CONFLICTING INTERESTS AND THE SIXTH AMENDMENT RIGHT TO COUNSEL

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This Article explores an undertheorized aspect of the Sixth Amendment right to counsel: the right to conflict-free counsel. A conflict between the accused and defense counsel threatens counsel's undivided loyalty to the defendant, frustrates counsel's basic duty to assist the defendant, and jeopardizes the integrity of the adjudication process.

Conflicts between the accused and defense counsel arise in four scenarios, counsel's duty to another client, to a former client, to a third person, or to counsel's own interests. Conflicts between the accused and defense counsel's own interests have received less scholarly attention and jurisprudential development relative to the other three scenarios. This inattention has created a gap in understanding of how such conflicts impact defendants' right to counsel and how to remedy them.

A fuller understanding of the right to conflict-free counsel is both timely and necessary. States that institute fee caps or pay low fees to appointed counsel risk creating a conflict between counsel's financial interests and zealous representation. Likewise, research reveals that counsel's racial bias against the accused's racial group can negatively impact representation, resulting in an inherent conflict of interest. Critical engagement of these scenarios is crucial to protecting defendants' right to counsel guarantee and ensuring that the law reflects contemporary practice.

This Article offers a clarifying assessment of conflicts that arise between the accused and defense counsel based on counsel's own interests. First, it explores the right to conflict-free counsel jurisprudence, revealing that it developed based on counsel's duty to other clients and third parties, ignoring conflicts based on counsel's own interests. Second, it examines how conflicts of interest between defense counsel and the accused arise, identifying how some state courts have diverged from federal law to address them. Third, it turns to conflicts between the accused and defense counsel's own interests, such as counsel's bias and financial interests, revealing how the law fails to address them and the threat they pose to defendants' right to counsel. It also offers a suggestion for how to remedy such conflicts.

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I. INTRODUCTION

The Sixth Amendment right to counsel is fundamental to ensuring defendants receive a fair trial. Defense counsel is an integral part of the adjudication process, helping to ensure reliability of the proceedings, confidence in the outcome, and that the defendant receives due process.[1] It is defense counsel who safeguards the defendant's other constitutional rights.[2] Throughout the twentieth century, the United States Supreme Court recognized several related protections stemming from the right to counsel, acknowledging that merely having the assistance of a lawyer may not be sufficient.[3] These protections include the right to the effective assistance of counsel,[4] the right to counsel of choice,[5] the right to self-representation,[6] and the right to conflict free counsel.[7] This last right, a defendant's right to representation free from conflict, is relatively undertheorized and has received less scholarly attention.[8]

Some of the inattention is due to the seemingly straight-forward nature of the right to conflict-free counsel. Counsel's most basic duty is loyalty to the client, and counsel is obligated to avoid conflicting interests.[9] A conflict between the accused and defense counsel threatens counsel's undivided loyalty to the defendant, frustrates counsel's duty to assist the defendant, and jeopardizes the integrity of the adjudication process.[10] Seems simple enough.

However, identifying the source of the conflict between defense counsel and the accused may not be so straight-forward. [*Example of unclear conflict*]. Even harder to determine is how much, if at all, the conflict impacted counsel's actions and inactions on behalf of the defendant. Defense lawyers make countless decisions when representing a defendant against criminal charges. [*Examples of decision making in a case*]. Measuring "the impact of a conflict of interest[] on the attorney's options, tactics, and decisions . . . would be virtually impossible."[11]

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[1] Powell v. Alabama, 287 U.S. 45 (1932).
[2] *See* United States v. Cronic, 466 U.S. 648, 653-54 (1984) ("Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.") (internal citation omitted).
[3] Strickland v. Washington, 466 U.S. 668, 685 (1984) (recognizing that the presence of "a person who happens to be a lawyer . . . at trial alongside the accused . . . is not enough").
[4] *Id.* at 686-87 (1984) (recognizing that the right to counsel includes the right to effective counsel, and establishing the cause and prejudice standard to determine effectiveness).
[5] Powell v. Alabama, 287 U.S. at 53.
[6] Faretta v. California, 422 U.S. 806, 819 (1975).
[7] Wheat v. United States, 486 U.S. 153, 159-60 (1988) (describing conflict free counsel as an unwaivable right).
[8] Cite.
[9] *See* Strickland, 466 U.S. at 692.
[10] *See* Cuyler v. Sullivan, 466 U.S. 335 (1980).
[11] Holloway v. Arkansas, 435 U.S. 475, 491 (1978). *See also* United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (finding "[i]t . . . impossible to know what different choices . . . counsel would have

