DEFENSE LAWYERS AND THE SEPARATION OF POWERS

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Debates over the separation of powers in criminal law ignore defense lawyers. Prosecutors, judges, and legislators are the main focus. Scholars analyze the distribution of power between these three actors, as well as how they check—or fail to check—each other's authority. Meanwhile, scholars treat defense lawyers as merely representatives of their clients, not as government actors or policymakers. But this is an incomplete view. Modern defense lawyers exercise distinctive powers in the criminal justice system. They are also largely institutional insiders appointed by the state. One cannot understand the contours of power in an American criminal courthouse without knowing how its indigent defense system works.

This Article brings defense lawyers into the criminal law separation-of-powers debate. It proposes that we should understand defense counsel as exercising a sui generis "defense power," distinct from the traditional categories of legislative, judicial, and executive power. It then uses that more expansive view to develop three arguments: (1) Competent and assertive defense lawyers are necessary to, though not sufficient for, a robust dynamic of checks and balances in the criminal justice system. Effective defense lawyers help to limit prosecutorial and judicial power. That, in turn, protects important liberty interests and the rule of law. (2) Defense lawyers' effectiveness as a check depends, in significant part, on separation of powers questions. In particular, the political independence of defense lawyers is crucial. When defense lawyers are captured by other system actors, like judges or county governments, their ability to vigorously defend their clients is compromised. An effective defense power is thus largely contingent on institutional design—e.g. the choice between contract counsel, direct judicial appointment, a public defender's office, and other models. (3) Defense lawyers legitimately exercise collective power in the criminal justice system. They do so in a variety of ways—through litigation, work stoppage, vetoing judges, and other strategies. Such collective action is properly viewed in traditional Madisonian terms. Defense lawyers pursue their interests, and the interests of their clients, using their leverage within the system to counterbalance other actors.

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INTRODUCTION

The separation of powers is a foundational concept in American law. The basics are familiar to anyone who remembers high school civics. Constitutional authority is divided between three branches—legislative, executive, and judicial. Each branch has its own independent functions. The legislature enacts the laws, the executive enforces the laws, and the judiciary interprets the laws. The three branches also check and balance one another, seeking to limit each other's encroachments. This tripartite structure, in theory, is meant to preserve the rule of law and insure against dictatorial consolidations of power. James Madison's formulation is canonical: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny."[1]

The separation of powers is also a major topic in contemporary criminal law scholarship. There is a robust debate between separation-of-powers formalists and separation-of-powers functionalists over how the criminal justice system should be structured. Formalist scholars critique our system for failing to maintain clear distinctions between executive, judicial, and legislative authority.[2] They argue that many of the system's recent transformations—like the rise of plea bargaining, the creation of state and federal sentencing commissions, and the widespread use of criminal supervision—compromise the separation of powers. They also warn that by consolidating prosecutorial and adjudicative power into single agencies, most notably prosecutors' offices, we have undermined constitutional liberty interests and the rule of law. By contrast, functionalist scholars welcome the blending of criminal law powers between different government branches.[3] In their view, such blending creates more efficient and effective criminal justice institutions. And they question whether separation-of-powers formalism even protects liberty interests in the first place, given that all three branches share the same broad goal: efficient incarceration of criminals.

Defense lawyers are mostly missing from this debate. It is easy to

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[1] FEDERALIST no. 47 (1788).

[2] *See, e.g.*, Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 996 (2006); Carissa Byrne Hessick, *Separation of Powers Versus Checks and Balances in the Criminal Justice System: A Response to Professor Epps*, 74 VAND. L. REV. EN BANC 159 (2021); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001); Alexandra Natapoff, *Misdemeanor Declination: A Theory of Internal Separation of Powers*, 102 TEX. L. REV. 937 (2024).

[3] *See, e.g.*, Daniel Epps, *Checks and Balances in Criminal Law*, 74 VAND. L. REV. 1, 21 (2021); Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law*, 110 HARV. L. REV. 469 (1996); Gerard Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).

understand why. Defense lawyers are not traditionally seen as part of the state. Their job is to advise and advocate on behalf of specific clients charged with crimes. And they do not clearly map onto the legislative, executive, or judicial branch of the Madisonian schematic. From the conventional perspective, defense lawyers are not a branch of government. They are merely agents of the people that the criminal justice system processes.

Our goal here is to remedy this exclusion. Defense lawyers belong in the criminal law separation of powers debate. Defendants have exclusive authority to exercise certain distinctive rights that only they hold. These rights are found in the Constitution, statutes, rules of evidence, and other sources of law. They include the right to take a case to trial, pursue legal arguments outside of trial, appeal a conviction, and more. Collectively we refer to these rights as the "defense power." This power is distinct from (and often antagonistic to) legislative, prosecutorial, and judicial power. While the defense power is ultimately vested in defendants themselves, in practice it is nearly always exercised by defense lawyers. And, in our current system, the government appoints a significant majority of defense lawyers.[4] Since *Gideon v. Wainwright*, we have built a patchwork of different indigent defense models that provide lawyers to defendants who cannot afford them.[5] Because our criminal justice system mostly prosecutes poor people, these indigent-defense lawyers take the bulk of criminal cases.[6] Some work in public defenders' offices. Others take cases through contracts or judicial appointments. These lawyers are representatives of their clients' interests. But they are also repeat players who exercise bureaucratic power within the criminal court system.[7] Describing this institutional criminal defense bar in

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[4] *See* United States Courts, Criminal Justice Act: Protecting the Right to Counsel for 60 Years (2024), *available at* https://www.uscourts.gov/news/2024/08/15/criminal-justice-act-protecting-right-counsel-60-years ("Today, nearly 90 percent of federal criminal defendants are aided by lawyers, investigators, and experts paid for under the CJA."); CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES (2000) ("At felony case termination, court-appointed counsel represented 82% of State defendants in the 75 largest counties in 1996").

[5] Gideon v. Wainwright, 372 U.S. 335 (1963); *see* Irene O. Joe, *Structuring the Public Defender*, 106 IOWA L. REV. 113 (2020) (describing how each of the states structures its indigent defense system).

[6] *See* WENDY SAWYER & PETER WAGNER, PRISON POLICY INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2024 ("Poverty, for example, plays a central role in mass incarceration. People in prison and jail are disproportionately poor compared to the overall U.S. population."); Tara O'Neill Hayes, *Incarceration and Poverty in the United States*, AMERICAN ACTION FORUM, June 30, 2020, *available at* https://www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states.

[7] *See* Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419 (1996).

separation-of-powers terms generates important insights about our system. Here we identify and elaborate upon three.

First, defense lawyers add an additional dimension to the criminal law separation-of-powers debate between formalists and functionalists. The functionalists' strongest critique is that prosecutors, judges, and legislators are largely aligned on criminal justice policy.[8] All three branches have a shared interest in punishing criminal defendants both efficiently and to the public's satisfaction. Disagreements, if they exist, are largely confined to the margins. But defense lawyers, insofar as they represent the people being punished, do carry an opposing set of interests. They invoke legal authority to undermine prosecutorial goals. And, if successful, they create a rift between prosecutors' commitment to punishment and judges' obligation to apply the law. Defense lawyers can thus provide some of the benefits ascribed to a well-functioning separation of powers. They can protect liberty interests (namely those of defendants) and the rule of law (against lawlessness in law enforcement). This dynamic suggests an under-theorized connection between adversarial litigation and the Madisonian model of checks and balances.

Second, the separation-of-powers framework helps us understand how the defense power is often captured by opposing interests. Defense lawyers have no natural base of power. They are politically weak, largely because their clients are unpopular. Consequently, other system actors can stifle the assertion of defense rights by controlling the defense bar. To prevent such cooptation, defense lawyers need political independence.[9] Questions about the institutional design of indigent defense thus bear on the larger success of Madison's model in the criminal justice system. Two issues are especially vital: who appoints defense lawyers, and how are they funded? These are decided in a wide variety of different ways across the United States. Some jurisdictions have centralized public defender offices, others have judges appoint individual defense lawyers on a case-by-case basis or through a panel system, others contract with law firms to provide indigent defense services, and yet others use a mixture of these models.[10] Public defender systems also take a variety of institutional forms. Some are incorporated as independent nonprofits. Some have leaders appointed by other government officials, like judges, governors, or county boards of supervisors. And a few public defenders are even elected.[11] Closely related to the question of appointment

[8] *See, e.g.*, Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 176 (2019); Epps, *supra* note 3, at 47-49.

[9] A similar set of separation-of-powers concerns influenced the design of the federal judiciary. *See* Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315 (1999).

[10] *See* Joe, *supra* note 5; Eve B. Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 MICH. L. REV. 207 (2023).

[11] This happens in Florida, Tennessee, several Nebraska counties, and San Francisco

is the question of funding. When it comes to resources, publicly appointed defense lawyers are at the mercy of other government entities. Whoever controls the purse strings controls how effective defense counsel will be. If judges (or other officials) decide how much to pay and when, they can use that authority in overt and subtle ways to undermine the defense power.

Third, this framework also gives us a vocabulary to describe collective action by defense lawyers. Defense lawyers, especially when they work together in an institutional public defender's office, can exercise leverage over the system. This happens both inside and outside the courtroom. In litigation defense lawyers can collectively negotiate over standard plea offers, collect and use information about police misconduct, put pressure on the court system by exercising procedural rights, develop legal issues for appeal, and more. One especially salient example, which we discuss in depth, is defense lawyer vetoes of judges.[12] In many jurisdictions, a defense lawyer can refuse to allow a certain judge to sit on a case. Public defender offices sometimes use this power collectively to exclude certain judges from criminal cases, which can have a moderating effect on the judiciary. Outside of litigation defense lawyers can influence how the criminal justice bureaucracy functions, for example by negotiating for more time and space to meet with clients, or by going on strike to lower their caseloads. Public defender offices thus exercise power not just as representatives of their clients, but also as institutional insiders with some measure of control over the legal process. Such collective action is difficult to square with a view of defense lawyers are merely tunnel-visioned representatives of individual clients' interests in particular cases. But it makes sense if one also understands defense lawyers as part of the criminal justice system's governing structure, and therefore as necessarily engaged in institutional politics.

This Article is organized into four Parts. Part I describes the debate between formalists and functionalists in scholarship concerning the separation of powers in criminal law. Part II makes the case that defense lawyers should be brought into this debate, as they exercise a *sui generis* "defense power." It also shows that incorporating defense lawyers helps answer the functionalist critique. Part III explores how institutional design choices over defense lawyer appointment and funding determine how the defense power is exercised. It considers a variety of different indigent defense models, including flat-fee contracts, panels, and public defender offices. It concludes that a politically independent public defender office provides the strongest Madisonian checks. Part IV catalogues numerous ways that independent and well-resourced defense attorneys can (and do) exercise their collective power, both in the courtroom and in bureaucratic negotiations over

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[12] *See infra* Part IV.C.

criminal justice policy. These include refusing to take cases, exercising veto power over judges, and engaging in group litigation strategies.

I. THE CRIMINAL LAW SEPARATION OF POWERS DEBATE

Legal academics are engaged in a robust debate over the separation of powers in criminal law. This debate has, mirroring constitutional law scholarship, pitted separation-of-powers formalists against separation-of-powers functionalists.[13] Formalist scholars criticize blurred lines between executive, legislative, and judicial actors, and argue that strict separation of powers should be enforced in criminal law. The formalists thus aim to bring criminal law into line with the three-branch structure outlined in the Constitution.[14] Functionalist scholars, by contrast, argue that the blurred lines of our current system are superior to a system with strictly separated government powers. The functionalists thus prefer a practical approach to defining different branches' authority, even where it results in one branch exercising powers traditionally reserved for another.[15] This section explores how each camp in this debate views the proper role of the legislature, prosecution, and judiciary, with an emphasis on the problem of prosecutorial hegemony.[16]

Formalists typically ground their position in two claims: (1) that the Constitution imposes a strict separation of powers in the criminal law context, and (2) that unilateral power over criminal punishment threatens individual liberty and the rule of law.[17]

First, they argue that the Constitution reflects a clear preference for strict separation of the government's power over criminal punishment.[18] Rachel

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[13] *See* Shalev Gad Roisman, *Balancing Interests in the Separation of Powers*, 91 U. CHI. L. REV. 1331, 1351-63 (2024) (summarizing the formalist/functionalist debate concerning the constitutional separation of powers).

[14] Barkow, *supra* note 2, at 996 ("In the literature on separation of powers, this is typically referred to as a "formalist" approach to separation of powers, where legislative, executive, and judicial powers are to be separated and novel arrangements that allow a blending of functions or a weakening of one branch's power are disallowed."); *id.* at 995 ("The formalist approach to separation of powers is characterized by the use of bright-line rules designed to keep each branch within its sphere of power.")

[15] *Id.* ("This is typically contrasted with the 'functional' approach, which allows a case-by-case inquiry to see if the particular relaxation of separation of powers in a given case will result in an inappropriate aggrandizement of one branch's power over another.")

[16] Scholarship in this genre has largely (some might say myopically) focused on the federal system. But some of the analysis draws on state systems as well. *See, e.g.*, Hessick, *supra* note 2, at 181.

[17] Barkow, *supra* note 2, at 994-95.

[18] *See* Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV 1071, 1077-1108 (2017).

Barkow, a prominent formalist, notes the multiple layers of constitutional protection against overreach by each branch.[19] Barkow explains, "each branch of government must agree before criminal power can be exercised against an individual" because "Congress must criminalize the conduct, the executive must decide to prosecute, and the judiciary (judges and juries) must agree to convict."[20] To constrain the legislative branch's power over the judiciary, Article I prohibits Congress from passing bills of attainder[21] or ex post facto laws,[22] and limits Congress's ability to suspend the writ of habeas corpus.[23] Similarly, Article III constrains the judiciary to hearing only cases and controversies,[24] leading to the limitations of standing and the doctrine of judicial restraint.[25] To constrain both the executive and legislative branches, the Constitution gives the judiciary (including juries) the unreviewable power to acquit defendants.[26] Fundamentally, in Barkow's view, "[t]his scheme provides ample evidence that the potential growth and abuse of federal criminal power was anticipated by the Framers and that they intended to place limits on it through the separation of powers."[27] By giving multiple institutions a veto over punishment decisions, our system prevents the power to punish from being concentrated in a single body.[28]

Second, formalists emphasize the dangers inherent in unilateral power over punishment.[29] We will illustrate with a few examples. The most prominent, and concerning, example is the increased power of prosecutors in areas traditionally reserved for judges and legislatures.[30] Formalists argue

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[19] Barkow, *supra* note 2, at 1013-16.

[20] *Id.* at 1017.

[21] U.S. Const., Art I, § 9, cl. 3; *INS v. Chadha*, 462 U.S. 919, 961 (1983) (Powell, J., concurring in the judgment) (explaining that the Framers' banned bills of attainder to prevent Congress from "unilaterally" depriving an individual of their freedom, invoking separation of powers rationales).

[22] U.S. Const., Art I, § 9, cl. 3; The Federalist No. 84, 511-12 (Alexander Hamilton) ("The creation of crimes after the commission of the fact […] ha[s] been, in all ages, the favorite and most formidable instrument[] of tyranny.")

[23] U.S. Const., Art I, § 9, cl. 2.

[24] U.S. Const., Art III, § 2.

[25] William A. Fletcher, *The Structure of Standing*, 98 YALE L. J. 221, 222 (1988).

[26] U.S. Const., amend. V, cl. 3; Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 48-51.

[27] Barkow, *supra* note 2, at 1016.

