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THE FUTURE OF CRIMINAL DEFENSE CONFLICTS: IDEOLOGICAL BIASES AND EFFECTIVE COUNSEL

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"No man can serve two masters: for either he will hate one, and love the other; or else he will hold to the one, and despise the other."[1]

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I. INTRODUCTION

On November 15, 2021, a jury in Kenosha, Wisconsin found Kyle Rittenhouse not guilty of all charges relating to his shooting of three individuals during a Black Lives Matter protest.[2] The verdict was highly controversial, with supporters of Rittenhouse holding it out as a victory for Second Amendment rights and opponents decrying his actions as vigilantism.[3] While Rittenhouse's attorneys argued in court that it was a

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1. *Matthew* 6:24 (King James).
2. Becky Sullivan, *Kyle Rittenhouse Is Acquitted of all Charges in the Trial Over Killing 2 in Kenosha.* N.P.R. (Nov. 19, 2021, 5:53 PM), https://www.npr.org/2021/11/19/1057288807/kyle-rittenhouse-acquitted-all-charges-verdict.
3. *Id.*

simple case of self-defense, groups connected with the defense team had a very different message.[4] In a tweet that he later deleted, lead attorney John Pierce compared Kyle Rittenhouse to the unknown patriot who fired the "shot heard round the world" which began the Revolutionary War, stating that "[a] Second American Revolution against Tyranny has begun."[5] The implications were obvious: the case was about a cause just as much as it was about Rittenhouse.[6] Rittenhouse was acquitted, but what if he had not been? Would his original lawyers have been deemed constitutionally ineffective for caring not just for a client, but a cause? This Commentary explores the ethical and constitutional questions implicated when a lawyer represents a cause while also representing a client.

Beyond the case of Kyle Rittenhouse, the potential for ideological conflicts of interest has risen exponentially. Accusations of misconduct by defense attorneys have been flung across the political spectrum, from the Trump White House to the offices of the American Civil Liberties Union ("ACLU").[7] What all these cases have in common is a concern about improper conflicts of interest. The basis for the avoidance of such conflicts comes from Model Rule of Professional Conduct 1.7., which prohibits lawyers from engaging clients whose representation will result in a conflict of interest that is "adverse" to the their client.[8]

Courts have long held that significant conflicts of interest can create both ethical and constitutional problems in the criminal context.[9] They invoke major issues of effective assistance of counsel by making it difficult to determine whether the attorney is acting on behalf of their client or someone else. It follows that there should also be significant concern if the defense attorney is being paid to represent a client as part of an ideological or political group whose interests might not be the same

4. Bernard Condon, *Kenosha Shooter's Defense Portrays Him as 'American Patriot'*. Assoc. Press (Sept. 24, 2020, 3:39 PM), https://apnews.com/article/shootings-us-news-ap-top-news-riots-wisconsin-76104678645cc0e1f717f5d93ff427f7.

5. *Id*.

6. Stacy St. Clair & Dan Hinkel, *Kyle Rittenhouse Lawyer Steps Away from Criminal Case, Hours After Prosecutors Allege Fundraising Effort 'Provides Ample Opportunity For Self-dealing and Fraud*,' CHI. TRIB. (Dec. 03, 2020), https://www.chicagotribune.com/news/breaking/ct-kyle-rittenhouse-court-hearing-kenosha-shooting-20201203-nb5su6pmobg77gktohqqwxfm44-story.html.

7. *See* Deepa Shivaram, *Who Is John Eastman, the Trump Lawyer at the Center of the Jan. 6 Investigation?,* NPR (June 17, 2022, 5:04 AM), https://www.npr.org/2022/06/17/1105600072/who-is-john-eastman-the-trump-lawyer-at-the-center-of-the-jan-6-investigation; Michael Powell, *Once a Bastion of Free Speech, the A.C.L.U. Faces an Identity Crisis.* N.Y. TIMES (Sept. 28, 2021), https://www.nytimes.com/2021/06/06/us/aclu-free-speech.html.

8. MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 2020).

9. *See, e.g.*, Wood v. Georgia, 450 U.S. 261, 268-70 (1981).

as the individual who is on trial, even if that third party does not have a criminal interest in the proceedings. In a society where attorneys are taking clients merely to make a political statement,[10] standards of ethics and competence must be even more explicit in prohibiting conflicts of interest. Simply put, a defense attorney should be severely restricted from accepting payments from third parties intent on pushing a specific message, especially when doing so would risk damaging their client's chances of a favorable resolution to their criminal proceedings.

This Commentary explores the problems inherent in allowing third-party fee payments as part of pushing an overall message. Specifically, how these payments relate to effective representation in criminal proceedings. Part I will discuss *Strickland v. Washington* and the origin of effective assistance of counsel, as well as an analysis of third-party fee payments and conflicts of interest. Part II will continue with several modern examples of ideology and politics interfering with the role of a criminal defense attorney. This Part will also include the argument that third-party fee payments based on ideology or other means are outside the scope of professional conduct and should be curtailed except in extremely limited circumstances, with ineffective assistance claims and other remedies in place to deal with significant violations.

II. CONFLICTS OF INTEREST AND THIRD-PARTY FEES

To understand why ideological commitments can be seen as a conflict of interest, it is important to examine a few key areas of the law more broadly. In this Section, I will lay out the elements of an ineffective assistance of counsel claim to explain how my theory fits within its criteria. Next, I will discuss why third-party fee payments are so controversial, especially when the interests of that party conflict with those of the client. The final piece of this Part will include an examination of what remedies a trial court can implement to prevent a defendant from being represented by conflicted counsel.

