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## When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy from a Land Time Forgot

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# When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy from a Land Time Forgot

Andrew M. Siegel\*

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\* Assistant Professor of Law, University of South Carolina School of Law. JD, New York University School of Law; MA in History, Princeton University; BA, Yale University. This project is the outgrowth of hundreds of conversations over the last four years with dozens of lawyers and legal academics in South Carolina and elsewhere. With apologies to those whom I have forgotten and anonymity for those who have requested it, I would like to thank David Bruck, John Blume, Beattie Butler, Deborah Ahrens, Rich Seamon, Jim Flanagan, Don Wedlock, Marie Riley, Ken Gaines, Joel Samuels, Josie Brown, Trevor Morrison, Eduardo Peñalver, Dan Medwed, Rick Bierschbach, Brandon Garrett, and Tor Ekeland for their input at various points in the process. A draft of this Article was presented at the 2005 annual meeting of the Innocence Network in Washington, D.C. I would like to thank Dan Medwed for his invitation to speak at the conference and the other panelists for their suggestions and support. Greg Flowers provided extraordinarily efficient and insightful research assistance and deserves the lion's share of the credit for what appears in Part II below.

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## I. Introduction

Criminal trial practice in South Carolina is shaped by one overarching reality: the State's elected prosecutors have complete and exclusive statutory authority to determine what cases are called to trial or for a plea and in front of what judges.<sup>1</sup> The ramifications of this single structural feature are legion: Lawyers and witnesses often have little real notice as to when and whether cases will be called for trial. Incarcerated defendants who might otherwise exercise their right to a jury trial routinely plead guilty instead of waiting in jail until the solicitor<sup>2</sup> deigns to bring their cases to a

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1. See S.C. CODE ANN. § 1-7-330 (2004) ("Preparation of the dockets for general sessions courts shall be exclusively vested in the circuit solicitor and the solicitor shall determine the order in which cases on the docket are called for trial. Provided, however, that no later than seven days prior to the beginning of each term of general sessions court, the solicitor in each circuit shall prepare and publish a docket setting forth the cases to be called for trial during the term."). In South Carolina, the "general sessions courts" are county courts that have primary jurisdiction to adjudicate felony and serious misdemeanor cases. Less serious cases are adjudicated (at least in the first instance) in local magistrate and municipal courts. No statute governs control of the docket in these local courts and experience indicates that scheduling practices vary from judge to judge. When this article discusses criminal court docketing practices in South Carolina, its observations and conclusions should be understood to apply only to cases brought in general sessions court.

It should be noted that a little-cited provision of South Carolina law allows a defendant to seek "immediate disposition" of her case through a plea of guilty. See S.C. CODE ANN. §§ 17-23-120 to -150 (2004). However, since the provision is by its terms only applicable when the prosecutor assents, see § 17-23-130, its only consequence is to free prosecutors from the need to obtain a grand jury indictment before accepting a guilty plea.

2. In South Carolina, local, State-level prosecutors are called "solicitors." See S.C. CODE ANN. §1-7-310 (2004) (introducing office of "solicitor"); S.C. CODE ANN. §1-7-320 (2004) (defining

court's attention. Illegally obtained evidence is rarely challenged, because no judge has the authority to entertain a motion to exclude such evidence (or to dismiss the case for lack of sufficient evidence) until the morning of trial.<sup>3</sup> Clients free on bond must continuously rearrange their lives to make court appearances called by solicitors for no purpose other than to ascertain the defendant's continuing availability.

Though this institutional arrangement was once fairly common,<sup>4</sup> South Carolina is now the only state in the union that formally reserves to its prosecutors the exclusive authority to set the criminal court docket.<sup>5</sup> Knowledge that South Carolina continues to structure its criminal justice system in this way rarely seeps across the State's borders.<sup>6</sup> Indeed, if one

solicitor's duties to include "prosecutions"). This article treats "solicitor" and "prosecutor" as synonyms unless otherwise indicated. In a similar vein, unless otherwise indicated, all references to a court's "calendar" and its "docket" should be read as interchangeable.

3. See, e.g., *State v. Needs*, 508 S.E.2d 857, 863 (S.C. 1998) (holding that trial court generally has no power to dismiss a properly drawn indictment before trial); *State v. Ridge*, 236 S.E.2d 401, 402 (S.C. 1977) (holding that before the jury is impaneled decision to drop prosecution is "within the discretion of the solicitor" and that "the trial judge may not direct or prevent [dismissals] at that time"); *State v. Charles*, 190 S.E. 466, 468 (S.C. 1937) (holding similarly).

4. For a discussion of the history of prosecutorial control of the docket in South Carolina and elsewhere, see *infra* Part II.

5. See *infra* Part I.A.5. The laws and rules of some states are silent on how criminal court dockets are set, leaving decisions on docketing procedures to judicial discretion and local custom. It appears that in some localities in those states (as well as perhaps in some states that ostensibly vest docket control in the court) judges largely defer to prosecutors in setting the court calendar. See, e.g., *Bishop v. State*, 482 So. 2d 1322, 1324 (Ala. Crim. App. 1985) (concluding, after reviewing local traditions and practices as well as relevant statutes and court decisions, that system whereby one county's court allocates bulk of authority to prosecutors to set court calendars while retaining supervisory power is permissible because it is "not improper for the prosecuting attorney to have input into the positioning of cases on the criminal trial docket"). Moreover, in a handful of states where prosecutors once controlled the docket, reform has been only partial, stripping the prosecutors of the ultimate authority to force or prohibit cases from going to trial but allowing them to retain significant subsidiary involvement in the management of the docket. See, e.g., N.C. GEN. STAT. § 7A-49.4 (2005) (codifying 1999 compromise in which cases continue to be "calendared" by prosecutors but which require prosecutors to exercise their discretion according to a "docketing plan" approved by the judges in the district after consultation with the defense bar); MASS. GEN. LAWS ANN. ch. 278, § 1 (West 1998) (giving prosecutors the authority to "make and deposit with the clerk . . . a list of all cases to be tried," but permitting judges to alter the order of the list by order "for cause shown" and, as amended in 1974, allowing judges to add cases to the list "on its own motion" or on the motion "of the defendant"); cf. *Commonwealth v. Dixon*, 441 A.2d 1305, 1307 (Pa. Super. Ct. 1982) ("Although the trial court is ultimately responsible for the proper management of the criminal calendar, the prosecutor and the Court administrator share such responsibility, at least in the first instance."). Though *Dixon* is cited as significant authority in two major legal encyclopedia, see *infra* note 7, it is an unreasoned decision from a state trial court that relies on out-of-context quotations from other trial court opinions and has never itself been cited by another court. I am skeptical as to whether it accurately represents the state of the law on docket control in Pennsylvania in 1982, let alone 2005. For more on the developments in these and other states, see *infra* Part II.

6. See, e.g., John Rubin, 1999 *Legislation Affecting Criminal Law and Procedure*, Administration of Justice No. 99-05 at 9-10 (1999), available at <http://www.ncinfo.iog.unc.edu/programs/crimlaw/aoj9905crimlegislation.pdf> (explaining a compromise that ended complete prosecutorial docket control in North Carolina and reporting erroneously that "[u]nique among the fifty state, North Carolina has allowed prosecutors control over the calendaring of felony cases"); Telephone Interview with Brian Ostrom, Principal Court Research Consultant, National Center for State Courts, (January 8, 2005) (one of the nation's foremost authorities on the case management systems of state courts commenting that "I

consults the relevant literature, awareness that this was once a common practice or that it is even a theoretical option for structuring a criminal justice system is gradually slipping from our collective professional consciousness.<sup>7</sup> More significantly, contemporary sources have long since abandoned even the threadbare discussion of the policy consequences of prosecutorial calendar control that once spotted treatises and law reviews.<sup>8</sup>

When first exposed to the persistence of prosecutorial docket control in South Carolina, outside observers tend to leap to two related conclusions. First, most assume that the system is unconstitutional under existing caselaw or through relatively uncontroversial extrapolation from that caselaw. Second, most express puzzlement at why such a system has persisted in South Carolina given its underlying constitutional vulnerability. This puzzlement often manifests itself as shock or outrage at the fact that South Carolina's criminal defense and civil rights bars have not mounted a concerted constitutional challenge to the docketing system.<sup>9</sup>

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never knew that South Carolina did it that way. We always talk about the degree to which courts need to be convinced to aggressively manage their own dockets. I always wondered in the back of my mind whether there were some states that imposed legal constraints on the courts' authority but I didn't know of any.").

7. Conscientious review of the last quarter-century of law review literature and the current editions of the standard criminal law and procedure textbooks and treatises has uncovered no mention of the history or constitutional status of the various possible docket control regimes. A few treatises mention in passing the fact that judges normally control the docket. A typical example is CHARLES E. TORCIA, 3 WHARTON'S CRIMINAL PROCEDURE § 377, at 483 (13th ed. 1991) ("[T]he trial judge ordinarily has the discretionary power to determine the order in which cases will be called on its trial list and to call a case out of order.") The major legal encyclopedia mention the issue in passing, stating that courts have ultimate control over their own dockets but noting a division of authority on the question whether it is proper for prosecutors to have any input at all in structuring the docket. See 23A C.J.S. *Criminal Law* § 1144 (1989); 75 AM. JUR. 2D *Trial* § 77 (1991). Interestingly, these (largely identical) articles rest their assessment of a conflict on only two authorities, the unreasoned and unfollowed Pennsylvania trial court decision, *Commonwealth v. Dixon*, 441 A2d 1305, 1307 (Pa. Super. Ct. 1982), discussed *supra* note 5, and *Bishop v. State*, 482 So. 2d 1322, 1324 (Ala. Crim. App. 1985), also discussed *supra* note 5.

One interesting example of the degree to which the issue has slipped off of our professional radar screen is the 2002 decision of the Advisory Committee on the Federal Rules of Criminal Procedure to remove from the Rules a sentence guaranteeing federal district judges the right to maintain their own dockets on the grounds that "[t]he Committee believed that the sentence simply stated a truism and was no longer necessary." Fed. R. Crim. P. 50 advisory committee's notes on 2002 amendments. The nation's leading experts on criminal procedure could literally not fathom the existence of an alternative docketing scheme despite the continued vitality of such a system in, at minimum, South Carolina.

8. See, e.g., LESTER BERNHARDT ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 383-84 (1947); Edward W. Furia, *The Right of the District Attorney to Prepare the Criminal Calendar*, 26 TEMP. L. Q. 128, 131 (1952); Note, *Calendar Practice in Criminal Courts—Control By Court or Prosecutor?*, 48 COLUM. L. REV. 613 (1948) (hereafter "Columbia Note"); Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057, 1072-75 (hereafter "Pennsylvania Note") (containing section entitled "Control of the Criminal Calendar"); Note, *A Novel System of Criminal Court Calendar Practice*, 35 CORNELL L. Q. 349 (1950) (hereafter "Cornell Note").

9. These reactions are abstracted from conversations this author had with about a dozen academics and practitioners with expertise in criminal law and procedure and/or constitutional law between July 2002 and January 2005. The specific formulation of these ideas is my attempt to express their common reaction rather than an accurate transcription of any one individual's words. It is likely that some (but not all) of the people with whom I conversed would have framed these thoughts differently or would want to shade or qualify them before signing on to them.

Using the frequent puzzlement of such outsiders as a jumping off point, this article interrogates the institution of solicitorial control of the docket as it is practiced in South Carolina. The article proceeds in three parts, each of which attempts to make a contribution to a different scholarly discussion. In Part II, I explore the history of criminal court docket control both in South Carolina and nationally, uncovering a fascinating, yet, until now, largely ignored, thread in the history of American criminal procedure. In Part III, I examine some of the many ways in which prosecutorial control of the docket has the potential to cause or encourage wrongful convictions. Finally, in Part IV, I attempt to explain why South Carolina lawyers have not made a substantial effort to uproot solicitorial control of the docket despite its increasingly anomalous and doctrinally tenuous status. Among other tasks, I attempt to distill some general lessons about the value and limitations of systemic reform litigation from the perspective of a campaign unwaged, a battle not fought.

Though this article draws its lessons from South Carolina's now-anomalous system of complete prosecutorial control, its implications reach well beyond the State's borders in several significant ways. First, the article uncovers a national historical narrative that, in addition to its intrinsic value, also serves to illuminate the events and values underlying a core aspect of each state's dispute resolution rules. Though occasionally esoteric, the historical argument at the heart of Part II provides a wealth of data to litigators and judges charged with interpreting each state's criminal docketing rules and administering criminal justice in conformity with legislative intent and constitutional guarantees.

Second, Part IV of this article represents a unique intervention in the ongoing theoretical debate about the wisdom and efficacy of systemic reform litigation. Most writing on systemic reform litigation focuses on cases filed and fully litigated—narrating successes,<sup>10</sup> explaining failures,<sup>11</sup> and differentiating between the two.<sup>12</sup> This article, by contrast, focuses on a litigation campaign that, despite its conceptual promise, has not yet been waged. In endeavoring to explain why such a campaign has not been waged, this article identifies—and discusses at a broad level of generality—

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10. For classic examples, see the first generation of writing on the legal campaign against segregation, e.g., RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1975) (narrating in great detail and with great reverence the path of the litigation in *Brown* and its sister cases).

11. The literature on the so-close and yet-so-far battle to abolish capital punishment through constitutional litigation constitutes one such collective post-mortem. For one recent take on that episode, see Austin Sarat, *Recapturing the Spirit of Furman: The American Bar Association and the New Abolitionist Politics*, 61 *LAW & CONTEMP. PROBS.* 5 (1998).

12. For two examples among many, see, for example, MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* (2004) (arguing, in step with a sizable cadre of other revisionists, that the NAACP's legal campaign against public school segregation should not, in the end, be treated as a major victory); MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING IN THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998) (arguing, against conventional wisdom, that the institutional reform litigation resulting in court management of many of America's prisons was a success).

a number of factors that have the potential to defeat or undercut the effectiveness of a seemingly promising litigation campaign. The potential roadblocks posited in this Part serve as a mild caution for those who might otherwise jump headlong into impact litigation and as a checklist of issues to consider for those who choose to move forward with such litigation.

Most importantly, Part III of this article offers a thorough and careful—albeit anecdotal—catalog of the primary threats to justice and efficiency posed by South Carolina's now-unique system of complete prosecutorial docket control. While this section undoubtedly makes some specific policy observations whose relevance is limited to South Carolina (and perhaps the handful of other states where prosecutors retain primary authority for the management of criminal court dockets<sup>13</sup>), its over-arching theme is of vital importance to legislators, judges, and litigants across the nation. Though the big battles over the structural rules of docket control are dormant in all but a few states, interstitial questions of docket control authority are debated and decided everyday in jurisdictions across the country. When legislators design criminal justice structures and tinker with procedural rules, when overworked courts adopt administrative rules for speeding their dockets or divvying their cases, when defense lawyers and prosecutors meet with judges in scheduling conferences, their determinations have great consequence for the quality and character of criminal justice. What South Carolina's experience suggests is that our nation will be better served if we firmly and forthrightly accept and act upon the proposition that fair and impartial justice cannot be guaranteed if administrative control of the courtroom is vested in a party-litigant.

## II. Prosecutorial Docket Control in Historical Perspective

The decision as to who has the authority to bring a matter up for resolution before the relevant tribunal is one of the most basic decisions a system of adjudication must make. Despite—or perhaps because of—the elemental nature of this structural matter, historical treatments of the American criminal justice system have thus far offered a startling paucity of evidence as to how docket control power has been allocated at different times and in different places.<sup>14</sup> In the absence of a clear historical

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13. See discussion *supra* note 5 (citing examples of North Carolina and Massachusetts).

14. I have been unable to locate a single academic article by either a historian or a legal scholar that is focused on this subject. General works of history fare no better. The leading one-volume work on the history of American Criminal Justice does not mention docket control. See (or rather don't see) LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* (1994). Nor do most of the other standard reference works on the history of criminal justice, for example., HERBERT A. JOHNSON & NANCY TRAVIS WOLFE, *HISTORY OF CRIMINAL JUSTICE* (3d ed. 2003); ERIC H. MONKKONEN, ed., *CRIME AND JUSTICE IN AMERICAN HISTORY: THE COLONIES AND EARLY REPUBLIC* (1992) (collecting major essays on early American criminal justice); *ENCYCLOPEDIA OF CRIME AND JUSTICE* (2d ed. 2002), or, with one exception, the leading case studies of American criminal practice, for example, GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003); WILLIAM E. NELSON, *THE AMERICANIZATION OF THE COMMON LAW, THE IMPACT OF*

explanation of how and when the great majority of American states moved away from prosecutorial docket control (and of a concomitant explanation as to why and how South Carolina has remained resistant), it is difficult to assess whether and to what extent South Carolina's unique system is in tension with our collective constitutional understandings and public policy norms.

Drawing primarily on secondary sources, appellate decisions, and statutes, this Part attempts to fill the historical gap, providing a provisional narrative of the history of docket control practices in the United States, primarily in the post-World War II era.<sup>15</sup> In addition—and in stark contrast—this Part also provides a narrative of the political and legal developments that entrenched prosecutorial docket control in South Carolina during the same era in which that practice was withering or being uprooted in the remainder of the nation.

## A. The National Story

### 1. The (Hazy) Early Chapters

The early history of criminal docket control procedures is hazy at best.<sup>16</sup> It appears that some colonies granted a public prosecutor the power

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LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1975); LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA 1870-1910* (1981). The one significant exception is ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE, PHILADELPHIA 1800-1880* (1989), which narrates in great detail the way in which cases were called in Philadelphia's lower level criminal courts and mentions several times the mechanisms for calling cases utilized in that city's felony courts.

The paucity of historical evidence is particularly striking given the voluminous literature that has developed over the historical development of other structural features of our criminal justice system, such as the growth of plea-bargaining or the decline in the role of the jury. On the former, see, e.g., FISHER, *supra*, at 6-11 (narrating the "three waves" of scholarship on the history of plea bargaining in America). On the latter, see, e.g., two classic sources, Nelson, *supra*, at 21 (noting that early in American history juries "had vast power to find both law and facts") and Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 590-96 (1939) (discussing nineteenth-century cases in which juries decided questions of law), and two more recent works, George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 667-73 (1997) and Renee B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505 (1996). The shifting balance of power between judges and lawyers in the nineteenth century has been the subject of some interesting recent historical scholarship, though none of it mentions the issue of docket control. For one insightful example of this new scholarship, see Renee Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195 (2000).

<sup>15</sup> This narrative is not meant to be definitive. To the contrary, I hope this article encourages other historians to examine the relevant court records and other primary sources in order to uncover a richer and fuller history of docket control procedures. If and when such studies are completed, I expect that they will modify my narrative and identify some inaccuracies in my story. I am cautiously optimistic, however, that the basic structure of the story detailed in the next few pages will stand the tests of time and professional contestation.

<sup>16</sup> Much of this haze is due to the lack of readily available source material. Some of it, however, also turns on the anachronism of my research question. To speak of a "docket" whose control must be allocated to some party or a local "prosecutor" as someone who might be vested with such control is to assume the existence of concepts and roles that were themselves emerging—often hesitantly and unevenly—across the United States during the time period in question. On the history of public



to determine when and whether cases were called before a judge—along with the ancillary duty to provide notice—as early as the middle of the Eighteenth Century.<sup>17</sup> In most colonies, however, the process for calling cases was more informal and judge-driven. Small-scale or low-stakes criminal prosecutions were often resolved on the spot by Judges or Justices of the Peace applying a system of rough natural justice.<sup>18</sup> More serious cases usually required a more formal process (including, in many cases, a grand jury indictment and/or a jury trial) and multiple court dates. Even in those cases, however, criminal matters seem to have moved towards resolution through a largely informal process, whereby judges, complainants (or prosecutors), and defendants all had significant say in

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prosecutors in the United States, the standard source is Abraham S. Goldstein, *Prosecution: History of the Public Prosecutor*, in *ENCYCLOPEDIA OF CRIME & JUSTICE*, *supra* note 14, at 1242-46 (explaining that public prosecutors of some stripe had emerged in most of the United States by the turn of the nineteenth century, but that the shift towards popular elections as the primary means for filling those offices and the conceptualization of prosecutors as executive officials rather than judicial administrators were largely developments of the Nineteenth and early Twentieth Centuries). For a fuller treatment that touches tangentially on the issues raised in this piece, see Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309 (2002). It should be noted that the development of public prosecution did not mean the immediate or even the rapid end of private prosecutions. See, e.g., STEINBERG, *supra* note 14 (narrating the coexistence of public and private prosecution in nineteenth-century Philadelphia). On the failure of one state to maintain a criminal court docket well into the twentieth century, see Hugh N. Fuller, *CRIMINAL JUSTICE IN VIRGINIA* 8 (1931) (noting absence of central docketing records in Virginia, circa 1930); *cf. id.* at 145 (recommending adoption of a formal docketing system).

