

FIVE FACES OF THE PUBLIC DEFENDER

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SCOTT W. HOWE*

Abstract: Special stigma attaches to zealous public defenders. They are widely viewed as undermining the public welfare, of acting immorally, and of inappropriately empathizing with criminals over victims. Poor funding for public defender offices in many jurisdictions underscores what the body politic in those places thinks of unsparingly zealous public defense. The stigma finds sustenance in an account endorsed by zealous public defenders themselves—that they function as client-centered advocates, operating largely outside the criminal justice system and without caring about the public welfare, about guilt or innocence, or much about victims. This scenario poses a dilemma for zealous public defenders who aim to counter the allegations or for poorly funded defender offices that seek to acquire more resources so that they can consistently provide zealous representation. How can they rebut criticisms with which they largely agree? This Article argues that they could, in theory, acknowledge their work as multi-faceted, requiring that they sometimes serve as zealous advocates but often also in several roles that directly benefit the state. This alternate perspective finds support in the Supreme Court’s acknowledgement in recent years that criminal justice has become, for the most part, a system of guilty pleas rather than of trials. Although this strategy is the most truthful and responsive to the critics, this Article finds it unworkable from the perspective of the zealous public defenders, which reveals a conundrum. Zealous public defenders must deceive themselves that they are rebels who do not care about the public interest (or about justice or victims) to effectively serve it. Although they face difficulty in making their own case, this Article exposes the reality and the illusion to help defend zealous public defenders against their critics.

INTRODUCTION

In 2022, Ketanji Brown Jackson was nominated to the Supreme Court.¹ Jackson’s nomination to the High Court fueled a controversy over the work

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¹ *The Senate Confirms Ketanji Brown Jackson to Serve on the U.S. Supreme Court*, WHITE HOUSE.GOV, <https://www.whitehouse.gov/kbj/> [<https://perma.cc/7HW7-VA85>]. Justice Jackson, nomi-

and perspectives of public defenders.² Justice Jackson's nomination catalyzed discussion about public defenders' work because, before serving as a federal judge, she worked as an assistant public defender for the Office of the Federal Public Defender, in Washington, D.C.³ Her stint lasted only two and a half years, and she worked mostly on appellate cases in which she was addressing questions of law before judges rather than contesting facts before juries.⁴ Nonetheless, that prior experience was noteworthy. Before Joe Biden's presidency, former public defenders were much less likely than former prosecutors to be appointed to the lower federal courts,⁵ and no former public defender had ever been nominated to the Supreme Court.⁶

Public commentary divided sharply over Justice Jackson's public defender experience.⁷ For many supporters, Justice Jackson's public defender background favored her confirmation.⁸ President Biden reportedly nominated Justice Jackson in part because she served as a public defender, a job President Biden held for a short time as a young lawyer.⁹ Current and former public de-

nated by President Joe Biden, is the Court's 116th Associate Justice, succeeding Justice Stephen Breyer. *Id.*

² Carl Hulse, *Jackson's Record as Defender Likely to Be Target of Senators*, N.Y. TIMES, Mar. 17, 2022, at A1 (noting that attacks against Justice Jackson's nomination "reflect what has emerged in recent months as a Republican effort to vilify and discredit President Biden administration judicial nominees who have served as public defenders").

³ See Charlie Savage, *As Public Defender, Supreme Court Pick Aided Clients Others Avoided*, N.Y. TIMES, Feb. 22, 2022, at A20 (noting that this background is "likely to receive particular scrutiny").

⁴ *Id.* Justice Jackson also represented several Guantanamo Bay prisoners, suspected of terrorist activities, in habeas corpus actions challenging their detentions. *Id.*

⁵ See Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates?*, CATO INST. (May 27, 2021), <https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates> [<https://perma.cc/66X7-7SNM>] (noting that, as of 2019, 318 out of 880 federal judges had previously served as prosecutors, while only 58 had served as public defenders). Nevertheless, the Biden administration has nominated more judges with criminal defense backgrounds, particularly women of color, in an effort to increase diversity on the federal bench. Hulse, *supra* note 2.

⁶ See Savage, *supra* note 3 (noting that Justice Jackson's anticipated confirmation would represent the first time a public defender would be on the modern Court).

⁷ See, e.g., Hulse, *supra* note 2 (noting the polarized commentary on Justice Jackson's public defender background).

⁸ See, e.g., Harper Neidig, *Criminal Justice Reformers Rally for First Public Defender on Supreme Court*, THE HILL (Mar. 20, 2022), <https://thehill.com/regulation/court-battles/598834-criminal-justice-reformers-rally-for-first-public-defender-on/> [<https://perma.cc/E72Z-3AXT>] (noting that her nomination has "energized criminal justice reformers").

⁹ See Hulse, *supra* note 2 (noting President Biden's early career experience as a public defender and that he has actively sought to nominate more judges with public defense backgrounds); Katie Rogers, *Biden Picks Jackson to Be First Black Woman on Supreme Court*, N.Y. TIMES, Feb. 26, 2022, at A1 (noting Justice Jackson's public defender experience "made her an unusual, but to Mr. Biden, appealing, choice").

fenders urged the value of Justice Jackson's experience and the beneficial insights it would help bring to the Court.¹⁰

Opponents of Justice Jackson's confirmation alleged that her public defender work was problematic and revealed her heterodox perspectives.¹¹ Senator Josh Hawley questioned the fitness of former public defenders to serve on the Court: "[l]ike any attorney who has been in any kind of practice, they are going to have to answer for the clients they represented and the arguments they made."¹² Senator Ted Cruz urged in a television interview that a public defender background was "radical" and "troubling."¹³ He contended that public defenders' "heart[s] [are] with the murderers" and that they "often have a natural inclination in the direction of the criminal."¹⁴ Most Republicans on the Senate Judiciary Committee at the time apparently held similar views, as most of them opposed confirming public defenders to the federal bench.¹⁵ Indeed, before President Biden, "presidents of both political parties [had] long shied away" from nominating former public defenders for judgeships "because of their susceptibility to political attacks tied to the crimes attributed to their clients."¹⁶

¹⁰ See, e.g., Premal Dharia, *Opinion: I Was a Public Defender for Over a Decade. KBJ's Empathy Is What Our Highest Court Needs*, CNN (Apr. 8, 2022), <https://www.cnn.com/2022/04/08/opinions/ketanji-brown-jackson-confirmation-public-defender-dharia/index.html> [<https://perma.cc/W896-MWTN>] (urging that Justice Jackson's empathy and experience as a public defender would benefit the Supreme Court); Vida B. Johnson & Robin Walker Sterling, *Judge Jackson's Public Defender Past Is a Strength, Not a Weakness*, U.S. L. WK. (Mar. 23, 2022), <https://news.bloomberglaw.com/us-law-week/judge-jacksons-public-defender-past-is-a-strength-not-a-weakness> [<https://perma.cc/A4PV-UGP7>] (urging that Justice Jackson's public defender background would make her "pro-fairness and pro-Constitution"); see also Neidig, *supra* note 8 (noting hope among those supporting criminal justice reform that "[Justice Jackson] could end up serving as a sort of spiritual leader for that movement from the bench").

¹¹ See Austin Sarat & Dennis Aftergut, *Republicans Are Attacking Judge Jackson for Defending Poor People's Rights*, THE HILL (Mar. 21, 2022), <https://thehill.com/opinion/judiciary/598978-republicans-are-attacking-judge-jackson-for-defending-poor-peoples-rights/> [<https://perma.cc/7SGT-E7XC>] (noting, for example, opponents' skepticism that Justice Jackson's representation of accused criminals would affect her ability to perform the duties of a Supreme Court justice).

¹² Hulse, *supra* note 2.

¹³ Fox News, *Cruz: This Is Very Disturbing*, YOUTUBE (Apr. 3, 2022), <https://www.youtube.com/watch?v=kzS0F-2Js4g> [<https://perma.cc/NK7F-CMUM>] (capturing Senator Cruz's disapproval of Justice Jackson's sentencing practices with regard to criminal defendants compared to national averages).

¹⁴ *Id.*

¹⁵ Hulse, *supra* note 2; see also Carl Hulse, *Democrats Pick Nearly 100 Federal Judges*, N.Y. TIMES, Dec. 30, 2022, at A13 (noting Republicans' criticisms of President Biden's judicial nominees for being "too liberal and sympathetic to criminal defendants" to be federal judges).

¹⁶ Hulse, *supra* note 2.

This Article deconstructs the work of zealous public defenders and the stigma attached to it.¹⁷ By public defenders, I mean those who perform public defense full time, or nearly so, for indigent clients to whom they are assigned and at public expense.¹⁸ My focus is especially on those who defend at the trial level for two reasons—first, because almost all criminal defendants plead guilty and do not appeal;¹⁹ second, because zealous representation by defense counsel at the trial level, compared to the appellate level, evokes the most condemnation.²⁰

This Article discusses how zealous public defenders²¹ can defend themselves against their critics and how poorly funded defender offices can advocate for more resources to enable them to provide zealous representation. The Supreme Court’s jurisprudence provides indigent criminal defendants with a Sixth Amendment right to appointed counsel.²² Consequently, public defenders

¹⁷ Most criminal defense work is public defense work because criminally accused persons tend to be poor. *See, e.g., Note, Gideon’s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2065 (2000) (indicating that public defenders represent approximately 80% of criminal defendants due to indigence).

¹⁸ This definition is expansive in that it includes publicly funded, court-appointed attorneys in addition to salaried attorneys who work for a public-defender agency. There are reasons to distinguish the two categories based on the view that court-appointed attorneys may tend to face special problems and pressures in providing competent representation. The distinction, however, is less central to the discussion in this Article, which focuses mostly on zealous defenders, whether court-appointed or salaried in defender agencies.

¹⁹ *See, e.g.,* Jerry Kronenberg, *Right of a State Appeal in Criminal Cases*, 49 J. CRIM. L. & CRIMINOLOGY 473, 481 (1959) (stating that, for various reasons, many criminal defendants decide against appealing); *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (noting that guilty pleas produce 97% of criminal convictions in federal cases and 94% of criminal convictions in state cases).

²⁰ For the criticisms against trial-level public defenders, *see infra* Part II.B.

²¹ The view that a defense attorney should act with zeal on the client’s behalf is embodied in several non-binding portions of the American Bar Association Model Rules of Professional Conduct; for example, the comment to Rule 1.3 states that a lawyer must act with “zeal in advocacy upon the client’s behalf,” but the rule itself only states: “A lawyer shall act with reasonable diligence and promptness in representing a client.” *See, e.g.,* MODEL RULES OF PRO. CONDUCT r. 1.3, r. 1.3 cmt. (AM. BAR ASS’N 2013)). The notion of zealous representation in the modern era has become tied to Henry Brougham’s famous statement in his 1820 defense of Queen Caroline in the House of Lords regarding the duty of an advocate:

[A]n advocate, by the sacred duty of his connection with his client, knows, in the discharge of that office, but one person in the world, that client and none other. To save that client by all expedient means—to protect that client at all hazards and costs to all others, and among other to himself—is the highest and most unquestioned of his duties

HL Deb (3 Oct. 1820) (3) col. 114. For a history of how this view was long rejected but came to be accepted in modern times, *see generally* Michael S. Ariens, *Brougham’s Ghost*, 35 N. ILL. U. L. REV. 263 (2015).

²² *See, e.g.,* *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) (holding that the Sixth Amendment right to appointed counsel applies to individuals charged with a crime in federal court and quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932), on the danger that an unrepresented criminal defendant who is

are widely understood to play an essential role in our criminal justice system.²³ Yet, as the confirmation controversy surrounding Justice Jackson suggested, zealous public defenders are widely viewed as undermining the public welfare,²⁴ acting immorally,²⁵ and inappropriately empathizing with criminals over victims.²⁶ Poor funding levels for public defender offices in many jurisdictions underscore what the body politic in those places thinks of unsparingly zealous public defense.²⁷

innocent will be unable to prove it), *abrogation recognized by Jones v. Hendrix*, 143 S. Ct. 1857 (2023); *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963) (holding that the Sixth Amendment right to appointed counsel applies against the states in a felony trial and quoting the same language from *Powell*); *Argersinger v. Hamlin*, 407 U.S. 25, 31, 40 (1972) (extending the Sixth Amendment right to appointed counsel to any criminal trial where an accused is deprived of their liberty and, again, quoting the same language from *Powell*).

²³ See, e.g., MICHAEL SCOTT WEISS, PUBLIC DEFENDERS: PRAGMATIC AND POLITICAL MOTIVATIONS TO REPRESENT THE INDIGENT 11 (2005) (suggesting that defense attorneys fill the most crucial role in the adversarial court system); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1241 (1993) (discussing the general consensus that indigent criminal defendants deserve effective representation); see also Justin F. Marceau, *Gideon's Shadow*, 122 YALE L.J. 2482, 2484 (2013) (observing that the guarantee of counsel in criminal cases “is regarded as a right without peer, even in a field of litigation saturated with constitutional protections”); Donald A. Dripps, *Up from Gideon*, 45 TEX. TECH. L. REV. 113, 114 (2012) (asserting that there is a general consensus in the legal profession that “*Gideon*’s appointed counsel rule” was “a great decision . . . both in the sense of historical significance and in the sense of achieving justice”).

²⁴ See, e.g., KEVIN DAVIS, DEFENDING THE DAMNED: INSIDE CHICAGO’S COOK COUNTY PUBLIC DEFENDER’S OFFICE 36 (2007) (noting the public’s view that public defenders “subvert justice and aid the criminals”); Mark H. Moore, Michael P. Judge, Carlos J. Martinez & Leonard Noisette, *The Best Defense Is No Offense: Preventing Crime Through Effective Public Defense*, 29 N.Y.U. REV. L. & SOC. CHANGE 57, 60 (2004) (“To the extent that the public believes that deterrence and incapacitation effectively control crime, and that a publicly financed zealous defense gets guilty defendants off on technicalities, public defenders appear to be obstacles to effective crime control.”); Craig M. Bradley & Joseph L. Hoffmann, *Public Perception, Justice, and the “Search for Truth” in Criminal Cases*, 69 S. CAL. L. REV. 1267, 1296 (1996) (“A large part of the public’s disdain for lawyers, and for the criminal justice system in general, can be attributed to the perception that lawyers are simply *too* adversarial, seeking to ‘win at all costs’ without regard to the ‘truth’ or the interests of the larger society.”); see also JONATHAN RAPPING, *GIDEON’S PROMISE: A PUBLIC DEFENDER MOVEMENT TO TRANSFORM CRIMINAL JUSTICE* 13 (2020) (noting that while the public defender “must ferret out violations of the process and correct them,” this is also a view “that the current legal system finds pesky and does not tolerate”).

²⁵ See, e.g., Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 86 (1995) (noting that public defenders are often viewed by the public as immoral for doing the job (citing JAMES KUNEN, “HOW CAN YOU DEFEND THOSE PEOPLE?”: THE MAKING OF A CRIMINAL LAWYER (1983))); see also Paul Butler, *How Can You Prosecute Those People?*, in HOW CAN YOU REPRESENT THOSE PEOPLE? 15, 18–19 (Abbe Smith & Monroe H. Freedman eds., 2013) (asserting that concern over defense of the guilty arises from the view that defense attorneys are often aware of their client’s guilt).

²⁶ See *supra* notes 13–16 and accompanying text (explaining common criticisms of Justice Jackson’s public defense background upon her nomination to the Supreme Court).

²⁷ See Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2153 (2013) (“[M]ost states, counties, and municipalities—responsible for over ninety-five percent of all criminal prosecutions—have refused to provide funding

This Article frames the possible responses by first describing, from an academic perspective, the tasks of public defenders in relation to their clients' autonomy and the demands of the state.²⁸ The descriptive effort reveals that a one-dimensional and static account will not work because the mission of public defenders is neither singular nor fixed. Rather, the public defender has multiple roles that accommodate the interests of both the clients and the state.²⁹

Although this framework could, in theory, help challenge the stigma attached to zealous public defenders, this Article reveals a puzzle. Both the critics and the zealous public defenders fail to acknowledge that public defense work primarily serves interests other than those of the clients.³⁰ Yet, the notion that zealous public defenders care only about their clients poses a dilemma if the defenders seek to respond to the allegations. How can they exonerate themselves against accusations with which they largely agree?³¹

This Article concludes that responding truthfully and persuasively to this question requires viewing a public defender's work differently than they typically see it.³² Rebuttal demands acknowledgement that public defenders are more than client-centered advocates.³³ It requires focusing less on their adversative behavior in trials and motions and more on their cooperative work in

necessary for counsel and equal justice, despite repeated reports of deficient representation and gross miscarriages of justice.”). Many observers see a need to improve the funding and effectiveness of insufficiently aggressive public defender offices to enable them to protect the innocent and others who may confront police and prosecutorial mistreatment. *See, e.g.,* Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15, 82–83 (2016) (noting that after an American Bar Association Report appeared in 1983, “advocates have described indigent defense in a language of ‘crisis’ that has never abated”); Mary Sue Backus & Paul Marcus, *The Crisis in Indigent Defense: A National Perspective*, J. VA. TRIAL LAWS. ASS’N 19, 19 (2006) (“In the four decades since Gideon, a plethora of studies and reports has attempted to call attention to the problems plaguing individual indigent defense systems.”) Yet this view meets opposition because zealous public defenders are also viewed as posing a danger. *See, e.g.,* Moore et al., *supra* note 24, at 58 (“If public defenders are perceived as pro-criminal, and if the operations of public defender agencies are perceived as increasing society’s vulnerability to crime, the public will see no reason to support their activities.”).

