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# The People's Right: Reimagining the Right to Counsel

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The People's Right: Reimagining the Right to Counsel

Martin Guggenheim\*

Introduction

Separation of governmental powers is widely regarded as essential to protecting the liberty of Americans. The Supreme Court has, in many celebrated cases, emphasized the importance of separated powers as a critical means of providing checks and balances on executive, legislative and judicial power, thereby mitigating the dangers associated with concentrated power. Dispersing power is to be assured by the Constitution in two ways. First, each branch was given particular, limited powers. Second, other branches were to be placed in position to oversee the execution of certain powers to ensure they are being used appropriately.

In the criminal justice system, courts oversee executive power when prosecutors file criminal complaints after individuals have been arrested and charged with crime. Everyone familiar with the operation of criminal justice in the United States over the past generation recognizes we are experiencing a severe crisis in the administration of indigent defense. In particular, because legislatures have failed to provide sufficient funds, in the overwhelming

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<sup>&</sup>lt;sup>1</sup>See, e.g., Boumediene v. Bush, 553 U.S. \_\_\_, \_\_(2008) ("The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty."). See also Loving v. United States, 517 U.S. 748, 756 (1996) (noting that "[e]ven before the birth of this country, separation of powers was known to be a defense against tyranny"); cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("[T]he Constitution diffuses power the better to secure liberty"); Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers").

<sup>&</sup>lt;sup>2</sup> Morrison v. Olson, 487 U.S. 654, 691 (1988) (Prosecution is an executive power, lawmaking a legislative one; and

majority of cases prosecuted in state court, defendants are not provided with an attorney who has the capacity to undertake any kind of meaningful investigation into the facts and circumstances of the case. As a consequence, criminal courts in recent years have increasingly failed to perform any meaningful oversight over executive power. In far too many cases, defendants are arrested, charged, arraigned, announced guilty, and sentenced without anyone other than from the police or the prosecutor's office (both executive functions) having made even rudimentary inquiry into the facts and circumstances of the case.

Courts need to rely on a vital ally when performing their oversight responsibilities. They depend (*we* depend) on a robust indigent defense system which routinely investigates the underlying facts and circumstances of individual cases as the only truly meaningful check on executive power. This Article advocates a re-imagining of the role of defense counsel in criminal cases as a vital tool for the structural protection of overreaching of executive power. The Sixth Amendment right to counsel, universally regarded as an individual right, simultaneously serves as an essential structural protection for all of society by ensuring that courts are able to perform their independent role of checking executive power.

Challenges to inadequate indigent defense systems have invariably been brought as Sixth Amendment claims focused on the rights of the individual defendant. For the most part, these challenges have failed. A challenge focused on the collective rights of the people, however, would have to be considered in entirely new terms. Simply stated, it would assert that those responsible for the failure to provide sufficient funds for an adequate defender system (usually the legislative but sometimes the executive branch as well) have improperly intruded into core

judicial branch responsibilities, denying courts the opportunity to perform their essential functions. This shift from an individual's to society's loss would change the focus of the inquiry in dramatic ways and would provide courts with the legitimacy to do something that, paradoxically, they are currently denied because of an opposite understanding of the court's proper place in our system of separated powers. Specifically, current wisdom has it that courts act beyond their proper authority when they order legislatures to spend more money than they are willing on indigent defense. Because choices concerning the expenditure of public money are properly allocated to the legislative branch, the reasoning goes, such judicial orders would constitute an improper intrusion by the courts into the legislature's prerogatives.

This Article advances the obverse claim. Separation of powers, which has long been a shield preventing courts from overseeing indigent defense systems, is now a sword by which courts are authorized to decide for themselves whether indigent defense systems are adequate to allow courts to do their duty. If courts find they are not, they would be constitutionally empowered to fix the problem by insisting that more money is made available for indigent defense.

An indigent defender system is widely understood as necessary to protect and enforce the rights of its clients. But taken as a whole, the indigent system becomes something much bigger. If the individual defense attorney may be seen as a private attorney general enforcing the rights of his or her client, the collective defense system should be seen as the investigative arm of the judiciary providing meaningful oversight on executive power. Without a robust indigent defense system, one with the capacity to investigate cases on a regular basis, the executive branch ends up with a license which would have been unthinkable to the Framers of the Constitution who

worked so carefully to ensure that executive power would be checked on a regular basis. The current system which allocates inadequate funds for indigent defense raises a substantial separation of powers question because, in practice, the executive branch has too much accumulated power (to prosecute and to influence the outcome of a filed case on grounds other than the merits) and, relatedly, the judicial branch is denied its duty to decide cases independently.

This Article will proceed in five Parts. Part I describes the current crisis in indigent defense in the United States and the connected concern that there is virtually no investigation conducted by anyone outside the executive branch when defendants are charged with crimes. Part II explains that the essential function of courts in our system of separated powers is to provide meaningful oversight of executive power and also demonstrates how carefully courts have guarded core judicial functions from perceived encroachment by another branch of government. This Part also reveals how the legislative and executive branches have contributed to limiting courts from performing any kind of meaningful oversight of criminal prosecutions by the combined strategy of under-funding the defense function, flooding courts with cases, and providing material advantages to prosecutors over defenders. Part III sets forth the constitutional argument that the Sixth Amendment right to counsel should be viewed today as an imperative to protect the rights of the people, including those who are never arrested and charged with the commission of a crime. This Part also suggests how the broad interests of society are adversely affected when courts fail to perform their constitutional role. Part IV reveals that challenges to deficiencies in indigent defense system have been brought as Sixth Amendment violations focused on the individual defendant's rights and explains why, for the most part, they have been

unsuccessful. It then proposes a very different systemic challenge Sixth Amendment claims based on separation of powers. Finally, Part V reflects broadly on the advantages of reinvigorating separation of powers into modern court practice. It shows how this perspective sheds new light on familiar challenges. It also has the potential to move past the current limitation on expanding the constitutional right to counsel which has been mired in a narrow vision of Sixth Amendment doctrine. Separation of powers offers an entirely different way of conceiving when indigent litigants ought to be given court-assigned counsel.

### I. The Crisis in Indigent Defense in the United States

More than forty five years after the Supreme Court ruled in *Gideon v. Wainwright* that States must provide free lawyers for all accused felons<sup>3</sup> and twenty six years after it announced that the Constitution ensures some minimum level of quality in defense work, <sup>4</sup> almost everyone familiar with the state of indigent defense in the United States gives it a failing grade.<sup>5</sup> As Stephan Bright has observed: "[n]o constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel."

Those who write on the subject emphasize that the court-assigned defense lawyers are overworked, underpaid and, far too commonly, unable to perform even the most basic tasks

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<sup>&</sup>lt;sup>3</sup> 372 U.S. 335 (1963).

<sup>&</sup>lt;sup>4</sup> Strickland v. Washington, 466 U.S. 668 (1984).

<sup>&</sup>lt;sup>5</sup> See, e.g., Stephen J. Schulhofer & David Friedman, Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants, 31 AM. CRIM. L. Rev. 73, 74 (1993) (most criminal defense systems in the United States are in "a state of perpetual crisis"). <sup>6</sup> Stephen B. Bright, Turning Celebrated Principles into Reality, CHAMPION, Jan./Feb. 2003, at 6. See also NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ASSEMBLY LINE JUSTICE: MISSISSIPPI'S INDIGENT DEFENSE CRISIS 6 (2003). Pamela Metgzer uses equally unsettling language when she writes "The rhetoric of the Sixth Amendment is grand; the reality is grim. The rhetoric promises that: 'i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.' [and that '[t]he accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal.' In reality, a mechanical and rote invocation of a rigid right-to-counsel doctrine deprives modern criminal defendants of counsel at proceedings that are truly critical stages of contemporary criminal procedure." Pamela R. Metzger, Beyond the Bright Line: A

which are essential to effective lawyering.<sup>7</sup> As Ronald Wright recently summarized, "[y]ear after year, in study after study, observers find remarkably poor defense lawyering." It is beyond the purpose of this Article to prove these claims. Instead, these should be read as a proffer. The Article's inquiry is, if it is true that the playing field for government prosecution of indigent defendants is as unlevel as reported here and if indigent defendants routinely are denied assigned counsel who are capable of undertaking any meaningful investigation into the underlying facts of the case, whether this has anything to do with the judicial branch's duty to protect its independence from undue encroachment by the other government branches.

To use New York as one example of a system in crisis, in 2006 a blue ribbon commission appointed by then-Chief Judge Judith S. Kaye released a report concluding that

the indigent defense system in New York State is both severely dysfunctional and structurally incapable of providing each poor defendant with the effective legal representation that he or she is guaranteed by the Constitution of the United States and the Constitution and laws of the State of New York .... [and] has resulted in a disparate, inequitable, and ineffective system for securing constitutional guarantees to those too poor to obtain counsel of their own choosing.<sup>9</sup>

The Commission undertook a statewide independent investigation and also relied on a comprehensive report issued by the Spangenberg Group.<sup>10</sup> The Commission concluded that there is "a crisis in the delivery of defense services to the indigent throughout New York State and that

Contemporary Right-To-Counsel Doctrine, 97 Nw. U. L. Rev. 1635, 1636 (citing United States v. Wade, 388 U.S. 218, 226 (1967).

<sup>&</sup>lt;sup>7</sup> See, e.g., DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM, 64 (1999) ("at least every five years a major study has been released finding that indigent defense is inadequate"). <sup>8</sup> Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 221 (2004).

<sup>&</sup>lt;sup>9</sup> Final Report to the Chief Judge of the State of New York, Commission on the Future of Indigent Defense Services \_\_ (June 18, 2006) (Kaye Commission Report).

<sup>&</sup>lt;sup>10</sup> which has earned a deserved reputation for expertise in examining assigned counsel programs for criminal defendants in many states over many years. STATUS OF INDIGENT DEFENSE IN NEW YORK: A STUDY FOR CHIEF JUDGE KAYE'S COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES, FINAL REPORT (June 16, 2006) (SPANGENBERG REPORT).

the right to the effective assistance of counsel . . . is not being provided to a large portion of those who are entitled to it."<sup>11</sup> The testimony the Commission heard "was replete with descriptions by defenders of their inability to provide effective representation due to a lack of resources" which severely limited their capacity to investigate cases and "contributed to defense providers having only minimal contact with clients and their families."<sup>12</sup>

Finding that virtually every institutional defender office has too many clients, <sup>13</sup> the Commission described one county in which each attorney has an average caseload of 1,000 misdemeanor and 175 felony cases per attorney per year. Despite this, "the chief public defender annually is required to submit to the county a proposal as to how he would operate his office with a 10 to 12 percent budget cut."

The combination of excessive caseloads and inadequate budgets also mean that out-of-court investigations are almost never undertaken. Spangenberg found that most defender offices have "no staff investigators or an insufficient number of them"<sup>15</sup> and that some defender offices never use investigators in any of their cases. <sup>16</sup> Instead, virtually the only lawyering being conducted is pleading clients guilty on cases without conducting any kind of investigation. <sup>17</sup> One public defender admitted that his high caseload puts pressure on him to take pleas for his clients

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<sup>&</sup>lt;sup>11</sup> *Id.* at 16. This finding built upon the Spangenberg Report's conclusion that "New York's indigent defense system is in a serious state of crisis and suffers from an acute and chronic lack of funding." SPANGENBERG REPORT at 155.

<sup>12</sup> KAYE COMMISSION REPORT at 17.

<sup>&</sup>lt;sup>13</sup> *Id*.

<sup>&</sup>lt;sup>14</sup> *Id*. at 18.

<sup>&</sup>lt;sup>15</sup> *Id* 

<sup>&</sup>lt;sup>16</sup> *Id.* at 50 (reporting on Steuben County). Another office spent a total of \$1,345 for all of 2004 on investigators when the office represented 1,128 clients in criminal and family court. Id. The defender office for Buffalo does not even employ staff investigators. Id. at 51.

<sup>&</sup>lt;sup>17</sup> Contested claims over facts in New York are an extreme rarity. According to Spangenberg, "Across the State, based on data reported by the Counties in 2006, less than 2% of public defense cases are taken to trial. In the Counties, the trial rate is 1.4%, or only 463 out of more than 32,000 reported public defense cases."

even when he believes the client has a strong defense.<sup>18</sup>

A Report by the American Bar Association in 2004 which studied the state of affairs for indigent defense in the United States concluded that "thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation." Deborah Rhode, finding that indigent defendants are unable to secure meaningful counsel throughout the country recently described the story of a Mississippi woman who was accused of shoplifting and spent a year in jail without even having the opportunity to speak to her court-appointed lawyer. This is, in part, because some defense lawyers providing counsel to indigent defendants under a state contract system are expected to handle more than 1000 cases each year. One public defender in Minnesota resigned from his job after being obliged in the previous year to handle a caseload of 135 felony cases, 53 gross misdemeanors, 343 misdemeanors, 136 probation violations, and 60 miscellaneous cases.

Of all the claims respecting the routine inadequacy of indigent defense work, the claim that almost no independent investigations are being conducted stands out. The problem has been with us now for almost a generation. Researchers studying New York indigent defense in the

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<sup>&</sup>lt;sup>18</sup> SPANGENBERG REPORT at \_\_\_. (Washington County).

<sup>&</sup>lt;sup>19</sup> AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE iv (2004), available at http://www.abanet.org/legalservices/sclaid/defender/brokenpromise This Report attributed inadequate legal representation for indigent defendants to a variety of factors including incompetent and inexperienced lawyers; excessive caseloads; and lack of meaningful contact with clients, investigation, research, and conflict-free representation.

In Mississippi, children as young as fourteen are incarcerated with adults and may wait months to speak to a lawyer. NAACP LEGAL DEF. & EDUC. FUND, ASSEMBLY LINE JUSTICE: MISSISSIPPI'S INDIGENT DEFENSE CRISIS 6 (2003), available at http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/ms-assemblylinejustice.pdf

20 DEBORAH L. RHODE, ACCESS TO JUSTICE 126 (2004).

<sup>&</sup>lt;sup>21</sup> *Id.* at 28.

<sup>&</sup>lt;sup>22</sup> David A. Simon, Note, *Equal Before the Law: Toward A Restoration of Gideon's Promise*, 43 Harv. C.R.-C.L. L. Rev. 581, 587 (2008) (*citing* Conrad DeFiebre, *Public Defenders Seek Lighter Load*, STAR TRIBUNE, Aug. 30, 2003,

1980s made findings almost identical to those made in 2006. It would be unthinkable for a wealthy defendant to agree to plead guilty before the lawyer engaged to represent him or her was allowed the opportunity to think through all of the options available and to undertake even a rudimentary investigation into the facts. Indeed, professional standards for defense lawyers have, for many years, made clear that defense lawyers at the initial appearance stage should "enter[] a plea of not guilty in all but the most extraordinary circumstances where a sound tactical reason exists for not doing so." Nonetheless, as a result of the caseloads inflicted on many public defenders, countless cases are disposed of at the initial appearance by defendants entering guilty pleas when the lawyers have conducted no investigation whatsoever and have spoken with the defendant in a holding pen for no more than a very few minutes. 24

Even when a case survives the initial appearance, one set of investigators found in the 1980s that nearly 80 percent of public defenders have never used an investigator in a single case. Even worse, in more than 87 percent of felony cases and 92 percent of misdemeanors they never conducted any kind of investigation whatsoever. An exhaustive study of indigent representation in New York City in the 1980s found that "investigations are rarely conducted into the tens of thousands of minor arrests processed in the criminal courts of our large cities." In a class action brought by the New York County Lawyers Association in 2003, a state court judge in 2003 found that

at 1B.)

<sup>&</sup>lt;sup>23</sup> NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 3. (1995)

<sup>&</sup>lt;sup>24</sup> CRIMINAL COURT OF THE CITY OF NEW YORK, EXECUTIVE SUMMARY (statistics for Jan. 2000, showing that of the total of 367,962 criminal filings in 1999, 197,022 were disposed of in arraignments) (on file with the Chief Administrative Judge).

<sup>&</sup>lt;sup>25</sup> Michael McConville & Chester Mirsky, *Criminal Defense of the Poor in New York*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 763 at tbl. 6-3 (1986-87).

<sup>&</sup>lt;sup>26</sup> *Id*. at 762.

Too many assigned counsel do not: conduct a prompt and thorough interview of the defendant; consult with the defendant on a regular basis; examine the legal sufficiency of the complaint or indictment; seek the defendant's prompt pretrial release; retain investigators, social workers or other experts where appropriate; file pretrial motions where appropriate; fully advise the defendant regarding any plea and only after conducting an investigation of the law and the facts; prepare for trial and court appearances; and engage in appropriate presentence advocacy, including seeking to obtain the defendant's entry into any appropriate diversionary program.<sup>28</sup>

What matters for separation of powers purposes is just how little work is done in most of the criminal cases filed by prosecutors. Because the vast number of people prosecuted in the United States are eligible for court-appointed counsel, <sup>29</sup> most defendants get a lawyer who fails to spend any meaningful time working on the case, beyond interviewing the defendant, appearing in court to enter a not guilty plea, negotiating a plea arrangement with the prosecutor, counseling the client, and appearing in court to enter the plea. As a result, court-assigned lawyers very rarely interview percipient witnesses, visit the scene of the crime, or do any meaningful independent factual investigation. <sup>30</sup> In other words, rarely does a court-assigned lawyer do any of the staples of criminal defense work.

The American criminal justice system has shifted its emphasis over the past generation away from focusing on the trial itself as the principal means by which charges are resolved in

<sup>&</sup>lt;sup>27</sup> *Id.* at 760-65.

New York County Lawyers Association v. New York State, 763 N.Y.S.2d 397, 403 (Sup. Ct. 2003). The court also found the existing compensation rates for assigned counsel were unconstitutional because their inadequacy violated a defendant's constitutional and statutory rights to meaningful and effective representation. In May 2003, the Legislature enacted legislation that increased the rates of compensation for assigned counsel. S. 1406-B/A, 2106-B (Chapter 62 of the Laws of 2003). The main provisions of the law, which took effect on January 1, 2004, (a) increased assigned counsel fees to \$60 per hour for misdemeanors (with a per case cap of \$2,400) and \$75 per hour for felonies.

<sup>&</sup>lt;sup>29</sup> See Caroline Wolf Harlow, U.S. Dep't of Justice, Defense Counsel in Criminal Cases 1 (2000); Steven K. Smith & Carol J. DeFrances, U.S. Dep't of Justice, Indigent Defense 1 (1996) (80 %). About 82% of state felony defendants and 66% of federal felony defendants use publicly financed counsel. Caroline Wolf Harlow, U.S. Dep't of Justice, Defense Counsel in Criminal Cases 1 (2000).

<sup>&</sup>lt;sup>30</sup> See generally Deborah L. Rhode, Access to Justice 122-24 (2004).

court. Even though everyone understands that a necessary component for trial preparation is fact investigation, <sup>31</sup> fact investigation remains a vital undertaking even when defense lawyers do not expect cases to go to trial. Although there can be an art to negotiating pleas, <sup>32</sup> few would agree that it is appropriate for defense lawyers routinely to negotiate pleas (and counsel their clients to accept them) without first conducting a meaningful investigation into the facts of a criminal complaint. Indeed, the American Bar Association's Standards explicitly forbid such a practice. <sup>33</sup> Even if being a good negotiator involves real talent, the skill needed for excellent negotiation depends mightily on the lawyer's sense of the worth of the case. <sup>34</sup> That sense cannot be gained merely by reading the materials given to defense counsel by the prosecutor and by speaking with the defendant. More importantly, when no one other than the prosecutor meaningfully looks underneath what is alleged in a charging instrument, courts are precluded from serving as any kind of check on executive authority.

#### II. The Judicial Function in Criminal Cases

Courts were established not only to provide individuals with a fair proceeding; they also are supposed to check state action invoked to interfere with an individual's liberty. To be sure, when defendants actually are given a fair trial, these two interests – the individual's in due

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<sup>&</sup>lt;sup>31</sup> See generally Kenney F. Hegland, Trial and Practice Skills (3d ed. 2002); David A. Binder & Paul Bergman, Fact Investigation: From Hypothesis to Proof (1984).

<sup>&</sup>lt;sup>32</sup> See, e.g., ROGER FISHER AND WILLIAM URY, GETTING TO YES (Houghton Mifflin 1981); STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS 213-66 (2d ed. 2003).

<sup>&</sup>lt;sup>33</sup> ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-6.1 (3d ed. 1993) ("Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.") "[u]nder no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial."

<sup>&</sup>lt;sup>34</sup> MILTON HEUMANN, PLEA BARGAINING 76 (1978); Rebecca Hollander-Blumoff, *Getting to 'Guilty': Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115, 122-124 (1997).

process and society's in checking executive power – seamlessly merge. But they are independent and even when a proceeding may be said to comport with due process, the court's role as an independent check may nonetheless have been improperly thwarted. That is why courts have a duty to ensure that a guilty plea is more than the product of a knowing and intelligent choice.

When the executive branch petitions a court to enter a judgment, it does so because our system of separated powers forbids it from acting unilaterally on the matter.<sup>35</sup> This truism has become lost to a generation used to courts entering convictions by the tens of thousands immediately upon the filing of a criminal complaint. But that is not the way things were supposed to be and the Founders of our system of separated powers would undoubtedly be perplexed at how far astray current practice has moved from their original vision.

A court's duty, and limitation, is to resolve cases or controversies. Courts are not authorized to make pronouncements or to enter judgments in matters that are not real disputes. This not only includes feigned cases, it also includes matters in which one party does not attempt to present a defense, when one may exist.<sup>36</sup>

In this vein, it is instructive to re-read *Alford v. North Carolina*,<sup>37</sup> the 1970 Supreme Court case which held that courts may allow a defendant to plead guilty even while s/he denies being guilty factually. What stands out on the re-reading is how much independent investigation into the facts of the case took place before the trial court accepted the plea. Alford's lawyer

<sup>&</sup>lt;sup>35</sup> See Robertson v. United States ex rel. Watson, \_\_ U.S. \_\_, 78 USLW 4428, 4429 (2010) ("Our entire criminal justice system is premised on the notion that a criminal prosecution pits the government against the governed.").