[28] *See* Hessick, *supra* note 2, at 166 ("I think tyranny is used in the context of criminal law as a shorthand for the idea of the concentration of the power to inflict punishment into the hands of a single individual.").

[29] *See generally* Baughman, *supra* note 18.

[30] *See generally* Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansion Legislation*, 32 AM. CRIM. L. REV. 137 (1995)

that prosecutors improperly wield legislative power when they exercise their nearly unlimited charging discretion.[31] By making categorical enforcement decisions, for example, a prosecutor is arguably stepping into the role of the legislature and deciding what counts as a crime.[32] Indeed, prosecutors and the legislature may mutually benefit from prosecutors wielding such de facto legislative power. As William Stuntz has observed, "discretionary enforcement frees legislators from having to worry about criminalizing too much, since not everything that is criminalized will be prosecuted; likewise, legislative power liberates prosecutors, widening their range of charging opportunities."[33] Courts further expand this executive power by declining to check prosecutorial charging criteria.[34] This results in prosecutors effectively defining what is a crime and who gets punished.

Formalists also argue that prosecutors improperly wield judicial power through the plea-bargaining system. Because cases almost never go to trial, prosecutors are the "final adjudicators" for nearly all defendants.[35] In the name of judicial economy, the Supreme Court has authorized prosecutors to threaten defendants with higher charges or longer sentences if they exercise their trial rights.[36] Formalists argue that this power results in coercive unilateral adjudication. Prosecutors leverage the threat of charges, sometimes including charges they could not actually prove, to achieve a guilty plea by

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(outlining historical factors in expanding prosecutorial power and the failure of the executive and legislative branches to check it); Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH & LEE L. REV. 1413 (2010) (comparing the shift of judicial roles to executive actors in the United States and Europe); David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L & CRIMINOLOGY 473 (2016) (arguing that prosecutors act as "bridges" and mediating actors between institutions, but the usual checks of those branches do not apply to them).

[31] Stephanos Bibas, *Prosecutorial Regulation versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 961 (2009) [hereinafter Bibas, *Prosecutorial Regulation*].

[32] *See* Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603, 611-20 (2020)

[33] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 511, 528 (2001).

[34] Bibas, *Prosecutorial Regulation, supra* note 31, at 112; *but see* Emi MacLean, *Embracing "Too Much Justice": Realizing the Potential of the California Racial Justice Act*, 29 BERKELEY J. CRIM. L. 89, 90-91 (2024) (explaining the significance of the California Racial Justice Act, legislation broadening California courts' responsibility to review criminal cases for bias in response to the high federal standard for such claims).

[35] Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law,* 61 STAN. L. REV. 869, 871 (2009) [hereinafter, Barkow, *Policing of Prosecutors*].

[36] *Id.* at 879, citing *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); Hessick, *supra* note 2, at 171-72.

making it irrational for a defendant to go to trial.[37] Further, in the Fourth Amendment context Aziz Huq observes that judges are increasingly unwilling to check executive power over investigations.[38] As a consequence, most meaningful limits on the government's power to search are imposed from within the executive branch itself.[39] That is, effectively, another transfer of judicial power to prosecutors.

Turning to judicial overreach, Jacob Schuman has argued that the judiciary steps into the role of the executive when judges initiate hearings to revoke probation or other forms of criminal supervision.[40] Judges may issue a summons for a defendant on supervision to appear, and then determine whether the defendant violated their supervision and what sentence they should face.[41] These judge-initiated prosecutions comprise almost a quarter of federal criminal proceedings and half of proceedings against low level conduct.[42] Schuman argues that this violates the separation of powers because "rather than the executive branch deciding to prosecute and the judiciary agreeing to convict, a single district judge wields unchecked authority" over the whole process.[43] The defendant's fate is thus entirely in the hands of a single person, with few meaningful limits on that person's power to punish.

On the other side, functionalists maintain that other forms of political competition are preferable to a strict separation of powers.[44] For example, Daniel Epps argues that the separation of powers does not protect the interests of defendants and the public in criminal law.[45] Epps relies on the work of constitutional law scholars like Elizabeth Magill, who argue that separating government functions into different branches does not necessarily produce political competition.[46] The basic idea is that conflict between parties and interests, not between formal branches of government, is what produces

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[37] Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 246 (2006).

[38] Aziz Z. Huq, *How the Fourth Amendment and the Separation of Powers Rise (And Fall) Together*, 83 U. CHI. L. REV. 139, 155, 161-63 (2016).

[39] *Id.*; *see* Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 UC DAVIS L. REV. 1591 (2014).

[40] Jacob Schuman, *Prosecutors in Robes*, 77 STANFORD L. REV. __ (forthcoming 2025) at 5.

[41] *Id.*

[42] *Id.* at 6.

[43] *Id.*

[44] Epps, *supra* note 3, at 1-2.

[45] *Id.* at 7.

[46] *See, e.g.*, M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1171-72 (2000); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2323 (2006).

meaningful checks on power.[47] Importing this insight to criminal law, Epps writes that the protection of liberty interests depends not on separated powers but on "whether enough distinct interests have a hand in controlling the system's machinery to prevent any one interest from consolidating and abusing it."[48] Epps concludes that the separation of powers has not only failed to curtail abuses like police brutality and excessive plea bargaining, but has actually created those problems due to concurrent political pressures on all three branches driving in the same direction.[49] By this reasoning, the problem is not that the judiciary and legislature have lost power to the executive at the expense of defendants. The real problem is that the three branches largely agree on how the criminal justice system should be run.[50]

Consistent with this argument, some functionalists maintain that prosecutors do not actually wield disproportionate power, but merely facilitate collective efforts by courts, legislators, and law enforcement agencies to achieve a shared goal.[51] They are relatively more sanguine about prosecutors' role in the current system, and therefore place less emphasis on returning power to the other branches. Some functionalists advocate relying instead on other forms of political competition, for example prosecutorial elections and party politics, to provide systemic checks on abuses of power.[52] Others argue that the professional norms of prosecutors provide an adequate check. Judge Gerard Lynch, for example, describes prosecutors as de facto adjudicators in an administrative system of criminal justice.[53] In Judge Lynch's view, prosecutors can (if properly trained) exercise their unilateral charging and plea bargaining powers thoughtfully, fairly, and with the goal of achieving just outcomes.[54] And Dan Kahan even argues that federal prosecutors should be given explicit authority to decide the meaning of criminal laws through *Chevron*-style deference.[55] Kahan acknowledges that this proposal is a delegation of legislative authority to the executive, and defends it on the grounds that prosecutors are politically unified, experienced in law enforcement, and accountable to the public through elections.[56] On this

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[47] Epps, *supra* note 3, at 27.

[48] Epps, *supra* note 3, at 44.

[49] Epps, *supra* note 3, at 47-49.

[50] *Id.*; *see also* Baughman, *supra* note 18, at 1109-10; Bellin, *supra* note 8.

[51] *See* Bellin, *supra* note 8, at 176; Sklansky, *supra* note 30, at 502-04.

[52] *See, e.g.*, Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603, 627-32 (2020) (arguing that elections are an appropriate functionalist check on prosecutors declining to charge certain crimes).

[53] *See* Lynch, *supra* note 3.

[54] *Id.* at 2149-50.

[55] Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law*, 110 HARV. L. REV. 469 (1996).

[56] *Id.* at 470-71.

view, concentrating power in prosecutors does not pose a unique threat to individual liberty or the rule of law. Rather, the choice between prosecutorial, judicial, and legislative governance is about picking the most competent agency for the task at hand.

As a kind of fallback position, numerous formalist (and some functionalist) scholars have advocated for internal separation of powers within the executive branch.[57] The idea here is that, if the constitutional separation of powers cannot limit prosecutorial expansion, perhaps liberty and rule-of-law interests can be protected through subconstitutional checks.[58] For example, Alexandra Natapoff argues that separation of powers within the executive branch could restrain police officer misconduct.[59] Currently prosecutors rarely prosecute police misconduct,[60] fail to check police perjury,[61] and resist acknowledging wrongful convictions arising from bad policing.[62] Natapoff proposes that prosecutors' offices should adopt strong misdemeanor declination policies to screen out the products of bad police work, and should end the direct involvement of police officers in prosecuting cases.[63] Similarly, Rachel Barkow has argued that prosecutorial power is uniquely dangerous because prosecutors are not subject the stringent procedural restrictions of the Administrative Procedure Act or other administrative law rules.[64] One could build such internal legal processes into prosecutors' offices, thus making them more like other administrative agencies.[65] For example, Barkow proposes restructuring prosecutors' offices to separate prosecution functions (e.g. taking a case to trial or negotiating a plea bargain) from adjudication functions (e.g. deciding what charge to file based on the facts).[66] From a functionalist perspective, one might criticize this approach as restrictive. Judge Lynch, for example, is skeptical of turning prosecutors' offices into rule-bound agencies. He maintains that doing so

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[57] *See, e.g.*, Bibas, *Prosecutorial Regulation*; Barkow, *Policing of Prosecutors*, *supra* note 35, at 895; Baughman, *supra* note 18, at 1122-32; Epps, *supra* note 3, at 73-78.

[58] Baughman, *supra* note 18, at 1122-32.

[59] Alexandra Natapoff, *Misdemeanor Declination: A Theory of Internal Separation of Powers*, 102 TEX. L. REV. 937, 951-54 (2024) [hereinafter Natapoff, *Misdemeanor Declination*].

[60] Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1450–51 (2016).

[61] Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1045, 1047 (1996).

[62] Natapoff, *Misdemeanor Declination*, *supra* note 59, at 956.

[63] *Id.* at 992-1008.

[64] Barkow, *Separation of Powers*, *supra* note 2, at 993.

[65] *See, e.g.*, Bibas, *Prosecutorial Regulation*; Barkow, *Policing of Prosecutors*, *supra* note 35, at 895.

[66] *See, e.g.*, Barkow, *Policing of Prosecutors*, *supra* note 35, at 895.

would impose unnecessary complexity and expense, and would inevitably shift power to an alternative, non-bureaucratized process.[67] On the other hand, Carissa Byrne Hessick argues that internal separation of powers is less effective at protecting liberty than the classic Madisonian approach.[68] Looking at state criminal justice systems, she observes that even a diffuse executive branch normally sees itself as a single "team" and pressures its component agencies to fall in line behind punitive policies.[69]

Fundamentally, this debate is about how to design the criminal justice system. According to formalists, the system has abandoned Madison's vision of separated powers and is sliding into a kind of administrative tyranny dominated by the executive. It lacks meaningful checks and leaves defendants at the whim of a lawless prosecution bureaucracy. According to functionalists, the abstract division of powers into different branches is inefficient and does not actually protect our freedom. They observe that the separation of authority in criminal law masks broad substantive agreement on criminal justice policy, rendering it empty formalism. Better, they posit, to freely intermingle powers between different branches, and rely on professional norms and ordinary politics to check arbitrary deprivations of liberty.

II. THE DEFENSE POWER

The debate we just surveyed concerns judges, prosecutors, and legislatures. Defendants and their lawyers are basically absent. But defendants do have certain powers in the criminal justice system. These powers generally take the form of procedural rights. A defendant can force the prosecution to prove its case to a jury, compel witnesses to testify, use legal rules to suppress or exclude evidence, appeal their conviction, and more.[70] These rights belong exclusively to the defendant. They can be exercised to fight a prosecution, or they can be traded away in the plea bargain process. Defense rights are thus valuable both (1) as tools to defeat a criminal charge in court, and (2) as leverage to negotiate for less punishment. Prosecutors and judges create incentives to waive these rights and plead guilty. Indeed, such defense waivers are indispensable to the criminal justice system as currently constituted. Ours is a system of pleas, not a system of

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[67] Lynch, *supra* note 3, at 2144-45; *see also* Sklansky, *supra* note 30, at 512-20 (discussing the difficulty with implementing prosecution guidelines and other internal reforms).

[68] Hessick, *supra* note 2, at 179-83.

[69] *Id.* at 181.

[70] *See, e.g.*, U.S. CONST. amd. IV, V, VI; Mapp v. Ohio, 367 U.S. 643 (1961); FED. R. APP. P. Rule 4(b).

trials.[71] Criminal courts could not process anything close to their current volume if a large fraction of defendants exercised their procedural rights.[72] The system depends on guilty pleas to function normally. This makes the criminal defendant a quasi-veto player in the criminal justice system. For a conviction to happen the legislature must create a crime, the prosecutor must bring charges, and the court system must convict.[73] But for a conviction to happen efficiently, the defendant must also waive their rights.

This defense power is vested in criminal defendants themselves. But in practice, it is normally exercised by defense lawyers. Defense lawyers advise their clients on the best strategy in a case, including whether to waive or exercise procedural rights. They also represent their clients in court, and in negotiations with prosecutors. They have professional duties to inform a client about their case, advise a client about the best course of action, respect a client's choices, keep case-related information confidential, and pursue a client's overarching goals.[74] But defense lawyers also exercise a good deal of autonomy, both under the ethics rules and in practice, when deciding what to do in criminal cases.[75] This functional autonomy flows from their status as professional insiders who know how the legal system works. And defense lawyers are, today, normally selected and paid by the state. Since *Gideon*, state and local governments throughout the United States have created indigent defense systems that now handle a substantial majority of criminal cases.[76]

Consequently, we have institutionalized the defense power by creating professional bodies of government-appointed indigent defense counsel. We should understand this public defense bar not just as a bunch of lawyers but also, in effect, as a fourth branch of government.[77] Doing so yields fruitful

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[71] *See* Lafler v. Cooper, 566 U.S. 156, 169–70 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials.").

[72] *See* Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999 (2022); Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1099 (2013).

[73] Barkow, *supra* note 2, at 1017.

[74] *See* Model Rules of Professional Responsibility Rules 1.2, 1.3, 1.4, 2.1.

[75] *See id.* at Rule 1.2 cmt. 2 ("Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters.").

[76] *See* sources cited *supra* note 4.

[77] One might reasonably ask, if defense lawyers are a branch of government for separation of powers purposes, what about other criminal justice institutions? A few come to mind. Grand juries, for example, traditionally had independent status and played a significant role in our justice system. *See generally* Nino C. Monea, *The Fall of Grand Juries*, 12 NORTHEASTERN UNIV. L. REV. 411 (2020). Modern grand juries, however, provide few meaningful checks on prosecutors' charging power. *See* Chesa Boudin & Eric Fish, *Towards Pretrial Criminal Adjudication* at 18-21, *forthcoming* B.C. L. REV. (2025). They are thus, at

insights into the separation of powers in the criminal justice system. Defense lawyers are, of course, not one of the three branches enumerated in the Constitution. There is no vesting clause for the defense power, as there is for the legislative, executive, and judicial powers.[78] The shift to public provision of defense counsel is an emergent feature of our constitutional order, one that developed in the Twentieth Century and is not found in the original document.[79] It is also very much incomplete.[80] But in the present system, one cannot adequately describe the power dynamics in a criminal courthouse without knowing how its indigent defense system works. Publicly appointed defense lawyers are institutional insiders who, at least in many courts, provide meaningful checks on prosecutorial and judicial power.[81]

Admittedly, this will be a counterintuitive framing for many.[82] Several objections spring to mind. Here we will address three. (1) That private defense lawyers still handle many cases; (2) That defense lawyers are merely representatives of their clients' interests; and (3) That defense lawyers' restrictive professional ethical obligations prevent them from acting as a political institution.