²⁸ *See infra* Part I (discussing the five roles of zealous public defenders as they relate to the interests of both the client and the state).

²⁹ *See infra* Part I (discussing the five roles of zealous public defenders as they relate to the interests of both the client and the state).

³⁰ *See infra* Part II.B (highlighting commonalities between the views of zealous public defenders and their critics).

³¹ This Article does not support any suggestion that public defenders generally are morally deficient, although it also does not aim to establish that public defenders should always be free of self-doubt for behaviors that go to “the outer barricade[s] of zealous representation.” Barbara Babcock, *“Defending the Guilty” After 30 Years*, in HOW CAN YOU REPRESENT THOSE PEOPLE?, *supra* note 25, at 8.

³² *See infra* notes 293–305 and accompanying text.

³³ *See, e.g., infra* notes 122–146 and accompanying text (discussing, for example, the public defender’s role as a state emissary).

promoting guilty pleas.³⁴ Likewise, an adequate response requires acknowledging that public defenders' trial work serves not mostly to protect the trial clients but to legitimize the larger adjudication system.³⁵ Zealous public defenders help protect against the distribution of undeserved punishment but also promote the efficient and legitimized distribution of punishment through guilty pleas.³⁶

Yet a conundrum remains: can public defenders find motivation to zealously oppose the government in appropriate cases on this understanding or must they deceive themselves by believing that they are solely client-centered advocates? This Article concludes that public defenders cannot properly challenge prosecutors and judges as they should if they begin to see themselves as mostly cooperative players in a bureaucratic, plea-bargaining system. Their need for self-deception or self-repression is central to the unusual work they perform.³⁷ Consequently, others must defend public defenders against their critics. Their advocates, however, must stand outside of the illusion to convey both the value of the zealous defenders' work and the importance of the illusion in performing it.

This Article proceeds in three stages. Part I asserts that, from an academic perspective, the public defender plays five roles.³⁸ The first is as an agent of the client, engaged to serve the client's interests substantially as the client envisions them.³⁹ The second is as a guardian for the client, heavily pursuing the defender's view of the client's best interests.⁴⁰ The third is as a mediator, appointed to try to accommodate the interests of both the client and the state.⁴¹ The fourth is as an emissary sent by the state to communicate the government's view of the case, to hear out the defendant's responses, and to guide the defendant through the state's adjudicatory and sentencing processes.⁴² The fifth is

³⁴ See *infra* notes 147–184 and accompanying text (explaining the public defender's role as a guilty-plea advocate).

³⁵ See, e.g., LISA J. MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* 172 (1987) (discussing that public defenders' main contribution is to "maintain the impression" that an accused person's rights are safeguarded by the criminal justice system).

³⁶ See *infra* notes 280–282 and accompanying text (suggesting that the value of public defenders' work may lie primarily in making the guilty-plea and adjudication systems appear legitimate).

³⁷ Zealous public defenders often become immersed in a theatrical performance at trial. See, e.g., H. RICHARD UVILLER, *VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA* 154 (1996) (highlighting the observation of former prosecutor that, "it may well be that the most effective defense is provided by a theatrical champion, master of dissimulation and sleight-of-tongue").

³⁸ See *infra* notes 59–184 and accompanying text.

³⁹ See *infra* notes 67–84 and accompanying text.

⁴⁰ See *infra* notes 85–104 and accompanying text.

⁴¹ See *infra* notes 105–121 and accompanying text.

⁴² See *infra* notes 122–146 and accompanying text.

as a guilty-plea advocate, assisting the state in securing guilty pleas in its effort to legitimize the efficient distribution of deserved punishment.⁴³

Part II presents an alternate understanding of the role of public defenders by way of two seemingly disparate observers of the criminal justice system—ironically, these two observers largely coalesce in their views regarding the zealous public defenders.⁴⁴ The first is a zealous public defender.⁴⁵ The second is a tax-paying, crime-victim critic.⁴⁶ Both agree that zealous public defenders do not care about the public welfare, about guilt or innocence,⁴⁷ or much about victims.⁴⁸ From both perspectives, zealous public defenders serve only as client-centered advocates functioning primarily as trial lawyers aggressively seeking acquittals.⁴⁹ From both perspectives, they are “lawyer-outlaws” who reject the notion that they are part of the adjudication system.⁵⁰ This coalescence of views challenges zealous public defenders, or those defender offices that seek improved funding, in any effort to respond to the critics.

Part III focuses on three strategies that zealous public defenders could, in theory, pursue to try to respond.⁵¹ First, they could continue to identify solely as

⁴³ See *infra* notes 147–184 and accompanying text.

⁴⁴ See *infra* notes 187–226 and accompanying text.

⁴⁵ See *infra* notes 187–201 and accompanying text.

⁴⁶ See *infra* notes 202–226 and accompanying text. Some critics find the public funding of zealous defenders especially galling. See, e.g., BRADLEY M. BITTAN, *THE PUBLIC DEFENDER EXPERIENCE: INSIDE THE HEADS AND HEARTS OF AMERICA’S “REAL LAWYERS”* 33 (1997) (noting that some people consider public defense funding, which is derived from the public’s tax dollars, to be a waste of money).

⁴⁷ See PAUL B. WICE, *PUBLIC DEFENDERS AND THE AMERICAN JUSTICE SYSTEM* 173 (2005) (“Most laymen cannot grasp how a defender is willing to make a career out of representing so many obviously guilty clients.”); Barbara Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 180 (1983–1984) (asserting that “the fundamental mind-set of most criminal defense lawyers . . . is one of staggering indifference” to the innocence or guilt of their clients); Robert P. Mosteller, *Why Defense Attorneys Cannot, but Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1, 11 (2010) (observing from his seven years at the Public Defender Service for the District of Columbia that he “practiced most days as if [he] did not care about guilt or innocence”). Defenders must care, however, about guilt in some narrow circumstances. Knowledge of guilt based, for example, on a client’s confidential confession to defense counsel limits how counsel can defend the client. See MODEL RULES OF PRO. CONDUCT r. 3.3(a)(3) (AM. BAR ASS’N 2013) (prohibiting the lawyer from offering evidence the lawyer knows to be false).

⁴⁸ See *infra* note 284 and accompanying text (sharing public defenders’ concessions that they do not think much about victims’ suffering).

⁴⁹ See WEISS, *supra* note 23, at 13 (noting “the image of criminal defense attorneys as savvy, passionate and noble fighters for underdog clients”); *id.* at 15 (noting the image of “confrontational trial crusaders that grows out of the adversarial model”).

⁵⁰ Barbara A. Babcock, Book Review, 53 GEO. WASH. L. REV. 310, 315 (1984–1985) (reviewing JAMES S. KUNEN, “HOW CAN YOU DEFEND THOSE PEOPLE?”: THE MAKING OF A CRIMINAL LAWYER (1983)); see also MCINTYRE, *supra* note 35, at 150 (noting that public defenders mostly view their role as that of a trial lawyer and suggesting that the self-perception is modestly delusional “given the relative frequency of these performances”).

⁵¹ See *infra* notes 227–292 and accompanying text.

zealous, client-centered advocates and reject the allegations as misdirected at them rather than at the rules and conventions of the adjudication system.⁵² Second, they could try to continue to identify solely as zealous, client-centered advocates but abandon their indifference to consequences and argue that their adversarial work directly fosters the public welfare.⁵³ Finally, they could acknowledge that they have five roles, sometimes serving as zealous advocates but, more often, as agents for both their clients and the state.⁵⁴ The first approach is the least responsive to the critics, the second one is a compromise that is somewhat more forthcoming, and the last one is the most compelling. Nevertheless, the public defender who embraces the latter strategies will likely undermine their own work to the extent that they persuade their critics. The defender will soon see their role primarily as a bureaucratic actor serving the adjudication system, which will impair the defender's ability to appropriately challenge the system and thereby to legitimize it.⁵⁵

This Article concludes that self-deception and misapprehension help explain both how public defenders can function zealously to legitimize the system but also why their place in it is perilous.⁵⁶ Zealous defenders operate in multiple roles that directly serve both their clients and the state.⁵⁷ At the same time, they must deceive themselves that they are only client-centered advocates to perform effectively.⁵⁸ Their critics operate on the same misapprehension, and zealous defenders cannot defend themselves because they must stay immersed in their illusion to survive. This is the central puzzle of the zealous defenders' contested place and why it is difficult to muster widespread support for them. Zealous defenders thrive, as does the stigma about them, in the failure to acknowledge that they have five faces. Recognizing both the reality and the illusion may help some skeptics see the value and the difficulty of the zealous public defender's work.

⁵² See *infra* notes 231–243 and accompanying text.

⁵³ See *infra* notes 244–266 and accompanying text.

⁵⁴ See *infra* notes 267–292 and accompanying text.

⁵⁵ See *infra* notes 234–238 and accompanying text.

⁵⁶ See *infra* notes 293–305 and accompanying text.

⁵⁷ See *infra* notes 105–184 and accompanying text (describing the public defender's mediator, emissary, and guilty-plea advocate roles, which also benefit the state).

⁵⁸ For many public defenders, the job is ethically and emotionally challenging. See, e.g., Susan Bandes, *Repression and Denial in Criminal Lawyering*, 9 BUFF. CRIM. L. REV. 339, 364–83 (2006) (detailing the coping mechanisms that criminal defense lawyers use to deal with the “emotionally difficult aspects of their jobs” and discussing the negative consequences of those strategies); Randy Bellows, *Notes of a Public Defender*, in THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES 69, 97 (Phillip B. Heymann & Lance Liebman eds., 1988) (noting, upon leaving his job as a public defender, “I do not do good when I help bad men go free”); KUNEN, *supra* note 25, at 143 (capturing a former public defender's observation that “[y]ou get worn out from *not feeling* the pain and sadness”).

I. THE FIVE ROLES

From an external, academic perspective, public defense in criminal cases serves both the defendant and the state. Criminal defense lawyers who are paid by the client or work voluntarily also serve both parties. Nevertheless, the duality of masters is more salient where the state pays the defense lawyers and the clients do not choose them. Many indigent criminal defendants surmise that their public defenders have conflicted interests, which undermines the defendant's trust in their defense counsel.⁵⁹ Those defendants are not wrong to notice that their lawyers also work for the government.⁶⁰ The public defender acts in five roles that vary along a spectrum from client-centered to state-centered but that often overlap. The degree to which the lawyer acts more in some roles than in others depends in part on their working circumstances and their choices in addition to the circumstances of the case. There is also often room for debate, on both descriptive and normative levels, over which, if any, role predominates.⁶¹

Section A of this Part discusses the public defender's role as an agent of the client, in which defenders largely take on the client's vision regarding the defense.⁶² Section B of this Part analyzes the public defender's role as a guardian of the client, in which the defender actualizes their own perception of the client's best interests.⁶³ Section C of this Part explores the ways in which a public defender also acts as a mediator, a role in which the defender accounts for both the interests of the client and the state.⁶⁴ Section D of this Part introduces the public defender's fourth role as that of an emissary, a role in which the defender acts as a liaison, communicating the government's view to the client and helping the government guide the client through the guilty-plea and sentencing stages.⁶⁵ Finally, Section E of this Part defines the public defender's

⁵⁹ See, e.g., JONATHAN D. CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE* 123 (1972) (asserting, based on study of criminal defendants' views about the criminal justice system, that "[f]or the bulk of the defendants—represented by public defenders—their attorney appeared to be at best a middleman and at worst an enemy agent"); see also Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83, 119–21 (2003) (discussing mistrust of public defenders by their clients, which can be "stressful and tiresome" for the defender).

⁶⁰ See, e.g., WICE, *supra* note 47, at 177–78 (noting that clients interpret the fact that public defenders work for the government as a conflict of interest and quoting a defender who acknowledged "the plausibility of his clients' concerns").

⁶¹ See discussion *infra* Part II.

⁶² See *infra* notes 67–84 and accompanying text.

⁶³ See *infra* notes 85–104 and accompanying text.

⁶⁴ See *infra* notes 105–121 and accompanying text.

⁶⁵ See *infra* notes 122–146 and accompanying text.

fifth role as a guilty-plea advocate, a role in which the defender helps the state achieve plea deals, thereby promoting efficiency.⁶⁶

A. Agent

The first role of the public defender is as an agent of the client, appointed to pursue the client's interests largely as the client perceives them. This agency model coincides with an English and American history of self-representation.⁶⁷ At common law, self-representation was standard and it remained frequent after the laws of England and the United States provided for a defendant's right to counsel in criminal cases.⁶⁸ In the modern era, self-representation is a constitutional right of the accused.⁶⁹ The Supreme Court also has interpreted the Sixth Amendment⁷⁰ to give the indigent accused a right to appointed counsel in any case involving a deprivation of liberty or a suspended sentence that may end up in the actual deprivation of liberty.⁷¹ The right to self-representation, however, protects the accused's dignity and autonomy, and the appointment of counsel does not eliminate that protection.⁷² The Sixth Amendment guarantee of counsel only "speaks of the 'assistance' of counsel,"⁷³ and the Court has asserted that it "contemplat[es] a norm in which the accused, and not a lawyer, is master of their own defense."⁷⁴

The Court also has supported some interpretations of the Sixth Amendment that coincide with the view of the client as master and the lawyer

⁶⁶ See *infra* notes 147–184 and accompanying text.

⁶⁷ *Gonzalez v. United States*, 553 U.S. 242, 254 (2008) (Scalia, J., concurring in judgment) ("[A]ction taken by counsel over his client's objection . . . [has] the effect of revoking [counsel's] agency with respect to the action in question."); *Agency*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "agency" as a relationship between parties in which the agent acts on behalf of the principal).

⁶⁸ See *Faretta v. California*, 422 U.S. 806, 823 (1975) (noting that self-representation was once a litigation requirement and that, even when it stopped being so, it continued being litigants' general practice (citing F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 211 (2d ed. 1909))).

⁶⁹ See *id.* at 834 (stating that the right to choose between self-representation and counsel resides only with the defendant).

⁷⁰ The Sixth Amendment provides, among other things, that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

⁷¹ See, e.g., *Alabama v. Shelton*, 535 U.S. 654, 658 (2002) (holding that the right to counsel applies to a defendant who receives a suspended sentence that may result in actual incarceration (citing *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972))). But see *Padilla v. Kentucky*, 559 U.S. 356, 389 (2010) (Scalia, J., dissenting) (arguing that the Sixth Amendment right to counsel simply provides a criminal defendant with the right to hire an attorney or use services volunteered by an attorney).

⁷² *McKaskle v. Wiggins*, 465 U.S. 168, 176–77 (1984) ("The right to appear *pro se* exists to affirm the dignity and autonomy of the accused . . .").

⁷³ *Faretta*, 422 U.S. at 820.

⁷⁴ *Gannett Co. v. DePasquale*, 433 U.S. 368, 382 n.10 (1979) (citing *Faretta*, 422 U.S. at 819–20).

as agent.⁷⁵ For instance, in 1983, in *Jones v. Barnes*, the Court emphasized the criminal defendant's final authority regarding certain decisions, including how to plead, whether to waive a jury, whether to testify, and whether to take or waive an appeal.⁷⁶ Additionally, in 2018, in *McCoy v. Louisiana*, the Court held that the accused has the authority to claim innocence at the guilt-or-innocence trial, which their lawyer cannot supersede by admitting guilt.⁷⁷ Confirming the importance of these safeguards, the Court ruled that their violation amounts to structural error that is not subject to harmless-error review.⁷⁸ These violations rank as structural in part because the autonomy rights at issue are not meant "to protect the defendant from erroneous conviction" but to enable the defendant to be the primary decision-maker over matters that affect their own liberty interests.⁷⁹

Although public defenders can hold different perspectives on what their agency entails, a maximal view would allow the accused to decide much more than what the Court has required. Indeed, in the last five decades, a client-centered approach,⁸⁰ rather than a lawyer-centered approach, has been at the forefront of teaching lawyering theory, especially in clinical legal educational settings.⁸¹ The client-centered approach even advises attorneys against offering their own opinions about what the defendant "ought" to do.⁸² This approach also calls for the client to "make[] all decisions that are likely to have a substantial legal or nonlegal impact on the client's life."⁸³ For example, the lawyer

⁷⁵ *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508–10 (2018).

⁷⁶ 463 U.S. at 751; *see also* *Garza v. Idaho*, 139 S. Ct. 738, 746–47 (2019) (reaffirming that the decision whether to file an appeal is the defendant's, not the lawyer's, choice; that counsel who disregards a defendant's directions to file an appeal has performed inadequately; and that a presumption of prejudice applies even if the defendant agreed to waive their right to appeal before the trial court).

⁷⁷ 138 S. Ct. at 1508–10. In dicta, the Supreme Court has also indicated that the defendant's physical presence at trial is a decision that belongs exclusively to the client. *Taylor v. Illinois*, 484 U.S. 400, 418 n.24 (1988) (citing *Cross v. United States*, 325 F.2d 629, 630–33 (D.C. Cir. 1963)).

