Putting Justice Kagan's "Hobbyhorse" Through Its Paces: An Examination of the Criminal Defense Advocacy Gap at the U.S. Supreme Court

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INTRODUCTION

Since her appointment in 2010, Justice Elena Kagan has remarked on multiple occasions that although the overall quality of advocacy before the U.S. Supreme Court today is high, the same cannot be said of the advocacy for criminal defendants.[1] While some scholars and practitioners have made similar observations,[2] there has been little meaningful study devoted to the question of whether criminal defendants—as a category of litigant—are being adequately represented by counsel at the Supreme Court. In particular, no commentator has meaningfully explored whether inexperienced criminal defense attorneys make sufficient use of assistance offered by expert Supreme Court litigators.[3]

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1. *See, e.g.*, Janet Miller, *Supreme Court Justice Elena Kagan Tells U-M Crowd About Serious and Not-So-Serious Workings of the High Court*, ANN ARBOR NEWS (Sept. 7, 2012, 5:00 PM), http://www.annarbor.com/news/supreme-court-justice-elena-kagan-discusses-the-serious-and-not-so-serious-workings-of-the-high-cour ("Often, [attorneys for criminal defendants] are appearing before the Supreme Court for the first time. I hope that changes in the future." (quoting Justice Kagan)); *see also* Dep't of Justice, *50 Years Later: The Legacy of* Gideon v. Wainwright*, Ceremony Part 2*, U.S. DEP'T OF JUST. (Mar. 15, 2013) [hereinafter *50 Years Later*], http://www.justice.gov/atj/gideon/events.html.

2. *See, e.g.*, Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1562 (2008) (stating that the advocacy gap experienced by criminal defendants is "especially troublesome"); Symposium, *The Rise of Appellate Litigators and State Solicitors General*, 29 REV. LITIG. 545, 561 (2010) (quoting Supreme Court practitioner Beth S. Brinkman as saying that "[t]he criminal defense bar has not been traditionally well-organized or represented in the Supreme Court").

3. One student commentator has argued that an attorney does not have an ethical obligation to accept the help of a Supreme Court specialist if the client makes an informed decision to reject the specialist's help and the inexperienced attorney devotes the time and resources necessary to provide competent representation. *See* Christine M. Macey, Note, *Referral Is Not Required: How Inexperienced Supreme Court Advocates Can Fulfill Their Ethical Obligations*, 22 GEO. J. LEGAL ETHICS 979, 979–80 (2009). Based on the relatively flexible requirements of the rules of professional conduct, this is a sound conclusion. However, whether an inexperienced attorney is able to provide the *best available* representation is an altogether different question. This Note argues that based on the evidence that Supreme Court

This Note aims to fill part of that void. I argue that the criminal defense advocacy gap observed by Justice Kagan does exist; that the advocacy gap places criminal defendants at a distinct disadvantage before the Court; and that to close this advocacy gap, more criminal defense attorneys should accept assistance from Supreme Court specialists once a case reaches the merits stage of Supreme Court litigation.

Part I presents a statistical analysis of Justice Kagan's assertion that criminal defendants are more likely than other litigants to be represented at the Supreme Court by inexperienced advocates. I test that assertion by comparing the Supreme Court experience of criminal defense attorneys appearing at oral argument with that of opposing government counsel and other Supreme Court advocates during the last five Supreme Court Terms. The results show that Justice Kagan is correct: criminal defendants are significantly more likely than other litigants to be represented by counsel making their first Supreme Court argument. This disparity increases when the experience of defense attorneys is compared with that of their opposing government counsel.

Part II of this Note asks whether the criminal defense experience deficit is a problem. It answers that question by presenting the results of empirical studies that show an attorney with previous Supreme Court experience is more likely to achieve a positive outcome for his client at the merits stage than counsel without Supreme Court experience. These studies suggest that criminal defendants who are represented by inexperienced counsel are at a distinct disadvantage at the Supreme Court, especially in light of the extensive Supreme Court expertise often wielded by their government adversaries. Further, these studies suggest that the criminal defense experience deficit is a cause for concern for the entire country because the decisions made by the Court in criminal cases shape civil liberties for all who live, work, and travel in the United States.

Part III examines the implications that these data have for criminal defense attorneys who reach the merits stage of Supreme Court litigation. Although there may be some promise in making systemic reforms to improve criminal defense advocacy at the Supreme Court, I argue that the simplest and most effective way to address the criminal defense advocacy gap is for criminal defense attorneys who lack Supreme Court experience to be more willing to accept briefing and argument help from Supreme Court experts.

I. TESTING JUSTICE KAGAN'S HOBBYHORSE: ARE CRIMINAL DEFENDANTS MORE LIKELY TO BE REPRESENTED BY INEXPERIENCED COUNSEL THAN OTHER SUPREME COURT LITIGANTS?

In March 2013, at an event honoring the fiftieth anniversary of the landmark decision in *Gideon v. Wainwright*, Justice Kagan lamented the quality of

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specialists improve a litigant's chances before the Court, and that pro bono assistance from Supreme Court specialists is already widely available, criminal defense attorneys should be more willing to accept assistance from specialists.

criminal defense advocacy at the Supreme Court, describing the issue as her "hobbyhorse":

> [C]ase in and case out, the category of litigant who is not getting great representation at the Supreme Court are criminal defendants . . . . [W]hat we see is that people are being represented by whoever the trial counsel was for a particular defendant . . . . [A]ppellate advocacy is hard, and it takes a lot of skill, and a lot of experience, and so my big hobbyhorse is . . . getting people in the defense bar to be thinking about this and to be thinking about how to get folks who might have been extremely good trial counsel . . . to realize that actually, at the Supreme Court level . . . those cases [should get] . . . into the hands of the absolute best Supreme Court advocates . . . .[4]

Justice Kagan's outspokenness on this issue is noteworthy because the notion that appellate specialists should always handle an appeal is not a forgone conclusion.[5] Further, the emergence of Supreme Court specialists and their increasing presence before the Court has garnered criticism from some who believe that Supreme Court specialists carry distorted incentives in representing pro bono clients before the Court.[6]

The controversy surrounding representation of criminal defendants by Supreme Court specialists is examined in greater detail in Part III. For purposes of this Part, however, I focus only on whether criminal defendants are actually experiencing the advocacy gap that Justice Kagan has observed. Given the frequency with which high profile Supreme Court advocates seem to take on criminal defendants as clients, one may reasonably question whether the inexperience of defense counsel described by Justice Kagan is dramatic enough to cause alarm.[7] My research discovered no statistical study of Supreme Court experience of criminal defense attorneys appearing before the Court. This Part fills that void with an empirical analysis that compares oral argument experi-

4. *50 Years Later*, *supra* note 1.

5. *See generally* Robert A. Mittelstaedt & Brian J. Murray, *Who Should Do the Oral Argument?*, LITIG., Summer/Fall 2012, at 48, 49 (discussing circumstances where trial counsel may be better suited than an appellate specialist to handle an appeal).

6. *See* Nancy Morawetz, *Counterbalancing Distorted Incentives in Supreme Court Pro Bono Practice: Recommendations for the New Supreme Court Pro Bono Bar and Public Interest Practice Communities*, 86 N.Y.U. L. REV. 131, 168–71 (2011); *see also* Adam Liptak, *Specialists' Help at Court Can Come with a Catch*, N.Y. TIMES, Oct. 9, 2010, http://www.nytimes.com/2010/10/10/us/10lawyers.html (quoting a criminal defense lawyer as saying about Supreme Court specialists that "[t]here's one and only one reason they're interested. It's not because they love your client . . . . They want to get the case into the Supreme Court").

7. For example, in the first half of the October 2013 Term alone, high-profile Supreme Court specialists Paul Clement, Neal Katyal, and Jeffrey Fisher each represented criminal defendants before the Court. Before becoming the current U.S. Solicitor General, Donald Verrilli made the representation of criminal defendants before the Court a staple of his pro bono Supreme Court practice. *See generally* Tony Mauro, *Supreme Effort: Jenner & Block's Donald Verrilli Has Become a Passionate Advocate for the Rights of Capital Defendants at the Supreme Court*, AM. LAW., July 2007, at 111.

ence of criminal defense attorneys with that of other lawyers appearing before the Court over the last five years.

A. DESCRIPTION OF METHODOLOGY

To test Justice Kagan's assertion that criminal defendants are more likely to be represented by inexperienced attorneys than other litigants, I determined whether criminal defense attorneys appearing at oral argument in October Terms 2008 through 2012 had previously argued before the Supreme Court and compared the rates of first-time advocates for criminal defendants with those of other litigants.[8] Although it is widely acknowledged that briefing is the most important piece of advocacy at the merits stage of a Supreme Court case,[9] I chose to measure first-time argument rates because the attorney who presents oral argument not only provides the last word on behalf of a litigant before the Court, but is also most likely to have maintained control over the case's briefing and other strategic decisions throughout the litigation.[10]

To determine whether an attorney was a first-time advocate, I used argument data from the Oyez Project of the IIT Chicago-Kent School of Law. The Oyez Project's website provides audio recordings for each oral argument in the Supreme Court and catalogs arguments by individual advocate.[11] By selecting an advocate's name, the website user is provided with a list of all Supreme Court cases in which that lawyer has argued.[12] I used this resource to determine whether the advocates presenting oral argument in all cases during October

8. The Supreme Court's annual Terms begin on the first Monday in October, and thus each calendar year at the Court is referred to as an "October Term." In evaluating attorney experience, I chose not to use the popular definition for a Supreme Court "expert" developed by Professor Richard Lazarus in his 2008 article on the reemergence of elite Supreme Court practitioners. *See* Lazarus, *supra* note 2, at 1502. Professor Lazarus defines a Supreme Court expert as an attorney who has presented five or more oral arguments before the Court, or is affiliated with an organization or law firm that has presented, in the aggregate, ten or more oral arguments. *See id.* To be sure, measuring whether an attorney is a first-time advocate is a less sophisticated indicator of attorney experience and advocacy quality. Nonetheless, I chose to measure rates of first-time advocacy because I could more reliably compile those data than I could the data required for the Lazarus definition. However, where I discuss the role of Supreme Court specialists in closing the criminal defense advocacy gap in Part III, I have in mind those members of the elite Supreme Court bar that are captured by the Lazarus definition. *See infra* note 124 and accompanying text.

9. *See, e.g.*, Charles A. Rothfeld, *Avoiding Missteps in the Supreme Court: A Guide to Resources for Counsel*, 7 J. APP. PRAC. & PROCESS 249, 253 (2005) ("[T]he written briefs are the most important element of the lawyers' presentation to the Justices."); s*ee also* Bryan A. Garner, *Interviews with United States Supreme Court Justices*, 13 SCRIBES J. LEGAL WRITING 1, 136 (2010) (quoting Justice Ginsburg as stating that between briefing and oral argument, "the brief is ever so much more important").

10. *See* Jeffrey L. Fisher, *A Clinic's Place in the Supreme Court Bar*, 65 STAN. L. REV. 137, 149 (2013) (noting that for purposes of empirical analysis of Supreme Court advocacy, it makes most sense to focus on attorneys appearing at oral argument because arguing counsel likely controlled the litigation strategy).

11. *About Oyez*, OYEZ, http://www.oyez.org/about (last visited Sept. 10, 2014).