To further complicate the issue, in most jurisdictions, criminal cases were brought (and continue to be brought) in a variety of different fora with strikingly different rules, procedures, and players. See, e.g., FRIEDMAN & PERCIVAL, *supra* note 14, at 39 (explaining that criminal cases in nineteenth century California were divided between a "Superior Court" and "justices' courts or police courts"); STEINBERG, *supra* note 14 (describing nineteenth century criminal trial practice in Philadelphia and emphasizing the differences between cases resolved in front of Alderman serving as Justices of the Peace and cases sent along for further proceedings in the "courts of record"); Donna J. Spidel and Stuart W. Thomas, Jr., *Crime and Society in North Carolina, 1663-1740*, in 2 MONKKONEN, *supra* note 14, at 699, 700-701 (describing division of labor in colonial North Carolina between a "General Court" and "precinct" or "county" courts). To ask what the calendaring processes were in a given jurisdiction at a particular time often requires either a bi- or tri-furcated answer or a false synthesis of divergent procedures. Unless otherwise indicated, my discussion of calendaring practice in a given state refers to the practice in that state's general felony trial court. *Cf.* note 1 *supra* (limiting my discussion of contemporary South Carolina to such a court).

17. See, e.g., Columbia Note, *supra* note 8, at 615 (examining historical evidence and concluding that, in New York, "[g]eneral power in the prosecutor to control the criminal calendar probably had its origin in colonial days"). It is worth noting, however, that Carolyn Ramsey's more recent and more thorough discussion of the role of public prosecutors in New York during this period cautions against reliance on some of the sources from which the Columbia Note appears to draw its information. See Ramsey, *supra* note 16, at 1324-27.

18. The scope of the power of magistrates and justices of the peace is a recurrent theme in the history of practically every colony. See, e.g., STEINBERG, *supra* note 14, at 37-55 (describing, in a chapter entitled "The Aldermen and Primary Justice," the central role of Philadelphia's aldermen in adjudicating cases and administering the city's criminal justice system, usually through one-shot appearances); NELSON, *supra* note 14, at 15 (sketching out the substantial jurisdiction of Justices of the Peace both individually and as a collective court in colonial Massachusetts); see generally LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d ed. 1985) 286 (concluding that during the late colonial and early national periods, "[m]ost offenders, and almost everybody charged with petty crimes, were dealt with in a great rush, and quite summarily").

when and how cases were disposed of.<sup>19</sup> Docketing practices appear to have varied greatly across regions and jurisdictions; one factor that likely colored the local variation was the relative power and assertiveness of the bench and the bar.<sup>20</sup>

In many jurisdictions, the Nineteenth Century saw a consolidation of *de facto* (and, at times, *de jure*) calendar control in the hands of public prosecutors. A number of factors appear to have contributed to this trend. First, as procedures became more formalized and governmental functions more organized, a larger percentage of cases required multiple court appearances, which, in turn, increasingly required courts to “manage” their caseload in order to keep track of cases and to assure the presence of all relevant parties. In an era without large court staffs, the prosecutor was a readily available and appropriately qualified individual on whom to devolve this responsibility. Second, as the volume of criminal prosecutions increased and as judges became more likely to order defendants jailed pretrial, the number of defendants who needed to be produced from custody for criminal court proceedings grew unwieldy. In some localities, it was likely prosecutors’ ability to coordinate the appearance of pretrial detainees that earned them the privilege and chore of determining the order in which the court would hear cases.<sup>21</sup>

Finally, the rise of prosecutorial control of the docket in the Nineteenth Century may have been the result of the prevalence of “circuit riding,” the practice whereby judges traveled long distances from county to county or town to town to hear cases for a day or a week, only to ride off into the sunset (often accompanied by much of the private bar) when the docket was dry or the term of court was over.<sup>22</sup> In a world where criminal

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19. See, e.g., STEINBERG, *supra* note 14, at 57 (describing Philadelphia’s venue for the trial of more serious cases, The Courts of Record, as facing a “complex caseload” that required “a day-to-day struggle” between “court officials” and litigants over “seemingly simple matters of criminal procedure such as whether to prosecute, when to hear a case, whether and when to discontinue a case, and what to consider in arriving at a sentence”); see also *id.* at 59, 64, 70, 184 (illustrating, in various ways, that “day-to-day struggle” with regard to the court calendar); cf. Douglass Greenberg, *Crime, Law Enforcement, and Social Control in America*, in 1 MONKKONEN, *supra* note 14, at 231, 250-52 (describing system of ensuring defendants’ appearances in colonial South Carolina as haphazard and often unsuccessful for reasons that ranged from inability to fill criminal justice positions, to colony’s unwillingness to pay for a functioning jail, to “the general disregard of South Carolinians for the law”).

20. Cf. Lettow Lerner, *supra* note 14, *passim* (explaining regional pattern in which judges lost the power to comment on the evidence in many states in the nineteenth century South and West as the result of a regional legal culture in which judges were disrespected by lawyers and lawyers often had more political power than judges).

21. See, e.g., STEINBERG, *supra* note 14, at 70 (noting power of district attorneys to schedule date on which cases of jailed defendants would be adjudicated).

22. Much of the literature on circuit-riding deals with the much contested but long-lasting practice whereby United States Supreme Court Justices were required to ride circuit over several states, handling cases at both the trial and intermediate appellate levels. See, e.g., 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 85-90 (1922); Wythe Holt, *The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects: The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793*, 36 BUFF. L. REV. 301 (1987); Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753 (2003). While the insights provided by those sources tell us something about what it was like to be part of a

court judges were likely to be over-worked and over-tired outsiders who rode into town a few times a year for short sittings, there were strong advantages to having an official with knowledge of the local scene ready with a list of cases when a judge arrived. While the sources on this point have proven particularly illusive, it is likely that the practice of vesting either legal or practical authority for docket management in local prosecutors gained a toehold in many jurisdictions during the Nineteenth Century as a practical response to the realities of circuit riding.

There is no systematic record as to how many localities ever accorded the prosecutor formal control over court calendars.<sup>23</sup> The available evidence seems to suggest that, in the late Nineteenth and early Twentieth Centuries, prosecutorial control was an almost universal system in much of the South,<sup>24</sup> a surprisingly common practice in the Northeast,<sup>25</sup>

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traveling legal circus, the experiences of the United States Supreme Court are, here like elsewhere, unrepresentative of the rest of the judiciary. The historical literature on circuit-riding among state-court judges and attorneys reveals a rougher-hewn, more ad hoc legal culture. See, e.g., FRIEDMAN, *supra* note 14, at 140-41, 308-10 (describing the life of a circuit riding judge or lawyer); DANIEL H. CALHOUN, *PROFESSIONAL LIVES IN AMERICA: STRUCTURE AND ASPIRATION, 1750-1850*, at 59-87 (1965) (same).

23. We also lack reliable information on the details of the systems categorized as involving prosecutorial control. More modern experience demonstrates that there are nearly as many variations on prosecutorial docketing systems as there are jurisdictions adopting that model. For example, it makes an enormous difference in describing and evaluating the imposition of criminal justice whether a legal system saw prosecutorial control of the docket as a ministerial duty subject to careful supervision and ultimate review by the bench or whether it saw prosecutorial control as a discretionary power largely immune from judicial oversight. Cataloging where states fell on that spectrum is a daunting task that will require substantial archival research.

24. Since most southern states did not write prosecutorial control into their statutes, the evidence for this proposition, while strong, is anecdotal. South Carolina, of course, still retains full prosecutorial docket control. North Carolina continues to operate with a modified version of prosecutorial control and only recently abandoned full control. See *infra* text accompanying notes 58-65. In many other southern states, Twentieth-Century legislatures and rulemakers have added provisions to previously silent state law affirmatively placing the power to control dockets in the hands of judges or court administrators. See, e.g., FLOR. STAT. § 43.26 (adopted 1971) (giving "chief judge" of each circuit the authority "[t]o supervise dockets and calendars"); KY. R. CIV. P. 79.03 (adopted 1976) (providing that court clerk shall maintain trial "calendars of all actions"); KY. R. CRIM. P. 13.01 (stating that above rule applies in criminal actions as well); VA. CODE ANN. § 19.2-240 (adopted 1950) (specifying that "Clerks shall make out criminal docket" and laying out precise rules for the order of such dockets); VA. CODE ANN. § 19.2-241 (adopted 1950) (giving judges power to set trial dates and summon witnesses for criminal trials); TEX. CODE. CRIM. PROC. ANN. art. 33.08 (2005) (adopted 1965) ("The district court and county courts shall have control of their respective dockets as to the setting of criminal cases."); cf. *Woodall v. Laurita*, 195 S.E.2d 717, 719 (W. Va. 1973) (construing 1931 West Virginia statute ordering court clerk to make out a "docket of cases pending" as prohibiting unilateral prosecutorial control of the court calendar—even with the consent of the judge—because the statute "contemplates an orderly procedure for the setting of the criminal docket, and explicitly contemplates the control of the criminal docket by the court and not by a party litigant"). Given the experience in the Carolinas and conversations with lawyers in some other southern states, it is likely that in most, if not all of those states, the statutes were necessary to overturn the traditional practice of prosecutorial control. Cf. *State v. Simpson*, 551 So. 2d 1303 (La. 1989) (striking down the traditional, albeit uncodified, practice of allowing prosecutors to pick criminal court judges in some jurisdictions, as the practice violated due process).

25. By tradition, New York granted prosecutors the power to set the docket in most counties well into the 1940's. See Columbia Note, *supra* note 8, at 613-614 ("Traditionally, calendar practice in New York has been controlled by the prosecutor. In the metropolitan area where there are multiple part courts, the district attorney has performed not only the function of determining when the case will be set down for trial, but also, by means of preparing a separate trial calendar for each part, the function of

the affirmative law of a few states in the Midwest and West,<sup>26</sup> and the default policy of beleaguered judges in many overtaxed urban jurisdictions regardless of region.<sup>27</sup> By the time law reformers began to examine the issue of docket control in the middle of the Twentieth Century, prosecutorial control of the docket was a common, although likely minority, arrangement in American criminal courts.<sup>28</sup>

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allocating cases among the several parts.”). Massachusetts allocated prosecutors that authority by statute. *See id.* at 614, n.1 (citing MASS. GEN. LAWS ch. 278 § 1 (1933)). Rhode Island did the same via court decision. *See id.* (citing *Orabona v. Linscott*, 144 A. 52, 53 (1928)). Though it goes strangely unnoticed by both the Columbia and Pennsylvania Notes, Pennsylvania also allowed prosecutors to control the docket well into the middle of the twentieth century. *See Furia, supra* note 8, at 128 (“Throughout the several counties of the Commonwealth of Pennsylvania, the District Attorney’s office exercises the right to list the criminal cases for indictment before the Grand Jury, for arraignment, and for trial. In most cases, the District Attorney determines in what order cases will be tried on a particular day.”); *cf. STEINBERG, supra* note 14, at 82 (noting that in Philadelphia in the middle of the nineteenth century, public prosecutor was “essentially a clerk, organizing the court calendar and presenting cases to grand and petit juries”).

26. *See, e.g., Columbia Note, supra* note 8, at 614, n.1 (citing WYO. COMP. STAT. ANN. § 10-822 (1945)).

27. *Cf. Orfield, supra* note 8, at 383 (“Although the preparation of trial calendars appears to be a court function, in state criminal cases and apparently federal as well, this function is actually exercised by the prosecuting attorney, with practically no supervision by the court in which the action is pending. The prosecuting attorney is not only allowed to fix the time of arraignment and trial, but in some cities actually distributes the various cases to be tried among the different judges as he desires.”). Though Orfield speaks generally, there is reason to wonder whether he is, in fact, drawing his observations from a balanced set of national data points. He never cites his sources, and there is some circumstantial evidence to suggest that New York and Pennsylvania may have had a disproportionate role in shaping his view of the operation of docketing systems nationwide (*i.e.*, he taught at Temple University, New York University Press published the book, all the other major published scholarship on the issue was in New York and Pennsylvania publications, the issue was pending in the courts of New York and, to a lesser extent, Pennsylvania at the time).

28. As noted above, *see supra* note 27, Orfield concludes that the preparation of trial calendars “appears to be a court function” from reading the statute books but is “actually exercised by the prosecuting attorney.” Orfield, *supra* note 8, at 383-84. The author of the Columbia note half-heartedly surveyed some of the states to determine which vested control of the docket in the prosecutor and which vested control in the court, and found only three states that gave the power to the prosecutor by statute or court decision. *See Columbia Note, supra* note 8, at 613-614, n.1. The author of the Pennsylvania note was even more perfunctory—listing 22 states that grant the power to the court or set it by fixed system and only two (Massachusetts and North Carolina) that give the power to the prosecutor, but failing to provide citations for any of those states (other than Rhode Island) or to explain what the rules might be like in the other 26 states. *See Pennsylvania Note, supra* note 8, at 1072, n.99.

The above exercises in rudimentary counting grossly understate the number of jurisdictions that provided the prosecutor with *de jure* or *de facto* authority to set criminal court calendars, as many states allocated docketing power by court rules or custom or left the matter to the discretion of local judges. (New York, South Carolina, and Pennsylvania being three conspicuous examples discussed thoroughly in this article.) Moreover, to the extent that the numbers reported in these articles accurately convey the impression that the majority of jurisdictions granted control over the docket to judges or court administrators by the middle of the Twentieth Century, that conclusion supports either of two equally plausible hypotheses. Perhaps prosecutorial control of the docket was always a minority practice, not the dominant nineteenth-century regime as later commentators have tended to assume. Alternatively, perhaps the numbers capture a snapshot of a moment in time after the pendulum had already begun to swing back away from that arrangement. Choosing between those competing hypotheses is well beyond the scope of this project.

## 2. A Slow and Steady Trend Away from Prosecutorial Control

Sometime in the first half of the Twentieth Century, the institution of prosecutorial control of the docket began to fade away. The precise reasons that law reformers targeted prosecutorial control in the early to middle part of the Twentieth Century likely differ from jurisdiction to jurisdiction and, in any event, await further research. However, some intriguing possibilities present themselves. First, Progressive Era reforms, the growth of government bureaucracies, and new ideas about the scientific management of information had combined to make it more feasible for the judiciary to manage its own caseload. Second, the role of the public prosecutor had completed its two-century-long transformation from neutral judicial functionary to executive branch advocate, thereby increasing the incongruity of prosecutorial calendar control.<sup>29</sup> Third, the substantial expansion in the number of judges necessary to deal with a rapidly growing population may have undercut prosecutorial control of the docket, both by allowing states to move away from a system of itinerant judges to one in which judges sat exclusively in a single courtroom and by expanding the strategic advantage prosecutors gained from controlling the criminal court docket, leading to injustices that were readily apparent.

Initially, the decline of prosecutorial calendar control attracted very little attention. However, in the middle of the century, some of the largest and most influential states engaged in strenuous debate over criminal court calendar control, and commentators briefly took notice.<sup>30</sup> In a few law review publications and treatises, mid-century authors described the contemporary practice in a number of jurisdictions and discussed the pros and cons of both prosecutorial and judicial control.<sup>31</sup> According to these sources, by the 1940's, most, but not all, states allocated formal control over the criminal docket to judges.<sup>32</sup> Nevertheless, in many (perhaps most) of those jurisdictions, prosecutors continued to exercise *de facto* control, either at the behest or with the indulgence of the judiciary.<sup>33</sup> The

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29. See generally Goldstein, *supra* note 16. As a result, the fiction that the prosecutor could and would neutrally and selflessly manage the trial docket without regard to securing the government's advantage—always a dubious premise given human nature—collapsed under the weight of countervailing evidence.

30. See, e.g., Columbia Note, *supra* note 8 (reporting on and drawing inspiration from then-current controversy in New York state courts regarding permissibility of court rules allocating cases); *McDonald v. Goldstein*, 83 N.Y.S.2d 620 (N.Y. Sup. Ct. 1948) (rejecting prosecutor's challenge to new court rules allocating cases for trial on the ground that, tradition aside, courts have inherent power to control their own dockets if they so wish); Furia, *supra* note 8, at 128, n.1 (explaining that Quarter Sessions Court of Philadelphia had just taken over control of docketing cases where defendant was incarcerated pretrial "at the recommendation of the author," the former clerk of that court).

31. See, e.g., Orfield, *supra* note 8; Columbia Note, *supra* note 8; Pennsylvania Note, *supra* note 8; Furia, *supra* note 8; Cornell Note, *supra* note 8.

32. See discussion *supra* note 28.

33. See Orfield, *supra* note 8, at 383-84 ("Although the preparation of trial calendars appears to be a court function, in state criminal cases and apparently federal as well, this function is actually exercised by the prosecuting attorney, with practically no supervision by the court in which the action is pending.

commentators noted that both the formal and *de facto* control of prosecutors were under attack in a number of jurisdictions and took sides in the debate.<sup>34</sup>

The brief flurry of attention the issue received seems to have had no effect on the national trend away from prosecutorial control. By the 1960s, prosecutorial control of criminal court dockets was in wide retreat through most of the nation.<sup>35</sup> As with many other issues, the South appears to have been the outlier, holding on to its preexisting institutions with remarkable tenacity. Intriguingly, the national bar and the legal academic community appear to have been unaware or uninterested in the fact that many states in the South continued to employ prosecutorial docket control. Once victory was achieved in states like New York and Pennsylvania, law reformers and academics closed up shop on the issue, neglecting to mention it in their publications or their manifestos. One searches in vain for a single article or treatise written during the late 1950s or 1960s that addresses the possibility that prosecutors might control criminal court calendars, let alone the fact that they continued to do so in a small but significant number of states.

### 3. The Emergence of National Standards

In the late 1960s and early 1970s, a substantial number of national organizations attempted to draft rules, model rules, or national standards for the conduct of criminal cases. These projects—with one significant exception—unequivocally urged that control of the criminal court docket be vested in the court rather than the prosecutor. One provision of American Bar Association's Standards for Criminal Justice, adopted in 1972, urges that the "trial court" be given "the ultimate responsibility for proper management of the criminal calendar," and states that judges "should take measures to insure that cases are listed on the calendar and disposed of as promptly as circumstances permit."<sup>36</sup> The Speedy Trial provision of those standards, adopted in 1968, goes further, insisting without modification that "[c]ontrol over the trial calendar should be vested in the court."<sup>37</sup> The

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The prosecuting attorney is not only allowed to fix the time of arraignment and trial, but in some cities actually distributes the various cases to be tried among the different judges as he desires.").

34. None more pointedly than Edward Furia, former clerk of Philadelphia's Court of Quarter Sessions. See, e.g., Furia, *supra* note 8, at 128 ("The evils which present themselves when the District Attorney has the power to prepare the criminal calendar are evident and become shockingly manifest under an inefficient, procrastinating or irresponsible District Attorney.").

35. As indicated *supra* note 24 and *infra* Part II.A.3, the pace of statutory change picked up in the 1960s and early 1970s, as did the willingness of state courts to revisit the issue. New York's transformation seems to have played some role in setting the national consensus against prosecutorial control. See *supra* note 30 and accompanying text. By the time the issue was again broached—this time by rulemaking bodies—in the late 1960s and early 1970s, the norm of court control had become so established that few outside the South seriously considered the possibility of any other scheme.

36. American Bar Association, Standards for Criminal Justice, Standards Relating to the Function of the Trial Judge, Standard 3-8(a) (1972) (approved draft, 1972).

