

HISTORY'S LESSON FOR THE RIGHT TO COUNSEL

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This article will identify the types of lawyer errors that demonstrate a fundamental failure to provide the expert assistance that lawyers have provided for 900 years. In that subcategory of cases, the Supreme Court's Sixth Amendment doctrine promising effective assistance of counsel does not deliver on its promise. Some defendants go to prison, or to their death, because the defense lawyer did not present the client's strongest case at trial. When a defense is not raised at trial, procedural rules almost always deem it defaulted and thus lost forever.

The question at the heart of this article is whether the Sixth Amendment right to counsel should require postconviction review of fundamental failures of lawyers at the trial stage. To date, the Supreme Court's doctrine has effectively placed almost all lawyer errors at trial off limits when convictions are reviewed, in part because of the Court's concerns with finality and comity. The presentation of new claims after conviction acts to undermine finality and to create inefficiencies. To permit state defendants to raise those claims in federal court for the first time also undermines respect for state courts. This article argues that these legitimate concerns should not, however, lead to a parsimonious reading of the Sixth Amendment right to the assistance of counsel. Fundamental errors, such as the lack of loyalty to the client or the failure to raise claims likely to produce an acquittal, should not be ignored because of procedural rules. Outside that subcategory of fundamental failures, lawyer error should be essentially ignored. Defendants have a right to an adequate level of expert assistance, but not to a perfect lawyer.

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The Supreme Court has failed indigent criminal defendants. The causes of the failure are pervasive and systemic. The effects are everywhere. Prosecutors have insufficient incentives to turn over exculpatory evidence and there is virtually no bar to the prosecution's use of false confessions and misleading eyewitness identification evidence. Most indigent defendants feel intense pressure to plead guilty irrespective of their guilt or innocence. But the Court's biggest failure, the one that most disappoints, is its failure to provide indigent defendants an effective right to counsel.

In 1963, Justice Black announced a judgment that reversed a 1942 case in which he had dissented.¹ Black wrote for a unanimous Court that the "right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."² The Court noted the "obvious truth" that "in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."³ The Court was moved to state this "noble ideal" by "reason and reflection."⁴

Today this noble ideal is manifested by lawyers who sleep through substantial parts of the trial;⁵ who do not interview the police officer who, according to the defendant, used a gun to coerce a confession;⁶ who present no mitigating evidence at the sentencing phase in a death penalty case, even though much evidence is available;⁷ who fail to raise the defendant's best argument on appeal;⁸ and who have a sexual relationship with the defendant's fiancé that provides a motive not to transmit a plea offer to the client.⁹ In all of these cases, and hundreds of others like them, courts held that the defendant received everything that the Sixth Amendment right to counsel guarantees.

It is not just the many glaring failures that condemn the Court's approach to the right to counsel. An exhaustive study of New York County in the mid-1980s revealed that private lawyers appointed to represent indigent defendants *did not interview their clients* in eighty-two percent of nonhomicide cases.¹⁰ Even in homicide cases, lawyers interviewed their clients only twenty-six percent of the time.¹¹ Moreover, in large cities,

1. *Betts v. Brady*, 316 U.S. 455 (1942), *overruled by Gideon v. Wainwright*, 372 U.S. 335 (1963).

2. *Gideon*, 372 U.S. at 344.

3. *Id.*

4. *Id.*

5. *Burdine v. Johnson*, 231 F.3d 950 (5th Cir. 2000), *vacated by* 262 F.3d 336 (5th Cir. 2001) (en banc).

6. *Mitchell v. Kemp*, 483 U.S. 1026 (1987) (Marshall, J., dissenting from denial of certiorari).

7. *Id.* See also *Romero v. Lynaugh*, 884 F.2d 871 (5th Cir. 1989).

8. *Smith v. Murray*, 477 U.S. 527 (1986).

9. *Barentine v. United States*, 728 F. Supp. 1241 (W.D.N.C. 1990).

10. Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 758 (1986-87).

11. *Id.* at 759.

“criminal courts are places of *mass* processing,” which “arraign defendants twenty-four hours a day, seven days a week.”¹² Lower courts “commonly docket over 100 or more cases a day, while superior courts often docket 60 felony indictments a day. Court business is conducted in a swirl of activity as judges seek to ‘move’ crowded calendars.”¹³ Imagine facing that “swirl of activity” with a lawyer that you meet for the first time in the hallway moments before your case is called.

Professors Michael McConville and Chester Mirsky have issued a stinging indictment of the public-financed system of providing counsel to the poor.¹⁴ They contend that the “system is designed to institutionalize cost-efficient lawyering arrangements that depend on routinized case processing and discourage individual lawyers assigned to the poor from providing them with adversarial advocacy.”¹⁵ For McConville and Mirsky, the “principal effects” of public financed criminal defense “have been to strengthen the private bar’s monopoly over fee-paying cases and to enable the state to discipline the poor through the implementation of the criminal sanction.”¹⁶

Though I would not go as far as McConville and Mirsky, truth lurks in their indictment of indigent defense as mass processing of cases of the poor. The state is, after all, paying the lawyers on both sides of the case to keep the system moving.¹⁷ What is the harm, one might ask? One harm is that indigent defendants are forced to accept plea bargains that overstate their actual culpability.¹⁸ A second harm is simply treating the poor differently, denying them the vigorous defense that the more affluent enjoy.¹⁹ Both of these harms are, however, difficult to measure.²⁰ As to overstated culpability who, other than Immanuel Kant, knows the “true” desert that a malefactor deserves? As to the equality argument, it is true enough, but proves too much. The public fisc simply cannot provide the millions of indigent defendants the same kind of defense that O.J. Simpson deployed.²¹ If the system is necessarily going to treat poor defendants differently, the only issue is where one draws the line. The contentiousness of line drawing here, as elsewhere, makes it difficult to obtain general agreement about how much harm is inflicted by the inequality.

12. Michael McConville & Chester L. Mirsky, *Understanding Defense of the Poor in State Courts*, 10 *STUD. IN L. POL. & SOC’Y* 217, 217 (1990).

13. *Id.*

14. *Id.* at 217–18.

15. *Id.* at 234.

16. *Id.*

17. *See generally id.* at 217.

18. *Id.* at 228–30.

19. *Id.* at 234–35.

20. *See id.* at 234, n.24.

21. In 1999, public defense offices in the 100 largest counties in the United States processed about 4.2 million cases. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *INDIGENT DEFENSE SERVICES IN LARGE COUNTIES* (2000).

There is a far graver harm, however, than contested points about desert and equal treatment. We now have incontrovertible evidence that when DNA evidence is available and tested, the police have arrested an innocent person one time in four.²² To be sure, the DNA evidence overstates the error rate in arrests overall. When the identity of the perpetrator is thought to be known, no DNA test will be performed. The chance of convicting the innocent in these cases is far lower. Yet given 14 million arrests each year,²³ even an error rate as low as two percent produces more than a quarter million of innocent defendants arrested *each year*. And many of these innocent people will be caught up in the “swirl of activity” in city courts, awaiting the arrival of a public defender who is struggling to handle hundreds of cases. When the lawyer who arrives on the scene is incompetent, indifferent, overwhelmed—or all three—the threatened harm is the conviction of an innocent.

How many times is an innocent defendant convicted? No one knows because we have no independent method for determining who is innocent other than the very small number of almost random successful DNA claims made after a conviction has become final. Professor Daniel Givelber has drawn on two studies to estimate an error rate of between 0.8 and four percent.²⁴ It is impossible to quantify the extent to which effective lawyering and careful appellate review will reduce the rate at which innocent defendants are convicted. But with a possible error rate of four percent, or 40,000 innocent people convicted of serious crimes each year,²⁵ the time has come to try something different in the provision and regulation of counsel.

Surely, one might say, the Court has done *something* to ensure adequate representation. Well, yes, but not much. The Court’s attempt to set standards in *Strickland v. Washington*²⁶ is almost universally viewed as

22. Peter Neufeld & Barry G. Scheck, *Commentary* to EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL, at xxviii (1996). A data base of over 10,000 cases was drawn from FBI labs during the period of 1988 to 1995. Another sample of about 10,000 cases was drawn from labs other than the FBI. The results were roughly the same in both samples. I focus on the FBI sample on the assumption that quality control is better in the FBI labs.

These FBI tests exonerated the suspect in twenty percent of the cases. In another twenty percent, the results were inconclusive. Removing the inconclusive results from the study, and assuming that police seek FBI testing only of prime suspects, this study tells us that in roughly one in four cases (twenty percent of the eighty percent conclusive results), the police had an innocent person identified as a prime suspect.

23. In 2001, the FBI recorded a total of 13.7 million arrests for nontraffic violations. See FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIMES IN THE UNITED STATES: 2001 UNIFORM CRIME REPORTS 233 (2001), available at http://www.fbi.gov/ucr/cius_01/01crime4.pdf.

24. Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1344 (1997).

25. State and federal courts convicted almost one million adults of felonies in 2000. See MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP’T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2000, at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc00.pdf>.

26. 466 U.S. 668 (1984).

a failure.²⁷ It amounts to little more than exhorting lower courts to examine the record, and then instructing them to presume competent representation.²⁸ Even if the representation was poor enough to rebut the presumption of competency, the Court also requires the defendant to show actual prejudice by the deficient representation.²⁹ Because the level of ineptness required to establish deficient representation is so profound, the prosecution likely will have filled the record with damning evidence, thus making it very difficult to show prejudice from a particular failure, or even a set of failures. It is a strange world indeed, as Donald Dripps has noted, when courts look for prejudice in the very record created by a lawyer who by *definition provided deficient assistance*.³⁰

Scholars have concluded that the *Strickland* approach is a cynical dead end, designed to affirm all but the most deeply flawed convictions.³¹ Yet no one has put *Strickland's* failures in a historical context. No one has asked how lawyers performed over the hundreds of years that preceded *Strickland*. To be sure, history will not produce a precise new rule for judging counsel. Legal representation today is far different from Blackstone's day. The trial process in the reign of Henry I, when we first find records of counsel being offered, is unrecognizable by today's standards.³² Among the "antiquated methods of trial" of this era were the ordeal of the hot iron, the ordeal of water, and trial by battle.³³ Even in 1116, however, counsel performed a task that lawyers still do today—advising the litigants how to "plead" their cases prior to the beginning of trial.³⁴ Attention to history will, therefore, permit us to distinguish the

27. See, e.g., Keith Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of Cronin's Call to Presume Prejudice from Representational Absence*, 76 TEMP. L. REV. 827 (2003); Donald A. Dripps, *Ineffective Litigation of Ineffective Assistance Claims: Some Uncomfortable Reflections on Massaro v. United States*, 42 BRANDEIS L.J. 793 (2004).

28. See 466 U.S. at 687–91.

29. See *id.* at 692.

30. See Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 264 (1997).

31. See, e.g., Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 115 (1986).

32. For example, Blackstone notes that the ordeal of hot iron required the litigant to take hot iron by his hand or to walk over nine red hot plowshares. 4 WILLIAM BLACKSTONE, COMMENTARIES *337. If the litigant escaped unhurt, he was judged to be telling the truth. Ordeal by water consisted of putting the arm up to the elbow in boiling water or being cast into a river or pond. *Id.* If the litigant was unhurt by the boiling water, or if he sank in the pond or river, he was judged to be telling the truth. Trial by battle, brought to England by the Normans, was a duel fought until one party vanquished the other. *Id.* at *340. God would "unquestionably give the victory to the innocent or injured party." *Id.* Other forms of "trial" included "oath-swearing" where the parties swore an oath that they were telling the truth and called upon "oath-helpers" to support their oath. Pollock and Maitland note the "punctilious regard for formalities" that oath-swearing required. 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 600–01 (2d ed. 1905). "If a wrong word is used, the oath 'bursts' and the adversary wins. In the twelfth century such elaborate forms of asseveration [solemn oath] had been devised that, rather than attempt them, men would take their chance at the hot iron." *Id.*

33. 4 BLACKSTONE, *supra* note 32, at *340.

34. See *infra* text accompanying note 152.

core functions of counsel from later, but perhaps less fundamental, functions that the *Strickland* approach treats as equally important.

Lawyers performed two kinds of tasks for clients in England from the twelfth century to the nineteenth century: they functioned as their clients' alter egos and also as specialized assistants when clients represented themselves in court, as they were often required to do.³⁵ In England, those roles have almost always been performed by different persons (even today England retains both solicitors and barristers). In this country, one person came to perform both roles almost from the earliest colonial days.³⁶ Viewing a single person as both the alter ego and specialized assistant has led, I will argue, to the impoverished *Strickland* standard.³⁷

Strickland, in effect, asks whether the representation has been so deficient and so detrimental to the client's case that the client should be relieved of the acts of his alter ego. But history tells us that, in England, the lawyer who advocated for the client was the assistant, *not* the alter ego.³⁸ Thus, an approach for measuring effective counsel that is truer to history would focus on specific failures in the providing of specialized assistance and not on whether the alter ego relationship failed the client. If one asks whether the client received the specialized assistance that lawyers routinely provide clients, then one need not examine the entire record to see whether the lawyer failed as alter ego. In this way, my approach is less intrusive into the lawyer-client relationship and would be less onerous for courts than *Strickland*. Fundamental errors in providing specialized assistance, on the other hand, should be presumed to be ineffective assistance of counsel.

I begin this paper by describing *Strickland*.³⁹ Here I will draw on the account in David Von Drehle's book for facts that do not appear in the court's opinion.⁴⁰ Part II analyzes the difference between the alter ego role of lawyers and that of a specialized assistant.⁴¹ Part III provides a brief history of counsel in English and early American law, concluding that pleaders or specialized assistants were the forerunners of today's criminal defense lawyers.⁴² In Part IV, I discuss how the role of pleader and alter ego merged in American law.⁴³ Part V shows how the Supreme Court's counsel doctrine in many ways already contemplates the distinction I draw between pleading a case and being the client's alter ego.⁴⁴ In Part VI, I show how this distinction can provide courts with a better doc-

35. See *infra* text accompanying notes 152, 198–202.

36. See *infra* text accompanying notes 214–17, 222.

37. See generally *infra* Part V.

38. See *infra* text accompanying notes 160–64.

39. See *infra* Part I.

40. DAVID VON DREHLE, *AMONG THE LOWEST OF THE DEAD* 134 (1995).

41. See *infra* Part II.

42. See *infra* Part III.

43. See *infra* Part IV.

44. See *infra* Part V.

trinal tool to measure whether counsel has been effective for purposes of the Sixth Amendment.⁴⁵

I. THE CASE FROM HELL

Imagine representing David Washington. Out of work, depressed, and worried about supporting his family, he was in a laundromat when a man who identified himself as a minister made a proposition: if Washington came to the minister's home, there might be money in it for him. What Washington did not know until later was that the minister's proposition was sexual in nature; it included "that Washington strip and straddle his face."⁴⁶

"I just stabbed him with a knife," Washington would later say. "I stabbed him about five times. The only thing going through my mind, I said, 'Here I am out here trying to get some money to feed my family, and here go a minister, supposed to be a minister in the church, running around doing stuff like that.'"⁴⁷ Von Drehle further explains how Washington changed:

In the span of a week, David Washington killed three times. He barged into the home of some old ladies in the neighborhood—he believed they ran a fencing operation, though newspapers reported only that the old women "ran frequent yard sales." Washington brandished a gun and began tying them up. . . . One of the women rose from her chair, and Washington started firing wildly. Blood everywhere, one woman dead. Next, Washington kidnapped a student from the University of Miami, robbed him of eighty dollars, and considered holding him for ransom. Instead—as the young man recited the Lord's Prayer—Washington stabbed him to death.⁴⁸

David Washington had no record of violent crimes and seemed remorseful when he was arrested.⁴⁹ He confessed to the one murder.⁵⁰ A lawyer was appointed to represent him and, naturally, advised him not to confess to the other two murders, but he did.⁵¹ He also chose to plead guilty.⁵² The lawyer advised him to ask for an advisory jury verdict in the

45. See *infra* Part VI.

46. VON DREHLE, *supra* note 40, at 134.

47. *Id.*

48. *Id.*

49. See *id.* at 134–35. While on death row, "he could often be heard weeping in his cell. True remorse is rare on the row—most of the men there have nothing but empty space where their conscience should be. But even hardened observers tended to agree that Washington's remorse was real and gut-wrenching." *Id.* at 134.