12. *Id.*

Terms 2008 through 2012 were making their first argument, or whether the advocate was a repeat player.[13] From this compilation of data, I was able to determine the overall rate at which first-time arguments were made before the Court in each Term. I then used the same method to determine the rate of first-time advocacy for both defense and government counsel in criminal cases during the same time period. I identified criminal cases using the subject identifiers in the data set provided by the Supreme Court Database, a project of the Washington University in St. Louis.[14]

B. RESULTS AND DISCUSSION

Of the 768 oral arguments made on behalf of petitioner or respondent in all cases during October Terms 2008 through 2012, just 282—or 36.7%—were made by a first-time advocate.[15] The rate of first-time argument remains low even if you remove arguments made by the perpetual repeat players from the U.S. Solicitor General's Office. Excluding arguments made by that office, 43.2% of oral arguments for petitioner or respondent were made by first-timers.[16] A different picture emerges, however, when examining the advocates for criminal defendants. Of the 107 criminal defense arguments analyzed, 57% were made by first-time Supreme Court advocates.[17] Table 1 shows, for each of the last five Supreme Court Terms, the rate of first-time arguments for all attorneys appearing before the Court and the rate of first-time arguments by criminal defense attorneys.

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13. I did not analyze the experience of attorneys making arguments as amicus curiae. I excluded such arguments because the majority of amicus arguments heard by the Court are presented by attorneys from the U.S. Solicitor General's Office, almost all of whom have argued multiple Supreme Court cases. On occasion, the Court will allow amicus argument from a third party that is not the United States; however, this circumstance occurs so infrequently that it would not have altered the results of my analysis.

14. One difficulty I encountered was determining how to identify, using the Supreme Court Database, cases in which criminal defendants appeared as a party. This is unfortunately not as simple as selecting the "Criminal Procedure" subcategory provided by the database. The Supreme Court Database codes each case with only one legal "issue," and, for example, ineffective assistance of counsel claims brought by criminal defendants are classified under the "Civil Rights" category. *See Analysis Specifications*, SUP. CT. DATABASE, http://supremecourtdatabase.org/analysis.php (last visited Sept. 10, 2014). Thus, to ensure I was getting an accurate selection of criminal defendants who appear before the Supreme Court each Term, I broadened my search to include not only "Criminal Procedure" cases, but also all cases falling under the "indigents" subset within the "Civil Rights" category. When this method retrieved cases that did not involve criminal defendants, I removed them from the analysis. For a detailed discussion of the challenges associated with using the categories provided by the Supreme Court Database, but in the context of business cases, see Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1437–48 (2013).

15. Data on file with author.

16. These data are in line with those published by Professor Lazarus in his 2008 article on the reemergence of Supreme Court specialists. Professor Lazarus found that in October Terms 2005, 2006, and 2007, first-time advocates appeared before the Supreme Court in 56%, 58%, and 43% of oral arguments, respectively. *See* Lazarus, *supra* note 2, at 1520 tbl.3.

17. Data on file with author.

Table 1

October Term	Percentage of Arguments by First-Time Advocates: All Cases	Percentage of Arguments by First-Time Advocates: Criminal Defense
2008	36.5%	56.5%
2009	37.8%	59.1%
2010	40.4%	57.1%
2011	33.8%	52.6%
2012	34.8%	59.1%
Average	**36.7%**	**57%**

These data confirm that Justice Kagan is correct about the inexperience of criminal defense attorneys at the Supreme Court: they are significantly more likely to be making their first argument than counsel for other litigants. The high rate of first-time advocacy for criminal defense attorneys is even more concerning, however, when viewed in light of the experience wielded by their government adversaries.[18] In the same 107 criminal cases, counsel for the government argued their first Supreme Court case 38.3% of the time. Table 2 compares the rates of first-time advocacy between government attorneys and defense attorneys in the same set of criminal cases.

Table 2

October Term	Percentage of Arguments by First-Time Advocates: Government in Criminal Cases	Percentage of Arguments by First-Time Advocates: Defense Attorneys in Criminal Cases
2008	39.1%	56.5%
2009	31.8%	59.1%
2010	42.9%	57.1%
2011	47.4%	52.6%
2012	31.8%	59.1%
Average	**38.3%**	**57%**

18. Authors Jeffrey Paul DeSousa and Melissa Meyer have recently argued that private Supreme Court specialists and public interest organizations should partner to improve criminal defense advocacy at the Court. Their piece discusses in detail the disadvantage that criminal defendants have in litigating against the "appellate machine" of the U.S. Solicitor General's Office. The piece overestimates the frequency with which the Supreme Court decides criminal cases in which the United States—as opposed to one of the fifty states—is the petitioner or respondent. Approximately half of the 107 criminal cases I examined did not involve the United States as a direct party. However, given the many amicus arguments made in support of states in those same criminal cases, *see infra* notes 20–23 and accompanying text, DeSousa and Meyer are right to suggest that the U.S. Solicitor General's Office poses a tremendous hurdle for individual criminal defendants who appear before the Court, *see* Jeffrey Paul DeSousa & Melissa Meyer, Note, *Equilibrium in High Court Representation for Criminal Defendants: How the Supreme Court Bar Can Champion Civil Liberties*, 26 GEO. J. LEGAL ETHICS 911, 912–18 (2013).

Although the first-time advocacy rate for government attorneys is slightly higher than the average across all attorneys appearing before the Court, the disparity between government and defense experience skyrockets when you take into account the frequent oral arguments made by the U.S. Solicitor General as amicus curiae in support of states in criminal cases. In almost all of the cases described above in which a government attorney presented his or her first oral argument before the Court, the first-time advocate was a *state* prosecutor.[19] In over half of those cases, however, an experienced attorney from the U.S. Solicitor General's Office presented an amicus argument in support of the State's position.[20] This means that in cases where a criminal defendant was being prosecuted by a first-time advocate, the defense attorney was often in the unenviable position of having to rebut the arguments of both the rookie state prosecutor and an experienced Supreme Court specialist from the U.S. Solicitor General's Office.[21]

Thus, when the U.S. Solicitor General amicus arguments are included in the analysis of attorney experience in criminal cases, the advocacy gap between the defense and the government grows dramatically. From October Term 2008 through 2012, the position of the government was argued by a first-time advocate *without* supporting amicus argument from the U.S. Solicitor General's Office in just 16.8% of criminal cases, whereas the same figure for criminal defendants was 57%.[22] Put another way, the government position in criminal cases was argued by at least one repeat-player 83.2% of the time, compared to just 43% for the defense.[23] Figure 1 illustrates the dramatic experience gap between defendants and the government in criminal cases in the last five years.

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19. Data on file with author.

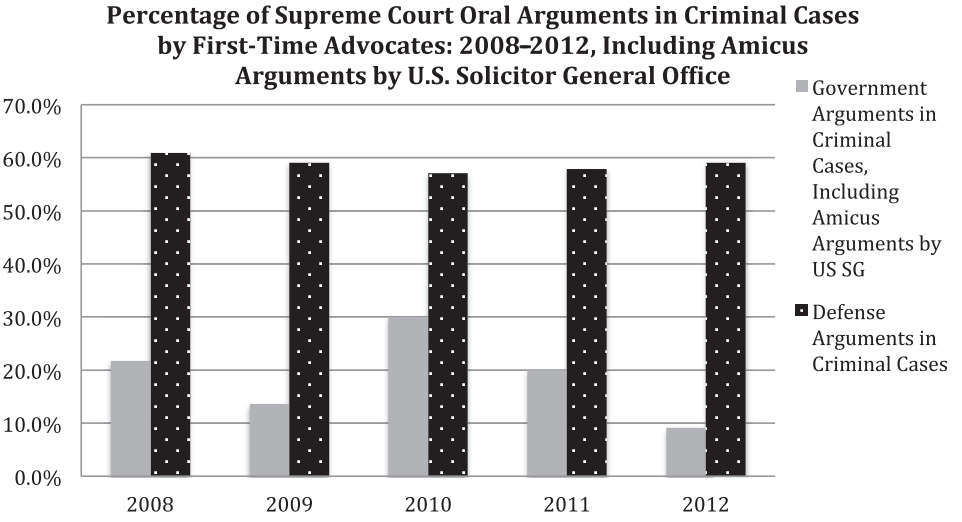
20. Data on file with author. Almost all of the amicus arguments made by the U.S. Solicitor General's Office that I have described were presented by an attorney who had delivered at least one previous Supreme Court argument. In most cases, the attorney had made several previous arguments. In addition to the argument *experience* of the attorneys in the U.S. Solicitor General's Office, though, the Office is renowned for the quality of its Supreme Court advocacy and the rate at which it prevails before the Court. *See, e.g.*, Patrick C. Wohlfarth, *The Tenth Justice? Consequences of Politicization in the Solicitor General's Office*, 71 J. POL. 224, 225 (2009) (noting that studies by political scientists show that "the justices overwhelmingly support the S.G.'s legal positions on the merits compared to all other participants" in Supreme Court litigation).

21. Consider the example of *Williams v. Illinois*, a case that dealt with an important Confrontation Clause question of whether an expert witness can testify about a DNA report prepared by a nontestifying third-party lab analyst. 132 S. Ct. 2221, 2227 (2012). In *Williams*, Illinois state appellate defender Brian Carroll argued on behalf of the defendant, Sandy Williams. It was his first Supreme Court argument. His state adversary, Anita Alvarez, was the State's Attorney for Cook County, Illinois. Alvarez—an elected official—was also making her first argument before the Court. Unlike Carroll, however, Alvarez was assisted by an amicus argument from Deputy U.S. Solicitor General Michael Dreeben. Dreeben, widely regarded as one of the best Supreme Court advocates practicing today, had argued eighty-eight Supreme Court cases by the close of the 2012 Term. *SCOTUSblog Stat Pack, October Term 2012, Oral Argument—Advocates*, SCOTUSBLOG (June 27, 2013) [hereinafter *SCOTUSblog Stat Pack*], http://scotusblog.com/wp-content/uploads/2013/06/argument-advocates_OT12.pdf.

22. Data on file with author.

23. Data on file with author.

Figure 1



These data show that the government in criminal cases was nearly twice as likely as criminal defendants to be represented or supported in amicus argument by a repeat-Supreme Court litigator. For those—like Justice Kagan—who are concerned about the advocacy that criminal defendants receive before the Court, these are the most telling numbers. Not only are criminal defendants significantly more likely to be represented by Supreme Court novices than other litigants generally, but their government adversaries are *especially* likely to be highly experienced.

II. IS THE CRIMINAL DEFENSE EXPERIENCE DEFICIT A PROBLEM?

The results described above show that Justice Kagan is correct: criminal defense attorneys—more often than other Supreme Court advocates—are "appearing before the Supreme Court for the first time."[24] But so what? Many outstanding lawyers never have, and never will, make a Supreme Court argument. Just because an attorney has argued in the Supreme Court does not mean he or she is an excellent Supreme Court advocate; conversely, inexperienced Supreme Court lawyers can provide excellent representation before the Court.[25]

However, it defies logic to suggest that Supreme Court experience does not, at the very least, provide a rough indication of the quality of advocacy an attorney provides. Empirical studies on Supreme Court advocacy reflect this notion. This Part presents the statistical findings of three sets of researchers that show an advocate's experience matters in the outcome of Supreme Court

24. Miller, *supra* note 1.

25. *See* Fisher, *supra* note 10, at 150 ("[M]any lawyers with fewer than five arguments can do an outstanding job before the Court.").

cases.[26] It then goes on to make the case that because experience matters, the criminal defense experience deficit jeopardizes both the outcomes for individual defendants and the shape of civil liberties nationwide.