A. Ineffective Assistance of Counsel

The Sixth Amendment guarantees that all criminal defendants shall have the "[a]ssistance of Counsel for [their] defense".[11] With the adoption of *Strickland v. Washington* in 1984, the Court clarified that this included cases addressing the actual effectiveness of counsel at trial.[12] In

10. *See infra* Part II(a) for examples of attorneys taking these kinds of clients.
11. U.S. CONST. amend. VI.
12. *See* 466 U.S. 668, 686 (1984).

Strickland, the Court created a two-prong test to properly determine whether defense counsel performed ineffectively, stating that the defendant must show: 1)that counsel's performance was deficient, and 2)that the deficient performance prejudiced their defense.[13]

The Court then went on to apply the *Strickland* test to other ineffective assistance of counsel claims.[14] In these cases, the Court held to the performance duty laid out in *Strickland*, namely that an attorney's function is to assist the defendant, which includes duties of loyalty and avoidance of conflicts of interest.[15] Defense attorneys are also required to promptly communicate with their clients about the state of the proceedings in order to give them the ability to direct their representation.[16] The Model Rules of Professional Conduct have a similar standard, stating that lawyers shall provide "competent representation" to their client.[17] Indeed, the Court has commented that the Model Rule standard serves as an "important guide[]" to determining whether defense counsel has failed to meet the performance prong of the *Strickland* test.[18]

Courts looking at ineffective assistance of counsel ("IAC") claims also must determine whether prejudice exists.[19] Other than the common determination governed by the standard above, there are some situations where prejudice is so likely that it is presumed to exist.[20] In *Cuyler v. Sullivan* that included scenarios where the defendant was able to demonstrate that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance."[21] This idea of presumed prejudice has been expanded by other courts. For example, the Second Circuit recognizes both actual and per se conflicts in IAC claims, with the former category following the "adversely affected" performance standard and the latter stating that the conflicts are unwaivable and do not require any showing of prejudice.[22] Loyalty to a third party has not been explicitly addressed on the federal level, but some states have approached this type of conflict as being

13. *Id.* at 687.
14. *See, e.g.*, Hill v. Lockhart, 474 U.S. 52, 58-9 (1985)(stating that the *Strickland* test applies to plea bargaining).
15. *Strickland*, 466 U.S. at 688; *see also* Cuyler v. Sullivan, 446 U.S. 335, 346 (1980).
16. *See* Missouri v. Frye, 566 U.S. 134, 145-46 (2012).
17. MODEL RULES OF PRO. CONDUCT r. 1.1(AM. BAR ASS'N 2020).
18. *Frye*, 566 U.S. at 145.
19. *Strickland*, 466 U.S. at 687.
20. *Id.* at 692.
21. 446 U.S. 335, 348, 350 (1980).
22. United States v. Williams, 372 F.3d 96, 102 (2d Cir. 2004).

within the *Sullivan* standard.[23] Scholars continue to debate the effectiveness of the *Strickland* prejudice standard, with some arguing that there should be certain widely accepted presumptions of prejudice.[24] One argument in support of this so-called "presumptive prejudice" theory is that it does not guarantee relief for the defendant, but instead puts the burden of producing information on the government and its greater resources instead of on the defendant.[25] Defendants already suffer prejudice due to their conviction and are owed a presumption to balance the fundamental protections of the right to effective counsel.[26]

B. Historical Context of Third-Party Fee Payments

The Sixth Amendment's right to counsel has also been defined to prohibit conflicts of interest in criminal proceedings.[27] Many early conflicts arose from concerns about joint representation of criminal defendants, and that such representation would aid one client at the expense of another.[28] Ethical standards also lay out a clear prohibition on lawyers having such conflicts, stating that a lawyer shall not represent a client if there is a conflict of interest.[29]

The Supreme Court has acknowledged that, in certain situations, defendants can waive their attorney's conflict of interest.[30] However, there are circumstances in which no waiver will be proper.[31] In situations where the attorney is hired by a third party with potential criminal liability in the case, protecting the identity of said party could reasonably conflict with the duty of the attorney to represent their client.[32]

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23. *See, e.g.*, Acosta v. State, 233 S.W.3d 349, 354 (Tex. Crim. App. 2007) (holding that a lawyer acting in the interests of his client's wife while damaging the client's position is a "clear example of how the danger of ineffective assistance via a conflict of interest is not strictly limited to the codefendant context").

24. *See, e.g.*, Thea Johnson & Emily Arvizu, *Proving Prejudice After* Lee v. United States*: Ineffective Assistance of Counsel in the Crimmigration Context*, 25 HARV. LATIN AM. L. REV. 12, 56-57 (2022)(stating that a defendant facing deportation should be able to present a rebuttable presumption of prejudice when their criminal attorney fails to inform them of the consequences of a plea).

25. Alex C. Werner, *Pleading with the Past: Assessing State Approaches to* Lafler *and* Frye's *Counterfactual Prejudice Prong*, 121 COLUM. L. REV. 411, 441 (2021).

26. *Id.*

27. *See* Glasser v. United States, 315 U.S. 60, 70 (1942).