50. Strickland v. Washington, 466 U.S. 668, 672 (1984).

51. *Id.*

52. *Id.*

sentencing phase, but Washington refused.⁵³ He was willing to let the judge decide his fate.⁵⁴

Given Washington's confessions, the defense lawyer had few strategic cards to play. Indeed, counsel later testified that he felt "hopeless" about overcoming "the evidentiary effect of [Washington's] confessions to the gruesome crimes."⁵⁵ The *Strickland* Court even noted that it was "understandabl[e]" for counsel to feel "hopeless" about Washington's "prospects."⁵⁶ There was only one plausible defense to be made against the death penalty: Florida law considered as a mitigating factor in the penalty phase that the crimes were committed "under extreme mental or emotional disturbance."⁵⁷

Washington's family situation, lack of a record of violent crimes, and obvious depression provided a substantial basis for a claim of "extreme mental or emotional disturbance."⁵⁸ The type of investigation Washington's lawyer conducted should tell us whether he performed competently. The lawyer chose to investigate the claim of extreme mental or emotional disturbance, Washington's only hope of avoiding a capital sentence, by doing two things. He talked to Washington about his background, and he spoke via telephone to Washington's mother and wife, neither of whom he ever met with in person.⁵⁹ End of investigation.

Counsel did not request a psychiatric examination "since his conversations with his client gave no indication that [Washington] had psychological problems."⁶⁰ Counsel did not put on any witnesses at the sentencing hearing, not even Washington.⁶¹ A client tells his lawyer that he was under tremendous stress and, despite no previous record of violent crime, he commits more than a dozen major felonies in a ten-day period, including three brutal murders. Yet his lawyer did not seek the advice of a psychiatrist about whether Washington was under "extreme mental or emotional disturbance."

The U.S. Supreme Court held, eight to one, that Washington received the "assistance of counsel" that the Sixth Amendment guarantees.⁶² Indeed, the Court told us that the issue of counsel's performance was not even a close one: "The facts . . . *make clear* that the conduct of . . . counsel at and before . . . [the] sentencing proceeding cannot be

53. *Id.*

54. *Id.*

55. *Id.* at 673.

56. *Id.* at 699. The Court's sympathy for this shoddy lawyering sends an unfortunate message to the bench and bar.

57. *Id.* at 674.

58. *Id.* at 673-74, 676.

59. *Id.* at 672-73.

60. *Id.* at 673.

61. *Id.*

62. *See id.* at 700-01.

found unreasonable.”⁶³ Even if the lawyer’s performance had been held to be deficient, Washington would still have lost his case.

The Court in *Strickland* held that the Sixth Amendment right to assistance of counsel is violated only when the lawyer’s deficient performance prejudices the defendant’s case.⁶⁴ The prejudice inquiry is the same one the Court applies in measuring whether a new trial should be granted on the grounds of lost evidence—when, for example, a witness missing because he was deported by the government⁶⁵ or the failure of the government to turn over evidence to the defendant.⁶⁶ When the question is whether the loss of evidence requires a new trial, the Court has held that the answer depends on whether there is a reasonable probability that the result of the original proceeding would have been different if the witness had not been deported or the government had turned over the evidence.⁶⁷ In the right to counsel context, the question is the same—whether a new trial should be granted—and the answer is the same. A defendant gets a new trial only if there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”⁶⁸

As Justice Marshall points out in his dissent in *Strickland*, to require prejudice in the right to counsel context is essentially to say to a defendant that the right to a competent lawyer exists only when the state’s case is weak.⁶⁹ Why would *that* be the best understanding of the Sixth Amendment assistance of counsel? Do not even obviously guilty defendants have the same right to assistance of counsel as do less obviously guilty, or innocent, defendants? Marshall argued that to insist on prejudice is to confuse the procedural nature of the right to counsel with the substantive protections available when lost evidence is the issue.⁷⁰

The Court’s response to Marshall was to focus on the right to the assistance of counsel within the overall structure of the Sixth Amendment. After quoting the Sixth Amendment in its entirety, the Court observed, “Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment”⁷¹ This role, the Court reiterates, is “a role that is critical to the ability of the adversarial system to produce just results.”⁷²

63. *Id.* at 698 (emphasis added).

64. *Id.* at 687.

65. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867–72 (1982).

66. *United States v. Agurs*, 427 U.S. 97, 103–14 (1976).

67. *See Valenzuela-Bernal*, 458 U.S. at 867; *Agurs*, 427 U.S. at 112–14.

68. *Strickland*, 466 U.S. at 694.

69. *Id.* at 710.

70. *Id.*

71. *Id.* at 685.

72. *Id.*

The Court even relied on the just outcome goal to define when counsel's performance was deficient. When making that determination, "the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case."⁷³ In seeking to define standards for measuring when the lawyer has made the adversarial system work, the Court gets lost in a circularity: "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 by the Sixth Amendment."⁷⁴ Remarkably, the Court offers only the following as a way out of this circularity: "defendant must show that counsel's representation fell below an objective standard of reasonableness."⁷⁵ Undoubtedly sensing the inadequacy of this definition, the Court defensively instructs the reader, "[m]ore specific guidelines are not appropriate."⁷⁶

The Court not only eschewed specific guidelines, but also adopted a presumption that renders guidelines irrelevant.⁷⁷ Concerned about the "distorting effects of hindsight," the Court concluded, "[j]udicial scrutiny of counsel's performance must be highly deferential."⁷⁸ More to the point: "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"⁷⁹ The presumption is, in the Court's words, a strong one: "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."⁸⁰

When reading *Strickland*, one is tempted to ask: Why substitute a vague aspiration for the relatively specific language of the Constitution? Why talk about the right to a fair trial, or a just outcome, when the Constitution requires the assistance of counsel? Why resort to a presumption that lawyers have done their job effectively? The answer, of course, is that the Court lacked a better understanding of how to assess when counsel is effective. Donald Dripps responds: "*Strickland's* critics rightly claim that the current right-to-counsel doctrine is dysfunctional."⁸¹ Vivian Berger concludes that the "Court's visions of the right to counsel and the role of counsel are incoherent, or downright cynical."⁸²

73. *Id.* at 690.

74. *Id.* at 687.

75. *Id.* at 688.

76. *Id.*

77. *Id.*

78. *Id.* at 689.

79. *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

80. *Id.* at 690.

81. Dripps, *supra* note 30, at 242.

82. Berger, *supra* note 31, at 115.

Oddly, the focus on the fair trial goal means that both prongs of the *Strickland* test are really measuring the same thing. The prejudice component is explicitly based on finding “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”⁸³ But how is this really different from judging performance based on whether counsel made “the adversarial testing process work in the particular case”? If the two standards largely overlap, as I believe they do, the presumption of reasonable professional judgment can, in individual cases, make the prejudice inquiry meaningless. Because a defendant must meet both prongs of *Strickland*, some defendants whose lawyer cost them a probable acquittal will not be permitted a new trial because a reviewing court will find the overall representation not bad enough to rebut the presumption of reasonableness. The forfeited claims that would have produced an acquittal will never be heard by a court. *Strickland* thus sanctions, under the Sixth Amendment, a system in which lawyers literally cost their clients an acquittal. This cannot be the best reading of the Sixth Amendment.

An example, to which I shall return, is *Smith v. Murray*.⁸⁴ The lawyer made a novel *Miranda* claim at trial, lost on the claim, and did not raise it on appeal.⁸⁵ In a federal habeas proceeding, the claim once again emerged, and the Supreme Court granted certiorari to decide the issue.⁸⁶ Upon a closer examination of the case, however, the Court decided that it should not reach the merits of the claim because the defendant had procedurally defaulted the claim when his lawyer failed to raise it during the state appellate process.⁸⁷ The Court noted that an exception to procedural default would exist if counsel had been ineffective under the Sixth Amendment, but held that this lawyer’s overall representation was not unreasonable and, thus, did not constitute deficient performance.⁸⁸ Even though the evidence in question was highly prejudicial in sentencing, and its exclusion would likely have produced a result in the defendant’s favor, the lawyer performed well enough *overall* that the Court did not reach the prejudice inquiry. The Court affirmed Michael Smith’s death sentence on June 26, 1986.⁸⁹ On July 31, 1986, with no appellate court *ever* having resolved the merits of his novel *Miranda* claim, the state of Virginia executed Smith.⁹⁰

83. *Id.* at 687.

84. 477 U.S. 527 (1986).

85. *Id.* at 530–32.

86. *Id.* at 532–33.

87. *Id.* at 533–34.

88. *Id.* at 535–36.

89. *Id.* at 539.

90. *Sawyer v. Whitley*, 505 U.S. 333, 353 (1992) (Blackmun, J., concurring).

The Court's vision of the Sixth Amendment provided no relief for David Washington either. He was executed in the electric chair on July 13, 1984.⁹¹ According to author David Von Drehle:

He was ashamed and remorseful to the end; he had that small credit. As his twelve-year-old daughter sobbed through their final visit, he cupped her trembling chin in his hand and said: "I want you to look at me, and I want you to see where I am . . . and I want you to do better." Hours later, strapped into the electric chair, he said of the survivors of his victims: "I'm sorry for all the grief and heartache I have brought to them. If my death brings them any satisfaction, so be it."⁹²

History offers insight into why *Strickland* is unsatisfactory and how it might be improved. Understanding the Sixth Amendment to guarantee a just outcome misses the point of what the Framers were trying to achieve. The Framers wrote the Sixth Amendment to guarantee specific procedures thought to make conviction more difficult.⁹³ Indeed, in some ways, the Framers did *not* want a neutral fair trial and an accurate outcome. They wanted to make certain that the newly minted and powerful central government could not use the criminal process to destroy its enemies.⁹⁴ Thus, it is a historical error of the first magnitude to conclude that a defendant has received the assistance of counsel whenever the outcome of the trial is just. The Framers guaranteed the assistance of counsel to permit defendants to be a thorn in the side of the prosecution.⁹⁵ That function is of course completely unconnected to the question of guilt or innocence.

If one begins afresh with the language of the Sixth Amendment, and leavens that language with the history of the right to counsel, one travels quite a different road from the Court and reaches quite a different destination. The assistance of counsel language of the Sixth Amendment is plain enough, as the Court noted in *Faretta v. California*:

[The Sixth Amendment] speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered

91. DAVID J. KEETE, THE SENTENCING PROJECT, SENTENCING ADVOCACY AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL: THE PROSPECTS FOR SENTENCING ADVOCACY IN NONCAPITAL STATE COURT SENTENCING PROCEEDINGS 3 (2003).

92. VON DREHLE, *supra* note 40, at 524.

93. George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Criminal Procedure*, 100 MICH. L. REV. 145, 149 (2001).

94. *See id.*

95. *Id.* at 179–80.

wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master⁹⁶

Moreover, the *Faretta* Court implied that even when a defendant hires a lawyer, the defendant remains in some senses the “master”: “It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of *trial strategy* in many areas.”⁹⁷ Outside of trial strategy, therefore, *Faretta* implies that the lawyer is not *always* indistinguishable from the client, that while a lawyer often functions as the client’s alter ego, the lawyer does not *always* displace the client. This conceptual division between the lawyer and the client is critical to my attempt to reformulate the notion of effective assistance. Just as someone who hires an accountant is not automatically charged with every act the accountant does in the course of the employment, *Faretta* makes clear that a client is not automatically charged with the legal consequences of the lawyer’s acts. Finding the right line between the acts that “belong” to the client and those that do not is, of course, tricky business.

We can begin with one certainty: Lawyers from the twelfth and thirteenth centuries who provided “counsel” did not stand in for the client in the same way that an “attorney in fact” acted for the principal.⁹⁸ This distinction, which continues to this day in England, offers a new way to understand Sixth Amendment assistance of counsel.

II. LAWYERS AS ALTER EGOS AND PLEADERS

One aspect of the problem that history makes clear, and the Supreme Court obscures, is that lawyers have two different roles when representing clients. These roles almost always merge to some extent, and lawyers are usually not aware that they sometimes act in one role to the exclusion of the other. Lawyers provide specialized advice, as did the “pleaders” and serjeants for five hundred years in England,⁹⁹ but they also serve as the alter egos of their clients, as did attorneys during the era of serjeants and pleaders.¹⁰⁰ In the alter ego role, the lawyer speaks for the client in and out of court, potentially binding the client in a wide range of legal contexts. The lawyer who negotiates a settlement in a civil case binds the client, unless the client can prove that the lawyer acted outside the scope of authority as the legal agent of the client.¹⁰¹

Trial procedure entails an even more complete delegation of authority to the lawyer. All jurisdictions have some kind of rule of proce-

96. 422 U.S. 806, 820 (1975).

97. *Id.* (emphasis added).

98. *See infra* Part III.

99. *See infra* Part III.

100. *See infra* Part III.

101. 7 AM. JUR. 2D, *Attorneys at Law*, § 147 (1997).

dural default.¹⁰² If the lawyer does not object properly to the admission of evidence, or does not raise a particular defense, the lawyer has, in the typical case, defaulted the client's right later to question the evidence or to raise the defense.¹⁰³ Rules of procedural default of underlying substantive claims sometimes contain exceptions for "plain error," under the theory that the forfeiture of fundamental constitutional rights is just too harsh,¹⁰⁴ but the cases that fit the plain error rule are rare.¹⁰⁵ Another exception is constitutional in nature. If the overall representation of the criminal defendant failed to meet the *Strickland* standard, then the defendant can "start over" with his conviction vacated and a chance to raise whatever rights were forfeited by the first lawyer's deficient performance.¹⁰⁶ As we have seen, that standard is both vague and ruled by a strong presumption that the defendant received what the Sixth Amendment guarantees.

The Court extended the doctrine of procedural default to federal habeas cases from state courts in *Wainwright v. Sykes*.¹⁰⁷ The effect of *Sykes*, and an earlier case dealing with claims defaulted in federal court,¹⁰⁸ is that claims defaulted in lower courts are almost always defaulted in federal habeas review, as well.¹⁰⁹ The rule of procedural default does not mean, of course, that the claim is without merit. Rather, it means that the merits of the claim *will never be reached*. It is for this reason that the failure to raise, or preserve, claims favorable to the defendant's case is a fundamental failure of counsel. Even though almost all defaulted claims are the result of inept or corrupt lawyering, the Court has made clear that the mere existence of egregious lawyer error cannot be used to avoid procedural default.¹¹⁰

There is an irony in the Court's doctrine here that others have noticed.¹¹¹ As long as the lawyer does not fall below the very low *Strickland* floor, the more the lawyer errs in failing to raise claims, the less appellate review the defendant can have. Thus, the perverse outcome of the Court's ineffectiveness doctrine when paired with its procedural default doctrine is that, unless the lawyer is wholly incompetent, the clients who

102. 7 *id.* § 166.

103. 75 AM. JUR. 2D, *Trial*, § 412 (1991).

104. 4 AM. JUR. 2D, *Appellate Review*, §§ 767-775 (1995).

105. For an example, see *Smith v. Murray*, 477 U.S. 527 (1986), where the Court refused to hear a *Miranda* claim raised at trial but abandoned on appeal.

106. See *Coleman v. Thompson*, 501 U.S. 722 (1991); *Smith v. Murray*, 477 U.S. 527 (1986); *Murray v. Carrier*, 477 U.S. 478 (1986).

107. 433 U.S. 72 (1977).

108. *Davis v. United States*, 411 U.S. 233 (1973).

109. See *Sykes*, 433 U.S. at 86-89; *Davis*, 411 U.S. at 238-39.

110. See *Sykes*, 433 U.S. at 86-88.

111. See, e.g., Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 691, 691-92 (1990).

have the worst lawyers receive the least review of their errors.¹¹² Why would this be the best approach to reviewing convictions?

Oddly enough, *Strickland* also suffers from being too intrusive into the finality of criminal convictions. Despite its strong presumption of substantive deference to the decisions of lawyers, it permits procedural inquiry into *every argument* that counsel was ineffective, which has so far led to tens of thousands of appellate claims.¹¹³ All the substantive deference in the world does not obviate the necessity of reaching the merits, at least summarily, of each of these tens of thousands of arguments. Defendants who are represented on appeal by counsel at state expense, or who represent themselves, have little incentive to refrain from raising claims of ineffective assistance of counsel in prior proceedings even if the chances of prevailing are extremely low. Moreover, the nature of the claim is such that it is theoretically infinite in duration. On first appeal, the claim is that trial counsel was ineffective. On the appeal to a higher court (by certiorari or other mechanism), the claim could be that the trial counsel and counsel at first appeal were ineffective; the appellate counsel could be charged with ineffectiveness in part for not fully recognizing the ineffectiveness of trial counsel. In the first habeas proceeding, the claim could be that trial and both appellate counsel were ineffective (the second appellate counsel ineffective, in part, for not fully recognizing the ineffectiveness of the trial and first appellate counsel). If the first habeas is denied, a second habeas can be brought claiming that all four lawyers were ineffective.¹¹⁴ And so on, to the ends of the earth.