<sup>36</sup> Muskrat v. United States, 219 U.S. 346, 357 (1911). See also Flast v. Cohen, 392 U.S. 83, 94-101 (1968); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 242 (1937) (case is justiciable only when there is "a dispute between parties who face each other in an adversary proceeding."); Abraham S. Goldstein, Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure, 26 STAN. L. REV. 1009, 1022-1023 (1974) ("almost from the beginning of American law, the courts were reluctant to accept plea bargaining as legitimate. They held that the prosecutor had no authority to "compromise criminal cases," because such compromises violated the legal principles formally established by legislatures and courts").

explained to the court that he interviewed all but one of his alibi witnesses and they strongly implicated him in the crime. <sup>38</sup> More importantly, the trial court heard sworn testimony regarding the commission of the crime before permitting Alford to plead guilty. Altogether, the trial court heard three witnesses, including a police officer who summarized the State's case and two percipient witnesses who testified that shortly before the crime, they saw Alford take a gun from his house, state his intention to kill the victim and then return home and state that he accomplished the deed. <sup>39</sup> After this testimony, Alford "testified that he had not committed the murder but that he was pleading guilty because he faced the threat of the death penalty if he did not do so." <sup>40</sup> In Alford's words, "I'm not guilty but I plead guilty." <sup>41</sup>

Finding that the plea was knowingly and intelligently made and not the product of coercion, the Supreme Court ruled that no error was committed in accepting the plea. <sup>42</sup> The difficulty in *Alford* was created when the defendant explicitly stated that he did not commit any crime. As the Court explained earlier the same year, an admission of factual guilt "is normally '[c]entral to the plea and the foundation for entering judgment against the defendant." Up until this time, "State and lower federal courts [we]re divided upon whether a guilty plea can be accepted when it is accompanied by protestations of innocence and hence contains only a waiver of trial but no admission of guilt." "Ordinarily," the Court explained, "a judgment of

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<sup>&</sup>lt;sup>37</sup> Alford v. North Carolina, 400 U.S. 25 (1970).

<sup>&</sup>lt;sup>38</sup> *Id.* at 28-29; 31-33.

<sup>&</sup>lt;sup>39</sup> *Id.* at 28.

<sup>&</sup>lt;sup>40</sup> Id

<sup>&</sup>lt;sup>41</sup> *Id.* In the Court's words, "Alford stated: 'I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all." *Id.*<sup>42</sup> *Id* at 38.

<sup>&</sup>lt;sup>43</sup> Brady, 397 U.S. 742, 748 (1970).

<sup>&</sup>lt;sup>44</sup> *Id.* at 33. (As the Court explained, "[s]ome courts, giving expression to the principle that '(o)ur law only authorizes a conviction where guilt is shown,' Harris v. State, 172 S.W. 975, 977 (1915), require that trial judges

conviction resting on a plea of guilty is justified by the defendant's admission that he committed the crime charged against him and his consent that judgment be entered without a trial of any kind."<sup>45</sup> This is because "[t]he plea usually subsumes both elements, and justifiably so, even though there is no separate, express admission by the defendant that he committed the particular acts claimed to constitute the crime charged in the indictment."<sup>46</sup>

The Federal Rules for Criminal Procedure prohibit a judge from accepting a guilty plea "unless it is satisfied that there is a factual basis for the plea" and most states have almost identical rules for accepting admissions. Although the Court held that "an express admission of guilt . . . is not a constitutional requisite to the imposition of criminal penalty," because "a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime," it did so only after being satisfied that "the record before the judge contain[s] strong evidence of actual guilt." Importantly, the Court stressed that Alford was permitted to plead guilty only after it independently found both that the evidence against him

reject such pleas").

<sup>&</sup>lt;sup>45</sup>*Id.* at 32

<sup>&</sup>lt;sup>46</sup> *Id*.

<sup>&</sup>lt;sup>47</sup> FED.RULE CRIM.PROC. 11(b)(3). According to the Supreme Court, there is no similar requirement for pleas of nolo contendere, since it was thought desirable to permit defendants to plead nolo without making any inquiry into their actual guilt. Throughout its history, that is, the plea of nolo contendere has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency. *Alford*, 400 U.S. at 35 & n.8. The Court also expressly kept alive the possibility of a court refusing to accept a plea of guilty because it is not satisfied that there is a basis for entering a judgment of guilt. *Id.* at 38 & n.11 (citing FED. R. CRIM. PRO. 11). For the history of nolo contenders at common law, *See* Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1371-73 (2003).

<sup>&</sup>lt;sup>48</sup> *Alford*, 400 U.S. at 37.

<sup>&</sup>lt;sup>49</sup> *Id*.

<sup>&</sup>lt;sup>50</sup> *Id*.

<sup>&</sup>lt;sup>51</sup> *Id*.

"substantially negated his claim of innocence" and that this incriminating evidence allowed the trial judge to "test whether the plea was being intelligently entered." The Court stressed that what made the plea acceptable was that the trial "court had heard an account of the events on the night of the murder, including information from Alford's acquaintances that he had departed from his home with his gun stating his intention to kill and that he had later declared that he had carried out his intention."

To one familiar with goings on in modern municipal criminal courts this account is likely to be startling. Few practitioners today have ever seen a judge insist upon proof in the form of sworn testimony by a percipient witness before the judge reaches the independent conclusion that there is a basis to enter a judgment of conviction. But this act of insisting on an *independent* determination of such a factual basis is the very meaning of how courts are to exercise their proper role in our system of separated powers. Note the fact that what happened in *Alford* is twice removed from what happens regularly in criminal court today. It's not merely that courts no longer make such independent inquiries, neither does the accused's court-assigned counsel.

Although *Alford* is considered today to be principally about allowing defendants to plead guilty despite professing innocence, the case deserves to be more prominently recalled a statement of what judges ought to be doing in all plea cases, including when the defendant

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<sup>&</sup>lt;sup>52</sup> *Id.* at 38.

<sup>&</sup>lt;sup>53</sup> *Id.* The Court also cited various state and federal court decisions that "properly caution that pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea." (*citing* Griffin v. United States, 405 F.2d 1378, 1380 (D.C. Cir. 1968); Bruce v. United States, 379 F.2d, at 119 (1967); Commonwealth v. Cottrell, 249 A.2d 294 (PA. 1969). People v. Serrano, 206 N.E.2d 330, 332 (N.Y. 1965); State v. Branner, 63 S.E. 169, 171 (N.C. 1908); Kreuter v. United States, 201 F.2d 33, 36 (10<sup>th</sup> Cir. 1952).
<sup>54</sup> *Id.* at 32.

<sup>&</sup>lt;sup>55</sup> See Smith v. Robbins, 528 U.S. 259, 294-295 (2000) Souter, J., dissenting) ("A simple statement by counsel that an appeal has no merit, coupled with an appellate court's endorsement of counsel's conclusion, gives no affirmative indication that anyone has sought out the appellant's best arguments or championed his cause to the degree contemplated by the adversary system. . . . A judicial process that renders constitutional error invisible is, after all,

admits his guilt. The Supreme Court's concern that courts undertake an independent assessment of the case before allowing a defendant to short-circuit the court's fact-finding function is equally salient when defendants profess their guilt as when they do not.

The systemic inadequacy of an indigent defense system in an inquisitorial system might raise a due process claim, but it would not raise a separation of powers claim. This is because "[i]n an inquisitorial system," the Supreme Court has explained, "the failure to raise a legal error can in part be attributed to the magistrate, and thus to the state itself. In our system, however, the responsibility for failing to raise an issue generally rests with the parties themselves." In other words, in our system of justice, judges *depend* on defense counsel to investigate cases and to present any critical issue to the court's attention. As the Supreme Court has recognized, lawyers are needed to sharpen the "presentation of issues upon which the court so largely depends for illumination of difficult questions." When that does not happen, judges are unable to perform their oversight role. When it does not happen systematically because of choices made by another governmental branch, an essential judicial function has been encroached.

When a criminal complaint is filed in court, judges are institutionally incapable of checking the veracity of the claim without relying on the central players in the process expected to perform that role. As Bruce Green explains, a robust implementation of the Sixth Amendment

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itself an affront to the Constitution.").

<sup>&</sup>lt;sup>56</sup> Sanchez-Llamas v. Oregon, 548 U.S. 331, 357 (2006).

<sup>&</sup>lt;sup>57</sup> See Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221 (1974) ("[A] court must rely on the parties' treatment of the facts and claims before it to develop its rules of law.") See also Amanda Frost, The Limits of Advocacy, 59 DUKE L. J. 447, 449 (2009) ("An adversarial system is typically defined as one in which the parties present the facts and legal arguments to an impartial and passive decisionmaker, who then decides cases on their terms. Indeed, party presentation is cited as the major distinction between the adversarial system in the United States and the inquisitorial systems of continental Europe, where judges take the lead in the investigation and presentation of the case").

<sup>&</sup>lt;sup>58</sup> O'Shea v. Littleton, 414 U.S. 488, 494 (1974). *See also* Robert Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 505 (1998) ("every trial judge knows [that] the task of determining the legal

is needed to advance the "reliability of the criminal process, the availability of other constitutional and procedural protections afforded criminal defendants, and relative equality between the opposing sides of a criminal controversy and among different classes of criminal defendants."

The rule in separation of powers cases involving perceived encroachment into the judicial function is straightforward. The doctrine forbids another branch from enacting a law or behaving in a manner that either undermines the "essential attributes" of the courts<sup>60</sup> or encroaches on their "central prerogatives." It takes no work at all to identify the central prerogatives of courts. Under the federal system (and, importantly in this central respect, there is no distinction between the federal and individual state systems), they are, in the language of Article III, "to decide cases and controversies." Accordingly, any action by another governmental branch that can be said to interfere with a court's capacity to decide cases and controversies raises a

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outcome is rendered almost impossible without effective assistance of counsel.").

<sup>&</sup>lt;sup>59</sup> Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 440-41 (1993).

<sup>&</sup>lt;sup>60</sup> N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60-61 (1982) (Congress does not have the power to remove the essential attributes of judicial power from Article III courts and give those attributes to Article I courts); see also Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850-51 (1986) (Article I court's constitutional validity depends on the extent to which it "exercises the range of jurisdiction and powers normally vested only in Article III courts," as well as "the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III").

<sup>&</sup>lt;sup>61</sup> Miller v. French, 530 U.S. 327, 341 (2000) ("[T]he Constitution prohibits one branch from encroaching on the central prerogatives of another ...."); *see also* New York v. United States, 505 U.S. 144, 182 (1992) (stating that the separation of powers is violated when "one branch [of the federal government] invades the territory of another"); cf. Gordon v. United States, 117 U.S. 697 app. at 700 (1886) ("The judicial power of the United States is in point of origin and title equal with the other powers of the government, and is as exclusively vested in the court created by or pursuant to the Constitution, as the legislative power is vested in Congress, or the executive power in the President." (internal quotation omitted)); Loving v. United States, 517 U.S. 748, 757 (1996) ("Even when a branch does not arrogate power to itself, moreover, the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties") (citations omitted).

<sup>62</sup> As we shall see later on, however, the specific articulation of court's "essential functions" has stressed one

<sup>&</sup>lt;sup>62</sup> As we shall see later on, however, the specific articulation of court's "essential functions" has stressed one characteristic sometimes necessary to decide cases "to say what the law is" over a second common characteristic to find facts and that this privileging of law finding over fact finding has deep implications for the core thesis of this Article. *See* n. \_\_ *infra* and accompanying text.

<sup>&</sup>lt;sup>63</sup> U.S. CONST. ART. III.

significant separation of powers question.

Indeed, the Supreme Court has jealously guarded the judicial power to decide cases or controversies by insisting, most famously, that courts have the *final* word on matters decided by courts. <sup>64</sup> More needs to be said, however, to grasp the full meaning of what is expected of courts as they discharge this essential function. The Supreme Court has tended to emphasize above all else that courts are obliged "to say what the law is" when they decide cases. <sup>65</sup> Because saying what the law is sometimes is the key to deciding the case before it, one of a court's essential functions is to announce the rule of law. For this reason, few doubt the importance of courts being free to answer legal questions as they best believe.

In the overwhelming majority of cases, however, judges have a very different challenge before them. To use criminal law as an example, the court's task in the run-of-the-mill case is to decide whether the executive branch's factual claim that at a particular time and place an individual did something illegal should be ratified. For this reason, any interference by another branch with a court's duty to determine in a criminal prosecution whether the act allegedly committed was criminal and whether the accused was the wrongdoer would be an illegal encroachment on the judicial process. Legislatures can no more make a law that inhibits courts from carrying out their duty to evaluate statutes in light of the Constitution, than they can functionally hamper courts' performance of that duty.<sup>66</sup>

The Court has been swift to strike down efforts by another Branch when it would have restricted evidence courts may secure or the arguments lawyers may make to judges. In *United* 

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<sup>&</sup>lt;sup>64</sup> See Cooper v. Aaron, 358 U.S. 1 (1958). See also City of Boerne v. Flores, 521 U.S. 507 (1997).

<sup>65</sup> Marbury v. Madison, 1 Cranch 137, 2 L.Ed 60 (1803).

<sup>&</sup>lt;sup>66</sup> A "primary constitutional duty of the Judicial Branch," the Supreme Court reminds us, is "to do justice in criminal prosecutions." United States v. Nixon, 418 U.S. 683, 707 (1974). Any interference by another branch of the courts'

States v. Nixon,<sup>67</sup> President Nixon asserted Executive Privilege in refusing to turn over documents subpoenaed as part of a criminal prosecution. The Court characterized the case as a clash of two constitutional domains: the Executive's interest in the confidentiality of its communications versus the "constitutional need for production of relevant evidence in a criminal proceeding." The Court stressed that it was "not ... concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation." Explaining that the need for information in the criminal context is very strong because a "primary constitutional duty of the Judicial Branch [is] to do justice in criminal prosecutions," the Court concluded that withholding material needed by the court to carry out its tasks "conflict[s] with the function of the courts under Art. III" and constitutes an impairment of the 'essential functions of [another] branch."

In a particularly illuminating case, in 2001, the Court ruled that even legislatively imposed restrictions on what lawyers may argue before judges impermissibly intruded into the judicial function. The challenged legislation prohibited recipients of Legal Services Corporation (LSC) funding from representing clients in efforts to amend or challenge the validity of existing welfare laws.<sup>73</sup> In *Legal Services Corporation v. Velazquez*,<sup>74</sup> the Court concluded that the

capacity to perform this role violates separation of powers.

<sup>&</sup>lt;sup>67</sup> United States v. Nixon, 418 U.S. 683 (1974).

<sup>&</sup>lt;sup>68</sup> *Id.* at 713.

<sup>&</sup>lt;sup>69</sup> *Id.* at 712 & n. 19.

<sup>&</sup>lt;sup>70</sup> *Id.* at 707.

 $<sup>^{71}</sup>$  *Id*.

<sup>&</sup>lt;sup>72</sup> *Id. See also* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982) ("The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial.").

<sup>&</sup>lt;sup>73</sup> See Omnibus Consolidated Rescissions and Appropriations Act of 1996 (OCRAA), Pub. L. No. 104-134, § 504, 110 Stat. 1321-50, 1321-53 to -57.

<sup>&</sup>lt;sup>74</sup> Legal Services Corporation v. Velazquez, 531 U.S. 533 (2001).

federal law<sup>75</sup> violated the separation of powers because by "[r]estricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts," the law "distorts the legal system by altering the traditional role of the attorneys."<sup>76</sup>

It may not be clear why separation of powers forbids Congress from altering the role of an attorney without the Court's explanation that restricting what a lawyer may argue can interfere with the *judges*' role to decide cases. The Court explained, "[w]e must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge." Further, the law also had the potential to interfere with how judges are to perform their role. In Justice Kennedy's words, "[b]y seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power."

Most recently, in *Boumediene v. Bush*, <sup>79</sup> the Court made clear that any legislative act that impedes on a litigant's chance to appear in court is subject to heightened judicial review as an intrusion on separation of powers. In that case, the Court ruled that Congress could not deprive a litigant in a case against the government from being denied "an opportunity . . . to present exculpatory evidence" without intruding into the judicial function. <sup>80</sup>

<sup>&</sup>lt;sup>75</sup> § 504(a)(16).

<sup>&</sup>lt;sup>76</sup> *Velazquez*, 531U.S. at 544.

<sup>&</sup>lt;sup>77</sup> *Id.* at 548.

<sup>&</sup>lt;sup>78</sup> *Id.* at 545. See also Laura Abel and David Udell, *If You Gag the Lawyers Do You Choke the Courts?*, 29 FORDHAM URB. L. J. 873 (2003) describing how funding restrictions on legal services lawyers interfere with functions of the courts.

<sup>&</sup>lt;sup>79</sup> Boumediene v. Bush, 553 U.S. \_\_ (2008).

<sup>&</sup>lt;sup>80</sup> Id. at \_\_. ("We do hold that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release."). In 2000, the Court even took seriously the claim that Congress offended the Constitution by placing "a deadline on

Legislation that has the effect of hampering courts in the performance of their constitutional duty not only encroaches on an essential function of courts. It also constitutes an impermissible usurpation of power because interference with judicial oversight of executive action results in the executive branch having too much unilateral power. This was Montesquieu's great insight. In his words,

In order to have [] liberty, it is requisite the government be so constituted as one man needs not be afraid of another. When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. . . . there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of every thing, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals. 81

It is for this reason Madison called "[t]he accumulation of all powers legislative, executive and judiciary in the same hands . . . the very definition of tyranny." It is also why Madison insisted that "members of each department should be as little dependent as possible on those of the others."

Everyone familiar with the practice of law recognizes that facts predominate in the resolution of legal disputes. This is particularly true at the trial level where most lawyers preparing for contested litigation strive to present facts to fit within well-established law and

judicial decisionmaking, thereby interfering with core judicial functions." See *Miller v. French*, 530 U.S. 327 (2000).

<sup>&</sup>lt;sup>81</sup> 1 M. DE SECONDAT, BARON DE MONTESQUIEU, SPIRIT OF LAWS 174 (Thomas Nugent trans., 1878).

<sup>&</sup>lt;sup>82</sup> THE FEDERALIST NO. 47, at 244 James Madison) (Bantam 1982). *See also* No. 51 ("In a single republic, all the power surrendered by the people, is submitted to the administration of a single government; and usurpations are guarded against by a division of the government into distinct and separate departments." The FEDERALIST NO. 51, 263-64 (James Madison) (Bantam 1982).

<sup>&</sup>lt;sup>83</sup> THE FEDERALIST No. 51, at 262 (James Madison) (Bantam 1982).

rarely bother litigating over what the law is. For those cases - the overwhelming majority of contested matters in all trial level courts - it is misleading to stress that the principal function of courts is to "say what the law is." If the measure of an institution's core function is what it is supposed to do day in and day out, fact finding, not law finding (or law declaring) is the primary function of courts. As a well-known trial judge put it in 1950, "a trial . . . is more of a fact suit than a lawsuit."

Even in *Bush v. Gore*, <sup>85</sup> among the most notorious Supreme Court decisions for its declaration that re-counting ballots in some but not all Florida counties offended the Fourteenth Amendment's Equal Protection Clause, the core disagreement was over *facts* - how many ballots belonged in the category of contestable; how many ballots contained hanging chads, etc. Factfinding was the antecedent task of the judiciary to declaring what the law was. Even more, whatever the ultimate statement of what the law was, the contest over facts was crucial to society's sense of a just outcome.

Our most contentious legal battles commonly are disputes over what happened: did the police use a certain level of force when interrogating an individual? Did they actually observe what they claimed to have seen before making an arrest? Where was the defendant at the time of the incident? What was his or her intention when the act occurred? As every trial lawyer knows, the overwhelming percentage of contested legal battles are fought over facts and cases almost always are won or lost depending on which side wins the battle over contested facts.

In this sense, it is misleading to stress that the primary function of courts is to say what

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<sup>&</sup>lt;sup>84</sup> Q. REYNOLDS, COURTROOM: THE STORY OF SAMUAL S. LIEBOWITZ 409 (1950). Justice Jackson famously observed that even at the Supreme Court, "most contentions of law are won or lost on the facts." (Robert Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 803 (1951). <sup>85</sup> Bush v. Gore, 531 U.S.98 (2000).

the law is. Although it is a truism that courts get to say what the law is, that authority commonly is the background to the bread and butter work of saying what the facts are. If we reframe the essential function of courts away from the appellate level, those involved with the justice system in the United States would certainly agree that the courts' most common and vital purpose is to say what the facts are since that is how most contested legal disputes are decided.

Why is this important? Because after two centuries of stressing that courts exist, above all else, to say what the law is, well-established doctrines have emerged calculated to guard and protect that function from encroachment from other branches. "All possible care," Alexander Hamilton warned, "should be taken to guard the judiciary against 'attacks' by its coordinate branches. "Because a system that hampers the judiciary's function (its "province" and "duty" to say what the law and facts are), they violate the very essence of separation of powers. "87"

The way pleas are routinely accepted by municipal criminal courts often even would violate the minimum requirement in federal law for taking pleas in federal court, which requires that judges are satisfied that there is a "factual basis" for the plea. But learning that there is such a basis does not begin to approach the court's independent responsibilities to provide checks and balances. In many cases involving "broken windows"-related arrests, there will always be a "factual basis" if all that is meant by that is that the defendant was at a particular

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<sup>&</sup>lt;sup>86</sup> THE FEDERALIST No. 78, at 465-466 (Alexander Hamilton)

<sup>&</sup>lt;sup>87</sup> Boumediene v. Bush, 553 U.S. \_\_\_, \_\_(2008) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers").

<sup>&</sup>lt;sup>88</sup> FED. R. CRIM. P. 11(b)(3). In addition, of course, courts are supposed to ensure that the defendant is entering a plea of guilty without the kind of coercion the law prohibits. Hill v. Lockhart, 474 U.S. 52, 56 (1985) (noting that the "longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice ...."") (citations omitted).

place and time when s/he was arrested.<sup>89</sup> In this sense, the requirement of finding a "factual basis" is little more than a determination that a legal position is not completely irrational.

Take as a very common example when poor people are arrested in a community where the police aggressively apply a broken windows campaign. Three young men are arrested and charged with criminal trespass and illegal loitering. 90 When a police patrol car came upon them, they were sitting on a stoop on a block characterized by the police as an area where drugs are sold. Even though nothing incriminating was found on any of them, all three were arrested, held in a police cell overnight and arraigned the next day. At the arraignment, each is given a courtassigned defense lawyer who recommends, without doing any kind of investigation, that they plead guilty to the offense of loitering, in exchange for a promise that they can walk out of court without further sanction. When they take their lawyers' advice, all three will "admit" to the judge that they committed an offense. Moreover, the judge will be made aware that there was a factual basis for the arrest because the defendants will acknowledge that they was sitting on the stoop in front of a building in which none of them resided. But that should not begin to satisfy anyone committed to the rule of law that the case properly ought to end with a conviction. The possibility that the arrests were baseless or that the three defendants committed no crime remains very prominent.<sup>91</sup> For this reason, the rule that a court must determine that there is a "factual basis" for the plea does not begin to satisfy the concern in this Article that courts no longer

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<sup>&</sup>lt;sup>89</sup> See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2120 (1998) ("[F]or most defendants the primary adjudication they receive is, in fact, an administrative decision by a state functionary, the prosecutor, who acts essentially in an inquisitorial mode.").

<sup>&</sup>lt;sup>90</sup> See, e.g., N.Y. Penal Law § 240.35(1) (Consol. 2000) ("A person is guilty of loitering when he ...[l]oiters, remains or wanders about in a public place for the purpose of begging.");

<sup>&</sup>lt;sup>91</sup> See, e.g., Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85, 85-86 (1997) (describing routine arrests that resulted in pleas of guilty of thousands for the crime of loitering for the purpose of begging, a law that years earlier had been declared unconstitutional by the United States Court of the Appeals for the Second Circuit in Loper v. New York City Police Dep't, 999 F.2d 699, 705 (2d Cir. 1993).

perform a meaningful oversight role in the criminal justice system.