28. *See, e.g.*, *id.*; *see also* Debra Lyn Bassett, *Three's a Crowd: A Proposal to Abolish Joint Representation*, 32 RUTGERS L.J. 387, 390-91 (2001).

29. MODEL RULES OF PRO. CONDUCT r. 1.7(AM. BAR ASS'N 2020).

30. *See* Wood v. Georgia, 450 U.S. 261, 273-74 (1981).

31. *Id.* at 268-69; *see also* United States v. Laureano-Pérez, 797 F.3d 45, 55-57 (1st Cir. 2015).

32. James A. Brown, *Hiring of Attorney to Represent Third Parties - The Umbrella Defense*, 43 LA. L. REV. 1041, 1053, 1053 n.53 (1982).

Courts have been specific about when the identity of a third-party payor can be kept confidential. The Second Circuit has stated that "absent special circumstances, client identity and fee information are not privileged."[33] Other federal circuits have set similar requirements for attorneys attempting to shield payor identities from disclosure.[34] The single exception to this confidentiality argument specifically requires that exceptional circumstances exist which would be tantamount to a professional communication.[35] In simpler terms, the identity of a client is kept confidential only when it is "connected inextricably with a privileged communication."[36] Even in the sphere of state courts, the standard appears to follow a similar policy.[37] These exceptions specifically refer to the identity of the *client*, while nothing in the federal circuits creates a carve-out for third-party identities; in fact, courts have specifically stated that when a third party takes it upon themselves to pay for a defendant's representation, their identity is not privileged.[38]

C. Disqualifying Counsel for Conflicts of Interest

As noted above, being hired by a third party with a criminal interest in the case is an automatic unwaivable conflict for the defendant.[39] However, what happens when a district court is presented with the waiver of a different conflict that it feels is suspect? First, the conflict must be an "actual conflict" that has affected counsel's performance.[40] For example, the Second and Ninth Circuits have found that "[i]f a conflict is so egregious that no rational defendant would knowingly and voluntarily

33. *In re* Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 248 (2d Cir. 1986) (en banc).

34. *In re* Horn, 976 F.2d 1314, 1317 (9th Cir. 1992)("An attorney may invoke the privilege to protect the identity of a client or information regarding a client's fee arrangements if disclosure would 'convey[] information which ordinarily would be conceded to be part of the usual privileged communication between attorney and client.'")(quoting Baird v. Koerner, 279 F.2d 623, 632 (9th Cir. 1960)); *see also In re* Grand Jury Subpoena for Att'y Representing Crim. Defendant Reyes-Requena, 926 F.2d 1423, 1431 (5th Cir. 1991).

35. United States v. Gray, 876 F.2d 1411, 1416 (9th Cir. 1989); *see also* United States v. Hodge & Zweig, 548 F.2d 1347, 1353 (9th Cir. 1977).

36. *In re Grand Jury Subpoena for Att'y Representing Crim. Defendant Reyes-Requena*, 926 F.2d at 1431.

37. *See* State v. Toscano, 100 A.2d 170, 173 (N.J. 1953) ("[W]hile the privilege protects against the disclosure of confidential communications from the client to his attorney, it is not intended to permit concealment by the attorney of the identity of his client.").

38. *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d at 248.

39. *See* Wood v. Georgia, 450 U.S. 261, 268-69, 273-74 (1981).

40. Mickens v. Taylor, 535 U.S. 162, 171-72, 172 n.5 (2002).

desire the attorney's representation, then the court must disqualify the attorney."[41]

In these situations, a trial court will remove counsel even if a waiver exists. Here the trial court is forced to decide whether proper representation can be carried out by the conflicted attorney.[42] While the Sixth Amendment does give a defendant the right to select their own counsel, the main goal of the Amendment is to provide an effective advocate, not guarantee a lawyer that they prefer.[43]

The trial court may then decline the waiver of defense counsel's conflict.[44] Third-party payments of criminal defense fees are particularly suspect, with the Supreme Court stating that "inherent dangers. . . arise when a criminal defendant is represented by a lawyer hired and paid by a third party."[45] When a trial court finds an actual conflict of interest it should not be required to tolerate inadequate representation of a defendant.[46]

Now I reach the heart of this dilemma: whether ideological bias in the third-party payors of defense fees necessarily creates an unwaivable conflict of interest for the defense attorneys representing criminal defendants. Based on the rationale above, it appears that ideological biases would fall into the same category.

III. IDEOLOGY AS A CONFLICT

A. Evidence of Ideological Conflicts in the Law

While ideological bias is not new to the legal field, it has become increasingly prominent.[47] Even prior to former President Donald Trump's rise to the national stage, lawyers were involved in politics and policymaking for both sides of the aisle.[48] In a world where the lines are increasingly blurred, conduct by attorneys has fallen into a gray area. The Southern Poverty Law Center ("SPLC"), a group known for its

41. United States v. Lussier, 71 F.3d 456, 461 (2d Cir. 1995); United States v. Martinez, 143 F.3d 1266, 1270 (9th Cir. 1998).

42. Wheat v. United States, 486 U.S. 153, 162 (1988).

43. *Id.* at 159.

44. *Id.* at 162.

45. Wood v. Georgia, 450 U.S. 261, 268-69 (1981).

46. *Wheat*, 486 U.S. at 162 (quoting United States v. Dolan, 570 F.2d 1177, 1184 (3d Cir. 1978)).