37. American Bar Association, Standards for Criminal Justice, Standards Relating to Speedy Trial, Standard 1.2 (1967) (draft adopted 1968). In the second edition of this section, adopted in the

Uniform Rules of Criminal Procedure, promulgated in 1974, concur, curtly providing that “[t]he court shall provide for the assignment of cases upon the calendar in accordance with this Rule.”<sup>38</sup> So, too, do the standards promulgated by the National Advisory Commission on Criminal Justice in 1973.<sup>39</sup> Only the National District Attorneys’ Association disagreed, insisting, in their 1977 “National Prosecution Standards,” that “[c]ontrol of the calendar should be jointly vested in the prosecutor and the court” and that “the prosecutor should determine the order in which cases are to be tried.”<sup>40</sup>

The promulgation of national standards for the management of criminal trials during the 1970s was part and parcel of a larger effort launched during that era to study, analyze, and organize the structure and business of courts, particularly state trial courts. Organizations, such as the National Center for State Courts, began to systematically track the business of our nation’s courts and offered periodic assessments and reports, recording data and recommending reforms.<sup>41</sup> By the late 1970s or early 1980s, the procedures and policies courts ought to use to mobilize their resources and manage their case-flow had become a subject of academic inquiry. Judicial control over all dockets—criminal and civil—was the assumed starting-point for the scientific study of docket management, rather than a subject of academic debate.<sup>42</sup>

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1980s, the Commentary on the rule makes explicit the drafters’ intention that “the trial court should be vested with absolute (not merely ultimate) responsibility over the trial calendar.” See Commentary, American Bar Association, Standards for Criminal Justices, Standards Relating to Speedy Trial, Standard 1.2 (2d ed.). A third edition of this standard was adopted by the ABA in 2004 and awaits commentary. The new version significantly expands its discussion of the management of criminal trial calendars and caseloads, *inter alia*, renumbering the relevant standard as 12-4.5, expanding the scope of the court’s authority (to include not only “trial calendars” but also “all other calendars on which a case might be placed”), specifying that the court should take control of case scheduling from the very beginning of the proceedings, and imposing affirmative obligations on courts to manage their dockets fairly and efficiently. See AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL, Standard 12-4.5, (third edition, adopted 2004), available at [http://www.abanet.org/crimjust/standards/speedytrial\\_blk.html#4.5](http://www.abanet.org/crimjust/standards/speedytrial_blk.html#4.5).

38. UNIFORM R. OF CRIM. P. 721(a) (1974). At that time, the Federal Rules of Criminal Procedure were in accord. See FED. R. CRIM. P. 50(a) (1948) (repealed 2002). (“The district courts may provide for placing criminal proceedings upon appropriate calendars.”). Interestingly, that provision was removed from the Federal Rules of Criminal Procedure in 2002, because “[t]he Committee believed that the sentence simply stated a truism and was no longer necessary.” Note to FED. R. CRIM. P. 50. It is hard to imagine a more pointed example of the degree to which the issue has fallen off of the national radar screen than the advisory committee’s comment.

39. NATIONAL ADVISORY BOARD ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, 180 (1973) (“Cases should be assigned under the supervision of the presiding judge.”).

40. NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS, 193 (1977).

41. To understand the sheer volume of quantitative and qualitative study performed by the National Center for State Courts and its affiliate organizations, one need only peruse their website: <http://www.ncsconline.org>.

42. That discussions of criminal court docket management start from the assumption that the judiciary has flexibility to set its own docketing systems is obvious from nearly every significant study of the issue. One recent study that makes this problematic assumption but is in every other way first-rate is BRIAN J. OSTROM AND ROGER A. HANSON, EFFICIENCY, TIMELINESS, AND QUALITY: A NEW

#### 4. The South (and Other Outliers) Fall Into Line

In roughly the last third of the Twentieth Century, the great majority of states that had allowed prosecutors the authority to control criminal court dockets fell into line with the national norm and either abandoned that practice or seriously limited the scope of prosecutorial discretion. In Massachusetts, for example, a 1974 statute granted judges the authority to add cases to their dockets on their “own motion.”<sup>43</sup> That change (combined with the judges’ pre-existing power to delay cases “for cause shown”)<sup>44</sup> shifted to the judiciary the ultimate authority for processing cases. Similarly, in 1972, the Rhode Island Supreme Court read the existing statutes to require judicial docket control, abandoning a seventy-two-year-old precedent that had vested docketing authority with prosecutors.<sup>45</sup>

Massachusetts and Rhode Island notwithstanding, most of the reform activity during the late Twentieth Century was in the South. Some Southern states passed statutes formally entrusting the power to set criminal calendars to judges or clerks of the court.<sup>46</sup> In other states, appellate courts used their rulemaking authority to promulgate new docket management systems that located authority in trial judges or clerks.<sup>47</sup>

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PERSPECTIVE FROM NINE STATE CRIMINAL COURTS (National Center for State Courts for the National Institute of Justice and the State Justice Institute 1999), *available at* [http://www.ncsconline.org/WC/Publications/Res\\_CasMan\\_EfficiencyPub.pdf](http://www.ncsconline.org/WC/Publications/Res_CasMan_EfficiencyPub.pdf).

43. MASS. GEN. LAWS ANN. ch. 278 § 1 (as amended by St.1974 c. 228, approved May 16, 1974).

44. *Id.*

45. *Tate v. Howard*, 296 A.2d 19, 25-26 (R.I. 1972) (holding that, prior decisions seemingly to the contrary notwithstanding, courts rather than prosecutors have the ultimate authority to manage trial calendars under Rhode Island law). The Court couched its decision as a clarification of existing caselaw, *see id.* at 25 (“This preempting of Tate’s tentative trial date give us the opportunity to put at rest the longtime belief held by many that the Attorney General has absolute control of the criminal calendars of this state’s trial courts.”), and cited some state and federal decisions that had already chipped away at the prosecutor’s authority. *See id.* at 25-26 (collecting cases). Nonetheless, the Court was, in large measure, simply being polite to its predecessors; the two Rhode Island Supreme Court precedents the Court “clarified” starkly granted prosecutors the authority to manage the criminal court dockets. *See Orabona v. Linscott*, 144 A. 52, 53 (R.I. 1928) (interpreting Rhode Island Constitution to vest in the Attorney General “control of his docket for the trial of criminal cases” and allowing him to “try them in such order as he sees fit,” subject only to Constitutional and statutory notice and speedy trial requirements); *State v. Silvius*, 47 A. 888, 888 (1900) (holding similarly, albeit more ambiguously).

46. *See, e.g.*, FLA. STAT. ANN. §43.26(2) (2005) (“The chief judge of the circuit shall have the power: . . . (c) to supervise dockets and calendars.”) (as amended in 2003) (original version identical in substance); TEX. CODE. CRIM. PROC. ANN. art. 33.08 (2005) (“The district court and county courts shall have control of their respective dockets as to the setting of criminal cases.”) (adopted 1965).

47. *See, e.g.*, KY. R. CIV. P. 79.03 (adopted 1976) (providing that court clerk shall maintain trial “calendars of all actions”); KY. R. CRIM. P. 13.01 (stating that above rule applies in criminal actions as well); MISS. RULE CRIM. P. 9.02 (“A docket of cases for trial shall be maintained by the clerk or the court administrator. Cases set by the judge for hearing must be ready at the appointed time.”) (effective May 1, 1995). For a discussion of the efforts of South Carolina’s judiciary to adopt more modest rules regarding docket control, *see infra* Part II.B.2.

Without specifying details, one source from the mid-1970s lists Alabama, West Virginia, Arkansas, Maryland, Colorado, and Delaware as jurisdictions that had recently shifted from prosecutorial to court control. *See* Hugh E. Munn, *Judge Denies Challenge to Anders Trial Docket*



As the norm of judicial docket control became more firmly entrenched in the national and regional judicial cultures, appellate courts became more willing to police the behavior of prosecutors and judges in challenges brought by criminal defendants. In states where judicial control of the docket was well-established in the statute books, appellate judges issued a number of decisions invalidating local practices that ran counter to the letter or spirit of the docket-control statutes. In one early example, the Supreme Court of West Virginia lambasted the system of *de facto* solicitorial control that had developed in Monongalia County—cataloging a series of wrongs that sound suspiciously like those chronicled in this Article and, in particular, taking issue with the propriety of a “party litigant” managing the docket.<sup>48</sup> The Georgia Supreme Court has, in several cases, reviewed local docket management practices that allowed prosecutors to place cases on the calendars of particular judges and also empowered the prosecutors to call cases for trial out of order.<sup>49</sup> While finding no constitutional violation,<sup>50</sup> the State Supreme Court found both practices incompatible with the State’s statutes and rules for docket management.<sup>51</sup> In yet another case, the Court of Appeals of Virginia treated as a nullity a trial date set by a prosecutor because the relevant statute “expressly places the control of the process under the supervision of the trial court, not a party litigant.”<sup>52</sup> Putting teeth in its ruling, the court threw out a conviction for escape and dismissed the indictment with prejudice.<sup>53</sup>

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*Control*, THE STATE (Columbia, S.C.), Oct. 11, 1975, at B-1.

48. *Woodall v. Lauritia*, 195 S.E.2d 717, 719 (W. Va. 1973). According to the court, the former prosecutor in Monongalia County, “did not set any motions for argument; . . . failed to set cases for trial in the order in which the defendants were indicted; . . . did not set a day certain for each felony case in a reasonable manner; and, . . . did not consult with the court and the clerk before posting the cases for trial, all of which is required by the statute.” *Id.*

49. The most important such case is *Cuzzort v. State*, 519 S.E.2d 687 (Ga. 1999) (holding that local docket management plan that vested authority in prosecutor to set criminal court calendar violates both UNIF. SUPERIOR COURT RULE 3.1 and GA. CODE ANN. § 17-8-1). The Georgia appellate courts have also addressed related issues in at least a half dozen other cases, most prominently *State v. Wooten*, 543 S.E.2d 721 (Ga. 2001) (reversing lower court decision that had overturned a conviction because it was entered through an illegal prosecution-controlled docket system after finding that the docket system—while illegal—did not rise to the level of a due process violation); *Miners v. State*, 550 S.E.2d 725 (Ga. Ct. App. 2001) (finding that district attorney’s failure to follow docketing system in calling defendant’s case to trial did not constitute reversible error because it was unlikely to have affected accuracy of verdict).

50. See, e.g., *Wooten*, 543 S.E.2d at 721.

51. See *Cuzzort*, 519 S.E.2d at 688-89.

52. *Williams v. Commonwealth*, 347 S.E.2d 146, 148 (Va. Ct. App. 1986). But see *Bishop v. State*, 482 So.2d 1322, 1324 (Ala. Crim. App. 1985) (holding that prosecutorial involvement in setting of criminal court calendars does not raise significant constitutional or statutory issues as long as court retains ultimate authority over calendar).

53. *Williams*, 317 S.W.2d at 148-49. The issue in the case was whether petitioner was entitled to dismissal under Virginia’s Speedy Trial Act or whether a portion of the delay was attributable to his lawyer’s decision to seek a continuance of an ostensible trial date set by the prosecutor. *Id.* at 147-48. The court concluded that the trial date was nothing more than an attempt to harass the defendant, did not give the defense sufficient warning, and was—in any event—of no legal effect because it was set by the prosecutor rather than the court as required by Virginia law. *Id.* at 148.

The Supreme Court of Louisiana acted even more boldly, striking down aspects of the State's docket control system on federal constitutional grounds. In *State v. Simpson*, the court found unconstitutional one district's practice of allowing prosecutors to choose the judge to preside over a their cases.<sup>54</sup> Stating that "fundamental fairness" requires "a fair trial in a fair tribunal," the Court held that, in order "[t]o meet due process requirements, capital and other felony cases must be allotted for trial to the various divisions of the court, or to judges assigned criminal court duty, on a random or rotating basis."<sup>55</sup> Sensing perhaps that the local prosecutors needed firm guidance on how to proceed in a world where the playing field had been leveled, the court further emphasized that, under Louisiana law, the trial judge once assigned "has ultimate control over the scheduling of criminal cases for trial."<sup>56</sup> Finally, while the prosecutor may (under court supervision) maintain a significant role in setting cases for trial, once a day's roster is set, "due process" requires that prosecutors take up the cases in the order listed.<sup>57</sup>

The North Carolina story is a complex amalgam of judicial decisions and statutory reform.<sup>58</sup> Up until the late 1990s, North Carolina maintained a system similar to—though slightly more moderate—than that of its neighbor to the south. Prosecutors had full statutory authority to set the criminal court calendar, subject only to notice and specificity requirements, while judges apparently had final say as to which cases from the day's list were actually called for trial.<sup>59</sup> (In many locales, judges apparently abdicated this authority to prosecutors, creating a system that was in practice roughly equivalent to South Carolina's.) During the 1970s, the United States Court of Appeals for the Fourth Circuit granted *habeas* relief to a petitioner who suffered a particularly egregious manipulation of

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54. 551 So. 2d 1303 (La. 1989).

55. *Id.* at 1304. The argument that there is a constitutional right to a randomly assigned judge has not fared well when others have attempted to borrow it. *See, e.g.*, *Tyson v. Trigg*, 50 F.3d 436, 439-42 (7th Cir. 1995) (distinguishing *Simpson* in *habeas corpus* challenge by the boxer Mike Tyson to Indiana system where each trial judge is assigned to a particular grand jury and prosecutor is allowed to select grand jury to whom he wishes to present case, thereby also selecting the judge); *United States v. Forbes*, 150 F. Supp. 2d 672, 681-84 (D.N.J. 2001) (distinguishing *Simpson* in case where federal judge was assigned white collar criminal case because of his prior handling of a related civil action); *Simeon v. Hardin*, 451 S.E.2d 858, 870-71 (N.C. 1994) (distinguishing *Simpson* in facial challenge to North Carolina's docket control regime); *but cf.* *United States v. Pearson*, 204 F.3d 1243, 1257 (10th Cir. 2000) (opining that "if the assignment of a case to an individual judge should not be based on 'the desire to influence the outcome of the proceedings,' then allowing a prosecutor to perform that task raises substantial due process concerns," but declining to definitively resolve the question due to the case's procedural posture (quoting *Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir. 1987))). For the purposes of full disclosure, the author notes that, while in private practice, he worked briefly on unrelated motions for one of the defendants in the *Forbes* case.

56. *Simpson*, 551 So. 2d at 1304.

57. *Id.* at 1305.

58. The story of reform in North Carolina is told well and succinctly in Rubin, *supra* note 6.

59. The relevant pre-reform statutory provisions are laid out, among other places, in the text of the state supreme court's decision in *Simeon v. Hardin*, 451 S.E.2d 858, 868-70 (N.C. 1994).

his case and a particularly unsympathetic trial judge.<sup>60</sup> Criticism of the docketing system mounted, but the system limped on unchanged. In 1992, criminal defendants from one county challenged the State's docketing regime in a class action suit.<sup>61</sup> Though the State Supreme Court found the docketing statutes constitutional on their face,<sup>62</sup> it held that the plaintiffs' allegations (which echo those raised in Part III of this Article)<sup>63</sup> were sufficient to raise a claim that "the statutes which grant the district attorney the calendaring authority are being applied in an unconstitutional manner" in the relevant county.<sup>64</sup>

In the aftermath of the Supreme Court decision in that case, the various interested groups began negotiating a new system of docket management for the North Carolina courts. Though it took nearly five years, a compromise statutory scheme was eventually enacted and took effect on January 1, 2000. Pursuant to the new scheme, prosecutors continue to retain the authority to set criminal court calendars, but the duty is much more administrative. The statute requires that cases be docketed according to a "local case docketing plan" developed by the district attorney after consultation with judges and defense counsel. Cases must, in the ordinary course, be called in the order listed. Most importantly, the statute requires that initial trial dates for all felonies must be set by the court at an administrative "setting" and does not permit prosecutors to add cases unilaterally to that list.<sup>65</sup>

## 5. Current Practice

With the exception of South Carolina, every state with a formal policy on the issue now vests the ultimate authority to manage criminal court dockets in the judiciary—be it the trial judge, an administrative judge, or the clerk of court. As the above pages indicate, however, the implementation of this consensus differs from state to state. In many jurisdictions, prosecutors are barred by state law or tradition from having any role in shaping the trial calendar beyond the say normally accorded to a

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60. *Shirley v. North Carolina*, 528 F.2d 819 (4th Cir. 1975) (reversing conviction under Due Process Clause when state delayed trial for 16 months then called case on a day when it knew indispensable defense witness was unavailable).

61. *See Simeon*, 451 S.E.2d at 862.

62. *See id.* at 869-71.

63. The complaint alleged that the district attorney held defendants in jail in order to coerce them into pleading guilty, repeatedly listed cases with no intention of calling them for trial thereby forcing defense counsel to do unnecessary and repetitive case preparation, failed to call cases on agreed upon dates even when defense witnesses had been flown in at considerable expense, used control of the docket to punish disfavored defense counsel and to extract pretrial punishment, and listed an exorbitant number of cases on trial lists in order to avoid giving genuine notice to defense counsel as to when cases would be called. *Id.* at 862-63 (laying out claims of named defendants); *id.* at 871-72 (laying out in more detail the complaint's central allegations).

64. *Id.* at 872.

65. The new scheme is carefully explained in Rubin, *supra* note 6. The new statute is N.C. GEN. STAT. § 7A-49.4, which was created by N.C. SESS. LAWS 1999-428 (S292).

party in any litigation. In other areas, however, prosecutors play a bigger role, sometimes even retaining the right and responsibility to prepare the calendar as an initial matter. Conversations with criminal lawyers and academics from across the nation suggest that—whatever the formal rules in place in any given locale—prosecutors have been fairly adept at amassing and defending peculiar powers to participate in or otherwise exert their control over the allocation and management of cases. As one North Carolina academic suggested, “[s]imply passing a law does not always change the culture in an institution.”<sup>66</sup>

There also appears to be a great deal of variety in the ways in which the judiciary manages criminal dockets. Though the subject is largely beyond the scope of this Article, it is worth noting that locales are divided between a “master calendar” system that lists all cases on a single docket and distributes them among judges for various proceedings based on day-to-day availability and the preferred “individual calendar” system in which cases are distributed to individual judges promptly upon arrest or indictment and the judges are responsible for managing their own dockets.<sup>67</sup> Locales are also divided between systems that process cases in the order that they arrive and systems that employ some form of “differential case management,” adopting rules of priority based on characteristics such as severity, complexity, and whether the defendant is incarcerated.<sup>68</sup> These docketing regime decisions—like the choice of whether to give prosecutors or courts ultimate control—have consequences for the quality of justice and the likelihood of wrongful convictions.

## B. The South Carolina Story

### 1. The Back Story

In many ways, the history of prosecutorial docket control in South Carolina tracks the national story. Throughout most of the Nineteenth and Twentieth Centuries, South Carolina’s elected solicitors controlled the court dockets in their respective jurisdictions<sup>69</sup> as a matter of custom and

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66. E-mail from James C. Drennan, Professor, Institute of Government, University of North Carolina at Chapel Hill, to W. Greg Flowers, February 3, 2005 (on file with author).

67. For an excellent discussion of this issue, see Ostrom and Hanson, *supra* note 42, especially at 51-52.

68. For one of the many publications that explains and extolls the virtues of differential case management, see Maureen Solomon & Holly Bakke, *Case Differentiation: An Approach to Individualized Case Management*, 73 JUDICATURE 719 (1989). For an article extolling differential case management as a tool for the South Carolina criminal courts and defending its compatibility with prosecutorial docket control, see Tommy Pope and Kevin Brackett, *DCM: Bringing Order to Chaos*, SOUTH CAROLINA LAWYER (March 2001), available at <http://www.sclbar.org/pdf/SCL/Mar01/pope.pdf>.

69. South Carolina has sixteen elected solicitors, each with responsibility for one judicial “circuit.” A judicial circuit is, in turn, made up of between two and five counties. See S.C. CODE ANN. 14-5-610 (1976). Serious criminal cases are heard in the circuit court of the county where the crime took place. Since solicitors are elected by judicial circuit but cases are heard in county courts, each solicitor has responsibility for maintaining the docket in multiple counties.

tradition.<sup>70</sup> Though the history of solicitorial control is shrouded in some degree of mystery, conventional wisdom suggests that the practice gained acceptance as a response to the realities of circuit riding, itself a common practice in Nineteenth Century South Carolina.<sup>71</sup> By the early part of the Nineteenth Century at the latest, the practice was firmly entrenched and largely unchallenged, despite the absence of any statutory or constitutional authorization. It was simply a background reality of South Carolina's system of criminal adjudication.

