# THE ADVERSARY SYSTEM, ADVOCACY, AND EFFECTIVE ASSISTANCE OF COUNSEL IN CRIMINAL CASES

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## INTRODUCTION

Some lawyers make a profound difference. Whether a criminal defendant goes to prison may depend on her lawyer's knowledge and skill. Moreover, the convicted defendant's degree of liability and the severity of her punishment can turn on the quality of her lawyer. In a capital case, a defendant's execution may be a matter the lawyer, like Lady Macbeth, cannot wash from her hands.

The failings and inadequacies of defense counsel, however, should not help to satisfy the prosecution's burden of proving guilt, or of establishing appropriate liability and punishment. Criminal defendants should suffer conviction and prison or execution solely because of their properly proven crimes. Since so much depends on attorney competence, our laws and policies should attempt to ensure that attorneys are, in fact, competent. A constitutional standard defining adequate criminal defense attorney performance is one way to further attorney competence.

In two 1984 cases, *United States v. Cronic*[1] and *Strickland v. Washington*,[2] the United States Supreme Court addressed the question of effective assistance of counsel in criminal cases.[3] The Court established a new, but relatively weak, constitutional effective assistance standard and set forth detailed rules for its application.[4]

This article examines the Court's new constitutional standard and its related rules, exploring their theoretical and practical implications. I conclude that the new standard, based solely on due process considerations,[5] offers relief to some defendants who suffer because of counsel's inadequate performance, but by no means reaches all meritorious claims. While *Cronic* and *Strickland* will help lower courts resolve ineffective assistance claims by giving them a uniform standard to apply, the two decisions do not solve the systemic problem of ineffective assistance of counsel. The Court's new rules provide no

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1. 466 U.S. 648 (1984).

2. 466 U.S. 668 (1984).

3. The Supreme Court first acknowledged that the right to counsel means the right to "effective assistance of counsel" in McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

4. *Cronic*, 466 U.S. at 657-62; *Strickland*, 466 U.S. at 687-98.

5. U.S. CONST. amend. XIV.

practical guidance to criminal defense attorneys and do nothing to improve the quality of criminal defense.

As an alternative to the Court's rules, I propose effective assistance standards based on advocacy norms derived from both due process[6] and equal protection guarantees.[7] Only by addressing equal protection as well as due process concerns can an effective assistance standard protect the reliability and accuracy of trial court results. Unlike the *Cronic-Strickland* rules, such standards would impose minimum, specific defense attorney obligations.

## I
## THE SUPREME COURT'S NEW CONSTITUTIONAL STANDARD FOR EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

### *A. The Standard Defined*

In *United States v. Cronic* and *Strickland v. Washington*, the Supreme Court finally held that the sixth amendment guarantee of assistance of counsel in criminal trials requires effective counsel.[8] Together, the cases provide a much needed, although general and inadequate, statement of what constitutes effective assistance of counsel. Prior to these decisions, state and lower federal courts had often disputed this issue,[9] and convicted defendants often claimed in appeals and writs that counsel had been ineffective.[10]

Prior cases had recognized that there were three general situations in which there might be ineffective assistance of counsel. Counsel might be ineffective because she was incompetent,[11] because she was operating under some state imposed disability, such as a short time to prepare,[12] or because she had a conflict of interest.[13] In addition to the foregoing situations, there was some developing law that capital cases, because of the stakes involved and their

6. *Id.*

7. *Id.*

8. *Cronic*, 466 U.S. at 654-55; *Strickland*, 466 U.S. at 686.

9. *See* Bazelon, *The Defective Assistance of Counsel*, 42 CIN. L. REV. 1 (1973); Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233 (1979). *See generally* 2 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE, §§ 11.7, 11.10.

10. 2 W. LAFAVE & J. ISRAEL, *supra* note 9, at § 11.1 (citing Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 331 (1973)); Sherrill, *Death Row on Trial*, N.Y. TIMES, Nov. 13, 1983, § 6 (Magazine), at 80, 100 ("Ineffective counsel if one of the commonest arguments in capital cases . . . .").

11. *See, e.g., McMann*, 397 U.S. at 771 ("If the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel."); *see also* W. LAFAVE & J. ISRAEL, *supra* note 9, at § 11.10.

12. Geders v. United States, 425 U.S. 80 (1976); *see also* Herring v. New York, 422 U.S. 853 (1975); *cf.* United States v. Decoster, 624 F.2d 196, 201 (D.C. Cir. 1976) (discussion of state imposed barriers to effective assistance of counsel). *But see* Morris v. Slappy, 461 U.S. 1 (1983); Chambers v. Maroney, 399 U.S. 42 (1970). *See generally* Strazella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443 (1977) (discussion of development of effective assistance of counsel law).

13. Holloway v. Arkansas, 435 U.S. 475 (1978) (sixth amendment violated when trial court failed either to appoint separate counsel for codefendants or to take adequate steps to ascertain whether the risk of conflict of interest was too remote to warrant separate counsel);

unique features, might require a different competency standard than ordinary criminal cases.[14]

The decisions in *Cronic*, which dealt with an alleged state imposed disability,[15] and *Strickland*, which dealt with alleged incompetence in a capital case,[16] were obviously intended to establish a general standard and to provide guidance to lower courts beset with ineffective assistance claims.

In *Cronic*, the issue was whether defense counsel was necessarily ineffective because of situational disabilities imposed by the government and the defense attorney's own inexperience.[17] Cronic was charged with a complex mail fraud scheme which the government had investigated for four and one-half years. Shortly before trial, Cronic's retained counsel withdrew. The trial court then appointed a young real estate lawyer, with no jury trial experience, to represent Cronic. The trial court then gave the new attorney only twenty-five days to prepare. Following conviction, a federal court of appeals held that Cronic's right to effective assistance of counsel had been violated.[18] The court reasoned that in view of the gravity and complexity of the case, the time afforded inexperienced counsel to investigate and prepare was inadequate. In effect, the court held that counsel could not have been effective under the circumstances.[19]

The United States Supreme Court reversed. Justice Stevens, writing for the majority, stated that the adversary criminal trial is a testing process designed to secure convictions of the guilty and acquittal of the innocent.[20] Effective defense counsel ensures that the criminal trial process is fair by testing the prosecution's case, thus reducing the risk of erroneous conviction.[21] The purpose of the sixth amendment right to counsel, therefore, is to secure a fair trial which produces reliable results.[22] Consequently, there is no sixth

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Glasser v. United States, 315 U.S. 60 (1942) (same); *see also* 2 W. LAFAVE & J. ISRAEL, *supra* note 9, at § 11.9.

14. *Cf.* Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983).

15. *Cronic*, 466 U.S. at 649-50.

16. *Strickland*, 466 U.S. at 671.

17. *Cronic*, 466 U.S. at 649-50.

18. United States v. Cronic, 675 F.2d 1126, 1129 (10th Cir. 1982) (quoting United States v. Golub, 638 F.2d 185, 189 (10th Cir. 1980)).

19. *Cronic*, 675 F.2d at 1129.

20. *Cronic*, 466 U.S. at 655.

21. *Id.* at 655-56. The statement is ambiguous, however. It may mean the Court believes that trial procedures cannot produce accurate results unless those procedures are fair. In other words, fairness is a means to accuracy. Alternatively, one could acknowledge that it is possible to produce accurate results even through unfair procedures, but that fairness is an independent value to be pursued. Finally, the Court's statement could be a mixed claim that certain fair procedures, such as the right to counsel, are a means to ensure accuracy of results, but that others, such as the right to a jury trial (assuming the right is intended as some kind of fairness guarantee), are not, and that we seek fairness both as a means and as an end.

While the opinions in *Cronic* and *Strickland* do not distinguish between these possibilities, their emphasis on "meaningful adversary testing" as the lodestone of effective assistance of counsel suggests that the Court views fairness solely as a means of ensuring accurate results.

22. *Id.* at 658.

amendment violation if defense counsel conducted the trial in such a way as to ensure a "meaningful adversarial testing" of the prosecution's case, even where she committed "demonstrable errors."[23] In *Cronic*, although defense trial counsel made errors, there was no showing that the trial was not a "meaningful" testing of the prosecution's case or that the conviction was not reliable.[24]

The Supreme Court adopted the *Cronic* theory of the sixth amendment and applied it to alleged incompetence of capital trial counsel in *Strickland v. Washington*. In doing so, the Court went well beyond the *Cronic* statement and detailed how reviewing courts should approach ineffective assistance claims.

In *Strickland*, the state of Florida charged Washington with three counts of capital murder, robbery, kidnapping, and other felonies.[25] The trial court appointed an experienced criminal lawyer to defend him. Against his attorney's advice, Washington confessed to two murders, waived a jury trial, and pled guilty to all charges. Washington also waived his right to be sentenced by an advisory capital sentencing jury, choosing instead to be sentenced by the trial judge.[26]

Trial counsel, understandably believing the situation to be hopeless, prepared for the sentencing hearing only by speaking with Washington and telephoning Washington's wife and mother.[27] He sought neither character witnesses nor a psychiatric examination.[28] He decided not to present any evidence about Washington's character or emotional state,[29] despite a capital defendant's right to present any relevant mitigating evidence which might persuade the sentencing authority to save his life.[30] Relying on the trial judge's statement that he respects people who accept responsibility for their actions, counsel argued that Washington's "remorse and acceptance of respon-

23. *Id.* at 656.

24. *Id.* at 666.

25. *Strickland*, 466 U.S. at 672.

26. *Id.*

27. *Id.* at 672-73.

28. *Id.* at 673.