47. Christina Pazzanese, *Gauging the Bias of Lawyers*, HARVARD GAZETTE (Aug. 10, 2017), https://news.harvard.edu/gazette/story/2017/08/analyst-gauges-the-political-bias-of-lawyers/.

48. Adam Bonica, Adam S. Chilton & Maya Sen, The Political Ideologies of American Lawyers, 8 J. LEGAL ANALYSIS 277, 292 (2016).

cutting-edge civil rights work, has faced accusations that its focus shifted from fighting hatred to overzealous action that has even shocked those with similar ideological viewpoints.[49] Concerns have been raised, for example, that the SPLC is going too far in its characterization of those connected to hate groups.[50] On the opposite end of the spectrum are individuals such as Rudy Giuliani, who has been disbarred in New York and suspended in Washington D.C. for his misrepresentations in lawsuits surrounding alleged fraud in the 2020 election.[51]

When these issues are examined in more detail, a pattern begins to emerge. Lawyers have a history of failing to represent their clients by adhering to ideology and political causes over their client's wishes. Take the ACLU for example: once known as a champion of the First Amendment, even defending the free speech rights of Neo-Nazis. Now the group is accused of picking and choosing which defendants have that same constitutional right.[52] Even the old guard within the ACLU have concerns about the organization deciding what speech is worthy of protection, instead of sticking with the longstanding policy to protect the right regardless of the motives of the speakers.[53] These actions could be perceived as a bias against clients with legitimate First Amendment concerns which are being represented differently than those which are more "in line" with ACLU positions. Looking back at the SPLC, there is a similar concern of liberal bias which is drawn from the critique that this organization is engaging in "partisan political crusading."[54] While no explicit claims of conflict have arisen from defendants represented by these organizations, these issues do indicate a potential for irreparable harm to the rights of defendants represented by these traditionally "liberal" groups.

49. Ben Schreckinger, *Has a Civil Rights Stalwart Lost Its Way?*, POLITICO MAG., (July/Aug. 2017), https://www.politico.com/magazine/story/2017/06/28/morris-dees-splc-trump-southern-poverty-law-center-215312/.

50. *Id.* Detractors point to the SPLC's classification of individuals such as British-Muslim activist Maajid Nawaz as "anti-Muslim extremists" as proof of the organization's over-characterization of hate-based discrimination. *Id.*

51. Keith L. Alexander, *Giuliani 'Weaponized' Law License In Trump Election Suit, D.C. Bar Argues*, WASH. POST (Dec. 6, 2022), https://www.washingtonpost.com/dc-md-va/2022/12/06/rudy-giuliani-dc-bar-license-hearing/; Myah Ward, *Rudy Giuliani Suspended from Practicing Law in D.C., Weeks After Similar Action in New York*, Politico (Aug. 8, 2021, 9:14 AM), https://www.politico.com/news/2021/07/07/rudy-giuliani-suspended-washington-dc-498653#:~:text=A%20District%20of%20Columbia%20court,to%20overturn%20the%202020%20election.

52. Powell, *supra* note 7.

53. *See id.*

54. Schreckinger, *supra* note 49.

On the opposite end of the spectrum, there are several examples of lawyers driven by ideology which arise from the false allegations of fraud surrounding the 2020 election. Rudy Giuliani has faced ethical proceedings over his role in attempting to overturn the Pennsylvania election results based on unfounded allegations.[55] John Eastman, an attorney and senior advisor to then-President Trump, authored the strategy that Trump attempted to use to overturn the election in his favor.[56] That strategy was acknowledged by Eastman to be meritless in court as well as illegal under federal law,[57] thus implicating potential criminal liability and ethical conduct proceedings.[58] Such action could only be motivated by desires separate from his moral and ethical obligations to his client's legitimate interests; namely, the pursuit of an ideological cause that he has identified with for decades and that his client was relentlessly pursuing.[59] Eastman is currently facing ethics proceedings in California over these actions.[60]

Criminal liability in this area does not stop with Eastman. The House Select Committee to Investigate the January 6th Attack on the United States Capitol (hereinafter the January 6th Committee) has referred multiple members of the Trump administration for contempt charges after they failed to respond to congressional subpoenas.[61] Among these is Steve Bannon, a former advisor to former President Trump who was found guilty of contempt.[62] While his lawyers argued that his refusal was based on a legitimate reliance on privilege, the trial judge and the prosecutor pushed back against such claims.[63] The legal reality is that

55. Alexander, *supra* note 51.

56. Shivaram, *supra* note 7.

57. *Id*.

58. MODEL RULES OF PRO. CONDUCT r. 3.1(AM. BAR ASS'N 2020).

59. *See* Michael S. Schmidt & Maggie Haberman, *The Lawyer Behind the Memo on How Trump Could Stay in Office*, N.Y. TIMES (Oct. 13, 2022), https://www.nytimes.com/2021/10/02/us/politics/john-eastman-trump-memo.html.

60. Steve Benen, *Trump Lawyer Eastman Faces Possible Disbarment, Among Other Troubles*, MSNBC (Jan. 27, 2023, 11:22 AM), https://www.msnbc.com/rachel-maddow-show/maddowblog/trump-lawyer-eastman-faces-possible-disbarment-troubles-rcna67862.

