed defense counsel).

107. *See* DALLAS COUNTY COMMISSIONER’S COURT, Meeting of Jan. 15, 2019, video recording available at <https://perma.cc/GG4P-6HLD>, timestamp 2:00:40; 2:06:15; 2:17:05; 2:23:00 (commissioners and county judge openly discussing the monetary incentives behind the private criminal defense bar’s opposition to having public defenders at initial appearances, explaining that private defense attorneys write bonds for their clients and are concerned about losing that income if more personal bonds are issued, and explaining that that private attorneys want to be appointed at initial appearances as a way to get more appointments”); *see also* telephone interviews with Jane Doe (2018) (notes on file with author) (describing opposition by local defense attorneys to creation of public defender office). Jane Doe is not her real name.

108. Bright & Sanneh, *supra* note 36, at 2168 (“In Georgia, as a result of financial pressures, the state public defense agency and some local public defenders joined the Attorney General’s office in arguing that public defenders should be exempt from the rules of professional conduct that prevent lawyers from representing clients with conflicting interests.”).

109. Alschuler, *supra* note 62, at 1194-95, 1221 n.114 (detailing “cop-out lawyers” who use fake evidence to trick their clients into pleading guilty and attorneys who conspire with prosecutors behind their clients’ backs to raise money-bail amounts to force clients to

### III. THE CONSTITUTIONAL RIGHT(S) TO INDEPENDENT COUNSEL

Problems of dependency raise serious constitutional issues. In this Part, I offer a selection of doctrinal arguments explaining why. By necessity, the majority of the factual circumstances I discuss are hypothetical, but hopefully the previous Parts have proven that these circumstances actually occur.

The problems discussed in Part II give rise to at least four constitutional violations. Interference with defense counsel can (1) create a conflict of interest for defense counsel that violates the Sixth Amendment; (2) constitute government interference with the defense relationship in violation of the Sixth Amendment; (3) be retaliation in violation of the First Amendment; and (4) violate the rule of judicial-executive incompatibility.

These doctrinal arguments go to the conceptual core of defense independence: protecting defense attorneys from outside interference with their work. The First Amendment forbids the government (in the person of a judge or a prosecutor) from taking adverse action against a lawyer for fighting unconstitutional practices.<sup>110</sup> The Sixth Amendment's conflict-of-interest doctrine protects that same independence by forbidding arrangements that burden the ability of attorneys to make judgments about their cases free from improper outside influences, and its interference doctrine protects against government attempts to impose those burdens.<sup>111</sup> Finally, the judicial-executive incompatibility doctrine protects the independence of counsel by disabling a principal threat to that independence, a conflicted bench. These doctrinal arguments, in my view, have strength as tools for reform because they are connected to the purpose of that reform, and to a core underlying value of the adversary system. These features, I hope, cause them to make sense as concepts, not merely as technically correct applications of precedent.

#### A. Ineffective Assistance by Conflict of Interest

In some contexts, defense dependence can violate the Sixth Amendment right of clients to un-conflicted counsel. The Sixth Amendment requires that defense attorneys be free from conflicting interests,<sup>112</sup> but their status as repeat players gives prosecutors and judges the opportunity (and incentive) to force defense attorneys to choose between zealous representation of certain clients and adverse consequences to other clients or to the attorneys' careers. Both prosecutorial and judicial interference can create an unconstitutional conflict of

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plead guilty).

110. *Infra* Part IV.C.

111. *Infra* Part IV.B.

112. *E.g.*, *Holloway v. Arkansas*, 438 U.S. 475, 482 (1978).

interest for counsel. When a prosecutor strong-arms or blacklists an attorney, or when the prosecutor plays one of the attorney's clients off against another, the prosecutor has created an unconstitutional conflict of interest between the attorney's clients' interests. When a judge threatens to take adverse action against some clients (current or future) if a defense attorney advocates on behalf of a current one, the judge has created an unconstitutional conflict of interest between the attorney's clients' interests. When judges or prosecutors threaten adverse action against the lawyer directly, they create a conflict of interest between the attorneys' interests and their clients'. In all of these contexts, the principle is the same: the prosecutor or judge has forced the defense attorney to represent (either concurrently or successively) actually conflicting interests.<sup>113</sup> That violates the Constitution.

The Sixth Amendment protects the right to the effective assistance of counsel. Constitutionally ineffective assistance can take two basic forms: incompetence and disloyalty. The incompetence-based ineffective assistance of counsel inquiry, articulated in *Strickland v. Washington*,<sup>114</sup> asks whether counsel's performance may have worked an unfair outcome on the defendant's case. To establish ineffective assistance of counsel, defendants must make two showings, and both are difficult to make. First, they must show that their lawyers' performance was constitutionally deficient because it fell below an objective standard of reasonableness.<sup>115</sup> In establishing whether counsel's performance was objectively unreasonable, defendants must overcome a strong presumption that counsel's conduct was part of a legitimate trial strategy.<sup>116</sup> Second, defendants must show that they were prejudiced by counsel's deficient performance.<sup>117</sup> That is, defendants must show that there is a reasonable probability that, but for counsel's specific errors and omissions, the "result" of the proceedings would have been different. "Result," in this context, contemplates at least the verdict and the sentence: To successfully make this claim, defendants must point to specific errors and omissions and show that there is a reasonable probability that, but for those mistakes, they would have

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113. The law distinguishes between actual conflicts of interest, in which "conflicting loyalties point in opposite directions" and "potential" ones, in which conflicting loyalties may arise if some non-guaranteed fact (*e.g.*, a certain witness testifying) happens. 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.9 (4th ed. 2019).

114. 466 U.S. 668, 690, 692 (1984). *Hill v. Lockhart*, 474 U.S. 52 (1985), governs ineffective assistance that results in foregoing the right to a trial by pleading guilty. The inquiry is essentially the same: But for counsel's deficient advice, is there a reasonable probability that the defendant would not have waived his right to go to trial? *Id.* at 58-59.

115. *Strickland*, 466 U.S. at 687-88.

116. *Id.* at 689.

117. *Id.* at 691-92.

been acquitted or received a lesser sentence.<sup>118</sup>

Claims based on a breach of counsel's duty of loyalty are governed by a different line of cases, which does not require the same strenuous showing of case-specific prejudice that *Strickland* requires for competency cases. The Supreme Court explained the Sixth Amendment conflict-of-interest doctrine in cases starting with *United States v. Glasser*.<sup>119</sup> In *Glasser*, the Court held that "the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests."<sup>120</sup> This rule gives rise to a trial court's duty to inquire into the possibility of a conflict where a single attorney is representing codefendants or where it is otherwise reasonable to suspect that conflicting interests might arise, and to insist on separate representation of defendants with conflicting interests wherever the court knows or should know of the existence of an actual conflict.<sup>121</sup>

In *Holloway v. Arkansas*, the Court held that although "joint representation is not per se violative of constitutional guarantees of effective assistance"—after all, sometimes the defendant benefits from joint representation<sup>122</sup>—where the trial court disregards an actual or imminent conflict, the error is reversible, regardless of the probable effect on the outcome of the case.<sup>123</sup> In *Mickens v. Taylor*, the Court reiterated<sup>124</sup> that defendants must have their convictions overturned whenever they can show that their lawyers' conflict of interest had any negative effect on their performance in the case; in contrast to ineffective assistance of counsel cases stemming from incompetence of counsel, defendants need not show that the adverse performance would possibly (or probably) have affected the *outcome* of the case. Courts have addressed prosecutor-defense relationship conflicts in which the defense attorney is herself under criminal investigation,<sup>125</sup> works for a prosecutor's office,<sup>126</sup> or has

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118. *Id.* at 693-94.

119. 315 U.S. 60 (1943).

120. *Id.* at 70.

121. See LAFAYETTE ET AL., *supra* note 113, at § 11.9(b).

122. See *Glasser*, 315 U.S. at 92 (Frankfurter, J., concurring) ("A common defense . . . gives strength against a common attack.").

123. *Holloway v. Arkansas*, 438 U.S. 475, 482, 488-89 (1978); see also *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (finding no duty to inquire into conflicts under the circumstances); *Dukes v. Warden, Conn. State Prison*, 406 U.S. 250, 257 (1972) (finding no conflict).

124. In *Holloway*, the Court explained that "whenever a trial court improperly requires joint representation over timely objection reversal is automatic." 435 U.S. at 488. Cf. *Mickens v. Taylor*, 535 U.S. 162, 172 (2002).

