THE PEOPLE'S RIGHT TO A WELL-FUNDED INDIGENT DEFENDER SYSTEM

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ABSTRACT

This Article re-imagines the Sixth Amendment's right to counsel, which has been treated exclusively as an individual right enforceable through the Due Process Clause, as a collective right of the People. It argues that there are vital structural protections inherent in the right to counsel that go well beyond an individual's due process rights. In particular, the Constitution was designed to ensure a robust system of checks and balances when executive power was exercised. Perhaps the paradigmatic example of the exercise of such power is the arrest and prosecution of an individual. At one time, the primary means for overseeing prosecutors was through the jury system. In the modern crush of criminal justice, however, juries play a statistically insignificant checking power function. This is the first Article to suggest that 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. In our adversarial justice system, judges are constrained from performing more than a very modest investigation into cases. Instead, if investigations conducted outside of the executive branch are to take place, they will be done by defense counsel.

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 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 defender system, one with the capacity to investigate cases on a regular basis, the executive branch ends up with a license to act which would have been unthinkable to the Framers of the Constitution who worked so carefully to

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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 the ability to carry out its duty to decide cases independently. The implications for this new understanding of the right to counsel are immense, not only allowing affirmative class-action challenges to under-funded indigent defender systems, but also requiring counsel for civil litigants whenever the government is the petitioner.

I.
INTRODUCTION

Many important features of criminal justice practice have changed dramatically over the past generation in the United States. Three stand out. First, the overwhelming majority of defendants charged with crimes in the United States today is indigent and represented by court-assigned counsel.[1] Second, these lawyers are commonly burdened with caseloads that make it impossible for them to conduct meaningful investigations into the charges.[2] Third, we no longer rely on an adjudicative system in which a statistically significant percentage of cases is resolved by a contested evidentiary hearing.[3]

1. *See* CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000) (stating that about 82% of state felony defendants and 66% of federal felony defendants use publicly financed counsel); STEVEN K. SMITH & CAROL J. DEFRANCES, U.S. DEP'T OF JUSTICE, INDIGENT DEFENSE 1 (1996) (stating that 80% of local jail inmates indicated in 1989 that they were assigned an attorney to represent them).

2. *See generally* DEBORAH L. RHODE, ACCESS TO JUSTICE 122–24 (2004) (stating that indigent defense services are grossly underfunded and overextended, particularly in comparison to the resources given to prosecutors and other government entities).

3. Ninety-seven percent of federal criminal defendants waive all trial rights and plead guilty.

Each of these changes has greatly impacted how the lower criminal courts function. Each has been written about extensively. But all previous discussions have considered these changes as independent variables. This article examines the implications of the combination of these three changes. Taken together, they have stripped the courts of their oversight function, upsetting the checks and balances that were a vital part of the Founders' vision for how the government was to operate.[4] Cumulatively, these changes have undermined the most important structural feature of American government: separation of powers.[5]

A generation ago, criminal courts still acted as a meaningful check on executive power. Either enough cases went to trial that juries still mattered, or defense attorneys conducted their own investigation into the facts of the case so that, by the time the accused pled guilty or was convicted, *somebody* other than the police or prosecutor had independently examined the case. Today, for the vast majority of cases, the only lawyering being conducted by the defense is pleading clients guilty without anyone outside of the executive branch conducting any kind of investigation.

When the executive branch petitions a court to enter a judgment, it does so because our system of separated powers prevents it from acting unilaterally on the matter. Courts were established not only to provide individuals with a fair proceeding; they also are supposed to check state action that has been invoked to interfere impermissibly with an individual's liberty.[6] To be sure, when defendants actually are given a fair trial, these two interests—the individual's in due process and society's in checking executive power—seamlessly merge. But they are independent interests.

In an inquisitorial system—in which the judge is responsible for investigating all aspects of the case—the systemic inadequacy of an indigent defender system might raise a due process claim, but it would not raise a

United States v. 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, 2008 (1992) (stating that ninety percent of cases are resolved by guilty pleas).

4. Morrison v. Olson, 487 U.S. 654, 693 (1988) ("[T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.' We have not hesitated to invalidate provisions of law which violate this principle.") (internal citation omitted).

5. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 742 (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."); Loving v. United States, 517 U.S. 748, 756 (1996) ("Even 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.").

6. *See* Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L.J. 961, 1003 n.204 (2011) ("[N]o matter what structural role is assigned to constitutional courts, the discourse of fundamental rights remains the *lingua franca* of judicial review.").

separation-of-powers claim. In the adversarial, American system of justice, judges perform an extremely passive role in adjudicating facts, leaving it to litigants to develop the record.[7] In other words, judges *depend* on defense counsel to investigate cases and to present any critical issue to the court's attention. When that does not happen, judges are unable to provide adequate oversight of executive action. When inadequate investigation of claims made against criminal defendants happens systematically, because of choices made by another governmental branch, an essential judicial function has been impaired.

A robust defender system should be understood as furthering the interests of the people for reasons other than high theory about the importance of checks and balances. The virtually free ride prosecutors enjoy when it comes to prosecuting low-level criminal cases exacts considerable costs on society. Many collateral consequences follow from such an inadequate defense system. American society has experienced an unprecedented increase in the incarceration rate,[8] resulting in the disenfranchisement of a historically high number of Americans who have been convicted of a felony.[9] Even more, in the past decade nearly one million non-citizen immigrants have been removed from the United States because they had been convicted of a crime.[10] In addition, too many American cities have suffered from police scandals, leading many Americans to wonder whether the police believe they can get away with almost anything.[11]

The judiciary performs its oversight role on executive power less frequently and less rigorously today than is good for anyone committed to constraining power. The crisis in indigent defense is high on the list of why this is so. Courts need to be able to rely on a vital ally when performing their oversight responsibilities. They depend on a robust indigent defender system that routinely investigates the underlying facts and circumstances of individual cases—providing the only truly meaningful check on executive power. This Article advocates a re-imagining of the role of defense counsel in criminal cases to serve as a vital tool for the structural protection against the 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.

Challenges to inadequate indigent defender systems invariably have been brought as Sixth Amendment claims focused on the rights of the individual defendant. For the most part, these challenges have failed.[12] A challenge focused on the collective rights of the people, however, would have to be considered in

7. Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1024 (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.").

8. *See infra* notes 155–156 and accompanying text.

9. *See infra* notes 157–161 and accompanying text.

10. *See infra* notes 162–166 and accompanying text.

11. *See infra* notes 167–1723 and accompanying text.

12. *See infra* notes 41–43 and accompanying text.

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—have improperly intruded on core judicial branch responsibilities, denying courts the opportunity to perform their essential functions. This shift from an individual's loss to society's loss would change the focus of the inquiry in dramatic ways. It 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 otherwise would spend 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 reverse claim. Separation of powers, which has long been a shield preventing courts from overseeing indigent defender systems, is instead a sword by which courts are authorized to decide for themselves whether indigent defender systems are adequate to allow courts to perform their constitutionally-assigned function. If courts find that they are not, they would be constitutionally empowered to fix the problem by insisting that more money be 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 defender 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 defender system—one with the capacity to investigate cases on a regular basis—the executive branch has a license that 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 for two reasons. First, 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). Second, the judicial branch is denied the ability to carry out its duty to decide cases independently.

This Article will proceed in five Parts. Part II describes the current crisis in indigent defense in the United States and the related concern that there is virtually no investigation conducted by anyone outside the executive branch when defendants are charged with crimes. Part III explores how challenges to systemic inadequacies in indigent defender systems have fared as class action challenges framed as anticipated violations of an accused's right to an effective lawyer, explaining first what an individual defendant is owed in Sixth

Amendment terms.

Part IV, the heart of the Article, develops the argument that a meaningful indigent defender system is necessary to ensure meaningful oversight on the exercise of prosecutorial power. This Part argues that the Sixth Amendment's right to counsel should come to be seen as a structural protection for everyone's rights, including those never arrested or prosecuted. To bolster the argument, this Part explains that trial judges are expected to be satisfied independently that there is a factual basis for the conviction before permitting a defendant to plead guilty and further explains why judges depend on defense counsel to perform investigations. It then shows how the huge upsurge in convictions over the past generation, combined with an ever-diminishing reliance on jury trials to check prosecutorial power, exacts significant costs on society that go well beyond the impact on individual defendants and their families.

Part V describes the elements of a new cause of action that challenges inadequate budgets for indigent defense as an encroachment on the judiciary. It explains that the action—available under all state constitutions—would allege that inadequate funding of indigent defense results in the systemic failure of courts to perform their essential oversight function, as well as an encroachment by both the legislative and executive branches on an essential judicial role. The Part also explains why defendants should have standing to bring the case, why it is justiciable, and how courts may remedy the constitutional violation.

Part VI discusses the advantages to viewing the systemic failure to investigate prosecutions in terms of accumulating power in the executive branch. It explains why there is hope that judges will take this new challenge more seriously than they have taken traditional challenges to the indigent defense crisis. Finally, this Part briefly explores ways in which a new conception of the indigent defense crisis may yield other gains. These gains may include helping judges recapture a better sense of their constitutional responsibilities and, even more broadly, recognizing the threat of accumulated executive power even when the government sues someone in a civil proceeding.

II.
THE CRISIS IN INDIGENT DEFENSE IN THE UNITED STATES

Nearly fifty years after the Supreme Court ruled in *Gideon v. Wainwright* that States must provide free lawyers for all accused felons[13] and twenty-eight years after it announced that the Constitution ensures some minimum level of quality in defense work,[14] almost everyone familiar with the state of indigent defense in the United States gives it a failing grade.[15] As Stephen Bright has

13. 372 U.S. 335 (1963).

14. Strickland v. Washington, 466 U.S. 668 (1984).

15. *See, e.g.*, Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 74 (1993) (finding most criminal defense

observed: "[n]o constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel."[16]

Paying for indigent defense is a state or local obligation. Funding methods across the United States vary widely from state to state, and often from county to county within the same state. According to Phyllis E. Mann, "[t]he administration of public defense services varies by jurisdiction and may be carried out by a state, a county, a city, an individual judge, or by every possible combination of these."[17] The three basic forms of indigent defense include: a statewide public defender office, a contract system, or an assigned counsel/appointment system.[18] Most jurisdictions use a combination of these three methods in delivering indigent defense representation.[19] The defender may be a private law office of a single attorney, a part-time defense lawyer who also handles other matters, a member of an assigned counsel panel who is paid by the case or has a contract with the court to accept assignments, or a full-time staff attorney in a large office.[20]

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 duties responsibly. 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. Those who write on the subject emphasize that court-assigned defense lawyers are overworked, underpaid, and, far too commonly, unable to perform even the most basic tasks which are essential to effective lawyering.[21] As Ronald Wright recently

systems in the United States are in "a state of perpetual crisis"). *See also* Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427 (2009).

16. Stephen B. Bright, *Turning Celebrated Principles into Reality*, CHAMPION, Jan./Feb. 2003, at 6. *See also* NAACP LEGAL DEF. & EDUC. FUND, INC., ASSEMBLY LINE JUSTICE: MISSISSIPPI'S INDIGENT DEFENSE CRISIS 6 (2003) (stating that the right to counsel is "functionally meaningless in Mississippi, a state which provides almost no regulation, oversight, or funding for indigent defense"). 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.' '[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 Contemporary Right-To-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1636 (2003) (quoting U.S. CONST. amend. VI; United States v. Wade, 388 U.S. 218, 226 (1967)).

17. Phyllis E. Mann, *Ethical Obligations of Indigent Defense Attorneys to Their Clients*, 75 MO. L. REV. 715, 716 (2010).

18. *Id.* at 725.

19. *Id.* at 725–26.

20. *Id.*

21. *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL

summarized, "[y]ear after year, in study after study, observers find remarkably poor defense lawyering."[22] It is beyond the purpose of this Article to prove these claims. Instead, they should be read as a proffer. The Article's inquiry is: if the playing field for government prosecution of indigent defendants is as unlevel as reported here, and if indigent defendants routinely are denied assigned counsel capable of undertaking any meaningful investigation into the underlying facts of the case, does this implicate the judicial branch's duty to protect its independence from undue encroachment by the other branches of government?

New York State's indigent defender system is one example of a system in crisis. In 2006, a blue ribbon commission appointed by then-Chief Judge Judith S. Kaye undertook a statewide independent investigation, which relied to a certain extent on a comprehensive report issued by the Spangenberg Group.[23] The Commission found 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.[24]

It concluded that there is "a crisis in the delivery of defense services to the indigent throughout New York State and that the right to the effective assistance of counsel . . . is not being provided to a large portion of those who are entitled to it."[25] 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 "contribute[d] to defense providers having only minimal contact with clients and their families."[26]

Finding that virtually every institutional defender office has too many

JUSTICE SYSTEM 64 (1999) ("At least every five years since *Gideon* was decided, a major study has been released finding that indigent defense is inadequate.").

22. Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 221 (2004).

23. ROBERT L. SPANGENBERG, JENNIFER W. RIGGS, JENNIFER M. SAUBERMANN, DAVID J. NEWHOUSE & MAREA L. BEEMAN, SPANGENBERG GRP., STATUS OF INDIGENT DEFENSE IN NEW YORK: A STUDY FOR CHIEF JUDGE KAYE'S COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES, FINAL REPORT (2006) [hereinafter SPANGENBERG REPORT]. The Spangenberg Group has earned a deserved reputation for expertise in examining assigned counsel programs for criminal defendants in many states over many years.

24. COMM'N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 3 (2006) [hereinafter KAYE COMMISSION REPORT].

25. *Id.* at 15. This finding is 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, *supra* note 23, at 155.

26. KAYE COMMISSION REPORT, *supra* note 24, at 17.

clients,[27] 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."[28]

The combination of excessive caseloads and inadequate budgets means that defender offices almost never perform out-of-court investigations. Spangenberg found in 2006 that many defender offices have no staff investigators or an insufficient number of them[29] and that some public defenders never use investigators in any of their cases.[30] The lack of resources compels public defenders to enter guilty pleas on behalf of their clients despite the fact that an investigation was never conducted.[31] One public defender admitted that because of his office's high caseload, they "'don't really file' pretrial motions in misdemeanor cases and [ ] they 'don't really try misdemeanors' at all."[32]

Researchers studying New York indigent defense in the 1980s made findings almost identical to those made in 2006. 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."[33] In more than 72 percent of homicide cases, 87 percent of non-homicide felony cases, and 92 percent of misdemeanor cases, no investigation of any kind was conducted.[34]

The New York system reveals just how meaningless judicial oversight has become. Judges routinely give no more than three to five minutes of court time to any given case.[35] The majority of arrests are disposed of at the first judicial

27. *Id.*

28. *Id.* at 18.

29. SPANGENBERG REPORT, *supra* note 23, at 49.

30. *See id.* at 49 (citing Steuben County's failure to hire a staff investigator as well as a legal aid defender's comment that he has not used an investigator "in a long time"). Another county's office spent only $1,345 on investigations in all of 2004 even though the office represented 1,128 clients in criminal and family court. *Id.*

31. Contested claims over facts in New York are an extreme rarity. According to Spangenberg, in 2001, the New York City Criminal Courts disposed of 98% of summons issued at the first arraignment. *Id.* at 142. 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). *Id.*

32. *Id.* at 144.

33. Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 337 (2002), *citing* Michael McConville & Chester Mirsky, *Criminal Defense of the Poor in New York*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 760–65 (1986-87). In large cities, the number of such "minor" arrests is increasing. *See* N.Y. Cnty. Lawyers Ass'n v. State, 763 N.Y.S.2d 397, 403 (N.Y. Sup. Ct. 2003) (explaining that in New York City there was a 20% increase in the filing of non-felony cases from 1995 to 2001).