Many prosecutors have contented themselves with the modern plea bargaining system believing that virtually all persons charged with crimes are guilty. For them, accepting pleas even without defense counsel conducting any kind of investigation raises little concern. There is, of course, no empirical evidence allowing anyone to know the percentage of those convicted by any means that are factually guilty. More importantly, however, guilt is only one (and, often, a relatively unimportant one) of many factors that matter in ascertaining whether or not a plea of guilty is appropriate.

The meaningful test for separation of powers purposes is whether the prosecutor should be allowed to secure a conviction, in light of everything, including the facts, the substantive law, and the multitude of other laws regulating police action, such as the Fourth Amendment. This is what is meant when discussing whether a criminal case has "triable issues." When a factually guilty person could not be convicted in a contested matter because of insufficient proof of guilt, the proper outcome under the American system of justice is supposed to be a verdict of not

 <sup>&</sup>lt;sup>92</sup> See MILTON HEUMANN, PLEA BARGAINING 103 (1978); Daniel Givelber, Lost Innocence: Speculation and Data About the Acquitted, 42 Am. CRIM. L. REV. 1167, 1188 (2004).
 <sup>93</sup> This sometimes overlooks the multitude of reasons that innocent defendants choose to plead guilty to avoid risk

This sometimes overlooks the multitude of reasons that innocent defendants choose to plead guilty to avoid risk and to gain the immediate benefit of physical freedom. See, e.g., Darryl K. Brown, The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication, 93 CAL. L. REV. 1585, 1612 (2005); Abbe Smith, Defending the Innocent, 32 CONN. L. REV. 485, 494 & nn. 56-58 (2000). See also Stephen J. Schulhofer, Plea Bargaining as Disaster, 101 YALE L.J. 1979, 2001 (1992) (there is a "social interest in not punishing defendants who are factually innocent... even if individual defendants would prefer to have that option").

<sup>&</sup>lt;sup>94</sup> Some suggest that plea bargaining actually encourages prosecutors to bring cases against individuals even when they do not have a strong case. *See* Oren Gazal-Aval, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2298-99 (2006) ("When plea bargaining is available, the prosecutor can reach a guilty plea in almost every case, even a very weak one. When the case is weak, meaning when the probability that a trial would result in conviction is relatively small, she can assure a conviction by offering the defendant a substantial discount--a discount big enough to compensate him for foregoing the possibility of being found not guilty. Knowing that gaining convictions in weak cases is not difficult, the prosecutor cares less about the strength of the cases she brings. As a result, she is more likely to prosecute weak cases where defendants are more likely to be innocent.").

<sup>&</sup>lt;sup>95</sup> See, e.g., Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 399 (1982) (noting that separation of powers "calls for an independent particularizer with power to . . .

guilty. Although we cannot know how many not guilty people plead guilty without being given lawyers who even bother to investigate the facts of their cases, we can very comfortably conclude that many plead guilty without being able even to try to mount a defense. In perhaps the only study of its kind, Stephen Schulhofer's careful study of the Philadelphia criminal courts in the 1980s led him to conclude that at least 57 percent of filed cases "involved legitimately triable issues." One can only assume that the percentage of triable issues in cases has increased in the aftermath of the stunning increase in arrests over the past twenty years.

The New York system reveals just how meaningless judicial oversight has become. Judges routinely give no more than 3-5 minutes of court time to any given case. 97 Not only are the majority of arrests disposed of at the first judicial appearance by plea. The defendant almost always has met with his or her lawyer for only a few minutes before pleading guilty. 98 The only information defense attorney has in his or her possession is the defendant's record of prior criminal involvement and the form prepared by the New York City Criminal Justice Agency which contains a recommendation to the court as to whether a defendant should be held without bail, have bail set or released on his or her own recognizance. 99 In the words of the Spangenberg Report, "[d]uring these few minutes, attorneys are expected to assess whether to recommend the defendant plead or not, consult with the defendant and fully advise him or her of the consequences of pleading to a criminal charge, including all of the collateral consequences that come along with having a criminal conviction, such as housing, state and federal assistance and

ascertain the precise facts of the particular case").

<sup>96</sup> Stephen J. Schulhofer, Is Plea Bargaining Inevitable?, 97 HARV. L. REV. 1037, 1081 (1984).

<sup>&</sup>lt;sup>97</sup> Spangenberg Report at 143.

<sup>&</sup>lt;sup>98</sup> *Id.* at 144.

<sup>&</sup>lt;sup>99</sup> Id.

immigration issues."100

Many have commented on aspects of criminal procedures that contribute to wrongful convictions, suggesting that even with a robust defender system, some problems will not be eliminated. 101 Some point a large finger at the system of pleas bargaining itself. 102 As John Langbein explains, perhaps the most serious drawback to a pervasive plea bargaining system is that "the accused cannot present defenses and have his guilt proved to a jury beyond a reasonable doubt – his greatest safeguard against mistaken conviction." Stephen Schulhofer is convinced that our plea bargaining system is a "disaster" and almost 20 years ago boldly called for its abolition. 104 It goes without saying that one could not even contemplate such a radical change in criminal justice processing without investing in a meaningful, active indigent defense bar. But the costs society pays for the administrative processing of criminal matters go well beyond those paid by the convicted and their loved ones.

It is not the point of this Article to criticize the use of plea bargaining as such. <sup>105</sup> For better or worse, ours is a system dominated by pleas. The point here is what needs to be incorporated into the plea bargaining arrangement to ensure that courts do more to stand

<sup>&</sup>lt;sup>100</sup> Id.

<sup>&</sup>lt;sup>101</sup> See, e.g., Susan R. Klein, Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining, 84 Tex. L. REV. 2023, 2025 (2006) (discussing, among other things, problems associated with eyewitness identifications and flaws in scientific testing). See also James S. Liebman et al., A Broken System: Error Rates in Capital CASES, 1973-1995, at ii (2000), available at http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=232712 (study of more than 6,000 death cases between 1973 and 1995 found an overall error rate of 68%, and 37% of these reversals were for "egregiously incompetent defense lawyering.").

<sup>&</sup>lt;sup>102</sup> See, e.g., Oren Gazal-Ayal, Partial Ban on Plea Bargains, 27 CARDOZO L. REV. 2295 (2006); Albert W. Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. CHI. L. REV. 50, 60 (1968). See also Stephen J. Schulhofer, Plea Bargaining as Disaster, 101 YALE L.J. 1979, 2003 (1992).

<sup>&</sup>lt;sup>103</sup> John H. Langbein, Understanding the Short History of Plea Bargaining, 13 LAW & Soc'y Rev. 261, 262 (1978). <sup>104</sup> Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992).

<sup>&</sup>lt;sup>105</sup> Among the most trenchant criticism of the plea bargaining system based on the values articulated in this Article of concern about the structural meaning of the loss of trials has been by Professors Alschuler and Schulhofer. See, e.g., Albert W. Alschuler, Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System, 50 U. CHI. L. REV. 931, 932-34 (1983); Stephen J. Schulhofer, Criminal Justice Discretion as a

independently from the other branches and perform their vital separation of powers function.

Judges need defense lawyers who conduct investigations on more than an occasional basis if we are to maintain a meaningful system of judicial oversight into executive action. For separation of powers purposes, perhaps the most important aspect of the crisis in indigent defense in the United States today is the extent to which it has been imposed on the courts by the other branches of government. Far from being an incidental or unavoidable condition, it is the deliberate outcome of carefully chosen decisions made by legislatures and, in many situations, in conjunction with the executive branch.

#### A. The Legislature's Role in Creating the Crisis in Indigent Defense

The federal government does not fund state-level indigent defense. Nor has the Supreme Court addressed how states should pay for the provision of indigent defense. <sup>106</sup> As a consequence, each state has a constitutional duty to ensure that a member of the bar is assigned to indigent defendants accused of all but the most trivial of offenses <sup>107</sup> but states have little incentive to ensure that indigent defendants are represented by competent, properly trained lawyers with sufficiently small caseloads to ensure they are able to perform all of the responsibilities called for by excellent lawyering.

Funding methods across the United States vary widely from state to state, often from county to county within the same state.<sup>108</sup> Whatever the particular chosen method, one thing is clear: in the great majority of jurisdictions in the United States those responsible for funding indigent legal services have failed to provide the funds needed for counsel to undertake their

Regulatory System, 17 J. LEGAL STUD. 43, 49-60 (1988).

<sup>&</sup>lt;sup>106</sup> Normal Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 842 (2004).

<sup>&</sup>lt;sup>107</sup> See Scott v. Illinois, 440 U.S. 367 (1979); Alabama v. Shelton, 535 U.S. 654 (2002).

duties responsibly.<sup>109</sup> These inadequate funding levels are directly traceable to the failure of legislatures, whether at the state or local level, to authorize a sufficient amount of money for indigent defense.<sup>110</sup>

As Cara Drinan recently explained, "[i]nadequate funding is the root cause of the indigent defense crisis." The explanations for the failure of legislatures to fulfill this responsibility are varied. Some have explained this failure as the result of widespread public distaste for indigent criminals and their attorneys. As one commentator has written, "[p]erhaps the basis for such opposition is the public's desire to maintain safety and order, or its concern that an effective attorney will be able to secure a not-guilty verdict at trial, allowing guilty defendants to 'get away with' the crimes they committed." 113

Writers have suggested that indigent defendants should be regarded as belonging to the

<sup>&</sup>lt;sup>108</sup> *Id.* at 844.

<sup>&</sup>lt;sup>109</sup> See n. \_\_infra and accompanying text.

<sup>&</sup>lt;sup>110</sup> Congress and the Department of Justice are also at least partly responsible for this failure. The Department of Justice has regularly more generously funded the prosecution function, even at the state and local level, than it has the defense function. Partly in acknowledgement of this, in February, 2010 President Obama appointed Harvard Law Professor Laurence Tribe as Senior Counselor for Access to Justice, a new initiative aimed at broadly improving access to civil and criminal defense services for the poor and middle class. *See also* Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. Rev. 791, 828-29 (2009) (supporting the creation of a new Federal Center for Defense Services which "could administer matching grants and other financial incentives for state and local governments to improve their efforts to provide defense representation.").

Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV L. & SOC. CHANGE 427, 431 (2009). *See also* David A. Simon, Note, *Equal Before the Law: Toward a Restoration of Gideon's Promise*, 43 HARV. C.R.-C.L. L. REV. 581, 586 (2008); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 222 (2004) ("Indigent defense remains on a starvation diet in most jurisdictions in the United States").

<sup>112</sup> See Stephen B. Bright, Counsel for the Poor: the Death Sentence Not for the Worst Crime But for the Worst Lawyer, 103 YALE L.J. 1835, 1870 (1994) (expressing doubts about improvement in indigent representation due to unpopularity of accused and "lack of leadership and commitment to fairness of those entrusted with responsibility for the justice system"). See also Note, Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems, 118 HARV. L. REV. 1731, 1731-1732 (2005) ("Due to the political unpopularity of criminal defendants and their lack of financial and political capital, state legislatures are unlikely to allocate significant attention or resources to the problem of indigent defense").

<sup>&</sup>lt;sup>113</sup> Erin V. Everett, Salvation Lies Within: Why the Mississippi Supreme Court Can and Should Step in to Solve Mississippi's Indigent Defense Crisis, 74 Miss. L.J. 213, 219 (2004). See also Suzanne E. Mounts, Public Defender Programs, Professional Responsibility, and Competent Representation, 1982 Wis. L. Rev. 473, 475 (1982).

kind of "discrete and insular minorit[y]"<sup>114</sup> that is in need of hyper-protection by the courts. <sup>115</sup> Certainly, the interests of those who are eligible for free court-assigned counsel are insufficiently present in the political process. Rachel Barkow has observed that "[n]either criminal defendants nor judges . . . have much sway in the political process."<sup>116</sup> Legislators are fully aware that their refusal to spend new money on indigent defense will never directly hurt their friends or financial supporters. The right to purchase the best lawyer money can buy remains available to those in the private lawyering market. Indeed, the wealthy may even benefit directly from being the only group to have lawyers with small caseloads and time to devote to their defense.

If this is true, then there is an incentive to keep indigent defense underfunded. But even if there is no direct incentive to do so, the political realities regarding voting on crime-related matters in the United States remain an almost insuperable barrier to legislative action. Stephen Schulhofer has explained that "[v]igorous, unrelenting challenge to authority can only be viewed with ambivalence, if not hostility, by the communities for whom those in authority are attempting to act; the essentials of the adversary system have needed constitutional protection precisely for this reason."

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<sup>&</sup>lt;sup>114</sup> U.S. v. Carolene Products Co., 304 U.S. 144, 153, n.4 (1938). See Donald A. Dripps, Criminal Procedure, Footnote Four, and the Theory of Public Choice: or, Why Don't Legislatures Give a Damn About the Rights of the Accused?, 44 SYRACUSE L. REV. 1079 (1993).

<sup>&</sup>lt;sup>115</sup> See, e.g., Andrew E. Goldsmith, The Bill For Rights: State and Local Financing for Public Schools and Indigent Defense, 30 N.Y.U. REV. L. & SOC. CHANGE 89, 141-42 (2005); Cara H. Drinan, The Third Generation of Indigent Defense Litigation, 33 NYU REV L. & SOC. CHANGE 427, 431 (2009); See also Rodger Citron, Note, (Un) Luckey v Miller: The Case For A Structural Injunction to Improve Indigent Defense Services, 101 YALE L. J. 481, 498 (1991) ("the beneficiaries of indigent defense programs are typically numerical, economic, and ethnic minorities").

<sup>116</sup> Barkow, Separation of Powers at 1029.

<sup>&</sup>lt;sup>117</sup> See Ronald J. Tabak, Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?, 21 FORDHAM URB. L.J. 239, 295-296 (1994).

<sup>&</sup>lt;sup>118</sup> Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1104 (1984). Rachel Barkow makes a similar point. *See* Rachel E. Barkow, *Separation of Powers* at 1049 ("The political process will not work because the vast majority of people will be unaffected and will not mobilize to fight against the practice. And the judicial process will not work if the only question in a given case is whether the individual defendant before the Court made the deal knowingly and voluntarily.")

In the end, the complete explanation for failure of the political process to fund adequate indigent defense is less important than the result: generally speaking, legislatures have not come close to ensuring that people unable to purchase legal services in the marketplace are given lawyers who have the capacity to investigate the underlying claims in the overwhelming majority of cases they are required to handle. Local government's concern almost invariably is to establish an indigent defense system based on "who can do it cheapest." 119

#### B. The Executive Branch's Contribution to the Indigent Crisis

The executive and legislative branches have dramatically tilted the scales in favor of government by choosing a combined strategy of flooding the courts with cases and refusing to fund indigent defense at levels necessary for lawyers to be able to investigate charges the government has brought against their clients. This allows the executive branch to dictate its opponent's litigation strategy by forcing counsel to recommend accepting a plea of guilty. As a result, criminal cases are no longer meaningfully adversarial.

It is crucial to understand how deeply choices by the executive branch negatively impact the capacity of courts to react. As a direct consequence of the so-called "broken windows" campaign waged by law enforcement officials at the local and state levels in many parts of the United States, <sup>120</sup> criminal courts have become so overwhelmed with volume that judges have been routinely excluded from performing their separation of powers responsibilities. <sup>121</sup> Police

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<sup>&</sup>lt;sup>119</sup> SPANGENBERG REPORT at 155. See also Richard Klein, The Eleventh Commandment: Thou Shalt Not be Compelled to Render the Ineffective Assistance of Counsel, 68 IND. L.J. 363, 432 (1993) (politicians are unwilling to provide sufficient funding for indigent defense)

<sup>120</sup> See generally James Q. Wilson & George L. Kelling, Broken Windows, ATLANTIC MONTHLY, Mar. 1982, at 29.

<sup>121</sup> Beginning in the 1980s, caseloads of indigent defense counsel started to dramatically increase, making it ever less likely that lawyers would have the capacity to investigate their cases meaningfully. According to Richard Klein and Robert Spangenberg, between 1982 and 1986, the Justice Department found that the caseload of the nation's indigent defense programs grew by 40%. RICHARD KLEIN & ROBERT SPANGENBERG, AM. BAR ASS'N, THE INDIGENT DEFENSE CRISIS 3 (1993) (citing Bureau of Justice Statistics, U.S. Dep't of Justice, Criminal Defense for the

arrests based on the exercise of their discretion, which is invariably exercised in the context of a broken windows campaign, potentially threatens everyone's freedom and, for this reason, must be overseen by the courts when those cases reach them. That oversight has been lacking as a direct consequence of inadequate indigent defense funding. The numbers are staggering.

According to Robert Spangenberg, in New York City between 1991 and 2004 the increase in arraignments for low level criminal offenses rose from 98,278 to 581,734, an increase of 491 percent. <sup>122</sup> In one year alone, from 1999 to 2000, the number of cases increased by 53 percent. <sup>123</sup> Many have written about the virtues and problems associated with this dramatic change in policing policy. <sup>124</sup> Some have sharply questioned the wisdom of rounding up such a large number of people, who tend overwhelmingly to be disproportionately African American or Latino, on the grounds that is has the "perverse effect of antagonizing minority communities and undermining the legitimacy of law enforcement." <sup>125</sup> Whatever one ultimately concludes about this policy, one thing is manifest. The executive branch has been permitted to interfere dramatically with the liberty interests of countless individuals without any kind of meaningful check by the courts. Instead, the judiciary has become a pawn in the instrument of executive choice, incapable of reviewing the propriety or legality of the arrests and being reduced to doing

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Poor--1986 (1988)).

<sup>&</sup>lt;sup>122</sup> SPANGENBERG REPORT at 143. See also <a href="http://www.villagevoice.com/2010-06-08/news/nypd-tapes-3-detective-comes-forward-downgrading-">http://www.villagevoice.com/2010-06-08/news/nypd-tapes-3-detective-comes-forward-downgrading-</a>

 $<sup>\</sup>frac{\text{rape/<https://exchange.law.nyu.edu/owa/redir.aspx?C=ccf2f3641e41464f863a79415c82a6d6\&URL=http%3a%2f%2fwww.villagevoice.com%2f2010-06-08%2fnews%2fnypd-tapes-3-detective-comes-forward-downgrading-rape%2f> for discussion of how new York City reduces felonies to isdemeanors by "recategorizing" them. <math display="block">\frac{123}{12}Id.$ 

<sup>&</sup>lt;sup>124</sup> See, e.g., GEORGE L. KELLING & WILLIAM H. SOUSA, JR., CTR. FOR CIVIC INNOVATION, DO POLICE MATTER? 10 (finding that misdemeanor arrests in New York City prevented over 60,000 violent crimes between 1989 and 1998) available at <a href="http://www.manhattan-institute.org/html/cr\_22.htm">http://www.manhattan-institute.org/html/cr\_22.htm</a>; But See Bernard E. Harcourt, Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style, 97 MICHIGAN LAW REV. 291 (1998).

<sup>125</sup> Jeffrey Fagan and Tracey L. Meares, Punishment, Deterrence and Social Control: The Paradox of Punishment in

almost nothing more than accepting pleas at the time of arraignment.

In 2001, for example, the New York City Criminal Courts disposed of 98 percent of summons issued at the first arraignment. <sup>126</sup> In 2004, of the more than 319,000 cases filed in Criminal Court, there were 727 trials altogether (280 by jury and 447 by bench). <sup>127</sup> Altogether, 51 percent of all cases were disposed of at arraignment. <sup>128</sup> During the same period that petty criminal filings have soared, felony filings decreased by 58 percent <sup>129</sup> By 2004, criminal courts in New York City overwhelmingly involved misdemeanors or lower level offenses, constituting 83 percent of the filings. <sup>130</sup>

C. How the Defense System Is Further Skewed to Advantage the Executive Branch

If this were all there was to say, it would make a strong case that the indigent defense crisis raises significant separation of powers concerns. But there is more. Not only have many legislatures chosen to underfund indigent defense, they have chosen to provide considerably more funds for prosecutors than for the defense function. Inequality of legal representation raises a significant separation of powers issue when the government prosecutes defendants and also pays for their defense because, as things currently are arranged in the United States, the choices to advantage the government in the prosecution are made outside of meaningful oversight by the judicial branch. Courts must make meaningful inquiry into whether courts are performing (and are being permitted to perform) their role of serving as a meaningful check on executive power.

As Ronald Wright explains, "[p]arity of resources is not the current reality in criminal

*Minority Communities*, 6 Ohio St. J. Crim. L. 173, 219-220 (2008). *See also* Bernard E. Harcourt, Illusion of Order: The False Promise of Broken Windows Policing 140-80 (Harvard 2001).

<sup>&</sup>lt;sup>126</sup> SPANGENBERG REPORT at 143.

<sup>&</sup>lt;sup>127</sup> *Id*.

<sup>&</sup>lt;sup>128</sup> *Id*.

<sup>&</sup>lt;sup>129</sup> *Id*.

justice funding. Prosecutors tend to draw larger salaries than publicly-funded defense attorneys. All too often they have lower individual caseloads than full-time public defenders and greater access to staff investigators, expert witnesses, and other resources." According to Wright, entry-level prosecutors tend to earn higher salaries than entry-level public defenders in many jurisdictions; even more, "[t]he salary differences persist at every level of experience; prosecutors earn more from bottom to top of the seniority scale." 132

The scarcity of defender resources frequently stands in stark contrast to the prosecution's access to the additional resources and services of other governmental agencies, the costs of which are not reflected in their budgets. The choice to fund prosecutorial resources at considerable higher levels than defender resources happens far too commonly in many parts of the United States. In 1999, David Cole reported: "Nationwide, we spend more than \$97.5 billion annually on criminal justice. More than half of that goes to the police and prosecution . . . . Indigent defense, by contrast, receives only 1.3 percent of annual federal criminal justice expenditures, and only 2 percent of total state and federal criminal justice expenditures." 134

Wright, a sophisticated researcher, looked carefully at the question of parity between prosecutors and defenders, recognizing that salary by itself fails to tell the whole story.

 $^{130}$  Id

<sup>&</sup>lt;sup>131</sup> Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 222 (2004).

<sup>&</sup>lt;sup>132</sup> *Id.* at 230 & n.43.

<sup>&</sup>lt;sup>133</sup> This is not to say, of course, that too many prosecutors also toil under crushing caseloads, harming both the public and defendants. *See* Adam Gershowitz & Laura Killinger, *The State (Never) Rests: How Excessive Prosecutor Caseloads Harm Criminal Defendants*, 79 Nw. U. L. Rev. \_\_ (2011).

<sup>&</sup>lt;sup>134</sup> DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM, 64 (footnote omitted). *See also* Erin V. Everett, *Salvation Lies Within: Why the Mississippi Supreme Court Can and Should Step in to Solve Mississippi's Indigent Defense Crisis*, 74 MISS. L.J. 213, 219-220, 221 & n. 32 (2004) (in 2001, Mississippi spent approximately \$16.5 million on prosecuting felony cases and less than \$9 million on indigent defense, leaving one court clerk to conclude that "(i)n every criminal case, it's like fielding a high school team to play the Green Bay Packers").

