

THE ABSENCE OF AGENCY IN INDIGENT DEFENSE

Robert E. Toone*

ABSTRACT

Despite the fact that courts routinely hold indigent criminal defendants responsible for the acts and omissions of their lawyers under a theory of agency, there is effectively no agency in that lawyer-client relationship. Agency requires that the principal retain the right to control, but a series of Supreme Court rulings issued in the wake of Gideon v. Wainwright, 372 U.S. 335 (1963), established that the representation that indigent defendants receive comes at the cost of losing control over most aspects of their defense. This loss puts indigent defendants in a fundamentally different position than defendants who can retain their own counsel, and it is the primary reason why the overall quality of indigent defense is so poor. There is little incentive for appointed lawyers to expend effort or resources on particular cases beyond the minimum required to avoid court or employer sanction. Furthermore, the ability of lawyers to microallocate services by refusing clients' reasonable, defense-related requests allows legislatures to starve resources at the systemic level. Ironically, it is the view of lawyers as removed and autonomous professionals who require protection from their clients' interference that has allowed chronic underfunding and unmanageable caseloads to persist in indigent defense. A reexamination of the rules on decisionmaking control and the incentives governing the indigent defendant-lawyer relationship is in order if we are to avoid another fifty years of systemic failure.

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* Partner, Foley Hoag LLP, Boston, Massachusetts. © 2014, Robert E. Toone.

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INTRODUCTION

In *Gideon v. Wainwright*, the Supreme Court held that the Assistance of Counsel Clause of the Sixth Amendment entitles all persons accused of crime, rich and poor, to legal representation for their defense.¹ The ideal that “every defendant stands equal before the law,” the Court declared, cannot be realized “if the poor man charged with crime has to face his accusers without a lawyer to assist him.”² A year later, Anthony Lewis observed that it would be an enormous challenge to bring to life *Gideon*’s dream in which “every man charged with crime will be capably defended, no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense.”³

The fifty-year commemoration of *Gideon* has come and gone, and we are no closer to realizing that dream. Defendants in the United States face a system in which “no defense at all, rather than aggressive defense or even desultory defense, is the norm” and where “individualized scrutiny is replaced by the indifferent mass-processing of interchangeable clients.”⁴ Appointed lawyers fail to serve their clients with diligence and thoroughness, conduct adequate preparation for hearings and trial, or keep their clients reasonably informed.⁵ It is, in Amy Bach’s words, a system of ordinary injustice,⁶ where every day thousands of defendants languish in

1. 372 U.S. 335, 342 (1963). The Supreme Court ruled in *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938), that the Sixth Amendment guarantees legal representation to indigent defendants in federal court. In *Gideon*, the Court extended this right to felony defendants in state court, 372 U.S. at 339, and the right now attaches to all defendants who may be imprisoned if convicted. See *Rothgery v. Gillespie Co.*, 554 U.S. 191, 214 (2008) (holding that right attaches at initial appearance before magistrate judge, where defendant learns charge against him and liberty is subject to restriction); *Alabama v. Shelton*, 535 U.S. 654, 674 (2002) (right applies to defendant who faces suspended sentence of imprisonment); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (right applies to prosecution involving potential deprivation of liberty).

2. 372 U.S. at 344.

3. ANTHONY LEWIS, *GIDEON’S TRUMPET* 215 (1964).

4. David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1762 (1993).

5. Bruce A. Green, *Criminal Neglect: Indigent Defense from A Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1169–70 (2003) (citations omitted).

6. See AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* (2009).

jails and detention centers with little knowledge about their cases and no ability to advance their defenses. The poor performance of appointed lawyers further undermines the effective functioning of the adversarial system, which relies on the parties' aggressive pursuit of their own interests to ensure that the innocent are protected and the guilty are appropriately punished.⁷

Countless articles, reports, and op-eds have criticized this failed system of indigent defense, many focusing on the problems of underfunding and overwhelming lawyer caseloads. Few, however, have addressed the rules of law and professional ethics that allow these problems to persist.

In almost every circumstance except indigent defense, legal representation is a form of agency: a relationship in which an agent with specialized legal knowledge and skills acts on a principal's behalf, subject to the principal's control. Control is essential to agency because it allows the principal to monitor and direct the agent's activities, whose objectives may conflict with the principal's own. Thus, in normal lawyer-client relationships, clients can limit shirking, disloyalty, and other "agency costs" by exercising greater control over their cases. Without control, a principal cannot compel the agent to expend the necessary effort to achieve the principal's goals. There is, in effect, no agency relationship at all.

Under the tenure of Chief Justice Warren Burger, the Supreme Court removed agency from the indigent defense relationship, resulting in a two-tiered system of criminal justice—one for rich and one for poor—in conflict with *Gideon*'s promise of equal justice. Now, the representation that indigent defendants receive under the Sixth Amendment comes at the cost of losing control over their defense. They have essentially no ability to prevent their lawyers from shirking or pursuing ends that conflict with the defendants' own. They have no ability to compel their lawyers to investigate defenses, research case law, file motions, prepare for trial, or perform other critical defense-related tasks. In turn, state and local legislatures can limit overall resources for indigent defense systems, confident that appointed lawyers will use their authority over clients to "triage" services at a very low level of visibility.

This article argues that to fully understand the chronic failure of indigent defense, we must examine it from the perspective of a rational defendant, an individual accused of crime who wants to benefit from "the guiding hand of counsel,"⁸ but also wants to participate in his defense and prevent his appointed lawyer from shirking her responsibilities; and a rational lawyer who, like most

7. See *United States v. Cronin*, 466 U.S. 648, 656–57 (1984); *Herring v. New York*, 422 U.S. 853, 862 (1975). The defendant is "a significant actor in the criminal process, not merely the passive object of government action," and he must assert his rights and make important strategic choices at every stage of the proceeding. ROBERT HERMANN ET AL., *COUNSEL FOR THE POOR: CRIMINAL DEFENSE IN URBAN AMERICA* 15 (1977). Effective advocacy by appointed counsel is critical to making this system work.

8. See *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

agents, seeks to maximize her own utility. If we are to realize *Gideon*'s dream in the next fifty years, we should consider how the allocation of authority within the lawyer-client relationship impacts the incentives and effort expended by appointed lawyers and, in turn, the ability of legislatures to limit overall funding for indigent defense.

I. AGENCY IN RETAINED COUNSEL RELATIONSHIPS

A. *The Principal's Right of Control*

Lawyers are generally "recognized as agents for their clients in litigation and other legal matters."⁹ In the courts, this point usually arises in deciding whether a client is bound by his lawyer's decisions. In the 1962 case of *Link v. Wabash Railroad Co.*, the Supreme Court declared that in "our system of representative litigation" "each party is deemed bound by the acts of his lawyer-agent."¹⁰ In that case, the trial court dismissed the plaintiff's negligence action for failure to prosecute after his counsel failed to appear at a pretrial conference.¹¹ On appeal, a majority of the Supreme Court rejected the claim that the dismissal imposed "an unjust penalty" on the plaintiff because he "voluntarily chose this attorney as his representative in the action, and . . . cannot now avoid the consequences of the acts or omissions of this freely selected agent."¹² This rule has since been applied in civil and criminal cases alike and without regard for whether counsel was "voluntarily chose[n]" by the party or assigned by the court.¹³ In recent years, the Supreme Court has recognized a limited equitable exception for cases where the lawyer effectively "abandons" her client.¹⁴ It has not, however, disturbed the general rule that "[b]ecause the attorney is the litigant's agent, the attorney's acts

9. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 cmt. b (2000); *see also* Deborah A. DeMott, *The Lawyer as Agent*, 67 *FORDHAM L. REV.* 301, 301 (1998) (stating that "the lawyer-client relationship is a commonsensical illustration of agency," even though "the law of agency does not by itself capture all of the legal consequences of relationships between lawyers and clients and between lawyers and others to whom the lawyer owes duties").

10. 370 U.S. 626, 634 (1962) (citation omitted).

11. *Id.* at 628–29.

12. *Id.* at 633–34. As Adam Liptak has observed, even though Justice Harlan announced this rule with "the air of a first principle," the case was narrowly decided, with Justice Black in dissent describing as "contrary to the most fundamental ideas of fairness and justice to impose the punishment for the lawyer's failure to prosecute upon the plaintiff who, so far as this record shows, was simply trusting his lawyer to take care of his case as clients generally do." Adam Liptak, *Foreword: Agency and Equity: Why Do We Blame Clients for Their Lawyers' Mistakes?*, 110 *MICH. L. REV.* 875, 877–78 (2012) (quoting *Link*, 370 U.S. at 643 (Black, J., dissenting)).

13. *See* Liptak, *supra* note 12, at 876–77 (quoting *Link*, 370 U.S. at 633).

14. *Maples v. Thomas*, 132 S. Ct. 912, 922–24 (2012); *see also* *Holland v. Florida*, 560 U.S. 631, 652–54 (2010) (remanding for reconsideration on equitable tolling). "Common sense," the Court observed in *Maples*, "dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." 132 S. Ct. at 923 (quoting *Holland*, 560 U.S. at 659 (Alito, J., concurring)).

(or failures to act) within the scope of the representation are treated as those of his client.”¹⁵

In theory, the idea of agency should entail more than just holding parties responsible for the negligence of their lawyers. Agency is defined as “the fiduciary relationship that arises when one person (‘a principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests or otherwise consents so to act.”¹⁶ The elements of an agency relationship are thus a mutual manifestation of consent, the agent’s undertaking to act on behalf of the principal, and the principal’s right to control the agent.¹⁷ A principal-agent relationship arises only when all three elements are present; the fact that a relationship may be characterized as agency “in the context of industry or popular usage” is not controlling.¹⁸

In particular, the principal’s right to control the agent is “a constant across relationships of agency.”¹⁹ It encompasses the right “to assess the agent’s performance, provide instructions to the agent, and terminate the agency relationship by revoking the agent’s authority.”²⁰ The right to control is not absolute; like other agents, lawyers are “subject to legal limits on acts that may be done rightfully on behalf of a principal,”²¹ as well as “profession-defined norms and discipline.”²² Nevertheless, the law of agency provides that the principal’s right to control is inalienable, continuing “even if the principal has previously agreed with the agent that the principal will not give interim instructions to the agent or will not otherwise interfere in the agent’s exercise of discretion.”²³ A lawyer may have remedies for the breach of an earlier agreement delegating authority to her, but “[u]nless the agent resigns, the agent has a duty to obey a reasonable instruction

15. *Holland*, 560 U.S. at 664 (Scalia, J., dissenting) (citing *Link*, 370 U.S. at 633–34 & n.10); see also *Coleman v. Thompson*, 501 U.S. 722, 750–51 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 88–90 (1977). In particular, negligence on the part of a defendant’s post-conviction lawyer does not qualify as cause for a procedural default, since “the principal bears the risk of negligent conduct on the part of his agent.” *Maples*, 132 S. Ct. at 922 (citing *Coleman*, 501 U.S. at 753–54).

16. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

17. DeMott, *supra* note 9, at 302–03.

18. RESTATEMENT (THIRD) OF AGENCY § 1.02.

19. *Id.* § 1.01 cmt. c.; see also *id.* § 1.01 cmt. f.

20. *Id.* § 1.01 cmt. f.; see also Deborah A. DeMott, *The Mechanisms of Control*, 13 CONN. J. INT’L L. 233, 235–36 (1999) (“The principal’s ability to control the agent by specifying the service to be provided, by designing the agent’s incentive system, and by providing interim instructions to the agent, underlies the principal’s accountability for consequences of the agent’s interaction with third parties.”).

21. DeMott, *supra* note 9, at 305.

22. *Id.*; see also *id.* at 306 (discussing “the robust professional culture and standards that define a lawyer’s professional identity” and observing that “the lawyer’s membership in a self-regulating profession limits the reach of the lawyer’s agency relationship with the client as the source of the client’s rights and the lawyer’s obligations”); RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f (stating that agent’s duty of obedience does not require her “to obey instructions to commit a crime or a tort or to violate established professional standards”).

23. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f; see also DeMott, *supra* note 9, at 304 (“[U]nder the common law of agency, a principal who has agreed not to exercise control nevertheless retains the power to do so.”).

from the principal.”²⁴ Indeed, an allocation whereby the lawyer assumed irrevocable authority over most or all non-waivable decisions related to a litigation matter, “completely beyond client direction,” would call into question the very existence of an agency relationship.²⁵

B. Default Allocation of Authority, Negotiation, and Variation in Private Practice

From a standpoint of professional regulation, the allocation of decisionmaking authority for privately retained lawyers begins—but does not end—with Model Rule of Professional Conduct 1.2. That rule provides that, with the exception of certain specified decisions, a lawyer “shall abide by a client’s decisions concerning the objectives of representation” but need only “consult with the client as to the means by which they are to be pursued.”²⁶ Many have noted the relative vacuity of the difference between “objectives” and “means” in legal matters.²⁷ This point is particularly apparent in criminal cases, where the primary objectives of representation are essentially the same in almost *every* case, regardless of the charged offense, the defendant’s background, or even his actual guilt or innocence. That is, almost every defendant seeks to avoid charges, avoid conviction, and, when that is not possible, obtain the least severe punishment possible.²⁸ Indeed, where defendants do not share those basic objectives, courts may intervene to protect the fundamental norm of challenge that underlies the adversarial system and society’s

24. See DeMott, *supra* note 9, at 304 & n.7; see also RESTATEMENT (THIRD) OF AGENCY § 3.10(1) (providing that principal may terminate agent’s authority “[n]otwithstanding any agreement between principal and agent”).

25. See DeMott, *supra* note 9, at 304 & n.8.

26. MODEL RULES OF PROF’L CONDUCT R. 1.2 (2013); see also MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. (“[A] lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued.”).

27. See Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 507 (1994) (“Proponents of client-centeredness identify several flaws in the ends-means dichotomy. The fluidity of the concept makes it nearly impossible to predict whether a client will view a particular decision as implicating means or ends.”); Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. CRIM. L. & CRIMINOLOGY 161, 182 (2000) (“The distinction between objectives and means, however, is not as coherent as it might initially appear, and many decisions can be easily characterized both as strategic ones regarding means and as fundamental ones regarding objectives.”); Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 324 (1987) (arguing that the “assumed dichotomy between means and ends does not survive close analysis”); Rodney J. Uphoff, *Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant’s Tactical Choices*, 68 U. CIN. L. REV. 763, 776–77 (2000) (“In fact, the lawyer’s selection of means or counsel’s strategic choices may so profoundly affect the client’s substantive rights and the opportunity to realize the client’s objectives that it is inconsistent with general agency principles to permit the lawyer/agent such sweeping control.”). At one point, the ABA’s own commentary on the rule acknowledged that a “clear distinction” between the two “sometimes cannot be drawn.” See MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. (1989).

28. See Christopher Johnson, *The Law’s Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted Indignity*, 93 KY. L.J. 39, 130–31 (2004) (observing that “in the more general run of cases . . . the defendant has no interest at stake anywhere near as important as the interest in winning the case”).

interest in accurate and just outcomes that that system is intended to protect.²⁹

Because Rule 1.2 separately reserves to criminal defendants the decision about how to plead, its grant of decisionmaking authority over “objectives” gives them little additional authority. By contrast, lawyers need not under Rule 1.2’s default allocation pursue the “means” preferred by their clients. The commentary to the rule acknowledges that disagreements between clients and attorneys may arise, but notes that the rule “does not prescribe how such disagreements are to be resolved.”³⁰ If a disagreement cannot be resolved, the lawyer may withdraw from the case, or the client may fire the lawyer.³¹

For wealthy defendants, however, the allocation of authority established by Rule 1.2 is only presumptive.³² Because they pay the piper, they have the power to negotiate greater control over the conduct of their defense, including over decisions involving the “means” of representation, either at the outset of the representation or as a condition for future payment. This point is recognized in the Restatement (Third) of The Law Governing Lawyers, which discusses the “broad freedom of clients and lawyers to work out allocations of authority.”³³ Thus, while the lawyer “begins with broad authority to make choices advancing the client’s interests,” the client “may limit the lawyer’s authority by contract or instructions.”³⁴

29. See generally Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 640–44 (2005).

30. MODEL RULE OF PROF’L CONDUCT 1.2 cmt. 2 (2013). The commentary does observe that “[c]lients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters,” while lawyers “usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.” *Id.*

31. *Id.*

32. Of course, not all defendants who retain counsel have the economic power to dictate terms of representation. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 34 n.118 (1997) (citing Malcolm M. Feeley, *Bench Trials, Adversariness, and Plea Bargaining: A Comment on Schulhofer’s Plan*, 14 N.Y.U. REV. L. & SOC. CHANGE 173, 174 (1986)) (distinguishing between “well-paid retained counsel” and counsel “retained by defendants whose finances place them only slightly above the indigency line”). Defendants with moderate means often end up represented by “marginal practitioners” who are sometimes less able and responsive than appointed counsel. See *id.*; HERMANN, *supra* note 7, at 132–33. It is common, for example, in DUI and other low-level criminal cases for retained defense attorneys to demand that clients pay a substantial flat fee at the outset of the representation. See generally Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. REV. 1, 7–13 (1993). Because clients in such cases have limited financial leverage, lawyers frequently assume greater decisionmaking control over the course of the defense. See Rodney J. Uphoff & Peter B. Wood, *The Allocation Of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study Of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 29 (1998).

33. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21 cmt. c (2000); see also PAUL G. HASKELL, *WHY LAWYERS BEHAVE AS THEY DO* 86 (1998) (stating that “the professional rules permit the lawyer to practice in accordance with the hired gun model or the independent lawyer model, as he chooses”).

34. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21 cmt. b; see also Johnson, *supra* note 28, at 131 (“Defendants wealthy enough to retain counsel can, by contract with their lawyer, retain final authority over defense decisions.”); H. Richard Uviller, *Calling the Shots: The Allocation of Choice Between the Accused and*

As a result of this freedom of contract, we see substantial variation in the market for retained legal counsel in how decisionmaking authority is allocated between clients and lawyers. There is no prevailing model allocation of authority, but rather a diversity of arrangements that reflect differences in the parties' respective interests, legal knowledge and experience, and bargaining power.

In forming these arrangements, clients address the problems that are inherent in every principal-agent relationship. In the classic principal-agent problem, the agent has asymmetric information relative to the principal (*i.e.*, in this case, the lawyer's specialized legal knowledge and skills). The principal contracts with the agent to act on his behalf, but a problem arises because the two parties have different goals and objectives (economists refer to this as different "utility functions"),³⁵ and the principal's costs of monitoring the agent's performance are high.³⁶ The misalignment of the principal's and agent's incentives and the difficulty involved in monitoring the agent's actions result in a situation referred to as moral hazard.³⁷ For example, the benefits received by the principal may depend on how much effort the agent exerts, and it may be difficult for the agent to observe the level of effort exerted. In this situation, if the agent receives a fixed payment for her services, unrelated to her actual performance, she will have an incentive to shirk: to expend less effort than necessary to achieve the principal's ends. Solving the principal-agent problem involves designing the agent's incentives in such a way as to align the interests of the two parties while minimizing monitoring costs for the agent.

Significant costs are involved in getting lawyers in private practice to act in the best interests of their clients. Conflicts arise between the client's and the lawyer's interests "because the agent has the power to control the principal's affairs but does not fully bear the risks and rewards associated with this control."³⁸ As Professor

Counsel in the Defense of a Criminal Case, 52 RUTGERS L. REV. 719, 755–56 (2000) (observing that unlike "institutional and assigned counsel," retained counsel "may state the terms of their engagement in contractual terms").

35. See Stephen A. Ross, *The Economic Theory of Agency: The Principal's Problem*, 63 AM. ECON. REV. 134, 134 (1973) (noting that both the agent and principal possess state-independent utility functions and they act so as to maximize their respective utility); Steven Shavell, *Risk Sharing and Incentives in the Principal and Agent Relationship*, 10 BELL J. ECON. 55, 57 (1979) (describing the principal's utility function as dependent on wealth and the agent's utility function as dependent on wealth and effort).

36. See David E. M. Sappington, *Incentives in Principal-Agent Relationships*, 5 J. ECON. PERSP. 45, 45 (1991) ("The central concern is how the principal can best motivate the agent to perform as the principal would prefer, taking into account the difficulties in monitoring the agent's activities.").

37. See, e.g., Ian Ayres & Peter Cramton, *Relational Investing and Agency Theory*, 15 CARDOZO L. REV. 1033, 1044 (1994) ("The possibility of moral hazard stems from the agent's 'hidden action.' The [principal] can only imperfectly observe an agent's efforts, making it difficult to reward and punish agents appropriately."); Bengt Holmstrom, *Moral Hazard and Observability*, 10 BELL J. ECON. 74, 74 (1979) ("The source of this moral hazard or incentive problem is an asymmetry of information among individuals that results because individual actions cannot be observed and hence contracted upon.").

38. Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1709 (1998).

Ribstein has explained, “[a]gency costs are potentially significant in legal representation because the client delegates significant discretion to the lawyer but incurs high monitoring costs because of the specialized and idiosyncratic nature of professional work.”³⁹ Monitoring costs involve not only “measuring or observing the behavior of the agent,” but also efforts “to ‘control’ the behavior of the agent through budget restrictions, compensation policies, operating rules, etc.”⁴⁰ In retained counsel relationships, one kind of agency cost occurs when a lawyer causes the client “to buy more services than the client would buy if the client made the decision with full information.”⁴¹ A different cost involves the lawyer failing to “to invest the amount of time and other resources representing clients necessary to maximize the interests of both lawyers and clients.”⁴² As in all principal-agent relationships, the client’s problem is how to limit such shirking and ensure that the lawyer acts according to the goals and objectives of the client.

Agency costs are addressed in a number of ways. Competition in the market incentivizes lawyers and law firms to establish and maintain a reputation for effectively advocating clients’ interests while respecting their concerns about risk management and litigation costs.⁴³ Professional regulation also imposes some pressure on lawyers to act as a fiduciary for their clients.⁴⁴ Most important, clients with economic power can increase their monitoring of and control over all aspects of litigation (“objectives” and “means” alike) to ensure that their interests are advanced and that an appropriate level of effort is exerted and to better manage the incentive and information asymmetry problems that come with the lawyer-client relationship.⁴⁵ This monitoring can include imposition of reporting requirements on lawyers, detailed litigation budgets, client preapproval of motion practice or discovery plans, and direct involvement in settlement negotiations or court proceedings. A client can also use alternative fee arrangements—*i.e.*, compensation models that differ from traditional hourly billing—to better incentivize a

39. *Id.*; see also 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, 77–78 (1993) (“[U]nder the best of circumstances, the relationship between defendant and counsel involve serious agency problems.”).

40. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305, 308 n.9 (1976).

41. Ribstein, *supra* note 38, at 1710.

42. *Id.* at 1709.

43. See Schulhofer & Friedman, *supra* note 39, at 77–78.

44. For example, the preamble to the Model Rules of Professional Conduct discusses a lawyer’s role as zealous advocate under the rules of the adversary system, Model Rule 1.3 directs lawyers to act “with reasonable diligence” in representing clients, and Model Rule 1.5 prohibits lawyers from charging or collecting unreasonable fees. MODEL RULES OF PROF’L CONDUCT (2013).

45. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21 cmt. d (2000) (“A client may give instructions to a lawyer during the representation about matters within the lawyer’s reasonable power to perform, just as any other principal may instruct an agent.”).

lawyer's performance⁴⁶ and fire her if she fails to follow directions.⁴⁷

There is no unique solution to the principal-agent problems that arise in the private legal market.⁴⁸ In recent decades, corporate and other sophisticated clients have taken a more active approach to managing outside counsel.⁴⁹ Aggressive monitoring efforts by clients, however, are costly and can lead to resentment by lawyers.⁵⁰

It is also true that, in the mid-twentieth century at least, a few elite lawyers demanded near-complete control over litigation as a condition of their retention. For example, it was the view of prominent attorneys (later judges) Clement F. Haynsworth, Jr. and Thurmond Arnold that the lawyer was "the master" who served the client's needs only "as the lawyer sees them, not as the client sees them."⁵¹ Celebrated defense attorney F. Lee Bailey similarly advised attorneys to tell clients that "you alone will control the strategy of the defense, decide what legal points are to be raised, determine what witnesses to call, engage in whatever discussions you deem necessary with the prosecution."⁵² Edward Bennett

46. See Robert E. Litan & Steven C. Salop, *Reforming the Lawyer-Client Relationship Through Alternative Billing Methods*, 77 JUDICATURE 191, 194–196 (1994).

47. See generally Robert W. Hillman, *Client Choice, Contractual Restraints, and the Market for Legal Services*, 36 HOFSTRA L. REV. 65, 65 (2007) (discussing "norm of client choice" that "rests on the simple and largely unquestioned premise that clients should be free to discharge their lawyers, with or without cause and even, under most circumstances, in contravention of contract").

48. Cf. Gary J. Miller, *Solutions to Principal-Agent Problems in Firms*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 349, 349–50 (Claude Ménard and Mary M. Shirley, eds., 2008) (arguing that there is no unique solution to principal-agent problems in firms and "incentives, monitoring, and cooperation" play different roles "in the infinite variety of contractual forms that can govern transactions within the firm").

49. Beginning in the 1970s, a surge in demand for legal services led to high growth in the number of practicing lawyers, larger law firms, higher lawyer salaries, and increased specialization and competition among lawyers. See Roger C. Cramton, *The Future of Law Practice in the United States*, 24 QUINNIPIAC L. REV. 529, 532–33 (2006); Charles D. Weisselberg & Su Li, *Big Law's Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms*, 53 ARIZ. L. REV. 1221, 1227, 1231 (2011) (describing the changing market for lawyers as contributing to the growth of specialized white collar practices). At the same time, many companies substantially expanded their in-house legal staffs, bringing in lawyers with the experience and knowledge to handle a broad range of legal matters on their own and to actively manage outside counsel when necessary. See Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 761. For example, the "DuPont legal model," developed by E.I. DuPont de Nemours in the 1990s and adopted by other companies, emphasizes increased control over outside counsel, direct involvement in litigation strategy, minimization of costs, and fee arrangements that better align the interests of clients and counsel. See Terry Carter, *Do it the DuPont Way*, 90 A.B.A. J. 27, 27 (2004); Thomas L. Sager & Steven A. Lauer, *Establishing and Maximizing Corporate Legal Resources*, 29 OF COUNSEL, Feb. 2010 at 6; see also David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2081–82 (2010) (discussing role of General Electric's legal officer in expanding in-house legal department and actively managing legal costs).

50. Miller, *supra* note 48, at 358.

51. Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 193 (1978). No client of Arnold's, Abe Fortas wrote in a fond retrospective, was "permitted to dictate or determine the strategy or substance of the representation, even if the client insisted that his prescription for the litigation was necessary to serve the larger cause to which he was committed." Abe Fortas, *Thurman Arnold and the Theatre of the Law*, 79 YALE L.J. 988, 996 (1970).

52. F. LEE BAILEY & HENRY B. ROTHBLATT, FUNDAMENTALS OF CRIMINAL ADVOCACY 44 (1974).

Williams, founder of the firm Williams & Connolly, liked to say he would defend anyone “as long as the client gave him total control of the case and paid up front.”⁵³ In a 1986 interview, Williams explained his views on control as follows:

I tell the client that I have to have it, that I can’t work without it. I give a bad analogy. I say, look, if you want me to take your appendix out, I have to have absolute control of the operation. You can’t put your hand on the scalpel, not if you want to survive. If you don’t have absolute confidence in my ability, as a lawyer, then find somebody—one person—in whom you do have confidence.⁵⁴

This was not just lip service for Williams: he declined to represent writer and antiwar activist Benjamin Spock because it was “quite clear that I would never get the kind of control over that case that I insist upon,”⁵⁵ and he withdrew from representing oil tycoon Armand Hammer after he declined to follow Williams’s advice.⁵⁶

It is difficult to say to what extent this model of decisionmaking control was ever representative of the broader private market for retained criminal defense lawyers,⁵⁷ but it is not today, at least among sophisticated paying clients. As recognized in the Restatement of the Law Governing Lawyers, clients have “broad freedom” to negotiate allocations of authority with retained counsel, depending on “the importance of the case, the client’s sophistication and wish to be involved, the level of shared understandings between client and lawyer, the significance and technical complexity of the decisions in question, the need for speedy action, and other considerations.”⁵⁸ Certainly, some wealthy clients may elect to give their lawyers full rein to run the case, but others demand more involvement in and control over the defense,⁵⁹ and they are free to do so as long as they do not require

53. EVAN THOMAS, *THE MAN TO SEE: EDWARD BENNETT WILLIAMS, ULTIMATE INSIDER, LEGENDARY TRIAL LAWYER* 20 (1991).

54. Priscilla Anne Schwab, *Interview with Edward Bennett Williams*, 12 LITIGATION 28, 30 (1986); *see also* THOMAS, *supra* note 53, at 474.

55. Kenneth P. Troccoli, *Control Over the Defense: Representing Zacarias Moussaoui*, 33 CHAMPION 30, 38 & n.149 (2009) (citing ROBERT PACK, *EDWARD BENNETT WILLIAMS FOR THE DEFENSE* 361 (2d ed. 1988)).

56. *Id.* at 38 (citing PACK, *supra* note 55, at 21).

57. *See* Uphoff & Wood, *supra* note 32, at 5 (noting “a paucity of empirical evidence indicating whether clients are making strategic and tactical decisions in their cases”); *see also id.* at 21 (“Systematic data collection regarding client involvement in decisionmaking is virtually non-existent.”).

58. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 cmt. c (2000).

59. For example, white-collar defense attorney Abbe Lowell described his client former Senator (and trial lawyer) John Edwards as highly involved in his ultimately successful defense against federal campaign finance fraud charges: “There was not a day—I like to joke and say there wasn’t an hour—that he wasn’t involved. He had lots of input, lots and lots of ideas. He wasn’t shy about telling us ideas he had, things he thought we did well, things we could do better.” Marisa M. Kashino, *Capital Comment: A Conversation with Abbe Lowell*, WASHINGTONIAN, June 15, 2012, <http://www.washingtonian.com/blogs/capitalcomment/politics/a-conversation-with-abbe-lowell.php>.

their lawyers to violate the rules of the court or professional conduct or the law.⁶⁰ As it turns out, Williams's authoritarian approach to lawyering has been more influential in an altogether different part of the criminal justice system.

II. LAWYER CONTROL IN INDIGENT COUNSEL RELATIONSHIPS

There is a common perception among indigent criminal defendants that they are powerless, subject to the whims of the criminal justice system, and unable to push the levers of the adversarial system.⁶¹ This perception is accurate, and by design. The price that poor defendants pay for receiving appointed legal representation is the loss of control over their defense. In the decades that followed *Gideon*, a series of rules developed by bar associations and the courts sharply limited the right to control of indigent defendants—so sharply, it is questionable whether any agency relationship exists between most of these defendants and their lawyers—even though, as we have seen, all defendants are bound by decisions that their “lawyer-agents” make. In this sense, indigent defendants stand in a fundamentally different place than others when it comes to their ability to exert control over their defense.

This situation was not preordained. To the contrary, in the years after *Gideon* there was substantial uncertainty in the courts and legal profession about how decisionmaking authority should be allocated between defendants and appointed lawyers. The prevailing rules on this issue are largely due to the influence of one man: Chief Justice Warren Burger.

A. Professional Standards: Vein-Clamping Surgeons and Sleeve-Plucking Clients

Warren Burger may be best remembered for his achievements in judicial administration. As Chief Justice, Burger “considered himself the steward of the whole judicial system, state and federal” and helped to establish a “plethora of institutions dedicated to enhancing the administration of justice.”⁶² In addition to

60. Under Model Rule of Professional Conduct 1.16(a), a lawyer is required to withdraw from representation of a client if “the representation will result in violation of the rules of professional conduct or other law,” MODEL RULES OF PROF'L CONDUCT R. 1.16(a) (2013), and is permitted to withdraw if the client “persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent” or “insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.” *Id.* R. 1.16(b)(2), (4).

61. See, e.g., BACH, *supra* note 6, at 46–47 (quoting Georgia state defendant imprisoned for months after his charges were dismissed, “You feel like a castaway . . . Nobody knows you exist.”); KAREN HOUPPERT, CHASING GIDEON: THE ELUSIVE QUEST FOR POOR PEOPLE'S JUSTICE 16–20 (2013) (describing inability of parents of New Jersey child charged with molestation to obtain requested legal services or reliable information from assigned public defender); Jonathan A. Rapping, *Retuning Gideon's Trumpet: Telling the Story in the Context of Today's Criminal-Justice Crisis*, 92 TEXAS L. REV. 1225, 1227 (2013) (arguing that failure to fulfill *Gideon*'s promise has resulted in “increasing numbers of people, mostly poor,” being “dumped onto the conveyor belt” that whisks them “from arrest to sentencing”).

62. Carl Tobias, *Warren Burger and the Administration of Justice*, 41 VILL. L. REV. 505, 507 (1996); see also Edward A. Tamm & Paul C. Reardon, *Warren E. Burger and the Administration of Justice*, 1981 BYU L. REV.

promoting judicial efficiency and effective court management, he “praised, cajoled, criticized, prodded, and preached” to members of the legal profession “about such issues as legal ethics, lawyer discipline, and the efficiency and expense of legal and court processes.”⁶³

One frequent theme of Burger’s was “the ineptness, the bungling, the malpractice, if you will” of trial lawyers that could be “observed in court houses all over this country every day.”⁶⁴ At an ABA prayer breakfast in 1969, he observed that “in many courtrooms, cases are being inadequately tried by poorly trained lawyers, and people suffer because lawyers are licensed, with very few exceptions, without the slightest inquiry into their capacity to perform the intensely practical functions of a counselor or advocate.”⁶⁵ Four years later, he estimated that “from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation.”⁶⁶

This concern about the competence of America’s lawyers was not accompanied by a deep sense of compassion for defendants who complained about their lawyers’ performance or sought to raise issues that they neglected. In one concurring opinion, issued while Burger served on the D.C. Circuit, he condemned the “vicious and unwarranted attacks” by former clients of court-appointed attorneys on appeal, noting how “the indigent client’s sense of gratitude” tended to be “dulled by incarceration.”⁶⁷ With “the enormous expansion of indigent representation,” Burger observed, there came “a need for some guidelines to protect the volunteer lawyer who, after full consideration, decides on a course of action which his indigent client opposes.”⁶⁸ He continued:

As I see it that lawyer must be free to follow his own professional judgment and conscience no matter what his client thinks or be entirely free to withdraw rather than be compelled to advance absurd and nonsensical contentions on pain of a vicious attack from the jail house. We have no more right to ask

447, 500 (1981) (explaining that Burger “stressed the need to prepare students by practical training, especially in trial advocacy”).