First, it is certainly true that private criminal defense lawyers exist in our system. Public defenders and other indigent defense lawyers do take a significant majority of cases, but they also operate alongside a private defense bar.[83] Some defendants are too wealthy to qualify for court-appointed counsel. Some defendants opt to hire their own lawyers even though they

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least in the contemporary system, a poor candidate for an additional "branch." Sentencing commissions also come to mind—they exercise power by writing quasi-criminal codes that govern sentencing. Sentencing commissions certainly do raise separation of powers concerns, but they are housed in one of the three branches of government rather than existing as a separate entity with its own source of constitutional power. Some are executive agencies, some are judicial agencies, and some are legislative agencies. *See* KELLY LYN MITCHELL, SENTENCING COMMISSIONS AND GUIDELINES BY THE NUMBERS 4 (2017) (showing that fourteen state/federal sentencing commissions are executive agencies, seven are judicial agencies, and two are legislative agencies).

[78] *See* Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1390 (1994).

[79] *See* SARA MAYEUX, FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA 24-56 (2020).

[80] *See* Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2152–54 (2013)

[81] *See, e.g.*, Eric S. Fish, *Resisting Mass Immigrant Prosecutions*, 133 YALE L.J. 1884 (2004) (describing collective action by public defenders in California and Texas that significantly slowed down two different mass immigrant prosecution systems); Taylor-Thompson, *supra* note 7, at 2429-33 (describing collective litigation efforts by public defenders over DNA evidence).

[82] *See* Taylor-Thompson, *supra* note 7, at 2425-29 (describing the dominance of the individualized paradigm of public defense).

[83] *See* sources cited *supra* note 4.

would qualify. And some defendants choose to represent themselves *pro se*.[84] But this does not mean publicly appointed defense lawyers must be placed outside the separation-of-powers framework. Branches of government can be partially privatized and remain branches of government. Indeed, Jon Michaels has shown that privatization is often itself a move in the separation of powers game.[85] If you wish to weaken or eliminate a rival agency, privatizing its functions is a potent way to do so.[86] And defense lawyers are not the only actor in our legal system that is partially private. In the civil legal system, private arbitrators decide cases that would otherwise go to judges.[87] Private security officers frequently perform the functions of police.[88] And consider prosecutors. For much of American history, private prosecution was the dominant model.[89] The prosecutor was normally a lawyer hired by a private citizen, rather than an agent of the government. During the 19th century we transitioned to the current system, in which prosecutors are nearly always government employees.[90] But vestiges of private prosecution remain in several states.[91] If private prosecution were still widespread, say for example if 20% of cases involved private prosecutors, we would nonetheless properly view public prosecutors as a branch of government. Defense lawyers are no different.

Second, one might argue that defense lawyers are not a branch of government because they are merely the agents of their clients. Their job is not to participate in governance or check other branches, but instead to protect their clients' interests as defined by their clients. But representing concrete people's interests is not incompatible with being a branch of government. Indeed, it is common for executive and legislative bodies to have a

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[84] One could analogize the relationship between *pro se* defendants and public defenders as akin to that between direct democracy (e.g. ballot initiatives) and elected legislatures. In the former cases the people personally exercise their power, while in the latter cases the people's institutional representatives exercise it on their behalf.

[85] Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUMB. L. REV. 515 (2015).

[86] *Id.* at 572-87 ("[A]gency leaders are commingling state and commercial power, teaming up with some of their administrative rivals and sidelining others. Disabling these secondary, administrative checks and balances heralds the rise of a new governing paradigm: an increasingly privatized state.").

[87] *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015).

[88] *See* David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1998); Stephen Rushin, *The Regulation of Private Police*, 115 W. VA. L. REV. 159 (2012).

[89] *See* Emma Kaufman, *The Past and Persistence of Private Prosecution*, 173 U. PENN. L. REV. 89, 106-18 (2024); Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1573-81 (2020).

[90] Kaufman, *supra* note 89, at 111-12.

[91] *Id.* at 150-52 (table showing that six states allow private criminal prosecutions).

representational character. Legislators represent the people in their districts. Elected prosecutors represent "the people" of their county or state. An elected official's representational relationship to their constituents is, of course, less demanding than the full fiduciary duties of an attorney-client relationship.[92] But that is a difference of degree. And there are other government attorneys with fiduciary duties to clients. For example, state attorneys general are normally elected, and are uncontroversially considered part of the executive branch.[93] Yet attorneys general frequently have attorney-client relationships with state agencies that include traditional ethical duties like loyalty and confidentiality.[94] One could even see the public defense bar's representational character as democratic, akin to legislatures and elected prosecutors. On this view the defense bar represents "the people" one at a time, as individuals, while prosecutors represent "the people" abstractly and in bulk.[95] Indeed, public defense institutions can be understood to represent the entire community insofar as any of us might be charged with a crime. One can have duties as the legal representative of concrete people, while also behaving as a government body with institutional leverage and a stake in policy questions.

Third, perhaps defense lawyers' strict professional ethical duties make it improper for them to do anything but help with specific cases. This is a slight variation on the previous argument. It identifies a tension between defense lawyers' role ethics and their engagement in institutional politics. And there are certainly situations where such tension exists. For example, if an elected public defender ran on a platform of saving money for the county by refusing to hire expert witnesses, that would create a clear conflict of interest. Similarly, if a public defender's office wanted to take every case to trial to overload the court system, that would harm clients who would benefit from

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[92] *See* Ethan J. Leib, David L. Ponet & Michael Serota, *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. FORUM 91 (2013); EDMUND BURKE, *Speech to the Electors at Bristol*, in SELECTED WRITINGS AND SPEECHES 186, 186–87 (Peter J. Stanlis ed., 1963) (arguing that legislators' duty is to pursue the general good, not solely the good of a particular legislative district).

[93] 43 states elect their attorneys general. *See* Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty To Defend*, 124 YALE L.J. 2100, 2124-27 (2015).

[94] *See* Justin G. Davids, *State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers*, 38 COLUM. J.L. & SOC. PROBS. 365, 374–75 (2005).

[95] *Cf.* Jocelyn Simonson, *The Place of 'the People' in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019) (arguing that "the people," in the sense of the democratic community, appear on both sides of a criminal case, not just the prosecution's side); Laura I. Appleman, *The Community Right to Counsel*, 17 Berkeley J. Crim. L. 1 (2012) (describing the right to counsel as one held by the broader democratic public, not just by individual defendants).

plea agreements.[96] Defense lawyers' professional ethics clearly limit what they can do as political actors. But tension is not incompatibility. Defense lawyers can participate in institutional politics without compromising their ethical commitments. They simply must take care not to violate their duties to clients and to the court system. Indeed, a similar tension exists for judges. Judges, too, have strict professional ethics norms. They must decide cases impartially, avoid the appearance of bias, permit all parties to be heard, and more.[97] These duties are often in conflict with judges' role checking and balancing other government actors. They also come into conflict with the widespread practice of judicial elections.[98] But, notwithstanding this tension, the judicial power is still rightly included in the Madisonian separation of powers framework. The defense power should be as well.

Including defense lawyers adds a new dimension to the formalist/functionalist debate. One of the strongest functionalist arguments is that the three main branches—legislature, prosecution, and judiciary—have broadly overlapping interests in criminal justice policy, even if they sometimes disagree.[99] At a basic level, these three actors all want a criminal justice system that punishes criminals efficiently and to the public's satisfaction. Defense lawyers, on the other hand, represent directly adverse interests. They are professionally committed to preventing or minimizing their clients' punishment. And they are responsible for enforcing laws and asserting rights that protect their clients from the government. Including defense lawyers in the separation-of-powers equation thus opens the door to true institutional conflict. Such conflict can, in the traditional Madisonian view, protect liberty interests and enforce the rule of law. To put it another way, a well-functioning adversary litigation system entails a well-functioning separation of powers. Defense lawyers, if they are aggressive and effective, can seek remedies when police, prosecutors, or judges violate the law. They can, for example, argue for throwing out unlawfully obtained evidence or dismissing ill-founded criminal charges. Defense lawyers can also elevate judges vis-à-vis prosecutors. Prosecutors naturally dominate a system of guilty pleas. But judges have more control over a case when they are deciding legal issues, as opposed to just rubber-stamping plea deals. By making legal claims, defense lawyers force prosecutors to litigate and judges to adjudicate. They can thus impose law and procedure on a system that seeks to avoid both.

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[96] *See* Fish, *supra* note 81, at 1947-49; Crespo, *supra* note 72, at 2022-25.

[97] *See* AMERICAN BAR ASSOCIATION MODEL CODE OF JUDICIAL CONDUCT, Canon 2.

[98] *See, e.g.*, Bradley S. Clanton, *Suppressing Speech in Judicial Elections: How the Canons of Judicial Ethics Abridge the Freedom of Speech of Judges and Candidates for Judicial Office*, 21 MISS. C. L. REV. 267 (2002).

[99] *See* Baughman, *supra* note 18, at 1109-10; Bellin, *supra* note 8, at 176; Epps, *supra* note 3, at 47-49.

Admittedly, it is still possible to build a closed-loop plea system with effective defense lawyers. If prosecutors have overwhelming punishment leverage, for example, even the best defense lawyers will advise their clients to waive rights and plead guilty.[100] Effective defense counsel are thus necessary, but not sufficient, for generating institutional conflict. But for the criminal justice system to produce legal rulings at all, the defense must conduct adversary litigation. Without legal arguments, the rule of law has no purchase.

Defense lawyers thus bolster the case for separation-of-powers formalism in the criminal justice system. But to provide meaningful checks and balances, they must contend with basic structural disadvantages. Defense lawyers are politically weak. Alexander Hamilton described the judiciary as the "least dangerous" branch of government because it controls no armies and relies on the legislature for funding.[101] But publicly appointed defense lawyers are an even weaker branch. Defense lawyers have no natural base of power. Their clients are politically unpopular. They risk popular backlash just for succeeding at their jobs. They have much less influence over criminal legislation than do prosecutors.[102] And they are chronically underfunded.[103] Due to this structural weakness, it is vital that defense lawyers maintain their political independence. If they are coopted by another branch, say the executive or the judiciary, then the criminal justice system can become a functionally non-adversarial plea mill. The rule of law lacks purchase in such a system, and defendants' rights can be readily ignored.[104]

III. INSTITUTIONAL INDEPENDENCE AND EFFECTIVENESS

Defense lawyers in our system are politically weak, usually appointed by other government bodies, and mostly paid with public money. This leaves

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[100] *See* David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 YALE L.J. 2578, 2590-97 (2013).

[101] ALEXANDER HAMILTON, FEDERALIST NO. 78 (1788).

[102] *See* WILLIAM STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 173 (2011) ("In other fields, legislation is about tradeoffs and compromises. When writing and enacting criminal prohibitions, legislators usually ignore tradeoffs and rarely need to compromise. Save for law enforcement lobbies, few organized, well-funded interest groups take an interest in criminal statutes; criminal defendants' interests nearly always go unrepresented in legislative always. Legislators thus have little reason to focus carefully on the consequences of the prohibitions they write."). *See also* Craig S. Lerner, *Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599 (arguing that criminal justice reforms favoring defendants are normally only enacted to benefit prosecuted politicians).

[103] *See* Bright & Sanneh, *supra* note 80, at 110-21.

[104] *See, e.g.*, Fish, *supra* note 81, at 1932-49 (describing one such system, which processes federal immigration-related convictions).

them vulnerable to capture by other system actors, like judges or executive branch officials. Coopting court-appointed defense lawyers can be very helpful if your goal is to turn a criminal court into a closed-loop conviction machine. That can be done by aligning defense lawyers' professional incentives with the efficient processing of guilty pleas. When that is achieved, a defense lawyer's main role is to meet the defendant and convince them to plead guilty quickly.[105] Such lawyers create the outward appearance of fairness (through their presence) while ensuring a procedurally minimal court process (through their cooptation).[106] This is a widespread problem. It is difficult for defense lawyers to create meaningful conflict or enforce rule-of-law norms when they lack political independence. If defense lawyers are directly accountable to other system actors, their ability to act as a counterweight is compromised. The existence of checks and balances in the criminal justice system thus depends, in significant part, on the institutional design of indigent defense.

This Part describes the three main structures for providing indigent defense services in the United States,[107] and explores how each impacts defense lawyers' independence and effectiveness.[108] First, we consider the flat-fee contract model, which is the most problematic approach. Second, we examine panel systems, which share many of the same deficiencies. Third, we detail our preferred model: institutional public defender offices. There is significant variation among such offices—some are housed in the executive

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[105] *See, e.g.*, Taylor-Thompson, *supra* note 7, at ("These defender offices adopted a philosophy of practice quite different from what one might expect today: they would assist in the system's prosecution of the guilty and would fight for acquittal only for those defendants who were obviously innocent. Adversarial defense was deemed an unnecessary strategy because most indigent defendants were thought to be guilty."); Fish, *supra* note 81, at 1945-49 (describing the cooptation of defense lawyers in federal immigration prosecutions)

[106] *See* Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC. REV. 15 (1967) (describing the court system's cooptation of public defenders); *cf.* Paul Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176 (2013) (arguing that court-appointed defense lawyers create the appearance of procedural legitimacy in a fundamentally unjust system).

[107] In practice, because unwaivable conflicts are common in criminal cases, most jurisdictions rely on more than one model of service provision. So, for example a county's primary model might be an institutional public defender office with secondary (conflict) representation being handled via a panel system. *See, e.g.*, A Snapshot of Indigent Defense in California, Office of the State Public Defender, Nov. 2023 at 3-4 (illustrating via map and chart the types of indigent defense providers in California counties by primary, secondary, and tertiary levels of service).

[108] For a comprehensive 50 state survey of indigent defense services *see* David Carroll, *Right to Counsel Services in the 50 States: An Indigent Defense Reference Guide for Policymakers*, SIXTH AMEND. CENTER (Mar. 2017), https://www.in.gov/ccaa/files/Right-to-Counsel-Services-in-the-50-States.pdf.

branch, some are in the judicial branch, some are accountable to heterogenous boards, some are nonprofits, and some have directly elected leaders. And this choice of institutional structure helps determine whether a public defender's office is functionally independent or vulnerable to capture.

A. The Flat-Fee Contract Model

Too many jurisdictions rely on flat-fee contracts with private—nongovernmental—lawyers to handle all or a portion of indigent criminal defendant representation.[109] While the particulars of the contracts vary widely, what they have in common is an incentive structure that undermines effective assistance of counsel and renders the defense extremely weak from a separation-of-powers standpoint.[110] In some jurisdictions, counties contract with a single lawyer or law firm to handle primary representation for all cases, or an entire class of cases, such as felonies.[111] Because these private practice lawyers are paid the same fixed amount regardless of how many cases they handle or how hard they work on each case, there is an incentive to work as little as possible and resolve cases as quickly as possible. Hiring outside support in the form of expert witnesses, social workers, interpreters, or even investigators—a minimum requirement for effective assistance[112]—reduces the lawyers' ability to turn a profit.[113] It is common for contract lawyers or firms to have contracts with multiple counties and/or to take private retained cases on the side.[114] The results are often disastrous.

San Benito County, California, for example, has long relied on a contract with a private firm to provide indigent defense services.[115] The Office of the State Public Defender, at the request of the County, investigated the quality of indigent defense service provision and issued a scathing report. The report found, for example, that in a three-year period the contract firm conducted just three jury trials.[116] So few motions to suppress evidence[117] are filed that

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[109] The American Bar Association has long condemned this model. *See, e.g.*, AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, REPORT TO THE HOUSE OF DELEGATES (1985) (condemning flat-fee contracts as a way to save money).

[110] Primus, *supra* note 10, at 214-15.

[111] *See, e.g.*, Trinity and Modoc counties, California. Contracts on file with authors.