34. McConville & Mirsky, *supra* note 33 at 762.

35. SPANGENBERG REPORT, *supra* note 23, at 143 (stating that one criminal court judge in Manhattan processes approximately 120 to 170 cases per day, leaving her approximately three to five minutes per case).

appearance by plea.[36] Therefore, the defendant almost always has met with his or her lawyer for only a few minutes before pleading guilty.[37]

This description of practice in New York is only one example of what happens in most states across the country. A report by the American Bar Association in 2004 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."[38] Moreover, because a vast number of people prosecuted in the United States are eligible for court-appointed counsel,[39] 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. In other words, rarely does a court-assigned lawyer do any of the staples of criminal defense work such as interviewing percipient witnesses, visiting the scene of the crime, or conducting any meaningful, independent, factual investigation.[40]

III.
CHALLENGING SYSTEMIC INADEQUACIES IN STATE COURTS

This Part describes traditional efforts to challenge systemic inadequacies in a state's indigent defender system. These efforts all have been framed in conventional Sixth Amendment terms, in which the core of the challenge is that the state's system is skewed to deny an individual defendant her constitutional

36. CRIMINAL COURT OF THE CITY OF NEW YORK, EXECUTIVE SUMMARY FOR THE JUDICIAL YEAR TO DATE ENDING JANUARY 2, 2000 (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).

37. *See* SPANGENBERG REPORT, *supra* note 23, at 143.

38. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE iv (2004) [hereinafter GIDEON'S BROKEN PROMISE], *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf. 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. *Id. See also* RHODE, *supra* note 2, at 126 (2004) (stating that bidding systems for indigent defense contracts results in a "race to the bottom," in which attorneys who can process the highest volume of cases in the shortest amount of time are the winners); David A. Simon, *Equal Before the Law: Toward A Restoration of* Gideon*'s Promise*, 43 HARV. C.R.-C.L. L. REV. 581, 590 (2008) (stating that 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).

39. *See* HARLOW, *supra* note 1, at 1 ("At felony case termination, court-appointed counsel represented 82% of State defendants in the 75 largest counties in 1996 and 66% of Federal defendants in 1998."); SMITH & DEFRANCES, *supra* note 1, at 1 (stating that 80% of local jail inmates were represented by appointed counsel in 1989).

40. *See generally* RHODE, *supra* note 2, at 122–24 (2004).

right to an effective lawyer. Later, in Part IV, the Article will describe and contrast these traditional efforts with a new cause of action: that the indigent defender system violates separation of powers.

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

Over the past generation, many lawsuits have been brought in federal and state courts challenging system-wide inadequacies in a state-operated indigent defender system.[41] All of these actions have one thing in common: the core of the challenge was that the state was maintaining an indigent defender system that violated the Sixth Amendment. These challenges have commonly floundered because of the substantive law on ineffective assistance of counsel established by the Supreme Court. Specifically, courts tend to prohibit anticipatory claims from

41. About ten such suits were filed between 1980 and 2000. *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 twenty 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 HUM. RTS. 11, 15 (2009). *See, e.g.*, Luckey v. Harris, 860 F.2d 1012 (11th Cir. 1988) (deciding a case after the indigent sought injunctive relief for deficiencies in indigent defense services); State v. Smith, 681 P.2d 1374 (Ariz. 1984) (deciding a case alleging bidding system for indigent defense representation inadequate); State v. Hanger, 706 P.2d 1240 (Ariz. Ct. App. 1985) (affirming dismissal of criminal charges with prejudice due to State's failure to pay for constitutionally and statutorily required costs for indigent defense); Arnold v. Kemp, 813 S.W.2d 770 (Ark. 1991) (holding that certain statutory expense and fee caps were unconstitutional); Corenevsky v. Superior Court, 682 P.2d 360 (Cal. 1984) (deciding a case after the defendant contested State's refusal to pay indigent defense costs); People v. Knight, 239 Cal. Rptr. 413 (Cal. Ct. App. 1987) (holding that a public defender contract that permitted attorneys to engage in private practice, did not allow for additional remuneration if the case went to trial, and limited investigator's fees, did not cause attorneys to render ineffective assistance of counsel); Hatten v. State, 561 So. 2d 562 (Fla. 1990) (holding that public defender did not provide effective representation due to backlog of cases); *In re* Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So. 2d 1130 (Fla. 1990) (discussing the duties of public defenders); State *ex rel.* Stephan v. Smith, 747 P.2d 816 (Kan. 1987) (holding that appointed attorneys to represent indigent are entitled to compensation); State v. Peart, 621 So. 2d 780 (La. 1993) (holding that the Constitution requires the legislature to establish a system to provide indigent defendants with qualified counsel and that defendants in section E of the Orleans Parish Criminal District Court generally were not provided with effective counsel); Kennedy v. Carlson, 544 N.W.2d 1 (Minn. 1996) (deciding case alleging bidding system was inadequate in providing indigent with effective defense counsel); State *ex rel.* Wolff v. Ruddy, 617 S.W.2d 64 (Mo. 1981) (establishing temporary guidelines to deal with the lack of funds in providing indigent defense); State v. Robinson, 465 A.2d 1214 (N.H. 1983) (holding a limit on attorney fees for indigent defense, as well as a failure to reimburse attorney for investigation, unconstitutional); State v. Lynch, 796 P.2d 1150 (Okla. 1990) (holding first that compulsory court appointment system might be unconstitutional under the state constitution on an as-applied basis, and second that the Supreme Court of Oklahoma would create a statewide system of compensation for court-appointed counsel); City of Mount Vernon v. Weston, 844 P.2d 438 (Wash. Ct. App. 1992) (holding that a public defender did not have the time to undertake appellate representation of indigent defendants at some overall savings to taxpayers).

being heard on the merits.[42] As a result, in most states today, the exclusive means by which litigants are able to complain about the quality of legal representation provided 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.[43]

42. *See Luckey*, 860 F.2d at 1017 ("[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."); Rodger Citron, *(Un)* Luckey v. Miller*: The Case For A Structural Injunction to Improve Indigent Defense Services*, 101 YALE L. J. 481, 492–94 (1991) (stating that plaintiffs must show actual injury before a court can grant injunctive relief). An accused ordinarily lacks standing to challenge an indigent defense scheme because she is unable to demonstrate a cognizable harm flowing from an inadequately funded program. *See, e.g*., People v. Dist. Court, 761 P.2d 206, 210 (Colo. 1988) (holding that a finding of ineffective assistance must be made after trial, not prospectively); Johnson v. State, 693 N.E.2d 941, 952–53 (Ind. 1998) (holding that in order for a defendant to successfully challenge his conviction on ineffective assistance of counsel grounds, he must show prejudice); Lewis v. Dist. Court, 555 N.W.2d 216, 220 (Iowa 1996) (rejecting the argument that indigents are harmed by the state fee guidelines); Hansen v. State, 592 So. 2d 114, 153 (Miss. 1991) (holding that statutory limits on fees for court-appointed counsel did not induce ineffective assistance of counsel). *See also* Los Angeles v. Lyons, 461 U.S. 95 (1983) (holding that an injunction against the Los Angeles Police Department to prevent police officers from using chokeholds could not be sustained because of standing); E.T. v. George, 681 F. Supp. 2d 1151 (E.D. Cal. 2010) (dismissing an action alleging excessive caseloads in abuse and neglect proceedings). The few federal class actions challenging the inadequacy of state-arranged indigent defense programs that 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) (dismissing an action because of comity concerns and standing). *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 justiciability grounds not involving federalism or abstention. *See, e.g*, Platt v. State, 664 N.E.2d 357, 363 n.5 (Ind. Ct. App. 1996) (citing a Minnesota case approvingly, where that case stated that such claims are too speculative); *Kennedy*, 544 N.W.2d at 5, 8 (dismissing the case based on ripeness). *But see* Benjamin v. Fraser, 264 F.3d 175, 186 (2d Cir. 2001) (stating "[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.").

43. *See, e.g.*, Citron, *supra* note 42, at 486 (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 the determination of whether one's right to counsel was violated could be determined only on 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 of counsel that their conviction violated due process because of "special circumstances." *See, e.g.*, Chewning v. Cunningham, 368 U.S. 443 (1962) (holding that a trial and conviction without counsel, after defendant requested counsel, entitled defendant to habeas relief); Hudson v. North Carolina, 363 U.S. 697 (1960) (holding that a failure to provide counsel following lawyer's withdrawal after co-defendant's plea violated due process); Bute v. Illinois, 333 U.S. 640 (1948) (holding there was no

1. What an Individual Defendant Is Owed: The Effective Assistance of Counsel

Despite well-known coverage of the inadequacy of funding for indigent defense and its negative effects on the capacity to provide effective representation,[44] the Supreme Court has ignored the problem.[45] Although the Court has addressed the subject of ineffectiveness of 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*[46] that effectiveness should be determined by whether counsel's conduct fell "within the range of competence demanded of attorneys in criminal cases."[47] Declining to employ a checklist for determining whether counsel's conduct was constitutionally deficient, the Court created a two-prong test that defendants seeking post-conviction relief must satisfy.[48] The "deficient performance" prong requires a defendant to show that counsel made errors so serious that "counsel's representation fell below an

due process violation where record was silent as to defendant's desire for counsel); Gryger v. Burke, 334 U.S. 728 (1948) (holding that state's failure to provide counsel during plea not a due process violation); Foster v. Illinois, 332 U.S. 134 (1947) (affirming a sentence imposed after a guilty plea, challenged on due process grounds because the defendant was not counseled regarding the benefits and costs of pleading guilty); Williams v. Kaiser, 323 U.S. 471 (1945) (holding that a case may not be dismissed for failure to state a cause of action after a defendant requested counsel and was denied it, and eventually pled guilty to a capital offense). 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 338. 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 determine when a defendant was wrongfully deprived of 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.

44. *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) (explaining how Texas does not provide any state funding for public defense yet executes the most defendants).

45. *But see* Miranda v. Arizona, 384 U.S. 436, 472 (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."). Indeed, the Court approvingly quoted additional language supporting that proposition in a footnote:

> 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.

Id. at 472 n.41 (quoting REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 9 (1963)).

46. 466 U.S. 668 (1984).

47. *Strickland*, 466 U.S. at 687 (quoting McMann v. Richardson, 397 U.S. 759, 770–71 (1970)).

48. *Id.* at 688–89.

objective standard of reasonableness" in light of "all the circumstances."[49] In addition, under the "prejudice" prong, the defendant must demonstrate that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[50] 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,"[51] 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" include not considering whether to interview a particular individual),[52] measured by an "objective standard of reasonableness."[53] 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.[54]

"[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."[55] 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.[56]

49. *Id.* at 688.

50. *Id.* at 694.

51. *Id.* at 686.

52. *Id.* at 689, 691 ("[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.").

53. *Id.* at 687–88.

54. *Id.* at 694.

55. Mickens v. Taylor, 535 U.S. 162, 166 (2002).

56. This was the import of Justice Marshall's dissenting opinion in *Strickland*:

> [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). Compounding this, as Stephanos Bibas has explained, retrospective reviews are difficult to assess because of cognitive bias. *See generally* Stephanos Bibas, *The*

As some commentators have noted, the *Strickland* 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."[57] 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, that when "the quality of representation prevailing in a community is poor, then the expectations set by the *Strickland* standard will be correspondingly low."[58]

2. Systemic Sixth Amendment Challenges

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.[59] But as of yet, none of these cases has improved the delivery of legal services in their states dramatically; according to commentators, their overall impact has been very small.[60]

It is undeniable however, that Sixth Amendment law is inhospitable to claims that court-assigned counsel (or the system by which counsel is assigned) is unconstitutional. *Webb v. Commonwealth*[61] illustrates how courts have handled claims involving the probability of a defendant receiving inadequate counsel. In *Webb*, a defendant in Virginia and his lawyer anticipated that caps on

Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel, 2004 UTAH L. REV. 1, 2 (2004). Ineffective assistance of counsel cases are examined in a 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.

57. *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1732 (2005) [hereinafter *Effectively Ineffective*]. In addition, *Strickland* invites challenges based on claims of ineffectiveness of counsel only after cases are completed. *Id.*

58. Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 500 (1993).

59. 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. Oct. 23, 1996); State v. Peart, 621 So. 2d 780 (La. 1993); Lavallee v. Justices in the Hampden Superior Court, 812 N.E.2d 895 (Mass. 2004); Recorder's Court Bar Ass'n v. Wayne Cnty. Court, 503 N.W.2d 885 (Mich. 1993); Duncan v. State, 774 N.W.2d 89 (Mich. Ct. App. 2009), *vacated and remanded*, 780 N.W.2d 843 (Mich. 2010); Kennedy v. Carlson, 544 N.W.2d 1 (Minn. 1996); State v. Quitman Cnty., 807 So. 2d 401 (Miss. 2001); White v. Martz, No. CDV-2002-133, 2002 WL 34377577 (Mont. Dist. Ct. July 25, 2002); Hurrell-Harring v. State, 930 N.E.2d 217 (N.Y. 2010); State v. Lynch, 796 P.2d 1150 (Okla. 1990); City of Mount Vernon v. Weston, 844 P.2d 438 (Wash. Ct. App. 1992).

60. *See Effectively Ineffective*, *supra* note 57, at 1735–41; Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1117–21 (2005) (admitting that state victories may be "limited in their long-term impact" and "were seemingly unable to sustain enduring structural or fundamental change to indigent defense systems").

61. 528 S.E.2d 138, 140 (Va. 2000).

the money allocated to the defense function would interfere with Webb's right to have an effective lawyer and sought a pretrial ruling that the statutory payment arrangement created a conflict of interest for defense counsel. 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.[62] 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.[63]

A recent decision by New York's highest court also is illustrative of the limits of prospective challenges involving ineffectiveness. In *Hurrell-Harring v. State of New York*,[64] the Court of Appeals agreed with an intermediate appellate court that a party may not claim before a criminal case is completed that an indigent defender system is unconstitutional because the attorneys appointed for the defendants have not, so far, provided them with effective assistance of counsel.[65] 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."[66] The court held that claims that the challenged indigent defender 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*.[67] The court ruled that all of the claims of outright denial of counsel could be heard without forcing a defendant to go to trial.[68]

The plaintiffs also alleged two other kinds of Sixth Amendment violations. These included the following:

62. *Id.* at 140 & n.1.

63. *Id.* at 142.

64. *Hurrell-Harring*, 930 N.E.2d 217.

65. *Id.* at 222 ("[G]eneral prescriptive relief is unavailable and indeed incompatible with the adjudication of claims alleging constitutionally ineffective assistance of counsel.").

66. *Id.* at 221–22.

67. The Court of Appeals reasoned as follows:

> "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 *Gideon*."

Id. at 222–24.

68. *Id.* at 227.

> 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.[69]

The court made it clear that these additional claims may or may not present a Sixth Amendment claim capable of redress 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*."[70]

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.[71] The former may not.[72]

69. *Id.* at 222.

70. *Id.* at 224–25.

71. Though its decision was later reversed by the Supreme Court of Michigan, the Michigan Court of Appeals, in *Duncan v. State*, 774 N.W.2d 89 (Mich. App. 2009), *rev'd* 784 N.W.2d 51 (Mich. 2010), went further than the New York Court of Appeals did in *Hurrell-Harring*. The court held that the *Strickland* test applies only in the postconviction context and "is not workable or appropriate to apply when addressing standing, ripeness, and related justiciability principles," explaining that "[i]t 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.* at 125. But 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.* at 125–26. 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. *Id.* at 137.

72. As the New York Court of Appeals reasoned in *Hurrell-Harring*:

> 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-

IV.
REINTERPRETATION OF DEFENSE COUNSEL AS THE PEOPLE'S RIGHT

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 process and society's in checking executive power—seamlessly merge. But they are independent interests. 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.[73]

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.[74] 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. 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.[75]

> 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.

Hurrell-Harring, 930 N.E.2d at 226.

73. *See* North Carolina v. Alford, 400 U.S. 25, 32 (1970) (explaining that ordinarily a plea must contain a factually-based admission by the defendant of guilt to the charge pled). *See also* FED. R. CRIM. P. 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.").

74. *See* Robertson v. United States *ex rel.* Watson, 130 S. Ct. 2184, 2188 (2010) (Roberts, C.J., dissenting) ("Our entire criminal justice system is premised on the notion that a criminal prosecution pits the government against the governed.").