Given the singular importance of the right to counsel, should the extent of impact even matter when a conflict of interest exists? Different courts answer this question in different ways.[12]

Another explanation for the lack of attention paid to the defendant's right to conflict-free counsel is that the right to effective assistance often overshadows it. Relatedly, the two rights are often collapsed into one single right, the right to the effective assistance of counsel.[13] In appellate litigation, defendant-petitioners sometimes add a claim that their right to conflict-free counsel as an afterthought, relying on the same underlying facts as a claim of ineffective assistance of counsel.[14]

The right to conflict-free counsel and the right to effective counsel are distinct rights, both stemming from the Sixth Amendment right to counsel, and different standards apply. The Supreme Court decided the leading conflict of interest case, *Cuyler v. Sullivan*, just four years before *Strickland v. Washington*, where it established a uniform standard for determining the right to effective assistance.[15] [*Explain distinction and different standards* – Strickland *requires prejudice showing,* Cuyler *does not*].

Conflicts between the accused and counsel can arise in four scenarios, counsel's duty to another client, to a former client, to a third person, or to counsel's own interests.[16] The most obvious type of conflict arises from counsel's duty to another client, usually a concurrent or former client. This often occurs during joint representation, which is easy to identity and to avoid. Conflict of interest scholarship and jurisprudence reflect a focus on conflicts that arise based on the very scenario. Early cases arose out of counsel representing multiple defendants *Glasser v. United States*, 315 U.S. 60 (1942), *Holloway v. Arkansas*, 435 U.S. 475 (1978), and *Cuyler v. Sullivan*, 446 U.S. 335 (1980). This misplaced focus ignores contemporary practice and discordant relationships between defense counsel and the accused.

Conflicts between the accused and defense counsel's own interests have received less scholarly attention and remain an undertheorized aspect of conflict-of-interest jurisprudence. [*Examples of lack of engagement*]. Two sources of defense counsel's conflicting interests with the client include counsel's bias and financial interests.

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made, and then to quantify the impact of those different choices on the outcome of the proceedings.").

[12] *Compare* Cuyler v. Sullivan (1980) *with* Commonwealth v. Dew (Mass. 2023).

[13] Cite.

[14] Cite.

[15] *Compare* Cuyler, 466 U.S. 335 (1980) *with* Strickland, 466 U.S. 668 (1984).

[16] *See* Model Rules of Professional Conduct, Rule 1.7(a)(2) (listing the four types of conflict of interest that can arise between the accused and defense counsel).

Counsel may harbor bias against their client based on their client's race and/or ethnicity, which can negatively impact representation. There is a growing body of research indicating as much.[17] [*Detail research*].

A jurisdiction's fee arrangement for appointed counsel, either flat fee or a low fee cap, can cause a conflict of interest between the accused and counsel's own financial interests. [*Mention jurisdiction(s) with such arrangements*]. In those situations, the flat fee and/or low fee cap creates a disincentive for counsel to spend more than the minimum level of effort or time on a case.[18] [*Include examples*].

The Article unfolds as follows. Part Two explores the right to conflict-free counsel jurisprudence, revealing that it developed based on counsel's duty to other clients and third parties, ignoring conflicts based on counsel's own interests. Part Three examines how conflicts of interest between defense counsel and the accused arise, identifying how some state courts have diverged from federal law to address them. Part Four turns to conflicts between the accused and defense counsel's own interests, such as counsel's bias and financial interests, revealing how the law fails to address them and the threat they pose to defendants' right to counsel. It also offers a suggestion for how to remedy such conflicts. The Article concludes with XXX.

II. RIGHT TO CONFLICT-FREE COUNSEL

This Part explores the right to conflict free counsel jurisprudence, revealing that it developed based on counsel's duty to other clients and third parties, ignoring conflicts based on counsel's own interests.

The early conflict cases all arose out of counsel representing multiple defendants *Glasser v. United States*, 315 U.S. 60 (1942), *Holloway v. Arkansas*, 435 U.S. 475 (1978), *Cuyler v. Sullivan*, 446 U.S. 335 (1980), *Wood v. Georgia*, 450 U.S. 261 (1981).

Although Congress ratified the Sixth Amendment right to counsel in 1791, the law did not develop until the twentieth century.[19] The Supreme Court did not have much occasion to weigh in on the right to counsel given the relatively small number of federal criminal prosecutions compared to the states.[20] Instead, state courts addressed questions pertaining to the right to counsel.