29. *Id.*

30. *See* Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978); *cf.* Hertz & Weisberg, Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CALIF. L. REV. 317 (1981). Indeed, expert capital defense attorneys believe that it is critical to present mitigating evidence. *See generally* D. BALSKE & J. CARROLL, TRIAL OF THE PENALTY PHASE: A MATTER OF LIFE OR DEATH (1984); Farmer & Kinard, *The Trial of the Penalty Phase*, in 2 CALIFORNIA DEATH PENALTY MANUAL N-33 (Cal. Office of the State Pub. Defender ed. 1980) (remarks at Nat'l Legal Aid and Defender Ass'n Convention, Philadelphia 1976); Goodpaster, *supra* note 14.

EDS. NOTE: Normally it is the policy of the *Review* to use female pronouns for the third person singular when the pronoun is used generically. However, because the overwhelming number of capital defendants are male, this article will use the male singular pronoun when referring to a capital defendant. *See* D. BALSKE & J. CARROLL, *supra*, at 2 n.1 (In 1984, of the 1,268 inmates on death row, 13 were female).

sibility justified sparing him from the death penalty."[31] He also argued that Washington had committed his crimes under extreme emotional disturbance.[32] The trial judge sentenced Washington to death.

Washington thereafter sought collateral relief, alleging, among other claims, that counsel's failure to investigate and present character witnesses, to seek a pre-sentence investigation report, to investigate medical examiners' reports, and to cross-examine medical experts constituted ineffective assistance.[33]

In an elaborate opinion, the Court, speaking through Justice O'Connor, ultimately rejected Washington's claims, holding that his attorney was not unconstitutionally ineffective.[34] It stated that in order for a convicted defendant to establish ineffective assistance of counsel, she would have to show both that counsel's performance was deficient and that the deficiencies were prejudicial.[35] The Court, rather than specifically setting out defense counsel duties, held that counsel's performance was to be assessed under a standard of "reasonableness under prevailing professional norms."[36] In other words, the Court will deem counsel's performance inadequate only if reasonably competent counsel would not have acted as trial counsel did.

The Court also provided detailed rules to guide courts applying the standard. Reviewing courts must strongly presume that trial counsel was competent[37] and that the trial result was reliable.[38] The courts must assess counsel's acts and omissions from counsel's perspective at the time challenged decisions were made, rather than with the benefit of hindsight.[39] In reconstructing counsel's perspective, the court must take into account any constraints of time, money, or client information and choice.[40]

Once the reviewing court determines that trial counsel's performance was deficient, the defendant must show that she was prejudiced by it.[41] She "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[42] In other words, in determining prejudice, the reviewing court should judge the fundamental fairness of the proceeding. Thus, an ineffective assistance claimant must show that "despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adver-

31. *Strickland*, 466 U.S. at 673.
32. *Id.* at 673-74.
33. *Id.* at 675.
34. *Id.* at 700.
35. *Id.* at 687.
36. *Id.* at 688.
37. *Id.* at 689.
38. *Id.* at 696.
39. *Id.* at 689; Goodpaster, *supra* note 14, at 343-44.
40. *Strickland*, 466 U.S. at 681 (citing court of appeals holding).
41. *Id.* at 691-92.
42. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

sarial process that our system counts on to produce just results."[43]

The Court also held that because a capital sentencing proceeding was virtually a kind of adversary trial, the same reasonable competence standard applicable to criminal trials is also applicable to capital sentencing hearings.[44] The Court, however, changed the prejudice standard somewhat to reflect the unique character of the capital sentencing decision. To establish prejudice due to attorney incompetence affecting the capital sentencing hearing, the defendant must show "a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."[45]

In sum, no matter how deficient trial counsel was, as long as the adversarial process sufficiently tested the prosecution's case so as to result in a reliable verdict, there is no denial of the sixth amendment right to effective assistance of counsel. If the trial result is questionable, there is a potential denial of effective assistance when counsel's conduct was outside the range of what reasonably competent counsel would do in the same situation. However, when counsel's trial conduct is called into question, a reviewing court must strongly presume that counsel was competent; in their decisions and actions, defense counsel must be given the benefit of every doubt. Finally, even when a claimant shows an attorney's conduct to have been incompetent, she must still show that such conduct affected the trial result.

In order to assess these new rules for effective assistance of counsel, it is first necessary to consider the purpose of effective assistance standards within an adversarial legal system.

### *B. What Should an Effective Assistance Standard Do?*

Standards for effective assistance of counsel should help insure that criminal adjudications deliver results as correct as reasonably possible. By doing so, such standards would ensure that the criminal justice system accords fairness to the defendant. This fairness is the defendant's major systemic concern[46] and is essentially a question of due process and equal protection. Due process should guarantee fairness to individuals in their prosecutions; equal protection should accord fairness as between individuals in their separate prosecutions.

Due process attempts to ensure that the state obtains convictions fairly. The adversary criminal trial is an imperfect system for determining facts and assigning criminal liabilities. Because the consequences of conviction are severe, we are deeply concerned about the possibility that someone will be

43. *Id.* at 696.

44. *Id.* at 686-87.

45. *Id.* at 695.

46. Of course, a standard for effective assistance of counsel should also reflect the need to accord fairness to the state, essentially a question of finality of criminal adjudications. This aspect of the standard, however, is beyond the scope of this article.

wrongly convicted. An effective defense lawyer is therefore critical to ensuring the fairness of adversary criminal trials; if a defense lawyer is insufficiently skilled or knowledgeable, the defendant may be convicted because of her lawyer's inadequacies, not because she is really guilty.

Conviction of the innocent, however, is not our only due process concern. Criminal trials decide not only whether a defendant is guilty, but sometimes also her degree of guilt. Furthermore, what happens at trial may directly relate to the punishment which a convict receives, particularly in capital cases. Consequently, a lawyer's poor performance for even a provably guilty defendant may result in the trier of fact finding a greater degree of guilt or imposing a greater punishment than is warranted.

Fairness to the defendant also requires that criminal defendants be treated evenhandedly. Equal protection principles should ensure that the criminal justice system, which relies on defense attorneys of widely varying abilities, skills, knowledge, industry, and professional moralities, does not treat similarly situated defendants unequally. Similar defendants who have committed similar crimes under similar circumstances ought not to receive vastly different dispositions because of their respective lawyers' varying professional attributes.

The equal treatment problem arises in two ways, which are sometimes interrelated. Similarly situated defendants may receive nonequivalent representation because their lawyers are not equally competent or because they do not have equivalent resources to devote to the case. Under the criminal representation-by-appointment system found in most states, there is little assurance of quality representation. A capable lawyer may be appointed for one indigent defendant, an incapable one for another. In addition, lawyers who are generally competent may be functionally incompetent because they lack the time and resources necessary to do competent work. An affluent defendant can hire a competent attorney and finance a competent defense. A well-funded public defender's office may have excellent investigative resources. In contrast, a private attorney appointed to represent an indigent defendant or a poorly funded public defender's office may have no financial resources. In the latter situations, it is unlikely that a court will finance a competent defense.

In the United States, there are massive interstate and intrastate inequalities in the financing of criminal defense services. Capital cases present a particularly serious, perhaps gruesome, example of this problem. It is quite likely that some capital defendants receive capital sentences because their lawyers do not have the resources to complete a proper investigation or because their lawyers do not know how to try a capital case. Many persons executed or now scheduled to be executed in Mississippi or Louisiana, for example, would not receive a death sentence in California. California is not a more lenient jurisdiction, but it provides considerable resources for the defense of capital cases

that these other states do not provide.[47]

What this example illustrates is generalizable to all criminal cases. Many ineffective assistance problems are systemic problems: poor appointment systems, weak and underfinanced public defender and defense support systems, a weak defense bar, and undertrained attorneys. An *effective* effective assistance standard would address these systemic problems in some way and thereby prevent, insofar as is possible, unfair and unequal treatment.

There is a relationship between due process and equal protection fairness concerns. A court's treatment of an individual may seem fair when her case is looked at by itself, but may appear unfair when compared to similar cases where there was more lenient treatment. Fairness to individuals also requires a standard of scaling or grading which compares the case to other dissimilar cases, as well. The premeditated murderer is more culpable than a heat of passion killer, and the same punishment for these respective offenders is disproportionate. An ideal system of criminal justice would apportion its criminal liabilities to ensure both fairness to individuals and fairness as between individuals, whether or not they are similarly charged or convicted. Because defense counsel plays a critical role in shaping a fact-finder's and sentencer's perceptions of a defendant and the circumstances of her alleged crimes, effective assistance standards should address all the fairness concerns which arise.

47. The larger California public defender offices are well staffed and organized for capital defense work. Where a public defender's office is not appointed, California judges screen possible capital defense attorney appointments. *See Cronic*, 466 U.S. at 665 n.38 (court suggests that trial courts screen appointments). Judges will sometimes appoint two attorneys to defend a capital case. *See* CAL. PENAL CODE § 987(d) (West Supp. 1985) (authorizing funds for appointment of a second attorney for defendant if trial court finds that second attorney is needed to provide a complete and full defense); *cf.* Keenan v. Superior Court, 31 Cal. 3d 424, 434, 640 P.2d 108, 113-14, 180 Cal. Rptr. 489, 495, *appeal dismissed sub nom.* California v. Keenan, 459 U.S. 937 (1982) (given the constitutionally mandated distinction between death and other penalties, trial court abused its discretion when it denied defendant's motion for appointment of a second attorney).