Workload levels and other factors, such as support services for lawyers who need to build their case also need to be compared before concluding that one side has the advantage over the other. Unfortunately, when these other factors are included Wright reports, the prosecutors' advantage only grows. He found that even where prosecutors' salaries are higher across the board from the defense, their workload levels were often lower and the resources available to them to assist in bringing a case to court (wholly aside from the police resources used to build a case before it is brought to the prosecutor), were considerably greater. This led Wright to conclude that "[a]ll of these components -- salary, workload, and support services -- combine to produce an overall gap in spending between the prosecution and defense functions." As a result, very few defendants that are given an attorney paid for by the government receive nearly the level of representation that the government insists upon for itself. 136

These features of practice unquestionably advantage executive power in a multitude of ways. But nothing does so quite as brilliantly as the maintenance of an ineffective defender system in the overwhelming majority of jurisdictions in the state courts. When the legislative or

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<sup>&</sup>lt;sup>135</sup> Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 231 & n.48 (2004) (hereinafter Wright, *Parity of Resources*). According to Wright, prosecutors outspend defense statewide by nearly three to one in Louisiana, not including police investigative resources Id. Wright also estimated that of the \$1.56 billion one should have expected the government to pay for defense services in a system committed to parity, only \$1.1 billion was spent, a shortfall of more than 50 percent. *Id.*Parity in resources exists in an extreme minority of jurisdictions. A Connecticut statute, passed in 1974, for example,

provides that the "salaries paid to public defenders, assistant public defenders and deputy assistant public defenders in the superior court shall be comparable to those paid to state's attorneys, assistant state's attorneys and deputy assistant state's attorneys in the various judicial districts in the court." CONN. GEN. STAT. §51-293(h) (\_\_\_\_\_). Oddly, some legislators have seen fit to ensure that defense counsel is paid at a lower rate than prosecutors. See, e.g., ARIZ. STAT. § 11-582 (requiring that public defenders earn at least 70% of the salary of prosecutors). According to Ronald Wright, Kansas, Massachusetts, North Carolina, Tennessee, and Wyoming all practice parity of salary for prosecutors and defenders. Wright, Parity of Resources at 233 & n. 54 and any number of local jurisdictions do the same (mentioning Orange County, California and Maricopa County, Arizona.) The federal system sets a very good example where the pay scale for federal public defenders is the same as Assistant United States Attorneys.

<sup>&</sup>lt;sup>136</sup> See generally American Bar Association Standing Committee on Legal Aid & Indigent Defendants, Gideon's Broken Promise 69 (2004), available at http://

www.abanet.org/legalservices/sclaid/defender/brokenpromise; David A. Simon, Note: Equal Before the Law:

executive branch designs a defender system in which structurally it is impossible in most cases, and unlikely in all but a few, for lawyers to work with these raw materials by meeting with witnesses and going to the scene of the crime, government has "so undermine[d] the proper functioning of the adversarial process that [outcome] cannot be relied on as having produced a just result."<sup>137</sup>

## III. Defense Counsel as the People's Right

We commonly think about legal representation as an individual matter, and for good reason. The Sixth Amendment is written in terms of a personal right ("[i]n all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence"). <sup>138</sup> In addition, we sensibly believe in the importance of each person having the right to adequate representation to ensure that no one is deprived of fundamental rights such as the right to liberty without due process of law.

Nonetheless, several scholars have emphasized that many of the rights in the Bill of Rights can be seen as more than an individual's right because they protect more than the individual immediately affected by its implementation. <sup>139</sup> Anthony Amsterdam suggested more

Toward a Restoration of Gideon's Promise, 43 HARV. CIVIL RIGHTS- CIVIL LIB. L. REV. 581, 586 (2008).

<sup>&</sup>lt;sup>137</sup> Strickland v. Washington, 466 U.S. 668, 699 (1984).

<sup>&</sup>lt;sup>138</sup> U.S. CONST., SIXTH AMENDMENT.

<sup>139</sup> See Laurence H. Tribe, Saenz Sans Prophecy: Does the Privileges or Immunities Revical Portend the Future—or Reveal the Structure of the Present?, 113 HARV. L. REV. 110, 160 ("Many enumerated individual rights are inseparably tied to the architectural premises of the constitutional system); Richard H. Pildes, Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law, 45 HASTINGS L. J. 711, 722 (1994) ("rather than protecting individual autonomy, rights are often the tools constitutional law uses to maintain appropriate structural relationships of authority"); Geoffrey P. Miller, Rights and Structure in Constitutional Theory, 8 SOC. PHIL. & POL. 196, 212 (1991) ("the Bill of Rights can plausibly be understood as granting new powers to the Court to control the activities of the other two branches. Beyond this . . . the Bill of Rights should be seen as a central document establishing the legitimacy of judicial review and the equal dignity of the Supreme Court as a coordinate branch of the federal government." See also Strickland v. Washington, 466 U.S. 668, 685 (1984) ("The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to reach just results"); United States v. Cronic, 466 U.S. 648, 656 (1984) ("Thus, the adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an

than thirty-five years ago that the Fourth Amendment "should be viewed as a collection of protections of atomistic spheres of interest of individual citizens or as a regulation of governmental conduct." <sup>140</sup> In doing so, he reminded us that the Fourth Amendment speaks in terms of the "right of the people to be secure in their persons, houses, papers, and effects" and he argued that the amendment is best regarded as "a regulatory canon requiring government to order its law enforcement procedures in a fashion that keeps us collectively secure in our persons, houses, papers and effects, against unreasonable searches and seizures." <sup>141</sup> Why, he wondered, should the privacy interests protected by the amendment be thought of protecting personal rights of isolated individuals when a more straight-forward reading understands "the people" mentioned in the amendment to be "We the People"? <sup>142</sup>

More recently, and even more connected to the Sixth Amendment, Akhil Amar advises that the Bill of Rights protections were not originally conceived as individual rights so much as structural protections against excessive executive power providing oversight of government action to the people. Most of the provisions in the Fifth, Sixth, Seventh and Eighth Amendments, he argues, were included to mitigate "the danger that government officials might attempt to rule in their own self-interest at the expense of their constituents" . . . liberty." According to Amar, the Founders planned for meaningful check on executive authority by requiring trials by jury. 144

advocate"").

<sup>&</sup>lt;sup>140</sup> Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 367 (1974).

<sup>&</sup>lt;sup>141</sup> *Id*.

<sup>&</sup>lt;sup>142</sup> Id.

AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 82 (1998). For example, the Fourth and Eighth Amendments, in Amar's view, were designed to place limits on state power in those instances in which the jury could not provide a check. That is, because courts issue arrest warrants, set bail, and sentence without juries, additional protections were needed. *Id.* at 87. *See also* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 (1991); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1012 (2006).

<sup>&</sup>lt;sup>144</sup> AMAR at 88.

In support of his thesis, he cites Toqueville's explanation the function of juries in the United States. Toqueville wrote "The jury is that portion of the nation to which the prosecution of the laws is entrusted." He also quotes legislators of the day who regarded the jury as "the democratic branch of the judicial power." He also reminds us that in his *Commentaries on the Constitution*, Joseph Story described the other provisions in the Sixth Amendment as "valuable appendages of the trial by jury." Amar further explains that, at the time of the founding, the jury trial was seen more as a public right than a party's. In his words, "it is anachronistic to see jury trial as an issue of individual right rather than (also, and more fundamentally) a question of government structure." Even as late as 1898, the Supreme Court expressed its view that a criminal could not waive jury trial.

Not only was the jury trial part of the structural protections against over-reaching by government, a *public* trial is also something guaranteed to the people. Amar reminds us that "[t]he phrase *the people* appears in no fewer than five of the ten amendments that make up our Bill of Rights; and so we would do well to take seriously the republican and populist overtones of its etymological cousin, *public*" trial in the Sixth Amendment. Amar explains that both a public and jury trial provides the people not only with the authority to reject the government's

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<sup>&</sup>lt;sup>145</sup> *Id.* 95 (*quoting* 1A. DE TOQUEVILLE, DEMOCRACY IN AMERICA 293-94 (Phillips Bradley ed., Vintage 1945).

<sup>&</sup>lt;sup>147</sup> *Id.* at 97 *quoting* 3 Joseph Story, Commentaries on the Constitution of the United States §1785 (Boston: Hillard Gray, 1833).

<sup>&</sup>lt;sup>148</sup> *Id.* at 104. *But see* Patton v. United States, 281 U.S. 276 (1930).

<sup>&</sup>lt;sup>149</sup> *Id.* at 108. Thompson v. Utah, 170 U.S. 343, 353-54 (1989). *See also* Schick v. United States, 195 U.S. 65 (1904); Albert W. Alschuler, *Plea Bargaining and its History*, 13 LAW & SOC'Y REV. 211, 224 (1979) (citing many state cases between the late 1800s and early 1900s which expressed a very strong bias against pleas and in favor of trial as the proper means by which to resolve a criminal prosecution; Shelton v. United States, 356 U.S. 26 (1958) reversing per curiam on confession of error 246 F.2d 571 (5<sup>th</sup> Cir. 1957) (en banc) setting aside judgment in 242 F.2d 101 (5<sup>th</sup> Cir.) (panel held plea bargaining unlawful; reversed by en banc court and reversed by Supreme Court). (Justice and liberty are not the subjects of bargaining and barter." 242 F.2d at 113; Patton v. United States, 281 U.S. 276, 307 (1930) (under "ancient doctrine... the accused could waive nothing").

claim and acquit the defendant, they also gain useful insight into how the executive branch is operating, information they can use in the next elections. <sup>151</sup>

Amar stops short of arguing that at the time of the founding the Sixth Amendment right to counsel also furthered structural interests. Indeed, such an argument would be difficult to sustain given that, as Justice Scalia recently reminded us, "[t]he Sixth Amendment as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel." In an era when individual legal representation in criminal prosecutions happened only occasionally, Amar more reasonably suggests that the right to counsel as originally conceived was more of an individual's right based, perhaps, on autonomy, autonomy, fairness or symmetry (since prosecutors often were represented by counsel.) Amar's principal interest in this issue, however, was to help explain why the defendant ought to be able to waive his or her right to counsel (in contrast, for example, with a public trial). Much of this makes sense in an era where the expected consequence of a criminal prosecution was that it would be resolved by a jury trial. This method of resolution admirably secures the structure of separated powers, guaranteeing meaningful oversight and checks on executive power (and, in the bargain, on the misuse of judicial power).

But what are we to make of all of this today? A great deal has changed since the country was founded, a time when, as Darryl Brown explains, "prosecutors were relatively weak

<sup>&</sup>lt;sup>150</sup> *Id.* at 112.

<sup>&</sup>lt;sup>151</sup> *Id.* at 112. *See also* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 64-65 (2003) ("The criminal jury provides yet an additional check--one from outside the government itself").

<sup>&</sup>lt;sup>152</sup> Padilla v. Kentucky, \_\_ U.S. \_\_ , 78 U.S.L.W. 4235, 4245 (March 31, 2010) (Scalia, J., dissenting).

<sup>&</sup>lt;sup>153</sup> AMAR at 114.

<sup>&</sup>lt;sup>154</sup> *Id*. at 116.

<sup>&</sup>lt;sup>155</sup> Putting the waiver question to the side, Amar also acknowledges that "truth seeking" is another value which the Founders intended to further by the Sixth Amendment's rights to confront and subpoena witnesses as well as to have

officials, and judges were the more worrisome agents of government power." Just as the Fifth Amendment's significance of grand juries and the Sixth Amendment's importance of petit juries, once understood by the Founders to be a vital feature of checks and balances, 157 have waned under the changing circumstances of modern criminal prosecutions, the Sixth Amendment's right to counsel has waxed. In 1963, in *Gideon v. Wainwright*, 158 the Court incorporated the Sixth Amendment right to counsel in federal felony cases through the Due Process Clause of the Fourteenth Amendment and applied it to all state felony prosecutions as well and in 1972 it expanded *Gideon's* reach by holding that no defendant could be imprisoned, even for a misdemeanor conviction, unless he had been provided counsel. 159 *Gideon* replaced the Founder's original understanding that it was acceptable for indigent defendants to defend themselves without the aid of counsel. 160 This other significant change is the extent to which contested trials have become the extreme exception in criminal cases. 161

Though important features of our understanding of the centrality of various enumerated rights in the Bill of Rights may have changed since 1791, the constant, all the while, has been the signal importance of maintaining a system that meaningfully checks power exercised by the executive. The Founders would not recognize the modern criminal justice system in which

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counsel. Id. at 115.

<sup>&</sup>lt;sup>156</sup> Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 Cal. L. Rev. 1585, 1633 (2005) (*citing* Joan E. Jacoby, The American Prosecutor: A Search for Identity 273-76 (1980).

<sup>&</sup>lt;sup>157</sup> See AMAR at 84-86

<sup>&</sup>lt;sup>158</sup> Gideon, 372 U.S. at 344.

<sup>&</sup>lt;sup>159</sup> Argersinger v. Hamlin, 407 U.S. 25 (1972). See also Scott v. Illinois, 440 U.S. 367, 373-74 (1979) (Constitution requires that an indigent person be afforded free court-assigned counsel before any sentence to a term of imprisonment may be imposed); Alabama v. Shelton, 535 U.S. 654 (2002) (person given suspended thirty day sentence and placed on probation entitled to appointed counsel because probation sentence may result in actual deprivation of liberty).

<sup>&</sup>lt;sup>160</sup> See Betts v. Brady, 316 U.S. 455, 476 & n.20 (1942).

<sup>&</sup>lt;sup>161</sup> Ninety-seven percent of federal criminal defendants waive all trial rights and plead guilty. United States v.

almost everyone pleads guilty within a few days of being arrested and before anyone other than the prosecutor's office has done even a cursory investigation into the matter. What they undoubtedly would immediately grasp, however, is that the careful checks and balances they intended to operate are non-existent in such a system.

When juries are no longer used, all we have left to rely upon are judges to oversee executive action. If ours were an inquisitorial system, the form and function of judges would be dramatically different from their role in the American adversarial system. <sup>162</sup> In the American system of justice, judges perform an extremely passive role in adjudicating facts. 163 Judges leave it to the litigants to develop the record. 164 Our system depends on impartiality and a level playing

Booker, 543 U.S. 220, 289 (2005) (Stevens, J., dissenting in part). See also Stephen J. Schulhofer, Plea Bargaining as Disaster, 101 YALE L.J. 1979, 2003 (1992).

<sup>&</sup>lt;sup>162</sup> Abraham S. Goldstein and Martin Marcus, *The Myth of Judicial Supervision in Three 'Inquisitorial' Systems*, 87 YALE L.J. 240, 242 n.7 (1977) ("We use the term 'inquisitorial' to describe a system in which the state, rather than the parties, has the overriding responsibility for eliciting the facts of the crime. In its pure form, the judge discharges that responsibility, both before and at trial.").

<sup>&</sup>lt;sup>163</sup> See Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 584 (2006) ("Adjudication has certain functions it must perform--principally, presentation of claims and defenses, issue definition, evidence gathering, marshaling of evidence and arguments, determination of law and facts, application of fact to law, declaring appropriate remedies, and ensuring compliance with those remedies. Interwoven into the question of how to accomplish these functions is the question of who should accomplish them. The adversarial system allocates the first four functions to the parties (or, typically, their lawyers), and the latter four functions to the court (which, in the American version, sometimes redelegates the factfinding and application functions to the jury). In the inquisitorial approach, most or all of the first three functions are assumed by the court, with more limited input from the parties and their lawyers). See also Ellen E. Sward, Values, Ideology and the Evolution of the Adversary Sysyem, 64 IND. L.J. 301, 301(1988/89) ("The adversary system is characterized by party control of the investigation and presentation of evidence and argument, and by a passive decisionmaker who merely listens to both sides and renders a decision based on what she has heard"). Most recently, in a related view, Chief Justice Roberts likened the role of a Supreme Court Justice to an umpire who simply makes the calls but who is a passive contributor to the proceeding. See Bruce Weber, "Judges vs. Umpires," N.Y. TIMES, July 12, 2009, Week in Review at 1 ("Umpires don't make rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role.") To further this analogy, we might say that judges are to umpires as lawyers are to ball players. <sup>164</sup> Abraham S. Goldstein, Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure, 26 STAN. L. REV. 1009, 1023 (1974) ("The American judge assumes that he is to react to matters presented to him and that if initiatives are to be taken, counsel will take them. Experienced trial lawyers who become judges slip quickly into the expectations and work habits associated with the judicial role. The American judge . . . has come to rely on the parties and their counsel to define and develop issues. And there is little in our experience to guide him in a more active role; he is being asked, while judge, to engage in a species of administrative supervision which is ordinarily left to the executive branch because of our deep commitment to the separation of powers.").

field but leaves the lawyering to the parties. As the Supreme Court has explained, "What makes a system adversarial rather than inquisitorial is ... the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties." 166

Rachel Barkow also objects to the free pass currently given to prosecutors – a pass largely given to them by judges who fail to check prosecutorial decisions. "[T]he only process-judicial or otherwise--that most defendants receive," according to Barkow, "comes from prosecutors." She explains that "[i]n the course of reaching a negotiated disposition, 'the prosecutor acts as the administrative decision- maker who determines, in the first instance, whether an accused will be subject to social sanction, and if so, how much punishment will be imposed." Barkow cogently argues for greater judicial involvement in overseeing plea bargaining. One obstacle to very much judicial oversight, interestingly enough, is a concern grounded in separation of powers: judges ought not monitor too carefully the choices of

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<sup>168</sup> *Id*.

<sup>165</sup> A number of scholars have argued that judges should perform more actively in civil cases where one of the parties is self-represented. See, e.g., Russell Engler, Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role, 22 Notre Dame J.L. Ethics & Pub. Pol'y 367 (2008); Paris R. Baldacci, Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 659 (2006); Richard Zorza, The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications, 17 GEO. J. LEGAL ETHICS 423, 423 (2004); Russell G. Pearce, Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help, 73 FORDHAM L. REV. 969 (2004); Russell Engler, And Justice for All--Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks, 67 FORDHAM L. REV. 1987 (1999). <sup>166</sup> McNeil v. Wisconsin, 501 U.S. 171, 181, n. 2 (1991). See also U.S. v. Pryce, 938 F.2d 1343, 1352-1353 (D.C. Cir. 1991) (Silberman, C.J., dissenting in part) ("In our adversary system, judges act 'essentially as arbiters of legal questions presented and argued by the parties before them.' We thus ordinarily have no right to consider issues not raised by a party in either briefing or argument, both because our system assumes and depends upon the assistance of counsel . . . and because of the unfairness of such a practice to the other party" (citations omitted)); Judith Resnik, Managerial Judges, 96 HARV. L. REV. 374, 382 (1982) (in "our tradition . . . "the parties, not the judge, have the major responsibility for and control over the definition of the dispute").

<sup>&</sup>lt;sup>167</sup> Barkow, *Separation of Powers* at 1024-1025 (2006).

prosecutors lest courts intrude into the executive function.<sup>169</sup> There is relatively little that judges by themselves can do to oversee meaningfully prosecutorial power, without an effective defender system doing the spade work for them, judges will continue to be stymied in their capacity to serve as a strong check on executive power.<sup>170</sup>

Since judges cannot perform a meaningful oversight role on executive power without a robust public defense system in place, the only appropriate substitute for what the founders expected juries to do is left for defense lawyers to do. Without a functional public defender bar, the "process" we get (we, the people, that is) is aptly described by federal Judge Gerald Lynch.

In a substantial number of cases, the judicial "process" consists of the simultaneous filing of a criminal charge by a prosecutor (often by means of a prosecutor's "information" rather than an indictment, with the defendant waiving the submission of the evidence and charge to a grand jury) and admission of guilt by the defendant. The charging document may be quite skeletal, the defendant's account of his guilty actions brief, and the judicial inquiry concerned more with whether the defendant is of sound mind and understands the consequences of what he is doing than with the accuracy of the facts to which he is attesting. <sup>171</sup>

Amsterdam and Amar both conceive of the rights in the Bill of Rights as structural limitations on official power. Amsterdam argued that an atomistic view of the Fourth Amendment insufficiently protects liberty because it makes it that much more difficult to

<sup>&</sup>lt;sup>169</sup> See generally Sara S. Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 COLUM.L.REV. 1433, 1462 (1984). (arguing that courts lack general supervisory authority over prosecutors and investigators and concluding that the separation of powers principle limits judicial control of executive branch lawyers).

<sup>170</sup> See Darryl K. Brown, The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication, 93

<sup>&</sup>lt;sup>170</sup> See Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1612 (2005) ("much fact-finding practice, especially in routine state court cases, is fact-finding run by the executive branch with little check from defendants or courts").

<sup>&</sup>lt;sup>171</sup> See Gerard E. Lynch, Our Administrative System of Criminal Justice, 66 FORDHAM L. REV. 2117, 2122 (1998). See also Barkow, Separation of Powers at 1049 ("The real question in cases where defendants plead guilty, then, should not be whether the plea of any individual defendant is voluntary or knowing, but whether there is a sufficient check on prosecutors' use of the bargaining power. If the Court focused on the structural relationship among branches instead of on individual defendants, it would see that there is currently no check at all. Prosecutors have almost unbridled discretion to make or not make these deals in any given case.").

regulate executive power – the central purpose of the Bill of Rights. <sup>172</sup> As Amsterdam persuasively reasons, "to be sure, the framers appreciated the need for a powerful central government. But they also feared what a powerful central government might bring, not only to the jeopardy of the states but to the terror of the individual." <sup>173</sup> Among their most important concerns, according to Amsterdam, was "an intense sense of danger of oppression of the individual."

Just as the right to serve on a jury also protects the people's right to participate in government decisionmaking, <sup>175</sup> it is the people's right to ensure there is a robust indigent defense system available in every community. As an important report from the 1960s reminds us, "a system of justice that provides inadequate opportunities to challenge official decisions is not only productive of injuries to individuals, but is itself a threat to the state's security and the larger interests of the community. . . The loss in vitality of the adversary system . . . significantly endangers the basic interests of a free community." Structural protection through a robust indigent defender system serves as a crucial check on the executive branch's otherwise unfettered power to expand the discretionary authority of police and prosecutors—discretion that has significant consequences not only for the day-to-day practices of law enforcement, but also in the political arena through effects on voter disenfranchisement and immigration status.

Although the Supreme Court has examined the need for defense lawyers for indigent defendants to be allowed the opportunity to develop the facts of each case through the lens of the

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<sup>&</sup>lt;sup>172</sup> Anthony G. Amsterdam, *Perspectives on the Fourth Amendment* at 439.

<sup>&</sup>lt;sup>173</sup> *Id.* at 400.

<sup>&</sup>lt;sup>174</sup> *Id*.

<sup>&</sup>lt;sup>175</sup> See Batson v. Kentucky, 476 U.S. 79 (1986); Taylor v. Louisiana, 419 U.S. 522 (1975).