The Sixth Amendment right to counsel establishes an accused person's right to conflict free counsel. Practice standards, the rules of professional conduct, and

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[17] L. Song Richardson & Phil Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. (2013); Matthew Clair, PRIVILEGE AND PUNISHMENT (2020); Alexis Hoag, *Black on Black Representation*, N.Y.U. L. Rev. (2021).
[18] Sixth Amendment Center. State cases.
[19] *See* SARA MAYEUX, FREE JUSTICE (2019).
[20] Cite.

counsel's ethical considerations guide counsel to avoid and prevent conflicts of interest between defense counsel and the accused.

The ethical guidelines define a conflict as "the [concurrent] representation of one client . . . adverse to another client" or when "the representation of one or more clients . . . materially limit[s] . . . the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer."[21]

A. The Court's Role in Protecting the Right to Counsel

Early right to counsel jurisprudence developed in the state courts.[22] That is where the majority of criminal prosecutions occurred, and state high courts regularly weighed in on the rights of criminal defendants.[23] The United States Supreme Court did not have much occasion to decide right to counsel claims until the twentieth century.[24] The Court began to recognize that the assistance of counsel was a crucial part of due process and that the trial court was primarily responsible for ensuring the defendant had access to defense counsel.[25]

In *Powell*, the Court recognized that the trial court played a vital role in ensuring counsel's assistance met the constitutional guarantee. [*Details of case*]. There, the Court found that the trial court was responsible for making an *effective* appointment on behalf of the defendants. This included appointing counsel capable of representing someone facing capital charges and far enough in advance to adequately prepare for trial.

Similarly in *Zerbst*, the trial court had a duty to protect the defendant's constitutional right to counsel.[26] There, the government charged two enlisted men in the United States Marine Corps with possessing and passing counterfeit United States currency.[27] The authorities arrested them on November 21, 1934, but because neither defendant had access to bail, they remained in jail until their first appearance and notice of indictment two months later on January 21, 1935.[28] The following day, on January 22, the men requested counsel at arraignment due to the fact that they lived in another state, had no local friends or relatives, and lacked funds and education.[29] The trial court refused, and the men "were . . . tried, convicted, and sentenced . . . to four and one-half years in the penitentiary" all on the same day.[30]

[*Debrief and transition*].

Like in the early right to counsel cases, the first conflict cases focused on the trial court's primary role in protecting the accused's right.

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[21] Model Rules of Prof. Conduct, Rule 1.7.
[22] *See* Sara Mayeux, *IAC before* Powell v. Alabama, IOWA L. REV. (2014).
[23] Cite.
[24] Cite.
[25] *See* Powell v. Alabama, 287 U.S. 45 (1932) and Johnson v. Zerbst, 304 U.S. 458 (1938).
[26] 304 U.S. at 465.
[27] *Id.* at 459-60.
[28] *Id.* at 460.
[29] *Id.*
[30] *Id.*

B. The Right to Counsel's Undivided Assistance

The Supreme Court first recognized the right to conflict free counsel as a necessary part of the right to counsel in *Glasser v. United States*, 315 U.S. 60 (1942). Again, it viewed the trial court as playing a critical role in protecting this right.

From 1935 to 1939, Daniel Glasser served as an Assistant United States Attorney in the Northern District of Illinois charge of liquor cases.[31] Norton Kretske was his colleague in the office until 1937, upon which time he entered private practice.[32] Along with three co-defendants, the government charged the men with conspiracy to defraud the United States for a scheme that involved accepting money from people facing violations of federal liquor laws in exchange for dismissing the charges.[33] On the eve of trial, Kretske's counsel informed the court that Kretske no longer wanted to work with him.[34] The judge then asked if Glasser's counsel would act as Kretske's attorney.[35] Glasser's counsel, William Stewart warned the court that the evidence against Glasser was inconsistent and that there would be a "divergency" with regard to how he would approach defending Glasser and Kretske.[36]

After reviewing the record, the Supreme Court held that the trial court created the conflict when it requested Glasser's counsel to represent his codefendant, Kretske.[37] It found that due to counsel's divided interests between Glasser and Kretske, counsel failed to cross-examine a key witness and failed to object to inadmissible evidence.[38] The Court overturned Glasser's conviction based on his lawyer's "struggle to serve two masters" and the trial court's interference with Glasser's right to his lawyer's undivided assistance.[39] The Court declined to specify a degree of prejudice resulting from a conflict of interest, explaining that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[40]

Holloway v. Arkansas, 435 U.S. 475 (1978)

Court appointed single attorney for three codefendants charged with robbery and rape, set for consolidated trial. Pretrial, defendants moved for separate counsel, court refused. Renewed motion before the jury was empaneled, counsel explained that the defendants wanted to testify, and that he would not be able to properly

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[31] 315 U.S. 60, 63.
[32] *Id.*
[33] *Id.* at 64.
[34] *Id.* at 68.
[35] *Id.*
[36] *Id.* at 68.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 75.
[40] *Id.* at 75-76.

cross-examine them. Court denied request. Defendants gave conflicting versions of their whereabouts when the crime occurred. Jury convicted all three. Court reversed, no need to show prejudice, any search for it would be "misguided speculation."