California also has a well developed capital defense training program, and expert legal consultation is available to attorneys trying capital cases. "In the trial of a capital case the indigent defendant, through his counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense." CAL. PENAL CODE § 987.9 (West Supp. 1985). The Office of the California State Public Defender and the Capital Appellate Project (CAP) provide attorney selection services to the courts and also provide assistance to capital attorneys. CAP is a nonprofit corporation established by the State Bar to recruit and represent indigent appellants in capital appeals and other officials and writs. Letter from Michael G. Millman, CAP Executive Director, to Author (Nov. 9, 1984) (on file at offices of New York University Review of Law & Social Change). Continuances for trial preparation are liberally granted, and it is not unusual for California to provide $30,000, $40,000, or more for defense experts. *See generally* Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C.D. L. REV. 1221 (1985).

By contrast, Louisiana offers little assistance to capital defendants. The public defenders who handle capital cases are overworked and understaffed. Court-appointed attorneys are paid only $1,000 and do not have the money or resources to hire expert witnesses and conduct thorough investigations, and continuances are difficult to get. DeParle, *Quirky Justice System Making Louisiana's Ultimate Decision*, Times-Picayune, Apr. 7, 1985 (Special Report, A Matter of Life or Death), at 6-7. There appears to be little or no organized capital defense consultation.

How well does the *Cronic-Strickland* effective assistance standard address these problems? On first reading, the standard seems rightly concerned with substantive justice and consistent with widely held views about the function of criminal defense counsel. Who could object to a standard which purports to overturn unfair, unreliable convictions and affirm all others? Further consideration, however, shows that the Court's new standard is not based on advocacy norms[48] and is unconcerned with unequal results caused by incompetent and unequal advocacy. Rather, it addresses only those concerns relating to due process, system finality, and judicial review, according primary importance to the latter two considerations. It ignores equal treatment problems, and embeds unequal treatment in constitutional law, altering accepted adversary system doctrine to do so. In addition, the new effective assistance standard is itself ineffective, both in accomplishing its own fairness aims and in remedying the systemic problem of incompetent trial counsel.

By assuming that ineffective assistance is not a serious criminal justice system problem,[49] the Court's standard becomes a poor screening device to locate the many cases where a defendant is injured because of her attorney's performance. The standard is not based in advocacy norms, and thus fails to address and define critical defense attorney obligations. It gives no positive guidance to defense attorneys and does nothing to increase defense attorney competence. It does not prevent attorney incompetence, but invites a post-trial review which makes the claimant's case presentation monumentally difficult. The standard neither acknowledges, nor attempts to remedy, the effective assistance equal treatment problems created both by wealth discrimination in the criminal justice system and inadequate provision of resources. It also fails to address effective assistance problems likely to affect the great majority of criminal cases—those involving guilty pleas.[50] Finally, in capital cases, the new standard uses an improper and unintelligible criterion to review the effects of counsel's deficiencies on capital sentencing, undervalues the emotional impact of evidence, and ignores the reality that counsel's strategic decisions during the guilt phase of a trial have an enormous impact during the penalty phase.[51]

These very defects, of course, make the standard an excellent device to discourage and dispose of ineffective assistance claims. Indeed, the Court's new standard appears primarily designed to help reviewing courts deal efficiently with these claims rather than seriously address the potential injustice problems caused by incompetent trial counsel.

This is quite an indictment, and I now turn to my proof of its several counts.

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48. *See infra* text accompanying note 121.

49. *See infra* text accompanying notes 69-72.

50. *See infra* text accompanying notes 97-98.

51. *See infra* text accompanying notes 108-109.

### C. *Theory: What is the Purpose of the Adversary System?*

In order to determine what effective assistance of criminal trial counsel is, and how to ensure it, one must analyze the purposes of our system of adversary trial and the role that adversary counsel plays in achieving those purposes. There are at least four major views of these purposes: the truth-finding view, the fair decision view, the enforcement of rights view, and the view that the adversary system is a process designed to produce publicly acceptable conclusions, whether or not actually true, which project substantive legal norms.

Perhaps the most commonly held view of the purpose of the adversary system is that it is a good truth-finding device. Trial lawyers customarily express this view, and the Supreme Court adopted it in *Cronic* and *Strickland*. This view asserts that a battle in which two opponents contest what the "facts" are and present opposing points of view before a neutral factfinder is more likely to disclose what happened than any other procedure.

Critics realize that our adversary system has some features which are not conducive to this kind of truth-finding.[52] Nonetheless, some believe the adversary system is superior to any other system because, whether or not it discovers the "truth" in some objective or absolute sense, it achieves a second purpose, that of fairness. This fairness is achieved by each party participating equally in shaping the final decision. A battle between adversaries fought under the same rules before an impartial judge ensures both equal participation and fairness.[53]

It is obvious, however, that some features of our adversary criminal trial contribute only weakly, if at all, either to truth-finding or fairness, at least in

52. J. FRANK, COURTS ON TRIAL 80-102, 108-25 (1949); M. FRANKEL, PARTISAN JUSTICE *passim* (1980); Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973); Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 34, 39-43 (H. Berman ed. 1971).

Consider also the following example which, while but a single case, suggests just how weak the truth-finding theory may be:

> [I]t was necessary for [this rape case] to be tried three times. The first time it was tried, the defendant was found guilty and was given a life sentence; then, for a variety of reasons such as newspaper publicity, it was necessary to have the case retried. The second time it was tried the result was a hung jury; so it was tried a third time. This time the defendant was acquitted and the jury actually took up a collection of sixty-four dollars and gave it to him.

Kalven, *Juries in Personal Injury Cases: Their Functions and Methods*, in TRAUMA AND THE AUTOMOBILE 335, 336 (W. Curran & N. Chayet eds. 1966).

These critics may accept that the continental "inquisitorial" or investigative system of trial is a better way to determine what actually happened than through adversary trial. *Cf.* Damaska, *supra* note 52, at 580. For a description of the inquisitorial or investigative system, see *id.* at 556-57. *See generally* J. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY (1977).

53. Fuller, *supra* note 52, at 39-43. The truth-finding and fair-decision views of the purpose of the adversary system are not incompatible. One could argue that fair procedures help to ensure that truth will be discovered or that an interest in the discovery of truth is not inconsistent with fairness. Although it did not discuss these questions, the Supreme Court appears to have taken this view in *Cronic* and *Strickland*.

the immediate context of the trial. Such considerations lead to a third view of the purpose of adversary criminal trial, one emphasizing rights. One version of this position focuses on those defendant's rights which appear designed, in part, to make it difficult for the government to bring and win prosecutions.[54] Such rights include the privilege against self-incrimination, unilateral discovery from the prosecution, and the rights to jury trial and to proof beyond a reasonable doubt. Indeed, these rights arguably distort the truth-finding capabilities of trials and are unfair to the prosecution. This view accepts that truth-finding and fair decision-making are purposes of adversary criminal trial, but further holds that adversary criminal trial has the additional purpose of protecting the defendant from the potentially unfair advantage of government's great power and resources. Because of the serious consequences of criminal conviction, we have established a set of defendant's rights which operate to skew the truth-finding and fair decision functions of the adversary system to disadvantage the government.

A second version of the rights view focuses on everyone's constitutional rights rather than on the the effects of governmental power on the defendant and her trial. These constitutional rights are in jeopardy if the government can violate them with impunity. Courts have devised exclusionary rules to protect fourth, fifth, and sixth amendment rights.[55] Prosecutions thus become occasions for vindicating constitutional rights and remedying their violation;[56] the criminal trial becomes a forum for policing the government as well as a proceeding for determining the liability of an individual defendant.[57]

The final view of the purpose of adversary trial is that it is intended to produce "acceptable conclusions and thus to project substantive legal rules."[58] This view links several ideas. A major aim of the legal system is to educate—to articulate behavioral norms and to affirm certain moral values and law-abiding attitudes.[59] Trials are a kind of moral drama which project a public message through a verdict.[60] If the public is to accept this message, it must believe that a guilty verdict represents a moral judgment about an actual historical fact rather than a mere statement concerning the prosecution's ability to prove certain facts.[61] To accomplish this goal, the trial process must be structured so that it gives rise to public confidence in the result. If the public

54. *See* Damaska, *supra* note 52, at 574-77, 583-89; Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1063-64 (1975).

55. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

56. Damaska, *supra* note 52, at 522-25; Uviller, *The Advocate, The Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. PA. L. REV. 1067, 1077 (1975).

57. A necessary consequence of this view, of course, is that some truly guilty persons who could otherwise be convicted fairly may go free or may receive less than appropriate liability or punishment.

58. Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1390 (1985).

59. *Id.* at 1360.

60. *Id.*

61. In North Carolina v. Alford, 400 U.S. 25 (1970), the Supreme Court arguably blurred

believes the trier of fact erred, it will not accept the moral condemnation of conduct that the verdict embodies.

This educative view posits that the rights accorded an accused serve to strengthen public confidence in the correctness of the verdict. When the prosecution must overcome substantial disadvantages such as high burden of proof, the privilege against self-incrimination, lack of discovery, and the exclusion of probative evidence to convince a jury that a defendant committed a crime, the public is more likely to believe that a guilty verdict was the result of the defendant's culpability. In this view, defense counsel's role is "to design and present the most plausible defenses, even though they may be false."[62] Without such extreme testing of the prosecution's case, the public might not credit a jury finding of guilt.[63]

Although the Supreme Court asserted in *Cronic*[64] and *Strickland*[65] that truth-finding and fairness were the primary purposes of the adversary system, the structure of the adversary system shows that it has multiple purposes;[66]

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this distinction by holding that a trial court may accept a guilty plea from a defendant who does not admit that he committed any criminal acts. The Court stated:

> Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when, as in the present case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.

*Id.* at 37; *see id.* at 37-38.