As we will see in Part III,¹¹⁵ an ancient and rigid distinction once existed between “attorney” and “counsel,” between one who stood as the alter ego of the client, and one who provided specialized assistance. Those who assisted the defendant in court had several names over the centuries, but, in the early days, were most often known as “pleaders”: professional advocates who spoke the counts of the complaint for the litigant.¹¹⁶ For centuries, attorneys were forbidden to plead their clients’

112. *Id.* at 692 (concluding that “so long as counsel is not so bad as to fall below the *Strickland* standard, the poorest level of representation at trial receives the least scrutiny in postconviction review . . .”).

113. A Westlaw search for “Strickland” in December 2001, produced about 37,000 entries. The Center for Capital Litigators in Columbia, South Carolina has collected citations and summaries of all published, successful ineffective assistance of counsel claims since *Strickland*. As of December, 2001, the list contained roughly 1,200 state and federal cases. Thus, combining these data pools, we can roughly estimate that defendants win about 3% of the claims of ineffective assistance.

114. The Antiterrorism and Effective Death Penalty Act of 1996 imposed a one-year statute of limitations on the filing of habeas claims. See 28 U.S.C. § 2244 (d)(1) (2000). The issue in an ineffective assistance of counsel case is when the statute of limitations begins to run. One alternative time line begins on the “date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” § 2244 (d)(1)(D). Presumably, the existence of ineffective assistance in the earlier habeas is a “factual predicate” that would give the petitioner one year from that date to file the new habeas proceeding.

115. See *infra* notes 156–97 and accompanying text.

116. See *infra* notes 156–60 and accompanying text.

cases in court. Pleading was the exclusive province of the pleaders.¹¹⁷ Early case records from the thirteenth century show the parties appearing by attorney, with a pleader arguing the case.¹¹⁸ As Holdsworth puts it:

[T]he distinction between the attorney who represents a person for the purposes of litigation, and the pleader who speaks for a litigant in court, is fundamental in early law. . . . Thus the appointment by a litigant of an attorney, and the obtaining by the litigant of the assistance of a pleader, are two very different things; and so the class of attorneys and the class of pleaders naturally tended, from a very early period, to become quite distinct.¹¹⁹

That this distinction spanned centuries can be seen in an 1839 articulation of the distinction in an English case: “If you appear . . . by attorney, he represents you, but when you have the assistance of an advocate you are present, and he supports your cause by his learning, ingenuity and zeal.”¹²⁰ Holdsworth finds this distinction “clearly shown upon the records of the courts all through our English legal history.”¹²¹

Today, we in the United States still distinguish between the roles of “attorney” and “advocate,” though the two roles now overlap in American law to such a large degree that our linguistic usage has become sloppy. We typically use “counsel,” “attorney,” and “lawyer” interchangeably to encompass the function of providing specialized legal advice, as well as acting as the client’s alter ego. Only occasionally do we clearly distinguish these roles, as, for example, when we speak of an “attorney in fact,” a person who is expressly authorized to function as the alter ego of a principal.¹²² This relationship is typically accomplished by an explicit grant of a power of attorney, and the person who is the attorney in fact need not be (and often is not) a lawyer.¹²³

Despite our modern linguistic usage, the roles of specialist and alter ego need not necessarily merge when a lawyer represents a client. A lawyer might, for example, be hired to draft a document or provide advice about an action the client is contemplating. In that context, the lawyer is a specialist. The client will use the document to perform, or not perform, the act. Nothing the lawyer does in this situation can bind the client. Alternatively, a lawyer can be named an attorney in fact to act for the client. In that context the lawyer is only the client’s alter ego, and not a legal specialist.

The roles overlap when the lawyer is hired to resolve a legal dispute. The lawyer provides advice about the best course of action, here

117. 2 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 505–06 (3d ed. 1923).

118. 2 *id.* at 311 n.5.

119. 6 *id.* at 432.

120. 2 *id.* at 311 (quoting *The Serjeants’ Case* (internal citations omitted)).

121. *Id.*

122. BLACK’S LAW DICTIONARY 164 (4th ed. 1968).

123. *Id.*

acting as a specialist. The lawyer writes a letter offering to settle the case on certain terms, now acting as an alter ego. The lawyer prepares, signs, and files papers in court, here acting both as alter ego and legal specialist. The lawyer investigates the case, argues motions, subpoenas witnesses, picks a jury, makes opening statements, decides which witnesses to call and how to question them, introduces exhibits, cross-examines the prosecution witnesses, requests instructions, and makes closing arguments. In all of these contexts the lawyer is acting both as specialist and alter ego. It is not difficult to see why everyone, including the Supreme Court, has lost sight of the fact that these functions are very different.

To take examples from opposite ends of the spectrum, the client must plead to the charge¹²⁴—the lawyer cannot do this act for the client—but the lawyer has complete authority to decide how to question witnesses.¹²⁵ When pleading to the charge, the alter ego status completely disappears, and the lawyer is only a specialist who can advise the client. If the lawyer pled guilty for a client, the judge would reject the plea and insist that the client plead personally.¹²⁶ If the lawyer pled not guilty, then the client could disavow the plea by pleading personally.¹²⁷ On the other hand, the lawyer functions as the client's complete alter ego when questioning witnesses. If the client asked to question a witness, or sought to disavow the lawyer's question, the judge would not permit the client to do so. The client in this context has relinquished to the lawyer all rights to act.

The American Bar Association explains this division of responsibility as follows:

[The client] has the right to decide, for example, what plea to enter, whether to accept a plea agreement, whether to waive jury trial, whether to testify, and whether to take an appeal if convicted. In questions of means, the lawyer should assume responsibility for technical and legal, strategic and tactical issues, such as what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what motions to make, and what evidence to introduce.¹²⁸

Our civil and criminal justice systems depend on a core alter ego relationship, as our linguistic usage makes clear, by often referring to what counsel does as if the defendant had done it personally. Courts routinely state that “defendant argues before this court,” or “defendant moved to suppress evidence,” or “defendant made a *Brady* request.”¹²⁹ Except in the rare pro se case, defendants do not actually *do* any of those acts. Lawyers do them. The alter ego linguistic usage effaces the lawyer and

124. STANDARDS FOR CRIMINAL JUSTICE § 4.5.2, cmt. (1979).

125. *Id.*

126. *See* FED. R. CRIM. P. 11(a)(1).

127. *Id.* (granting to the defendant the right to plead guilty or nolo contendere).

128. STANDARDS FOR CRIMINAL JUSTICE § 4-3.1, cmt. (1993).

129. *See, e.g.,* United States v. Radcliff, 311 F.3d 1153, 1157 (10th Cir. 2003).

the lawyer's position in the process. Also effaced is the lawyer's responsibility for almost all errors made in criminal cases, leaving that responsibility at the doorstep of the client, as if the client had made the errors personally.¹³⁰

To a large extent, this is inevitable and salutary. If the lawyer were not generally the client's alter ego in court, then the efficiency of the proceedings would be seriously impaired, with no discernible gain in client autonomy. Consider the cases where defendants insist on their right of self-representation and a court appoints standby counsel to step in when needed. Justice White's dissent in *McKaskle v. Wiggins*,¹³¹ described what can happen if the defendant and his lawyer both insist on substantial participation in the conduct of the trial:

Standby counsel intervened in a substantial manner without Wiggins' permission well over 50 times during the course of the three-day trial; many of these interruptions precipitated direct conflict between Wiggins and counsel, often in the presence of the jury. Although the trial court appears to have resolved the conflicts calling for a ruling in Wiggins' favor, their mere existence disrupted the proceedings and turned the trial into an ordeal through which the jury was required to suffer. At several points during the trial, moreover, counsel blatantly interfered with Wiggins' attempt to present his defense . . .¹³²

This is not a good way to run a courtroom and makes plain why a robust alter ego status between client and lawyer is necessary when lawyers act for clients in the courtroom. To say that the alter ego status should be robust, however, is not to say that it should be complete. Courts, of course, recognize this. If a lawyer performs at a level below the *Strickland* standard, then courts will not attribute this conduct to the client, even when the lawyer is acting as alter ego.¹³³ Moreover, the Court recognizes the right of criminal clients to discharge their lawyer provided by the State and represent themselves.¹³⁴

Rather than argue about the level of inept assistance that should relieve the client of the alter ego status, I will argue that courts should seek to separate the role of specialist from that of alter ego. In the former category, the Sixth Amendment requires more of lawyers than *Strickland* requires. The failure of the lawyer as legal specialist can occur in many different contexts, but failure is most obvious (and probably most harmful) when it is the failure to make legal and factual claims on behalf of the criminal client. It is this category of lawyer failures, almost always leading to procedural default, that is the focus of my paper.

130. See RESTATEMENT (SECOND) OF AGENCY §§ 1(e), 397(c) (1958).

131. 465 U.S. 168 (1984).

132. *Id.* at 191 (White, J., dissenting).

133. See *Strickland v. Washington*, 466 U.S. 668, 687-98 (1984).

134. *Faretta v. California*, 422 U.S. 806, 819-20 (1975).

In sum, *Strickland* gives us the worst of both worlds: a substantive standard so flabby that it is virtually worthless, and the procedural opportunity to litigate endlessly (and lose endlessly) the substantive issue. What is to be done? One would like to structure an ex post inquiry into counsel's representation that achieves three goals simultaneously: (1) to insure that the defendant received a reasonable level of assistance of counsel; (2) to avoid undue interference with the finality of criminal convictions; and (3) to avoid unfairness to lawyers who have to make on the spot decisions without knowing how the process will play itself out. But is this possible?

Many have criticized *Strickland*, only to despair of finding a better standard.¹³⁵ Presumably, it was the lack of a better alternative that prompted Justice Brennan not only to join the Court's opinion in *Strickland* on that point, but also to wax somewhat enthusiastic about the *Strickland* standard.¹³⁶ Perhaps Brennan settled too easily for a vague and parsimonious standard. Perhaps history has a lesson for us. What kinds of assistance have lawyers provided in the past?

III. A BRIEF HISTORY OF LAWYERS AND DEFENDANTS

Some there be who know not how to state their causes or to defend them in court, and some who cannot, and therefore are pleaders necessary; so that what plaintiffs and others cannot or know not how to do by themselves they may do by their serjeants, proctors, or friends. Pleaders are serjeants wise in the law of the realm who serve the commonalty of the people, stating and defending for hire actions in court for those who have need of them.

—THE MIRROR OF JUSTICES (ca. 1285)¹³⁷

It is easy, perhaps inevitable, to approach problems by assuming that the world has always been more or less the way it is now. When we hear the words "right to the assistance of counsel," we naturally think of Perry Mason or Johnny Cochran—the lawyer who is in control of everything about the case, the lawyer whose own fate seems inextricably intertwined with the defendant, the lawyer who metaphorically *is* the defendant. Our image is of the lawyer who takes the case early, perhaps as early as the defendant's arrest, guides the case through the many pre-trial stages, carefully prepares for trial, and is at the accused's elbow from the first moment of jury selection to the verdict, and through the appeal if necessary.

This is not what "counsel" has meant for most of history. One can trace the right to counsel to Greek and Roman law.¹³⁸ Though many par-

135. See, e.g., Berger, *supra* note 31, at 112–16.

136. *Strickland*, 466 U.S. at 703 (Brennan, J., concurring).

137. THE MIRROR OF JUSTICES 47 (William Joseph Whittaker ed. 1895); see Frederic William Maitland, *Introduction to THE MIRROR OF JUSTICES*, at xlix (William Joseph Whittaker ed. 1895) (stating likely date of composition).

allels can probably be drawn between Roman law and modern law on what it means to have counsel, it suffices for my purposes to concentrate on the law of England. The distinction I draw from history is between a pleader, one who offers specialized legal assistance, and an attorney, one who is the client's alter ego. I will use the early term "pleader" to encompass all of the various labels that have been given advocates over time and will offer a "translation" as necessary for clarity. "Attorney" as the name of the legal actor who is the client's alter ego has remained remarkably constant for centuries—though "special" attorneys seemed to function as pleaders.

The laws of William the Conqueror are few and spare in details. No mention is made of pleaders, but we do see the alter ego concept in a primitive form: "if a Frenchman shall charge an Englishman with perjury or murder or theft or homicide or [robbery], the Englishman may defend himself, as he shall prefer, either by the ordeal of hot iron or by wager of battle. But if the Englishman be infirm, let him find another who will take his place."¹³⁹ One who takes a defendant's place in the ordeal¹⁴⁰ or wager of battle¹⁴¹ is a pure form of alter ego (and one that lawyers today should be thankful is no longer part of the job!).

That counsel as adviser appeared for the first time in the reign of Henry I is not all that surprising. After several chaotic decades that included the Norman invasion under William in 1066,¹⁴² England was ruled by a strong king who united the kingdom of England and the duchy of Normandy.¹⁴³ His father thought that he "would be destined for the church," and he was the "first Norman king (and there had not been many Saxon ones) who could read and write."¹⁴⁴

By 1106, in the midst of Henry I's reign, England and Normandy were once again unified under one leader—this time, a man who appreciated the role that law could play in keeping peace in his kingdom, as well as in raising revenue to sustain his court and his armies.¹⁴⁵

A scribe wrote down the laws of Henry I some time around 1118,¹⁴⁶ a remarkable document that we are fortunate to have. Of course, these "laws" were not positive law as we understand it today but, rather, a de-

138. See WILLIAM FORSYTH, *THE HISTORY OF LAWYERS, ANCIENT AND MODERN* 179 (1875).

139. *Laws of William*, c. 6. Frenchmen fared better if accused by the English. The Englishman had to prove his accusation by ordeal or wager of battle. If the Englishman was unwilling to do either, the Frenchman "shall acquit himself by a valid oath." There is no provision for the English to charge each other with crime. It appears the Norman courts left those matters to the English.

140. See *supra* notes 32–33 and accompanying text.

141. See *supra* notes 32–33 and accompanying text.

142. The Normans were descendants of Vikings who had settled in northern France and adopted the customs and language of the French aristocracy. See FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 66 (2d ed. 1903).

143. W.L. WARREN, *HENRY II* 8 (1973).

144. MIKE ASHLEY, *THE MAMMOTH BOOK OF BRITISH KINGS & QUEENS* 508 (1998).

145. See POLLOCK & MAITLAND, *supra* note 142, at 95–96.

146. LEGES HENRICI PRIMI 35–36 (L. J. Downer ed. & trans., 1972).

scription of how courts operated.¹⁴⁷ In effect, the scribe set down the existing common law. The practice of providing “counsel” to an accused was recognized, limited, and justified in these laws, particularly in laws 46, 47, 48, and 49.¹⁴⁸

The use of counsel was limited in rather complex ways, including one that seems odd to modern ears—in serious cases, “no one shall seek counsel,” but must answer the accusation at once.¹⁴⁹ The goal was likely to attempt to restrict “counsel” to those who are more likely to be innocent of serious crimes, on the theory that innocent defendants are more likely immediately to deny the accusation or, perhaps, that God could speak through the defendant, guilty or innocent, more clearly without “counsel” involved.¹⁵⁰ With serious crimes that are dangerous to society and the king off to one side, the basic early twelfth century rule about counsel can be seen in Law 46.¹⁵¹ After first describing some particular kinds of procedure, Law 46 provides:

46, 4. In other cases an accused person may seek counsel and obtain it from his friends and relatives (no law should forbid this), in particular the advice of those whom he brings with him or invites to attend his plea; and in taking counsel he shall faithfully state the truth of the matter so that circumstances may appear to the best advantage with respect to the plea or its peaceful settlement.

46, 5. It is a good rule that when anyone’s counsel is given in a plea it be made known that any assertion is subject to the right of correction, so that if by chance the advocate has added anything unnecessarily or left anything out, it may be amended.

46, 6. For it is often the case that a person sees less in his own cause than in someone else’s and it is generally possible to amend in another person’s mouth what may not be amended in his own.¹⁵²

The linguistic use of “counsel” in these early laws parallels the verb “to counsel.” The focus is on the act of advising or providing specialized assistance about the initial response to the accusation. As noted earlier,¹⁵³ the trial procedure of this era is unrecognizable as a trial to modern readers, and it is unclear whether counsel played any role in the ac-

147. See *id.* at 2–7.

148. *Id.* at 157–65.

149. *Id.* at 157–59. It lists several specific crimes, such as “theft, murder, betrayal of one’s lord, robbery . . . arson, counterfeiting” and then includes “the criminal or more serious causes.” *Id.* It is not clear to me the sense in which “criminal” is being used in this sentence, for the laws otherwise talk about “accusation” and the “accused person.” See, e.g., *id.* at 157.