C. Sixth Amendment Right to Conflict Free Counsel

[*Identify through line from* Cuyler *to* Wood*, focus still seems to be on court's role in ensuring there is not conflict and on multiple representation, which should put court on notice on potential conflict. Law does not seem to grapple with other potential conflicts*].

Cuyler v. Sullivan: Pennsylvania prosecution, federal habeas. Three defendants, same two lawyers, three separate and successive trials. Jury convicted the first defendant Sullivan; separate juries acquitted the second and third defendants. Sullivan appealed. Standard requires the defendant to make two showings on appeal, first that an actual conflict existed and second, that the conflict adversely affected counsel's performance such that the reviewing court can assume prejudice.[41] Sullivan could not show actual conflict. Conviction affirmed.

Wood v. Georgia, 450 U.S. 261 (1981) – former employees of an adult movie theater and bookstore convicted of distributing obscene materials in violation of GA law. Avoided jail, placed on probation as long as they paid off their fine. Missed payment, probation revoked and jailed.

Both defendants represented by the same lawyer, who was paid by their former employer. Their former lawyer also posted bond and paid other fines related to the defendants' second arrest. Case remanded to determine whether there was an actual confclit of interest at the time of the probation revocation or earlier, and whether the defendant's waived their right to independent counsel. Court had duty to inquire about the possibility of a conflict.

Strickland also discusses defendant's right to counsel free from conflict.

III. RIGHT TO CONFLICT FREE COUNSEL

This Part examines how conflicts of interest between defense counsel and the accused arise, identifying how some state courts have diverged from federal law to address them.

A. Types of Conflicts

Four types of conflicts: counsel's duty to another client, to a former client, to a third person, or to counsel's own interests. [*Include examples*].

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[41] Cuyler v. Sullivan, 446 U.S. 335 (1980).

The law does not resolve the different types of conflicts that can arise. Instead, it reflects the most common, yet avoidable type of conflict: joint representation.

Conflict resulting from counsel's own interests is a murky thing to identify and the harm is difficult to measure. Counsel's personal interests impair representation, effectively denying the client their right to counsel.

The defendant's demonstration that a conflict exists should be enough to give rise to a constitutional violation. The defendant need not make any additional showing.

B. Applying Cuyler *to the Various Types of Conflicts*

C. What Cuyler *Leaves Unresolved*

Cuyler's two-pronged showing is inappropriate for this kind of conflict. Courts often misapply *Cuyler* and/or parties fail to raise the claim properly. [*Include examples*]. Case review of unvindicated claims, focus on federal habeas (state court convictions).

The Court decided *Cuyler* pre-*Strickland*, but it echoes the two-prong ineffective assistance of counsel standard from *Strickland v. Washington*, requiring deficient performance and prejudice.

To be clear, impact on performance is something less than prejudice, which would require demonstrating a reasonable likelihood in a different outcome.[42] Prejudice is hard to demonstrate.[43] Yet, determining whether the conflict adversely impacted counsel's performance can be difficult to measure. [*Look to language from* Commonwealth v. Dew]. Defense counsel makes countless decisions throughout the course of representation, resulting in action and inaction. The resulting impact can be both pervasive and hard to pinpoint.

Applicability of the standard from *Cuyler* remains an open question. *Mickens v. Taylor*, 535 U.S. 162, 176 (2002).

IV. CONFLICTS BASED ON COUNSEL'S OWN INTERESTS

This Part turns to conflicts between the accused and defense counsel's own interests, such as counsel's bias and financial interests, revealing how the law fails to address them and the threat they pose to defendants' right to counsel. It also offers a suggestion for how to remedy such conflicts.

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[42] Strickland.
[43] Cite (prejudice hard to prove).

Growing body of research demonstrating the negative impact counsel's bias can have on representation. Jurisdictions that operate flat fee and low cap fee structures can create conflicts between counsel's financial interests and the accused.