A. EMPIRICAL DATA SHOW THAT SUPREME COURT EXPERIENCE MATTERS

Conventional wisdom holds that advocacy matters—better lawyers get better results for their clients.[27] This logic should still hold at the Supreme Court; the Justices are human beings, and they ought to be susceptible to persuasion by skilled advocates just like other judges or jurors.[28] In the past several decades, a number of researchers have attempted to test this hypothesis empirically. Their studies on Supreme Court advocacy confirm that experienced Supreme Court advocates are more likely than inexperienced advocates to achieve successful outcomes before the Court.[29] This section examines the empirical data available on advocates' effect on the Court at the merits stage of Supreme Court litigation.[30] It begins with a discussion of the limitations inherent in empirical study

26. Some recent scholarly discussions of Supreme Court advocacy have relied on anecdotal evidence to establish that Supreme Court experience influences the outcome of Court decisions. *See, e.g.*, DeSousa & Meyer, *supra* note 18, at 925–26 (describing statements made by former U.S. Solicitor General Paul Clement for the proposition that the strength of advocacy matters in the outcome of Supreme Court cases); Macey, *supra* note 3, at 986–87 (describing an interview with experienced Supreme Court advocate Michael Gottesman for the proposition that experienced advocates are more likely to succeed at the merits stage of a Supreme Court case than inexperienced advocates). Given that Part I presents a statistical analysis of the criminal defense experience deficit, however, it is important for purposes of this Note to discuss in detail the statistical studies—as opposed to one-off observations by Justices and advocates—that show Supreme Court experience matters. Further, notwithstanding the inherent limitations in empirical studies of Supreme Court advocacy discussed in this Part, the data compiled by these researchers is the most persuasive evidence that experience matters.

27. Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 346 (2011) (discussing evidence that the quality of legal representation has a strong effect on the outcomes of cases).

28. Justice Scalia recently acknowledged that Supreme Court lawyering matters in the Justices' decisionmaking, stating that the Justices "are dependent upon these [lawyers] who have lived with the case for months—in many cases years—to clarify the facts and to clarify the law. . . . [T]he reason to listen to them is that they presumably know more about the subject than [the Justices]." Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), http://nymag.com/news/features/antonin-scalia-2013-10/.

29. *See, e.g.*, Fisher, *supra* note 10, at 155 (finding that Supreme Court experts are 1.4 to 2 times as likely to win Supreme Court cases at the merits stage than nonexperts).

30. The studies discussed in this Part each examine the success of advocacy at the merits stage of Supreme Court litigation, and not at the jurisdictional stage, in which advocates attempt to convince the Court to hear (or reject) a case, most often through a petition for certiorari. The concerns raised by Justice Kagan about the poor quality of criminal defense at the Supreme Court are about advocacy at the merits stage: briefing and oral argument. Thus, thorough treatment of the effect of any criminal defense experience deficit at the certiorari stage is beyond the scope of this Note. It is worth mentioning, however, that scholars seem to agree that the effect of high-quality Supreme Court advocacy is greatest at the certiorari stage. Given the Court's resource constraints in sifting through the thousands of cert petitions filed each year, the Justices are particularly dependent on the arguments made by skilled advocates that a case is—or is not—cert-worthy. *See* Lazarus, *supra* note 2, at 1523 (stating that "[t]he Justices are likely more dependent on the advocates at the jurisdictional stage than at any other stage in the litigation"); *see also* Fisher, *supra* note 10, at 162 (arguing that Supreme Court

of advocacy at the Supreme Court and then presents the findings of three statistical analyses on Supreme Court advocacy.

1. Limitations of Empirical Studies of Supreme Court Advocacy

The presentation of empirical data on Supreme Court advocacy that follows comes with a caveat: the effect of advocacy on the Court is difficult to measure. Notwithstanding the many hurdles an attorney must overcome just to persuade the Court to hear his or her case, the landscape through which a Supreme Court lawyer must travel at the merits stage is full of complex variables that affect the outcome of the litigation. This reality presents significant obstacles for researchers attempting to define and measure an advocate's effect on the Court.

One such variable is the uncertainty surrounding the extent to which the "lead" lawyer has controlled the strategic decisionmaking of the litigation. A litigant's presentation to the Justices is often the collaborative product of multiple attorneys who have worked on the case.[31] Moreover, the attorney at oral argument is not necessarily the driving force in crafting a party's arguments;[32] and it is the brief—not the oral argument—that is regarded as the most important piece of advocacy at the merits stage.[33] It is not uncommon for an attorney making his or her first oral argument to have received pro bono briefing assistance from a Supreme Court clinic or a law firm with a Supreme Court

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specialists provide the greatest advantage at the certiorari stage, "when familiarity with the Court and credibility of counsel is even more important" than at the merits stage). Thus, to the extent that the studies in this Part establish that experienced Supreme Court advocates are more likely than inexperienced advocates to win on the merits, such an advantage is almost certainly magnified at the certiorari stage. *See* Fisher, *supra* note 10, at 162 ("I think it is safe to say that whatever the precise statistical advantage on the merits is, Supreme Court specialists provide a greater comparative advantage at the certiorari stage . . . ."). There is also reason to believe that the advocacy gap for criminal defendants at the certiorari stage is greater than at the merits stage: many of those Supreme Court experts who do represent criminal defendants before the Court do not undertake the representation until after certiorari has been granted. *See* Lazarus, *supra* note 2, at 1561 (noting that "virtually none of the private Supreme Court Bar offers significant, on-going pro bono assistance at the certiorari stage").

31. For example, in the recently argued immigration case *Mayorkas v. Cuellar de Osorio*, the respondents' brief listed the names of twelve lawyers from three different law firms. *See* Brief for Respondents, Mayorkas v. Cuellar de Osorio, 134 S. Ct. 2191 (2014) (No. 12-930), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2013/11/12-930-bs.pdf.

32. *See* Fisher, *supra* note 10, at 149 ("Sometimes solo practitioners and other lawyers who argue cases affiliate with Supreme Court specialists for purposes of briefing, allowing the specialists significant (if not total) control over the case's briefing.").

33. *See, e.g.*, Rothfeld, *supra* note 9. The briefing stage itself involves several tasks: drafting, editing, and filing both the merits briefs and reply briefs, and seeking amicus brief support from third parties. In crafting a brief's arguments, skilled Supreme Court attorneys often must engage in painstaking work to completely overhaul the arguments made in the litigation below. *See* Lazarus, *supra* note 2, at 1540 ("Supreme Court advocacy more often than not requires that counsel completely rethink a case from the way that it was litigated and argued below."). A number of Justices themselves have publicly remarked that although oral argument is not an insignificant part of the job, the briefs are the most influential piece of advocacy that a litigant's attorney provides to the Court at the merits stage. *See, e.g.*, Garner, *supra* note 9 (quoting Justice Ginsburg as stating that between briefing and oral argument, "the brief is ever so much more important").

practice.[34] In such cases, it is impossible to know which attorney had primary responsibility for developing the litigant's arguments.

A second difficulty is determining how to define success before the Court. Although each case may nominally result in a "win" for one litigant and a "loss" for the other, not all wins are created equal.[35] One of the hallmarks of the elite Supreme Court practitioner is the ability to recognize that a case is going to be lost at the Court and to develop a litigation strategy that leads the Court to provide the losing litigant with a "soft landing," leaving open alternative paths to prevail on remand.[36] In other words, given the complexity of the Court's decisions, there can be successful defeats and unsuccessful victories. It would be nearly impossible to quantify success in a way that takes into account this reality of Supreme Court litigation.[37]

A third complication in trying to determine whether good advocacy influences the Court's decisions is that there is no perfect way to determine what constitutes "good" advocacy. Quality of advocacy cannot be quantified solely by experience: just because an attorney is appearing before the Supreme Court for the first time does not mean that he or she is incapable of providing exceptional Supreme Court representation.[38] Similarly, advocacy quality cannot be measured solely by whether the attorney wins or loses. For the reasons described above, just because an attorney receives a majority of votes from the Court does not mean that he or she did an exceptional job.[39] Instead, superior advocacy likely results from a combination of factors—both tangible and intangible—including an attorney's superior skill, superior resources, and superior experience.[40] No one indicator provides a perfect proxy for an advocate's

34. Lower court counsel who retain primary responsibility for a case at the Supreme Court "often seek significant help from experts in Supreme Court practice both in the drafting of the brief and in the preparation of the oral argument." Lazarus, *supra* note 2, at 1519. Similarly, it is not uncommon for a state attorney general to make the oral argument, while the state solicitor general is listed on the brief as "counsel of record." The recent brief and argument in *Kansas v. Cheever*, 134 S. Ct. 596 (2013), is an example of this situation. Kansas Attorney General Derek Schmidt appeared at oral argument, but it was Kansas Solicitor General Stephen McAllister who appeared as counsel of record on the brief. *Compare* Petitioner's Brief on the Merits, Kansas v. Cheever, 134 S. Ct. 596 (2013) (No. 12-609) (identifying Kansas Solicitor General Stephen McAllister as the "Counsel of Record" for the state), *with* Transcript of Oral Argument at 3–17, 55–59, Kansas v. Cheever, 134 S. Ct. 596 (2013) (No. 12-609) (identifying Kansas Attorney General Derek Schmidt as appearing on behalf of the state at oral argument).

35. *See* Fisher, *supra* note 10, at 148 (arguing that a victory at the Supreme Court "that establishes a legal test that the litigant will have difficulty satisfying on a remand . . . is not much of a win").

36. *See* Lazarus, *supra* note 2, at 1541.

37. *See* Fisher, *supra* note 10, at 148 (noting that it would be "difficult, if not impossible" to quantify a successful "soft landing").

38. *See* Lazarus, *supra* note 2, at 1561 (stating that in some instances "novice Supreme Court counsel can in fact do an outstanding job").

39. For a case study on the matter, see DeSousa and Meyer's discussion of *United States v. Jones*, 132 S. Ct. 945 (2012). DeSousa & Meyer, *supra* note 18, at 927–38 (discussing a unanimous victory for a criminal defendant at the Supreme Court in spite of the poor advocacy of his inexperienced defense attorney at oral argument).

40. *See* Fisher, *supra* note 10, at 139.

ability to persuade the Justices, introducing another layer of uncertainty into empirical study of Supreme Court advocacy.

2. Results of Empirical Studies on Supreme Court Advocacy

Notwithstanding these inherent complexities, three sets of researchers have published studies that quantify the effect of advocacy on the Court. They each find that experienced advocates are more likely to achieve positive outcomes for their clients than inexperienced advocates.[41] Each study treats the individual who presented oral argument as the party's attorney.[42] Such a choice makes sense because, although it may be the case that other attorneys had substantial input in the production of the merits brief or other litigation decisions, the attorney who argues the case is most likely to have controlled strategic advocacy decisions over the course of the Supreme Court litigation.[43] The studies also each define success by classifying each decision as either a win or a loss for each litigant.[44] Again, this decision works for an empirical study because it would be impossible to identify cases in which a "loss" for a litigant was actually a desired outcome.[45] The researchers each differ, however, in how they choose to define an advocate's ability. The studies are discussed, in turn, below.

a. McGuire Studies. In an analysis of Supreme Court cases from October Term 1977 through 1982, Professor Kevin McGuire concluded that having more experienced counsel positively influences the outcome of the Court's decisions.[46] The study tested whether an attorney with more Supreme Court litigation "expertise" has a greater likelihood of success in cases on the merits.[47] Expertise was measured by the total number of Supreme Court arguments made by the attorney appearing at oral argument during the study period.[48] Acknowledging that there are drawbacks to using experience as a direct measure of an attorney's advocacy proficiency, McGuire argued that an attorney's argument experience is the best available measure of quality, on the hypothesis that "the justices place greater trust in the lawyers whose arguments they hear and whose

41. *See* Fisher, *supra* note 10, at 156; Timothy R. Johnson, James F. Spriggs II & Paul J. Wahlbeck, *Oral Advocacy Before the United States Supreme Court: Does It Affect the Justices' Decisions?*, 85 WASH. U. L. REV. 457, 487 (2007); Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187, 187 (1995).