<sup>&</sup>lt;sup>176</sup> U.S. Attorney General's Comm., Poverty and the Administration of Federal Criminal Justice 11 (1963) (*cited in* Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 Harv. L. Rev. 1037, 1105 (1984).

Fourteenth Amendment's Due Process Clause, it is instructive to hear its words. The Court has long understood that the right to counsel advances more than an individual's right. Counsel for the defense, the Court has stressed, advances truth and fairness in the justice system (as independent values apart from how the individual defendant benefits). To safeguard the right that "criminal defendants be afforded a meaningful opportunity to present a complete defense," the Court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence."

In ruling that the Sixth Amendment's right of compulsory process must be applied to state as well as federal trials because it is a fundamental element of due process, the Court explained:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. <sup>179</sup>

That is why, among other reasons, interfering with a defendant's right to investigate or bring forth material evidence impermissibly interferes with the "integrity of the fact finding process." <sup>180</sup>

Moreover, even though the Supreme Court has tended to focus on the importance of factgathering and presentation in the context of contested trials, the underlying values captured by

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<sup>&</sup>lt;sup>177</sup> See, e.g., Polk County v. Dodson, 454 U.S. 312, 318 (1981) ("assist the public interest in truth and fairness"). See also Cuyler v. Sullivan, 446 U.S. 335, 343 (1980) (without counsel for the defendant "a serious risk of injustice infects the trial itself"); Herring v. New York, 422 U.S. 853, 862 (1975) (forceful advocacy from both sides of the case advances the legal system's larger goal of achieving justice within the rule of law).

<sup>&</sup>lt;sup>178</sup> California v. Trombetta, 467 U.S. 479, 485 (1984) (*citing* United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982).

<sup>&</sup>lt;sup>179</sup> Washington v. Texas, 388 U.S. 14, 19 (1967).

the Court apply just as powerfully during the time that counsel first is assigned a case until counsel is in a position to advise a defendant whether to forgo the right to take the case to trial. The Court has described "[t]he need to develop all relevant facts in the adversary system [as] both fundamental and comprehensive," because "[t]he ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." Even more, because an important responsibility of courts is to insist that the executive branch not possess advantages over defendants unrelated to the merits of the prosecution, indigent defendants are entitled to state-subsidized investigative and expert services where appropriate. 182

It is a well-worn concept that a true adversary process is "essential to the integrity of the judicial process." But this is equally true when cases are resolved by contested facts and by pleas. Competent counsel serves multiple purposes and, even more, serves a structural value in the American democracy above and apart from the ensuring due process to the individual accused. Even though *Hamdi v. Rumsfeld*, was decided on due process grounds – holding that enemy combatants have a right to be heard in a judicial proceeding – the Court recognized that this conclusion would also be required to uphold the important structural protections embedded in separation of powers. In the Court's words, "we have made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the

<sup>&</sup>lt;sup>180</sup> Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

United States v. Nixon, 418 U.S. 683, 709 (1974). *See also* U.S. v. Reynolds, 345 U.S. 1, 12 (1953) ("since the Government which prosecutes the accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to this defense").

<sup>&</sup>lt;sup>182</sup> See, e.g., Ake v. Oklahoma, 470 U.S. 68 (1985). See also Little v. Streater (State must pay for blood tests for an indigent putative father's defense of a paternity suit).

<sup>&</sup>lt;sup>183</sup> United States v. Johnson, 319 U.S. 302, 304-05 (1943).

<sup>&</sup>lt;sup>184</sup> 542 U.S. 507 (2004).

Executive's discretion in the realm of detentions." 185

No one doubts that "a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding," where the "right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Equally, no one should doubt that the right to meaningful investigation into the facts of circumstances of each case before it is resolved, whether by trial or plea, is essential to the integrity of the judicial process. In an individual case, it may make complete sense for the accused to plea guilty rather than challenge questionable executive action. In the absence of sufficient defense resources, the rational thing for the individual to do is take a quick plea even if the interests of society as a whole are better served by awaiting discovery and investigation.

## A. How the People Are Impacted by the Criminal Justice System

It is important to count the multitude of ways society as a whole is impacted by the results achieved in criminal prosecutions. Although some of this impact would occur even if executive power were meaningfully checked in criminal cases, the relative free ride prosecutors have enjoyed when it comes to prosecuting low-level criminal cases exacts considerable costs on society. As Steven Zeidman reminds us, "every single arrest is brutally important, significant

<sup>&</sup>lt;sup>185</sup> *Id.* at 536.

<sup>&</sup>lt;sup>186</sup> Strickland v. Washington, 466 U.S. 668, 685 (1984).

<sup>&</sup>lt;sup>187</sup> As the New York Court of Appeals recently observed: "Assuming the allegations of the complaint to be true, there is considerable risk that indigent defendants are, with a fair degree of regularity, being denied constitutionally mandated counsel in the five subject counties. The severe imbalance in the adversary process that such a state of affairs would produce cannot be doubted. Nor can it be doubted that courts would in consequence of such imbalance become breeding grounds for unreliable judgments. Wrongful conviction, the ultimate sign of a criminal justice system's breakdown and failure, has been documented in too many cases. Wrongful convictions, however, are not the only injustices that command our present concern. As plaintiffs rightly point out, the absence of representation at

and meaningful to the person arrested."<sup>188</sup> Sometimes we forget, however, that unchecked executive power impacts more than those unfortunates who are wrongfully arrested. Many collateral consequences follow from such an inadequate defense system. When the number of persons brought through the criminal justice system reaches the unprecedented level it has today, the impact is considerably greater than the numbers themselves suggest.

Darryl Brown recently stressed that "[t]otal felony convictions" in the United States, "now approach one million per year." Even more, "American incarceration rates have increased roughly six-fold in the past thirty years. Until 1970, the United States imprisoned about 100 people per 100,000, a ration modestly higher than European countries' contemporary rates. In the past three decades, however, the American incarceration rate has increased to nearly 700 per 100,000, a percentage unprecedented in American history and among industrialized nations." To be sure, get-tough laws and harsh prison sentences are not themselves the result of an inadequate defender system. But it hardly needs to be made clear that the soaring incarceration rate in the United States is the consequence of policy decisions of elected legislative and executive officials.

Consider the implications for some of this purely in separation of powers terms. As a result of voter disenfranchisement laws (which are in effect in all but two states in the

critical stages is capable of causing grave and irreparable injury to persons who will not be convicted. Gideon's guarantee to the assistance of counsel does not turn upon a defendant's guilt or innocence, and neither can the availability of a remedy for its denial." *Hurrell-Harding*, at \_\_\_.

<sup>&</sup>lt;sup>188</sup> KAYE COMMISSION, Additional Commentary at 5. *See also See also* Robertson v. United States *ex rel*. Watson, \_\_ U.S. \_\_, 78 USLW 4428, 4428 (2010) ("The terrifying force of the criminal justice system nay only be brought against an individual by society as a whole.").

<sup>&</sup>lt;sup>189</sup> Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1595 (2005).

<sup>&</sup>lt;sup>190</sup> *Id.* (*citing* U.S. DEP'T OF JUSTICE, SOURCEOOK OF CRIMINAL JUSTICE STATISTICS 2002, tbl. 5.18 at 417, tbl. 5.44 at 477 (available at http://www.albany.edu/sourcebook/tost\_5hmtl).

country), <sup>191</sup> it is estimated that 5.3 million Americans are denied the right to vote. <sup>192</sup> It is also estimated that a full 13% of African American men are prohibited from voting because of criminal records. <sup>193</sup> In Florida alone, as of Election Day 2000, more than 600,000 people were prohibited from voting because of their criminal record, <sup>194</sup> leading one set of researchers to conclude that Al Gore would have won the state of Florida's Presidential election that year by more than 60,000 votes if Florida did not disenfranchise felons. <sup>195</sup>

But there is more. The impact this has had on immigrants and immigration practice cannot be overstated. Before 1996, the Attorney General was granted discretion by Congress to grant relief for persons subject to deportation as a consequence of having a criminal conviction issued by a state or federal court. Between 1991 and 1996, the Attorney General exercised discretion to prevent the removal of non-citizens more than 10,000 times. Since 1996, when Congress eliminated the availability of the Attorney General to grant discretionary relief from deportation, it is "practically inevitable" that a noncitizen will be deported upon his or her conviction of a removable offense. According to the Department of Homeland Security, between the years 1999 and 2008 federal immigration authorities removed 854,000 non-citizen

<sup>&</sup>lt;sup>191</sup> Only Maine and Vermont allow incarcerated prisoners to vote. *See* Bailey Figler, *A Vote for Democracy: Confronting the Racial Aspects of Felon Disenfranchisement*, 61 N.Y.U. ANN. SURV. AM. L. 723, 743 (2006).

<sup>&</sup>lt;sup>192</sup> See The Sentencing Project, available at <a href="http://www.sentencingproject.org/template/page.cfm?id=133">http://www.sentencingproject.org/template/page.cfm?id=133</a>. See also JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 76 (Oxford University Press 2006).

<sup>193</sup> Id. at 77.

<sup>&</sup>lt;sup>194</sup> Bailey Figler, *A Vote for Democracy: Confronting the Racial Aspects of Felon Disenfranchisement*, 61 N.Y.U. Ann. Surv. Am. L. 723, 724 (2006).

<sup>&</sup>lt;sup>195</sup> Christopher Uggen & Jeff Manza, *Democratic Contraction?*: Political Consequences of Felon Disenfranchisement in the United States, 67 AM. Soc. Rev. 777, 792-93 (2002).

<sup>&</sup>lt;sup>196</sup> SECTION 212 OF THE IMMIGRATION AND NATIONALITY ACT OF 1952, 8 U.S.C. § 1182(c).

<sup>&</sup>lt;sup>197</sup> INS v. St. Cyr, 533 U.S. 289, 296 (2001).

<sup>&</sup>lt;sup>198</sup> See Padilla v. Kentucky, 130 S.Ct. 1473, 78 U.S.L.W. 4235, 4237 (March 31, 2010).

immigrants from the United States based on their criminal convictions.<sup>199</sup> By removing this number of non-citizens because they have been convicted of a crime, the executive branch is able to ensure a vastly smaller number of persons remaining within the United States will be able to become citizens (and voters) at any point in the future. This number very likely exceeds the number of persons removed because often families leave with them.

The combination of felon disenfranchisement and immigrant removal practices means that literally millions of potential voters are kept out of the way. This raises manifest separation of powers questions when it is linked to a system that encourages overreaching by executive power because of an underfunded indigent defense system.

Although it is impossible to calculate the full costs resulting from the lack of checks on executive power over the past generation, we also should count among them the all-too-common scandals which periodically come to light (long after they have taken a deep toll) in local departments. These include the seemingly countless stories of undercover police officers who framed suspects by planting drugs on them<sup>200</sup> or fabricate evidence;<sup>201</sup> the frequency with which

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<sup>&</sup>lt;sup>199</sup> US DEPARTMENT OF HOMELAND SECURITY, YEARBOOK OF IMMIGRATION STATISTICS, ENFORCEMENT, 2008. Available at <a href="http://www.dhs.gov/files/statistics/publications/YrBk08En.shtm">http://www.dhs.gov/files/statistics/publications/YrBk08En.shtm</a> (Table 37: Aliens Removed by Criminal Status and Region and Country of Nationality: Fiscal Years 1999 to 2008).

<sup>&</sup>lt;sup>200</sup> Camden, N.J., (*see* "Camden Police Scandal Has Widespread Consequences," Matt Katz, The Philadelphia Inquirer, February 21, 2010; "Camden Police Corruption Scandal Unraveled, 185 Drug Cases Dropped," Times Newsline, March 2010, 2010, available at <a href="http://www.timesnewsline.com/news/Camden-Police-Corruption-Scandal-Unraveled--185-Drug-Cases-Dropped-1269081864/">http://www.timesnewsline.com/news/Camden-Police-Corruption-Scandal-Unraveled--185-Drug-Cases-Dropped-1269081864/</a>); Chicago (see "City cops acquitted of making up drug charges," Matthew Walberg, Chicago Tribune, January 28, 2010)); Oakland (see "Oakland Police Department wants to fire 11 officers in warrant scandal," Paul T. Rosynsky, Kelly Rayburn and Harry Harris (Oakland Tribune), Contra Costa Times, January 16, 2009); "What Brown got done; Progress made on economy -- mixed success on crime, schools," Jim Herron Zamora, The San Francisco Chronicle, January 29, 2006; "Police Corruption Charges Reopen Wounds in Oakland," Evelyn Nieves, The New York Times, November 30, 2000); "Lawsuit filed in Oakland police scandal," Kim Curtis, Associated Press, The Seattle Times, December 10, 2000)); Los Angeles (see "Police Whistle-Blower Sentenced to Prison," The New York Times, February 26, 2000; "LA Police Scandal Deepens," BBC News, January 26, 2000; "Los Angeles Police Review Big Scandal," The New York Times, March 1, 2000, <a href="http://news.bbc.co.uk/2/hi/americas/619197.stm">http://news.bbc.co.uk/2/hi/americas/619197.stm</a>.); Philadelphia (see "Philadelphia Police Scandal Results In a Plan for a Suit Claiming Racism," Michael Janofsky, The New York Times, August 28, 1995; "Philadelphia Monitor

the police assault individuals and then cover their crimes by arresting the victims and falsely accusing them of crimes;<sup>202</sup> and the many stories of improprieties at crime laboratories, including falsification of evidence, not following procedures, and tainted cases throughout the United States. 203 These lawless acts often mean the real wrongdoer is not apprehended 204 and sometimes mean that when the police are themselves criminals they do not get caught because no one is policing them.<sup>205</sup>

Takes Police To Task," Francis X. Clines, THE NEW YORK TIMES, April 4, 2001);

NY State Police (see "An Officer's Guilt Casts Shadow on Trials," THE NEW YORK TIMES, March 4, 1993. <sup>202</sup> Oakland (see "Probe of chief's son called unusual: Feds rarely intervene in cases of alleged brutality by police," Jaxon Van Derbeken and Susan Sward. THE SAN FRANCISCO CHRONICLE, December 7, 2003; Pittsburgh (See "Family plans lawsuit over Pa. teen's beating," Ramit Plushnick-Masti, WASHINGTON POST, January 27, 2010.); Maryland (see "U-Md. Officials Seek Inquiry of Campus Video in Beating Case," Ruben Castaneda, THE WASHINGTON POST, April 21, 2010.); West Virginia (see "Cleanup State Police reforms," Editorial, CHARLESTON GAZETTE, December 7, 2000.); New York City (see "City Room: The Abner Louima Case, 10 Years Later," Sewell Chan, THE NEW YORK TIMES, August 9, 2007, available at http://cityroom.blogs.nytimes.com/2007/08/09/the-abnerlouima-case-10-years-later/.); Philadelphia (see "Black Plainclothes Officer Says the Police Beat Her," THE NEW YORK TIMES, January 13, 1995.); Brooklyn in 2008, (see "In Brooklyn, Police Work Is Undone By Scandal," Christine Hauser, THE NEW YORK TIMES, February 5, 2008. See also "Drugs-for-Information Scandal Shakes Up New York Police Narcotics Force," Al Baker, THE NEW YORK TIMES, January 23, 2008.

<sup>&</sup>lt;sup>203</sup> San Francisco, (see "S.F. police lab scandal may torpedo 1,900 drug cases," USA TODAY, March 29, 2010, available at http://content.usatoday.com/communities/ondeadline/post/2010/03/sfpd-lab-scandal-may-torpedo-1900drug-cases/1;) Michigan, Texas and West Virginia, (see "Study Calls for Oversight of Forensics in Crime Labs," Solomon Moore, THE NEW YORK TIMES, February 19, 2009)); New York State Police, (see "Police Review Lab Work After Suicide of Scientist," Nicholas Confessore, THE NEW YORK TIMES, June 12, 2008; "Probe: Crime Data Faked," Brendan J. Lyons, ALBANY TIMES-UNION, December 18, 2009); Houston, (see "Crime lab investigator to target specific cases; Focus will be on those in which team suspects injustice, he says," Steve McVicker, THE HOUSTON CHRONICLE, January 11, 2006 "Crime lab investigator to target specific cases; Focus will be on those in which team suspects injustice, he says," Steve McVicker, THE HOUSTON CHRONICLE, January 11, 2006; "Lawmaker to hold crime lab hearings; Whitmire says HPD, state woes have hurt public confidence in the justice system," Roma Khanna, THE HOUSTON CHRONICLE, September 4, 2004); West Virginia "Crime Lab Back in Court: New Charges Bring Up 1980s Zain Scandals," Paul J. Nyden, CHARLESTON GAZETTE, April 2, 2006..

<sup>&</sup>lt;sup>204</sup> Steven Zeidman, a member for the Kaye Commission which studied New York's indigent defense system wrote a powerful separate statement to the Commission's recommendations in which he wondered whether a system that pleads guilty at arraignment 69 percent of all misdemeanor cases contributed in any way to the variety of scandals in New York during the same period, including police graft and misconduct and an Attorney General's investigation into police practices associated with stop and frisks. KAYE COMMISSION, Additional Commentary at 2. <sup>205</sup> According to the U.S. General Accounting Office, 1993 and 1997 the number of police officers who were

convicted as a result of FBI-led corruption investigations was 129 in 1993; 143 in 1994; 135 in 1995; 83 in 1996; and 150 in 1997. U.S. GENERAL ACCOUNTING OFFICE DRUG-RELATED POLICE CORRUPTION (May 1998) at 35. "From 1992 to 2008, nearly 2,000 New York Police Department officers were arrested, according to the department's own annual reports of the Internal Affairs Bureau, an average of 119 a year.... Most of those investigations involved drugs, theft or crimes like fraud, bribery or sex offenses, on and off the job." "N.Y.P.D. Confidential," Al Baker and Jo Craven McGinty, THE NEW YORK TIMES, March 26, 2010). See also "In Brooklyn,

In addition, as Albert Alschuler persuasively demonstrated more than forty years ago, another form of lawlessness that is encouraged when the police understand that the odds are small that anyone will challenge their version of what happened is that the imagined deterrent effect created by the exclusionary rules is undermined. As a consequence, unconstitutional behavior by the police ends up resulting in successful prosecution because defendants are denied the means to challenge illegal searches and seizures.

It is impossible to say how different American society would be if every defendant were given a lawyer with the time and resources to investigate the circumstances of the arrest that high profile defendants are able to purchase. It is, of course, pure fantasy even to imagine living in such a place. But the further we permit ourselves to stray from that vision, the more we encourage a different form of lawlessness, one few Americans would be proud to call their own.

Society as a whole has much at stake to ensure that executive power is meaningfully checked on a regular basis. What stands us apart from totalitarian power, in a very important sense, is not our normative laws. It is our commitment to authorizing one branch of government to remain independent from executive power and which stands to oversee and control it.

Executive power has been used increasingly to advance such policies as allowing national

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Police Work Is Undone By Scandal," Christine Hauser, The New York Times, February 5, 2008; "Drugs-for-Information Scandal Shakes Up New York Police Narcotics Force," Al Baker, The New York Times, January 23, 2008; "7 Chicago Police Officers Indicted in Extortion Scheme," Don Terry, The New York Times, December 21, 1996; "Officer accused of taking money: Cop demanded \$ 70, LoDo bar patron says," Mike McPhee, The Denver Post July 22, 2000; "The Scandal at Midtown South: The Precinct; Coveted Post Amid an Underworld of Enticements," David Kocieniewski with Kit R. Roane, The New York Times, July 18, 1998; "Police-Corruption Charges Shake up a Chicago Suburb," Dirk Johnson, The New York Times, October 13, 1996; "Convicted Police Officer Receives Sentence of At Least 11 Years," Joseph B. Treaster, The New York Times, July 12, 1994. U.S. GENERAL ACCOUNTING OFFICE, DRUG-RELATED POLICE CORRUPTION (May 1998) at 36; "New York's Police Allow Corruption, Mollen Panel Says," Selwyn Raab, The New York Times, December 29, 1993.

<sup>&</sup>lt;sup>206</sup> Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 82 (1968). *See also* Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 323 (2005) (discussing one "particular type of corruption" called "falsifications" including testimonial perjury,

political conventions to take place without the noise and, to some in power, distaste connected with mass demonstrations. But these actions should be more associated with governments whose chief characteristic is being able to do what they want precisely because they control the whole of government power. The American vision was to be different.

Courts, through vigorous investigations by defense counsel, are perhaps best regarded as auditors conducting investigating into the executive's actions. Under the current arrangement, where there are virtually no investigations being conducted when the poor are arrested, the executive branch understands its actions are so freakishly carefully examined that the only meaningful constraint on the exercise of its power is self-imposed. When trials occurred often enough that the police and prosecutors could not know in advance which cases would be thoroughly examined, the auditing system worked well enough. But it no longer does. Today's picture is as if the federal government announced that it was eliminating auditing of federal tax returns. It doesn't take much imagination to anticipate how taxpayers would conform their behavior accordingly.

The judiciary performs its auditing role less often today than is good for anyone committed to constraining power. The crisis in indigent defense should count very high on the list of why this is so. The findings regarding the inadequacy of counsel for the indigent over the past generation lead to the unavoidable conclusion that there has been too little oversight on executive power when it comes to low-level quality of life arrests which disproportionately affect persons who are assigned counsel by the state.

The next Part will consider how litigation (principally in state courts) challenging the

inadequacy of an indigent defender system has fared over the past generation. These challenges have claimed that a class of defendants is at risk of denial of their Sixth and Fourteenth Amendments rights to adequate counsel and due process. Then it will advance a very different theory upon which such cases should be brought: that the Legislature's refusal to fund indigent defense at minimally adequate levels constitutes an unconstitutional encroachment on the independence of the judiciary. Instead of due process as the principal ground upon which to challenge the inadequacy of representation, courts should intervene to oversee the terms under which lawyers are hired, trained and paid to ensure that judicial independence is maintained. Such an approach would be the opposite from the current understanding of the relationship between courts and legislatures in the area of indigent representation. Rather than "view[ing] such an order as infringing upon legislative prerogatives."<sup>207</sup> courts should recognize that there has long been an on-going infringement by the legislatures upon their rightful responsibilities. This separation of powers claim would be available both in federal and state court (though federal challenges would only reach federal criminal prosecutions).

## IV. Challenging Systemic Inadequacies in State Courts

Despite widespread coverage of the inadequacy of funding for indigent defense and its negative effects on the capacity to provide effective representation, <sup>208</sup> the Supreme Court has ignored the problem. <sup>209</sup> Although the Court has addressed the subject of ineffectiveness of

<sup>&</sup>quot;probably the most common form of police corruption facing the criminal justice system.")

207 Note, Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems, 118 HARV. L. REV. 1731, 1744 (2005). See also Brief of Amici Curiae on behalf of Former Prosecutors Michael A. Battle et al, in Hurrell-Harding v. State of New York at 10 ("The deficient system for defending the indigent alleged in the complaint undercuts the work of prosecutors and damages the integrity of the criminal justice system."). <sup>208</sup> See, e.g., Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 YALE L.J. 1835, 1852 (1994).