75. *See* Muskrat v. United States, 219 U.S. 346, 357 (1911) ("The term [case] implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."). *See also* Flast v. Cohen, 392 U.S. 83, 94–101 (1968) (discussing how Article III of the United States Constitution limits federal court jurisdiction to "cases" and "controversies," which requires an adversarial component); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 242

A. Many Rights in the Bill of Rights Are More Than an Individual'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.").[76] 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 their implementation.[77] Anthony Amsterdam suggested more 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."[78] In doing so, he reminded us that the Fourth Amendment speaks in terms of the "right of the people," 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."[79] Why, he wondered, should the privacy interests protected by the Amendment be thought of as protecting personal rights of isolated individuals

(1937) (stating a case is justiciable only when there is "a dispute between parties who face each other in an adversary proceeding"); Goldstein, *supra* note 7, at 1022–23 ("[A]lmost from the beginning of American law, the courts were reluctant to accept plea bargaining as legitimate [within an adversarial system]. 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.").

76. U.S. CONST., amend. VI.

77. *See* Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, 8 SOC. PHIL. & POL'Y 196, 212 (2009) ("[T]he 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."); Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 722 (1994) (stating that "rather than protecting individual autonomy, rights are often the tools constitutional law uses to maintain appropriate structural relationships of authority"); Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 161 (1999) ("Many enumerated individual rights are inseparably tied to the architectural premises of the constitutional system . . . [and] 'have their roots in, and to some degree reflect back upon, directly organizational and institutionally focused features of the Constitution.'" (quoting 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-13, at 46 (3d ed. 2000))). *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 produce just results.").

78. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974).

79. *Id.*

when a more straightforward reading understands "the people" mentioned in the amendment to be "We the People"?[80]

More recently, and even more related to the Sixth Amendment, Akhil Amar advises that the Bill of Rights protections were not originally conceived as individual rights. Instead, they are structural protections against excessive executive power, protections that provide oversight of government action to the people. Most of the provisions in the Fifth, Sixth, Seventh and Eighth Amendments, Amar 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."[81] According to Amar, the Founders planned for a meaningful check on executive authority by requiring trials by jury.[82] In support, he cites Tocqueville's explanation of the function of juries in the United States. Tocqueville wrote, "[t]he jury is that portion of the nation to which the prosecution of the laws is entrusted."[83] Amar also quotes legislators of the day who regarded the jury as "the democratic branch of the judiciary power."[84] He reminds us that in his *Commentaries on the Constitution*, Joseph Story described the other provisions in the Sixth Amendment as "valuable appendage[s] of the trial by jury."[85] 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."[86] Even as late as 1898, the Supreme Court expressed its view that a criminal defendant could not waive a jury trial.[87]

80. *Id.*

81. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 82 (1998) [hereinafter AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION]. 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) [hereinafter Amar, *The Bill of Rights as a Constitution*] ("A close look at the Bill reveals structural ideas tightly interconnected with language of rights; states' rights and majority rights alongside individual and minority rights; and protection of various intermediate associations. . ."); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1017 (2006) (stating that "there is no denying [Amar's] claim that the Bill of Rights contains structural provisions that serve to protect rights," and that in the realm of criminal justice, at least, the separation of powers derives not just from Articles I, II, and III, but also subsequent additions).

82. AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION, *supra* note 81, at 88.

83. *Id.* at 95 (quoting 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293–94 (Phillips Bradley ed., Vintage 1945).

84. *Id.*

85. *Id.* at 97 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1785 (Boston, Hillard Gray, 1833)).

86. *Id.* at 104. *But see* Patton v. United States, 281 U.S. 276, 293, 297 (1930) (holding that the constitutional right to trial by jury is not "a part of the frame of government," but rather a "guarantee to the accused" which is waivable).

87. AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION, *supra* note 81, at 108 ("[I]ndeed, as late as 1898, the Supreme Court, per justice Harlan, was squarely on record as

Not only is the jury trial considered a structural protection against over-reaching by the government, the Constitution also guarantees a *public* trial 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."[88] Amar explains that a public trial and a jury trial provide the people not only with the authority to reject the government's claim and acquit the defendant, but also with useful insight into how the executive branch is operating, which is information they can use in the next elections.[89]

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."[90] 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,[91] or fairness or symmetry[92] (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 her right to counsel (in contrast, for example, with a public trial).[93] 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).

declaring that a criminal defendant could not waive jury trial."); Patton v. United States, 281 U.S. 276, 307 (1930) (under "ancient doctrine . . . the accused could waive nothing"); Thompson v. Utah, 170 U.S. 343, 353–54 (1898) (stating that an accused cannot waive a jury trial because the public has an interest in the accused's life and liberty). *See also* Albert W. Alschuler, *Plea Bargaining and its History*, 13 LAW & SOC'Y REV. 211, 224 (1979) (citing many state cases from 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, 242 F.2d 101, 113 (5th Cir. 1957) ("Justice and liberty are not the subjects of bargaining and barter."), *rev'd en banc*, 246 F.2d 571 (5th Cir. 1957), *rev'd per curiam*, 356 U.S. 26 (1958).

88. AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION, *supra* note 81, at 112 (emphasis omitted) (citations omitted).

89. *Id. 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, 65 (2003) ("The criminal jury provides yet an additional check—one from outside the government itself.").

90. Padilla v. Kentucky, 559 U.S. ___, 130 S. Ct. 1473, 1495 (2010) (Scalia, J., dissenting).

91. AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION, *supra* note 81, at 114.

92. *Id.* at 116.

93. Putting the waiver question to the side, Amar also acknowledges that "truth seeking" is another value which the Founders intended to further via the Sixth Amendment's rights to confront and subpoena witnesses, as well as to have counsel. *Id.* at 115.

B. Why Current Realities Justify Conceiving the Right to Counsel as the People's Right

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 officials, and judges were the more worrisome agents of government power."[94] First, as the significance of grand juries under the Fifth Amendment and the importance of petit juries under the Sixth Amendment have waned under the changing circumstances of modern criminal prosecutions—both were once understood by the Founders to be a vital feature of checks and balances[95]—the Sixth Amendment's right to counsel has waxed. In 1963, in *Gideon v. Wainwright*, 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.[96] In 1972, it expanded *Gideon's* reach by holding that no defendant could be imprisoned, even for a misdemeanor conviction, unless she had been provided counsel.[97] *Gideon* replaced the Founders' original understanding that indigent defendants could be left to defend themselves without the aid of counsel.[98] Second, contested trials have become the extreme exception in criminal cases; most defendants settle their cases by accepting a guilty plea.[99]

Though 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 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 almost all defendants plead guilty within a few days of arrest and before anyone, other than the prosecutor's office, has performed even a cursory investigation. What they undoubtedly would immediately grasp, however, is that the careful checks and balances they

94. Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1632 (2005).

95. *See* AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION, *supra* note 81, at 84–86.

96. Gideon v. Wainwright, 372 U.S. 335, 342–45 (1963).

97. Argersinger v. Hamlin, 407 U.S. 25, 40 (1972). *See also* Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (holding that the 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, 674 (2002) (holding that a person given a suspended thirty-day sentence and placed on probation is entitled to appointed counsel because a probation sentence may result in actual deprivation of liberty).

98. *See* Betts v. Brady, 316 U.S. 455, 471 (1942) ("[W]e are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case.").

99. Ninety-seven percent of federal criminal defendants waive all trial rights and plead guilty. United States v. Booker, 543 U.S. 220, 289 (2005) (Stevens, J., dissenting in part). *See also* Schulhofer, *supra* note 3, at 2008 (stating that approximately 90% of cases are resolved by guilty plea).

intended to create are non-existent in such a system.

Judges cannot perform meaningful oversight of executive power without a robust public defense system in place: defense lawyers are the only appropriate substitute for what the Founders expected juries to do at trial. Without a functional public defender bar, the "process" we get (we, the people, that is) is aptly described by Gerard Lynch, who is now a judge on the Second Circuit:

> 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.[100]

Amsterdam and Amar both conceive of the rights in the Bill of Rights as structural limitations on official power. Amsterdam argues that an atomistic view of the Fourth Amendment insufficiently protects liberty because it makes it that much more difficult to regulate executive power, which is the central purpose of the Bill of Rights.[101] As he persuasively reasons, "[t]o 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."[102] Among their most important concerns, according to Amsterdam, was "an intense sense of danger of oppression of the individual."[103]

C. Re-reading North Carolina v. Alford

In this vein, it is instructive to re-read *North Carolina v. Alford*, the 1970 Supreme Court case that held that courts may allow a defendant to plead guilty even though the defendant denies factual guilt.[104] The trial court, significantly, required extensive independent investigation into the facts of the case before accepting the plea. Alford's lawyer explained to the court that he interviewed all but one of Alford's alibi witnesses, and they strongly implicated him in the

100. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2122 (1998). *See also* Barkow, supra note 81, 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.").

101. Amsterdam, *supra* note 78, at 439.

102. *Id.* at 400.

103. *Id.*

104. North Carolina v. Alford, 400 U.S. 25, 38 (1970).

crime.[105] 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.[106] 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."[107] In Alford's words, "I'm not guilty but I plead guilty."[108]

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.[109] The difficulty in *Alford* was that 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."[110] 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."[111] "Ordinarily," the Court explained, "a judgment of 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."[112] 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."[113]

The Federal Rules for Criminal Procedure prohibit a judge from accepting a guilty plea without "determin[ing] that there is a factual basis for the plea."[114]

105. *Id.* at 27.

106. *Id.* at 28.

107. *Id.*

108. *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.

109. *Id.* at 38.

110. Brady v. United States, 397 U.S. 742, 748 (1970).

111. *Alford*, 400 U.S. at 33. The Court went on to state that "[s]ome courts, giving expression to the principle that '[o]ur law only authorizes a conviction where guilt is shown,' require that trial judges reject such pleas." *Id.* (quoting Harris v. State, 172 S.W. 975, 977 (1915)).

112. *Id.* at 32.

113. *Id.*

114. FED. R. CRIM. P. 11(b)(3). According to the Supreme Court, "[T]here 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." *Alford*, 400 U.S. at 35 n.8.

Most states have almost identical rules for accepting admissions.[115] Although the Court held that "an express admission of guilt . . . is not a constitutional requisite to the imposition of criminal penalty,"[116] 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,"[117] it did so only after being satisfied that "the record before the judge contains strong evidence of actual guilt."[118] Importantly, the Court stressed that Alford was permitted to plead guilty only after it independently found both that the evidence against him "substantially negated his claim of innocence"[119] and that this incriminating evidence allowed the trial judge to "test whether the plea was being intelligently entered."[120] The Court explained 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."[121]

To one familiar with goings-on in modern municipal criminal courts, this account is likely 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 for such a factual basis exemplifies how courts are to exercise their proper role in our system of separated powers.[122]

"Throughout its history . . . 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." *Id.* The Court also expressly kept alive the possibility that a court could refuse to accept a plea of guilty because the defendant continued to assert her innocence. *Id.* at 38 n.11. For the history of nolo contendere 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).

115. *Alford*, 400 U.S. at 38 n.10.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 38.

120. *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." *Id.* at 38 n.10 (citing Griffin v. United States, 405 F.2d 1378, 1380 (D.C. Cir. 1968); Bruce v. United States, 379 F.2d 113, 119 (1967); Commonwealth v. Cottrell, 249 A.2d 294 (Pa. 1969)). The Court also cited cases supporting the proposition that "until the judge taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence," the judge should not accept the plea. *Id.* (citing 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 (10th Cir. 1952)).

121. *Id.* at 32.

122. *Cf.* Smith v. Robbins, 528 U.S. 259, 294–95 (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

Note that what happened in *Alford* is twice removed from what happens regularly in criminal court today. It is not merely that courts no longer make such independent inquiries, but that the accused's court-assigned counsel does not either.[123] Although today *Alford* is considered to be principally about allowing defendants to plead guilty despite professing innocence, the case deserves more prominence as a statement of what judges ought to do in all plea cases, including those in which the defendant admits her guilt. The concern the Court expressed in *Alford*, 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 court's independent responsibility to satisfy itself that sufficient inquiry into the facts of a case precedes the plea of guilty applies without distinction to those cases in which the accused claims she is factually innocent and claims she is factually guilty. In both instances, a formal adjudication of guilt constitutes an independent assessment by the court that the adjudication is appropriate.

D. Judges Rely on Defense Lawyers to Investigate in an Adversary System

The systemic inadequacy of an indigent defender 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."[124] In the American system of justice, judges perform an extremely passive role in adjudicating facts.[125] In other words, in our system of justice, judges *depend* on

best arguments or championed his cause to the degree contemplated by the adversary system. . . . To guard against the possibility, then, that counsel has not done the advocate's work of looking hard for potential issues, there must be some prod to find any reclusive merit in an ostensibly unpromising case and some process to assess the lawyer's efforts after the fact. A judicial process that renders constitutional error invisible is, after all, itself an affront to the Constitution.").

123. *See supra* n. 23–40 and accompanying text.

124. Sanchez-Llamas v. Oregon, 548 U.S. 331, 357 (2006).

125. *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 System*, 64 IND. L.J. 301, 302 (1989) ("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

defense counsel to investigate cases and to present any critical issue to the court's attention; otherwise, only the prosecution participates in the adjudicative process.[126] 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."[127] When that does not happen, judges are unable to perform their oversight role.[128] When it does not happen systematically because of choices made by another governmental branch, an essential judicial function is encroached.

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."[129] One obstacle preventing appropriate judicial oversight, interestingly enough, is a concern grounded in separation of powers: judges ought not monitor too carefully the choices of prosecutors lest courts intrude on the executive function.[130] As a result, there is

passive contributor to the proceeding. *See* Bruce Weber, *Umpires v. Judges*, N.Y. TIMES, July 12, 2009, at Week in Review 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.

126. *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.").

127. O'Shea v. Littleton, 414 U.S. 488, 494 (1974) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). *See also* Robert W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 505 (1998) ("[E]very trial judge knows [that] the task of determining the correct legal outcome is rendered almost impossible without effective counsel.").

128. 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.*, 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); 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); Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367 (2008); 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); 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, 426 (2004).

129. Barkow, *supra* note 81, at 1024 (2006). Indeed, Professor Barkow goes on to note 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.'" *Id.* at 1024–25 (quoting Lynch, *supra* note 100, at 2135).

130. *See generally* Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV.

relatively little that judges by themselves can do to oversee meaningfully prosecutorial power;[131] they need an effective defender system to do the spade work for them.

Municipal courts often violate the minimum requirement for taking pleas in federal court. The minimum standard requires that judges are satisfied that there is a "factual basis" for the plea.[132] But even the federal rule does not meet the court's independent responsibilities to provide checks and balances.[133] In many cases, the court finds a "factual basis" as long as the defendant was at a particular place at the particular time she was arrested.

For example, consider a community in which indigent people are arrested because the police aggressively apply a "broken windows" campaign. Three young men are arrested and charged with criminal trespass and illegal loitering.[134] 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 the police do not find anything incriminating on any of them, all three are arrested, held in a police cell overnight, and arraigned the next day. At the arraignment, each is given a court-assigned defense lawyer. Each lawyer recommends, without performing any investigation, that the defendants 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 find there was a factual basis for the arrest because the defendants will acknowledge that they were sitting on the stoop in front of a building in which none of them resided. However, that finding should not justify ending the case with a conviction. There remains a distinct possibility that the arrests were baseless or that the three defendants committed no crime; in fact, the Second Circuit held in 1993 that the criminal loitering statute is unconstitutional.[135] For

1433, 1434 (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).

131. *See* Brown, *supra* note 94, at 1612 ("[M]uch fact-finding practice, especially in routine state court cases, is fact-finding run by the executive branch with little check from defendants or courts.").

132. 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) ("The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice . . . .'" (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970))).

133. *See* Lynch, *supra* note 100, at 2120 ("[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.").

134. *See, e.g.*, N.Y. PENAL LAW § 240.35(1) (McKinney 1989) ("A person is guilty of loitering when he: 1) Loiters, remains or wanders about in a public place for the purpose of begging."), *invalidated by* Loper v. New York City Police Dept., 999 F.2d 699 (2d Cir. 1993).

135. *See* Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85, 85–86 (2007) (describing routine arrests that resulted in thousands of guilty pleas for the crime of loitering for the purpose of begging, a law that years earlier had been declared unconstitutional by the United

this reason, the rule that a court must determine that there is a "factual basis" for the plea does not begin to respond to the concern in this Article that courts no longer perform a meaningful oversight role in the criminal justice system.