42. *See* Fisher, *supra* note 10, at 149; Johnson et al., *supra* note 41, at 485; McGuire, *supra* note 41, at 190.

43. *See* Fisher, *supra* note 10, at 149 (explaining that his empirical study focuses on attorneys appearing at oral argument because arguing counsel likely controlled the litigation strategy).

44. *See* Fisher, *supra* note 10, at 148; Johnson et al., *supra* note 41, at 492–93; McGuire, *supra* note 41, at 191.

45. *See supra* text accompanying note 44.

46. *See* McGuire, *supra* note 41, at 187–88.

47. *Id.* at 190.

48. *Id.* at 190–91.

briefs they read most frequently."[49]

The study found that an advocate's experience was a statistically significant determinant in the outcome of Supreme Court cases, even when controlling for other factors such as the number of amicus briefs filed in the case or the presence of an amicus brief from the U.S. Solicitor General.[50] Over the study period, a petitioner's likelihood of winning increased by seven percentage points if his or her attorney was more experienced than the opponent.[51] In a follow-up study of arguments by the U.S. Solicitor General's Office over the same time period, McGuire made the even more remarkable finding that attorney experience is so important that the U.S. Solicitor General Office's well-documented litigation advantage[52] "disappear[ed] completely" when opposing counsel had comparable Supreme Court argument experience.[53]

b. Johnson et al. Study. In 2007, Professors Timothy Johnson, James Spriggs, and Paul Wahlbeck published a study of oral arguments' effect on Supreme Court decisions using argument notes kept by Justice Blackmun during his tenure on the Court.[54] Justice Blackmun's detailed, handwritten notes contain substantive comments about each attorney's oral arguments, as well as a grade—typically a number on an eight-point grading scale.[55] Instead of using an attorney's oral argument experience as the measure of an advocate's quality, the study utilizes the argument grades given by Justice Blackmun for each advocate during Blackmun's time on the Court from 1970 through 1994.[56]

To first establish that Justice Blackmun's grades are reliable indicators of advocacy quality, the authors compared his grades with other factors that scholars typically associate with high-quality advocacy, including prior oral argument experience. They found that "those having previously argued before the Court" were among those who earned the best grades from Justice Blackmun.[57] Converting Justice Blackmun's grades to a 100-point scale, the research-

49. *Id.* at 193.

50. *Id.* at 191–92.

51. *Id.* at 194.

52. *See, e.g.*, Wohlfarth, *supra* note 20 (noting that studies by political scientists show that "the justices overwhelmingly support the S.G.'s legal positions on the merits compared to all other participants" in Supreme Court litigation).

53. Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505, 515 (1998). For a critique of McGuire's studies, see Lazarus, *supra* note 2, at 1545 n.236. *See also* Fisher, *supra* note 10, at 141 (describing McGuire's findings and the shortcomings of his analysis).

54. *See* Johnson et al., *supra* note 41, at 460.

55. *Id.* at 486.

56. At least one other study made use of Justice Blackmun's notes in this way. *See* Andrea McAtee & Kevin T. McGuire, *Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?*, 41 LAW & SOC'Y REV. 259, 263 (2007). Professor Lazarus has questioned the reliability of this type of study, arguing that Justice Blackmun's ratings are too subjective to provide an accurate picture of advocacy quality. *See* Lazarus, *supra* note 2, at 1549 n.248.

57. *See* Johnson et al., *supra* note 41, at 487.

ers found that the most experienced Supreme Court advocates earned scores an average of seven points higher than the least experienced advocates.[58] The study went on to examine whether advocates with higher grades were more likely to have succeeded in obtaining votes from the Justices.[59] Controlling for factors other than argument quality that may affect a Justice's decisionmaking, the authors found that the Court did indeed respond to the quality of advocacy provided by the attorney.[60] The statistical analysis revealed that "nearly all Justices are influenced by the quality of oral arguments," and the authors concluded that "[t]he litigant whose attorney provides the stronger oral argument is substantially more likely to win the case."[61]

c. Fisher Study. Professor Jeffrey Fisher has published the most notable recent study on the effect of advocacy on the Supreme Court's decisions. Professor Fisher's study is the first empirical examination of Supreme Court advocacy postdating the emergence of the modern Supreme Court bar.[62] The study tests whether an attorney's Supreme Court "expertise" affects outcomes on the merits of Supreme Court cases.[63] Professor Fisher, himself an experienced Supreme Court advocate,[64] adopted the definition of Supreme Court "expert" established by Professor Lazarus: an attorney is a Supreme Court expert if, at the time of argument, he or she has argued five or more cases before the Court or is affiliated with a law firm or organization that has collectively argued ten or more Supreme Court cases.[65] By including an attorney's organizational affiliation in the definition of a Supreme Court expert, the Lazarus definition explicitly considers the resources available to an attorney in addition to the attorney's experience.[66] This makes the definition a broader, more sophisticated measure of advocacy ability than the experience data McGuire

58. *Id.* at 482.
59. *Id*. at 489.
60. *Id.* at 495.
61. *Id.* at 498, 502.
62. *See* Fisher, *supra* note 10, at 144.
63. *See id*. at 146. Fisher defined a litigant's victory as "any decision that upsets the judgment below in any way" for a petitioner and a decision that "leaves the judgment below entirely in place" for a respondent. *Id*. at 148.
64. By the end of October Term 2012, Fisher had argued over twenty cases before the Court, many in his capacity as Co-Director of the Stanford Supreme Court Litigation Clinic. *See SCOTUSblog Stat Pack*, *supra* note 21.
65. *See* Lazarus, *supra* note 2, at 1502. Lazarus notes that the number of oral arguments used in his definition understates an individual attorney's experience because those who have argued at least five cases "are likely to have filed briefs in far more cases on the merits either as amicus curiae or as co-counsel in at least five times that number." *Id*.
66. Lazarus explains that the reason for including as an expert an attorney affiliated with an organization that has argued ten or more Supreme Court cases is "the expert advice that the [attorney] inevitably receives from professional colleagues." *Id*.

used.[67] The heart of the definition, however, remains litigation experience.[68]

The study examined attorney expertise in 356 oral arguments from October Terms 2004 through 2010, controlling the results for whether the successful party was a petitioner or respondent.[69] Professor Fisher found that if the litigant is a petitioner, he or she is roughly 1.4 times more likely to win if represented by a Supreme Court expert than if represented by a nonexpert.[70] If the litigant is a respondent, he or she is slightly more than twice as likely to win with expert counsel.[71] The advantage provided by Supreme Court experts was more dramatic when the quality of opposing counsel was held constant. To do so, Professor Fisher examined cases in the sample in which the opposing party was represented by attorneys from the U.S. Solicitor General's Office.[72] For petitioners litigating against the U.S. Solicitor General's Office, experts won 65.2% of the time, compared with just 43.5% for nonexperts.[73] For respondents litigating against the U.S. Solicitor General's Office, experts won 57.1% of their cases, whereas nonexperts prevailed just 9.1% of the time.[74] Controlling for other factors that may influence the Court's decisions, Professor Fisher found that no variable besides an attorney's expertise explains the differential rates of success between nonexperts and experts.[75]

3. A Common Thread: Experience Matters

The empirical studies presented above collectively establish that experienced advocates are more likely than novice Supreme Court counsel to win at the merits stage of Supreme Court litigation. Although each study defines advocacy quality differently, the measures of quality used are each rooted in an advocate's Supreme Court argument *experience*. As acknowledged above, there is

67. *See supra* text accompanying notes 46–48.

68. Professor Fisher suggests that the Lazarus definition provides three advantages, all of which are tied directly to an advocate's experience. First, the definition indicates an advocate's familiarity with the Supreme Court forum and the tendencies of individual Justices. Such familiarity better positions an advocate to succeed in persuading the Court. Second, the Justices themselves are likely to be familiar with an attorney who meets the Lazarus definition, which may make them more likely to credit the experienced advocate's assertions than those of an attorney with whom the Court is unfamiliar. Finally, the experienced advocate who meets the Lazarus definition is likely to be highly skilled. Professor Fisher argues that there are really only two ways to argue five or more Supreme Court cases over the course of a career: land a highly competitive job with the U.S. Solicitor General's Office or develop a reputation as an exceptionally talented Supreme Court advocate. *See* Fisher, *supra* note 10, at 150.

69. *Id.* at 151. Fisher controlled for whether the litigant was a petitioner or respondent because of the documented advantage that petitioners have over respondents at the merits stage of Supreme Court litigation: the Court tends to rule in favor of petitioners much more often than respondents. *See id.* at 152.

70. *Id.* at 155.

71. *Id.*

72. *Id.* This has the effect of eliminating the possibility that the weakness of an attorney's adversary contributed to a victory.

73. *Id.*

74. *Id.*

75. *Id.* at 156.

no perfect proxy for an attorney's ability.[76] However, the data are clear: Experience matters. A Supreme Court litigant is more likely to win if he or she is represented by a Supreme Court specialist.

B. THE CRIMINAL DEFENSE EXPERIENCE DEFICIT JEOPARDIZES CIVIL LIBERTIES FOR ALL

Justice Kagan is right to be sounding an alarm about the criminal defense experience deficit at the Court today. The lack of experienced counsel briefing and arguing on behalf of criminal defendants places those individuals at a distinct disadvantage in the presentation of their cases to the Court. The empirical evidence on Supreme Court experience demonstrates that many of the criminal defendants represented at the Court today by novice counsel would achieve better outcomes if represented by experienced advocates.[77]

What's more, however, is that the criminal defense experience deficit not only causes individual defendants to lose; it adversely affects the nation at large. An attorney who litigates before the Court bears a responsibility unique to the Supreme Court forum: the arguments made by counsel shape Supreme Court decisions that bind the entire country.[78] While the binding nature of Supreme Court decisions holds for all types of cases adjudicated at the Court, it takes on particular significance in criminal cases. The Court hears more cases about criminal procedure than any single other legal issue.[79] In each of the past ten Supreme Court Terms, the Court has decided over twenty cases dealing with criminal procedure—each one of which set binding precedent for the country.[80] And despite the widely documented shrinking of the Court's docket in the past thirty years,[81] criminal procedure cases have remained steady candidates for grants of certiorari: since the Supreme Court Database began tracking Supreme Court decisions, the amount of criminal procedure cases heard each Term by the Court has steadily grown as a proportion of the Court's docket, even though the absolute number of cases heard by the Court has declined.[82]

Most importantly, though, decisions by the Court in criminal cases shape civil liberties for all individuals who live, work, and travel within our borders. In this sense, the lawyers who appear before the Supreme Court on behalf of criminal defendants represent not only the client but innumerable individuals throughout

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76. *See supra* text accompanying note 40.

77. *See supra* section II.A.

78. *See* Fisher, *supra* note 10, at 142.

79. Calculations by author using data from the Supreme Court Database. *See Analysis Specifications*, *supra* note 14.

80. *Id.*

81. *See, e.g.*, Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1225 (2012).