62. Nesson, *supra* note 58, at 1376.

63. In theory, because a defendant is presumed innocent until proven guilty, Nesson's argument that zealous defense attorney advocacy increases public confidence in the outcome of a trial is applicable whether or not the defendant is found guilty. As a practical matter, however, many people believe the defendant to be guilty from the time she is arrested. *See, e.g., Reagan Seeks Judges With "Traditional Approach,"* U.S. NEWS & WORLD REP., Oct. 14, 1985, at 67 (In responding to a question regarding the necessity of giving a criminal defendant the right to have a lawyer present prior to being questioned by police under Miranda v. Arizona, 384 U.S. 435 (1966), United States Attorney General Edwin Meese responded, "Suspects who are innocent of a crime [should have the protection of a lawyer before police questioning]. But the thing is, you don't have many suspects who are innocent of a crime. That's contradictory. If a person is innocent of a crime, then he is not a suspect."). Thus, when a zealous advocate obtains for her client a verdict of not guilty, the public may, at least in some cases, perceive that a guilty person is going unpunished.

Nesson acknowledges that "a verdict of not guilty . . . will . . . undermine the legal system's projection of behavioral norms if the public has an independent basis for believing that the defendant did in fact commit the wrongful act." Nesson, *supra* note 58, at 1367. This might occur if trials were generally perceived as so encumbered with evidentiary and other restrictions extraneous to truth-finding that trial results were unreliable. The degree to which this perception is held by the public is a fine empirical question which Nesson does not treat. If the adversary system's purpose is to generate normative messages to deter antisocial conduct, the credibility of the system as a "truth" producer is critical. If it is true that the public no longer credits the system, we should change its structure to enhance credibility. *Cf. id.* & n.31.

64. 466 U.S. at 655-58.

65. 466 U.S. at 684 (addressing only fairness).

66. In order to show that our adversary system has multiple purposes, it is helpful to define what comprises the system. American adversary criminal trial is a regulated contest between champions of competing versions of historical fact, inferences of fact, and liabilities dependent on fact, held before and decided by an impartial and passive audience. The chief

these purposes sometimes conflict. For example, the purpose of policing the police conflicts with the purpose of truth-finding. Similarly, we cannot permit judges actively to seek truth and interrogate witnesses and at the same time permit party control of the trial. We cannot both use the defendant as a relevant source of information to help us discover truth and grant the defendant a perfect right to silence. Inevitably, we are forced to compromise some, perhaps all, of the purposes we seek to realize through adversary criminal trial.

One of the purposes most clearly compromised by the structure of the adversary system is truth-seeking. This compromise is illustrated by examining the consequences of our prevailing advocacy ideology. In our adversary system, the adversary's aim is *not* necessarily the discovery of truth. The adversary aims to win, and wants discovery of truth only where the truth, if it can be known, is useful to winning. Finally, even if a trial uncovers the "facts" of what happened, what those facts *mean*, in terms of liability, is altogether another question. In significant part, trials are contests over meaning, and where "facts" are bound to be disclosed, the adversary attempts to shape them and their disclosure so they will bear meanings useful to her case.

Thus, we must acknowledge that under any view of the adversary system, we pursue ends other than truth, sometimes to the detriment of truth. We must also recognize that we both use and authorize trial counsel to seek those other ends and that, in doing so, we permit them to interfere with truth-finding, perhaps for a more general and ultimate legal system purpose. This less than idealistic vision of the adversary system, however, leads to a different effective assistance of counsel standard than that adopted by the Supreme Court. If we acknowledge the multiple purposes of the system, and the pivotal role of counsel in achieving them, we should not test effectiveness simply by measuring fairness and accuracy of results; instead, we should include some measure reflecting the other system purposes as well. Thus, if the purpose of the system is to enforce constitutional rights and to police the police, effective counsel must pursue these goals, even when they do not help to ensure an accurate result. Similarly, counsel should seek to enforce constitutional rights if doing so is useful to the defendant's case. Such a tactic may be viewed as a goal in itself or as a step in making a prosecution difficult, and therefore eminently believable when it results in a guilty verdict. Because we authorize counsel to use various means to help achieve these purposes, we should measure counsel's performance by her use of those means.

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structural features of such trials are: (1) "proof" of facts through a contest of disparate versions of facts; (2) party control and management of evidence presentation; (3) party commitment to winning rather than to the disclosure of truth; (4) discovery rules imposing a greater obligation on the prosecution to disclose evidence than upon the defense; (5) complex evidentiary rules governing admissible evidence, and what and how facts may be proven; (6) a traditional presentation order requiring the prosecution to proceed first, and thus reveal its case before the defense commits itself; (7) an absence of governmental power to demand that the accused testify; (8) an extraordinarily high burden of proof imposed on the prosecution; and (9) lay or jury determination of facts. *See also supra* note 52.

The Supreme Court's proclamation that truth-finding and fairness are the essential purposes of the adversary system[67] leads to a reading of the sixth amendment right to effective assistance of counsel as a due process or fair trial right. By implication, the Court was also saying that a criminal defendant is entitled neither to a defense attorney who asserts rights beyond those necessary for a fair trial with a reliable result nor to an attorney capable of testing the prosecution's case to the fullest extent possible.

As a practical matter, the criminal justice system permits some defendants to have attorneys who will use every legitimate means possible, including vindication of rights, and all a trial lawyer's skills and tricks, to defeat a prosecution. The *Cronic-Strickland* effective assistance standard, in effect, holds that while some defendants, usually the affluent, have such lawyers, a criminal defendant is not entitled to one. The new standard thus accepts a system with two classes of defendants: those who through wealth or the luck of counsel appointment have attorneys capable of using the system to defeat or ameliorate a prosecution, and those who do not. The Supreme Court's reading of the sixth amendment guarantee of effective assistance of counsel thus accords due process or fairness, but not equal protection. The Court's effort to reengineer our system of adversary criminal trial to produce more truth-finding uses the indigent defendant as a shim.[68]

### *D. Problems with the Court's Effective Assistance Rules*

#### *1. Presumptions of Competence and Reliability*

While there is no empirical study of trial attorney competence, some judges, like Chief Justice Burger,[69] have reported from their experience that criminal trial attorney incompetence is both widespread and serious.[70] Studies of defense attorney behavior in plea bargaining, which would include the vast majority of all criminal cases, strongly suggest significant incompetence and

67. *See supra* notes 64–65 and accompanying text.

68. Should we read the equal protection clause of the fourteenth amendment as guaranteeing the indigent criminal defendant the same opportunity as the wealthy defendant to defeat a meritorious prosecution? It may be that we skew the criminal trial as a decision-making process to take account of interests other than the accurate determination of the facts. It may also be that skilled lawyers can play the skew and gain acquittals where, in truth, they should not. An advocate of truth-finding might nonetheless argue that this skew is a flaw in the system, the remedy for which is to reduce the number of all such windfalls, not expand it.

As sympathetic as I am to this position, I must note that it is an objection to the nontruth-finding purposes of the adversary system and the ways in which we achieve them. In other words, it is an objection to our adversary system as presently structured. The proper remedy is reformation of the system across the board.

69. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973).

70. *See id.* at 234; Bazelon, *supra* note 9, at 2.

If we make the assumption that one-half of trial lawyers are not qualified to be trial lawyers, we must also assume they do not all try cases against one another. In a worst case assumption, each incompetent would face a competent attorney in trial. This would mean that all trials were defective.

reveal that many defense attorneys trade off their client's interests for their own.[71] Consequently, while we do not know the incidence of trial attorney incompetence, impressionistic information indicates it may be a serious systemic problem.

Given the state of our knowledge, it is amazing that the Supreme Court adopted an effective assistance review standard which included strong presumptions of attorney competence and of the reliability of trial results. The Court's opinion in *Strickland* simply declares the presumptions and makes no effort to establish a factual basis for them or otherwise to justify them.[72]

From a judicial review perspective, one can see why a presumption of attorney competence is absolutely necessary. If we cannot make some such presumption, many trial results are questionable and in jeopardy. Given that the important decisions made by criminal trials have a profound effect on defendants' lives, and all the time, effort, money, and resources put into criminal trials, such uncertainty is a horrifying prospect. This fearful thought, rather than any empirical conclusion, creates the Court's presumption. Thus, the presumption is merely an expression of confidence in the workings of the adversary system; belief in the system, not knowledge of its actual operations, animates it. It is clear, then, that if we do have a serious ineffective assistance problem, the *Cronic-Strickland* rules do not treat it. Instead, they create a judicial *deus ex machina,* a judicial invention which solves the problem of counsel incompetence by presuming it away.

Not knowing how serious a problem criminal trial attorney incompetence is, nor having any easy way to find out, one might accept the need for a presumption of competence just to make the system work. Nevertheless, one might also expect a recognition that such a working presumption was merely factual, made when there was no showing that it was inappropriate. A strong presumption of competence, though, as the Court made in *Strickland*, means that ineffective assistance claims are, *as a matter of law*, quite difficult to establish. Thus, the strong presumption appears to be a result-oriented addition to the *Strickland* "reasonable competency" standard, designed to ensure the discouragement and ready defeat of ineffective assistance claims.

Incompetent trial counsel, however, can create serious injustices—unwarranted convictions, punishments, and executions—which a strong presumption of competency cannot make vanish. In fact, the presumption creates a situation wherein the only effective way to address incompetency is before, rather than after, trial. This could be done through adequate defense service

71. Alschuler, *The Defense Attorney's Role in Plea Bargaining,* 84 YALE L.J. 1179 (1975).

72. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

*Strickland*, 466 U.S. at 688 (citation omitted).

financing and training programs, and perhaps through peer review or certification programs.