For most of the Twentieth Century, the State's courts were rarely asked to speak to issues related to prosecutorial docket control. When asked, however, the courts quickly and succinctly reinforced prosecutorial prerogative. In one 1971 case, the South Carolina Supreme Court rejected an appeal challenging the failure to accord a continuance to a criminal defendant that, *inter alia*, argued the defendant was entitled to the continuance because his case had been called ahead of more than 70 older cases listed in front of it on the county's master criminal docket.<sup>72</sup> In rejecting the challenge, the Court opined that "the solicitor has the authority to call cases in such order and in such manner as will facilitate the efficient administration of his official duties, subject to the overall broad supervision of the trial judge."<sup>73</sup> Six years later, the same court made it clear that solicitors had little cause to worry about "the overall broad supervision of the trial judge" when it overturned a trial judge's dismissal of two criminal charges that had been repeatedly scheduled for trial by the solicitor's office but not called.<sup>74</sup> According to the court, the decision whether or not to dismiss a case pretrial lies entirely in the hands of the solicitor and the solicitor has full discretion to delay a scheduled case at any moment before the case has been formally called for trial.<sup>75</sup>

In 1975, the Richland County (Columbia) Public Defender's Office

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70. Until 1980, no legislation governed the issue of docket control. Moreover, state courts would only speak to the issue under the rarest of circumstances. For what appears to be the full set of state Supreme Court cases addressing the issue, see *State v. Ridge*, 236 S.E.2d 401 (S.C. 1997); *State v. Mikell*, 185 S.E.2d 814 (S.C. 1971); *State v. Charles*, 190 S.E.2d 466 (S.C. 1937).

71. See, e.g., Telephone Interview with David Bruck (October 21, 2004) (conveying South Carolina criminal defense bar's supposition that the practice of solicitorial control is a vestigial institution that owes its history to nineteenth-century circuit-riding). It should be noted that solicitorial control of the docket is not the only vestige of the circuit-riding past that shapes South Carolina's contemporary judicial system. Prosecutors are still elected by "judicial circuit," and trial judges fill slots designated either for a particular circuit or "at-large." More importantly, judges are assigned to particular courthouses for "terms" that last only one week. Some judges sit in the same courthouse week after week (often including a Chief Administrative Judge for each county, usually appointed for a one-year period), while others move from county to county, both within and outside their nominal judicial circuit, according to schedules promulgated by the Chief Justice of the State Supreme Court approximately a year in advance. In an era of modern transportation and communications, circuit-riding barely resembles the nineteenth-century practice. Still, in a technical sense, it survives in South Carolina to this day.

72. *State v. Mikell*, 185 S.E.2d 814 (S.C. 1971).

73. *Id.* at 816-17.

74. *State v. Ridge*, 236 S.E.2d 401 (S.C. 1977).

75. *Id.* at 402.

and a substantial portion of the private bar (led by Civil Rights veteran and future United States District Judge Matthew J. Perry) made a motion before the County's Chief Administrative Judge asking him to set a criminal trial calendar of his own with the assistance of the clerk of court.<sup>76</sup> The lawyers argued that nothing in the State's law and rules precluded such an action and that considerations of justice and efficiency militated in its favor.<sup>77</sup> Rejecting suggestions that the court's inherent powers were sufficient authority for such an order in the absence of a statute to the contrary, the judge expressed sympathy for the petitioners' substantive arguments, but determined that he was powerless to grant them relief.<sup>78</sup> In a state where custom and tradition are treated reverentially, it surprised no one that a local trial judge was hesitant to upend such a consistently followed practice, even when faced with compelling arguments and an emerging national consensus against the traditional practice.

## 2. The Courts and the Legislature Struggle for Supremacy

By the late 1970s, the winds of court reform that were sweeping the nation had reached South Carolina.<sup>79</sup> The South Carolina legislature was engaged in a complicated and contentious process of court unification and re-organization that drastically reworked the State's trial courts and created—after much protest and fumbling—an intermediate appellate court.<sup>80</sup> Both within and outside the court system, important players were dedicating substantial amounts of time to reevaluating and redrafting various codes of rules and procedures. It was a time where many issues,

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76. See Hugh E. Munn, *Control Over Trial Docket Challenged: Motion Filed Against Anders*, THE STATE (Columbia, S.C.), October 7, 1975, at B-1; Anne Marshall, *Solicitor Criticizes Petition*, THE COLUMBIA RECORD, October 7, 1975, at 1-B.

77. See Munn, *supra* note 76. The motion relied, *inter alia*, on the degree to which the system left defense counsel under-prepared for trial, the inherent unfairness of one party controlling the course of litigation, and a recently published report of the American Bar Association's *Commissions on Standards of Judicial Administration*. See *id.*

78. See Munn, *supra* note 47, at B-1 ("[Judge John] Grimball declared [the idea] 'has much merit,' but the judge turned down the request, saying he doesn't have the authority to issue such an order."). It is worth noting that in arguing the motion, defense lawyers stressed the recent abandonment of prosecutorial docket control in other states. See *id.* (citing Alabama, West Virginia, Arkansas, Maryland, Colorado, and Delaware).

79. For a brief discussion of the national trends, see *supra* Part II.A.3-4. For a discussion of the impact of national trends towards court reform on developments in South Carolina during the 1970's, see Barry Edmond Hambright, *The South Carolina Supreme Court (1971)* (unpublished Ph.D. dissertation, University of South Carolina) ch.4 (bearing the title "Judicial Reform"). For an acknowledgment of the impact of national concerns about the management of criminal trial dockets on the efforts of the South Carolina Supreme Court during this period, see Holly Gatling, *Supreme Court Delivers Order on Indictments*, THE STATE (Columbia, S.C.), Sept. 27, 1979, at 14-A (reporting comments of the State's Attorney General describing a Supreme Court reform order as "another cog in the wheel of judicial reform [that] is in keeping with U.S. Supreme Court Chief Justice Warren Burger's 'speedy trial' mandate on federal courts").

80. The Byzantine and serpentine process through which the state debated and redebated judicial reform during this period is desperately in need of a new chronicler. The best existing source is Hambright, *supra* note 79.

long thought settled, were on the table.

If South Carolina had followed the national course, prosecutorial docket control might well have been eliminated or drastically curtailed as part and parcel of this wave of reform. And, at first, events moved in that direction. On September 26, 1979, the South Carolina Supreme Court promulgated a new "administrative rule" for the State's circuit (trial) courts.<sup>81</sup> According to the new rule, solicitors had 90 days after they received an arrest warrant from the clerk of court to either prepare an indictment for presentment to a grand jury, formally dismiss the warrant, or make "other affirmative disposition" of the case "in writing."<sup>82</sup> The time limits were subject to extension for successive 90-day periods if, on motion, the circuit court found "good cause for such delay."<sup>83</sup>

While the rule would have imposed some uniformity and oversight over solicitors and would have cabined their discretion to manage the criminal docket in the early stages of a pending criminal case, it was hardly earth shattering. It imposed no limits on the ability of solicitors to manage cases once a grand jury indictment had been handed down, gave judges no authority to call cases on their own or to dismiss indictments if the solicitor declined to call the cases, and did not even directly empower judges to impose sanctions on solicitors for failing to meet the timetable laid out in its own text.<sup>84</sup>

Nonetheless, the new rule provoked the ire of legislators and solicitors.<sup>85</sup> In part, opposition to the rule was motivated by a stark preference for the traditional system of solicitorial docket control; to those who wanted to retain prosecutorial control, the rule was an opening wedge that might be used to leverage bigger changes in the system.<sup>86</sup> More importantly, however, the judicial order in this case became further fodder for an intense and bitter rivalry between the legislature and the judiciary over which body had the ultimate authority to craft the State's judicial rules

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81. Order of the South Carolina Supreme Court Re: Rules of the Circuit Court, Rule 95 (issued September 26, 1979) (on file with the author). For contemporary news coverage of the Order, see Gatling, *supra* note 79.

82. Order of the South Carolina Supreme Court, *supra* note 81.

83. Order of the South Carolina Supreme Court, *supra* note 81.

84. The State Attorney General, a proponent of the new order, recognized these defects—particularly the failure to specify "a remedy or punishment for noncompliance." See Gatling, *supra* note 79 (reporting his comments).

85. See, e.g., Hambright, *supra* note 79, at 204-05 (reporting opposition of one powerful representative, now the State's Chief Justice); Douglass Mauldin, *Solicitor Control of Dockets Praised*, THE STATE (Columbia, S.C.), May 31, 1980, at 5-B (reporting comments of legislators and solicitors who opposed Supreme Court's order and supported statute that codified solicitorial control).

86. Relatedly, some legislators argued that the Order violated Article V, Section 20 of the South Carolina Constitution which created the office of solicitor and gave the legislature the authority to set the solicitors' duties. See Hambright, *supra* note 79, at 205 (reporting the argument). It remains unclear why some learned legislators believed that—in the absence of legislation to the contrary—a judicial order requiring solicitors to proceed expeditiously in processing cases for trial would run afoul of this general and innocuous constitutional provision.

and procedures.<sup>87</sup> To many in the legislature, the order in question was but the latest attempt of the State's judges to accrete power that properly belonged with the people's elected representatives.

As the annual legislative session was winding down in the spring of 1980, legislative allies and opponents of the State's judiciary reached a compromise on the major issue dividing them—the future of the enacted but not yet operative intermediate appellate court.<sup>88</sup> In the waning hours of the legislative session, the courts' chief antagonist, longtime Senate leader L. Marion Gressette, quietly proposed—as an amendment to an unrelated law—a new State statute that would mandate full and complete solicitorial control of the criminal court docket.<sup>89</sup> With almost no debate, the proposed amendment was adopted, and the newly minted bill was rushed through both the Senate and the House (where it was floor managed by a member who was also an assistant solicitor in Richland County).<sup>90</sup> Opponents of the bill complained to the press that few members “were aware what they were voting on” and that the bill had been purposefully pushed through the House during the brief absence of the one member who would have been most likely to have informed his colleagues of the bill's contents.<sup>91</sup> Nonetheless, when Governor Richard Riley signed the bill, solicitorial control of the criminal court dockets became entrenched in the statutory law of the State of South Carolina, just as it was disappearing from the statute books and practices of other states. The provision remains unchanged to this day.<sup>92</sup>

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87. Hambright recounts this controversy though not thoroughly. See Hambright, *supra* note 79, at 198-205. For contemporary news coverage that makes this connection, see Douglass Mauldin, *House Votes to Reduce Circuit Judge Authority*, THE STATE (Columbia, S.C.), May 30, 1980, at 6-D; Editorial, *Court Rebuff Bill Slides on Through*, THE STATE (Columbia, S.C.), June 1, 1980, at 2-B.

88. See Douglass Mauldin, *Compromise Reached on Appeals Court Delay*, THE STATE (Columbia, S.C.), May 30, 1980, at 6-D.

89. See, e.g., Editorial, *supra* note 87 (reporting events). The statutory text is reproduced *supra* note 1.

90. See, e.g., Mauldin, *supra* note 87 (reporting events). The official Journals of the State Senate and the State House confirm the absence of any debate. See, e.g., JOURNAL OF THE SOUTH CAROLINA SENATE (1979), at 1892-93 (presentation of amendment); JOURNAL OF THE SOUTH CAROLINA SENATE (1979), at 1896 (approval of the amendment); JOURNAL OF THE SOUTH CAROLINA HOUSE (1979), at 3360 (approval by the House of the bill with the Senate amendments); JOURNAL OF THE SOUTH CAROLINA HOUSE (1979), at 3363 (point of order challenging action rebuffed); JOURNAL OF THE SOUTH CAROLINA HOUSE (1979), at 3394 (formally ratifying the Act).

91. Mauldin, *supra* note 87.

92. Even with the passage of the statute, the battle between the legislature and the courts did not immediately abate. Just three years later, the State Supreme Court issued another administrative order seeking to impose limits on prosecutorial docketing authority, this time relying specifically on its authority under the Separation of Powers Clause of the South Carolina Constitution, S.C. CONST. art. V., § 4. See Order of the South Carolina Supreme Court (issued August 11, 1983) (on file with the author). Once again the issue of concern was the length of time it was taking to dispose of many cases. This time the specific reaction was a new rule mandating that “each circuit court judge is to continue any and all criminal matters which have been pending for a period of less than 180 days from arrest until such time as there are no cases exceeding 180 days from the date of arrest pending and awaiting trial.” *Id.* Though the order was reiterated in another order dated January 13, 1984, see Order of the South Carolina Supreme Court (issued January 13, 1984) (on file with the author) and was referenced as still binding in



### 3. Contemporary Case Management Experiments

Since 1980, there have been periodic efforts to amend South Carolina law to transfer control of the criminal docket from solicitors to judges, usually to the Chief Administrative Judge for each county. One such bill is currently pending.<sup>93</sup> While such bills reflect the continued existence of opposition to the State's now-anomalous docketing system, they have never been able to gain any traction. To the contrary, the idea that prosecutors' control of the criminal docket is natural and inevitable has become deeply entrenched in South Carolina's political culture. Candidates for high judicial office are routinely required to pledge fealty to solicitorial control in language that has almost become ritualistic.<sup>94</sup>

The commitment of legislators and judges to prosecutorial control has not, however, prevented the State from experimenting with modern docket control mechanisms, including institutional arrangements that in the abstract threaten to clip off a portion of the discretion now reserved to solicitors. In particular, several judicial circuits have experimented with pilot programs that structure the pretrial process into several "appearance" dates.<sup>95</sup> Under the theory of the program, defendants arrested in a particular month will have a first appearance that is largely administrative on a specified date, a second appearance on one of several preset dates (tracked onto a particular date based on the severity of the crime and the complexity

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another order three years later, *see* Order of the South Carolina Supreme Court (issued October 6, 1987) (on file with the author) (hereinafter "1987 Order"), adherence to its dictates never gained traction. What became of the order is something of a mystery—while several lawyers interviewed for this piece remember the order being rescinded, I have been unable to identify any records to confirm that fact. At most, the order remains on the books only as a dead letter.

It should be further noted that the order of October 6, 1987 contains language that might be read to strip control of the docket from solicitors and hand it to each circuit's chief administrative judge. *See* 1987 Order, *supra* ("It is ordered that the administrative authority of the Chief Administrative Judges of the circuit courts to set and amend dockets for terms of circuit court shall be exclusive. Dockets may not be amended without prior approval by the Chief Administrative Judge . . ."). However, the remainder of the order strongly suggests that it was intended only to protect the authority of the Chief Administrative Judge vis-à-vis other judges hearing cases in his circuit and was not intended to disturb the division of powers between the solicitors and the bench. *See id.* (imposing limits on the power of "presiding judges" to issue continuances without the approval of the Chief Administrative Judge). Moreover, even if the order was intended to strip solicitors of some authority, it has not had that effect. Finally, if so interpreted, the order would conflict with the statutory provision cited above and, as such, would ultimately require a determination from the state's courts that the statutory provision unconstitutionally encroaches on the powers of those courts. There currently seems little prospect of such a ruling.

93. S.280, 115th Leg., 2d Reg. Sess. (S.C. 2005).

94. *See, e.g.*, Chief Justice Jean H. Toal, State of the Judiciary 2003, 2003 SOUTH CAROLINA HOUSE JOURNAL, at 1103 (February 26, 2003) ("I strongly support the control of the docket by our circuit solicitors."); Chief Justice Jean H. Toal, State of the Judiciary 2002, 2002 SOUTH CAROLINA HOUSE JOURNAL, at 1323 (March 6, 2002), ("I support continued control by the solicitors of South Carolina of the management of criminal dockets in our state.").

95. The program was launched most extensively in Richland County, though it has spread to other counties. The Chief Justice has been effusive in her praise of the program and, in particular, of Fifth Circuit Solicitor Barney Giese's voluntary participation and efforts. *See, e.g.*, 2003 SOUTH CAROLINA HOUSE JOURNAL, at 1103; 2002 SOUTH CAROLINA HOUSE JOURNAL, at 1323.

of the case), and a third appearance for trial or plea on a date set at the second appearance. Though adoption of such an “appearance”-based system by solicitors has thus far been voluntary, the program has been designed, promoted, and monitored by an “ad hoc Criminal Docketing Committee” chaired by the State’s Chief Justice.<sup>96</sup>

This appearance system bears a striking resemblance to the compromise system enacted in North Carolina as a result of the clamor against pure prosecutorial docket control.<sup>97</sup> If the system succeeds in bringing predictability and structure to the criminal scheduling process, if solicitors treat the new rules as harbingers of a new era of cooperative docket management rather than a series of strictures to manipulate and avoid, if the holes in the system are filled in and enforcement mechanisms are tightened, and if the system spreads either voluntarily or by statute across the State, then the first years of the Twenty-First Century might eventually come to be recognized as the moment when the State of South Carolina shifted away from a system of pure prosecutorial docket control. But those are a lot of “ifs.”

Moreover, the initial evidence from the trenches is discouraging. Buttressed by the Chief Justice’s repeated assertion that these pilot programs are not meant to threaten prosecutorial control<sup>98</sup> and, in any event, protected by the clear text of the relevant statute, prosecutors have clung tenaciously to their prerogatives and have resisted many—though not all—of the judiciary’s efforts to rationalize the docketing process.<sup>99</sup> Judges, dependent on the legislature for reelection<sup>100</sup> and, in any case, acting without statutory authorization, have been cautious not to step on the toes of prosecutors. As a result, less has changed in the relevant counties than one might expect from perusing the Chief Justice’s glowing reports. Prosecutors treat the dates scheduled for third appearances as advisory, letting matters pass those dates without notice to the defense or the court and calling other cases on those days without explanation. Judges have little formal power to impose litigation sanctions for failure to adhere to the scheduled dates and largely decline to use their powers of moral suasion to that end. More importantly, once cases pass their track end date (the scheduled third appearance)—as most of them do—prosecutors recapture even the modicum of power that they had abdicated to the court and retain

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96. In addition to the annual state of the judiciary addresses, cited *supra* note 94, see also SOUTH CAROLINA JUDICIAL DEPARTMENT ACCOUNTABILITY REPORT 2000-2001, at 36 (identifying and naming the Committee).

97. See *supra* note 65 and accompanying text.

98. See *supra* note 94.

99. Reports from attorneys practicing in the counties following the plan indicate that solicitors’ offices have stopped calling defendants in for unnecessary appearances at least until the tracks have run out, have with significant exceptions largely stopped calling cases for trial before the date set for third appearances, and have sometimes been willing to give earlier notice of what cases they actually plan to call on a given day when pressed by the Chief Administrative Judge. See Interviews with Anonymous Attorneys from Richland County, in Columbia, S.C. (November 2004-April 2005) (on file with author).

100. See *infra* Part IV.B.

full discretion to schedule trials, pleas, and court appearances as they see fit.

As one can see, the story of solicitorial control of the docket in South Carolina continues to unfold. That being the case, the Parts that follow are persistently in danger of becoming stale, inaccurate, or anachronistic. If events come to pass that relegate pure prosecutorial docket control to the scrapheap of South Carolina history, my hope is that the Parts that follow will serve as a snapshot of a moment in time where the efficient and equitable administration of justice in some American states depended on the kindness of prosecutors.

### III. Prosecutorial Docketing Authority and Wrongful Convictions

South Carolina's practice of vesting docketing authority in its solicitors is certainly anomalous. However, mere variation in the structuring of a judicial system should not—in and of itself—set off normative alarm bells. It is at least theoretically possible that the other states were too quick to abandon prosecutorial docket control. Alternatively, perhaps South Carolina faces unique challenges in the administration of justice that require greater solicitorial input than in other states. Even if neither of those theses is sustainable, perhaps solicitorial control of the docket is a harmless vestigial structure, a curious reluctance to abandon a past practice whose reasons for existing have long since passed but has few consequences beyond its tendency to exacerbate stereotypes of South Carolina as a backwards-looking state.

In this article, I have neither the space nor the appropriate audience for a contextualized debate about the reasons for and the wisdom of South Carolina's decision to retain—indeed entrench—prosecutorial docket control in the face of a persistent and now unanimous national trend to the contrary. Instead, this Part lays some of the necessary groundwork for that discussion by detailing in an anecdotal but fairly systematic way the potential negative consequences of prosecutorial docket control, with a particular eye on the ways in which such a system has a tendency to produce wrongful convictions.