82. Over October Terms 1975–1984, when the size of the Supreme Court's docket was at its most recent peak, criminal procedure cases made up an average of 22.2% of the cases heard. That percentage has increased in recent years. Over October Terms 2005–2012, criminal procedure cases have made up 29.7% of the Court's docket. Calculations were made by the author using data from the Supreme Court Database. *See Analysis Specifications*, *supra* note 14.

the nation who may someday find themselves the subject of a criminal prosecution.[83] The large disparity in criminal defense advocacy experience described in Part I thus has profound negative consequences for unknown scores of people—and the families, friends, and communities around them—who will ultimately be targeted for criminal punishment by their local, state, and federal governments.[84]

III. WHAT CAN BE DONE TO IMPROVE ADVOCACY FOR CRIMINAL DEFENDANTS APPEARING BEFORE THE SUPREME COURT?

The empirical data on the positive effect of expert Supreme Court representation show that the criminal defense experience deficit described in Part I is a problem worthy of concern from the defense advocacy community and all others who value civil liberties. The next logical question, then, is what can be done to improve advocacy for criminal defendants at the Court? Supreme Court commentators have identified strategies for improving advocacy for underrepresented litigants that seem to fall into two categories. The first category consists of systemic reforms designed to improve the advocacy of otherwise inexperienced attorneys who appear before the Court.[85] The second is much simpler: for Supreme Court specialists to play a greater role in advocating on behalf of underrepresented litigants.[86] For the reasons discussed in this Part, although systemic reform efforts do offer some promise for criminal defendants, the more effective means for improving criminal defense advocacy at the Supreme Court is—in Justice Kagan's words—for more criminal defense cases to get "into the hands of the absolute best Supreme Court advocates."[87] For this solution to meaningfully improve the prospects for criminal defendants, though, inexperienced criminal defense attorneys must become more willing to accept the widely available offers of pro bono assistance from specialists.

At the outset of this Part, it is important to reiterate that for the reasons discussed in footnote 30, this Note focuses on representation of criminal defendants at the *merits* stage of Supreme Court litigation. Therefore, whether criminal defense attorneys should be more willing to accept offers of assistance from specialists in seeking certiorari is beyond the scope of this Note. Pro bono representation of Supreme Court litigants by specialists has garnered criticism

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83. *See* Fisher, *supra* note 10, at 142.

84. *See id.* ("A 'wrong' turn in the law—that is, a turn that is affected by an imbalance in representation instead of the strength of legal arguments—can have profound consequences. And an ongoing representational disadvantage for identifiable classes of litigants can systematically skew the law against them."); Posner & Yoon, *supra* note 27, at 349 ("[L]itigation not only protects private and public rights but also is the vehicle for the development and refinement of the law itself. That function can be distorted by large disparities in the quality of legal representation . . . .").

85. *See infra* notes 108–14 and accompanying text.

86. *See generally* Fisher, *supra* note 10 (discussing the role of Supreme Court clinics at law schools in serving underrepresented litigants at the Supreme Court).

87. *See 50 Years Later*, *supra* note 1.

from New York University Law Professor Nancy Morawetz and others because of the potentially distorted incentives that specialists have in seeking review by the Court.[88] Her criticism has contributed to an important debate[89] that scholars and practitioners should continue to probe, given the prevalence of appellate specialists practicing in today's Supreme Court and the outsized role that this relatively small cadre of attorneys plays in shaping the Court's decisions.[90] However, whatever distorted incentives exist when a specialist is *seeking* review by the Court—the focal point of Morawetz's concern—are significantly muted when the Court has already granted certiorari and review of the merits is inevitable.[91] The question this Note addresses is: once the Court has granted certiorari, who should brief and argue the merits—the inexperienced defense counsel who represented the defendant in proceedings below, or a Supreme Court specialist offering to represent the client on a pro bono basis?

This Part proceeds in two sections. First, I discuss the limited promise of systemic reforms to improve criminal defense advocacy at the Court; second, I argue that the existing willingness of Supreme Court specialists to represent criminal defendants—free of charge—is an asset that has the potential to close the existing advocacy gap. This requires, however, a greater willingness on the

88. *See* Morawetz, *supra* note 6, at 145. Morawetz argues that due to the intense competition among Supreme Court specialists to get arguments at the Court, *see infra* notes 124–35 and accompanying text, specialists have a disincentive to pursue alternative courses of action that may be in the best interest of the client, *see* Morawetz, *supra* note 6, at 145–57. Further, Morawetz believes that the incentive felt by specialists to get arguments in the Supreme Court discourages collaboration with public interest lawyers to identify the best vehicles for Supreme Court review in a particular area of law, thus undermining carefully calibrated litigation strategies and harming the development of the law. Morawetz, *supra* note 6, at 159–71.

89. Professor Fisher's article provides a response to Morawetz's concerns about the distorted incentives that members of the elite Supreme Court bar—including practitioners at law school clinics like that run by Professor Fisher—may have in representing clients in Supreme Court litigation. *See* Fisher, *supra* note 10, at 177–98; *see also* Kirstin Lustila, Note, *Ethical Duties of Expert Supreme Court Counsel*, 24 GEO. J. LEGAL ETHICS 659 (2011) (examining the ethical obligations under the *Model Rules of Professional Conduct* of Supreme Court experts seeking certiorari for pro bono clients).

90. *See* Lazarus, *supra* note 2, at 1563 (concluding that the modern Supreme Court bar has already "had a profound effect on the development of the law").

91. Once the Supreme Court grants certiorari, an attorney is no longer able to engage in the full case analysis and identification of best vehicles for review that Morawetz advocates. Indeed, Morawetz's recommendations for counterbalancing distorted incentives explicitly address whether to *seek* review by the Supreme Court. *See* Morawetz, *supra* note 6, at 190–96. Of course, Supreme Court specialists may still have some incentives at the merits stage that an inexperienced criminal defense attorney would not. But such incentives are certainly less significant than those that exist when a specialist is deciding whether to seek Supreme Court review. For example, Morawetz suggests that Supreme Court specialists interested in getting oral arguments might be less likely to pursue settlement, which can occur even after certiorari has been granted. *See id.* at 157–59. However, as Professor Fisher points out, an attorney's interest in arguing before the Court (and therefore foregoing settlement talks) may be just as strong—if not stronger—for novice Supreme Court counsel as it is for specialists. *See* Fisher, *supra* note 10, at 177–79. Another example is the possibility that a specialist would frame arguments with a view toward maintaining credibility with the Justices. But that possibility would be no greater than that which exists for any attorney who appears frequently in a single forum. Litigants in all fora routinely disregard such a distorted incentive in favor of hiring an experienced attorney. *See* Morawetz, *supra* note 6, at 139.

part of inexperienced criminal defense attorneys to accept pro bono offers from specialists.

A. POTENTIAL FOR SYSTEMIC REFORMS: ARE THERE LESSONS THE DEFENSE BAR CAN LEARN FROM THE STATES TO IMPROVE CRIMINAL DEFENSE ADVOCACY AT THE SUPREME COURT?

One way to help close the criminal defense advocacy gap would be for the defense advocacy community, including private criminal defense attorneys, public defenders, and public interest organizations, to champion broad-scale reforms to improve appellate and Supreme Court advocacy for criminal defendants. Perhaps the best example of this type of reform effort is the set of changes put in place by states in the past thirty years. During the 1970s and 80s, Chief Justice Warren Burger made the poor quality of advocacy for state and local governments at the Supreme Court a recurring theme of his speeches.[92] In direct response to Chief Justice Burger's criticism, the states implemented institutional reforms to their appellate and Supreme Court practices.[93] Court-watchers today—including Justices themselves—agree that the advocacy of the states has drastically improved as a result of these changes.[94]

The most high-profile change in state appellate practices has come through the creation of state solicitor general offices—positions that, in some states, are explicitly modeled after the position of the U.S. Solicitor General.[95] Once rare, thirty-nine states plus the District of Columbia, the U.S. Virgin Islands, and Puerto Rico now designate a single attorney—typically titled solicitor general—to oversee all of the state's civil appellate work, including in the U.S.

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92. John G. Roberts, Jr., *Oral Advocacy and the Re-Emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 79 (2005). For example, at The Catholic University of America's Conference on Supreme Court Advocacy in 1983, Chief Justice Burger made a direct challenge to the states by announcing that the "Supreme Court is no place for inexperienced or ill-prepared advocates; such advocates provide little help to the Court; they do a disservice to their clients—and to themselves." Warren E. Burger, *Foreword: Conference on Supreme Court Advocacy*, 33 CATH. U. L. REV. 525, 525 (1984).

93. *See* Symposium, *supra* note 2, at 555 ("Now at about the time of Chief Justice Burger's comments, the states and local governments began to try to do something about it. The National Association of Attorneys General began a program preparing moot courts for lawyers from state AG offices.").

94. *See, e.g.*, Garner, *supra* note 9, at 45 ("[D]uring my early years there were a number of states who let people argue cases maybe for political reasons, rather than because they were the best qualified lawyer. So on the whole, I guess the [advocacy] is better now." (quoting Justice Stevens)); Senior, *supra* note 28 (quoting Justice Scalia as saying that "many of the states have adopted a new office of solicitor general, so that the people who come to argue from the states are people who know how to conduct appellate argument").

95. *See* Marcia Coyle, *Justices Listen to a Key Voice: State Solicitors General Get More Time in High Court*, NAT'L L.J., Apr. 7, 2008, http://www.nationallawjournal.com/id=900005507976? (quoting current U.S. Senator and former Texas state solicitor general Ted Cruz as saying that "[e]xactly as the United States government is able to do over time in the Supreme Court, this position enables the state to develop a line of jurisprudence in the state supreme court"). *See generally* James R. Layton, *The Evolving Role of the State Solicitor: Toward the Federal Model?*, 3 J. APP. PRAC. & PROCESS 533 (2001) (comparing the role of state solicitors general to that of the U.S. Solicitor General).

Supreme Court.[96] In many of those states, the same individual oversees the state's criminal appeals.[97] The goal of creating a state solicitor general office, according to current Missouri state Solicitor General James Layton, who has written and spoken about the rise of state solicitors general,[98] is to improve the quality of the state's appellate work.[99] While state solicitors general oversee all of the state's appeals—in both state and federal courts—one obvious byproduct of the state solicitor general position is the development of an office with expertise in litigating before the U.S. Supreme Court.[100] Several Justices have remarked that the creation of state solicitor general offices has improved the quality of representation for states at the Court.[101] The creation of state solicitor general offices has also had the effect of enabling states to attract some of the most talented appellate practitioners in the country—many of whom are former Supreme Court law clerks.[102]

Another change made by the states to improve Supreme Court advocacy is the use of the brief-editing and moot court resources provided by the National Association of Attorneys General (NAAG).[103] Developed in direct response to

96. Memorandum from Dan Schweitzer, Nat'l Ass'n of Att'ys Gen., States with Solicitors General (Jan. 2013) (on file with author).

97. *Id*. Schweitzer describes two models used by states: 1) a centralized model, where all of the state's appellate work is performed by an appellate office led by a state solicitor general; and 2) a decentralized model, where the state solicitor general and a small team of assistants edit appellate briefs submitted by other attorneys and oversee training programs to improve the appellate advocacy of the state. *Id*.

98. *See generally* Layton, *supra* note 95 (discussing the history and evolution of the state solicitor general position).

99. *See, e.g.*, Tony Mauro, *Solicitous Behavior*, AM. LAW., Aug. 2003, at 63, 63 ("[B]y moving to the solicitor general title and model, states are trying to increase the professionalism and quality of the work.").

100. *See* Coyle, *supra* note 95 (describing the role of state solicitors general in Supreme Court litigation).

