

2020

The Defender General

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ARTICLE

THE DEFENDER GENERAL

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The United States needs a Defender General—a public official charged with representing the collective interests of criminal defendants before the Supreme Court of the United States. The Supreme Court is effectively our nation’s chief regulator of criminal justice. But in the battle to influence the Court’s rulemaking, government interests have substantial structural advantages. As compared to counsel for defendants, government lawyers—and particularly those from the U.S. Solicitor General’s Office—tend to be more experienced advocates who have more credibility with the Court. Most importantly, government lawyers can act strategically to play for bigger long-term victories, while defense lawyers must zealously advocate for the interests of their clients—even when they conflict with the collective interests of defendants. The prosecution’s advantages likely distort the law on the margins.

If designed carefully, staffed with the right personnel, and given time to develop institutional credibility, a new Office of the Defender General could level the playing field, making the Court a more effective regulator of criminal justice. In some cases—where the interests of a particular defendant and those of defendants as a class align—the Defender General would appear as counsel for a defendant. In cases where the defendant’s interests diverge from the collective interests of defendants, the Defender General might urge the Court not to grant certiorari, or it might even argue against the defendant’s position on the merits. In all cases, the Defender General

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would take the broad view, strategically seeking to move the doctrine in defendant-friendly directions and counteracting the government's structural advantages.

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INTRODUCTION

Among its many other roles, the Supreme Court of the United States serves as a preeminent regulator of the nation's criminal justice system. Through the process of constitutional adjudication, the Justices develop rules that govern criminal justice actors at all stages of the criminal process, from police officers to prison guards and everyone in between. Observers often defend the Court's aggressive role in criminal justice as a corrective to a political process that badly discounts the interests of criminal suspects and

defendants.¹ Yet many fail to acknowledge that the Supreme Court is *itself* a forum in which defendants are at a significant structural disadvantage.

Quite simply, criminal litigation in the Supreme Court is not played on a level playing field. Rather, in the contest to influence the Court's criminal justice policymaking, the government has three weighty advantages. *First*, and most importantly, prosecutors can "play for the rules." They can advocate for the long-term objectives of the government as a unitary interest, even when that means sacrificing a particular conviction. Criminal defense lawyers, by contrast, must zealously defend the interests of their particular clients. They must play for the case, even to the point of making arguments that are contrary to the interests of criminal defendants collectively. *Second*, there is often a stark contrast in the quality of representation in criminal cases at the Court. While the prosecution is typically represented by experienced lawyers working within formal institutional structures designed to maximize Supreme Court expertise and influence, defendants often have lawyers with little or no Supreme Court experience. Two sitting Justices have publicly decried the problem,² and scholarly analyses support their assessments.³ *Third*, government lawyers—especially lawyers from the Office of the Solicitor General in the Department of Justice—are repeat players before the Court. Beyond expertise, those frequent appearances give the Office credibility in

¹ See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 173 (1980) (explaining the need for a "nonpolitical check on excessive severity" in the death penalty context); see also Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1093 (1993) (noting that the electorate "overwhelming[ly]" favors police and prosecutorial powers).

² See Melissa Harris, *Justice Elena Kagan Gives an Inside Look at the U.S. Supreme Court*, CHI. TRIB. (Feb. 3, 2015, 4:05 PM), <http://www.chicagotribune.com/business/ct-confidential-elena-kagan-0204-biz-20150203-column.html> [<https://perma.cc/AL3R-DSV7>] ("I think that the litigants who are underserved in terms of lawyering quality are criminal defendants," [Justice] Kagan said.); Janet Miller, *Supreme Court Justice Elena Kagan Tells U-M Crowd About Serious and Not-So-Serious Workings of the High Court*, ANN ARBOR NEWS (Sept. 7, 2012, 5:00 PM), <http://www.annarbor.com/news/supreme-court-justice-elena-kagan-discusses-the-serious-and-not-so-serious-workings-of-the-high-court> [<https://perma.cc/QAX5-WLT5>] (quoting Justice Kagan as saying, "Often, [criminal defense attorneys] are appearing before the Supreme Court for the first time. I hope that changes in the future" (quotation marks omitted)); Janet Roberts, Joan Biskupic & John Shiffman, *Special Report: In Ever-Clubbier Bar, Eight Men Emerge as Supreme Court Confidants*, REUTERS (Dec. 8, 2014, 5:57 AM), <https://www.reuters.com/article/us-scotus-advocates-specialreport-idUSKBN0J M11E20141208> [<https://perma.cc/N84B-ZE3Y>] ("Said Justice Sonia Sotomayor: 'I think it's malpractice for any lawyer who thinks this is my one shot before the Supreme Court and I have to take it.'").

³ See Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 MINN. L. REV. 1985, 1988 (2016) (characterizing the Supreme Court criminal defense bar as "uniquely inexpert"); William C. Kinder, Note, *Putting Justice Kagan's "Hobbyhorse" Through Its Paces: An Examination of the Criminal Defense Advocacy Gap at the U.S. Supreme Court*, 103 GEO. L.J. 227, 236 (2014) ("[T]he criminal defense experience deficit jeopardizes both the outcomes for individual defendants and the shape of civil liberties nationwide.").

the eyes of the Justices. Credibility is a valuable currency in all litigation, including criminal litigation in the Supreme Court.

Taken together, these advantages put a thumb on the scales in Supreme Court criminal litigation. Of course, that does not mean that defense interests lose in every case. Far from it: criminal defendants regularly win significant victories at the High Court, including several just in October Term 2018.⁴ But the representational asymmetries likely distort the Court's decisionmaking over time, at least at the margins, making criminal justice policy friendlier to the government than it might otherwise be. As a result, the Supreme Court is a flawed regulator of criminal justice.

This Article offers a solution to this problem. We propose, theorize, and defend an Office of the Defender General that would be charged with advocating for the interests of criminal defendants *as a class* before the Supreme Court. If designed appropriately, staffed with the right personnel, and given time to develop institutional credibility, such an office could significantly level the playing field. Creating a Defender General would be a relatively straightforward and low-cost reform that would generate significant benefits for the entire criminal justice system.

The Article develops that argument in three parts. Part I explains the problems with the Court's status quo decisionmaking process in criminal cases. Section I.A begins by situating the Court's role in criminal justice policymaking. It explains that because other institutions lack the willingness or ability to closely supervise the criminal justice system, the Court acts as a *de facto* regulator through case-by-case adjudication. Section I.B then fully describes the three asymmetries noted above—quality of advocacy, lawyer credibility, and, most critically, the government's "unified vision," which permits it to play the long game before the Court. Section I.B also offers examples of how these asymmetries influence the development of legal doctrine, at least at the margins. Lastly, Section I.C discusses previous attempts to deal with the problem of asymmetrical Supreme Court representation in criminal cases. We pay particular attention to two—legislation offered by Senator Cory Booker in 2016,⁵ and a proposal by Professor Andrew Crespo.⁶ While both would remediate some of the disparities in Supreme Court criminal litigation, neither tackles them all.

We lay out our proposal in Part II. Section II.A describes the projected operations of the Office of the Defender General. We envision that the Defender General would participate in Supreme Court criminal litigation at

4 See, e.g., *United States v. Davis*, 139 S. Ct. 2319 (2019); *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019); *Timbs v. Indiana*, 139 S. Ct. 682 (2019).

5 See Clarence Gideon Full Access to Justice Act, S. 3145, 114th Cong. (2016).

6 See Crespo, *supra* note 3, at 2026-30.

both the certiorari and the merits stages. In cases where the interests of a particular defendant were aligned with the interests of defendants collectively, the Defender General could serve as defense counsel or (where a defendant has a lawyer he wants to keep) as *amicus curiae* in support of the defendant. But in other cases, where the interests diverged, the Defender General might decline to participate, argue that the Court should deny certiorari in a particular case, or even file a merits brief arguing *against* the positions taken by a particular defendant. But whether the Defender General argued for or against the defendant in a particular case, her involvement would ameliorate the asymmetries endemic in Supreme Court criminal litigation today. That's because the interests of defendants *collectively* would be represented by a team of experienced, credible attorneys thinking about how to move doctrine in defendant-friendly directions over the long run of cases.

Section II.B goes on to consider how the Office would be designed. The most pressing questions involve who would serve as the head of the Office—the Defender General herself—and how that person would be selected. Our hope is that the Office would, by virtue of its role in Supreme Court litigation, bear considerable prestige, and thus be an attractive position for both experienced criminal defense attorneys and talented Supreme Court litigators. The “who selects” question is more complicated. We propose that the Defender General be selected by—and accountable to—a board whose members represent various constituencies within the criminal defense community. Section II.B also briefly considers questions about the design of the Office and its staffing more generally.

Section II.C responds to likely objections. It first engages with the objection that existing institutions either do or could fulfill the mission that we envision for the Defender General. While existing institutions do valuable work in advocating on behalf of criminal defendants in the Supreme Court, none can counteract the government's advantages as effectively as a Defender General would. Next, Section II.C entertains the objection that the *collective* interests of defendants would be impossible for the Defender General to identify. While we acknowledge that ascertaining the collective interests of heterogeneous defendants would, in some cases, involve difficult tradeoffs, we believe that a Defender General would be able to meet the challenge. Finally, Section II.C considers—and ultimately adopts as a friendly amendment—the objection that our proposal would, if adopted, lead to a proliferation of Supreme Court “Generals” for various corners of the law.

Part III considers possible extensions of the proposal, as well as some additional implications. In Section III.A, we imagine how the proposal might work in a world with radically different ethical rules. What if the Defender General were the *exclusive* Supreme Court lawyer for criminal defendants,

with the power to concede a case against a defendant's wishes? The Solicitor General possesses that authority in almost all litigation in which the United States is a party. We ultimately conclude that such a regime would be normatively unacceptable in the defense context, but examining the possibility helps draw into focus the problem of asymmetrical ethical rules in criminal litigation. In Section III.B, we briefly consider various possibilities for how the Defender General's Office could be involved in the criminal process beyond the Supreme Court—in lower appellate courts, trial courts, and state courts. These possibilities present various difficulties and tradeoffs.

Finally, Part III.C considers potential alternatives to the proposal we have identified. Our proposal represents a kind of "leveling up," giving criminal defendants as a class the benefits enjoyed by the government. But an alternative would be a form of leveling down: what if the government were required to litigate cases more like individual criminal defendants? As one way to implement that vision, we imagine shifting choices about Supreme Court litigation from the Solicitor General's Office to line-level federal prosecutors. We ultimately reject that proposal for several reasons, but considering it helps bring the problem we are trying to solve into starker relief. We also briefly consider regulatory alternatives other than courts: if it isn't possible to truly level the playing field in the judicial arena, does that suggest that the Supreme Court is not the right regulatory institution in criminal justice? Perhaps, but here we think it is critical to do a comparative institutional analysis. And it is far from clear that any alternative regulator would not have its own distorting asymmetries, given the fundamental differences between the kinds of interests on competing sides of the battle to shape the rules in criminal justice.

I. THE PROBLEM

This Part lays out the problem that our proposal seeks to solve. Section I.A describes the Supreme Court's preeminent role in regulating the American criminal justice system. Section I.B then explains the three representational asymmetries that distort the Court's decisionmaking in criminal cases. Section I.C briefly reviews previous proposals to improve the representation of criminal defendants at the Supreme Court.

A. *The Supreme Court as Criminal Justice Regulator*

The Supreme Court plays a number of roles in the American legal system. It gets the most attention, of course, when it decides important matters of constitutional law. The nation often asks the Court to find "answers" to its

most divisive questions—affirmative action,⁷ gay marriage,⁸ abortion,⁹ to name a few—in the Constitution. Often, the Court is willing to take up that invitation.¹⁰

Yet much of what the Court does every year never appears in a newspaper headline. While in any given Term the Court will decide a handful of high-profile cases dealing with grand questions of constitutional law, the bulk of its cases are more quotidian. Consider the Court’s work in October Term 2018. While a few big-ticket constitutional cases like *American Legion v. American Humanist Ass’n*¹¹ and *Rucho v. Common Cause*¹² got most of the attention, the Court decided plenty of cases like *Nutraceutical Corp. v. Lambert*,¹³ which concerned the deadline to seek permission to file an interlocutory appeal under Federal Rule of Civil Procedure 23(f), or *Rimini Street, Inc. v. Oracle USA, Inc.*,¹⁴ which addressed the meaning of the term “full costs” in the Copyright Act’s fee-shifting provision. Such cases do not engage the public’s imagination like *American Legion* and *Rucho* do, but they are an important part of the Court’s work. For in addition to being the tribunal charged with resolving the country’s deepest constitutional conundrums, the Court is also the venue we entrust to resolve less exciting questions of federal law that have divided or confused the lower courts.¹⁵

But the Supreme Court has yet another role that might be its most significant. The Court is, perhaps more than anything else, a *criminal* court. Criminal cases constitute roughly a third of the Court’s merits docket in a typical Term.¹⁶ October Term 2018 was no exception, with criminal cases making

⁷ See, e.g., *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 302-03 (2013) (reviewing the constitutionality of a race-conscious admissions program).

⁸ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015) (reviewing the constitutionality of state laws denying full recognition to same-sex marriages).

⁹ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844-46 (1992) (reviewing the constitutionality of laws burdening abortion access); *Roe v. Wade*, 410 U.S. 113, 116 (1973) (same).

¹⁰ It’s in these highest-profile cases that Eugene Rostow’s description of the Justices as “teachers in a vital national seminar” seems most fitting. Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952). For a somewhat critical appraisal of this vision of Supreme Court Justices as teachers for the country, see Daniel Epps, *Teacher for the Nation*, 70 HASTINGS L.J. 1207, 1209-10 (2019).

¹¹ 139 S. Ct. 2067 (2019).

¹² 139 S. Ct. 2484 (2019).

¹³ 139 S. Ct. 710, 713 (2019).

¹⁴ 139 S. Ct. 873, 876 (2019).

¹⁵ See Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1569 (2008) (discussing the Court’s emphasis on resolving circuit splits and ensuring uniformity of the law).

¹⁶ In October Term 2017, the Court decided sixteen criminal cases and seven federal habeas corpus cases out of seventy-one merits cases (32.4%). *The Supreme Court, 2017 Term—The Statistics*, 132 HARV. L. REV. 447, 460-61 (2018). The prior Term, the Court decided seventeen criminal cases and five federal habeas cases out of sixty-nine merits cases (31.9%). *The Supreme Court, 2016 Term—The Statistics*, 131 HARV. L. REV. 403, 414-16 (2017). Although we are counting habeas cases, these statistics do not include other civil cases which may touch on criminal justice such as civil actions

up a large chunk (23.6%) of the docket.¹⁷ The Court also routinely decides a number of what we might call “criminal-adjacent” civil cases—cases involving civil-rights causes of action, such as *Bivens*¹⁸ and 42 U.S.C. § 1983—that have meaningful consequences for policing and other aspects of law enforcement.¹⁹

Considering only the merits docket, moreover, understates the role criminal justice plays at the Court. Criminal cases claim an even larger share of the Court’s certiorari docket.²⁰ Also, a significant portion of the Court’s “shadow docket”—the opinions and orders that the Court issues outside of the normal process for briefing and oral argument²¹—involve criminal or criminal-adjacent matters.²² A striking number of the Court’s summary reversals in recent years have involved criminal or habeas cases, as well as civil cases dealing with the question of qualified immunity for law enforcement officers.²³ And much of the Court’s orders docket involves criminal justice, as the Court expends significant resources dealing with last-minute requests for stays of execution in capital cases.²⁴

Through its work in criminal and criminal-adjacent cases, the Supreme Court exerts a powerful influence over the country’s criminal justice system—

brought under 42 U.S.C. § 1983 or *Bivens*. For a fuller elaboration of what counts as a “criminal case” for purposes of this Article, see *infra* note 204 and accompanying text.

¹⁷ *The Supreme Court, 2018 Term—The Statistics*, 133 HARV. L. REV. 412, 426-27 (2019).

¹⁸ See generally *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

¹⁹ In October Term 2018, for example, the Court decided *Nieves v. Bartlett*, 139 S. Ct. 1715, 1720-21 (2019), which dealt with the standard for First Amendment retaliatory-arrest suits against police officers; *City of Escondido v. Emmons*, 139 S. Ct. 500, 501 (2019) (*per curiam*), which addressed whether two police officers were entitled to qualified immunity from a suit alleging excessive force; and *McDonough v. Smith*, 139 S. Ct. 2149, 2153 (2019), which concerned the statute of limitations for fabricated-evidence claims brought against a prosecutor.

²⁰ For example, between October 1, 2009, and September 30, 2010, 5910 certiorari petitions were filed, of which 2449 (41.4%) were from criminal cases. See UNIV. AT ALBANY, HINDELANG CRIMINAL JUSTICE RESEARCH CTR., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.5.70.2010, <https://www.albany.edu/sourcebook/pdf/t5702010.pdf> [<https://perma.cc/D2A4-7EK9>] (last visited Mar. 25, 2020).

²¹ William Baude, *Foreword: The Supreme Court’s Shadow Docket*, N.Y.U. J.L. & LIBERTY 1, 1, 5 (2015).

²² See *id.* at 41-45 (listing summary reversals in the Roberts Court through July 2014, of which forty-one out of fifty-seven (71.9%) involved criminal or habeas cases, and of which an additional six (10.5%) involved § 1983 cases).

²³ For discussion of the Court’s use of summary reversals in criminal cases, see *id.* at 30-36, 39, and Robert M. Yablon, *Justice Sotomayor and the Supreme Court’s Certiorari Process*, YALE L.J. FORUM 551, 561-62 (2014). On summary reversals involving qualified immunity, see William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 85-87 (2018).

²⁴ See EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT 119-29 (1998) (describing the flurry of activity within the Court when last-minute motions are filed in capital cases). Indeed, such filings are so frequent that “the Clerk of the Supreme Court keeps track of scheduled executions around the country and distributes the list to the Justices every week.” STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 924-25 (10th ed. 2013).

or, perhaps, more accurately, our nation's criminal justice *systems*. Some of the Court's cases—such as those involving the interpretation of federal statutes—affect only federal criminal justice, which itself is a fairly small slice of American criminal justice.²⁵ But decisions that involve the constitutional rules governing criminal investigations, plea bargains, and trials apply to *all* the criminal justice systems—federal, state, and local.

Those rulings can have major consequences. Perhaps most famously, *Miranda v. Arizona*²⁶ changed police practices nationwide, making the *Miranda* warnings an ever-present feature of custodial arrests. That case was, to be sure, the high-water mark of the Warren Court's interventions into the criminal sphere.²⁷ But the Court's ability to profoundly shape the practice of criminal law persists. For a more recent example, consider *Apprendi v. New Jersey*²⁸ and its progeny. In a series of cases, the Court held the sentencing schemes of a number of states,²⁹ as well as the federal government,³⁰ unconstitutional. Similarly, the Court's decision in *Jones v. United States*³¹ sharply limited law enforcement's use of GPS tracking devices on automobiles, forcing the FBI alone to immediately turn off nearly three thousand devices.³² The Court continues to be a key policymaker in the criminal justice arena, even if it is not as willing to dictate the fine details of policy as it was in the days of *Miranda*.

Meanwhile, no other single institution in America is nearly as powerful in shaping policy over criminal justice. Congress and state legislatures can enact substantive criminal laws that govern only within their own jurisdictional domains—and even within those domains, legislatures' ability to set policy is shared with separately accountable prosecutors.³³ The United States Department of Justice (DOJ) plays some role in regulating state and

²⁵ See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1019 (2006) (noting that, despite the growth in federal statutes and prosecutions, “states still bear most of the responsibility for the regulation of crime”).

²⁶ 384 U.S. 436 (1966).

²⁷ See David Rossman, *Resurrecting Miranda's Right to Counsel*, 97 B.U. L. REV. 1129, 1130 (2017) (“*Miranda* represented the high-water mark of the criminal procedure revolution of the 1960s.”).

²⁸ 530 U.S. 466 (2000).

²⁹ See *id.* at 491-92; see also *Cunningham v. California*, 549 U.S. 270, 274 (2007); *Blakely v. Washington*, 542 U.S. 296, 305 (2004).

³⁰ See *United States v. Booker*, 543 U.S. 220, 244-45 (2005).

³¹ 565 U.S. 400, 404, 413 (2012).

³² Ariane de Vogue, *Supreme Court Ruling Prompts FBI to Turn Off 3,000 Tracking Devices*, ABC NEWS (Mar. 7, 2012), <https://abcnews.go.com/blogs/politics/2012/03/supreme-court-ruling-prompts-fbi-to-turn-off-3000-tracking-devices> [https://perma.cc/SU3K-L5W2].

³³ For a discussion of the fragmentation of power within the criminal justice system, see Daniel Epps, *Checks and Balances in the Criminal Law*, 74 VAND. L. REV. (forthcoming 2021) (manuscript at 60) (on file with authors).

local law enforcement by enforcing federal civil-rights statutes. But it tends to intervene only in cases involving the worst abuses.³⁴

In addition, it is surely true, as Rachel Harmon has observed, that federal constitutional doctrine plays a relatively small role in regulating policing when compared to state and local law.³⁵ Our point, however, is not that the Supreme Court occupies the regulatory field; state legislatures and state agencies have more power within their jurisdictions. Our point instead is that the Court is the most powerful regulator with authority over the whole country's criminal justice apparatus. Quite simply, if one hopes to effectuate change governing the entire criminal justice system in a single shot, the Supreme Court is the only show in town.

For these reasons, one can think of the Supreme Court as effectively the nation's chief—and only—agency charged with regulating the criminal justice system as a whole. The Justices themselves might bristle at this description, which seems inconsistent with the idea of the Court as a *court*. We do not mean to imply that the Court, in its interventions in the criminal arena, has transgressed its proper judicial role (though some would make that claim about particularly adventurous decisions like *Miranda*). There are certainly differences between the Supreme Court and true regulatory agencies—perhaps most importantly, unlike ordinary agencies, the Court can make “rules” only in the context of adjudicating concrete disputes.³⁶

Nonetheless, we think understanding the Court as a kind of regulatory agency can be illuminating. First, it hammers home the extent to which there

³⁴ For a discussion on the limits of DOJ's willingness to bring federal criminal charges against local law enforcement officers, see Adam Harris Kurland, *The Enduring Virtues of Deferential Federalism: The Federal Government's Proper Role in Prosecuting Law Enforcement Officers for Civil Rights Offenses*, 70 HASTINGS L.J. 771, 776-78 (2019). Criminal prosecutions are not the only tool DOJ uses to regulate local law enforcement, however. DOJ also “subsidizes reform . . . by providing grants to local departments to encourage specific remedial measures.” Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 55 (2012). In practice, however, these grants “overwhelmingly . . . serve purposes other than promoting civil rights.” *Id.* DOJ also can seek injunctive relief against police departments to remedy patterns or practices of conduct that violate citizens' civil rights. Holly James McMickle, *Letting DOJ Lead the Way: Why DOJ's Pattern or Practice Authority Is the Most Effective Tool to Control Racial Profiling*, 13 GEO. MASON U. C.R.L.J. 311, 311 n.1, 323-25 (2003). Again, though, this tool “has yet to achieve status as a national oversight mechanism for all police actions,” given DOJ's traditional reluctance to interfere too heavily in state and local policing because of federalism concerns. *Id.* at 336-37. For a more optimistic account of the executive branch's ability to further criminal justice reform, see generally Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811 (2017).