63. Tamm & Reardon, *supra* note 62, at 499.

64. Warren E. Burger, *Remarks on Trial Advocacy: A Proposition*, 7 WASHBURN L.J. 15, 18–19 (1967); *see also id.* at 15 (“[T]he majority of lawyers who appear in court are so poorly trained that they are not properly performing their job and that their manners and their professional performance and their professional ethics offend a great many people.”).

65. Tamm & Reardon, *supra* note 62, at 500 (quoting Warren E. Burger, Remarks at Prayer Breakfast, American Bar Association Convention (Aug. 10, 1969)).

66. Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 234 (1973); *see also* Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 950 (1995) (“As a result of the marked increase in attorney misconduct and the failure of the organized Bar to discipline violations, the standing of the legal profession is perhaps at its lowest ebb in this century—and perhaps at its lowest in history.”).

67. *Williams v. United States*, 345 F.2d 733, 736 (D.C. Cir. 1965).

68. *Id.* at 737.

volunteer lawyers to stultify themselves or prostitute their professional standards than we would have to demand that paid lawyers do so.⁶⁹

Burger's focus on the lawyer-protecting role of professional standards was revealing. From 1964 to 1969, he served as chairman of the ABA's Advisory Committee on the Prosecution and Defense Functions, part of the ABA's effort to establish standards for criminal defense in the years immediately following *Gideon*.⁷⁰ Burger ultimately took over this effort in its entirety.⁷¹ Upon publication of the ABA standards in 1974, he described the project as "the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history" and recommended that "[e]veryone connected with criminal justice . . . become totally familiar with [the Standard's] substantive content."⁷²

In an article in 1969, Burger described the initial fact-finding efforts of the Advisory Committee on the Prosecution and Defense Functions. After calling in "as 'expert witnesses' some of the foremost criminal defense lawyers in the United States"—a group that included Edward Bennett Williams—the committee arrived at a number of principles.⁷³ Chief among them was "the question of who controls the case."⁷⁴ A "great problem," Burger observed, had arisen in *Gideon*'s wake. This problem did not involve the quality of legal representation, overburdened courts, or legislative resources, but rather "jail house lawyers"—defendants who had acquired "a certain limited skill" in the law and were "flooding [their court-appointed lawyers] with instructions about how to run the case and what motions to make, etc."⁷⁵ Burger's expert witnesses found this situation intolerable:

These distinguished criminal defense lawyers were very firm in the proposition that the lawyer must control the case—the lawyer as a professional must control the case. I remember one of these lawyers using as an analogy, that any other standard would be as ridiculous as having a man go into the hospital, to have his appendix taken out by a local anesthetic, telling the doctor, "No, don't cut there, cut here. Don't clamp that vein, clamp this one. Don't do this, do that." This was merely a concrete reflection of what these men learned from long experience. The committee agreed, that the defense of a criminal case is a very high-level, professional function and it takes a highly trained man to

69. *Id.*

70. STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEF. FUNCTION vi (Tentative Draft March 1970).

71. Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 10 (2009).

72. *Id.* (quoting Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 251, 251, 253 (1974) [hereinafter Burger, *Introduction*]).

73. Warren E. Burger, *Counsel for the Prosecution and Defense—Their Roles Under the Minimum Standards*, 8 AM. CRIM. L.Q. 2, 4 (1969) [hereinafter Burger, *Counsel for the Prosecution and Defense*].

74. *Id.*

75. *Id.*

perform it. It also requires a man who is somewhat detached and objective and not emotionally involved. In this report the proposition emerges firmly that the lawyer must control the case.⁷⁶

In the real world, doctors do not use local anesthesia to remove appendixes or clamp veins.⁷⁷ Perhaps that is the charm of Williams's "bad analogy"—the absurdity of the idea that a patient might even think to micromanage his surgeon during surgery. It is one thing for an elite D.C. lawyer to use such a metaphor to explain his insistence on control, however, and quite another for it to justify a rule of general applicability. Burger certainly intended his committee's work to apply broadly to all defendant-lawyer relationships.⁷⁸ He acknowledged that appointed counsel may face certain unique "practical problems," due to the fact that "a defender establishment in a large city dealing with thousands of cases in a year, realistically is not quite in the same posture because the defendant does not pick this defense counsel."⁷⁹ This nod to legal realism, however, did not result in any refinement of the committee's recommendations. To the contrary, Burger emphasized, it was imperative that the ABA's standards apply uniformly, "whether the defense counsel is appointed by the court, whether he is part of the defender's system or a legal aid group, or is hired and paid a fee in advance."⁸⁰

The views of this advisory committee became ABA doctrine with the promulgation of its Standards Relating to the Prosecution Function and the Defense Function in 1971.⁸¹ Standard 5.2, on the "control and direction of the case," delineated a few discrete decisions to be made by the client⁸² and then relegated to the lawyer "exclusive" control over "decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions."⁸³ The commentary suggested that lawyers and clients operate on different planes of consciousness, where constitutional rights "are such that only trained experts can comprehend their full significance and an explanation to any but the most sophisticated client would be futile."⁸⁴ It advised lawyers to "seek to maintain a cooperative relationship" with their clients—taking care not to "completely

76. *Id.* at 4–5. Burger acknowledged a few "exceptions" to the rule on attorney control, recognizing that the defendant should ultimately decide how to plead, whether to waive a jury, and whether to testify. *Id.* at 5.

77. Janet M. Torpy, *Local Anesthesia*, 306 JAMA 1395, 1395 (2011).

78. See Marcus, *supra* note 71, at 10 (quoting Burger, *Introduction*, *supra* note 72, at 253 (1974)).

79. Burger, *Counsel for the Prosecution and Defense*, *supra* note 73, at 6.

80. *Id.* at 4.

81. STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEF. FUNCTION (1971).

82. "Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are: (i) what plea to enter; (ii) whether to waive jury trial; (iii) whether to testify in his own behalf." STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEF. FUNCTION § 5.2(a) (1971).

83. *Id.* § 5.2(b).

84. *Id.* § 5.2 cmt. b.

ignore” them when making decisions about what witnesses to call or issues to argue.⁸⁵ Nevertheless, “the power of decision”—“the ultimate choice and responsibility for the strategic and tactical decisions in the case”—had to rest with the lawyer,⁸⁶ since “[e]very experienced advocate can recall the disconcerting experience of trying to conduct the examination of a witness or follow opposing arguments or the judge’s charge while the client ‘plucks at his sleeve’ offering gratuitous suggestions.”⁸⁷

B. Incorporation into Sixth Amendment Jurisprudence

The ABA’s view on decisionmaking control soon became incorporated into constitutional law. Even as the Supreme Court broadened the application of the right of indigent defendants to appointed counsel, a series of less celebrated rulings restricted its meaning by limiting the ability of represented defendants to control their defense.⁸⁸ These rulings reflected many of the biases held by the ABA advisory committee: the belief that broad control must be vested in the attorney; the view of attorneys as high-level professionals practicing an art unfathomable to laymen; and a disdain for defendants who pester their attorneys with ideas about how their defenses should be conducted. Ironically, these rulings began with one that, on its face, purported to recognize principles of agency underlying the Assistance of Counsel clause itself.

1. The Dilemma of Appointed Representation

Although *Faretta v. California*, 422 U.S. 806 (1975) is best known, for better or worse,⁸⁹ as the case that established the right of self-representation, it is also the first post-*Gideon* case to address the problem of inadequate indigent defense. The defendant, Anthony Faretta, sought to represent himself because the public defender’s office was “very loaded down with . . . a heavy case load” and he believed he could do a better job representing himself.⁹⁰ The majority, which represented the more liberal wing of the Court, was sympathetic to Faretta’s predicament, observing that it was the defendant, not defense counsel, who would

85. *Id.*

86. *Id.*

87. *Id.*

88. See *Gonzalez v. United States*, 553 U.S. 242, 245 (2008); *Taylor v. Illinois*, 484 U.S. 400 (1988); *Strickland v. Washington*, 466 U.S. 668 (1984); *Jones v. Barnes*, 463 U.S. 745, 754 (1983); *Morris v. Slappy*, 461 U.S. 1 (1983); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Estelle v. Williams*, 425 U.S. 501 (1976); *Faretta v. California*, 422 U.S. 806, 807 (1975).

89. For one view on “worse,” see Toone, *supra* note 29 (discussing the consequences of self-representation on the integrity of the criminal justice system).

90. *Faretta*, 422 U.S. at 807.

bear the consequences of counsel's failure to prepare.⁹¹ The Sixth Amendment, it observed, "does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense."⁹² In particular, the amendment:

[S]peaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.⁹³

The Court thus conceived of counsel as an agent to the defendant's principal: an assistant or "tool"—not a "master" whose interference would strip the right to make a defense of "the personal character upon which the Amendment insists."⁹⁴

This seeming endorsement of defendant control, however, was immediately undermined by the Court's observation—citing three rulings from the 1960s—that "when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas."⁹⁵ Such allocation, the Court reasoned, could only be justified "by the defendant's consent, at the outset, to accept counsel as his representative."⁹⁶ The Court thus derived the right to self-representation by reasoning that (i) a defendant who accepts appointed counsel necessarily consents to having that attorney exercise decisionmaking control over the defense, and (ii) such consent is meaningful only if some other option exists. That other option, the Court concluded, was proceeding without counsel altogether.⁹⁷

In other words, rather than hold that the "language and spirit of the Sixth Amendment" require a defendant to maintain control over his defense generally, the Court assumed attorney decisionmaking control as a given (per "law and

91. *Id.* at 819–20 ("The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."); *id.* at 834 ("The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction.").

92. *Id.* at 819.

93. *Id.* at 820.

94. *Id.*

95. *Id.* at 820 (citing *Brookhart v. Janis*, 384 U.S. 1, 7–8 (1966); *Henry v. Mississippi*, 379 U.S. 443, 451 (1965); *Fay v. Noia*, 372 U.S. 391, 439 (1963)).

96. *Id.* at 820–21. This idea of implicit consent to lawyer decisionmaking had previously been embraced by some lower courts. In *Williams v. Beto*, 354 F.2d 698, 705–06 (5th Cir. 1966), for example, the court wrote that a defendant's acceptance of appointed counsel amounted to a confession of "his own inadequacy in the field" and a stipulation "to be bound by the presumably superior knowledge of the professional man on whose assistance he proposes to depend." The Fifth Circuit noted that it gave this issue "more than ordinarily extensive discussion because we, too, are aware of those considerations" that prompted Judge Burger's concurring opinion in *Williams v. United States*, 345 F.2d 733 (D.C. Cir. 1965). 354 F.2d at 699–700; see also Lester J. Mazor, *Power and Responsibility in the Attorney Client Relation*, 20 STAN. L. REV. 1120, 1134 & n.88 (1968) (citing *Rhay v. Browder*, 342 F.2d 345, 348–49 (9th Cir. 1965)).

97. See *Faretta*, 422 U.S. at 820–21.

tradition”)⁹⁸ and then created a new constitutional right to make that allocation of power seem more fair. It refrained from examining that allocation of power itself.⁹⁹ Although the Court has since limited its impact,¹⁰⁰ *Faretta* remains a curious example of exuberant rights rhetoric deployed in support of a dismal practical end: a dilemma whereby indigent defendants must choose between the loss of professional representation or the loss of control over their defense.

2. *The End of “Deliberate Bypass”*

Although the Court in *Faretta* posited that “law and tradition” allocated to lawyers “the power to make binding decisions of trial strategy in many areas,”¹⁰¹ the evidence for this is quite weak. As Lester Mazor observed in 1968, “[t]he problem of the allocation of power and responsibility in the attorney-client relation is as old as the relation itself.”¹⁰² Indeed, the three “deliberate bypass” cases from the 1960s cited as support for this tradition in *Faretta*—*Brookhart v. Janis*,¹⁰³ *Henry v. Mississippi*,¹⁰⁴ and *Fay v. Noia*¹⁰⁵—indicate a much more complex understanding of the relationship between defendants and lawyers in criminal cases.

The “deliberate bypass” rule established in these cases reflected the Court’s views on the unfairness of holding defendants responsible for trial decisions they did not participate in. In short, this rule stated that defendants could seek federal habeas corpus review of constitutional claims unless they intentionally bypassed a procedural opportunity to raise them.¹⁰⁶ In *Fay*, the Court ruled that “the considered choice” of the defendant was required to establish a waiver of the right to habeas relief, and that a “choice made by counsel not participated in by the petitioner does not automatically bar relief.”¹⁰⁷ The Court moderated this position somewhat in *Henry v. Mississippi*, which involved defense counsel’s failure to object to the admission of a police officer’s testimony regarding an unlawful

98. *Id.* at 820.

99. For his part, Chief Justice Burger dissented on the ground that there is no basis in the Constitution for a right to represent oneself. 422 U.S. at 836–37 (Burger, C.J., dissenting). He stated that “there is nothing desirable or useful in permitting every accused person, even the most uneducated and inexperienced, to insist upon conducting his own defense to criminal charges.” *Id.* at 836.

100. In *Martinez v. Court of Appeal of California*, 528 U.S. 152, 162–64 (2000), the Court ruled that defendants do not have the right to represent themselves on direct appeal. In *Indiana v. Edwards*, 554 U.S. 164, 167 (2008), the Court ruled that a defendant may be mentally competent to stand trial yet not competent to represent himself.

101. *Faretta*, 422 U.S. at 820. Such a tradition has also been assumed by some scholars. See, e.g., Strauss, *supra* note 27, at 318–19 (referring to “traditional allocation of decisionmaking authority”).

102. Mazor, *supra* note 96, at 1139.

103. *Brookhart v. Janis*, 384 U.S. 1 (1966).

104. *Henry v. Mississippi*, 379 U.S. 443 (1965).

105. *Fay v. Noia*, 372 U.S. 391 (1963).

106. See *id.* at 438–39.

107. *Id.* at 439.

search of the defendant's car.¹⁰⁸ It remanded for a determination whether the defendant knowingly waived his claim, stating that "[a]lthough trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims," the "deliberate bypassing by counsel of the contemporaneous-objection rule as a part of trial strategy would have that effect in this case."¹⁰⁹ In *Brookhart v. Janis*, the Court unwound *Henry's* double negative by finding that "counsel may, under some conditions, where the circumstances are not 'exceptional, preclude the accused from asserting constitutional claims,'"¹¹⁰ but nevertheless rejected the idea that counsel could override his client's expressed desire not to plead guilty by agreeing to a trial procedure that was its practical equivalent.¹¹¹

Contrary to what the Court suggested in *Faretta*, none of these cases recognized the authority of a lawyer to make binding decisions about trial strategy contrary to her client's wishes,¹¹² much less limited the decisionmaking authority of defendants to a few discrete issues.¹¹³ To the contrary, these cases broadly protected the right of defendants to control their own defenses—until the Burger Court overturned them.

In *Estelle v. Williams*,¹¹⁴ Chief Justice Burger authored a majority opinion holding that while a state could not compel a defendant to stand trial before a jury wearing prison attire, that case did not show a "sufficient reason to excuse the failure to raise the issue before trial."¹¹⁵ Noting that it was impossible to say whether "this was a defense tactic or simply indifference,"¹¹⁶ Burger emphasized that "once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney"—"[a]ny other approach would rewrite the duties of trial judges and counsel in our legal system."¹¹⁷ That same day, the Court denied habeas relief for a defendant whose lawyer did not object to the exclusion of African Americans from the grand jury that indicted him.¹¹⁸ In both cases,

108. See 379 U.S. at 444–45.

109. *Id.* at 451–52.

110. *Brookhart v. Janis*, 384 U.S. 1, 7 (1966).

111. *Id.* at 7–8.

112. In a separate opinion in *Brookhart*, Justice Harlan expressed his view that "a lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval." 384 U.S. at 8 (Harlan, J., concurring). He cited no support for this position, and no other justice joined.

113. Even the ABA advisory committee that endorsed a broad conception of attorney decisionmaking authority recognized that the rulings in *Fay* and *Henry* created "a gray zone" about the extent to which defendants would be bound by trial decisions in which they did not knowingly participate. See STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEF. FUNCTION § 5.2 cmt. a (1971).

114. 425 U.S. 501 (1976).

115. *Id.* at 512.

116. *Id.* at 512 n.9.

117. *Id.* at 512.

118. *Francis v. Henderson*, 425 U.S. 536, 536, 542 (1976).