⁷⁸ *McCoy*, 138 S. Ct. at 1511; *see also* *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (asserting that the right to self-representation is "not amenable to 'harmless error' analysis").

⁷⁹ *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017) (citing *Faretta*, 422 U.S. at 834).

⁸⁰ The client-centered perspective was initially proposed in the 1970s by Professors David Binder and Susan Price in their work on legal interviewing and counseling. *See generally* DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 123 (1977). Subsequent versions of the work have a modified title, and it is now in its fourth edition. *See* DAVID A. BINDER, PAUL B. BERGMAN, PAUL R. TREMBLAY & IAN S. WEINSTEIN, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (4th ed. 2019).

⁸¹ Todd A. Berger, *The Constitutional Limits of Client-Centered Decision Making*, 50 U. RICH. L. REV. 1089, 1093 (2016).

⁸² G. NICHOLAS HERMAN & JEAN M. CARY, *A PRACTICAL APPROACH TO CLIENT, INTERVIEWING, COUNSELING, AND DECISION-MAKING: FOR CLINICAL PROGRAMS AND PRACTICAL-SKILLS COURSES* 8 (2009).

⁸³ Berger, *supra* note 81, at 1092.

would defer to the client on matters such as which prospective jurors to challenge and which witnesses to call. Dispossessing defendants of the power to make these important decisions weakens their autonomy.⁸⁴ In contrast, to involve defendants in such decisions and defer to their wishes is to more fully actualize the notion of the public defender as an agent of the client.

B. Guardian

The second role of the public defender is as a guardian of the client. The prevailing view is that, although criminal defendants have a right of self-representation, they are generally unable to represent themselves effectively against skilled and experienced state actors, including police, prosecutors and judges.⁸⁵ The guardian role contemplates that the public defender helps overcome the defendant's disability insofar as the public defender has the relevant knowledge, experience, skills, and judgment that the client lacks.⁸⁶ This view of the accused as disadvantaged and in need of an expert to effectively guard their interests is a core explanation for early Supreme Court rulings that indigent criminal defendants have a right to appointed counsel under the Sixth Amendment.⁸⁷

Some Supreme Court doctrine also indicates that the lawyer plays a guardian's role at trial regarding how to pursue a client's objectives.⁸⁸ According to the Court, "[t]rial management is the lawyer's province."⁸⁹ Defense counsel has the authority to make several decisions regarding a case without the defendant's consent, including choosing arguments and objecting at trial.⁹⁰ Similarly, the Court maintains that counsel can unilaterally waive the client's

⁸⁴ Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147, 1159 (2010).

⁸⁵ See *Faretta v. California*, 422 U.S. 806, 835 (1975) (requiring that the accused who wishes to represent himself "must 'knowingly and intelligently' forgo" the benefits of counsel after "be[ing] made aware of the dangers and disadvantages of self-representation").

⁸⁶ See, e.g., *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932) (observing that even "the intelligent and educated layman has small and sometimes no skill in the science of law" and "lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one"); see also *Gonzalez v. United States*, 553 U.S. 242, 249–50 (2008) (noting that an attorney generally has a deeper understanding of procedural issues than a defendant would because an attorney uses expertise gained from having worked in the legal profession).

⁸⁷ See *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (describing the danger that an unrepresented criminal defendant who is innocent will be unable to prove it (quoting *Powell*, 287 U.S. at 68–69)); *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972) (same).

⁸⁸ See *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018) (noting that certain decisions regarding how to proceed at trial are to be made by counsel).

⁸⁹ *Id.*

⁹⁰ *Id.* (quoting *Gonzalez*, 553 U.S. at 248).

statutory right to a speedy trial⁹¹ and can consent in federal court to having a magistrate judge, rather than an Article III judge, preside over *voir dire* and jury selection.⁹² In effect, the public defender is the decision-maker on most strategy questions at trial.⁹³

The public defender may also serve as a guardian regarding decisions on what the objectives of the defense should be. Often, the public defender will propose an objective, such as to concede guilt in some form at trial, and the client will not disagree. A lawyer might propose, for example, to pursue a guilty but mentally ill verdict, to concede guilt as to a lesser-included offense but contest guilt on the greater charge, or to concede guilt of a capital charge and argue against a death sentence at the separate sentencing trial.⁹⁴ The client may not be fully comfortable with the lawyer's decision but also may not expressly object. In that case, the lawyer can go forward, and the client's later claim to a denial of their autonomy will not prevail.⁹⁵ In *McCoy*, the Court distinguished a defendant's autonomy to claim innocence at the guilt-or-innocence trial from the situation where the client remains unresponsive when consulted about the lawyer's proposal to concede guilt.⁹⁶ The Court further declared that a lawyer does not negate a defendant's autonomy to decide the defense objective if the defendant does not assert it.⁹⁷ In such a case, the public defender proceeds as a guardian.

In the plea-bargaining and sentencing contexts, public defenders also often act as guardians. Usually, the client does not participate in discussions with the prosecutors and must count on the public defender to report the terms of a plea bargain accurately.⁹⁸ The client also depends on counsel to not mislead

⁹¹ See *New York v. Hill*, 528 U.S. 110, 115 (2000) (noting that it is the province of counsel to determine the propriety of any delay in the case).

⁹² See *Gonzalez*, 553 U.S. at 251 (finding that the decision to have either a magistrate judge or an Article III judge preside over a case is not a fundamental trial choice requiring defendant's consent).

⁹³ See *supra* notes 89–92 and accompanying text (describing the lawyer's role at trial). For more decisions that the Supreme Court has viewed as tactical and, therefore, for the lawyer rather than the client, to decide, see *Berger*, *supra* note 81, at 1100–01.

⁹⁴ Christopher Slobogin, *Guilty but Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494, 495 (1985) (noting that the guilty but mentally ill verdict provides space for imposition of a sentence that fits the offense while also allowing the defendant to receive mental health resources while incarcerated or hospitalized).

⁹⁵ See, e.g., *Florida v. Nixon*, 543 U.S. 175, 187–92 (2004) (holding that where defendant was unresponsive when consulted, counsel's strategic choice to concede guilt of capital charge and argue against death sentence was not a negation of defendant's autonomy).

⁹⁶ *McCoy*, 138 S. Ct. at 1508–09.

⁹⁷ See *id.* at 1509 (noting that a defense attorney may choose to pursue the strategy they believe to be most beneficial if the defendant does not wish to be involved in the defense).

⁹⁸ See Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1462 (2005) (explaining that defendants rely on public defenders to communicate with the prosecution and negotiate terms and plea deals that are in their best interests because defendants do not

them about the adverse consequences of a guilty plea.⁹⁹ In preparation for the guilty-plea hearing, the public defender may counsel the defendant to follow a script of standard answers to expected questions from the judge, although the defendant would like to respond differently.¹⁰⁰ For example, when asked if anyone has threatened the defendant or promised them anything to get them to plead guilty, they must respond negatively to please the judge.¹⁰¹ This is so even if the defendant feels threatened by the additional charges and longer sentences the prosecutor would seek for convictions after a trial, and they have been promised some form of leniency in return for a plea.¹⁰² Moreover, at sentencing, the public defender may try to talk as much as possible in lieu of the client even if the client wishes to speak because the client may get sidetracked by their frustrations, fail to show much remorse, or worse, disclaim responsibility for the crime.¹⁰³ As guardian, a lawyer uses their skill and expertise to communicate between the client and the state while also bolstering the client's case to the extent permitted by the system.¹⁰⁴

typically communicate with prosecutors); *see also* *Missouri v. Frye*, 566 U.S. 134, 148–49 (2012) (holding that counsel's objectively unreasonable failure to inform a client of the prosecution's plea offer can, on an adequate showing of prejudice, deny the client the effective assistance of counsel).

⁹⁹ *See, e.g.,* *Lee v. United States*, 137 S. Ct. 1958, 1969 (2017) (holding that defendant demonstrated reasonable probability that he would not have pleaded guilty but for his counsel's erroneous advice as to the deportation consequences and, thus, the erroneous advice prejudiced defendant and amounted to ineffective assistance); *see also* *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (holding that counsel engaged in deficient performance by misadvising defendant on whether his plea of guilty made him subject to deportation, but not addressing question of prejudice); *Hill v. Lockhart*, 474 U.S. 52, 58–60 (1985) (holding that misinformation provided by counsel will not upset guilty plea if defendant would nonetheless have pleaded guilty); *cf. Lafler v. Cooper*, 566 U.S. 156, 174–75 (2012) (holding that defendant was prejudiced by counsel's deficient performance in erroneously advising that he could not be convicted at trial, which caused defendant to reject a guilty plea offer, after which he was convicted at trial and received a harsher sentence).

¹⁰⁰ *See* Natapoff, *supra* note 98, at 1464 (“Indeed, defendants often are told to say things they clearly do not mean or believe.”).

¹⁰¹ *Id.* (characterizing such responses as “counterintuitive speech rituals of plea colloquies”).

¹⁰² *See id.* (noting that most defendants are likely uncomfortable in denying that they have been threatened despite having received the prosecution's threats to add charges or to seek a heavier sentence if the defendant does not accept the plea deal); UVILLER, *supra* note 37, at 193 (noting that the “[s]tandard, required response” to the question of whether “anyone [has] threatened you or promised you anything to induce you to take this plea?” is “No, Your Honor”); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1170 (2008) (“Fictions permeate even the bargaining process: in many jurisdictions, defendants must concur on the record that no promises were made in exchange for their pleas even though bargains clearly were struck.”).

¹⁰³ *See* Natapoff, *supra* note 98, at 1465–66, 1470 (noting the potential for the client to “offend the judge” at sentencing and the tendency of defense counsel to try to silence the client).

¹⁰⁴ *Id.* at 1470.

C. Mediator

Often, the public defender serves a third role as a mediator.¹⁰⁵ The vast majority of dispositions in criminal cases come about after a guilty plea, and usually after an agreement by the defendant to plead guilty in exchange for some form of leniency by the prosecutor.¹⁰⁶ In this context, the public defender frequently operates as a “middle[person],” communicating with and sometimes negotiating with both the accused and the prosecutor regarding the terms of a guilty-plea agreement that both parties can accept.¹⁰⁷

The Supreme Court has endorsed plea bargaining as essential and permissible¹⁰⁸ and acknowledged defense counsel’s important role in its functioning.¹⁰⁹ Long ago, the Court recognized that plea bargaining is necessary to the effective operation of the criminal adjudication process at reasonable expense.¹¹⁰ Absent bargained guilty pleas, the courts could not handle all of the criminal cases without a huge increase in their funding.¹¹¹ With the exception of homicides, crime rates in the United States are comparable to those in Western Europe, but, according to the American body politic, all crime should be prosecuted as much as possible.¹¹² In this effort, a guilty plea takes a small fraction of the time and judicial resources involved with a trial, particularly a jury trial.¹¹³ According to the Court, plea bargaining also has advantages for both the prosecution and the accused because it conserves the state’s resources and allows defendants to receive more favorable sentencing terms.¹¹⁴ Further,

¹⁰⁵ RICHARD QUINNEY, *THE SOCIAL REALITY OF CRIME* 156 (1970) (describing the lawyer’s role as “a mediator between the client and judicial agents”).

¹⁰⁶ See, e.g., Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) (asserting that plea bargaining “is not some adjunct to the criminal justice system; it is the criminal justice system”).

¹⁰⁷ CASPER, *supra* note 59, at 123.

¹⁰⁸ See, e.g., *Blackledge v. Allison*, 431 U.S. 63, 71 (1977) (noting the importance of plea bargaining in the criminal justice system and its potential to benefit all parties).

¹⁰⁹ See, e.g., *Brady v. United States*, 397 U.S. 742, 758 (1970) (asserting an expectation that “courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel”).

¹¹⁰ See *Santobello v. New York*, 404 U.S. 257, 260 (1971) (declaring that plea bargaining “is an essential component of the administration of justice” and that, “[p]roperly administered, it is to be encouraged”).

¹¹¹ See *id.* (explaining that a court system without guilty pleas would require considerably more courts and judges because all criminal charges would require a full trial).

¹¹² See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 50 (2011) (observing that, aside from homicides, most countries in Western Europe have a comparable or higher crime rate than the United States); *id.* at 55–56 (noting the rise since the 1980s of the view that “a healthy criminal justice system should punish all the criminals it can”).

¹¹³ See Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 606 (2005) (noting the substantial difference in time, preparation, and resources between a guilty plea and a jury trial).

¹¹⁴ *Missouri v. Frye*, 566 U.S. 134, 144 (2012).

the Court has noted that realizing these benefits can require the participation of effective defense counsel during plea negotiations.¹¹⁵

As a mediator, the public defender may proactively pursue a plea bargain. The prosecutor and the defendant each have a veto over any proposal and, absent an agreement, the case usually will go to trial.¹¹⁶ To reach a deal, the public defender may suggest terms that will appeal to both the defendant and the prosecutor. For example, a public defender may be able to arrange a plea bargain involving a reduced charge before a grand jury indictment because the prosecutor may feel less room to bargain substantially in favor of leniency if there is already a formal charge in the case.¹¹⁷ Likewise, experienced public defenders may sometimes successfully advise prompt cooperation by their clients to provide information and evidence against other criminal actors to secure a good bargain.¹¹⁸ Experienced defenders have typically developed trust with prosecutors, allowing them to facilitate negotiations between the prosecutor and the defendant.¹¹⁹

The mediator role may also require the public defender to engineer a bargain that both the defendant and the prosecutor initially oppose but eventually abide. Mediation can mean negotiating with the prosecutor rather than only passively receiving a government offer (or merely proposing one to the prosecutor) and subsequently negotiating with the accused. The Supreme Court has indicated that defense counsel has a “duty” to engage in “bargaining” or “negotiation,” presumably with the prosecutor, yet the Court has avoided specifying the nature of that responsibility because it is so dependent on case-specific facts.¹²⁰ Despite uncertainty over how to describe what public defenders should do as intermediaries, there is no doubt that they can, and frequently do, negotiate in a persevering and ultimately influential way with both the prosecutor and the accused.¹²¹

¹¹⁵ *Id.* at 144–45.

¹¹⁶ See Natapoff, *supra* note 98, at 1462 (noting the defendant’s veto power in the bargaining process); see also Bright & Sanneh, *supra* note 27, at 2158 (noting the prosecutor’s power to dictate outcomes through plea bargaining in many cases).

¹¹⁷ Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2484–85 (2004) (observing that the prosecutor may have more trouble persuading their supervisor to endorse the deal).

¹¹⁸ See *id.* (noting the benefits of fast cooperation by the defendant and the ability of experienced public defenders to convince their clients to make a plea deal to cooperate).

¹¹⁹ *Id.*

¹²⁰ See *Frye*, 566 U.S. at 144–45 (noting that it is difficult to define the contours of this duty).

¹²¹ See, e.g., Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 128 (1995) (“Counsel’s ability to strike a responsive chord with an innovative or emotional presentation may succeed in moving a cynical prosecutor to offer a more favorable bargain.”); Bellows, *supra* note 58, at 90 (advising, as a former public defender, on the need, at times, to push clients to accept guilty pleas).

D. Emissary

Public defenders frequently serve a fourth role as an emissary of the state.¹²² In this capacity, public defenders help make the guilty-plea system function more efficiently and, at least seemingly, more humanely. Despite the “popular myth” that we have an adversary criminal justice system “designed to protect precious rights while determining individual guilt,”¹²³ approximately ninety-five percent of convictions are the result of guilty pleas.¹²⁴ As stated by the Supreme Court, “criminal justice today is for the most part a system of pleas, not a system of trials.”¹²⁵ As noted, the Court also has acknowledged that this plea system serves government objectives.¹²⁶ In this context, zealous public defenders assist the state by effectively and compassionately escorting accused persons through the painful and often devastating process of confronting the state’s case against them. This process includes a defendant’s admission of guilt and being sentenced, often to months or years of incarceration or to substantial fines and other impositions on their liberties.

The emissary role contemplates that the excellence of the public defender’s resources, investigative efforts, trial abilities, and negotiating skills frequently will not improve the outcome of a case for the client.¹²⁷ A large pro-

¹²² See Natapoff, *supra* note 98, at 1474 (describing a liaison function of defense counsel while noting that the typical attorney-client conversation is not effective at enabling the client to engage expressively); see also *Emissary*, BLACK’S LAW DICTIONARY, *supra* note 67 (defining “emissary” as an individual acting as another’s representative in a mission, especially in an effort to further a specific goal).

¹²³ Babcock, *supra* note 47, at 182 (characterizing our criminal justice system as “a bureaucratic mill grinding out guilty pleas”).

¹²⁴ See *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (noting that guilty pleas result in 97% of criminal convictions at the federal level and 94% of criminal convictions at the state level).

¹²⁵ *Id.*

¹²⁶ See *Santobello v. New York*, 404 U.S. 257, 260 (1971) (noting that plea bargaining is a beneficial system and that, absent such a system, courts would need additional resources to accommodate more trials).