125. See, e.g., *United States v. Fulton*, 5 F.3d 605 (2d Cir. 1993); *Mannhalt v. Reed*, 847 F.2d 576 (9th Cir. 1988); *United States v. Taylor*, 657 F.2d 92 (6th Cir. 1981); see also *United States v. McLain*, 823 F.2d 1457, 1463-64 (11th Cir. 1987) (holding that an actual

a close personal relationship to the prosecuting attorney.<sup>127</sup>

The Supreme Court views attorneys representing clients with actively conflicting interests as so pernicious to the administration of justice that defendants, in some circumstances, cannot agree to such representation even if they want to.<sup>128</sup> Trial courts have an independent interest in fairness, one sufficiently powerful that it overcomes a defendant's stated desire to be represented by the attorney of his choice. I say "stated" because part of the problem with concurrent conflicts of interest is that the court might not be hearing the whole story. Organized criminal enterprises present a cited example: if the boss hires the lawyer for the whole enterprise, the trial court might justifiably fear that the low-level soldiers are being pressured not to say that they'd rather go it alone.<sup>129</sup> The Court views conflicts of interest as uniquely corrosive to the criminal system because of their tendency to corrupt the relationship between lawyer and client.

Problems of defense independence may present conflicts of interest that violate the Constitution. When David Anderson represented a dozen or so people and was presented with a tied offer for all but one of them to plead guilty, he was forced to represent a dozen or so clients with immediately adverse interests.<sup>130</sup> Each of Anderson's clients might have benefited from holding out—that is, each of the clients might have been better off declining the deal and waiting for a better one (or taking his chances at trial). But Anderson needed to consider the interests of the other eleven people, and they would all benefit from the twelfth person pleading guilty. Each of those people could have his conviction overturned if he showed that Anderson would not have recommended a guilty plea absent the tied offer between his clients; the clients need not show that they would have taken Anderson's advice and declined the deal.<sup>131</sup>

Judicial interference can create similar problems. Anderson again provides a good example. When the judge explicitly threatened to take adverse action against Anderson's future (or other current) clients if he insisted on requesting

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conflict existed where defense counsel was under investigation by same prosecutor for an unrelated offense, counsel apparently was aware that delay in defendant's case would postpone his own indictment (which would come only after defendant's case was resolved), and counsel failed to direct defendant toward a possible avenue of plea negotiations that he might have wanted to reserve for his own case).

126. LAFAVE ET AL., *supra* note 113, § 11.9(a), text accompanying n.20.

127. *Id.* at text accompanying n.23.

128. *Wheat v. United States*, 486 U.S. 153, 160, 162 (1988).

129. *See* William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 799 (1989).

130. Telephone interview with David Anderson, *supra* note 70.

131. *See supra* note 124.

hearings for his current ones, the judge forced Anderson to represent conflicting interests, namely between his current and future (or other current) clients.<sup>132</sup> And in *Edwards*, discussed above, the Supreme Court of Georgia held that an unconstitutional conflict of interest arises when a judge conditions a decision to stop an unconstitutional practice with a commitment by a public defender not to challenge it in future cases.<sup>133</sup>

Both judges and prosecutors can create conflicts between attorneys' own interests and their clients'. Any time that an attorney is appointed *by the prosecutor* to represent a client, the attorney labors under a conflict between his own interest in continued appointments and his client's interest in avoiding prosecution, conviction, and sentence. The same can be true of judges' appointment power. In *Walberg v. Israel*,<sup>134</sup> the Seventh Circuit overturned a defendant's conviction on habeas corpus where the trial court judge explicitly discouraged the attorney from taking actions because the attorney owed his career, and continued appointments, to the judge. In *Walberg*, the trial court judge, in response to a motion to recuse him for having told the defense attorney (whom he had appointed) that "I am going to fix you on the trial of this case," told the defense attorney that

I am ashamed of you, the man who came to me and asked me to put him in a law office, which I did, . . . and . . . you thank me for. I put you, when you graduated, into the District Attorney's Office and kept you there. . . . I have appointed you in this case. I'm a good friend of your mother's, a good friend of your sister's and I was a good friend of your father's.<sup>135</sup>

If the Constitution forbids a defendant to be convicted if he was represented by an attorney with conflicting interests, the Constitution necessarily limits some of the moves available to judges and prosecutors in the repeat-player game of the criminal system. And that is the crux of the problem identified in this Article: The Sixth Amendment requires that defense attorneys be free from conflicting interests, but their status as repeat players grants prosecutors and judges the opportunity to force defense attorneys to represent conflicting interests.

## B. Interference with The Right to Counsel

Threats to defense independence can violate the Sixth Amendment anti-interference doctrine if they interfere with the strategic decision-making, advice, or participation of defense counsel.

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132. Telephone interview with David Anderson, *supra* note 70.

133. *Edwards v. Lewis*, 658 S.E.2d 116, 120-21 (Ga. 2008).

134. 766 F.2d 1071 (7th Cir. 1985).

135. *Id.* at 1073.

The interference doctrine arose from the intersection of ostensibly neutral state procedural rules with the special circumstances of criminal defendants. The doctrine began with the conflict between witness-competency rules, which limited the ability of certain witnesses to testify on the ground that their testimony was biased or otherwise impure, and a defendant's constitutional right to the strategic advice of counsel. The Court first articulated the interference doctrine in *Ferguson v. Georgia*.<sup>136</sup> Georgia adhered to the traditional common-law rule that defendants are incompetent to offer sworn testimony in their own cases.<sup>137</sup> To get around the harsh effects of that rule, Georgia courts allowed defendants to present unquestioned, unsworn statements to the jury. Under this procedure, the "defendant is placed in the witness chair and told by . . . the court that nobody can ask him any questions, and that he may make such statement to the jury as he sees proper in his own defense."<sup>138</sup> The Court held that this procedure violated the Sixth Amendment right to counsel because it forced defendants to speak to the jury without "the guiding hand of counsel."<sup>139</sup> In *Brooks v. Tennessee*,<sup>140</sup> the Court said, in a passage styled as an alternative holding,<sup>141</sup> that Tennessee violated the anti-interference rule when it required testifying defendants to testify before any other defense witnesses in order to prevent defendants, who are not subject to witness-sequestration rules, from conforming their testimony to all of the other witnesses at the close of the defense case.<sup>142</sup> In *Herring v. New York*, the Court held that a statute authorizing a trial court to deny counsel the opportunity to make a closing argument in a bench trial constituted interference with the participation of counsel in violation of the Sixth Amendment.<sup>143</sup>

The Court expanded the interference doctrine in another line of cases addressing rules prohibiting counsel from conferring with their clients during intra-testimony recesses. Most courts impose a general prohibition on conferring with counsel while under oath. In *Geders v. United States*, the Court

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136. 365 U.S. 570 (1961).

137. *Id.* at 570-71.

138. *Id.* at 593 (internal citation and quotation marks omitted).

139. *See id.* at 594-96 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

140. 406 U.S. 605 (1972).

141. The Court's principal holding was that this rule violated the right against self-incrimination. *See id.* at 611-12.

142. *Id.* at 607-08 ("The rule that a defendant must testify first is related to the ancient practice of sequestering prospective witnesses in order to prevent their being influenced by other testimony in the case. See 6 J. WIGMORE, EVIDENCE § 1837 (3d ed. 1940). Because the criminal defendant is entitled to be present during trial, and thus cannot be sequestered, the requirement that he precede other defense witnesses was developed by court decision and statute as an alternative means of minimizing this influence as to him.").

143. 422 U.S. 853, 864-65 (1975).

held that applying this rule to testifying criminal defendants seeking to confer with counsel during an overnight break in testimony violates the Sixth Amendment.<sup>144</sup> (The Court later held that *Geders* applied only to lengthy recesses.)<sup>145</sup> The Court subsequently explained that criminal defendants need not show prejudice to their cases to have their convictions reversed on appeal under *Geders*.<sup>146</sup> That is because, the Court explained, under *Ferguson, Brooks, Herring, and Geders*, the “[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”<sup>147</sup>

A related holding arises under the counsel-of-choice doctrine. In *United States v. Gonzalez-Lopez*, the Supreme Court held that the Sixth Amendment protects the right of criminal defendants to be represented by the retained counsel of their choice.<sup>148</sup> This rule is thought to extend only to defendants who can afford to pay for their lawyers.<sup>149</sup> In *United States v. Stein*,<sup>150</sup> the Second Circuit considered the effects of a United States Department of Justice policy that rewarded companies for declining to pay for defense lawyers for their employees when both the company and the employees were under criminal investigation. The Second Circuit upheld the dismissal of an indictment against 13 individual officers of KPMG, the accounting firm, where KPMG had succumbed to government pressure and refused to indemnify its employees and pay for their lawyers.<sup>151</sup> “[T]he Sixth Amendment,” the court said, “protects against unjustified governmental interference with the right to defend oneself

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144. 425 U.S. 80, 91 (1976).