101. *See* Roberts, *supra* note 92, at 77–78 (observing that state solicitors general are appearing far more frequently before the U.S. Supreme Court than they did in 1980, and that "if you do have an office of appellate specialist at the state level . . . it is natural to hope and assume that lawyers from that office will bring more experience and expertise to their cases before the Supreme Court"); s*ee also supra* note 94.

102. *See* Mauro, *supra* note 99 (stating that "the most telling sign of the increased importance and potency of state SGs is that more and more of the lawyers filling these positions are former Supreme Court law clerks"); David Lat, *A Hot New Trend: State Solicitors General*, ABOVE THE LAW (Aug. 19, 2008, 11:09 AM), http://abovethelaw.com/2008/08/a-hot-new-trend-state-solicitors-general (describing the trend of young former Supreme Court clerks taking positions as state solicitors general); Cheryl Miller, *Harris Adds Octane to State Solicitor General Post*, RECORDER (Oct. 28, 2013), http://www.therecorder.com/id=1202625517190/Harris-Adds-Octane-to-State-Solicitor-General-Post (describing the hiring of D.C.-based Supreme Court specialist Edward Dumont as California Solicitor General); Peter Page, *State Solicitor General Appointments Open Doors for Appellate Practitioners*, NAT'L L.J., Aug. 18, 2008, http://www.nationallawjournal.com/id=1202423731494/State-solicitor-general-appointments-open-doors-for-appellate-practitioners ("Washington . . . remains the launching ground for the most promising appellate careers, but appointments as a state solicitor general have brought home top legal talent.").

103. *Supreme Court Project*, NAT'L ASS'N ATT'YS GEN., http://www.naag.org/supreme_court.php (last visited Jan. 3, 2014).

Chief Justice Burger's critique,[104] NAAG's Supreme Court Project provides brief-editing assistance to all states appearing before the U.S. Supreme Court and organizes moot courts to prepare advocates for oral argument.[105] NAAG also provides assistance to states through its Supreme Court Fellowship Program,[106] which brings state lawyers to Washington, D.C. for intensive training in NAAG's Supreme Court litigation work.[107] Court-watchers seem to agree that the program has succeeded in improving state advocacy at the Court.[108]

Given today's critique of criminal defense advocacy by Justice Kagan, one might wonder whether similar systemic reforms may improve advocacy for criminal defendants, just as they have for the states. Some believe there is promise in such efforts. For example, the Defender Services Office of the Administrative Office of the U.S. Courts, which assists in administering federal indigent defense services under the Criminal Justice Act, has already attempted to provide centralized Supreme Court advocacy training and resources to criminal defense attorneys engaged in Supreme Court litigation.[109] The program offers to connect public defenders and court-appointed counsel in search of assistance with Georgetown University Law Center's Supreme Court Institute,[110] Sidley Austin's Supreme Court Practice,[111] and the Defender's Supreme Court Resource and Assistance Panel (DSCRAP).[112]

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104. *See supra* note 93.

105. *Supreme Court Project*, *supra* note 103.

106. *NAAG Welcomes Two Fall Supreme Court Fellows*, NAT'L ASS'N ATT'YS GEN., http://www.naag.org/naag-welcomes-two-fall-supreme-court-fellows.php (last visited Jan. 17, 2014) (announcing the selection of two new fellows and describing the NAAG Supreme Court Fellowship program).

107. *Id.*

108. *See, e.g.*, Mauro, *supra* note 99 (quoting renowned Supreme Court advocate David Frederick as saying that "NAAG . . . deserves a lot of credit for raising the level of [Supreme Court] advocacy by states"). Indeed, Justice Ginsburg has explicitly lauded the briefing help provided by NAAG, stating that "the representation of cities and states has gotten much better as a result of the organizations formed to help them with their brief-writing. . . . [T]he quality of those briefs I think today is better than it was before those organizations started up and began assisting the state attorneys general . . . ." Garner, *supra* note 9, at 136.

109. *Supreme Court Advocacy Program*, DEFENDER SERVICES OFF. TRAINING DIVISION, http://www.fd.org/navigation/supreme-court-advocacy-program (last visited Jan. 14, 2014).

110. The Supreme Court Institute at Georgetown University Law Center organizes free moot courts for attorneys preparing for oral argument at the Supreme Court. *See Supreme Court Institute*, GEORGETOWN U. L. CENTER, https://www.law.georgetown.edu/academics/centers-institutes/supreme-court-institute (last visited Jan. 7, 2014). The program is tremendously popular. In October Term 2012, lawyers in every case argued before the Court first prepared with a moot court argument at the Supreme Court Institute, and Justice Ginsburg has said it provides a "tremendous service to the Court." Adam Liptak, *A Test Track for Tuning up Supreme Court Arguments*, N.Y. TIMES, June 23, 2013, http://www.nytimes.com/2013/06/24/us/a-test-track-for-tuning-up-supreme-court-arguments.html.

111. According to the Supreme Court Advocacy Program page on the Defender Services Office website, Sidley Austin's Supreme Court Practice provides a number of moot court and briefing services for criminal defense attorneys litigating at the Supreme Court. *See Supreme Court Advocacy Program*, *supra* note 109. Professor Lazarus has identified Sidley Austin as one of, if not the only, law firm with a Supreme Court practice that has consistently assisted criminal defense counsel in preparing petitions for certiorari, amicus briefs, and advocates for oral argument. *See* Lazarus, *supra* note 2, at 1560 & n.313.

112. According to its website, "DSCRAP is a panel of federal defenders assisting other defenders and court-appointed counsel engaged in Supreme Court litigation: brainstorming issues, preparing and

Academic commentators have also suggested that system-wide reforms—like those employed by the states—have the potential to improve outcomes for criminal defendants. In their recently published note on the role of Supreme Court specialists and public interest groups in enhancing criminal defense advocacy at the Court, authors Jeffrey Paul DeSousa and Melissa Meyer argue that the legal community at large—including the American Bar Association and the various appellate Inns of Court—should provide and promote more appellate training programs for practicing attorneys.[113] By emphasizing the value of appellate-specific training for lawyers, they argue that professional groups can spur general improvement in appellate practice throughout the federal courts of appeals as well as the Supreme Court.[114]

In another example, Professor Lazarus points to a recent practice of the states that he believes holds promise for underrepresented litigants at the Supreme Court: presenting oral argument as amicus curiae.[115] Although the Supreme Court typically denies requests for divided argument, the Court has recently granted amicus argument time in some cases to state solicitors general,[116] and Lazarus argues there is "no compelling reason to confine that practice to government lawyers."[117] Thus, he believes the Court should also be willing to grant amicus argument time to public interest organizations on behalf of litigants who often receive poor representation, such as criminal defendants.[118]

The types of systemic reforms that have been successful for states are certainly worth further exploration. However, their potential for closing the existing criminal defense advocacy gap is limited because states are a fundamentally different type of Supreme Court litigant than criminal defendants. The states are a finite group of fifty governments who are not only likely to appear before the Court repeatedly, but are constantly engaged in appellate litigation in their state courts and federal appeals courts. This means that the states have an incentive to constantly—and collectively—improve their appellate practices, especially in the face of direct criticism from members of the U.S. Supreme Court.[119] Professor Lazarus has suggested that the increase in the number of state solicitor general offices is a direct result of that incentive: states have recognized that "they need to be able to compete more effectively before the Court with the private sector Supreme Court Bar,"[120] and therefore they are

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finalizing petitions and merits briefs, coordinating amicus curiae, and conducting moot courts in final preparation for oral argument." *About DSCRAP*, DEFENDER'S SUP. CT. RESOURCE & ASSISTANCE PANEL, http://www.dscrap.blogspot.com (last visited Jan. 14, 2014).

113. *See* DeSousa & Meyer, *supra* note 18, at 942.

114. *See id.* at 943.

115. *See* Lazarus, *supra* note 2, at 1562.

116. *See id*.

117. *Id*.

118. *See id*.

119. *See* Burger, *supra* note 92, at 525.

120. *See* Lazarus, *supra* note 2, at 1558.

engaged in an "arms race" to enhance their Supreme Court practices.[121]

Unlike the states, however, criminal defendants feel no such pressure to collectively improve appellate defense practice because individuals prosecuted for crimes do not repeatedly litigate in appeals courts—let alone in the U.S. Supreme Court. Similarly, individual criminal defense attorneys have little natural incentive to invest in improving Supreme Court practice for the defense bar as a whole. Unlike the fifty states, the defense bar consists of thousands of criminal defense attorneys across the country whose chances of ever having a case before the Supreme Court are extraordinarily slim.[122] Thus, the defense bar is not subject to the pressures of the "arms race" felt by states striving to keep up with the increasingly specialized nature of Supreme Court practice. In this regard, organizing the defense bar—whose attorneys are unlikely to ever argue before the Court—to invest in systemic reforms to improve Supreme Court criminal defense may be an exercise in herding cats.[123]

B. THE SIMPLE SOLUTION: CRIMINAL DEFENSE ATTORNEYS SHOULD BECOME MORE WILLING TO ACCEPT OFFERS OF HELP FROM SUPREME COURT EXPERTS

1. Expert Help Is Available for Free

In light of the complications posed by systemic reform efforts, the most promising method to close the criminal defense advocacy gap may be for Supreme Court specialists to brief and argue more cases for criminal defendants.[124] This option is particularly attractive given the surplus of Supreme Court specialists who are willing to represent certain litigants on a pro bono

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121. *Id*. Lazarus states that the rise in number of state solicitors general is consistent with the "arms race" hypothesis offered by Professors Tom Merrill and Joseph Kearney to explain the recent rise in amicus brief filings.

122. *See* Fisher, *supra* note 10, at 165 ("Supreme Court litigation (especially on the merits) happens rarely enough that it is highly unlikely that a typical criminal defense attorney or plaintiff's lawyer has ever done it, much less accumulated the kind of experience that comes from handling several cases in a given forum.").

123. In one example of the lack of organization in the defense bar, Dori Bernstein, Director of Georgetown's Supreme Court Institute, has said that her efforts to provide state and local public defenders and private criminal defense attorneys with information about the Institute's moot courts have been stymied by the lack of a centralized clearinghouse or other means of communication to reach defense attorneys en masse. Interview with Dori Bernstein, Dir., Georgetown Univ. Law Ctr. Supreme Court Inst., in D.C. (Jan. 14, 2013) [hereinafter Interview with Dori Bernstein]. Another example of the hurdles faced by criminal defendants in pursuing systemic improvements to defense advocacy at the Court can be seen in the lack of political will for investment in public defender programs. *See* David Cole, Gideon v. Wainwright *and* Strickland v. Washington*: Broken Promises*, *in* CRIMINAL PROCEDURE STORIES 118–25 (Carol S. Steiker ed., 2006) (describing the lack of political pressure to improve indigent defense); *see also* Ron Nixon, *Public Defenders Are Tightening Belts Because of Steep Federal Budget Cuts*, N.Y. TIMES, Aug. 23, 2013, http://www.nytimes.com/2013/08/24/us/public-defenders-are-tightening-belts-because-of-steep-federal-budget-cuts.html. At a time when programs at all levels of government are strapped for funding, significant reforms to public defense appellate practices may be unrealistic.