A. Defense Counsel's Bias as an Unconstitutional Conflict

Increase in research on defense counsel bias and the negative impact that can have on representation.

Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 L. & Hum. Behav. 413 (2011)

L. Song Richardson and Phil Goff, *Public Defender Triage*, Yale L.J. (2013)

Jeff Adachi, *PDs Can Be Biased, too, and it Hurts Their Non-White Clients*, Wash. Post, June 7, 2016

Alexis Hoag, *Black on Black Representation*, N.Y.U. L. Rev. (2021)

Paul Messick, *Represented by a Racist: Why Courts Rarely Grant Relief to Clients of Racist Lawyers*, 109 Calif. L. Rev. 1231 (2021)

Ellis v. Harrison, 947 F.3d 555 (9th Cir. 2020)

Osborne v. Terry (11th Cir. 2006). Curtis Osborne, a Black man facing capital charges, was represented by appointed counsel who referred to him as the n-word. When speaking with another client, counsel, allegedly said that Osborne was a n-word and deserved to die. Osborne was convicted and sentenced to death. He unsuccessful raised IAC for counsel's failure to communicate a pretrial life offer based on counsel's racial bias. Reviewing court denied the claim, explaining that Osborne failed to connect counsel's racial animosity to poor performance. Osborne executed.

B. Counsel's Financial Interests as an Unconstitutional Conflict

Recognize issue with lack of funding for indigent defense generally. Unique problem with private counsel appointed to represent indigent clients. Explain flat fee and low fee cap structure. Flat fee and low fee caps disincentivize counsel from performing more than the minimum amount of work on a case. Counsel has a financial interest to do the least amount of work possible and take on more cases to make a living wage.

Survey of jurisdictions that operate flat fee arrangements and low fee caps that result in an effective flat fee pay structure.

Sixth Amendment Center state and county evaluations

CO bans flat fees and low hourly rates in certain cases
https://6ac.org/colorado-bans-flat-fees-and-low-hourly-rates-in-certain-cases/

VA report finds low fee caps cause problems
https://6ac.org/virginia-legislative-report-finds-low-fee-caps-cause-problems/

OR abolishes flat fee
https://6ac.org/oregon-passes-sweeping-indigent-defense-reforms/

Idaho state bar ethics opinion

Low pay in New York

Refer to *Dorsey v. Vandergriff*, unsuccessful cert petition from Missouri in which the trial court appointed defense counsel in a capital case and arranged to pay them a flat fee of $12,000 each.

Question presented: "whether, where appointed counsel in a capital case had a flat-fee contract and failed to investigate or challenge a capital murder charge to the client's detriment, counsel had an actual conflict of interest that adversely affected their performance such that *Cuyler v. Sullivan*'s presumption of prejudice applies."

C. How Some State Courts Resolve Conflicts Based on Counsel's Own Interests

Instead of applying *Cuyler*, some lower courts are beginning to apply a streamlined standard that requires the defendant to demonstrate the existence of an actual conflict and nothing more.[44] [*Survey of various state court decisions, often with more protective conceptions of the right to counsel*].

> *Commonwealth v. Dew*, 492 Mass. 254 (Mass. 2023). Defense counsel Richard Doyle harbored anti-Black racist and Islamophobic views. Espoused them repeatedly on social media, referred to clients and to people at the court using racist, Islamophobic, and other bigoted language and imagery, used or posted such references while in court (based on social media location tags). Massachusetts's Committee for Public Counsel Services (CPCS) suspended Doyle from representing defendants for one year. Court later appointed him to represent Anthony Dew, a Black Muslim man. When Dew was wearing a kufi, Doyle refused to meet with him. Doyle continued to espouse anti-Black racist and Islamophobic statements on social media while representing Dew. Dew plead guilty, sentenced to prison.

[44] Commonwealth v. Dew (Mass. 2023).

Massachusetts Supreme Judicial Court reasoned that the Commonwealth's Article 12 right to counsel is more protective than Sixth Amendment right.[45] Defendant need only show that actual conflict is enough. No additional showing required. Departed from *Cuyler*, the more rigorous SCOTUS standard. Pointed to CPCS finding regarding Doyle.

Other states.

D. How the United States Supreme Court Should Address Conflicts Based on Counsel's Own Interests

V. CONCLUSION

Courts should look to state courts to adopt uniform conflict of interest standard to better capture the realities of contemporary practice and support the Sixth Amendment right to counsel guarantee.

[45] *Dew*, 492 Mass. at 263-64.