150. Thanks to Barbara Spillman Schweiger for the idea in the last phrase. Although one needs to be cautious in asserting parallels to the vastly different modern procedure, I cannot help but wonder if the original controversy over the *Miranda* warnings might, to some extent, be based on the same notion—that an accused should not benefit from the specialized help of counsel unless he denies his guilt to the police during interrogation.

151. LEGES HENRICI PRIMI, *supra* note 146, at 155.

152. *Id.* at 157.

153. See *supra* note 32 and accompanying text.

tual trial.¹⁵⁴ The earliest function of counsel, then, was the one that was still predominant in the age of Lord Coke five centuries later—to plead the case in a technical or formal sense, rather than help the fact-finder resolve the case.

Though most early advocates were friends or relatives of the defendant, some professional advocates appeared in the later part of the twelfth century.¹⁵⁵ Professional or not, pleaders soon became popular. Holdsworth concluded that pleaders were employed during the reign of Edward I (1272–1307) “[p]robably in any important case.”¹⁵⁶ Part of the popularity of pleaders was due to the already technical nature of English pleading. Cases were often lost by a “verbal slip” in pleading.¹⁵⁷ In this context, Law 46.6 was critical: “[I]t is generally possible to amend in another person’s mouth what may not be amended in his own.”¹⁵⁸ That counts or pleas made by a pleader could be disavowed by the client was a huge pragmatic benefit of employing a pleader, as Holdsworth notes:

In those days one of the chief advantages of having a pleader to speak for one before the court lay in the fact that it was possible to disavow a mistake made by the pleader, and so avoid losing the action by a verbal slip. The man who employs a pleader has two chances of escaping error. The man who does not has only one chance. We see traces of this idea in the thirteenth century in the custom observed both in the king’s courts and in the local courts of asking a litigant whether he will abide by his pleader’s statement.¹⁵⁹

Baker reports finding “several examples in the Curia Regis rolls [from 1209] of counts being disavowed by plaintiffs, thereby revealing that they had been spoken by advocates.”¹⁶⁰

On the other hand, a litigant could not disavow a mistake made in court by his attorney because the attorney was the client’s alter ego, as can be seen in Glanvill, the earliest English treatise writer (1188).¹⁶¹ Glanvill noted that the principal must “abide by whatever was done in court by his attorney, whether it was a judgment or a concord [settlement].”¹⁶² But “there can be no doubt that a principal may remove his attorney and prosecute his own plea”¹⁶³ The distinction is clear be-

154. See *supra* note 32 and accompanying text.

155. J. H. BAKER, *THE ORDER OF SERJEANTS AT LAW* 9 (1984).

156. 2 HOLDSWORTH, *supra* note 117, at 313.

157. 2 *id.* at 312.

158. LEGES HENRICI PRIMI, *supra* note 46, at 6.

159. 2 HOLDSWORTH, *supra* note 117, at 312.

160. See generally BAKER, *supra* note 155.

161. THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL 135 (XI, 4) (G. D. G. Hall ed. & trans. photo. reprint 1983) (1965) [hereinafter GLANVILL].

162. *Id.*

163. *Id.* at 134.

tween the "idea that one man can stand in the place of another" and the "idea that one man can assist another in legal proceedings."¹⁶⁴

The greatest of the early treatise writers, Henrici of Bracton,¹⁶⁵ wrote his treatise some seventy years after Glanvill, between 1250 and 1258.¹⁶⁶ Bracton distinguished between the role of an attorney and that of the "responsalis," the latter being someone who provided counsel in the Henry I sense of advising or speaking in court for another. Bracton wrote:

There is thus a great difference between a responsalis and an attorney. He [the attorney] may, however speak against the assise, just as the principal lord himself may, that it remain, perpetually or for a time, . . . [and] against the jurors, the plaintiff and the judge, if he has no jurisdiction, and against the writ. And generally, he will have all the exceptions the principal lord would have.¹⁶⁷

We should be careful to avoid an anachronistic reading of Bracton. What the attorney is described as doing sounds very much like what lawyers do for criminal defendants today. But in Bracton's day, as in Glanvill's, the responsibility for making and defending a cause was on the party personally.¹⁶⁸ Thus, the significance of Bracton's description of what the attorney could do (e.g., "speak against the jurors") is that the attorney stood in the stead of the principal who would otherwise do these acts himself. The "respondent," on the other hand, is one who advised the principal or the attorney on how to plead or respond to the case and thus bore a closer resemblance to the modern lawyer than the attorney. The attorney in Bracton's day was more like the modern day attorney in fact; this is clear in the quote above: "has all the exceptions which a principal lord would have." Moreover, Glanvill made clear that the attorney could litigate the case as the client when the client was absent,¹⁶⁹ something that we would not permit a lawyer to do today.¹⁷⁰ That the attorney literally stood in for the client reinforces the notion that he was something other than a legal specialist providing advice.

Another thirteenth century treatise writer, Britton, also noted a distinction between the types of representation offered by pleaders and attorneys.¹⁷¹ Probably derivative of Bracton,¹⁷² Britton's treatise was pub-

164. 2 HOLDSWORTH, *supra* note 117, at 311–12.

165. See 1 POLLOCK & MAITLAND, *supra* note 32, at 206 ("Bracton's book is the crown and flower of English medieval jurisprudence.").

166. 2 HOLDSWORTH, *supra* note 117, at 207.

167. 3 HENRICI DE BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND 142 (Samuel E. Thorne trans., 1977).

168. 3 *id.* at 211.

169. See GLANVILL, *supra* note 161, at 133–35.

170. See generally Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1 (1998).

171. 2 BRITTON 610–14 (Francis Morgan Nichols trans., 1901).

172. 1 POLLOCK & MAITLAND, *supra* note 32, at 210.

lished some thirty or forty years after Bracton.¹⁷³ Written in French rather than Latin, Britton's work was popular and thus influential.¹⁷⁴ Britton draws an explicit distinction between "general attorneys" and "special attorneys."¹⁷⁵ Once the pleading was done, the work of the "special attorney"—the pleader—was at an end.

All general attorneys may levy fines and make chirographs, [an instrument of gift or conveyance] and final accords [agreements] in all pleas as fully as those whose attorneys they are. This cannot be done by special attorneys; for as soon as parties are at accord in any sort of plea, that proceeding is at an end; and if any question is to be made upon the accord, thereupon begins another sort of plea, and of another nature.¹⁷⁶

Baker concludes that by 1293, at the latest (roughly the date of Britton's treatise), "the countors [pleaders] and attorneys in the Bench, as in London, were distinct groups."¹⁷⁷ By the late fourteenth century, pleaders were likely to be professional lawyers—for three hundred years called "serjeants"—rather than friends or relatives.¹⁷⁸ Nonetheless, the procedural distinction between the pleader and the attorney continued.¹⁷⁹ Here is one description of how serjeants functioned in court:

Proceedings started with one serjeant making a count for the plaintiff, explaining his claim or complaint, and a second serjeant making a formal defence for the defendant. For the next stage in proceedings, the making of exceptions by the defendant and their rebuttal by the plaintiff, it was advantageous to have the assistance of as many serjeants as the litigant could afford or obtain and there seems to have been no limit on the numbers he could use. It was common for a litigant to have two serjeants speaking for him and not uncommon for him to have more. In one exceptional case of 1296 a plaintiff had as many as five. Occasionally the reports show serjeants who had not been engaged by either party also participating and speaking simply as *amici curie*.¹⁸⁰

The serjeant could speak "for the litigant but without any specific judicial authorization to do so."¹⁸¹ A litigant's appointment of an attorney, to be distinguished from a pleader, had to be strictly proved and often required a formal appointment in court.¹⁸² This is not surprising when one considers that the attorney could bind his principal by what he

173. 1 *id.*

174. 1 *id.*

175. See 2 BRITTON, *supra* note 171, at 610–14.

176. See 2 *id.* at 612–13.

177. BAKER, *supra* note 155, at 13.

178. 6 HOLDSWORTH, *supra* note 117, at 432.

179. 6 *id.*

180. PAUL BRAND, THE ORIGINS OF THE ENGLISH LEGAL PROFESSION 95–96 (1992).

181. *Id.* at 98.

182. 2 HOLDSWORTH, *supra* note 117, at 315–16.

did or said in court *even when the principal was not present*.¹⁸³ Though the litigant could discharge the attorney, the litigant could not disavow him as long as he functioned as alter ego.¹⁸⁴ The litigant and the litigant's alter ego, the attorney, could disavow the serjeant.¹⁸⁵ Brand refers to a 1292 case in which the client's attorney immediately disavowed a defense offered by the client's serjeant.¹⁸⁶

The work of attorneys in this era was typically less glamorous than the prior example might suggest. The attorney "actually took his client's place in litigation and conducted proceedings in his client's name. He took out process and kept the [court officials] properly informed so that all the necessary entries might be made upon the roll."¹⁸⁷ The largely ministerial role of the attorney as alter ego was in stark contrast to the skill required of pleaders. As Baker puts it: "The distinction between the pleader and the attorney represents the difference between the intellectual or scientific function and the mechanical or ministerial function."¹⁸⁸ Attorneys were hired "to follow and defend causes mechanically, continuing a suit by issuing the process and making the necessary entries."¹⁸⁹ The pleader, on the other hand, had as his task "that of argument at the bar, and as a natural consequence the judges came to be chosen from his class."¹⁹⁰

Either the defendant or his attorney would hire the serjeant or serjeants.¹⁹¹ Though the arrangement was usually in advance of the hearing, occasionally a serjeant was retained on the spot.¹⁹² Brand cites a 1306 case in which the judge advised the "plaintiff's serjeant to go away and seek assistance and [he] subsequently returned with two fellow-serjeants."¹⁹³ It was not just defendants who increasingly sought counsel during this period. The king insisted on an adequate number of serjeants in the king's courts from the thirteenth century onward, suggesting that serjeants were highly valued by the crown.¹⁹⁴ Presumably, having capable pleaders produced more accurate results with more dispatch.¹⁹⁵

183. See, e.g., GLANVILL, *supra* note 161, at 133–35.

184. *Id.* at 134.

185. BRAND, *supra* note 180, at 98.

186. *Id.* at 99.

187. J. H. BAKER, THE LEGAL PROFESSION AND THE COMMON LAW 126 (1986).

188. *Id.* at 100.

189. *Id.*

190. *Id.*

191. BRAND, *supra* note 180, at 104.

192. *Id.*

193. *Id.*

194. *Id.* at 103–04.

195. Perhaps surprisingly, there was an informal system of appointed counsel as early as the 1290s. The "justices in eyre were probably assigning serjeants to the service of poor clients and perhaps requiring them to provide gratuitous service. In a bill presented in the 1292 Shropshire eyre a complainant who claimed to be poor asked the justices to 'grant' him a serjeant, 'so that his right is not lost.'" *Id.* at 104.

In sum, as Baker concludes, “[t]here has been a divided legal profession in [England], as in the civil law system, ever since there has been a ‘profession.’ Indeed, the distinction between attorney and pleader is older than the profession itself”¹⁹⁶ Pollock and Maitland noted different “roots” of the English legal profession—“the attorney represents his client, appears in his client’s place, while the counter speaks on behalf of a litigant, who is present in court either in person or by attorney.”¹⁹⁷

The Blackstone era provides the best picture of what the Framers probably had in mind when they wrote the Sixth Amendment. By Blackstone’s day, the rule that no counsel was permitted in serious cases, first recorded during the reign of Henry I, now had an important exception: “no counsel shall be allowed a prisoner upon his trial, upon the general issue in any capital crime, *unless some point of law shall arise proper to be debated.*”¹⁹⁸ The exception for points of law “proper to be debated” is consistent with the role of a lawyer as a pleader, as an expert in the law, but not as an attorney who can bind his principal.

Moreover, Blackstone concluded that judges routinely ignored the no-counsel rule for issues that might be considered outside “points of law,” thus, in effect allowing “counsel to instruct [the prisoner] what questions to ask, or even to ask questions for him, with respect to matters of fact” as well as “to matters of law,” for which defendants “are *entitled* to the assistance of counsel.”¹⁹⁹ The picture that emerges is of an assistant. Counsel could tell the prisoner what questions to ask and could provide assistance on matters of law. When Blackstone notes that counsel could “*even . . . ask questions for [the accused],*” it suggests that the traditional role for the felony defendant as late as the mid-eighteenth century was to ask questions himself, with advice from counsel.²⁰⁰

The Framing-era picture in England, then, is of the prisoner presenting a defense, assisted by counsel on questions of law, and often on questions of fact, in varying degrees as permitted by the judge.²⁰¹ The attorney’s role during this period, on the other hand, was still to bind his principal.²⁰² We can see this in the work of Sir John Comyns, a serjeant from 1726 to 1743, who noted the long-standing common law that “every one commanded by the king’s writ to appear, ought to appear in person. But after appearance, the [courts] . . . might admit him by attorney.”²⁰³ This aspect of the common law was changing by the eighteenth century, and Comyns noted numerous exceptions to the rule that the party should

196. BAKER, *supra* note 155, at 99.

197. 1 POLLOCK & MAITLAND, *supra* note 32, at 216.

198. 4 BLACKSTONE, *supra* note 32, at *355 (citing 2 HAWKINS 400) (emphasis added).

199. 4 *id.* at *355–56.

200. 4 *id.* at *355 (emphasis added).

201. See *supra* notes 198–200 and accompanying text.

202. 4 BLACKSTONE, *supra* note 32, at *356.

203. 1 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 602–03 (London, A. Straham 1800 edition).

appear personally if summoned by the king's writ. For example, "persons out of the realm" could use "general attornies" to "appear and answer for their master, and make attornies under them in *praemunire* [defense of the charge], as well as other writs and plaints."²⁰⁴ Similarly, persons who were outlawed "may be admitted by attorney."²⁰⁵ After recording many exceptions to the common law rule, Comyns concludes that "it is now the common courte for the plaintiff or defendant in all manner of actions, where there may be an attorney, to appear by attorney."²⁰⁶ The appearance by the attorney did not change the function of the serjeant, which was still to plead the case.

The colonies did not embrace the distinction between pleader and attorney. In part, this was based on colonial distrust of professional lawyers. As Lawrence Friedman put it, "[t]he legal profession, with its special privileges and principles, its private, esoteric language, seemed an obstacle to efficient or godly government."²⁰⁷ The English settlers, however, had absorbed the common law tradition and the notion that courts existed to solve disputes. Thus, as the colonists began to engage in more and more commercial ventures, it was only a matter of time before the absence of lawyers could no longer be endured.²⁰⁸ The distrust of English-trained lawyers, coupled with a total lack of schools in the colonies that could train lawyers,²⁰⁹ led to an amateur and semiprofessional practice of law as the need for lawyers increased. In the late seventeenth century, "justices of the peace, sheriffs, and clerks, acted as attorneys in New Jersey."²¹⁰ Burlington, West New Jersey had, at that time, a single lawyer.²¹¹ "Of 207 attorneys in Maryland between 1660 and 1715, 79 were planters; others were clerks or merchants; only 48 could be described as professional lawyers."²¹² When the Earl of Bellomont arrived in Rhode Island in 1699, he characterized the man who was then General Attorney as "a poor illiterate mechanic, very ignorant," and the Earl expressed amazement that colonists relied on him "for his opinion and knowledge of law."²¹³

204. 1 *id.* at 603.

205. 1 *id.* at 603-04.

206. 1 *id.* at 604. To be sure, Comyns lists numerous exceptions to this general rule. Some are archaic. A party could not, for example, appear by attorney when the suit is settled by battle (and attorneys must have been glad of that rule). *Id.* at 605. An idiot could not appear by attorney. *Id.* A "misnomer" had to be pled personally. *Id.* Most of the exceptions went to various forms of contempt of court. If a party was charged with any form of contempt, then "the court will not admit him by attorney, but oblige him to appear in person." *Id.* at 604. Presumably, the courts wanted physical control over a party who might have been guilty of contempt.

207. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 95 (2d ed. 1985).

208. *See id.* at 96.

209. *Id.* at 97.

210. *Id.*

211. *Id.* at 94.

212. *Id.* at 99.

213. Mary Sarah Bilder, *The Lost Lawyers: Early American Legal Literates and Transatlantic Legal Culture*, 11 *YALE J.L. & HUMAN.* 47, 48 (1999).