I begin with a word about method. The scenarios sketched out below are not reportage—I make no representation that the potential abuses I catalog are the norm in any South Carolina county (let alone in the State as a whole) and no effort to cite to particular cases where such abuses have occurred. On the other hand, this Part is not the result (or perhaps I should say: is not solely the result) of idle academic speculation. My knowledge of the theoretical problems posed by solicitorial docket control are informed by my observations of the actual operation of that institution in South Carolina over the last four years and by countless conversations with criminal defense attorneys throughout the State.<sup>101</sup>

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101. For several reasons, I am comfortable with a method that describes the potential ramifications of prosecutorial docket control in a detailed but abstract (and largely uncited) way. First,

In the remainder of this Part, I sketch out four ways in which control of the docket gives South Carolina prosecutors an opportunity to influence the quality of justice dispensed in the South Carolina courts. As human ingenuity knows few bounds in its quest for competitive advantage, the situations described here are archetypal rather than exhaustive. What jumps out of each of these anecdotes is the degree to which a single background structure—in the abstract, nothing more than a procedural rule—can predispose a criminal justice system towards wrongful convictions.

#### A. Cases That Go to Trial: Ensuring Systematically Underprepared Trial Counsel and Other Strategic Manipulations

##### 1. The Potential Ills

Perhaps the most obvious danger associated with prosecutorial control of the criminal court calendar is the fear that prosecutors will use their scheduling power to ensure that cases will come to trial at a time and in a manner that is particularly disadvantageous to defendants. There are innumerable ways in which prosecutors can use their control of the docket to gain a strategic advantage.

For example, prosecutors in multi-judge locales can use their power over scheduling cases to bring matters before judges who are likely to be particularly sympathetic to the prosecution or particularly hostile to the defendant. Though the need to spread work among all the sitting judges serves as something of a check on this authority, the variety of a criminal

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though the situations I depict are abstracted, they are abstracted from real events. While I am unwilling to commit to the conclusion that these practices are the norm in any given county (let alone the State) or that they were utilized in any given case, I am confident that each of these scenarios depicts a situation that has occurred multiple times within the borders of South Carolina within recent memory. Second, since our Constitutional guarantee of due process includes a commitment to structuring our institutions (particularly judicial institutions) to limit officials' opportunities for bias and manipulation, *see, e.g.*, *Ward v. Village of Monroeville*, 409 U.S. 57, 60-62 (1972) (holding that Due Process Clause is violated when initial trial of fact for traffic offenses is mayor who, due to his other duties, has an interest in maximizing fees and fines); *cf.* *Ballard v. Commissioner of Internal Revenue*, 544 U.S. 40 (2005) (striking down, albeit on technical grounds, tax court procedure whereby initial reports of special trial judges were turned over to tax court judges but not made part of the record on appeal), the existence of plausible scenarios under which unscrupulous solicitors might use their docketing power to overwhelm the rights of criminal defendants, raises a constitutional concern, irrespective of whether those scenarios commonly reach fruition. *Cf.* *State v. Simpson*, 551 So. 2d 1303 (La. 1989) (striking down prosecutors' ability to docket cases in front of judges of their choice because such a system on its face violates "fundamental fairness," and hence the Due Process Clause of the Fourteenth Amendment). Third, this, in the end, is not an essay about South Carolina; it is an essay about the potential consequences of prosecutorial docket control that is informed by the South Carolina experience. Commentators, lawmakers, and judges evaluating different docketing regimes need exposure not only to data as to how solicitorial control works in South Carolina but also to the informed theorizing and structural analysis South Carolinians have developed through concerted engagement with this issue.

For a (much shorter) discussion of the potential ills of prosecutorial docket control that proceeds in much the same way, see Furia, *supra* note 8, at 128-30. For evidence that prosecutorial control raised similar concern in North Carolina, see *supra* note 63 and sources cited therein.

court's docket provides many opportunities for manipulation. Judges who aggressively enforce laws against physical and sexual violence, but are skeptical about the wisdom of harsh drug laws, can be fed a steady diet of assaults and rapes. Judges who hold police officers to a strict standard when evaluating the constitutionality of searches and seizures can be sent cases that do not turn on physical evidence. Judges who are generally sympathetic to defendants at trial can be assigned lower profile cases, cases where the prosecutors are skeptical about their own evidence and resigned to a not guilty verdict, or cases where the evidence is overwhelming and the statute requires a substantial minimum term (or can be held out from trial duty altogether and asked to take pleas).<sup>102</sup>

Prosecutors can also manipulate the date of trial to disadvantage defendants and defense counsel. If prosecutors want to put defense counsel at a disadvantage, they can call complex cases shortly after counsel returns from vacation or stack defense counsel's cases back-to-back, limiting the time for preparation and ensuring the opposing lawyer's exhaustion. If the defendant intends to call witnesses on his behalf, the prosecutor can schedule the case so as to inconvenience the witnesses, hoping that they will fail to show or will arrive surly or angry at the defendant. If the defendant is out on bond and working or caring for children, the solicitor can schedule the case at the moment most likely to wreak havoc on the defendant's attempt to lead an orderly and responsible life.

Because of the limited oversight that a solicitor has in any given case until the case is called before a judge as well as the reality that multiple cases must be ready to go to trial on any given day, a solicitor committed to exacting the maximum toll from a defendant (or from defense counsel) for exercising the right to trial can use the strategies just sketched out multiple times in a single case. A defendant may receive notice to appear for trial one day, forcing him to take time off work, gather family members, subpoena witnesses (both lay and expert), and confer with counsel only to have the prosecutor decline to call the case. When, two weeks or two months later, the defendant receives similar notice, the whole dance is repeated, only with a crankier cast of characters. Two or three iterations of this maneuver are often all that is needed to assure the unavailability of witnesses or, as will be discussed in more detail below, to obtain a guilty plea born out of frustration rather than deliberation.

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102. The question whether the Due Process Clause imposes any limitations on systems in which prosecutors influence the selection of judges is the only constitutional question broached in this article that has been the subject of significant litigation. A number of courts have expressed sympathy for this argument, see, for example, *United States v. Pearson*, 203 F.3d 1243, 1257 (10th Cir. 2000) and at least one court has granted relief on that basis, see *Simpson*, 551 So. 2d at 1303 (striking down prosecutors' ability to docket cases in front of judges of their choice because such a system on its face violates "fundamental fairness," and hence the Due Process Clause of the Fourteenth Amendment); see also *Pearson*, 203 F.3d at 1255-59 (reviewing caselaw on this and related issues and suggesting that language in several United States Supreme Court and other appellate cases is sympathetic to this claim). However, the majority of the courts to have addressed this Due Process issue have declined to find a violation, at least on the facts before them. See cases cited *supra* note 55.

A prosecutor who chooses to use indirection or feigned indecision can further multiply his strategic advantage. A solicitor can informally provide information to defense counsel as to a proposed trial date only to change his mind and move the date forward or backward. Moving the date forward—or calling a case without genuine notice that it was a candidate to be called—increases the odds that trial counsel will be under-prepared. Moving the date backward unsettles a defendant's expectations, makes it more difficult to plan for the presence of witnesses (particularly expert witnesses) and family members, and undermines the defendant's trust in his attorney.<sup>103</sup> As an alternative to such indirection, prosecutors can express uncertainty about what case they are going to call until (or perhaps past) the last legally sanctioned moment,<sup>104</sup> leaving defense counsel unsure what case or cases to prepare while possessing that information themselves.

The tactic of crying wolf about the imminence of trial—or the decision not to provide sufficient information as to which cases will be called—works to deplete the energy and resolve of defense attorneys. For better or for worse, whether by choice or scheduling pressure, most trial lawyers operate on a cyclic work schedule in which they apply themselves exclusively to the final stages of preparation for and the actual conduct of a jury trial then turn their attention more diffusely to the routine maintenance of their cases before gearing up for another monomaniacal trial cycle. If conscientious defense counsel is led to believe that trial is imminent (or even possible) within the next several days, that attorney may shift into trial mode, putting aside other work matters, ignoring competing family commitments, and generally shifting into a high adrenaline, heavy concentration state. Defense lawyers who are maneuvered into trial mode several weeks in a row only to see their cases uncalled often find themselves mentally and physically exhausted and desperately behind in managing their remaining cases.<sup>105</sup> If a defense lawyer who has been so treated is then actually called to trial, he or she is likely to be performing at

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103. Since defense lawyers often work together in public defenders' offices and, in any event, often pool information, the decision to push back a tentatively scheduled trial has the effect of undermining the expectations of not only the lawyer in the delayed case but also of the lawyer in whatever case or cases are called in its stead.

104. South Carolina law requires that solicitors publish their trial dockets at least seven days in advance. *See* S.C. CODE ANN. § 1-7-330 (2004). However, as discussed further below, many solicitors provide weekly trial lists that contain many more cases than can be called, often without guidance as to the order in which they will be pursued. *See, e.g.*, Trial List for Term of Court Beginning June 27, 2005, Richland County General Sessions Court (on file with author) (listing thirteen cases). Moreover, many solicitor's offices publish periodic rosters of pending cases that they label "trial dockets." *See, e.g.*, <http://www.richlandonline.com/departments/solicitor/trialdockets.asp> (last visited November 30, 2005) (providing "trial dockets" for particular dates that often total 700 or 800 cases per week). According to interviews with local defense counsel, the solicitors' offices that produce such "dockets" take the position that these rosters fully satisfy the statutory notice requirement.

105. Obviously, distracting defense lawyers from the day-to-day maintenance of their cases, in and of itself, has consequences for the equitable administration of justice and for the likelihood of wrongful convictions.

a sub-optimal level.<sup>106</sup>

Because the participants in the criminal justice system tend to be repeat players, prosecutorial efforts to manipulate trial dates to the disadvantage of defendants and counsel have a cumulative effect. If a defense counsel operates in a system where prosecutors consistently utilize the trial calendar as a strategic tool, he or she will rapidly become acculturated to that reality and, more likely than not, adopt one of several coping mechanisms. A certain percentage of defense counsel in such a system will find the realities of criminal defense work in a jurisdiction with solicitorial control of the docket untenable and opt out, whether by moving to another locale, shifting their attention to civil work, or becoming prosecutors themselves.<sup>107</sup> Some experienced defense lawyers who are not driven out by prosecutorial docket control will attempt to keep themselves in heightened trial-ready mode on a regular basis with predictable consequences of chronic fatigue and irritability. Others will attempt to curry favor with prosecutors in order to garner special dispensation from the prosecutors' normally ruthless manipulation of the trial calendar, perhaps trading information or aggression of advocacy for a more predictable work schedule.

Faced with a system without predictable trial dates, criminal defense lawyers are probably most likely to cope by developing a style of practice that, in all but the most serious cases, puts off most of their trial preparation to the last minute. Some trial preparation tasks—the weighing of strategic options, the preparation of arguments and cross-examinations, the research and preparation of pre-trial motions—can often be performed adequately (though never optimally) in an artificially compressed time frame. Other tasks, such as the identification and location of witnesses, the service of subpoenas to ensure their presence, and the development of expert testimony, often cannot be accomplished overnight or over a weekend, leaving defense counsel with the Hobson's Choice of spending their precious personal capital with judges to seek continuances or

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106. A prosecutor who maneuvers defense counsel into several false trial preparation cycles in order to tire him out for a real trial is like the proverbial professional athlete who manipulates his rival into staying out carousing into the wee hours the night before the big game. While those stories have a certain raffish charm when told in the context of competitive games, they take on a more sinister cast in the context of criminal trials.

107. I presume that the percentage of defense counsel pushed out by solicitorial docket control who otherwise would remain members of the criminal bar is additive to the already high proportion of lawyers who "burn out" and leave criminal defense practice relatively quickly due to other factors. For an interesting article about the phenomena of "public defender burnout," see Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203 (2004). It is certainly possible, however, that prosecutorial control of the docket burns defense lawyers out faster but does not measurably increase the overall burnout rate. Alternatively, it is at least theoretically possible that the factors contributing to the burnout of defense lawyers (especially public defenders) are so over-determined that the additional frustration of solicitorial docket control has only a marginal impact. The effect of prosecutorial docket control on the career patterns of defense counsel is one of many aspects of the phenomena that is ripe for empirical research.

proceeding to trial underprepared and unarmed.<sup>108</sup> Last minute preparation also may mean less opportunity to confer with a defendant about strategic and factual issues, leading directly to some trial errors and creating distrust between client and lawyer that further erodes the efficacy of representation.

## 2. Opportunities to Mitigate These Ills and Their Effect on Wrongful Convictions

The ability of prosecutors to manipulate trial dates to their strategic advantage has fairly obvious consequences for “wrongful convictions,” however one conceptualizes that term.<sup>109</sup> For those whose definition of wrongful conviction focuses narrowly on the question of factual innocence, the most troubling aspect of calendar manipulation is that it systematically brings defendants to court with cases that are under-investigated and under-prepared, thereby increasing the chance that an innocent person will be convicted.<sup>110</sup> For those who conceptualize wrongful convictions more

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108. Speaking of Hobson’s Choices, defense counsel who have alleged trial dates lined up days or weeks in advance may be faced with the dilemma of whether to instruct or subpoena potential witnesses to appear on that date if the likelihood of trial appears slim. Failure to do so has the potential to drastically undercut a client’s case. On the other hand, repeatedly noticing witnesses to appear on the off chance that a trial might be called is a sure recipe for encouraging ill will, recalcitrance, and absent witnesses. If the witnesses are repeat players (law enforcement officers, experts, etc.), the ill will engendered may also spill over to the lawyers’ other clients.

109. For the popular press and many in academia, the phrase “wrongful convictions” has become almost synonymous with vindicated or verifiable claims of actual innocence. A persistent minority of the academic community—of which I consider myself a member—continues to insist on a broader understanding of “wrongful convictions.” See, e.g., Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1346 n.92 (1997) (“Actual innocence means what it says—the defendant did not commit the crime of which he has been convicted. Wrongfully-convicted defendants may or may not be actually innocent; their defining characteristic is that their convictions were secured as a result of a material legal error.”); Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L. REV. 1097, 1104-05 & n.24 (2003) (explaining difference between general claim of “wrongful conviction” and claim of factual innocence and noting that new Innocence Projects have a difficult choice to make in determining whether to limit themselves to the latter). Throughout this Part, I will address the ramifications of potential abuses of prosecutorial docket control not only for those who are actually innocent, but also for those who might be convicted as a result of the violation of a constitutional right or as a consequence of a fundamentally unfair trial or pretrial procedure.

110. In 2004, *The State*, South Carolina’s leading daily newspaper, ran a series of articles on the causes of and solutions to wrongful convictions, treating that term as synonymous with conviction of the innocent. See Rick Brundrett, *Questions of Innocence: Sometimes The Bad Guy Isn’t the One Doing Time*, THE STATE (Columbia, SC), July 4, 2004, at A1; Rick Brundrett, *Advocates Back Inmate*, THE STATE (Columbia, SC), July 4, 2004, at A1; Rick Brundrett, *Race Often an Issue in Wrongful Convictions*, THE STATE (Columbia, SC), July 4, 2004, at A11; Rick Brundrett, *Lawyers Aim to Fix South Carolina Justice’s Mistakes*, THE STATE (Columbia, SC), July 6, 2004, at A6; Rick Brundrett, *Exonerated Man’s Freedom Shortlived*, THE STATE (Columbia, SC), July 6, 2004, at A1; Rick Brundrett, *Preventing Wrongful Convictions: Who They Are/What They Said*, THE STATE (Columbia, SC), July 6, 2004, at A1 (hereinafter *Preventing Wrongful Convictions*); Editorial, *McMaster Should Order Changes to Protect the Innocent*, THE STATE (Columbia, SC), July 20, 2004, at A6. In its item on potential fixes, it listed “eliminat[ing] solicitors’ control of the trial docket.” *Preventing Wrongful Convictions*, *supra*, at A6. In explanation, the author quoted the Executive Director of the South Carolina chapter of the American Civil Liberties Union, Denyse Williams, arguing that prosecutorial docket control “force[s] people to take pleas they ordinarily wouldn’t take or force[s] people to trial



broadly so as to include convictions obtained through procedures that violate the constitutional rights of criminal defendants regardless of guilt or innocence, the manipulation of trial calendars to thwart a defendant's fair ability to present evidence in his defense rings a number of constitutional warning bells.<sup>111</sup> For those who view the subject of wrongful convictions as a more general attempt to identify and eliminate rules, procedures, and patterns of governmental conduct that warp our administration of justice, prosecutorial docket control is a prototypical incarnation of their concerns.

In any given system, the degree to which prosecutorial calendar control effectuates wrongful convictions is, at least in part, determined by the degree to which courts police the prosecutors' abuse of their discretion. In some systems where prosecutors have some control over the docket, the judiciary possesses important statutory powers to check such abuses.<sup>112</sup>

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when they are not ready" and noting that "[w]e get a lot of letters from people in pre-trial detention (about this issue)." *Id.* Her concerns were echoed by a researcher for the National Center for State Courts. *See id.* (quoting Kenneth Pankey to the effect that research has demonstrated that "judges are better managers of criminal court dockets than prosecutors"). Prosecutors quoted in the article expressed surprise that the issue was even raised and denied any connection between solicitorial control and wrongful convictions. *See id.* (quoting Barney Giese, Solicitor for the Fifth Judicial Circuit (Richland and Kerhsaw Counties) and President of the S.C. Solicitors Association as saying that "he is not aware of any serious complaints in his office about the scheduling of trials"); *id.* (quoting Greg Hembree, the elected solicitor for another circuit, as saying that "he doesn't know of a case a judge forced to trial when a defense lawyer was asking for more time to prepare"). The three defense lawyers quoted loudly about other reforms are notably silent on the issue of docket control, perhaps reflecting their ambivalence, but more likely reflecting their understanding that the issue is a third-rail that defense counsel question at great peril to themselves and their clients.

111. As will be discussed *infra* Part IV, prosecutorial docket control raises serious issues under at least three federal constitutional provisions. First, prosecutorial decisions to delay the resolution of particular cases for strategic advantage or to jump newer cases over older cases on the trial docket for no apparent reason present at least superficially appealing claims under the Speedy Trial Clause, U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."). Second, objections to many aspects of the prosecutorial control regime—such as concerns over a party litigant picking its own judge or worries about the state purposefully holding defendants in jail so as to coerce a plea to a crime for which the state understands it lacks sufficient evidence—resonate with the core concerns of the Fourteenth Amendment's Due Process Clause, U.S. CONST. amend. XIV, Due Process Cl. ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . ."). Finally, the cumulative effects of operating under a system of complete prosecutorial docket control raise questions about whether criminal defendants in certain South Carolina counties are receiving adequate assistance of counsel as required by the federal Constitution, U.S. CONST. amend. VI (guaranteeing a defendant "the Assistance of Counsel for his Defense"); *Strickland v. Washington*, 466 U.S. 668 (1984) (holding that Sixth Amendment is not satisfied by provision of "inadequate assistance of counsel"). Perhaps the most interesting doctrinal question raised by prosecutorial docket control is whether the Sixth Amendment right to counsel is violated if prosecutors manage their criminal calendar so as to intentionally interfere with the relationship between criminal lawyers and their clients even if the substance of the representation is not constitutionally deficient.

So as not to mislead, it must be emphasized at the outset that existing constitutional doctrine imposes substantial hurdles for each of these claims, *see* Part IV.C. *infra*, and that the majority of Courts that have addressed related claims have not found constitutional violations, *see, e.g.*, cases cited *supra* note 102.

112. For a discussion on the systems now in place in two such states, Massachusetts and North Carolina, *see supra* note 5. For a discussion of pilot programs in some South Carolina counties that voluntarily cede similar powers to administrative judges, *see supra* notes 94-98 and accompanying text.

Even when state law provides judges with little ammunition, constitutional guarantees of adequate notice and a speedy trial theoretically cabin the ability of prosecutors to manipulate trial dates.<sup>113</sup>

If the South Carolina experience is any guide, however, those protections have little practical power to combat docket manipulation. For example, prosecutors can easily retain their discretion to manage trial dockets to their strategic advantage while meeting statutory and constitutional notice requirements by substantially over-noticing cases for any given trial date or term.<sup>114</sup> Though this practice may itself be subject to constitutional challenge in extreme situations,<sup>115</sup> it is remarkably difficult to claim that a defendant does not have proper notice that her case will be called for trial when she is holding in her hands a properly executed legal document informing her of just that fact.