³⁵ See Rachel Harmon, *Reconsidering Criminal Procedure: Teaching the Law of the Police*, 60 ST. LOUIS U. L.J. 391, 394, 397-98 (2016) (discussing state and local law's role in funding, training, and managing police conduct).

³⁶ See *infra* note 45. In comparison, traditional agencies can ordinarily choose to make policy by case-by-case adjudication or by prospective rulemaking. See *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

is no other institution in America that has the authority to supervise the nation's criminal justice system. This is odd, given that for almost every aspect of American society, there is some federal czar, commissioner, or secretary charged with making rules, or at least trying to influence policy, for the entire country. Yet when it comes to criminal justice, the Supreme Court stands on its own—perhaps *because* criminal justice has long been seen as within the responsibility of courts.³⁷ The situation may also be an artifact of the Court's willingness to step up and rein in some of the system's worst excesses for a significant part of the twentieth century, making the need for another regulatory institution seem less apparent.

Thinking of the Court as a criminal justice regulatory agency also highlights the ways in which the Court, and courts in general, are imperfect regulators. Compared in the abstract to administrative agencies, the Supreme Court is significantly constrained. It cannot freely gather information, as norms of the adversarial process typically prevent judges from relying on facts that were not presented by the parties.³⁸ It cannot (entirely) set its own regulatory agenda.³⁹ And courts face both legal and practical limitations on their ability to order the kinds of structural changes that would be necessary for certain kinds of reform.⁴⁰

Given these deficiencies, many see the Supreme Court as hopelessly inadequate as a criminal justice regulator. Consider, for example, scholarly

³⁷ See BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 73 (2017) (“Many people seem to believe that it is the responsibility of judges to supervise law enforcement.”).

³⁸ See *infra* note 47 and accompanying text. The Court seems particularly ill equipped to acquire what are typically called “legislative” facts—facts about the world generally, distinguished from facts about the parties in a particular case. Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1759 (2014). And the Court's attempts to deal with this deficiency are problematic. As Allison Orr Larsen has shown, the Court appears to be increasingly relying on untested factual assertions made in amicus briefs when writing opinions. See *id.* at 1761-64.

³⁹ To be sure, the Supreme Court is more able to set its own agenda than are other courts, given that the Justices are largely free to choose their cases from the many thousands of certiorari petitions filed each year. See Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 710-17 (2018) (describing the Court's discretion in detail). Nonetheless, the Court cannot choose to address a particular issue if no petitions are filed raising that issue. See Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2357 n.168 (1999) (“[T]he Court still lacks affirmative agenda control because it cannot create a vehicle for deciding a particular issue; it must await one.”); see also NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 125 (1994) (“[J]udges are far less able to initiate decision-making than legislators. . . . Judges must await action brought by moving parties, often private parties.”).

⁴⁰ See Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 59-63 (1979) (arguing that courts face serious institutional limitations in attempting to fashion remedies to effect institutional change); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 645-49 (1982) (arguing that remedies involved in institutional reform involve different forms of power than those which courts typically exercise).

critiques of judicial efforts to regulate law enforcement. Barry Friedman has argued that “[t]he courts are not up to the task” given their limited remedial toolkit and lack of democratic accountability.⁴¹ Christopher Slobogin observes that courts lack expertise “about resource allocation and the relative efficacy of enforcement methods” that police departments themselves possess.⁴² Daphna Renan argues that courts’ “transactional” approach to Fourth Amendment issues, which “focuses on a discrete law enforcement-citizen encounter and the question whether that one-off interaction is constitutionally reasonable,” makes them ill equipped to address issues of programmatic government surveillance.⁴³ Andrew Crespo has described this focus on one-off interactions as “transactional myopia.”⁴⁴

Despite these shortcomings, no institution seems likely to supplant the Supreme Court as the preeminent regulator of criminal justice nationwide, at least not in the short term. And even if other institutions take greater responsibility in the future, the Court is likely to remain one of the most important policymakers in this sphere. In light of that reality, it is important to identify whether there are systemic problems in how the Supreme Court decides cases—and thus makes policy—in the criminal arena. There are, as the next Section reveals.

B. Representation Distortion

Notwithstanding its prominent role in criminal justice regulation, the Supreme Court remains a *court*. Its decisions are part of—usually the culmination of—litigation. And in our adversarial tradition, parties, not courts, control litigation. Parties choose what cases to bring, what arguments to make, and what facts to present. Various norms and rules of the adjudicative process make courts dependent on these choices. Courts (at least federal courts) cannot decide issues outside of discrete cases or controversies;⁴⁵ they typically treat arguments or objections not raised by the

⁴¹ FRIEDMAN, *supra* note 37, at 73.

⁴² Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 121 (2016). Along somewhat similar lines, John Rappaport argues that courts should encourage law-enforcement agencies to regulate themselves, because law enforcement possesses “greater experience and expertise” vis-à-vis courts. John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205, 234-35 (2015).

⁴³ Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1041 (2016).

⁴⁴ Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2057 (2016). Crespo argues that the scholars emphasizing courts’ transactional myopia underestimate courts’ ability to obtain “systemic facts” about how the criminal justice system operates. *See id.* at 2052, 2108-12.

⁴⁵ Federal courts are limited to resolving discrete “cases” and “controversies.” *See* U.S. CONST. art. III, § 2 (capitalization altered). This requirement has long been understood to prohibit federal

parties as forfeited;⁴⁶ and they are supposed to blind themselves to facts about the parties not presented by the litigants.⁴⁷

There are, to be sure, reasonable justifications for these restrictions. The case-or-controversy requirement and corresponding ban on advisory opinions are rooted in the separation of powers;⁴⁸ the reluctance to consider forfeited arguments is thought to encourage efficiency and fairness to the opposing side;⁴⁹ and constraints on extrajudicial factfinding preserve the fairness of the proceedings and impartiality of the adjudicators.⁵⁰ At the same time, the restrictions have downsides—which manifest as some of the institutional deficiencies of courts we considered in the previous Section.

Of course, many institutional choices involve difficult tradeoffs.⁵¹ But there is reason to think that the limitations of judicial decisionmaking are especially problematic when the Court acts as a criminal justice regulator. The party-driven nature of litigation distorts the rules governing criminal justice over time. That is because of asymmetries in how different interests are represented at the Supreme Court. One set of interests—the prosecution’s—has consistent advantages, both in individual cases and in the larger effort to shape the Court’s jurisprudence.

courts from rendering “advisory” opinions on issues not squarely presented by a case litigated by two actually adverse parties. See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 52-56 (7th ed. 2015).

⁴⁶ See, e.g., *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 226 n.4 (2013) (“Because this argument was not raised by the parties or passed on by the lower courts, we do not consider it.”); *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981) (“We decline to consider this argument since it was not raised by either of the parties here or below.”), *overruled on other grounds* by *DelCostello v. Int’l Bhd. of Teamsters*, 462 U.S. 151 (1983).

⁴⁷ See FED. R. EVID. 201 (identifying narrow circumstances in which courts may take notice of adjudicative facts not supported by record evidence); see also FED. R. EVID. 201(a) advisory committee’s note (defining “adjudicative facts” as facts that “relate to their parties, their activities, their properties, their businesses” (quoting 2 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* 353 (1958))).

⁴⁸ See, e.g., ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 47 (7th ed. 2016) (“[S]eparation of powers is maintained by keeping the courts out of the legislative process. The judicial role is limited to deciding actual disputes; it does not include giving advice to Congress or the president.”).

⁴⁹ See, e.g., *Puckett v. United States*, 556 U.S. 129, 134 (2009) (observing that objections must be raised below in order to “give[] the district court the opportunity to consider and resolve” objections and also to “prevent[] a litigant from ‘sandbagging’ the court”); *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 441 (1990) (Marshall, J., dissenting) (“The courts’ general refusal to consider arguments not raised by the parties . . . is founded in part on the need to ensure that each party has fair notice of the arguments to which he must respond.”).

⁵⁰ See FED. R. EVID. 201 advisory committee’s note (“The reason we use trial-type procedure . . . is that we make the practical judgement, on the basis of experience, that taking evidence, subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts, that is, facts pertaining to the parties.” (quoting Kenneth Culp Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in *PERSPECTIVES OF LAW* 69 (Roscoe Pound et al. eds., 1964) (quotation marks omitted))).

⁵¹ For nuanced discussion of institutional choice, see generally KOMESAR, *supra* note 39.

The following subsections explain the specific advantages that the government enjoys in the Court and why those advantages are likely to distort doctrine. As we see it, three significant asymmetries favor prosecution-side interests at the High Court. First, the government is a unitary actor that can act to protect its collective interests across a range of cases. Criminal defendants, by contrast, are a large and dispersed group of individuals; their personal incentives do not always correspond with what is best for defendants as a class. Second, lawyers representing criminal defendants are often less experienced, and thus less capable, than their government counterparts. Third, government lawyers—particularly the lawyers for the federal government—work within institutional structures that enable them to develop significant reserves of credibility with the Justices.

These advantages do not mean that the Supreme Court grants every certiorari petition the government files, or that the government wins every criminal case litigated on the merits. Nonetheless, there is good reason to believe that these asymmetries have an effect on the doctrine over the long run, resulting in regulation that is friendlier to government interests than it might otherwise be.

1. Unified Vision

In every criminal case at the Supreme Court, a prosecutor will be seeking to vindicate the government's long-term interests. (Sometimes there will be two prosecutors, when the Solicitor General is participating as an *amicus curiae* in support of a state.) On the other side of the "v." is not someone advocating for the long-term interests of criminal defendants. Instead, there is a *particular* criminal defendant and his lawyer. Put another way: Any Supreme Court criminal case can establish a precedent affecting the rights of every criminal suspect or defendant in the country—but only one criminal defendant is actually involved in litigating it.

At first glance, it might not be obvious why this matters. Any particular defendant, one might think, has a strong interest in prevailing in order to avoid criminal sanctions. So then shouldn't any given defendant be equipped to advocate for the interests of criminal defendants more generally? Sometimes, the answer is surely yes. When the Court faces a binary choice between two rules—one favoring the government, and one favoring defendants—any defendant is reasonably well positioned to act on behalf of the larger pool of criminal defendants.⁵² In those cases, so long as the

⁵² For example, in *Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019), where the question before the Court was straightforward and effectively binary—should the Excessive Fines Clause be incorporated against the states or not?—the defendant, Tyson Timbs, was in a good position to make arguments that would benefit all others.

defendant has good counsel—a problem we will consider separately below—that defendant may be an effective “class representative.” But there are many cases in which that will not be true—and many other ways in which litigant incentives and ethical rules give the government an advantage in the battle to shape the rules.

We will illustrate this claim with examples, but it is helpful to begin with the framework from Marc Galanter’s classic analysis of “why the ‘haves’ tend to come out ahead” in the legal system.⁵³ Galanter distinguishes between “one-shotters” and “repeat players” in litigation.⁵⁴ One-shotters “have only occasional recourse to the courts” whereas repeat players “are engaged in many similar litigations over time.”⁵⁵ As Galanter explains, repeat players have many advantages that help them win individual cases, including specialized knowledge, “economies of scale,” and earned credibility with judicial decisionmakers.⁵⁶ Most crucially for present purposes, repeat players can “play for rules in litigation itself.”⁵⁷ That is, repeat players can make choices aimed at setting favorable precedents for *future* cases—even if those choices make the repeat player less likely to prevail in a particular case. One-shotters, by contrast, are only concerned with winning the case at hand.⁵⁸

Galanter’s distinction captures an important dynamic in Supreme Court criminal litigation. The two sides are playing fundamentally different games. The government plays for the rules, whereas each criminal defendant (and that defendant’s lawyer) must play to win the case.

Playing for the rules means many things in practice. Consider some possibilities. The first involves *vehicle selection*. The factual details of a particular case can affect a court’s choice of rule to govern future cases. As Frederick Schauer has explained, cognitive biases mean that concrete cases can distort a court’s rulemaking “whenever the concrete case is nonrepresentative of the full array of events that the ensuing rule or principle will encompass.”⁵⁹ Making matters worse, it may be “extremely difficult . . . for judges to avoid making what to them appears to be the correct decision with respect to the particular facts at issue and the particular parties before them.”⁶⁰ For these reasons, there is cause to suspect that idiosyncratic features of a particular case might influence a court’s choice of rule more than it rationally should.

⁵³ Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 124 (1974).

⁵⁴ *Id.* at 97.

⁵⁵ *Id.*

⁵⁶ *See id.* at 98-101.

⁵⁷ *Id.* at 100.

⁵⁸ *See id.*

⁵⁹ Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884 (2006).

⁶⁰ *Id.* at 899.

One might hope that the Supreme Court, of all courts, would be more resistant to such biases, given the care with which it selects cases and the time it devotes to deciding them.⁶¹ But Schauer points to a number of examples indicating that this bias plagues even Supreme Court decisionmaking.⁶² Litigators understand this, at least intuitively. “Impact litigators” seeking to change the law often devote substantial effort to identifying sympathetic plaintiffs in the hopes of better persuading the Court.⁶³ The practice has been going on for more than a century, at least: The dispute that led to *Plessy v. Ferguson*⁶⁴ was carefully choreographed by lawyers looking to challenge Louisiana’s Separate Car Act.⁶⁵ Homer Plessy was apparently chosen as the test litigant because he was light-skinned and so “the arbitrariness of the classification would be accentuated.”⁶⁶ Careful plaintiff selection is now a commonplace tactic for those seeking to engineer Supreme Court victories; the architects of the *Obergefell v. Hodges* litigation,⁶⁷ for example, “selected and groomed their plaintiffs with great care.”⁶⁸

There is every reason to think that government lawyers, too, pay close attention to the factual details of cases in determining how best to influence the Court. As former Acting Solicitor General Barbara Underwood has explained, “[I]n responding to a petition for certiorari, or in deciding whether to file one, the Solicitor General is likely to consider both whether the question presented is worthy of Supreme Court review, and whether the particular case is a good vehicle for presenting that question to the Court.”⁶⁹ But more than that, Underwood notes, “In defending a federal statute, . . . the Solicitor General’s interest in selecting cases may be not just to find a case

⁶¹ For discussion of the Court’s case selection process, see DORIS MARIE PROVIN, *CASE SELECTION IN THE UNITED STATES SUPREME COURT* (1980), and Epps & Ortman, *supra* note 39, at 710-17.

⁶² See Schauer, *supra* note 59, at 901-03.

⁶³ See Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J. FORUM 136, 137 (2015) (“[T]he selection of plaintiffs is one of the most significant decisions a cause lawyer can make.”); Kimberly Strawbridge Robinson, *Supreme Court Lawsuits in Search of a Plaintiff*, BLOOMBERG LAW (Apr. 16, 2018, 3:58 PM), <https://news.bloomberglaw.com/business-and-practice/supreme-court-lawsuits-in-search-of-a-plaintiff> [<https://perma.cc/5AXN-N5QQ>] (“Public interest lawyers on both the right and the left often seek out plaintiffs and initiate litigation specifically to change the law, [Erwin Chemerinsky said.]”).

⁶⁴ 163 U.S. 537 (1896).

⁶⁵ For a thorough retelling of this legal choreography, including the lengthy process of plaintiff selection, see CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* 28-43 (1987).

⁶⁶ *Id.* at 31.

⁶⁷ 135 S. Ct. 2584 (2015).

⁶⁸ Godsoe, *supra* note 63, at 137-38.

⁶⁹ Barbara D. Underwood, *Facts on the Ground and Federalism in the Air: The Solicitor General’s Effort to Defend Federal Statutes During the Federalism Revival*, 21 SAINT JOHN’S J. LEGAL COMMENT. 473, 475 (2007).

that presents the issue squarely but rather to find a case that presents the government's position in the most favorable light."⁷⁰

Former Solicitor General Seth Waxman uses the phrase "procedural influence" to describe "the ability of the Solicitor General—on occasion—to affect which cases come to the Court on a particular issue, and in what order."⁷¹ The Solicitor General exercises this power by choosing which cases to appeal.⁷² If, for example, a legal issue is likely to recur, the Solicitor General may decline to authorize an appeal of a loss in the lower courts to better await a "case[] in which the government's position can be cast in its best light."⁷³ As one observer puts it, the Solicitor General "does not sit beside the Justices on the bench, but he stands in place of them when he decides which cases should be taken to the Court."⁷⁴

Criminal cases present the government with many opportunities to deploy this strategy. The high volume of criminal cases means that the government will often be able to choose a vehicle that frames an issue for the Justices in the most favorable light. By the same token, the government can sometimes avoid vehicles with particularly compelling facts for the defendant's side of the issue by simply declining to appeal adverse rulings, or even by "confess[ing] . . . error" in the judgment below on different grounds.⁷⁵ From the government's perspective, any one criminal case has relatively low stakes, and so the consequences of giving up on one case can be worth bearing in order to maximize the chances of shaping the rules that will govern many more cases in the future.

In some instances, the government can be particularly proactive in identifying attractive candidates for certiorari. Consider *United States v. Fanfan*, decided alongside *United States v. Booker*.⁷⁶ In the wake of *Blakely v. Washington*,⁷⁷ which

⁷⁰ *Id.* A current Deputy Solicitor General has made similar observations. See Malcolm L. Stewart, *United States Appeals: Strategic and Policy Considerations*, U.S. ATT'YS' BULL., Jan. 2013, at 13, 15 ("[T]he government generally takes particular care to select favorable 'vehicles' for appellate consideration of recurring legal issues. The best vehicles are cases in which the facts present the government's position in a favorable light, maximizing the likelihood that the government's view will strike judges as intuitively fair.")

⁷¹ Seth P. Waxman, *Foreword: Does the Solicitor General Matter?*, 53 STAN. L. REV. 1115, 1117 (2001) (emphasis omitted).

⁷² Lower court decisions against the United States may only be appealed with the approval of the Solicitor General. See Margaret D. McGaughey, *When the United States Loses in a Criminal Case: The Government Appeal Process*, 18 J. APP. PRAC. & PROCESS 297, 309-15 (2017).

⁷³ Stewart, *supra* note 70, at 16.

⁷⁴ LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 6 (1987).

⁷⁵ Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—and an Alternative*, 107 MICH. L. REV. 711, 731 (2009); see also *infra* text accompanying notes 111–121.

⁷⁶ 543 U.S. 220 (2005).

⁷⁷ 542 U.S. 296, 305 (2004).

had struck down a state sentencing-guidelines system on Sixth Amendment grounds, lower federal courts were beginning to declare the U.S. Sentencing Guidelines system unconstitutional.⁷⁸ Eager to find ideal candidates for certiorari, the Solicitor General's office "canvassed US Attorney's Offices around the country for prospects, plucked Fanfan's case from the First Circuit while it was still pending there, and took it directly to the Supreme Court."⁷⁹

Our point is not to endorse strategic vehicle selection at the Court as a normative matter. The practice is at least sometimes troubling. For instance, the decision to pick Homer Plessy as a test litigant because he was light-skinned raises difficult questions about, for example, when impact litigators might reinforce prejudice by acknowledging it in client selection. But those questions—and the appropriateness of strategic vehicle selection in general—are for another day. For our purposes, what is critical is that this is a real phenomenon and there is no obvious way to prevent the government from engaging in it in criminal cases. Therein lies the asymmetry: criminal defendants are in no position to conduct such coordinated, strategic behavior before the Supreme Court. The problem is that defendants are not an undifferentiated whole; they are individuals with their own incentives. Sometimes, those incentives line up with the interests of defendants more generally, but not inevitably.⁸⁰ An unsympathetic defendant has every incentive to appeal his conviction even if he has virtually no chance of obtaining a reversal and even if his case is a poor vehicle for influencing the Supreme Court. That defendant is entitled to counsel on direct appeal.⁸¹ Although an attorney is not required to file a frivolous appeal,⁸² the decision to appeal otherwise remains in the client's control.⁸³ Further, while defendants have no constitutional right to court-appointed counsel for discretionary appeals such as certiorari petitions,⁸⁴

78 For a discussion of the case law that developed at the circuit-court level between *Blakely* and *Booker*, see Kathleen A. Hirce, Comment, *A Swift and Temporary Instruction: The Effectiveness of the Circuit Courts Between Blakely and Booker*, 2 SETON HALL CIR. REV. 271 (2005).

79 McGaughey, *supra* note 72, at 313.

80 See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 796 (1994) (observing that while criminal defendants are "a kind of private attorney general," they are the "worst kind" because they "will litigate on the worst set of facts" and because they "care[] only about the case at hand . . . and [have] no long view").

81 See *Douglas v. California*, 372 U.S. 353, 355-57 (1963).

82 See *Anders v. California*, 386 U.S. 738, 744 (1967).

83 See AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION § 4-5.2(b)(viii) (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition [<https://perma.cc/2NV4-CC4P>] ("The decisions ultimately to be made by a competent client, after full consultation with defense counsel, include . . . whether to appeal . . .").

84 See *Ross v. Moffitt*, 417 U.S. 600, 617-18 (1974).

appointed lawyers in the federal system are required to file a certiorari petition where such a petition would not be frivolous.⁸⁵

And because a lawyer's duty is always to her client, it would be inappropriate for counsel to refuse to pursue an appeal or file a certiorari petition, when doing so might benefit the client, simply because it might not be in the long-term strategic interests of defendants more generally. Indeed, lawyers who have made such tradeoffs to the detriment of their clients have been criticized for conflicts of interest.⁸⁶ At the Supreme Court, this asymmetry puts the government in a much stronger position than defendants to influence the Justices through vehicle selection.⁸⁷

Of course, "the government" is not a monolithic entity. In the realm of constitutional criminal procedure, there are a multitude of governments involved, including, most importantly, states. Does that fact undercut the story we have been telling thus far? It could, if state involvement undermined the Solicitor General's ability to screen potential vehicles. In practice, this is not a significant concern. First, "[l]ike the Justice Department, a state attorney general's office has the option of selecting from among many cases the most compelling facts for obtaining Supreme Court review."⁸⁸ State prosecutors, that is, have the same motivation, and ability, as the Solicitor General to play for the rule, not for the case. Second, state attorneys general often coordinate with each other, and with the Solicitor General.⁸⁹ Thus, the

⁸⁵ See REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, H.R. DOC. NO. 89-62, at 7 (1965) ("[C]ounsel appointed on appeal should advise the defendant of his right to initiate a further review by the filing of a petition for certiorari, and to file such petition, if requested by the defendant."); see also, e.g., Mark J. Langer, Clerk, U.S. Court of Appeals for the District of Columbia Circuit, Informational Packet for Court Appointed Counsel 4 (rev. Jan. 10, 2020), [https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20CJA%20Letter%20to%20Court%20Appointed%20Counsel/\\$FILE/CJALTR2.pdf](https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20CJA%20Letter%20to%20Court%20Appointed%20Counsel/$FILE/CJALTR2.pdf) [<https://perma.cc/HU95-WM3V>] (detailing the obligations of appointed counsel with regard to petitions for certiorari).

⁸⁶ A charge of this nature was leveled against the NAACP Legal Defense Fund's efforts in capital cases in the 1970s for supposedly putting the interests of death penalty abolition above the interests of individual clients. See EVAN J. MANDERY, *A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA* 57-63, 360-61, 430-31 (2013) (discussing the conflict in LDF's roles).