¹²⁷ There is evidence that having legal representation may place defendants at a disadvantage in some instances. Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049, 1069 (2013); see also Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 490–94 (2007) (noting a study that found that self-represented defendants realized better sentencing outcomes than represented defendants); Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1237–38 (1989) (noting that young defendants with legal representation are two to three times more likely to receive a harsh punishment than those without legal representation). On the related claim that “the scale of punishment of the poor would not be reduced by more effective lawyers,” see Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2186 (2013). Professor Butler notes indirect evidence in the rarity of findings of ineffective assistance under the two-prong test for ineffective assistance of counsel imposed in *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* The first prong requires deficient performance, while the second requires “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 688, 694.

portion of criminal defendants are factually guilty of the charges against them and, even with good legal assistance, have little likelihood of mounting a successful defense.¹²⁸ Further, although some defendants have a solid defense to the most serious charge, they have no good defense to a lesser-included crime,¹²⁹ and the plea offer is to the lesser charge on which they would likely face a trial conviction and a harsh sentence. Sometimes, the defendant is caught in the act of the crime or on the scene and confesses to the police.¹³⁰ In many cases, there is a wealth of eyewitness and forensic evidence supporting guilt. The accused may also have a significant criminal record, which the prosecution can use as impeachment evidence if the defendant chooses to testify.¹³¹ In cases with overwhelming prosecution evidence and recidivist clients, the public defender typically has no leverage to negotiate a better plea bargain¹³² and modest, if any, influence on the judge's sentence.¹³³ Despite the inability to achieve a better result by pursuing an adversarial approach, the public defender still serves a valuable function as an emissary for the state.

There are other circumstances in which public defenders have no ability to affect outcomes but remain valuable state emissaries. Many accused persons want to plead guilty without regard to their public defender's ability to mount a plausible defense.¹³⁴ This may be true even when the public defender justifiably believes that the best interests of the accused would be served by going to trial.¹³⁵ For some defendants, the prospect of a public trial causes fear, embar-

¹²⁸ See, e.g., Uphoff, *supra* note 121, at 94 (emphasizing how common it is for defense counsel to receive a case in which their client has a long criminal record and no clearly applicable defense for the pending charges).

¹²⁹ See QUINNEY, *supra* note 105, at 157 (noting that defendants are typically guilty of committing some criminal offense).

¹³⁰ See, e.g., Uphoff, *supra* note 121, at 101 ("The defendant, for example, is caught in front of numerous witnesses walking out of a store with an item she was attempting to steal and gives a statement admitting the offense.").

¹³¹ See George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 866 (2000) (suggesting that laws that first allowed criminal defendants to testify at trial, when they previously had been allowed only to offer an unsworn statement, "had the probably unintended effect of discouraging criminal defendants with criminal pasts from going to trial," because they could then be impeached with their prior convictions). George Fisher contends that the "[d]efendant-testimony laws helped to persuade accomplished criminals to plead guilty." *Id.*

¹³² See, e.g., Uphoff, *supra* note 121, at 94 ("In such a case, defense counsel may feel more like a beggar than a bargainer . . .").

¹³³ See Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathetic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1236 (2004) ("For some clients and some cases, heroics have no effect; there is literally nothing to be done.").

¹³⁴ See Uphoff, *supra* note 121, at 81 (observing that many defendants simply prefer pleading guilty).

¹³⁵ See, e.g., BITTAN, *supra* note 46, at 33 (noting that some clients do not care "what the plea offer is or whether there is a plea offer at all," and "want to plead guilty even when [the public defender] doesn't want [them] to").

rassment, and anxiety.¹³⁶ Other accused persons have “religious or moral feelings” that make them “readily admit their guilt.”¹³⁷ Still others prefer pleading guilty to obtain a lighter sentence¹³⁸ than they might after trial because they are risk-averse¹³⁹ or because they can get out of jail sooner by doing so.¹⁴⁰ Even innocent accused persons sometimes prefer to plead guilty.¹⁴¹ The promulgation of harsh sentencing laws in recent decades means that many defendants “are simply terrified of going to trial and facing the possibility of such severe sentences.”¹⁴² In these cases, the public defender may not affect the outcome, but may still help the state.

The public defender serves a valuable function for the state as an emissary merely by facilitating the guilty plea and sentencing with civility and expertise.¹⁴³ The public defender provides defendants with information about the adjudicatory process, listens to them voice their explanations, frustrations, and concerns, explains how a trial would proceed and how it would likely come out, explains the bargain offered by the government, and communicates back with prosecutors, judges, and other state officials to enable the guilty plea and sentencing.¹⁴⁴ Although many defendants, including recidivists, might figure out on their own that they should accept the government’s guilty-plea offer, their public defender can still help as a liaison with the prosecutor and the judge. The public defender’s participation also promotes the appearance that the accused has been properly advised and has made a knowing and intelligent trial waiver.¹⁴⁵ These benefits accrue to the state.¹⁴⁶

¹³⁶ See Uphoff, *supra* note 121, at 81–84 (describing internal motivations for defendants to plead guilty).

¹³⁷ *Id.* at 83.

¹³⁸ *Id.*

¹³⁹ See, e.g., Natapoff, *supra* note 127, at 1064 (“Mandatory minimum sentences and heavy trial penalties often pressure defendants into pleading no matter how good their lawyers are.”).

¹⁴⁰ See BITTAN, *supra* note 46, at 85–86 (explaining that the desire to get out of jail pressures many defendants to pursue a guilty plea).

¹⁴¹ See STUNTZ, *supra* note 112, at 58 (“The lack of careful investigation that characterizes most felony prosecutions virtually guarantees that a significant number of innocent defendants are pressured to plead to crimes they did not commit.”); Mosteller, *supra* note 47, at 30 (“Clients, even if innocent, still made a rational choice to plead guilty.”); Bowers, *supra* note 102, at 1119–20 (asserting that for “the typical innocent defendant in the typical case—which I will demonstrate is a recidivist facing petty charges—the best resolution is generally a quick plea in exchange for a light, bargained-for sentence”).

¹⁴² WICE, *supra* note 47, at 111.

¹⁴³ See, e.g., RAPPING, *supra* note 24, at 200–01 (discussing the value, apart from case outcomes, on “treating the accused with dignity and respect”).

¹⁴⁴ See, e.g., Natapoff, *supra* note 98, at 1474 (describing the typical interaction between a public defender and their client and the importance of strong communication to that interaction).

¹⁴⁵ See, e.g., Natapoff, *supra* note 127, at 1051 (“In various ways, having a competent lawyer has become a kind of proxy for the conclusion that a defendant was treated fairly by the criminal system.”); Butler, *supra* note 127, at 2197 (noting the prevailing view that “[i]f more poor people are

E. Guilty-Plea Advocate

The fifth and final role of the public defenders derives from their inability to escape the forces of the bureaucratic, plea-bargaining system in which they mostly operate.¹⁴⁷ Our adjudicatory process is not so much an adversarial one as it is “a bureaucratic mill grinding out guilty pleas.”¹⁴⁸ In a system designed to thrive on guilty pleas—which the Supreme Court has essentially admitted ours is¹⁴⁹—the systemic objective, although unstated, is to get almost every defendant to plead guilty.¹⁵⁰ As we have seen, this goal has been achieved to an astonishing degree.¹⁵¹ On average, in both state and federal courts, out of every twenty criminal defendants, approximately nineteen will resolve their case by pleading guilty to one or more offenses.¹⁵² Defendants “plead guilty for a measure of leniency.”¹⁵³ Prosecutors and judges are typically willing to extend this leniency to gain “efficient relief from a suffocating workload” and to “spare[] the prosecutor the risk of loss and the judge the risk of reversal.”¹⁵⁴ Whether public defenders self-identify as co-conspirators or not, they rarely can avoid becoming complicit in this project. As guilty-plea advocates,¹⁵⁵ the public defender’s function is not to help shield against the pressure to plead guilty, but to “make the defendant realize with full clarity the coercive power of the alternatives that he faces.”¹⁵⁶ Public defenders with substantial caseloads

represented by lawyers because of *Gideon*, arguably their trials or plea bargains are fairer than before *Gideon*, when they did not have lawyers”).

¹⁴⁶ See, e.g., Butler, *supra* note 127, at 2197 (asserting that the provision of public defense counsel “provides a legitimization of the status quo”).

¹⁴⁷ See, e.g., David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 YALE L.J. 2578, 2581–82 (2013) (describing our criminal justice system as “thoroughly unmoored from its adversarial foundation”).

¹⁴⁸ Babcock, *supra* note 47, at 182.

¹⁴⁹ See *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (noting that around 95% of convictions at both the state and federal levels come about from guilty pleas).

¹⁵⁰ See generally Fisher, *supra* note 131 (providing a history of plea bargaining and the reasons it has come to dominate our criminal justice system).

¹⁵¹ See *Lafler*, 566 U.S. at 170 (noting the high rate of guilty pleas in state and federal courts).

¹⁵² See *id.* (same).

¹⁵³ Fisher, *supra* note 131, at 866; see also Uphoff, *supra* note 121, at 81–89 (recounting internal pressures defendants experience favoring a guilty plea and external pressures imposed on them to plead guilty by prosecutors and judges).

¹⁵⁴ Fisher, *supra* note 131, at 867. As Fisher notes, protection from these risks offers reputational benefits to both the judge and the prosecutor. *Id.*

¹⁵⁵ For the classic account of the criminal defense lawyer as “double agent, serving higher organizational rather than professional ends,” see Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC’Y REV. 15, 31 (1967).

¹⁵⁶ Albert W. Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1, 58 (1975) (“In that way, the attorney may persuade the defendant to choose the course that, within the confines of a cynical system, is likely to injure him least.”).

almost inevitably become “handmaidens” to the objective of the plea bargaining system.¹⁵⁷

The forces operating on even the zealous public defender to advocate a guilty plea over a trial go beyond a consideration of the client’s best interests.¹⁵⁸ The judge and the prosecutor surely will appreciate the cooperation and may be pleasant and complimentary toward counsel. More importantly, public defenders cannot help but recognize their own substantial savings of time, effort, and emotional resources. Guilty plea hearings usually require only a few minutes of court time, only modest preparation and only minor participation by counsel.¹⁵⁹ In contrast, a trial can go on for days or weeks and typically involves intense preparation, arduous advocacy, and conflict with the judge and prosecutor.¹⁶⁰ A guilty plea also will substantially reduce the possibility for claims by the client that the defense lawyer acted ineffectively.¹⁶¹ There will also be no appellate review of a trial and, thus, no appellate lawyer or appellate judges who will assess the lawyer’s trial performance.¹⁶² Guilty pleas benefit the public defender enormously.

At the same time, public defenders can almost always plausibly advocate for a guilty plea based on their agent or guardian roles as well.¹⁶³ Some clients

¹⁵⁷ Natapoff, *supra* note 127, at 1067 (citing Alschuler, *supra* note 156, at 58); *see also* RAPPING, *supra* note 24, at 13 (“The system encourages [public defenders] to join forces with prosecutors and judges in the effort to grease the wheels of the machine.”); KAREN HOUPPERT, CHASING *GIDEON*: THE ELUSIVE QUEST FOR POOR PEOPLE’S JUSTICE 25 (2013) (quoting a defender attorney who asserts that “if you just sell the client a deal and move things along, the situation becomes almost manageable”).

¹⁵⁸ For some “public defenders,” as I have defined them, *supra* note 18 and accompanying text, the incentives can favor going to trial with limited preparation rather than encouraging a guilty plea. *See* Mosteller, *supra* note 47, at 45 (describing this reverse effect for some defenders in some jurisdictions). For example, if the defender is an appointed lawyer who is paid by the hour and receives more for in-court work than out-of-court work, there may be monetary incentives favoring going to trial. *Id.* These lawyers, however, do not qualify as zealous defenders under my definition of the term.

¹⁵⁹ *See, e.g.,* Howe, *supra* note 113, at 605–06 (noting the substantially greater time and effort required of court and counsel for a trial compared to a guilty plea).

¹⁶⁰ *See id.* at 606 (“The average jury trial . . . involves several pre-trial hearings and much preparation time by the prosecutor.”).

¹⁶¹ Regarding the possibility of a defendant successfully claiming ineffectiveness after a guilty plea, *see infra* note 184 and accompanying text.

¹⁶² *See infra* note 184 and accompanying text (discussing ineffective assistance of counsel claims).

¹⁶³ This Article posits a reasonably well-resourced, competent, and motivated public defender with a reasonable number of cases. Those assumptions, however, often do not conform with reality because there are negative forces that can influence public defenders to push some of their clients to accept guilty pleas against their best interests. *See, e.g.,* Bright & Sanneh, *supra* note 27, at 2152 (noting that many public defenders have “enormous caseloads” with minimal resources to investigate and hire expert witnesses and, therefore, must “practice triage” by encouraging guilty pleas); Backus & Marcus, *supra* note 27, at 21 (noting that public defenders sometimes opt for plea bargaining to avoid trial due to their heavy caseload, not because doing so is in the defendant’s best interest). There are also psychological perils that can influence even well-positioned and committed public defenders to

want to plead guilty without regard to the evidence the prosecution might offer at trial.¹⁶⁴ Likewise, there is almost always great doubt,¹⁶⁵ and often reason for full-blown disbelief,¹⁶⁶ that a defendant will be found not guilty.¹⁶⁷ Demonstrably innocent persons, including in the most serious criminal cases, have regularly suffered wrongful convictions.¹⁶⁸ Also, the reduced discovery that usually takes place in criminal cases as compared to civil cases heightens the public defender's inability accurately to assess the possibilities for a good trial outcome.¹⁶⁹ Partly because a criminal defendant generally has a Fifth Amendment privilege not to disclose in advance much about their defense, states historically have not required prosecutors to disclose in advance as much about the government's case as in the civil context.¹⁷⁰ For example, interrogatories regarding the prosecution's evidence and depositions of prosecution witnesses

favor plea bargains, sometimes against their clients' best interests. See Scott W. Howe, *The Perilous Psychology of Public Defending*, 2015 J. PRO. LAW. 157, 159–72 (2015) (asserting that an aversion to representing innocent clients can influence public defenders to begin to perceive cases as involving guilty clients and to favor plea bargains although those clients have a viable defense).

¹⁶⁴ See *supra* notes 134–142 and accompanying text (discussing various reasons why a defendant might like to plead guilty).

¹⁶⁵ See, e.g., Uphoff, *supra* note 121, at 81 (noting “the uncertainty of predicting trial verdicts” and “the desire to avoid overly optimistic expectations”); Bellows, *supra* note 58, at 85 (“A trial is always a crapshoot and even strong [defense] cases get lost for mysterious reasons.”).

¹⁶⁶ See, e.g., Uphoff, *supra* note 121, at 101 (“The defendant, for example, is caught in front of numerous witnesses walking out of a store with an item she was attempting to steal and gives a statement admitting the offense.”); QUINNEY, *supra* note 105, at 157 (“The great majority of defendants handled by criminal lawyers are actually guilty of some offense.”).

¹⁶⁷ See, e.g., Uphoff, *supra* note 121, at 81–82 (noting that the possibility of going to trial and receiving a longer sentence can impact a decision to plead guilty).

¹⁶⁸ See *Innocence*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/innocence> [<https://perma.cc/SD2U-PJQA>] (indicating that, since 1973, at least 190 persons have been exonerated after being wrongfully convicted and sentenced to death).

¹⁶⁹ See *Expanded Discovery in Criminal Cases: A Policy Review*, JUST. PROJECT 1 (2007), https://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/expanded20discovery20policy20briefpdf.pdf [<https://perma.cc/5XEN-K74Z>] [hereinafter *Expanded Discovery*] (“The fact that discovery laws are so broad in civil cases and are often so restrictive in criminal cases—where the freedom and, sometimes, the life of the defendant are at stake—is as nonsensical as it is unjust.”); Bibas, *supra* note 117, at 2494 (observing that discovery in criminal cases is too limited to provide sufficient information before trial to predict the probable outcome (citing John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 450–60 (2001))).

¹⁷⁰ See WAYNE R. LAFAYE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, *CRIMINAL PROCEDURE* 1139 (6th ed. 2017) (noting this historical explanation for limited discovery); Bright & Sanneh, *supra* note 27, at 2157 (“Most jurisdictions allow prosecutors to withhold almost everything about their case and conduct ‘trial by ambush.’” (quoting Norman L. Reimer, *Discovery Reform: The Time for Action Is at Hand*, CHAMPION, Mar. 2012, at 7, 7)); David Luban, *Are Criminal Defenders Different?*, 91 U. MICH. L. REV. 1729, 1737 (1993) (emphasizing defendants' lack of discovery rights as compared to the prosecution).

generally are not required.¹⁷¹ Defense investigation of government witnesses also often produces little because, even when the defense can identify them, those witnesses often will not speak to defense lawyers or investigators. Investigation focusing on possible defense witnesses is similarly often a wasted effort. Defendants themselves are typically unreliable sources of information about the facts or other possible witnesses.¹⁷² Purported defense witnesses often cannot be located or will not cooperate.¹⁷³ Those who can be found are often not credible, because, for example, they have criminal records or are “family members or close friends of the defendant.”¹⁷⁴ In addition, such witnesses typically “lack[] communication skills.”¹⁷⁵ In these circumstances, public defenders can reasonably postulate that the government will have compelling evidence and the defense will fall apart.