Justice Brennan charged the majority with flouting *Fay* and *Henry*.¹¹⁹

The following year, the Court sharply limited the “deliberate bypass” rule in *Wainwright v. Sykes*.¹²⁰ In that case, the defendant had been convicted in Florida state court after his lawyer failed to object at trial to the admission of inculpatory statements made by the defendant to the police.¹²¹ Writing for the majority, Justice Rehnquist framed the issue as one of federalism, stating that Florida’s contemporaneous-objection requirement deserved “greater respect than *Fay* gives it,”¹²² but he had little to say about the fairness of holding defendants responsible for the decisions of counsel in which they did not participate or even opposed.¹²³ In a concurring opinion, Chief Justice Burger explained why the “deliberate bypass” rule could not apply to trial decisions like these that were “necessarily entrusted to the defendant’s attorney”:¹²⁴

Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate—and ultimate—responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must, as a practical matter, be made without consulting the client. The trial process simply does not permit the type of frequent and protracted interruptions which would be necessary if it were required that clients give knowing and intelligent approval to each of the myriad tactical decisions as a trial proceeds.¹²⁵

Justice Brennan’s proposal that a lawyer exercise “his expertise and judgment in his client’s service, and with his client’s knowing and intelligent participation where possible,” would be, according to Burger, “unmanageable to the point of impossibility.”¹²⁶

The Supreme Court finally overruled *Fay* entirely in *Coleman v. Thompson*, a 1991 case that held that the late filing of a notice of appeal by the lawyer for a death penalty prisoner in state post-conviction proceedings barred the prisoner from seeking federal habeas review.¹²⁷ The Court rejected the notion that a lawyer who commits such an egregious error “ceases to be an agent” of the defendant (at least

119. See *id.* at 542–53 (Brennan, J., dissenting); *Williams*, 425 U.S. at 521 n.5 (Brennan, J., dissenting).

120. 433 U.S. 72, 87–88 (1977).

121. *Id.* at 74–77.

122. *Id.* at 88. Federal habeas review of claimed errors subject to state procedural waiver would now be barred “absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation.” *Id.* at 84.

123. See *id.* at 100 (Brennan, J., dissenting) (“[L]eft unanswered is the thorny question that must be recognized to be central to a realistic rationalization of this area of law: How should the federal habeas court treat a procedural default in a state court that is attributable purely and simply to the error or negligence of a defendant’s trial counsel?”).

124. See *id.* at 93 (Burger, C.J., concurring).

125. *Id.* (footnotes and citations omitted).

126. *Id.* at 94 (emphasis omitted).

127. 501 U.S. 722, 750, 752 (1991).

in proceedings like Virginia's post-conviction review "where the State has no responsibility to ensure that the petitioner was represented by competent counsel"), since under "well-settled principles of agency law" a principal is liable for the harm caused by the negligent conduct of his agent.¹²⁸

3. *The Entrenchment of Lawyer Control*

Faretta, *Williams*, and *Sykes* were followed by a series of cases in which the Supreme Court entrenched the rule of attorney decisionmaking control.

In *Jones v. Barnes*,¹²⁹ the Court rejected the ineffective assistance claim of a defendant whose appellate counsel refused to brief or argue two nonfrivolous claims. The Second Circuit had granted relief, reasoning that while under *Anders v. California*¹³⁰ counsel was not obligated to raise frivolous issues on appeal, when a defendant requests that counsel "raise additional colorable points, counsel must argue the additional points to the full extent of his professional ability."¹³¹ The view of appointed counsel that the defendant was "unlikely to prevail on the merits of his nonfrivolous arguments" was "no substitute for an active advocate's presentation of those arguments to the appellate court."¹³²

Writing for a majority of six, Chief Justice Burger rejected the Second Circuit's analysis.¹³³ Citing the ABA criminal justice standards and his concurring opinion in *Wainwright v. Sykes*, Burger stated that a defendant "has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal,"¹³⁴ and, under *Faretta*, could also "act as his or her own advocate."¹³⁵ He continued, however: "Neither *Anders* nor any other decision of this Court suggests . . . that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points."¹³⁶ The Second Circuit's rule would "seriously undermine[] the ability of counsel to present the client's case in accord with counsel's professional evaluation," because "[e]xperi-

128. *Id.* at 754 (citing RESTATEMENT (SECOND) OF AGENCY § 242 (1958)).

129. 463 U.S. 745, 754 (1983).

130. 386 U.S. 738 (1967).

131. *Barnes v. Jones*, 665 F.2d 427, 433 (2d Cir. 1981).

132. *Id.*

133. *Jones*, 463 U.S. at 750–51.

134. *Id.* at 751. In *Taylor v. Illinois*, 484 U.S. 400, 418 n.24 (1988), discussed below, the Court also cited with approval a lower court decision stating that only the defendant can waive the right to be present during trial. *See also Troccoli*, *supra* note 55, at 32 (listing other decisions that lower federal and state courts have found "belong solely to the defendant").

135. *Jones*, 463 U.S. at 751. In dissent, Justice Brennan accurately noted a point that was already evident in *Faretta*: defendants who seek to present their strongest defense face the "all-or-nothing" dilemma of choosing to accept representation and sacrificing control over their case, or waiving counsel and forgoing the benefits of professional representation. *See id.* at 759 (Brennan, J., dissenting).

136. *Id.* at 751.

enced advocates since time beyond memory” have stressed the importance of “winnowing out weaker arguments on appeal.”¹³⁷

Burger relied selectively on professional standards to arrive at this conclusion. While noting Barnes’s argument that the ABA standards for criminal appeals indicated that “counsel should accede to a client’s insistence on pressing a particular contention on appeal,” Burger countered that the defense function standards (which he had helped to draft) provided that “strategic and tactical decisions” are “the exclusive province of the defense counsel.”¹³⁸ He further cited the recently promulgated “final draft” of Model Rule of Professional Conduct 1.2, which provided that while a lawyer should “abide by a client’s decisions concerning the objectives of representation,” she need only “consult with the client as to the means by which they are to be pursued.”¹³⁹ Burger failed to mention that the initial “discussion draft” of that rule—which the Second Circuit had relied on below—set forth a contrary rule on allocation of decisionmaking authority, generally requiring a lawyer to “accept a client’s decisions concerning the objectives of the representation and *the means by which they are to be pursued.*”¹⁴⁰ The inconsistency in these ethical standards reflected the lack of consensus in the legal profession on the proper allocation of decisionmaking authority. By incorporating the most lawyer-centric standards into its Sixth Amendment standard, the Court prevented indigent defendants from assuming a more active role in their defense.

The same year it decided *Barnes*, the Supreme Court declared that the Sixth Amendment does not require meaningful relations between a defendant and his appointed counsel. In *Morris v. Slappy*,¹⁴¹ the defendant objected to the substitution of a new public defender, six days before trial, as the result of his original public defender’s emergency surgery.¹⁴² All justices agreed that Slappy was not entitled to habeas relief due to his failure to make a timely motion for a continuance based on the original attorney’s unavailability.¹⁴³ The majority opinion, again authored by Chief Justice Burger, went further. In its decision

137. *Id.*

138. *Id.* at 753 n.6.

139. *Id.*

140. *Barnes v. Jones*, 665 F.2d 427, 436 (2d Cir. 1981) (emphasis added) (citing MODEL RULES OF PROF’L CONDUCT R. 1.3 (Discussion Draft 1980)); see also Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 536 (1990) (“As originally proposed, the text of Model Rule 1.3 could have been read as reserving virtually all decisions to the client.”). The initial draft of this rule was numbered 1.3. Nor did Burger mention the applicable Model Code of Professional Responsibility, which provided that “[i]n the final analysis . . . ‘the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.’” See *Barnes*, 665 F.2d at 436 (quoting MODEL CODE OF PROF’L RESPONSIBILITY EC 7–8 (1980)).

141. 461 U.S. 1 (1983).

142. *Id.* at 6.

143. See *id.* at 15 (majority opinion); see also *id.* at 19 (Brennan, J., concurring) (“I agree with the Court that the trial judge was justified in denying respondent’s midtrial motion for a continuance . . .”); *Id.* at 29 (Blackmun, J., concurring).

below, the Ninth Circuit had discussed the need for “a meaningful attorney-client relationship” involving trust, confidence, and close consultation;¹⁴⁴ Burger scorned this analysis, repeating the reference to a “meaningful relationship” tenfold, each time in scare quotes,¹⁴⁵ and describing it as a “novel idea”¹⁴⁶ and “without basis in the law.”¹⁴⁷ Burger emphasized the statement in court by Slappy’s substitute counsel that no continuance was necessary,¹⁴⁸ even though Slappy complained that the new lawyer had not had enough time to investigate and prepare the case¹⁴⁹ and described Slappy as “adamant—even contumacious”—for refusing to follow the new lawyer’s advice.¹⁵⁰

While both *Barnes* and *Slappy* reached the same result—rejecting attempts by defendants to assert control over their defense in a manner inconsistent with the judgment of their (current) appointed counsel—their treatment of the lawyer-client relationship differed. As Professor Vivian Berger observed, while “the Court chose to eulogize counsel’s independence and expertise in the *Barnes* situation, where the client wished to disclaim professional advice and assistance to some extent,” it minimized those values in *Slappy* by rejecting the defendant’s efforts to receive “the continuing, full assistance of the attorney originally assigned him.”¹⁵¹ In *Slappy*, the Court assigned a higher value to judicial efficiency and administration, noting the difficulty in “assembling the witnesses, lawyers, and jurors at the same place at the same time” and suggesting that a judge’s “insistence on expeditiousness” is problematic only when “unreasoning and arbitrary.”¹⁵²

The Court’s interest in judicial efficiency continued to drive its rulings on decisionmaking authority after Chief Justice Burger’s retirement in 1986. In *Taylor v. Illinois*,¹⁵³ it rejected the argument that “it is unfair to visit the sins of the lawyer upon his client” where the lawyer’s discovery violation led to the preclusion of a defense witness as a sanction.¹⁵⁴ It reasoned that a lawyer must have “full authority

144. *Slappy v. Morris*, 649 F.2d 718, 720 (9th Cir. 1981) (quoting *McKinnon v. State*, 526 P.2d 18, 22 (Alaska 1974)).

145. See *Slappy*, 461 U.S. at 3, 10–14 (placing the phrase “meaningful relationship” in quotation marks each time it is used).

146. *Id.* at 14.

147. *Id.* at 13.

148. *Id.* at 12.

149. See *id.* at 6 (“He only [sic] been on this case one day and a half your Honor, he can’t possibly have had enough time to investigate all these things in this case.”).

150. *Id.* at 12; see also Jane C. Hoeffel, *Toward a More Robust Right to Counsel of Choice*, 44 SAN DIEGO L. REV. 525, 536–37 (2007) (“Whereas Clarence Gideon is hailed as a hero for fighting for the right to counsel all the way to the Supreme Court, Joseph Slappy’s efforts toward recognition for his plight were treated by Chief Justice Burger with disdain, if not contempt.”).

151. Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 55 (1986).

152. 461 U.S. at 11–12 (citation omitted).

153. 484 U.S. 400 (1988).

154. *Id.* at 416. As Justice Brennan observed in dissent, there was no evidence that the defendant Ray Taylor “played any role” in his lawyer’s violation of the pretrial discovery rules. *Id.* at 431–32 (Brennan, J., dissenting).

to manage the conduct of the trial,” since the “adversary process could not function effectively if every tactical decision required client approval.”¹⁵⁵ The lawyer “speaks for the client,” and it would be “impracticable” for a court to investigate the “relative responsibilities” between lawyer and the defendant before issuing a sanction like preclusion.¹⁵⁶ The Court similarly ruled in *Gonzalez v. United States* that an attorney can waive a defendant’s right to have a district judge preside over *voir dire* without the defendant’s consent.¹⁵⁷ In explaining why “[g]iving the attorney control of trial management matters is a practical necessity,”¹⁵⁸ the Court reprised themes developed in the ABA standards and its earlier cases. “The presentation of a criminal defense,” it declared, was “a mystifying process even for well-informed laypersons”; indeed, only “trained experts” could “comprehend the full significance” of defendants’ constitutional rights.¹⁵⁹ “In most instances,” the Court continued, “the attorney will have a better understanding of the procedural choices than the client; or at least the law should so assume.”¹⁶⁰

Finally, in 2006 the Court drew a critical distinction between the ability of wealthy and indigent defendants to select their own lawyers. In *United States v. Gonzalez-Lopez*, the district court refused to allow the defendant to be represented by an out-of-state attorney he had hired.¹⁶¹ The Supreme Court found this violation to be a Sixth Amendment violation not subject to harmless error review.¹⁶² Writing for the majority, Justice Scalia wrote that the right to counsel of choice is “the root meaning of the constitutional guarantee,” and a deprivation is “complete” as soon as the defendant is “erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.”¹⁶³ At the same time, he confirmed the minority’s view that this right “does not extend to defendants who require counsel to be appointed for them.”¹⁶⁴ For those defendants, there is no constitutional protection regarding how their counsel is selected. Instead, the only protection they receive is the ability to seek relief from conviction when their appointed lawyer’s performance falls “outside the wide range” of

155. *Id.* at 418.

156. *Id.*

157. 553 U.S. 242, 245 (2008).

158. *Id.* at 249.

159. *Id.* (quoting STANDARDS FOR CRIMINAL JUSTICE, DEF. FUNCTION § 4–5.2 cmt. (3d ed. 1993); *see also id.* (“[A]n explanation to any but the most sophisticated client would be futile.”)).

160. *Id.* at 249–50 (citations omitted); *see also* Troccoli, *supra* note 55, at 32–33 (listing decisions that Supreme Court and lower federal and state courts have found to be “within the control of the attorney”).

161. 548 U.S. 140, 142 (2006).

162. *Id.* at 152.

163. *Id.* at 147–48; *see also* Kaley v. United States, 134 S. Ct. 1090, 1102 (2014) (citing *Gonzalez-Lopez*, 548 U.S. at 147–48).

164. 548 U.S. at 151 (citing *Wheat v. United States*, 486 U.S. 153, 159 (1988); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624, 626 (1989)); *see generally* Hillman, *supra* note 47, at 84 (“An individual who cannot afford a lawyer enjoys no benefit from the principle of client choice. Unfortunately, such individuals comprise a majority of our population.”)).

competent assistance and undermines the reliability of the trial as a result.¹⁶⁵ Because of the Court's highly deferential approach to lawyers' decisionmaking, that remedy has given indigent defendants little comfort.

4. *Post-Conviction Review of Counsel's Performance*

Even though indigent defendants are routinely held responsible for the acts and omissions of their appointed counsel, on the theory that "the attorney is the litigant's agent,"¹⁶⁶ there is no provision for enforcing the other elements of an agency relationship.¹⁶⁷ There is no requirement that an indigent defendant affirmatively consent to the appointment of his lawyer and, as we have seen, no general right to control that lawyer's conduct during the case. In fact, the defendant does not generally have the right to challenge the adequacy of his counsel's representation while it is ongoing or even on direct appeal.¹⁶⁸

From a constitutional standpoint, the adequacy of counsel's performance is assessed after the fact, in post-conviction review, via a claim for "ineffective assistance of counsel." As set forth in *Strickland v. Washington*,¹⁶⁹ to obtain relief under this standard a defendant must show that (i) counsel's performance was objectively deficient—"outside the wide range of professionally competent assistance"—and (ii) there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different."¹⁷⁰ The *Strickland* standard does not address whether the elements of an agency relationship have been met.¹⁷¹ Instead, the Court reasoned in that case, because the Assistance of Counsel clause "envision[s] counsel's playing a role that is critical to

165. In an essay, Michael Dreeben, the Deputy Solicitor General who argued the government's case in *Gonzalez-Lopez*, described the ruling as "a body blow to the ideal of equal justice." Michael R. Dreeben, *The Right to Present a Twinkie Defense*, 9 GREEN BAG 2D 347, 352 (2006). The implicit message to indigent defendants, Dreeben wrote, was: "If you have incompetent, or conflicted, or lethargic, or grossly inexperienced counsel, you have no ground for complaint unless you can show that competent counsel would have created a reasonable probability of a different outcome. But if only you were rich! Then, a denial of your first-choice counsel would be the golden road to a new trial." *Id.*; see also *The Supreme Court 2005 Term—Leading Cases: Sixth Amendment—Right to Counsel of Choice*, 120 HARV. L. REV. 203, 207–08 (2006) (describing *Gonzalez-Lopez* as "intuitively troubling because the trial in which the outcome is fairly reliable—in which the defendant was convicted despite having a top lawyer—gets reversed, while the trial in which reliability is questionable—in which the defendant did not have an attorney adequately presenting his case—is almost invariably upheld").

166. See *Holland v. Florida*, 560 U.S. 631, 664 (2010).

167. See *supra* Part II.A (discussing essential elements of agency).

168. See Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1103 (1999) ("Federal practice has been, with limited exceptions, to require such claims to be raised not on direct appeal, but rather in collateral proceedings.").

169. 466 U.S. 668 (1984).

170. *Id.* at 690–94.