### 2. *Time and Money Constraints and the "Reasonably" Competent Attorney*

The Court's treatment in *Strickland* of the reasonable competency standard and its application scheme shows some of its problematic practical consequences. In determining whether defense counsel's choices were within the range of reasonable competency, the reviewing court must consider the totality of the circumstances.[73] The circumstances apparently include "[l]imitations of time and money . . . [which] may force early strategic choices, often based solely on conversations with the defendant and a review of the prosecution's evidence."[74]

This language shows little awareness of the very foundations or conditions of effectiveness—which the defense attorney may have some responsibility for—and little appreciation for what reasonable criminal defense advocates actually do. It suggests that lack of time and money are inherent, natural constraints on defense attorneys, and that defense attorneys have no advocacy obligation to seek additional time and money. It fails to acknowledge that the defense attorney may have some obligation to investigate a client's story.

The major obligation of defense counsel is to try to make herself effective. This means requesting more time and money if possible, making a record on these issues if not, and attempting to develop an effective working relationship with the defendant.[75] Developing such a relationship may be difficult, for defendants often do not trust defense counsel, particularly when the attorneys are public defenders or court appointees. *Strickland*, however, avoids the sensitive issue of the defense attorney's obligation to establish an effective, working relationship with the client because the decision ignores the importance of such a relationship.[76]

An effective, working, lawyer-client relationship implies that the attor-

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73. *Strickland*, 466 U.S. at 681 (quoting Washington v. Strickland, 693 F.2d 1243, 1255 (5th Cir. 1982) (footnote omitted)).

74. *Id.*

75. Counsel is provided to assist the defendant in presenting his defense, but in order to do so effectively the attorney must work closely with the defendant in formulating defense strategy. This may require the defendant to disclose embarrassing and intimate information to his attorney . . . . Moreover, counsel is likely to have to make a number of crucial decisions throughout the proceedings on a range of subjects that may require consultation with the defendant. These decisions can best be made, and counsel's duties most effectively discharged, if the attorney and the defendant have a relationship characterized by trust and confidence.

Morris v. Slappy, 461 U.S. 1, 21 (1983) (Brennan, J., concurring in the result).

76. The Court has not adequately addressed this difficult issue. *Slappy*, 461 U.S. 1, might appear to have settled it, but does not do so. In *Slappy*, the federal court of appeals had held that Slappy's sixth amendment right to counsel had been violated because he had not been granted a trial continuance so that his original appointed attorney, who was absent because of emergency surgery, could try the case. The court of appeals held that the sixth amendment right to counsel guarantees a "meaningful relationship" between an accused and her counsel. The

ney does not rely solely on the client's initial story as defense gospel. However, *Strickland* implies that it is almost always proper for a defense attorney to rely on her client's story. For example, under *Strickland*, if the client says she has an alibi, the defense attorney may reasonably base her investigative and other defense decisions on that information. This assumption belies the experience and practice of most criminal defense attorneys, who are well aware that most defendants are guilty, and that many clients lie, at least initially.[77] An experienced criminal defense attorney treats a client's assertions simply as possibilities to be tested against evidence rather than as givens.[78] Indeed, one significant purpose of defense investigation and discovery is simply to verify the client's story. *Strickland* was insensitive to such realities of criminal defense practice, and failed to appreciate that, particularly in those jurisdictions where the defense cannot obtain much discovery from the prosecution, the unsavvy, gullible, or overworked and undersupported defense attorney can go radically astray in preparing a case.

The Court's assumptions regarding limitations on time and money also ignore the possibility that even skilled counsel may be made ineffective by a lack of time or money. Thus, the Court completely skirts the equal treatment issues because defendants who can afford to hire their own attorneys do not suffer the same "limitations of time and money" experienced by indigent defendants. Wealth discrimination and criminal defense financing problems are endemic to the criminal justice system, and the new effective assistance rules neither lessen nor even acknowledge them.[79]

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Supreme Court reversed, expressly rejecting this idea. *Id.* at 13-14. The *Slappy* holding, however, is narrower than it appears.

Shortly before trial, Slappy's public defender, Goldfine, was hospitalized for surgery. The trial court then appointed another public defender named Hotchkiss from the same office to represent Slappy. Slappy requested a trial continuance so that Goldfine could try the case. Hotchkiss opposed the continuance on grounds that, relying on Goldfine's case work-up and his office's investigation, he felt adequately prepared to try the case. *Id.* at 6. Nothing in the record suggested either that Hotchkiss was not adequately prepared nor that Hotchkiss was not a competent attorney. Indeed, after Slappy's request for a continuance was denied, Hotchkiss obtained a hung jury on two of the serious charges against Slappy. *Id.* at 12.

While Slappy may have preferred Goldfine to Hotchkiss, the communication between Hotchkiss and Slappy, either directly or through the public defender's office, was sufficient for Hotchkiss to do his job. Slappy may not have had a "meaningful" relationship with Hotchkiss, but he had an effective, working relationship which generated the information and decisions necessary to trying the case. Under these circumstances, *Slappy* must be read as meaning that where there has been attorney-client communication adequate to prepare for trial, and the trial attorney has been competent, a defendant's claim that she has a better relationship with another attorney who might try the case makes out no sixth amendment claim. The Court, therefore, has not decided what obligations a defense attorney has to attempt in order to develop an effective, working relationship with a defendant.

77. As a former public defender, I simply assert that this is the commonly held view of criminal defense attorneys. For an academic source see Uviller, *supra* note 56, at 1072.

78. *Id.*

79. "Undoubtedly, we must accept the harsh reality that the quality of a criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy." *Slappy*, 461 U.S. at 23 (Brennan, J., concurring in result).

All of the foregoing problems arose in the illustrative case of *Knighton v. Maggio.*[80] Louisiana charged Knighton with capital murder for a single killing which occurred during the course of an armed robbery. Knighton's attorney, Phillips, was a local public defender with considerable felony jury trial experience and a felony caseload in the hundreds. Knighton maintained he was innocent and provided Phillips with the names of two alibi witnesses. Although he could not locate the witnesses, Phillips resolved to use the alibi theory.

One week before trial was to begin, the prosecutor charged one of the alibi witnesses with the same robbery-murder. Phillips looked for the other alibi witness, but was unable to locate her until she took the witness stand, along with the charged alibi witness, to testify against Knighton. Phillips, having only prepared the now hopeless alibi defense, desperately atttempted to establish that Knighton lacked the intent necessary to commit the crime charged.

One hour after the jury returned a guilty verdict, the court began Knighton's capital sentencing hearing. Although mitigating evidence did exist, Phillips was unaware of it. He had made no penalty phase investigation whatsoever, and offered no evidence at the sentencing hearing, but simply pled for Knighton's life. Knighton was sentenced to death and later executed.[81]

At a federal habeas corpus hearing on his effectiveness, Phillips explained that he felt overwhelmed and devastated that his alibi case had been eviscerated by the very witnesses who were supposed to establish it.[82] Knighton presented many character witnesses at his habeas hearing who testified regarding the mitigating evidence they would have given at his capital sentencing trial had they been called. Four legal experts familiar with the trial of capital cases also testified that Phillips' caseload was far too great and that reasonably competent capital defense counsel would conduct both a guilt and a sentencing phase investigation well before trial. The psychological and emotional impact of mitigating evidence might persuade a jury to spare Knighton. Each expert thought Phillips' performance was well below standard for capital counsel, although, because of his caseload, Phillips himself may not have been entirely at fault.[83]

On the basis of *Strickland*, Knighton's ineffective assistance writ was denied. In reviewing this denial, the federal court of appeals opined that Phillips' performance and "decision" not to use mitigating evidence were not

80. Knighton v. Maggio, 740 F.2d 1344 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 32 (1984). The author attended Knighton's habeas corpus hearing in the federal district court. The text discussion includes facts developed at that hearing, but not mentioned in the court of appeals opinion.

81. Before he was executed, Knighton stated he had been high on drugs when the killing occurred and that he had not intended to kill, but at most merely to wound. J. Doss, The Death Penalty—Law and Morality 3, 31-32 (Dec. 18, 1984) (unpublished manuscript) (on file at offices of New York University Review of Law & Social Change).

82. *Knighton*, 740 F.2d at 1348.

83. This is my own summary of the defense experts' testimony. *See supra* note 80.

constitutionally deficient.[84]

No one can say whether Knighton's jury would have sentenced him to death had it had all the evidence which was finally presented at the habeas hearing. Several features of his trial counsel's performance, however, were deficient and may have contributed to his capital conviction and sentence. For instance, counsel did not attempt to pierce his client's alibi story or claim of innocence. Counsel also prepared an alibi case without alibi witnesses, and he continued this defense even after he learned the prosecution had charged a major alibi witness. In a capital case, he did not anticipate a death-qualifying guilt verdict, and neither investigated nor otherwise prepared for a capital sentencing hearing. Even after the guilty verdict was returned, he did not request a continuance so that he could attempt to do so.

Phillips was probably in no position to perform any of these tasks had he thought to do them. In addition to lacking skill and knowledge, his omissions showed him to be an overworked public defender too tolerant of the conditions under which he operated. He was seriously overloaded with cases; he had little investigative or other resources; the system did not provide open discovery and it moved cases rapidly; Phillips had no time to reflect on his work.

In Louisiana, attorneys like Phillips probably establish the norm under the *Strickland* reasonable competency standard.[85] Nevertheless, the mere fact that Phillips was an "experienced" public defender does not mean he was in a position to do the best that could have been done for Knighton, nor that what he did for Knighton was even adequate. Had Knighton been an affluent defendant able to pay an attorney who could devote herself to his case, his case clearly would have been tried quite differently and the trial outcome might have been different.[86]

The *Knighton* case illustrates some of the defects inherent in the new effective assistance rules. While nominally a comparative standard using the practice of reasonably competent attorneys as the norm, the new effective assistance rule imposes no minimum obligations of any kind on defense attorneys. It takes circumstantial constraints of time, money, and clients' intitial stories as givens which the defense attorney has neither the responsibility nor

84. *Knighton,* 740 F.2d at 1350.