124. For purposes of this discussion, I consider a "specialist" to be an attorney who has the type of expertise in Supreme Court practice identified by Professor Lazarus. Professor Lazarus defines a Supreme Court expert as an attorney who has presented five or more oral arguments before the Court or

basis.[125] Due to market forces, there is no shortage of expert pro bono assistance available to many of those appearing before the Court.[126] The Court only hears seventy to eighty cases each Term, and only a fraction of those cases include litigants—typically businesses or other institutional clients—capable of paying the hourly rates charged by Supreme Court specialists.[127] As a result of the scarce opportunities to represent a paying client before the Court, specialists have an economic incentive to participate in Supreme Court litigation on a "'loss-leader' basis."[128] That is, in order to impress potential paying clients with their Supreme Court bona fides and secure future business, Supreme Court specialists are routinely willing to represent other clients before the Court for free.[129]

From a business perspective, the attraction for specialists in taking on pro bono clients is, of course, the publicity and marketing associated with assuming full responsibility of the case on the merits.[130] As Professor Morawetz notes, webpages for leading Supreme Court practices routinely advertise the extensive experience that their Supreme Court litigators have in briefing and arguing before the Court.[131] With at least twenty-four law firms and several law school clinics that have established Supreme Court practices,[132] the Court's meager annual docket generates intense competition among Supreme Court specialists

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is affiliated with an organization or law firm that has presented, in the aggregate, ten or more oral arguments. *See* Lazarus, *supra* note 2, at 1502; *see also supra* note 8.

125. DeSousa and Meyer are correct to suggest that the emergence of Supreme Court specialists has the potential to help close the advocacy gap for criminal defendants at the Court. *See* DeSousa & Meyer, *supra* note 18, at 911. But their prescription—which focuses on coordination between Supreme Court specialists and civil liberties interest groups to ensure criminal defendants receive adequate representation—ignores that the help of Supreme Court specialists is already widely available to criminal defendants and their attorneys.

126. *See* Lazarus, *supra* note 2, at 1557–58 (explaining the market incentive for Supreme Court specialists to offer pro bono services).

127. *Id.* at 1557.

128. *Id.*

129. *Id.*

130. *See id.* This is not to say that all Supreme Court specialists represent pro bono clients *only* to generate new business from paying clients. Many specialists have a dedicated personal commitment to representing underrepresented interests before the Court. *See, e.g.*, Mauro, *supra* note 7 (describing Solicitor General Donald Verrilli's commitment to representing criminal defendants in capital cases when he was in private practice). *See generally* Lazarus, *supra* note 2, at 1557 (attributing the prevalence of pro bono representation by specialists in part to the personal commitment of lawyers to assisting those who cannot afford to pay the legal fees normally generated in Supreme Court litigation). The market forces encouraging specialists to offer pro bono services, however, are what make the practice so widespread.

131. *See* Morawetz, *supra* note 6, at 142 & n.38. Specialists typically seek to assume full responsibility for the litigation, including the presentation of oral argument. *See* Lazarus, *supra* note 2, at 1557. Although some law firms will provide pro bono assistance in more limited capacities, *see* Rothfeld, *supra* note 9, at 255, this seems to be the exception rather than the rule, *see* Lazarus, *supra* note 2, at 1560 & n.313 (noting that Sidley Austin is one of, if not the only, law firm with a Supreme Court practice that has consistently assisted criminal defense counsel in preparing petitions for certiorari, amicus briefs, and advocates for oral argument).

132. *See* Morawetz, *supra* note 6, at 140.

to take on pro bono clients.[133]

The result is that inexperienced attorneys can "quickly be inundated with competing offers from many of the nation's most celebrated Supreme Court advocates willing to take on the case for no charge."[134] This phenomenon is not limited to cases that have already reached the merits stage of Supreme Court litigation. Specialists regularly offer their services to attorneys handling cases in the federal courts of appeals that may be mere *candidates* for certiorari.[135] It stands to reason that pro bono offers are even more ubiquitous after certiorari has been granted, when it is certain that a merits brief will be written and argument will be held. Dori Bernstein, Director of Georgetown's Supreme Court Institute, believes that, with little effort, any inexperienced attorney who has certiorari granted will be able to find a specialist—whether from a private law firm, a law school clinic, or other public interest organization—to represent their client at the merits stage on a pro bono basis.[136]

What's more, the Supreme Court specialist option is especially workable for criminal defendants because criminal cases do not generally create conflicts of interest for private law firms. One of the problems Professor Lazarus sees in relying on specialists to close the advocacy gap for generally underrepresented litigants is that in certain types of cases, such as employment discrimination, tort, or environmental pollution disputes, Supreme Court specialists regularly refuse to serve as pro bono counsel for fear that it would upset their law firms' financially important business clients.[137] But unlike cases in which civil plaintiffs litigate against businesses, criminal cases do not create the business conflicts for law firms that are common in the cases identified by Professor Lazarus.[138] Thus, although it is impossible to know precisely the extent to

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133. *Id.*

134. Lazarus, *supra* note 2, at 1557. Consider the experience of Shreveport, Louisiana attorney Patricia Gilley, described in a recent *Louisiana Bar Journal* article:

> Pat's phone began to ring and emails came pouring in immediately after the en banc denial. She was overwhelmed with offers from clinics and other specialists who wanted to take over the case and apply for certiorari. She received DVDs, brochures and other material touting the experience of various volunteers.

S. Christopher Slatten, *Patricia Gilley and* Henderson v. United States*: A Shreveport Small-Firm Lawyer's Path to Victory in the U.S. Supreme Court*, 61 LA. B.J. 178, 180 (2013).

135. This practice was pioneered by Supreme Court advocate Tom Goldstein, who developed the now-common technique of identifying splits in the circuit courts of appeals—the cases most likely to attract attention from the Supreme Court—and offering to litigate those cases in the Supreme Court for free. *See* Liptak, *supra* note 6.

136. Interview with Dori Bernstein, *supra* note 123. In her capacity as Director of the Supreme Court Institute, Bernstein organizes each moot court and recruits Supreme Court practitioners and law professors to serve as mock Justices.

137. Lazarus, *supra* note 2, at 1560 ("There are . . . areas of law in which the vast majority of the private Supreme Court Bar regularly declines to serve as pro bono counsel because of its concern that doing so will upset some of its most financially important business clients."); s*ee also* Morawetz, *supra* note 6, at 143–44 (discussing conflicts of interest that private law firms face when one of the litigants is a private company).

138. *See* Lazarus, *supra* note 2, at 1560.

which inexperienced criminal defense attorneys receive offers for pro bono assistance, it is unlikely that many—if any—reach the Supreme Court lectern without having had an opportunity to hand the case to an expert Supreme Court litigator.

2. Identifying the Problem: Expert Help Is Too Often Rejected

If the pro bono assistance of Supreme Court specialists is so readily available, why are criminal defendants so often poorly represented at the Court? One possible explanation is that the professional culture of the defense bar leads criminal defense lawyers, more so than other types of attorneys, to reject help from Supreme Court specialists.[139] Criminal defense lawyers are famously nonconformist.[140] One criminal defense attorney has described her own colleagues as "a breed unto themselves" and "often ill at ease with people who are not themselves criminal defense lawyers."[141] Max Stern, president of the Massachusetts Association of Criminal Defense Lawyers (MACDL), aptly summarized the reputation in remarks at his organization's 2012 annual conference:

> There are those who think that the concept of an association of criminal defense is an oxymoron, since criminal lawyers are such unreconstructed individualists. And it is true that defense lawyers tend to be opinionated, stubborn, and hard to satisfy, and as different from each other as are their clients.[142]

Although it is less than scientific to rely on such generalizations to explain the advocacy gap experienced by criminal defendants at the Supreme Court, such characteristics of criminal defense attorneys may make them more likely than other lawyers to distrust offers of help from Supreme Court specialists. This, in turn, may help drive the criminal defense experience deficit described in Part I.[143]

Anecdotal evidence also supports this hypothesis. In a 2010 article about the

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139. Of course, it is ultimately the defendant—not the defense attorney—who has the power to decide who will represent him or her before the Court. However, offers of pro bono assistance by specialists are made to the litigant's existing attorney. *See* Liptak, *supra* note 6. Thus, in a practical sense, it is the attorney representing the defendant in proceedings below who makes an initial determination about the specialist's offer and how (or whether) to convey that offer to the client. For a discussion on the ethical obligations of an attorney to notify a client about an offer of pro bono assistance from a Supreme Court specialist, see Macey, *supra* note 3, at 989–90.

140. *See* Abbe Smith, *The Bounds of Zeal in Criminal Defense: Some Thoughts on Lynne Stewart*, 44 S. TEX. L. REV. 31, 45 (2002) (describing the tendency of criminal defense attorneys to "flaunt authority").

141. ABBE SMITH, CASE OF A LIFETIME: A CRIMINAL DEFENSE LAWYER'S STORY 32–33 (2008).

142. Max Stern, *Winter 2012 Annual Meeting: Opening Remarks by MACDL President Max Stern*, MASS. ASS'N CRIM. DEF. LAW. (Jan. 19, 2012), http://www.macdl.com/Default.aspx?pageId=1228136.

143. Indeed, Professor Lazarus also identifies the "embedded" culture of the criminal defense bar as particularly resistant to offers for help at the Court. *See* Lazarus, *supra* note 2, at 1560–61 ("Many criminal defense attorneys . . . not only insist on maintaining their status as lead counsel once it has

emergence of Supreme Court specialists and their efforts to take on pro bono clients, the *New York Times*' Adam Liptak wrote that public interest lawyers, including criminal defense attorneys, often distrust specialists who offer to take over a case at the Supreme Court.[144] The article quoted criminal defense lawyer Barry Schwartz of Denver as saying of Supreme Court specialists: "There's one and only one reason they're interested. It's not because they love your client . . . . They want to get the case into the Supreme Court."[145]

There is reason to believe that the kind of tension identified by Liptak may curb the extent to which specialists participate in criminal defense cases at the Supreme Court. In one notable example of such conflict, a local Washington, D.C. criminal defense attorney was reported by the legal blog *Above the Law* to have turned down expert assistance in the closely watched Fourth Amendment case *United States v. Jones*.[146] The defendant's trial lawyer—a small-firm criminal defense attorney with no Supreme Court experience[147]—appeared at the oral argument, despite having accepted the help of Supreme Court expert Walter Dellinger on his brief.[148] The attorney, Stephen Leckar, was widely criticized for his performance at oral argument,[149] leading reporter and blogger Kashmir Hill to remark that "[u]nfortunately Leckar is rumored to have rejected an offer from famed appellate lawyer Walter Dellinger of O'Melveny & Myers to argue the case."[150]

Similarly, coverage of Louisiana criminal defense attorney Patricia Gilley's recent Supreme Court argument in *Henderson v. United States*[151] suggests there was conflict between Gilley and the specialists assisting her at both the certiorari and merits stages of the case. A *Louisiana Bar Journal* article reported that Gilley accepted the assistance of the University of Texas Law School's Supreme

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become a Supreme Court case, but decline the offers of experts in Supreme Court advocacy for significant assistance in the preparation of briefs and the presentation of oral argument.").

144. Liptak, *supra* note 6 (stating that public interest lawyers are "often wary of, if not hostile toward, the new breed of skilled and ambitious [Supreme Court] advocates").

145. *Id.*

146. 132 S. Ct. 945 (2012); Kashmir Hill, *SCOTUS Not Psyched About Idea of Government Secretly Putting GPS Trackers on Their Cars*, ABOVE THE LAW (Nov. 8, 2011, 3:19 PM), http://abovethelaw.com/2011/11/scotus-not-psyched-about-idea-of-government-secretly-putting-gps-trackers-on-their-cars.

147. *See* Kashmir Hill, *Supreme Court Justices Concerned About Pervasive, Technology-Enabled Government Surveillance*, FORBES (Nov. 8, 2011, 1:30 PM), http://www.forbes.com/sites/kashmirhill/2011/11/08/supreme-court-justices-concerned-about-pervasive-technology-enabled-government-surveillance/.