Many prosecutors—and unfortunately many judges—have accepted the modern plea bargaining system because of the widespread belief that virtually all persons charged with crimes are guilty.[136] For them, accepting pleas even without any defense investigation raises little concern. There is, of course, no empirical evidence identifying the percentage of those convicted who are factually guilty.[137] The important point is that, in practice, guilt is only one (and, often, a relatively unimportant one) of many factors that count in ascertaining whether or not a plea of guilty is appropriate.[138]

The meaningful test for separation-of-powers purposes is whether, in light of the facts, the substantive law, and the multitude of other laws regulating police action (such as the Fourth Amendment), the prosecutor should be allowed to independently and unilaterally secure a conviction.[139] This is what is meant when determining 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 a

States Court of the Appeals for the Second Circuit in *Loper*, 999 F.2d at 705).

136. *See* Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 808 n.442 (2006) ("[The] tendency to view not-guilty verdicts primarily as the system's failure to convict the guilty follows from the widely held judicial belief that most defendants are guilty."). Some observers argue that this belief extends to many defense lawyers. MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 61 (1977) (stating that many defense lawyers believe that "[m]ost of the defendants are factually guilty and have no legal grounds to challenge the state's evidence").

137. 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-Ayal, *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.").

138. This sometimes overlooks the multitude of reasons why innocent defendants choose to plead guilty, including to avoid risk and to gain the immediate benefit of physical freedom. *See, e.g.*, Brown, *supra* note 94, at 1612 (stating that even innocent defendants often plead guilty if they are risk averse or plausibly distrust the adjudicative process); Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 494 & nn.56–58 (2000) (explaining both the pressures put on innocent defendants to plead guilty, as well as relating specific instances where innocent defendants were pressured into pleading guilty). *See also* Schulhofer, *supra* note 3, at 2001 ("[There is a] social interest in not punishing defendants who are factually innocent . . . even if individual defendants would prefer to have that option.").

139. *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) ("[The] separation of powers political theory . . . calls for an independent particularizer with power to . . . ascertain the precise facts of the particular case.").

verdict of not 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 comfortably conclude that many plead guilty without getting the opportunity to mount a defense. In perhaps the only study of its kind, Stephen Schulhofer's careful analysis of the Philadelphia criminal courts in the 1980s led him to conclude that at least 57 percent of filed cases "involved legitimately triable issues."[140] One can only assume that the percentage of triable issues in cases has increased as the number of arrests has increased over the past twenty years.[141]

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 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 above and beyond the benefits to each individual defendant.[142] To safeguard the criminal defendant's right to "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.'"[143]

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

140. Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1081 (1984).

141. *See* Bruce Western, PUNISHMENT AND INEQUALITY IN AMERICA 46 (2006) (reporting a "fourfold growth in drug arrest rates from the late 1960s to 2001"). *See also* K. Babe Howell, *Broken Lives From Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 281 (2009) (reporting that in New York City in 1989, before the police implemented its zero tolerance policy, the number of non-felony arrests was approximately 86,000. In 1996, after the policy was fully implemented, it had soared to 176,000).

142. *See, e.g.*, Polk Cnty. v. Dodson, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness."). *See also* Cuyler v. Sullivan, 446 U.S. 335, 343 (1980) (stating that without a lawyer for the defendant "able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself"); Herring v. New York, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

143. California v. Trombetta, 467 U.S. 479, 485 (1984) (quoting United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982)).

> of challenging their testimony, he has the right to present his own witnesses to establish a defense.[144]

That is why, among other reasons, interfering with a defendant's right to elicit material evidence impermissibly interferes with the "integrity of the fact-finding process."[145]

Moreover, even though the Supreme Court has focused on the importance of fact-gathering and presentation in contested trials, the underlying values captured by the Court apply just as powerfully throughout the earlier stages of the attorney-client relationship, from the time that counsel is first assigned to a case until counsel is in a position to advise a defendant whether to take a plea or go 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."[146] Even more, because courts are responsible for insisting 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.[147]

It is a well-worn concept that a true adversary process is "essential to the integrity of the judicial process."[148] 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 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.[149] 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

144. Washington v. Texas, 388 U.S. 14, 19 (1967).

145. Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (quoting Berger v. California, 393 U.S. 314, 315 (1969)).

146. United States v. Nixon, 418 U.S. 683, 709 (1974). *See also* United States v. Reynolds, 345 U.S. 1, 12 (1953) ("[S]ince the Government which prosecutes an 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 his defense.").

147. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 79 (1985) (holding that a State must pay for a psychiatric evaluation for an indigent defendant where sanity is seriously in question because "a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained."). *See also* Little v. Streater, 452 U.S. 1, 16–17 (1981) (holding that a State must pay for blood tests for an indigent putative father's defense of a paternity suit).

148. United States v. Johnson, 319 U.S. 302, 304–05 (1943).

149. Hamdi v. Rumsfeld, 542 U.S. 507, 535–36 (2004).

maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions."[150]

The right to serve on a jury protects the people's right to participate in government decisionmaking.[151] The people's right to a robust indigent defender system in every community does the same. As an important report on criminal justice 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 to the larger interests of the community.
>
> . . . [T]he loss in vitality of the adversary system . . . significantly endangers the basic interests of a free community."[152]

A robust indigent defender system serves as a crucial structural check on the executive branch's otherwise unfettered power to expand the discretionary authority of police and prosecutors. As the following Section shows, this discretion has significant consequences not only for the day-to-day practices of law enforcement but also in the political arena through its effects on voter disenfranchisement and immigration status.

E. 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 these impacts 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.[153] As

150. *Id.* at 536.

151. *See* Batson v. Kentucky, 476 U.S. 79, 87 (1986) ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."); Taylor v. Louisiana, 419 U.S. 522, 530 (1975) ("Community participation in the administration of the criminal law . . .[ ] is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.").

152. ATTORNEY GEN.'S COMM. ON POVERTY AND THE ADMIN. OF FED. CRIMINAL JUSTICE, 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)).

153. 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 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

Steven Zeidman reminds us, "every single arrest is brutally important, significant and meaningful to the person arrested."[154] Sometimes we forget, however, that unchecked executive power harms more than those unfortunates who are wrongfully arrested. Many collateral consequences follow from such an inadequate defense system. And 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.

1. Massive Incarceration of Americans

There are now nearly one million total felony convictions in the United States every year.[155] Current incarceration rates are the unprecedented result of about a six-fold increase over the past thirty years. Since 1970, American incarceration rates have climbed from 100 to almost 700 incarcerated persons per 100,000 people, "a percentage unprecedented in American history and among industrialized nations."[156] To be sure, get-tough laws and harsh prison sentences are not themselves the result of an inadequate defender system. But it hardly needs clarification that the soaring incarceration rate in the United States is the consequence of policy decisions made by elected legislative and executive officials.

2. Felony Disenfranchisement

Consider the implications purely in separation-of-powers terms. Because of voter disenfranchisement laws in effect in all but two states in the country,[157] it is estimated that about 5.3 million Americans are denied the right to vote.[158] Estimates suggest that 13 percent of African American men are prohibited from voting because of their criminal records.[159] In Florida alone, as of Election Day in 2000, more than 600,000 people were prohibited from voting because of their

innocence, and neither can the availability of a remedy for its denial.

Hurrell-Harring v. State, 930 N.E.2d 217, 227 (N.Y. 2010).

154. KAYE COMMISSION REPORT, *supra* note 24, at Additional Commentary by Steven Zeidman 5. *See also* Robertson v. United States *ex rel.* Watson, 130 S. Ct. 2184, 2185 (2010) ("The terrifying force of the criminal justice system may only be brought to bear against an individual by society as a whole . . . .").

155. Brown, *supra* note 94, at 1595.

156. *Id.*

157. Only Maine and Vermont allow incarcerated prisoners to vote. Bailey Figler, *A Vote for Democracy: Confronting the Racial Aspects of Felon Disenfranchisement*, 61 N.Y.U. ANN. SURV. AM. L. 723, 743 (2006).

158. *Felony Disenfranchisement*, SENTENCING PROJECT (last visited Apr. 8, 2012), http://www.sentencingproject.org/template/page.cfm?id=133. *See also* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 76 (2006) (determining that on Election Day in 2004, felon disenfranchisement resulted in 5.3 million Americans disenfranchised). Given growth in the general and inmate populations, the total is almost certainly larger today.

159. MANZA & UGGEN, *supra* note 15858, at 77.

criminal records,[160] leading one set of researchers to conclude that Al Gore would have won the state of Florida's Presidential election by more than 60,000 votes if Florida did not disenfranchise felons.[161]

3. Removal of Non-Citizens from the Country

The combination of reduced executive discretion in immigration proceedings and unchecked executive authority in criminal proceedings has had a tremendous impact on immigrants and immigration practice. Before 1996, the Attorney General could grant relief to persons subject to deportation because of a state or federal criminal conviction.[162] Between 1989 and 1995, the Attorney General prevented the removal of more than 10,000 non-citizens.[163] In 1996, however, Congress curtailed the Attorney General's discretion to grant relief from deportation, making it "practically inevitable" that a noncitizen will be deported upon his or her conviction of a removable offense.[164] Subsequently, between 1999 and 2010, federal immigration authorities removed 1,021,581 non-citizen immigrants from the United States based on their criminal convictions.[165] By removing vast numbers of non-citizens, the executive branch ensures that fewer people will remain in the United States and be able to become citizens (and voters) in the future. As deportees often bring their citizen children and other family with them when they are forced to leave, official figures understate the total number of persons removed.[166]

The combination of felon disenfranchisement and immigrant removal practices means that literally millions of potential voters are from voting. This raises manifest separation-of-powers questions when it is linked to a system that encourages overreaching by executive power by underfunding the indigent defender system because executive branch decisions may end up impacting future elections.

160. Figler, *supra* note 157, at 724.

161. Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 792–93 (2002).

162. Immigration and Nationality Act of 1952 § 212(c), 8 U.S.C. § 1182(c) (1994) (stating that the Attorney General has discretion to allow certain illegal immigrants to stay in the United States, even though they might legally be deported) (repealed 1996).

163. INS v. St. Cyr, 533 U.S. 289, 296 (2001).

164. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1480 (2010).

165. U.S. DEP'T OF HOMELAND SEC., YEARBOOK OF IMMIGRATION STATISTICS 2010: ALIENS REMOVED BY CRIMINAL STATUS AND REGION AND COUNTRY OF NATIONALITY, *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/table37d.xls.

166. *See* Maria del Pilar Castillo, *Issues of Family Separation: An Argument for Moving Away From Enforcement-Only Solutions to Our Immigration 'Problem,'* 25 TEMP. INT'L & COMP. L.J. 179, 180 (2011) ("A large number of these individuals have citizen children who depend on them for their well-being and will be forced to leave the country as a result of the parent's deportation.").

4. Police Scandals and Lawlessness

It is impossible to calculate the full costs to society of the lack of checks on executive power over the past generation. Among the incalculable harms, we cannot ignore the all-too-common scandals that periodically come to light (long after they have taken a deep toll) in local police departments. Undercover police officers frame suspects by planting drugs on them,[167] or fabricating evidence.[168] Police frequently assault individuals and then cover up their crimes by arresting their victims and making false accusations.[169] Crime laboratory workers falsify

167. Examples of the police framing suspects by planting drugs on them are widespread across the country. Cities that have had particular problems with police corruption include Camden, New Jersey, *see* Matt Katz, *Camden Police Scandal Has Widespread Consequences*, PHILA. INQUIRER (Feb. 21, 2010), http://www.philly.com/philly/news/year-in-review/20100221_Camden_police_scandal_has_widespread_consequences.html; *Camden Police Corruption Scandal Unraveled, 185 Drug Cases Dropped*, TIMES NEWSLINE (Mar. 20, 2010), http://www.timesnewsline.com/news/Camden-Police-Corruption-Scandal-Unraveled--185-Drug-Cases-Dropped-1269081864/; Chicago, Illinois, *see* Matthew Walberg, *City Cops Acquitted of Making Up Drug Charges*, CHI. TRIB. (Jan. 28, 2010), http://articles.chicagotribune.com/2010-01-28/news/1001271043_1_drug-charges-police-officers-tactical-officer; Oakland, California, *see* Evelyn Nieves, *Police Corruption Charges Reopen Wounds in Oakland*, N.Y. TIMES, November 30, 2000, at A18; Paul T. Rosynsky, Kelly Rayburn & Harry Harris, *Oakland Police Department Wants to Fire 11 Officers in Warrant Scandal*, OAKLAND TRIB., Jan. 15, 2009; Kim Curtis, *Lawsuit Filed in Oakland Police Scandal*, SEATTLE TIMES (December 10, 2000), http://community.seattletimes.nwsource.com/archive/?date=20001210&slug=TTAP2ISKP; Jim Herron Zamora, *What Brown Got Done; Progress Made on Economy—Mixed Success on Crime, Schools*, S.F. CHRON. (Jan. 29, 2006), http://www.sfgate.com/politics/article/OAKLAND-What-Brown-got-done-Progress-made-on-2505686.php; Los Angeles, California, *see Los Angeles Police Review Big Scandal*, N.Y. TIMES, Mar. 1, 2000, at A12, *Police Whistle-Blower Sentenced to Prison*, N.Y. TIMES, Feb. 26, 2000, at A16; *L.A. Police Scandal Deepens*, BBC NEWS (Jan. 26, 2000), http://news.bbc.co.uk/2/hi/americas/619197.stm; New York, New York, *see* Tim Stelloh, *Detective Is Found Guilty of Planting Drugs*, N.Y. TIMES, Nov. 2, 2011 at A26, http://www.nytimes.com/2011/11/02/nyregion/brooklyn-detective-convicted-of-planting-drugs-on-innocent-people.html; and Philadelphia, Pennsylvania, *see* Francis X. Clines, *Philadelphia Monitor Takes Police To Task*, N.Y. TIMES, Apr. 4, 2001, at A12; Michael Janofsky, *Philadelphia Police Scandal Results In a Plan for a Suit Claiming Racism*, N.Y. TIMES, Dec. 12, 1995, at D23; Don Terry, *Philadelphia Shaken by Criminal Police Officers*, N.Y. TIMES, Aug. 28, 1995, at A1.

168. *See An Officer's Guilt Casts Shadow on Trials*, N.Y. TIMES, Mar. 4, 1993, at B6 (discussing how a "rising star" in the New York State Police's "elite criminal investigations arm" was caught fabricating fingerprints in multiple cases only after he boasted of it in a job interview with the CIA).

169. There are examples of this throughout the United States, in places such as Oakland, California, *see* Jaxon Van Derbeken & Susan Sward, *Probe of Chief's Son Called Unusual: Feds Rarely Intervene in Cases of Alleged Brutality by Police*, S.F. CHRON., Dec. 7, 2003, at A29; Pittsburgh, Pennsylvania, *see* Ramit Plushnick-Masti, *Family Plans Lawsuit Over Pa. Teen's Beating*, BOSTON.COM (Jan. 27, 2010), http://www.boston.com/news/nation/articles/2010/01/27/family_plans_lawsuit_over_pa_teens_beating/; Maryland, *see* Ruben Castaneda, *U-Md. Officials Want Inquiry in Video Sought in Beating*, WASH. POST, Apr. 21, 2010, at B2; West Virginia, *see* Editorial, *Cleanup State Police Reforms*, CHARLESTON GAZETTE, Dec. 7, 2000, at 4A; New York, New York, *see* Sewell Chan, *City Room: The Abner Louima Case, 10 Years Later*, N.Y. TIMES CITY ROOM BLOG (Aug. 9, 2007), http://cityroom.blogs.nytimes.com/2007/08/09/the-abner-louima-case-10-years-later/; Philadelphia, Pennsylvania, *see* Kimberly J. McLarin, BLACK PLAINCLOTHES OFFICER SAYS THE POLICE BEAT HER, N.Y. TIMES, Jan. 13, 1995, at A14; and Brooklyn, New York, *see* Al Baker, *Drugs-for-Information Scandal Shakes Up New*

evidence, fail to follow necessary safeguards, and taint cases throughout the United States.[170] Often, these lawless acts result in the real wrongdoers escaping apprehension, including those instances where the police are themselves the criminals, because no one is policing them.[171]

In addition, as Albert Alschuler persuasively demonstrated more than forty years ago, the potential deterrent effect created by the exclusionary rule is undermined when the police do not expect anyone to challenge their version of what happened.[172] As a consequence, unconstitutional police behavior results in

York Police Narcotics Force, N.Y. TIMES, Jan. 23, 2008, at B1; Christine Hauser, *In Brooklyn, Police Work Is Undone By Scandal*, N.Y. TIMES, Feb. 5, 2008, at B1.