<sup>&</sup>lt;sup>209</sup> But See Miranda v. Arizona, 384 U.S. 436, 473 (1966) ("While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice." See also

defense counsel, it has only done so in individual cases, never in the context of systemic inadequacies. In 1984, the Court ruled in *Strickland v. Washington*<sup>210</sup> that effectiveness should be determined by whether counsel's conduct fell "within the range of competence demanded of attorneys in criminal cases." Declining to employ a checklist for determining whether counsel's conduct was constitutionally deficient, the Court created a two-prong test which defendants seeking post-conviction relief must satisfy. The "deficient performance" prong requires a defendant to show that counsel made errors so serious that "counsel's representation fell below an objective standard of reasonableness" in light of "all the circumstances." In addition, under the "prejudice" prong, the defendant must demonstrate that there is a "reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." As a result, unless "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result," convictions may not be overturned even when there is no dispute that counsel did not do what was expected.

Each prong has proven to be a high barrier. The Court encouraged post-conviction judges to be "highly deferential" towards the "choices" made by counsel (even when those "choices"

*Id.* & n. 41: ("When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice.") (*quoting* REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 9 (1963).

<sup>&</sup>lt;sup>210</sup> Strickland v. Washington, 466 U.S. 668 (1984). *See also* United States v. Cronic, 466 U.S. 648 (1984); Cuyler v. Sullivan, 446 U.S. 335 (1980).

<sup>&</sup>lt;sup>211</sup> Strickland, 466 U.S. at 687 (quoting McMann v. Richardson 397 U.S. 759, 770-71 (1970)).

<sup>&</sup>lt;sup>212</sup> *Id.* at 688-89.

<sup>&</sup>lt;sup>213</sup> *Id.* at 688.

<sup>&</sup>lt;sup>214</sup> *Id.* at 694.

<sup>&</sup>lt;sup>215</sup> *Id.* at 686.

include not considering whether to interview a particular individual),<sup>216</sup> measured by an "objective standard of reasonableness."<sup>217</sup> Even more, the now convicted person must also show that counsel's inadequacy "actually affected the ultimate outcome of the case."<sup>218</sup> Absent a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," courts are to blink at the inadequacy and reject the ineffectiveness claim.<sup>219</sup>

"[D]efects in assistance that have no probable effect upon the trial's outcome," the Court emphasized in 2002, "do not establish a constitutional violation." The now convicted person has the burden of proving "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In addition, the record to be reviewed by the post-conviction court is the one created by the lawyer whose performance is being questioned. Trying to figure out what might have been in it, had the lawyer done a better job, is, to say the least, challenging. 2222

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Compounding this, as Stephanos Bibas has explained, is that retrospective reviews are difficult to assess because of cognitive bias. Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of* 

<sup>&</sup>lt;sup>216</sup> *Id.* at 689.

<sup>&</sup>lt;sup>217</sup> *Id.* at 688-89.

<sup>&</sup>lt;sup>218</sup> *Id.* at 693

<sup>&</sup>lt;sup>219</sup> *Id.* at 689.

<sup>&</sup>lt;sup>220</sup> Mickens v. Taylor, 535 U.S. 164, 166 (2002).

<sup>&</sup>lt;sup>221</sup> *Id.* at 166.

<sup>&</sup>lt;sup>222</sup> This was the import of Justice Marshall's dissenting opinion in *Strickland*:

<sup>[</sup>I]t is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. *Strickland*, 466 U.S. at 710 (Marshall, J., dissenting). In a closely related context, courts frequently reject claims that it was error to deny an assigned counsel's special request for extra funds to conduct an investigation, reasoning that counsel failed to make a sufficient showing of the need. This led Judge Frank M. Johnson, Jr., to wonder in a case in which the denial of counsel's request for expert assistance was upheld, "[H]ow could [counsel] know if he needed a microbiologist, an organic chemist, a urologist, a hematologist, or that which the state used, a serologist? How further could he specify the type of testing he needed without first hiring an expert to make that determination?" Moore v. Kemp, 809 F.2d 702, 743 (11th Cir. 1987) (Johnson, J., concurring in part and dissenting in part).

As some commentators have noted, Strickland's 223 test for ineffectiveness "is not structured to accommodate an argument related to funding" because the test is "ends-oriented -in that it focuses on the lawyer's performance and the ultimate judgment in a case." <sup>224</sup> Even worse, because under Strickland, the "reasonableness" of a defense lawyer's representation is governed by "prevailing professional norms," this means, as Bruce Green has observed, when "the quality of representation prevailing in a community is poor, then the expectations set by the Strickland standard will be correspondingly low."225

Previous Efforts to Get Courts to Force Legislatures to Spend More on Indigent A. Defense

Over the past generation, a number of lawsuits have been brought both in federal and state courts challenging system-wide inadequacies in a state-operated indigent defense system.<sup>226</sup> All of these actions have one thing in common: the core of the challenge was that the state was maintaining an indigent defense system that violated the Sixth Amendment. These challenges

Counsel, 2004 UTAH L. REV. 1. These cases are examined in context where the reviewing judges have all of the incriminating information in the case. They are then asked to decide whether the defendant was unfairly convicted even when they are persuaded of his guilt.

<sup>&</sup>lt;sup>223</sup> Strickland v. Washington, 466 U.S. 668 (1984).

<sup>&</sup>lt;sup>224</sup> Effectively Ineffective at 1732. In addition, Strickland invites challenges based on claims of ineffectiveness of counsel only after cases are completed. *Id.*<sup>225</sup> Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*,78 *Iowa L. Rev. 433*, 500

<sup>(1993)</sup> 

About ten such suits were filed between 1980 and 2000. Note, Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense, 113 HARV. L. REV. 2062, 2074 n.93 (2000). According to Norman Lefstein over the past 20 years cases have been brought challenging the systems in Alabama, California, Connecticut, Florida, Georgia, Illinois, Kansas, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Hampshire, New York, Tennessee and West Virginia, among others. Norman Lefstein, A Broken Indigent Defense System: Observations and Recommendations of a New National Report, 36 SPG Hum. Rts 11, 2009. See, e.g., Luckey v. Harris, 860 F.2d 1012 (11th Cir. 1988); State v. Smith, 681 P.2d 1374 (Ariz. 1984); State v. Hanger, 706 P.2d 1240 (Ariz. Ct. App. 1985); Arnold v. Kemp, 813 S.W.2d 770 (Ark. 1991); Corenevsky v. Superior Court, 682 P.2d 360 (Cal. 1984); People v. Knight, 239 Cal. Rptr. 413 (Ct. App. 1987); Hatten v. State, 561 So. 2d 562 (Fla. 1990), cert. denied, 495 U.S. 957 (1990); In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So. 2d 1130 (Fla. 1990); State ex rel. Stephan v. Smith, 747 P.2d 816 (Kan. 1987); State v. Peart, 621 So. 2d 780 (La. 1993); Kennedy v. Carlson, 544 N.W.2d 1 (Minn. 1996); State v. Robinson, 465 A.2d 1214 (N.H. 1983); State ex rel. Wolff v. Ruddy, 617 S.W.2d 64 (Mo. 1981), cert. denied, 454 U.S. 1142 (1982); State v. Lynch, 796 P.2d 1150 (Okla. 1990); Mount Vernon v. Weston, 844 P.2d 438 (Wash. Ct.

have commonly foundered because of the substantive law on ineffective assistance of counsel established by the Supreme Court. Specifically, courts tend to prohibit anticipatory claims from being heard on the merits.<sup>227</sup> As a result, in most states today, the exclusive means by which litigants are able to complain about the quality of legal representation given to them by the State is to wait until the case is completed and then raise in a post-conviction context all claims regarding the inadequacy of representation.<sup>228</sup>

App. 1992).

An accused ordinarily lacks standing to challenge an indigent defense scheme because s/he is unable to demonstrate a cognizable harm flowing from an inadequately funded program. See, e.g., People v. Dist. Court of El Paso County, 761 P.2d 206, 210 (Colo. 1988) (finding of ineffective assistance must be made after trial, not prospectively); Johnson v. State, 693 N.E.2d 941, 952 (Ind. 1998); Lewis v. State, 555 N.W.2d 216, 219 (Iowa 1996) (rejecting the argument that indigents are harmed); Hansen v. State, 592 So. 2d 114, 153 (Miss. 1991) (finding that counsel exceeded the Strickland standard, and that there was no ineffective assistance of counsel). See also Los Angeles v. Lyons, 461 U.S. 95 (1983). See also E.T. v. George, \_\_ F.Supp.2d \_\_, 2010 WL 121018 (E.D.Cal. (Jan. 7, 2010). The few federal class actions challenging the inadequacy of state-arranged indigent defense programs have been brought over the past several decades have been dismissed on standing, abstention or other justiciability grounds such as ripeness or comity. See, e.g., Luckey v. Miller, 976 F.2d 673, 676, 679 (11th Cir. 1992) (comity and standing); Foster v. Kassulke, 898 F.2d 1144, 1146 47 (6th Cir. 1990) (dismissing challenge to indigent system based on concerns of prospective ineffective practice as "too speculative and hypothetical to support jurisdiction). See also Gardner v. Luckey, 500 F.2d 712, 715 (5th Cir. 1974) ("It is clear from the face of their complaint that our appellants contemplate exactly the sort of intrusive and unworkable supervision of state judicial processes condemned in O'Shea [v. Littleton]."); Wallace v. Kern, 499 F.2d 1345, 1351 (2d Cir.1974) ("This is not the proper business of the federal courts, which have no supervisory authority over the state courts and have no power to establish rules of practice for the state courts."). Some state courts have dismissed these cases on justicability grounds not involving federalism or abstention. See, e.g., Platt v. State, 664 N.E.2d 357, 363 n.5 (Ind. Ct. App. 1996) (claims are too spectulative); Kennedy v. Carlson, 544 N.W.2d 1, 5 8 (Minn. 1996) (standing and ripeness). But See Benjamin v. Fraser, 264 F.3d 175, 186 (2d. Cir. 2001) ("[i]n considering burdens on the Sixth Amendment right to counsel, we have not previously required that an incarcerated plaintiff demonstrate 'actual injury' in order to have standing.").

See, e.g., Rodger Citron, Note, (Un)Luckey v. Miller: The Case for a Structural Injunction to Improve Indigent Defense Services, 101 YALE L. J. 481, 486-89 (1991). One of the interesting aspects of right-to-counsel case progression is that Gideon v. Wainwright, 372 U.S. 335 (1963), which established the baseline principal for the right to counsel, did so by expressly overruling Betts v. Brady, 316 U.S. 455, 461-62 (1942), a 1942 decision which held that, although there was no automatic right to counsel in every state felony case, a defendant's right to due process of law may require the appointment of counsel for an indigent but ruled that the determination of whether one's right to counsel was violated could be determined one a case-by-case basis after the conviction. The Court allowed Betts to survive for a mere 21 years before rejecting it in Gideon.

Between 1942 and 1963 courts were obliged to consider claims by individuals who were convicted without the aid

<sup>&</sup>lt;sup>227</sup> See Luckey v. Harris, 860 F.2d 1012, 1017-18 (11th Cir. 1988) ("[The Strickland] standard is inappropriate for a civil suit seeking prospective relief. The sixth amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the "ineffectiveness" standard may nonetheless violate a defendant's rights under the sixth amendment."); see also Rodger Citron, Note, (Un) Luckey v Miller: The Case For A Structural Injunction to Improve Indigent Defense Services, 101 YALE L. J. 481, 492-494 (1991).

Webb v. Commonwealth<sup>229</sup> is illustrative. In Webb, a defendant in Virginia and his lawyer anticipated that the money allocated to the defense function would interfere with Webb's right to have an effective lawyer. The court recognized that Virginia ranked last in fees for indigent defense counsel and that, adding together the hours his lawyer spent preparing for trial, his lawyer was to receive approximately \$18 per hour for this work. Nonetheless, the court held that these claims do not amount to any kind of showing of a denial of effective counsel. The court's answer is to require the defendant to be actually harmed instead of allowing a claim that he will likely be harmed.<sup>230</sup>

It is true that several state courts have demonstrated some willingness to address systemic inadequacies in indigent defense resulting from legislative refusal to provide adequate funding, including courts in Arizona, Connecticut, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New York, Oklahoma and Washington.<sup>231</sup> Cases in Michigan and New

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of counsel that their conviction violated due process because of "special circumstances." *See*, *e.g.*, Foster v. Illinois, 332 U.S. 134 (1955); Bute v. Illinois, 333 U.S. 640 (1948); Gryger v. Burke, 334 U.S. 728 (1948); Williams v. Kaiser, 323 U.S. 471 (1945); Hudson v. North Carolina, 363 U.S. 697 (1960); Chewning v. Cunningham, 368 U.S. 443 (1962). In choosing to overrule *Betts*, Justice Black explained that the Court had come to realize that "the problem of a defendant's federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts." *Gideon*, 372 U.S. at 344. It is more than a bit ironic, therefore, that the *Betts* rule – once removed - has been revitalized as the controlling law

in right to counsel cases. The discredited *Betts* rule that courts could figure out when a defendant was wrongfully deprived of his or her right to counsel after the case is over is now the controlling means by which courts are to ascertain whether a defendant's right to effective assistance of counsel was violated. Just as ex post challenges to the right to counsel were required by *Betts*, ex post challenges to the right to effective assistance of counsel are all that defendants may make today.

<sup>&</sup>lt;sup>229</sup> Webb v. Comm. of Virginia, 528 S.E. 2d 138, 140 (Va. 2000).

<sup>State v. Smith, 681 P.2d 1374 (Ariz. 1984); State v. Hanger, 706 P.2d 1240 (Ariz. Ct. App. 1985); Rivera v. Rowland, No. CV 950545629S, 1996 WL 636475 at \*5 (Conn.1996); State v. Peart, 621 So. 2d 780 (La. 1993); Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228 (2004); Duncan v. State, 774 N.W.2d 89 (Mich. Ct. App. 2009), vacated and remanded, 780 N.W.2d 843 (Mich. 2010); Recorder's Court Bar Ass'n v. Wayne County Court, 503 N.W.2d 885 (Mich. 1993); Recorder's Court Bar Ass'n v. Wayne County Court, 503 N.W.2d 885 (Mich. 1993). Kennedy v. Carlson, 544 N.W.2d 1 (Minn. 1996); State v. Quitman County, 807 So. 2d 401 (Miss. 2001); White v. Martz, No. CDV-2002-133 (Mont. Dist. Ct. July 25, 2002); Hurrell-Harding v. State of New York, N.E.2d \_\_\_, 2010 WL 1791000 (N.Y. 2010); State v. Lynch, 796 P.2d 1150 (Okla. 1990); Mount Vernon v. Weston, 844 P.2d 438 (Wash. Ct. App. 1992).</sup> 

York are proceeding as of 2010. But none of these cases dramatically improved the delivery of legal services in their states and, according to commentators, their overall impact was very small.<sup>232</sup>

It is undeniable however, that Sixth Amendment law is inhospitable to anticipatory claims that court-assigned counsel (or the system by which counsel is assigned) is unconstitutional. This is well illustrated by a recent decision by New York's highest court. In *Hurrell-Harding v. State of New York*, <sup>233</sup> the Court of Appeals agreed with an intermediate appellate court that a party may not claim before the criminal case is completed that an indigent defender system is unconstitutional because it creates too high a probability that defendants would be given ineffective counsel. <sup>234</sup> Unlike the intermediate appellate court, however, the Court of Appeals found that "[t]he questions properly raised in this Sixth Amendment-grounded action . . . go not to whether ineffectiveness has assumed systemic dimensions, but rather to whether the State has met its foundational obligation under Gideon to provide legal representation." <sup>235</sup> The court held that claims that the challenged indigent defense system resulted in defendants being forced to go without counsel properly state a Sixth Amendment violation because, unlike claims of ineffectiveness, being denied counsel altogether violates the Sixth Amendment without regard to any *ex post* evaluation of the kind called for in *Strickland*. <sup>236</sup>

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<sup>&</sup>lt;sup>232</sup> See Effectively Ineffective at 1735-41; Mary Sue Backus & Paul Marcus, The Right to Counsel in Criminal Cases, A National Crisis, 57 HASTINGS L.J. 1031, 1117-1121.

<sup>&</sup>lt;sup>233</sup> Hurrell-Harding v. The State of New York, \_\_ N.E.2d \_\_, 2010 WL 1791000 (N.Y. 2010).

<sup>&</sup>lt;sup>234</sup> *Id.* at \_\_\_.

<sup>&</sup>lt;sup>235</sup> *Id.* at \_\_\_.

<sup>&</sup>lt;sup>236</sup> *Id.* at \_\_. ("This complaint contains numerous plain allegations that in specific cases counsel simply was not provided at critical stages of the proceedings. The complaint additionally contains allegations sufficient to justify the inference that these deprivations may be illustrative of significantly more widespread practices; of particular note in this connection are the allegations that in numerous cases representational denials are premised on subjective and highly variable notions of indigency, raising possible due process and equal protection concerns. These allegations state a claim, not for ineffective assistance under Strickland, but for basic denial of the right to counsel under

The court ruled the all claims of outright denial of counsel may be heard without forcing a defendant to go to trial. But the plaintiffs also alleged two other kinds of Sixth Amendment violations. These included the following:

the complaint contains allegations to the effect that although lawyers were eventually nominally appointed for plaintiffs, they were unavailable to their clients-that they conferred with them little, if at all, were often completely unresponsive to their urgent inquiries and requests from jail, sometimes for months on end, waived important rights without consulting them, and ultimately appeared to do little more on their behalf than act as conduits for plea offers, some of which purportedly were highly unfavorable. It is repeatedly alleged that counsel missed court appearances, and that when they did appear they were not prepared to proceed, often because they were entirely new to the case, the matters having previously been handled by other similarly unprepared counsel.<sup>237</sup>

The court made clear that these additional claims may or may not present a Sixth Amendment claim capable of being redressed before the criminal case is completed. "While it may turn out after further factual development that what is really at issue is whether the representation afforded was effective-a subject not properly litigated in this civil action-at this juncture," the court explained, "construing the allegations before us as we must, in the light most favorable to plaintiffs, the complaint states a claim for constructive denial of the right to counsel by reason of insufficient compliance with the constitutional mandate of *Gideon*."

There is, in other words, an important but subtle distinction between being provided ineffective counsel and effectively being denied counsel. The latter claim may be brought before the criminal case is completed.<sup>239</sup> The former may not.<sup>240</sup>

Gideon.").

<sup>&</sup>lt;sup>237</sup> *Id.* at \_\_\_.

<sup>&</sup>lt;sup>238</sup> *Id.* at \_\_\_.

<sup>&</sup>lt;sup>239</sup> The Michigan Court of Appeals in Duncan v. State, 744 N.W.2d 89 (Mich. App. 2009), *vacated and remanded* 780 N.W.2d 843 (Mich. 2010) went further than the New York Court of Appeals in *Hurrell-Harding*, *supra*, holding that the *Stickland* test applies only in the postconviction context and "is not workable or appropriate to apply when addressing standing, ripeness, and related justiciability principles." 744 N.W.2d at 125. The court explained that "[i]t

A number of scholars have suggested that the *Strickland* test should be modified to permit *ex ante* challenges to the sufficiency of legal services arrangement based on formulae such as caseloads, salary, training, and support service personnel (investigators and the like) available to the defense. <sup>241</sup> This Article will not build upon, or even address, such proposals. Suffice it to say, *Strickland* can be overruled only by the Supreme Court. If, someday, the Court is willing to become more engaged in ensuring due process proactively in criminal indigent defense, we will likely see significant improvements in funding and other arrangements for public defenders.

Even if the rule established by *Strickland* requires courts to wait until after the trial to decide whether an individual's due process rights were violated, <sup>242</sup> *Strickland* poses no

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is entirely logical to generally place the decisive emphasis in a court opinion on the fairness of a trial and the reliability of a verdict when addressing a criminal appeal alleging ineffective assistance because the appellant is seeking a remedy that vacates the verdict and remands the case for a new trial," id., but that when seeking the avoidance of prospective harm, "[t]he right to counsel must mean more than just the right to an outcome." *Id.* at 126). According to the court, in a prospective challenge the doctrine of harmless error has no role to play. Indeed, the court concluded that "[a]pplying the two-part test from Strickland here as an absolute requirement defies logic" because it would be "akin to taking a position that indigent defendants who are ostensibly guilty are unworthy or not deserving of counsel who will perform at or above an objective standard of reasonableness." *Id.* Ultimately, the court held that the complaint stated a proper claim of Sixth Amendment violations with respect to a multitude of acts taken or not taken by assigned counsel before trial that arguably deprive plaintiffs of their right to an effective counsel even when their case does not go to trial.

<sup>&</sup>lt;sup>240</sup> See *Id.* at ("Here we emphasize that our recognition that plaintiffs may have claims for constructive denial of counsel should not be viewed as a back door for what would be non-justiciable assertions of ineffective assistance seeking remedies specifically addressed to attorney performance, such as uniform hiring, training and practice standards. To the extent that a cognizable Sixth Amendment claim is stated in this collateral civil action, it is to the effect that in one or more of the five counties at issue the basic constitutional mandate for the provision of counsel to indigent defendants at all critical stages is at risk of being left unmet because of systemic conditions, not by reason of the personal failings and poor professional decisions of individual attorneys. While the defense of indigents in the five subject counties might perhaps be improved in many ways that the Legislature is free to explore, the much narrower focus of the constitutionally based judicial remedy here sought must be simply to assure that every indigent defendant is afforded actual assistance of counsel, as Gideon commands.").

<sup>&</sup>lt;sup>241</sup> See, e.g., Donald A. Dripps, Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard, 88 J. CRIM. L. & CRIMINOLOGY 242, 284 (1997); Note, Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense, 113 HARV. L. REV. 2062, 2071-72 (2000).

<sup>&</sup>lt;sup>242</sup> Under the *Strickland* standard, a claim that the defense lawyer was underpaid is also doomed because underpayment has become the "reasonable" standard. *See* Foster v. Kassulke, 898 F.2d 1144, 1147 (6th Cir. 1990) (relationship between compensation and effectiveness is uncertain); Coulter v. State, 804 S.W.2d 348, 358 (Ark. 1991) (failure to make showing that fee cap led to deficient performance). But see Heath v. State, 574 S.E.2d 852,

impediment to ex ante systemic challenges based on separation of powers.

B. A New Cause of Action: Challenging Inadequate Budgets for Indigent Defense as an Encroachment on the Judiciary

Although this Article intentionally develops the federal separation of powers claim, the claim would be identical in every state, regardless of the differences in language between the various texts of each State's Constitution. In every state, just as in the federal system, courts exist to decide cases that are assigned to them. <sup>243</sup> The signal separation of powers principle stressed in this Article – that the judiciary is expected to perform its duty of deciding cases free from encroachment by the other branches – applies without distinction in every state in the country. 244 Indeed, as Adrian Vermeule has stressed, "[s]tate courts have long been vigorous defenders of the constitutionally vested 'judicial power' against perceived legislative encroachments.",<sup>245</sup> If there is any difference between some state constitutions and the federal, in this regard, is that, unlike the federal version, some States have explicitly assigned tasks to the

<sup>855 (</sup>Ga. Ct. App. 2002) (applying a presumption of ineffective assistance for this defendant based on the caseload and inactivity of the contract attorney).