171. See generally Wendy Zorana Zupac, Note, *Mere Negligence or Abandonment: Evaluating Claims of Attorney Misconduct After Maples v. Thomas*, 122 YALE L.J. 1328, 1335–38 (2013) (contrasting "performance-based inquiry" of *Strickland*, which focuses on "the attorney's performance," with "relationship-based standard" that examines "the nature of the attorney-client relationship").

the ability of the adversarial system to produce just results,”¹⁷² a lawyer’s performance violates the Sixth Amendment only when it “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”¹⁷³

This retrospective, results-focused inquiry, the Court emphasized, is “highly deferential” to a lawyer’s strategic choices.¹⁷⁴ Because “[i]ntensive scrutiny of counsel . . . could dampen the ardor and impair the independence of defense counsel,”¹⁷⁵ reviewing courts must eliminate the “distorting effects of hindsight”¹⁷⁶ and “evaluate the conduct from counsel’s perspective at the time.”¹⁷⁷ The Court clearly viewed the lawyer, not the defendant, as the essential actor in the adversarial process.¹⁷⁸ Furthermore, even though the Court in *Barnes* relied on the ABA criminal justice standards in determining the extent of counsel’s decision making authority, it rejected in *Strickland* the idea that counsel’s performance must also satisfy those same standards to the extent they address the defense function.¹⁷⁹ “Any such set of rules,” the Court explained, “would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.”¹⁸⁰

The ruling in *Strickland* has been broadly criticized.¹⁸¹ Some have argued that the Supreme Court betrayed the promise of *Gideon* by setting a low standard for counsel’s performance and a high barrier for relief through the prejudice requirement.¹⁸² But at least as troubling is the fact that by emphasizing the independence of counsel and need to defer to counsel’s “strategic” choices—choices that may

172. *Strickland*, 466 U.S. at 685.

173. *Id.* at 686.

174. *Id.* at 689; *see also id.* at 690–91 (stating that “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation”).

175. *Id.* at 690.

176. *Id.* at 689.

177. *Id.* at 690.

178. *See, e.g., id.* at 686 (stating that the “benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct” undermined the adversarial process); *id.* at 690, 696 (establishing strong presumption that counsel’s conduct is constitutionally acceptable); *id.* at 691 (applying “heavy measure of deference to counsel’s judgments”).

179. *Id.* at 688–89; *see also* United States v. Decoster, 624 F.2d 196, 275–300 (D.C. Cir. 1976) (Bazelon, J., dissenting) (arguing that counsel should be judged against ABA guidelines for standard norms as a method for determining effectiveness).

180. *Strickland*, 466 U.S. at 689 (citation omitted).

181. *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 (1994); William S. Geimer, *A Decade of Strickland’s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1995); Bruce A. Green, *Lethal Fiction: The Meaning of “Counsel” in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993).

182. *See, e.g.,* Geimer, *supra* note 181, at 93 (“Directly contrary to its rhetoric in *Strickland*, the court has effectively ensured that *Gideon* guarantees little more than the presence of a person with a law license alongside the accused at trial.”).

take into consideration the “limited resources” available to appointed counsel¹⁸³—*Strickland* fortified the shift in decision making authority from defendants to appointed lawyers.¹⁸⁴ This shift has weakened the ability of represented defendants to compel attorney action and allowed claims of lawyer strategy to mask sloth and incompetence.¹⁸⁵ As a result, ineffective assistance doctrine has tolerated “a very low activity level by defense attorneys,”¹⁸⁶ even in cases involving the most severe penalties.¹⁸⁷

III. THE IMPACT ON INDIGENT DEFENSE

The Supreme Court has posited that the relationship between indigent defendants and appointed counsel is “identical to that existing between any other lawyer and client,” except how the lawyer is selected and paid.¹⁸⁸ That is mistaken; lawyer-client relationships are fundamentally different for rich and poor defendants. The difference is not simply a matter of who pays for the lawyer’s services. Nor is it merely a qualitative difference in the services that the defendants tend to receive: in Justice Kagan’s words, “a Cadillac defense” versus “a Ford Taurus

183. See *Harrington v. Richter*, 131 S. Ct. 770, 789–90 (2011); see also Stuntz, *supra* note 32, at 21 (stating that standard for ineffective assistance “rules out claims based on inadequate resources”).

184. See Uphoff & Wood, *supra* note 32, at 20 (“*Strickland* grants defense lawyers almost unlimited freedom of action in managing a case and further dictates that counsel’s strategic choices will be deemed professionally adequate as long as they can reasonably be considered sound trial strategy. Although *Strickland* does not mandate a lawyer-centered approach to decisionmaking, it certainly facilitates such an approach.”).

185. See Stuntz, *supra* note 32, at 21 (“Decisions not to contest plausibly contestable cases, along with decisions not to raise plausible legal claims, are close to unchallengeable.”).

186. *Id.* at 20; see also Stephen F. Smith, *Taking Strickland Claims Seriously*, 93 MARQ. L. REV. 515, 516–17 (2009) (“For many years under *Strickland*, the Court repeatedly tolerated minimal effort and preparation by defense attorneys, refused to hold defense attorneys to the minimum standards of conduct prescribed by the legal profession, and blindly deferred to strategic and tactical decisions by counsel.”); Green, *supra* note 5, at 1189 (arguing that post-*Strickland* decisions “seem to teach to a criminal defense lawyer . . . that he need hardly communicate with an indigent client and may quickly ‘plead out’ the client without conducting enough investigation and research to ascertain the likelihood of prevailing at trial”).

187. See Bright, *supra* note 181, at 1857–66 (describing capital cases in which indigent defendants received exceptionally poor representation).

188. *Polk Cnty. v. Dodson*, 454 U.S. 312, 318 (1981) (affirming the dismissal of a lawsuit brought against a public defender under federal civil rights law because such lawyers do not act “under color of state law”). Citing the ABA’s criminal justice standards, the Court wrote that “[o]nce a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.” *Id.* (quoting ABA STANDARDS FOR CRIMINAL JUSTICE 4-3.9 (2d ed. 1980)); see also *Vermont v. Brillion*, 556 U.S. 81, 84, 91 (2009) (holding that short of an “institutional breakdown” in its public defender system, a state may not be held responsible for a delay attributable to the defendant’s assigned counsel). The *Brillion* Court emphasized the role of appointed lawyer as the defendant’s agent “when acting, or failing to act, in furtherance of the litigation,” 556 U.S. at 90–91 (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991)), and held that because “the relationship between a defendant and the public defender representing him is ‘identical to that existing between any other lawyer and client,’” there is no reason not to apply the general rule that delay caused by the defense weighs against the defendant, *id.* at 91 (quoting *Dodson*, 454 U.S. at 318).

defense.”¹⁸⁹ Instead, the difference involves the essential nature of the relationship. A wealthy defendant can choose his lawyer and negotiate the nature and scope of the representation, including the extent of the defendant’s involvement in how his defense is conducted, and even if control is initially delegated to the lawyer, the client retains ultimate authority to direct his lawyer’s actions. For the poor, the Assistance of Counsel Clause provides an extraordinary benefit in our constitutional system: the service of a trained professional, paid for by the government, to represent the defendant in opposing charges brought by the government. As interpreted by the Supreme Court, however, this benefit requires a defendant to relinquish control over his defense. With little or no ability to select his representative, negotiate the terms of representation, or direct the lawyer’s conduct during the case, the indigent defendant is not a real principal but rather a passive recipient of a service that is largely out of his control.

The removal of agency from the indigent defendant-lawyer relationship is critical to understanding the persistent failure of indigent defense and why other structural reforms are unlikely to solve the problem.

A. *Underfunding, Excessive Caseloads, and Lawyer Incentives*

Many articles and reports have condemned America’s indigent defense system. Each five-year anniversary of *Gideon* has brought some new blue-ribbon report condemning the nation’s failure to adequately implement that ruling. An ABA report commemorating *Gideon*’s fortieth anniversary, for example, found that “indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.”¹⁹⁰ Another blue-ribbon report released on the forty-fifth anniversary addressed the “urgent need for fundamental reform.”¹⁹¹ Reviewing the scholarly literature on the fiftieth anniversary, Professor Carol Steiker observed that it ranged “from concerned to excoriating about the state of indigent criminal defense services.”¹⁹²

These critics have rightly observed that the causes of this failure are structural in nature, involving forces that “pose systemic barriers to the delivery of adequate criminal defense services to the poor, even by demonstrably capable and dedicated

189. See Debra Cassens Weiss, *Kagan Says Poor Defendants Are Entitled to a “Ford Taurus” Defense*, A.B.A. J., Mar. 19, 2013, http://www.abajournal.com/news/article/kagan_says_poor_defendants_are_entitled_to_a_ford_taurus_defense/.

190. AMERICAN BAR ASS’N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE*, at v (2004) [hereinafter *GIDEON’S BROKEN PROMISE*], available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_execsummary.authcheckdam.pdf.

191. NAT’L RIGHT TO COUNSEL COMM., CONSTITUTION PROJECT, *JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL* 52 (2009) [hereinafter *JUSTICE DENIED*], available at <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf>.

192. Carol S. Steiker, *Gideon at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2697 (2013).

lawyers.”¹⁹³ No informed observer today believes that the problem can be simply attributed to that subset of appointed lawyers whom Judge David Bazelon described as “walking violations of the [S]ixth [A]mendment.”¹⁹⁴ Clearly, some practitioners are ill suited for the work, and no one can defend lawyers who sleep during trials or who demonstrate contempt for their clients, or whose substance abuse, conflicts of interest, or ineptitude prevents them from performing basic defense functions. They, however, are not representative of the vast majority of indigent defenders, who possess both the aptitude and inclination to provide vigorous representation to their clients.

Nevertheless, the structural explanations offered by most indigent defense critics fail to account fully for the persistent and seemingly intractable nature of the problem. The most important structural factor, critics appear to agree, is the lack of adequate funding for indigent defense systems. Again and again, funding has been identified as the “root cause” of the indigent defense crisis,¹⁹⁵ the “single greatest obstacle to delivering competent and diligent defense representation,”¹⁹⁶ and the “largest and most obvious piece of the puzzle.”¹⁹⁷ Over the past five decades, editorial boards, committees, civic leaders, and law professors have called on state and local legislatures to increase funding for indigent defense. Little has been achieved. Attempts to expand resources for the benefit of criminal defendants—

193. *Id.* at 2696; see also Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 686–87 (2007) (distinguishing between “personal ineffectiveness” with “structural ineffectiveness . . . resulting from heavy defender caseloads”).

194. David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973).

195. *E.g.*, Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 429 (2009).

196. JUSTICE DENIED, *supra* note 191, at 6–7 (internal quotation marks omitted).

197. Steiker, *supra* note 192, at 2700; see also THOMAS GIOVANNI & ROOPAL PATEL, BRENNAN CENTER FOR JUSTICE, *GIDEON AT 50: THREE REFORMS TO REVIVE THE RIGHT TO COUNSEL* 3 (2013) (stating that public defender offices “regularly face profound difficulties in providing effective counsel due to lack of funding, resources, and time”); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1045 (2006) (stating that “[b]y every measure in every report analyzing the U.S. criminal justice system, the defense function for poor people is drastically underfinanced”); Kyung M. Lee, *Reinventing Gideon v. Wainwright: Holistic Defenders, Indigent Defendants, and the Right to Counsel*, 31 AM. J. CRIM. L. 367, 373 (2004) (stating that “funding is conceivably related to every other problem in indigent defense”); Robert L. Spangenberg & Tessa J. Schwartz, *The Indigent Defense Crisis is Chronic: Balanced Allocation of Resources Is Needed to End the Constitutional Crisis*, 9 CRIM. JUST. 13, 13 (1994) (stating that “the current level of funding for a majority of the indigent defense programs around the country has reached the crisis level and threatens the effective implementation of the Sixth Amendment right to counsel”). Other identified structural problems involve the political dependence of indigent defense providers, see JUSTICE DENIED, *supra* note 191, at 80 (stating that the lack of independence “threatens the right to counsel”); Steiker, *supra* note 192, at 2700 (describing the “lack of crucial independence from the political and judicial branches” as a structural problem); the lack of performance standards, training, and oversight for appointed lawyers, see JUSTICE DENIED, *supra* note 191, at 91; Steiker, *supra* note 192, at 2700 (stating that “lack of adequate organization, training, and oversight” is a structural problem); and the complexity of the law and criminal process, see JUSTICE DENIED, *supra* note 191, at 76; Stuntz, *supra* note 32, at 19–18 (describing the law governing criminal procedure as “substantial and detailed” and noting its vast doctrinal expansion over the past generation); Note, *Simplicity as Equality in Criminal Procedure*, 120 HARV. L. REV. 1585, 1595–96 (2007).

taking “scarce dollars from health care, education, jobs, or defense”—always face tremendous political resistance,¹⁹⁸ and the rare legislative successes are often short-lived. Nor have advocates for increased funding made significant headway through institutional reform litigation.¹⁹⁹

But what exactly is the causal relationship between inadequate funding and poor performance by appointed lawyers? Some effects are clear enough. To borrow Stephen Schulhofer’s phrase,²⁰⁰ it “does not require a Ph.D. in economics” to understand that low funding generally leads to low lawyer compensation, which makes it more difficult (though not impossible) to attract and retain the more talented members of the profession.²⁰¹ Low funding also hinders performance by denying appointed lawyers such resources as formal training; legal research technology; and the assistance of investigators, experts, paralegals, and other support staff.²⁰²

Other consequences of underfunding, however, are less clear than many assume. Some critics maintain, for example, that disincentives to vigorous representation result from the low amount of compensation provided to defense attorneys.²⁰³ It is important to recognize, however, that payment-related disincentives in indigent defense exist independently of the amount of payment that is provided. Most appointed lawyers are paid a fixed fee per case, a fixed payment per contractual

198. John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1218 (1994); see also Steiker, *supra* note 192, at 2700 (“With clamoring demand for dwindling public funds for schools, hospitals, roads and bridges, public transportation, firefighters, and police officers, it is not surprising that more money for lawyers representing alleged criminals is not high on anyone’s list. Generating the will to provide these crucial resources is an enormous challenge.”).

199. See Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85, 88 (2007) (stating that while litigation reform efforts “had initial success, the improvements were short-term and already have dissipated”); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 251 (2004) (arguing that the unraveling of a victory for defense funding in *State v. Peart*, 621 So. 2d 780 (La. 1993), “should make us wary about the power of litigation to improve defense funding in the long run”); Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1735–36 (2005) (arguing that notwithstanding “symbolic contribution” of state-court litigation challenging inadequate funding for indigent defense, decisions “have ultimately had less of a practical, sustainable impact than many had hoped”).

200. Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1989 (1992).

201. See JUSTICE DENIED, *supra* note 191, at 195 (stating that “compensation paid to defenders, as well as the fees provided through contracts and to assigned counsel on a case-by-case basis, often discourages well qualified lawyers from representing the indigent”); GIDEON’S BROKEN PROMISE, *supra* note 190, at 38 (stating that “financial disincentives of defense systems make it difficult to attract and retain experienced, competent attorneys”).

202. See GIDEON’S BROKEN PROMISE, *supra* note 190, at 7.

203. See, e.g., AM. BAR ASS’N & NAT’L LEGAL AID & DEFENDER ASS’N, GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING 6 (1982) (“Regrettably, though understandably, the level of compensation also has an effect on what lawyers are willing to do for their clients.”); GIDEON’S BROKEN PROMISE, *supra* note 190, at 7 (stating that “exceedingly modest compensation deters private attorneys from performing more than the bare minimum required for payment” and that “[a]ttorneys who do not receive sufficient compensation have a disincentive to devote the necessary time and efforts to provide meaningful representation”).

period, or a fixed salary.²⁰⁴ A lawyer who is compensated based on the number of cases she handles has “an obvious financial incentive to conclude cases on [her] criminal docket swiftly”: to plead cases out without investigation, legal research, motion practice, or trial.²⁰⁵ Public and contract defenders who receive a fixed salary do not personally benefit from higher caseloads, but their compensation nevertheless disincentivizes them from spending more effort on any particular case than necessary to avoid the court’s sanction or an employer’s reprimand.²⁰⁶ In some assigned counsel programs, lawyers are paid on an hourly rate basis, a method of compensation that usually rewards additional effort by counsel.²⁰⁷ The total amount of compensation allowed under these programs, however, is almost always subject to a cap that reduces the lawyers’ incentive to act beyond the corresponding number of hours.²⁰⁸ Under each approach, the incentives for inaction are structural and exist irrespective of the total amount of compensation provided. Putting the point in economic terms, an increase in compensation may widen “the gap between gains and costs faced by the agent” but will not directly “alter her choice of effort.”²⁰⁹

A related issue is high lawyer caseloads, a problem that is generally associated with low funding for indigent defense. Clearly, high caseloads have a deleterious

204. For an overview of the primary models for providing representation to indigent defendants, see Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31 (1995); HERMANN, *supra* note 7, at 3. This article uses the term “appointed lawyer” to refer generally to all who represent indigent defendants, including public defenders, contract defenders, and assigned private lawyers.