170. Places that have had crime lab scandals include San Francisco, California, *see* Michael Winter, *S.F. Police Lab Scandal May Torpedo 1,900 Drug Cases*, USA TODAY (Mar. 29, 2010), http://content.usatoday.com/communities/ondeadline/post/2010/03/sfpd-lab-scandal-may-torpedo-1900-drug-cases/1; Michigan, Texas and West Virginia, *see* Solomon Moore, *Study Calls for Oversight of Forensics in Crime Labs*, N.Y. TIMES, Feb. 19, 2009, at A13; Paul J. Nyden, *Crime Lab Back in Court: New Charges Bring Up 1980s Zain Scandals*, CHARLESTON GAZETTE, Apr. 2, 2006, at A1; New York, *see* Nicholas Confessore, *Police Review Lab Work After Suicide of Scientist*, N.Y. TIMES, June 12, 2008, at B1; Brendan J. Lyons, *Probe: Crime Data Faked*, TIMES UNION (Albany), Dec. 18, 2009, at A1; and Houston, Texas, *see* Steve McVicker, *Crime Lab Investigator to Target Specific Cases; Focus Will Be on Those in Which Team Suspects Injustice, He Says*, HOUS. CHRON., Jan. 11, 2006, at A1; Roma Khanna, Lawmaker to Hold Crime Lab Hearings—Whitmire Says HPD, State Woes Have Hurt Public Confidence in the Justice System, HOUS. CHRON., Sept. 4, 2004, at A1.

171. According to the U.S. General Accounting Office, between 1993 and 1997, the number of police officers 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. GEN. ACCOUNTING OFFICE, INFORMATION ON DRUG-RELATED POLICE CORRUPTION 35 (1998). The report also lists a selection of public investigations into police corruption in drug-enforcement units. *Id.* at 36–37. *See also* Al Baker & Jo Craven McGinty, *N.Y.P.D. Confidential*, N.Y. TIMES, Mar. 26, 2010, at MB1 ("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."); Baker, *supra* note 169, at B1; Hauser, *supra* note 169, at B1; Dirk Johnson, *Police-Corruption Charges Shake up a Chicago Suburb*, N.Y. TIMES, Oct. 13, 1996, at A14; David Kocieniewski & Kit R. Roane, *The Scandal at Midtown South: The Precinct; Coveted Post Amid an Underworld of Enticements*, N.Y. TIMES, Jul. 18, 1998, at B3; Mike McPhee, *Officer accused of taking money: Cop demanded $ 70, LoDo bar patron says*, DENVER POST, Jul. 22, 2000, at B1; Selwyn Raab, *New York's Police Allow Corruption, Mollen Panel Says*, N.Y. TIMES, Dec. 29, 1993, at A1; Don Terry, *7 Chicago Police Officers Indicted in Extortion Scheme*, N.Y. TIMES, Dec. 21, 1996, at 12; Joseph B. Treaster, *Convicted Police Officer Receives a Sentence of At Least 11 Years*, N.Y. TIMES, Jul. 12, 1994, at A1.

172. *See* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 82–83 (1968) (explaining that in a system where a prosecutor seems to be getting plea deals in every case, a police officer may decide to engage in unconstitutional conduct because it is more likely than not that the defendant will plead guilty to something). *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," which includes testimonial perjury, documentary perjury and falsification of police records which were found, in New York City at least, to be "probably the most common form of police corruption facing the criminal justice system." (quoting COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP'T, CITY OF NEW YORK, COMMISSION REPORT OF 1994, at 11 (1994), *available at* http://www.parc.info/reports/pdf/mollenreport.pdf)).

successful prosecutions because defendants are denied the means to challenge illegal searches and seizures.

It is impossible to say how American society would differ if every defendant were given a lawyer with the same time and resources to investigate the circumstances of her arrest as lawyers purchased by high profile defendants. It is, of course, pure fantasy to imagine living in such a place. But the further we permit ourselves to stray from that vision, the more we encourage a form of lawlessness that few Americans would be proud to call their own.[173]

American society as a whole has much at stake in ensuring that executive power is meaningfully checked on a regular basis. Our normative laws are not what distinguish us from totalitarian regimes. It is our commitment to authorizing one branch of government to remain independent from executive power to prevent usurpation of control. However, executive power is increasingly used to advance tyrannical policies, such as eliminating noise at national political conventions and preventing mass demonstrations. These actions are more associated with governments whose chief characteristic is doing whatever 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, investigating executive action. However, under the current arrangement, in which the circumstances of indigent defendants' arrests are not investigated, the executive branch understands that its actions are rarely, if ever, examined. The only meaningful constraint on the exercise of executive power is, therefore, self-imposed. When trials occurred regularly, such that the police and prosecutors would not know which cases would be thoroughly examined, the auditing system worked well enough. But it no longer does. Today, it is as if the federal government announced it was eliminating audits of 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 executive power. The crisis in indigent defense is a large part of this problem. The findings regarding the inadequacy of counsel for the indigent confirm that there has been minimal oversight of executive power when it comes to low-level, quality of life arrests, which disproportionately affect persons assigned counsel by the state.

173. Steven Zeidman, a member of the Kaye Commission, which studied New York's indigent defense system, wrote a powerful separate statement to the Commission's recommendations. In it, he wondered whether a system in which 69% of all misdemeanor defendants plead guilty at arraignment contributed in any way to the variety of scandals in New York during the same period, including police graft and misconduct as well as an Attorney General investigation into police stop and frisks. KAYE COMMISSION REPORT, *supra* note 24, at Additional Commentary by Steven Zeidman 2.

V.
NEW CAUSE OF ACTION: CHALLENGING INADEQUATE BUDGETS FOR INDIGENT DEFENSE AS AN ENCROACHMENT ON THE JUDICIARY

A number of scholars have suggested that the *Strickland* test should be modified to permit *ex ante* challenges to the sufficiency of legal services arrangements based on factors such as caseload, salary, training, and the availability of support service personnel (e.g., investigators and the like).[174] This Article does not build upon, or even address, such proposals. Suffice it to say, only the Supreme Court can overrule *Strickland*. If, someday, the Court is willing to engage in ensuring due process in indigent criminal defense, we will likely see significant improvements in funding and other arrangements for public defenders.

Yet even if the rule established by *Strickland* requires courts to wait until after trial to determine individual due process violations,[175] *Strickland* poses no impediment to *ex ante* systemic challenges based on separation of powers. 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[176] or encroaches on their "central prerogatives."[177] It

174. *See, e.g.*, Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an* Ex Ante *Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 284–86 (1997) (stating that no ex post standard can remedy the real defects of indigent defense, and that an ex ante cause of action should be preferred); *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, *supra* note 41, at 2071–72 (explaining that developing an ex ante Sixth Amendment standard is extremely important, given the importance of the Sixth Amendment).

175. Under the *Strickland* standard, a claim that the defense lawyer was underpaid is likely doomed because courts are unwilling to associate underpayment with poor lawyering. *See* Foster v. Kassulke, 898 F.2d 1144, 1147 (6th Cir. 1990) (stating that the relationship between an attorney's compensation and her effectiveness is uncertain); Coulter v. State, 804 S.W.2d 348, 358 (Ark. 1991) (stating that the plaintiff failed to make a sufficient showing that statutory fee cap led to constitutionally deficient performance).

176. Indeed, while the Supreme Court has recognized some instances where Congress has the power to create "legislative courts" without violating separation of powers, these circumstances have been strictly curtailed. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 (1982) (stating that there are only three situations in which Art. III does not bar the creation of legislative courts, and in each of those situations the Court has recognized certain exceptional powers bestowed upon Congress by the Constitution or history); *see also* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986) (explaining that an 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").

177. 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) ("The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves of the encroachment.").

takes no work at all to identify the central prerogatives of courts.[178] Under the federal system (importantly, in this respect, there is no distinction between the federal and state systems), courts' prerogatives are to decide "cases" and "controversies."[179] Accordingly, any action by another branch of government that interferes with a court's capacity to decide cases or controversies raises a significant separation-of-powers question.

Moreover, unlike many other separation-of-powers inquiries, this claim does not depend on any showing of intent on the part of another governmental branch. In contrast, when the Court has had to decide whether certain federal legislation wrongfully interferes with judicial authority by effectively overruling a constitutional decision, it will investigate Congress's intent in enacting the law.[180] But the claim described in this Article is different. The interference discussed in this Article is not about changing an outcome previously reached by a court. An interference with a court's capacity to decide a case—whether because the court is denied access to relevant and material information or arguments,[181] is unable to hear a witness due to poor acoustics,[182] or can't ensure that there is sufficient evidence to justify a judgment of conviction—is an impermissible interference with an essential court function regardless of intention.[183]

The Supreme Court has jealously guarded its judicial power to decide cases or controversies. To be sure, the Court has focused more on a court's duty "to say what the law is"[184] than on its corresponding responsibility to "say what the

178. As we shall see, however, the historical articulation of a court's "essential functions" has stressed one characteristic—"to say what the law is"—over another—to find facts. Privileging law-finding over fact-finding has deep implications for the core thesis of this Article. *See infra* notes 184–190 and accompanying text.

179. *See* U.S. CONST. art. III, § 2.

180. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 436 (2000) ("[W]e agree . . . that Congress intended by its enactment to overrule *Miranda*.").

181. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 546 (2001) (stating that a statutory restriction that prevented the Legal Services Corporation from challenging existing welfare law either in court or through an attempt to amend the statute, "threaten[ed] severe impairment of the judicial function."); United States v. Nixon, 418 U.S. 683, 707 (1974) (stating that an unqualified privilege would be a major impediment to the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions, and would plainly conflict with Art. III).

182. Hosford v. State, 525 So. 2d 789, 798 (Miss. 1988) (stating that a court cannot tolerate a "chronic, distracting noise problem which has substantially interfered with court proceedings" under the state Constitution).

183. *See, e.g.*, 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."). Even if intention were a required element for the cause of action, it would be relatively simple to prove, at a minimum, deliberate indifference on the part of the legislature to the effects of the indigent defense crisis and the legislature's deliberate choice not to increase spending on indigent defense in light of the many studies and reports demonstrating the likelihood that high caseloads ensure that defense counsel will almost never be able to conduct a meaningful investigation. *See supra* notes 33–40 and accompanying text.

184. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

facts are." Most famously, it insists that courts have the *final* word on matters decided by courts.[185] More needs to be said, however, to grasp what is expected of courts as they discharge this essential function. Because saying what the law is may be the key to deciding the case, one of a court's essential functions is to announce the rule of law. For this reason, few doubt that courts should have the freedom to answer legal questions as they best conclude.

In the overwhelming majority of cases, however, judges face a very different challenge. To use criminal prosecution as an example, the court's task in the run-of-the-mill case is to decide whether to ratify the executive branch's factual claim that at a particular time and place an individual did something illegal. For this reason, any interference by another branch with a court's duty to determine 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 determining guilt or innocence.[186]

Everyone familiar with the practice of law recognizes that facts predominate in the resolution of legal disputes. 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 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 this battle.

This is particularly true at the trial level, where most lawyers strive to present facts to fit within well-established law without bothering to litigate over what the law is. For those cases—which constitute the overwhelming majority of contested matters in all trial-level courts—it is misleading to assert 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."[187]

185. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (stating that courts retain the ultimate authority to determine whether Congress exceeded its constitutional powers); Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[*Marbury v. Madison*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.").

186. 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 in the courts' capacity to perform this role violates separation of powers.

187. QUENTIN REYNOLDS, COURTROOM: THE STORY OF SAMUEL S. LEIBOWITZ 409 (1950).

Even in *Bush v. Gore*,[188] 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, and so on. This fact-finding was antecedent to declaring what the law was. Even more, whatever the ultimate statement of the law, the contest over facts was crucial to society's sense of a just outcome.

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 to guard and protect that function against encroachment from other branches. "[A]ll possible care," Alexander Hamilton warned, "is requisite to enable [the judiciary] to defended itself against [the other branches'] attacks."[189] When the other branches of government create 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.[190]

A. The Failure to Fund Indigent Defense at Adequate Levels to Ensure That a Critical Mass of Prosecutions Are Independently Investigated Is an Encroachment on an Essential Court Function

The Court has been swift to strike down actions by another branch when those actions would have restricted courts' access to evidence or arguments. In *United States v. Nixon*,[191] 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 between 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."[192] 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."[193] Rather, the court focused on the need for information in the criminal context because a "primary constitutional duty of the Judicial Branch [is] to do justice in criminal prosecutions."[194]

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).

188. Bush v. Gore, 531 U.S. 98 (2000).

189. THE FEDERALIST NO. 78, at 473 (Alexander Hamilton) (Bantam 1982).

190. *See, e.g.*, 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.").

191. 418 U.S. 683 (1974).

192. *Id.* at 713.

193. *Id.* at 712 & n.19.

194. *Id.* at 707.

Therefore, 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,"[195] and constitutes an impairment of the "essential functions of [another] branch."[196]

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.[197] 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.[198] In *Legal Services Corporation v. Velazquez*, the Court concluded that the federal law 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 attorneys' traditional role."[199]

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 in *Velasquez* that, "[w]e must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge."[200] Further, the law also has the potential to interfere with how judges perform their role. In Justice Kennedy's words, "By 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."[201]

Most recently, in *Boumediene v. Bush*,[202] the Court emphasized 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 *Boumediene*, the Court ruled that Congress could not deprive a quasi-criminal defendant "an opportunity . . . to present relevant exculpatory evidence" without intruding into the judicial function.[203]

195. *Id.*

196. *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.").

197. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 545 (2001).

198. *Id.* at 537–38. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996 (OCRAA) § 504, Pub. L. No. 104-134, 110 Stat. 1321–53 to –57 (1996), *invalidated by Velazquez*, 531 U.S. at 549.

199. *Velazquez*, 531 U.S. at 534.

200. *Id.* at 548.

201. *Id.* at 545. For a wide-ranging and comprehensive discussion of how funding restrictions on legal services lawyers interfere with functions of the courts, see Laura Abel & David Udell, *If You Gag the Lawyers, Do You Choke the Courts? Some Implications for Judges When Funding Restrictions Curb Advocacy by Lawyers on Behalf of the Poor*, 29 FORDHAM URB. L. J. 873 (2002).

202. 553 U.S. 723 (2008).

203. *Id.* at 789. The Court also stated that:

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. . . .
>
> . . .[T]here 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 everything, 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.[204]

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."[205] It is also why Madison insisted that "members of each department should be as little dependent as possible on those of the others."[206]

B. It Makes No Difference When the Claim Is Based on a State's Constitution

Although this Article intentionally develops the federal separation-of-powers claim, the claim would be nearly 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 assigned

> 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.

Id. at 787. Additionally, in 2000, the Court took seriously the claim that Congress offended separation-of-powers principles where a federal statute placed "a deadline on judicial decisionmaking, thereby interfering with core judicial functions." *See* Miller v. French, 530 U.S. 327, 349 (2000).

204. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 173–74 (Thomas Nugent trans., Batoche Books 2001) (1752).

205. THE FEDERALIST NO. 47, at 293 (James Madison) (Bantam 1982). *See also* THE FEDERALIST NO. 51, 317 (James Madison) (Bantam 1982) ("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.").