⁸⁷ The asymmetry between a monolithic government and dispersed individual defendants has significant effects throughout the criminal justice system, well beyond the Supreme Court context. John Blume has observed that prosecutors' use of aggressive charging to induce defendants to plead guilty would grind to a halt if "the criminal defense bar rose up in collective action." John H. Blume, *How the "Shackles" of Individual Ethics Prevent Structural Reform in the American Criminal Justice System*, 42 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 23, 29 (2016). The problem, though, is that "[t]he individualized ethical ethos of the modern criminal defense lawyer . . . dooms actions to achieve collective good." *Id.* at 31.

⁸⁸ Charles G. Cole, *How Your Case Can Catch the Supreme Court's Eye*, CRIM. JUST., Fall 1987, at 15, 15.

⁸⁹ In criminal cases, "the states can expect amicus support from the Solicitor General's Office and from the other state attorneys general." *Id.* The states have developed institutional structures

different governments can coordinate in a way that defendants cannot. Finally, when a state files a less-than-optimal certiorari petition, the Solicitor General can decline to participate as an amicus, in the hopes of reducing the likelihood that the petition will be granted.

Thus, in summary, the government can consistently shape the context in which the Court considers particular questions. And yet criminal defendants cannot, since each defendant with a plausible argument for certiorari has every incentive to file a petition. Assuming that the choice of vehicle has some influence over the Court's decisionmaking—and the most sophisticated Supreme Court litigators believe that it does—this asymmetry will, over the long run of cases, introduce some degree of pro-government tilt that would not otherwise exist into the resulting legal rules.

But this is not the only advantage the government has by virtue of its ability to play for the rules. The government is also better equipped to make persuasive arguments on the merits. Consider a case where the Court must select from a range of possible rules (or standards), rather than make a simple binary choice. The defense lawyer in such a case must argue for the rule that will enable her client to prevail in the case—even if the Court appears more likely to be persuaded by a slightly less defendant-protective rule. The government, by contrast, can argue for whichever rule it thinks is most likely to convince the Court—even if that rule might lead to a “loss” in the particular case.

The Solicitor General is particularly well equipped to play this role. His office (the lawyer currently serving in that role is male) presents argument in seventy-two percent of the Court's criminal cases, either as the prosecutor in federal cases or as amicus in support of the prosecutor in state cases, giving it an outsized power to shape the law.⁹⁰ And it often argues for rules that seem designed to provide narrow victories for government interests, or at least to limit the damage of a ruling that goes against the government's wishes. Defense lawyers, by contrast, are less able to behave strategically in this manner, as they cannot sacrifice the interests of a particular defendant to obtain a greater victory.

We illustrate these dynamics with two examples. The first is *Maryland v. Shatzer*,⁹¹ where the Court confronted questions it had left unresolved in *Edwards v. Arizona*.⁹² In *Edwards*, the Court held that when a suspect in

to help enable cooperation. In the 1980s, the National Association of Attorneys General established the Supreme Court Clearinghouse Project, a permanent institution that helps advise state attorneys general on Supreme Court advocacy and coordinate amicus activity. See Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525, 542-44 (1994).

⁹⁰ Crespo, *supra* note 3, at 2013 (describing oral arguments during the first decade of the Roberts Court).

⁹¹ 559 U.S. 98 (2010).

⁹² 451 U.S. 477 (1981).

custody is read the *Miranda* warnings and tells police he wants a lawyer, not only must interrogation cease, but police cannot thereafter reinstate interrogation without counsel, even if the suspect consents to it.⁹³ Once a suspect invokes his right to counsel, that is, *Edwards* applies an irrebuttable presumption that subsequent police-initiated custodial interrogation is coercive.⁹⁴ But for how long? And can intervening events (like the suspect being released from custody) terminate the presumption, such that the police may again initiate custodial interrogation as they can with anyone else—that is, by reading the *Miranda* warnings and obtaining a waiver? These were the questions before the Court in *Shatzer*.⁹⁵

Shatzer demonstrates how the interests of a particular defendant can run contrary to the interests of defendants as a class. In August 2003, while Michael Shatzer was serving time in a Maryland prison, a police detective attempted to question him about allegations that he had sexually abused his three-year-old son. He declined to talk without a lawyer. In March 2006, more than two and a half years later, Shatzer was still incarcerated when additional evidence of the abuse emerged. A different detective went to see Shatzer (by then in a different facility) and read him the *Miranda* warnings. This time he agreed to speak and incriminated himself. Based in part on the incriminating statement, Shatzer was found guilty of sexual child abuse.⁹⁶

Shatzer's case thus turned on whether the *Edwards* presumption still applied when the detective visited him in prison in 2006. At oral argument, it became clear that there were three plausible answers to the question of how long the *Edwards* presumption lasts.⁹⁷ One possibility, the one pressed by Shatzer's attorney, was that it lasts indefinitely.⁹⁸ Once a defendant invokes his right to counsel during a custodial interrogation, that is, the *Edwards* presumption applies to him, apparently forever. Another possibility, the one

⁹³ *Id.* at 484-87.

⁹⁴ See *Michigan v. Harvey*, 494 U.S. 344, 356 (1990) (Stevens, J., dissenting) (citing *Edwards* for the proposition that “[t]he initiation by the police of contact with an unrepresented defendant, after the invocation of the right to counsel during interrogation or at arraignment, creates an irrebuttable presumption that a defendant's waiver of his privilege against compelled self-incrimination is not voluntary”).

⁹⁵ Brief for Petitioner at i, *Shatzer*, 559 U.S. 98 (No. 08-680).

⁹⁶ The facts are drawn from the Court's opinion. See *Shatzer*, 559 U.S. at 100-02.

⁹⁷ In addition to the three possibilities discussed in the text, Justice Breyer promoted a perplexing approach derived from analogy to the rules of legal ethics. See Transcript of Oral Argument at 20-21, 41, *Shatzer*, 559 U.S. 98 (No. 08-680) (suggesting that if there is a breach in custody and time has passed since an individual's initial interrogation, a questioner who “did not and would not reasonably believe that the suspect was looking for or was represented by counsel” can permissibly interrogate the individual in the absence of counsel). No other Justice appeared interested in Breyer's approach, and Justice Scalia mocked it openly. *Id.* at 42. In the end, Justice Breyer joined Justice Scalia's majority opinion without comment. *Shatzer*, 559 U.S. at 99.

⁹⁸ Transcript of Oral Argument, *supra* note 97, at 34, 36.

avored by prosecutors, was that the *Edwards* presumption ends the moment a person is released from the custody in which he invoked *Miranda*.⁹⁹ Thus, once there is a “break in custody,”¹⁰⁰ the police can subsequently initiate a custodial interrogation just by reading the *Miranda* warnings and getting a waiver. It became clear at oral argument that neither of these extreme positions was attractive to the Justices. A middle position emerged—that the *Edwards* presumption ends when there is a “break in custody” *plus* the passage of some amount of time.¹⁰¹ The crucial question thus became—how much time?

But consider the position that put Shatzer’s attorney—Celia Davis, an assistant public defender in Maryland—in. The facts were not on her side. Two and a half *years* had passed between her client’s “break in custody” and his subsequent *Miranda* waiver.¹⁰² While no one at oral argument could predict *exactly* how long beyond the end of the initial custody the Court might be willing to apply the *Edwards* presumption, it would clearly *not* go for two and a half years. Thus, the only way for Davis to prevail was to persist in the argument that was going nowhere—that the *Edwards* presumption lasts forever. Her predicament even became a source of humor. Justice Alito asked the question: “If we were to choose a time period here, what would—what would you propose?”¹⁰³ Without pause, Davis insisted: “Oh, anything over two years and seven months.”¹⁰⁴ The transcript reflects laughter in the courtroom.¹⁰⁵ Pressed by Justice Alito for a “serious” answer to his question, Davis replied that “*Edwards* continues to the end,” explaining further that it is “all or nothing.”¹⁰⁶

A lawyer representing the interests of defendants as a class could have taken a different tactic. Seeing that the “all or nothing” argument wasn’t working, she could have argued, as a compromise, that the *Edwards* presumption should continue until a break in custody is followed by a relatively long period of time—say sixty or ninety days. That wouldn’t have helped Shatzer, but his case was a lost cause, and it would have helped defendants in other cases. That option wasn’t ethically available to Davis, who, quite appropriately, stuck to her position.

⁹⁹ *Id.* at 28.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 12-13, 14-15, 20-21, 28.

¹⁰² As the Court analyzed the case, the “break in custody” in Shatzer’s case occurred almost simultaneously with his invoking *Miranda*. That’s because the Court regarded his return from the interrogation to the “general prison population” within the prison to be a break in custody. *Shatzer*, 559 U.S. at 113-14.

¹⁰³ Transcript of Oral Argument, *supra* note 97, at 56.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 57.

¹⁰⁶ *Id.* (emphasis added).

The strategic retreat closed to Shatzer's attorney was very much open to the government lawyers at argument, and they took it. When it became clear that at least some Justices rejected his preferred rule (that the *Edwards* presumption ends the moment there is a break in custody), the Attorney General of Maryland quickly pivoted to accept a short time limit—seven days—as a compromise.¹⁰⁷ He was joined at argument by an attorney from the U.S. Solicitor General's Office, Toby Heytens, lending that office's gravitas and expertise to the state prosecutor's efforts.¹⁰⁸ Heytens indicated the federal government was also open to a timing rule.¹⁰⁹

In a 7–2 decision, the Court ruled that the “only logical endpoint of [the] *Edwards* [presumption rule] is termination of *Miranda* custody and any of its lingering effects,” which takes “14 days.”¹¹⁰ Though Maryland and the United States had not gotten all they wanted, this was a fairly significant victory for their interests. One can only wonder the degree to which the categorical fourteen-day rule was shaped by the asymmetrical dynamics we have described. Michael Shatzer was a particularly unappealing defendant; would the Court inevitably have landed on the fourteen-day rule with a more defendant-friendly vehicle? Might the Justices have chosen a more defendant-protective rule (sixty or ninety days following a break in custody, perhaps) if, alongside Shatzer's counsel at the oral argument, someone had been arguing for the interests of defendants as a class? There's no way to know for certain. Nonetheless, it is easy to believe that the asymmetrical dynamic of criminal litigation in the Supreme Court affected the doctrine.

The second example shows how the Solicitor General, unlike defense lawyers, *can* play for the rule, even when that means conceding the case. Today, the constitutionality of plea bargaining—that is, the practice of exchanging “leniency” for guilty pleas—is firmly settled.¹¹¹ It wasn't always. As late as the 1950s, plea bargaining's legality was an open question.¹¹² In 1957, a panel of the Fifth Circuit dramatically held in *Shelton v. United States* that a guilty plea premised on a prosecutor's promise of leniency is presumed

¹⁰⁷ *See id.* at 15 (“But if—in Justice Kennedy's question, if we were going to adopt a time limit, I—we would suggest, like, for example, a seven-day time limit.”).

¹⁰⁸ *See id.* at 20. Maryland also had the support of thirty-seven states in an amicus brief. *See* Brief of Florida et al. as Amici Curiae in Support of Petitioner, *Maryland v. Shatzer*, 559 U.S. 98 (2010) (No. 08-680).

¹⁰⁹ Transcript of Oral Argument, *supra* note 97, at 28.

¹¹⁰ *Shatzer*, 559 U.S. at 108, 110.

¹¹¹ *See* *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (acknowledging the prosecutor's “constitutionally legitimate” interest in plea bargaining); *Brady v. United States*, 397 U.S. 742, 753 (1970) (holding that “[t]he Fifth Amendment does not reach so far” as to forbid plea bargaining).

¹¹² *See* William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435, 1493-95 (2020) (explaining that plea bargaining's legality was in doubt in part because of uncertainty over applicability of the “unconstitutional conditions” doctrine).

involuntary, adding: “Justice and liberty are not the subjects of bargaining and barter.”¹¹³ The Department of Justice persuaded the en banc Fifth Circuit to rehear and reverse the panel,¹¹⁴ but the defendant kept the case alive by filing a certiorari petition.

From the government’s perspective, the certiorari petition was extraordinarily dangerous. American criminal justice had already come to depend on plea bargaining.¹¹⁵ If the Court granted the petition and agreed with the Fifth Circuit panel, the consequences for the American criminal justice system would have been enormous. The government’s strategic interests were thus clear—far better to sacrifice Shelton’s conviction for violating the Dyer Act (with a one-year sentence)¹¹⁶ than to risk throwing state and federal criminal courts into chaos.

And so, in response to Shelton’s certiorari petition, the Solicitor General confessed error, but not on the issue that the Fifth Circuit judges had tussled over.¹¹⁷ Rather, the Solicitor General “confess[ed]” that the trial court had “err[ed]” by not conducting a sufficient inquiry into the voluntariness of Shelton’s guilty plea.¹¹⁸ The Solicitor General’s basis for confessing error was flimsy to the point of being pretextual.¹¹⁹ Albert Alschuler conjectures—we think persuasively—as to what was really going on: “[T]he Solicitor General . . . may have assessed the probable votes of individual Supreme Court Justices, may have sensed a substantial likelihood that the Court would hold the practice of plea bargaining unlawful, and may have sought to foreclose this ruling through a confession of error on narrow and disingenuous grounds.”¹²⁰ The Court went along with the Solicitor General, issuing a brief per curiam opinion granting the certiorari petition and remanding for further proceedings.¹²¹

Because the Solicitor General can play for the rule, he was free to decide that preserving plea bargaining was more important to the government’s long-term interests than preserving Shelton’s conviction. It may have been the most

¹¹³ 242 F.2d 101, 113 (5th Cir. 1957).

¹¹⁴ 246 F.2d 571, 572 (5th Cir. 1957) (en banc).

¹¹⁵ See Ortman, *supra* note 112, at 1497 (arguing that plea bargaining had become the ordinary and largely accepted method of resolving criminal cases in the United States by the middle decades of the twentieth century).

¹¹⁶ See *Shelton*, 242 F.2d at 102.

¹¹⁷ *Shelton v. United States*, 356 U.S. 26, 26 (1958) (per curiam).

¹¹⁸ Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 36 (1979). Alschuler located the Solicitor General’s confession of error in the Supreme Court library. *Id.*

¹¹⁹ Both the Fifth Circuit panel and the en banc court had found that issue did not warrant relief. See *id.* (citing *Shelton*, 246 F.2d at 572-73 (en banc); *Shelton*, 242 F.2d at 112 (panel)). Alschuler notes that the confession “seemed peculiar” in part because the Solicitor General simply “failed to mention the ruling of the court of appeals on the issue in question.” *Id.*

¹²⁰ *Id.* at 37.

¹²¹ *Shelton*, 356 U.S. at 26.

practically consequential confession of error in the Court's history. Twelve years later, with Warren Burger having replaced Earl Warren at the center of the bench, the Court affirmed the constitutionality of plea bargaining.¹²² As Alschuler observes, "One wonders whether . . . the history of plea bargaining might not have taken a dramatically different turn but for the action of the Solicitor General" in *Shelton*.¹²³ Just as *Shatzer* exemplifies the strategic constraints on defense lawyering in Supreme Court litigation, *Shelton* illustrates the government's free hand, and its potentially momentous consequences.

2. Quality of Advocacy

Criminal defendants face another disadvantage in the battle to shape Supreme Court doctrine. Though not in every case, they are on average represented by less experienced—and, we would contend, sometimes less able—counsel in front of the Court when compared to the prosecution. The reason why this is so turns on institutional structures and individual incentives.

Consider the government side first. In every case directly involving the United States, the Solicitor General will press the government's case before the Court. First established in 1870,¹²⁴ the Solicitor General has primary responsibility for nearly all Supreme Court litigation on behalf of the United States,¹²⁵ and also is in charge of deciding when the government will seek appeals of adverse decisions throughout the court system.¹²⁶ The Solicitor General has been described as "the country's most influential litigator,"¹²⁷ and the position is highly coveted, attracting some of the nation's most talented (and ambitious) lawyers. Former Solicitors General are typically the subject of bidding wars by top law firms when they move to private practice.¹²⁸

¹²² *Brady v. United States*, 397 U.S. 742, 758 (1970); Ortman, *supra* note 112, at 1494-96.

¹²³ Alschuler, *supra* note 118, at 37.

¹²⁴ See Act of June 22, 1870, ch. 150, § 2, 16 Stat. 162, 162.

¹²⁵ The only significant exception arises from federal agencies that have "independent litigation authority." See Elliott Karr, Essay, *Independent Litigation Authority and Calls for the Views of the Solicitor General*, 77 GEO. WASH. L. REV. 1080, 1080-81, 1085 & n.28 (2009) (discussing this authority, the agencies that possess it, and the relationship between these agencies and the Solicitor General).

¹²⁶ See *supra* note 72.

¹²⁷ Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1326 (2010).

¹²⁸ After Solicitor General Paul Clement left office near the end of the Bush Administration, for example, he was "the belle of the ball" among law firms looking to hire him to head their Supreme Court practices. Dan Slater, *Paul Clement: The LeBron James of Law Firm Recruiting*, WALL ST. J.: LAW BLOG (Oct. 27, 2008, 9:22 AM ET), <https://blogs.wsj.com/law/2008/10/27/paul-clement-the-lebron-james-of-law-firm-recruiting> [<https://perma.cc/2JU2-JMWP>]. For an argument that former Solicitors General may be overpaid by clients in light of the results they produce, see Ryan C. Black & Ryan J. Owens, *The Success of Former Solicitors General in Private Practice: Costly and Unnecessary?*, 2016 MICH. ST. L. REV. 325, 326-27, 360.

In addition to the Solicitor General himself, the Solicitor General's Office (OSG) employs a number of additional attorneys—four deputies and sixteen assistants.¹²⁹ Each is a highly skilled and impressively credentialed Supreme Court litigator. The OSG enjoys significant success at the Court, with a much higher victory rate than other litigants.¹³⁰ One recent empirical study concluded that the OSG is more likely to win its cases than the mere experience of its attorneys would predict, suggesting that the OSG's "internal institutional dynamics" may make it uniquely successful.¹³¹

Those institutional dynamics seem to make the OSG particularly able in the criminal sphere. One of the deputies—until recently, Michael Dreeben—is assigned primary responsibility for the OSG's criminal caseload.¹³² That deputy has the ability to develop deep expertise in criminal law and procedure, and to become a particularly experienced advocate before the Court. During his tenure, Dreeben became "the second most experienced Supreme Court advocate *in the nation*."¹³³ Upon his recent retirement, Dreeben was lauded as a true master of the craft of appellate advocacy.¹³⁴ Although the "criminal deputy" does not conduct all of the OSG's oral arguments involving criminal matters, he "manage[s] the federal government's criminal docket," as former Solicitor General Donald Verrilli has explained.¹³⁵

The advocacy in support of the federal government in criminal cases before the Court is thus consistently of the highest quality. Of course, many criminal cases involve states, not the federal government, as parties. But there, too, prosecution-side interests usually enjoy top-flight counsel. In recent decades, a number of states have created solicitor general offices modeled on the federal office. As Richard Lazarus explains, these states hired "highly credentialed attorneys, often former clerks to U.S. Supreme Court Justices" who "are quickly developing their own expertise in High Court

129 Michael R. Dreeben, *The Role of the Solicitor General in the Department of Justice's Appellate Process*, 61 U.S. ATT'YS' BULL., Jan. 2013, at 5, 5.

130 See Cordray & Cordray, *supra* note 127, at 1335 ("Overall, the Solicitor General's winning percentage is 60-70% (as opposed to the 50% win rate for all litigants)."); see also Ryan C. Black & Ryan J. Owens, *A Built-In Advantage: The Office of the Solicitor General and the U.S. Supreme Court*, 66 POL. RES. Q. 454, 461 (2013) (finding that OSG attorneys have "a 10% higher chance of winning" exclusively because they are part of the OSG).

131 See Black & Owens, *supra* note 130, at 454-55.

132 Crespo, *supra* note 3, at 2014-15.

133 *Id.* at 2015.

134 See, e.g., Donald B. Verrilli, *Michael Dreeben: A True Public Servant*, SCOTUSBLOG (Aug. 2, 2019, 3:48 PM), <https://www.scotusblog.com/2019/08/michael-dreeben-a-true-public-servant> [<https://perma.cc/3HBW-GDF6>] (describing Dreeben's "awe-inspiring performances" in Supreme Court oral argument, made possible by his ability to "underst[and] the relevant legal materials at the deepest and most detailed level; . . . grasp[] every nuance and difficulty of the government's position; and . . . distill[] his key points to their crystalline essence").

135 *Id.*

advocacy.”¹³⁶ These offices pay dividends for the states that have created them; one study concluded that “states are more likely to win when they utilize attorneys from a formal state [solicitor general office], even after accounting for the general levels of institutional resources that vary across states.”¹³⁷

Even in the occasional instance where a state is not represented by skilled counsel in the Court, government interests still find able representation. That is because the federal Solicitor General routinely participates in briefing and oral argument as an *amicus curiae* in support of state prosecutors.¹³⁸ The Solicitor General can thus protect prosecution interests even if a state happens to drop the ball. More often, though, there are two able attorneys arguing in favor of the government.

Criminal defendants, by contrast, are less consistently represented by the most experienced and able practitioners. The reason, we think, is partly institutional. While many criminal defendants have government-provided lawyers—such as public defenders—there is no centralized public-defender office that provides Supreme Court representation.¹³⁹ Instead, defendants are often represented by the attorneys who represented them in the lower courts,¹⁴⁰ who are very rarely Supreme Court experts. In fact, criminal defendants’ lawyers are often arguing at the Court for the first (and likely only) time in their careers.

These lawyers could, of course, hand off their arguments to more experienced practitioners. Some leading Supreme Court practitioners—most notably Professor Jeffrey Fisher, of Stanford Law School’s Supreme Court

¹³⁶ Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1501 (2008).

¹³⁷ Ryan J. Owens & Patrick C. Wohlfarth, *State Solicitors General, Appellate Expertise, and State Success Before the U.S. Supreme Court*, 48 LAW & SOC’Y REV. 657, 658 (2014).

¹³⁸ See Crespo, *supra* note 3, at 2013 (finding that the federal Office of the Solicitor General participates, either as counsel for a party or as *amicus*, in seventy-two percent of criminal cases before the Supreme Court—and in those cases, “virtually always argues in opposition to the criminal defendant”). For a thorough and impressive study of *amicus* participation by the Office of the Solicitor General in Supreme Court oral argument, see Darcy Covert & A.J. Wang, *The Loudest Voice at the Supreme Court: The Solicitor General’s Dominance of Amicus Oral Argument* (Apr. 21, 2020), VAND. L. REV. (forthcoming), <https://ssrn.com/abstract=3446919> [<https://perma.cc/SN8B-M6R5>].

¹³⁹ The nearest analogue we are aware of is the Defender Supreme Court Resource & Assistance Panel (DSCRAP). As the Defender Services Office’s website explains, DSCRAP “brings together defenders from across the country who have expertise and practical experience on the particular issues of federal criminal law that come before the Court,” but does not itself provide representation. See *Supreme Court Advocacy Assistance*, DEFENDER SERVICES OFFICE: TRAINING DIVISION, <https://www.fd.org/supreme-court-advocacy-assistance> [<https://perma.cc/LTS3-J5X4>] (last visited Mar. 25, 2020).

¹⁴⁰ See Harris, *supra* note 2 (quoting Justice Kagan as stating, “Every time one of these [criminal] cases comes to the court where the trial lawyer . . . is doing their first Supreme Court argument without thinking about the court, . . . rather than giving over one of these cases to an experienced Supreme Court bar member, that’s when I get a little upset”).