61. Kyle Cheney, Nicholas Wu & Josh Gerstein, *'Do Your Job': Jan. 6 Committee Presses DOJ as Push for Meadows Contempt Charge Languishes*, POLITICO (Mar. 28, 2022, 9:44 PM), https://www.politico.com/news/2022/03/28/jan-6-committee-doj-meadows-contempt-00021172.

62. Tierney Sneed, Katelyn Polantz & Holmes Lybrand, *Steve Bannon Found Guilty of Contempt for Defying January 6 Committee Subpoena*, CNN (July 22, 2022, 5:40 PM), https://www.cnn.com/2022/07/22/politics/steve-bannon-contempt-of-congress-january-6-verdict/index.html.

63. *Id.*; Carrie Johnson, *Steve Bannon Found Guilty on Both Contempt of Congress Charges*, N.P.R. (July 22, 2022, 3:40 PM), https://www.npr.org/2022/07/22/1112937587/steve-bannon-guilty-jan-6-committee-contempt-charges.

Bannon was not a government official who could be shielded by executive privilege.[64] Even if he had been, President Biden had declined to extend executive privilege to those involved in the January 6th attack,[65] and the law places priority on the decisions of a sitting president about executive privilege over the wishes of a former president.[66] Being aware of this, as they undoubtedly were, how could Bannon's lawyers claim to be representing his best interests when arguing a defense that was almost guaranteed to fail? Focusing on the political nature of the case and attempting to characterize it as a "witch hunt" further supports the idea that ideology, and not common sense, was calling the shots.

Issues surrounding January 6th have resulted in other significant conflicts of interest—or at least an appearance of such conflicts. Attorneys representing former President Trump in negotiations with federal prosecutors are the same lawyers as those representing key Trump advisors, including Steve Bannon.[67] Other lawyers who have represented former President Trump in various criminal proceedings are floating within this circle, handling his former advisors' contempt charges and other matters stemming from the January 6th attack.[68] Experts in legal ethics have expressed certain concerns with the conflicting nature of these representations, particularly if one of the defendants wished to take a plea bargain that might be disadvantageous to President Trump or his goals.[69] Professor Kathleen Clark, a legal ethics expert, even went so far as to say that "[i]t's in Trump's interest certainly for them all to stick together and resist."[70] That raises the concern that the attorneys would be more loyal to former President Trump's ideological agenda than to the ethical and moral obligations owed to their client.

Not all these individuals are in denial about the high risk of conflict this situation presents. Former White House aide Cassidy Hutchinson switched attorneys before her January 6th Committee hearing.[71] Such

64. Johnson, *supra* note 63.

65. *See* Stephen Collinson, *Biden's Refusal of Executive Privilege Claim Ignites New Firestorm With Trump*, CNN (Oct. 26, 2021, 12:44 AM), https://www.cnn.com/2021/10/26/politics/donald-trump-joe-biden-executive-privilege-january-6/index.html.

66. 44 U.S.C. § 2208(C).

67. Zoe Tillman, *Trump Lawyers Rotate Among Inner Circle as Legal Woes Mount*, 97 DAILY BUS. REV. 33 (Aug. 10, 2022).

68. *Id.*

69. *Id.*

70. *Id.*

71. Betsy Woodruff Swan, *Hutchinson, Former Meadows Aide, Replaces Lawyer on Cusp of Jan. 6th Hearings*, POLITICO (June 9, 2022, 12:13 PM), https://www.politico.com/news/2022/06/09/hutchinson-former-meadows-aide-replaces-lawyer-jan-6-hearings-00038439.

action could be attributed to any number of factors, but what is significant is the fact that Hutchinson gave damaging information about former President Trump and his senior staff to the Committee, and that unlike other senior aides, she chose to remove her Trump-affiliated counsel in favor of an attorney known to have different views.[72] These facts lend credence to the argument that these Trump-affiliated lawyers held their allegiance to ideology over the principles of ethics that are supposed to guide their actions.

B. Addressing the Conflicts

As noted in Part I, the remedy for conflicts of interest in criminal proceedings is for the trial court to dismiss counsel for a conflict or for the defendant to proceed with an ineffective assistance of counsel claim after the proceedings have ended.[73] The problem with the current system is that ideology has not been implemented into the common understanding of a conflict. It would seem appropriate to compare relying on third-party fee payments to representing two clients with competing interests; after all, there is no guarantee that the fee payor has interests that are identical to those of the client, especially when the former is not implicated in their criminal activity. Indeed, legal scholarship suggests that attorneys with these divided loyalties cannot be truly effective advocates, as they often will be forced to choose between competing interests.[74] However, no such comparison between ideology and third-party fees currently exists in prevailing legal scholarship.[75] This requires a showing of how ideology fits within the current framework.

In the case of Kyle Rittenhouse, for example, there were concerns about having third party donations paying for his defense. The statements and fundraisers of these supporters were done in a style reminiscent of campaign letters, giving off significant partisan energy

72. *Id.*

73. *See supra* Part I(c).

74. *See, e.g.*, Veronica J. Finkelstein, *Better Not Call Saul: The Impact of Criminal Attorneys on their Clients' Sixth Amendment Right to Effective Assistance of Counsel*, 83 U. CIN. L. REV. 1215, 1247-1249 (2015) (listing examples where attorneys will pursue personal agendas during representation to the detriment of their clients).