145. *Perry v. Leeke*, 488 U.S. 272, 280, 284 (1989) (holding prohibition on conference during 15-minute recess constitutional).

146. *Id.* at 278-80.

147. *Id.* at 280 (“See, e. g., *Geders v. United States*, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); *Herring v. New York*, 422 U. S. 853 (1975) (bar on summation at bench trial); *Brooks v. Tennessee*, 406 U. S. 605, 612-613 (1972) (requirement that defendant be first defense witness); *Ferguson v. Georgia*, 365 U. S. 570, 593-596 (1961) (bar on direct examination of defendant).” (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984)); see also *Maine v. Moulton*, 474 U.S. 159, 170-71 (1985) (“[T]he prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.”).

148. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 152 (2006); see also John Rappaport, *The Structural Function of the Sixth Amendment Right to Counsel of Choice*, 2016 SUP. CT. L. REV. 117, 143 (2017) (arguing that the Supreme Court’s counsel-of-choice rule serves to protect the defense bar from complete control by the government).

149. But see Janet Moore, *Isonomy, Austerity, and the Right to Choose Counsel*, 51 IND. L. REV. 167-70 (2018) (challenging the practical and doctrinal bases of the rule that poor people cannot choose their own attorneys (citing Janet Moore, *The Antidemocratic Sixth Amendment*, 91 WASH. L. REV. 1705, 1707 (2016)).

150. 541 F.3d 130, 136 (2d Cir. 2008).

151. *Id.* at 157.

using whatever assets one has or might reasonably and lawfully obtain.”<sup>152</sup> This makes sense because “the right to counsel in an adversarial legal system would mean little if defense counsel could be controlled by the government.”<sup>153</sup> So, although that case was decided under a counsel-of-choice framework, it seems at least as well classified as an interference case. And in any event, it is relevant to the problems in this Article: where the government uses its outside relationship with counsel (here the prosecution of counsel’s payor) to interfere with counsel’s ability to advocate for their clients, the government violates the Constitution.

Problems of defense independence, then, fall almost by definition within the rule against interference, and are within the core purposes of the doctrine. Problems of defense independence may violate the rule of interference whenever prosecutors’ or judges’ interference effects a reasonably severe restriction on the ability of counsel to make decisions on their clients’ behalf. The contours of the interference doctrine are less than clear, as the above discussion shows, so it is hard to predict the precise types of interference that fall within the doctrine. For now, it is sufficient to note that the interference doctrine regulates threats to defense independence. And the related counsel-of-choice doctrine also protects the independence of counsel by ensuring, as John Rappaport has argued, that the bar is free from total state control in the aggregate.<sup>154</sup>

### C. The First Amendment<sup>155</sup>

When thinking about litigation to fight unconstitutional indigent defense systems, scholars sometimes overlook the centrality of expression.<sup>156</sup> People in the crosshairs of the criminal system often want to be heard,<sup>157</sup> and fair

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152. *Id.* at 156.

153. *Id.* at 154.

154. See Rappaport, *supra* note 148, at 143.

155. I have made some, but not all, of the arguments in this Subpart in my role as counsel to the plaintiff in *Willey v. Ewing*, 18-CV-00081 (S.D. Tex.), a retaliation case brought by a criminal defense lawyer who was removed from his appointed cases and not assigned any more in retaliation for his advocacy on behalf of his clients. The court denied the defendants’ motion to dismiss, which argued, *inter alia*, that speech by attorneys on behalf of clients is not protected from retaliation. *Willey v. Ewing*, No. 3:18-CV-00081, 2018 WL 7115180 (S.D. Tex. Dec. 17, 2018), *report and recommendation adopted*, 2019 WL 313432 (S.D. Tex. Jan. 24, 2019). The case was settled shortly thereafter.

156. See Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1491 (2005) (arguing that scholars overlook the importance of defendants’ silence throughout the criminal process).

157. See *id.* at 1450-51.

procedural systems must hear them.<sup>158</sup> In the American criminal system, defendants are almost always heard only through their lawyers.<sup>159</sup> First Amendment claims are central to independent counsel's ability to advocate for their clients, either by defending them from specific charges or by advocating for the systemic reforms discussed in Part V, but throughout the country those lawyers are systematically silenced. As the following paragraphs will show, public defenders' constitutionally unique status renders their First Amendment claims central to the problem of dependent defense.

The doctrinal question central to my argument in this Part is whether attorneys' *in-court* speech is protected by the First Amendment from retaliation. In *Legal Services Corporation v. Velazquez*,<sup>160</sup> the Supreme Court held that Congress violated the First Amendment rights of lawyers, and maybe the due process rights of their clients, when it forbade lawyers who received Legal Services Corporation ("LSC") funding from challenging the constitutionality of welfare programs. The LSC was created by Congress in 1974 to fund independent legal-services providers for poor people across the country.<sup>161</sup> In 1996, Congress forbade the LSC to fund any organization

[T]hat initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation.<sup>162</sup>

The restriction in funding was applied to any organization that violated these restrictions, regardless of whether the organization used LSC funds to do it.<sup>163</sup> Shortly after the 1996 restrictions were passed, LSC issued implementing regulations, and a group of lawyers who worked for LSC-funded providers and their clients sued LSC, arguing that the restrictions violated the First Amendment.<sup>164</sup>

The doctrinal basis of *Velazquez* has led to some confusion in the lower

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158. See *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) ("The fundamental requisite of due process of law is the opportunity to be heard." (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914))).

159. Natapoff, *supra* note 156, at 1449-50.

160. 531 U.S. 533, 542, 547-49 (2001).

161. *Id.* at 536.

162. *Id.* at 538 (quoting Omnibus Consolidated Rescissions and Appropriations Act of 1996, § 504(a)(16)).

163. *Id.*

164. *Id.* at 539.

courts.<sup>165</sup> Whatever the legal theory underlying *Velazquez*, however, the following must be true: The Constitution sometimes forbids the government from restricting lawyers' in-court speech on behalf of their clients. This will be crucial to First Amendment claims based on defense independence.

The most likely circumstance in which a First Amendment claim based on the independence of counsel will arise is when an attorney advocates on behalf of her client and, as a result, suffers adverse consequences at the hands of a state actor. Claims like these will usually sound in retaliation.<sup>166</sup> To state a claim for retaliation in violation of the First Amendment, government employees<sup>167</sup> must show that (1) they "engaged in protected First Amendment" speech; (2) they "suffered an adverse employment action;" and (3) that there was a "causal connection" between the two.<sup>168</sup> To be protected from retaliation, employees' speech must be made (a) as a citizen, rather than as a government employee; (b) on a matter of public concern; and (c) if both of those things are true, the value of the speech must be weighed against its potential for disruption in the government workplace.<sup>169</sup> I'll discuss each point in turn.

### 1. Courtrooms as public fora

Speech associated with defense independence can take many forms. For First Amendment purposes, some of these forms make for easy cases: a letter to the editor of the local paper decrying the injustice of the allocation of public school funds,<sup>170</sup> a letter to a state agency explaining that a local judge is

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165. Compare *Mezibov v. Allen*, 411 F.3d 712, 720 (6th Cir. 2005) (distinguishing *Velazquez* in First Amendment case based on in-court speech by reasoning that "*Velazquez* was a challenge by the Legal Services Corporation and its indigent clients seeking to vindicate the clients' own First Amendment interests in having their otherwise-reasonable arguments heard in court; nowhere does *Velazquez* recognize a First Amendment right personal to the attorney independent of his client."), with *Bright v. Gallia County*, 753 F.3d 639, 654 (6th Cir. 2014) (begrudgingly following *Mezibov*).

166. An attorney seeking a prospective judgment that she be permitted to make certain arguments without suffering future adverse consequences may not technically be stating a retaliation claim—she has not yet suffered any retaliation—but this should not affect the doctrinal arguments that follow. In all relevant cases, an attorney will need to prove that the government may not take certain actions against her if those actions are motivated by the content or viewpoint of her speech.

167. An attorney on a panel of criminal defense lawyers may be an independent contractor rather than an employee. But that distinction does not matter for purposes of a First Amendment claim. See *Wabaunsee County v. Umbehr*, 518 U.S. 668, 675, 678-81 (1996) (holding that independent contractors are protected from retaliatory termination of their contracts).

168. E.g., *Dillon v. Morano*, 497 F.3d 247, 251 (2d Cir. 2007).

169. See *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

170. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 566 (1968).

violating the law,<sup>171</sup> advocacy in favor of an opposing candidate for the office of judge or prosecutor,<sup>172</sup> or plain-old public complaining about injustice. I won't dwell on these cases further here because they're legally easy, but in Part V they will prove very important.