Litigation Clinic, which he codirects with Professor Pamela Karlan—have had great success representing criminal defendants before the Court pro bono.¹⁴¹ But many inexperienced lawyers representing criminal defendants seem unwilling to cede ground to more experienced counsel.¹⁴² There are many possible explanations. Some may be opposed to the increasingly elite nature of the Supreme Court bar.¹⁴³ Others may not be aware of the specialized nature of Supreme Court practice, or they may be overconfident in their own abilities.¹⁴⁴ Personal incentives, too, may play a role; Supreme Court oral arguments are rare honors for attorneys, and attorneys may convince themselves they are right for the job out of self-interested motives. In addition, criminal defendants themselves may be unaware of the existence of a specialized Supreme Court bar that is eager to provide free representation at the Court, and thus may not seek out more experienced counsel.

Whatever the precise explanation for why nonexpert criminal lawyers retain cases at the Supreme Court, it has led to a significant representational imbalance. Many close observers of the Supreme Court have taken note—including at least two current Justices. Bemoaning criminal defense lawyers who insisted on keeping their cases, Justice Sotomayor remarked, “I think it’s malpractice for any lawyer who thinks this is my one shot before the Supreme Court and I have to take it.”¹⁴⁵ Justice Kagan offered similar observations:

I think that the litigants who are underserved in terms of lawyering quality are criminal defendants Every time one of these cases comes to the court where the trial lawyer—and the person may be a terrific trial lawyer—is doing their first Supreme Court argument without thinking about the court, without thinking about the way it operates, rather than giving over one of these cases to an experienced Supreme Court bar member, that’s when I get a little upset.¹⁴⁶

As expert Supreme Court litigator (and former OSG lawyer) Roy Englert described the problem, “There is a real injustice There are often two

¹⁴¹ We discuss Fisher and the Stanford clinic *infra* in subsection II.C.1.

¹⁴² See Kinder, *supra* note 3, at 253-55 (citing instances where criminal defense attorneys, “famously nonconformist,” rejected assistance from Supreme Court specialists).

¹⁴³ For a brief history tracing the development of the modern elite Supreme Court bar, see Lazarus, *supra* note 136, at 1491-93, 1497-1502.

¹⁴⁴ See Tony Mauro, *Will Defense Lawyers Accept Help on High Court Criminal Cases?*, LEGAL TIMES (May 12, 2006), <http://www.law.harvard.edu/faculty/rlazarus/docs/media/Will%20Defense%20Lawyers%20Legal%20Times%202006.pdf> [<https://perma.cc/92GR-Z4AP>] (suggesting that “solo newbies” of “the criminal defense bar” believe “that if they can conquer a hometown jury, they can work the same charm on the nine justices of the nation’s highest court”).

¹⁴⁵ Roberts, Biskupic & Shiffman, *supra* note 2 (quotation marks omitted).

¹⁴⁶ Harris, *supra* note 2 (quotation marks omitted).

experienced oral advocates on the prosecution side and one oral advocate—usually not an appellate specialist, and usually presenting his or her first Supreme Court argument—on the defense side.”¹⁴⁷

Scholars have confirmed these observers’ impressions. Crespo’s empirical analysis of oral arguments during the Roberts Court concluded that “criminal defendants are almost never represented by expert counsel in arguments before the Supreme Court.”¹⁴⁸ In his analysis, two thirds of lawyers representing criminal defendants were Supreme Court novices—a significantly higher percentage than seen in civil cases before the Court.¹⁴⁹ A study by William Kinder, considering a smaller slice of Roberts Court cases, similarly concluded that criminal defendants were far more likely to have inexperienced Supreme Court counsel than other litigants.¹⁵⁰

To be sure, experience is only a proxy for attorney quality. Even the greatest Supreme Court advocate had a first argument. And there is no doubt that some of those first-time advocates did an excellent job. Nonetheless, given that the Justices “have increasingly come to rely on and expect expert advocacy,”¹⁵¹ there is reason to believe that some of those inexperienced attorneys are not serving their clients as effectively as a seasoned expert like Jeff Fisher could.

Moreover, there is some evidence that at the Supreme Court, *experience matters*. A recent empirical analysis by Michael Nelson and Lee Epstein concluded that “on average, attorneys with experience, relative to first-timers, are significantly more likely to win their cases and attract the votes of justices.”¹⁵² This finding is surprising for those who think that judicial ideology is the sole determinant of Supreme Court decisionmaking. Although more empirical evidence would be useful, this finding is consistent with the common-sense idea that litigating in the Supreme Court is a specialized skill, which, like all specialized skills, improves with practice.¹⁵³ And Nelson and Epstein’s finding is strong evidence that factors unrelated to the underlying

¹⁴⁷ Mauro, *supra* note 144 (quotation marks omitted). Another Supreme Court expert, former Assistant to the Solicitor General Beth Brinkmann, has offered similar remarks: “The criminal defense bar has not been traditionally well-organized or represented in the Supreme Court. Sometimes it’s pretty dismal, other times it’s outstanding.” *The Rise of Appellate Litigators and State Solicitors General*, 29 REV. LITIG. 545, 561 (2010).

¹⁴⁸ Crespo, *supra* note 3, at 2007.

¹⁴⁹ *Id.* at 2008.

¹⁵⁰ Kinder, *supra* note 3, at 232.

¹⁵¹ Crespo, *supra* note 3, at 2007.

¹⁵² Michael J. Nelson & Lee Epstein, *Lawyers with More Experience Obtain Better Outcomes* 2 (unpublished manuscript), <http://epstein.wustl.edu/research/DoAttorneysMatterPaper.pdf> [<https://perma.cc/YQ44-Q4VH>].

¹⁵³ See David J. Bederman, *A Chilly Reception at the Court*, 5 J. APP. PRAC. & PROCESS 51, 59 (2003) (“In the unique arena of Supreme Court advocacy, the key ingredient of success can often be the lawyer’s level of experience and comfort.”).

legal merits of a case can affect the results of particular Supreme Court rulings. Over time, if an advocacy gap causes one side to lose more often than it would otherwise, we should expect that differential to change the shape of legal doctrine as a whole.

To be sure, there is a worthwhile debate to be had about whether the emergence of an elite Supreme Court bar is good for the Court or the nation.¹⁵⁴ That debate is for another day. Our point is that in a world with an elite Supreme Court bar, criminal defendants with nonexpert counsel are at a disadvantage. And because of the Court's role as chief regulator of the criminal justice system, that fact imposes substantial externalities on criminal defendants more broadly. If there is going to be a rear-guard effort to counter the rise of elitism in the Supreme Court bar, it should not be at the expense of criminal defendants.

3. Credibility

The problems do not end with defense lawyers' relative lack of expertise in Supreme Court criminal litigation. They also have less *credibility*, in the Court's eyes, than the prosecutors they face off against. That doesn't mean, of course, that the typical attorney representing a criminal defendant before the Supreme Court has any less integrity than the typical prosecutor. Rather, it is merely another symptom of an asymmetry noted above: that in criminal litigation at the Supreme Court, the government is a repeat player, while defendants are (usually) "one-shotters."¹⁵⁵

Beyond the opportunity to "play for the rule," repeat-player status also confers credibility on a litigant. This is because, as Galanter explains, a repeat player "must establish and maintain credibility as a combatant."¹⁵⁶ Repeat players have a powerful incentive not to make false or dubious assertions. Because the stakes of any given case are low, they can prioritize building and preserving their credibility over winning the immediate dispute.¹⁵⁷ And importantly, decisionmakers—Supreme Court Justices—*know* that repeat players' assertions are constrained by their need to maintain credibility, meaning that the decisionmaker can justifiably rely on them. Not so the assertions of one-shotters, whose perspective is limited to the particular case.

¹⁵⁴ For an introduction to this debate, see Richard J. Lazarus, *Docket Capture at the High Court*, 119 YALE L.J. ONLINE 89 (2010).

¹⁵⁵ Galanter, *supra* note 53, at 97; see also *supra* notes 55–58 and accompanying text.

¹⁵⁶ Galanter, *supra* note 53, at 99.

¹⁵⁷ See REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 31 (1992) ("[T]he government is more interested in the long-term development of the law and rules than in the immediate success of a particular case."); Galanter, *supra* note 53, at 99 ("The [repeat player] must establish and maintain credibility as a combatant. His interest in his 'bargaining reputation' serves as a resource to establish 'commitment' to his bargaining positions.")

If a one-shotter is caught making a false assertion, that may hurt her chances of prevailing in the pending case, but the bad consequences end there. Rational decisionmakers know this too, and they are, again justifiably, more skeptical of the one-shotters' claims.¹⁵⁸

If anything, the usual advantage that repeat players have over one-shotters in litigation is magnified in criminal litigation at the Supreme Court. Not only are *defendants* one-shot litigants, but their *lawyers* usually are too.¹⁵⁹ As noted above, Crespo found that two-thirds of the arguments on behalf of criminal defendants were by Supreme Court "novices," which he defined as "attorneys who presented only one argument to the Court over the span of the [first decade of the Roberts Court] and who were not already established experts when the decade began."¹⁶⁰ While it is possible that some of these arguments marked the beginning of a lawyer's career as a Supreme Court advocate, for most of these lawyers, the argument was their one and only time before the Court.¹⁶¹ There is every reason to expect that these advocates' objective in the Supreme Court was to win the case at hand, not to build a reputation with the Justices for future cases. That is as it should be,¹⁶² but there is a credibility downside. Ordinarily, even when a party is a one-shotter,

¹⁵⁸ See Galanter, *supra* note 53, at 99 ("With no bargaining reputation to maintain, the [one-shotter] has more difficulty in convincingly committing himself in bargaining.")

¹⁵⁹ It is extremely uncommon for any particular *defendant* to appear before the Court in more than one case. Cf. *Perkins v. Standard Oil Co. of Cal.*, 322 F. Supp. 375, 376 (D. Or. 1971) ("It is rare indeed for a party to be twice successful in petitioning for certiorari and twice successful in convincing the Supreme Court that its position should be adopted."), *modified sub nom. Perkins v. Standard Oil Co. of California*, 474 F.2d 549 (9th Cir. 1973), *supplemented by* 487 F.2d 672 (9th Cir. 1973). For exceptions, see generally Jason Iuliano & Ya Sheng Lin, *Supreme Court Repeaters*, 69 VAND. L. REV. 1349 (2016).

¹⁶⁰ Crespo, *supra* note 3, at 2008.

¹⁶¹ See *id.* at 2008 n.78 (hypothesizing as such). Indeed, the one-shot nature of much criminal advocacy in the Supreme Court can lead to unethical conduct. Jeffrey Fisher recounts a telephone conversation he had with an attorney whose client had prevailed in a state supreme court. Jeffrey L. Fisher, *A Clinic's Place in the Supreme Court Bar*, 65 STAN. L. REV. 137, 178 (2013). Fisher noted that it was a "shame" that the state court had not ruled for the lawyer's client on *state* constitutional grounds. *Id.* The lawyer explained that he "purposely refrained from raising the state constitution so that if [he] won in the state supreme court, [he] could get a U.S. Supreme Court argument." *Id.* (quotation marks omitted).

¹⁶² An individual criminal defense lawyer's interest is supposed to be winning the case on their client's behalf. The defendant's interest and the one-shot Supreme Court defense lawyer's interests, moreover, are not out of sync. A Supreme Court win, after all, can be a powerful marketing tool when a lawyer returns to ordinary practice. Indeed, just appearing in the Supreme Court can be used to generate business. Utah attorney Michael Studebaker argued the losing side of *Brigham City v. Stuart*, 547 U.S. 398 (2006). His merits brief, Tony Mauro wrote in *Legal Times*, "raised eyebrows," though his performance at oral argument was "not as bad as some had feared." Mauro, *supra* note 144. To this day, Studebaker's Avvo profile leads with "I have argued [sic] before the US Supreme Court." See *Michael P Studebaker*, AVVO, <https://www.avvo.com/attorneys/84401-ut-michael-studebaker-4467782.html> [<https://perma.cc/X9MX-Y2XF>] (last visited Mar. 25, 2020).

her lawyer is a repeat player,¹⁶³ and that offsets *some* of the one-shotter's disadvantages in litigating against a repeat player. Not so in much Supreme Court criminal litigation.

Even beyond the ordinary litigation dynamics of repeat players and one-shotters, the credibility gap between prosecutors and (typical) defense lawyers in Supreme Court litigation is accentuated by the unique position of the Solicitor General. Sometimes (though controversially) called the "Tenth Justice,"¹⁶⁴ the Solicitor General's access to the Justices exceeds that of ordinary litigants.¹⁶⁵ At the most tangible level, the Solicitor General has an office in the Supreme Court building.¹⁶⁶ More substantively, the OSG's frequent appearances before the Court builds rapport between the Justices and members of the Office.¹⁶⁷ Informally too, the Solicitor General and lawyers working under him or her have historically been invited to social gatherings of the Justices and law clerks to which "ordinary" Supreme Court advocates were not.¹⁶⁸ All this contributes to the OSG's credibility advantage over its criminal law adversaries.

This credibility is not simply a byproduct of the OSG's work; it is the result of a carefully cultivated strategy. As former Deputy Solicitor General Michael Dreeben has explained, the Solicitor General's Office "strives to have credibility before the Court by ensuring that its arguments have legal and factual integrity on the pros and cons of a position."¹⁶⁹ This goal helps make some sense of the Solicitor General's practice of confessing error in cases in which the government prevailed below (at least in cases, unlike *Shelton*, where

¹⁶³ See Galanter, *supra* note 53, at 114.

¹⁶⁴ See, e.g., CAPLAN, *supra* note 74; see also David A. Strauss, *The Solicitor General and the Interests of the United States*, 61 LAW & CONTEMP. PROBS. 165, 168 (1998) (describing, as "one of the most commonly held views" of the Solicitor General, "that the Solicitor General is not merely an official of the Executive Branch but someone who has special responsibilities to the Supreme Court—in some ways, a 'tenth Justice'"). But see Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505, 505-06 (1998) (rejecting the "Tenth Justice" hypothesis as empirically unfounded).

¹⁶⁵ See CAPLAN, *supra* note 74, at 19 ("The relationship between the Supreme Court and the SG's office has long been more intimate than anyone at either place likes to acknowledge.").

¹⁶⁶ *About the Court: Building Features*, SUP. CT. OF THE U.S., www.supremecourt.gov/about/buildingfeatures.aspx [https://perma.cc/ZA27-HFVW] (last visited Apr. 1, 2020).

¹⁶⁷ See Crespo, *supra* note 3, at 2015 (noting OSG's "cachet with the Court"); Lazarus, *supra* note 136, at 1497 (characterizing OSG as "completely familiar with the Justices and their precedent").

¹⁶⁸ See, e.g., CAPLAN, *supra* note 74, at 19-20 (describing personal contacts between Solicitors General and the Justices, as well as those between members of the Solicitor General's staff and the Justices, and noting one Justice's comment that these contacts "should make the hair stand up on the backs of the necks of private attorneys when they hear about [them]").

¹⁶⁹ Dreeben, *supra* note 129, at 7.

the Solicitor General isn't trying to dodge an issue).¹⁷⁰ Lawyers from the Solicitor General's Office tend to explain this practice using lofty language about legal ethics and the government's special duty to do justice.¹⁷¹ However, the real explanation likely involves a great deal of rational self-interest. As Thomas Merrill argues, confessions of error and similar practices "enhance the Solicitor General's reputation with the Justices for being an 'honest broker' or a 'straight shooter.' Having such a reputation undoubtedly increases the degree of overall deference that the Court gives the Solicitor General . . ."¹⁷² This practice seems particularly important in the criminal context, as "[t]he vast majority of confessions of error occur in criminal cases."¹⁷³

The Solicitor General works hard to maintain credibility because it matters—in a number of ways. Credibility matters first at the agenda-setting stage. The first challenge for a litigant with a certiorari-worthy issue is to get the Court to notice his petition, one of the thousands that will be filed each year.¹⁷⁴ Consider the Solicitor General's success in getting the Court to grant its petitions. Lazarus observes that grant rate for petitions filed by the Solicitor General—around seventy percent—is "several orders of magnitude" higher than the three- to four-percent rate for ordinary paid litigants.¹⁷⁵ Though the Solicitor General's high grant rate can partially be explained by considerations of brief quality and interbranch comity,¹⁷⁶ the OSG's credibility as a repeat player likely contributes as well.¹⁷⁷ Credibility also

¹⁷⁰ See Neal Kumar Katyal, *The Solicitor General and Confession of Error*, 81 FORDHAM L. REV. 3027, 3030 (2013) (noting that over the last century-plus, "all Solicitors General . . . have confessed error, roughly at the pace of two or three times per Supreme Court term").

¹⁷¹ See, e.g., *id.* at 3029-30 ("To me there is no greater institution that shows really what true legal ethics is about than the confession-of-error practice by the Solicitor General."); see also Dreeben, *supra* note 129, at 10 (discussing confessions of error in terms of concerns about convicting the innocent and "miscarriage[s] of justice").

¹⁷² Thomas W. Merrill, *High-Level, "Tenured" Lawyers*, 61 LAW & CONTEMP. PROBS. 83, 97 (1998).

¹⁷³ David M. Rosenzweig, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079, 2080-81 (1994).

¹⁷⁴ See Epps & Ortman, *supra* note 39, at 713 ("From approximately 7,000-8,000 certiorari petitions every year, the Court grants review in fewer than ninety . . .").

¹⁷⁵ Lazarus, *supra* note 136, at 1493.

¹⁷⁶ See Cordray & Cordray, *supra* note 127, at 1338 ("[T]he Solicitor General . . . represents a branch of government, and although the two branches serve as a check on one another, they nonetheless have common institutional interests."); Lazarus, *supra* note 136, at 1493 ("The Court plainly provides the Solicitor General's legal arguments with heightened respect because of the nature of his client—the United States—and the deference that the judicial branch naturally owes . . . to the views of counsel representing the interests of the two other branches of government."); James L. Cooper, Note, *The Solicitor General and the Evolution of Activism*, 65 IND. L.J. 675, 684 (1990) (noting that "[t]he general quality of the government's legal work" and the fact that "[t]he Court has historically found the Solicitor General's advice to be helpful" make the Court more willing to grant government petitions).

¹⁷⁷ Lazarus explains that the Solicitor General's Office files certiorari petitions only after carefully scrutinizing an issue for its cert-worthiness, and posits that its certiorari-stage success flows

appears to matter for non-government certiorari petitions. Lazarus notes that expert Supreme Court litigators can claim grant rates as high as twenty percent.¹⁷⁸ Though the high quality of their work product obviously plays a role, so does their credibility in the eyes of the Justices and their clerks. When law clerks “see the name of an attorney whose work before the Court they know,” Lazarus explains, “that attorney’s involvement in the case, by itself, conveys an important message about the significance of the legal issues being presented and the credibility of the assertions being made.”¹⁷⁹

Credibility also matters at the merits stage of litigation, though perhaps not as much.¹⁸⁰ Credibility may be less important when it comes to the Court’s evaluation of a litigant’s *normative* view of what legal rule the Court should adopt or how a case should come out.¹⁸¹ That’s because litigants—and their lawyers—are for obvious reasons not neutrals with respect to how the Court rules in their cases, though a particularly credible advocate might have some persuasive force in characterizing the best reading of the Court’s prior cases. But a lawyer’s credibility *is* critical when she attempts to convince the Court to adopt her view of a “legislative fact”—a fact about the world beyond the case.¹⁸² Such facts are often crucial inputs to Supreme Court

in part from the fact that the Court is “aware of the kind of judgment exercised by the Solicitor General in deciding which cases warrant the Court’s review.” Lazarus, *supra* note 136, at 1495-96; see also Cordray & Cordray, *supra* note 127, at 1337 (“The Solicitor General’s established reputation and enhanced credibility cause justices and their clerks to rely heavily on the Solicitor General’s briefs.”); Fisher, *supra* note 161, at 169 (“One reason the Solicitor General’s office enjoys such a high rate of success in its certiorari practice is because the Court knows that it generally refuses to file a certiorari petition unless it genuinely believes that certiorari should be granted.”). Some commentators believe that the Solicitor General is *too* stingy in authorizing certiorari petitions. See, e.g., Adam D. Chandler, Comment, *Solicitor General of the United States: Tenth Justice or Zealous Advocate?*, 121 YALE L.J. 725, 725 (2011) (arguing “that the Solicitor General should behave more zealously in his advocacy at the petition stage, which will almost certainly require him to file more cert. petitions each year”). The Solicitor General’s influence on the Court’s agenda setting appears greatest, moreover, in cases where the Court asks the Solicitor General to weigh in on whether it should grant certiorari. Lazarus reports that in these instances, “almost every time the Court follows the Solicitor General’s advice.” Lazarus, *supra* note 136, at 1494.

¹⁷⁸ Lazarus, *supra* note 136, at 1527.

¹⁷⁹ *Id.* at 1526.

¹⁸⁰ See Fisher, *supra* note 161, at 162 (“I think it is safe to say that whatever the precise statistical advantage on the merits is, Supreme Court specialists provide a greater comparative advantage at the certiorari stage, when familiarity with the Court and credibility of counsel is even more important.” (footnote omitted)).

¹⁸¹ Hence, discussing the Solicitor General’s influence on the Court in federalism cases, former Solicitor General Seth Waxman observed that “it’s pellucidly clear that the bottom-line views of the United States as to the appropriate balance between national and state power are uniquely unimportant to the Court.” Waxman, *supra* note 71, at 1119.

¹⁸² See *id.* (“[A]ny court must be concerned with the real-world consequences of doctrinal change. And in this respect I think the views of the United States do retain significance.”).

decisionmaking,¹⁸³ yet the Justices have neither the opportunity nor the competence to verify propositions of legislative fact propounded by parties or amici.¹⁸⁴ In this informational vacuum, the credibility of counsel for the parties and their amici loom large.¹⁸⁵ The prosecution's credibility advantage in Supreme Court criminal litigation makes it likely—indeed inevitable—that the Justices' background understanding of the realities of the criminal justice system will tilt in the prosecution's favor.

C. Previous Proposals

We are not the first to recognize that institutional reform is required to address asymmetrical representation in Supreme Court criminal litigation. In recent years, Professor Andrew Crespo and Senator Cory Booker have both proposed new institutions targeting the problem. Crespo argued that the Court should organize a “standing committee” of its bar, whose members would appear as amici curiae in criminal cases.¹⁸⁶ Senator Booker introduced legislation in 2016 to create a “Defender Office for Supreme Court Advocacy” (the “Defender Office”), whose attorneys would be available to represent criminal defendants in noncapital cases at the Court.¹⁸⁷ These are good proposals that would achieve *some* of the advantages of the Office of the Defender General developed in Part II, though neither would attain them all.¹⁸⁸

Consider first Crespo's standing committee. Crespo argues that the Supreme Court should “consider formally empowering such a committee to select an attorney to argue as *amicus curiae* in any case in which the Office of the Solicitor General will present argument against a criminal defendant.”¹⁸⁹

¹⁸³ See Larsen, *supra* note 38, at 1759 (“Supreme Court decisions today frequently turn on questions of so-called ‘legislative fact’—generalized facts about the world that are not limited to any specific case.”).

¹⁸⁴ See *id.* at 1805 (discussing the institutional features that position administrative agencies to “process legislative facts,” including subject-matter expertise, and concluding that “[j]udges cannot provide this same expertise”).