While there were tentative attempts in a few places to establish the order of serjeants or barristers,²¹⁴ the net effect of a century or so of colonial reinvention of the right to counsel was to merge these disparate roles into a single person.²¹⁵ The colonists had, after all, “started over” in an era when serjeants in England were taking on more and more of the trial presentation.²¹⁶ Thus, colonial lawyers were thought of as alter egos first and specialists second.²¹⁷ John Douglass concluded, “Colonial Maryland’s legal profession had its origin in letters of attorney. Letters of attorney were legal instruments of personal volition by which one person authorized another to act in his place and stead.”²¹⁸ The “extemporized system of pleading brought before the courts pleaders wholly unknown to them and over whom they exercised no control.”²¹⁹ Courts and the legislatures gradually began to assert control²²⁰ over colonial lawyers as they became accepted professionals, in part because the amateurs were gradually displaced by “a socially elite bar made up of lawyers from England and scions of the colonial elites.”²²¹

The colonies thus never developed a formally bifurcated conception of lawyers by role—attorneys to function only as alter ego and pleaders to provide specialized assistance to defendants who represented themselves. Unlike the modern legal system, however, the colonial defendant was thought to be structurally capable of representing himself, thus rendering unnecessary the alter ego and legal specialist.²²² This seems clear from Rhode Island’s 1647 rule on “Pleaders,” stating that “any man may plead his own case in any court or before any jury” or “may make his attorney to plead for him” or “may use the attorney that belongs to the court.”²²³ To similar effect is the Pennsylvania Frame of Government of 1682: “In all courts all persons of all persuasions may . . . personally plead their own cause themselves, or if unable, by their friend . . .”²²⁴

The state constitutions generally followed this pattern. The Georgia Constitution of 1798 provided: “No person shall be debarred from

214. FRIEDMAN, *supra* note 207, at 99 (In 1755, a New Jersey rule created the rank of serjeant, and in 1762 the superior court in Massachusetts created the rank of barrister).

215. See *infra* text accompanying notes 225–35 (citing laws, charters, colonial constitutions, and proposals for the Bill of Rights, none of which drew any distinctions between a pleader and an attorney).

216. 4 BLACKSTONE, *supra* note 32, at *345–46 (noting that, in Blackstone’s day, judges permitted counsel to ask questions “with respect to matters of fact”).

217. FRIEDMAN, *supra* note 207, at 99.

218. John E. Douglass, *Between Pettifoggers and Professionals: Pleaders and Practitioners and the Beginnings of the Legal Profession in Colonial Maryland 1634–1731*, 39 AM. J. LEGAL HIST. 359, 360 (1995).

219. *Id.* at 361.

220. *Id.* at 365–82. Indeed, the increased control over practitioners led to a “strike” on their part—in 1725, they refused to plead the causes they had accepted fees to plead and instead nonsuited all cases. *Id.* at 359, 382–84.

221. *Id.* at 359–60.

222. See Bilder, *supra* note 213, at 60–64.

223. *Id.* at 60.

224. PA. FRAME OF GOV’T OF 1682, art. VI.

advocating or defending his cause before any court or tribunal, either by himself or counsel or both."²²⁵ Of similar import are the Delaware Constitution of 1792;²²⁶ the Maryland Declaration of Rights of 1776;²²⁷ the Massachusetts Constitution of 1780;²²⁸ the New Hampshire Constitution of 1784;²²⁹ the Pennsylvania Constitution of 1776;²³⁰ and the Vermont Constitution of 1777.²³¹

State conventions sent proposals to the Framers for rights to be included in the Bill of Rights. Five mention some version of a right to counsel.²³² Three were identically worded: "be allowed counsel in his favor" (North Carolina, Rhode Island, and Virginia).²³³ The Pennsylvania minority proposal tracked the colonial constitutions, seeking a right "to be heard by himself or his counsel."²³⁴ The New York proposal was to guarantee the accused "the assistance of Council for his defence."²³⁵

Madison chose the New York language, with a change of spelling and capitalization, and the clause guaranteeing the right "to have the Assistance of Counsel for his defence" became part of the Constitution without change.²³⁶ There was no discussion of the right to counsel in the First Congress.²³⁷ It might be significant that Madison chose, and the Congress ratified, assistance of counsel rather than the right to "be allowed counsel in his favor," as proposed by three state conventions.²³⁸ Perhaps this means that the Framers saw the essential right as one of receiving assistance, while the defendant personally pled the case.

Even if the Framers meant to create a robust right to receive specialized advice, this does not tell us, of course, what remedy is appropriate when a pleader fails in his duty to his criminal client. The robust distinction in English law between a pleader and an attorney tells us nothing about what happened if the defendant did *not* disavow the argument of his pleader. What little early evidence we have about remedy suggests that it was almost always an action against the lawyer (fine, suspension,

225. GA. CONST. OF 1798, art. III, § 8.

226. DEL. CONST., art. I, § 7.

227. MD. DECL. OF RTS. OF 1776, art. XIX.

228. See MASS. CONST. OF 1780, art. XII, § 13 (providing that the defendant "be fully heard in his defence by himself, or counsel, at his election").

229. See N.H. CONST. OF 1787, art. XII, § 13 (providing that the defendant "be fully heard in his defence by himself, or counsel, at his election.").

230. See PA. CONST. OF 1776, art. I, ch. 9 (providing that a defendant has a "right to be heard by himself and his council.").

231. See VT. CONST. OF 1777, ch. 1, cl. 10 (providing that the defendant "hath a Right to be heard, by himself and his Counsel").

232. See THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS 401-02 (Neil H. Cogan ed., 1997) [hereinafter THE COMPLETE BILL OF RIGHTS].

233. See *id.*

234. *Id.* at 402.

235. *Id.* at 401.

236. U.S. CONST. amend. IV.

237. No discussion appears in Cogan's account of the Framers' debate over the Sixth Amendment. See THE COMPLETE BILL OF RIGHTS, *supra* note 232, at 415-19.

238. See *supra* note 233 and accompanying text.

criminal sanctions), rather than an attempt to remedy the harm done.²³⁹ Indeed, we have evidence from as far back as 1209 of counters “being amerced or even imprisoned for errors.”²⁴⁰ One exception to these prospective consequences was when the harm could be undone completely as, for example, when a lawyer refused to deliver papers that he was obligated to deliver. In that case, “the court will compel an attorney, upon motion, to do what he ought: as, to deliver writings which he had as attorney upon payment of all due to him.”²⁴¹

At least one colony made provision for when counsel caused his client’s case to “miscarry” through “neglect or mismanagement” of the case.²⁴² In 1727, the New Jersey colonial legislature passed an act creating a right of action against the lawyer in these cases; it was disallowed by England in 1731, but was reenacted in 1747 and permitted to stand.²⁴³ The 1747 version made the lawyer “liable to make good all Damages sustained by his Employers, to be recovered by Action in any Court of Record.”²⁴⁴ It seems clear that the intent was to force the neglectful lawyer to make good financial losses he had caused. By analogy, the criminal defendant who had suffered a fine could presumably bring an action against his lawyer under this statute. As there is no way for a lawyer to restore the client’s liberty lost through neglect, one might view this 1747 statute as permitting a court to set aside a conviction caused by the neglect of an officer of the court.

In sum, by the time of the ratification of the Sixth Amendment, a single person typically functioned as the client’s alter ego and legal specialist in the United States. This distinguished American law from English law at the time and continues to distinguish it today. The existence of barristers and solicitors as different classes of lawyers in England today shows that the nine hundred year old distinction between legal specialist and alter ego continues to exist. The evolution to modern right to counsel in the United States was not yet complete in 1791.²⁴⁵ It awaited a change in the default rule about whether criminal defendants could be expected to represent themselves. The modern rule is a strong default that criminal defendants are hopelessly disadvantaged if they represent themselves. This change in the default rule happened gradually over a century and a half, finally becoming complete in 1963.²⁴⁶ By then, the al-

239. See BRAND, *supra* note 180, at 115–42.

240. BAKER, *supra* note 155, at 9.

241. COMYNS, *supra* note 203, at 611.

242. Stephen B. Presser, *An Introduction to the Legal History of Colonial New Jersey*, 7 RUTGERS L.J. 262, 308 (1976) (citing 1 S. NEVILL, THE ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW JERSEY 352 (1752)).

243. *Id.*

244. *Id.*

245. See *supra* notes 225–36 and accompanying text.

246. Gideon v. Wainwright, 372 U.S. 335 (1963).

ter ego aspect of the relationship became almost total,²⁴⁷ leading in short order to *Strickland* and a subtle change in how lawyer errors are treated.

IV. PLEADERS AND ATTORNEYS MERGE

As the colonial constitutions and statutes make plain, litigants retained the right to prosecute or defend their own cause. While it is impossible to know definitively how often lawyers were used in court, case reports from the Court of Oyer and Terminer in New Jersey from 1749–1762 permit us to estimate that lawyers assisted criminal defendants in fifteen to twenty-five percent of cases that went to trial.²⁴⁸ These data suggest both a custom of self-representation and an economic reality: most citizens could not afford the services of a lawyer and no system existed for the state to pay legal fees for indigent defendants.

The number of lawyers surged after the Revolution, and grew even more rapidly in the fifty years after the Civil War.²⁴⁹ Much of this growth was due to the rapid expansion of commerce and land ownership as the insular east coast grew to meet the Pacific Ocean.²⁵⁰ With commerce comes money, and money both requires and pays for expert assistance. Most criminal defendants, then as now, had little money and no lawyer to help in dealing with the “blunt, merciless, and swift” criminal law that existed in typical criminal cases throughout the nineteenth century.²⁵¹ The difference that the nineteenth century made, however, was one of expectations. While it seems likely that some eighteenth century defendants made their defense personally out of choice, it seems far less likely that this would be true by the end of the nineteenth century. As lawyers became ubiquitous in business dealings, and more visible in politics and the local community, most criminal defendants would surely *want* a lawyer. That they could afford one was still unlikely in most cases as we entered the twentieth century.

Indeed, well into the twentieth century, courts spoke of lawyers as providing expert assistance that was helpful but usually not necessary. In *Powell v. Alabama*,²⁵² for example, nine black defendants were charged with the capital crime of raping two white women. They faced a hostile Southern criminal justice system without a lawyer representing them in a traditional manner.²⁵³ In deciding whether the defendants were deprived of due process of law, the *Powell* Court over and over again described

247. See *infra* text accompanying notes 262–66.

248. Records available from author.

249. FRIEDMAN, *supra* note 207, at 633.

250. *Id.* at 633–48.

251. *Id.* at 575.

252. 287 U.S. 45 (1932).

253. Without giving the defendants time to obtain counsel, the trial court appointed all the members of the local bar to represent the defendants, aided by an out-of-state lawyer who was not appointed to represent the defendants until the day of trial. *Id.* at 52–58.

the right to counsel as the right to the aid or assistance of counsel.²⁵⁴ The Court referred favorably to a district court opinion permitting counsel in a deportation case because the potential deportee “was entitled to confer with and have the aid of counsel.”²⁵⁵ In narrowly circumscribing the holding in *Powell*, the Court stated that a court must assign counsel “in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like.”²⁵⁶

Though perhaps just a locution, the notion seemed to be that defendants could be expected, consistently with due process, to represent themselves in most cases. When counsel was required, it was because of the specialized aid and assistance the lawyer could offer. In the 1942 case of *Betts v. Brady*,²⁵⁷ the Court turned this locution into holding. Charged with robbery, Betts claimed that he was indigent and asked the trial judge to appoint counsel.²⁵⁸ The judge refused and the Supreme Court affirmed.²⁵⁹ The *Betts* opinion canvassed the English and early American history of the right to counsel and concluded, consistent with what I have shown in this article, that counsel had always been viewed more as an assistant than as a prerequisite to a fair trial.²⁶⁰ Betts was better able to defend himself than the defendants in *Powell*, in part because the issue was not as complex or as serious as that in *Powell*, and in part because he was not an ignorant youth.²⁶¹ Thus, the Court held, no due process violation occurred when the state forced Betts to defend himself without the “advice and assistance” of counsel.²⁶²

As late as 1942, therefore, the criminal defense lawyer was still viewed as one who provided “advice and assistance,” much as the twelfth century pleader did. The merger of the American lawyer as specialist with lawyer as alter ego was far from complete. In the 1950s and 1960s, however, the roles began to merge rapidly. Perhaps it was the rise of the middle class, the explosion in the number of lawyers, and the emergence of mass media. Perry Mason first aired in 1957, followed in the 1960s by *The Defenders* and *Judd for the Defense*. The Court assisted in the evolution toward alter ego status with its 1963 decision in *Gideon v. Wainwright*,²⁶³ overruling *Betts* and holding that all indigent felony defendants have a right to counsel at state expense.²⁶⁴ The net effect of *Gideon* was

254. See, e.g., *id.* at 61 (“assistance of counsel, . . . aid of counsel, . . . right to the aid of counsel”); *id.* at 68 (“right to the aid of counsel”); *id.* at 70 (“aid of counsel, . . . right to the aid of counsel”).

255. *Id.* at 70 (referring to *Ex parte Chin Loy You*, 223 F. 833, 839 (D. Mass. 1915)).

256. *Id.* at 71.

257. 316 U.S. 455 (1942).

258. *Id.* at 457.

259. See *id.* at 457, 473.

260. See *id.* at 465–67.

261. *Id.* at 472.

262. See *id.*

263. 372 U.S. 335 (1963).

264. *Id.*

to hold that defendants are structurally incapable of representing themselves.²⁶⁵ That the lawyer in the post-*Gideon* world almost always speaks for the criminal client in the courtroom further enhances the notion that the criminal lawyer is the alter ego of the client.

The merger was not total. We saw that the current ABA Standards reserve some decisions to the client, principally the decisions of whether to plead guilty and whether to testify.²⁶⁶ Moreover, at a deep theoretical level, the client remains the master and the lawyer the assistant. In *Gideon*, the Court noted that a fair trial could not be held if “the poor man charged with crime has to face his accusers without a lawyer to *assist* him.”²⁶⁷ As we have seen, *Faretta v. California* made clear the “assistant” status of the lawyer.²⁶⁸ The narrow issue in *Faretta* was whether defendants have a Sixth Amendment right to represent themselves. The Court held that the Sixth Amendment contains such a right:

The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be “informed of the nature and cause of the accusation,” who must be “confronted with the witnesses against him,” and who must be accorded “compulsory process for obtaining witnesses in his favor.” Although not stated in the Amendment in so many words, the right to self-representation—to make one’s own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.²⁶⁹

The analytical structure of *Faretta* implies what the ABA Standards explicitly recognize, that some decisions belong to the client.²⁷⁰ Presumably, an error by counsel in assisting the client in making *these* decisions would always be ineffective assistance of counsel. Suppose a client tells his lawyer that he does not want to take the plea agreement offered by the prosecutor, but the lawyer confuses this client with another one and “accepts” the offer that the client has instructed the lawyer to reject. No cases raising this issue seem to exist, almost certainly because it is simply beyond belief that a judge would force the defendant to abide by the erroneous “acceptance” of the plea offer. Serjeants from the thirteenth century would find this rule familiar, as it is roughly comparable to permitting the litigant to disavow a plea made by the serjeant in court.²⁷¹ The question this raises, taken up in the next part, is how best to

265. *Id.* at 344.

266. *See supra* note 128 and accompanying text.

267. *Gideon*, 372 U.S. at 344.

268. *See supra* note 134 and accompanying text.

269. *Faretta v. California*, 422 U.S. 806, 819–20 (1975).

270. *See supra* note 128 and accompanying text.

271. *See supra* notes 158–60 and accompanying text.

understand what disavowing the serjeant's plea means in today's criminal procedure.

V. TAKING ACCOUNT OF THE DIFFERENT ROLES OF LAWYERS

We think, then, that the question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made. So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default.

—*Murray v. Carrier* (1986)²⁷²

[A pleader] loyally will maintain the right of his client, so that he may not fail through his folly, or negligence, nor by default of him, nor by default of any argument that he could urge.

—*The Mirror of Justices* (ca. 1285)²⁷³

I suggested in Part IV that certain failures of the lawyer as pleader, and thus expert assistant, should be sufficient by themselves to qualify as ineffective assistance of counsel and accordingly to avoid procedural default.²⁷⁴ The question here is how best to construct a category of pleading errors that will be treated to a more rigorous testing. Perhaps the analogy to disavowing the serjeant's plea can be expanded. In the thirteenth century, the defendant's case was often won or lost by the skill of the serjeant in pleading the technical counts of the defense.²⁷⁵ Today, the skill of the lawyer similarly manifests itself in technical decisions—for example, what defense to pursue, what motions to suppress to make, and what witnesses to call. Perhaps the client should be able to disavow those decisions. Because today's lawyer acts as both specialist and alter ego, the defendant has precious little opportunity to disavow pleading decisions when they are made. One crude way the modern defendant can disavow pleading decisions is through the *Faretta* right to be her own lawyer.²⁷⁶ Professor Anne Bowen Poulin concludes that many requests to proceed pro se result from a trial judge's refusal to appoint substitute counsel in cases where the defendant has concluded that the assigned lawyer will not provide an adequate defense.²⁷⁷ By rejecting the appointed lawyer, the client is “disavowing” the alter ego role the system created.