205. See *Jones v. Barnes*, 463 U.S. 745, 761 (1983) (Brennan, J., dissenting); see also James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 195 (2012) (observing that fee structure for appointed counsel in Philadelphia murder cases providing flat rate for preparation with additional payments for trial “creates an incentive to take cases to trial, but does not create any marginal incentive to prepare for trial”).

206. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2477 (2004) (describing how flat fees create financial incentives to plead cases out quickly).

207. Indeed, the hourly rate billing model has been criticized in the private legal market for incentivizing overbilling, a category of misconduct that includes claiming fees for work that has not been done, doing more work than necessary, doing work that would be better performed by others, or advising clients “to buy more legal services than they need by exaggerating the work that needs to be done on the assigned task or by overestimating the legal risks to which the clients are exposed.” Ribstein, *supra* note 38, at 1711.

208. See Stuntz, *supra* note 32, at 10–11 (describing the typical statutory fee caps defense lawyers face); see also Gershowitz, *supra* note 199, at 95 (“Because many jurisdictions cap the total fees that appointed counsel recover, defense lawyers reap diminishing returns for each extra hour they work on a case.”); Green, *supra* note 5, at 1179 (“Panel lawyers who are paid low fixed fees or whose hourly rates are capped at a low amount obviously have an economic incentive to take on a large volume of low-paying cases and handle each one quickly.”); Spangenberg & Schwartz, *supra* note 197, at 15 (“Some attorneys have little incentive to continue to work after reaching the number of hours allotted for a case or find that they must make up for the low compensation per case by taking on more clients than they can represent properly.”).

209. Ralf Caers et al., *Principal-Agent Relationships on the Stewardship-Agency Axis*, 17 NONPROFIT MGMT. & LEADERSHIP 25, 28 (2006). If, for example, a private lawyer who receives a flat fee per case has no financial incentive to conduct investigations or bring cases to trial, the doubling of her fee will not change her incentives. Similarly, while the imposition of a lower caseload cap (made possible through an increase in funding to a public defender office) might enable a public defendant to pursue a more vigorous defense for some of her clients, there is no guarantee that she will actually do so.

effect on lawyer performance. As one report summarized:

[D]efense lawyers are constantly forced to violate their oaths as attorneys because their caseloads make it impossible for them to practice law as they are required to do according to the profession's rules. They cannot interview their clients properly, effectively seek their pretrial release, file appropriate motions, conduct necessary fact investigations, negotiate responsibly with the prosecutor, adequately prepare for hearings, and perform countless other tasks that normally would be undertaken by a lawyer with sufficient time and resources. Yes, the clients have lawyers, but lawyers with crushing caseloads who, through no fault of their own, provide second-rate legal services, simply because it is not humanly possible for them to do otherwise.²¹⁰

As in this passage, critics frequently describe high caseloads as a condition that is “forced” upon appointed lawyers—leading them to provide inadequate representation “through no fault of their own.” With respect to line public defenders, who do not generally select or control their caseload, that description is accurate. Other appointed counsel, however, may end up with high caseloads by choice, particularly if they are compensated on a flat-fee basis. Assigned and contract attorneys often agree to “a high volume of cases that can be disposed of quickly as a way of maximizing income and may serve as a disincentive to invest the essential time required to provide quality representation.”²¹¹ Overall “inadequate compensation” may contribute to the lawyers’ pursuit of such high-volume business,²¹² but so do the incentives created by the flat-fee-per-case compensation model. And none of it would be possible absent the professional and legal rules that enable lawyers to handle so many cases at once.

For each case in which a lawyer has been appointed, there is a defendant who would like his lawyer to seek pretrial release, file appropriate motions, conduct investigations, prepare for hearings, and perform other critical defense tasks. The proposition that lawyers with high caseloads cannot perform such tasks necessarily presumes that their clients are unable to compel them. Similarly, while critics of America’s indigent defense system have condemned the disincentives to lawyers

210. JUSTICE DENIED, *supra* note 191, at 7; *see also* Spangenberg & Schwartz, *supra* note 197, at 15 (“There simply are not enough resources and time to find and interview defense and prosecution witnesses, obtain and analyze evidence, visit the scene of an alleged crime, consult with experts, research case law, prepare motions, and keep in close contact with one’s client.”).

211. JUSTICE DENIED, *supra* note 191, at 195; *see also* Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2165–66 (2013) (describing how low-bid indigent defense contracts create “an incentive for lawyers to handle a high volume of cases and spend as little time as possible on each case to make a profit”).

212. *See* JUSTICE DENIED, *supra* note 191, at 195 (stating that such inadequate compensation does lead to lawyers accepting a large volume of cases); *see also* NORMAN LEFSTEIN, AM. BAR ASS’N, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 14 (2011), *available at* http://www.americanbar.org/content/dam/aba/publications/books/lisclaid_def_securing_reasonable_caseloads.authcheckdam.pdf (“When adequate oversight of assigned counsel programs is lacking, the lawyers, in an effort to maximize their incomes, sometimes accept too many cases, because they are poorly compensated on a per case basis for their services.”).

that they believe result from inadequate systemic funding, few have addressed the disincentives to action that arise in the appointed lawyer-client relationship itself. In the private legal market, tremendous attention has been paid in recent years to the complex interplay between incentives and costs within principal-agent relationships. In indigent defense, these issues have been largely ignored.

B. Rationing

Many critics see indigent defense as essentially a problem of rationing.²¹³ For example, a recent report by the National Association of Criminal Defense Lawyers charged that “the majority of states continue to limit the amount of compensation that may be earned by assigned counsel, effectively rationing justice.”²¹⁴ Blame is generally assigned to the state and local legislative bodies that allocate funding for indigent defense systems, and to a large extent that blame is well deserved. Nevertheless, there is no question about who ends up actually withholding services from indigent defendants: the lawyers appointed to defend them. Systemic funding decisions delegate to appointed lawyers “the job of rationing rights . . . of choosing which, among the formal entitlements courts have created, will see practical implementation, and in which cases.”²¹⁵ These lawyers are “forced by circumstances to engage in triage, i.e., determining which clients merit attention and which do not.”²¹⁶ Such picking and choosing invariably results in “the inadequate handling of a large number of cases.”²¹⁷

In recent years, some legal scholars have responded to these circumstances by advancing proposals for the principled rationing of indigent defense services. These proposals share the same basic logic. First, they assume the inevitability of

213. See e.g., Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783; Bruce A. Green, *Judicial Rationalizations for Rationing Justice: How Sixth Amendment Doctrine Undermines Reform*, 70 FORDHAM L. REV. 1729 (2002); David Allan Felice, Comment, *Justice Rationed: A Look at Alabama's Present Indigent Defense System with a Vision Towards Change*, 52 ALA. L. REV. 975, 986–87 (2001) (stating that there is a general shortage of resources provided for indigent defense in Alabama, which has led many competent attorneys to stop representing the indigent).

214. JOHN P. GROSS, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *GIDEON AT 50: A THREE-PART EXAMINATION OF INDIGENT DEFENSE IN AMERICA* (pt. 1) 14 (2013), available at <http://www.nacdl.org/reports/gideonat50/rationingjustice/>.

215. Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 807 (2004).

216. L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2632 (2013) (citation omitted).

217. Spangenberg & Schwartz, *supra* note 197, at 15; see also Bright & Sanneh, *supra* note 211, at 2152 (stating that appointed counsel attempt to represent more people than is humanly or ethically possible); JUSTICE DENIED, *supra* note 191, at 69 (citation omitted) (describing “M.A.S.H. style operating procedure” where public defenders must “choose among clients as to who will receive effective legal assistance”); Green, *supra* note 5, at 1181 (“Probably the most common strategy is to engage in triage: pleading out the overwhelming majority of cases quickly in order to conserve time to investigate and defend a small number of cases.”).

inadequate resources for indigent defense.²¹⁸ Second, they find deficient current ad hoc approaches for rationing defense services.²¹⁹ Third, they propose more principled approaches based on theories of ethics, efficiency, and justice.²²⁰ Finally, they acknowledge that principled rationing is inherently complex and difficult to administer, but argue that their proposals represent an improvement on the status quo.²²¹

These scholars may be correct that a more principled and consistent system of rationing is the best we can hope for during the next fifty years of *Gideon*'s implementation. Still, it cannot be denied that these proposals, however well-intentioned and perhaps necessary, are strategies for capitulation, fundamentally inconsistent with the understanding that *Gideon* guarantees the competent representation of every poor person charged with a crime. Most significantly, they all presume that appointed lawyers may withhold needed services from some, if not all, of their clients. Professor Glenn Cohen, for example, recently explained why the Supreme Court's Sixth Amendment jurisprudence does not limit the ability of appointed lawyers to ration defense services in criminal cases.²²² Unlike wealthy defendants, he observed, indigent defendants are not entitled to choose their

218. I. Glenn Cohen, *Rationing Legal Services*, 5 J. LEGAL ANALYSIS 221, 222 (2013) ("The deepening crisis in funding of legal services only makes more pressing and manifest a sad reality: there is and always will be persistent scarcity in the availability of both criminal and civil legal assistance."); Brown, *supra* note 215, at 805 ("Indigent defense is widely underfunded, and the political structures through which funding decisions are made suggest little hope for improvement."); *id.* at 820 ("[A] world of perpetually underfunded indigent defense is one in which some clients inevitably get inadequate representation."); Mitchell, *supra* note 198, at 1218 (stating that public defender system is "terribly underfunded" but it is "unlikely that this will change appreciably").

219. Cohen, *supra* note 218, at 225–36 (surveying rationing approaches of sample legal service providers); Brown, *supra* note 215, at 812–14 (discussing how defense rights are rationed through judicial preferences for lawyers "who dispatch cases expeditiously, without a level of motion practice, investigation, or pleas for expert assistance that would slow dockets and drain limited funds"); Mitchell, *supra* note 198, at 1239–48 (describing how against backdrop of inherent rationing public defenders conduct "triage, albeit haphazardly and intuitively").

220. Cohen, *supra* note 218, at 301 (following extensive review of potential rationing principles, making tangible recommendations toward more just allocation of legal services); Brown, *supra* note 215, at 816–28 (arguing that defense resources should be distributed "(1) toward strategies more likely to vindicate factual innocence, and (2) toward charges and clients who have the most at stake or are likely to gain the greatest life benefit"); Mitchell, *supra* note 198, at 1288–91 (proposing ethical framework for rationing under which priority would go to "seriousness" (cases involving factual innocence or extreme potential sentences), then cases "implicating system protection," then cases involving "concrete injustice"). Richardson and Goff have criticized the suggestion that public defenders should ration services based on perceived factual innocence since "innocence determinations can only be speculative hunches based upon inadequate information," circumstances that allow implicit biases to "thrive." See Richardson & Goff, *supra* note 216, at 2644.

221. Cohen, *supra* note 218, at 224 (arguing that even simple model of rationing "demonstrates many flaws in current systems for rationing legal services and why this neglected area deserves much more scrutiny than it has heretofore received"); Brown, *supra* note 215, at 828 ("The choice in underfunded systems is not between zealous advocacy and rights rationing. It is between haphazard, ad hoc rationing and thoughtful, well-conceived allocation."); Mitchell, *supra* note 198, at 1319 (arguing that until we apply "a coherent ethic of resource allocation, our legal and ethical descriptions" of criminal defense attorneys will be "ungrounded in reality").

222. See Cohen, *supra* note 218, at 243.

lawyers,²²³ or to receive any particular level of effort by their appointed lawyers so long as their performance is deemed “effective” after the fact.²²⁴ Indeed, Cohen noted, the Supreme Court rejected the suggestion that the lawyer-client relationship must be “meaningful.”²²⁵ Therefore, he concludes, “the criminal right to counsel jurisprudence constitutes at most a *de minimis* constraint” on the rationing of defense services.²²⁶ Cohen’s aim was to show that his principled rationing solution is constitutionally permissible, but his analysis is equally illustrative of why the indigent defense problem exists in the first place.

C. Moral Hazard and Microallocation

The real root cause of the indigent defense problem is moral hazard, writ large. As discussed in Part I.B, a defendant who has retained counsel can limit shirking, disloyalty, and other agency costs through monitoring, which may include the exercise of greater control over the course of the defense. Even if the defendant initially allocated most decisionmaking authority to his lawyer, he may demand greater control as a condition of the lawyer’s retention or continued service and compensation. By contrast, a principal who lacks control cannot compel the agent to expend the necessary time and effort to achieve the principal’s objectives. There is, in effect, no agency relationship at all. That is the plight of indigent defendants. For them, the presumptive allocation of authority under *Jones v. Barnes* and Rule 1.2 is the only allocation of authority; the lawyer is empowered to make all decisions except those few expressly reserved to the defendant. Furthermore, because they have no economic leverage, an indigent defendant can neither establish the terms of representation at the outset nor negotiate the extent of his counsel’s authority as the case proceeds. In this respect, appointed counsel act more like unsupervised trustees than agents.²²⁷

223. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006) (“[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them.”).

224. See *Strickland v. Washington*, 466 U.S. 668, 689–94 (1984).

225. Cohen, *supra* note 218, at 243 (citing *Morris v. Slappy*, 461 U.S. 1, 14 (1983)).

226. *Id.* Similarly, Professor John Mitchell defended his proposal for principled rationing on the ground that the Sixth Amendment does not require “focus,” what he defined as the level of effort that a skilled private attorney with a reasonable caseload would provide. Mitchell, *supra* note 198, at 1253–54. In response, Monroe Freedman accused Mitchell of making “common cause with those judges who have already reduced the Sixth Amendment to constitutional hypocrisy.” Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 917 (2005).

227. See DeMott, *supra* note 9, at 304 n.8 (“If the lawyer’s exercise of discretion is totally beyond client direction, then the lawyer’s position is in effect comparable to that of a trustee and not an agent.”); Uphoff & Wood, *supra* note 32, at 14 (observing that “the lawyer’s selection of means or strategic choices may so profoundly affect the client’s substantive rights and the opportunity to realize the client’s objectives that it is inconsistent with general agency principles to permit the lawyer/agent such sweeping control”). Unlike an agent who “undertakes to act on behalf of his principal and subject to his control,” a trustee is not generally subject to the control of the beneficiary. See RESTATEMENT (SECOND) OF TRUSTS § 8 cmt. b (1959).

As a result, indigent defendants have essentially no ability to prevent their lawyers from shirking or pursuing private ends that conflict with the defendants' own. They cannot compel their lawyers to perform reasonable defense-related requests like investigating defenses, filing motions, or preparing particular lines of cross-examination at trial. Nor can they prevent their lawyers from diverting needed time and resources to other cases, attempting to curry favor with prosecutors or judges by withholding particular claims or objections, or otherwise ingratiating themselves with the officials responsible for creating and funding indigent defense systems. In economic terms, indigent defendants are exposed to the problem of moral hazard inherent in principal-agent relationships, but, unlike other principals, they are denied the ability to ameliorate that problem through monitoring their purported agents' performance.

Given these unique aspects of the relationship between indigent defendants and appointed counsel, it is no surprise that the quality of services provided tends to be poor. The problem is compounded by the fact that, at a systemic level, the absence of agency in indigent defense facilitates the rationing of services at a low level of visibility. In other words, state and local legislatures rely on the ability of appointed lawyers to refuse their clients' requests for services in order to withhold overall funding for indigent defense systems.

The allocation of scarce resources occurs at different levels.²²⁸ First-order determinations define the total resources that will be allocated for a particular need.²²⁹ Second-order determinations "allocate the available resources as defined by the first order."²³⁰ In the world of health care, economists and bioethicists use the terms macroallocation and microallocation to distinguish between these kinds of resource allocation. Macroallocation involves the distribution of resources to institutions or definable groups of people by legislatures, government agencies, insurance companies, and other payers.²³¹ Microallocation, also called "bedside

228. See generally GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* (1978) (studying scarcities that make painful choices necessary). Although it is common to speak of indigent defense resources in terms of scarcity, it is important to note that such scarcity results from "the decision by society that it is not prepared to forgo other goods and benefits in a number sufficient to remove the scarcity," not due to some inalterable condition of nature. *Id.* at 22. In particular, the demand for indigent defense resources corresponds to the amount that the government spends on initiating criminal prosecutions and the penalties it seeks for defendants who are found guilty.

229. *Id.* at 19.