¹⁸⁵ In at least two instances in recent years, the Solicitor General's Office has sent letters to the Court to “correct” factual errors in its briefing. See Regina Jefferies, *Tragedy of Errors: The Solicitor General, the Supreme Court and the Truth*, JUST SECURITY (May 23, 2018), <https://www.justsecurity.org/56718/tragedy-errors-solicitor-general-supreme-court-truth> [<https://perma.cc/YD5Y-E9HF>] (describing correction letters regarding *Nken v. Holder*, 556 U.S. 418 (2009), and *Demore v. Kim*, 538 U.S. 510 (2003)). In each case, the Court had relied on the Solicitor General's error in its opinion. *Id.*

¹⁸⁶ See Crespo, *supra* note 3, at 2026-30.

¹⁸⁷ See Clarence Gideon Full Access to Justice Act, S. 3145, 114th Cong. § 2 (2016).

¹⁸⁸ Additionally, some have suggested that existing institutions, such as the elite Supreme Court bar or the National Association of Criminal Defense Lawyers, could “step up” to close the advocacy gap. See, e.g., Kinder, *supra* note 3, at 229 (arguing that “to close [the] advocacy gap, more criminal defense attorneys should accept assistance from Supreme Court specialists once a case reaches the merits stage of Supreme Court litigation”). We consider this possibility below in Section II.C.

¹⁸⁹ Crespo, *supra* note 3, at 2026-27.

Crespo reckons, and we agree, that a committee of this sort would “attract top flight talent to its ranks.”¹⁹⁰ He further contends that arguments presented by these lawyers would “likely go a long way toward closing the advocacy gap in the Court’s criminal docket.”¹⁹¹ Again, we agree, but Crespo’s solution doesn’t solve the entire problem of asymmetrical Supreme Court representation. It would alleviate the quality gap between prosecutors and criminal defense lawyers at the Supreme Court, but that is not enough to level the playing field. Most importantly, Crespo envisions that a standing committee member will present argument (as amici) in support of a criminal *defendant* whose case appears before the Court. He does not suggest that members of the committee would represent the interest of criminal *defendants* as a class. Nor should attorneys drawn from the ranks of the private law firms attempt to represent criminal defendants as a class.¹⁹² Unlike our Defender General, such attorneys lack either the perspective or accountability that is required to speak on behalf of criminal defendants collectively.¹⁹³ Crespo’s proposal is also limited in that the standing committee’s work would begin when the Court grants certiorari. Unlike the Defender General, then, it could not remedy representational inequalities between prosecutors and defendants at the certiorari stage.

Senator Booker’s proposal is closer to ours than Crespo’s. Booker’s bill would have created the Defender Office as a nonprofit corporation headed by a director and supervised by a board drawn in equal parts from federal defender organizations, Criminal Justice Act (CJA) panel attorneys, and state and local public defenders.¹⁹⁴ The legislation envisioned that the Defender Office would give first priority to indigent defendants, but that it could represent or assist non-indigent defendants in the Supreme Court as resources permitted.¹⁹⁵ The bill further empowered the Defender Office to appear as amicus in any criminal case at the Supreme Court or in any state high court

¹⁹⁰ *Id.* at 2027.

¹⁹¹ *Id.* at 2027-28.

¹⁹² Crespo envisions that the standing committee would include members “from the academy, from established criminal defense organizations, and from the elite Supreme Court Bar.” *Id.* at 2027.

¹⁹³ Crespo’s proposal, moreover, would narrow but not eliminate the credibility gap between the Solicitor General’s Office and criminal defense attorneys in the Supreme Court. *See supra* subsection I.B.3. It would narrow it because the individual attorneys selected by the standing committee to appear before the Court would likely be repeat players themselves, with reputational interests to protect. We think it unlikely, however, that the credibility of individual lawyers could ever match the *institutional* credibility that the Office of the Solicitor General has accumulated over the decades. The Office of the Defender General, on the other hand, could, though that will take time. *See infra* Part II.

¹⁹⁴ Clarence Gideon Full Access to Justice Act, S. 3145, 114th Cong. § 2 (2016). Senator Booker reintroduced the legislation in the 115th Congress. *See* Clarence Gideon Full Access to Justice Act, S. 330, 115th Cong. (2017).

¹⁹⁵ S. 3145, § 2.

criminal case that implicated a question of federal law.¹⁹⁶ And it could even file certiorari petitions on behalf of individual criminal defendants.¹⁹⁷

There is much common ground between Senator Booker's Defender Office and our proposal, as will become clear shortly.¹⁹⁸ But because Booker's proposal languished in the Senate and died without even a hearing,¹⁹⁹ there remains much to say about it. There are, moreover, important differences between Senator Booker's Defender Office and our Defender General. One is that Booker's proposal was specifically geared at remedying representational gaps at the Supreme Court between indigent defendants and prosecutors.²⁰⁰ We do not distinguish between indigent and non-indigent defendants, because we believe that there is an advocacy gap at the Supreme Court no matter whether the defense lawyer is a federal defender, a CJA panel attorney, or a private lawyer.²⁰¹ But the most important difference between the proposals is that, unlike the Defender General, Booker's Defender Office retains the traditional assumption of a lawyer representing a single client. While the Defender Office's work would likely give it *visibility* into the interests of criminal defendants collectively, whenever the interests of an individual defendant and the interests of criminal defendants in general diverged—as they inevitably would²⁰²—Booker's Defender Office, unlike our Defender General, would be duty-bound to represent the individual's interests. It would thus leave in place the asymmetry in Supreme Court cases between the Solicitor General's unified voice and the dispersed, sometimes conflicting perspectives of individual defendants.²⁰³

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See *infra* Part II.

¹⁹⁹ See *All Actions: S. 3145—114th Congress (2015-2016)*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/3145/committees> [<https://perma.cc/C5LP-6MY2>] (last visited Apr. 2, 2020). Perhaps it would have succeeded with a fully theorized 27,000-word law review article backing it up. We like to think so.

²⁰⁰ Booker made this priority clear when he introduced the bill on the Senate floor. See 162 CONG. REC. S4917 (daily ed. July 7, 2016) (statement of Sen. Booker) (“To fill in those gaps in the highest court of our land and better balance the scales of justice between the government and the defendants, the Gideon Act would establish an independent federal public defender office charged with representing poor defendants before the United States Supreme Court.”).

²⁰¹ Indeed, because of the availability of help from the federal Defender Services Office's Supreme Court Advocacy Assistance program for federal defenders and panel attorneys, it is not hard to imagine that indigents represented by those attorneys fare better at the Supreme Court than defendants represented by non-expert private lawyers. See *supra* note 139.

²⁰² See *infra* subsection II.A.1.

²⁰³ The title “Defender General” is also not new to us, though we appear to be the first to suggest a Defender General's Office specifically designed as the Supreme Court counterpart to the Solicitor General in criminal cases. Previously, the title has been used to designate the chief public defender of a jurisdiction. See VT. STAT. ANN. tit. 13, § 5251 (2019) (creating the “Office of Defender General” to head public defense in Vermont); S. REP. NO. 91-790, at 18 (1970) (“The [Senate Judiciary] committee recognizes the desirability of eventual creation of a strong, independent office

II. THE PROPOSAL

This Part develops our proposed solution to the problem of asymmetrical representation in criminal litigation at the Supreme Court. Section II.A explores how, at an operational level, the Office of the Defender General would provide expert, credible counsel to represent the interests of criminal defendants collectively. Section II.B then considers two important implementation questions—how the Defender General would be selected and held accountable, and how her office would be staffed. Finally, Section II.C addresses several potential objections to the proposal.

A. *The Proposal and Its Benefits*

We propose the creation of a new federal agency, the Office of the Defender General, with the mission of conducting criminal litigation in the United States Supreme Court on behalf of the interests of criminal defendants as a collective class. The Office would be headed by a senior official, the

to administer the Federal defender program. It considered as a possibility the immediate establishment of a new, independent official—a ‘Defender General of the United States.’”); MODEL PUB. DEF. ACT § 10 (UNIF. LAW COMM’N 1970) (creating an Office of the Defender General, headed by an appointed “Defender General” who has “primary responsibility for providing needy persons with legal services”). A few scholars, moreover, have suggested that a federal “Defender General” could serve as a kind of political counterweight to the Attorney General. See Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743, 817 (1995) (“In order to balance the government’s symbolic relationship to the criminal justice system, I would propose the creation of a ‘Defender General’ at the federal level. Like the Attorney General, the federal Defender General would also be a high government official, although not necessarily a member of the President’s Cabinet.”); Andrea D. Lyon, *Dean’s Desk: The United States Needs a Defender General*, IND. LAW. (Oct. 18, 2016), <https://www.theindianalawyer.com/articles/41749-deans-desk-the-united-states-needs-a-defender-general> [<https://perma.cc/KBL9-7RMN>] (arguing that a “defender general should command the same respect and stature that the offices of the attorney general and solicitor general command” and use its influence to “ensure that all of those interested in criminal justice have a seat at the table”). More recently, Matthew Segal of the ACLU of Massachusetts published an opinion piece in *Slate* arguing that a Defender General could counter a Department of Justice that is increasingly making “faulty,” politically motivated arguments in court. Matthew R. Segal, *The Census Case Shows Why We Need a Defender General*, SLATE (June 27, 2019, 3:31 PM), <https://slate.com/news-and-politics/2019/06/doj-noel-francisco-lies-census-case-supreme-court-defender-general.html> [<https://perma.cc/9KBD-NBZW>]. Segal’s Defender General’s Office, which would be more of a watchdog than a specialized Supreme Court advocate for criminal cases, would call the Department of Justice to task when it stepped out of line. See *id.* Segal thus asks rhetorically whether DOJ brass would send “a career lawyer to quibble with federal judges about soap and blankets for detained kids if they had understood that a prestigious government-funded law office was prepared to tell the court that the DOJ’s position was meritless?” *Id.* Segal’s argument is premised on countering what we have called the Solicitor General’s credibility advantage. See *supra* subsection I.B.3. Credibility is important, but like Senator Booker’s proposal (which Segal’s op-ed notes), Segal’s Defender General does not aim to solve the fundamental asymmetry in Supreme Court criminal litigation between the unified vision of prosecutors and the dispersed interests of defendants.

Defender General, and staffed with deputy and assistant defenders general. In some cases, where the interests of a particular defendant were aligned with the collective interests of defendants, the Defender General would appear before the Court as defense counsel. In other cases, the Office would appear as amicus in its own name, either to supplement the presentation of defense counsel, or, when necessary, to oppose the defendant's position.

This Section explores how the Defender General would go about conducting Supreme Court litigation on behalf of the collective interests of defendants. The Defender General's purview would include both the Court's agenda-setting stage (that is, the certiorari docket) and the merits stage. We consider each segment of the Office's work in turn. We bracket until the next Section all questions of how the Defender General will be selected, how her office will be staffed, and how she will be held accountable.

Before we turn to the operational details, we must tackle one definitional matter. We have said that the Defender General would conduct *criminal* litigation in the Supreme Court. But what precisely is "criminal" litigation? In other words, what is the subject-matter limitation on the Defender General's jurisdiction? In many cases, the criminal nature of litigation is uncontroversial. Certainly, no one would doubt that a direct or collateral attack on a criminal conviction constitutes criminal litigation. Nor would anyone suggest that a government appeal of a criminal sentence is not criminal litigation. Other sorts of cases may pose more difficult definitional problems. Is litigation about prison conditions criminal? What about a civil lawsuit to enjoin enforcement of a criminal statute on the grounds that it is void-for-vagueness under the Fifth and Fourteenth Amendments? While we do not have firmly settled views about where the outer limits of "criminal" litigation fall, we believe that the Defender General's jurisdiction should include any matter in which criminal defendants as a collective class have an identifiable interest.²⁰⁴

1. The Defender General's Role in Certiorari

Though the Defender General's work on merits cases will be more visible, leveling the adversarial playing field at the certiorari stage is at least as

²⁰⁴ A related question is whether the Defender General should be involved with constitutional torts cases raising issues under, for instance, the Fourth and Fifth Amendments. On the one hand, these cases can obviously implicate legal doctrines that are of interest to criminal defendants. On the other, civil plaintiffs in constitutional torts cases may have interests that diverge from the interests of criminal defendants. Civil plaintiffs, for instance, may be inclined to press for remedial schemes emphasizing monetary damages, while criminal defendants may be more interested in exclusionary remedies. Given the opportunity for diverging interests, we doubt that it would be appropriate for the Defender General to actually represent civil plaintiffs in constitutional tort cases at the Court. That said, the Office might well make a practice of filing amicus briefs on its own behalf in such cases.

important. As we explained above, the prosecution (via the Solicitor General) currently enjoys an enormous advantage in shaping the Court's docket.²⁰⁵ In large part, that is because the Solicitor General can approach the Court's agenda strategically. When a legal question surfaces that warrants the Supreme Court's attention, the Solicitor General can sometimes fend off a certiorari grant until a case arises that puts its position in the best-possible light, even if that means absorbing short-term losses.²⁰⁶ Not so criminal defendants, each of whom is separately represented and each of whom wants relief in *his* case. The Defender General would fundamentally change that dynamic, bringing the same strategic perspective to the defense side that the Solicitor General gives the prosecution.

There's a second reason why it is critical that the Defender General have an active certiorari-stage practice. The Defender General's effectiveness in representing the *collective* interest of criminal defendants requires that her Office possess a working knowledge of the legal issues that confront defendants broadly. The Office's work on the Court's merits cases alone will not provide that broad outlook because, as we have explored elsewhere, the Court's merits docket is not representative of any broader universe of litigation.²⁰⁷ The Office's work on a wide array of certiorari-stage matters, on the other hand, will give it a window into the legal issues confronting a large number of defendants.

We envision that the Defender General's certiorari-stage work will have three main components: fielding requests for Supreme Court representation from defendants,²⁰⁸ monitoring certiorari petitions in criminal cases, and responding to "Calls for the View of the Defender General" (CVDGs) from the Court.

First, the Defender General would entertain requests for representation from defendants seeking or opposing Supreme Court review. The Office would establish a system whereby defendants eligible to file certiorari petitions—typically, this would be defendants who had lost in a federal appellate court or a terminal state appeal—could ask the Office to take over their case.²⁰⁹ Likewise, a prevailing defendant who received a certiorari

²⁰⁵ See *supra* notes 69–79 and accompanying text.

²⁰⁶ See *supra* notes 111–122 and accompanying text.

²⁰⁷ Epps & Ortman, *supra* note 39, at 719–20.

²⁰⁸ For ease of exposition, we refer in the text to the Defender General's potential clients as "defendants." As noted above, however, there may be instances in which the Defender General represents a civil plaintiff. See *supra* note 204.

²⁰⁹ We need not specify all the details of the application process here, but one is important. The defendant (and his existing defense team) would be warned not to include any attorney-client privileged materials in the application. This matters because, as we explain, the Defender General could end up taking a position in the Supreme Court that is adverse to the defendant. See *infra* text accompanying notes 227–230.

petition filed by a prosecutor could ask the Defender General to take responsibility for opposing certiorari.

The Defender General (or, more realistically, her assistants and deputies) would carefully screen these requests for representation. As the Solicitor General does with requests for petitions submitted by federal agencies,²¹⁰ the Defender General would examine the case to determine whether it contains any certiorari-worthy questions of law. The Defender General's credibility with the Court, of course, would depend in part on whether the Court comes to see the Office's petitions as dependable. We suspect that the vast majority of requests would be eliminated on the grounds that there is no legal question plausibly warranting the Court's review. For those cases that have a plausible issue, the Defender General would evaluate whether the defendant's interests align with the interests of defendants as a class. That inquiry has both substantive and strategic considerations. Substantively, the Defender General must determine whether the ruling the defendant would seek from the Court would work to the benefit of defendants as a class. Strategically, the Defender General would consider whether the factual and procedural details of *this* defendant's case maximize the chances of a favorable ruling from the Court on the legal question. If another case "in the certiorari pipeline"²¹¹ (or expected to be there soon) raises the same question of law in a more auspicious context, the Defender General would work to promote a grant in that case instead.

When the Defender General declines a case, the defendant would be free to use other counsel to file a certiorari petition, or, more rarely, a brief in opposition to a government petition, on his own. But when the Defender General determines that representing a defendant at the certiorari stage is in the Office's interest, the Defender General could assume responsibility as lead counsel.²¹² The defendant would then get free Supreme Court representation of the highest caliber (which is the inducement for defendants to approach the Defender General's Office in the first place). The Defender General's obligation would be to represent the defendant zealously—as long as doing so advanced the interests of defendants. This arrangement might seem to present ethical quandaries, given the Defender General's ultimate obligation to protect defendants generally. But it is one that government lawyers encounter regularly; when federal law enforcement officers are sued in their individual capacities under *Bivens*, the Department of Justice has

²¹⁰ See *supra* notes 69–72 and accompanying text.

²¹¹ See Fisher, *supra* note 161, at 184 ("It thus becomes important to litigants, if there are multiple cases in the certiorari pipeline that present a common legal issue, that the case the Court chooses to decide the issue puts the litigants' best foot forward.").

²¹² Presumptively, in such cases the Office would continue to represent the defendant at the merits stage if the case is granted.

discretion to represent the defendant when doing so is in the interests of the United States.²¹³

The second component of the Defender General's certiorari-stage work would be monitoring criminal certiorari petitions *not* filed by the Office. The purpose of this review—aside from helping the Office keep abreast of criminal law issues affecting defendants—would be to identify cases in which a certiorari-stage amicus brief from the Office would be appropriate. There are several scenarios in which such a filing could further the Office's mission. Where a defendant files a petition in a case that the Office believes warrants the Court's review, the Office could file a brief supporting the petition. To the extent that the Defender General is seen by the Court as a reliable judge of a case's worthiness, her support could help the petition get picked out of the pile. This could prove particularly valuable where the defendant's petition was not written by an expert Supreme Court lawyer. In other cases, the Office may determine that although a defendant's petition poses a plausibly certiorari-worthy legal question, Supreme Court review is likely to end badly for the interests of criminal defendants.²¹⁴ In these cases, if there are grounds to oppose certiorari, the Office could file an amicus brief doing so.

The Defender General could also participate as certiorari-stage amicus where a prosecutor (the Solicitor General or a state official) filed the petition. Obviously, the Defender General would oppose certiorari in these cases where, in the Office's view, certiorari was not warranted, and support certiorari where it was. The Office might also conclude in a "state-on-top" case that there *was* a legal error below, but that the Court would likely create bad precedent for defendants if it granted full review.²¹⁵ In such a case, if the Office thought a grant likely, it might file an amicus brief with a "suggestion of error"—analogous to a "confession of error" by the Solicitor General—urging the Court to summarily reverse or "GVR" (grant, vacate, and remand) the decision below on narrower grounds.²¹⁶ Like an amicus brief opposing a defendant's certiorari petition, such a brief would put the Office's interests directly opposite those of a criminal defendant. Because the Office

²¹³ 28 C.F.R. § 50.15(a) (2019); *see also* James E. Pfander & David P. Baltmanis, Response, *W(h)ither Bivens?*, 161 U. PA. L. REV. ONLINE 231, 238 (2013) (explaining that DOJ represents *Bivens* defendants "only where doing so advances the interests of the Government").

²¹⁴ This could happen, for instance, where several cases working their way through the lower courts raise the same legal question.

²¹⁵ A "state-on-top" case is one where the government, rather than the defendant, asks the Supreme Court to reverse the decision of a lower court.

²¹⁶ *See* Rosenzweig, *supra* note 173, at 2081 (describing the various actions the Solicitor General might ask the Court to take in response to a confession of error).

would represent the interests of defendants collectively, that poses no insurmountable hurdle.²¹⁷

The final component of the Office's certiorari-stage work would be in responding to CVDGs from the Court itself. The Supreme Court regularly calls for the view of the Solicitor General in cases where the United States is not a party.²¹⁸ Our expectation is that the Court would similarly seek the views of the Defender General when it contemplates granting certiorari in a criminal matter and the Office has not already participated.

2. The Defender General's Role on the Merits

Unlike the certiorari docket, where the Defender General's involvement would (of necessity) be sporadic, the Defender General would participate as counsel or amicus in most, or even all, of the Supreme Court's merits cases implicating criminal law or procedure.

The Defender General (or her designee) would presumptively serve as defense counsel in matters where her office filed the certiorari petition. This is only a presumption. The defendant might wish to change lawyers. Moreover, the Defender General might discover, after filing the certiorari petition, that the defendant's interests do not align with the interests of defendants collectively. In such a case, the Defender General would need to withdraw from the case. The same thing happens in *Bivens* cases when a government lawyer representing a federal "employee becomes aware that the representation of the employee could involve the assertion of a position that conflicts with the interests of the United States."²¹⁹ Unless the employee is willing to waive the position, the government lawyer withdraws from the case and (assuming other requirements are satisfied) a private attorney takes over the representation. The Office of the Defender General could promulgate regulations working much the same way. In an extraordinary case where withdrawal couldn't be completed immediately—for instance if the conflict did not arise until oral argument—the Defender General's duty would, like a government lawyer in the equivalent situation in a *Bivens* case, be to "take all reasonable steps to avoid prejudice to the [defendant]."²²⁰ To be sure, mid-case withdrawal would be problematic, because the Defender General, having been a lawyer for the defendant, would be unable to appear in the case as

²¹⁷ To be sure, there would be costs associated with the Defender General opposing a specific defendant on the merits. We address this issue *infra*, at text accompanying notes 231–232.

²¹⁸ See Neal Devins & Saikrishna B. Prakash, *Reverse Advisory Opinions*, 80 U. CHI. L. REV. 859, 881–84 (2013) (reviewing the process by which the Supreme Court solicits these "reverse advisory opinions" from the Solicitor General and other parties, and the impact thereof on the relationship between the Court and the Solicitor General).

²¹⁹ 28 C.F.R. § 50.15(a)(11) (2019).

²²⁰ 28 C.F.R. § 50.15(a)(12).

amicus opposing the relief sought by the defendant.²²¹ This just reinforces the importance of the Defender General's pre-certiorari petition screening.

Additionally, defendants whose certiorari petitions are granted (or who are respondents in matters where the prosecution's petition has been granted) could ask the Office to take over the case.²²² In deciding whether to assume representation in a merits case, the Office's central consideration would be whether the defendant's interests line up with those of defendants collectively. The Office could not take on a merits case where it would be ethically bound to advance an argument that would be detrimental to the interests of defendants as a class.

Where the Defender General represents a defendant, she would participate like any other lead counsel in briefing and arguing the case. In other cases, the Defender General would appear as an amicus, but not, we hope, as an ordinary amicus. In theory, any amicus can ask the Court for permission to partake in oral argument.²²³ In reality, only the Solicitor General's requests stand a realistic chance of being granted.²²⁴ The Court "almost always grants" motions from the Solicitor General to participate in oral argument in cases where the United States is not a party.²²⁵ Because the Defender General would be the Solicitor General's counterpart in criminal cases, we hope that the Court would treat her requests for amicus oral argument similarly.

The Defender General's substantive stances in its merits-stage amicus briefs and arguments will vary depending on the case. Where the Defender General and the defendant see the case in similar terms, the Defender General would supplement the presentation of the defense counsel. This would be especially valuable in cases where the defense lawyer is not an expert Supreme Court advocate.²²⁶

In other cases, the Defender General might have a different view than the defendant on a discrete issue. For example, the defendant and the Defender General might disagree on what remedy the Court should order for some

²²¹ See MODEL RULES OF PROF'L CONDUCT r. 1.9 (AM. BAR ASS'N 2019).