75. An intensive search of Lexis, Westlaw, HeinOnline, and other major search engines and databases has revealed a lack of substantive scholarship in this area. These searches included the following terms: "conflicts"; "ethics and ideology"; "ineffective counsel"; "third party conflicts"; "joint representation and biases"; "fair trial and conflicts"; "ideology and third party conflicts".

that drew national attention.[76] The use of rhetoric and patriotic fervor in the media concerned experts across the country.[77] According to these experts, there is a temptation to shape court arguments to "keep the money flowing while the battle is ongoing, [which] puts lawyers at risk of trying to serve two masters."[78] There is also a danger, in their opinion, of social media altering the narrative and causing lawyers to play for the donors.[79]

While Rittenhouse was acquitted of all charges, imagine if he had not been. There is at least some argument that Rittenhouse's self-defense claim was on shaky ground given that *he* provoked the encounter that led to the killing. If that claim failed, would it not be reasonable to suggest that the guilty verdict was due, at least in part, to his counsel's conflict? Imagine that Rittenhouse had wanted to take a plea but was persuaded by his attorney not to. Now we have entered IAC territory because an attorney gave his client poor advice due to their desire to further the agenda of a third-party payor bankrolling the defense. If the trial judge had realized what was happening, they could have conducted a *Wheat* analysis to determine whether defense counsel was acting appropriately.[80] But if they do not, we must consider how to protect the defendant's right to competent, conflict-free counsel.

Assuming conviction occurs, then the IAC standards as laid out in *Strickland* must be applied.[81] A violation of ethical rules is an "important guide[] to determining whether a performance violation exists in an IAC claim, which means that if a conflict of interest is established in violation of those rules then a significant step has been made towards showing a performance failure.[82] It has also been established that the defendant must show "an actual conflict of interest [that] adversely affected his lawyer's performance."[83] The biggest roadblock is getting ideological conflicts accepted as "actual conflicts." As indicated previously, the Supreme Court is skeptical of any situation where a third-party is paying for criminal defense fees,[84] and when an ethical conflict is also present the Court has been even harsher in finding counsel incapable of proper

76. Maggie Astor, *Political Fund-Raisers Are Basing Appeals to Donors on the Rittenhouse Trial*, N.Y. TIMES (Nov. 19, 2021), https://www.nytimes.com/2021/11/19/us/kyle-rittenhouse-political-fundraising.html.

77. Condon, *supra* note 4.

78. *Id*.

79. *Id*.

80. *See supra* notes 42-44 and accompanying text.

81. *See supra* note 13 and accompanying text.

82. Missouri v. Frye, 566 U.S. 134, 145 (2012).

83. Strickland v. Washington, 466 U.S. 668, 692 (1984).

84. Wood v. Georgia, 450 U.S. 261, 268-69 (1981).

representation.[85] In Rittenhouse's case, the appearance that his original lawyers were playing to the media and to donors rather than focusing on the criminal case would be significant.[86] Because the defense was being paid for by third parties, one piece of the test has likely been satisfied.

In most cases, prejudice is required to show that the defendant suffered actual harm and would have gotten a different outcome but for the defense lawyer's poor performance.[87] But where prejudice is presumed, it is not necessary that the defendant prove this harm.[88] While ideology has never been included as a conflict that would qualify for this treatment, the changes in the legal landscape over the past decade make adaptation necessary for maintaining the ethical representation of clients. Courts have not reached this conclusion yet, but there is significant evidence that they are moving in this direction, including recent instances where courts have begun chastising attorneys and invoking desires to implement consequences in response to frivolous claims and inappropriate ideological-based arguments presented in court.[89] In the Rittenhouse example, the judge could be informed by defense counsel's out-of-court comments, history of the types of cases they have participated in, and the identities of the third-party payors of his fees. Much of this is public record,[90] and there is no recourse under federal law that would allow counsel to hide the identity of their fee payor.[91]

This would also remove the need for a showing of prejudice by the defendant, instead allowing for the per se presumption of prejudice. The Supreme Court has held that prejudice per se exists when counsel "actively represents conflicting interests" that affect their performance.[92] In a broader sense, an analysis of Supreme Court jurisprudence has found that the key trait of a presumption of prejudice is that the conflict is so pervasive throughout the representation that its impact is too

85. Wheat v. United States, 486 U.S. 153, 162 (1988).

86. Condon, *supra* note 4.

87. *See supra* notes 19-20 and accompanying text.

88. *Strickland*, 566 U.S. at 692 (quoting Cuyler v. Sullivan, 446 U.S. 335, 350, 348 (1980)).

89. Mike Scarcella, *Attorney Sanctions Upheld in 'Utterly Baseless' Lawsuit Challenging 2020 Election*, REUTERS (Dec. 13, 2022, 4:33 PM), https://www.reuters.com/legal/legalindustry/attorney-sanctions-upheld-utterly-baseless-lawsuit-challenging-2020-election-2022-12-13/.

90. St. Clair, *supra* note 6.

91. *See, e.g.*, *In re* Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 248 (2d Cir. 1986); *see also* United States v. Hodge & Zweig, 548 F.2d 1347, 1355 (9th Cir. 1977).

92. Cuyler v. Sullivan, 446 U.S. 335, 348, 350 (1980).

difficult to detect.[93] Society and the courts should be as concerned about the idea that a third-party is causing as serious a conflict as it would be if the attorney was representing another criminal party, was asleep during trial, or had a personal interest in the case. I have already discussed how problematic the courts have found these ideological claims to be, to the point that attorneys are unable to properly represent their clients when the stakes are high.[94] When an ideological agenda (either the attorney's own or a third party's) overcomes the duty of an attorney to effectively represent their client, they have crossed the line from poor (but perhaps reasonable) performance to a breach of ethics that clearly creates a situation where prejudice can be presumed.