<sup>&</sup>lt;sup>243</sup> See, e.g., Claremont School Dist. v. Governor, 725 A.2d 648, 650 (N.H. 1998) (courts' duty under state constitution is to say what the law is"); McClung v. Employment Development Dept., 99 P.3d 1015, 1017 (Cal., 2004) (California courts charged with constitutional duty "to say what the law is"); People v. Bruner 175 N.E. 400, 402 (III. 1931) ("interpretation of statutes and determining their validity are inherently judicial functions vested in courts by [State] Constitution"); Duncan v. State, 774 N.W.2d 89, 98 (Mich. App. 2009), vacated and remanded, 780 N.W.2d 843 (Mich. 2010) ("the role of the judiciary in our tripartite system of government entails, in part, interpreting constitutional language, applying constitutional requirements to the given facts in a case, safeguarding constitutional rights, and halting unconstitutional conduct"); Maron v. Silver, 925 N.E.2d 899, 913 (N.Y. 2010) ("The concept of the separation of powers is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions"); In re Dotson, 76 S.W.3d 393, 403 Tex.Crim.App.,2002 "To prohibit the ambitious encroachments of one branch upon another, the Texas Constitution, like the federal Constitution, divides power into three separate branches; Hale v. Wellpinit School Dist. No. 49, 198 P.3d 1021, 1026 (Wash. 2009) ("The principle of separation of powers was incorporated into the Washington State Constitution in 1889. Consistent with the federal courts we have long held that '[i]t is emphatically the province and duty of the judicial department to say what the law is.""). <sup>244</sup> See, e.g., Maron v. Silver, 925 N.E.2d 899, 914 (N.Y. 2010) ("[i]t is a fundamental principle of the organic law that each department should be free from interference, in the discharge of its peculiar duties, by either of the others"); In re Dotson, 76 S.W.3d 393, 403 (Tex.Crim.App.,2002) (State separation of powers is "violated when one branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers.").

courts (beyond the implicit command to decide cases or controversies). 246 Whatever the text in any particular constitution, however, in every State the essential function of courts (just as in the federal system) is to stand apart, independent of the other governmental branches, and decide the cases that come before it without permitting government any advantage in the litigation unrelated to substantive law.

Plainly, courts are not the only properly empowered governmental branch to decide the budget for judicially related matters, including indigent defense. Our cooperative government permits overlapping, shared functioning. 247 In such a governmental structure, it is appropriate to assign initial allocation of judicial resources to the legislature and to assign meaningful review of the allocation to the judicial branch with the proper inquiry being whether the allocation is sufficient to ensure that judges perform their constitutional duty. <sup>248</sup>

If one were writing on a blank slate, we would do well to consider assigning to the judiciary the responsibility for designing the assigned counsel system. Of all governmental

<sup>&</sup>lt;sup>245</sup> Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. Ct. Rev. 357.

<sup>&</sup>lt;sup>246</sup> See, e.g, N.J. CONST. ART. VI, § 2, ¶ 3 ("The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts, The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.").

As the Supreme Court reminds us, both "the provisions of the Constitution itself, and [] the Federalist Papers" make manifest "that the Constitution by no means contemplates total separation of each of these three essential branches of Government. The President is a participant in the law-making process by virtue of his authority to veto bills enacted by Congress. The Senate is a participant in the appointive process by virtue of its authority to refuse to confirm persons nominated to office by the President." Buckley v. Valeo, 424 U.S. 1, 120 (1976). As a result, all separation of powers inquiries should be delicately made. See Hampton & Co. v. United States, 276 U.S. 394, 406 (1928) ("the three branches are co-ordinate parts of one government" and "common sense" must determine when one branch unconstitutionally intrudes into another's essential functions). See also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (the Constitution contemplates some integration of "dispersed powers into a workable government" calling for both "interdependence" and "reciprocity"). To the extent the "Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other," the canonical understanding of the role of the Courts may be criticized as such an encroachment. JAMES MADISON, THE FEDERALIST No. 51, 323-324 (G.P. Putnam's Sons ed. 1908). See also THE FEDERALIST No. 48, at 333-37 (James Madison) (Jacob E. Cooke ed., 1961) (the legislative, judicial, and executive branches must have some degree of power over one another in order to preserve their distinct roles). <sup>248</sup> *See* Mistretta v. United States, 488 U.S. 361, 386 (1989) (There is a "twilight area" of appropriate overlapping

actors, judges possess the special expertise to know what they need to discharge their constitutional responsibilities and are well-poised to determine the appropriate caseload levels for lawyers.<sup>249</sup> But we do not write on such a slate. For better or worse, this responsibility has been given to legislatures.

Even so, there are many ways that courts could play a vital role in addressing their needs to perform their essential functions in addition to accepting jurisdiction in a lawsuit challenging the inadequacy of funding for the assigned counsel system. Applied to the adequacy of indigent defense, state court judges, or the chief judge of the highest court, might routinely be asked to appear before the legislature to discuss the judges' views of how the judicial process works best. Many years ago, in recommending that the legislative branch be given the power to legislate judicial rules, A. Leo Levin and Anthony Amsterdam, for example, creatively recommended that the law also require that members of the judiciary (such as the state's Chief Justice) be given the opportunity to appear before the legislature and express their view on the

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authority). See also Sibbach v. Wilson & Co., 312 U.S. 1 (1941) (upholding Rules Enabling Act of 1934).

<sup>249</sup> See, e.g., Gideon's Promise Unfulfilled at 2070-73 ("[J]udges are intimately acquainted with the functions of attorneys and the practical implications of caseloads, support services, research facilities, and other resources for effective representation.... [W]hatever doubts might exist about judicial supervision of other institutions, as a practical matter, judges are well suited to oversee indigent defense systems." (footnote omitted)). See also State v. Smith, 681 P.2d 1374, 1380 (Ariz. 1984) (justifying its authority to oversee adequacy of indigent defense system on, among other things, "on our own experience as attorneys.)"; State v. Lynch, 796 P.2d 1150, 1163 (Okla. 1990) (same); In re Gault, 387 U.S. 1, 70 (1071) (Harlan, J., concurring in part and dissenting in part) (certain legislative judgments have been entrusted "at least in part to courts" because "courts have been understood to possess particular competence").

For a related argument of when to authorize courts to make rules because they are the most expert at doing so, see Roscoe Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599 (1926); Roscoe Pound, *Regulating Procedural Details by Rules of Court*, 13 A.B.A.J. SUPP. 12 (1927). *See also* John Henry Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928).

More than 50 years ago, Leo Levin and Anthony Amsterdam proposed a practical means of sharing powers between the legislative and judicial branches with respect to rule-making involving the courts. In states that allocate the initial rule-making authority to the courts, they proposed, for example, that the legislature might retain the authority to change the rule, but only by a super-majority vote. A. Leo Levin and Anthony G. Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 39-40 (1958).

wisdom of a pending bill before it could be voted upon.<sup>251</sup>

Judges, in turn, would be well advised to recommend that minimum standards of practice by the organized bar be taken into consideration when designing and funding an assigned counsel system. Consider, for example, American Bar Association standards for defense counsel. According to the ABA, "[u]nder no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial." If judges explained to the legislature why this standard is appropriate, and what the enforcement of such a standard would mean for funding purposes (because compliance with such a standard would mean capping individual caseloads for counsel and funding investigators so that an analysis of the evidence can be undertaken), legislatures would be considerably better informed when making budget allocation choices. To the extent, this resulted in sufficient funding levels for assigned counsel, a cooperative arrangement among the branches would settle the matter. 253

If, however, some are troubled even to imagine that budgets for indigent defense is a

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<sup>&</sup>lt;sup>251</sup> Id. at 40.

<sup>&</sup>lt;sup>252</sup> ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-6.1 (3d ed. 1993).

When it would not, however, it may be necessary ultimately for courts to have to review the adequacy of the budget allocation in a lawsuit brought for the purpose of seeking a court order that the legislature increase the funding for indigent defense. *See*, *e.g.*, *Hurrell-Harding v. State of New York*, *supra*, at \_\_ ("It is, of course, possible that a remedy in this action would necessitate the appropriation of funds and perhaps, particularly in a time of scarcity, some reordering of legislative priorities. But this does not amount to an argument upon which a court might be relieved of its essential obligation to provide a remedy for violation of a fundamental constitutional right . . . We have consistently held that enforcement of a clear constitutional or statutory mandate is the proper work of the courts . . . and it would be odd if we made an exception in the case of a mandate as well-established and as essential to our institutional integrity as the one requiring the State to provide legal representation to indigent criminal defendants at all critical stages of the proceedings against them.") (citations omitted).

matter committed solely to the judicial branch,<sup>254</sup> current doctrine wrongly applies the inverse principle. Because the legislature is expected to make decisions about how to spend tax dollars, courts have declared themselves unable to overrule those choices.<sup>255</sup> The belief that allocation of the public purse is a legislative choice beyond meaningful review by courts lies at the heart of the current crisis of justice in the United States today.<sup>256</sup>

Although we should want courts to be wary when clashing with other branches of government, the conclusion most courts have reached that they are *barred* from ordering legislatures to spend more money on indigent defense because budget setting is the legislature's proper business is especially bizarre when contrasted with the myriad of examples of courts jealously guarding their turf whenever they perceive even the slightest encroachment upon it.

State courts have long recognized and applied the principle that a proper application of

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<sup>&</sup>lt;sup>254</sup> See, e.g., Roa v. Lodi Med. Group, Inc., 695 P.2d 164, 172 (Cal. 1985) (rejecting plaintiff's argument that "in light of this court's inherent power to review attorney fee contracts and to prevent overreaching and unfairness, the question of the appropriateness of attorney fees is a matter committed solely to the judicial branch" (citation omitted), app. dismissed, 474 U.S. 990 (1985).

<sup>&</sup>lt;sup>255</sup> Robin Adler, Enforcing the Right to Counsel: Can the Courts Do It? The Failure of Systemic Reform Litigation, 2007 J. INST. JUST. INTL. STUD. 59 ("What is limiting the courts from ordering sweeping reform is the doctrine of separation of powers.") See, e.g., State v. Peart, 621 So.2d 780, 791 (La 1993) ("We decline at this time to undertake ... more intrusive and specific measures because this Court should not lightly tread in the affairs of other branches of government and because the legislature ought to assess such measures in the first instance."); In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So.2d at 1136 ("[W]hile it is true that the legislature's failure to adequately fund the public defenders' offices is at the heart of this problem and the legislature should live up to its responsibilities and appropriate an adequate amount for this purpose, it is not the function of this Court to decide what constitutes adequate funding and then order the legislature to appropriate such an amount. Appropriation of funds for the operation of government is a legislative function."); Lavallee v. Justices in the Hampden Superior Court, 442 Mass. at 244 ("The legislature is keenly aware of the defendants' Constitutional right to counsel, and of the demands that right makes on the public treasury. As the representative branch in charge of making laws and appropriating funds, it will no doubt continue to exercise prudence and flexibility in choosing among competing policy options to address the rights of indigent defendants to counsel ... We urge such cooperation in fashioning a permanent remedy for what can now fairly be seen as a systemic problem of a Constitutional dimension.").

<sup>&</sup>lt;sup>256</sup> See Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 514-15 (1937) ("The existence of local conditions which, because of their nature and extent, are of concern to the public as a whole, the modes of advancing the public interest by correcting them or avoiding their consequences, are peculiarly within the knowledge of the legislature, and to it, and not to the courts, is committed the duty and responsibility of making choice of the possible methods.") (citations omitted).

separation of powers means that courts have inherent authority within their scope of jurisdiction to do what is reasonably necessary for the administration of justice.<sup>257</sup>

In 2000, Adrian Vermeuile chronicled various state court rulings declaring the actions of another governmental branch to violate separation of powers under the state Constitution as an impermissible encroachment on the judiciary.<sup>258</sup> Vermeuile grouped these cases into four categories: (1) statutes altering common-law rules of liability or remedy; <sup>259</sup> (2) statutes altering

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<sup>&</sup>lt;sup>257</sup> See, e.g., Makemson v. Martin County, 491 So. 2d 1109, 1112 (Fla. 1986) (finding fee-cap statute unconstitutional as applied because it curtailed inherent judicial authority to ensure adequate representation); Smith v. State, 394 A.2d 834, 839 (N.H. 1978) ("Since the obligation to represent indigent defendants is an obligation springing from judicial authority, so too is the determination of reasonable compensation for court-appointed attorneys a matter for judicial determination. The power to regulate officers of the court is a power inherent in the judicial branch. Implicit in that power is the authority to fix reasonable compensation rates for court-appointed attorneys."); Field v. Freeman, 527 F. Fupp. 935, 940 (D. Kan. 1981) (courts posess "inherent power to disqualify counsel where necessary to preserve the integrity of the adversary system."); Theard v. United States, 354 U.S. 278, 281 (1956). See also Ted Z. Robertson & Christa Brown, The Judiciary's Inherent Power to Compel Funding: A Tale of Heating Stoves and Air Conditioners, 20 St. MARY'S L.J. 863, 866 (1989) ("The judiciary is not merely an agency of the legislature, but is instead a constitutionally established separate, independent, and co-equal branch of government."); Note, The Courts' Inherent Power to Compel Legislative Funding of Judicial Functions, 81 MICH. L. REV. 1687, 1692 (1983) (asserting that constitutional risks justify invocation of court's inherent power). <sup>258</sup> Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV 357. <sup>259</sup> Id. at 373-374 (collecting cases) (Best v Taylor Machine Works, 179 Ill. 2d 367, 414 (1997) (imposition of limit of \$500,000 in personal injury actions for "non-economic" compensatory damages violated separation of powers by arrogating to the legislature the judicial power of reducing damages awards, resulting in an "undu[e] infringe[ment] upon the inherent powers of judges"). (Immunity: see, e.g., Office of the State Attorney, Fourth Judicial Circuit of Florida v Parrotino, 628 So.2d 1097 (Fla 1993) (dictum) (legislature may not abrogate prosecutorial immunity, because state attorneys are quasi-judicial officers); Presley v Mississippi State Highway Comm'n, 608 So.2d 1288 (1992) (separation of powers bars statute directing state courts to apply only sovereign immunity precedents approved by the legislature)); (Remedies: see, e.g., State v Hochhausler, 668 N.E.2d 457 (Ohio 1996) (separation of powers gives judiciary authority to stay the administrative suspension of a driver's license, despite contrary statute); People v Warren, 671 N.E.2d 700 (1996) (legislature may not prohibit judicial imposition of civil contempt sanctions); Walker v Bentley, 678 So.2d 1265 (Fla 1996) (striking down statute that restricted judicial authority to impose criminal contempts); Burradell v State, 326 Ark 182 (1996) (legislature may not restrict trial court's inherent authority to punish for in-court contempt); In the Interest of J.E.S., 817 P.2d 508 (Colo. 1991) (invalidating statute that abrogated judicial power to incarcerate juveniles for contempt); People v Williams, 577 N.E.2d 762 (Ill. 1991) (invalidating statute that restricted bail pending appeal)); (Damages caps: see, e.g., Lakin v Senco Products, 329 Or. 62 (Or. 1999) (statutory cap on personal injury damages violates right to jury trial); Trovato v deVeau, 736 A.2d 1212 (NH 1999) (striking down statutory damages cap as violation of estate's right to recover for personal injuries); Moore v Mobile Infirmary Ass'n, 592 So.2d 156 (Ala 1991) (statutory cap on noneconomic damages in medical malpractice actions violated right to jury trial); Sofie v Fibreboard Corp., 112 Wash.2d 636 (1989) (statutory cap on noneconomic damages violates right to trial by jury), opinion amended in unrelated respects, 780 P.2d 260 (Wash. 1989); Arneson v Olson, 270 N.W.2d 125, 137 (N.D. 1978) (statute regulating various aspects of medical malpractice claims violated right to jury trial)); (See also Steinke v South Carolina Department of Labor, 336 S.C. 373 (1999) (legislature usurped judicial power by attempting to retroactively reinstate statutory damages cap that the judiciary had earlier held to have been repealed by implication); Sofie v Fibreboard Corp., 771 P.2d 711, 720-21

procedural and evidentiary rules;<sup>260</sup> (3) statutes that alter the legal effect of judicial judgments;<sup>261</sup> and (4) appropriations statutes that, in the judiciary's view, provide insufficient funding for the exercise of judicial functions.<sup>262</sup>

Courts have shown no hesitancy protecting their own responsibilities against perceived encroachments of their essential functions in a host of matters that are significantly less intrusive than the failure to provide courts with the capacity to ensure that indigent parties are represented relatively equally when the government is against them. They have refused, for example, to permit the legislature to dictate who provides security in the court house<sup>263</sup> and have protected their authority over their employees and the terms of employment.<sup>264</sup> They have also comfortably invoked separation of powers principles in insisting that no other branch intrude on

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<sup>(</sup>Wash. 1989) (dictum) (cap on noneconomic damages is a legislative attempt to mandate a legal conclusion that may violate separation of powers). Compare Smith v Department of Insurance, 507 So.2d 1080 (Fla 1987) (striking down statutory cap on noneconomic damages as invalid restriction on victims' access to the courts). But see Kirkland v Blaine County Medical Center, 4 P.3d 1115 (Idaho 2000) (cap on noneconomic damages does not violate separation of powers).

<sup>&</sup>lt;sup>260</sup> *Id.* at 374 (collecting cases) (Armstrong v Roger's Outdoor Sports, See Armstrong v Roger's Outdoor Sports, Inc., 581 So2d 414, 417 (Ala 1991) (per curiam) (Legislature intruded "into the core of the judicial function" when it required both trial and appellate courts to review juries' punitive damage awards de novo because it is "the very essences of a judge's power" to exercise discretion whether or not to defer to the jury's punitive damages award)). <sup>261</sup> *Id.* (collecting cases) (citing Ex Parte Jenkins, 723 So2d 649 (Ala 1998) (statute mandating reopening of final judgments of paternity held to unconstitutionally encroach upon the judicial power); State v Mundie, 508 NW2d 462 (Iowa 1993).)

<sup>&</sup>lt;sup>262</sup> *Id.* (collecting cases) (Commonwealth ex rel. Carroll v Tate, 274 A2d 193 (Pa 1971) (state court order appropriately directed the mayor and city council on pain of contempt to increase the judicial budget because "the co-equal independent Judiciary . . . possess[es] the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities)).

<sup>&</sup>lt;sup>263</sup> See Petition of Mone, 719 A2d 626 (N.H. 1998) (law requiring county sheriffs, rather than judicial-branch officers, to provide security in state courts held to encroach upon judicial power).

<sup>&</sup>lt;sup>264</sup> See First Judicial District v Pennsylvania Human Relations Commission, 556 Pa 258 (1999) (separation of powers bars agency, acting under statutory authority, from asserting jurisdiction over sexual harassment policies applied to employees in the judicial branch); Judicial Attorneys' Assn. v State, 459 Mich. 291 (1998) (statute designating county, rather than judiciary, as employer of court employees violates separation of powers). See also FELIX F. STUMPF, INHERENT POWERS OF THE COURTS: SWORD AND SHIELD OF THE JUDICIARY (1994); State ex rel. Lambert v Stephens, 200 W.Va. 802 (1997) (finding inherent judicial power to order that a parking area on county property be designated for exclusive use by court personnel, despite contrary position of county commission); County of Barnstable v Commonwealth, 410 Mass. 326 (1991) (counties may be obligated to fund courthouses, in lieu of appropriations by state legislature); Matter of Alamance County Court Facilities, 329 N.C. 84 (1991) (judiciary has inherent power to order local authorities to provide courthouse facilities)

their perceived prerogative to define the rules governing judicial disqualification or recusal.<sup>265</sup> They have even comfortably held that legislative restrictions on judicial authority to determine how to select members of a jury improperly encroach upon judicial authority.<sup>266</sup>

Courts have asserted their inherent authority to preserve the integrity of the judicial branch when they determined that their courtrooms were so acoustically inadequate that jurors were unable to hear testimony. Reasoning that "there is no fourth branch of government to turn to," the Mississippi Supreme Court explained that courts are assigned the responsibility of determining what they require to perform their essential functions. Courts have declared legislative acts to be an unconstitutional encroachment on exclusive judicial powers in such

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administer Justice . . . ").

<sup>&</sup>lt;sup>265</sup> See, e.g., Weinstock v. Holden, 995 S.W.2d 408 (Mo. 1999) (statute prohibiting judges from presiding over cases from which they could derive a direct or indirect benefit violated the state constitution's separation of powers doctrine).

<sup>&</sup>lt;sup>266</sup> See People v. Jackson, 371 N.E.2d 602 (Ill. 1977). See also Linda D. Jellum, "Which is to be Master," The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers, 56 UCLA L. REV. 837 (2009) People v. Reichenbach, 568 N.W.2d 383 (Mich. App. 1997), aff'd 587 N.W.2d 1 (Mich. 1998) (Legislature impermissibly invaded province of courts by forbidding sentencing courts from counting a prior conviction in which the defendant was neither represented by counsel nor knowingly waived such representation).

<sup>&</sup>lt;sup>267</sup> Hosford v. State, 525 So. 2d 789, 798 (Miss. 1988). See also In re Griffiths, 118 Ind. 83, 20 N.E. 513 (1889) (striking a statute requiring the court to make a syllabus of each opinion as an encroachment on judicial power); Atchison, T. & S.F. Ry. v. Long, 122 Okla. 86 (1926), (time frame on when cases shall be decided ); Houston v. Williams, 13 Cal. 24 (1859), (striking as an encroachment upon judicial independence a statute requiring written opinions in all appellate court decisions); Dahnke v. People, 168 Ill. 102 (1897) (proceeding to hold in judicial contempt a county courthouse custodian who, under the directions of the board of county commissioners, had changed locks on the courtroom door during adjournment and refused readmittance to the judge, sheriff, bailiffs, attorneys, parties and witnesses in an attempt to enforce the board's assignment of particular courtrooms to individual judges); Board of Comm'rs v. Stout, 136 Ind. 53 (1893) (sheriff ordered by court to seize control of the courthouse elevator over the opposition of the board of commissioners); In re Janitor, 35 Wis. 410 (1874) (held void an order of the state superintendent of public property dismissing the court-chosen janitor of the supreme court). Hosford, 525 So. 2d at 797-98. Many courts, in countless contexts, have exercised their inherent powers to ensure that courts may function in the manner judges regard as necessary. See, e.g., White v. Board of County Commissioners, 537 So. 2d 1376 (Fla. 1989) (trial court properly exercised inherent judicial power to require that an attorney representing an indigent defendant should be compensated at a fee in excess of the statutory minimum); Pena v. Dist. Court, 681 P.2d 953, 956 (Colo. 1984) (within inherent powers of judiciary to determine and compel payment of sums necessary to carry out its responsibilities); Commonwealth ex rel Carroll v. Tate, 274 A.2d 193, 197 (Pa. 1971) ("(T)he Judiciary must possess the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to

divergent areas as prescribing the procedure for sanctioning unlawful court papers;<sup>269</sup> treating judicial failure to issue decision before forty-five-day deadline as equivalent to denial of motion;<sup>270</sup> making health care providers legally incompetent to testify about providers;<sup>271</sup> and prohibiting excessive contingent-fee arrangements.<sup>272</sup>

Many of these rulings implicitly require legislatures to expend funds not initially allocated. State courts have also explicitly ordered additional funds to be spent. Sometimes, state courts invoke their "inherent authority" to act in contravention of explicit legislative determinations, even when the legislature has seen fit to cap the amount of money to be paid to court-assigned counsel.<sup>273</sup>

What this very brief survey demonstrates is that state courts comfortably will act to strike down another branch of government's acts when the courts perceive them as interfering with prerogatives of the judicial branch. As this Article has shown, without a viable indigent defense system courts are unable to discharge their fundamental responsibility to ascertain independently whether the facts and circumstances in most criminal prosecutions justify entering an order of conviction. For this reason, the proposition that courts are unable to demand that the other

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<sup>&</sup>lt;sup>269</sup> See, e.g., Squillace v Kelley, 990 P.2d 497 (Wy. 1999).