85. Defense counsel's performance is deficient if it falls below the range of conduct "reasonably competent" criminal defense attorneys undertake in such a case. *Strickland* does not clarify whether this is a local, state, or national standard. Lower courts prior to *Strickland* have interpreted reasonable competence as being a local standard. *See, e.g.*, Moran v. Morris, 478 F. Supp. 145 (C.D. Cal. 1979), *vacated and remanded on other grounds,* 665 F.2d 900 (9th Cir. 1981). The standard, therefore, may vary from jurisdiction to jurisdiction and may vary within a state. Since the *Strickland* standard does not create minimum competency requirements, in areas where criminal defense practice standards are low, the standard for determining deficiency may be lower. The "meaningful adversary testing" fair trial rationale of *Cronic-Strickland* probably sets some lower limit, although it is unclear what that limit is. *Cf. supra* note 72.

86. For an excellent study of high priced, white collar criminal defense, see K. MANN, DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 229-37 (1985).

the capacity to change. Because it accords to defense attorney decisions and actions a "strong presumption" of attorney competence, it virtually mandates that reviewing courts find that most defense attorneys, no matter what they have done or failed to do, are competent.[87]

### 3. *Practical Problems in Determining Prejudice under the Court's Standard*

*Strickland*'s prejudice test shows how retrogressive the Court's new effective assistance rules are as a guide for defense advocacy. The test is, in effect, a harmless error test which asks whether there was overwhelming evidence of the defendant's guilt, notwithstanding counsel's substandard performance. Such a test effectively tells trial counsel that if the evidence against her client appears strong, she can be less diligent than in cases where her client's guilt is less clear.[88] Generally, however, harder cases require greater effort, and a lawyer needs to become increasingly diligent and aggressive as the strength of the evidence against her client increases.

In addition to the perverse message that the prejudice test sends defense attorneys, the test also imposes a formidable burden of proof on those defendants who assert a claim of ineffective assistance. Under the test, the claimant has the burden of showing that counsel's deficiencies were such as to undermine confidence in the outcome of the trial.[89] Given the strong presumptions in favor of attorney competence and the reliability of trial results, this burden can be insurmountable, even in the most meritorious of cases.

In general, it is exceptionally difficult to establish ineffective assistance of counsel from an appellate record which reflects only what transpired in the trial court. For example, where counsel has failed to interview witnesses or investigate, the record on appeal may show that counsel did not perform the task. However, the record is unlikely to show either the reasons for counsel's omission or what information the investigation would have provided. Where the question is not one of omission, but of commission, the strategy and hindsight rules will come into play to explain or excuse it.[90] On the other hand,

87. The strong presumption of attorney competence, as well as the presumption of reliability of trial results in the face of alleged attorney incompetence, seem to be gratuitous additions to a standard sufficiently stringent without them. The presumptions have no basis in fact and seem explainable only as result-oriented additions designed to ensure the ready defeat of ineffective assistance claims. This is perfectly understandable if we assume that the new standard was devised, at least in part, to stem the flood of ineffective assistance claims and to limit the number of reversals on that ground. *Cf. supra* text accompanying notes 69-72.

88. Lower courts have begun to express some uneasiness about "harmless error" by defense counsel. Some courts have suggested that a convicted defendant may sue her attorney civilly for performance deficient under the sixth amendment but not prejudicial. *See, e.g.*, Crisp v. Duckworth, 743 F.2d 580, 588-89 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 1221 (1985); McKinney v. Israel, 740 F.2d 491, 492 (7th Cir. 1984).

89. *Strickland*, 466 U.S. at 687.

90. "Reviewing courts should avoid second guessing counsel's informed choice among tactical alternatives, but a defense attorney's freedom to make such decisions is not without limits." People v. Pope, 23 Cal. 3d 412, 424, 590 P.2d 859, 866, 152 Cal. Rptr. 732, 739 (1979). Where possible, courts will construe counsels' choices as reasonably competent tactics, *id.* at

the record, which must be read to support the verdict, *will* support it.[91]

Assuming the claimant does understand all of this, her ineffective assistance petition must then state a prima facie case alleging deficiencies which, if true, would lead to an inference of prejudice. Petitioner's allegations will have to overcome a response by the government which adverts to the evidence of guilt revealed by the trial record. When the claimant alleges attorney failures to investigate, interview witnesses, or otherwise develop favorable evidence, she generally will be unable to make the prejudice showing without conducting the very investigation, or developing the very evidence, which she claims that her attorney omitted. Impoverished, imprisoned, and unrepresented, the claimant cannot be expected to fill her counsel's investigatory void.

In the unlikely case that petitioner overcomes this difficulty, she may get a hearing. If counsel is appointed, a doubtful prospect in many jurisdictions, counsel may need money to pursue the investigation that petitioner claims her trial counsel should have explored. In many jurisdictions, it is highly doubtful that a judge would order the state to finance this investigative work. Thus, the prejudice standard, which might be appropriate for wealthy claimants, may prevent indigent defendants, wrongly convicted because of counsel's failings, from obtaining relief.

Assuming the petitioner gets a hearing on her ineffective assistance claim, she will have to establish further that her trial counsel fell below the local competency standard. To do this, she may have to obtain expert local defense counsel to examine the trial record and other submitted evidence, and render an opinion on whether reasonably competent counsel would have done or failed to do those tasks complained of by the petitioner. Unless a court is willing to take judicial notice, there is no other way to establish the local professional norm. These expert witnesses may demand fees to study the case files and records, and to testify. It is once again unlikely that the state will cover this expense.

If the petitioner does get this far, she must still overcome the strategy and hindsight rules. Petitioner will have to show that her attorney's challenged decisions or failures were unreasonable under the circumstances as known to counsel at the time she made the decisions. These circumstances include limitations of time, money, and client information, for the defense attorney has no advocacy obligation to attempt to transcend these barriers.[92] Given the strong presumption in favor of attorney competence, petitioners will rarely, if ever, be

425, 590 P.2d at 866, 152 Cal. Rptr. at 739, and where the record does not show why counsel acted, or does not permit a reasonable inference, courts will also assume that counsel acted competently, *id.* at 426, 590 P.2d at 867, 152 Cal. Rptr. at 740; *see also* United States v. Decoster, 624 F.2d 196, 203 (D.C. Cir. 1979) ("The defense attorney's function consists, in large part, of the application of professional judgment to an infinite variety of decisions in the development and prosecution of the case.").

91. The habeas corpus petitioner, who theoretically can develop additional record, fares no better. A habeas petitioner is usually poor, in prison, and uneducated. Even in the best of circumstances, she would have grave difficulties learning of her counsel's deficiencies.

92. *See supra* notes 73-74 and accompanying text.

able to make the required showing. However, even assuming the petitioner does establish substandard attorney performance, she must then show that the probable effects of her attorney's errors were such as to undermine confidence in the accuracy of her conviction.

Post-*Strickland* cases show that very few effective assistance petitioners will, in fact, succeed. Reviewing courts have found defense counsel stunningly deficient, and have nonetheless found no prejudice. For example, *Crisp v. Duckworth*[93] involved a first degree murder trial in which there were no eyewitnesses to the killing. One major issue was whether the defendant had an intent to kill. Among his other failings, defense counsel Quirk did not interview *any* of the twenty-nine prosecution witnesses. At a post-trial hearing on his competency, Quirk testified that he generally knew without investigating what information he wished to put before the jury, and it was his practice therefore not to investigate in preparation for trial. The dumbfounded court of appeals rightly found these statements "amazing."[94]

Nevertheless, the court found no prejudice under *Strickland*.[95] Given the enormity of Quirk's deficiencies, however, the court did make a disclaimer: "[D]efense attorneys 'should not view the *Strickland* prejudice test as an excuse to exert less than a full effort on behalf of criminal defendants facing apparently inevitable conviction.' "[96]

Obviously, ineffective assistance of counsel is a problem better prevented than retroactively addressed. On the other hand, it is also obvious that our system does not uniformly provide effective counsel before trial. We must have some review standard which finds those cases where incompetent counsel cause injustice. An ideal standard would both locate those cases and provide guidelines stating, at least generally, what was expected of counsel. Such guidelines, in addition to being an aid in deciding cases on review, would guide counsel and aid criminal justice planners in devising counsel appointment and training systems, and determining who will be responsible for financing defense services.

As appropriate as it may seem in the abstract, the *Cronic-Strickland* standard is not rooted in the reality of the criminal justice system, but in the reality of the judicial review system. It is far less a standard for effective assistance of counsel than a standard for disposing of effective assistance of counsel claims.

### *4. The New Standard and Guilty Pleas*

The new standard does little to correct the general problem of ineffective assistance of counsel. It is also difficult to apply to the vast majority of cases handled by criminal defense attorneys. Since far more cases are resolved by

93. 743 F.2d 580 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 1221 (1985).
94. *Id.* at 583.
95. *Id.* at 588.
96. *Id.* at 588 (quoting *Israel*, 740 F.2d at 492 n.2).

plea bargain than by trial, ineffective assistance is a quantitatively greater problem in guilty plea cases than in cases resoved by trial.[97] Furthermore, the ineffective assistance problem is much harder to reach in guilty plea cases because there is no evidentiary record from which to assess counsel's alleged failings.[98]

Even assuming a claimant could create an appropriate record,[99] the *Cronic-Strickland* focus on "meaningful adversary testing" or a "fair and accurate result" is not very relevant in plea bargaining situations. Pleas are often negotiated before cases are thoroughly investigated or witnesses interviewed. In a trial sense, there is no adversarial testing at all. The only testing that does exist takes place in defense counsel's mind as she assesses whether, given what she knows about the case, the prosecutor's bargaining policies and trial abilities, and the trial judge's proclivities, the proferred deal is as good as can be obtained and is preferable to trial. There may also be some testing of the state's case through negotiations with the prosecutor. In a bargaining situation, a "fair and accurate result" must therefore mean a result which is reasonable under the circumstances.