Similarly, the requirement that defendants receive a “speedy trial” is difficult to enforce in a system where judges do not systematically manage their own dockets. Under such a system, the most judges can do is play a backstop role, setting an immovable final date after which a case might be dismissed under the Speedy Trial Clause.<sup>116</sup> *Ex ante*, the prospect that in any one case a judge might a year or two down the road draw a line in the sand is likely to have, at most, a trivial effect on the prosecutor’s management of that case, let alone his entire caseload. The prosecutor still maintains the authority to call the case at the most advantageous time and in the most disruptive way during the long window allowed by the Speedy

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113. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”); U.S. CONST. amend. XIV, Due Process Cl. (“Nor shall any State deprive any person of life, liberty, or property, without due process of law”); *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542, (1985) (“An essential principle of due process is that a deprivation of life, liberty, or property ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case.’”).

114. The ultimate version of this strategy—employed by some solicitors in South Carolina—is to formally notice *all* pending cases of a sufficient age for trial weeks in advance, thus meeting the statutory notice requirement. See “Trial dockets,” *supra* note 104 (listing 600, 700, even 800 cases per week “for trial”). Whether this “notice” is sufficient to fulfill the mandate of the Fourteenth Amendment’s Due Process Clause is an open question. Cf. *infra* text accompanying note 168 (arguing that docket manipulation that serves to thwart genuine notice violates at least the spirit of the Due Process Clause).

115. See discussion *infra* Part IV.A.

116. The U.S. Constitution’s speedy trial guarantee has been interpreted in a flexible manner that often gives it little teeth. The lead case, of course, is *Barker v. Wingo*, 407 U.S. 514 (1972). In states with constitutional or statutory speedy trial rules that impose more specific requirements on prosecutors, speedy trial rights would likely serve as more of a check on prosecutorial docket control. Of course, South Carolina is the one state with full prosecutorial docket control and one of the few states without a more specific state-law speedy trial right. See S.C. CONST. art. 1, § 14 (laying out a right to speedy trial in exactly the same terms as in the United States Constitution); *State v. Brazell*, 480 S.E.2d 64, 74-77 (S.C. 1997) (indicating that scope of and test for violations of state speedy trial right is identical to that of federal right under *Barker v. Wingo*); cf. S.C. Code Ann. § 17-23-90 (2004) (providing a right to release on bond if not tried within “one term” of court and release without bond if not tried within two terms); *Ex Parte Attardo*, 249 S.E. 2d 771 (S.C. 1978) (interpreting a “term” of court broadly, allowing detention for multiple years); *State v. Campbell*, 288 S.E.2d 395 (S.C. 1982) (determining that right to release after two terms is simply right to pretrial release and does not preclude continued prosecution).

### Trial Clause.

Though law provides little impediment to prosecutorial manipulation of the court calendar, culture and pragmatism may fare a bit better as checks on prosecutors. Prosecutors, defense counsel, and judges must learn to coexist in a system where all are overburdened. Aggressive manipulation of the calendar by a prosecutor has adverse consequences for that solicitor's ability to perform his duties that must be balanced against the strategic advantages gained. Egregious manipulation of the docket runs the risk of embarrassing and expensive reversals of convictions, perhaps on due process or ineffective assistance of counsel grounds. More directly, prosecutors who persistently antagonize defense counsel run the risk of losing the cooperation of those lawyers in scheduling pleas. Similarly, prosecutors who antagonize trial judges run the risk of adverse substantive and procedural rulings, uncomfortable court room dynamics, and lenient sentences. While judges lack substantial power to control the court calendar, they do have the ability to use their residual powers to frustrate the prosecutors' scheduling design, for example, through the granting of continuances and motions to dismiss for discovery or speedy trial violations or through the simple determination not to take the bench on a given day. If, out of a sense of justice or efficiency or the desire to seek vengeance on a disfavored prosecutor, an administrative judge takes a substantial interest in his court's trial calendar, the consequences of prosecutorial resistance may be too high a price to pay for prosecutorial independence. For these reasons, enlightened self-interest may serve to moderate the worst excesses of solicitorial control.

## B. Cases That Plead: Increasing the Risks of Waiting for Trial

### 1. The Potential Ills

With little effort, prosecutorial docket control can be used to manipulate a plea out of a defendant who would otherwise exercise her right to trial. If a defendant is incarcerated pending the resolution of her case, often all the prosecutor need do is wait the defendant out, declining politely to move on her case.<sup>117</sup> A prosecutor who has convinced the defendant that he or she may never see the inside of a courtroom has obtained a substantial amount of psychological control. Some defendants may break and plead guilty against their own interests simply to obtain resolution. Others may calculate, quite rationally, that they are likely to get home more quickly if they plead guilty as charged than if they wait until the prosecutor deigns to call the case to trial. And all defendants are likely to be more receptive to a plea offer if that carrot is dangled after the prosecutor

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117. This was one of the primary complaints in the constitutional challenge to North Carolina's former system of prosecutorial docket control. See *Simeon v. Hardin*, 451 S.E.2d 858, 871-72 (N.C. 1994).

has demonstrated his willingness to use the stick of docket control to impose substantial pre-trial punishment.<sup>118</sup>

Defendants who withstand the initial pressure to plead and see their cases rise to the top of the trial docket may nonetheless find themselves under a new pressure to plead on the eve of trial if the prosecutor has manipulated the docket so as to catch defense counsel under-prepared or defense witnesses unavailable or disinclined to help. As indicated above,<sup>119</sup> even if the prosecutor has played a case straight and called it to trial in short order and with full notice, defense counsel may still be under-prepared due to the cumulative weight of operating in a system of absolute solicitorial discretion or due to the bad habits and coping mechanisms encouraged by such a system. Since the decision whether to go forward with a trial or plead guilty often turns on close calculations of potential rewards and punishments, a system that allows prosecutors to undercut a defense lawyer's preparedness or a defendant's trust in her counsel even incrementally has the potential to shift a substantial percentage of cases from trials to pleas.

For nonincarcerated defendants, solicitors must be more patient if they wish to utilize their docket control power to extract pleas. In many situations, however, the power can eventually be used with a vengeance. For example, a solicitor whose case appears weak has little incentive to dismiss an indictment if he believes there is some chance that the defendant might be arrested again. In such a case, a normally prudent solicitor might simply sit on the matter, hoping that a rearrested defendant might be convinced to dispose of the older (and weaker) case along with the newer charges or that the defendant's rearrest might simply lessen his willingness or that of his attorney to bring the case to trial. Similarly, a solicitor might hold on to the case with the hope—born from experience—that the defendant might fail to show up in court for a scheduled hearing or might otherwise violate his bond, thereby allowing for the issuance of a bench warrant.<sup>120</sup> Once such a warrant issues, the solicitor has not only the normal strategic advantages attendant to an incarcerated defendant but also a unique opportunity to leverage a not-yet-served bench warrant into a quick and dirty guilty plea. Indeed, the fear that a bench-warranted defendant might be dropped to the back of the line and forced to await the attention of an angered solicitor and an unsympathetic judicial system might itself be sufficient reason for a defendant charged with a relatively minor crime to

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118. While prosecutors more often use control of the docket to encourage pleas, they also at times use docket control to prevent clients from pleading guilty. See, e.g., Motion to Allow Defendant to Plead Guilty in Front of Plea Judge as Designated by Solicitor, *State v. Shumpert*, Nos. 2004-GS-10-8579, 2004-GS-10-4335-4336 (draft of June 16, 2005) (on file with author) (challenging prosecutor's refusal to allow defendant to plead guilty as charged to indictment, where refusal allegedly motivated by relative leniency of judges designated by solicitor to accept pleas for the weeks at issue).

119. See *supra* text accompanying notes 106-108.

120. For a discussion of the power to schedule court appearances as an important potential tool of prosecutorial manipulation, see *infra* Part III.D.

enter an initial guilty plea rather than attempt to navigate a trap-filled and structurally unbalanced criminal justice system.

## 2. Opportunities to Mitigate the Ills and Their Effects on Wrongful Convictions

Though they attract less attention and less sympathy than wrongful convictions entered after full trials, wrongful convictions are often arrived at through guilty pleas as well.<sup>121</sup> For many reasons, defendants who are innocent of the conduct for which they are charged may nonetheless find it rational to plead guilty rather than await a jury trial or may plead guilty out of frustration and anxiety. Prosecutorial docket control increases nearly every risk factor for such “false” guilty pleas: increasing the time many defendants must wait for a resolution of their cases, obscuring full knowledge of the cases’ time horizon, reducing defense counsel’s pre-trial preparation, eroding trust between defendants and their counsel, and increasing the incentives for defense counsel not to antagonize prosecutors.<sup>122</sup> For reasons similar to those sketched above, those who define wrongful convictions more broadly to include all cases where defendants are convicted in violation of their constitutional rights or in contravention of norms of fairness and decorum are also likely to be alarmed by guilty pleas entered as the result of (or out of fear of) prosecutorial manipulation of the criminal docket.

The few checks that exist on prosecutors’ ability to manipulate the criminal docket in cases that go to trial are largely absent in the context of cases that plead guilty. In guilty plea cases under a system of prosecutorial control, judges normally become involved in the matter only after the defendant has decided to enter a plea. The scrutiny provided by the judge in that circumstance is legendarily perfunctory.<sup>123</sup> Moreover, the adversarial system is ill-equipped to bring to light inequities and rights violations whose very effect is to cause defendants to acquiesce to prosecutorial preferences.

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121. For some of the many academic articles that discuss the reasons why those who are innocent plead guilty in substantial numbers, see, e.g., F. Andrew Hessick, III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189 (2002); Daina Bortek, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429, 1439-42 (2004).

122. See *Preventing Wrongful Convictions*, *supra* note 110 (reporting complaints of pre-trial detainees that prosecutorial docket control forces individuals, including innocent arrestees, to plead guilty even when they don’t want to).

123. When a defendant chooses to plead guilty, the judge is required to apprise the defendant on the record of the most important rights that he or she is waiving and to determine whether the plea is given voluntarily. See, e.g., *Boykin v. Alabama*, 395 U.S. 238 (1969). Beyond those tasks—usually performed in rote language and without deep probing—the judge has little power to or interest in probing into the defendant’s reasons for pleading or the wisdom of that decision. For one particularly heated attack on this area of jurisprudence, see Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroad of Criminal Defendants*, 75 U. COLO. L. REV. 863 (2004).

The cultural factors that impose some restraints on prosecutorial manipulation of the trial calendar cut in the other direction in plea cases. As scholars have long understood,<sup>124</sup> the personal and professional interests of defense counsel and judges are in the vast majority of cases better served by a guilty plea than by a jury trial. A prosecutor who manipulates a recalcitrant defendant into testifying by declining to call his case or by orchestrating and then offering to ignore a bench warrant is likely to encounter the gratitude of a bench that has no interest in trying the case and the approval (albeit perhaps grudging) of an over-burdened defense lawyer.

When defendants or defense lawyers object to the use of docketing regimes to enable guilty pleas, their substantive legal claims are likely to be insubstantial. For example, while there is something distressing about a prosecutor purposefully delaying the progress of a case with the hope that a defendant will fail to fulfill the terms of his bond, once the defendant has missed a court appearance or been charged with another offense there is little defense counsel can say or do to challenge pretrial detention. Indeed, a defense lawyer who raises an accusation of prosecutorial manipulation in such circumstances will most likely come across as churlish and bring judicial animosity down on her own head and that of her client.

### C. The Absence of a Pretrial Judge: Warping Administrative Justice, Limiting Adjudicative Justice

#### 1. The Potential Ills

In addition to the fairly direct ways in which solicitorial docket control may impact upon the fairness and efficacy of the criminal justice system, such a system has indirect consequences that further threaten to warp criminal justice. High on the list of these second-order consequences is the damage done by the absence of an assigned judge during most of the pretrial process.

Judges serve many functions in the modern criminal justice system. Though a full discussion of the role of the criminal trial judge in the early Twenty-first Century is beyond the scope of this article,<sup>125</sup> it is worth emphasizing two distinct aspects of the judicial role. First, criminal trial judges continue to serve an important adjudicative function, ruling on legal motions, deciding evidentiary issues, instructing juries, and imposing sentences. Second, in most systems, such judges have taken on important

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124. See, e.g., Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part 1*, 76 COLUM. L. REV. 1059 (1976).

125. This is not to say that such a discussion is not needed. In comparison with the substantial work done on the evolving role of the civil court judge over the last quarter-century, there is a paucity of systemic work cataloging and evaluating the various roles performed by contemporary criminal court judges. For an interesting and important article with many tangential points of connection, see Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).

administrative functions—scheduling cases, overseeing their progress through the system, conferring with the parties at various stages of the pretrial process to determine whether settlement is possible, and brokering mutually satisfactory resolutions if one party or the other is irrationally recalcitrant or if communication has broken down.<sup>126</sup>

It goes without saying that systems of pure solicitorial docket control purposefully limit the administrative authority of judges. The judiciary does not have the power to set cases for trial or for pleas, and, in general, has little power to supervise the progress of cases through the system. Moreover, under such a system, a particular judge is not formally assigned to a case until the moment it is called to trial or for a guilty plea.<sup>127</sup> Hence, whatever limited supervisory powers the judiciary has over a case during the pretrial stage rests with a general administrative judge who lacks both familiarity with the case and a personal incentive in resolving the matter expeditiously.

The absence of significant judicial oversight in the pretrial stage has substantial consequences for the day-to-day management of cases. Prosecutors (and defense counsel) have no one with ultimate responsibility for the case looking over their shoulders to make sure that they are taking the necessary steps to assure that the case reaches an orderly and expeditious resolution. When plea negotiations bog down or one side is holding out for an unreasonable offer in light of the facts and the circumstances of the case, no neutral arbiter is available to mediate the parties' dispute or talk sense into the recalcitrant party. When the parties fundamentally disagree about the severity of the case or about overarching legal issues that affect its disposition, little or no judicial guidance is available. Given the importance of plea bargaining to modern criminal justice,<sup>128</sup> defendants are particularly disadvantaged by the absence of a supervisory judge. Criminal defendants are in essence required to participate in an administrative criminal justice system operated by their party-opponent rather than by a managerial judge.

Though these effects are real and important, the loss of a managerial judge is ultimately not as consequential for the progress of

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126. *Cf. id.* (discussing the increasingly administrative nature of the criminal justice system, albeit with a focus more on prosecutors than judges).

127. In some South Carolina locales, a trial judge is informally designated a few days or even weeks before trial. See interviews with anonymous local defense counsel, March 2004–April 2005 (on file with author). If such a judge chooses to exercise his or her authority, he or she may consider pretrial motions or attempt to exert influence over the parties' plea negotiations in the intervening time. Of course, the prosecutor need not call the case in front of that judge if he becomes sufficiently frustrated with the judge's behavior or rulings during the intervening period. This is also as good a place as any to mention that most of the inequities discussed in this Part are absent in South Carolina's capital cases, where prosecutors indicate their desired trial dates months in advance and judges are then appointed to take control of the case, including scheduling and pretrial motions.

128. See, e.g., Alschuler, *The Defense Attorney's Role in Plea Bargaining*, *supra* note 124, at 1206 (reporting 1975 New York City study indicating that 96 percent of criminal convictions occur as a result of a guilty plea); Cook, *supra* note 123, at 866 & n.17 (reporting that national federal guilty plea rate is approximately 95 percent and that in some jurisdictions it exceeds 99 percent).

criminal cases as the lack of access to an adjudicative judge until the morning of trial. Criminal defendants who possess powerful legal arguments that, for example, the central evidence in their case is inadmissible or that, even on the prosecutor's theory of the case, they are not guilty of the charged offense as a matter of law have no opportunity to raise these issues for prompt pretrial resolution. Nor do they even have the ability to gauge the judicial winds on these questions more informally. Instead, to obtain judicial guidance as to the merits of their legal arguments, they are forced to invoke repeatedly their intention to take the case to trial, to lose the benefit of any plea offer or other informal consideration that comes with a plea, to provoke the ire of the prosecutor (and perhaps of an administrative judge), and to wait an indeterminate amount of time before the solicitor calls the case for trial. Many—perhaps most—defendants with credible legal issues that might preclude either prosecution or conviction find it prudent to plead guilty and avoid this gauntlet without ever receiving an adjudication of the merits of their legal claims.

Those that choose to push forward to the day of trial to obtain judicial resolution often encounter a judge who is both expecting a trial and unfamiliar with the case. These factors make it both more likely that a defendant will lose such a motion and more likely that he will be taken to task or punished if he chooses to plead guilty after losing the motion. While efficiency arguments arguably predispose judges to grant motions to exclude evidence or dismiss charges that are made in advance of trial preparation, such concerns oftentimes cut the other way if the motion is not argued until the parties are fully prepared for trial. Once the full cast of characters are gathered and a trial is called, efforts to obtain dismissal or quash important evidence often appear stale or contrived, even though resolution of such motions at an earlier date was likely impossible. If the defendant does lose the motion and decides to plead guilty, it is difficult for the judge not to take into consideration in sentencing the expense and inconvenience of bringing the case to the edge of trial, despite the fact that the defendant played no part in structuring the system so as to delay the resolution of the crucial pretrial motion until those expenses and inconveniences have been incurred.

At least in some locales in South Carolina, one of the consequences of scheduling pretrial motions for the morning of trial is the creation of an ad hoc legal culture that conceptualizes substantive legal motions as part and parcel of oral trial practice and disdains or disallows written motion practice. In a world where "pretrial" is a phase of a criminal trial occurring between jury selection and opening statements, it is little wonder that even substantial legal issues (such as the legality of a search, the sufficiency of an indictment, or the resolution of double jeopardy concerns) are often resolved through off-the-cuff argumentation akin to that which might accompany an evidentiary objection. Even if a defense attorney has sufficient warning of the arrival of a trial date to brief a particularly important legal issue, the trial judge will have little or no familiarity with



the facts and a minute timeframe in which to assimilate the relevant issues, absorb the legal argument, call for a response from the other side, and review the relevant authorities. Under such circumstances, professionalism often comes across as pedantry, thoroughness as grandiosity.

For several decades, astute observers of the contemporary American criminal justice system have observed that whether an accused rule-breaker receives a criminal sanction (and the severity of that sanction) is determined through a process in which rules of law—both substantive and procedural—play only a small and ever-decreasing role.<sup>129</sup> Prosecutorial docket control exacerbates that trend by limiting the sphere of adjudication to the day of the trial and by creating an environment on that day whereby thorough and reasoned legal argument is disrespected and discouraged. Perversely, however, the defendant whose access to adjudicative justice is foreclosed is pushed back not into a judge-driven system of administrative justice where the full weight of the system is brought to bear on both prosecutors and defense counsel in an attempt to achieve just and expeditious resolution of their cases but instead into a prosecutor-directed system of administrative justice where docket control is a potent prosecutorial weapon.

## 2. Opportunities to Mitigate the Ills and Their Effects on Wrongful Convictions

The absence of pretrial judicial oversight and the limited nature of motions practice in a system of pure prosecutorial docket control plays to some of the fears of those who are particularly concerned with the conviction of the innocent. For example, the inability to fully brief complicated legal arguments about the admissibility of evidence reduces the possibility that courts will fully understand and dispassionately consider motions to exclude the kinds of evidence that correlate with wrongful convictions, such as identifications or purported confessions obtained through suggestive or coercive procedures.<sup>130</sup> Indeed, to the extent that experienced lawyers determine that a regime of prosecutorial docket control like South Carolina's creates a criminal justice system that does not provide

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129. One classic in this vein, albeit one that makes the argument indirectly, is William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L. J. 1 (1997) (arguing, *inter alia*, that the presence of a substantial body of constitutional criminal procedural rules provokes institutional responses by legislators, police departments, and prosecutors that have more to do with resolution of particular criminal cases than the rules themselves). For a more recent piece that makes this claim more succinctly and more directly, see Douglas Husak, *Is the Criminal Law Important?*, 1 OHIO ST. J. CRIM. L. 261 (2003).