Public defenders also typically have good reason to expect that the trial judge will impose a significantly harsher sentence for a conviction after trial than after a guilty plea.¹⁷⁶ If a plea bargain will reduce the charge or guarantee a particular sentence, the risk of a harsher sentence after a trial conviction is especially apparent. Knowledge of a particular judge’s sentencing practices can help the public defender make a better assessment of how great the possible disadvantage for the defendant after a guilty verdict, assuming a “particular judge is assigned in advance of a trial or a guilty plea hearing.”¹⁷⁷ The pervasive practice among judges of imposing a substantially greater sentence for a conviction after a guilty verdict than after a guilty plea for the same crime, however, is so well known¹⁷⁸ that a defense lawyer would act ineptly by not counseling the client to consider it.¹⁷⁹

¹⁷¹ See LAFAVE ET AL., *supra* note 170, at 1139 (noting that, despite expansionist efforts regarding defense discovery in criminal cases, depositions and interrogatories regarding government witnesses and evidence have generally been deemed inappropriate); *Expanded Discovery*, *supra* note 169 (noting the typical absence of depositions in criminal cases).

¹⁷² See WICE, *supra* note 47, at 108–10 (reporting that public defenders in one urban office “unanimously agreed that the client is not a reliable source of useful information”).

¹⁷³ See *id.* at 111–12 (discussing these various impediments to finding and presenting defense witnesses).

¹⁷⁴ See *id.* at 112.

¹⁷⁵ See *id.* at 133.

¹⁷⁶ See, e.g., Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313, 314 (2019) (noting that empirical studies have typically found a two- to six-fold increase in the odds of imprisonment with 15% to 60% longer sentences for defendants who go to trial compared to similarly situated defendants who plead guilty).

¹⁷⁷ Uphoff, *supra* note 121, at 113.

¹⁷⁸ See Jeffrey Bellin, *Plea Bargaining’s Uncertainty Problem*, 101 TEX. L. REV. 539, 540–41 (2023) (discussing the notable differences between sentences imposed before and after trial). The debate is not whether this practice exists but whether there are justifications for it other than to encourage defendants to plead guilty and, when not, whether it is best understood as giving a “discount” for pleading guilty or imposing a “penalty” for going to trial. Efforts to justify the disparities on other

In their guilty plea advocate role, moreover, a public defender can amplify the pressure on a defendant to plead guilty.¹⁸⁰ One public defender described the process in terms that suggest the potential intensity of the effort:

If you decide that your client needs to accept a plea offer, sell it to him as if your life depended on it. His does. Do what it takes to convince him, whether it is making pro-con charts of the facts, having him talk to other lawyers in the office, or even having him cross-

than administrative convenience grounds have focused on, among other things, the idea that there is greater vividness in the portrayal at trial of the defendant's violence, the belief that the defendant has committed perjury by testifying in their own defense at trial, the notion that the defendant who pleads guilty has manifested their greater rehabilitative potential, and the view that the pleading defendant may have cooperated in the prosecution of other defendants. *See* LAFAYETTE ET AL., *supra* note 170, at 1198–99 (discussing these and other justifications). In federal court, empirical evidence also indicates that, if defense counsel attempts “to challenge or even to question the government’s evidence,” judges often impose “a higher sentence based on the finding [under the federal sentencing guidelines] that the defendant has either failed to accept responsibility or has obstructed justice.” Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CAL L. REV. 425, 472 (2004). On the debate over whether disparities attributable to administrative convenience are plea discounts or trial penalties, see Ben Grunwald, *Distinguishing Plea Discounts and Trial Penalties*, 37 GA. ST. L. REV. 261, 267 (2021) (offering a conceptual framework to define plea discounts and trial penalties and distinguish between them). *See also* Bowers, *supra* note 102, at 1156 (contending that “postplea sentences are, in fact, the communally appropriate ones” and post-trial sentences include “disproportionate trial penalties”).

¹⁷⁹ *See, e.g.*, Uphoff, *supra* note 121, at 97 (“Indeed, it would be very poor lawyering to simply permit a client to proceed to trial on a hopeless case without trying to convince that client to consider plea bargaining.”); Smith, *supra* note 133, at 1231 (asserting that sometimes pleading guilty “is exactly what . . . [criminal defendants] should do, or risk a much greater sentence after trial”).

¹⁸⁰ The right of the criminal defendant to autonomy only marginally circumscribes the wide freedom of the public defender to push the defendant to plead guilty. As we have seen, the Supreme Court has held that the autonomy right confers on the client the decision whether to plead guilty. *See supra* notes 75–76 and accompanying text. The Court, however, has not prohibited defense counsel from advising clients to pursue that course when defense counsel concludes that it serves their interests. Nor has the Court suggested that defense counsel may not advocate forcefully in those circumstances. Indeed, “[i]n a world where it makes sense even for innocents to plead guilty,” Natapoff, *supra* note 127, at 1072, defense counsel may not have to conclude that the client is probably guilty before pushing them in that direction. *See, e.g.*, Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236, 2250 (2013) (“An innocent defendant offered a substantial discount for pleading guilty faces a dilemma no matter how good counsel is.”). There are surely limits. Lawyer behavior that amounts to coercion would seem to undermine client autonomy. The Court has not clarified precisely what lawyer conduct would go too far. A threat to sabotage the defense in some respect, or an equivalent form of compulsion, may be necessary to establish a violation. *See Machibroda v. United States*, 368 U.S. 487, 493 (1962) (noting that “threats” or improper “promises” can render a guilty plea involuntary).

examined by another lawyer so that he sees his defense demolished.¹⁸¹

The public defender also need not give up in the face of the client's refusal to plead guilty. "If you know what your client should do, you should push it even if your client initially believes you are selling him a rotten fish."¹⁸² The lawyer might push with sufficient vigor that the resistant client moves to fire them.¹⁸³ Nevertheless, even that outcome is not necessarily bad given that, assuming the court permits the public defender to withdraw, the next lawyer might have more success in getting the client to agree to plead guilty.¹⁸⁴

¹⁸¹ Bellows, *supra* note 58, at 90; see also HOUPPERT, *supra* note 157, at 25 (quoting a defender attorney who notes that "it's really easy to sell a bad plea bargain to someone" by "overemphasiz[ing] the risks").

¹⁸² Bellows, *supra* note 58, at 91.

¹⁸³ See *id.* (asserting that pushing this hard is a necessary part of the work for public defenders).

¹⁸⁴ The client's right to effective assistance of counsel only modestly limits the broad authority of the public defender to press him to plead guilty. The two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), governs claims of ineffective assistance in plea bargaining. See, e.g., *Hill v. Lockhart*, 474 U.S. 52, 57–58 (1985) ("Two terms ago, in *Strickland v. Washington*, we adopted a two-part standard for evaluating claims of ineffective assistance of counsel." (citation omitted)). To establish a violation, a defendant must show that counsel's representation fell "below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, and that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In 2010, in *Padilla v. Kentucky*, the Court held that an objectively unreasonable misstatement of law or omission of legal advice that causes a defendant to plead guilty to their prejudice can constitute ineffective assistance. See 559 U.S. 356, 370–71 (2010). This rule, however, does not prevent a defender from vigorously counseling their client to plead guilty. The *Padilla* decision means that a defender should not misstate relevant law or fail to warn about relevant law. See *id.* The attorney error in *Padilla* was a flatly erroneous statement that the client need not worry about his status as an immigrant in pleading guilty to drug charges that made his deportation virtually mandatory. See *id.* at 359–60. *Padilla* involved affirmative mis-advice, but the Court declared that an objectively unreasonable failure to provide advice could also constitute deficient performance. See *id.* at 370–71 (stating that counsel has a duty to advise the client regarding adverse immigration consequences of a guilty plea). Although *Padilla* involved an attorney error regarding the collateral consequences of a guilty plea, objectively unreasonable advice regarding the direct consequences could also amount to incompetent performance. For example, if the defender failed to advise the client who pleaded guilty of an available affirmative defense, such as necessity, the error could be objectively unreasonable, although the defendant would have to establish prejudice to prevail. See, e.g., *Hill*, 474 U.S. at 59. The Supreme Court has stated that codified standards of professional practice as they relate to plea bargaining, even if not binding on lawyers, can be "important guides" regarding *Strickland*'s first prong, and it has cited the American Bar Association Standards for Criminal Justice. See, e.g., *Missouri v. Frye*, 566 U.S. 134, 145 (2012). Those standards, however, also do not prevent the public defender, short of misrepresentation or coercion, from urging a client to accept a guilty plea. See AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Standard 4-5.1(f) (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/ [<https://perma.cc/2HHK-5FJW>] (counseling defense lawyers against purposely mischaracterizing the dangers or prospects in a given case or influencing a defendant's decision to plead guilty).

II. THE ALTERNATE VIEW FROM PUBLIC DEFENDERS AND THEIR CRITICS

The notion that zealous public defenders serve five roles, some of which directly benefit the state, will provoke widespread dissent, particularly from zealous public defenders and their critics. In this Part, I give voice to those two alternative perspectives, which happen to correspond with each other in many respects.

Section A of this Part discusses the view of the zealous public defender.¹⁸⁵ Section B of this Part explores the view of their critics.¹⁸⁶ From both perspectives, zealous public defenders are largely indifferent to public welfare and to the suffering of crime victims. Both agree that zealous public defenders serve only as advocates for their clients. Both also see zealous public defenders primarily as trial lawyers aggressively seeking acquittals, usually for clients about whose possible guilt they have no concern. From both perspectives, zealous public defenders are nonconformists, operating as opponents of the prosecutors and judges in the adjudication system. This concurrence of views reflects that zealous public defenders and the stigma that attaches to them blossom based on an illusion.

A. The Zealous Public Defender

My own experience as a public defender illustrates the first alternative view: that of zealous public defenders. I was fortunate to work as a public defender at an excellent office for a few years early in my legal career and, in that job, was trained to see my work as focused on pursuing the best interests of my clients within the limits of the law.¹⁸⁷ I saw myself as their agent and guardian. Trying to find the right balance between those two roles was sometimes challenging. Nevertheless, I aimed to get my clients the best possible outcome in their cases. I never intended to assist the government. My clients often did not trust me at first, because they knew I was called a “public defender,” and they were not paying me. I did not, however, see myself as succumbing to inappropriate pressure to curry favor with prosecutors or judges. There was no person who embodied “the state” or “the government” to whom I felt indebted. I was not friends with judges or with prosecutors and interacted with them only professionally and guardedly.

Although most of my clients pleaded guilty, I tried not to let my own interests influence what course I advised them to pursue. This was not always easy, because there were personal benefits to me in encouraging most of my

¹⁸⁵ See *infra* notes 187–201 and accompanying text.

¹⁸⁶ See *infra* notes 202–226 and accompanying text.

¹⁸⁷ I worked as a Staff Attorney for the Public Defender Service for the District of Columbia from 1981 to 1985 and from 1986 to 1988. My personal anecdotal accounts are based on that experience.

clients to accept a plea bargain. That I sometimes yielded to my own interests is, even now, difficult to concede, in part because it was almost always possible to see a plea bargain as in the client's best interests.

Although few of my clients proceeded to trial, I saw myself as primarily a trial lawyer, except for stints I spent writing appeals. In addition to the desire to promote equal justice, the desire to gain experience as a trial lawyer was one of my motivations for taking the job. I soon learned that the trial work was more difficult and unpleasant than I had anticipated.¹⁸⁸ I spent much of my time, however, preparing for and participating in trials and pre-trial hearings, including preliminary hearings and hearings on motions to suppress evidence. Much of the preparation went into intensive investigation aimed at uncovering evidence that would help the defense.

I tried to suspend judgment regarding the guilt or innocence of each client and focus on assessing what inculpatory information the prosecution possessed and what information favorable to the defense that I possessed. Based in part on that evaluation, I would determine their best course of action, whether it was a bargained guilty plea or a trial. I tried not to worry about the public welfare, about justice, or about the suffering of the victims. The effort was not always easy because it required self-suppression, even self-deception. Outside of my job, I was not indifferent to such concerns and, indeed, while a defender, was the victim of three unrelated, minor crimes for which I wished the culprits would have been caught, proven guilty, and punished.¹⁸⁹ Also, the suppression of sympathy for my client's victims carried over into my personal life in ways that eventually troubled me. If a friend had a family member who died or was suffering, I expressed sorrow and empathy, but I began to wonder if I was losing the capacity for those emotions.

I was not only largely indifferent to the suffering of victims but to the plight of most accused persons other than my clients. In a co-defendant case, if I could save my client by suggesting that the co-defendant deserved all the blame, I would not hesitate to do so. I would even blame the co-defendant on a

¹⁸⁸ See *supra* notes 158–161 and accompanying text.

¹⁸⁹ Each of the incidents were too minor to expect the District of Columbia police to show serious interest, and I do not recall reporting them. In the first, the perpetrator tried to steal my car. I found the driver's door unlocked, the steering column surrounding the ignition shattered, and the ignition inoperable after the would-be car thief apparently tried to start the car with something like a screwdriver. The second incident involved my car while it was parked on the street near my residence. I came out one morning to go to work and found that both wheels and tires on the curb side had been stolen. The third happened while I was at work. I rode a recently purchased and relatively expensive road bike to the public defender offices, which were then on the ground floor of the historic building that now houses the District of Columbia Court of Appeals. I parked the bike in my office but left the office door unlocked because the outer doors to the building were secure. While I was down the hall, perhaps talking with a colleague, the thief (possibly another lawyer's client) entered my office and stole it.

mere good-faith belief, without solid evidence that the co-defendant was probably the sole offender. My goal was to obtain the best outcome for my client within the law, not to secure justice or equality.¹⁹⁰

In trial cases, I tried to act in unmitigated devotion¹⁹¹ to my clients, and, in many instances, we were able to secure on every charge an acquittal or a mistrial based on a dead-locked jury. I would help trial clients take advantage of the Fifth Amendment privilege and the attorney-client privilege to refuse to provide information to the government and to keep my clients from testifying.¹⁹² I would take advantage of other Bill of Rights doctrines to try to suppress evidence of their guilt.¹⁹³ I would provide them with a suit and tie, although they had never worn such clothing before, to portray them to the jury as different from the kind of persons who would commit the charged offenses.¹⁹⁴ I would convey empathy for them through passionate arguments and displays of respect and affection in my interactions with them before the jury.¹⁹⁵ In reliance on their rights under the Confrontation Clause,¹⁹⁶ I would try to make prosecution witnesses appear confused, mistaken, or dishonest and to suggest alternative theories about how events occurred that had little, if any, evidentiary foundation.¹⁹⁷ I would also rely on the presumption of innocence and the beyond-a-reasonable-doubt standard to ask the jury to acquit my clients on minor uncertainties or unlikely possibilities,¹⁹⁸ although usually I convinced

¹⁹⁰ For an example of such a case in which I participated, see Scott W. Howe, *Untangling Competing Conceptions of "Evidence,"* 30 LOY. L.A. L. REV. 1199, 1203–13 (1997).

¹⁹¹ Babcock, *supra* note 31, at 10 (noting the various techniques used, including assessing defenses, moving to suppress evidence, and assembling advantageous facts).

¹⁹² U.S. CONST. amend. V; see also *United States v. Wade*, 388 U.S. 218, 256–57 (1967) (White, J., dissenting in part and concurring in part) (“[D]efense counsel has no . . . obligation to ascertain or present the truth He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution’s case.”).

¹⁹³ For example, the Fourth Amendment protects “against unreasonable searches and seizures.” U.S. CONST. amend. IV.

¹⁹⁴ These kinds of efforts to portray the client in the best light before the jury are common among zealous defense counsel. See, e.g., KUNEN, *supra* note 58, at 186 (sharing a public defender’s recounting that one of his clients, who was wearing his lawyer’s clothes, looked presentable at trial).

¹⁹⁵ Such efforts to try to influence juries are standard among zealous defenders. See, e.g., *id.* at 247 (detailing a public defender’s experience of interacting with his client in front of the jury to show friendliness that might make the client more palatable to the jurors).

¹⁹⁶ U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”).

¹⁹⁷ See *Wade*, 388 U.S. at 257 (asserting that, consistent with the law, it is normal for defense lawyers to confuse witnesses or make them seem unbelievable).

¹⁹⁸ See, e.g., John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin’s Position on the Criminal Lawyer’s “Different Mission,”* 1 GEO. J. LEGAL ETHICS 339, 340–43 (1987) (explaining that the Fifth Amendment privilege and the reasonable doubt standard enable defenders to avoid focusing on the truth).

myself that these doubts were reasonable. All these actions were part of providing a zealous defense.¹⁹⁹

While a public defender, I thought criticisms of zealous public defense work were misdirected. I believed I should serve only as an agent or guardian of my clients. I saw nothing more improper about it than the work a well-paid civil lawyer would perform for an unpopular corporate client. If my efforts sometimes amounted to deception, the rules and conventions of the adjudication system authorized them.²⁰⁰ Those rules and conventions are not beyond criticism.²⁰¹ They revealed, in my view, however, that a criminal trial is not a

¹⁹⁹ In the legal academy, the effort to assign blame to public defenders for their zealotry sometimes assumes that they should reduce their aggressiveness when they know their client who is going to trial is guilty and should defend them vigorously only when they reasonably doubt their guilt. See, e.g., William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1708 (1993) (stating that it is preferable for prosecutors to be successful in convicting guilty defendants and unsuccessful in convicting innocent defendants); *id.* at 1725 (asserting that forceful defense tactics should be reserved for those cases with a likelihood of excessive punishment). Yet this theory implicitly attributes knowledge to defenders that they frequently do not possess and cannot plausibly acquire. First, regarding their clients who go to trial, public defenders will often lack enough good information to know that they are guilty. See, e.g., Babcock, *supra* note 31, at 10 (“In the cases that went to trial, I always managed to develop at least a reasonable doubt . . .”). Second, other than following the principle that, as an agent or guardian, defenders should lawfully pursue the client’s best interests, they will lack clarity about how much and in what ways they should reduce their aggressiveness when they conclude that they are guilty. See *id.* at 9 (noting that locating the “middle ground” of how persistent counsel should be in pressing for the acquittal of a guilty client is difficult for both academics and practicing lawyers).