²²² We suspect that this will happen rarely; having secured a certiorari grant, the existing defense lawyer is likely to resist such a change. See Mauro, *supra* note 144.

²²³ SUP. CT. R. 28(7).

²²⁴ Cordray & Cordray, *supra* note 127, at 1355; see also Crespo, *supra* note 3, at 2024 ("In practice the Court deems [the required] 'extraordinary circumstances' to be present when the Solicitor General seeks to argue, but absent otherwise—including when *amici* seek leave to argue in support of criminal defendants.").

²²⁵ Cordray & Cordray, *supra* note 127, at 1355. This is how the Solicitor General manages to appear in oral arguments in seventy-two percent of the Court's criminal cases. Crespo, *supra* note 3, at 2013.

²²⁶ Indeed, where the Defender General sees the case as the defendant does and the defendant is represented by a high-caliber Supreme Court lawyer, the Defender General may elect not to participate at all.

error in the proceedings below. Cases could even arise where the Defender General appears as amicus in support of the prosecutor. This could happen when a defendant seeks relief that would be injurious to defendants in general. An example will illustrate how this could work. The Supreme Court has instructed federal appeals courts to give district judges wide berth to disagree with the United States Sentencing Guidelines on policy grounds.²²⁷ That discretion often works to the benefit of defendants.²²⁸ Occasionally, however, a sentencing judge will conclude that a guideline is too lenient as a matter of policy.²²⁹ A defendant in such a case might ask the Supreme Court to impose limits on a sentencing judge's discretion to disagree with the Guidelines on policy grounds.²³⁰ That relief, though good for the particular defendant, would likely be bad for defendants in general. If the Court heard such a case on the merits, the Defender General might choose to argue against the defendant.

There are unquestionably costs for permitting the Defender General to overtly oppose a position taken by a specific criminal defendant. Doing so could, as we have suggested, enhance the Defender General's credibility with the Court, but it might at the same time undermine the Defender General's credibility with the criminal defense bar. That, in turn, might discourage criminal defense lawyers from cooperating with the Office—for instance, by alerting it to emerging certiorari-worthy issues percolating in the lower courts. An individual defendant who finds himself opposed by both a prosecutor and an agency representing the interests of criminal defendants, moreover, might regard this “teaming up” against him as particularly unfair.

We recognize these potential costs of empowering the Defender General to oppose criminal defendants in particular cases, but ultimately conclude that they are worth bearing. As we explored above, when specific criminal defendants have interests that aren't aligned with the interests of criminal

²²⁷ See, e.g., *Kimbrough v. United States*, 552 U.S. 85, 110 (2007) (“[I]t would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence ‘greater than necessary’ to achieve §3553(a)’s purposes, even in a mine-run case.”).

²²⁸ See Scott Michelman & Jay Rorty, *Doing Kimbrough Justice: Implementing Policy Disagreements with the Federal Sentencing Guidelines*, 45 SUFFOLK U. L. REV. 1083, 1113-14 (2012) (reviewing cases wherein judges have weighed policy and individualized factors to arrive at more lenient sentences).

²²⁹ E.g., *United States v. VandeBrake*, 771 F. Supp. 2d 961, 999, 1012-13 (N.D. Iowa 2011) (sentencing a defendant to forty-eight months' imprisonment where the guideline range was twenty-one to twenty-seven months, based on policy disagreement with the guidelines), *aff'd*, 679 F.3d 1030 (8th Cir. 2012).

²³⁰ Full disclosure: one of us was counsel to a petitioner in such a case. See *Petition for Writ of Certiorari, United States v. VandeBrake*, 568 U.S. 1193 (2013) (mem.) (No. 12-488). The certiorari petition was denied. *VandeBrake*, 568 U.S. 1193. Obviously, we are writing only in our personal capacities.

defendants generally, there is a danger that they will present positions that, if adopted, would be detrimental to defendants in the general run of cases, or, as we saw with *Shatzer*, will not argue for positions that would be beneficial to defendants generally.²³¹ Only a Defender General empowered to urge the Court to reject the defendant's position in the former case or to adopt a position not articulated by the defendant in the latter can correct for divergences between the interests of a defendant and defendants generally.

That said, these concerns might suggest that the Defender General should be cautious in exercising her ability to outright oppose a defendant's position. Over time, as the Office built up its credibility with the Court, the Defender General might find that merely declining to participate would send a sufficiently strong signal to the Court about the Office's view of a case without requiring the Defender General to actually say that a particular defendant should lose. Indeed, remaining silent is the tack that the U.S. Solicitor General sometimes takes in criminal cases where OSG does not endorse a particularly aggressive position taken by a state—perhaps because OSG is not eager to damage relationships with prosecution-side lawyers.²³² Thus, while we think an effective Defender General would sometimes need to disagree with particular defendants, she could choose to do so only in cases where the benefits of doing so outweigh the costs.

* * *

In summary, a Defender General empowered to participate in Supreme Court litigation at the certiorari and merits stages would go a far ways towards counteracting the systemic distortion in Supreme Court rulemaking we described in Part I. We stress, however, that we are not claiming that the Defender General would somehow lead to perfect neutrality in Supreme Court criminal cases—whatever that might mean. That is, the ideology and preferences of Supreme Court Justices will ultimately remain the most powerful determinant of the content of the Court's criminal cases. The Burger and Rehnquist Courts would almost certainly have moved criminal procedure jurisprudence in the direction of government interests even if the Defender

²³¹ See *supra* subsection I.B.1.

²³² For example, consider *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014), where the State of Florida sought to defend its strict rule that a defendant must have an IQ score of 70 or lower to qualify as intellectually disabled and thus ineligible for capital punishment under *Atkins v. Virginia*, 536 U.S. 304 (2002). The U.S. Solicitor General's Office declined to participate in the case as *amicus curiae* in support of either side, and the Court rejected Florida's rule as inconsistent with *Atkins*. See *Hall*, 134 S. Ct. at 2000-01.

General had been created in the 1970s.²³³ Our claim, instead, is that the structure of Supreme Court litigation as it exists now introduces additional government-friendly skew *on top of what is already present*, and it is *this* skew that the Defender General would counteract.

B. Implementation

Having laid out our ideal vision for what the Defender General would do, we now turn to more practical questions. This Section will discuss how the Office of the Defender General might be implemented in our system. We first discuss the question of how the Defender General would be selected, and by whom—and also how she would, if necessary, be held accountable. We then explore how the Office of the Defender General should be designed to best enable it to accomplish its mission.

1. Selection and Accountability

For there to be a Defender General, someone must have the power to select her. And the choice of which person or institution selects the Defender General could have significant implications for what kind of Defender General we might get. This Section will explore that question, but before doing so it is useful to make clear what kind of lawyer we hope would occupy the position.

As we see it, the role requires two distinct and equally important qualities. First, the Defender General must be committed to the formal mission of the Office: defending the interests of criminal defendants generally. A good Defender General would have a demonstrated commitment to, and knowledge of, criminal justice. Someone with experience in public defense, or perhaps extensive pro bono work, could fit the bill. We caution, though, that it would be important for the Defender General to recognize the distinction between arguing for the interests of defendants collectively and arguing for the interests of particular defendants. An effective Defender General (when acting as an amicus) would sometimes be willing to say that the defendant in a particular case should lose. Some lawyers who had spent long periods as individual defense lawyers might find that transition challenging.²³⁴

The second quality the Defender General must have—of course—is expertise as a Supreme Court advocate. This does not mean that plausible candidates need to have previously argued at the Court. Nor should prior

²³³ See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2468 (1996) (arguing that under Chief Justices Burger and Rehnquist, “the Supreme Court [had] profoundly changed its approach to constitutional criminal procedure since the 1960s” by becoming “less sympathetic to claims of individual rights and more accommodating to assertions of the need for public order”).

²³⁴ See *infra* note 271.

experience as a Supreme Court clerk be seen as a prerequisite. Although the Supreme Court bar is dominated by former Supreme Court clerks,²³⁵ the clerkship experience does not provide unique training or knowledge that lawyers without those clerkships cannot obtain through other means.²³⁶ What we think is necessary, though, is at least some background in the specialized nature of Supreme Court litigation. As Justice Kagan has noted, lawyers unfamiliar with the norms of Supreme Court advocacy do not serve their clients well.²³⁷

These two qualities may be in tension in some instances. The most dedicated advocates for the rights of criminal defendants might not be the most experienced Supreme Court advocates. And the lawyers with the most expertise in Supreme Court advocacy might not be particularly committed to protecting defendants. The position would, we expect, be coveted by aspiring Supreme Court advocates, since it would present one of the best ways to get oral argument experience outside of the Solicitor General's office. If the Office of the Defender General became just a launching pad for lucrative appellate litigation careers, it might attract candidates who would not take its mission as seriously as we would hope.

To this problem, we can say only that there would likely be a number of talented candidates vying for the position, and we are confident that at any given time there would be a number of lawyers in America who have both needed qualities. As long as the selection process were careful and fair, an excellent candidate could be found.

But who could be trusted with the power to select the Defender General? There are a number of possibilities, but we see two main options. First, the Defender General could be selected by the Supreme Court Justices. Second, she could be selected by some kind of special-purpose board or institution charged with that responsibility. In the discussion that follows, we will initially bracket questions about constitutional requirements in order to lay out what we see as the ideal set of arrangements.

²³⁵ See Joan Biskupic, Janet Roberts & John Shiffman, *At America's Court of Last Resort, a Handful of Lawyers Now Dominates the Docket*, REUTERS (Dec. 8, 2014, 10:30 AM GMT), <https://www.reuters.com/investigates/special-report/scotus> [<https://perma.cc/V35X-3MZM>] (“Among the 66 leading [Supreme Court] lawyers, 31 worked as a clerk for a Supreme Court justice.”).

²³⁶ We note that the most accomplished criminal specialist before the Supreme Court in recent decades—Michael Dreeben—did not clerk at the Court. See *Michael R. Dreeben*, O'MELVENY, <https://www.omm.com/professionals/michael-r-dreeben> [<https://perma.cc/CU5C-HJUV>] (last visited Apr. 2, 2020).

²³⁷ See Harris, *supra* note 2 (quoting Justice Kagan as saying, “I think that the litigants who are underserved in terms of lawyering quality are criminal defendants . . . [whose] trial lawyer . . . is doing their first Supreme Court argument without thinking about the court, without thinking about the way it operates, rather than giving [the case] to an experienced Supreme Court bar member.”).

The advantage of having the Defender General selected by the Supreme Court is that the Justices know what kind of advocacy they are looking for, and would thus be ideally positioned to select a skilled Supreme Court expert. Moreover, there is already a good model in existing laws and practices, as federal appellate judges are currently empowered to select the heads of federal public defender offices in their respective circuits, and district judges typically select the attorneys who will serve on panels for appointment in individual cases.²³⁸ It thus might seem only logical for the Supreme Court to select the Defender General who would practice before the Court.

There are drawbacks to that approach, however. First, the current system of heavy judicial control over indigent defense has attracted criticism. A 1993 report by a Committee of the Judicial Conference concluded that federal indigent defense needed greater independence from the judiciary.²³⁹ The National Association of Criminal Defense Lawyers has made a similar recommendation, citing potential conflicts of interest and other concerns.²⁴⁰ David Patton, the head of the Federal Defenders of New York, has argued that the judiciary's power over indigent defense can raise difficult ethical questions.²⁴¹

Moreover, the Justices do not have a perfect track record in the instances where they have power to make appointments. Consider the Justices' use of their power to appoint amici in cases where neither party is defending the judgment below, which happens with some regularity. Kate Shaw has noted that the Justices in recent years have almost always appointed former clerks or other lawyers having personal relationships with one or more Justices, a number of whom were arguing before the Court for the first time.²⁴² While these appointed amici generally seem to have effectively discharged their

238 NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, FEDERAL INDIGENT DEFENSE 2015: THE INDEPENDENCE IMPERATIVE 14 (2015), <https://www.nacdl.org/getattachment/f06b8fd6-8386-4e51-9539-71f964e4fa84/federal-indigent-defense-2015-the-independence-imperative.pdf> [<https://perma.cc/Q79E-DKF6>]; David E. Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL L. REV. 335, 353-54 (2017).

239 See COMM. TO REVIEW THE CRIMINAL JUSTICE ACT PROGRAM, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT 75-77 (1993) ("The CJA program has become so large and complex that full-time management is needed to run it. . . . [Under the Committee's proposed recommendation], [t]he responsibilities of the federal judiciary would change substantially. . . . from controller to the more appropriate role of consultant and impartial evaluator under the adversarial system.").

240 See NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 238, at 9 (concluding that "[c]ontrol over federal indigent defense services must be insulated from judicial interference").

241 For a discussion of these ethical questions, see Patton, *supra* note 238, at 368-72.

242 See Katherine Shaw, Essay, *Friends of the Court: Evaluating the Supreme Court's Amicus Invitations*, 101 CORNELL L. REV. 1533, 1556-57, 1560-61 (2016) (pointing out that sixty-eight percent of all appointed amici once served as law clerks to one or more Justices, and that that figure is rising—and that fifty-six percent of appointed amici "had never previously argued before the Court at the time of their invitation").

responsibilities, the practice raises some concerns about the Court's seeming reliance on a system of patronage rather than a purely merit-based approach.

Given this problem, we think a better solution would be the creation of some kind of board or commission with the power to select, or at least to recommend the selection of, the Defender General. Again, there is already a good model here in current law: each federal judicial district is permitted to rely for indigent defense on a "Community Defender Organization," which is "a private nonprofit organization with its own board of directors that selects an executive director to head the office."²⁴³ A similar model could work for the Office of the Defender General.

Of course, this raises the question of who would appoint the board members. For that task, we look to the Supreme Court, but we do so cautiously. There are again drawbacks to relying on the Court. The Chief Justice is empowered to appoint the members of a number of important committees such as the Federal Advisory Committee on Civil Rules,²⁴⁴ which is charged with proposing amendments to the Federal Rules of Civil Procedure. Chief Justice Roberts has been criticized for choosing committee members who are mostly white, male, and civil-defense-friendly.²⁴⁵ There is thus a concern that a board selected at the discretion of the Court might reflect the Justices' views on criminal defense. Still, *someone* must do the picking. We thus propose to cabin the Court's discretion by specifying a required background for each seat on the board. For purposes of discussion, we propose a five-member board consisting of: (i) an experienced member of the Supreme Court bar, (ii) a formerly incarcerated person, (iii) a representative of the federal defender service, (iv) a representative from state public defense, and (v) a representative of the private criminal defense bar. We stress that we are not committed to this specific list;²⁴⁶ what matters is narrowing the Court's personnel selection in such a way as to ensure the broadest possible representation of the interests of criminal defendants as a class.

²⁴³ Patton, *supra* note 238, at 352-53.

²⁴⁴ *About the Judicial Conference*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference> [https://perma.cc/MC3E-9CKH] (last visited Apr. 2, 2020).

²⁴⁵ Brooke D. Coleman, *The Committee That Dictates the Rules of American Courts Looks Nothing Like America—or the Federal Judiciary*, SLATE (Oct. 24, 2018, 4:03 PM), <https://slate.com/news-and-politics/2018/10/john-roberts-courts-rules-rigged.html> [https://perma.cc/C2GQ-7PMH] ("Of the current 14 members on the committee, nine are white men, four are white women, and one is a black man. These members have also mostly spent their careers working for large law firms that defend companies against class actions, and not the plaintiff-side firms that bring them.").

²⁴⁶ Perhaps, for instance, the board should include a representative of the criminal law academy. We would never dream of proposing such a thing.

The board would select the Defender General for a nonrenewable five-year term. That period would be long enough to develop credibility with the Justices, but short enough that any particular officeholder would have only a limited ability to influence the law. The Defender General would be subject to removal by the board for cause. Although it is our expectation that this power would rarely need to be exercised, given that we would expect the board to be able to select from a number of highly qualified candidates, some form of accountability is necessary given the importance of the position and the possibility that a Defender General might interpret his or her responsibilities in some idiosyncratic way. Although the Justices of the Court would not have a direct say in appointment and removal, they would have some indirect influence, as the board would be more likely to remove Defenders General who had seemingly lost credibility with the Court (for example, if the Court started refusing to permit the Office to participate in oral argument as an amicus).

This arrangement strikes us as ideal. But would it be constitutional? To answer that, we must ask whether the Defender General would qualify as an “Officer of the United States” under the Constitution’s Appointments Clause.²⁴⁷ If so, the Constitution would not permit a board appointed by the Court to hold the appointment power.²⁴⁸ There is, however, a plausible argument that the Defender General would not qualify as an “Officer of the United States.”

Both the Supreme Court and DOJ’s Office of Legal Counsel (OLC) have concluded that “officer” status turns on two key questions: (1) whether the person performs a “‘continuing’ position established by law” and (2) what constitutes “the extent of power an individual wields in carrying out his assigned functions.”²⁴⁹ The Defender General’s role would unquestionably satisfy one of these criteria, as it would be a “continuing office established by law.”²⁵⁰ But the Defender General would arguably not exercise sufficient power to qualify as an “Officer.” This is not to say that the position is unimportant. Although the Supreme Court has thus far been unwilling to lay out the precise test in greater detail,²⁵¹ OLC has concluded that what matters is whether the actor in question is exercising “delegated sovereign authority,”

²⁴⁷ See U.S. CONST. art. II, § 2, cl. 2.

²⁴⁸ So-called “principal officers” must be appointed by the President and confirmed by the Senate, while Congress can authorize “inferior officers” to be appointed by the President alone, the judiciary, or heads of departments. See *Edmond v. United States*, 520 U.S. 651, 659-61 (1997).

²⁴⁹ *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2051 (2018) (quoting *United States v. Germaine*, 99 U.S. 508, 511 (1879)); see also *Officers of the U.S. Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 76-78 (2007).

²⁵⁰ *Lucia*, 138 S. Ct. at 2052.

²⁵¹ *Id.*

defined as “power lawfully conferred by the government to bind third parties, or the government itself, for the public benefit.”²⁵²

The Defender General would have no such power. She would only have the power to *advocate* for particular legal rulings; she would not have the power to bind the public through her interpretations of the law. In this way, she is unlike the administrative law judges considered in *Lucia*, who had the power to regulate hearings, take testimony, and enforce compliance with discovery orders.²⁵³ The Defender General could, concededly, bind the individual defendants she was representing by, say, conceding particular arguments. But this is not obviously the same thing as binding someone for the *public* benefit.²⁵⁴ If that’s right, the Defender General would not be an “Officer of the United States,” meaning that the Appointments Clause would “care[] not a whit about who name[s]” her.²⁵⁵

That said, the Appointments Clause question strikes us as a close one. To the extent that our ideal arrangement falls on the wrong side of the constitutional line, we think our proposal can be modified to work within the strictures of the Appointments Clause with only small costs. We would retain our proposed board, but we would make its duties advisory; it would make hiring recommendations to the Supreme Court, which would retain the ultimate appointment power. We would also make the Defender General removable at will by the Court, although the Board would be responsible for making recommendations about removal to the Court. Making the Defender General subject to at-will removal would avoid any constitutional problems under *Free Enterprise Fund v. Public Company Accounting Oversight Board*.²⁵⁶ It would also help ensure that the Defender General qualifies as an “inferior officer” whose power of appointment can be vested in the “courts of law” rather than a “principal officer” who would need to be appointed by the President.²⁵⁷ Giving the Court the ultimate control over hiring and firing would make the Defender General a bit less independent, but our hope is that the Justices would defer to the advisory board most of the time, overruling its recommendations only in exceptional cases.

²⁵² *Officers of the U.S. Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. at 87.

²⁵³ *Lucia*, 138 S. Ct. at 2053.

²⁵⁴ A helpful analogy comes from the realm of public defense. In *Ferri v. Ackerman*, the Supreme Court determined that in that public defenders’ “duty is not to the public at large,” they are not entitled to immunity from suit. 444 U.S. 193, 204 (1979). Relying on this reasoning, one commentator concluded that a board controlling federal public defenders would not be constrained by the Appointments Clause. See Patton, *supra* note 238, at 391-92. Similar reasoning might apply to the Defender General.

²⁵⁵ *Lucia*, 138 S. Ct. at 2051.

²⁵⁶ See 561 U.S. 477, 508-10 (2010) (finding no violation of Appointments Clause if inferior officers can be removed at will).

²⁵⁷ U.S. CONST. art. II, § 2, cl. 2 (capitalization altered); see also *Lucia*, 138 S. Ct. at 2051 n.3.

2. Design of the Office

Another key question of implementation is how the Office of the Defender General would be structured. Choices here may have profound implications for the success of the proposal. The structure of the Office of the Solicitor General has likely been a major source of its influence. As Ryan Black and Ryan Owens have suggested, it may be the attorneys *other than* the Solicitor General that have done the most to generate that Office's trust and credibility with the Justices.²⁵⁸ The Defender General should follow the Solicitor General's lead.

The Office should thus employ a number of skilled lawyers in addition to the Defender General. These lawyers—unlike the Defender General herself—would have no set limit on their time of service, thus enabling a deep institutional memory within the organization and longer-term relationships with the Court (much like the one Michael Dreeben was able to develop during his longtime tenure as the Solicitor General's "criminal deputy"). These attorneys would be ineligible, however, for direct appointment as the Defender General, in order to ensure a good mix between stability and fresh eyes in the Office. That rule would help ensure that only attorneys with a long-term commitment to the goals of the Office would take the positions, rather than attracting those who just saw the role as a stepping stone to the next office.

Nevertheless, there would necessarily be some turnover in the Office as some experienced attorneys were lured away to private practice—something that happens regularly in the Office of the Solicitor General. Again, it would be helpful to copy the Solicitor General's model, and to have Deputy Defenders General who could be selected from among the longer-serving, and most proven, Assistants to the Defender General. Those Deputies would, we hope, become especially trusted advocates at the Court over time, and could match up well with their counterparts from the Solicitor General's Office.

The Office would also need to have the ability to understand the current problems faced by criminal defendants. Appellate litigators themselves are probably not the best-equipped professionals to develop that kind of expertise. For that reason, it would be important for the Office to employ a small team of criminal justice policy experts and researchers, as well, perhaps, as formerly incarcerated individuals and experienced trial-level criminal defense lawyers, who could advise the Defender General as she selects the Office's positions and priorities.

²⁵⁸ See Black & Owens, *supra* note 130, at 462 (“[W]e believe that OSG success likely stems from the office’s longstanding relationship with the Court and with the professionalism its attorneys display. . . . [O]ur data suggest that the OSG observes something unique that leads to its built-in advantage. The answer, we speculate, might be found in the OSG’s *professionals*.”).

C. Potential Objections

This Section considers potential objections to the proposed Office of the Defender General. We consider first whether other existing institutions could perform the Defender General's functions. Second, we examine whether conceptualizing the Defender General's client as the collective interests of criminal defendants poses too many theoretical and practical problems. Third, we confront the argument that creating a Defender General would require creating "generals" in other legal contexts.