130. The literature on the causes of wrongful convictions is immense and growing by the day. Despite the volume of commentary, the analysis is strikingly consistent—bad lawyering, bad science, flawed interrogation procedures, police and prosecutorial misconduct, unreliable jail house testimony, and, especially, erroneous eyewitness testimony (often arrived at through flawed identification protocols) are the primary causes for the conviction of the innocent. For one study among many, see THE INNOCENCE PROJECT, CAUSES AND REMEDIES OF WRONGFUL CONVICTIONS, <http://www.innocenceproject.com/causes/index.php> (last visited Feb. 22, 2006).

a sufficient opportunity to challenge such evidence, they are forced to advise clients facing such evidence to consider entering guilty pleas, their claims of innocence notwithstanding. In turn, the failure of such clients to preserve their legal claims further impoverishes the State's already sparse legal literature, delaying the system's recognition of wrongful conviction warning signs that have already seeped their way into the legal consciousness of other states.

Those who conceptualize wrongful convictions more broadly—in particular those who connect “wrongful conviction” with the deprivation of a constitutional right—are likely to take special offense at a system that is designed so as to foreclose careful consideration of possible violations of the Fourth, Fifth, and Sixth Amendments' evidence-gathering limitations.<sup>131</sup> At least as a first order calculation, police and prosecutorial overreaching is likely to be encouraged by a system which ratchets up the cost of obtaining a judicial hearing on the constitutionality of the evidence-gathering in a given case.

The potential pitfalls associated with the absence of a pretrial judge are perhaps the most easily mediated of the dangers addressed in this Article. While a system of complete prosecutorial docket control like South Carolina's protects prosecutorial prerogative to delay the assignment of cases until the very last moment, it does not, on its face, prevent the judiciary from more actively overseeing the progress of cases during the months leading up to trial. In particular, Chief Administrative Judges (or their equivalent in other jurisdictions) can use their general supervisory powers to prod prosecutors to bring cases to trial, to mediate plea disputes, and to actively monitor compliance with discovery obligations.<sup>132</sup> With a bit more controversy, they may also be able to entertain pretrial motions to dismiss indictments as legally defective or substantively insufficient, to exclude evidence obtained in violation of the Constitution, or to authorize the introduction of controversial expert testimony. While those kinds of motions are normally left to the discretion of a trial judge, their resolution by an administrative judge might be necessary in situations where the orderly administration of justice requires earlier or fuller attention to the issue than can be provided by the trial judge.<sup>133</sup>

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131. *But see* Stuntz, *supra* note 129, at 44-45 (arguing that focus on constitutional criminal procedure might divert attention of criminal defense lawyers from innocence-related investigation and argumentation). If Stuntz is correct, it is at least theoretically possible that a system of prosecutorial control that devalues Fourth, Fifth, and Sixth Amendment motions might redirect energies in ways that reduce the number of innocent convictees.

132. This is especially true in jurisdictions where judges are empowered to hold administrative “appearances” or “settings” to manage the flow of cases. For a discussion of North Carolina's adoption of the administrative “setting” system as a statutory compromise, see *supra* note 65 and accompanying text. For the voluntary adoption of a similar “appearance” system in some South Carolina counties, see *supra* notes 94-96 and accompanying text.

133. Some examples might be when the motion is likely to succeed and dispose of the case, when the motion is likely to fail and by so doing facilitate a plea, when the motion is so complex that it requires substantial judicial scrutiny to evaluate, or when the motion is for the admissibility of expert

To the extent that judicial assertiveness is an answer to the problem of the absent pretrial judge, cultural and pragmatic factors potentially stand in the way. Administrative judges have an understandable desire to avoid stepping on the toes of their fellow trial judges. Further, confrontations with prosecutors are unpleasant and threaten to be counter-productive in a system designed to give the prosecutors so much control over court administration. Finally, the advantages gained by moving more quickly to resolve important motions is undercut by the efficiency cost of getting multiple judges up to speed on the facts of a particular case. Though none of these factors are insurmountable, taken together, they go a long way in explaining why a system where judges are not selected until the eve of trial might still reserve for the trial judge those decisions that rationally ought to have been made weeks or months beforehand.

D. The Excessive Noticing of Court Appearances: Surveillance, Harassment, and a Second Bite at Pretrial Incarceration

1. The Potential Ills

In virtually every criminal court system, defendants who are free on bond must agree to appear for all properly ordered court hearings and appearances during the pendency of their charges.<sup>134</sup> While this rule is reasonable on its face—particularly when administered with appropriate flexibility by a judge sensitive to the complexities of human existence—it presents substantial opportunities for manipulation and harassment in a system where prosecutors have complete control over the scheduling of defendants' court appearances. In a system of pure solicitorial docket control, a prosecutor can list a defendant's case for resolution repeatedly—thereby requiring his persistent presence in the courtroom—without any intention of actually calling the case.<sup>135</sup>

Such a tactic serves many prosecutorial goals. First, and most legitimately, it assures the defendant's continuing presence in the jurisdiction and continued awareness that charges are pending. More troublingly, though, if a defendant is holding fast to a trial demand, it increases the personal and professional costs of waiting for trial, thereby shifting a percentage of cases into the plea column out of calculation or frustration.<sup>136</sup> In so doing, it also serves as a warning to lawyers and

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testimony and the expert is too busy or expensive to retain unless the issue is resolved substantially in advance of trial.

134. See, e.g., S.C. CODE ANN. § 38-53-70 (2004) ("If a defendant fails to appear at a court proceeding to which he has been summoned, the court must issue a bench warrant for the defendant.").

135. Depending on the particular administrative procedures of the jurisdiction, it is even possible that a solicitor might be able to send legally binding notice requiring a defendant to appear without listing his or her case for any formal court proceeding.

136. One reason such a tool is effective is that it can be utilized in a carefully calibrated manner. An individual might be called in and sent promptly home one week, called in and made to sit for the bulk of a day another, and then called in and not released for several days in a third week. The ability to

criminal defendants as to the potential costs of antagonizing prosecutors (through recalcitrance in plea negotiations, aggressive pretrial litigation, or some other such “sin”); like most good weapons it need only be rolled out on occasion to serve a deterrent function. Most disturbing, the repeated listing of extra cases for court appearances serves a docket management function, as a predictable percentage of defendants will miss any given court date, thereby forfeiting bond and/or provoking a bench warrant.<sup>137</sup>

The *reductio ad absurdum* of this tactic is the process of “roll-calling”: scheduling all bond defendants with pending charges to appear in court on a given day to announce their continued availability and, perhaps, to confer with prosecutors as to the disposition of their cases.<sup>138</sup> Even in the absence of a blanket roll-call, prosecutors have a strong incentive to use their scheduling power to bring into the courthouse in any given week a substantial percentage of defendants facing old charges. Since, in a system of pure prosecutorial control, there is no requirement that prosecutors proceed with any particular case on any given day, it is simply a no-lose proposition for prosecutors to fill the courthouse with bond clients. Requiring a defendant’s appearance has many potential positive outcomes for a prosecutor—the defendant may fail to show and be bench warranted, the defendant may agree to plead that day for convenience’s sake, the defendant may confer with his lawyer and become more realistic about the potential outcome of his case, and so on. On the other hand, there is little risk associated with this potential reward. Nor is there even a significant efficiency cost—if the prosecutor is too busy or tired to deal with the case, he can simply send the defendant home, without prejudice, to recall him the next week or even the next day. In a culture of prosecutorial docket control, the incentive structure is so stacked towards excessive noticing of bond

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ratchet up pressure is a defining characteristic of any system designed to break the human will.

137. Under South Carolina law, there remains a substantial unresolved issue as to the scope of judges’ authority to issue bench warrants when a defendant fails to appear. The relevant statute specifies that, “[i]f a defendant fails to appear at a court proceeding to which he has been summoned, the court must issue a bench warrant for the defendant.” S.C. CODE ANN. § 38-53-70 (2004). The statute is silent, however, as to what constitutes a “court proceeding.” If a defendant is summoned to court merely because the solicitor wants to ascertain his continued availability or because the solicitor wants the defendant to confer with his counsel in the hopes that a plea can be worked out, is the summons in contemplation of a “court proceeding”? Similarly, is it an act of bad faith that vitiates a bench warrant if the solicitor puts a case on a trial list with no intention of calling it, but then formally calls the case and seeks a bench warrant only after the defendant fails to appear?

138. Repeated massive roll calls are the stuff of legend in many South Carolina counties. The appearance system that has been rolled out in some South Carolina counties, *see supra* notes 95-96 and accompanying text, was motivated to some extent by a desire to limit court appearances to those necessary for the progress of the case. While I have elsewhere expressed skepticism about the appearance system, *see supra* text accompanying notes 99-100, it has, according to all reports, been very successful in reducing the frequency of mass roll calls and, in general, in limiting the number of court appearances defendants must make before their cases are resolved. (On the other hand, once a case goes beyond its track, prosecutors do reclaim the power to call defendants in on a whim and even to undertake full roll calls.) For evidence that, while they do not necessarily call them in, prosecutors continue to list hundred of clients for “trial” each week, even in counties which have adopted an appearance system, *see* “Trial Dockets,” *supra* note 104; *see also supra* note 114 (discussing related issues).

defendants that even the most fair-minded prosecutors are likely to succumb to the temptation.

## 2. Opportunities to Mitigate the Ills and Their Effects on Wrongful Convictions

The excessive noticing of defendants for court appearances in a system of prosecutorial docket control is one of many factors that might make it more likely that factually innocent defendants will plead guilty out of frustration or calculation.<sup>139</sup> Beyond that real but likely marginal effect,<sup>140</sup> this aspect of the system is much more likely to offend those who are worried about structural inequities and the dignity of criminal defendants than those whose focus is more directly on factual innocence. Put slightly differently, the harms implicit in the excessive noticing of defendants for court appearances are largely intrinsic rather than instrumental. The process wears down their resolve and depletes their free will, detracts from and demeans their attempts to live autonomous lives, form family ties, and engage in meaningful work, and forces them to live under the constant threat of substantial pretrial punishment even though a judge has already determined that they do not fall into the narrow category of individuals for whom bail may be denied. In a system where there are no limits on the ability of prosecutors to call a bond defendant into court, a criminal indictment itself sentences a defendant to live by the will of another. The dehumanization that is at the heart of modern criminal sanctions begins early.<sup>141</sup>

To the credit of legal authorities in South Carolina and the other jurisdictions where prosecutorial docket control had a long run or continues to retain a toe-hold, few judges or legislators are comfortable with a system

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139. See also *supra* Part II.B (discussing some of the other ways in which a system of prosecutorial docket control might manipulate defendants—even innocent defendants—into pleading guilty).

140. The effect is likely marginal because prosecutors, particularly prosecutors in a system of prosecutorial docket control, already have so many ways to push a defendant to plead guilty that a few unnecessary court appearances may well seem like only an additional drop in the bucket of frustration. Moreover, a factually innocent client is probably somewhat more likely to continue in her unwillingness to plead even in the face of such tactics than a guilty defendant. Finally, since this tactic is by definition reserved for defendants on bond and is most effective when the effect of the defendant's plea is to terminate the proceeding without a prison sentence (through a fine, a time served sentence, some sort of diversionary program, or most likely probation), even if it does result in the guilty plea convictions of some factually innocent defendants, those defendants are not likely to serve prison sentences as a result (and thus fall outside the heartland of the concerns of many in the Innocence community).

141. For a discussion of the nature of the contemporary criminal sanctions regime that focuses on the ways in which modern punishments purposefully dehumanize convicted criminals and then reconstruct them as objects for our moral disapprobation, see Deborah Ahrens, *Not in Front of the Children: Prohibition on Child Custody as Civil Branding*, 75 N.Y.U. L. REV. 737, 737-42 & nn. 1-18 (2000); see also, e.g., *PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY* 416 (Andrew von Hirsch & Andrew Ashworth eds., 1998) ("[T]he convicted offender is excluded from the moral universe of discourse, and is made to serve merely as the object of and conduit for public messages of denunciation.").

that gives prosecutors untrammelled authority to call defendants into court on a whim with little or no intention of making progress in their cases. Substantial thought has gone into developing strategies to mitigate these effects. The “appearance” or “setting” system that exists either voluntarily or by statute in large swaths of both North and South Carolina is, to a large degree, designed to deal with this issue (by mandating particular appearance dates tied to particular legal and administrative tasks and precluding intermediate dates).<sup>142</sup> Simpler reforms such as more careful judicial scrutiny of either initial notices to appear or subsequent bench warrant applications may also serve to separate out the wheat of legitimate court appearances from the chaff of prosecutorial over-reaching. Ultimately, the simple recognition that the practice of noticing defendants to appear in court for the purpose of harassing or punishing them exceeds the norms of professional decorum might itself be a sufficient spur to reform.

#### IV. The Failure to Challenge Solicitorial Docket Control in South Carolina: Some Lessons for Systemic Reform Litigation

As I demonstrated in Part II, South Carolina’s system of pure prosecutorial docket control is not only unique among the fifty states but is also at odds with well-established national policy norms. As I sketched out in Part III, such a system of pure prosecutorial docket control poses a multifaceted threat to the fair and efficient administration of justice and likely contributes to the forging of wrongful convictions. At first blush, those two factors—the isolation of South Carolina from National norms and the magnitude of the consequences chargeable to a single practice—suggest that prosecutorial control of the docket is ripe for a constitutional challenge. After all, if the history of systemic reform litigation tells us anything, it tells us that those two ingredients are a potent recipe for judicial intervention.<sup>143</sup>

Moreover, once one understands the nature and scope of the fairness concerns raised by prosecutorial docket control, several provisions of constitutional text seem to suggest a degree of solicitude for those arguments. For example, the Fourteenth Amendment’s prohibition on the taking of “liberty” without “due process” suggests a willingness to police

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142. See *supra* note 65 and accompanying text (discussing North Carolina’s new statutory scheme); *supra* notes 94-97 and accompanying text (discussing voluntary adoption of similar scheme in some South Carolina counties).

143. Cases where the Supreme Court has brought a few outlier states into accord with emerging national norms far outstrip cases where the Supreme Court is at the forefront in setting such norms. For a few high profile examples of the Supreme Court performing this “clean-up” function, see *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling earlier precedent and invalidating laws banning private same-sex sexual activity only after the number of states with such laws had declined to under ten); *Coker v. Georgia*, 433 U.S. 584 (1977) (invalidating only state statute that continued to allow death penalty for rape of an adult woman); *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating anti-miscegenation laws only after the 14 non-southern states with such laws repealed them, isolating the southern states on this issue).

criminal court adjudicative procedures for systematic biases.<sup>144</sup> Similarly, the Sixth Amendment's guarantee of a "speedy trial" suggests a willingness to scrutinize a state's mechanisms for resolving cases when those structures fail to resolve cases at a clip that comports with a common-sense understanding of "speedy."<sup>145</sup> Finally, the Sixth Amendment's guarantee of a "right to counsel" strongly implies that the courts are likely to be concerned with intentional state impediments to the proper function of a criminal defendant's relationship with his or her lawyer.<sup>146</sup>

Given that frame, it is tempting to assume that the failure of the state's criminal defense and civil rights bars to muster a concerted challenge to the docketing statute reflects a failure of will, imagination, or initiative among those lawyers. This temptation is buttressed by regional prejudices that leave many outsiders dubious about the abilities of locally-trained southern lawyers, and is further exacerbated by the largely accurate perception that South Carolina is a relatively resource-poor state that neither adequately funds its public defense system nor supports a substantial privately-funded law reform or impact litigation infrastructure.

Alternatively, it is equally tempting to let the lawyers off the hook and place the blame on the judges—both federal and state—who might adjudicate such a lawsuit. According to this theory, the criminal defense and public interest bars in South Carolina have been around the block enough times to understand that such an audacious challenge to such a traditional and ingrained element of the State's juridical culture is likely to meet with stone-faced rejection whatever its abstract merits. Rather than tilting at windmills in the State courts or the United States Court of Appeals for the Fourth Circuit, those lawyers have dedicated themselves to the zealous representation of their clients within the confines of the system or to other less controversial law reform goals.

While I see kernels of truth in each of these explanations,<sup>147</sup> both, in the end, are too simplistic. The South Carolina Bar is replete with lawyers who have earned national reputations for their criminal law savvy, and the State has, in just the last few years, been home to a number of nationally significant constitutional cases.<sup>148</sup> Further, while the courts of the State and region certainly look like a hostile forum for the litigation of a constitutional challenge to solicitorial control of the criminal docket, legal challenges to docket control procedures have won success in other

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144. U.S. CONST. amend. XIV, § 1.

145. U.S. CONST. amend. VI.

146. *Id.*

147. South Carolina does have a poverty of litigation resources in comparison with the great majority of other states and the specter of review by the famously conservative Fourth Circuit certainly diminishes the appeal of running to federal court with a novel constitutional claim.

148. See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (challenging the policy of drug-testing pregnant women at a public hospital and turning over results to local police); *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 2990 (2005) (challenging the town council's policy of beginning meetings with Christian prayer).

seemingly inhospitable states,<sup>149</sup> as have similar challenges to indigent defense funding systems.<sup>150</sup>

If the failure of South Carolina lawyers to launch a systemic reform campaign against the State's criminal docketing system cannot be traced either to the failings of the bar nor to the impenetrable conservatism of the local and regional bench, where might we look for explanation? Though I do not have any firm or final conclusions to offer on this matter, exploring the question has lead me to identify three factors that appear to stand in the way of successful litigation on this issue. First, the professional and moral responsibility criminal defense counsel owe to their clients undercuts their ability to perfect strong constitutional challenges to the State's docketing regime. Second, the most pernicious aspects of the docketing regime only achieve their negative consequences in combination with other troubling or idiosyncratic features of South Carolina law. Challenges to the docketing regime that do not fully explain these other features, therefore, run the risk of sounding artificially flat and of leaving in place, if they succeed, substantial portions of the structures that cause the relevant harms. Finally, for complicated historical and theoretical reasons, the serious inequities produced by prosecutorial control of the docket do not neatly map onto the relevant constitutional doctrine. Fitting these claims into the existing shape of constitutional law is an exercise in extrapolation and retailoring, rather than one of simple application.

These factors do not mean that a lawsuit challenging prosecutorial control of the docket in South Carolina could not succeed. To the contrary, anyone who wished to bring such a challenge would have substantial legal raw material with which to work and would benefit heavily from the semi-successful challenges brought in other jurisdictions. Moreover, experience suggests that, even if such a challenge did not succeed in the courtroom it would have the potential to bring public attention to the issue, build coalitions, and prod legislative change.<sup>151</sup>

What these factors do suggest, however, is that there have been—and continue to be—reasons to be cautious when laying the groundwork and shaping the legal claims for a possible constitutional challenge to South Carolina Code § 1-7-330.<sup>152</sup> More importantly, these speed bumps are not the result of nominal factors or idiosyncrasies of South Carolina law, but rather stem from common and very basic realities about the nature of legal

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149. See, e.g., *Simeon v. Hardin*, 451 S.E.2d 858, 868-70 (N.C. 1994); *State v. Simpson*, 551 So. 2d 1303 (La. 1989).

150. See, e.g., *State v. Quitman County*, 807 So. 2d 401 (Miss. 2001); *State v. Peart*, 621 So. 2d 780 (La. 1993); *State v. Lynch*, 796 P.2d 1150 (Okla. 1990).

151. For an important recent article that unpacks these possibilities with skill and attention to detail, see Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477 (2004).

152. S.C. CODE ANN. § 1-7-330 (2004) ("Preparation of the dockets for general sessions courts shall be exclusively vested in the circuit solicitor and the solicitor shall determine the order in which cases on the docket are called for trial. Provided, however, that no later than seven days prior to the beginning of each term of general sessions court, the solicitor in each circuit shall prepare and publish a docket setting forth the cases to be called for trial during the term.")



roles, legal rules, and legal doctrine. As such, they stand as lessons—albeit perhaps murky ones—for other law reformers contemplating challenges to similarly overbearing practices in other jurisdictions

#### A. The Roles and Responsibilities of Criminal Defense Counsel

For both doctrinal and persuasive reasons, the ideal challenge to solicitorial control of the criminal court docket would likely emerge from a case in which a criminal defendant suffered direct and substantial prejudice as the result of the solicitor's manipulation of the docket.<sup>153</sup> Though every lawyer who has thought about the issue seems to have a pet theory as to exactly what kind of prejudice is most likely to get a court's attention, popular candidates include defendants who are unable to ensure the attendance of alibi witnesses because they are given insufficient warning as to the trial date, defendants who are unable to procure the services of expert witnesses for similar reasons, and defendants whose counsel are wildly unprepared because the solicitor blatantly misled them as to the trial date or purposely strung several of their cases back-to-back in order to wear them down.