Regarding the tiny fraction of cases where the defender will *know* the client is guilty but ends up in trial, there has long been disagreement within the profession about whether the defender acts immorally by zealously pursuing acquittal. Compare, e.g., Mitchell, *supra* note 198, at 340–44 (arguing that it is morally permissible to present alternative possibilities that counsel knows are false), Ellen Yankiver Suni, *Who Stole the Cookie from the Cookie Jar?: The Law and Ethics of Shifting Blame in Criminal Cases*, 68 FORDHAM L. REV. 1643, 1649 (2000) (noting commentators who contend that defense lawyers can ethically do anything the law permits to defend even guilty persons), and MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 13, 26–27 (1990) (indicating that defense counsel can ethically advance a false defense and try to impeach the truthful witness), with Teresa Stanton Collett, *Understanding Freedman’s Ethics*, 33 ARIZ. L. REV. 455, 464–65 (1991) (asserting that it is wrong for defense counsel to present a false defense either explicitly or implicitly), Murray L. Schwartz, *On Making the True Look False and the False Look True*, 41 SW. L.J. 1135, 1145 (1988) (contending that cross-examination should be disallowed if counsel knows the witness’s testimony about their “level of certainty” is accurate), and Harry I. Subin, *Is This Lie Necessary? Further Reflections on the Right to Present a False Defense*, 1 GEO. J. LEGAL ETHICS 689, 689–90 (1988) (arguing that it is ethical to present carefully worded alternative inferences or explanations that counsel knows are false to assist the jury in weighing the state’s evidence but that the jury should be instructed regarding the narrow purpose for which they are allowed and the potential that they lack a good-faith basis).

²⁰⁰ For a similar view, see DAVIS, *supra* note 24, at xii (“By raising hell, these lawyers honor the law.”).

²⁰¹ Such criticism builds on the notion that truth-seeking should be the overriding goal of the criminal justice system. Although there is much about the relevant law that is to the contrary, see *supra* notes 191–198 and accompanying text, many observers share the truth-seeking perspective. See

search for the truth but rather a more complex, historically-influenced form of contest.

B. The Critic

The tax-paying crime victim can easily be disturbed by zealous public defenders precisely because of their ethos and their decision to take on the job. I have heard the criticisms, and they focus on some of the very points that zealous public defenders concede about their work. Public defenders are not concerned about public welfare or justice or victims.²⁰² Public defenders admit that in representing a trial client, they do not worry that the client probably committed the crimes of which they are accused.²⁰³ They display empathy for the defendant, act vigorously in pursuit of an acquittal, and pretend to have confidence in their client's innocence.²⁰⁴ Yet the critics contend that to be indifferent to injustice while willingly assisting the possible or probable perpetrator seems both a threat to the public welfare and immoral.²⁰⁵ And why would any talented lawyer who cares about justice take on the defender position rather than serve as a prosecutor? Zealous public defenders act like renegades—why should we encourage them with public funds?²⁰⁶

generally Jeffrey Toobin, *Ito and the Truth School*, NEW YORKER, Mar. 27, 1995, at 42, 42 (discussing the view of judges and scholars who advocate truth-seeking as the goal); see also Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1591 n.36 (1999) (noting commentary supporting and opposing the "truth school" of criminal justice).

²⁰² See *supra* notes 24–26 and accompanying text.

²⁰³ See, e.g., WEISS, *supra* note 23, at 96–98 (recounting interviews with various public defenders who asserted that they do not care about their clients' factual guilt or innocence); see also Mosteller, *supra* note 47, at 8 (urging that it is important for defense lawyers to display indifference as to whether their client is guilty or innocent because their job is to defend all who come to them).

²⁰⁴ See, e.g., UVILLER, *supra* note 37, at 154 (observing, from the perspective of a former prosecutor, that effective criminal defense involves a theatrical performance that involves "dissimulation" and "sleight-of-tongue"); SEYMOUR WISHMAN, *CONFESSIONS OF A CRIMINAL LAWYER* 240 (1981) (observing that, as a criminal defense lawyer, he had "conjur[ed] up false emotions in an effort to influence" juries); Moore et al., *supra* note 24, at 60 (asserting that public defenders must realize that, in fulfilling their goal of zealous defense for their clients, the public may view their actions as defending crime and not liberty).

²⁰⁵ See, e.g., DAVIS, *supra* note 24, at 36 (noting the view that public defenders "are heartless bastards who trick and scheme and hurt good people so very bad people can walk away free, never to face the consequences of their crimes"); WEISS, *supra* note 23, at 28 (asserting that successful defense can hinder distribution of deserved punishment while encouraging defendants to commit more crimes).

²⁰⁶ On the point that critics find disgraceful—the use of taxpayer dollars to support indigent criminal defense—see BITTAN, *supra* note 46, at 117, for a discussion of the ways that public defenders face ridicule in part because "the public keeps in mind that this 'shameful' activity is being paid for by their hardworking, taxpaying dollars."

The criticisms do not depend on the zealous defender knowing the client is guilty.²⁰⁷ The issue, instead, is whether the defender believes the client is innocent, because, otherwise, the defender is engaged in duplicity.²⁰⁸ Rarely does the defender believe the trial client is innocent beyond a reasonable doubt and only occasionally does the defender believe innocence is even probable.²⁰⁹ Defenders generally do not care that even their trial clients are probably guilty.²¹⁰ This means the zealous defender is often engaged at trial in an effort at deception.²¹¹ Dishonesty is not always immoral. A cost-benefit analysis may justify it sometimes. Nevertheless, for a public defender to try to help someone escape justice who the defender believes probably or even possibly committed a crime, especially a serious one, presents a challenging scenario. Although it is not illegal, it seems unscrupulous.²¹²

The criticisms also do not hinge on the precise tactics employed by the public defender to try to secure an acquittal. Zealously defending typically amounts to an effort to convey to the jury that the defender believes passionately in the client's innocence²¹³ and that the defender is appealing and credible. The defender's basic effort to show confidence in the client's innocence and to gain the jury's favor and trust for purposes of gaining an acquittal is a ruse if the defender does not believe the client is innocent. Merely arguing that there is reasonable doubt is a hoax if one does not reasonably believe it. Efforts to display affection for the client and to make them appear well-groomed,

²⁰⁷ See, e.g., Ogletree, *supra* note 25, at 82 (noting the popular view that many accused persons are not deserving of defense counsel).

²⁰⁸ See, e.g., WISHMAN, *supra* note 204, at 240 (reflecting on his "deceitful performances" in his efforts to influence juries); Bradley & Hoffman, *supra* note 24, at 1296 (asserting that much of the public's criticism toward both lawyers and the criminal justice system arises because lawyers consistently seek victory, no matter the cost or larger societal interests).

²⁰⁹ See, e.g., Bellows, *supra* note 58, at 74 (noting that having a client who you believe is innocent is extremely rare); UVILLER, *supra* note 37, at 155 (noting that, on rare occasions, a lawyer might have a client whom they know is facing a false accusation); WISHMAN, *supra* note 204, at 152 ("It was rare for me to have an occasion to fight to vindicate the rights of someone . . . who had been unfairly accused.").

²¹⁰ See, e.g., Babcock, *supra* note 31, at 6 (stating that most defense lawyers are indifferent to the question of the guilt or innocence of their client); see also H. Richard Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. PA. L. REV. 1067, 1072 (1975) (stating that the primary concerns of defense lawyers are whether their client's story is compelling and whether their case can overcome damaging points that the prosecution may raise).

²¹¹ See, e.g., KUNEN, *supra* note 58, at 116 ("Daily I made my escape to Court World, where reality was malleable, and I could at least try to bend it to my will, make two and two equal five, on a sgood day.") (sharing the perspective of a former public defender); WISHMAN, *supra* note 204, at 240 (describing his past "conjuring up [of] false emotions" to persuade juries as "calculated lies").

²¹² See Ogletree, *supra* note 23, at 1248 (stating that it is not uncommon for defense lawyers to defy common conceptions of morality to achieve positive outcomes for their clients).

²¹³ See, e.g., UVILLER, *supra* note 37, at 155 (asserting that defense counsel offers unwavering support at all stages of their client's case no matter the occasion).

well-dressed, and, thus, not the kind of person who would commit the charged offenses, are part of that basic ploy.²¹⁴ Additional tactics, such as impeaching truthful witnesses or conveying through questions and arguments a speculative defense, may further compromise the jury's ability to see the truth.²¹⁵ It seems, then, that the public defender inevitably acts immorally.²¹⁶

Zealous public defenders can also do more with formal evidentiary rules to hide, obscure, or deflect truths that disfavor their clients²¹⁷ than can civil lawyers, and at taxpayers' expense.²¹⁸ The Fifth Amendment privilege allows the criminal defendant not to testify, unlike the defendant in a civil case.²¹⁹ The laws allowing the suppression of relevant evidence in criminal cases enable public defenders to operate deceptively to a greater extent than can civil lawyers.²²⁰ So does the Sixth Amendment right to jury trial in criminal cases, which gives the judge in a criminal case less room than in a civil case to "intrude on the authority of the jury to decide matters in favor of protected parties, which, in the case of the Sixth Amendment, includes only criminal defendants."²²¹ Also, public defenders use the presumption of innocence and the reasonable-doubt standard, applicable only in criminal cases, to urge acquittals even when their clients are almost certainly guilty, a tactic unavailable to civil litigators.

The presumption of innocence and the beyond-a-reasonable-doubt standard, moreover, should provide no support for other tactics that confuse or mislead the jury. The mandate to start out believing that the accused is innocent, without evidence for believing it, and the high standard to find guilt, aim to

²¹⁴ See, e.g., BITTAN, *supra* note 46, at 84 ("Telling a client to simply 'be himself' on and off the witness stand may be the worst advice imaginable.").

²¹⁵ See, e.g., UVILLER, *supra* note 37, at 156 (asserting that what "customarily passes for argument to a jury" is "fiction weaving").

²¹⁶ Barbara Babcock acknowledged that most people see the very effort to "defend" a robber, rapist, or murderer as questionable because it involves deception. See Babcock, *supra* note 47, at 177. It means, for example, that the lawyer may file motions to suppress unfavorable evidence, confuse an honest witness on cross-examination, force a victim of rape to undergo a psychiatric examination, or challenge the credibility of an eyewitness by exposing their criminal history or mental illness. *Id.*

²¹⁷ See, e.g., Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1590 (2005) (noting that defense counsel is not primarily committed to accuracy and many clients want to cover their guilt with inaccuracies).

²¹⁸ See, e.g., BITTAN, *supra* note 46, at 33 (noting that much of the public finds appointing a defender sometimes a wasteful public expense).

²¹⁹ See, e.g., Mitchell, *supra* note 198, at 340–43 (asserting that the proof beyond a reasonable doubt standard and the Fifth Amendment privilege allow criminal defendants to focus on "legal guilt" rather than the truth or "factual guilt").

²²⁰ See, e.g., *supra* notes 197–198 and accompanying text (highlighting some of the rights that protect criminal defendants, but do not protect civil litigants).

²²¹ Scott W. Howe, *A Sixth Amendment Inclusionary Rule for Fourth Amendment Violations*, 54 CONN. L. REV. 613, 644 (2022).

give the accused some protection against conviction.²²² Yet that is no reason also to allow their defender to use deception to defend them. That we already give the defense a benefit is not justification to give more. At some point, the cost of allowing the guilty to go free outweighs the cost of convicting an innocent person. Where is the line?²²³ The answer is not part of the natural order.²²⁴ For public defenders, however, to try to hamper juries from finding the truth on the view that the ratio should be as high as possible is misguided.²²⁵

The solution from the critic's standpoint is to fund public defender services only modestly. The effect is not to eliminate public defenders altogether but to render them unable to provide zealous representation. This is the situation in many jurisdictions across the country.²²⁶

In the end, comparing the views of the zealous public defender against those of the critic reveals a stubborn truth. Zealous public defenders do not disagree with some central points that critics offer. The ethos of zealous public defenders is that one's duty is to serve only as an advocate for the client and, within the bounds of the law, to worry about no other interest. According to the critic, this ethos, unleashed within a system of rules that allows but rarely requires the public defender to act so adversatively, is a core piece of the problem.

III. STRATEGIES FOR JUSTIFYING ZEALOUS PUBLIC DEFENDERS

In theory, there are at least three ways that zealous public defenders could try to absolve themselves of the critics' charges. First, they could continue to identify solely as client-centered advocates and claim, as I did, that the criticisms should be redirected against the adjudication system.²²⁷ That path is discussed more fully in Section A of this Part.²²⁸ Second, as discussed in Section

²²² See LARRY LAUDAN, *TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY* 100–02 (2006) (discussing the protection afforded by the presumption).

²²³ The great English expositor of the common law, William Blackstone, famously put the ratio at ten to one. See 4 WILLIAM BLACKSTONE, *COMMENTARIES* *352 (“[F]or the law holds, that it is better that ten guilty persons escape, than that one innocent suffer.”).

²²⁴ See generally Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173, 173–77 (1997) (noting the historical and continuing disagreement about the proper ratio).

²²⁵ Religious texts also cast doubt on the morality of the effort and on the notion that the ratio should be ten to one. See, e.g., *Proverbs* 17:15 (King James) (“He that justifieth the wicked, and he that condemneth the just, even they both *are* abomination to the LORD.”).

²²⁶ See, e.g., Carol S. Steiker, *Gideon at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2700 (2013) (describing the funding as “woefully inadequate” in many places); Moore et al., *supra* note 24, at 59 (asserting that it is no longer feasible for many public defense lawyers to zealously defend their client); Bright & Sanneh, *supra* note 27, at 2153 (asserting that the poor funding in many jurisdictions contributes to “deficient representation and gross miscarriages of justice”); Backus & Markus, *supra* note 27, at 20 (describing public defense as severely underfunded).

²²⁷ See *supra* notes 200–201 and accompanying text.

²²⁸ See *infra* notes 231–243 and accompanying text.

B of this Part, zealous public defenders could try to continue to identify solely as client-centered advocates but abandon their indifference to consequences and contend that their adversarial behavior directly serves the public welfare.²²⁹ Third, they could acknowledge that they have five roles and that, although they sometimes serve as client-centered advocates, they often directly benefit both their clients and the state. This option is explored in Section C of this Part.²³⁰

The first strategy is an inadequate response to the critics, the second one is a compromise that is somewhat more forthcoming, and the last one is the most compelling. The latter two strategies, however, to the extent that they persuade critics, undermine the public defender's ability to appropriately challenge the system and thereby legitimize it. Thus, zealous public defenders cannot, as a practical matter, defend themselves.

A. Deflecting the Criticisms as Misdirected

Deflecting the criticisms as better directed against the rules and conventions of the adjudication system allows zealous public defenders to preserve their identity as only client-centered advocates. They can believe that by authorizing them to engage in zealous advocacy,²³¹ the adjudication system endorses their conduct. On this view, no further justifications for their work or the perspectives they must hold to carry it out are required.

Maintaining the self-image of a client-centered advocate who is unconcerned about guilt or innocence, victims, or the public welfare, helps the public defender vigorously defend. An eminent legal commentator in a position to know, the late Professor Barbara Babcock,²³² contended that the zealous public defender "must suspend belief (or disbelief) in every case[] and must be disinterested in either freeing the guilty or protecting the innocent."²³³ According to Babcock, "[a]ny other attitude inevitably leads to corruption of the defender's role because most of the accused are guilty."²³⁴ If the defender "consciously

²²⁹ See *infra* notes 244–266 and accompanying text.

²³⁰ See *infra* notes 267–292 and accompanying text.

²³¹ See *supra* notes 192–201 and accompanying text.

²³² Before serving on the Stanford Law School faculty, she had served as Director of the Public Defender Service for the District of Columbia. See BARBARA BABCOCK, *FISH RAINCOATS: A WOMAN LAWYER'S LIFE* 77–90 (2016) (recounting her work as Director of that agency from 1968 to 1972).

²³³ Babcock, *supra* note 50, at 314–15; see also Mosteller *supra* note 47, at 77 (contending that defense attorneys must display indifference to the guilt or innocence of their clients to survive in their field of work).

²³⁴ Babcock, *supra* note 50, at 315.

recognizes this fact, her work becomes insupportable and she is disabled.”²³⁵ The defender who focuses too much on whether their client is, in fact, guilty or innocent, becomes vulnerable to burning out.²³⁶

My experience as a public defender coincides with Professor Babcock’s view.²³⁷ Sustaining my self-image as a client-centered advocate allowed me to vigorously defend any client. With that identity, I did not have to worry about the public welfare, justice, or the suffering of victims.²³⁸ Focusing on those issues would have distracted me. Nearly all my clients appeared factually guilty and many had caused great harm to others. Yet, to have dwelled on the negative points would have impaired me as an advocate.