<sup>&</sup>lt;sup>270</sup> Fowler v Fowler, 984 S.W.2d 508 (Mo. 1999). *See also* In re Interest of Constance G., 254 Neb. 96 (1998) (separation of powers gives judiciary exclusive authority to determine whether admissible evidence is probative and how much weight it should receive); Claypool v Mladineo, 724 So2d 373 (Miss. 1998) (separation of powers gives Supreme Court inherent authority to promulgate procedural rules); Kunkel v Walton, 179 Ill.2d 519 (1997) (same). <sup>271</sup> State v Almonte, 644 A2d 595 (RI 1994).

<sup>&</sup>lt;sup>272</sup> Lloyd v Fishinger, 529 Pa. 513 (1992). See also See Newton v. Cox, 878 S.W.2d 105 (Tenn.), *cert. denied*, 513 U.S. 869 (1994).

<sup>&</sup>lt;sup>273</sup> See, e.g., White v Bd. of County Commissioners of Pinellas County, 537 So..2d 1376 (Fla. 1989) (judiciary has inherent power to exceed statutory fee caps for criminal defense attorneys); Irwin v Surdyks Liquor, 599 N.W.2d 132 (Minn. 1999) (statutorily imposed limitations on attorneys' fees violate the separation of powers). The Florida Supreme Court invalidated a statute providing defense counsel to be paid by their clients; concluding that the law violated separation of powers by invading the exclusive province of the judiciary. Graham v. Murrell, 462 So..2d 34 (Fla. 1984). See also Corenevsky v. Superior Court, 682 P.2d 360, 370-371 (Cal. 1984) (legislature improperly infringed on judiciary's power to determine what constitutes reasonable compensation for court-appointed attorneys).

branches of government create and maintain a robust indigent defender system is simply misguided. Affirmative litigation in state court should be available to litigants challenging indigent defense systems. Rather than basing such challenges on due process, the stronger claim is that the failure to fund indigent defense, when the failure is the responsibility of the legislative or executive branch, constitutes an unconstitutional encroachment on an essential function of the judiciary.

This Article does not attempt to address the merits of such cases. Its focus is, instead, on the propriety of courts entertaining the lawsuits. How courts are to decide challenges to a lack of parity in pay for prosecution and defense functions, for example, is a complicated subject deserving of its own extended inquiry. For these purposes, it is sufficient to make clear that a court acts well within its proper authority when it exercises judicial power to call before it those responsible for developing the budget and to require an explanation for an allocation whenever the budget negatively impacts the court's capacity to perform its core role.<sup>274</sup>

Most importantly, judges must come to understand they always play a role separate from merely being a referee. They also must satisfy themselves that their capacity to serve as a check on executive power remains. Claims that inequities in spending for indigent defense imperil the judiciary's capacity to serve as such a check (even when the spending levels for indigent defense do not raise a due process claim) state a cause of action and ought to proceed to the merits. Such claims in federal courts should be address to the prosecution and defense of federal criminal cases. State claims should be addressed to the prosecution and defense of state criminal cases.

Once a court were to find that insufficient funding imperils the courts from performing

<sup>&</sup>lt;sup>274</sup> This also means that courts have the proper authority to insist that they receive the needed funds for purposes

their constitutional responsibility, they will also have overcome the critical obstacle to ordering the legislature to spend additional money on indigent defense. As the New York Court of Appeals recently observed, "[i] is, of course, possible that a remedy in this action would necessitate the appropriation of funds and perhaps, particularly in a time of scarcity, some reordering of legislative priorities. But this does not amount to an argument upon which a court might be relieved of its essential obligation to provide a remedy for violation of a fundamental constitutional right." The Court went on to explain that it "is the proper work of the courts" to order that the legislature spend additional funds to avoid an unconstitutional result. 276

VI. Broader Implications of This Vision of Separated Powers and Its Advantages

This Article has wondered how the world would look differently if there were a meaningful indigent defense bar which made careful inquiry into the facts and circumstances of every arrest. It would be even more exhilarating to wonder how different things would look if courts took their separation of powers responsibilities more seriously. Much should change if courts became reinvigorated by the separation of powers claim made in this Article. Indeed, although the stress throughout this Article has been on the propriety of courts demanding from coordinate branches of government the tools they need to perform their independent functions, this would be only one way – even if an important one – in which courts would behave differently.

One might also wonder why anything would change through such a reinvigoration given

other than counsel for indigents, such as providing courts with competent language interpreters, among countless other examples.

Hurrell-Harding v. State of New York, at \_\_ (*citing* Marbury v. Madison, 1 Cranch 137, 147 [1803] ["every right, when withheld, must have a remedy, and every injury its proper redress"]).

<sup>&</sup>lt;sup>276</sup> Id. (citing Campaign for Fiscal Equity v. State of New York, 86 N.Y.2d 307 (1995); Jiggets v. Grinker, 75 N.Y.2d 411 (1990); McCain v. Koch, 70 N.Y.2d 109 (987); Klostermann v. Cuomo, 61 N.Y.2d 525 (1984).

the multitude of ways that courts themselves are to blame for the state of current affairs. It is undeniable that courts are solely responsible for the various decisions based on the Due Process Clause that have allowed, or even made more lopsided, the imbalance that currently exists in the criminal process today. Officially even *Strickland* (the case perhaps above all others responsible for the frequency with which indigent defendants are poorly represented) claims that defense counsel must perform effectively to ensure "the proper functioning of the adversary process" Thus, if current law already is designed to require the proper functioning of the adversary process why is an additional separation of powers analysis needed? How could it result in a more vigorous implementation of effective defense lawyering?

It is true, to be sure, that current doctrinal law could be considerably more sympathetic to claims that the Sixth Amendment is being violated by the conditions found in so many jurisdictions today throughout the United States. Were the Supreme Court more sympathetic to these Sixth Amendment claims, there would likely be no need to consider whether other Constitutional violations are also involved when defendants routinely plead guilty to crimes without anyone other than members of the executive branch being familiar with the underlying factual claims involved.

No one should doubt that a court that wanted to make major criminal-procedure innovations leveling the criminal justice playing field could seek to build on the language from *Wardius v. Oregon*, stressing that "[a]lthough the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, . . . it does speak to the balance of

<sup>&</sup>lt;sup>277</sup> See Strickland, 466 U.S. at 686.

forces between the accused and his accuser"<sup>278</sup> and it does require that the procedures made available to the litigants in criminal cases "must be a two-way street."<sup>279</sup> The Court also observed in another 1973 decision that defense lawyers are necessary to rectify the "imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official."<sup>280</sup>

In an important sense, this Article has advanced a rather weak version of an applied separation of powers approach to criminal justice. Suggesting that courts may be said to properly discharge their constitutional responsibilities to check executive power through the analogy of an auditor is a rather modest vision of checks and balances. A stronger version of applied separation of powers would treat all advantages unrelated to the merits held by the executive branch in matters before the judiciary as presumptively unconstitutional because they suggest an attempt to influence the outcome, thereby intruding on the judicial function. Tinkering with the scales of justice, in other words, raises both a due process and a separation of powers issue.<sup>281</sup>

This could lead to an understanding that judges are required to change the current course of practice as they strive to offer a forum designed to obtain a full and balanced picture of the facts and the law, by giving both contending parties in a case a roughly equal chance to present their evidence and arguments. Once again, cases decided in the context of the Sixth Amendment

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<sup>&</sup>lt;sup>278</sup> Wardius v. Oregon, 412 U.S. 470, 474 (1973).

 $<sup>^{279}</sup>$  *Id.* at 475.

<sup>&</sup>lt;sup>280</sup> United States v. Ash, 413 U.S. 300, 309 (1973). In addition, of course, the canonical case in the field, *Gideon v. Wainright* made clear that the Court (once, at least) regarded "lawyers in criminal courts [to be] necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Gideon*, 372 U.S. at 344.

<sup>&</sup>lt;sup>281</sup> Any attempt by the legislature to place a thumb on the executive's side of the scale in litigation presumptively should be treated as an impermissible intrusion into the judicial process. The unseen thumb state legislatures apply in criminal cases is to hamstring the defense. Underfunding indigent defense advantages the executive branch because it can be safe in the knowledge that most cases will never be contested. Though this is commonly seen as a due process concern, it is considerably more than that.

could be invoked to achieve this result. Thus, the Court wrote in *Herring v. New York*, <sup>282</sup> that the "right to the assistance of counsel . . . ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary factfinding process."

One reason to believe in a sustained focus on separated powers is that it dramatically changes the focus of attention. One cannot be certain how a reinvigorated separation of powers perspective would impact practice on the ground. <sup>284</sup> At the least, it should reveal the deep problems associated with trial judges who would behave the way Judge Harold Rothwax routinely operated when he sat for more than 20 years in the New York City trial level criminal court. Rothwax proudly explained his practice of moving cases through his court. <sup>285</sup> He would simply offer defendants, even when they were assigned their first court-assigned counsel moments before, that if they agreed to plea guilty on Day One, the sentence would be a minimum prison term of two and a maximum of four years. But that, "[a]fter today, it's 3 to 6"; and "after that, it's 4 to 8." <sup>286</sup> If nothing else, it should be considerably easier to grasp that judges who emulate Rothwax's conduct violate the very essence of their role by performing more as coprosecutors than as the independent check on executive power demanded by our constitutional system. It may not be obvious why this is more difficult to recognize only through a due process lens, but history reveals that it is.

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<sup>&</sup>lt;sup>282</sup> 422 U.S. 853 (1975).

<sup>&</sup>lt;sup>283</sup> Herring, 422 U.S. at 858. See also Kimmelman v. Morrison, 477 U.S. 365, 384 (1986), quoting Strickland v. Washington, 466 U.S. 668, 690 (1984) ("counsel's function is to make the adversarial testing process work in the particular case").

<sup>284</sup> After observing up close a number of criminal courts in the United States recently, Amy Bach reached the sad

<sup>&</sup>lt;sup>284</sup> After observing up close a number of criminal courts in the United States recently, Amy Bach reached the sad conclusion that they are comprised "of legal professionals who have become so accustomed to a pattern of lapses that they can no longer see their role in them." AMY BACH, ORDINARY INJUSTICE 2 (Metropolitan Books 2009).

<sup>285</sup> See Richard Klein, Due Process Denied: Judicial Coercion in the Plea Bargaining Process, 32 HOFSTRA L. REV. 1349, 1362 (2004).

<sup>&</sup>lt;sup>286</sup> *Id.* (*citing* Sam Roberts, "For One Zealous Judge, Hard Bargaining Pushes Cases Through the Courts," N.Y. TIMES, Apr. 29, 1985, at B1).

Another important example of how separation of powers instead of due process makes a claim look and sound different, potentially changing the prospects for normative rules, involves the process of plea bargaining. Under current due process doctrine, the duties counsel owes clients differ when cases are tried and when they result in the defendant pleading guilty. Expanding due process protections, the Supreme Court recently held that defense counsel has a duty to explain to a non-citizen the immigration-related consequences of pleading guilty. 287 But the due process rules respecting plea bargaining unintentionally undermine separation of powers goals in a variety of contexts. Current Supreme Court doctrine, for example, allows defendants to waive constitutionally protected discovery rights when pleading guilty. <sup>288</sup> In addition, under current law there is no requirement that counsel conduct even minimal investigations before advising their clients to plead guilty. 289 Nor are judges required even to mention to defendants when they plead guilty that they have a right to have their lawyer conduct such an investigation. <sup>290</sup> Only when cases go to trial has the Court ruled that due process may require that counsel "conduct a thorough investigation." <sup>291</sup> It would be considerably more difficult to justify allowing defendants to forgo all investigation into their defense, and even to do so without being made aware that they have a right to have their lawyer conduct a thorough investigation, when analyzed through the lens of separation of powers principles since independent investigations are the surest way to guard against executive wrongdoing.

Basing a claim on separated powers also dramatically changes the narrative. Most importantly, it changes both the villain and the victim. The villain now becomes one branch of

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<sup>&</sup>lt;sup>287</sup> Padilla v. Kentucky, \_\_ U.S. \_\_ , 78 U.S.L.W. 4235 (March 31, 2010).

<sup>&</sup>lt;sup>288</sup> See United States v. Ruiz, 536 U.S. 622 (2002).

<sup>289</sup> Id

<sup>&</sup>lt;sup>290</sup> See FED. RULE CRIM. PRO. 11.

government which wrongfully exceeded its constitutional powers and encroached on another branch's independence. Even better, many new victims are recognized. The first set of victims is the judges who may be thought of as being set up by the legislature to perform a function that is rigged from the outset. The other victim is the people.

Much else could change if courts demonstrated a serious commitment to being a meaningful check on executive power by acting as a truly independent actor. Rachel Barkow recently argued broadly for courts playing a greater oversight role in executive decisions in criminal justice to ensure a meaningful balance of power, <sup>292</sup> including a significantly greater oversight role in determining the limits of prosecutorial discretion in the area of charging defendants and in plea bargaining. <sup>293</sup> Once courts are committed to check robustly executive power and to monitor carefully all rules and practices that advantage government independent of the merits of the case, much will necessarily change beyond the insistence that a robust defense system is maintained. Some examples of what would require serious re-examination when the inquiry shifts from due process to separation of powers include claims for more discovery and for more services to mount a defense than are currently required under the due process clause, <sup>294</sup> claims of access to DNA and other forensic testing not now recognized, claims to override certain governmental evidentiary privileges; and even, perhaps, to call into question a whole roster of governmental perks which courts have always accepted without question. <sup>295</sup>

There are still other advantages. With respect to lawsuits challenging budget choices made by legislatures, plaintiffs bringing a separation of powers claim would have a considerably

<sup>291</sup> Williams v. Taylor, 529 U.S. 362, 396 (2000).

<sup>&</sup>lt;sup>292</sup> See Barkow, Separation of Powers.

<sup>&</sup>lt;sup>293</sup> *Id.* at 990.

<sup>&</sup>lt;sup>294</sup> See, e.g., Brady v. Maryland, 373 U.S. 83 (1963); Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

easier time establishing standing by virtue of being assigned an overburdened defense lawyer than they do when challenging the indigent defender system under the Sixth Amendment rights to effective assistance of counsel have been violated. In those cases, as we have seen, courts have tended to rule that the plaintiff is unable to show that his or her constitutional rights will be violated until after their case is completed.<sup>296</sup>

In this newly conceived lawsuit, the plaintiff will need only to show she will suffer some "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." This relatively easy standard to meet requires only showing that the plaintiff is likely to be disadvantaged by the funding issue, not that the plaintiff's constitutional rights are necessarily violated by the funding arrangement. As Justice Scalia put it, to have standing to challenge a structural violation of the Constitution, the plaintiff needs only to "show some respect in which he is harmed *more* than the rest of us." This should be accomplished by pleading that the high caseload with which the court-assigned lawyer is burdened raises a high probability that the lawyer will not be able to undertake a meaningful investigation into the plaintiff's case and that the lawyer would be able to undertake such an investigation if his or her caseload were reduced to the level recommended by independent groups such as the American bar Association.

A final significant benefit to this approach is what it may mean for justice claims outside of the criminal area. The essence of the separated powers argument in this Article is the

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<sup>&</sup>lt;sup>295</sup> See, e.g., United States Supreme Court Rule 37.4 and Federal Rule of Appellate Procedure 29(a).

<sup>&</sup>lt;sup>296</sup> See n. \_, supra, and accompanying text.

Allen v. Wright, 468 U.S. 737 (1984) (prudential standing factors include whether the line of causation between the illegal conduct and injury is too attenuated or the injury too abstract.

<sup>&</sup>lt;sup>298</sup> Antonin Scalia, *The Doctrine of Standing as an Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 891, 894 (1983). *Compare* Allen v. Wright, 468 U.S. 737 (1984) *with* Duke Power Co. v. Carolina Environmental

insistence on parity of treatment when the executive branch is represented by counsel and the party it has chosen to sue is either unrepresented or is represented by court-assigned counsel. This allows us to jump over the conceptual hurdle created by the Supreme Court when it famously ruled in 1981 in *Lassiter v. Department of Social Services*, <sup>299</sup> that only persons subject to loss of physical liberty have a due process right to court-assigned counsel as a matter of course. Ever since, claims seeking to expand *Gideon* to civil matters have stalled. <sup>300</sup>

Under the theory advanced in this Article, however, it matters not whether the cause of action is criminal or civil. The key inquiry is whether the executive branch is one of the parties and whether it has an advantage in the litigation against an individual which raises separation of powers concerns. The critical questions raised in this Article equally applies when the government seeks to evict from public housing someone too poor to retain competent counsel as when the government seeks to send someone to prison. The central separation of powers question is whether the executive branch stands before the independent judicial branch with an advantage unrelated to the merits of the case which has the potential to impair the courts from reaching the proper result based on the facts and the law.<sup>301</sup>

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Study Group, 438 U.S. 59 (1978).

Lassiter v. Department of Social Services, 452 U.S. 18 (1981).

<sup>&</sup>lt;sup>300</sup> See, e.g., Laura Abel, A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright, 15 TEMP. POL. & CIV. RTS. L. REV. 527 (2005-2006); Beverly Balos, Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings, 15 TEMP. POL. & CIV. RTS. L. REV. 557 (2005-2006); Bruce A. Boyer, Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham, 15 TEMP. POL. & CIV. RTS. L. REV. 635 (2005-2006); Deborah Perluss, Keeping the Eyes on the Prize: Visualizing the Civil Right to Counsel, 15 TEMP. POL. & CIV. RTS. L. REV. 719 (2005-2006); Michael Millemann, State Due Process Justification for a Right to Counsel in Some Civil Cases, 15 TEMP. POL. & CIV. RTS. L. REV. 733 (2005-2006). But See CALIFORNIA SHRIVER CIVIL JUSTICE ACT, AB 590, § 1(j) "Because in many civil cases lawyers are as essential as judges and courts to the proper functioning of the justice system, the state has just as great a responsibility to ensure adequate counsel is available to both parties in those cases as it does to supply judges, courthouses, and other forums for the hearing of those cases.").

<sup>&</sup>lt;sup>301</sup> There are many kinds of civil cases in which the executive branch is a party represented by counsel when the opposing party is indigent and unrepresented. The strongest separation of powers claim for counsel for indigent litigants in opposition to a government claim is when the Executive Branch has commenced the litigation and is

## Conclusion

To date, right-to-counsel cases have been regarded by courts as involving only a due process component. Due process, however, is treated as an individual's right. Defense counsel is also needed to advance a collective interest. There are always important separation of powers questions whenever the government is a part of the case, at least when the government has also created the rules which are likely to impact the outcome. The structural protections embedded in our constitutional democracy require that courts stand as a vigilant restraint on the exercise of executive or legislative power; that a court's independent exercise of its authority to be an independent check on the exercise of power by another branch of government requires that courts assess claims that the executive or legislative branch has advantaged itself in the litigation raises a substantial constitutional question and must be assessed by the courts through the lens of separation of powers.

Picture the iconic vision of Justice. Her scales are perfectly balanced. This cannot be said to comport with a system in which the government advantages itself by allocating sufficient funds to detect and prosecute alleged wrongdoers while choosing to deny indigent defendants a meaningful opportunity to investigate the case. In this sense, the other governmental branches

seeking a judgment permitting it to act, without which unilateral action would be illegal. Included in this category, ironically, are neglect, abuse, dependency and termination of parental rights cases which the Court in Lassiter held that the Constitution does not require the automatic assignment of counsel for indigent parties as a matter of due process of law. Lassister, of course, was not litigated on the theory of separation of powers advanced in this Article. Another large category of cases is eviction proceedings involving tenants in public housing. Still another important category, of course, involves immigration. However, it is unclear whether and how the separation of powers theory advanced in this Article applies to the field of immigration, where checks and balances through the judiciary are ordinary unavailable or available to a lesser extent than in most other areas. The full implications of the argument advanced here in the context of non-criminal proceedings are beyond the scope of the Article. An even larger number of cases in which indigents face the power of the executive branch involve challenges to administrative rulings within executive agencies in such areas as public benefits, social security disability, tax assessments, unemployment benefits, and veteran benefits, among others. Here, again, whether and how the arguments developed in this Article apply to judicial review of administrative rulings still needs to be considered.

are not merely intruding upon the judicial functions; they are actively involved in a process — whether intended or otherwise — to arrange for the government to win most of the time without regard to the merits of the particular case. Iconic Justice is being tinkered with in the same way that a crooked casino might rig a roulette wheel.

We protect our liberty only by erecting a governmental structure capable of checking the branches of government from overreaching. That is the function we have given to the courts. When they are unable to perform it, our system has misfired. When they are unable to perform it because of choices made by another branch of government, a profound separation of powers questions is raised. It is a question that courts possess the inherent authority to address. Our very system of justice depends on a fully functioning independent judiciary. Courts have long understood this in countless ways. But they have not applied this core principal to indigent defense. It is long past time to do so.

When she recently visited many criminal courts around the country, Amy Bach claims to have seen time and again instances in which "the defense lawyer, the judge, and prosecutor formed a kind of a tag team – charge the accused, assign a lawyer, prosecute, plead, sentence – with slight regard for the distinctions and complexities of each case." This was not supposed to be. Unless our courts put a stop to it, there is little reason to think anyone else will.

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<sup>&</sup>lt;sup>302</sup> AMY BACH, ORDINARY INJUSTICE 2 (Metropolitan Books 2009). *See also* Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 692(1981) ("adversary procedures encourage a representative to view himself, not as a judge or administrator, but truly as an advocate. They encourage him to prepare thoroughly, to argue vigorously, and to insure that evidence likely to advance his client's cause is presented and considered. A prosecutor or defense attorney whose primary concern is to cut corners probably would find a regime of plea bargaining ideally suited to his goals").