When defendants choose to represent themselves, judges usually appoint standby counsel to assist the defendant. The Court has never

272. 477 U.S. 478, 488 (1986) (citation omitted).

273. THE MIRROR OF JUSTICES, *supra* note 137, at 48.

274. See *supra* notes 266–72 and accompanying text.

275. See *supra* notes 115–19 and accompanying text.

276. See *supra* notes 185–95 and accompanying text.

277. Anne Bowen Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 N.Y.U. L. REV. 676, 687–91 (2000).

given us a clear picture of the role of standby counsel, other than to suggest that counsel should not intervene too frequently without the permission of the defendant.²⁷⁸ Professor Poulin recommends an active role for standby counsel, at least behind the scenes, offering advice and assistance to the defendant, whether or not requested.²⁷⁹ When standby counsel performs in this manner, the modern pro se defendant looks remarkably like the defendant described in the laws of Henry I.²⁸⁰ The defendant stands before the jury without the medium of the lawyer alter ego to question witnesses and make arguments, but with the specialized aid of counsel when the defendant requests that aid.

The Court discussed in *Faretta* the modern alter ego status that exists when defendants are represented by lawyers, noting that it extends to “the power to make binding decisions of trial strategy in many areas.”²⁸¹ This is a narrow description of the alter ego status, limiting it to trial strategy and not even totally in that context, but only in “many areas.” The Court is right to draw a rough distinction between trial strategy and other kinds of decisions, but there are two kinds of trial strategy. Strategy in the macro sense involves whether the client should testify, whether to offer an alibi defense or an insanity defense, and, more generally, devising the theory of the defense. Strategy also has a micro sense that includes every question the lawyer asks in court, the lawyer’s tone of voice and demeanor, and the questions the lawyer decides *not* to ask. These decisions are miles apart from the macro decisions.

Perhaps a distinction in the kind of assistance a lawyer provides can be drawn along the following lines: Whatever the practice in the thirteenth century, or even at the time of the Bill of Rights, the defendant today does not personally make his defense in the courtroom (excepting the pro se defendant of course). The strategic decisions involved in the courtroom presentation are more like the alter ego relationship of the principal and his attorney in the thirteenth century.²⁸² The lawyer *becomes* the client. As we saw earlier,²⁸³ modern linguistic usage is consistent with this parallel to the principal-attorney relationship. Unless there is an issue that calls attention to the distinction between the lawyer and the client (such as ineffective assistance of counsel), courts today do not say “the defendant’s lawyer objected to the court’s instructions.” Rather, we are treated to an alter ego description of “defendant objected to the court’s instruction.” Sometimes, apparently uncomfortable with the notion that the client is in all respects swallowed by the lawyer, courts will substitute “defense” for “defendant,” as in “the defense vigorously cross-examined the witnesses.” Courts almost never say, “The defendant’s

278. *McKaskle v. Wiggins*, 465 U.S. 168, 185 (1984).

279. Poulin, *supra* note 277, at 703–25.

280. See LEGES HENRICI PRMI, *supra* note 146, Laws 46, 4; 46, 5; 46, 6.

281. *Faretta v. California*, 422 U.S. 806, 820 (1975).

282. See *supra* notes 169–76 and accompanying text.

283. See *supra* notes 122–23 and accompanying text.

lawyer cross-examined the witnesses.” The linguistic effacement of the client in these usages suggests the alter ego relationship of an attorney to the principal, rather than the specialized assistance of a pleader assisting the client who is responsible for presenting his own case.

Unlike the attorneys who stood in for their principals, the serjeants of the thirteenth century assisted the client with the legal tasks that were structurally outside the ability of defendants to perform for themselves.²⁸⁴ From the thirteenth to roughly the eighteenth century, this task was to decide what kind of special plea to enter and to recite the elements of that plea in court.²⁸⁵ Here is where the serjeant was indispensable. What is structurally outside the ability of modern defendants is the analogous decision of which legal claims to present—for example, that claiming extreme emotional disturbance is the best avenue to avoiding the death penalty. If the modern lawyer fails to recognize and present favorable legal claims, then the lawyer has failed in the role as legal specialist. This failure is more fundamental than other types of failures in trial strategy or in the presentation of evidence.

When the client pleads to the charge after being advised by the lawyer, the lawyer is acting as specialist. When the lawyer objects, or fails to object, to evidence in court, the lawyer is acting as alter ego. Somewhere in between are the decisions about which defenses to raise, but these are analogous to the special pleas in the thirteenth century²⁸⁶ and, thus, belong in the specialist category. When the lawyer functions as a specialized assistant, the client should have more opportunity to disavow errors of the assistant. Here, *Strickland* is wrong to ignore fundamental errors just because the outcome would have been the same or just because the representation, as a whole, was not deficient.

Stated positively, the Sixth Amendment creates the right to competent specialized assistance in choosing defenses, regardless of whether competent representation would have changed the outcome of the case and regardless of whether the lawyer performed adequately in the other aspects of the case. Supporting broader review of failures to raise worthy defenses is that most criminal defendants today are indigent and thus do not choose their counsel. In addition, the state pays the lawyer for the defendant. When the state is responsible for the licensing, selection, and payment of defense counsel, it seems particularly unseemly for the state to ignore fundamental failures of that counsel in recognizing and raising defenses to the charge prosecuted by the state. One imagines an assembly line that begins with a charge filed by the state and ends with a conviction and prison sentence imposed by the state, attended at every stage by state actors whose principal function is to speed the assembly line as it produces conviction after conviction.

284. See *supra* notes 178–80 and accompanying text.

285. See *supra* notes 156–97 and accompanying text.

286. See *supra* notes 156–75 and accompanying text.

Advice from a specialist is more important at some points in the assembly line than others. Suppose, for example, that the lawyer advises against accepting what appears to be a favorable guilty plea offer because, the lawyer assures the client, the state will come up with a better deal. The prosecutor withdraws the plea offer, and the defendant is convicted and sentenced to a much longer sentence than the state had offered. For this defendant to prevail under *Strickland*, the defendant must show not only that the advice was constitutionally deficient, but also that the result would have been different had the lawyer not given that advice—that the defendant would have accepted the plea bargain. How can anyone ever know what the defendant would have done if the lawyer had provided adequate advice? Why should the defendant have to show that he would have followed competent advice about how to plead? Because pleading is the clearest example of the client acting personally, perhaps the client should be absolutely entitled to nondeficient advice about how to plead. Perhaps *any* violation of that entitlement should result in a reversal of the conviction.

Now suppose a lawyer raised several defenses, but failed to raise the client's strongest defense. Under *Strickland*, this defendant loses, even if the outcome would have been different as long as the failure to raise the strongest defense did not render the representation deficient when considered as a whole. Given the strong presumption against second-guessing lawyers when they make strategic decisions, this failure might not constitute deficient performance. If not, we have the odd result that a lawyer can provide constitutionally effective assistance *by forfeiting a defense likely to produce an acquittal*.

Consider in more detail the rape-murder case I mentioned earlier: *Smith v. Murray*.²⁸⁷ A private psychiatrist examined Smith at the request of his counsel.²⁸⁸ During the course of the examination, the psychiatrist asked Smith both about the murder he committed and about prior incidents of deviant sexual conduct.²⁸⁹

The Court recites the relevant facts:

Although petitioner initially declined to answer, he later stated that he had once torn the clothes off a girl on a school bus before deciding not to carry out his original plan to rape her. That information, together with a tentative diagnosis of "Sociopathic Personality; Sexual Deviation (rape)," was forwarded to the trial court, with copies sent both to [the defense lawyer] and to the prosecutor who was trying the case for the Commonwealth. At no point prior to or during the interview did [the psychiatrist] inform petitioner that his

287. 477 U.S. 527 (1986).

288. *See id.* at 529–30.

289. *Id.* at 530.

statements might later be used against him or that he had the right to remain silent and to have counsel present if he so desired.²⁹⁰

I now indulge a fictional version of *Smith*. Prior to trial, Smith insists on firing his lawyer and representing himself. The trial judge accedes and appoints a member of the bar to act as standby counsel, instructing the lawyer to make himself available should Smith have questions about law or procedure. Smith researches Fifth Amendment law and concludes that his statement to the psychiatrist might be inadmissible on the ground that he did not know he could remain silent. Smith asks standby counsel how to file a motion to suppress. The lawyer, either through incompetence or because of a belief that the motion is frivolous, tells Smith that he need not file a motion to suppress because he can object to the statement at trial. When Smith attempts to do this, the trial judge rules his motion out of order and holds that he has procedurally defaulted the motion by failing to raise it before trial, as required by the rules of procedure.

Though the Court's doctrine of pro se representation contains no holding or dicta on point, it would be monstrous to permit the trial judge's ruling to stand in this fictional version of *Smith*. The reason to have standby counsel in the first place is to permit the defendant to draw on the lawyer's expertise in matters of trial procedure and motion practice.²⁹¹ To permit the lawyer's error on this specialized question to forfeit the client's Fifth Amendment claim would be to punish the defendant for relying on the lawyer that the court insisted he needed. If the lawyer had not given the wrong advice, then the defendant likely would have asked someone else, the court clerk or the judge, and proceeded properly.

Now consider a variation on my fictional version of *Smith*. After researching the law, Smith decides that he cannot properly plead and argue the motion to suppress, and he asks the lawyer to undertake this specific task. The lawyer fails to file the motion on time, procedurally defaulting the Fifth Amendment issue. Let us assume that defaulting a claim because of a failure to file a motion on time is below the minimum standard of competence expected of lawyers. Is there any reason to treat this case differently from the first? Smith, the master, turns over to the lawyer, his assistant, a specific task, and the lawyer makes an error that is below the minimum level of competence expected of lawyers. This should fall below the *Strickland* standard of reasonably competent representation (leaving aside the question of prejudice).

Now consider a third variation on the actual *Smith* case: After researching Fifth Amendment law, Smith decides that he cannot do an adequate job representing himself. He informs the judge and the standby lawyer that he relinquishes his right to represent himself, but he insists that the Fifth Amendment claim be pursued. He instructs his law-

290. *Id.* (internal citations omitted).

291. *McKaskle v. Wiggins*, 465 U.S. 168, 184 (1984).

yer that under no circumstances is the lawyer to proceed without raising a Fifth Amendment objection to his statement. Smith does not specify how the issue is to be raised. The lawyer does not file a motion to suppress. At trial, Smith asks about the Fifth Amendment claim, and the lawyer says it is too late and the claim is no good anyway. Smith asks the trial judge to dismiss his lawyer and grant him a continuance. The judge refuses, and the trial proceeds.

In this third variation, the *Strickland* calculus changes. The lawyer in this variation represents Smith and thus partakes of the alter ego status that the Court used to construct the effective assistance of counsel doctrine in *Strickland*. As long as the lawyer's performance in general is within the "wide range of reasonable professional assistance,"²⁹² the lawyer's forfeiting of this specific claim would not by itself give Smith any right to have the claim litigated later.

Is the third variation really different from the first two? In those cases, Smith was more clearly the master in a formal sense, and the lawyer more clearly the assistant. In terms of substance, however, is Smith any less the master in variation three? If one wanted a system to remedy the fundamental errors of pleaders, then all three variations seem substantively the same. After all, Smith #3 told his lawyer that, under no circumstances, was the lawyer to fail to file the motion to suppress. Yet under the Court's doctrine, as long as Smith #3's lawyer tests the prosecution case enough to "make the adversarial testing process work in the particular case,"²⁹³ there is no substantive unfairness in attributing the lawyer's refusal to carry out the demand of his client. The alter ego status implicit in this doctrinal structure is almost complete. Thus, in the Court's world, fictional Smith #3 has procedurally defaulted his Fifth Amendment claim, even though he ordered it to be presented!

If variation three suggests permitting inquiry into the merits of the Fifth Amendment claim, as I believe it does, what of the more mundane case in which Smith never represented himself and does not insist on his Fifth Amendment claim because he does not know its value? This, of course, is the actual *Smith* case.²⁹⁴ Why is the failure of the lawyer, as expert, to recognize the value of the claim not just as fundamental an error as the failure to advise the pro se defendant when to assert the claim or the failure to assert the claim as the client instructed? Providing advice about which claims to raise or preserve forms the bedrock of what lawyers do for clients. In Rome there was an entire class of lawyers who functioned as "chamber counsel."²⁹⁵ When "applied to by the parties,

292. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

293. *Id.* at 690.

294. *Smith v. Murray*, 477 U.S. 527 (1986).

295. FORSYTH, *supra* note 138, at 84.

[these counsel] expounded the doctrines of the law, and informed their fellow-citizens of their rights and liabilities.”²⁹⁶

In *Smith*, the lawyer raised the claim at trial and defaulted it by not raising it on appeal.²⁹⁷ That he raised it at trial suggests that he thought it was plausible. Not preserving a plausible claim is analogous to a “pleading” that the thirteenth century litigant could disavow when his serjeant made it in court.²⁹⁸ To be sure, the litigant in the thirteenth century had the obligation to disavow what the pleader said at the time it was said. If he failed to do so, then there is no indication that there was any relief (recall, however, the case in which the judge advised the litigant to obtain the services of a different pleader²⁹⁹). One could argue, therefore, that *Smith* cannot draw support from history because, in the actual case—unlike all three fictional variations—he did not insist on the Fifth Amendment claim. There are two responses. First, we do not, in fact, know whether *Smith* insisted that his lawyer raise the Fifth Amendment claim on appeal. The Court makes no reference to this fact because it is unimportant to the Court’s doctrine.

More fundamentally, to require that *Smith* correct his pleader’s error on the spot misreads history. Defendants represented by serjeants were often also represented by attorneys.³⁰⁰ This salutary division of labor permitted the attorney to disavow the serjeant.³⁰¹ Today, of course, the role of alter ego and pleader are performed by a single individual. In most cases, the earliest that a second lawyer can spot and correct fundamental errors is on appeal, but the rule of procedural default almost always bars raising defaulted claims at that stage.³⁰² Thus, to be parallel in a substantive way with history, defendants should be permitted to disavow at a later time *some* of their lawyers’ decisions about raising and preserving legal claims. To do this, the Sixth Amendment can be held to trump the rule of procedural default for some errors by the first lawyer, even if that lawyer does not fall below the *Strickland* floor.

Disavowal of the first pleader’s choices potentially produces an enormous strain on the system. Disavowal should be limited, therefore, to failures that are fundamental in nature, those that potentially presented winnable claims. Using this standard, *Smith*’s second pleader must persuade a reviewing court that the Fifth Amendment claim was likely to be decided in his favor. This approach requires a reviewing court to decide the Fifth Amendment claim that the first pleader defaulted. If the court agrees that the claim has merit, then the net effect is

296. *Id.*

297. *Smith*, 477 U.S. at 529.

298. *See supra* note 160 and accompanying text.

299. *BRAND*, *supra* note 180.

300. *See supra* notes 181–97 and accompanying text.

301. *See supra* note 185 and accompanying text.

302. *See supra* notes 102–04 and accompanying text.

that one pleader disavows the plea of another pleader, just as in the thirteenth century.

What is missing in this approach is any requirement that the lawyer's representation as a whole be unreasonable or deficient. When the failure is a fundamental error in pleading the case, why should that error be erased when the overall representation, boosted by a strong presumption, barely makes it above the bar of "deficient performance"? And why make the defendant show prejudice, in addition to the inevitable prejudice from failing to plead the case properly?

The Court views the matter differently, insisting that the issue is the adequacy of the representation viewed as a whole and that defendants must demonstrate global prejudice by showing that the representation failed as an adversarial testing of the state's case.³⁰³ It is therefore possible, indeed likely, that a lawyer's error might deprive a defendant of an acquittal or a nondeath sentence but, viewed in the context of the entire representation, not be seen as a failure of the adversarial process. *Smith* is precisely that case. Here is what the Court had to say about the performance of Smith's lawyer:

Nor can it seriously be maintained that the decision not to press the claim on appeal was an error of such magnitude that it rendered counsel's performance constitutionally deficient under the test of *Strickland v. Washington*. [We have] reaffirmed that "the right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error . . . if that error is sufficiently egregious and prejudicial." But counsel's deliberate decision not to pursue his objection to the admission of [the psychiatric] testimony falls far short of meeting that rigorous standard. After conducting a vigorous defense at both the guilt and sentencing phases of the trial, counsel surveyed the extensive transcript, researched a number of claims, and decided that, under the current state of the law, 13 were worth pursuing on direct appeal. This process of "winnowing out weaker arguments on appeal and focusing on" those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy. It will often be the case that even the most informed counsel will fail to anticipate a state appellate court's willingness to reconsider a prior holding or will underestimate the likelihood that a federal habeas court will repudiate an established state rule. But, as *Strickland v. Washington* made clear, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."³⁰⁴

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

304. *Smith v. Murray*, 477 U.S. 527, 536 (1986).