Despite its benefits, however, the deflection strategy does not adequately address the critic’s allegations. Deflection fails to acknowledge that zealous public defenders could be part of a perceived problem even if they are not alone the problem. To blame rules and conventions that allow for zealous tactics is to ignore the defender’s agency in carrying out the defense. Rules and conventions rarely force public defenders to go to trial or to act zealously. Indeed, the zealous public defender does not have to exist. The many jurisdictions that have deprived defender offices of adequate funding such that they provide only non-zealous representation makes the point.²³⁹ Those offices likely promote guilty pleas at a higher rate, receive less favorable bargains, and provide a less vigorous defense at trial than they would if they were well-resourced. If the provision of a non-zealous public defender is a helpful solution in the view of critics, the zealous public defender is part of the perceived problem.

The deflection approach also is not fully descriptive of the defender’s work and is less compelling for that reason than a more forthcoming one. Allowing defenders to maintain the self-image of a client-centered advocate per-

²³⁵ *Id.*; see also DAVID FEIGE, *INDEFENSIBLE: ONE LAWYER’S JOURNEY INTO THE INFERNO OF AMERICAN JUSTICE* 252 (2006) (defining burnout as “the creeping suspicion that maybe everyone around you is right—your clients really are scum”).

²³⁶ Babcock, *supra* note 50, at 314.

²³⁷ See *supra* notes 232–236 and accompanying text (detailing Babcock’s views).

²³⁸ An exception was the rare circumstance in which information available to me indicated that my client was likely completely innocent, and the prosecution would not drop the charges. I disliked those cases. This view is common among public defenders. See, e.g., Bellows, *supra* note 58, at 74 (stating that some of the most difficult cases for public defenders to deal with are those in which they strongly believe that their client is innocent); Babcock, *supra* note 47, at 180 (noting that defenders believe it easier to represent likely guilty clients than it is to represent those clients that the lawyer believes are innocent); BITTAN, *supra* note 46, at 101 (suggesting that the cases in which clients are likely innocent exert more pressure on counsel to win, thereby making them some of the most difficult cases); see also Mosteller, *supra* note 47, at 41 (noting that defense lawyers instinctively lighten the pressure involved in their work by believing clients are guilty).

²³⁹ See *supra* note 27 and accompanying text.

petuates a misconception about zealous defenders. That deceptive self-image focuses mostly on the defender's adversative rather than cooperative behavior. Even zealous defenders facilitate guilty pleas by their clients in most cases, and that work, more obviously than the trial work, benefits the state.²⁴⁰ The Supreme Court recently acknowledged that criminal justice is, for the most part, a system of guilty pleas rather than of trials, and the statistics on that point are overwhelming.²⁴¹ The Court also has directed that defense counsel has a "duty" to engage in "bargaining" over a guilty plea.²⁴² Likewise, the Court has recognized that guilty pleas benefit both defendants and the state.²⁴³ These pronouncements emphasize that the adjudication system has become more about cooperation than conflict. To think, then, of zealous public defenders as only or even primarily client-centered advocates is to misapprehend their bureaucratic functions and how their work directly benefits the state.

B. Abandoning Indifference to Consequences

Asserting that there are direct public benefits from the defender's adversative behavior is another way, in theory, for the zealous public defender to preserve their self-image against criticism as only a client-centered advocate. The zealous defender may redeem their clients who have been mistreated by the police or who are innocent, which can be understood as a public benefit.²⁴⁴ The police will have violated the constitutional rights of some guilty clients, and the defender can try to enforce those rights by litigating motions to suppress evidence.²⁴⁵ Likewise, some clients against whom the available evidence strongly implies guilt will, nonetheless, be innocent, although the public defender will not know which ones.²⁴⁶ Operating as a zealous advocate focused

²⁴⁰ See *supra* Part I.E (describing the guilty-plea advocate role of a public defender).

²⁴¹ See *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (noting that around 95% of convictions at both the state and federal levels come about from guilty pleas).

²⁴² *Missouri v. Frye*, 566 U.S. 134, 144–45 (2012) (noting that it is difficult to define the contours of this duty).

²⁴³ *Id.* (observing the benefits that guilty pleas bestow upon both parties).

²⁴⁴ See, e.g., Daniel Givelber, *Lost Innocence: Speculation and Data About the Acquitted*, 42 AM. CRIM. L. REV. 1167, 1171 (2005) (asserting that achieving acquittals for guilty defendants forces the prosecution to conform to its guidelines even when dealing with defendants who are among the most disliked members of society); Moore et al., *supra* note 24, at 58 (asserting that public defenders help protect justice and liberty).

²⁴⁵ See, e.g., Mosteller, *supra* note 47, at 50 n.75 (noting the value of litigating a motion to suppress evidence for a guilty client); Steven Arrigg Koh, *Policing & the Problem of Physical Restraint*, 64 B.C. L. REV. 309, 329–32 (2023) (noting, for example, potential violations of the Fourth Amendment's protection against searches and seizures that are unreasonable under the circumstances when law enforcement officers use force against citizens).

²⁴⁶ See, e.g., Mosteller, *supra* note 47, at 27 (asserting that, in many cases, a defense lawyer who strongly believes that their client is guilty will be mistaken, and their client will actually be innocent).

only on serving their clients' best interests within the limits of the law may help ensure that more of those innocent defendants prevail.²⁴⁷

The zealous defender could also reasonably contend that zealous defense advocacy has direct public benefits beyond serving the interests of their clients.²⁴⁸ By vindicating clients, the public defender may well protect other citizens against police or prosecutorial mistreatment. It is plausible, at least, that police and prosecutors will be less likely to engage in questionable behavior if they know that, in cases that go forward on criminal charges, a vigorous defender may well discover and expose their conduct.²⁴⁹

The zealous public defender could combine this public benefit argument with some deflection as well. Why should criticism focus on the adversarial behavior of well-funded public defenders to the exclusion of overly aggressive prosecutors? Concern about prosecutorial tactics leading to wrongful convictions, particularly the common failure of prosecutors to comply with the constitutional duty to reveal exculpatory information, seems warranted.²⁵⁰ This is not merely a problem of perceived immorality but of actual misconduct.²⁵¹ Also, as one former prosecutor, Paul Butler, has noted, given our societal preference for wrongful acquittals to wrongful convictions, "[i]t is strange . . . that 'wrongful' acquittals seem to inspire more questioning about the role of the lawyer than wrongful convictions."²⁵² The anti-defender critic might respond that prosecutors generally are so dependent on the police that they are ill-

²⁴⁷ See, e.g., Alan M. Dershowitz, *Why I Defend the Guilty and Innocent Alike*, in HOW CAN YOU REPRESENT THOSE PEOPLE?, *supra* note 25, at 65, 68 (stating that innocent accused persons would face more wrongful convictions if defense counsel only took up those cases in which they believed their client was innocent); Mosteller, *supra* note 47, at 57 (arguing that to protect innocent clients, defenders "must be given some room to care individually and intensely about their clients" and that their efforts should be "recognized as valid and meritorious . . . even for the majority who are predictably guilty"); *id.* at 78 (suggesting that "adhering to the goal of equal treatment of defendants, regardless of defense attorneys' subjective views of their guilt or innocence, remains the primary protection for those who are innocent because too often innocence is not only unknowable, but comes with no clear markers even for insiders").

²⁴⁸ See, e.g., *In re Winship*, 397 U.S. 358, 364 (1970) (emphasizing the societal importance that everyone feel confident that they will not face criminal conviction absent the prosecution bearing the burden of persuading the factfinder of their guilt).

²⁴⁹ See, e.g., FREEDMAN, *supra* note 199, at 14–42, 109–41, 161–71 (contending that the criminal defense lawyer's commitment to the client's best interests, rather than to the truth, protects individual rights and the integrity of the adjudication process); see also Koh, *supra* note 245, at 329–32 (explaining potential constitutional issues arising from police use of force).

²⁵⁰ Prosecutors have a constitutional obligation to reveal information favorable to a criminal defendant in certain circumstances. See *Strickler v. Greene*, 527 U.S. 263, 280–81 (1999). There is substantial evidence of nationwide violation of this duty. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 131 (2007).

²⁵¹ See *Strickler*, 527 U.S. at 281 (describing the prosecution's duty to reveal exculpatory information).

²⁵² Butler, *supra* note 25, at 19.

informed insofar as they possess mostly secondary knowledge of a defendant's guilt.²⁵³ Yet this is not an inspiring foundation for differentiation, especially given the general inability of defenders to know whether their trial clients are guilty.²⁵⁴ The more forthright anti-defender response would be to concede that prosecutors should be sanctioned much more often than they are and to propose additional solutions.²⁵⁵

This public benefit (plus deflection) strategy, however, endangers the public defender's ability to remain a zealous advocate in cases where the client was abused by the police or is innocent. The defender may experience cognitive dissonance in claiming to care about justice and the public welfare in explaining their role but not caring about those issues in trying to perform it. At least, the divergence between self-justification and self-image seems difficult for many defenders to embrace for long. To care about justice and the public welfare can soon mean compromising zealous defense in favor of emphasizing plea bargains and satisfying judges.²⁵⁶ That is not the mental state of a zealous public defender.

More importantly, an approach focusing only on the direct benefits of the defender's adversative behavior is unlikely to persuade the victim-oriented critics. Defenders may try to explain their adversative work as promoting justice. Yet the critics may believe that their combative behavior thwarts justice more than it serves it.²⁵⁷ Also, the critics likely have even greater concerns regarding crime control and will feel disinclined to support public defenders' work if that work is viewed as perpetuating crime in society.²⁵⁸

An approach focused on the benefits of adversarial behavior loses force with victim-oriented critics by failing to embrace the defender's work in facilitating guilty pleas. The zealous defender often functions not as an opponent of the prosecutor and judge but rather as their collaborator.²⁵⁹ In encouraging guilty pleas, the defender directly serves the state while still playing an important role in seeking fairness through their sentencing presentations.²⁶⁰ The defender becomes a part of the bureaucratic team that enables the state to dis-

²⁵³ *Id.*

²⁵⁴ See *supra* note 246 and accompanying text; *infra* note 288 and accompanying text. Professor Butler acknowledges that this distinction is questionable and notes that there are also moral grounds to criticize prosecutors for coercing guilty pleas, dehumanizing defendants, and contributing to racial injustices. See Butler, *supra* note 25, at 22–25.

²⁵⁵ See DAVIS, *supra* note 250, at 135 (noting that prosecutors seldom face consequences for misconduct even when it is harmful to victims).

²⁵⁶ Babcock, *supra* note 50, at 315.

²⁵⁷ See *supra* note 205 and accompanying text.

²⁵⁸ Moore et al., *supra* note 24, at 58, 59.

²⁵⁹ See *supra* Part I.E (describing the defender's role as a guilty plea advocate).

²⁶⁰ See, e.g., Howe, *supra* note 163, at 169 (discussing the public defender's potentially influential role at sentencing by doing things "to present [their] client in the best light").

tribute deserved punishment efficiently.²⁶¹ Guilty pleas have become the main show in the adjudication system while trials and adversative pre-trial hearings have become the sideshow.²⁶² The adversative events serve largely to give an imprimatur of legitimacy to the predominance of guilty pleas.²⁶³

Emphasizing the zealous defenders' role in plea bargaining is important even if the value of that work may not be enough and their morals still questionable in the view of their most fervent critics.²⁶⁴ Admittedly, if public defenders defend more aggressively, prosecutors may give more concessions on plea bargains, which would affect the assessment of defenders' contributions to the public welfare.²⁶⁵ Likewise, precisely how the ratio of erroneous convictions to erroneous acquittals changes depending on the aggressiveness of public defenders' efforts is debatable as is the ratio that maximizes the public welfare.²⁶⁶ Nonetheless, to understand zealous public defenders as only or even primarily client-centered advocates is to fail to fully acknowledge their cooperative functions and the full extent of their contributions as state agents.

C. Acknowledging That Zealous Defenders Have Five Faces

The most compelling response to the victim-oriented critics is that the zealous defender has five functions and, in performing all of them, may well serve the public welfare significantly. A complementariness exists between the defender's various roles where, in a single case, they achieve an outcome to which both the client and the prosecutor largely agree. In my experience, this

²⁶¹ See *supra* notes 156–157 and accompanying text.

²⁶² See *supra* notes 123–125 and accompanying text.

²⁶³ See, e.g., MCINTYRE, *supra* note 35, at 172 (noting the principal value of public defenders in “maintain[ing] the impression that the rights of individuals charged with crimes are being protected”); see also Eve Brensike Primus, *Defense Counsel and Public Defense*, in REFORMING CRIMINAL JUSTICE: VOLUME 3: PRETRIAL AND TRIAL PROCESSES 121, 130 (Erik Luna ed., 2017) (noting that our adversarial system requires its results to be justified by zealous defenders).

²⁶⁴ See *supra* Part II.B (discussing public defender criticism).

²⁶⁵ See, e.g., Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1186–87 (1975) (noting that, in deciding what guilty-plea concessions to offer, prosecutors assess the defender's willingness to take cases to trial and their ability as a trial lawyer).

²⁶⁶ See *supra* notes 222–223 and accompanying text. Judge Posner has weighed in, if only tepidly, on the side of the anti-defenders. He has contended that “[a] bare-bones system” for the defense of indigent accused persons seems “to be good enough to reduce the probability of convicting an innocent person to a very low level.” RICHARD POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 163–64 (1999). Therefore, modestly funded defender offices “may be optimal” to avoid acquitting “many guilty people” or “devot[ing] much greater resources to the prosecution of criminal cases.” *Id.* Although he does not suggest that the highly competent public defenders are immoral, his utilitarian analysis gives support to those who think they are both inimical to the public welfare and immoral. See *supra* notes 203–214 and accompanying text. Yet, Judge Posner acknowledges being unsure about the extent to which innocent people are convicted and whether his view is correct. See POSNER, *supra*, at 165.

sort of consonance occurs often in indigent criminal defense work. The public defender, although perhaps unconsciously, arrives at the end of the case serving as an agent of the client and a guilty-plea advocate while, along the way, having acted in the three roles in between.

This complementariness of roles happens most often when there is a relatively smooth progression toward a guilty plea, after some mutual negotiation by the public defender with the prosecutor and the client. After assignment to a case, the public defender would operate in the agent and guardian roles to build trust with the client.²⁶⁷ The defender would meet with the client early and listen carefully to the client's information about the client's arrest, possible witnesses for the defense, and various aspects of the client's life. The defender would investigate the crime and the client's background, and, upon determining that the prosecution could likely prove the charges, the defender would gain the client's consent to seek a plea bargain. The defender would communicate with the prosecutor and, in the mediator role,²⁶⁸ propose a plea agreement that would spur the prosecutor to provide a counteroffer, which would involve, perhaps, dropping the highest charge but leaving substantial sentencing discretion with the judge. In the emissary²⁶⁹ and mediator roles, the public defender would present the offer to the client and lobby for it. The client would initially resist. Nevertheless, in the defender's role, among others, as a guilty-plea advocate,²⁷⁰ they would urge acceptance, and the client would relent. Operating in various roles, the lawyer would prepare the client for the plea hearing, which would proceed smoothly. At sentencing, the public defender and the prosecutor would make dueling arguments about the appropriate sentence, and the process would come out roughly as both parties expected. In the end, the public defender would serve as an agent and guardian of the client but also in the various other roles as well.

In the guilty-plea cases, the public defender is heavily influenced by bureaucratic forces. The defender holds deep commitments to the legal profession and the ongoing adjudication system and its other state agents—prosecutors and judges.²⁷¹ Although perhaps unwittingly, the defender acts as a

²⁶⁷ See *supra* notes 67–104 and accompanying text (discussing a public defender's roles as both an agent and guardian of the client).

²⁶⁸ See *supra* Part I.C (discussing the ways in which public defenders also act as mediators).

²⁶⁹ See *supra* Part I.D (explaining public defenders' fourth role as emissary).

²⁷⁰ See *supra* Part I.E (examining defenders' fifth and final role as a guilty-plea advocate).

²⁷¹ See, e.g., Blumberg, *supra* note 155, at 21 ("The accused's lawyer has far greater professional, economic, intellectual and other ties to the various elements of the court system than he does to his own client."); Babcock, *supra* note 47, at 181 (noting that public defenders are often "isolated from [their] clients," because the typical client "is usually not of the lawyer's social class, often not of the lawyer's race, and even the English-speaking defendant does not talk the same language" as the lawyer); Michael McConville & Chester L. Mirsky, *The Interdependence and Parallel Growth of As-*

mediator, emissary, and even guilty-plea advocate for the system as much as an agent or guardian of the clients.²⁷²

In guilty-plea cases, the public defender may not seriously offend the victim-oriented critics. Vengeful victims of the crime and their family and supporters might wish for the maximum possible sentence and, thus, criticize all the bureaucratic actors who facilitated the plea bargain and the discounted sentence. Even those critics, however, could contend that the prosecutor and judge were irresponsible rather than asserting that the public defender misled anyone. Defender aggressiveness is a concern primarily because of its potential to deceive gullible jurors, not cynical prosecutors and judges.²⁷³

Among those concerned for defendants, critics would remain. Some would contend that public defenders who push their clients to plead guilty are too often lazy, overworked, scared, or inept.²⁷⁴ Yet guilty pleas typically benefit both the client and the state.²⁷⁵ Some critics would, nonetheless, contend that public defenders who mostly facilitate guilty pleas have done little to solve “[t]he critical problem of the criminal justice system,” which is “a lack of fairness in deciding what to criminalize and how to enforce those prohibitions.”²⁷⁶ It is also unrealistic, however, to rely on defense counsel to resolve these societal issues.²⁷⁷

Less critical observers might see the value of bargained guilty pleas, as compared with trials, in allowing the state to increase its distribution of deserved punishment.²⁷⁸ Courts can impose many plea-bargained sentences in the time required to impose a single sentence based on a jury verdict.²⁷⁹ From that

signed Counsel and Institutional Defender Systems in New York City, 15 N.Y.U. REV. L. & SOC. CHANGE 582, 582–83 (1986–1987) (noting that “defense providers ally themselves with courts, prosecutors, local government, and the organized bar rather than with indigent defendants”).