For present purposes, the more interesting point is that an attorney's speech *in court* is protected by the First Amendment, which is the first prong of the test for a retaliation claim, as described above. Speech that is not protected by the First Amendment *at all* (that is, speech that any person could be punished in any otherwise-constitutional way for) is not protected from *retaliation* (that is, the specific adverse consequence of an adverse employment action).<sup>173</sup> The question whether attorney speech in court is protected by the First Amendment requires me to address two subsidiary questions: First, in what "forum," if any, is an attorney acting when she is advocating on behalf of her client? And, second, what if anything does she say there?

All First Amendment claims are context-specific. You have the right to wear a jacket that says "fuck the draft" in a state courthouse lobby,<sup>174</sup> but you probably don't have the right to wear it in the United States Supreme Court.<sup>175</sup> You have the right to say "bong hits for Jesus" on the sidewalk, but you don't

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171. *E.g.*, Willey v. Ewing, No. 3:18-CV-00081, 2018 WL 7115180, at \*6 (S.D. Tex. Dec. 17, 2018), *report and recommendation adopted*, 2019 WL 313432 (S.D. Tex. Jan. 24, 2019).

172. Heffernan v. City of Paterson, 136 S. Ct. 1412, 1416 (2016).

173. *See* Lynch v. Ackley, 811 F.3d 569, 578 n.8 (2d Cir. 2016) ("Moreover, as a prerequisite to th[e] whole [retaliation] analysis, the speech must come within the protection of the First Amendment to begin with. This element is rarely in dispute, as practically all speech enjoys some First Amendment protection—with rare exceptions for such things as obscenity, fighting words, and yelling 'fire' in a movie theater. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). And perhaps because it is hardly ever in dispute, it is generally assumed, rather than explicitly stated, that this is an essential element of the claim. A semantic confusion does, however, often arise in the explanation of a ruling on a State employee's claim of unconstitutional retaliation for speech. Courts sometimes characterize the determinative question in § 1983 First Amendment retaliation suits as whether the employee speech at issue was 'constitutionally protected.' In most cases, such words seem intended as shorthand for whether the speech was constitutionally protected from employer retaliation." (citation omitted)).

174. *Cohen v. California*, 403 U.S. 15, 16-17 (1971).

175. *See* 40 U.S.C. § 6135 ("It is unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display in the Building and grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement."); *see also* Hodge v. Talkin, 799 F.3d 1145, 1150 (D.C. Cir. 2015) (upholding against First Amendment challenge rule forbidding assemblages and displays on the Supreme Court portico because "[u]nder the lenient First Amendment standards applicable to nonpublic forums, the government can impose reasonable restrictions on speech as long as it refrains from suppressing particular viewpoints").

have the right to say it on a public-school field trip.<sup>176</sup> The law deals with the context-sensitivity of the First Amendment through forum analysis. This way of thinking covers both fora in the traditional sense (streets, parks, sidewalks, candidate forums) and in the “metaphysical” sense (government reimbursement programs, funding systems, and subsidies).<sup>177</sup> Fora come in at least three types with at least three different sets of corresponding rules for what the government can regulate within them.

First, there is the public forum. A public forum can be “traditional” or “designated.” Traditional public fora are places, such as “streets and parks,”<sup>178</sup> that “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>179</sup> The government may not close these places to speech,<sup>180</sup> and may not in such places regulate protected speech—that is, speech that falls outside of the categories of *un*protected speech, such as libel, true threats, obscenity, and incitement—based on its content absent a compelling reason to do so.<sup>181</sup> Designated public fora are places that the government has chosen to open to speech. Once it has done so, it must treat the forum just like a traditional public forum, except that it may close the forum.<sup>182</sup>

Second, there is the limited public forum. “[W]hen the government intends to grant only ‘selective access,’ by imposing either speaker-based or subject-matter limitations [on a forum when created], it has created a limited public forum.”<sup>183</sup> Within a limited public forum, the government may regulate speech based on its content so long as that regulation is reasonably germane to the purposes of the forum and so long as that regulation is clear and objective.<sup>184</sup> The rules may not be based on “viewpoint.”<sup>185</sup> Excluding all speech on the Israeli-Palestinian conflict is content discrimination;<sup>186</sup> excluding only racist speech but not anti-racist speech is viewpoint discrimination.<sup>187</sup>

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176. *Morse v. Frederick*, 551 U.S. 393, 397, 404-05 (2007).

177. *E.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995).

178. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

179. *Hague v. Cong. of Indus. Orgs.*, 307 U.S. 496, 515 (1939).

180. *Id.* at 515-16.

181. *Id.*

182. *See Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677-78 (1998) (describing designated public forums); *see also Seattle Mideast Awareness Campaign v. King County (SeaMAC)*, 781 F.3d 489, 496 (9th Cir. 2015).

183. *SeaMAC*, 781 F.3d at 497.

184. *Id.* at 499.

185. *Id.* at 501.

186. *See id.* at 502.

187. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

Finally, there is the non-public forum. This is a place that the government does not open to citizen speech at all. Within this sort of place, the government may engage in viewpoint discrimination of the speech it does permit—or does not.<sup>188</sup> This category often blends into the “government speech” doctrine, which holds that the government may itself speak and that it does so unburdened by the First Amendment altogether.<sup>189</sup> The government, for example, promotes smoking cessation through the National Institutes of Health to the exclusion of conflicting viewpoints.<sup>190</sup> When the government speaks, it may say what it wishes.

In *Velazquez*, the Court treated the LSC funding scheme at issue as akin to, if not exactly the same as, a “metaphysical” limited-purpose forum.<sup>191</sup> The *Velazquez* Court held that in-court advocacy which would result in retaliation within the funding scheme of the Legal Services Corporation states a constitutional claim.<sup>192</sup> Under *Velazquez* and the cases discussed above, then, a courtroom is a (perhaps strictly) limited public forum. The Supreme Court’s subsequent caselaw confirms this reading. In *Lane v. Franks*, a public employee was fired for truthful testimony in court in an investigation of his boss.<sup>193</sup> The Supreme Court held that the employee’s speech was protected from retaliation.<sup>194</sup> If that is true, then some place in the courtroom, a fortiori, is a forum of some kind. Otherwise the plaintiff would not be protected from any consequences visited on him for his testimony, let alone from workplace retaliation.

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188. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

189. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245-46 (2015).

190. *Quitting Smoking*, NAT’L CTR. FOR COMPLEMENTARY & INTEGRATIVE HEALTH (Nov. 15, 2017), <https://perma.cc/R2RZ-XC99>.

191. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543-44 (2001). Here’s what the Court wrote:

When the government creates a limited forum for speech, certain restrictions may be necessary to define the limits and purposes of the program. *Perry Ed. Assn.*, 460 U.S. 37 (1983); see also *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993). The same is true when the government establishes a subsidy for specified ends. *Rust v. Sullivan*, 500 U.S. 173 (1991). As this suit involves a subsidy, limited forum cases such as *Perry*, *Lamb’s Chapel*, and *Rosenberger* may not be controlling in a strict sense, yet they do provide some instruction.

*Id.* The citation to *Rosenberger* here is probably wrong. That case concerned a program at the University of Virginia allowing student groups to seek reimbursement for expenses, including printing costs. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 821 (1995). If that was a “forum case,” *Velazquez* must be one too. However murky its reasoning, the Court functionally treated the funding scheme at issue in *Velazquez* as a forum for speech.

192. *Velazquez*, 531 U.S. at 548-49.

193. 573 U.S. 228, 238 (2014).

194. *Id.*

The question, then, isn't whether the courtroom is a forum but instead what kind of regulations are permissible within it. The permissible purposes for limiting speech in the courtroom are myriad and longstanding,<sup>195</sup> but they are not unlimited.<sup>196</sup> Does a judge violate the First Amendment when she limits a particular line of inquiry on cross-examination? I would think the judge usually does not. But tricky questions will inevitably arise. What about forbidding a lawyer defending someone who murdered an abortion provider from arguing that his client has a justification defense?<sup>197</sup> Whenever judges make distinctions about what is "prejudicial" and what is "probative"<sup>198</sup>—the race of the victim? the race of the defendant? the police officer's views on race? the police officer's views on Donald Trump?—judges are making content-based distinctions, and sometimes viewpoint-based ones. But in all cases they *should be* making those decisions so that they are conducive to the purpose of the courtroom: seeking an accurate outcome and a just result. If a judge limits cross-examination on a topic because it is likely to expose embarrassing, but otherwise properly admissible, details of a political ally's personal life, I think that violates the First Amendment rights of the examining lawyer. If the judge limits cross-examination on a topic because it is likely to confuse or misdirect the jury, I think that does not violate the First Amendment right of the examining lawyer.