To properly analyze this issue, there must also be a discussion of waiver. As mentioned above, there are situations where a court will decline to accept a waiver of conflict from a defendant.[95] Because this is an actual conflict, a trial court would be forced to determine whether the defendant properly consented to the conflict of interest when agreeing to representation.[96] The prevailing standard in each circuit effectively boils down to whether a reasonable person in the defendant's position would have accepted representation while having knowledge of the conflict.[97]

In theory, no reasonable person would accept representation by an attorney who is conflicted between their interests and those of a third-party who is bankrolling the defense. The average person would likely want their attorney to be focused on what is best for them; after all, they are the one in danger of criminal conviction. It follows that most reasonable people would feel uncomfortable with the idea that their attorney was being influenced by someone with a different agenda than an acquittal.

However, the client might feel they are in ideological agreement with the attorney, and therefore are not worried about any conflict? One could presume that Kyle Rittenhouse felt that his attorneys were representing his interests and the interests of a greater cause—a cause that supported his individual right to use a gun on the day of the Kenosha killings.

There is potential for an issue when this position comes

into conflict with First Amendment protections for freedom of speech and association. Prohibiting an attorney from holding ideological beliefs that could harm their client could be construed as a violation of their

93. Tyler Daniels, *Presumed Prejudice: When Should Reviewing State Courts Assume A Defendant's Conflicted Counsel Negatively Impacted the Outcome of Trial?*, 49 FORDHAM URB. L.J. 221, 249 (2021).

94. *See supra* note 78 and accompanying text.

95. *See supra* notes 30-32, 39 and accompanying text.

96. *See* Wood v. Georgia, 450 U.S. 261, 273-74 (1981).

97. *See supra* notes 40-41 and accompanying text.

First Amendment rights.[98] This is true if the third-party payor of fees is the one with the ideological conflict, especially if that ideological conflict is related to political expression.[99] Political associations are protected under the First Amendment, and the Supreme Court has held that spending money is a proper expression of political activity.[100] There is therefore a presumption that most political activity is protected under the First Amendment,[101] which could implicate any situation where ideology is at issue even if the interested third party is paying for a criminal defense solely to further their own ideological agenda.

When litigation is at issue, protections of association are upheld as sacrosanct.[102] Individuals have the right to engage in litigation to protect their fundamental rights and to engage with lawyers while doing so.[103] Litigation in this sense is not simply addressing a conflict between two parties, but is "a means for achieving the lawful objectives of equality of treatment" by the government.[104] Applying this logic, the Court in *Primus* rejected the idea that fee sharing in and of itself was prohibited, but did indicate that serious conflicts of interest could be grounds for an exception.[105] Another concern that the Court has pointed out is whether the benefits of the representation were felt directly by the third party;[106] both the NAACP in *Button* and the ACLU in *Primus* were not engaged in litigation for any specific financial or ideological benefit, which, in the Court's view, was enough to avoid conflict.[107]

There is however an exception to the freedom of association protections that third parties have in litigation. Namely, that prejudicial

98. *See* Reed v. Town of Gilbert, 576 U.S. 155, 162 (2015) (explaining that government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content" and that such restrictions are only valid if they are "narrowly tailored to serve compelling state interests." (first quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972); then quoting Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989))).

99. *See, e.g., id.* at 169. In *Reed*, the Court stated that regulations targeted at specific political subject matter are content based discrimination and therefore impermissible under the First Amendment, even if no limits were imposed on the types of political expression permitted. *Id.*

100. *See* Buckley v. Valeo, 424 U.S. 1, 15, 19 (1976).

101. *Reed*, 576 U.S. at 162, 169.

102. *See In re* Primus, 436 U.S. 412, 426 (1978).

103. *Id.* at 427-429, 432-33.

104. NAACP v. Button, 371 U.S. 415, 429 (1963).

105. *In re Primus*, 436 U.S. at 436-37.

106. *Id.* at 436.

107. *Id.* The Court determined that there is always some potential for conflict when an organization handles litigation on an individual's behalf, but that in the absence of a "serious danger" of conflict or of the organization's interference with the methods of litigation there is not enough to justify preventing the representation. *Id.*

conflicts override First Amendment protections.[108] In *Button*, the Court determined that a conflict exists when an attorney acts to enrich either himself or an outside sponsor.[109] While the Court stated that any restrictions on the freedom of association must be specifically curtailed, they did allow for exceptions if a compelling government interest can be shown.[110]

Ideology in criminal representation would fit squarely within the requirements laid out by the Supreme Court as an exception to First Amendment protections. By labeling it as a conflict of interest, any fundamental protections at play would come up against the defendant's Sixth Amendment rights. The Supreme Court has created some guidance for situations where First and Sixth Amendment rights come into conflict, stating that "[t]he authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other."[111] The case-by-case standard allows a trial court to make a determination about what rights are most important in that particular case but does not lay out a test for how to make that decision.[112]

There is no case law directly on point that discusses freedom of association in conflict with the right to effective counsel,[113] which leaves us with the comparison of other First Amendment rights to the Sixth Amendment right to counsel. In *Smith v. Daily Mail Publishing Co.*, the Supreme Court indicated that freedom of the press can only be restricted under the "highest form of state interest," even when the right to a fair trial is at risk.[114] The same would therefore hold true for the First Amendment's protections for association.[115] However, the Court has stated that "[n]o right ranks higher than the right of the accused to a fair

108. *See Button*, 371 U.S. at 441-43 (discussing how conflicts of interest could affect a First Amendment analysis of freedom of expression and association).