[112] *See generally* Strickland v. Washington, 466 U.S. 668, 691 (1984) ("counsel has a duty to make reasonable investigations").

[113] *See, e.g.*, Email from Lassen County, CA county administrator regarding contract lawyer's refusal to hire investigators, on file with authors.

[114] Primus, *supra* note 10, at 215-16.

[115] OFFICE OF THE STATE PUBLIC DEFENDER, INDIGENT DEFENSE IN SAN BENITO COUNTY 9 (2024).

[116] *Id.* at 11.

[117] Motions to suppress are a critical pretrial procedure. Chesa Boudin and Eric Fish, Towards Pretrial Adjudication 66 BOS. COLL. L. REV. XX, 54-56 (forthcoming 2025).

in 99.4 percent of criminal cases the state's evidence and investigation go unchallenged. Put differently, "out of the roughly 7,500 cases filed in the past 5 years, lawyers in San Benito County only challenged police's conduct through legal motions in about 50 cases."[118] The report found grave problems with virtually every aspect of defense services including lawyers not meeting with clients, lawyers waiving rights without their clients' consent, lawyers not knowing how to request discovery, lack of confidential communications, lack of Spanish interpretation services, lack of investigation, and much more.[119] Sadly, San Benito is not alone. Six counties in California concurrently had contracts for indigent defense services with the same firm.[120] Across the country, in 2013, at least 20 states relied on flat-fee contracts to provide indigent defense services.[121] Such contracts leave lawyers overwhelmed, underpaid, and unable to provide competent representation.[122]

Too many cases and too few resources result in the defense bar being sidelined. When lawyers are overwhelmed, they cannot fulfill their constitutionally mandated role inside or outside the courtroom. Effective criminal defense advocacy requires independent and well-resourced attorneys. That is not possible when counties choose to award contracts to the lowest bidder. If lawyers' financial incentives are at odds with their clients' rights, they are far less able to enforce the rule of law, protect clients' liberty, or act as a check on other system actors.

B. Panel Systems

Another common model for indigent defense services is a panel system, where courts appoint and pay individual private practitioners on a case-by-case basis. This model predates *Gideon*,[123] although before *Gideon* court-appointed lawyers were expected to serve *pro bono*.[124] Today indigent defense panels are common in both federal and state courts.[125] For example,

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[118] OFFICE OF THE STATE PUBLIC DEFENDER, INDIGENT DEFENSE IN SAN BENITO COUNTY 12 (2024).

[119] *Id.* at 13-42. *See also* "ABA Ten Principles of a Public Defense Delivery System", American Bar Association, August 2023.

[120] OFFICE OF THE STATE PUBLIC DEFENDER, INDIGENT DEFENSE IN SAN BENITO COUNTY 9 (2024).

[121] NAT'L ASS'N OF CRIM. DEF. LAWYERS, GIDEON AT 50, PART I: RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS 14 (2013).

[122] *See* Primus, *supra* note 10, at 216-24.

[123] MAYEUX, *supra* note 79, at 24-56.

[124] JUDICIAL CONFERENCE OF THE UNITED STATES, 2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT 10 (2018).

[125] *See generally* Primus, *supra* note 10, at 225-37 (describing panel appointment systems). (problematic structure)

in 1964 Congress passed the Criminal Justice Act (CJA), which established a panel-based system for court-appointed defense attorneys in federal courts.[126] The CJA put federal judges in charge of panel appointments and pay. This choice was neither obvious nor inevitable, but Congress deemed the judiciary the "least bad option" for controlling federal indigent defense.[127]

Panel appointment systems suffer from many of the same problems as flat-fee contract systems.[128] Compensation rates are typically low, and courts often use fee caps or otherwise restrict earnings and expenses. Courts in some states have even imposed fee caps in death penalty cases, contributing to a crisis of defense lawyer incompetence in capital prosecutions.[129] Judges sometimes appoint their friends to the defense panel as a reward, remove lawyers who advocate too zealously, or refuse to approve funding for necessary investigation or experts.[130] Incompetent defense lawyers are a source of convenience for judges, because they dispose of cases more efficiently than lawyers who litigate. This creates an obvious conflict of interest. And this is an especially pronounced problem when panel lawyers handle death penalty cases.[131] Just a few years after the CJA was passed Chief Justice Warren Burger voiced prescient concerns about panel lawyers' lack of independence, arguing that the indigent defense bar "should be insulated from the courts, insulated from the prosecutor; it should be an independent body of lawyers."[132] Giving judges control over an indigent defense panel creates significant challenges for defense lawyers. Direct accountability to judges impedes their duties to their clients and their ability to check other actors in the criminal justice system.[133]

Private practitioners typically are unable to effectively lobby the courts for additional funding.[134] And where defense lawyers cannot negotiate for more resources, panel wages may not keep up with inflation and may even be cut to balance budgets.[135] Lack of independence can thus make it challenging to achieve adequate pay even when outside audits or higher

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[126] *Id.* at 13.

[127] *Id.* at 14.

[128] Primus, *supra* note 10, at 225.

[129] *See* Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crimes but for the Worst Lawyer*, 103 YALE L.J.1835, 1853-55 (1994).

[130] *Id.*

[131] *Id.*, at 1855-57 (describing some egregious examples of incompetent death penalty defenders who were appointed by judges).

[132] *Proceedings at the1969 Judicial Conf., U.S. Court of Appeals, Tenth Circuit: Min. Standards for Criminal Justice*, 49 F.R.D. 347, 374 (1969).

[133] JONATHAN RAPPING, GIDEON'S PROMISE: A PUBLIC DEFENDER MOVEMENT TO TRANSFORM CRIMINAL JUSTICE 198-99 (2020).

[134] Primus, *supra* note 10, at 226-30.

[135] For example, in 2018 Montana cut the hourly rate for panel lawyers. Mont. Legis. Audit Div., Performance Audit, Public Defender Workforce Management 29 (2020).

courts recognize that panel defenders "literally lose money if they take these cases."[136] And even where panel lawyers are paid relatively well, as in the federal courts, there are still myriad problems leading experts to advocate for more independent and institutionally stable defender services.[137] One common dynamic is that panel lawyers prioritize paying clients, while another is that panel work only attracts underqualified attorneys.[138] Worse still, instead of zealously advocating for more resources outside the courtroom and for their clients in the courtroom, panel lawyers often simply defend the status quo. For example, in San Mateo County, California, after a lawsuit, multiple reviews, and a grand jury report condemning inadequate representation, missed court dates, failure to communicate with clients, and more, the head of the defense panel defended the existing practices.[139]

As the San Mateo example illustrates, panel lawyers are often in an impossible predicament both in and out of the courtroom. Fight too hard and you lose your spot on the panel; roll over and you fail to meet your ethical duties to your client; ask for help and you admit you or your colleagues are providing ineffective assistance. Ultimately, panel appointment systems, like flat-fee contracts, undermine the independence of defense attorneys. They create financial disincentives for vigorous advocacy, and reward lawyers who make judges' lives easier with quick guilty pleas. Panel systems also pit atomized solo practitioners against coordinated, hierarchical institutional players on the prosecution side. That prevents defense lawyers from serving as a meaningful institutional counterweight to prosecutorial power.[140]

C. Public Defender Systems

Many jurisdictions choose to create an institutional public defender office.[141] These are either government agencies at the state or local level, or else nonprofit organizations incorporated to provide indigent defense

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[136] *In re the Petition to Amend SCR* 81.02, No. 17-06, at 3 (Wis. June 27, 2018).

[137] JUDICIAL CONFERENCE OF THE UNITED STATES, 2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT 15 (2018) *citing* Comm. to Review the Criminal Justice Act, Rep. of the Comm. to Review the Criminal Justice Act, at 2, reprinted in 52 Crim. L. Rep. (BNA) 2265 (1993).

[138] Primus, *supra* note 10, at 232-34.

[139] *See* Bob Egelko, *Lawsuit claims San Mateo County's unusual public defender program is 'defective and unlawful'*, SAN FRANCISCO CHRON. Mar. 13, 2024 (describing lawsuit, critical reports, grand jury investigation, and quoting the head of the defense panel).

[140] *See* JUDICIAL CONFERENCE OF THE UNITED STATES, 2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT 168-69 (2018) (federal panel lawyer in Georgia testifying that there is "the absolute need in my district for a federal public defender . . . to counterbalance an extremely professional United States Attorney's Office").

[141] For example, of the 94 federal districts, 91 are served by federal public defenders or community defenders. *About DSO*, DEF. SERVS. OFF., https://www.fd.org/node/96.

services. Public defender offices typically have full-time, salaried lawyers, paralegals, investigators, and other support staff.[142] They range in size from just a few employees in smaller rural jurisdictions,[143] to hundreds of staff in large urban areas.[144] In larger offices there is opportunity for specialization,[145] internal training and oversight,[146] auxiliary support services and other benefits of economies of scale.[147] Institutional public defender offices can also better address many of the separation-of-powers and ethical concerns that other service models present. To be sure, lack of independence, inadequate resources, and heavy caseloads are persistent problems with institutional public defenders.[148] Yet there are several advantages to this model.

First, institutional public defenders are in a far stronger position to advocate for additional funding or staffing[149] and to avoid the financial conflicts that plague flat-fee contract firms or private practitioners.[150] These offices are typically staffed by full-time employees who have some degree of job security, even civil service protections in some jurisdictions.[151] Public

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[142] *See, e.g.*, the Cook County, IL public defender office which provides immigration services as well as criminal defense. https://www.cookcountypublicdefender.org/resources/immigration-division.

[143] *See, e.g.*, Tuolumne County, CA public defender office which employs just three attorneys. https://www.tuolumnecounty.ca.gov/433/Meet-the-Attorneys.

[144] *See, e.g.*, the Los Angeles County, CA public defender office which employees more than 1,200 employees – including more than 700 attorneys, as well as paralegals, investigators, social workers, and administrative/support staff across 32 locations. https://pubdef.lacounty.gov/history/#:~:text=The%20Public%20Defenders%20Office%20has,%2C%20and%20administrative%2Fsupport%20staff.

[145] *See, e.g.*, Defender Association of Philadelphia, mental health unit, https://phillydefenders.org/mental-health/.

[146] *See, e.g.*, Colorado's statewide public defender office training program, https://www.coloradodefenders.us/join-our-team/defender-training/attorney-training/.

[147] Alex Bunin, *Public Defender Independence* 27 TEX. J. ON C.L. & C.R. 25, 26 (2021) ("Like a large law firm, with many specialties and skills that support one another, a public defender office is stronger than the sum of its parts.").

[148] *See generally* Primus, *supra* note 10, at 238-39 (describing underfunding of public defenders and gathering sources); *see, e.g.*, Andrew Mobley, *New Report Reveals Crisis in Arkansas Public Defender System*, KATV.COM, Nov. 16, 2024, https://katv.com/news/local/new-report-reveals-crisis-in-arkansas-public-defender-system-robert-steinbuch-ualr-bowen-us-commission-on-civil-rights-arkansas-advisory-committee-right-to-counsel-constitutional-rights-caseload-defendant-public-defender-pay-lack-of-funding-felony-cases. For a deep dive into what constitutes a reasonable caseload *see* NORMAN LEFSTEIN, A.B.A. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 15-18 (2011).

[149] Alex Bunin, *Public Defender Independence* 27 TEX. J. ON C.L. & C.R. 25, 30 (2021).

[150] Primus, *supra* note 10, at 239.

[151] Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 508 (1982). Labor protections for public

defender offices are also led by a chief executive who, among other things, can seek to expand staffing, increase budgets, and reduce caseloads.[152]

Second, in extreme situations, institutional public defenders can refuse to accept new case assignments.[153] While this decision could cost a chief public defender their job,[154] it is not without precedent,[155] and could not easily be used as a systemic check in a contract or panel system.[156]

Third, institutional public defender offices have the capacity to engage at the state or local level in lobbying for policy or even legislative changes far more effectively than their decentralized counterparts.[157] As institutional government actors, it is natural for public defenders to weigh in on pending criminal justice legislation or to advocate for changes to, for example, legal visiting conditions at the county jail.[158] Some public defenders even have full

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defender staff exist on a continuum. To take three California examples: Los Angeles County public defender attorneys have civil service protection and are all but impossible to fire; Alameda County public defender attorneys have good cause termination protection meaning they are entitled to a hearing where the county must establish good cause to release them; San Francisco County public defender attorneys are at will employees who can be fired at any time for any non-discriminatory reason. Of course, the extent to which staff are protected has significant implications not only for the institutional role these offices play vis-à-vis other system stakeholders but also, critically, for the ability of the chief public defender to control the direction of the office. Thus, there are really two related but distinct considerations: the power of the chief public defender as manager in internal dealings with labor, and the power of the chief public defender and their staff, collectively, in external dealings with other system stakeholders. A full exploration of these considerations is beyond the scope of this article and is worthy of further research.

[152] *Id.*

[153] *See infra* Part IV.B; *see also* John P. Gross, *Case Refusal: A Right for the Public Defender But Not a Remedy for the Defendant*, 95 WASH. U. L. REV. 253 (2017) (gathering examples of public defenders refusing new cases and explaining why it is a rare phenomenon); Brandon Buskey, *When Public Defenders Strike: Exploring How Public Defenders Can Utilize the Lessons of Public Choice Theory to Become Effective Political Actors*, 1 HARV. L. & POL'Y REV. 533, (2007).

[154] Bunin, *supra* note 149, at 27.

[155] For example, in 2009, the San Francisco public defender refused new case assignments in certain categories of cases. San Francisco Public Defender, *Why the Public Defender Is Withdrawing from Providing Representation at the CJC*, Aug. 11, 2009, https://sfpublicdefender.org/news/2009/08/public-defender-withdrawing-providing-representation-cjc/

[156] One US Attorney General has defended the right of public defenders to decline new appointments. Statement of Interest of the United States at 9, Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122 (W.D. Wash. 2013) (No. C11-1100RSL).

[157] To be sure, aggressive lobbying can and does result in termination of employment in some jurisdictions, but at least one court has held a chief public defender fired after filing an impact suit related to inadequate staffing and funding levels had a cause of action. Flora v. County of Luzerne, 776 F.3d 169, 179-81 (3d Cir. 2015).

[158] *See* Autumn Childress, *'Unsatisfactory': Richmond public defenders say jail conditions causing headache,* WRIC.com, Jul. 25, 2024,

time lobbyists or entire divisions dedicated to legislative advocacy.[159] Both formally and informally, an institutional office of the public defender can engage with other system stakeholders about issues beyond individual case-by-case advocacy. This engagement is complex. For example, policy changes that benefit an office's clients may come at a fiscal or political cost.[160] But it is difficult for flat-fee or panel defenders to have a comparable voice in criminal justice policy.

Fourth, institutional public defender offices can engage in impact litigation[161] and other forms of collective action.[162] Across the country, public defender-initiated impact litigation has had significant benefits for entire classes of clients[163] and allowed public defenders to assert their authority vis-à-vis other system actors.[164]

Given these structural advantages to institutional public defender offices, it should not be surprising that they tend to achieve better outcomes for their clients. For example, in one empirical study looking at multiple-defendant cases, assignment of public defenders rather than panel lawyers reduced the probability of any prison sentence by 22 percent and the length of prison sentences by 10 percent.[165] Other studies across the country and over the span of decades have shown that public defenders achieve lower conviction rates and sentences, and spend more time on their cases than non-institutional counterparts.[166]

The threshold choice to create an office of the public defender invariably leads to a second design question with major implications for funding,

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https://www.wric.com/news/taking-action/unsatisfactory-richmond-attorneys-say-jail-conditions-causing-headache; James Foreman, Jr., *Jorde Symposium Lecture: Confronting Mass Incarceration*, 107 CALIF. L. REV. 1955, 1964 (2019).