Criminal defense attorneys might suffer retaliation for many different varieties of in-court advocacy,<sup>199</sup> as discussed above in Part II. The key question for retaliation cases will be whether the putative retaliator is acting against the attorney for reasons that are reasonably germane to the purpose of a courtroom. Examining courts will give judges very broad latitude here, but under *Velazquez* that latitude is not infinite. The courtroom is a public forum, and the First Amendment protects what attorneys say there.

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195. See John Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437 (1904) (discussing the early common law of evidence and the many categories of evidence it forbade); Kathleen Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 569 (1998) ("Rules of evidence and procedure, bans on revealing grand jury testimony, page limits in briefs, and sanctions for frivolous pleadings, to name a few, are examples of speech limitations that are widely accepted as functional necessities in the administration of justice, much like rules of order in a town meeting.").

196. E.g., Michael Kagan, *The Public Defender's Pin: Untangling Free Speech Regulation in the Courtroom*, 111 NW. U. L. REV. 125, 126 (2017).

197. *Id.* at 130-31 (discussing case holding that the First Amendment does not limit the judge's actions in those circumstances); *Zal v. Steppe*, 968 F.2d 924, 936 (9th Cir. 1992) (denying habeas petition by attorney held in contempt for violating trial court's in limine ruling in abortion protester case).

198. FED. R. EVID. 403.

199. I count paper motions as "in-court" for this purpose.

## 2. Attorneys as citizens

To be protected from retaliation, speech must be made (1) as a citizen (rather than “pursuant to official responsibilities”) and (2) on a matter of public concern (rather than on, say, an internal personnel matter).<sup>200</sup> Speech “as a citizen,” in this context, refers to speech made by a government employee *not* in her capacity as a government employee.<sup>201</sup>

The second question is easy here. The advocacy that implicates problems of defense independence will almost certainly be on matters of public concern: the government’s compliance with the constitutional rights of criminal defendants, or the factual accuracy of criminal charges.

For at least some kinds of speech, the first question is easy too. When an attorney writes an op-ed, above her own signature and in her personal capacity, she is almost certainly speaking as a citizen, not a government employee, even though her speech may be “related to” her job.<sup>202</sup> The more interesting question involves speech in court. When attorneys appointed by the state speak on behalf of a client, they do not speak pursuant to official duties within the meaning of First Amendment doctrine. This is because, I argue, constitutional law has long recognized public defenders as constitutionally unique, independent actors, and the Supreme Court’s retaliation doctrine is concerned about the government’s ability to control its own speech, not the speech of independent actors.

In *Garcetti v. Ceballos*,<sup>203</sup> the Supreme Court considered a lawsuit by an assistant district attorney claiming that he was retaliated against because he submitted a memo challenging the factual accuracy of a warrant affidavit in a criminal case on his docket.<sup>204</sup> The Court held that because state employers must be able to control the speech of their employees, the employees may not state retaliation claims if they are punished for speech made “pursuant to his official duties.”<sup>205</sup> The Court held that the assistant district attorney submitted the memo pursuant to official duties and, therefore, that his claim failed.<sup>206</sup> But when attorneys appointed by the state are advocating on behalf of individual clients, they are not even state actors, and therefore cannot be speaking pursuant to official duties within the meaning of *Garcetti*.

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200. *Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006).

201. *Id.* at 418.

202. *Lane v. Franks*, 573 U.S. 228, 236 (2014) (explaining that speech is protected from retaliation even when it is “related to . . . public employment”).

203. *Garcetti*, 547 U.S. at 410.

204. *Id.* at 414-15.

205. *Id.* at 411.

206. *Id.* at 421.

The constitutionally unique status of public defenders in this context highlights the centrality of defense independence. When defense attorneys appointed by the state (be they public defenders or individual practitioners) advocate on behalf of their clients, they are not state actors.<sup>207</sup> The Supreme Court articulated this rule in the context of cases in which criminal defendants sued their state-appointed lawyers (and the counties they worked for) for malpractice.<sup>208</sup> The Court held that clients may not sue their lawyers under Section 1983 where the lawyers' performance is ineffective under the Sixth Amendment.<sup>209</sup> Public defenders, the Court concluded, must "be free of state control."<sup>210</sup> This conclusion stems from the Court's conclusion in another case that "an indispensable element of the effective performance of [the defense function] is the ability to act independently of the Government and to oppose it in adversary litigation."<sup>211</sup> The Court has recognized throughout these cases that public defenders are constitutionally unique: A service that the state must provide (albeit only when it chooses to prosecute someone) but that the state may not constitutionally control.<sup>212</sup>

*Garcetti* is a case about government speech.<sup>213</sup> In *Garcetti*, the Supreme Court disallowed retaliation claims based on government speech because they undermine the purpose of the government-speech doctrine: when the

207. *Polk County v. Dodson*, 454 U.S. 312, 318-19 (1981); *see also* *Georgia v. McCollum*, 505 U.S. 42, 54 (1992) (distinguishing *Polk County* and holding that defendants who strike jurors on racially discriminatory grounds are state actors, and explaining that "*Polk County* did not hold that the adversarial relationship of a public defender with the State precludes a finding of state action—it held that this adversarial relationship prevented the attorney's public employment from alone being sufficient to support a finding of state action . . . [;] the determination whether a public defender is a state actor for a particular purpose depends on the nature and context of the function he is performing").

208. *Polk County*, 454 U.S. at 314-15, 318-19.

209. *Id.* at 326; *see also* *West v. Atkins*, 487 U.S. 42, 49 (1988) ("In *Lugar v. Edmondson Oil Co.*, the Court made clear that if a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, 'that conduct [is] also action under color of state law and will support a suit under § 1983.'" (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 933 (1982))).

210. *Polk County*, 454 U.S. at 322.

211. *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979).

212. *Compare* *Gideon v. Wainwright*, 372 U.S. 335 (1963) (state must provide appointed counsel to defendants charged with felonies), *with Polk County*, 454 U.S. at 451 ("[I]t is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages.").

213. *See, e.g.,* *W.V. Ass'n of Club Owners & Fraternal Servs. v. Musgrave*, 553 F.3d 292, 299 (4th Cir. 2009) (interpreting *Garcetti v. Ceballos*, 547 U.S. 410 (2006), as "holding that speech made by government employee pursuant to official duties is government speech").

government speaks it may say what it wishes.<sup>214</sup> Because the government can speak only through its employees, allowing those employees to sue the government for things that they were ordered (or forbidden) to say would make it impossible for the government to speak.<sup>215</sup>

*Polk County* is a case about government control. In *Polk County*, the Court held that a public defender was not a state actor when sued for malpractice because she must “be free of state control.”<sup>216</sup> That freedom means that appointed counsel’s actions cannot be attributed to the government.<sup>217</sup> Indeed the *Velazquez* Court understood that *Polk County* stands for the proposition that appointed lawyers cannot speak for the government in court.<sup>218</sup> And *Garcetti* rested on the principle that “[o]fficial communications have official consequences.”<sup>219</sup> Because non-state actors cannot create official consequences, *Garcetti* cannot apply to non-state actors.

All this means that *Garcetti* cannot bar claims by public defenders based on their in-court conduct. This is because *Garcetti* should be read as a case about whether speech is protected *full stop*, not whether speech is protected from retaliation. *Garcetti* operates as a short-circuit to the entire retaliation analysis: courts don’t even need to ask whether the speech was on a matter of public concern and don’t even need to ask whether its benefits outweigh its burdens because speech pursuant to official duties is not protected speech at all. Reading *Garcetti* together with *Polk County* reveals that the Constitution already recognizes the importance of defense independence.

### 3. The range of adverse actions against attorneys

As discussed in Part II, when defense lawyers advocate for their clients, sometimes bad things happen to the lawyers, and sometimes bad things happen to their other clients. What sorts of bad things give rise to a First Amendment claim? Again, some examples make for easy cases. Where a defense attorney is fully removed from his cases by the judge before whom he practices, he states a

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214. *Garcetti*, 547 U.S. at 422.

215. *E.g., id.* at 422 (holding that speech pursuant to official duties “simply reflects the exercise of employer control over what the employer itself has commissioned or created”).

216. *Polk County*, 454 U.S. at 321.