Though such cases likely do occur, they are few and far between, largely because of the zealousness and adaptive ability of the criminal defense bar. When prosecutors attempt to call cases that raise these basic kinds of fairness concerns, most criminal defense lawyers raise their voices in loud and persistent protest, requesting and then demanding continuances. While lawyers seeking to bring down the system of prosecutorial docket control face the temptation to move forward in cases where they have been blindsided and left without crucial witnesses in order to perfect an attractive vehicle for challenging the docketing system, their ethical responsibilities to their clients preclude them from acting on those instincts.<sup>154</sup> Similarly, when maneuvered into trying cases for which they are manifestly unprepared, responsible trial counsel seek continuances, plead ineffectiveness, and, if those tactics fail, move heaven and earth to prepare themselves to provide at least adequate representation to their clients.

The irony is manifest. Defense counsel practicing in localities with the most unscrupulous solicitors work themselves to the bone in order to provide representation that, while constitutionally adequate, is subpar. By going above and beyond what should reasonably be expected of them in a desperate quest to serve the interests of their clients, these lawyers undercut

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153. For a cursory discussion of some of the doctrinal considerations, see *infra* Part IV.C.

154. See, e.g., AMERICAN BAR ASSOCIATION, ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 5, Ethical Consideration 5-1 ("The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."); AMERICAN BAR ASSOCIATION, ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7 ("A lawyer should represent a client zealously within the bounds of the law.") (1980).

the foundation of a constitutional challenge to the docketing regime and reinforce the very system that is causing them to provide frustratingly mediocre representation in the first place. If the lawyer blinks, his client suffers. If not, he suffers personally and defenders of the system gain another data point.

In a perverse way, then, the continued vitality of a system of prosecutorial docket control relies on the prediction that defense lawyers will maintain fidelity to their clients and their professional roles. In a world where defense lawyers did not owe duties of loyalty and zealous representation to each individual client, some substantial number might put their law reform goals (or even their personal comfort) over the interests of particular clients and allow cases to move forward in the absence of witnesses or without any real time for preparation.<sup>155</sup> If a sufficient number of defense lawyers were to act in such a manner, the system might well come crumbling down, buried in a series of outrages and scandals that the courts (or the legislature or the general public) could not ignore. In the world that exists, however, most defense lawyers do the best they can for their clients in a system that is stacked against them . . . and in so doing toughen the task for those committed to unstacking the system.

#### B. Webs of Inequity

While the dangers outlined in Part III are traceable to South Carolina's peculiar system of prosecutorial docket control, they are also enabled by other quirks of South Carolina law and politics. To take an example touched on above,<sup>156</sup> the dangers implicit in a prosecutor's ability to hold off on calling trials where the evidence is weak is exacerbated by South Carolina's failure to adopt state speedy trial rights that are more specific or demanding than the anemic federal test. While both of these rules—prosecutorial control over when a difficult trial will be called and the lack of a potent speedy trial remedy—might independently wreck havoc, the two taken together cause harms that are exponentially worse than would be caused by either separately. Similarly, South Carolina's rule forbidding (with limited exceptions) judicial dismissal of cases before they are called for trial<sup>157</sup> deepens the harms inflicted by prosecutorial docket control and closes off a potentially vital safety valve.

The consequences of prosecutorial docket control are further

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155. The ethical duties of criminal defense lawyers during the preparation and course of institutional reform litigation is the subject of a minor literature. See, e.g., Charles J. Ogletree & Randy Hertz, *The Ethical Dilemma of Public Defenders in Impact Litigation*, 14 NYU REV. L. & SOC. CHANGE 23 (1986).

156. See *supra* note 116 and cases and statutes cited therein. To take a related example, South Carolina is one of the few states that does not impose statutes of limitations on most criminal prosecutions. See Alan L. Adlestein, *Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial*, 37 WM. & MARY L. REV. 199, 250 n.223 (1995) ("South Carolina and Wyoming do not have any such statutes.").

157. See *supra* note 3; *supra* notes 72-75 and accompanying text.

buttressed by some larger structural features of South Carolina government. To take the most prominent example, South Carolina elects all of its judges to fixed terms (6 years for Circuit Court and Court of Appeals Judges and 10 years for Supreme Court Justices) by the vote of a joint session of the two chambers of the State legislature.<sup>158</sup> The consequences of this method of selection are predictable. Judges tend to be former State legislators or, at the very least, individuals with strong personal connection to important legislators.<sup>159</sup> During their time on the bench, judges desiring reelection must strain to remain in the good graces of the State legislature and must further refrain from antagonizing other political powerbrokers. As a consequence, the bulk of judges in South Carolina are culturally indisposed to challenge the authority of solicitors, while those who might be willing to exert stronger oversight over prosecutors must often back down for pragmatic reasons.<sup>160</sup> Thus, the structuring of South Carolina's judicial selection process hamstring judges in exercising their supervisory power, the one check essential to limiting the potential for abuse implicit when one party directs the litigation process.<sup>161</sup>

The lack of a state speedy trial rule, the prohibition on judicial dismissals, and the State's mechanism for selecting judges are but examples that illustrate a broader phenomenon. The problems identifiable in South Carolina's criminal justice system are not the product of a single rule but of a seamless web of rules, procedures, traditions, and attitudes that together warp the administration of criminal justice in the State. No doubt, some of those factors weigh more heavily in the calculus than the others—if this article is to be believed, prosecutorial docket control is at the very top of the list—but the threads are not easy to disentangle. Reformers who target one particular aspect of the State's laws are likely to run into confused stares from those who, without a fuller picture, cannot fathom why a single rule is causing so much *agita* and spirited disagreement from those who diagnose the relative importance of the contributing factors differently. Moreover, if reform is achieved on the targeted issue, the other contributing factors will remain and, depending on their vitality, might restitch themselves into a similar web of inequity.<sup>162</sup>

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158. The best source on the rules for judicial selection in the various states is the American Judicature Society. For a good compendium of information on the judicial selection methods in the various states (including the South Carolina information cited in the text), see AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES, APPELLATE AND GENERAL JURISDICTION COURTS (2004), available at <http://www.ajs.org/js/JudicialSelectionCharts.pdf>. Virginia is the only other state in the country that selects the bulk of its judges via naked legislative balloting. See *id.* at 13.

159. Four of the five members of the South Carolina Supreme Court, five of the nine members of the State Court of Appeals, and at least 19 circuit court judges are former legislators. See biographies located at <http://www.judicial.state.sc.us/index.cfm> (last visited Feb. 22, 2006).

160. Solicitors are popularly elected and tend to have substantial political bases of their own or close alliances with powerful legislators or both.

161. See *supra* notes 111-12 and accompanying text (discussing central importance of judicial oversight in determining whether system of prosecutorial docket control substantially increases danger of wrongful convictions).

162. For example, there is reason to fear that if prosecutorial control of the docket were modified

### C. The Mechanisms of Doctrinal Development

At first blush, the inequities traceable to solicitorial docket control appear to be the kinds of slights that the rights-bearing provisions of the United States Constitution were designed to rectify.<sup>163</sup> Indeed, when first exposed to the stark reality of the South Carolina system, most sophisticated constitutional thinkers are wont to assume that existing constitutional doctrine cuts broadly enough to invalidate the offending rule.<sup>164</sup> When one carefully parses the relevant caselaw, however, it becomes clear that our collective doctrinal mind has not grappled with the problem of prosecutorial docket control to the point of resolution.

Those searching for constitutional ammunition to challenge prosecutorial docket control must choose among a number of candidates. Back in the 1950s, 1960s, and 1970s, to the extent that prosecutorial docket control was considered a constitutional problem, it was conceptualized as raising Speedy Trial Clause issues.<sup>165</sup> To some extent, the fit is natural, as the darkest nightmare for a defendant faced with solicitorial docket control is that he will be left to rot in jail while the prosecutor declines to call the case. Further, in the years before the Supreme Court offered a definitive doctrinal framework for evaluating Speedy Trial Clause claims that focused on a case by case assessment of the totality of the circumstances,<sup>166</sup> it was plausible to suggest that prosecutorial docket control might on its face implicate Speedy Trial Clause concerns.

In recent years, the little constitutional litigation over prosecutorial docket control that has taken place has focused on the Fourteenth Amendment's Due Process Clause.<sup>167</sup> Again, the claim has an instinctive appeal, as the Due Process Clause is the Constitution's primary guarantor of governmental fairness. Many of the specific complaints about prosecutorial docket control resonate with pockets of due process doctrine. For example,

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by legislation or judicial decree, judges who are comfortable with the current practices and who fear the consequences of treading too aggressively on their reelection prospects might continue to defer to solicitors on calendaring issues. Certainly, the lukewarm success of North Carolina's reformed system, *see supra* note 65 and accompanying text, and South Carolina's similar experiments, *see supra* notes 95-97 and accompanying text, suggest that merely giving a judge some modicum of additional power on paper will not in and of itself curtail solicitorial influence.

163. *See supra* note 111 and text accompanying notes 144-47 for enumeration of the plausible constitutional claims.

164. *See supra* note 9 and accompanying text (recounting conversations on this subject). The reaction of those with whom I discussed the issue at the 2005 Innocence Network conference almost exactly mimicked these discussions.

165. For evidence that docket control was once treated as a speedy trial issue, *see, e.g.,* AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICES, STANDARDS RELATING TO SPEEDY TRIAL, Standard 12-1.2 (1967) (draft adopted 1968) (discussing issue as part of broader analysis of speedy trial rules); Orfield, *supra* note 8, at 380-85 (discussing docketing regimes in section entitled "Right to a Speedy Trial").

166. *See Barker v. Wingo*, 407 U.S. 514 (1972) (laying out framework).

167. *See, e.g.,* *Simeon v. Hardin*, 451 S.E.2d 858 (N.C. 1994); *State v. Simpson*, 551 So.2d 1303 (La. 1989); *see also* discussion *supra* notes 55 and 102 (discussing caselaw on due process right to randomly assigned judge).

the manipulation of trial dates raises issues of proper notice and the power to select the trial judge raises concerns about judicial neutrality.<sup>168</sup>

Finally, the degree to which prosecutorial docket control systematically encourages under-preparation for trial and undercuts the attorney-client relationship suggests the possibility of a Sixth Amendment claim premised on the ineffective assistance of counsel (IAC).<sup>169</sup> If, as the result of State statutory law, defense counsel must navigate a series of purposeless roadblocks and intentional stratagems in order to provide basic legal services, the right to counsel is impaired in the most literal sense. As one anonymous local attorney put it, in response to a particularly blatant manipulation of the docketing scheme, "The right to counsel has to mean more than the right to have someone with a law degree standing next to you when you plead guilty."<sup>170</sup>

Despite the intuitive applicability of these constitutional provisions to the abuses of solicitorial docket control, none of the provisions is a perfect fit. As I suggested above, the courts have shaped the Federal Speedy Trial Clause into a remedial backstop, imposing outer limits on the authority of the state to delay the processing of particular cases after case-specific evaluations of the length of the delay, the state's reasons, the defendant's assertion of his rights, and the amount of prejudice if any.<sup>171</sup> That Clause has been granted little affirmative muscle; statutes and practices that have a tendency to delay the diligent prosecution of cases are not subject to *ex ante* challenge based on their aggregate effects but can only be attacked peripherally as part of a general *ex post* challenge to the delay in a particular criminal prosecution.<sup>172</sup> As a result, the Federal Speedy Trial Clause might provide case-specific relief to the occasional individual stonewalled for an abnormally long period of time without proper justification, but it is unlikely to serve any significant role in a frontal assault on prosecutorial docket control.

The jurisprudence that has developed in the arena of IAC claims is similarly premised on a contextualized after-the-fact assessment of a particular counsel's performance.<sup>173</sup> That focus presents substantial

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168. *Cf. Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542, (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'"); *Ward v. Village of Monroeville*, 409 U.S. 57, 60-62 (1972) (holding that Due Process Clause requires an initial trier of fact who has no vested interest in the outcome of the case).

169. The Sixth Amendment guarantees all criminal defendants "the Assistance of Counsel for his defense." U.S. CONST. amend. VI. The Supreme Court has consistently held that the right to "Assistance of Counsel" carries with it a corollary right to "effective assistance of counsel." See generally *Strickland v. Washington*, 466 U.S. 668 (1984) (laying out standard modern tests for constitutional claims based on ineffective assistance of counsel).

170. Interview with Anonymous South Carolina criminal defense attorney, in Columbia, S.C. (November 5, 2004) (on file with author).

171. See *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (introducing case-specific balancing test).

172. See *id.*

173. For one serious recent discussion of the ramifications of structuring IAC doctrine in this way, see Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective*

obstacles to those who might seek to mobilize IAC arguments in a constitutional challenge to prosecutorial docket control. First, if a successful IAC challenge is made in the context of a particular criminal appeal or post-conviction petition, that decision will have little or no impact on the general vitality of prosecutorial docket control even if the judge lays substantial blame on that institution for the deficiency of representation. Second, to the extent that defense lawyers perform their tasks adequately despite the obstacles in their path, the fact that governmental actors took affirmative steps to reduce the quality of representation is of little or no constitutional moment.<sup>174</sup> Finally, even in cases where prosecutorial manipulation of the docket provokes defense counsel performance that falls below the low bar set in *Strickland v. Washington*, defendants will still be unable to obtain relief absent a demonstration that their lawyers' performance caused sufficient prejudice to invalidate the verdict.<sup>175</sup>

Though due process doctrine allows for broad *ex ante* challenges to rules and procedures that promise systemic unfairness, due process challenges to solicitorial control pose their own set of "fit" problems. While the language of the Due Process Clause seems particularly appropriate for such a challenge, due process doctrine quickly muddies the waters. In particular, advocates attempting to structure a due process challenge face the familiar problem of having to take a broad-based fairness-oriented challenge to a governmental practice and shoehorn it into either a "substantive" or a "procedural" due process box.<sup>176</sup> One might

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*Assistance of Counsel*, 2004 UTAH L. REV. 1.

It should be noted that the text here slightly overstates the doctrine's rigidity. While ineffective assistance of counsel claims are normally brought as after-the-fact challenges in particular criminal cases under the rules articulated in *Strickland*, a handful of courts have recognized an alternative systemic, *ex ante* IAC claim. See, e.g., *State v. Peart*, 621 So.2d 790 (La. 1993) (applying prospective rule-based analysis to IAC claims in challenge to funding of state indigent defense services); *State v. Lynch*, 796 P.2d 1150 (Okla. 1990) (acting similarly). Since the wisdom of and prospects for such an alternative IAC claim are well-developed in the scholarly literature on systemic challenges to insufficient indigent defense funding, I simply refer you to that literature, the latest flowering of which includes Bibas, *supra*; Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004); Daryl K. Brown, Essay, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004); Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731 (2005).

174. For more on this dilemma, see *supra* Part IV.A.

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

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

176. The tracking of due process claims into "procedural" and "substantive" due process is too

easily frame the claim as an argument that procedural due process concerns require the use of court-driven trial scheduling procedures. Alternatively, and with more difficulty, one might frame the issue as a substantive due process right not to be subjected to the coercion, harassment, and undue influence of prosecutors. Leaving aside the question of which is a better doctrinal fit, both approaches present identical problems—each forces the litigant to artificially limit the substance of her fairness-driven arguments and to subject those arguments to evaluation under standards designed for different kinds of claims.<sup>177</sup> The heart of the due process challenge to prosecutorial docket control is neither the constitutional necessity of a particular procedural protection, nor the substantive freedom from prosecutorial coercion but the manifold unfairness of an entire system of judicial administration.<sup>178</sup> While such a systemic concern seems centrally connected to the Due Process Clause's text and tradition, it is marginalized by modern due process doctrine.

In addition to the claim-specific doctrinal difficulties sketched above, a constitutional challenge to prosecutorial docket control falls between legal chairs in a number of other ways. For example, this kind of systemic challenge to background structures of criminal adjudication does not fit neatly into either a standard criminal appeal or post conviction proceeding, or into a general civil injunctive action.<sup>179</sup> Similarly, the concerns raised in this article may well turn out to be neither sufficiently universal to permit a facial challenge to the relevant South Carolina statute nor sufficiently case-specific to be comfortably litigated in (or cured by) an as-applied challenge.<sup>180</sup>

The concerns presented in this sub-part do not mean that a

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familiar a phenomenon to need a citation. For one article that manages to explain the difference while simultaneously demonstrating that the line between substantive and procedural due process can be blurry and arbitrary, see Ronald J. Krotoszynski, Jr., *Taming the Tail that Wags the Dog: Ex Post and Ex Ante Constraints on Informal Adjudication*, 56 ADMIN. L. REV. 1057, 1063-66 (2004).

177. For example, the standard test for whether a procedural due process violation has occurred is the balancing test articulated in *Matthews v. Eldridge*, 424 U.S. 319 (1976). This test captures some of the concerns raised by prosecutorial docket control but ultimately leaves out of the balance most of the substantive objections to prosecutorial control (except for worries about the factual reliability of the proceedings). See *id.* at 332-335 (weighing heavily in the balancing test the effect, if any, of the proposed procedure on the likelihood of "an erroneous deprivation" of life, liberty, or property).

178. One almost needs to coin a new due process label to capture the sense of the claim. "Systemic" due process is reasonably accurate. "Structural" due process would be even better if it was not already reserved by Laurence Tribe. See, e.g., Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975) (coining the term "structural due process" and giving it a different meaning).

179. This concern maps the long debate in the indigent defense community as to whether challenges to funding levels are most effectively brought in the context of criminal cases or as stand-alone civil actions. The issue is complicated by a set of tricky abstention and standing issues. See, e.g., Margaret H. Lemos, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV. 1808, 1825-29 (2000) (discussing applicability of *Younger* abstention doctrine, see *Younger v. Harris*, 401 U.S. 37 (1971), to civil challenges to indigent defense funding).

180. Cf. *Simeon v. Hardin*, 451 S.E.2d 858 (N.C. 1994) (rejecting a facial challenge to North Carolina's former system of prosecutorial docket control but allowing an as-applied challenge to survive a motion to dismiss).

constitutional challenge to prosecutorial docket control is untenable, but only that such a challenge requires more creative reimagination of doctrine than one might have guessed on first blush. What jumps out of the doctrinal analysis more than anything is the observation—startling in its simplicity—that the failure of one generation of criminal law reformers to keep prosecutorial docket control on the national agenda has made it more difficult for the next generation of law reformers to find firm constitutional footing for a challenge to that practice. In the years since lawyers last took seriously the issue of docket control, the doctrine of each of the relevant constitutional provisions has continued to evolve, picking up a doctrinal superstructure that shapes our analysis of its meaning.<sup>181</sup> These evolving superstructures did not develop in a vacuum, but instead were forged out of concrete cases litigated to challenge particular practices. As such, they reflect the concerns of the impact litigation bar and the judiciary at a particular historical moment. Time marches on, perceptions of injustice and litigation priorities shift, but the remnants of the old cases live on in the doctrine—superstructures forged in one era become mediating doctrine, subtly shifting the substantive meaning of constitutional guarantees and making it more difficult for differently configured claims to grab the attention of the guardians of those guarantees.

## V. Conclusion

This Article was inspired by a unique and troubling feature of South Carolina law—prosecutors’ complete statutory authority to craft and maintain the calendar of criminal cases. From that inspiration, however, it has ranged far afield: rescuing the history of criminal docketing regimes from the dustbin of history, unpacking some of the potential adverse consequences for the administration of justice stemming from prosecutorial docket control, and analyzing some of the lessons to be learned from the absence of a concerted constitutional challenge to South Carolina’s docketing system. The unifying hope of each of these diverse parts has been that my unique perspective—standing amidst a criminal justice system dominated by an archaic pre-modern procedural device—provides glimmers of insight that might be useful for those outside the state who need to deal in more mundane ways with criminal docketing procedures or undue prosecutorial influence or systemic reform litigation.

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181. See, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984) (developing a doctrinal test for evaluating ineffective assistance of counsel claims); *Matthews v. Eldridge*, 424 U.S. 319 (1976) (developing a test for procedural due process claims); *Barker v. Wingo*, 407 U.S. 514 (1972) (developing a test for speedy trial claims).