[159] *See, e.g.*, the Rhode Island Public Defender "Legislative Initiatives" division, https://www.ripd.org/officedivisions.html.

[160] Bunin, *supra* note 149, at 32 ("Taking a position that ultimately benefits their clients, but can also cost their local government millions of dollars, may jeopardize public defenders' positions.").

[161] The Bronx Defenders, for example, has a dedicated team focused on impact litigation. https://www.bronxdefenders.org/programs/impact-litigation/.

[162] *Infra* part IV.

[163] *See, e.g.*, Buffin v. City and County of San Francisco, Case No. 15-cv-04959-YGR (N.D. Cal. Mar. 4, 2019) (challenging pre-charging detention based on a bail schedule).

[164] Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers As Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1201 (2005), *but see* Charles J. Ogletree & Randy Hertz, *The Ethical Dilemmas of Public Defenders in Impact Litigation*, 14 N.Y.U. REV. L. & SOC. CHANGE 23, 24 (1986) (asserting that public defender impact litigation "creates an inherent potential for ethical conflicts").

[165] Yotam Shem-Tov, *Make or Buy?: The Provision of Indigent Defense Services in the United States*, 104 THE REV. OF ECON. AND STATS. 819, 819 (2022).

[166] *See* Primus, *supra* note 10, at 241-51 (describing studies from Philadelphia, Texas, San Francisco, Los Angeles, North Carolina, New York, and nationwide).

oversight, and independence: to whom does the chief public defender answer?[167] With any system design there is a risk of public defense providers being captured by other stakeholders. But not all capture looks the same, and the particular design choices matter. As Irene Joe's research shows, most states place the public defender in the executive branch, a smaller number place it in the judicial branch, and a handful delegate it to local governments.[168] Some public defenders are also elected by the voting public or incorporated as non-governmental non-profits. We now explore the implications of these various design choices for independence and capture.

1. Executive Appointment

The executive branch is responsible for enforcing laws, including policing and prosecution functions. Criminal justice reform advocates and the defense bar typically see a fundamental conflict when the executive branch is also in charge of public defense. Yet thirty-three states assign control of public defense to the executive branch,[169] often by statute.[170] This can lead to some stark conflicts of interest. For example, the governor of Louisiana has direct control over the state's public defender system.[171] He recently used that authority to push for funding changes that would have paid public defenders more if a client pled guilty.[172] This is symptomatic of a straightforward political problem—the chief executive of a state has strong political incentives to appear tough on crime. And those incentives run directly contrary to defense lawyers' professional role.

States sometimes move away from executive appointment models because of these concerns. But such reform efforts, even when successful at removing direct executive branch oversight, can fall short of the broader goal of avoiding public defender capture. New Mexico is an instructive example of the elusiveness of true independence for public defense agencies. In 2012, a New Mexico ballot measure gave voters the choice to remove the governor's authority to appoint the state's chief public defender. The head of the state criminal defense lawyers' association called the initiative a "no-

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[167] Some states have different management systems for trial-level, appellate-level, juvenile, and capital cases. Joe, *supra* note 5, at 130. Here, we focus on trial-level public defense institutional design.

[168] Joe, *supra* note 5, at 131.

[169] *Id.*.

[170] *See, e.g.*, DEL. CODE ANN. TIT., § 4602(a) ("The Office of Defense Services shall be headed by the Chief Defender [who] shall be . . . selected by the Governor."); GA. CODE ANN. § 17-12-1(b) ("The Georgia Public Defender Council shall be an independent agency within the executive branch of state government").

[171] *See* Lauren Gill, *Landry's Power Play Over Public Defense in Louisiana*, BOLTS, April 19, 2024, at https://boltsmag.org/jeff-landry-louisiana-public-defense.

[172] *Id.*

brainer," and summed it up thus: "Having a governor, a career prosecutor, appoint both the head of the Department of Public Safety and the chief public defender, deciding the budget allocations to each, giving input on how each department of government shall function on a regular basis is, to put it mildly, less than ideal and a conflict of interest."[173] It is easy to understand why the criminal defense community would bristle at being housed within the executive branch, and see that institutional choice as undermining the independence and effectiveness of public defense. Executive control over public defense is the epitome of capture by a hostile interest. New Mexico's ballot measure was ultimately successful and resulted in the state public defender becoming an independent state agency.[174] Yet it did not create a functionally independent, well-resourced public defender service. Instead, it gave rise to a different problem—securing adequate resources from the legislature.[175] When the public defender was an extension of the governor's office, it had a built-in patron to ask for funding allocations. But once it became independent, it struggled to lobby for money.[176] The head public defender thus confronted a budget crisis, stopped accepting new case assignments, and was ultimately held in contempt of court.[177] This example suggests that there may be an implied tradeoff, at least in some instances, between full political independence and securing resources.

2. Judicial Appointment

The judicial branch is responsible for interpreting laws, providing parties with due process, and neutrally adjudicating cases. Serving as a neutral arbiter of disputes would seem to be at odds with appointing and overseeing counsel for one side. But, in addition to panel systems, some federal defender offices are managed through the judicial branch,[178] as are eleven state public defender systems.[179] The specific role the judiciary plays in overseeing public

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[173] Debra Cassens Weiss, *New Mexico Ballot Measure Would Create Independent PD's Office*, ABA J. (Oct. 10, 2012), http://www.abajournal.com/news/article/new_mexico_ballot_measure_would_create_independent_pds_office.

[174] *See* Micah McCoy, *Gov. Martinez Signs Independent Public Defender Bill*, ACLU NEW MEXICO, April 8, 2013, aclu-nm.org/en/news/gov-martinez-signs-independent-public-defender-bill.

[175] *See Chief Public Defender Held in Contempt After Turning Down Cases, Says Office Can't Afford It*, NEW MEXICO POLITICAL REPORT, Dec. 2, 2016.

[176] *Id.*

[177] For a detailed description *see* Joe, *supra* note 5, at 115-17.

[178] *See generally* JUDICIAL CONFERENCE OF THE UNITED STATES, 2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT (2018) (describing the history and structure of indigent federal defense).

[179] Joe, *supra* note 5, at 131.

defense agencies varies across these jurisdictions. For example, some states that place the public defender within the judiciary provide for commissions or boards to do the oversight work.[180] Other states explicitly assign judges the power to appoint the chief public defender.[181] All of these approaches present different obstacles to autonomy, and myriad opportunities for capture. Concerns about defense lawyer cooptation are longstanding; many state statutes explicitly use language like "part of, but is not subject to the administrative control of"[182] or "independent department of the judicial branch"[183] to emphasize, at least symbolically, the need for independence. But to realize their potential as a separate power, capable of asserting checks and balances within the criminal justice system, defenders require more than symbolic independence.

Early concerns about lack of independence when judges oversee public defense functions has proven prescient.[184] In 2017, a committee of federal judges, scholars, and practitioners chosen by Chief Justice John Roberts issued a report on the state of the CJA. The report's central conclusion was that "[t]he needed course of action is clear: Congress should create an autonomous entity, not subject to judicial oversight and approval."[185] It cited numerous problems stemming from judicial control of federal defenders, including severe staffing shortages, significant quality discrepancies between districts, and chief public defenders feeling beholden to the preferences of the judges who reappoint them every four years.[186] Nearly a decade later, we have not separated federal public defender offices from control by the judges they appear before.

3. Board Appointment

Some states that formally assign the public defender to the judicial or executive branch provide for actual appointment of the chief public defender through a board or commission.[187] Depending on the details, this approach may be an effective way to achieve public defender independence, or it may

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[180] *See, e.g.*, COLO. REV. STAT. ANN. § 21-1-101(1); MINN. STAT. § 611.215(1); CONN. GEN. STAT. ANN. §§ 51-289 to 51-300.

[181] *See, e.g.*, WASH. REV. CODE ANN. § 2.70.010.

[182] MINN. STAT. § 611.215(1)(a).

[183] MO. REV. STAT. § 600.019(1)

[184] *Supra* note 132; *see* David E. Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL L. REV. 335, 338 (2017).

[185] JUDICIAL CONFERENCE OF THE UNITED STATES, 2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT X (2018).

[186] *Id.* at XX-XXI.

[187] *Compare* ARK. CODE ANN. § 16-87-202 (seven-member board with the governor appointing all members) *with* COLO. REV. STAT. ANN. § 21-1-101 (five-member board with the state supreme court appointing all members)

serve as a proxy vehicle for a particular branch to exercise control over public defenders. In all, twenty states have boards at the state level that are responsible for appointing and/or supervising public defenders.[188] The composition of these boards varies, with seats generally given to each branch of government (e.g. gubernatorial, judicial, and legislative appointees) and sometimes to other criminal justice stakeholders.[189]

In general, the more diverse the makeup of a board's membership, the more likely it is to secure independence for the public defender.[190] When a single official or branch appoints a majority of the board members, the board and, in turn, the public defender will be at greater risk of external domination.[191] A diverse board reduces that possibility by diffusing control between different interests. A diverse board can also potentially mitigate the tradeoff between political independence and funding. While public defenders might prefer low caseloads, high budgets, and no oversight, a more practical model for independence—because there will always be some level of oversight attached to increased budgets—is diverse boards that are themselves independent of and insulated from other branches of government. The need for this kind of structural independence is evident not only at the state level but also at the local level.

There are several states that decline to assign the public defender to any branch of state government. Typically these states delegate the authority to appoint the chief public defender to local or county government.[192] When that happens, the county legislative body tends to get the power to appoint the

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[188] Joe, *supra* note 5, at 133, Appendix E.

[189] *See, e.g.*, IND. CODE ANN. §§ 33-40-5-1 to 33-40-5-2, 33-40-6-1 (creating an 11-member commission where three members appointed by the state governor, three members are appointed by the chief justice of the state Supreme Court, one member is appointed by the Board of Trustees of the Indiana Criminal Justice Institute, two members of the state's House of Representatives are appointed by the Speaker of the House, and two members of the state Senate who are appointed by the president pro tempore of the Senate).

[190] *See generally*, Bunin, *supra* note 149, at 65-66 (discussing ideal oversight board composition to maximize independence).

[191] *See, e.g.*, Matthias Gafni, *After uproar, S.F. mayor says she'll stop making appointees sign undated resignation letters*, SAN FRAN. CHRON., (Sept. 25, 2022) https://www.sfchronicle.com/bayarea/article/S-F-mayor-made-police-commission-appointee-sign-17465024.php (describing the local chief executive's problematic practice of requiring undated letters of resignation in advance of appointing members of boards as a way to control subsequent votes by those appointees).

[192] *See, e.g.*, N.Y. COUNTY LAW §§ 716–721 ("The board of supervisors of any county may create an office of public defender, or may authorize a contract between its county and one or more other such counties to create an office of public defender to serve such counties."); 16 PA. STAT. AND CONS. STAT. ANN. §§ 9960.3–9960.4 ("In each county except the County of Philadelphia, there shall be a public defender, appointed. . . . by the Board of County Commissioners.").

chief public defender.[193] It is noteworthy that no state assigns the public defender to the legislative branch,[194] and yet when authority is delegated to the county level it is often legislative bodies that choose the head public defender for that jurisdiction. State legislatures typically follow the federal model of avoiding direct responsibility for managing specific agencies or services.[195] Not so with county level legislative branches.

California counties, for example, are governed by legislative Boards of Supervisors (usually five elected members) with no equivalent elected chief executive role[196] at the county level.[197] Rather, county boards hire an unelected chief executive administrator to oversee the business of the various county agencies.[198] The same Board of Supervisors is responsible for allocating budgets and approving new positions for hiring purposes for all the county agencies, including the public defender. This creates a real tension for an appointed chief public defender. Push too hard for more resources, or be too zealous in your advocacy for better conditions in the county jail, or access to county-funded diversion programs, or myriad other criminal justice policy issues, and you become a thorn in the side of the supervisors who can fire you. One potential advantage of this model is that it allows local governments to be more responsive to local needs and priorities than would a state-wide system. However, it also inevitably results in inequities across counties,[199] where a statewide model would not.[200] In some counties, candidates being

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[193] *See, e.g.*, *id.*; CA. GOVT. CODE § 27703 ("If the public defender of any county is to be appointed, he shall be appointed by the board of supervisors to serve at its will.").

[194] Joe, *supra* note 5, at Appendix A.

[195] *Id.* at 126 .

[196] The City and County of San Francisco is, as so often, the exception. It is the only one of California's 58 counties where municipal and county lines are entirely contiguous. Thus, San Francisco's government structure is a unique hybrid of municipal and county: 11 members of the Board of Supervisors (combining city council functions with board functions), not 5, and an elected mayor as chief executive who appoints the city administrator, unlike other counties where the board is responsible for choosing that executive role.

[197] *See, e.g.*, Anthony S. Alperin, *The Attorney-Client Privilege and the White House Counsel*, 29 W. ST. U. L. REV. 199, 207 (2002) (describing the difference between state and local government powers in California, including the Board of Supervisors legislative and administrative powers).

[198] *See, e.g.*, San Diego County's Chief Administrative Office https://www.sandiegocounty.gov/content/sdc/cao.html; California Association of County Executives https://www.calcountyexecs.com/directory.html.

[199] These inequities include the decision to have an institutional public defender (e.g. Alameda County) v. a panel system (e.g. San Mateo County) v. a contract system (e.g. Trinity County), as well as budget allocation where, for example, Shasta County spent $58 per capita on indigent defense in FY23-24 while neighboring Lassen County spent less than $30. All these examples are from within California. County budget documents on file with author.

[200] For example, Colorado's statewide public defender hires new attorneys and then

vetted for the chief public defender role are made to promise not to publicly take positions on any issues without the prior approval of the entire Board.[201] It is easy to see the political problem that a truly zealous chief public defender would create for the elected supervisors responsible for hiring and firing them. Rather than a separate power capable of checking and balancing other system actors, this institutional design renders a chief public defender little more than a middle manager navigating human resources and labor relations issues for the county.[202]

4. Nonprofit

Some institutional public defender offices exist not only outside of any branch of government but entirely outside of government. There are numerous well-respected, high-profile public defenders across the country at the federal,[203] state,[204] and local[205] level that are nonprofit corporations rather than government agencies. The independent nonprofit service provider model may allow for more independence and flexibility than a pure government institutional model. Nonprofits are not formally part of government or the political process, which may enhance independence in practice and appearance. Nonprofits may have diverse funding streams which can mitigate caseloads, protect autonomy, and diversify service provision. For example, many nonprofit public defenders offer a wide array of legal and social

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assigns them to a particular branch office—staff do not apply directly to a specific branch location.

[201] One of the authors (Boudin) was told this while interviewing for a position as the head of a public defender office in California.

[202] There are, however, chief public defenders who have served far longer than any member of their appointing Board and managed to achieve a degree of political autonomy. Consider, for example, Alameda County's Brendan Woods who has served as chief public defender since 2012. *See* Justin Phillips, *Alameda County's first Black chief public defender is trying to fix the problem with juries*, SAN FRAN. CHRON. (Apr. 4, 2021) https://www.sfchronicle.com/local/article/Alameda-County-s-first-Black-public-defender-is-16073555.php (describing Woods zealous advocacy and willingness to challenge the Superior Court on policy issues).

[203] *See, e.g.*, Federal Defenders of San Diego, California, https://fdsdi.com/.

[204] *See, e.g.*, New Hampshire Public Defender, https://www.nhpd.org/.