217. *Id.*

218. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001) (“The LSC lawyer, however, speaks on the behalf of his or her private, indigent client. Cf. *Polk County v. Dodson*, 454 U.S. 312, 321-22 (1981) (holding that a public defender does not act ‘under color of state law’ because . . . there is an ‘assumption that counsel will be free of state control’).”).

219. *Garcetti*, 547 U.S. at 422.

retaliation claim.<sup>220</sup> When a chief public defender is fired because he filed a class-action complaint on behalf of his clients alleging that the county in which he practices failed to fund his office adequately, he states a retaliation claim.<sup>221</sup> And, generally, when a government official takes adverse action directly<sup>222</sup> against the attorney, the adverse-action prong of a retaliation claim should be uncontroversial.

The tricky cases come up when a judge or prosecutor takes action against an attorney's *other clients* because of the attorney's protected advocacy. These kinds of adverse actions will often create conflicts of interest that violate the Sixth Amendment, discussed below. But assuming that an attorney can prove that a judge or prosecutor took adverse action against her clients because of her earlier advocacy on behalf of other clients, she also states a retaliation claim, at least in some circumstances.

The easiest such circumstances involve private attorneys. Consider a lawyer who advocates vigorously in a case and is then blacklisted, as I use the term above. Who would want to retain that lawyer, knowing that doing so would preclude a good plea bargain? The lawyer, then, suffers a loss of business because the prosecutor has taken action against her that was motivated by her protected speech. Consider next David Anderson, who was told by a judge that his future clients would suffer the consequences of his advocacy for their predecessors.<sup>223</sup> Although Anderson did not need to worry about his future business per se because he was a public defender, had he been fired for his (faultless) inability to advocate for his clients, he could state a retaliation claim against the judge. And, at root, he has an interest in fulfilling his constitutionally required mission.<sup>224</sup> That interest is inhibited by the judges' actions here. So, although the many nuanced questions discussed above arise here too—is it okay for judges to be more skeptical of attorneys who raise every single non-frivolous argument every time? for prosecutors to bargain more stiffly with an attorney who constantly criticizes them in public?<sup>225</sup>—at least some attorneys can state First Amendment–retaliation claims based on adverse treatment of their clients.

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220. Willey v. Ewing, No. 3:18-CV-00081, 2018 WL 7115180, at \*6 (S.D. Tex. Dec. 17, 2018), *report and recommendation adopted*, 2019 WL 313432 (S.D. Tex. Jan. 24, 2019).

221. Flora v. County of Luzerne, 776 F.3d 169, 173, 180 (3d Cir. 2015).

222. By “directly,” I mean taking action against the lawyer’s legal status, not the legal status of his clients.

223. Telephone interview with David Anderson, *supra* note 70.

224. *Cf.* Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) (holding that organization had standing to challenge practices that required it to divert resources from its chosen mission).

225. See Taylor-Thompson, *supra* note 74.

#### 4. The social benefit and workplace cost of non-frivolous argument

The final step of the retaliation analysis is to determine whether the value of the attorney's speech outweighs its disruptive capacity in the workplace, as the Court explained in *Pickering*.<sup>226</sup> Here, as in many *Pickering* cases,<sup>227</sup> the relative value and capacity for disruption of speech will usually be conclusively determined by its accuracy: if the speech at issue is a meritorious legal argument in a criminal case, it will necessarily show that the government is doing something *wrong*, and so its value will be high; and because it is showing that the government is doing something wrong, it cannot disrupt the *proper*<sup>228</sup> functioning of the government's mission in the criminal system, which is of course to prosecute according to law and not otherwise. The same analysis should apply to incorrect but non-frivolous arguments. Although those arguments may not show that the government was doing something wrong, those arguments will still be valuable to the court (otherwise they would be frivolous), so their benefits should be high and their costs low.

#### D. Judicial-Executive Incompatibility

A specific set of judicial-interference problems violate the Constitution's prohibition on judges having executive control over money generated in their courtrooms. Whenever judges appoint attorneys to represent indigent defendants, control the funding for those appointments, and also control the money from which the appointment funding is drawn, the judges violate the Constitution's rule of judicial-executive incompatibility.

In two cases in the 1920s, the Supreme Court considered when the

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226. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). I think *Pickering*'s balancing approach is conceptually incoherent—saying that the value of an attorney's speech outweighs its capacity to disrupt the interests of a workplace sounds to me like saying that red is heavier than nine—and that what *Pickering* cases really do is ask *why* the defendant took adverse action against the plaintiff. If that reason is reasonably related to the proper functioning of the defendant's workplace, the defendant wins; if not, the defendant loses. See, e.g., Don Herzog, *First Amendment Lectures at the University of Michigan Law School*, Spring 2013 (notes on file with author). But you do not need to agree with me to agree that *Pickering* is easy in this context.

227. See, e.g., *Jackler v. Byrne*, 658 F.3d 225, 242 (2d Cir. 2011) (emphasizing that defendants must protect the "'proper performance of governmental functions'" (emphasis in original) (internal quotation marks omitted) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006)); *Brawner v. City of Richardson*, 855 F.2d 187, 192 (5th Cir. 1988) (holding that employee's "statements could not have adversely affected the proper functioning of the department since the statements were made for the very reason that the department was not functioning properly").

228. See *Jackler*, 658 F.3d at 242.

institutional relationship between a judge's role as an arbiter of an individual case and her role as a public official with control over the funds collected in that case create a constitutional violation.<sup>229</sup> Both cases concerned Ohio's "mayor's courts," in which small-town mayors would preside over cases for fines.<sup>230</sup> In *Tumey v. Ohio*, the Supreme Court invalidated an Ohio law that provided for trial before a village mayor who could levy fines that would be used in part to cover his "fees and costs."<sup>231</sup> The Court held this unconstitutional "both because of [the mayor's] direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village."<sup>232</sup> In *Dugan v. Ohio*, the Court confronted another Ohio municipality in which defendants were tried before a mayor who could levy fines that went into the municipality's general fund.<sup>233</sup> But in *Dugan*, the mayor's relationship to the money collected was not executive. Although he was one of five members of the city commission that voted on how to use the fund, the mayor "ha[d] himself as such no executive, but only judicial, duties."<sup>234</sup> His "relation under the [municipality's] charter . . . to the fund contributed to by his fines as judge, or to the executive or financial policy of the city," the Court explained, "is remote."<sup>235</sup> The Court therefore held the *Dugan* scheme constitutional.<sup>236</sup>

In *Ward v. Village of Monroeville*, the Court reconciled *Tumey* and *Dugan*, and created a test to determine when institutional financial conflicts of interest violate the constitution.<sup>237</sup> First, the Court made clear that the test does *not* require that the judge "shared directly in the fees and costs" collected in his court.<sup>238</sup> "The test," the Court wrote,

is whether the mayor's situation is one which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused. Plainly that possible temptation may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court. This, too, is a situation in which an

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229. Compare *Tumey v. Ohio*, 273 U.S. 510 (1927), with *Dugan v. Ohio*, 277 U.S. 61 (1928).

230. Compare *Tumey*, 273 U.S. 510, with *Dugan*, 277 U.S. 61.

231. *Tumey*, 273 U.S. at 511.

232. *Id.* at 535 (emphasis added).

233. *Dugan*, 277 U.S. at 61.

234. *Id.* at 65.

235. *Id.*

236. *Id.*

237. 409 U.S. 57, 60 (1972).

238. *Id.*

official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, and necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.<sup>239</sup>

The core question, then, is whether judges who generate the revenue exercise “executive responsibilities” over its use.<sup>240</sup> If they do, the arrangement is unconstitutional.

In *Tumey* and *Ward*, the Court invalidated schemes under which judges exercised executive authority over money *collected* in their courts.<sup>241</sup> In a regime of judicial appointment of counsel, judges may exercise executive authority over money *spent* in their courts. In some jurisdictions, the counsel-appointing judges may have complete executive control over the money from which counsel is paid and are also tasked with determining whether counsel is adequately funded to satisfy the Sixth Amendment.<sup>242</sup> In many of these places, judges also must approve expenditures for investigators, social workers, and experts.<sup>243</sup> And these judges are always tasked with trying cases and approving guilty pleas. These arrangements, then, violate the *Tumey-Ward* rule, but in reverse. Judges have an institutional financial interest in encouraging defendants to plead guilty, in discouraging lengthy legal arguments, and in retaining underpaid and incompetent counsel, because the money spent on those things comes out of the judges’ executive till.<sup>244</sup>

The Supreme Court’s due process jurisprudence has birthed another line of judicial-executive incompatibility cases. Starting with *In re Murchison*, in which the Court invalidated a trial conducted by a judge who had served as a one-man grand jury in the same case,<sup>245</sup> the Court has consistently invalidated any scheme under which the executive and judicial power are exercised by the same person in the same case. In *Williams v. Pennsylvania*, the Court struck down a decision of the Pennsylvania Supreme Court on the timeliness of a

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239. *Id.* (internal quotation marks, citations, and alterations omitted).