206. THE FEDERALIST NO. 51, at 315 (James Madison) (Bantam 1982).

to them.[207] The 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.[208] Two critical aspects of separation of powers which are constant in both the federal and state systems are (1) courts have, as their core function assigned to them by the Constitution, the responsibility of deciding the cases that come before them, and (2) separation-of-powers principles are violated when another governmental branch interferes with the courts' core function.[209] Whatever the text of any particular state constitution, 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 the executive branch any advantage in the litigation unrelated to substantive law. Moreover, as Adrian Vermeule has stressed, "[s]tate courts have long been vigorous defenders of the constitutionally vested 'judicial power' against perceived legislative encroachments."[210] In fact, if there is any difference between some state constitutions and the federal Constitution, it is that some States have explicitly assigned additional tasks to the courts beyond

207. *See, e.g.*, McClung v. Emp't Dev. Dep't, 99 P.3d 1015, 1017 (Cal. 2004) (stating that California courts are charged with constitutional duty "to say what the law is" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))); People v. Bruner 175 N.E. 400, 405 (Ill. 1931) ("The interpretation of statutes, the determination of their validity, and the application of the rules and principles of the common law, among others, are inherently judicial functions. The [State] Constitution vested these functions in the courts created and authorized by it."); Duncan v. State, 774 N.W.2d 89, 98 (Mich. Ct. App. 2009) ("[T]he role of the judiciary in [Michigan's] 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."), *aff'd on other grounds*, 780 N.W.2d 843 (Mich. 2010), *vacated and remanded*, 784 N.W.2d 51 (Mich. 2010), *vacated*, 790 N.W.2d 695 (Mich. 2010), *reh'g denied*, 791 N.W.2d 713 (2010); Claremont Sch. Dist. v. Governor, 725 A.2d 648, 650 (N.H. 1998) (stating that the courts' duty under the state constitution is to "say what the law is"); 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."); *Ex parte* Dotson, 76 S.W.3d 393, 403 (Tex. Crim. App. 2002) (en banc) ("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 Sch. 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.'" (quoting *Marbury*, 5 U.S. (1 Cranch) at 177)).

208. *See, e.g.*, *Maron*, 925 N.E.2d at 913 ("'It 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.'" (quoting Cnty. of Oneida v. Berle, 404 N.E.2d 133, 137 (N.Y. 1980) (per curiam))); *Ex parte Dotson*, 76 S.W.3d at 403 (Tex. Crim. App. 2002) (explaining that 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" (quoting Armadillo Bail Bonds v. State, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990) (en banc))).

209. *See infra* Part V.A.

210. Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 359.

the implicit command to decide cases or controversies.[211]

The core of a separation-of-powers claim differs in several crucial ways from the cases chronicled in the preceding subsection. Those cases foundered on a theory that a class of defendants may seek prospective relief for an anticipated violation of their Sixth Amendment right. As we have seen, the substantive law of ineffectiveness requires looking backwards after the case is over to decide whether the Sixth Amendment right was violated. A separation-of-powers claim avoids this problem because there is no comparable requirement. Instead, state courts routinely entertain challenges that allege a prospective unconstitutional encroachment on judicial power by another governmental branch.

In 2000, Vermeule chronicled various state court rulings that declared that the actions of another governmental branch violated separation of powers under the state's constitution by impermissibly encroaching on the judiciary.[212] Vermeuile grouped these cases into four categories: (1) statutes altering common-law rules of liability or remedy; [213] (2) statutes altering procedural and evidentiary rules;[214] (3) statutes that alter the legal effect of judicial judgments;[215] and (4) appropriations statutes that, in the judiciary's view, provide insufficient funding for the exercise of judicial functions.[216]

211. *See, e.g*, N.J. CONST. art. VI, § II, para. 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."). *See also* Helen Hershkoff, *State Courts and the 'Passive Virtues': Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1836–37 (2001) ("Some state courts issue advisory opinions, grant standing to taxpayers challenging misuse of public funds, and decide important public questions even when federal courts would consider the disputes moot. Moreover, functions that seem intuitively nonjudicial in the federal system are assigned to the judicial branch in some states, and judicial officers discharge them comfortably. State judges in Tennessee appoint the attorney general, and some state constitutions establish sheriffs as part of the judicial, and not the executive, branch. Elsewhere (although only occasionally) state judges initiate investigations into public conditions without any request from a party or the public." (Citations omitted)).

212. *See* Vermeule, *supra* note 210, at 373–90.

213. *Id.* at 373–77, nn.55–58 (collecting cases). *See, e.g.*, Best v. Taylor Machine Works, 689 N.E.2d 1057, 1080 (Ill. 1997) (holding that a statutorily-imposed limitation of $500,000 in personal injury actions for "non-economic" compensatory damages violated separation of powers by "unduly encroach[ing] upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law.").

214. Vermeule, *supra* note 210, at 377–81 (collecting cases). *See, e.g.*, Armstrong v. Roger's Outdoor Sports, Inc., 581 So. 2d 414, 420 (Ala. 1991) (per curiam) (stating that the 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 essence of a judge's power" to exercise discretion as to whether or not to defer to the jury's punitive damages award).

215. Vermeule, *supra* note 210, at 381–82 (collecting cases). *See, e.g.*, *Ex Parte* Jenkins, 723 So. 2d 649, 650–51 (Ala. 1998) (holding that a statute mandating reopening of final judgments of paternity unconstitutionally encroached upon the judicial power and violated separation-of-powers principles).

216. Vermeule, *supra* note 210, at 382–87 (collecting cases). *See, e.g.*, Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193 (Pa. 1971) (state court order appropriately directed the mayor and city council on pain of contempt to increase the budget of the Philadelphia Court of Common

State courts have not hesitated to protect their own responsibilities against perceived encroachments of their essential functions. They have found separation-of-powers violations in a host of matters that are significantly less intrusive than preventing the courts from ensuring that indigent parties are represented relatively equally compared to the government. They have refused, for example, to permit the legislature to dictate who provides security in the courthouse,[217] and have protected their authority over their employees and the terms of employment, even by ruling that sexual harassment policies as applied to employees in the judicial branch may not go forward.[218] They have also comfortably invoked separation-of-powers principles when insisting that no other branch may intrude on their prerogative to define the rules governing judicial disqualification or recusal.[219] They have even held that legislative restrictions on judicial authority to determine how to select members of a jury improperly encroach upon judicial authority.[220]

State 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.[221] They have found laws impermissible when they required courts to make a syllabus of each opinion,[222] set a time frame on when cases shall be decided,[223] and require written opinions in all appellate court decisions.[224]

Pleas because the judiciary is co-equal and independent of the other two branches, and "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").

217. *See* Petition of Mone, 719 A.2d 626, 634 (N.H. 1998) (stating that a law requiring county sheriffs, rather than security officers employed by the judicial branch, to provide security in state courts encroached upon judicial power).

218. *See* Judicial Attorneys Ass'n v. State, 586 N.W.2d 894, 898 (Mich. 1998) (holding that a statute designating the county, rather than the judiciary, as employer of court employees violates separation of powers); First Judicial Dist. v. Pa. Human Relations Comm'n, 727 A.2d 1110 (Pa. 1999) (holding that a legislatively-created commission could not mandate the firing of a judicial employee for sexual harassment). *See also In re* Alamance Cnty. Court Facilities, 405 S.E.2d 125, 132 (N.C. 1991) (holding that the judiciary has inherent power to order local authorities to provide courthouse facilities); State *ex rel.* Lambert v. Stephens, 490 S.E.2d 891, 900–02 (W. Va. 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). *See also* FELIX F. STUMPF, INHERENT POWERS OF THE COURTS: SWORD AND SHIELD OF THE JUDICIARY (1994).

219. *See, e.g.*, Weinstock v. Holden, 995 S.W.2d 408, 411 (Mo. 1999) (holding that a 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).

220. *See* People v. Jackson, 371 N.E.2d 602, 606 (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, 879–97 (2009) (explaining different types of statutory provisions that direct judges with respect to statutory interpretation, and how they may or may not violate separation-of-powers).

221. *See* Hosford v. State, 525 So. 2d 789, 798 (Miss. 1988).

222. *See In re* Griffiths, 20 N.E. 513, 514 (Ind. 1889).

223. *See* Atchison v. Long, 251 P. 486, 486 (Okla. 1926).

224. *See* Houston v. Williams, 13 Cal. 24, 25 (1859). *See also* Dahnke v. People, 48 N.E. 137, 138–39 (Ill. 1897) (holding a county courthouse custodian in judicial contempt after he, under

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.[225] Under state constitutions, courts have declared legislative acts to be an unconstitutional encroachment on exclusive judicial powers in such divergent areas as prescribing the procedure for sanctioning individuals for filing court papers for improper purposes,[226] treating a judicial failure to issue a decision before a deadline as equivalent to denying a motion,[227] declaring health care providers legally incompetent to testify about patients (including about objective tests and observations),[228] and prohibiting excessive contingent-fee arrangements.[229]

Many of these rulings implicitly require legislatures to expend funds not initially allocated. State courts have also explicitly ordered additional funds to be spent.[230] Sometimes, state courts invoke their "inherent authority" to act in contravention of explicit legislative acts, such as when the legislature capped the amount of money paid to court-assigned counsel.[231]

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the directions of the board of county commissioners, 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); Bd. of Comm'rs v. Stout, 35 N.E. 683, 685–86 (Ind. 1893) (ordering the sheriff to seize control of the courthouse elevator over the opposition of the county board of commissioners, as the operation of the courthouse elevator was part of the inherent powers of the court); *In re* Janitor of the Supreme Court, 35 Wis. 410, 421 (1874) (held void an order of the state superintendent of public property dismissing the court-chosen janitor of the supreme court).

225. *Hosford*, 525 So. 2d at 798. 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.*, Pena v. Dist. Court, 681 P.2d 953, 956 (Colo. 1984) (finding it was within the inherent powers of the judiciary to determine and compel payment of sums necessary to carry out its responsibilities); White v. Bd. of Cnty. Comm'rs, 537 So. 2d 1376, 1380 (Fla. 1989) (holding trial court properly exercised inherent judicial power to require that an attorney representing an indigent defendant be compensated a fee in excess of the statutory minimum); 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 administer Justice . . . .") (emphasis omitted).

226. *See* Squillace v. Kelley, 990 P.2d 497, 501 (Wyo. 1999).

227. *See* Fowler v. Fowler, 984 S.W.2d 508, 511–12 (Mo. 1999) (en banc). *See also In re* Constance G., 575 N.W.2d 133, 138 (Neb. 1998) (holding that separation of powers gives judiciary exclusive authority to determine whether admissible evidence is probative and how much weight it should receive); Kunkel v. Walton, 689 N.E.2d 1047, 1052 (Ill. 1997) (finding that separation of powers gives state supreme court inherent authority to promulgate procedural rules).

228. *See* State v. Almonte, 644 A.2d 295, 299 (R.I. 1994).

229. *See* Lloyd v. Fishinger, 605 A.2d 1193, 1196 (Pa. 1992). *But see* Newton v. Cox, 878 S.W.2d 105, 112 (Tenn. 1994) (holding a legislative act that limited contingency fees was not unconstitutional because it was "supplemental to and in aid of" the court's exercise of judicial powers).

230. *See supra* n.225 and accompanying text.

231. *See, e.g.*, *White*, 537 So. 2d at 1380 (Fla. 1989) (finding that the judiciary has inherent power to exceed statutory fee caps for criminal defense attorneys). *Cf.* Irwin v. Surdyks Liquor, 599 N.W.2d 132, 142 (Minn. 1999) (holding that statutorily imposed limitations on attorneys' fees violate separation of powers). The Florida District Court of Appeals invalidated a statute requiring

What this very brief survey demonstrates is that state courts will strike down another branch's acts when the courts perceive them as interfering with prerogatives of the judicial branch. As this article has shown, without a viable indigent defender system courts are unable to discharge their fundamental responsibility to ascertain independently whether the facts and circumstances justify entering an order of conviction. For this reason, the proposition that courts are unable to demand that the other branches of government create and maintain a robust indigent defender system is simply misguided. Affirmative litigation in state court is available to individuals challenging indigent defender 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 judiciary function. It is irrelevant whether this intrusion is deliberate or unintended. State constitutions, as well as the federal Constitution, require that courts be given the resources to conduct their essential function. The next two subparts discuss how a claim might allege that wrongful conduct is the consequence of legislative action (or inaction) or executive branch decisions.

C. 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.[232] As a consequence, while 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,[233] states have little incentive to ensure that indigent defendants are represented by competent, properly trained lawyers with caseloads small enough to enable them to perform all of their responsibilities.

As Cara Drinan recently explained, "[i]nadequate funding is the root cause of the indigent defense crisis."[234] Funding methods across the United States vary

the public defender or private attorney representing a defendant to move the court to assess the value of the attorney's services, concluding that the law violated separation of powers by invading the exclusive province of the judiciary. Graham v. Murrell, 462 So. 2d 34, 35 (Fla. Dist. Ct. App. 1984). *See also* Corenevsky v. Superior Court, 682 P.2d 360, 370–71 (Cal. 1984) (holding that the legislature improperly infringed on the judiciary's power to determine what constitutes reasonable compensation for court-appointed attorneys, and it is solely a judicial question whether a defendant will be afforded defense services).

232. Norman Lefstein, *In Search of* Gideon*'s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 842 (2004).

233. *See* Scott v. Illinois, 440 U.S. 367, 373–74 (1979) ("[N]o indigent criminal defendant [can] be sentenced to a term of imprisonment unless the state has afforded him the right to assistance of appointed counsel in his defense."). *See also* Alabama v. Shelton, 535 U.S. 654, 674 (2002) ("'[A] defendant who receives a suspended or probated sentence to imprisonment has a constitutional right to counsel.'" (quoting *Ex parte* Shelton, 851 So. 2d 96, 102 (2000))).

234. Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV L. & SOC. CHANGE 427, 431 (2009).

widely from state to state, and often from county to county within the same state.[235] Whatever the particular funding method, one thing is clear: in the great majority of jurisdictions, those responsible for funding indigent legal services have failed to provide the funds needed for counsel to undertake their duties responsibly.[236] 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.[237]

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.[238] 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."[239]

Some writers have suggested that indigent defendants should be regarded as belonging to the kind of "discrete and insular minorit[y]"[240] that receives hyper-protection by the courts.[241] Certainly, the interests of those who are eligible for

235. Lefstein, *supra* note 232, at 844 (listing several different funding sources, as well as different funding methods).

236. *Id.* at 851–57. *See also infra* notes 257–263 and accompanying text.

237. Congress and the Department of Justice are also at least partly responsible for this failure. The Department of Justice has regularly funded the prosecution function more generously, even at the state and local level, than it has the defense function. Partly in acknowledgement of this, the Department of Justice established the Access to Justice Initiative (ATJ) in March 2010 to address the access-to-justice crisis in the criminal and civil justice system. Its "mission is to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status. The Initiative's staff works within the Department of Justice, across federal agencies, and with state, local, and tribal justice system stakeholders to increase access to counsel and legal assistance and to improve the justice delivery systems that serve people who are unable to afford lawyers." *See* http://www.justice.gov/atj/. *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").

238. *See Effectively Ineffective*, *supra* note 57, at 1731–32 ("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 . . . ."). *See also* Bright, *supra* note 44, at 1870 (expressing doubts about improvement in indigent representation due to the unpopularity of the accused and "lack of leadership and commitment to fairness of those entrusted with responsibility for the justice system").

239. 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, 218–19 (2004). *See also* Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 475 ("A defender program operates in a context which is, by and large, hostile to its purpose—providing representation to people charged with committing a crime.").

240. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

241. *See, e.g.*, Andrew E. Goldsmith, *The Bill For Rights: State and Local Financing for Public Education and Indigent Defense*, 30 N.Y.U. REV. L. & SOC. CHANGE 89, 141–42 (2005)

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."[242] 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.

If this is true, then there is a political 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.[243] As Stephen Schulhofer has explained, "[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."[244]

In the end, the complete explanation for the failure to fund indigent defense adequately 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. The priority of local government is to establish an indigent defender system based on "who can do it cheapest."[245]

(stating that indigent defendants charged in wealthy counties can claim to be politically powerless as a group, as they are unlikely to reside in the county where they are charged); Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 430 (2009) (stating that indigent defendants "represent the archetypal discrete and insular minority"); 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, 1081 (1993) (explaining that because legislatures undervalue the rights of the accused, and the accused should count as a discrete and insular minority, the Supreme Court is right to regulate police, prosecutors, and the criminal trial process). *See also* Citron, *supra* note 42, at 498 (1991) ("[T]he beneficiaries of indigent defense systems are minorities—not only numerically, but economically and often ethnically as well.").