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97. JUDICIAL COUNCIL OF CALIFORNIA, 1985 ANNUAL REPORT 119 (in fiscal year 1983-84, 54,200 or 81% of all criminal dispositions in California superior courts were by guilty plea); Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293 (1975) (pressure on defendants to plead induces a high rate of convictions in cases in which there would be no conviction if there had been a trial); Nakell, *The Cost of the Death Penalty*, 14 CRIM. L. BULL. 69, 71 (1978) (85-90% of criminal cases, including murder cases, are resolved by guilty pleas and are therefore resolved without trials).

98. Courts often will not accept a guilty plea unless there is a "factual basis" for it. *See, e.g.*, FED. R. CRIM. P. 11; *cf.* Boykin v. Alabama, 395 U.S. 238 (1969) (Court cannot assume plea was voluntary when lower court asked the defendant no questions and created no factual record). That factual basis, however, is usually just a defendant's admission of ultimate facts of liability. It does not include statements of counsel's work, advice, or performance assessment of the case.

Ineffective assistance in plea bargaining appears to be a serious problem, as the following quotations reveal:

> What makes inmates most cynical about their preprison experience is the plea-bargaining system . . . . Even though an inmate may receive the benefit of a shorter sentence, the plea-bargaining system is characterized by deception and hypocrisy which divorce the inmate from the reality of his crime . . . . The Hughes Committee (the Joint Legislative Committee on Crime) made a study of prisoner attitudes toward plea bargaining . . . and found that almost 90 percent of the inmates surveyed had been solicited to enter a plea bargain. Most were bitter, believing that they did not receive effective legal representation or that the judge did not keep the state's promise of a sentence which had induced them to enter guilty pleas.

N.Y. STATE SPECIAL COMM. ON ATTICA, ATTICA 30-31 (1972).

> [T]he plea bargaining system is an inherently irrational method of administering justice and necessarily destructive of sound attorney-client relationships. This system subjects defense attorneys to serious temptations to disregard their clients' interests—temptations so strong that the invocation of professional ideals cannot begin to answer the problems that emerge. Today's guilty plea system leads even able, conscientious, and highly motivated attorneys to make decisions that are not really in their clients' interests.

Alschuler, *supra* note 71, at 1180.

99. *See supra* note 91.

A guilty plea may be overturned because the benefit promised in exchange for the plea was not forthcoming,[100] or it was not entered voluntarily, intelligently, and knowingly,[101] or the pleading defendant did not receive effective assistance of counsel.[102] Therefore, when an effective assistance question arises after a guilty plea, one must ask whether counsel improperly induced a plea or prejudicially misinformed or misled the defendant. Such questions, however, impose obligations on the attorney to develop relevant information, cultivate a fair and honest working relationship with her client, and fully inform her client regarding her choices—exactly the kinds of minimum obligations *Strickland* declined to impose.[103]

In a recent decision, *Hill v. Lockhart*,[104] the Supreme Court held that courts should use the *Strickland* standard to assess claims of ineffective assistance of counsel in plea bargain situations. A claimant who seeks such relief must show that counsel's advice was not " 'within the range of competence demanded of attorneys in criminal cases' "[105] and "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[106] In effect, the claimant would be saying that the plea was not intelligent and knowing, and therefore, not voluntary.

However, having prejudice turn on the competency of advice and the probability that a defendant would have insisted on trial but for incompetent advice, focuses only on the plea and not on the bargain in plea bargaining. In other words, since most guilty pleas result from the defendant receiving a benefit for the plea, there is a plea bargaining analogue to the "fair and accurate result" which trials are supposed to produce—the reasonable bargain.

Given the importance of the negotiated bargain in plea-bargaining, *Hill*'s application of the *Strickland* effective assistance standard is seriously deficient in two respects. First, *Hill* assumes that the guilty plea ineffective assistance claimant had but two choices: to have pled guilty to the charges to which she did plead, or to have gone to trial. But this is incorrect. Given competent advice, the defendant might have pled guilty to other charges. If alternative charges were not feasible, she might have tried to reach a more favorable deal by giving the prosecutor something additional in return. Such bargaining chips might have included testimony against an accomplice or giving the prosecutor useful information. Second, even if an attorney's advice was in some sense technically competent, it is possible that a reasonably competent attor-

100. Santobello v. New York, 404 U.S. 257 (1971); *cf.* 2 W. LAFAVE & J. ISRAEL, *supra* note 9, at § 20.2(d).

101. *Boykin*, 395 U.S. 238; 2 W. LAFAVE & J. ISRAEL, *supra* note 9, at § 20.5.

102. 2 W. LAFAVE & J. ISRAEL, *supra* note 9, at § 20.5.

103. *Cf.* 2 W. LAFAVE & J. ISRAEL, *supra* note 9, at § 20.3(b) (suggesting essential obligations of defense attorneys in plea negotiations).

104. 106 S. Ct. 366 (1985).

105. 106 S. Ct. at 369 (quoting *McMann*, 397 U.S. at 771).

106. 106 S. Ct. at 370.

ney would have obtained a better bargain. In other words, prejudice in the guilty plea situation cannot turn on the competency of advice alone; prejudice must also turn on the competency of the attorney's bargaining.

Even if *Hill* were read broadly to address these problems, the convict seeking to overturn her guilty plea would face a monumental task. She would have to show what bargains were possible, what bargain a reasonably competent attorney in similar circumstances might have reached, and what advice she would have given. Such considerations illustrate the need for clear rules requiring defense advocates to perform certain tasks. The prevalence, privacy and secrecy of plea bargaining in our criminal justice system, and the possibilities for its abuse,[107] all point toward the need for specific and compulsory defense attorney advocacy obligations.

### 5. *The New Standard as Applied to Capital Cases*

Virtually all capital cases go to trial. Unless the capital defendant can exchange his plea for a life sentence, he will almost certainly choose to go to trial. Unlike other criminal defendants, he has nothing to lose by choosing to be tried rather than plead.

Capital trial is complex, and differs significantly from other criminal trials.[108] Attorneys competent in ordinary criminal cases may not be qualified to try capital cases.[109] The standard announced in *Strickland* did not adequately address the effective assistance problems unique to capital trial, although *Strickland* itself was a capital case.

*Strickland* applies the same standard to the penalty phase trial of a capital case as to guilt trials of other criminal cases.[110] Thus, a reviewing court must examine capital counsel's penalty phase performance to determine whether there was sufficient adversarial testing in order to give the court confidence in the reliability of the result. However, while the fair and accurate result test has meaning for the trial on guilt and innocence, it is meaningless for the capital sentencing trial. The capital sentencing decision primarily involves a weighing of values; it is not a fact determination. It makes little sense to speak of an "accurate" or "correct" death sentence. A death sentence may only be "appropriate" or "just," in the sense that anyone hearing the evidence and argument on the issue might feel such a sentence warranted.

Consequently, the Court, in *Strickland*, altered the focus of its prejudice test for capital cases, requiring that the reviewing court decide whether, but for counsel's failings, the sentencer would have concluded that the balance of aggravating and mitigating factors did not warrant death.[111] The capital sen-

107. M. FEELEY, THE PROCESS IS THE PUNISHMENT (1979); 2 W. LAFAVE & J. ISRAEL, *supra* note 9, at § 20.1(f); Alschuler, *supra* note 71.

108. Goodpaster, *supra* note 14, at 303.

109. *Id.*

110. *See Strickland*, 466 U.S. at 698-700 (application of the Court's standards to the petitoner's sentencing hearing).

111. *Id.* at 695.

tence decision, however, is a discretionary one not compelled by facts. The decision may turn as much, or more, on the emotional, moral, or sympathetic content of evidence and argument than on the factual elements of the crime.[112] The prejudice test undervalues these intangible but important factors in capital sentencing and thereby misses the significance of certain possible attorney derelictions in capital cases.

For example, since the capital defendant has a virtually unlimited right to present mitigating evidence which might induce the sentencer to spare his life,[113] the most likely significant penalty phase dereliction of capital defense counsel is a failure to thoroughly investigate and present mitigating evidence.[114] When a reviewing court assesses such a dereliction under the *Strickland* test, it will ask whether, given the aggravating evidence, claimant's proffered mitigating evidence would have shifted the balance away from favoring death.[115] This question, disengaged from the living context of the capital trial, will probably be answered on the basis of some post-trial hearing record. It will focus on the intellectual content of the mitigating evidence and not the emotional and psychological responses stimulated by live witnesses, which incline a sentencer's decision one way or another. How can a reviewing court possibly determine how a sentencing authority would have responded emotionally to evidence the sentencer did not hear?[116]

*Strickland* failed to examine the issues that arise from the relationship between guilt and penalty phase trials in capital cases. A capital case defense attorney, who tries the capital case guilt phase without regard to its potential effects on the penalty phase trial may effectively condemn his client to a death sentence.[117] Such an attorney is not aware that some guilt phase defenses are

112. *Lockett*, 438 U.S. at 601-05; People v. Lanphear, 36 Cal. 3d 163, 680 P.2d 1081, 203 Cal. Rptr. 122 (1984); Gillers, *The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing*, 18 U.C.D. L. REV. 1037, 1078 (1985); Hertz & Weisberg, *supra* note 30, at 334-37.