230. *Id.*

231. See ERICH H. LOEWY & ROBERTA SPRINGER LOEWY, *TEXTBOOK OF HEALTHCARE ETHICS* 55 (2d ed. 2004); John F. Kilner, *Allocation of Healthcare Resources: Macroallocation*, in *ENCYCLOPEDIA OF BIOETHICS* 1098 (Steven G. Post ed., 3d ed. 2004); Theodore R. Marmor & Jan Blustein, *Models of Rationing: Introduction to Rationing*, 140 U. PA. L. REV. 1539, 1539–40 (1992). Policymakers and payers operating at these levels have a broad array of tools to influence how resources are allocated. For example, they can control the costs associated with particular services and medications by discouraging them through copayments, tiered formularies, or other incentives or excluding them altogether. They can also establish eligibility requirements and criteria for the transplantation of organs and use of other scarce resources.

rationing,”²³² involves the direct provision of services to individuals.²³³ It can occur in a number of complex and subtle ways: through, for example, eligibility determinations, triage, treatment delays, and the incorporation of resource constraints into clinical judgment.²³⁴

Although first-order and second-order determinations are made separately, there is considerable interplay between them.²³⁵ Microallocation is obviously influenced by macroallocation, since the ability to allocate resources to individuals is limited by the overall pool of resources available.²³⁶ Conversely, the very possibility of microallocating resources can facilitate efforts to limit the overall amount of resources expended, particularly where macro-level institutions lack either the ability or political will to do so on their own. As Calabresi and Bobbitt famously observed, when the high-level allocation of resources is not feasible due, for example, to an inevitable conflict between fundamental values, societies frequently shift to less visible forms of rationing.²³⁷ They might shift the locus of decisionmaking responsibility to market mechanisms, where individuals “appear to be the principal actors” and “the decentralized nature of market decisions act to absolve societies from responsibility for outcomes.”²³⁸ Alternatively, they might place authority for allocation “in the hands of technical experts,” thereby creating “the illusion that the decisions are based on neutral, objective data.”²³⁹

Legislators in charge of indigent defense funding do not have access to most tools commonly used to macroallocate health care resources. Unlike health care, for example, indigent defense cannot be readily divided into discrete kinds of services and treatments for which payment can be controlled at a systemic level.²⁴⁰ Legislatures have some ability to manage indigent defense costs by choosing between a public defender officer, contract attorney program, system of assigned private counsel, or some combination of these models. Some jurisdictions have

232. For an extensive discussion and defense of bedside rationing, see Mark A. Hall, *Rationing Health Care at the Bedside*, 69 N.Y.U. L. REV. 693, 720–21 (1994).

233. Kilner, *supra* note 231, at 1107; *see also* TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 267–287 (6th ed. 2008) (discussing the different levels at which healthcare must be rationed and the ethical problem of priority setting).

234. *See* Hall, *supra* note 232, at 712–14.

235. *See* CALABRESI & BOBBITT, *supra* note 228, at 20–21.

236. *See* LOEWY & LOEWY, *supra* note 231, at 163 (“Ultimately, macro-allocation allocates resources so that micro-allocation can take place, and micro-allocation, of necessity, takes place in the context provided by macro-allocation.”). For example, in medical institutions that operate under fixed budgets, salaried physicians “practice daily in resource-constrained environments that require them to be vigilant about costs and to prioritize among patients to an extent that clearly sacrifices some degree of optimal patient benefit.” Hall, *supra* note 232, at 720–21.

237. *See* CALABRESI & BOBBITT, *supra* note 228, at 18, 20–21.

238. *Id.* at 31.

239. *See* David Orentlicher, *The Rise and Fall of Managed Care: A Predictable “Tragic Choices” Phenomenon*, 47 ST. LOUIS U. L.J. 411, 416 (2003).

240. A legislature cannot, for example, “order defense lawyers to interview witnesses but not file suppression motions.” Brown, *supra* note 215, at 807.

also tried to limit costs through copayments, recoupment requirements, or adjustments to eligibility determinations, but those approaches raise constitutional concerns,²⁴¹ and in any event none come close in sophistication or effectiveness to the range of techniques used to manage health care costs.

Because the ability and perhaps authority of legislatures to macroallocate indigent defense services is limited, rationing must primarily occur at the micro level.²⁴² Here, decisionmaking control is critical. Just as “control over the use of the medically beneficial service” is a necessary condition for bedside rationing in health care,²⁴³ microallocation of indigent defense services cannot occur without the ability of counsel to make defense-related decisions without or even contrary to their clients’ approval. This is how rationing of indigent defense services works: not by imposing from above restrictions on the kind or amount of services that defense lawyers may provide but by assigning them broad decisionmaking control and requiring them to determine how their limited time and resources will be allocated among the many defendants they purport to represent. Thus, by structuring the *Gideon* right in a manner that allows counsel to refuse reasonable defense-related requests by their clients, the Supreme Court has not only prevented indigent defendants from limiting shirking and other agency costs, but also has allowed legislatures to limit overall resources for indigent defense systems. And defense attorneys have become the primary rationers of the indigent defense benefit: not agents for their clients, but rather “cost containment agents” for the government.²⁴⁴

241. See Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323 (2009); Kate Levine, *If You Cannot Afford a Lawyer: Assessing the Constitutionality of Massachusetts’s Reimbursement Statute*, 42 HARV. C.R.-C.L. L. REV. 191, 210–13 (2007); Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2072–76 (2006). In those jurisdictions where indigent defendants can be ordered to reimburse the government for the cost of appointed counsel’s services based on the number of hours worked, see Anderson, *supra*, at 329–32, the removal of decisionmaking control also hinders defendants from preventing counsel from expending more effort than desired. This agency cost is analogous to the problem of overbilling in the private legal market. See *supra* Part I.B.

242. See Brown, *supra* note 215, at 807 (“Funding decisions, in effect, delegate to trial attorneys and judges the job of rationing rights. That is, these actors have the job of choosing which of the formal entitlements courts have created will see practical implementation, and in which cases . . . [C]ounsel and trial courts will define the practical content of those constrained entitlements.”).

243. Peter A. Ubel & Susan D. Goold, *Recognizing Bedside Rationing: Clear Cases and Tough Calls*, 126 ANNALS INTERNAL MED. 74, 78 (1997); see also Richard G. Frank, *Rationing of Mental Health Services: Simple Observations on the Current Approach and Future Prospects*, 13 ADMIN. IN MENTAL HEALTH 22, 28 (1984) (observing that one consequence of rationing in HMOs is that “choice is taken away from the consumer and placed with the provider”).

244. Cf. Robert M. Veatch, *Physicians and Cost Containment: The Ethical Conflict*, 30 JURIMETRICS J. 461, 466–67 (1990) (discussing imposition of “cost containment agent” role on physicians to advance societal interest in “limiting health resource expenditures”); see also Jeremiah A. Baroness, *The Doctor’s Dilemma: Whom to Serve?*, 87 J. ROYAL SOC’Y MED. 31, 32 (1994) (“Beyond his or her traditional responsibilities to act for the patient, the physician must now act in a widening agency capacity for the Government, for health care institutions and for third party payers of a variety of stripes . . .”).

D. Aligning Agent Incentives and Restoring Principal Control

The prevailing rule on decisionmaking control is best understood as an invented tradition—a rule that purports to “imply continuity with the past” but is actually “quite recent in origin.”²⁴⁵ Rather than predating *Gideon*, the rule arose in reaction to the indigent defense right and its accompanying logistical challenges. Thus, while the Court in *Faretta* referred to a tradition that allocated to counsel “the power to make binding decisions of trial strategy in many areas,”²⁴⁶ the “deliberate bypass” rulings it cited in fact held that defendants should not suffer for decisions made by their lawyers against their wishes.²⁴⁷ Similarly, the ABA rule vesting broad authority in defense lawyers, initially advanced by Warren Burger’s advisory committee, developed not as a timeless truth about lawyers and clients but rather as a response to *Gideon* and the perceived problem of appointed lawyers being “flooded” by instructions from their clients.²⁴⁸ As Chief Justice, Burger worked to incorporate his views on control into constitutional law: overruling the “deliberate bypass” cases, rejecting the notion that the Sixth Amendment requires a meaningful relationship between lawyers and clients, and denying the right of a defendant to insist that his lawyer argue particular non-frivolous claims on his behalf.²⁴⁹ The absence of any consensus or longstanding tradition in the legal profession was perhaps demonstrated most vividly by the fact that on the last issue, in *Jones v. Barnes*, the Second Circuit and the Supreme Court reached opposite holdings, relying on different iterations of the same draft model rule.²⁵⁰

Legal scholars, too, have debated the allocation of decisionmaking authority in indigent defense relationships. Rather than examine the real-life effects of this allocation on performance or how indigent defense systems are funded, however, they have generally addressed these issues at a higher level of abstraction, weighing competing claims of autonomy and paternalism. Advocates of client decisionmaking have focused on the right of defendants to control their own destiny. They have argued, for example, that client decisionmaking “is an inherent good because it recognizes individual dignity and personhood, and the right of self-determination.”²⁵¹ Other scholars have argued that lawyers’ interest in their

245. See Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1312 (2012) (citing Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION* 1, 1–2 (Eric Hobsbawm & Terence Ranger eds., 1983)).

246. *Faretta v. California*, 422 U.S. 806, 820 (1975).

247. See *supra* Part II.B.2.

248. See *supra* Part II.A.

249. See *supra* Part II.B.2.

250. See *supra* Part II.B.3.

251. Strauss, *supra* note 27, at 336; see also Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819, 830 (1990) (“One of the purposes of the attorney is to protect the client’s autonomy from interference by the state and other individuals, and an attorney should not be another source of interference with the client’s autonomy.”); Dinerstein, *supra* note 140, at 512 (“The core

“craft and reputation . . . may require them to act contrary to their clients’ instructions.”²⁵² Under their view, lawyers are “educated, experienced, detached, and benevolent participants” who act more as “guardians than agents,” so that “when the defendant chooses to submit his plight to a lawyer, or accepts the services of a lawyer bestowed upon him, he necessarily surrenders a portion of his treasured autonomy to the professional with whom he associates himself.”²⁵³

There is always reason to be skeptical about the claimed inherent superiority of professionals. To be sure, the training and experience of lawyers were important to the Supreme Court’s decision to recognize a constitutional right to appointed counsel.²⁵⁴ And it is difficult to dispute that most lawyers are better suited than most defendants to make decisions about defense strategy.²⁵⁵ At the same time, claims about superior knowledge and competence are qualified for a reason. As

argument supporting client decisionmaking is that it enhances the client’s individual autonomy.”); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 75 (1979) (reasoning that because “the legal system is intended to facilitate client autonomy and self-determination in spheres outside that system, it would be anomalous if choosing a representative in order to gain access to the legal system entailed surrender of control”); Uphoff, *supra* note 27, at 819 (arguing that “there is no principled reason for depriving defendants of their freedom to make important strategic decisions”).

In an earlier article I criticized the idea that the autonomy of criminal defendants is a constitutional value that trumps, or at least counterbalances, other societal interests. *See generally* Toone, *supra* note 29. In particular, as used by the Supreme Court in *Faretta* the idea is philosophically incoherent (since the necessary conditions for autonomy do not exist in the context of the limited and artificial decisions that arise during criminal trials) and practically irrelevant to understanding structural problems in our criminal justice system (including the allocation of decisionmaking authority between lawyers and clients). *See id.* at 650–66. Some commentators have sought to elide this problem by defining the term “autonomy” to mean something like agency or control within the lawyer-client relationship. *See, e.g.,* Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant’s Right to Control the Case*, 90 B.U. L. REV. 1147, 1148–49, 1153 & n.22 (2010) (equating defendant’s autonomy interest with “right to control the case” but acknowledging that this definition “leaves to the side questions concerning ‘true’ autonomy, *i.e.*, the extent to which someone’s decisions actually are the product of free will as opposed to coercion or choice-limiting conditions such as poverty”); Strauss, *supra* note 27, at 339–40 (acknowledging that “autonomy is a vague notion” but arguing that “autonomy establishes a presumption in favor of client decisionmaking over all aspects of the lawsuit”). While this approach is preferable to advocating autonomy as a freestanding constitutional value, the fundamental problem remains: the ruling that gave rise to the idea of defendant autonomy, *Faretta*, was also the first to suggest that by accepting an appointed lawyer a defendant effectively agrees to relinquish most decisionmaking control to that lawyer. 422 U.S. at 820; *see also* Hashimoto, *supra*, at 1179–84 (criticizing “*Gideon* tradeoff” whereby “defendants waive any autonomy interest they might have by accepting the assistance of counsel”).

252. *See* Strauss, *supra* note 27, at 322.

253. Uviller, *supra* note 34, at 723–24, 768; *see also* 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 803 (3d ed. 2007) (arguing that lawyer should not be “forced to sacrifice his professional reputation” by following client’s instructions with which she disagrees); Donald F. Harris, *Prisoners of Prestige? Paternalism and the Legal Profession*, 17 J. LEGAL PROF. 125, 128 (1992).

254. As the Court first observed in *Powell v. Alabama*, 287 U.S. 45, 69 (1932), and later reiterated in *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963), even “the intelligent and educated layman has small and sometimes no skill in the science of law,” and without “the guiding hand of counsel . . . though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”

255. *See* Johnson, *supra* note 28, at 46 (“No one with any exposure to the criminal defense system could seriously entertain the argument that criminal defendants, as a class, exercise better judgment than criminal defense lawyers.”); Uviller, *supra* note 34, at 725 (stating that “by and large, the judgment of the lawyer is greatly superior to the unrealistic projections of the person in peril”).

Chief Justice Burger himself observed decades ago, many lawyers are simply not qualified to represent clients in court, and even experienced practitioners' claims of strategic wisdom are subject to reasonable debate.²⁵⁶ Advocates of lawyer decisionmaking argue that a full comprehension of legal procedure, substance, and trial strategy is inaccessible to "any but the most sophisticated clients,"²⁵⁷ but such claims may reflect more the legal profession's interest in controlling the delivery of legal services—the mystification of legal knowledge—than the inherent complexity of legal rules.²⁵⁸

More importantly, this debate has little bearing on the ordinary injustice experienced by most indigent defendants. Their concerns are less about debatable issues of litigation strategy (e.g., whether two or three claims should be raised on appeal) than their lawyers' abject neglect and inaction: defenses not being investigated, motions not being filed, witnesses not being called, and letters and phone calls not being returned. It is not a matter of defendants trying to define their own concept of existence, etc.,²⁵⁹ but rather a desperate inability to compel needed action from the lawyers assigned to represent them in court. Nor can it be said that overworked and underfunded lawyers are somehow acting paternalistically when they ignore their clients' inquiries and requests. Claims of autonomy and paternalism contribute little to understanding, much less resolving, the indigent defense problem.

A handful of scholars have addressed the impact that the allocation of decision-making control has on the incentives of appointed lawyers. Most significantly, Professor Stephen Schulhofer identified the absence of agency as a key problem in indigent defense.²⁶⁰ While agency costs are pervasive in retained counsel relationships, he observed, the market usually "generates mechanisms for monitoring and other contractual devices to reduce agency costs."²⁶¹ With indigent defendants,

256. To take just one example, in rejecting the defendant's claim in *Jones v. Barnes*, Chief Justice Burger cited various luminaries of the bar for the proposition that an appellant's brief should focus "on one central issue if possible, or at most on a few key issues." 463 U.S. 745, 751–53 (1983) (citations omitted). Such a focused approach certainly makes sense in many appeals, but experienced lawyers will not hesitate to raise four or more issues if, for example, they are equally strong, suggestive of cumulative error, otherwise complementary, or necessary to preserve for subsequent review.

257. STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEF. FUNCTION § 5.2 cmt. (b).

258. See Michael E. Tigar, *Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 16–17 (1970) (observing how "[t]he concept of representation becomes the vehicle for mystifying the law and rendering it incomprehensible to the defendant"); see also *Jones*, 463 U.S. at 762–63 (Brennan, J., dissenting) ("If the quality of justice in this country really depended on nice gradations in lawyers' rhetorical skills, we could no longer call it 'justice.'"). Cf. Mark A. Hall, *Institutional Control of Physician Behavior: Legal Barriers to Health Care Cost Containment*, 137 U. PA. L. REV. 431, 477 (1988) ("We should be skeptical of the extent of judgmental latitude sought by doctors because much of the judgmental aura that surrounds medical practice is due to physicians' use of uncertainty to create domains of control and influence.").

259. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

260. See Schulhofer, *supra* note 200, at 1988–91.

261. *Id.* at 1990.

“the problem is more basic.”²⁶² There, the lawyer-client relationship is “a partly or wholly involuntary relationship.”²⁶³ The defendant lacks any ability to select his attorney or “means to monitor counsel’s loyalty and performance.”²⁶⁴ Along with David Freedman, Schulhofer proposed as a solution the transfer of power “to select the attorney from the court system to the defendant,” as a means of introducing “consumer sovereignty into the institution of indigent defense.”²⁶⁵ Schulhofer and Friedman envisioned a “free market for defense services” that would “provide indigent defendants with freedom of choice and . . . provide attorneys with the same incentive to serve their clients that attorneys have always had when they represent clients other than the poor.”²⁶⁶ Similar proposals have been advanced by other scholars.²⁶⁷

These proposals are an innovative but imperfect response to the indigent defense problem. Instituting an element of free choice at the front end of the lawyer-client relationship might help defendants secure counsel who better suit their strategic goals. It would not, however, protect their ability to control the defense as the case proceeds. Indeed, some advocates of this approach have argued that even though selection of counsel would “increase[] the likelihood that [a defendant’s] wishes will be carried out,”²⁶⁸ the lawyer would nevertheless serve as “the manager of the lawsuit” with “sole responsibility to decide all questions of tactics.”²⁶⁹

Other scholars have proposed realigning the incentives of appointed lawyers by adjusting conditions outside the client relationship. This approach reflects the view of some economists that even in the absence of coercion and monitoring by the principal, principal-agent problems can be overcome by establishing the correct incentives.²⁷⁰ It is possible, for example, that shirking by appointed lawyers can be limited through their effective organization, training, and supervision in public defender offices.²⁷¹ Some empirical studies have found that, on average, public

262. *Id.*

263. *Id.* at 1991.