242. Barkow, *supra* note 81, at 1029.

243. *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, 295–96 (1994) (explaining how, in the context of the death penalty, the fear of being labeled soft-on-crime has made it so that politicians very rarely attempt to reform the criminal justice system). *See also* Marshall Frady, *Death in Arkansas*, THE NEW YORKER, Feb. 22, 1993, at 105.

244. Schulhofer, *supra* note 140, at 1104. Rachel Barkow makes a similar point. *See* Barkow, *supra* note 81, 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.").

245. *See, e.g.*, SPANGENBERG REPORT, *supra* note 23, at 154 ("There are many individuals who are convinced that over the last decade, [New York City] has been far more concerned with 'who can do it cheapest' and much less concerned about adequate quality of representation."). *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) ("Absent some completely unforeseeable event . . . it is almost inconceivable that elected politicians would call for or provide additional funding to represent indigents accused of crime.").

D. The Executive Branch's Contribution to the Indigent Crisis

The executive and legislative branches have dramatically tilted the scales in favor of the prosecution both by flooding the courts with cases and refusing to fund indigent defense at levels necessary for lawyers to be able to investigate. This allows the executive branch to dictate its opponent's litigation strategy by forcing counsel to recommend accepting a guilty plea. 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,[246] criminal courts have become so overwhelmed with volume that judges have been routinely excluded from performing their judicial responsibilities.[247] Discretionary arrests by police as a result of broken windows campaigns potentially threaten everyone's freedom. Courts provide critical oversight as a check on such discretionary police power. 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 591 percent.[248] In one year alone, from 1999 to 2000, the number of cases increased by 53 percent.[249] Many have written about the virtues and problems associated with this dramatic change in policing policy.[250] Some have sharply questioned the wisdom of rounding up such a large number of people, who tend to be disproportionately African American or Latino, on the grounds that it has the "perverse effect of antagonizing minority

246. *See generally* James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29. *See also* K. Babe Howell, *Broken Lives From Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271 (2009).

247. 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).

248. SPANGENBERG REPORT, *supra* note 23, at 142.

249. *Id.*

250. *Compare* GEORGE L. KELLING & WILLIAM H. SOUSA, JR., CTR. FOR CIVIC INNOVATION AT THE MANHATTAN INST., DO POLICE MATTER? AN ANALYSIS OF THE IMPACT OF NEW YORK CITY'S POLICE REFORMS 10 (2001), *available at* http://www.manhattan-institute.org/html/cr_22.htm (stating that misdemeanor arrests in New York City prevented over 60,000 violent crimes between 1989 and 1998), *with* 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 MICH. LAW REV. 291, 295–96 (1998) (stating that there is little empirical support for the argument that "broken windows" policing has reduced violent crime rates).

communities and undermining the legitimacy of law enforcement."[251] 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 reduced to merely accepting pleas at the time of arraignment.

In 2001, for example, the New York City Criminal Courts disposed of 98 percent of summonses at the first arraignment.[252] In 2004, of the more than 319,000 cases filed in Criminal Court, only 727 trials resulted (280 by jury and 447 by bench).[253] Altogether, 51 percent of all cases were disposed of at arraignment.[254] As petty criminal filings soared, felony filings decreased by 58 percent.[255] By 2004, criminal courts in New York City overwhelmingly involved misdemeanors or lower level offenses, constituting 83 percent of the filings.[256]

E. 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. Inequality of legal representation raises a significant separation-of-powers issue when the government prosecutes defendants and also pays for their defense; the choice to advantage the government in the prosecution is made without meaningful oversight by the judicial branch. There must be some meaningful inquiry into whether courts are performing (and are being permitted to perform) their role as a meaningful check on executive power.

As Ronald Wright explains, "[p]arity of resources is not the current reality in criminal 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."[257] According to Wright, entry-level prosecutors tend to earn higher salaries than entry-level public

251. Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 219–20 (2008). *See also* BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 140–80 (2001).

252. SPANGENBERG REPORT, *supra* note 23, at 142.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 222 (2004).

defenders; even more, "[t]he salary differences persist at every level of experience; prosecutors earn more from bottom to top of the seniority scale."[258]

The funding disparity between prosecutors and defenders is especially stark when factoring in the additional resources and services of other governmental agencies that partner with prosecutors.[259] 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."[260]

Workload levels and other factors, such as support services for lawyers who need to build their cases, 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. Not only are prosecutors' salaries higher, their workload levels are often lower and the resources available to them (wholly aside from the police resources used to build a case before it is brought to the prosecutor), are considerably greater. This leads 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."[261] As a result, very few defendants that are given an attorney paid for by the government receive anywhere near the level of

258. *Id.* at 230.

259. This is not to deny, of course, that too many prosecutors also toil under crushing caseloads, harming both the public and defendants. *See generally* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutor Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261 (2011).

260. COLE, *supra* note 21, at 64 (footnote omitted). *See also* Everett, *supra* note 239, at 219–21 (2004) (stating that in 2001, Mississippi spent approximately $16.5 million 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").

261. Wright, *supra* note 257, at 231. According to Wright, prosecutors outspend defense statewide by nearly three to one in Louisiana, not including police investigative resources. *Id.* at 231 n.48. Wright also surveyed the 81 most populous counties in the United States and 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 30%. *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) (2012). Oddly, some legislators have seen fit to authorize that defense counsel is paid at a lower rate than prosecutors. *See, e.g.*, ARIZ. REV. STAT. ANN. § 11-582 (2012) (requiring that public defenders earn at least 70% of the salary of prosecutors). According to Wright, Kansas, Massachusetts, North Carolina, Tennessee, and Wyoming all practice parity of salary for prosecutors and defenders. Wright, *supra* note 257, at 233. A number of local jurisdictions do the same. *Id.* (mentioning Orange County, California and Maricopa County, Arizona). The federal system sets a very good example: the pay scale for federal public defenders is the same as it is for Assistant United States Attorneys. *Id.* at 233.

representation that the government insists upon for itself.[262]

These features of practice unquestionably advantage executive power in a multitude of ways. When the legislative or executive branch designs a defender system in which it is structurally impossible in most cases, and unlikely in all but a few, for lawyers to even meet with witnesses or visit the scene of the crime, government has "so undermine[d] the proper functioning of the adversarial process that [it] cannot be relied on as having produced a just result."[263]

F. Elements of a New Cause of Action

There are some very prominent differences between a case based on separation of powers and one based on ineffectiveness. Of these differences, two are most important.

1. Standing and Justiciability

This new lawsuit is very different conceptually from the due process class actions of the past. Those cases often foundered on the shoals of standing.[264] As the Supreme Court has explained, the "irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not conjectural or hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of . . . [which is] 'fairly . . . traceable to the challenged action. . . . Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[265] As discussed in Part III, typically the plaintiff in those cases was a defendant in an ongoing criminal case who complained that she was assigned or was very likely to be assigned a lawyer who carries such a large caseload that the plaintiff would be denied her constitutional right to an effective lawyer.[266] Many courts have ruled that the plaintiff lacks standing to challenge the systemic failures of the indigent defender system because she is unable to demonstrate that the system's inadequacies will, in fact, adversely affect her.[267] When the definition of harm to a defendant in a criminal case is proving that she will likely be wrongfully convicted because her lawyer is overworked, it is understandable that courts will conclude the defendant lacks standing.

The claim I propose here is a structural claim based on wrongful

262. *See generally* GIDEON'S BROKEN PROMISE, *supra* note 38. *See also* Simon, *supra* note 38, at 586 ("Inadequate funding is the primary source of the systemic failure in indigent defense programs nationwide.").

263. Strickland v. Washington, 466 U.S. 668, 686 (1984).

264. *See supra* notes 41–42 and accompanying text.

265. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (citations omitted).

266. *See id.*

267. *See id.*

interference with the judicial function. In *Bond v. United States*, the Supreme Court recently reaffirmed an injured person's standing to challenge a violation of a constitutional principle.[268] Though *Bond* was a federalism case, Justice Kennedy's opinion for the Court recognized an injured person's standing to object to a violation of constitutional principles generally, including separation of powers:

> The recognition of an injured person's standing to object to a violation of a constitutional principle that allocates power within government is illustrated, in an analogous context, by cases in which individuals sustain discrete, justiciable injury from actions that transgress separation-of-powers limitations. Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well.[269]

With respect to injury, in this newly conceived lawsuit the plaintiff will only need 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."[270] This standard requires only showing that the plaintiff is likely to be disadvantaged by inadequate funding, 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 need only "show some respect in which he is harmed *more* than the rest of us . . . ."[271] This threshold should be met 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, in addition, the lawyer would be able to undertake such investigation if her caseload were "controlled to permit the rendering of quality representation."[272]

268. Bond v. United States, 131 S. Ct. 2355, 2364–65 (2011).

269. *Id.* at 2365.

270. Allen v. Wright, 468 U.S. 737, 751 (1984). *See also id.* at 751–52 (articulating the prudential standing factors as whether the line of causation between the illegal conduct and injury is too attenuated or the injury too abstract).

271. Antonin Scalia, *The Doctrine of Standing as an Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983). *Compare* Allen v. Wright, 468 U.S. 737 (1984) (parents lacked standing to complain that granting tax exemptions to racially discriminatory private schools because their alleged injury was not fairly traceable to the government's conduct that was challenged as unlawful) *with* Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978) (citizens living near the site of proposed nuclear power plants had standing to maintain the declaratory judgment action because the allegedly impermissible conduct was fairly traceable to injuries they would sustain).

272. *See* ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002) (Principle 5), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

But this new cause of action may be suitable only as a class action because it seeks structural relief, not individual relief. The individual plaintiff seeking ex ante relief will not be able to make a sufficient showing that the lawyer assigned to represent her will be unable to provide effective assistance of counsel. To this extent, the old rules for individual challenges to underfunded counsel systems will continue to apply. What is new here is that all defendants who are assigned a criminal defense lawyer who is part of a structurally defective indigent defender system have standing to seek judicial intervention to improve the system. At minimum, a properly constructed class action should be sufficient to survive a motion to dismiss and to provide the plaintiff class with the chance to prove how infrequently cases are investigated.

Depending on the details in a particular jurisdiction, the named defendants in the lawsuit would vary. In some localities, the defendants would be the Governor, in others, the Legislature. In still others, it would be the county commissioner. In all cases, the defendants would include individuals or entities responsible for the budget decisions that have underfunded indigent defense.

2. Finding a Violation of the Constitution

The lawsuit could have two critical substantive elements, either of which should justify a finding of a violation of separation of powers.

a. Systematically Preventing Courts from Performing their Oversight Role

The critical inquiry for this substantive claim is whether the courts are able to do the job the Constitution requires of them. Those challenging current practices will have to persuade courts that a judge's constitutional responsibility is to act independently of the executive branch by permitting the entry of a judgment of conviction only after being satisfied that a meaningful investigation into the facts of the case occurred. This cause of action will focus on whether the resources provided by the other branches of government permit the courts to perform this role often enough. It is not immediately clear what evidence presented by the plaintiffs would survive a motion to dismiss. At one extreme, courts could require plaintiffs to prove that no defendant is sufficiently likely to be assigned a lawyer who will undertake even the slightest amount of investigation. Hopefully, no jurisdiction would be quite that strict. A substantive rule that requires such a showing is simply a promise that courts will not take this claim seriously. At the other extreme, plaintiffs would want to show that the funding arrangement ensures that some defendants will be deprived of an attorney who will undertake a minimally adequate investigation. But this would be insufficient to prove a separation-of-powers violation. Occasional failures to protect an individual's rights would not offend separation-of-powers principles. That kind of failure would be left to post-conviction challenge pursuant to

ordinary ineffectiveness rules. It is important that this new lawsuit not be viewed or treated as a substitute for the due process class action challenges of the past.

Between these two extremes a viable separation-of-powers claim exists. Plaintiffs would have to prove systemic failure to investigate by providing the court with data to show that judges are regularly deprived of serving as an independent overseer of prosecutorial power. Admittedly, this cause of action raises a number of vexing questions, including: what is the minimum amount of independent investigation necessary for sufficient auditing of executive power? Conceding the difficulty of determining this does not mean courts should not recognize the cause of action. The gravamen of the case is that courts are prevented from performing their constitutional duty. Courts committed to insisting that they be allowed to perform that duty have little choice but to struggle with the complexities of developing meaningful standards for such challenges.

Most importantly, judges must come to understand that they will always play a role in addition to that of referee. They must always satisfy themselves that they act as a check on executive power. 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.

b. Wrongfully Tipping the Scales of Justice in Favor of the Prosecution

A proper cause of action would also examine the inequality of resources between the prosecution and the defense. It is far from clear that the Constitution requires states to spend equally on the defense and prosecution. Even Congress's preference for salary parity between the prosecution and the defense may be more than the Constitution requires.[273] But this does not mean that the vast disparity in resources between prosecutors and defenders that currently exists — a disparity created and maintained by the other two branches of government—is constitutional. Again, the claim being raised is not that the inequality violates a particular defendant's right to a fair proceeding, but that the inequality broadly advantages the executive branch in proceedings originally designed to be better balanced. Given the central premise of American justice—that cases should be decided on the substantive and procedural rules of the dispute and not because of any advantage one party has over the other—it would seem appropriate to place the burden on the executive branch to justify what appears to be a thumb on the scale in its favor.

As with the first cause of action, deciding the merits of a claim of unfair advantage raises difficult questions that will need to be resolved. One of them is how unequal the playing field must be before it violates separation of powers. But these questions are, again, not so difficult that courts are incapable of

273. *See supra* note 260 and accompanying text.

resolving them. At minimum, it is important to make clear that a court acts well within its proper authority when it requires those responsible for developing the budget to provide an explanation for why an allocation negatively impacts the court's capacity to perform its core role.[274]

G. Remedies

Were we writing on a blank slate, we would do well to consider assigning to the judiciary the responsibility of designing the indigent defender system. Judges know what they need to discharge their constitutional responsibilities and are well-poised to determine the appropriate caseload levels for lawyers.[275] In our system, courts have refused to hold that budgetary decisions regarding indigent defense are matters committed solely to the judicial branch.[276] But current doctrine, quite 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.[277] The belief that allocation of the

274. This also means that courts have the proper authority to insist that they receive the needed funds for purposes other than counsel for indigents, such as providing courts with competent language interpreters, among countless other examples.

275. *See, e.g.*, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, *supra* note 41, at 2072–73 ("[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.") (footnotes omitted). *See also In re* Gault, 387 U.S. 1, 70 (1967) (Harlan, J., concurring in part and dissenting in part) (stating that certain legislative judgments have been entrusted "at least in part to courts" because "courts have been understood to possess particular competence"); State v. Smith, 681 P.2d 1374, 1380 (Ariz. 1984) (justifying its authority to oversee the adequacy of the indigent defense system on, among other things, "our own experience as attorneys"); State v. Lynch, 796 P.2d 1150, 1162–63 (Okla. 1990) (stating that the Oklahoma Supreme Court has inherent power to define and regulate the practice of law because that practice is intimately bound up with the exercise of judicial power). For a related argument of when to authorize courts to make rules because of their expertise, 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 H. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928).

276. *See, e.g.*, Roa v. Lodi Med. Grp., 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), *appeal dismissed*, 474 U.S. 990 (1985).

277. Robin Adler, *Enforcing the Right to Counsel: Can the Courts Do It? The Failure of Systemic Reform Litigation*, 2007 J. INST. JUST. INT'L STUD. 59, 69 ("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 1130, 1136 (Fla. 1990) ("[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

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.

Admittedly, we should want courts to be hesitant to clash with other branches of government. However, the conclusion most courts have reached, that they are *barred* from ordering legislatures to spend more money on indigent defense, is especially bizarre when contrasted with the myriad examples of courts jealously guarding their turf whenever they perceive the slightest encroachment. State courts have long recognized that a proper application of 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.[278] As the Supreme Court explained in *Bell v. Wolfish*, when another branch is responsible for overseeing certain functions, such as running schools or prisons, *and* courts conclude that others have greater expertise to make the challenged decisions, courts should defer to the expert judgment of those branches.[279] But this principle has no application to the subject of overseeing the operation of the courts. It is quintessentially within the unique expertise of judges to determine what is required before a judge can be satisfied independently that there is a basis to accept the entry of a judgment of

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, 812 N.E.2d 895, 909 ("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 constitutional dimension."). *See generally* Carmichael v. S. 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.").