240. *Id.*

241. *Tumey v. Ohio*, 273 U.S. 510, 535 (1927); *Ward*, 409 U.S. at 58.

242. Patton, *supra* note 55.

243. See SIXTH AMENDMENT CTR., TEXAS, *supra* note 31.

244. A person challenging a regime such as this one would have to show that the amounts spent were substantial relative to the overall budget of the court. See, e.g., *DePiero v. City of Macedonia*, 180 F.3d 770, 780 (6th Cir. 1999) (declaring that where revenue collected from fines “apparently amounted to approximately two percent of the general fund . . . [w]e see no need to split hairs over what is a ‘substantial’ figure . . . if the mayor’s executive authority and administrative responsibilities preclude him from serving as a neutral and detached decision maker”); *Rose v. Vill. of Peninsula*, 875 F. Supp. 442, 451 (N.D. Ohio 1995) (“[I]t is manifest that an annual collection of funds in excess of \$50,000, and which amount to over 10% of the Village of Peninsula’s general fund, are ‘substantial.’”).

245. 349 U.S. 133, 137 (1955).

habeas petition because one of the judges on the court had served 30 years earlier as district attorney in the underlying criminal case and had written “Approved to proceed on the death penalty” at the bottom of a memo.<sup>246</sup> Circumstances in which courts are tasked with approving the individual expenditures of defense counsel—for experts, social workers, investigators, and the like—could conceivably run afoul of this rule by too thoroughly involving the court in the conduct of the defense.

In prior Subparts, I’ve argued that ongoing institutional relationships between defense attorneys and adverse criminal-system actors create conflicts of interest that burden the defense attorney. In this Subpart, I’ve argued that those conflicts create conflicts of interest for the bench as well. The rule of judicial-executive incompatibility exists to protect the adjudication process from unfair influences on the bench. Responsibility for the funding and conduct of defense attorneys is one such unconstitutional influence.

#### IV. RESISTING THREATS TO INDEPENDENCE

In this Part, I sketch two structural reforms aimed at vindicating the constitutional principles for which I argued above and giving defense attorneys power to fight back against the violation of their clients’ rights. The core of these reforms is the principle of collective action. Acting alone, defense attorneys lack the power to resist threats to their independence and to their clients’ rights; together, they have that power. To harness it, I propose the creation of (more) politically independent, institutionalized public-defense offices to replace appointed-counsel systems. I further discuss the prospect of collective defense decision-making.

Consider again the familiar tragedy of American criminal procedure in which elaborate procedural rights go un-vindicated because counsel cannot

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246. 136 S. Ct. 1899, 1903, 1908-09 (2016). In *Williams*, the Court noted that the prosecutor-turned-justice, “Chief Justice Castille[,] denounced what he perceived as the ‘obstructionist anti-death penalty agenda’ of Williams’s attorneys from the Federal Community Defender Office. . . . [C]ourts ‘throughout Pennsylvania need to be vigilant and circumspect when it comes to the activities of this particular advocacy group,’ he wrote, lest Defender Office lawyers turn postconviction proceedings ‘into a circus where [they] are the ringmasters, with their parrots and puppets as a sideshow.’” *Id.* at 1905 (citation omitted). Meanwhile, the Court noted, “Chief Justice Castille’s own comments while running for judicial office refute the Commonwealth’s claim that he played a mere ministerial role in capital sentencing decisions. During the chief justice’s election campaign, multiple news outlets reported his statement that he ‘sent 45 people to death rows’ as district attorney.” *Id.* at 1907 (citation omitted). Although actual bias is unnecessary for a due process claim in this context, the Court’s opinion suggests that it had reason to believe Chief Justice Castille was not considering this case in the dispassionate, disinterested manner required by the Constitution.

vindicate them. Now imagine defenders attempting to fight back against that tragedy. Individual action in the face of that problem is limited. For one thing, most indigent-defense attorneys<sup>247</sup> do not have the time or resources to fight back in all but a few of their many cases. And, as described above, if an individual defender appointed by the bench or the prosecution tries to rock the boat too hard, the system may replace her with someone who does not. Purely individual action, then, is incapable of putting pressure on the criminal system in a way that will break its worst practices because even if individual defenders could vindicate the rights of individual clients, defenders cannot—unless they act together—vindicate the rights of all of their clients.<sup>248</sup>

To put this in context, imagine a public defender's office resolves to challenge the money-bail system systematically. To do this, its attorneys will have to vigorously argue for the release of its indigent clients by demanding hearings, evidence, and ultimately pretrial release. This slows down dockets for judges and makes it more difficult for prosecutors to extract guilty pleas. In part that is why such challenges can be effective. Defendants' procedural rights serve many purposes, but whatever else they do, they usually slow down the machinery of the state, and therefore have a first order decarceral effect. Therefore, if defenders take concerted actions to slow the system down—which, as I discuss below, they must do if they want to vindicate their clients' rights—they should expect the system to fight back. In this Part I begin to answer the question of what they need to resist that pressure and maintain the fight against their clients' jailing.

#### A. Institutions

The first way attorneys can act together to resist violations of their clients' rights is through institutionalized offices. Existing scholarship supports the superiority of stable institutional defense offices,<sup>249</sup> and scholars have noted that institutional defenders are capable of collective resistance to prosecutors in

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247. This reasoning does not necessarily apply to the paid defense bar, at least not the well-paid defense bar. Paid defense attorneys may have the resources to fight back against certain unconstitutional practices, and, at least sometimes, the effects of that fighting may benefit indigent defendants too. *See* Rappaport, *supra* note 148, at 151-52.

248. A brief clarification of what I mean by "act together" might be necessary at this point, even though I go into more detail below. A system of appointed counsel *that is managed by an independent advocate* may be fully capable of the kinds of advocacy I am discussing here. The issue I identify comes up only when appointed counsel are restricted by a criminal-system actor whose interests are adverse to those of the attorneys' clients. So, I am not ruling out the prospect that appointed counsel systems can function fully well, particularly when they are administered in concert with a public defender's office.

249. *See, e.g.,* Brensike Primus, *supra* note 19, at 1809.

ways that individual attorneys are not.<sup>250</sup> These institutions can defend against the practices I described above and support the ones I describe below.

Public-defense institutions create cultures.<sup>251</sup> And those cultures can nurture client-centered, progressive approaches to defense representation (just as, of course, they can nurture opposite approaches<sup>252</sup>). If nothing else, institutionalized public-defense offices can encourage defense attorneys to vindicate their clients' rights and can foster an environment in which threats to independence are not tolerated. People in institutions can protect each other, and, generally speaking, tend to protect the institution itself.<sup>253</sup> An institutional defense office, through training its attorneys and fostering their advocacy, can institute policies challenging illegal practices visited on their clients.

A would-be objector might ask: if the same institution represents a greater share of the defendants in a given jurisdiction, doesn't that institution become more likely to subordinate the interests of each individual client to the interests of the client population at large?<sup>254</sup> Institutions, one might think, are even more concerned about their long-term reputations than individual attorneys are, so perhaps institutionalizing public defense would make problems of dependency worse, not better. This is a valid concern in theory, but the examples described throughout this Article show that, in practice, the benefits of the power gained from collective action will probably outweigh the, at worst, marginal increase in the tendency of lawyers to subordinate their clients' interests. Appointed counsel suffer from severe dependency across the board. Institutionalized offices might confront the same problem, but at least they can do something about it.

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250. Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners' (Plea Bargain) Dilemma*, 1 J. LEGAL ANALYSIS 737, 765 (2009) ("Finally, even if public defenders somehow managed to unite defendants and organize them to overcome their collective action problem, it is not likely that this success would be long-lived. The public defender's office is set up and funded by the state. If it is too successful—if it forces the hand of prosecutors or organizes effective plea bargain strikes—the state can replace this system with a different one. For example, the state can contract out the representation of defendants to individual outside attorneys. By scattering representation across dispersed providers, coordination becomes impossible. The state, in other words, can influence the 'contracts' between defendants and their attorneys to ensure that the collective action problem remains in place.").

251. Brensike Primus, *supra* note 19, at 1809; Rapping, *supra* note 37, at 201-02.

252. Rapping, *supra* note 37, at 185-87 (discussing pre-Katrina New Orleans public defense culture).

253. *Cf.*, e.g., MAX WEBER, *ESSAYS IN SOCIOLOGY* 228-29 (H.H. Gerth & C. Wright Mills, eds. & trans., 2009).