[205] *See, e.g.*, Still She Rises, Tulsa, Oklahoma, https://stillsherises.org/, Arch City Defenders, St. Louis, Missouri, https://www.archcitydefenders.org/, Bronx Defenders, Bronx, New York https://www.bronxdefenders.org/.

services[206] and engage in impact litigation[207] not limited to a narrow interpretation of indigent criminal defense. Similarly, while government law offices will always depend on a government budget process to finance their operations, nonprofits can nimbly diversify income streams to include donations, grants, and more. But this model, too, has limitations and challenges.

Nonprofits depend on outsiders for funding and are subject to limits on their independence.[208] Nonprofits have boards of directors who may be members of other branches of government,[209] or private practitioners,[210] for example. Perhaps most critically, nonprofits that are primary service providers must contract with local governments to get appointed as counsel and to obtain government reimbursement for eligible services.[211] These contracts are subject to political pressures and whims, cost cutting, and all manner of skullduggery.[212] While nonprofit public defenders have a great reputation and track record, their independence, funding, and ability to receive court appointment to new cases are contingent.[213] Notwithstanding these limitations, the nonprofit model, if implemented well, does bring significant advantages in ensuring that public defenders are functionally

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[206] *See, e.g.*, The Defender Association of Philadelphia, https://phillydefenders.org/social-services/. This model is not limited to coastal states or large urban jurisdictions. For example, three counties in Utah rely on nonprofits for primary indigent defense. RAND CORP., PROVISIONAL CASELOAD STANDARDS FOR THE INDIGENT DEFENSE OF ADULT CRIMINAL AND JUVENILE DELINQUENCY CASES IN UTAH xi-xii (2021).

[207] *See, e.g.*, The Bronx Defenders, https://www.bronxdefenders.org/programs/impact-litigation/.

[208] *See, e.g.*, Benjamin Mueller, *Lawyers Who Appeared in Anti-Police Video Are Forced to Resign*, N.Y. TIMES, Feb. 4, 2015, https://www.nytimes.com/2015/02/05/nyregion/lawyers-who-appeared-in-anti-police-video-are-forced-to-resign.html (reporting on firing of two public defender attorneys in context of threat to major source of funding to nonprofit Bronx Defenders organization).

[209] The New Hampshire public defender is a statewide nonprofit service provider with its own board of directors but is also overseen by a 24-member judicial council housed, confusingly, within the executive branch. *Compare* https://www.judicialcouncil.nh.gov/about-council/duties *with* https://www.nhpd.org/our-team/.

[210] The San Diego Federal Defender's board is almost entirely private practitioners. https://fdsdi.com/fdsdi-board/

[211] Bunin, *supra* note 149, at 31.

[212] Consider, for example, the New York City Mayor Giuliani's aggressive tactics to severe ties with the Legal Aid Society. David Firestone, *Giuliani Moves to Reduce Legal Aid Society's Role*, N.Y. TIMES (Oct. 21, 1995), https://www.nytimes.com/1995/10/21/nyregion/giuliani-moves-to-reduce-legal-aid-society-s-role.html

[213] Structurally, there is a lot in common with the contract model discussed *supra* Part III.A with the key difference being that contract model services are usually provided by for-profit law firms.

independent from other government agencies.

5. Election

While almost every state and local chief prosecutor in the country is elected, as are most state court judges, chief public defender elections are relatively rare. Public defenders are elected in all of Florida[214] and Tennessee,[215] twenty-three counties in Nebraska,[216] and San Francisco, California.[217] Election, rather than appointment, can enhance the public profile and independence of the office and increase the adversarial power of the officeholder. But it can also create conflicts of interest stemming from the unpopularity of zealous defense lawyers.

To see the myriad ways electing a chief public defender might elevate that office as a separate power in the criminal justice system, one need look no further than San Francisco. For nearly two decades Jeff Adachi served as San Francisco's elected public defender. An entrenched incumbent,[218] he ran mostly without challengers and served until his death.[219] During annual county budget cycles Adachi was a zealous advocate for growing his staff: he tripled the office's budget during his tenure.[220] All the funding allowed him to broadly define the role of the public defender to include immigration services,[221] bail reform,[222] impact litigation,[223] and more.[224] Adachi had

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[214] FLA. STAT. ANN. § 27.50. For a history of why Florida elects public defenders and arguments in favor and against, *see* Zachary Phillips, *Why Does Florida Have Public Defender Elections*, 26 ST. THOMAS L. REV. 322 (2014).

[215] Tenn. Code Ann. § 8-14-102.

[216] Counties with populations of 100,000 or more elect public defenders. Neb. Rev. Stat. Ann. § 23-3401. Approximately 23 out of 93 counties in the state elect the chief public defender. Nebraska Appleseed Center for Law in the Public Interest, *Improving Public Defense Systems: A Comprehensive Evaluation of Indigent Defense in Nebraska* (2004).

[217] Cal. Gov't Code §§ 27702-04.

[218] Incumbent elected public defenders, like district attorneys and other "down ticket" officials have a huge advantage in winning reelection. *Id.* at 815.

[219] Vivian Ho, *"A model for America": the criminal justice reformer who inspired a generation*, THE GUARDIAN (Mar. 2, 2019) https://www.theguardian.com/us-news/2019/mar/02/jeff-adachi-public-defender-san-francisco-death-legacy.

[220] *Id.*.

[221] Joe Eskenazi, *Public Defender's immigration team hits a milestone — but there are so many miles yet to go*, MISSIONLOCAL.ORG (Jul. 3, 2018) https://missionlocal.org/2018/07/public-defenders-immigration-team-hits-a-milestone-but-there-are-so-many-miles-yet-to-go/.

[222] The office received the National Association of Criminal Defense Lawyers' Champion of Justice Award in 2019 for it's bail reform work. https://www.nacdl.org/newsrelease/ChampionofPublicDefenseAward.

[223] *See supra* note 163.

[224] Alena Yarmosky, *The Impact of Early Representation: An Analysis of the San Francisco Public Defender's Pre-Trial Release Unit*, CAL. POLICY LAB, (Jun. 2018)

tremendous autonomy and independence.[225] Critically, Adachi fought for his clients, issues, and office not only in the courtroom but also in the press. As one reporter put it: "Every local San Francisco journalist has hours of recorded interviews with Adachi – his critics used to call him a 'media whore', always quick to call a press conference – but he knew that when it came to righting wrongs within the criminal justice system, he had to convince more than just a jury of 12."[226] Of course, not all public defenders, elected or appointed, are Jeff Adachi, and not all jurisdictions are San Francisco.

In some public defender elections, candidates pandering to "tough on crime" electorates make promises or take actions fundamentally at odds with the ethical and constitutional mandates of the office. Elections can politicize constitutional and bureaucratic functions and complicate ethical obligations with partisan pandering.[227] Florida has seen elected public defenders clean out the experienced death penalty lawyers to save money, campaign with the endorsement of the police union, and promise to save money on public defense.[228] This last issue—campaign promises to save tax dollars—is one that cuts directly against the ability of a head public defender to advocate for increased resources.[229] Yet public defender campaigns often focus on cost savings.[230] More problematic still are campaign promises to prohibit defense tactics that are ethically required in some cases. For example, one Florida public defender candidate who received campaign funding from a police

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https://capolicylab.org/wp-content/uploads/2018/06/Policy-Brief-Early-Representation-Alena-Yarmosky.pdf.

[225] In 2017 he was a finalist to be appointed by the Los Angeles County Board of Supervisors as the chief public defender for Los Angeles County, the biggest public defender office in the country. He withdrew himself from consideration, telling the press "It was clear that I would not have the freedom that I have here," and reporters noted "the Los Angeles County public defender serves at the will of county supervisors — some of whom might not take kindly to a crusading public defender." Matier & Ross, *Jeff Adachi to L.A.? He says no*, SAN FRAN. CHRON. (May 24, 2017) https://www.sfchronicle.com/bayarea/article/Jeff-Adachi-to-L-A-He-says-no-11168375.php.

[226] Ho, *supra*, note 219.

[227] *See* Ronald F. Wright, *Public Defender Elections and Popular Control over Criminal Justice*, 75 MO. L. REV. 803, 804 (2010) ("[C]andidates who hope to appeal to voters often make promises that undermine the basic functions of the adversarial process.").

[228] John W. Hall, "*'First Thing We Do, Kill All The [Death Penalty] Lawyers,'*" 33 CHAMPION 5, 5 (2009).

[229] Of course, many politicians promise one thing and do another.

[230] *See, e.g.*, "Public Defense at a Reasonable Cost to the Taxpayer," Bob Oaks Campaign add published in Tennessee, ELIZABETHTON STAR, (Jul. 16, 2006) on file with authors https://drive.google.com/file/d/13xRtKV0OxoRwj1qgpgt0b6kdDaaJjo3l/view. *See generally*, Wright *supra* note 227, at 817-20 (describing public defender campaign promises focused on reducing costs and gathering sources).

union[231] promised that, if elected, no one in his office would be allowed to accuse the police of lying.[232] These sorts of incidents cause some experts to argue against electing chief defenders.[233]

Anecdotes about individual candidates, office holders, and campaigns aside, there have been surprisingly few empirical studies of the impact of electing public defenders. One study found that public defender elections enhance the independence and stature of the office, cause greater salary parity between public defenders and prosecutors, and increase the likelihood that judges have public defense experience.[234] From a separation of powers perspective, these results make sense. Elected public defenders do enjoy a democratic source of legitimacy. And they are not accountable to other system actors through an appointment process. So elected public defenders are, both symbolically and practically, vested with the independence necessary to act as a separate power within the criminal justice system. But, perhaps depending on the jurisdiction, their ability to act as a true institutional counterweight may be mitigated by their need to appeal to the electorate.

IV. COLLECTIVE ACTION BY DEFENSE LAWYERS

Defense lawyers sometimes work together in our system. This happens most commonly in public defender offices. Working together often helps defense lawyers achieve better outcomes for their clients than they could acting alone. By collaborating they can pool knowledge, advance novel legal theories, and exert pressure on the court system, police, and prosecutors. Such collective action is difficult to square with the traditional, individualized view of criminal defense.[235] But it is perfectly comprehensible if one incorporates defense lawyers into a separation-of-powers framework. Defense lawyers acting as a group can better check and balance the other branches of government, both in the courtroom and in broader negotiations over the court system. One could draw an analogy to labor unions. Unions have a duty of fair representation to their individual members, while also acting on behalf

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[231] Ron Littlepage, *Demands of City Pension Funds are Booming*, JACKSONVILLE.COM (Jan. 10, 2009) http://jacksonville.com/opinion/columnists/ron_littlepage/2009-01-11/story/demands_of_city_pension_funds_are_booming.

[232] Gwynedd Stuart, *Courting Disaster*, FOLIO WEEKLY (Dec. 16, 2008) at 16, 21.

[233] Wright, *supra* note 227, at 827-28 ("The appointment system keeps voters focused on the policies and priorities of the public defense system rather than the tactics that defense attorneys might follow in a particular case.").

[234] *See* Andrew Howard, *The Public's Defender: Analyzing the Impact of Electing Public Defenders*, 4 HRLR ONLINE 173 (2020) (drawing on both qualitative interviews and quantitative analysis).

[235] *See* Taylor-Thompson, *supra* note 7 (contrasting individualized versus collective understandings of the public defender).

of all their members collectively.[236] And by coordinating in a union, workers enjoy more negotiating leverage than they would as individuals. Unions thus help level the playing field with employers, whose natural unity otherwise gives them a structural advantage against individual employees. Similarly, defense lawyers who act collectively are bringing their power to bear as an institutional counterweight against the government. By doing so they help defendants gain more leverage against unified prosecution offices and judicial branches.

Such collective action can produce ethical problems. Defense lawyers have overriding professional ethical commitments to maintain confidentiality, provide candid advice, and further their clients' specific goals.[237] Where collective defense strategies create conflicts of interest between different clients, or between the lawyer and the client, they violate defense lawyers' duties. Plea bargain strikes are one much-discussed example.[238] They potentially help clients in the aggregate but hurt specific individual clients who would have benefitted from a plea deal. But there are also many situations where collective defense strategies are aligned with (or at least not contrary to) specific clients' individual interests. Here we discuss three such strategies in depth, situating them in the separation of powers framework. These are: (1) coordinating litigation strategy at the trial and appellate level, (2) collectively refusing to take new case assignments, and (3) systematically exercising veto rights against specific judges.

A. Litigation Strategies

When defense lawyers work together, for example in a public defender's office, they can litigate more effectively than they would working alone. They can pool information, cultivate and argue novel legal theories, and copy each other's best arguments. And when a group of lawyers develops an issue that succeeds, all of their clients benefit instead of just one. Such coordination is routine in prosecutor's offices. It is easier for prosecutors because they have a single abstract client ("the people") and unified leadership. For defense lawyers, on the other hand, working together is logistically difficult without a collective office like a public defender. But defense lawyer coordination, where it occurs, can help to counterbalance prosecutors' structural advantages. Here we will discuss three different strategies—pooling information, conducting impact litigation, and engaging in group

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[236] *See* Archibald Cox, The Duty of Fair Representation, 2 Villanova L. Rev. 151 (1957); Clyde W. Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251, 257 (1977).

[237] *See* Model Rules of Professional Responsibility Rules 1.2, 1.3, 1.4, 2.1.

[238] *See, e.g.*, Crespo, *supra* note 72, at 2022-25.

negotiation over courthouse policies.

First, information pooling. Defense lawyers often learn information in their cases that would be helpful to other defense lawyers in other cases. If defense lawyers have the capacity to systematically share information, then, they will be much more effective. One example is police officer misconduct. Say that a prosecutor discloses to a defense lawyer that a police officer witness has serious misconduct in their personnel file. This would be very useful information for the rest of the defense lawyers in the jurisdiction who have cases involving that officer. Some public defender offices have "bad cop" databases for this very purpose.[239] But atomized defense lawyers are less able to systematically share such evidence. And if the information is not shared then fewer defendants are able to benefit from it, and fewer officers are held professionally accountable for their misconduct. There are numerous other examples of situations where defense lawyers can share information about law enforcement actors. These include, for example, a crime lab that has corrupt employees, a police department that systematically conducts illegal searches, and a prosecutors' office that uses illegal jailhouse informants.[240] If the defense bar pools its knowledge of such practices, it can provide a more effective check on lawless law enforcement.

Second, litigation. Defense lawyers, when they act collectively, can strategically develop and argue for helpful legal theories. In other words, they can pursue impact litigation. A public defender's office, for example, will often see the same issues arise in cases over and over. Such offices can cultivate legal theories to address those issues, systematically coordinate objections, and find appropriate cases to appeal. This kind of strategic

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[239] *See* Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 785 (2015). Prosecutors would theoretically have obligations to disclose impeachment material in future cases too, but in practice such disclosure is often variable, can depend on the prosecutor's assessment of its relevance, and is partly contingent on defense lawyers requesting it. One of the authors (Fish), for example, had a case dismissed because the prosecutor failed to disclose impeachment evidence about one of its agent witnesses. The author only found out about the evidence after the trial was over, from one of the author's public defender colleagues who had had it disclosed in a prior trial.