1. Institutional Alternatives

A plausible objection to our proposal would claim that the work we envision the Defender General performing already is—or could be—carried out by existing institutions. The two most plausible candidates are the National Association of Criminal Defense Lawyers (NACDL) and Stanford Law School's Supreme Court Litigation Clinic. Both are major players at the Supreme Court. The NACDL, which has been described as "among the [Court's] most active amicus groups,"²⁵⁹ aims to "submit *amicus* briefs in the majority of criminal cases heard each term by the United States Supreme Court."²⁶⁰ The Stanford clinic is co-directed by Professor Jeffrey Fisher, who has personally argued, by our count, twenty-four criminal cases in the Supreme Court.²⁶¹ Andrew Crespo aptly calls Fisher a "one-man expert Supreme Court criminal defense bar."²⁶² We are great admirers of both the NACDL and the Stanford clinic, and nothing we have to say here should be

²⁵⁹ Joshua B. Fischman, *Do the Justices Vote Like Policy Makers? Evidence from Scaling the Supreme Court with Interest Groups*, 44 J. LEGAL STUD. S269, S279 (2015).

²⁶⁰ National Association of Criminal Defense Lawyers, NACDL *Amicus Curiae* Committee Mission Statement 1 (Nov. 2, 2019), <https://www.nacdl.org/getattachment/e63ce877-aa9f-44d7-acdc-a3b3f4ef8of7/amicus-program-2015-adopted-roster-updated-02192020.pdf> [<https://perma.cc/L32X-5HTQ>].

²⁶¹ We are relying on the cases listed on Fisher's Oyez page. *Jeffrey L. Fisher*, OYEZ, https://www.oyez.org/advocates/jeffrey_l_fisher [<https://perma.cc/DC8F-47DR>] (last visited Apr. 3, 2020). His criminal credits include *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020); *United States v. Stitt*, 139 S. Ct. 399 (2018); *Currier v. Virginia*, 138 S. Ct. 2144 (2018); *Koons v. United States*, 138 S. Ct. 1783 (2018); *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017); *Ohio v. Clark*, 135 S. Ct. 2173 (2015); *Heien v. North Carolina*, 135 S. Ct. 530 (2014); *Fernandez v. California*, 134 S. Ct. 1126 (2014); *Salinas v. Texas*, 570 U.S. 178 (2013); *Chaidez v. United States*, 568 U.S. 342 (2013); *Greene v. Fisher*, 565 U.S. 34 (2011); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *United States v. Tinklenberg*, 563 U.S. 647 (2011); *Magwood v. Patterson*, 561 U.S. 320 (2010); *United States v. O'Brien*, 560 U.S. 218 (2010); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Waddington v. Sarausad*, 555 U.S. 179 (2009); *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Burgess v. United States*, 553 U.S. 124 (2008); *Burton v. Stewart*, 549 U.S. 147 (2007); *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006); *Davis v. Washington*, 547 U.S. 813 (2006); *Blakely v. Washington*, 542 U.S. 296 (2004); and *Crawford v. Washington*, 541 U.S. 36 (2004).

²⁶² Crespo, *supra* note 3, at 2026.

understood as criticism of them. At the same time, neither is an adequate substitute for an Office of the Defender General.²⁶³

Consider the Stanford clinic first. While the clinic has been a critical voice in the Supreme Court on behalf of criminal defendants, its mission and incentives differ from the Defender General's. We have explained that unlike traditional criminal defense lawyers, the Defender General would litigate on behalf of a *cause*—criminal defendants as a class—not just a client.²⁶⁴ In an article examining how law school clinics fit into the Supreme Court bar, Fisher explains that the Stanford clinic consciously rejected a cause-lawyering model in favor of a client-centered approach.²⁶⁵ The Stanford clinic has good pedagogical reasons for that choice, but it entails, as Fisher acknowledges, that the clinic does not avoid cases or arguments on the grounds that they may produce bad law for defendants collectively.²⁶⁶ If it did, Fisher explains, “[t]he clinic itself would start controlling the shape of the law, instead of leaving that power to the Court.”²⁶⁷ We understand why a law school clinic would wish to avoid the appearance (or reality) of “shaping the law.” But shaping the law in a pro-defendant direction is a central premise of a Defender General's Office.

The NACDL's mission more closely aligns with that of the Office of the Defender General. The organization states in its Amicus Curiae Committee Mission Statement that it seeks to “provide *amicus* assistance on the federal and state level in those cases that present issues of importance to criminal defendants, criminal defense lawyers, and/or the criminal justice system as a whole.”²⁶⁸ This sounds not that far afield from the Defender General's mission. We would leave the interests of “criminal defense lawyers” out of the equation, but to its credit, the NACDL has filed amicus briefs on the defendants' side in several major ineffective assistance of counsel cases, where the interests of defendants and defense lawyers might be thought to diverge.²⁶⁹ That said, we have explained that representing the interests of

²⁶³ That said, Professor Fisher, given his expertise and commitment to protecting the rights of criminal defendants, would obviously make an ideal Defender General.

²⁶⁴ See *supra* Section II.A; see also Fisher, *supra* note 161, at 193 (“The mission of a public defender's office is to represent one client at a time Such an office would not refuse a representation (or decline to make an argument in the midst of a representation) for fear of making ‘bad law’ for other criminal defendants.”).

²⁶⁵ See *id.* at 145 (“Although I think that a Supreme Court clinic might reasonably decide to follow either approach, the Stanford Clinic, for example, has chosen to pursue a client-based model, in which the clinic views itself more as a legal services office than a cause-lawyering enterprise.”).

²⁶⁶ See *id.* at 191-95.

²⁶⁷ *Id.* at 195.

²⁶⁸ National Association of Criminal Defense Lawyers, *supra* note 260, at 1.

²⁶⁹ See, e.g., Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner, *Lee v. United States*, 137 S. Ct. 1958 (2017) (No. 16-327); Brief of the National Association of Criminal Defense Lawyers et al. as Amici Curiae in Support of Respondents,

criminal defendants as a class in the Supreme Court sometimes means affirmatively arguing *against* a particular criminal defendant.²⁷⁰ We suspect that it would be politically and institutionally awkward for an organization of and by criminal defense lawyers to do that.²⁷¹ The Defender General, on the other hand, would lack such political and institutional constraints.

The bigger reason why the NACDL does not already fulfill the role we propose for the Defender General has to do with resources. The NACDL relies on a committee of six national co-chairs to run its amicus program, none of whom are full-time NACDL staff members.²⁷² The national co-chairs are augmented by between two and four circuit vice-chairs for each federal circuit.²⁷³ The actual amicus briefs are authored by lawyer-volunteers, drawn substantially from the ranks of large law firms, law school professors, and other criminal defense and civil liberty organizations.²⁷⁴ Participation by the NACDL at the certiorari stage is, according to its guidelines, the “exception,” while “abstention is the rule.”²⁷⁵ The NACDL’s amicus program provides an enormously valuable service to criminal defendants, but we think it clear that these arrangements fall well short of what a fully staffed Office of the Defender General could do.

Missions and resources aside, there is a deeper problem with looking to institutions like the NACDL or the Stanford clinic to perform the functions that we envision for a Defender General. The service that we envision the Defender General providing—representing criminal defendants as a class—is a *public* service. It is directed at achieving a more balanced—and thus more just—criminal legal system, which would work to the public benefit. And we envision that the Office would possess perquisites that other Supreme Court litigants (aside from the Solicitor General) lack.²⁷⁶ We think that public

Laffler v. Cooper, 566 U.S. 156 (2012) (Nos. 10-209 & 10-444); Brief of the National Association of Criminal Defense Lawyers et al. as Amici Curiae in Support of Petitioner, Padilla v. Kentucky, 559 U.S. 356 (2010) (No. 08-651).

²⁷⁰ See *supra* text accompanying notes 211 and 227–229.

²⁷¹ Cf. Susan Bandes, *Repression and Denial in Criminal Lawyering*, 9 BUFF. CRIM. L. REV. 339, 359 (2006) (“Many of the lawyers who thrive in criminal defense . . . seem to relish the fight. They may be energized by challenging, and preferably thwarting, authority, by fighting for the underdog, or by their political commitments. Not all of these lawyers have a systemic critique of the criminal justice system . . .”).

²⁷² Currently, one of the co-chair positions is split, so that there are seven co-chairs in all. National Association of Criminal Defense Lawyers, *supra* note 260, at 5. Of these, two are law school professors, four are lawyers in private practice, and one is a federal defender. *Id.* One of the two law professors is, naturally, Stanford’s Jeffrey Fisher. *Id.*

²⁷³ *Id.* at 7–8.

²⁷⁴ *Id.* at 12. Though the amicus authors are not compensated, they do receive a “handsome certificate of thanks from NACDL’s President.” *Id.* at 1.

²⁷⁵ *Id.* at 8.

²⁷⁶ See *supra* note 225 and accompanying text.

functions should, in general, be performed by public officials.²⁷⁷ Stanford Law School and the NACDL are terrific institutions, but their leaders are not public officials.²⁷⁸

2. Identifying Collective Interests

Another objection to our proposal concerns the Defender General's charge to protect the interests of criminal defendants as a class. What exactly are these collective interests, and how is the Defender General supposed to identify them? Moreover, does it even make sense to talk about the collective interests of defendants generally when individual defendants may have wildly disparate interests, depending on the crimes for which they were convicted and other variables? Under this objection, the Defender General would either face hopeless uncertainty or would use the vagueness of her charge as an excuse to pursue her private policy preferences.

In most cases, we think, the objection will prove more theoretical than real. Usually, answering the question, "What legal rule is in the interests of criminal defendants collectively?" will be obvious. That said, there will be cases in which it proves difficult. That's because possible changes to legal rules sometimes create winners and losers *among* criminal defendants.

Take the Supreme Court's decision to give federal district judges more sentencing discretion in the wake of declaring the Federal Sentencing Guidelines unconstitutional, which made defendants like Derrick Kimbrough—whose below-Guidelines sentence the Court blessed in *Kimbrough v. United States*²⁷⁹—better off. At the same time, the change in the law simultaneously harmed defendants like Gerard Cavera, whose *above*-Guidelines sentence was upheld by the en banc Second Circuit in the immediate wake of *Kimbrough*, after a pre-*Kimbrough* panel had overturned the sentence.²⁸⁰

²⁷⁷ See Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115, 136-37 (Michael W. Dowdle ed., 2006) ("Private actors generate 'proprietary' information; the information produced by public agencies is 'owned' by the public. . . . Hence, to the extent that public accountability depends upon transparency, contracting out to private parties would seem a retreat from accountability."). We describe the Defender General's accountability above. See *supra* subsection II.B.1.

²⁷⁸ The Stanford clinic is part of Stanford Law School, which is administered by academic officials—a Dean, then a Provost, then a President, and finally a Board of Trustees. See *University Administration*, STAN. UNIV., <https://facts.stanford.edu/administration> [<https://perma.cc/9G5L-99TF>] (last visited Apr. 3, 2020). The NACDL is administered by an Executive Director, then a President, and finally a Board of Directors. See *Bylaws*, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS (Aug. 3, 2019), <https://www.nacdl.org/Landing/Bylaws> [<https://perma.cc/7TWS-PLDB>].

²⁷⁹ See *Kimbrough v. United States*, 552 U.S. 85, 90-91, 111 (2007) (reversing appellate court's determination that the below-Guidelines sentence was an abuse of discretion).

²⁸⁰ See *United States v. Cavera*, 550 F.3d 180, 185-87, 197 (2d Cir. 2008) (en banc) (quoting *United States v. Lucania*, 379 F. Supp. 2d 288, 293-94 (E.D.N.Y. 2005)) (affirming that a district

If the Office of the Defender General had existed at the time, should it have argued for or against federal sentencing discretion? Or should the fact that the rule change would not make *every* defendant better off mean that the Defender General would need to throw up her hands? We think in situations like this, a good Defender General would research carefully, consult widely with the policy experts in her office and the stakeholders (including defendants and incarcerated individuals) beyond it, and generally do her best to answer the question of what will do the most good for the most defendants. Often, there *will* be an answer to that question, even if getting to that answer requires some effort.²⁸¹

We acknowledge that in rare situations, there may not, even after research and consultation, be a “right answer” to the question of what is in the interests of criminal defendants as a class. And, relatedly, certain situations may present particularly difficult distributive quandaries. What if a legal rule will benefit a significant number of white-collar defendants—while at the same time harming similar number of convicted drug distributors? What if the Court were considering moving away from exclusionary rules and in favor of more civil damages actions—thereby harming guilty defendants and possibly benefiting innocent criminal suspects?

In these situations—which, again, we expect to be relatively rare—it may not be enough to simply say that the Defender General will make the decision. If there is no right answer, a Defender General who insisted that she knew which choice was really in defendants’ interests might undercut her hard-earned credibility. What then?

The best path, we think, is to start with transparency. The Defender General should explain the dilemma clearly and publicly. Just as every amicus brief by the Solicitor General begins with a section titled “Interest of the United States,”²⁸² we think the Defender General’s briefs should begin by explaining how the Office sees the issues mapping onto its charge. Where this choice is especially challenging, the Defender General should say so forthrightly. If the interests truly are in equipoise, the Defender General’s Office might file a brief in support of neither party, and simply explain the various consequences of the different rules the Supreme Court is considering.

court may impose an above-Guidelines sentence when the Guidelines, “‘in the pursuit of national uniformity in sentencing practices,’ do not take local circumstances into account”).

²⁸¹ Our instinct (though it is only an instinct) is that discretion has largely been a boon for criminal defendants as a group. The Defender General wouldn’t be limited to instincts; whatever her initial sense of the issue, she would, as we have indicated, seek to verify or falsify it through research and consultation.

²⁸² For a recent example, see Brief for the United States as Amicus Curiae at 1-2, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618 & 17-1623).

But perhaps a better approach in hard cases would be for the Defender General to look to her Office's *raison d'être* as a tiebreaker. If, for example, a rule will benefit one group of defendants while harming others, the Defender General might ask *which* group of defendants is most subject to the distorting influence the Office was created to counteract. In this regard, the Defender General might conclude that protecting indigent defendants is a higher priority than protecting white-collar defendants, since the latter may be more likely to be represented by expert Supreme Court counsel. This is merely a possibility; making these hard choices—and explaining why she had done so—would be the Defender General's responsibility and burden.

We stress that the Solicitor General has a similar responsibility and burden when he seeks to determine what the “interests of the United States” are with respect to any given legal issue. True, in criminal cases, the Solicitor General seems to find this task relatively easy, as the Office appears mostly to take the view that those interests line up squarely with the interests of federal prosecutors.²⁸³ But in other contexts the task is much more challenging, and the Solicitor General must resolve disputes among competing executive branch and independent agencies that disagree about the position the government should take.²⁸⁴ Compounding the problem is that there is no clear consensus about how, exactly, the Solicitor General should conceptualize his “client.” On one extreme the client is merely an “abstraction” that permits the Solicitor General to exercise his judgment about the best path forward.²⁸⁵ On the other end of the spectrum is the view that the Solicitor General should think of himself as any other political appointee, whose job it is to do the bidding of the administration.²⁸⁶ In between is a view that the Solicitor

²⁸³ See Crespo, *supra* note 3, at 2013 (noting that OSG “virtually always argues in opposition to the criminal defendant—an unsurprising fact given that the office is itself a prosecutorial office”).

²⁸⁴ For some examples of these conflicts, see Francis J. Aul, *Out of Many Clients, One: Conflict of Interest and the Office of the Solicitor General*, 31 GEO. J. LEGAL ETHICS 475, 481–84 (2018). See also Drew S. Days III, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 KY. L.J. 485, 487 (1994–1995) (noting that the Solicitor General's “responsibility is ultimately not to any particular agency or person in the federal government but rather to ‘the interests of the United States’ which may, on occasion, conflict with the short-term programmatic goals of an affected governmental entity”).

²⁸⁵ See FRANCIS BIDDLE, IN BRIEF AUTHORITY 97 (1962) (stating that the Solicitor General's “client is but an abstraction” and that “his guide is only the ethic of his own profession framed in the ambience of his experience and judgment”); see also *Rex E. Lee Conference on the Office of the Solicitor General of the United States*, 2003 BYU L. REV. 3, 39 [hereinafter *Rex Lee Conference*] (quoting former Deputy Solicitor General Andrew Frey, ascribing to former Solicitor General Charles Fried “the Harvard law professor model of the solicitor general” in which “naturally Harvard law professors know what is right and what is wrong in the law” and “[t]heir role is to help guide the Supreme Court to reach a correct decision”).

²⁸⁶ See Strauss, *supra* note 164, at 167–68 (describing the “Administration Approach,” under which “the Solicitor General is just like any other high-ranking executive official: His task is to help carry out the Administration's program”); see also *Rex Lee Conference*, *supra* note 285, at 40 (quoting

General should see his responsibility as one “to the federal government as an institution, not to the President or the Administration that he serves.”²⁸⁷

Which of these views is best is not for us to resolve here. Our point is merely that despite the theoretical difficulty of identifying the Solicitor General’s client, and despite the fact that hard questions about the scope of the Solicitor General’s duties do arise, the Office of the Solicitor General nonetheless keeps functioning—and, for the most part, functioning effectively. Similarly, even if conceptualizing defendants collectively as her client may present challenges for the Defender General, we expect that she would be able to work through them.

3. Other Generals

A final potential objection to our proposal is that it opens the door to a proliferation of Supreme Court “generals.” If criminal defendants need an advocate to represent their collective interests in the Supreme Court, why not a FOIA General, a Reproductive Rights General, a Class Action Plaintiffs’ General, or a Workers’ Rights General? This objection posits that a proliferation of government offices oriented towards Supreme Court advocacy would be unwieldy and undesirable.

The objection is, we think, misplaced. In Part I, we explained that it is the confluence of two circumstances that generates the need to have a Defender General represent the collective interests of criminal defendants—(i) the Supreme Court is the preeminent national regulator of criminal justice, and (ii) representation in criminal litigation at the Court is systematically asymmetrical. If there are other areas where both circumstances are present—that is, where the Court plays a significant policymaking role and advocacy is consistently skewed—a “general” may indeed be an appropriate corrective.²⁸⁸ Criminal litigation may not be unique in this regard, but we doubt that there are very many corners of the law that satisfy these twin criteria, at least to the

Judge Frank Easterbrook, stating: “My inclination is to say that the client of the solicitor general is the executive branch of the United States government. Not to say that the solicitor general is an independent agent, but he is litigating on behalf of the executive branch.” (quotation marks omitted)).

²⁸⁷ Strauss, *supra* note 164, at 166.

²⁸⁸ The mere fact of divergence between a lawyer’s interests and a client’s is not, however, enough to justify the creation of a Supreme Court general, in our view. Agency problems are endemic in attorney-client relationships. See Matthew C. Stephenson & Howell E. Jackson, Essay, *Lobbyists as Imperfect Agents: Implications for Public Policy in A Pluralist System*, 47 HARV. J. ON LEGIS. 1, 3 n.8 (2010) (collecting sources on attorney-client agency problems). We would not, for instance, endorse a “Prosecutor General” to argue for the abstract interests of “prosecution” on the grounds that individual prosecutors (including lawyers within the Office of the Solicitor General) may have diverging personal interests.

same degree. In part this is because in the non-criminal context, litigants more generally recognize the utility of hiring expert Supreme Court advocates.²⁸⁹

That said, to the extent there are other areas of law with similar pathologies, we say bring on the generals. That is, in areas where our legal system relies on regulation via Supreme Court litigation, and where that litigation process is systemically distorted, creating a new General's Office strikes us as likely to be cost-benefit justified in most cases. Rather than seeing a troubling objection, then, we are happy to take this argument as a friendly amendment.

III. EXTENSIONS

Having proposed the Office of the Defender General and defended it against objections in Part II, this final Part explores three ways in which the proposal might be extended. Section III.A explores (and ultimately rejects) a Defender General with even greater powers than those we proposed in Part II. Section III.B considers the possibility that the Defender General's work might extend beyond the Supreme Court, to lower federal courts and state courts. Lastly, Section III.C discusses alternative solutions to remedying the asymmetrical power to shape criminal justice regulation—none of which seems as attractive as the proposal to create an Office of the Defender General.

A. *Modifying Ethical Rules*

In Part II, we showed that, working with existing ethical rules, an Office of the Defender General could be constructed as a reasonably close analogue to the Office of the Solicitor General.²⁹⁰ But what if we don't take existing ethical rules as fixed? This section considers the possibility of a Defender General who is not just *available* to represent criminal defendants before the Supreme Court, but who is the *exclusive* lawyer for criminal defendants before the Supreme Court. An "exclusive" Defender General would be even better equipped to overcome the unified vision and credibility asymmetries than the version of the Defender General sketched in Part II. But it would come at a cost that, ultimately, we think is not worth bearing.

The Solicitor General is the only lawyer who can represent the United States in the Supreme Court.²⁹¹ That means that no federal official or agency

²⁸⁹ See Lazarus, *supra* note 136, at 1563 ("Better, more effective advocates influence the development of the law and there is generally no court where such advocacy can wield more far-reaching influence than the Supreme Court."). For an explanation of why this general pattern often does not apply to criminal cases, see *supra* notes 139–144 and accompanying text.

²⁹⁰ See *supra* Section II.A.

²⁹¹ See Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 256 (1994) ("Before the Supreme Court, however, the

can petition for certiorari without first winning the Solicitor General's support.²⁹² It also means that when the Court grants certiorari, it is the Solicitor General who files the briefs and presents argument, not an official's private lawyer or an agency's general counsel. The same arrangements could apply to the Defender General. In Part II, we proposed a mechanism by which a criminal defendant could ask the Defender General to file a certiorari petition on his behalf. In an "exclusive Defender General" model, the defendant's request would be mandatory, and it wouldn't just be for representation, but for permission to file a certiorari petition at all. If the Defender General declined, the defendant's appeals would be over and the judgment of the federal circuit court or last state court would be final.²⁹³ But if the Defender General determined that the case as a whole—or a particular issue raised in it—warranted a certiorari petition, the Office would take the matter over and represent the defendant until the end of Supreme Court litigation, whether that be a denial of certiorari or a decision on the merits. The defendant would (absent extraordinary circumstances) be "stuck" with the Defender General as his Supreme Court lawyer.

As a preliminary matter, we do not believe that curtailing a criminal defendant's right to petition for certiorari in this way poses any insurmountable constitutional problems. Criminal defendants have no due process right to any appeal, much less review by the United States Supreme

[Solicitor] General, with some notable exceptions, controls all aspects of independent agency litigation, including the power to seek certiorari."). There are, as Devins notes, a handful of exceptions where agencies are granted independent authority to litigate before the Supreme Court. *See id.* at 274-78 (noting, for example, that the Federal Trade Commission and now-dissolved Interstate Commerce Commission can "represent themselves before the Supreme Court whenever the Solicitor General refuses to defend their position," and that other statutory conflicts and political circumstances might cause the Solicitor General to authorize "[d]ual governmental presentations" in cases involving other agencies).

²⁹² *See* U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 2-2.121 (2018), <https://justice.gov/jm/jm-2-2000-procedure-respect-appeals-generally#2-2.121> [<https://perma.cc/78B9-UK8H>] ("[A]ll petitions for certiorari and direct appeals to the Supreme Court must be authorized by the Solicitor General.").

²⁹³ Things are a bit more complicated when it is the government, rather than the defendant, that petitions for certiorari. Where the Defender General believes that the defendant's interests align with the interests of defendants collectively, the Defender General could simply assume the representation. Where the interests do not align, however—for instance, if the Defender General would be inclined to suggest error—it would not make sense for the Defender General to act as the lawyer for the defendant. In such a case, the Court would need to appoint counsel to defend the judgment below. *See* Brian P. Goldman, Note, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 STAN. L. REV. 907, 909-10 (2011) ("[T]he Court has tapped an attorney to support an undefended judgment below, or to take a specific position as an amicus, forty-three times . . ."). Because the appointed lawyer would, in effect, be arguing for the defendant's interests, it makes more sense for the defendant in such a case to be represented by his own counsel, with the Defender General's Office appearing in its own name as amicus.