By focusing on the entire conduct of the defense, the Court was able to ignore a default that likely would have resulted in a favorable outcome for the defendant. In 1295, pleaders swore not to forfeit a claim of the client “by default of any argument that he could urge.”³⁰⁵ Today, counsel can fulfill its obligation under *Strickland* by winnowing out winnable arguments. I think the thirteenth century oath a better standard.

My argument suggests not even inquiring into the quality of the lawyering when the error involves lawyer performance in the trial itself, at least as long as the lawyer is acting as the client’s alter ego. Return to variation two, where Smith gives the lawyer the specific job of filing and arguing the Fifth Amendment motion. Now assume, however, that instead of failing to file it, the lawyer files and argues the motion, but argues it badly. This is different from the original hypothetical because the lawyer here is properly viewed as the client’s alter ego. When the client turns over a case, or an issue, to be argued, the client in effect makes the lawyer his “attorney” for the purpose of making the argument. It is as if the defendant makes the argument himself—thus, the linguistic effacement of the client that we have seen in judicial opinions.³⁰⁶ Assigning low-quality lawyer argument to the client makes sense because the role of the advocate here is to assist the judge in determining what the law is. Presumably, if the advocate says nothing, then the judge will decide the law correctly most of the time. If Smith’s Fifth Amendment argument has merit, and if his lawyer raises the argument, then the trial judge or the appellate court will likely recognize the merit in the argument. The real harm is done when the claim is not raised at all.

If this is right, and assuming the lawyer was competent enough in the first place to be assigned to the case, then why inquire at all into the quality of the Fifth Amendment argument? Here, *Strickland* would permit an argument as to the effectiveness of the representation. It seems to me, though, that when the alter ego status is at its most complete, as it is when the lawyer speaks for the client, we should require judges to make some kind of ex ante inquiry into the competence of the lawyer and then forbid subsequent claims that the lawyer’s in-court work was ineffective.

As an example of how this kind of deference would work, consider *Romero v. Lynaugh*.³⁰⁷ The lawyer failed to present any mitigating evidence at the sentencing phase in a capital case, even though the district court found that “defense counsel had sufficient grounds to argue . . . several mitigating factors . . .”³⁰⁸ These factors included “youth, intoxica-

305. THE MIRROR OF THE JUSTICES, *supra* note 137, at 48.

306. See *supra* notes 129–30 and accompanying text.

307. 884 F.2d 871 (5th Cir. 1989).

308. *Id.* at 876–77 (quoting district court).

tion, and family background.”³⁰⁹ Moreover, the entire defense at the sentencing phase consisted of the following argument to the jury:

Defense Counsel: Ladies and Gentlemen, I appreciate the time you took deliberating and the thought you put into this. I'm going to be extremely brief. I have a reputation for not being brief. Jesse, stand up. Jesse?

The Defendant: Sir?

Defense Counsel: Stand up.

You are an extremely intelligent jury. You've got that man's life in your hands. You can take it or not. That's all I have to say.³¹⁰

The district court held “that the decision ‘not to present any argument at the sentencing phase’ was so ‘patently unreasonable’ as to constitute a deficiency under *Strickland*.”³¹¹ The Fifth Circuit reversed, holding that counsel’s “dramatic ploy in the sentencing hearing” did not “fall off the constitutional range.”³¹² If the result were otherwise, the Fifth Circuit worried, then the law would not give lawyers “the latitude necessary to try a difficult case.”³¹³ Indeed, as the Fifth Circuit noted, counsel’s argument in *Romero* seems to be a clever attempt to ask for mercy—perhaps too clever by half. My approach differs in methodology from the *Strickland* approach, used in *Romero*, but not in result. Under my approach, as long as the lawyer had been found competent to represent clients in death penalty cases before the trial started—a critical threshold—and as long as he remains loyal to the client, the precise content of the closing argument should not be subject to second-guessing by courts later. Rather than inquire into the lawyer’s performance in closing argument, a judge following my approach would simply have to conclude that the closing argument fits in the alter ego category and that the pre-trial decision about competence in death cases was correct. As to the latter, presumably criteria would develop about competence (number of felony cases handled, number of death cases, complaints filed against the lawyer) that would permit trial judges to make decisions that are simple to review on appeal.

The line between the alter ego category and the category of specialized assistance claims that potentially permit disavowal is admittedly not a completely bright one. Those who will defend *Strickland*’s vague standard of “reasonably competent representation,” however, cannot complain about the fuzziness of any alternative approach. Moreover, I suspect the line will be pretty clear in most cases. One way to draw the line is between deciding the shape of the defense (what it will be and what witnesses best constitute the defense) and the actual in-court presenta-

309. *Id.* at 877.

310. *Id.* at 875.

311. *Id.* at 876.

312. *Id.* at 877.

313. *Id.*

tion of the defense with its countless decisions about how to present the case. The universe of alter ego conduct thus includes decisions about how to conduct direct and cross-examination; it also includes most failures to object on evidentiary grounds—*e.g.*, failure to object to leading questions, or on grounds of relevance, or privilege. It includes jury selection, opening statement, and closing argument. There are, of course, close cases. Failure to object to hearsay is usually also a failure to raise a potential violation of the Sixth Amendment Confrontation Clause.³¹⁴ Failure to call a witness to testify is both trial conduct and a decision about the best defense to present.

The point to my proposal is to urge that lawyer representation be broken down into alter ego and specialized assistance categories, not to answer all the close questions. For what it is worth, however, I think that a failure to subpoena a witness is potentially a default in the specialized assistance category, but not the failure to call a witness to the stand. If the witness is available, and the lawyer decides not to call her, then that is similar to deciding what questions to ask. The hearsay/Confrontation Clause issue is harder, but my inclination is to see it as alter ego conduct, indulging a common-sense presumption that all issues about the technical presentation of the case are alter ego conduct.

To be sure, the complete alter ego status holds for trial presentation only as long as the agent is acting for the principal. If the lawyer acts in ways that puts the outside world on notice that he is not acting on behalf of his principal, then the client would no longer be bound by the lawyer's acts, even in the trial presentation category. One agonizing example of manifested lack of loyalty is *Messer v. Kemp*.³¹⁵ The crime was a brutal rape and murder of an eight-year-old girl who left school gleefully when she was picked up by Messer, her uncle.³¹⁶ She suffered "six stab wounds to the body and five knife slashes traversing the victim's abdomen [along with] numerous lacerations and abrasions" on her face, neck, and upper chest.³¹⁷ In the guilt phase, counsel "argued" as follows:

I would be [dishonest] with each and every one of you if I tried to tell you the evidence said something other than what [the prosecutor] indicates occurred on that day so I'm not going to . . . I don't think in a situation like this there's anything that I can say except to say thank God this is over. . . . I pray to God that none of you or myself, or the other people in this court room, will ever see anything like this again. I'm not going to be dishonest to y'all and say something to change what is, the evidence is, what the evidence is, the law the judge gives you as to how to consider this evidence. That's all I have. Thank you.³¹⁸

314. U.S. CONST. amend. VI ("to be confronted with the witnesses against him.").

315. 760 F.2d 1080 (11th Cir. 1985).

316. *Id.* at 1082–83.

317. *Id.*

318. *Id.* at 1089 n.5.

The problem continued to the sentencing phase. The lawyer presented only the defendant's mother in mitigation, although other witnesses were available.³¹⁹ Moreover, the lawyer elicited from Messer's mother that she and Messer expected the death penalty, and that Messer "ha[d] got saved, he's confessed his sins to Christ, and he told me, he said 'mama, the Lord has forgiven me . . .'"³²⁰ The coup de grace was the closing argument to the jury: "[Your decision is] an awesome responsibility and I dare say I would rather be over here than in y'all's seats, because as a parent under these circumstances . . . but that's for y'all to decide."³²¹

Judge Johnson concluded in dissent that these "statements do not comprise a 'nonargument,' for they were more damaging to Messer than no representation at all."³²² It is difficult to avoid that conclusion. Would Messer have been better off without a lawyer at the sentencing phase? Without a lawyer, the jury would not have known that he and his mother expected the death penalty, that the Lord had forgiven Messer (and the jury could thus kill him with no compunction about where he would spend eternity), and that the defense lawyer, being a parent, would be sympathetic to a death verdict. I would have no trouble holding that this is a breach of the principal-agent relationship, taking the case out of the alter ego category. *Messer* is different from *Romero* because the lawyer's argument there could be construed as a strategic decision, invoking the alter ego rule. No strategic motive appears in the *Messer* closing argument.

Of course, to say that Messer's lawyer acted outside the alter ego role is to say that his failure to make an argument manifesting loyalty to his client is equivalent to Smith's lawyer forfeiting his *Miranda* claim. Smith, however, can win a reversal only if he persuades a later court that he probably would have won the *Miranda* claim and thus improved his case. To fail to raise a claim that has little or no merit is not ineffective assistance of counsel. As the Court said in *Smith*, we expect counsel to winnow claims. Unlike the Court, I would expect counsel not to winnow out strong claims, but as long as the claim is not a strong one, there is no Sixth Amendment problem.

In Messer's case, we must ask whether Messer would have "won" his claim—whether a closing argument that was loyal to his client would have been favorable to his effort to avoid the death penalty. Though there was no doubt that Messer was guilty, a death verdict is never a foregone conclusion. Moreover, I do not believe that the Sixth Amendment requires prejudice in the *Strickland* sense of "a reasonable probability that, but for counsel's unprofessional errors, the result of the pro-

319. *Id.* at 1091.

320. *Id.* at 1096 (Johnson, J., dissenting).

321. *Id.* at 1097 (Johnson, J., dissenting) (ellipsis in original, indicating the attorney's pause).

322. *Id.*

ceeding would have been different.”³²³ Drawing on what pleaders did for clients for hundreds of years,³²⁴ the Sixth Amendment should be interpreted to require only that the error is fundamental—and failing to be loyal to the client, as in *Messer*, certainly qualifies—and that it deprived the defendant of favorable evidence or harmed his chance for a favorable outcome. The answer here is the same as in *Smith*: each case would have been improved substantially if the lawyer had not committed fundamental error. Both should have won their ineffective assistance of counsel claims.

My approach thus changes *Strickland* in three ways. In the category of a failure of specialized assistance, defendants would not have to demonstrate that the representation, as a whole, was unreasonable or deficient. A single failure to raise or preserve a claim in the specialized assistance category, or the failure to manifest loyalty to the client, should permit the defendant a chance to disavow this action taken on his behalf. The second difference is that the defendant who seeks to disavow the representation does not have to show prejudice in the *Strickland* sense, only that the error deprived him of favorable evidence or harmed his case in some nontrivial way. History agrees with Justice Marshall’s dissent in *Strickland*: It is not just the innocent defendant, or the guilty one against whom the state has a weak case, who has a right to counsel under the Sixth Amendment.³²⁵ It is every defendant. Every defendant whose lawyer fails to manifest loyalty or who fails to raise a claim that the client probably would have won deserves a new trial.

The third difference between my approach and *Strickland* is that failures in presenting the case as the client’s alter ego would not require inquiry into the effectiveness of the representation, unless the failure suggests lack of loyalty. Courts would not have to evaluate decisions about which witness to call or the effectiveness of the closing argument. Even most decisions about which way to investigate the case would fall outside the fundamental error category. In this way, then, my approach is less intrusive than *Strickland*. As most claims of ineffective assistance fall into the alter ego category,³²⁶ the net effect of my approach is to concentrate judicial time in a narrow category of claims of fundamental failures rather than spread across a wide universe of cases. The total judicial time in reviewing counsel claims would probably be about the same, but would be concentrated in cases where the alleged failures go to the heart of what lawyers have done for clients for nine hundred years.

Under my proposal, defendants would lose the occasional case they now win when courts find the alter ego representation both deficient and prejudicial. Offset against that occasional loss, however, would be the

323. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

324. See *supra* notes 155–97 and accompanying text.

325. *Strickland*, 466 U.S. at 711 (Marshall, J., dissenting).

326. See, e.g., *Strickland*, 466 U.S. at 668.

saving of judicial time in assessing each of these alter ego claims on a case-by-case basis and, more importantly, my proposal would be more likely to reverse convictions where the lawyer forfeited a claim that creates doubt about the defendant's guilt. Though there is no way to know whether defendants overall would win more or fewer cases under my proposal, what ought to matter is that defendants will win cases where the failure of the lawyer deprived them of a fundamental claim suggesting that they were not guilty.

The Court began its post-*Strickland* jurisprudence as if forfeiting one important claim would generally be enough to demonstrate ineffective assistance. In *Kimmelman v. Morrison*,³²⁷ the Court unanimously found counsel's performance deficient when he did not file a motion to suppress evidence because he did not know about the search of defendant's apartment. He did not know about the search because he failed to conduct pretrial discovery.³²⁸ The Court stressed that counsel did not bypass discovery for reasons of strategy, but because of twin mistakes.³²⁹ First, he did not understand the law of discovery; second, he believed until trial that the case would not go forward because the rape victim did not wish to proceed.³³⁰ What makes *Kimmelman* different from *Strickland* is that the lawyer in *Kimmelman* could not explain his failure other than by admitting he did not understand the relevant law.

Kimmelman is important to my argument because the Court did not engage in a lengthy analysis of counsel's entire representation when assessing the error counsel made in forfeiting the defendant's claim. The Court conceded that counsel's "performance at trial" was "generally creditable enough," but this did not keep the Court from finding his representation "deficient" within the meaning of *Strickland*.³³¹ Why is it that the failure to move to discover the state's evidence is somehow much more "deficient" than the failure to press a *Miranda* claim in *Smith v. Murray*?³³² We have no way to know for sure, as the Court in *Smith*, oddly enough, does not even mention *Kimmelman*. It is as if the first post-*Strickland* ineffective assistance case had disappeared into a watery grave of repose and federalism by the time *Smith* was decided. We are thus reduced to speculation. Here are three conjectures as to why *Kimmelman* may manifest an error that is categorically more deficient than the failure to raise the *Miranda* claim in *Smith*.

First, perhaps failing to discover and suppress evidence of guilt is somehow of a different order of magnitude than failing to object to a diagnosis of a "Sociopathic Personality; Sexual Deviation (rape)." That seems unlikely, however, given that the only issue in *Smith* was whether

327. 477 U.S. 365 (1986).

328. *Id.* at 369.

329. *Id.* at 385.

330. *Id.* at 372, 385.

331. *Id.* at 386-87.

332. 477 U.S. 527 (1986).

he deserved the death penalty. The evidence of sexual deviation seems as damning on the penalty issue as physical evidence of a crime would be on guilt. Second, perhaps the failure of the lawyer in *Kimmelman* to know that he had a decision to make is a more fundamental kind of error. The lawyer in *Smith*, after all, raised the *Miranda* claim at trial before abandoning it on appeal. It is not clear, however, why ignorance of the relevant law is more deficient than knowing the law and still making a fundamental error about which claims to preserve. To test this idea, ask whether *Kimmelman* would have come out differently if the lawyer had filed for discovery, learned about the search, and then decided not to move to suppress. It seems unlikely. Indeed, to know of the availability of a powerful claim and to choose not to pursue it seems more, not less, deficient.

The third possible distinction goes to the type of failure. Perhaps the failure to file a discovery motion is a more basic error than not pressing a *Miranda* claim that the state courts had already rejected. Presumably, the more basic the error, the more likely it is to poison the entire representation, at least if we hold constant the harm to the defendant's case. This distinction also fails on the facts in *Smith*. However novel the *Miranda* claim, *Smith's* lawyer saw it and raised it at trial. To raise a claim that could, perhaps would, result in the suppression of damning evidence, and then to abandon it, ought to be considered a fundamental error of the pleader.

If *Kimmelman* is thus given a reasonable interpretation, my proposal is not radical at all. It is *Smith* that is the radical departure. When a lawyer fails to discharge a basic duty and harms the client's chance for a favorable outcome, courts should not scour the record for evidence of overall effective representation. Why should it matter that the lawyer presented a credible case at trial, and raised some plausible claims on appeal, if the lawyer failed to raise the one claim that might have produced a different outcome?