²⁷² On the roles of the defender as mediator, emissary, and guilty-plea advocate, see *supra* notes 105–184 and accompanying text.

²⁷³ See, e.g., Blumberg, *supra* note 155, at 30 (noting the “visibly impassive, almost bored reaction on the part of the judge and other members of the court retinue” to a typical “stirring” sentencing allocation by defense counsel).

²⁷⁴ See, e.g., MCINTYRE, *supra* note 35, at 150 (observing that some public defenders push their clients to plead guilty because they are not prepared for trial); *id.* at 151 (noting that some public defenders are afraid of trial); BITTAN, *supra* note 46, at 69 (observing that prosecutors may sense that a defense lawyer who does not want to go to trial is either “overworked” or “too scared to perform effectively”); Ogletree, *supra* note 25, at 86 (noting that “[p]ublic defenders are often viewed by the public as . . . incompetent at what they do”).

²⁷⁵ See *supra* Part I.E (describing the public defender’s guilty plea advocate role and the benefits that can accompany a guilty plea).

²⁷⁶ Chin, *supra* note 180, at 2240.

²⁷⁷ *Id.* at 2259.

²⁷⁸ See Howe, *supra* note 113, at 605–06 (noting the benefits of plea bargaining relative to trials in distributing deserved punishment).

²⁷⁹ See *id.* (noting that guilty-plea proceedings may take only a few minutes while a trial can easily take at least several days).

vantage, the public defender who facilitates both a guilty plea and the discounted sentence directly serves the public interest.

The value of the public defender's adversative work in trials and suppression hearings also may lie mostly in making the many guilty pleas appear legitimate.²⁸⁰ Individual trial clients of the defender would benefit from acquittals. Likewise, by redeeming those clients, the defender probably also protects other citizens against police or prosecutorial mistreatment.²⁸¹ The biggest public benefit of the defender's trial work, however, may be to make the adjudication system as a whole seem fair, and the system itself is almost entirely about guilty pleas.²⁸² When most accused persons plead guilty, the view that they could have chosen to contest the charges in a trial while represented by committed counsel implies that their decision to accept responsibility for wrongdoing is knowing, intelligent, and voluntary. This is a benefit to the state.

The zealous public defenders' relatively greater empathy for the client compared to the victim also seems unsuspicious, especially given their work in advising most clients to plead guilty.²⁸³ The lack of empathy that defenders feel toward victims seems role dependent. They could not serve as agents or guardians for their clients if they worried about the victims.²⁸⁴ Likewise, their

²⁸⁰ See, e.g., MCINTYRE, *supra* note 35, at 172 (noting the principal value of public defenders in "maintain[ing] the impression that the rights of individuals charged with crimes are being protected"); see also PRIMUS, *supra* note 263, at 130 (noting that our adversarial system "relies on zealous defenders to justify its results").

²⁸¹ See, e.g., FREEDMAN, *supra* note 199, at 14–42, 109–41, 161–71 (contending that the criminal defense lawyer's commitment to the client's best interest, rather than to the truth, protects individual rights and the integrity of the adjudication process); see also KOH, *supra* note 245 (explaining potential constitutional issues arising from police use of force).

²⁸² See, e.g., *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (noting that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas").

²⁸³ Although empathy for a client can help sustain and motivate public defenders, see *infra* notes 286–287 and accompanying text, it would become difficult to endure the work if they genuinely bore the full emotional toll of each losing client's tragedy. See, e.g., WICE, *supra* note 47, at 141 (noting one public defender's comment on the need "to not get caught up in each case and emotional tragedy because it would drive you nuts"). Also, it is not always easy to display empathy to every client, as some "can be downright loathsome." See Smith, *supra* note 133, at 1232. Public defenders must find a way to navigate these competing realities. See, e.g., *id.* at 1221–22 (asserting both that the lawyer-client relationship benefits from empathy, but that empathy can also be difficult to display in the face of the nature of public defense work); see also OGLETREE, *supra* note 23, at 1273 ("The idea that empathy helps to forestall burnout may appear counterintuitive" given the "popular conception . . . that the attorney must distance herself . . . to maintain perspective and avoid exhaustion and frustration.").

²⁸⁴ Many public defenders concede that they do not think much about the victims' suffering. See, e.g., David Feige, *HOW TO: Defend Someone You Know is Guilty*, N.Y. TIMES MAG. (Apr. 8, 2001), <https://www.nytimes.com/2001/04/08/magazine/how-to-defend-someone-you-know-is-guilty.html?searchResultPosition=1> [<https://perma.cc/34GE-UWHE>] (asserting that the victim "is an abstraction to me"); KUNEN, *supra* note 58, at 143 (noting that "you feel sympathy for the victims . . . but you suppress it"); Bellows, *supra* note 58, at 80 (asserting that "sympathy for the victim . . . is not an emotion you can afford to nurture or encourage"); Bandes, *supra* note 58, at 363–64 (noting that several

substantial empathy for the clients is usually understandable, despite the possible barriers in the attorney-client relationship.²⁸⁵ The role of agent or guardian in an adversarial context would be nearly impossible to perform zealously unless one projected substantial concern for the clients.²⁸⁶ The empathy is helpful in finding motivation to perform vigorously, and conveying it can help influence the decision-maker.²⁸⁷ Thus, the zealous defenders can seem to care more about the client than the victim and still operate with five faces.

In the end, however, any effort by public defenders to justify their work on the five-faces rationale must, like the other strategies, fail. Adopting this strategy would undermine defenders' ability to act as zealous advocates in cases involving defendants who appear probably guilty. Some of those clients will be rights-violated or innocent, and none of the system actors, including the public defender, will be able reliably to identify them.²⁸⁸ To protect those clients, and others like them—and, ultimately, to legitimize the larger adjudication system—the zealous defender must deny that they are serving as a media-

defense attorneys “recounted that they could not allow themselves to think too much about victims, and that they used euphemisms to describe the victims and their suffering”). Although a public defender bears responsibility for their client’s plight and experiences their client’s emotions firsthand, the defender has modest, if any, contact with the victims. *See, e.g.,* BITTAN, *supra* note 46, at 77 (noting the negligible contact that public defenders have with alleged victims); Feige, *supra* (explaining that it is easier for defense lawyers to feel more connected to their clients than to the alleged victims). Also, focusing on the tragedy that many victims have experienced would impede the defender’s ability to zealously defend. *See, e.g.,* KUNEN, *supra* note 58, at 143 (“It gets in the way.”); Bandes, *supra* note 58, at 363 (noting that empathy by the public defender with victims, survivors, and adverse witnesses might be a disservice to the client). As one former defender (who became a prosecutor and later a judge) noted, it would make “a difficult job nearly impossible.” Bellows, *supra* note 58, at 80.

²⁸⁵ *See, e.g.,* Natapoff, *supra* note 98, at 1474 (noting the many barriers involved with establishing a functional communicative relationship between the public defender and the client); WICE, *supra* note 47, at 135 (noting that the clients’ “anger, immaturity, emotional instability, and lack of intelligence undermined the lawyer-client relationship,” but that most defenders “maintain a dispassionate empathy for their clients” although only “occasionally” was there “a positive long-term relationship extending beyond the case’s conclusion”).

²⁸⁶ *See, e.g.,* Ogletree, *supra* note 23, at 1271 (asserting that his empathy for his clients helped sustain him as a public defender); *id.* at 1274 (noting that zealous defense results when counsel cares for their client on a personal level).

²⁸⁷ *See, e.g.,* Bandes, *supra* note 58, at 362 (noting that empathy helps defenders move along in the face of adversity); *id.* (stating that judges and juries will view the accused in a more favorable light if counsel displays care toward their client); MCINTYRE, *supra* note 35, at 143 (asserting the importance of empathy in defending factually-guilty clients); Ogletree, *supra* note 23, at 1274 (contending that “the quality of a lawyer’s representation often will improve when she takes an empathetic view of her client”).

²⁸⁸ *See, e.g.,* Mosteller, *supra* note 47, at 12 (noting the impossibility of defense counsel to truly know the guilt or innocence of their client); *see also* United States v. Wade, 388 U.S. 218, 257–58 (1967) (White, J., dissenting in part and concurring in part) (“Our interest in not convicting the innocent permits counsel . . . to put the State’s case in the worst possible light, regardless of what he thinks or knows to be the truth.”); Primus, *supra* note 263, at 129 (asserting that a primary function of criminal defense lawyers is to prevent wrongful convictions).

tor, emissary, or guilty-plea advocate. “Only by staying outside the system altogether can the defender act effectively and avoid the self-doubt and ambivalence that lead to burnout.”²⁸⁹ The defender must see their role as a trial lawyer rather than a guilty-plea lawyer.²⁹⁰ And, having assumed the responsibility of being an agent and guardian for purposes of trials, the defender must, for the sake of their own ability to vigorously defend clients, see themselves as staying in those roles while facilitating guilty pleas.²⁹¹ This illusion will be difficult to maintain long-term.²⁹² They cannot, however, remain a zealous defender and come to believe that they have five faces.

CONCLUSION

The widespread stigma attached to zealous public defenders is intractable. The stigma finds fuel in an apocryphal account that zealous public defenders largely serve their clients and are mostly opponents of the state.²⁹³ An underpinning theme of this Article is that this account is false, primarily because public defenders cooperate within a mostly guilty-plea system.²⁹⁴ Nonetheless, the work of public defenders is perplexingly multi-faceted. Still, zealous defenders themselves tend to accept and espouse a misleading narrative, which they must do to thrive as agents and guardians of their clients. They self-identify as client-centered trial lawyers who operate outside of the system, ready to vigorously defend the guilty (even as they mostly facilitate guilty pleas).²⁹⁵ If zealous public defenders misperceive their multi-faceted functions, it is unrealistic to expect the public generally to understand. The partially apt but fragmentary account of the gifted and devoted defense lawyer battling

²⁸⁹ Babcock, *supra* note 50, at 315.

²⁹⁰ See, e.g., Howe, *supra* note 163, at 169–72 (contending that seeing oneself as a “‘plea lawyer’ rather than a ‘trial lawyer’” will impede one’s ability to advocate zealously).

²⁹¹ See, e.g., MCINTYRE, *supra* note 35, at 150 (noting that public defenders view themselves as “trial lawyers” although most of their cases resolve through plea bargains).

²⁹² See, e.g., Howe, *supra* note 163, at 175 (contending that the tendency to see clients as guilty “develops as a coping mechanism over time and is fueled by a heavy caseload and the fear of representing those who might be innocent”).

²⁹³ See Babcock, *supra* note 47, at 182, 175 (asserting that the “persistence” of the question, “How can you defend a person you know is guilty?”, is “based on the image of the defense lawyer who uses daring courtroom skills and legal technicalities to free a homicidal maniac”).

²⁹⁴ On the possibility that they could help thwart it, if their clients were in a collective union organized to conduct a plea strike, see Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999, 2024 (2022) (asserting that “public defenders would need to counsel those clients . . . not just about the risks of such solidarity, but about its potentially dramatic decarceral power, too”).

²⁹⁵ See, e.g., MCINTYRE, *supra* note 35, at 150 (noting the self-image of public defenders as “trial lawyers”); Babcock, *supra* note 50, at 316 (asserting that the public defender “must remain outside the system in order to function effectively in it”); see also WEISS, *supra* note 23, at 15 (describing the image of public defenders as “confrontational trial crusaders that grows out of the adversarial model”).

fiercely in a criminal trial continues to animate widespread visions of the zealous defender as firebrand.²⁹⁶

Self-deception and misapprehension about the public defender's work helps explain how zealous public defenders can survive and legitimize the criminal justice system. It also explains why their place in that system has always been endangered. The effort to provide a zealous, combative defense in appropriate cases requires public defenders to view themselves as rebels who function outside of and in opposition to the system.²⁹⁷ Yet the inadequate funding for non-zealous defender offices in many jurisdictions is difficult to change²⁹⁸ precisely because the body politic in those places views zealous defense work as about thwarting rather than supporting the system.²⁹⁹ This is the conundrum of zealous defenders' disputed place and why marshalling widespread backing for them is challenging.

This Article counters the view, however, that zealous public defenders warrant opprobrium. Almost all public defenders surely have fought hard for some of their clients in adversarial events, and it is not always easy to countenance their aggressive tactics. Yet zealous public defenders may help protect the innocent and others from police and prosecutorial abuse, and, in the process, also may help legitimize plea bargaining.³⁰⁰ The substantially greater empathy that defenders feel toward the client compared to the victim also seems

²⁹⁶ See WEISS, *supra* note 23, at 15 (noting that the actual work of defense attorneys, which is dominated by plea bargaining, does not accord with their image).

²⁹⁷ See, e.g., Babcock, *supra* note 50, at 315 (asserting that the public defender "cannot view herself as part of a system—even one with the quixotic ideal of freeing the guilty in order to protect the innocent").

²⁹⁸ Critical commentary abounds among academics describing the funding levels as appalling. See, e.g., Steiker, *supra* note 226, at 2700 (noting the exacerbation of already-insufficient funding for public defense work, particularly after the 2008 economic crisis); Bright & Sanneh, *supra* note 27, at 2153 (asserting that most jurisdictions decline to supply necessary funding, even after receiving reports of inadequate representation and "gross miscarriages of justice"); Backus & Markus, *supra* note 27, at 20 (stating the prevalence of reports that funding for defending poor people is dramatically insufficient). Yet much of that commentary also acknowledges the difficulty of achieving reform. See, e.g., Steiker, *supra* note 226, at 2700 (describing the potential for reaching sufficient funding levels for public defender offices as "a pipedream"); Bright & Sanneh, *supra* note 27, at 2153 (concluding that public support for increasing public defense resources is nonexistent); Backus & Markus, *supra* note 27, at 20–21 (stating that the lack of public urgency regarding defense work for poor people places such concerns at "the bottom of most legislators' political agenda"); see also Dripps, *supra* note 23, at 114 (noting the "lingering fantasy" within the academy "that the Court someday, somehow, will force legislatures to pony up the resources for effective indigent defense").

²⁹⁹ See, e.g., DAVIS *supra* note 24, at 36 (noting that the public typically views public defenders who secure not guilty verdicts as having "tricked the system"); see also Moore et al., *supra* note 24, at 59 (observing that questions about whether public defenders protect liberty, justice, or rights are obscured by concerns regarding whether public defenders' actions increase or decrease crime rates).

³⁰⁰ See *supra* note 261 and accompanying text.

generally role dependent.³⁰¹ While not engaged in their adversarial battles, public defenders can care about justice, including distinguishing guilt from innocence³⁰² and empathizing with crime victims.³⁰³ This is why former public defenders can also recognize their past work as morally and psychologically taxing.³⁰⁴ Consistent with its underlying theme, the Article also concludes that zealous public defenders—despite their assumption of the role of outsider to the point of self-deception or self-repression³⁰⁵—usually have been integrated into a bureaucratic adjudication system that makes them insiders, functioning as mediators, emissaries and guilty-plea advocates for the system. Public defenders who become judges, like Ketanji Brown Jackson, bring substantial institutional knowledge and are not likely to be renegades.

³⁰¹ See *supra* notes 277–282 and accompanying text.

³⁰² Defenders can give explanations for doing the work that they do with statements condemning criminal behavior. See, e.g., Dershowitz, *supra* note 247, at 68–69 (sharing the perspective of a public defender who believes in “zealous advocacy, scrupulous compliance with constitutional safeguards, and the rule of law,” but who also “personally despise[s] criminals”).

³⁰³ As an example, one leading former public defender, the late Professor Barbara Babcock, criticized what occurred in the criminal trial of O.J. Simpson for the murder of Nicole Brown Simpson, which resulted in an acquittal. She found the consequences of defense counsel’s willingness to go to “the outer barricade[s] of zealous representation” to be “painful.” Babcock, *supra* note 31, at 8. She mostly blamed the jury for being gullible, see *id.*, and the judge for allowing the defense to pursue “far-ranging questions” about police racism in the absence of a “sufficient connection between the racism of the police and framing Simpson for murder.” *Id.* at 9. As for the defense lawyers, she conveyed that they had acted questionably, see *id.* at 8, but she concluded that they “did not commit established wrongs like suborning perjury or manufacturing evidence.” *Id.* at 9. She implied that they were also not forced to proceed as they did but, rather, were operating in an area of ethical choice not controlled by law. See *id.*

³⁰⁴ See *supra* note 58 and accompanying text.

³⁰⁵ See *supra* notes 289–290 and accompanying text.