[240] *See, e.g.*, Patrick Lee, *Crime Lab Scandal Forces Prosecutors to Disavow Thousands of Drug Convictions*, PROPUBLICA, April 19, 2017 (scandal involving a corrupt crime lab chemist whose work affected around 24,000 cases); Nirej Sekhon, *Mass Suppression: Aggregation and the Fourth Amendment*, 51 GA. L. REV. 429, 466-71, 474–77 (2017) (arguing that public defenders are well placed to identify systematic Fourth Amendment violations such as racial profiling); Elizabeth Weill-Greenberg & Jerry Iannelli, *DOJ Finds Orange County Sheriff, DA Violated Civil Rights Using Illegal Jailhouse Informants*, THE APPEAL, Oct. 13, 2022 (illegal jailhouse snitch program run by Orange County DA's office that was uncovered by a public defender); Etienne, *supra* note 164, at 1240-43 (public defenders systematically questioning officers over failure to read Miranda rights in Spanish).

behavior gives the defense lawyers several advantages they would otherwise lack. It lets them respond to systematic rights violations by going to a higher court. It lets them conduct appeals strategically, waiting for the right time and the right case to raise an issue.[241] And it lets them distribute an objection script to a larger group of defense lawyers. This ensures that, if a legal victory is obtained, many defendants will benefit because their lawyers raised the issue.[242] There are numerous examples of such strategic collective litigation. Public defenders have coordinated over issues like access to bail, DNA evidence, and jury pool composition.[243] And to take one rather dramatic example, in 2018 the federal defenders in San Diego raised the same legal objection in nearly 500 immigration-related prosecutions.[244] The appeals court ultimately agreed with the argument they raised, resulting in nearly 500 convictions being reversed by one decision.[245] That case involved many defense lawyers making the same objection for several months, and then litigating it in the appeals court. Individual defense lawyers working in their silos simply could not do such a thing.

Finally, institutional groups of defense lawyers have more sway to negotiate over policies within the court system. Such negotiations can occur with judges, prosecutors, jail administrators, and other actors. For example, public defenders can use their collective leverage to push the prosecutor's office to lower the standard plea bargain offer for a certain kind of charge.[246] They can pressure the local jail to change its policies regarding things like

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[241] *See* Jack Chin, *Agenda Setting as a Tactic in Institutional Criminal Defense*, 41 N.E. J. ON CRIM. L. & CIVIL CONFINEMENT 29 (2015) (calling on public defenders to develop legal issues they wish to advance in appellate courts); *cf.* Daniel Epps & William Ortman, *The Defender General*, 168 U. PENN. L. REV. 1469 (2020) (calling for a national Defender General to represent the collective interests of criminal defendants before the Supreme Court).

[242] *See* Fish, *supra* note 81, at 1962-63; Taylor-Thompson, *supra* note 7, at 2432 ("Within each office, defenders formulated arguments to be raised in every case in which the government sought to introduce DNA test results against an accused.").

[243] *See* Taylor-Thompson, *supra* note 7, at 2432 (public defender litigation over DNA evidence); Michael Barba, *SF public defender seeks order forcing California courts to follow bail reform decision*, SAN FRANCISCO EXAMINER, June 26, 2018 (public defender litigation over bail); Russell E. Lovell, II & David S. Walker, Achieving Fair Cross-Sections on Iowa Juries in the Post-Plain Worlds: The Lilly-Veal-Williams Trilogy, 68 Drake L. Rev. 499, 519-29 (public defender litigation over jury composition).

[244] Fish, *supra* note 81, at 1890, 1916-17.

[245] U.S. v. Corrales-Vazquez, 931 F.3d 944, 946 (9th Cir. 2019).

[246] *See* Etienne, *supra* note 164, at 1239-40 (describing a collective effort by federal defenders to get appeal waivers taken out of plea agreements by encouraging their clients to plead guilty without an agreement). In addition, both authors were aware of collective negotiations over standard plea offers when they practiced as public defenders in different offices. One was over the standard offer for a D.U.I. case, while another was over the standard offer in a federal drug smuggling case.

attorney visits or medical care. And they can negotiate with judges over courtroom procedures, such as the presence of defense attorneys at initial appearances or whether defendants will be shackled in the courtroom. Public defenders have some leverage to negotiate over these issues because they handle a lot of cases, and so they exercise some control over the day-to-day operation of the court system. If other system actors reject public defenders' requests, then public defenders can work together to make the court system run less smoothly. They can do things like systematically raise objections, demand hearings, and litigate legal issues. But any such leverage disappears if defense lawyers cannot or do not act collectively. Then they are simply individual lawyers who must accept the courthouse procedures they are given.

B. Work Stoppages

Among the most powerful tools available to public defenders as an institutional force is their ability to refuse cases or stop working entirely.[247] These actions—ranging from individual offices declining new assignments to system-wide strikes—demonstrate how defenders can exercise collective power to check other institutional actors and advocate for both their clients' interests and systemic reform.[248] When defenders refuse to accept new cases or engage in work stoppages, they can effectively grind the criminal courts to a halt, forcing other stakeholders to confront systemic deficiencies.[249]

The history of defender work stoppages reveals both their effectiveness and their costs. In 1994, the Legal Aid Society of New York engaged in a brief but significant strike over working conditions and compensation.[250] The

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[247] A federal separation of powers analogue to a defense lawyer work stoppage might be when Congress recesses to avoid voting on presidential appointments.

[248] Of course, there can be a tension between achieving long-term goals around wage, labor and working conditions for the lawyers and the shorter term needs of clients. In at least one case, the ACLU sued a public defender's office engaged in a work stoppage. Jed Lipinski, *The trials and travails of a New Orleans public defender*, NEW ORLEANS ADVOC. (July 19, 2019), https://www.nola.com/news/crime_police/article_cbfe2bcc-3ae9-520f-bd52-d3ba28a4fc69.html. But, getting sued under such circumstances might actually be welcome and support the fight for more resources. Eli Hager, *Why Getting Sued Could Be the Best Thing to Happen to New Orleans' Public Defenders*, THE MARSHALL PROJECT (Jan. 28, 2016), https://www.themarshallproject.org/2016/01/28/why-getting-sued-could-be-the-best-thing-to-happen-to-new-orleans-public-defenders.

[249] *See* Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L.J. 2150, 2167-68 (2013) (detailing crushing public defender caseloads and the systemic dependence on having defense lawyers who are willing to push cases forward).

[250] James C. McKinley Jr., *Striking Legal Aid Lawyers Bow to Mayoral Ultimatum*, N.Y. TIMES, (Oct. 5, 1994), https://www.nytimes.com/1994/10/05/nyregion/striking-legal-aid-lawyers-bow-to-mayoral-ultimatum.html. Two decades earlier, in 1973, some 400 lawyers

strike's immediate impact was severe disruption to court operations, but its long-term consequences were even more significant. Mayor Giuliani responded by reducing Legal Aid's role and fragmenting indigent defense services across multiple providers.[251] The process took over a year,[252] during which time indigent defendants surely suffered. This episode illustrates both the power of collective defender action and the potential risks[253] when defenders lack sufficient political independence or institutional protection.

More recently, public defenders have increasingly turned to case refusals as a form of collective action. This strategy involves defenders declining to accept new cases when their existing caseloads exceed their capacity to provide constitutionally adequate representation. In 2007, for instance, the New Orleans Public Defenders Office began refusing cases, citing overwhelming caseloads and insufficient resources.[254] The office chose to take similar action again in 2012,[255] and 2016.[256] These refusals effectively forced courts and county governments to confront the reality that the constitutional right to counsel cannot be meaningfully fulfilled without adequate resources.

The first New Orleans example, perhaps, contributed to similar actions across the country: in 2008 public defenders in at least seven states were refusing new cases or engaging in litigation over excessive caseloads.[257] In 2019, public defenders in Portland, Oregon refused to accept new cases and

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in the same Legal Aid office went on strike as well. *See* Lesley Oelsner *400 Legal Aid Lawyers Go On Strike for Better Pact*, N.Y. TIMES (July 3, 1973), https://www.nytimes.com/1973/07/03/archives/400-legal-aid-lawyers-go-on-strike-for-better-pact-400-legal-aid.html.

[251] David Firestone, *Giuliani Moves to Reduce Legal Aid Society's Role*, N.Y. TIMES (Oct. 21, 1995), https://www.nytimes.com/1995/10/21/nyregion/giuliani-moves-to-reduce-legal-aid-society-s-role.html.

[252] Bunin, *supra*, note 149, at 32.

[253] Some courts have held defenders in contempt for refusing to accept appointment, but the contempt findings do not always stick. *See, e.g.*, State v. Gasen, 356 N.E.2d 505 (Ohio Ct. App. 1976) (reversing contempt finding against a defender who refused a new appointment).

[254] State v. Peart, 621 So. 2d 780, 784 (La. 1993) (describing systemic deficiencies in New Orleans public defense system including a lawyer who was regularly unable to meet his incarcerated clients for the first time until they had been in custody 30 to 70 days).

[255] Bunin, *supra*, note 149, at 36.

[256] Ben Myers, *Orleans public defender's office to begin refusing serious felony cases Tuesday*, NEW ORLEANS ADVOC. (Jan. 12, 2016), https://www.nola.com/news/crime_police/article_ab6df9bc-39d3-5616-a413-baaee50bfb04.html.

[257] Erik Eckholm, *Citing Workload, Public Defenders Reject New Cases*, N.Y. TIMES, (Nov. 9, 2008), https://www.nytimes.com/2008/11/09/us/09defender.html.

engaged in a brief work stoppage to lobby the state legislature, arguing that excessive caseloads were preventing effective representation.[258] The Wyoming Supreme Court held that judges cannot force defenders to take cases beyond their capacity.[259] Missouri's public defender system has repeatedly implemented case refusal policies when caseloads exceed established standards.[260] Similarly, public defenders in Minnesota have engaged in coordinated case refusals to protest unsustainable workloads.[261] Even in the face of a state supreme court ruling prohibiting them from refusing appointments,[262] Minnesota defenders made significant budget gains thanks to effective deployment of work stoppages.[263]

Sometimes the question of whether public defenders are engaging in a work stoppage or not can itself become political fodder for fights between the branches. For example, in Oregon, starting in 2023, the state found itself in a "public defender crisis" in which thousands of indigent criminal defendants were not receiving counsel because "there are not enough qualified attorneys in Oregon to represent defendants."[264] There was certainly ample evidence that the Oregon public defenders had crushing caseloads.[265] Though federal courts ordered relief until the legislature could adequately fund public defense,[266] and the state Supreme Court agreed to hear multiple related cases,[267] prosecutors accused public defenders of engaging in a work

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[258] Aimee Green, *Portland public defenders toil under crushing caseloads, stage work stoppage to draw attention*, THE OREGONIAN (Jun. 11, 2019), https://www.oregonlive.com/news/2019/06/portland-public-defenders-toil-under-crushing-caseloads-stage-work-stoppage-to-draw-attention.html

[259] Lozano v. Cir. Ct. of Sixth Jud. Dist., 460 P.3d 721, 738 (Wyo. Sup. Ct. 2020).

[260] *See, e.g.*, State ex rel. Missouri Pub. Def. Comm'n v. Waters, 370 S.W.3d 592, 597 (Mo. 2012) (deciding a case in which the Missouri Public Defender Commission petitioned the court to withdraw appointment from cases that violated its caseload protocol).

[261] David Popoola, *Minnesota Public Defenders' Strike and the Power of Public Defenders' Collective Action*, ONLABOR (May 6, 2022), https://onlabor.org/minnesota-public-defenders-strike-and-the-power-of-public-defenders-collective-action/.

[262] Kennedy v. Carlson, 544 N.W.2d 1, 6 (Minn. 1996) citing Dziubak v. Mott, 503 N.W.2d 771, 775 (Minn. 1993) ("[A] public defender may not reject a client, but is obligated to represent whomever is assigned to her or him, regardless of her or his current caseload or the degree of difficulty the case presents.").

[263] Max Nesterak, *Public Defender Poised to Get $50 Million Windfall from Legislature*, MINN. REFORMER, (April 1, 2022), https://minnesotareformer.com/briefs/public-defenders-poised-to-get-50-million-windfall-from-legislature/.

[264] Betschart v. Oregon, 103 F.4th 607, 612 (9th Cir. 2024).

[265] *See* Data & Reporting, OREGON PUBLIC DEFENSE COMMISSION (showing many indigent service providers handling well over 100% of the maximum attorney caseload), https://www.oregon.gov/opdc/general/Pages/Datareporting.aspx.

[266] *Id.*

[267] *See, e.g.*, Hannah v. Oregon, 551 P.3d 938 (2024) (granting review on the question

stoppage.[268] Public defenders vigorously denied the suggestion that a work stoppage was occurring.[269] The controversy played out in the courts, in the legislature, and in the press.[270]

When defenders explicitly engage in work stoppages—or when their caseloads become so unmanageable that the courts stop assigning them new cases—the results can be understood within the separation of powers framework. Most directly, work stoppages operate as a check on legislative[271] power by creating pressure for adequate funding and resources. When defenders refuse to accept cases beyond their capacity, they force legislators to confront the real costs of maintaining a constitutionally inadequate defense system.[272] This dynamic illustrates how defenders can serve as institutional advocates for their clients' Sixth Amendment rights, translating constitutional guarantees into concrete resource demands in the face of often uniform resistance from other system stakeholders.

Work stoppages and case refusals also check judicial power by disrupting courts' ability to process cases efficiently. Indeed, a common criticism of public defenders is that they enable "assembly line" justice.[273] But the assembly line grinds to a halt without defense attorneys. When defenders stop accepting cases, judges lose their ability to manage their dockets. This pressure may motivate judges to become advocates for defender resources

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of whether the claims of unrepresented criminal defendants are justiciable); Oregon v. Casuga, 373 Ore. 155 (2024) (granting review on the question of what relief, if any, should be awarded to unrepresented criminal defendants).

[268] *See, e.g.,* Kevin Neely, *Opinion: DA Vasquez is right. The public defense 'crisis' is a work stoppage*, THE OREGONIAN (Jan. 15, 2025) (defending a newly elected prosecutor's claims about public defender work stoppage) https://www.oregonlive.com/opinion/2025/01/opinion-da-vasquez-is-right-the-public-defense-crisis-is-a-work-stoppage.html.

[269] *See, e.g.*, M. Grant, *Public Defenders Respond to DA Vasquez's Harmful Remarks on Public Defense Crisis*, AFSCME LOCAL 189 (Jan. 31, 2025) ("In order to address the number of unrepresented people in the system, each attorney would have to work 26 hours a day"), https://www.afscme189.com/news/public-defenders-respond-da-vasquez-s-harmful.

[270] Jamie Parfitt, *Is there a public defender shortage in Oregon, or is there a 'work stoppage' as the Multnomah County DA claims?*, KGW8, (Feb. 10, 2025), https://www.kgw.com/article/news/local/the-story/oregon-public-defender-shortage-da-vasquez-work-stoppage-crisis/283-76afd964-2595-4db8-8ffd-34071d7168d2.

[271] Though, as discussed, *supra*, part III, it is not always the legislative branch that has direct control over the budget for indigent defense.

[272] As in Minnesota in 2022. *See generally*, Primus, *supra*, note 10, at 62 (discussing the ways a stronger institutional defender service can lobby the legislature). (structure of indigent defense)

[273] Joanmarie I. Davoli, *You Have the Right to An Attorney; If you Cannot Afford One, Then the Government Will Underpay An Overworked Attorney Who must Also Be An Expert in Psychiatry and Immigration Law*, 2012 MICH. ST. L. REV. 1149, 1156 (2012).

themselves, as they seek to restore normal operations.[274]

Perhaps most significantly, collective defender actions check executive power[275] by preventing the smooth processing of cases through the system. Prosecutors rely on high volumes of quick plea bargains to maintain manageable caseloads and achieve desired conviction rates.[276] When defenders take collective action that disrupts this flow, they force prosecutors to prioritize cases and may even force the release of defendants from custody,[277] or outright dismissal of cases.[278]

The effectiveness of these actions depends heavily on defenders' institutional independence.[279] Contract defenders or appointed counsel systems, where attorneys are directly beholden to judges or county administrators for continued appointments, face greater barriers to collective action.[280] Similarly, defender offices lacking independent governance structures may find their ability to take militant (or even minimally ethical) positions compromised by political pressure, as illustrated by the aftermath

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[274] *See, e.g.*, Crystal Thomas, *MO Supreme Court chief: "System simply does not work" without public defender funding*, THE KANSAS CITY STAR (Jan. 23, 2020) (describing a Supreme Court justice advocating for expanding public defender budgets), https://www.kansascity.com/news/politics-government/article239530283.html.