254. *Cf.* United States *ex rel.* McCoy v. Rundle, 419 F.2d 118, 120 (3d Cir. 1969) ("The desire to appease an indignant trial judge who has already inflicted what seem excessively harsh sentences is magnified where an institutional law office represents many other defendants and is under pressure to subordinate the individual rights of one to the larger good of all.").

Ensuring that these institutions are politically independent can bring up familiar problems of institutional design. The state is at root responsible for the provision of indigent-defense services and cannot totally divorce itself from the question of how those services are provided. A broader question concerns exactly how to structure these institutions to ensure independence while maintaining accountability to the communities the institutions are meant to serve, but I will not address that question here; suffice it to note that there are several models available. Institutions governed by a mandated diversity of professionals—some of whom are elected, and some of whom are appointed—seem effective.<sup>255</sup> Some jurisdictions elect their public defenders, too.<sup>256</sup>

### B. Collective Action

Defenders in institutional offices can take collective action to protect their clients' rights, and I think (in some circumstances) that they should. In this final Subpart, I discuss the ethics and practice of collective public-defense action, canvass some of the options for implementing such action, and explain how collective action relates to the broader question of independence in an adversarial system. Above, I argued that the repeat-player structure of the criminal system gives prosecutors and judges the power to control defense attorneys by threatening adverse consequences across cases. That repeat-player structure also allows defense attorneys to do the same, but only if they have sufficient power.

The would-be objector chimes in again: How can independent counsel act collectively? Wouldn't such action necessarily subordinate the interests of individual clients to those of the group as a whole? Collective action in the public-defense context raises ethical questions familiar in the public-defense literature. When, if ever, is it ethically acceptable to take actions with the goal of reforming institutions, given that (at least in the classical understanding) public defenders' only duty is to their individual clients?<sup>257</sup>

This debate is often hashed out in the context of a plea-bargain strike. If the criminal system relies on guilty pleas—that is, on the ostensible cooperation of those it seeks to incarcerate—what will happen if defendants refuse to plead

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255. See, e.g., Brensike Primus, *supra* note 19, at 1809 (explaining as an example of a potentially independent structure that “[t]he Defender Association of Philadelphia, for example, has a Board composed of three groups of directors chosen by three different constituencies—the city government, the organized bar, and the community”).

256. E.g., FLA. CONST. art. V, § 18; FLA. STAT. ANN. § 27.50 (West 2018).

257. See, e.g., Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES, Mar. 11, 2012, at SR3; see also Charlie Gerstein, *The Prisoner's Lawyer's Dilemma*, 32 CRIM. JUST. 1, 33 (2017); Leonetti, *supra* note 64, at 387; Taylor-Thompson, *supra* note 74.

guilty en masse? On one side of this debate, some say that advising clients not to plead guilty for the purpose of forcing systemic change is necessarily unethical;<sup>258</sup> on the other side of this debate, some say that doing so is not necessarily unethical, either because part of a defender's appropriate role is in fact systemic,<sup>259</sup> or because in certain circumstances individual interests are all served by collective action.<sup>260</sup> Others contend that a plea-bargain strike cannot succeed as a game-theory matter because prosecutors have a responsive strategy that will prevail.<sup>261</sup> The debate about the ethics of plea-bargain striking ultimately collapses into a debate about its practical efficacy. If strikes would be in the interests of all of an attorney's would-be clients, it is difficult to see a professional-responsibility problem with them.<sup>262</sup> The question is when, if ever, a strike would be in clients' long-term interests. In my view, the answer is at least sometimes.<sup>263</sup>

But plea-bargain strikes are not the only options here. Merely asking *in every case* for the procedures to which defendants are entitled may alone frustrate the criminal system's worst practices.<sup>264</sup> In the bail example discussed at the start of this Article, that would mean insisting that every client be released pretrial unless the state proves, at a "full-blown adversary hearing,"<sup>265</sup> by clear and convincing evidence, that he poses an immitigable risk of flight or danger to the community.<sup>266</sup> When trial judges fail to hold such hearings or hear such proof, that means appealing in every case. There is evidence that this works.<sup>267</sup>

And when judges and prosecutors violate clients' rights, defenders can use

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258. Leonetti, *supra* note 64, at 387.

259. Taylor-Thompson, *supra* note 74, at 2450-51.

260. Gerstein, *supra* note 257.

261. See Oren Bar-Gill & Omri Ben-Shahar, *The Prisoner's (Plea Bargain) Dilemma*, 1 J.L. ANALYSIS 737, 769 (2009); see also Gerstein, *supra* note 257.

262. See Gerstein, *supra* note 257.

263. *Id.*

264. *E.g.*, Leonetti, *supra* note 64, at 378 ("You make an objection or file a motion or otherwise protest [an] illegal practice. If you are lucky, the illegal practice ends. It might work because the judge recognizes that your argument is well reasoned and researched, but probably not. More likely it will work the hundredth time because the judges eventually figure out that you are going to keep pestering them (making objections, slowing down dockets, filing motions, setting up appeals) until they change their practice, and it becomes easier to change the practice than to deal with your hectoring.").

265. United States v. Salerno, 481 U.S. 739, 750 (1987).

266. See *supra* note 3.

267. Cf. Alena Yarmosky, THE IMPACT OF EARLY REPRESENTATION: AN ANALYSIS OF THE SAN FRANCISCO PUBLIC DEFENDER'S PRE-TRIAL RELEASE UNIT, <https://perma.cc/J6DU-MNW6> (discussing impact of San Francisco public defender's aggressive pretrial representation).

their roles as repeat players to exert pressure, just as judges and prosecutors do. The criminal system is chock full of generally meaningless formalities that defendants routinely waive.<sup>268</sup> Sometimes defense attorneys waive these formalities for strategic reasons, but often defense attorneys waive them because they seem to be of little value and no one has ever asserted a right to them before.<sup>269</sup> Every time a defender waives a meaningless formality, though, she allows the system to move a little bit faster. Defenders as a group could threaten to do otherwise.<sup>270</sup> Defenders could insist on, say, full reading of the charges in every case, or they could refuse to stipulate to facts. By slowing down the system, defenders may force it to respect their clients' rights in other contexts. There is evidence that this, too, can work.<sup>271</sup>

In fact, in a system in which severely dependent counsel are the only representatives for a population of criminal defendants, almost any systematic violation of that population's rights can persist. If one attorney speaks up about the problem, she can be silenced. And if only one attorney ever speaks up, the system barely needs to silence her in the first place; judges and prosecutors can usually accommodate the protestations of one attorney, even though they clearly cannot accommodate the rights of the entire population. It is through this process that the unconstitutional money-bail system has detained hundreds of thousands of people per year, for forty or more years, without meaningful challenge.

#### CONCLUSION

In this Article, I argue that problems of defense independence violate the Constitution, that they render defense attorneys systematically incapable of fighting the criminal system's worst practices, and that the creation of independent institutions will help empower attorneys to fight back. But how does one go about creating institutions that are independent, without also rendering them non-responsive to the will of the people they represent? This is the question to which I alluded above, and I think it merits further scholarly

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268. *E.g.*, Leonetti, *supra* note 64, at 373.

269. *Id.* at 374-75 ("These waivers occur without reflection, to speed things along, and to further institutional relationships.").

270. *Id.* at 377-78, 387 (discussing concerted action by a single defender to pressure a judge to follow the constitution and noting "[the] pressure to make it easier and more efficient for prosecutors and judges to convict and sentence your clients is unrelenting. But there is an upside. The system relies on you to do it.").

271. *Id.* at 375 n.11 ("In my experience, defense attorneys who play along do not get good deals. Prosecutors do not make plea offers because they like you. They make plea offers because they fear you (if not your brilliance, then at least your power to make them work nights and weekends).").

exploration. The question will ultimately be one of political theory: how can a society best structure its institutions to protect the rights of a vulnerable minority? Prior scholarship has assumed that the American political system is more-or-less always aligned against the rights of criminal defendants. On this assumption, electing public defenders seems like a terrible idea, and indeed there have been some troubling consequences in states that do elect public defenders. But I'm not sure that this assumption is fully valid—or, at least, that it will always be so. In a polity that is attuned to the problems of mass incarceration, it is not obvious that a democratically responsive public defender will be unable to protect the rights of criminal defendants. Indeed, in many places in this country, people affected by the criminal system (be they defendants, former defendants, or family members of defendants) are not a minority. Should they control who represents criminal defendants, and, indirectly, how they do so? I hope that in the future scholars will devote attention to this question, because the practical benefit of my argument in this Article depends on an answer to it.