264. *Id.*

265. Schulhofer & Friedman, *supra* note 39, at 77–80, 97.

266. STEPHEN J. SCHULHOFER & DAVID D. FRIEDMAN, CATO INST. POLICY ANALYSIS NO. 666, REFORMING INDIGENT DEFENSE: HOW FREE MARKET PRINCIPLES CAN HELP TO FIX A BROKEN SYSTEM 1, 3, 18 (2010), available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa666.pdf>.

267. See Hoeffel, *supra* note 150, at 549 (emphasizing the importance of counsel of choice for indigent defendants); Peter W. Tague, *An Indigent’s Right to the Attorney of His Choice*, 27 STAN. L. REV. 73, 99 (1974) (“The importance to the indigent of choosing his attorney is clear: improvement in the attorney-client relationship, representation by an able attorney who will fight aggressively for him, and the likelihood of greater participation in structuring his defense.”).

268. Tague, *supra* note 267, at 84.

269. *Id.* at 83 n.64.

270. See Gary J. Miller & Andrew B. Whitford, *The Principal’s Use of Moral Hazard: Constraints on the Use of Incentives in Hierarchy*, 17 J. PUB. ADMIN. RES. & THEORY 213, 213–14 (2006).

271. There is extensive economic literature showing that the organization of firms can ameliorate agency costs through such mechanisms as hierarchical monitoring, team cooperation, outcome-based compensation, and

defenders achieve better outcomes for their clients than assigned private counsel.²⁷² Their success may be due to a number of factors, including better designed compensation policies²⁷³; economics of scale that provide better access to training, investigators, and other resources²⁷⁴; and their “esprit de corps.”²⁷⁵

Reputation may also play a role in limiting agency costs in the lawyer-client relationship.²⁷⁶ Lawyers who hope to attract paying clients have an interest in maintaining a reputation for effective advocacy, even when they are representing indigent clients. It can also be a matter of professional pride and reputation to win a favorable outcome for clients or, conversely, embarrassing for a court or bar disciplinary committee to find that an attorney provided ineffective assistance of counsel. On the other hand, many lawyers who represent indigent defendants have little interest in or hope of attracting paying clients. Even for those who do, the low visibility of most criminal law practice undermines the impact that reputational concerns might otherwise have on their performance.²⁷⁷ The shaming effect of ineffective assistance review is limited by not only the highly deferential standard of *Strickland*,²⁷⁸ but also the fact that few non-capital cases proceed to the stage of

“tournaments” that reward superior performance with “prizes” like promotion and increased compensation. *See, e.g.,* Bengt Holmstrom & Paul Milgrom, *The Firm as an Incentive System*, 84 AM. ECON. R. 972 (1994); Miller, *supra* note 48, at 349; Sappington, *supra* note 36, at 63–64.

272. One recent study found that compared to assigned counsel, public defenders in Philadelphia significantly reduced their clients’ murder conviction rate, probability of receiving a life sentence, and overall expected prison time. Anderson & Heaton, *supra* note 205, at 159; *see also* Peter A. Joy & Kevin C. McMunigal, *Does the Lawyer Make a Difference? Public Defender v. Appointed Counsel*, 27 CRIM. JUST. 46, 47 (2012) (reviewing a Philadelphia study and observing that low rates for assigned counsel “discourage adequate preparation, and create an incentive for . . . lawyers to take on many more cases than they can adequately handle”); Thomas H. Cohen, *Who’s Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes* 1, 9 (2011) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1876474 (finding that felony defendants represented by assigned counsel received less favorable outcomes compared to counterparts represented by public defenders).

273. *See, e.g.,* Anderson & Heaton, *supra* note 205, at 200 (concluding that fee amounts and related incentives cause assigned counsel “to spend less time with defendants and investigate and prepare cases less thoroughly” than lawyers in public defender offices).

274. David L. Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811, 814 (1976); *see also* Spangenberg & Beeman, *supra* note 204, at 36 (discussing “advantages of making available a reliable professional staff of well-trained and well-supported criminal defense attorneys for the representation of indigent defendants”).

275. Schulhofer & Friedman, *supra* note 39, at 87. Economists have theorized that workers with “a strong sense of public cause” or “public service motivation” may be important to bureaucracies “when outcome-based incentives cannot align self-interest and organizational efficiency.” Miller & Whitford, *supra* note 270, at 229; *see generally* JULIAN LE GRAND, *MOTIVATION, AGENCY, AND PUBLIC POLICY: OF KNIGHTS AND KNAVES, PAWNS AND QUEENS* (2003) (arguing that not all those in the public sector are altruistic “knights” and that these employees may need additional motivations for their work).

276. *See generally* Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173 (2008) (discussing how prospective clients consider lawyers’ reputation for aggressiveness, commitment to clients’ interests, and compliance with ethical rules, among other factors).

277. *See* Schulhofer & Friedman, *supra* note 39, at 77–78.

278. *See supra* Part II.B.4.

post-conviction review when such claims may be raised.²⁷⁹ As for the monitoring efforts of bar associations, “[p]rofessional disciplining of lawyers in general is largely mythical, and on the rare occasions when it is invoked, it is confined to flagrant violations that present a risk of unfavorable publicity.”²⁸⁰ In fact, reputational concerns can work against defendants’ interests, when, for example, lawyers refrain from aggressive advocacy in some cases in order to maintain their “credibility” with the court and others.²⁸¹

Finally, some scholars have proposed modifying compensation structures for appointed lawyers. As discussed earlier, fixed compensation (whether through a set or capped fee per case or a fixed salary) disincentivizes appointed lawyers from expending more effort on cases than necessary to avoid sanction, and assigned counsel in particular have an incentive to take on as many cases as the law and judicial system will allow. In the private legal market, recent decades have seen a broad array of changes in compensation—competitive bidding for work, “value billing,” success premiums, benchmarking—designed to better align the interests of lawyers and clients.²⁸² At least in theory, an “outcome-based” system of compensation might work in indigent defense as well, inducing appointed lawyers “to exert more than the minimum level of effort,”²⁸³ by better aligning their interest in compensation with defendants’ interest in obtaining acquittals or the least onerous punishments possible.²⁸⁴ For example, Pamela Karlan has argued that a partially contingent fee approach might make sense in indigent defense,²⁸⁵ even though current ethical rules stand in the way.²⁸⁶ Others have sought to better

279. See Primus, *supra* note 193, at 684.

280. HERMANN, *supra* note 7, at 17.

281. See Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1245 (2005) (discussing potential conflict involved in balancing credibility with client’s demands and noting one lawyer’s observation that “[i]f she makes what she considers to be a borderline frivolous argument to the court on behalf of one insistent client, it may hurt her chances of winning in the future”); John B. Mitchell, *In (Slightly Uncomfortable) Defense of “Triage” by Public Defenders*, 39 Val. U. L. Rev. 925, 926 n.18 (2005) (“While a private practitioner can come into court every week or so extolling their particular client’s virtues, even with a dramatically reduced caseload a public defender cannot make the same claim for each of their five-to-ten clients each day, day after day.”).

282. See, e.g., Wilkins, *supra* note 49, at 2100–03.

283. See Caers et al., *supra* note 209, at 28.

284. See Kathleen M. Eisenhardt, *Agency Theory: An Assessment and Review*, 14 ACAD. MGMT. REV. 57, 61 (1989).

285. See Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 COLUM. L. REV. 595, 634 (1993). Under her proposal, “a government-paid bonus in cases in which defendants obtain favorable outcomes” would help to “reinforce a client’s confidence in his lawyer’s loyalty” and offset incentives to shirk by rendering “lawyers and their clients partial joint venturers.” *Id.* at 634–35. In civil litigation, contingency fees are commonly used to share risks among lawyers and clients and to induce “the attorney to exert a higher, more efficient level of effort than could be implemented using hourly or fixed fees.” James D. Dana, Jr. & Kathryn E. Spier, *Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation*, 9 J. L. ECON. & ORG. 349, 350 (1993).

286. See, e.g., Adam Silberlight, *Gambling with Ethics and Constitutional Rights: A Look at Issues Involved with Contingent Fee Arrangements in Criminal Defense Practice*, 27 SEATTLE U. L. REV. 805, 805 (2004).

align incentives by, for example, transferring complex cases from appointed lawyers to public defenders²⁸⁷ or requiring all defendants, regardless of means, to be represented by the same set of appointed counsel.²⁸⁸

Some of these proposed reforms are more promising than others. Certainly, the broader promotion of independent, well-organized, and well-funded public defender offices, such as the Public Defender Service of the District of Columbia or many Federal Public Defender offices, would improve the overall quality of indigent defense.²⁸⁹ Yet even the structural advantages to public defender offices can be hindered by low funding and overwhelming caseloads²⁹⁰—problems which, as discussed, are made possible by the absence of agency in the lawyer-client relationship. We should therefore ask whether that root cause is something that could be reformed as well: whether “client choice and control” can be restored to the lawyer-defendant relationship so as to “minimize the differences between having a free lawyer and a paid one.”²⁹¹

It is unlikely that recognizing indigent defendants as actual principals would significantly disrupt the adjudicatory process. Lawyers would still be required to follow rules of substantive law, procedure, and professional ethics.²⁹² They would still be required to advise their clients about relevant law and procedure.²⁹³ Furthermore, even with a right to control, many indigent defendants would likely defer to the informed strategic judgment of their counsel, perhaps even delegating to them discretion to make a broad range of decisions depending on the complexity of the applicable law, the defendant’s understanding, the need for quick action, and other factors.²⁹⁴ They would also have an interest in the efficient presentation of their defense at trial—particularly since it is the defendant who will suffer to the extent his disruptive conduct undermines his counsel’s performance or, worse, aggravates the judge or jury.

In the end, the analogy that so impressed Chief Justice Burger fails because the typical criminal defendant is not immobilized like a surgical patient etherized upon

287. Emily Giarelli, Note, *Rethinking Webb, Reallocating Resources: When Virginia’s Fee Caps Create Conflicts of Interest, Public Defenders Must Provide Alternatives*, 24 GEO. J. LEGAL ETHICS 569, 585 (2011).

288. Leroy D. Clark, *All Defendants, Rich and Poor, Should Get Appointed Counsel in Criminal Cases: The Route to True Equal Justice*, 81 MARQ. L. REV. 47 (1997); Noam Scheiber, *The Case for Socialized Law*, NEW REPUBLIC, Feb. 3, 2014, <http://www.newrepublic.com/article/116424/socialized-law-radical-solution-inequality>.

289. Bright & Sanneh, *supra* note 211, at 2173–74.

290. See, e.g., *id.* at 2166–69 (discussing overwhelming public defender caseloads in various states); Stuntz, *supra* note 32, at 9–10 (observing that the significant decline in spending on indigent defense from 1970s to 1990s led to the “predictable result” of public defender offices ending up “with very large ratios of cases to lawyers”); see generally LEFSTEIN, *supra* note 212 (extensively documenting the huge caseloads faced by public defenders throughout the United States).

291. See HERMANN, *supra* note 7, at 172.

292. See *supra* Part II.A.

293. See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) (citing *Hill v. Lockhart*, 474 U.S. 52, 62 (1985) (White, J., concurring)).

294. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 cmt. c (2000).

a table. Surgeons exercise control during operations for the obvious reason that real surgical patients have no ability to discuss or reassess options. By contrast, most criminal defendants, properly advised by counsel, are capable of making reasonable defense-related decisions as the criminal process develops.²⁹⁵ There is no reason why the appointment of a lawyer need supplant a defendant's decision-making, as opposed to supporting it through the provision of professional advice and assistance.

That is not to say that restoring agency to indigent defense would not disrupt the status quo. Clearly, it would require more overall effort to be expended by appointed lawyers. Defendants with a right of control could compel their lawyers to perform precisely those tasks that are neglected under the current system: investigating witnesses and facts, seeking pretrial release, researching potential defenses, filing appropriate motions, engaging experts, preparing for effective cross-examination of government witnesses, etc. In other words, appointed lawyers could no longer triage among their assigned clients, since every defendant could insist that reasonable efforts be made on his behalf.

This reform would also require changes in how appointed lawyers are compensated. Assigned lawyers would not be able to maximize their income by churning through a high volume of cases. Nor could public defenders maintain their existing high caseloads and provide the necessary level of effort for each client. At a systemic level, legislatures could not rely on lawyers to micro-allocate services to their clients but rather would have to provide adequate funding or face a system-wide breakdown.

To be sure, a shift toward principal control would not conclusively resolve the problems involved in allocating resources for indigent defense. Legislatures would still look for ways to meet their funding obligations while avoiding the expenditure of unnecessary effort and resources by appointed lawyers.²⁹⁶ Some could try, for example, "pay for performance" compensation models that provide incentives for good performance while discouraging unnecessary costs. Others could promulgate detailed guidelines on the scope of allowed indigent defense services. Such

295. It is of course true that mental illness is prevalent in the American criminal justice system. See Henry J. Steadman et al., *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 *PSYCHIATRIC SERVICES* 761, 761 (2009) (documenting serious mental illness in 14.5 percent of men and 31 percent of women in jail settings); DORIS J. JAMES AND LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, *MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1* (2006), available at <http://www.bjs.gov/content/pub/pdf/mhppji.pdf> (finding that fifty-six percent of state prisoners, forty-five percent of federal prisoners, and sixty-four percent of local jail inmates had mental health problems). Nevertheless, professional rules provide that a lawyer "shall, as far as reasonably possible, maintain a normal client-lawyer relationship" even when the client's decisionmaking capacity is diminished by mental impairment. MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (2013). The Due Process Clause prohibits a defendant from pleading guilty or undergoing trial if he lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or "a rational as well as factual understanding of the proceedings against him." See *Godinez v. Moran*, 509 U.S. 389, 396 (1993); *Pate v. Robinson*, 383 U.S. 375, 387 (1966); *Dusky v. United States*, 362 U.S. 402, 402 (1960).

296. See Stuntz, *supra* note 32, at 32–33 & n.116 (discussing "overlitigation" in indigent defense).

approaches could raise constitutional questions in their own right. At the very least, however, they would require indigent defense costs to be addressed at a higher level of visibility—and not on the pretense that the unique professional expertise of lawyers prevents indigent defendants from having a say on how their defense is conducted.

CONCLUSION: THE PARADOX OF PATERNALISM

After fifty years of systemic failure in indigent defense, we need no reminder about the difficulty of reform. Local and state governments will always seek to limit costs, particularly those expended on behalf of poor criminal defendants. Nor will it be easy to persuade members of the legal profession to relinquish control over their cases—even if that degree of control is inconsistent with basic requirements of agency.

At the very least, lawyers should understand the paradox they have created. It is remarkable that the eccentric view of one elite corporate lawyer helped to establish the model for how decision-making authority is allocated among indigent defendants and their appointed lawyers. Decades after Edward Bennett Williams’s “bad analogy” impressed then-Judge Burger, our system of indigent defense remains premised on the idea that the surgeon-like technical expertise of lawyers demands near complete acquiescence by their clients. Viewing this issue through the lens of resource allocation helps to explain how Burger was able to simultaneously condemn the incompetence of America’s practicing lawyers and insist that they control most decisions in criminal cases. The irony is that this emphasis on lawyers’ technical expertise has mainly served to impose rationing responsibilities on the indigent defense bar. It has produced a system of cost control operating at a low level of visibility and predicated upon lawyers’ inability to provide a complete defense to their clients. This system demeans and overwhelms lawyers and nullifies their ability to serve as zealous advocates of the accused.

Given current circumstances, it is not surprising that many people view lawyers who serve indigent defendants, and public defenders in particular, as heroic. Equipped with limited resources and overwhelming caseloads, they argue for unpopular clients and due process and against ineffective and counterproductive policies of over-criminalization and incarceration. Professor Charles Ogletree has even argued that the motivating force of heroism is essential for “effective and sustained indigent criminal defense work” and to prevent public defender “burn-out.”²⁹⁷ But the idea that public defenders should view themselves as heroes in order to incentivize their vigorous representation of clients is troubling.²⁹⁸ Heroes

297. Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1243, 1267 (1993).

298. As Abbe Smith asked in response to Ogletree’s article, “[W]hy is providing counsel to the poor accused a ‘heroic’ thing, rather than merely the client’s due under the Constitution?” Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV.

rescue helpless victims; they do not advise and provide assistance to principals with control over their defense. And the idea of individual heroism assumes the impossibility of structural change.

Indigent defendants do not need heroes. They just need professionals working under an agency relationship, with an appropriate alignment of incentives, doing their jobs. The fact that this simple goal may seem unattainable only shows how far we are from realizing *Gideon*'s promise of equal justice.

1203, 1237 (2004); see also HOUPPERT, *supra* note 61, at 250–51 (“Most of the public defenders out there are not particularly interested in being vigilante superheroes acting alone to save the world from injustice . . . [M]ostly, they want the time and resources to do their job right without having to resort to heroics.”).