[275] In pushing back on executive power, case refusals may, in extreme situations, even directly impact the Governor: in 2016 the Missouri Public Defender began assigning cases to the governor under a provision that allows assignments of cases to *any* Missouri lawyer. Camila Domonoske, *Overworked and Underfunded, Mo. Public Defender Office Assigns Case—To the Governor*, NAT. PUB. RADIO (Aug. 4, 2016), https://www.npr.org/sections/thetwo-way/2016/ 08/04/488655916/overworked-and-underfunded-missouri-public-defender-assigns-a-case-to-the-govern.

[276] *See* Lafler v. Cooper, 566 U.S. 156, 170 (2012) (noting that around 95 percent of convictions at both the state and federal levels come about from guilty pleas). *See also* Stephanos Bibas *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004) (describing the dominant role of plea bargaining in the criminal system).

[277] *See, e.g.*, Betschart v. Oregon, 103 F.4th 607 (9th Cir. 2024) (affirming a district court order that in custody defendants must be released if counsel is not timely appointed).

[278] *See, e.g.*, Claire Rush, *Oregon Public Defender Shortage: Nearly 300 Cases Dismissed*, ASSOCIATED PRESS (Nov. 23, 2022), https://apnews.com/article/health-oregon-covid-portland-a13c2ecf6e4648272dfa12fb9244b7a6#:~:text=Judges%20in%20Multnomah%20County%2C%20which,this%20week%20of%20dismissed%20cases.

[279] *See* John P. Gross, *Case Refusal: A Right for the Public Defender but Not a Remedy for the Defendant*, 95 WASH. U. L. REV. 253, 256-59 (2017) (describing various reasons why so few defenders engage in collective refusals of new cases, including lack of independence, fear of retaliation from the judiciary, the legislature, the governor, or their own managers).

[280] Primus, *supra*, note 10, at 62 (structure of indigent defense); Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 93-94 (1993).

of the New York Legal Aid strike.[281] This reality underscores how questions of institutional design impact defenders' capacity to serve as a meaningful check within the system.

Critics might argue that work stoppages and case refusals hold the rights of individual defendants hostage to advance broader institutional goals.[282] However, it is well-established that when a large caseload or limited resources prevents a lawyer from providing effective assistance they must not accept new appointments and must withdraw from existing cases until effective assistance can be rendered to each client.[283] Thus, this critique misunderstands both the nature of systemic advocacy and the relationship between individual representation and collective action.[284] These collective actions typically target precisely those conditions that prevent effective individual representation–excessive caseloads, inadequate resources, and structural barriers to zealous advocacy.[285]

Moreover, the criticism ignores how other system actors routinely leverage their institutional power in ways that impact individual cases. Prosecutors regularly use charging and plea-bargaining policies to advance broader policy goals. Judges employ sentencing practices and procedural rules that reflect institutional priorities.[286] Defenders' collective actions are simply another instance of a power within the system using its institutional leverage to pursue its goals and check its enemies.

C. Vetoing Judges

A veto is a textbook example of a Madisonian check on a separate

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[281] *Supra*, note 250.

[282] Or even the self-interest of defense lawyers. *See generally* John P. Gross, *Case Refusal: A Right for the Public Defender but Not a Remedy for the Defendant*, 95 WASH. U. L. REV. 253 (2017) (arguing that public defenders concerned for defendants' well-being should accept even excessive caseloads).

[283] ABA Comm. On Ethics & Pro. Resp., Formal Op. 06-441 (2006). *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) (laying out the policy, rules, and laws governing case refusals); Bunin, *supra*, note 149 at 38 (discussing the ethical obligation to refuse and withdraw). (Public Defender Independence).

[284] *See* Alexandra Natapoff, *Gideon Skepticism*, 70 WASH. & LEE L. REV. 1049 (2013) (arguing that appointment of counsel, without more, is not enough to ensure fair outcomes for clients).

[285] *See generally* Hanlon, *supra*, note 283 (gathering examples of case refusal). Defenders also generally structure actions to minimize harm to individual defendants while maximizing pressure on system actors. *Id.*

[286] Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 921 (2009).

branch's power.[287] The presidential veto is a classic example.[288] The veto power itself and the threat of its use—implicit or explicit—gives the executive branch a meaningful check on the legislative branch.[289] Vetoes exist in areas of government beyond the President and Congress, including some criminal justice systems.

This subpart focuses on judicial vetoes. Judicial vetoes are a check that defense attorneys[290] may use to push back on the judiciary systematically or individually. Sometimes referred to as a "judicial peremptory challenge"[291] some 20 states allow parties to veto a particular judge and force the court to assign a new one.[292] The procedures and rules vary from state to state[293] but one thing is consistent: where the power exists it gives defenders a vehicle for individual and collective institutional action. As with presidential vetoes, the explicit or even implicit threat of a judicial veto may enforce norms or discipline judges whose rulings or behavior are outliers.[294]

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[287] *See generally*, Tom Donnelly, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 YALE L. J. 948, 989-90 (2009) ("President Jackson's veto of the Second Bank of the United States is also mentioned in every contemporary textbook. The veto" is a "quintessential example[] of Presidential" power).

[288] "From 1789 to 1992, Congress has overridden just 7% of the 1448 presidential vetoes, meaning that Presidents are highly effective when they elect to use the veto pen." David R. Stras & Ryan W. Scott, *Review Essay: Navigating The New Politics of Judicial Appointment: The Next Justice by Christopher L. Eisgruber,* 102 NW. U.L. REV. 1869, 1911 (2008).

[289] *See generally*, *id.* at 1911-12 (describing vetoes and veto threats and considering implications on the policy process).

[290] And, generally, prosecutors as well since both sides have the power to exercise these vetoes.

[291] The power to strike a judge is, arguably, more significant than the power to strike a juror because most cases don't go to trial, some go to a bench rather than a jury trial, and even when a case is decided by a jury, it is the judge who determines what evidence and instructions the jury receives. Sarah Park, *Perfecting the Judicial Peremptory Challenge: A New Approach Using Preliminary Data on California Judges in 2021*, 97 S. CAL. L. REV 253, 256 (2024).

[292] Sarah Park, *Perfecting the Judicial Peremptory Challenge: A New Approach Using Preliminary Data on California Judges in 2021*, 97 S. CAL. L. REV 253, 273 (2024). Several of these 20 states limit the right to civil cases only. *Id.*

[293] For example, in some states a party may veto judges more than once in the life of a case, OR. REV. STAT. § 14-250-70, in other states there is a fee associated with the exercise of the veto, MONT. CODE ANN. § 3-1-804, some jurisdictions allow disqualification with a mere allegation of bias while others require support for the allegation, *compare* CAL. CIV. PROC. CODE §170.6 *with* 28 U.S.C. § 144.

[294] Vetoes may be the most direct, but are not the only, way defenders can push back on disfavored judges. Another approach available even in jurisdictions without a veto power involves strategic exercise of the decision to demand a jury trial rather than a bench trial. *See, e.g.*, Lauren M. Ouziel, *Fact-Finder Choice in Felony Courts*, 57 U. CAL. DAVIS L. REV. 1191 (2023) (quoting an attorney who will demand a jury in every case if their assigned judge departs "from settled expectations around sentencing and reasonable doubt").

Individually, a defense attorney using a veto may simply have a bad relationship with a judge and want to avoid appearing in front of them. Or a lawyer may know that evidentiary or sentencing issues likely to come up in their case are not dealt with favorably by a particular judge and thus seek an alternative.[295] Sometimes these individual decisions are informed by which other judges are available to receive the case,[296] or by a client's race or gender.[297] This individual, selective use of vetoes may smack of forum shopping.[298] When done collectively, it provides an important defense check on judges.

If a group of defenders, or an entire office, decides not to accept a particular judge, in California often referred to as "papering the judge,"[299] they can force the court to move the judge to a new assignment (such as civil rather than criminal cases). In San Francisco, for example, California's Code of Civil Procedure Section 170.6 has long been used as a defense check on the judicial branch. If a judge makes a ruling that particularly offends the defense bar, the public defender has been known to organize collective vetoing of that judge.[300] If the judge is assigned to a calendar department, such as a felony arraignment and preliminary hearing department, even just a day or two of vetoes in all cases can totally disrupt business across the courthouse.[301] In smaller jurisdictions with only a couple of judges on the

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[295] *See* Michael L. Smith, *Papering Justices*, 50 B.Y.U. L. REV. at 3 (forthcoming 2025) (describing the process of vetoing a judge in California and the variety of strategic considerations at play).

[296] If there are several judges that a lawyer wants to avoid but they are all in trial or on vacation save one, it is safe to use the veto against the one available judge. But if the other judges are available to receive the assignment, it may be too big a risk to exercise the veto and potentially end up with an even less desired judicial assignment. The larger the number of possible judges in the jurisdiction, the harder this type of analysis becomes for an individual case or attorney.

[297] *See, e.g.*, email on file with authors [April 1, 2016] where a public defender urges the other members of her team assigned to the same judge to join her in vetoing him based on him "not letting our minority clients out of jail."

[298] Jeffrey W. Stempel, *Judicial Peremptory Challenges as Access Enhancers*, 86 FORDHAM L. REV. 2263, 2275-76 (2018).

[299] Michael L. Smith, *Papering Justices*, 50 B.Y.U. L. REV. at 3 (forthcoming 2025).

[300] Both authors worked in the San Francisco public defender and witnessed both the deployment of this collective veto as well as the effective use of the mere threat. See also emails on file with the authors from San Francisco public defenders asking their colleagues to join them in solidarity in vetoing particular judges.

[301] A trial department is harder to disrupt because if even a single defense attorney accepts assignment to that judge, the trial could keep the judge busy for weeks. The authors have both seen situations where a master calendar judge making trial assignments has numerous lawyers in a row veto a particular trial judge and the master calendar judge will simply keep calling cases on the trial list until someone in the queue accepts the assignment.

bench, it has the potential to be even more disruptive.[302]

To be clear, the prosecution has an even easier time using the veto as a coordinated attack on individual judges because every single prosecutor works for the same boss. For example, San Francisco District Attorney Brooke Jenkins recently directed her prosecutors to all veto Judge Anthony Kline, a judge handling juvenile court in his retirement from the Court of Appeal.[303] The Seattle City Attorney directed city prosecutors to file affidavits against a particular judge *en masse*.[304] When one of the authors (Boudin) was the district attorney of San Francisco, his policy was to allow individual attorneys to exercise vetoes in their discretion but any collective veto of a particular judge required approval from the top, which was never authorized.[305] Prosecutors have a clear hierarchy which makes the coordination of judicial vetoes much easier than it is for the defense bar. But, regardless of how easy it is to achieve, if prosecutors are treated as a cohesive institution that can check the judiciary with vetoes, then failing to view defense lawyers in the same way creates an unfair asymmetry. Indeed, defenders have proven quite capable of this kind of collective action.

Defenders use the judicial veto as a form of institutional collective action in jurisdictions across the country. For example, Illinois permits vetoes[306] and one longtime defender remembers multiple judges getting reassigned after successful collective actions.[307] Alaska also permits judicial vetoes.[308] The current head of the state-wide office of the public defender in Alaska, a former judge, confirms that the law is sometimes used collectively in "what is referred to as a 'blanket bump,'" though his policy is to "neither sanction it nor dissuade it."[309] A lawyer in the biggest public defender office in Oregon

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[302] Fifteen of California's 58 counties have two or fewer judges to handle their entire civil and criminal docket. *Judges Roster*, CALIFORNIA COURTS: THE JUDICIAL BRANCH OF CALIFORNIA, https://courts.ca.gov/courts/superior-courts/judges-roster.

[303] LaDoris Cordell, *How Bay Area Prosecutors Are Weaponizing California Statutes to Attack Judicial Independence*, SAN FRAN. CHRON. (Apr. 21, 2003) https://www.sfchronicle.com/opinion/openforum/article/blanket-disqualifications-judges-california-17889555.php.

[304] Monique Merrill, *Seattle city attorney sued over barring elected judge from hearing criminal cases*, COURTHOUSE NEWS SERVICE, Oct. 29, 2024, https://www.courthousenews.com/seattle-city-attorney-sued-over-barring-elected-judge-from-hearing-criminal-cases/.

[305] This requirement for authorization from the head of the office is consistent with how prosecutors in some other jurisdictions approach using vetoes. *See, e.g.*, Email from Chief Public Defender Terrance Haas, Nov. 14, 2024 (on file with authors) ("DAs must get approval from the top").

[306] 725 ILL. COMP. STAT. ANN. 5/114-5(a).

[307] Email from Bruce Boyer, Nov. 14, 2024, on file with authors.

[308] ALASKA STAT. § 22.20.022.

[309] Email from Chief Public Defender Terrance Haas, Nov. 14, 2024 (on file with authors).

also reports having seen collective action to "affidavit" particular judges off of all cases[310] under Oregon's judicial veto law.[311]

As with many institutional checks and balances, and as with a presidential veto of legislation, sometimes the credible threat is enough to moderate behavior in the other branch. In jurisdictions where defense attorneys have a veto and where they are organized enough—for example through a strong, independent, public defender office—to take collective action, judges may moderate their behavior and defense attorneys know it.[312] Judicial vetoes, then, provide another example of how defenders acting collectively can wield checks and balances against other system actors.

CONCLUSION

It is counterintuitive to think of defense lawyers as part of the separation-of-powers framework. But to exclude them is to miss something fundamental about our criminal justice institutions. Over the last half-century, we have built a system in which a significant majority of defendants' lawyers are selected and paid by the government. How we organize those defense lawyers—whether as contract counsel, individual practitioners, or institutional public defender offices—is a separation-of-powers problem. If defense lawyers are subject to judicial or executive control, they face pressure to move the docket along with quick guilty pleas. If they are insulated from such control, they can represent their clients much more effectively. If defense lawyers are atomized, they can rarely do more than process each case on its own. If they work together, such as in a public defender office, they can engage in group strategies like collective litigation, systematic vetoing of judges, and case refusals. Such strategies provide important checks on prosecutorial and judicial power.

This separation of powers framing has profound implications for both how we design defense institutions and how defense lawyers understand their role. If we want defense lawyers to provide meaningful checks on judges and prosecutors, we should design defense institutions to be politically independent, capable of lobbying for resources, and able to act collectively. And defense lawyers should conceive of themselves both as advocates in particular cases, and as institutional counterweights who seek to limit punishment and preserve the rule of law for defendants.

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[310] Email from Henry Oostrom-Shah, Nov. 17, 2024 (on file with authors).

[311] OR. REV. STAT. § 14.260.

[312] *See, e.g.*, San Francisco Public Defender unit-wide email on file with the author [Ilona Solomon, Jul. 31, 2015, on file with authors] where a public defender unhappy with a particular judge's approach to a motion to suppress suggested that the judge "needs some 170.6 challenges."