Court.²⁹⁴ Nor does denying a criminal defendant a Supreme Court lawyer of his choice violate the Sixth Amendment.²⁹⁵ Although the “right to select counsel of one’s choice” is the “root meaning” of the Sixth Amendment Counsel Clause,²⁹⁶ under current law the clause applies only to proceedings in trial courts and on direct appeals of right, *not* discretionary appeals.²⁹⁷

But while the exclusive Defender General model is not unconstitutional, it does raise thorny legal ethics problems.²⁹⁸ Every law student knows that lawyers are not permitted to represent a client if the representation will be “directly adverse to another client.”²⁹⁹ We have described the Defender General’s “client” as the “interests of defendants as a class,” and we have acknowledged that those interests do not always align with the interests of particular defendants.³⁰⁰ Indeed, that divergence of interests is why a Defender General is needed in the first place.³⁰¹ To be sure, because the Defender General will have refused to authorize certiorari petitions in cases raising obvious conflicts between defendants in general and the named defendant, such conflicts will be rare in cases in which the Defender General actually appears before the Court. But inevitably, the Defender General

²⁹⁴ See Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1221 (2013) (“[T]he Supreme Court has repeatedly declined to recognize a due process right to appeal in either civil or criminal cases.”).

²⁹⁵ U.S. CONST. amend. VI. For a fascinating recent discussion of the Counsel Clause, see John Rappaport, *The Structural Function of the Sixth Amendment Right to Counsel of Choice*, 2016 SUP. CT. REV. 117.

²⁹⁶ United States v. Gonzalez-Lopez, 548 U.S. 140, 147-48 (2006).

²⁹⁷ Ross v. Moffitt, 417 U.S. 600, 611-12 (1974). This is why defendants cannot assert ineffective assistance claims based on the performance of their counsel in discretionary appeals. See *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982) (per curiam).

²⁹⁸ The vexing ethical questions wouldn’t apply to the Defender General’s review of requests for certiorari petitions. In deciding whether a defendant will be permitted to seek Supreme Court review of his case, the Defender General would be acting as a gatekeeper, not as a lawyer subject to the rules of professional conduct. At most, an applicant would be considered a “prospective client” under the ethical rules. See MODEL RULES OF PROF’L CONDUCT r. 1.18(a) (AM. BAR ASS’N 2019) (“A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.”). (Indeed, if defendants were considered “clients” of the Defender General at this stage, arguably Model Rule 1.2 would render the Defender General unable to refuse to file a certiorari petition. See MODEL RULES OF PROF’L CONDUCT r. 1.2(a) (AM. BAR ASS’N 2019) (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation In a criminal case, the lawyer shall abide by the client’s decision . . . as to a plea to be entered, whether to waive jury trial and whether the client will testify.”).) Because the defendant would not yet be the Defender General’s client, the Defender General’s application instructions would specify that applicants should not include privileged materials in their submissions. See *supra* note 209. The ordinary conflict of interest rules would apply, however, once the Defender General approves a certiorari petition and appears as the lawyer for a defendant at the certiorari or the merits stage.

²⁹⁹ MODEL RULES OF PROF’L CONDUCT r. 1.7(a)(1) (AM. BAR ASS’N 2019).

³⁰⁰ See *supra* notes 211, 227–229 and accompanying text.

³⁰¹ See *supra* subsection I.B.1.

would confront cases where asserting a viable argument on behalf of an individual defendant would not align with the interests of defendants collectively. Under existing ethical rules, that would put the Defender General in an untenable position.

The question is whether conflict-of-interest rules should be changed to permit the Defender General to represent a particular defendant before the Supreme Court, *notwithstanding* that the Defender General's ultimate loyalty is to defendants collectively. We tolerate an analogous conflict of interest in the case of the Solicitor General. Then-Solicitor General Drew Days observed in 1994 that the Solicitor General's "responsibility is ultimately not to any particular agency or person in the federal government but rather to 'the interests of the United States.'"³⁰² Those interests, Days recognized, "may, on occasion, conflict with the short-term programmatic goals of an affected governmental entity."³⁰³ Yet when the Solicitor General appears in the Supreme Court in such a case, he or she appears *as the lawyer for* these "affected entities." Most controversially, that means that the Solicitor General appears in the Supreme Court as counsel for the so-called "independent" agencies.³⁰⁴ By definition, independent agencies are not subject to direct presidential control,³⁰⁵ and it is not difficult to imagine circumstances in which their interests and those of the President (and thus the Solicitor General) would diverge.³⁰⁶ Still, ethics rules do not preclude the Solicitor General from representing them.³⁰⁷ To be sure, the analogy between the Solicitor General representing an independent agency that would prefer its own counsel and the Defender General representing an unwilling criminal defendant isn't perfect. Independent agencies are "independent" in certain

³⁰² Days, *supra* note 284, at 487.

³⁰³ *Id.* To be sure, there are other ways of understanding the nature of the Solicitor General's "client." Margaret Meriwether Cordray and Richard Cordray mention "nine different conceptions," all offered by a former Solicitor General. Cordray & Cordray, *supra* note 127, at 1360-61 (citing Drew S. Days III, *Executive Branch Advocate v. Officer of the Court: The Solicitor General's Ethical Dilemma*, 22 NOVA L. REV. 679, 681 (1998)).

³⁰⁴ See Devins, *supra* note 291, at 256 ("Before the Supreme Court, . . . the [Solicitor] General, with some notable exceptions, controls all aspects of independent agency litigation.").

³⁰⁵ See Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 85 (2016) (noting that "independent agencies" are "insulated from presidential control by for-cause limitations on removal").

³⁰⁶ See Aul, *supra* note 284, at 481 ("As long as the Solicitor General represents these diverse components of the federal government, conflicts will arise in the course of litigating a case . . ."); Wade H. McCree, Jr., *The Solicitor General and His Client*, 59 WASH. U. L.Q. 337, 340-44 (1981) (describing, in a lecture by the then-serving Solicitor General, some of the "specific situations in which the Solicitor General's Office is called upon to ascertain 'the interests of the United States' and to resolve conflicting claims among different government offices").

³⁰⁷ See generally Aul, *supra* note 284.

ways defined by law and convention,³⁰⁸ but they are still organs of the government of the United States. Criminal defendants with cases before the Supreme Court are human beings, so the analogy goes only so far.

Whether it makes sense to change the ethics rules for the Defender General turns, we think, on how one understands the Supreme Court as an institution. If the Court is principally a *court*, allowing the Defender General to represent an unwilling defendant borders on absurd. When a defendant and the Defender General view a legal issue differently, the exclusive Defender General model leaves the defendant voiceless, despite his enormous stake in the proceedings. On the other hand, if the Court is principally a *lawmaking body* that uses discrete cases and controversies only as the backdrop for its policy judgments, the change makes much more sense. On that understanding, what counts is the policy the Court makes, not what happens to the particular case that provides the vehicle. Lower courts are available to work out such details. The voice the Court needs to hear is the one focused on policy—the Defender General’s.

In the end, while we certainly recognize that the Court *is* a lawmaking body,³⁰⁹ it is also still a court. And allowing the Defender General to represent unwilling defendants would likely strike many as too significant a deviation from settled norms about how courts function. Moreover, public legitimacy is an important component of the Supreme Court’s ability to regulate effectively.³¹⁰ The spectacle of forcing defendants to be represented by an attorney who doesn’t represent their interests—given how inconsistent that would seem with ordinary intuitions about how a court system should work—might make the Court’s decisions in the criminal sphere harder for the public to accept.

We are also concerned that an exclusive Defender General model would diminish the incentive for criminal defense lawyers at the trial and appellate levels to preserve and develop potentially certiorari-worthy legal questions. One—though of course not the exclusive—reason criminal lawyers are attentive to such issues is that identifying one could lead to a Supreme Court argument. If the Defender General (along with her assistants) get all of the arguments, that incentive would disappear.

³⁰⁸ See generally Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013).

³⁰⁹ See *supra* Section I.A.

³¹⁰ For a discussion of Supreme Court legitimacy, see Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019).

B. State- and Lower-Court Involvement

Thus far, we have contemplated a Defender General's Office that focuses exclusively on the Supreme Court. Its purview could be expanded. The Defender General could also participate as amicus in important cases pending in lower federal courts or even in state courts.³¹¹ A great deal of criminal law is obviously made and developed below the level of the Supreme Court.³¹² Indeed, on one account, federal appellate courts are "much more important [than the Supreme Court] in setting and enforcing the law of the United States."³¹³ By filing amicus briefs and presenting arguments, the Defender General could ensure that the views of defendants as a class are cogently presented in lower court cases that appear likely to break new legal ground.³¹⁴

The principal tradeoff, as we see it, is resources. For the Defender General to participate in lower court litigation, her Office would have to either monitor a vast number of pending cases or develop a mechanism through which participants in lower court litigation could alert it to unusually important cases. And then of course briefs must be written and arguments attended. That all takes personnel time. There is, moreover, less benefit to Defender General participation in lower court cases than in cases at the Supreme Court, and not only because Supreme Court decisions have binding national effect. We've described the systematic inequality between the quality of representation of defendants and the government in the Supreme Court.³¹⁵ We currently have no way of knowing whether that inequality exists in the lower federal courts or state courts, but even if it did, no amount of resources would (or should) enable the Defender General to participate in more than a tiny fraction of lower court cases. If there's a gap in the quality of appellate

³¹¹ We do not envision that the Defender General would ordinarily appear as counsel for particular defendants in lower federal or state appellate courts.

³¹² See generally Andrew Hessick, *The Impact of Government Appellate Strategies on the Development of Criminal Law*, 93 MARQ. L. REV. 477 (2009).

³¹³ FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 1-2 (2007).

³¹⁴ The Defender General's purview could be expanded beyond the Supreme Court in other ways as well. One possibility—which we note but do not explore in detail—is that the Defender General might advocate for pro-criminal defense positions in public and political forums. Such a move would come with costs and benefits. On the costs side, if the Defender General came to be seen as a political actor, that might undercut her credibility with the Justices. On the other hand, because at least some public defender offices are (understandably) wary of attracting too much political attention, a high-profile Defender General might fill a gap in the political discourse. See, e.g., Stanley A. Goldman, *Foreword: First Thing We Do, Let's Kill All the (Defense) Lawyers*, 30 LOY. L.A. L. REV. 1, 2 (1996) ("When I suggested to my supervisor that the public defender's office was obviously not doing enough public relations to explain our job to the citizenry, I was informed that the less the public knew about the job they were paying us to perform, the better off we would be."). We are grateful to Trevor Gardner for suggesting the potential expansion of the Defender General's mission.

³¹⁵ See *supra* subsection I.B.2.

lawyering outside the Supreme Court, the Defender General is not capable of solving that problem.

Nonetheless, when lower court litigation raises important legal questions implicating the interests of criminal defendants as a class, the Defender General could further its mission by presenting its views. This would have particular value in cases where the existing defense briefing is weak. Judge Carolyn King of the Fifth Circuit has noted that when she receives a “mediocre or even poor” brief from a United States Attorney’s Office in an important criminal case, she sometimes asks for a letter brief from the Solicitor General setting forth the position of the United States (even though the United States is already a party to the case).³¹⁶ The Defender General could play an analogous role in lower court litigation. When a lower federal or state court confronts a criminal law question that it recognizes is important, but for which the defense briefing is not helpful, the Defender General’s Office could be a convenient place for the court to turn.

State courts in particular suggest another possibility. In recent decades, many states have created their own state solicitor general’s offices to supervise appellate litigation on behalf of the government.³¹⁷ One study concluded that these offices improved states’ likelihood of success in cases before the Supreme Court.³¹⁸ If emulating the federal Solicitor General provides benefits for states, so could emulating a federal *Defender* General. One could imagine offices of state defenders general, charged with advocating for the collective interests of state defendants in state court cases in which the federal Defender General would lack the resources to participate.³¹⁹

C. *Alternative Solutions*

We’ve made our best case for why the Defender General is needed. Those not convinced by our proposal should answer a difficult question: if not the Defender General, what should be done about the asymmetries distorting the Court’s criminal decisionmaking? The most likely answer, of course, is to do nothing and to maintain the status quo. This option is

³¹⁶ *The Rise of Appellate Litigators and State Solicitors General*, *supra* note 147, at 677-78.

³¹⁷ See Banks Miller, *Describing the State Solicitors General*, 93 JUDICATURE 238, 238 (2010) (identifying this trend as having “beg[un] in earnest in the late 1980s”).

³¹⁸ See Owens & Wohlfarth, *supra* note 137, at 659 (finding that “a state that uses a state OSG attorney to litigate before the U.S. Supreme Court has a 0.24 greater [probability] of winning its case than a similar state that does not use an OSG attorney”).

³¹⁹ Given the diversity of state appellate court structures and existing statewide offices handling criminal appeals for indigent defendants, the value of such an office would vary substantially by state. In some states, indigent defense at the appellate level is already consolidated into one office, thus achieving some (but certainly not all) of the advantages of a defender general. See, e.g., IOWA CODE § 814.11(2)(a) (2020) (directing indigent appointments to the state appellate defender).

untenable; the stakes in criminal justice are high for individuals affected, and there is no good reason to simply ignore a persistent regulatory distortion. We see only two alternative reforms, which we consider in turn. The first would be to “level down” the government by forcing it to litigate more like an individual defendant. The second choice would be to try to shift more power over criminal justice to an institution other than the Supreme Court. Both options seem practically more difficult than creating an Office of the Defender General.

1. Leveling Down

The idea behind the Defender General proposal is a form of “leveling up.” The government has many advantages in criminal litigation at the Supreme Court; the Defender General proposal seeks to give defendants some of the advantages currently enjoyed exclusively by the government. But if equalizing representation is the goal, another option is to “level down”—to strip the government of its advantages, and make it litigate cases more like individual defendants do.³²⁰

What would leveling down look like? One method would be to get the Solicitor General’s Office out of the business of litigating criminal cases. Imagine that appellate control over every federal prosecution remained in the hands of the individual Assistant United States Attorney (AUSA) who had handled the case in the trial court.³²¹ That AUSA would decide whether to appeal adverse rulings and whether to seek certiorari; she would also take the lead on briefing and argument if the Supreme Court agreed to decide the case. Such a reform would address a number of the imbalances we have identified.

First, in terms of the government’s ability to play for the rules, the AUSA who prosecuted a defendant in the lower court would likely be personally and emotionally invested in achieving a favorable outcome in a particular case, and would thus be less willing to simply drop potential appeals with less-than-optimal facts—even if doing so might be in the government’s longer-term interest. Second, while many AUSAs (just like many public defenders) are excellent lawyers, we suspect that few are experts on the finer details of Supreme Court advocacy. Many would likely be arguing at the Court for the

³²⁰ Cf. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 787 (2011) (distinguishing between leveling up and leveling down in the context of the Equal Protection Clause).

³²¹ Each U.S. Attorney’s Office is supposed to designate one AUSA as a supervisor of that office’s appellate matters. U.S. DEP’T OF JUSTICE, JUSTICE MANUAL § 2-5.110 (2018), <https://www.justice.gov/jm/jm-2-5000-appellate-standards-us-attorneys-offices#2-5.110> [<https://perma.cc/7PRH-FSWL>]. Not every office has a dedicated appellate specialist, however. See McGaughey, *supra* note 72, at 310 (noting that appeal recommendation memoranda are prepared by an “office’s appellate specialist, if there is one”).

first (and probably only) time in their careers. Thus, this solution would ameliorate some of the existing advocacy gap between defendants and the government. Third, because any individual AUSA would not appear at the Court with any regularity, and because no particular U.S. Attorney's office would be likely to make frequent appearances before the Court,³²² the credibility gap between the two sides would likely be reduced.

This "solution" seems deeply unsatisfactory. For one, it would not fully address the imbalance because a number of criminal cases are litigated by states, not the federal government. And so meaningful leveling-down would require some additional restructuring of how *state* governments handle appeals in criminal cases—making this alternative proposal even more implausible.

The larger problem, though, is that the cure seems worse than the disease. Leveling down would make the two sides in criminal litigation more evenly matched, on average. But it would also clearly make the overall level of advocacy at the Supreme Court worse, or at least much less consistent. That change would, we fear, make Supreme Court decisionmaking more random in individual cases, as the level of advocacy on each side would be somewhat unpredictable from case to case. That randomness would, to be sure, benefit both sides of criminal litigation roughly evenly over time. But it would also likely make the Court a less effective regulator. The Court finds advocates from the Solicitor General's Office, like Michael Dreeben, credible because they provide the Justices with useful information and intelligent arguments that help them make better decisions.

We see no good reason to deprive the Court of that assistance. We care about the asymmetry in Supreme Court litigation because it leads the Court to produce substantively worse regulation—not because some balance of advantage in criminal litigation is inherently desirable.³²³ The two sides in

³²² There are some possible exceptions. The Southern District of New York, which is particularly prominent in criminal prosecutions for financial crimes, and the Eastern District of Virginia, in which a number of high-profile national security prosecutions take place, might make more frequent appearances. See Sari Horwitz, *In Va.'s Eastern District, U.S. Attorney's Reach Transcends Geographic Bounds*, WASH. POST (Dec. 15, 2012), https://www.washingtonpost.com/world/national-security/in-vas-eastern-district-us-attorneys-reach-transcends-geographic-bounds/2012/12/15/a3f8f992-4625-11e2-9648-a2c323a991d6_story.html [<https://perma.cc/2LER-5YWG>]; Allan Smith, *'We Know How to Do This Better Than Anybody': Southern District of NY on the Job After Mueller Probe Ends*, NBC NEWS (March 25, 2019, 11:33 AM EDT), <https://www.nbcnews.com/politics/donald-trump/we-know-how-do-better-anybody-southern-district-ny-job-n978681> [<https://perma.cc/SMP3-CD54>] (quoting a former AUSA in the Southern District of New York, describing that office as "historically . . . very independent, . . . especially in the financial crimes spaces," where the office "made its name" (quotation marks omitted)). Still, we think these appearances would not be nearly frequent enough to generate the institutional credibility currently enjoyed by the Solicitor General's Office.

³²³ For a fascinating discussion of attitudes towards the balance of power in criminal procedure, see Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1441-42, 1456-58 (1985).

criminal litigation “are not athletic teams, or separate branches of government that we hope will keep each other in check.”³²⁴ In this context, equality between the two sides is an instrumental tool, not the ultimate goal. It would be foolish to make the Court’s decisionmaking worse simply to make sure neither side has an advantage.

2. Regulatory Alternatives

If leveling down is not a good solution, the only other alternative would be to try to transfer power over criminal justice regulation to some new or different institution that isn’t the Supreme Court. Perhaps the problem is just with the use of *litigation* as the mechanism for regulatory rulemaking in the criminal arena. One can imagine legislatures taking on a larger role for regulating criminal justice. More adventurously, imagine (and bracket for now all federalism problems involved in this exercise) that some new federal agency or commission was put in charge of regulating some of the things currently under the Supreme Court’s jurisdiction—like the basic rules governing police practices. Perhaps such an agency, if well designed, could make rules without the distorting effect inevitably caused by adjudicating individual cases.

Perhaps—but it is important to “avoid comparing a model of case-based lawmaking that recognizes its flaws and limitations with an idealized model of . . . rulemaking that refuses to recognize the limitations of that process.”³²⁵ As Neil Komesar puts it, when selecting among different institutions “[t]he choice is always a choice among highly imperfect alternatives.”³²⁶ Here, the critical point is that there is no reason to think there is a plausible criminal justice regulator that would be immune from the pro-government distortions that afflict the Supreme Court’s process.

Consider legislatures first. As noted at the outset, the conventional wisdom is that the Court is the right institution to regulate criminal justice precisely because legislatures tend to be so hostile to defendants’ interests.³²⁷ And indeed, there are a number of arguments for why legislatures are likely to be particularly friendly to law-enforcement interests. That may be what *voters* want, because voters are more likely to identify with victims of crime than with those accused of crime.³²⁸ The way that power over criminal justice

324 David Alan Sklansky, *Two More Ways Not to Think About Privacy and the Fourth Amendment*, 82 U. CHI. L. REV. 223, 236-37 (2015). Sklansky’s remark was about the balance of power between *police* and criminals, but it is equally apt here.

325 Schauer, *supra* note 59, at 912.

326 KOMESAR, *supra* note 39, at 5.

327 See *supra* note 1 and accompanying text.

328 See Dripps, *supra* note 1, at 1093 (“The class of people at risk from [decisions not to arrest or convict individuals who are in fact guilty] is very large, and quite sensibly frightened about crime.

is shared between legislatures and prosecutors may create asymmetrical political incentives for legislators to pass tough-on-crime laws.³²⁹ And law-enforcement interests are highly effective at lobbying legislatures for their preferred reforms, whereas those subject to criminal law are much less equipped to organize in order to protect their interest in the legislative arena.³³⁰ Indeed, criminal suspects and defendants fare relatively poorly in the legislative process vis-à-vis the government for the same reasons that they fare less well in the judicial process—the government can present a unified front, whereas individual suspects and defendants are poorly equipped to band together and protect their interests.

Nor do agencies necessarily fare better than courts. That's because pro-law-enforcement interests are likely to be highly effective at influencing any regulatory body. Consider the U.S. Sentencing Commission. Although intended to be an insulated, independent body of experts, the Commission has at times become largely beholden to the interests of federal prosecutors.³³¹ Law-enforcement interests can thus “capture” a criminal justice regulatory agency in the same way that a regulated industry can capture a more traditional agency. Preventing such capture in criminal justice agencies would be a challenging task. Even if it is possible, and even if shifting the locus of criminal justice regulation from courts to agencies would be otherwise desirable, it would take a fundamental reworking of our institutions. Yet we need better *national* criminal justice policy in the here and now. For better or worse, that will come (or not) from the Court. Creating an Office of the Defender General is a relatively simple and practical reform that could improve the Court's criminal justice policymaking process immediately.

CONCLUSION

The list of broken institutions and harmful practices in American criminal justice is long—mass incarceration, police violence, coercive plea bargaining, and racially disparate policing and prosecution, to name a few. Each of these problems, and many more, impact the lives of thousands or millions of

Their interests are supported by a professional class with a very intense interest in the outcome of legislative decisions regarding criminal justice.”).

³²⁹ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509-10 (2001) (discussing how voters' demand for harsh treatment of criminals and the benefit of cooperation between prosecutors and legislators encourages an alliance that leads to broader liability rules and harsher sentences).

³³⁰ For a discussion of interest-group dynamics within sentencing commissions, see Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 723-30 (2005).

³³¹ See *id.* at 758-65 (explaining that the membership-selection features of the U.S. Sentencing Commission, in conjunction with other incentives, have led it to often be “heavily tilted toward law enforcement” and prosecution interests).

Americans, year in and year out. What are the technical details of litigation in the Supreme Court next to problems of their magnitudes?

Yet for better or worse, the Supreme Court's rulings affect the pathologies of criminal justice. They may not be their root cause, but sometimes—too often—they exacerbate them. Those concerned with reform of criminal justice—as we are—should worry about the Court. Specifically, they should worry about ways in which the details of Supreme Court litigation disadvantage criminal defendants. The asymmetric representation we have described is a significant example, and a real problem. It's also, as we've shown, a fixable one. The Defender General is an idea whose time has come.