148. *See* Brief for Respondent, United States v. Jones, 132 S. Ct. 945 (2012) (No. 10-1259), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2011/09/Antoine_Jones_Response_Brief_-_FILED_PDF_v1.pdf.

149. *See, e.g.*, Lyle Denniston, *Argument Recap: For GPS, Get a Warrant*, SCOTUSBLOG (Nov. 8, 2011, 2:12 PM), http://www.scotusblog.com/2011/11/argument-recap-for-gps-get-a-warrant ("[Jones's attorney] made what sounded like a tactical error, by putting his initial focus not on the intrusiveness of the monitoring, but on the initial installation of the device of Antoine Jones's private Jeep Cherokee."); *see also* Hill, *supra* note 147 ("When Jones's lawyer came up to argue, it was a little like watching 9 cats play with an injured mouse that they felt pity for.").

150. Hill, *supra* note 146.

151. 133 S. Ct. 1121 (2013).

Court Clinic after declining many other offers, but that ultimately "pressure" from the clinic "volunteers" led her to part ways to write the brief on her own.[152] A *SCOTUSblog* preview of the oral argument then described her briefing as "somewhat unusual" and pointed out that experienced Supreme Court advocate David Frederick, whose name had appeared on Gilley's petition for certiorari, had mysteriously dropped out of the case.[153] *SCOTUSblog* later characterized Gilley's performance at oral argument as "quite unhelpful to the Court," noting that she was "clearly in over her head."[154]

It is dangerous to read too much into anecdotal evidence and generalizations about the culture of criminal defense attorneys to draw conclusions about the advocacy gap described in this Note. Yet the facts remain. In the past five Terms, nearly 60% of criminal defendants were represented at oral argument by first-time Supreme Court advocates, compared to just 36.7% for all litigants.[155] This disparity has led Justice Kagan to identify criminal defendants as the category of litigant most poorly represented before the Court today.[156] Unfortunately, the advocacy gap felt by criminal defendants exists despite the surplus of assistance available, free of charge, from specialists in Supreme Court practice.[157] This suggests that criminal defense attorneys too often reject the help of Supreme Court specialists, to the detriment of both their client's chances of prevailing in the case and the shape of civil liberties throughout the country.

3. Inexperienced Criminal Defense Attorneys Should Become More Willing to Accept Pro Bono Help from Supreme Court Specialists

For the reasons discussed in Part II, resistance by criminal defense attorneys to accept pro bono help from Supreme Court specialists has profound consequences. Accordingly, criminal defense attorneys who lack significant appellate experience should become more willing to accept pro bono assistance from Supreme Court specialists. Though the purpose of this Note is not to provide a detailed prescription for how to get more criminal defense cases into the hands of Supreme Court specialists, at least two recommendations are worthy of brief discussion.

First, individual criminal defense attorneys for whom certiorari has been granted must honestly assess their ability to perform in the unique Supreme Court setting, in light of the evidence that shows specialists are more likely to succeed before the Court. To be sure, whether an appellate specialist should take

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152. *See* Slatten, *supra* note 134, at 180–81.

153. *See* Rory Little, *Argument Preview: Not-so-Plain Questions About Plain Error*, SCOTUSBLOG (Nov. 26, 2012, 10:50 AM), http://www.scotusblog.com/2012/11/argument-preview-not-so-plain-questions-about-plain-error/.

154. Rory Little, *Argument Recap: Trying to Discern a Timing Rule for a Rule that Says Nothing About Timing*, SCOTUSBLOG (Dec. 4, 2012, 9:35 AM), http://www.scotusblog.com/2012/12/argument-recap-trying-to-discern-a-timing-rule-for-a-rule-that-says-nothing-about-timing.

155. *See supra* notes 15–17 and accompanying text.

156. *50 Years Later*, supra note 1.

157. *See supra* text accompanying note 125.

over an appeal is not always an easy question and is one about which much has been written.[158] Some observers suggest that where a strong grasp of the case record is important to an issue on appeal, the trial lawyer may be the best advocate in the appellate forum.[159] However, many judges are true believers in the value added by appellate specialists, no matter the issue.[160] Consider the candor of Judge Laurence Silberman of the U.S. Court of Appeals for the D.C. Circuit: "[T]he skills needed for effective appellate advocacy are not always found—indeed, perhaps, are rarely found—in good trial lawyers. . . . Appellate advocacy is, in short, a specialty all to itself. And no one knows that better than appellate judges themselves."[161] Judge Silberman's sentiments about appellate advocacy carry even further weight in the context of Supreme Court advocacy, where the empirical data conclusively show that specialists are more likely to succeed than their novice counterparts.[162]

Thus, criminal defense attorneys who lack significant appellate experience should presume their clients' interests are best served by accepting a pro bono offer from a Supreme Court specialist. At a minimum, this means that an inexperienced defense attorney should delegate primary responsibility for briefing to the specialist.[163] It is of course reasonable to expect that defense trial counsel will continue to be reluctant to hand over a case entirely, and an inexperienced criminal defense attorney who enlists the help of a specialist need not remove him or herself from the picture entirely.[164] Conversely, specialists who offer their pro bono services should not attempt to exclude defense counsel completely from litigation decisions, nor make their offers of assistance conditional on doing the oral argument. This will increase the likelihood that even in instances where an inexperienced attorney insists on arguing the case, the Court will still receive the benefit of a Supreme Court expert's briefing.

Second, the legal professional and the defense advocacy communities—

158. *See* Mittelstaedt & Murray, *supra* note 5, at 48 (noting that there is a "good deal of scholarship" on the question of what kind of attorney should argue an appeal).

159. *Id.* at 49 (citing an appellate practitioner and a Delaware Supreme Court justice for the proposition that trial counsel should argue an appeal where record knowledge is important).

160. DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL § 1:14 (5th ed. 2007) (stating that "appellate judges often complain about the quality of advocacy and hint, none too subtly, about the need for appellate specialists").

161. Laurence H. Silberman, *Plain Talk on Appellate Advocacy*, 11 APP. ADVOC. 3, 3 (1998).

162. *See supra* section II.A.

163. Professor Fisher notes that it is not uncommon for inexperienced attorneys arguing before the Court to engage specialists for purposes of assisting with the brief. *See* Fisher, *supra* note 10, at 149. However, he suggests that even when an inexperienced attorney accepts such help, the inexperienced attorney often "has considerably more to say about how the brief is written" than does the expert. *Id.* This Note advocates that in accepting help from a specialist, an attorney should cede more control to the specialist. Inexperienced attorneys should allow specialists to have the primary say when it comes to the structure and content of the criminal defendant's brief.

164. Indeed, the defense attorney's knowledge of the case record and history can be a vital asset in the crafting of the merits litigation strategy. *See* Mittelstaedt & Murray, *supra* note 5, at 51–52 (stating that even where trial counsel hands a case off to an appellate specialist, trial counsel still has a crucial role to play).

including national and local bar associations, civil liberties interest groups, and associations of criminal defense practitioners—must be more willing to publicly confront the existence of the criminal defense advocacy gap. It is clear that at least one Justice is alarmed by the poor quality of representation currently experienced by criminal defendants.[165] But no other commentator has made a meaningful public appeal to criminal defense attorneys about the problems created by inexpert representation at the Supreme Court.[166]

Professional and interest groups should seize on Justice Kagan's warning and become more vocal about the risks that inhere—for both individual defendants and civil liberties at large—when inexperienced criminal defense attorneys remain lead counsel at the Supreme Court. These groups can cultivate a broader understanding of the value provided by Supreme Court specialists by publicly advocating that inexperienced attorneys accept pro bono offers of assistance. Admittedly, mobilizing defense attorneys around such a cause may—as discussed earlier—be an exercise in herding cats.[167] But as MACDL President Max Stern remarked in his 2012 speech, despite the individualism of criminal defense attorneys, they share an "overriding common interest in the need to advance the shared concerns of [the] profession and, more importantly, to safeguard [the] rights of our clients."[168] One shared concern for this community of lawyers must be the criminal defense advocacy gap at the Supreme Court—a disparity in representation that directly jeopardizes the rights of current and future criminal defendants nationwide.

CONCLUSION

Justice Kagan has called attention to an unfortunate reality in today's Supreme Court: attorneys for criminal defendants are not living up to expectations.[169] This Note shows that her observations about the poor quality of criminal defense advocacy are supported by data on attorney experience. Over the past five Supreme Court Terms, criminal defendants have been significantly

165. *See 50 Years Later*, *supra* note 1.

166. As discussed in note 3 *supra*, one student commentator has argued that an attorney does not have an ethical obligation to accept the help of a Supreme Court specialist if the client makes an informed decision to reject the specialist's help and the inexperienced attorney devotes the time and resources necessary to provide competent representation at the Court. *See* Macey, *supra* note 3, at 979–80. However, the question of whether an inexperienced attorney can fulfill his or her ethical obligations by representing a client at the Supreme Court is altogether different from the question of whether the inexperienced attorney *should* accept the assistance of a Supreme Court specialist. In their separate publication, DeSousa and Meyer suggest in a footnote that inexperienced advocates should accept pro bono assistance from Supreme Court specialists, but the issue is not a primary focus of their piece. *See* DeSousa & Meyer, *supra* note 18, at 934 n.168. Although I agree with DeSousa and Meyer's recommendation, the experience deficit demonstrated in Part I of this Note suggests that the willingness—or lack thereof—of criminal defense attorneys to accept widely available expert assistance must be central to any discussion about how to improve criminal defense advocacy at the Supreme Court.

167. *See supra* note 123 and accompanying text.

168. Stern, *supra* note 142.

169. *50 Years Later*, *supra* note 1.

more likely than other litigants to be represented by inexperienced attorneys. Across all cases from October Terms 2008 through 2012, just 36.7% of litigants were represented by attorneys making their first appearance before the Court.[170] For criminal defendants, however, the rate of first-time advocacy was nearly 60%.[171] The inexperience of criminal defense attorneys appearing at the Supreme Court is of even greater concern in light of the substantial experience of their government adversaries. In the same set of cases, the government was nearly twice as likely as the criminal defendant to be represented or supported in amicus argument by a repeat-Supreme Court litigator.[172]

This experience deficit should cause alarm for all who value civil liberties. The empirical data are clear that Supreme Court experience matters: according to the most recent statistical analysis of Supreme Court advocacy, Supreme Court experts were up to two times as likely to win as inexperienced advocates.[173] Thus, the consistent underrepresentation of criminal defendants has profound negative consequences for civil liberties, for all who will be targeted for criminal prosecution, and for all the families, friends, and communities affected by the nation's criminal justice system.[174]

Fortunately, there is hope that the criminal defense advocacy gap can be closed. To ensure high quality representation in criminal cases, more Supreme Court specialists should be representing criminal defendants at the merits stage of Supreme Court litigation. This option is workable because market forces create an incentive for Supreme Court specialists to provide pro bono services to underrepresented litigants—especially criminal defendants.[175] As a result, pro bono assistance from expert Supreme Court practitioners is readily available to criminal defense attorneys for whom certiorari has been granted.[176] Pro bono representation is a two-way street, however, and in order for this solution to achieve its potential, inexperienced criminal defense attorneys must become more willing to accept the offers of help from the nation's most accomplished Supreme Court litigators.

170. *See supra* section I.B.
171. *See supra* section I.B.
172. *See supra* section I.B.
173. *See* Fisher, *supra* note 10, at 155.
174. *See supra* note 84 and accompanying text.
175. *See supra* note 126 and accompanying text.
176. *See supra* note 134 and accompanying text.