109. *See id.* at 443.

110. *Id.* at 438.

111. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 561 (1976).

112. *Id.* at 561-62.

113. An extensive Westlaw and Lexis search of constitutional case law has found nothing placing the right to associate directly in conflict with the right to effective counsel. Existing analyses of conflicts between the First and Sixth Amendments have generally been limited to freedom of speech and freedom of the press, not the First Amendment right to association. The Supreme Court has laid out a substantive framework for conflicts between these First Amendment protections and the Sixth Amendment, which I discuss *infra* notes 114-119.

114. 443 U.S. 97, 102 (1979).

115. *See* Elrod v. Burns, 427 U.S. 347, 362 (1976) (citations omitted) ("It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. 'This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises. . . .'"(quoting Buckley v. Valeo, 424 U.S. 1, 65 (1976)).

trial."[116] The conflicting nature of these standards means that it depends on the discretion of the trial judge to make an appropriate determination.

For our purposes, the importance of ensuring a fair trial would appear to be more crucial than the right of an individual to associate with whom they please. A court has a compelling interest in making sure that the defendant receives a fair trial with conflict-free counsel. As this is "the most fundamental of all freedoms"[117] it should be enough to overcome the strict scrutiny analysis that is employed in cases of constitutional rights. The criminal justice system must be impartial and needs to be informed by the specific facts of each case.[118] As such, a trial court must have the ability to make important determinations about the constitutional rights of defendants to ensure the fair administration of justice. This is especially true because there is no guaranteed right under the Constitution for a defendant to have the lawyer of their choosing, only that they get a competent lawyer.[119]

IV. CONCLUSION

Failing to acknowledge the prevalence of ideological biases in the law is dangerous, not only to the defendants but also to the public. When society declines to address the widespread examples of ideological agendas appearing in criminal trials, it implicitly allows them to infect one of our most sacred and important processes. The criminal justice system is already rank with unfairness and partiality,[120] but the relationship between a lawyer and their client is still, and must continue to be, sacrosanct.

Third-party payments of defense fees have been controversial almost since their inception,[121] but they are still an ongoing issue of debate in the legal community due to disagreement about the proper ethical

116. Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 508 (1984).

117. Estes v. Texas, 381 U.S. 532, 540 (1965).

118. Pennekamp v. Florida, 328 U.S. 331, 366 (1946) (Frankfurter, J., concurring) ("The administration of [criminal] law . . . normally operates in an environment that is . . . individual. The distinctive circumstances of a particular case determine whether law is fairly administered . . . [not] extraneous factors psychologically calculated to disturb the exercise of an impartial and equitable judgment.").

119. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).

120. *See, e.g.*, Mario L. Barnes, *Foreword: Criminal Justice for Those (Still) at the Margins-Addressing Hidden Forms of Bias and the Politics of Which Lives Matter*, 5 U.C. IRVINE L. REV. 711, 717 (2015)(discussing race as one of many identity-related areas where significant disparities exist in the justice system).

121. *See, e.g.*, Glasser v. United States, 315 U.S. 60, 70 (1942); *see also* Bassett, *supra* note 28.

standards at play in conflict of interest cases.[122] That being said, many third-party fundraising apps (like GoFundMe) decline to allow their platforms to be used to raise money for ongoing criminal cases.[123] Society already appears to recognize the problems that come from allowing third parties to pay for criminal defenses, and with ideology now in play on a level not seen before it makes sense for courts to enact stronger protections for criminal defendants and preserve the sanctity of the trial process.

While I am asking the system to consider a change to the way that issues between lawyers and their clients are addressed, the problem this Commentary analyzes is urgent. The fact that there is no explicit method of dealing with ideology is a major issue. The solution that this Commentary proposes is not so significantly different from the current understanding of conflicts of interest and effective counsel that it would require a great deal of adaptation to implement. Rather, I would propose that courts add ideology to the short list of conflicts that are automatically assumed to prejudice a defendant and apply the standards already in existence to deal with them.

Accepting that there is an issue with the current administration of criminal justice will be difficult, but it is a necessary step to ensuring that our tradition of due process and fair treatment continues for generations to come. Both sides of the ideological spectrum are guilty of this, but that is exactly what makes it important to address. To achieve justice, we must take a hard look at the ideological conflicts discussed here and commit to reducing their influence on the justice system. Only then will we be able to ensure that there really is justice for all.

122. *See, e.g.*, Bassett, *supra* note 28; *see also* Ross Barr & Brian Friedman, *Joint Representation of Criminal Codefendants: A Proposal to Breathe Life into Section 4-3.5(c) of the ABA Standards Relating to the Administration of Criminal Justice*, 15 GEO. J. LEGAL ETHICS 635, 635-38 (2002); Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 212-15 (1982).

123. *GoFundMe Terms of Service*, GOFUNDME.COM (July 3, 2023), https://www.gofundme.com/c/terms. According to their Terms of Service, GoFundMe has a prohibition on fundraisers for the defense of financial crimes. *Id.*