278. *See, e.g.*, Theard v. United States, 354 U.S. 278, 281 (1957) ("The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included."); Field v. Freeman, 527 F. Supp. 935, 940 (D. Kan. 1981) ("Courts have the inherent power to disqualify counsel where necessary to preserve the integrity of the adversary process."); 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."). *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.") (footnotes omitted); *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).

279. 441 U.S. 520, 547–48 (1979).

conviction.

Once a court finds that insufficient funding prevents judges from performing their constitutional responsibility, they will also have to determine how to order the legislature to spend additional money on indigent defense. As the New York Court of Appeals recently observed, "[i]t 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."[280] 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.[281] Once a court finds that the legislature must spend additional funds so that courts are capable of carrying out their essential functions, courts certainly have the authority to direct that those funds be spent.

At the same time, 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 functions.[282] In such a governmental structure, it is appropriate to assign the initial decision regarding allocation of judicial resources to the legislature and to assign meaningful review of the allocation to the judicial branch. The proper inquiry for review is whether the allocation is sufficient to ensure that judges perform their constitutional duty.[283]

280. Hurrell-Harring v. State, 930 N.E.2d 217, 227 (N.Y. 2010). The court then quoted Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803), as stating "every right, when withheld, must have a remedy, and every injury its proper redress."

281. *Id.* (citations omitted).

282. 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 lawmaking 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, 121 (1976). As a result, all separation-of-powers inquiries should be delicately made. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928) (stating that 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. THE FEDERALIST NO. 51, at 314–15 (James Madison) (Bantam 1982). *See also* THE FEDERALIST NO. 48, at 300–01 (James Madison) (Bantam 1982) (stating that the legislative, judicial, and executive branches must have some degree of power over one another in order to preserve their distinct roles).

283. *See* Mistretta v. United States, 488 U.S. 361, 386 (1989) (stating that there is a "twilight

There are many ways that courts could play a vital role in ensuring they perform their essential functions in addition to accepting jurisdiction in a lawsuit challenging the inadequacy of funding for the assigned counsel system. State court judges, or the chief judge of the state's highest court, might routinely appear before the legislature to discuss the judges' views of how the judicial process works best. Judges 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."[284] 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 counsel can undertake an analysis of the evidence), legislatures would be considerably better informed when making budget allocation choices. To the extent this results in sufficient funding levels for assigned counsel, a cooperative arrangement among the branches would settle the matter.[285]

VI.
COULD THIS NEW CAUSE OF ACTION REALLY CHANGE THINGS?

One cannot be certain how a reinvigorated separation-of-powers perspective would impact practice on the ground.[286] But even reframing the indigent defense

area" of appropriate overlapping authority between the branches of government). *See also* Sibbach v. Wilson & Co., 312 U.S. 1, 10–11 (1941) (upholding Rules Enabling Act of 1934).

284. ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-6.1 (1993).

285. 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-Harring v. State, 930 N.E.2d 217, 227 (N.Y. 2010) ("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).

286. 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: HOW AMERICA HOLDS COURT 2 (2009).

crisis in the way advocated in this Article could have a salutary impact on judges themselves, who seem to have lost sight of their primary purpose in officiating over criminal prosecutions. If judges came to comprehend that they are being mistreated and undermined by the failure to sufficiently fund indigent defense, other collateral benefits would likely follow. Finally, the core claim in this Article, that the executive branch ought not be allowed to advantage itself in lawsuits against individuals, has broad implications beyond criminal law. This new cause of action may prove to lead the way to a new constitutional rule that even civil litigants are entitled to state-paid counsel when the government is suing them.

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.

This Article has wondered how the world would look differently if there were a meaningful indigent defense bar that 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 demonstrated a serious commitment, as a truly independent actor, to serving as a meaningful check on executive power. Although the focus of 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 in which courts would behave differently.

Rachel Barkow recently argued broadly for courts to play a greater oversight role in executive decisions in criminal cases to ensure a meaningful balance of power,[287] including a significantly greater oversight role in determining the limits of prosecutorial discretion in charging defendants and plea-bargaining.[288] Once courts are committed to checking robust executive power and monitoring all rules and practices that advantage government independent of the merits of the case, much will change. 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,[289]

287. *See* Barkow, *supra* note 81, at 994.

288. *Id.* at 996–97.

289. *See, e.g.*, Brady v. Maryland, 373 U.S. 83 (1963) (holding that the prosecution has a duty to give exculpatory evidence to the defense); Ake v. Oklahoma, 470 U.S. 68, 77 (1985) (balancing the private interest to be affected by the state, the government interest in providing the

claims of access to DNA and other forensic testing not now recognized,[290] and even, perhaps, claims that call into question a whole roster of governmental perks which courts have always accepted without question.[291]

What's left to discuss is whether this new cause of action really could make a difference. Given the large budget deficits faced by state and local governments, it is a particularly terrible time to advance a theory that calls upon courts to order them to spend a lot of money over the objection of voters and taxpayers. At minimum, those opposed to vastly increasing the amount of money spent on indigent defense will rely on the familiar claim that courts have no business mandating the expenditure of tax dollars.

The straightforward answer has already been given. Whenever courts find that the Constitution requires spending money, they are empowered to order that the money be spent. The core claim made in this Article is that these additional expenditures are truly necessary. Just as education costs money, and policing costs money, and military interventions cost money, protecting the people from overreaching by executive power costs money, too.

A. Changing the Narrative

Why this theory helps is precisely because it shifts the focus from those who are wronged by criminals (and those accused of being criminals) to society more broadly. The narrative of separated powers changes both the villain and the victim. The villain now becomes a branch of government that wrongfully exceeded its constitutional powers and encroached on another branch's independence. Even better, many new victims are recognized. Beyond identifying judges as victims because they are set up by the legislature to perform a rigged function, the people are another victim. It is considerably more persuasive to say to a judge that the current system harms the judge than to say that it is potentially harming someone accused of a crime. That was precisely the plaintiffs' lawyers argument to the Supreme Court in *Legal Services Corporation v. Velazquez* in challenging the restriction on activities that legal services lawyers may undertake.[292] The lawyers likely recognized that the argument that such restrictions are unfair to indigent clients would be met with skepticism because judges regard civil legal services as a privilege. If Congress were generous enough to offer free legal services to the poor, even with certain strings attached, the clients should be grateful to get any lawyer at all. But the plaintiffs' lawyers changed the focus to the judges themselves. By arguing that

safeguard, and the probable value of substitute procedures, to see whether the state needed to provide a psychiatrist for the defense).

290. *See, e.g.*, District Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52 (2009)

291. *See, e.g.*, SUP. CT. R. 37.4 ("No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General [or by a federal agency, a state, a municipality or any other similar entity]."); FED. R. APP. P. 29(a) (same).

292. Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).

Congress's choice to limit what legal services lawyers could argue in court hurt the judiciary, they made it considerably more likely that at least one or more Justices would re-evaluate what was at stake. This led to Justice Kennedy concluding that the restriction constituted an improper interference with the task of judging.[293] Advocates developing the theory at the heart of this Article will be able to do the same thing.

We are all victims of excessive executive power. The wealthy have never felt threatened by the crisis in indigent defense because they recognize they would be able to secure well-trained, highly talented lawyers with the capacity to investigate their case in the event they became a defendant themselves. Others do not feel threatened by the indigent defense crisis because they see themselves and their families as law-abiding and cannot foresee ever being a criminal defendant. All citizens are threatened, however, when the executive branch is permitted to amass excessive power and wield it virtually unchecked. The whole point of the separation-of-powers claim is that the innocent, *including* those who will never even be arrested, are ongoing victims of the current failure to monitor executive power.

B. Helping Judges Regain their Perspective

Refocusing the harms of an inadequate indigent defender system in this way may help explain why this new cause of action might persuade judges to fix a problem that they themselves may be said to have caused. Courts, after all, are solely responsible for due process caselaw that has allowed, or has made even more lopsided, the imbalance that currently exists in the criminal process today. No one should doubt that a court that wants to make major criminal-procedure innovations does not need a new theory of separated powers to do so. Instead, courts 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 forces between the accused and his accuser"[294] and it does require that the procedures made available to the litigants in criminal cases are "a two-way street."[295] Courts could also take advantage of the Supreme Court's observation 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."[296] Even *Strickland* (perhaps the case above all

293. *Id.* at 545 ("Under § 504(a)(16), however, cases would be presented by LSC attorneys who could not advise the courts of serious questions of statutory validity. . . . [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.").

294. Wardius v. Oregon, 412 U.S. 470, 474 (1973) (citation omitted).

295. *Id.* at 475.

296. 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

others responsible for the frequency with which indigent defendants are poorly represented) purports to demand that defense counsel perform effectively enough to ensure "the proper functioning of the adversarial process."[297]

If current law already is designed to require the proper functioning of the adversarial process, it is reasonable to wonder why an additional separation-of-powers analysis is needed. Even more, if the current crisis in indigent defense is traceable to judge-made law, it is still more reasonable to wonder why judges would suddenly adopt the theory to fix the problem they have helped create. Were the Supreme Court more sympathetic to defendants' Sixth Amendment claims, there would likely be no need to consider whether other constitutional violations are also involved when defendants plead guilty to crimes without anyone other than members of the executive branch understanding the underlying factual claims involved. In other words, if judges insisted on more and better defense for indigent defendants, the crisis described in this Article would not exist. For these reasons, why should anyone be optimistic that a new theory will fix a problem that, at minimum, exists only because judges have already been complicit in sustaining it?

By refocusing the harms away from the individual accused, and towards society as a whole (and to the judges themselves), the hope is that judges will come to better understand their constitutional responsibilities in overseeing criminal prosecutions. Far too many judges appear to miscomprehend their proper role. Administrators of municipal criminal courts speak and act as if the most important task judges are expected to perform is to move along and quickly resolve cases in the least amount of time. This attitude was perhaps best on display by the actions of Judge Harold Rothwax, who sat for more than twenty years on the New York City trial-level criminal court in the 1970s and 1980s. Rothwax proudly explained his method of moving cases through his court.[298] He would inform defendants at their arraignment, and at a time the judge knew the defendant did not have the benefit of a lawyer who made even a rudimentary inquiry into whether there was a defense to the charges, that they would be generously treated by the court if they agreed to plea on Day One. Rothwax offered defendants a minimum prison term of two years and a maximum of four years for a particular felony charge if they pled guilty that day. But, he also warned, "[a]fter today, it's 3 to 6"; and "after that, it's 4 to 8."[299] If nothing else, this new theory should offer a better sense of the proper function of a criminal court judge, even one whose docket is extremely overcrowded. Judges who act

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 v. Wainwright, 372 U.S. 335, 344 (1963).

297. Strickland v. Washington, 466 U.S. 668, 686 (1984).

298. *See* Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1362–64 (2004).

299. *Id.* at 1362 (citing Sam Roberts, *For One Zealous Judge, Hard Bargaining Pushes Cases Through the Courts*, N.Y. TIMES, Apr. 29, 1985, at B1).

on the understanding that their most important function is to encourage quick guilty pleas transparently violate the essence of their role by performing as co-prosecutors rather than as an independent check on executive power.

If judges reevaluate their primary function in criminal cases and pay greater attention to ensuring that counsel investigate the charges lodged against defendants, much would change. Judges might come to understand that they best discharge their constitutional duties by creating 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.[300]

Another important example of how separation of powers makes a claim look and sound different than due process involves the process of plea bargaining. Under current due process doctrine, the duties counsel owe clients differ when cases are tried and when they result in the defendant pleading guilty.[301] 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.[302] 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.[303] In addition, under current law there is no requirement that counsel conduct even minimal investigations before advising a client to plead guilty.[304] Nor are judges required to mention to defendants when they plead guilty that they have a right to have their lawyer conduct such an investigation.[305] Only when cases go to trial has the Court ruled that due process may require that counsel "conduct a thorough investigation."[306] When analyzed through the lens of separation-of-powers principles, however, it would be considerably more difficult to justify allowing defendants to forgo all investigation into their defense at the plea-

300. Once again, cases decided in the context of the Sixth Amendment could be invoked to achieve this result. Thus, the Court wrote in *Herring* 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." Herring v. New York, 422 U.S. 853, 858 (1975). *See also* Kimmelman v. Morrison, 477 U.S. 365, 384 (1986) ("[Defense] counsel's function . . . is to make the adversarial testing process work in the particular case." (quoting Strickland v. Washington, 466 U.S. 668, 690 (1984))).

301. In 2012, for the first time, the Supreme Court expanded the principle of effective assistance of counsel to the negotiation and plea bargaining stages of a criminal proceeding. *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) and Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012).

302. Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010).

303. *See* United States v. Ruiz, 536 U.S. 622, 625 (2002) (holding that a plea agreement requiring defendant to waive her right to receive information the government had regarding any "affirmative defense" she would raise at trial did not violate the Constitution).

304. *See id.* at 631 (Defendants need not possess "complete knowledge of the relevant circumstances" of their case before pleading guilty).

305. *See* FED. R. CRIM. P. 11.

306. *See* Williams v. Taylor, 529 U.S. 362, 396 (2000).

bargaining stage, since independent investigations are the surest way to guard against executive wrongdoing.

C. Civil Gideon *Claims*

A final significant benefit to this approach is what it may mean for claims outside of the criminal arena. A critical separation-of-powers argument in this Article is the 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* that only persons subject to loss of physical liberty have a due process right to court-assigned counsel as a matter of course.[307] Ever since, claims seeking to expand *Gideon* to civil matters have stalled.[308]

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 a party to the case and whether it has an advantage in the litigation against an individual. The critical questions raised in this Article equally apply when the government seeks to evict from public housing someone too poor to retain competent counsel and when it 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, an advantage which has the potential to impair the court's ability to reach the proper result based on the facts and the law.[309]

307. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 26–27 (1981).

308. *See, e.g.*, Turner v. Rogers, 131 S. Ct. 2507, 2515–20 (2011) (holding that imprisonment after failure to pay child support does not mean someone gets counsel if they are indigent, unless the person they are paying child support to has counsel). *See also* Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from* Gideon v. Wainwright, 15 TEMP. POL. & CIV. RTS. L. REV. 527 (2006); Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & CIV. RTS. L. REV. 557 (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 (2006); Michael Millemann, *State Due Process Justification for a Right to Counsel in Some Civil Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 733 (2006); Deborah Perluss, *Keeping the Eyes on the Prize: Visualizing the Civil Right to Counsel*, 15 TEMP. POL. & CIV. RTS. L. REV. 719 (2006). *But see* Sargent Shriver Civil Counsel Act, 2009 Cal. Legis Serv. Ch. 457 (A.B. 590) § 1(j) (West) ("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.").

309. There are many kinds of civil cases in which the executive branch is a party represented by counsel and 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 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 do not

VII.
CONCLUSION

To date, courts have regarded right-to-counsel cases 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 serve as a vigilant restraint on the exercise of executive or legislative power. Independently exercising its authority to serve as such a check requires the courts to assess claims that the executive or legislative branch has improperly advantaged itself before the courts.

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 their cases. In this sense, the other governmental branches 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 tinkered with in the same way that a crooked casino might rig a roulette wheel. Tinkering with the scales of justice raises both a due process issue and a separation-of-powers issue.

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."[310] This was not supposed to be.

require the automatic assignment of counsel for indigent parties as a matter of due process of law. *Lassiter*, of course, was not litigated on the separation of powers theory advanced in this Article. *See Lassiter*, 452 U.S. 18. Another large category of cases is eviction proceedings involving tenants in public housing. Still another important category, of course, is immigration cases. However, it is unclear whether and how the separation-of-powers theory advanced in this Article applies to the field of immigration, in which checks and balances through the judiciary are either unavailable or available to a lesser extent than in most other areas. *See* 8 U.S.C. §§ 1103(a), 1103(g)(2) (2012) (providing that determinations and rulings by the Attorney General with respect to all questions of immigration law shall be controlling and authorizing immigration judges, as non-Article III judges, to perform these duties for the Attorney General"). 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.

310. BACH, *supra* note 286, at 2. *See also* Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 692 (1981) ("Adversary procedures encourage a

Unless our courts put a stop to it, there is little reason to think anyone else will.

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.").