VI. A NEW STANDARD FOR THE ASSISTANCE OF COUNSEL

Strickland is right that not all errors of a lawyer should be judged as deficient performance under the Sixth Amendment. Lawyers, like physicians, pianists, and law professors, routinely make errors. Indeed, one-half of all lawyer performance will, by definition, fall below the performance mean. The Court made twin errors in *Strickland*, however. First, to "strongly" presume that the lawyer gave adequate assistance is to presume that the state has complied with the Sixth Amendment. Second, the Court instructed lower courts to ignore even failed assistance unless the defendant can show that adequate counsel would have produced a different result. In effect, *Strickland* employs a double presumption that a licensed lawyer always provides what the Sixth Amendment requires.

The anti-Federalists, who instigated the process that produced the Bill of Rights, would have found this double presumption incomprehensible. As noted earlier, the Sixth Amendment was written to manifest a deep skepticism about the new central government. It was intended to be a thorn in the side of the prosecution—indeed, to be a profoundly antigovernment provision. To permit the *government* routinely to assign lawyers to defendants would have already unnerved the anti-Federalists. To create a double presumption that this government-assigned lawyer is providing assistance of counsel required by the Sixth Amendment would have been, well, staggering to Patrick Henry, George Mason, Richard Henry Lee, and other anti-Federalists.³³³

I am not, of course, alone in criticizing *Strickland*, nor in offering a different approach. Vivian Berger calls for “broad systemic improvements” that include “specialization requirements . . . higher pay and greater auxiliary resources for assigned counsel, and structural changes in the delivery of defense services.”³³⁴ Federal legislation in 1988 created a right to counsel for habeas petitioners sentenced to death; it also set standards for the amount of experience the lawyer must have and dispensed with fee caps so that courts could award reasonable compensation.³³⁵ The American Bar Association Criminal Justice Section Task Force on Death Penalty Habeas would require appointment of lead counsel and cocounsel in all death cases, and would require “detailed minimum qualifications far exceeding the [1988] federal prerequisites.”³³⁶

Bruce Green recommends a more rigorous licensure process, and a decertification mechanism, in an effort to produce what he calls “qualified legal advocates” in criminal cases.³³⁷ In a bold elaboration of the *ex ante* licensure idea, Donald Dripps would require that the trial judge in each criminal case determine before trial “whether the defendant’s lawyer can effectively represent [the defendant]. Because the effectiveness of counsel is relative to the opposition, the test should be whether the defendant is represented by a lawyer roughly as good and roughly as well-prepared as counsel for the prosecution.”³³⁸

333. I do not mean to imply that the anti-Federalists were critical figures in the drafting and ratification of the Bill of Rights. Quite the opposite is true. Most of the anti-Federalists sought to use the lack of a bill of rights to defeat the Constitution. See, e.g., LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 12–43 (1999). Once Madison proposed a bill of rights, and thus silenced them on this point, many of the anti-Federalists regretted their initial political maneuver. *Id.* at 39–40. There is no doubt, however, that the Framers wrote the Bill of Rights with the avowed intent to mute the skepticism of the anti-Federalists and thus it is appropriate to read the Sixth Amendment as a profoundly antigovernment provision.

334. Berger, *supra* note 31, at 114.

335. Vivian Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665, 1687, n.148 (1990).

336. *Id.* at 1688.

337. Bruce A. Green, *Lethal Fiction: The Meaning of “Counsel” in the Sixth Amendment*, 78 IOWA L. REV. 433, 509–513 (1993).

338. Dripps, *supra* note 30, at 244.

Both *ex ante* reform efforts can draw strength from history. In 1403, in England, “provision was made for the exclusion of ignorant attorneys. They were to be examined by the judges, and those whom the judges admitted were to be enrolled. The judges were also to have the power to remove them.”³³⁹ Even more clear, if more remote in time and geography, was an imperial Roman ordinance of A.D. 370 that provided:

Care must be taken to prevent those who attain to a high rank at the bar, either through their merits or their erudition, from being engaged on one side, when the other is necessarily committed to such as are without skill or experience; and therefore if two or more of superior reputation are not to be found in the same court, it shall be the duty of the judge to make such an assignment of the advocates that an equal division may take place and each party have proper assistance.³⁴⁰

Though improved training and *ex ante* licensure is critical to the systemic health of criminal defense, the focus of my proposal is different. No matter the procedure to improve the quality of lawyers representing criminal clients, instances of incompetence will inevitably arise, and some mechanism must exist for measuring these instances against the Sixth Amendment requirement of the assistance of counsel. My proposal limits that review to fundamental failures to provide specialized legal assistance. In the courtroom alter ego context, I endorse some version of the Green-Dripps *ex ante* standard and would forbid after-the-fact inquiry into the quality of the representation, with the single exception that defendants could challenge whether the lawyer acted in derogation of the principal-agent relationship, as in *Messer*.³⁴¹ Failures of the principal-agent relationship are, presumably, quite rare. If they are not, then the quality of legal representation in this country is far below what it should be, and courts and legislatures should know that. In all acts taken as the alter ego of the client, courts would not have to reach the merits of the claim. If, for example, the defendant claims that the lawyer failed to interview a key witness for the prosecution, the reviewing court would have to decide only whether the failure could rise to a breach of the duty of loyalty. If so, the defendant wins the Sixth Amendment claim.³⁴² If not, the merits of the trial strategy will not be considered.

In cases where the claim is that the lawyer failed as a pleader and did not raise or preserve a favorable claim, courts must reach the merits of the claim to see if it would have improved the defense. If so, courts should reverse the conviction and give that defendant a second chance to have effective assistance of counsel. One pragmatic problem remains:

339. 2 HOLDSWORTH, *supra* note 117, at 505.

340. CODE JUST. 2.6.7 (Valentinian and Valens to Olybrius 370).

341. See *supra* notes 315–24 and accompanying text.

342. An example of where this failure, coupled with other failures, strongly suggests breach of the duty of loyalty is *Mitchell v. Kemp*, 483 U.S. 1026, 1029–31 (1987) (Marshall, J., dissenting from denial of certiorari).

how to assess whether a failure to provide legal assistance is fundamental in typical run-of-the-mill cases that are fact-dependent. In a case like *Smith*, courts can assess the *Miranda* issue because the lawyer raised it at trial and thus developed a record of the key underlying facts. In the more typical case, the claim will be that the lawyer failed to raise the claim in a motion to suppress. In these cases, discerning the value of the claim will be more difficult. This, of course, vividly makes Professor Dripps's point that "[i]t is all but ludicrous to ask a reviewing court to assess a record made by counsel to determine how counsel erred."³⁴³ Of course, the same problem attends the *Strickland* inquiry (which was the target of Dripps's criticism). An advantage to my approach is that the inquiry can focus on the specific claim that was not raised, without having to assess the lawyer's overall performance.

Staying with the *Miranda* example, the trial transcript will almost certainly contain testimony by the police officer who took the confession. In most cases, the prosecutor will likely ask whether the defendant received and waived the *Miranda* rights, even if there is no challenge to the confession. It can only help the prosecution's case to show that the police were fair and the defendant eager to talk. If the record contains that testimony, then courts can fairly infer that the warnings were given and waived. The defendant who now claims the lawyer should have raised a *Miranda* claim should not prevail. Not raising a meritless claim is certainly not a failure of specialized assistance.

The case is harder if the confession is introduced without mention of the *Miranda* warnings, though perhaps this is just one of those cases where some errors simply disappear beneath the murky waters created by incompetent counsel. There is no foolproof system for finding and evaluating errors in a record created by the counsel alleged to be ineffective. The only way to provide meaningful review when the record is silent on the merits of a claim is to hold an evidentiary hearing, with all the attendant damage to finality and repose.

Because that remedy should be sparingly applied, one approach to the silent record problem would be to presume that the claim is without merit unless a valid claim would render the state's case no longer sustainable (by whatever standard seems appropriate). For example, in *Wainwright v. Sykes*,³⁴⁴ the lawyer failed to raise a *Miranda* claim at any point in the proceedings. Let us assume the record makes no mention of whether the defendant received the warnings. Under my tentative proposal, a reviewing court would examine the record only so far as needed to find evidence of guilt independent of the confession. In almost all silent record cases, I suspect, the record would contain sufficient evidence of guilt that the reviewing court could presume that the *Miranda* claim

343. Dripps, *supra* note 30, at 243.

344. 433 U.S. 72, 75 (1977).

would not have made a difference.³⁴⁵ If, on the other hand, the reviewing court thinks the record insufficient to give assurance of guilt in the absence of the confession, then the court would hold an evidentiary hearing to determine whether the police complied with *Miranda*.

While this approach undermines finality to some extent, it is much less of a burden than retrying defendants, which is the only remedy under *Strickland*. To be sure, in some small number of cases, the factual record developed at the evidentiary hearing would demonstrate that the forfeited claim was a good one and that the state's case would have been insufficient had the claim been raised. A retrial would then be required. These are precisely the nightmare cases where the lawyer's failure demonstrably harmed the client's chance for an acquittal, precisely the cases that *should* be retried.

One advantage to my proposal is its focus on the particular advice that was offered or not offered. This is an easier inquiry than assessing the entire representation. Moreover, it permits narrow remedies, such as remanding for an evidentiary hearing. It does not permit courts to gloss over fundamental errors by concluding that, on balance, the job was not unconstitutionally bad. The better question is whether the lawyer manifested loyalty to the client and provided minimally acceptable advice on the kind of defense to present. History suggests this is the right question to ask.³⁴⁶ The oath of a pleader in the thirteenth century was loyally to "maintain the right of his client, so that he may not fail through his folly, or negligence, nor by default of him, nor by default of any argument that he could urge."³⁴⁷ The focus should not be whether the result of the trial was reliable but, rather, whether the client's cause failed through the lawyer's failure as a specialized assistant.

How does my argument affect the case of David Washington, the case that produced *Strickland*? Washington's lawyer recognized the value of the claim of extreme emotional disturbance and presented it to the court,³⁴⁸ unlike Smith's lawyer at the appeal stage.³⁴⁹ The deficiency in the performance of Washington's lawyer was in how he investigated and presented the claim, not in raising the claim. The question is whether a complete failure to put on evidence of the client's best claim and an almost complete failure to investigate it should require a remand to determine whether these failures harmed the client's case. My inclination is to say that Washington, like Smith, should be relieved of his lawyer's choice. The only investigation he did was to rely on his own judg-

345. I realize I am reincorporating *Strickland's* prejudice standard after having rejected it earlier. My proposal here is tentative—I would be happy with another solution—and, in any event, I propose this standard only for silent record cases. They pose a particularly thorny problem.

346. See *supra* notes 180–86 and accompanying text.

347. THE MIRROR OF JUSTICES, *supra* note 137, at 48.

348. *Strickland v. Washington*, 466 U.S. 668, 673–74 (1984).

349. See *supra* notes 84–87 and accompanying text (discussing the failure of Smith's attorney to raise a *Miranda* claim on appeal).

ment that Washington was not suffering from extreme emotional disturbance and to talk by phone to his mother and wife.³⁵⁰ Moreover, though he argued the claim to the judge, he presented no evidence other than the lack of a criminal record.

The difficulty, of course, is that extending my rule to cases where inferior evidence is offered creates a very difficult line-drawing problem. That Smith's lawyer did not raise the *Miranda* claim on appeal is a matter of historical fact. But if judges have to evaluate the sufficiency or quality of evidence offered on behalf of a claim, we are back in the soup of indeterminacy. One tentative solution would be to require a particular kind of evidence when the underlying claim is a technical one. Perhaps claims where the lawyer is not calling an expert requires at least a discussion with the client about soliciting the opinion of an expert—in Washington's case a psychologist or psychiatrist. If the lawyer makes the decision using only nonexpert sources, and particularly where he relies almost exclusively on his own untrained judgment, perhaps that is equivalent to no investigation at all.

Indeed, the Supreme Court in 2003 seemed to recognize the principle that a lawyer must avail herself of professional advice when the client presents as someone who could have a defense based on that advice. In *Wiggins v. Smith*³⁵¹ the defendant suffered severe physical and sexual abuse at the hands of his mother and under the care of a series of foster parents, but defense counsel did not engage a forensic social worker for the purpose of uncovering this history even though state funds were available for just such a purpose. Counsel did engage a psychologist to conduct tests on Wiggins. These tests revealed that he “had an IQ of 79, had difficulty coping with demanding situations, and exhibited features of a personality disorder.”³⁵²

With regard to Wiggins's history of abuse, defense counsel saw a one-page presentence investigation that described his “misery as a youth” and included a quote from Wiggins that his background was “disgusting” and the he spent most of his childhood in foster care. Counsel also had records from the social services agency documenting his “various placements in the State's foster care system.”³⁵³ The Court held, by a vote of 7-2, that the failure of counsel to instigate further into Wiggins's childhood violated *Strickland*'s requirement of “professionally competent assistance.”

It is not clear to me how Washington lost his case by a vote of 8-1 and Wiggins won by a vote 7-2. I suppose the lawyer in *Wiggins* was on formal notice that his client had a psychological problem while the lawyer who represented David Washington had no formal notice of his

350. *Strickland*, 466 U.S. at 672–73.

351. 539 U.S. 510 (2003).

352. *Id.* at 523.

353. *Id.*

problems. But that seems a distinction without a difference. The lawyer who represented Washington knew that his client had no record of violent crimes and had engaged in a horrific twelve-day crime spree that would be evidence of a psychological problem in anyone, let alone someone who had never been convicted of a violent crime. But I accept victories where I find them, and *Wiggins* seems a reformulation of the *Strickland* holding to require lawyers to do more than rely on their own judgment about potential emotional or psychological problems in their clients. It comes too late to help David Washington but will help defendants in the future who could benefit from defenses requiring expert testimony. I read *Wiggins* to say that lawyers who refuse to seek expert testimony in these cases are not providing the specialized assistance that the Sixth Amendment requires.

On the other hand, if the defense is alibi or a general failure of proof, then the lawyer would be permitted to make a decision about what kind of evidence to offer and courts would not second guess the decision.

CONCLUSION

Finality, comity, and economy are policies that drive criminal procedure doctrine generally, federal habeas corpus doctrine more specifically, and federal habeas review of ineffective assistance of counsel claims most specifically of all. These are not lightweight concerns. A justice system—civil or criminal—cannot function without a premium on finality. Double jeopardy, collateral estoppel, and res judicata are doctrines of ancient origin, developed, at least in part, to achieve finality.³⁵⁴

Moreover, our unique brand of federalism puts a high premium on comity. Federal courts should not lightly disregard the factual findings and legal conclusions reached by state courts. The specter of federal district judges holding endless evidentiary hearings that reexamine whether the state courts correctly decided ineffective assistance issues explains much about how *Strickland* is applied in habeas cases like *Smith v. Murray*. It is enough to give anyone pause. The crowded criminal appellate dockets of the last thirty years argue strongly in favor of rules that can rely as much as possible on the record developed at trial. And the very notion of letting defendants litigate claims that were not raised at trial has a sort of nightmarish quality about it.

Sympathy for finality and comity, and the powerful cultural forces they manifest, should not, however, require a parsimonious reading of the Sixth Amendment right to the assistance of counsel. When the alleged failure of the lawyer is in forfeiting claims that would have benefited the client's case, or in failing to manifest loyalty to her client,³⁵⁵ the

354. See GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW 71–86 (1998).

355. See *supra* notes 315–26 and accompanying text.

policy choice is between ignoring most of these fundamental errors by structuring presumptions in favor of the State³⁵⁶ (the *Strickland* approach) or forcing appellate courts to decide whether the claims were meritorious or the disloyalty harmful. While it is not an easy choice, the Sixth Amendment requires more from courts than simply deciding that, as a whole, the representation was not unreasonable, or not prejudicial, and thus that fundamental errors by counsel can safely be ignored.

I do not claim that the history I presented compels a particular policy choice. Nonetheless, I suspect that Glanvill,³⁵⁷ Bracton,³⁵⁸ Britton,³⁵⁹ and the author of *The Mirror of Justices*³⁶⁰ would be stunned to learn that in the twenty-first century the failure of lawyers to raise claims that might result in acquittal is not enough to prevent the client from going to prison or, in the case of Michael Smith, David Washington, and many others, to their death. If this seems intuitively right, then the only question is how to structure an inquiry into these failures. What I offer in this article is, I hope, the opening gambit in a sustained dialog about how to improve on the Court's sorry performance in the area of effective assistance of counsel.

356. See *supra* notes 64–84 and accompanying text.

357. See *supra* notes 161–64 and accompanying text.

358. See *supra* notes 165–72 and accompanying text.

359. See *supra* notes 171–77 and accompanying text.

360. See *supra* notes 137, 273 and accompanying text.