113. *Cf.* Hertz & Weisberg, *supra* note 30, at 326.

114. Goodpaster, *supra* note 14, at 303 n.22; *see also supra* text accompanying note 29.

115. *Strickland*, 466 U.S. at 695; *cf.* Goodpaster, *supra* note 14, at 337 n.150.

116. Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed "[those] compassionate or mitigating factors stemming from the diverse frailties of humankind." When we held that a defendant has a constitutional right to the consideration of such factors we clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses.

Caldwell v. Mississippi, 105 S. Ct. 2633, 2640 (1985) (citations omitted) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (plurality opinion)).

There may be some capital cases where, at least theoretically, trial counsel should not present mitigating evidence. For example, counsel arguably should not present mitigating evidence when doing so would invite the prosecutor to present devastating aggravating evidence in rebuttal. Counsel, however, should have at least the minimal obligation of investigating such evidence so that she can intelligently decide whether to use it. *Strickland* rejected this idea, notwithstanding the life or death decision involved.

117. Goodpaster, *supra* note 14, at 320.

seriously inconsistent with an affirmative penalty phase case for life. The trial of each phase must be planned and carried out with the other phase in mind. The capital case defense counsel must have an obligation to investigate for both the guilt and the penalty phase trials and should defer any strategy decision regarding the guilt phase trial until the penalty phase mitigating case is known.[118]

There are perhaps other criticisms of the *Cronic-Strickland* rules, but the foregoing are sufficient to show that they do not meet serious criminal justice system problems of ineffective assistance of counsel. In particular, the new rules depend on poor conceptions of the nature of adversary system advocacy, of the attitudes and practices of effective criminal defense advocates, and of the legal system conditions necessary for effective advocacy. In refusing to state what criminal defense advocates might minimally be expected to do, and in creating strong presumptions of attorney competence and reliability of trial results, the rules significantly undervalue the importance of zealous advocacy in ensuring the very reliability of results with which the Court is concerned. Finally, the new rules make no contribution to the quest for equal justice. They do nothing to guide attorneys, improve their performance, or ensure that all defendants have access to able attorneys sufficiently financed to provide adequate defense services.

## II
## AN ADVOCACY VIEW OF EFFECTIVE ASSISTANCE

In *Cronic* and *Strickland*, the Supreme Court identified truth-finding and fairness as the adversary system aims useful for measuring sixth amendment effective assistance claims.[119] In doing so, and in legislating the details for assessing such claims, the Court sealed in constitutional concrete a system of representation rife with inequities.[120] The Court recognized only the due process aspects of the effective assistance guarantee. It ensured that, regarding trial attorney competence, the system need not guarantee even roughly equal treatment between defendants. However, this equal protection claim cannot be so readily dismissed. The claim is not a demand for equivalent results, but one of entitlement to a certain kind of advocate, regardless of results. It is the claim that every criminal defendant is entitled to an attorney committed to seeking, and capable of obtaining, the best result under the circumstances. This equal protection component of the adversary system can only be realized through an advocacy model which recognizes the multiple intermediate purposes of the system.

118. *See* Farmer & Mullin, *Capital Trial Emphasis on the Punishment Stage of a Case*, in 2 CALIFORNIA DEATH PENALTY MANUAL N-24 (Cal. Office of the State Pub. Defender ed. 1980); *cf.* Farmer & Kinard, *supra* note 30, at N-34 to N-35.

119. *See supra* text accompanying notes 20-22 (*Cronic*); *cf. supra* text accompanying notes 37-43 (*Strickland*).

120. *See supra* note 47 and accompanying text.

The generally accepted theory of advocacy is that the attorney zealously and singlemindedly serves the interests of her client, attempting to obtain the best possible result under the circumstances.[121] In the criminal context, the best possible result is dismissal of charges or acquittal. The next best possible result is the least punishment for the least serious conviction. Under the advocacy view, counsel must pursue these goals for the client. She must not work towards the abstract goals of the adversary system.[122]

A criminal trial advocate may or may not have an interest in the historical truth of whether a crime was committed, whether her client was involved, the overall fairness of the trial, or the vindication of her client's constitutional rights. These other goals have no independent value to the advocate, but are only means to achieving the best result for the client. As an advocate, a criminal trial lawyer might not want the "true" facts to come out at all. If the facts must surface, she may attempt to gloss them with an interpretation most favorable to her client. Similarly, achieving a fair trial or vindicating constitutional rights are only means to securing a dismissal, acquittal, or conviction on lesser charges. Much like an emergency room physician, the criminal defense advocate's first concern is saving the client.

The theory of advocacy is an "invisible hand" theory of competition. It holds that the advocate who zealously attempts to obtain the best possible result for her client inadvertently, but inevitably, serves system purposes she neither cares about nor directly seeks to advance. Presumably, this is because she directly competes against an equally able and committed attorney whose aims directly oppose her own. Their respective efforts to maximize the interests of their sides lead to the best system results, although neither attorney tries directly to achieve them. Thus, advocates who serve their clients' goals, rather then the goals of the adversary system, best advance the purposes of the adversary system.[123]

We can see how the invisible hand theory works by considering how a zealous advocate who singlemindedly pursues her client's best interests also serves each of the goals of the adversary system. One such goal is to determine truth.[124] In most criminal trials, what we mean by "truth" or an "accurate" or "reliable" result is a combination of historical "fact," that is, "what

121. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1979); *cf. id.* at EC 7-1, EC 7-3, EC 7-4, EC 7-17; MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 comment (1983) ("[t]he advocate has a duty to use legal procedures for the fullest benefit of the client's cause . . . .").

122. *See supra* text accompanying notes 52-63.

123. Is the theory correct? We really have no way of knowing, for we do not use other adjudication systems. In other words, we have nothing with which to compare the adversary system to see whether another system would produce better results. In addition, unless we are in agreement about what purposes the legal system is trying to achieve, it is impossible to compare the results of different systems. For example, one kind of trial system might be better than the adversary system at delivering "truth," but worse at protecting everyone from the government's misuse of power.

124. *Cf. supra* text accompanying notes 66-67.

happened," and a decision about whether, and to what degree, someone is culpable for what happened. While these two factors are obviously related, they are conceptually severable. In a homicide trial, for example, the questions of historical fact are those regarding the circumstances of the alleged victim's death: how did she die, what did she die from, how was the defendant physically involved in her death, and so on. However, the culpability question addresses the degree of the defendant's responsibility for the death, a mixed fact and value question of intent.

Unless the defendant confesses, the trier of fact must infer the defendant's intent from the historical facts. But the process is often more complicated than this statement suggests, for in most cases worth trying, historical fact is itself at issue. If there is uncertainty about what happened, then the trier of fact must establish the historical facts by drawing inferences from the evidence presented by each side and determining the credibility of the witnesses. Inferences are the meanings that the trier of fact accords to the evidence presented.

A trial is thus a contest over the meaning of evidence. Each trial attorney must shape the meaning of the evidence in a favorable way and compose a convincing interpretation of it. The trier of fact uses all the trial data, including the respective attorneys' shaping of the evidence and their competing readings of it, to draw her own inferences and generate her own reading of the evidence. In a typical criminal trial, therefore, a trier of fact's inferences and her assessments of the witnesses' credibility, determine the defendant's culpability. In many cases, this is a gray area, where reasonable people could differ about what they perceive.[125]

"Truth" in the context of an adversary trial thus means the inferences of ultimate historical fact and culpability which the fact-finder draws from the "evidence" the adversaries help to fashion. How well such "truth" comports with the "real" truth, whatever that might be, is indeterminable. Indeed, because a jury verdict is a mixed composite of fact determinations and value judgments shaped by the attorneys, there may be no truth upon which to base criminal liability *independent* of the truth determined at trial. As stated by Enker:

> In many of these [criminal trials], objective truth is more ambiguous, if it exists at all. Such truth exists only as it emerges from the fact-determining process, and accuracy in this context really means relative equality of results as between defendants similarly situated and relative congruence between the formal verdict and our understand-

125. Two different trial attorneys hypothetically trying the same case separately with the "same" evidence against the same prosecutor could produce different results. The record of each case upon review will reflect different evidence because each attorney shaped the evidence differently. Thus, on review, whatever result a trial produces, it will most likely appear to reflect the truth, given the evidence.

ing of society's less formally expressed evaluation of such conduct.[126]

If there is no truth external to trial with which to compare truth as found at trial, and if "truth" is what a trial produces, then we cannot assume that a trial result reflects historical facts. The truth produced by a trial is relative, and when we say that a trial produces an accurate or reliable result, we simply

126. Enker, *Perspectives on Plea Bargaining*, in TASK FORCE REPORT: THE COURTS 108, 113 (Task Force on the Admin. of Justice ed. 1967); *cf.* Uviller, *supra* note 56, at 1076-79. Consider also the following:

> The law cannot always say that if fact *X* and fact *Y* are proved (both of which will generally be known not only to the tribunal of adjudication, but also, in advance, to the persons involved) legal result *Z* will ensue. Often the law can only say that if conduct of a stipulated standard is attained (or more often, is not attained), legal result *Z* will ensue; and whether that standard has been attained cannot be with certainty known in advance by the persons involved, but has to await the evaluation of the tribunal of fact. This is, indeed, so characteristic a feature of English law that examples, even though drawn from many different spheres of jurisprudence, give an inadequate impression of how pervasive it is. Has an act been done, or a contract performed, or a duty discharged within a reasonable time? Are goods reasonably fit for a particular purpose? Are they of merchantable quality? Has the defendant so conducted himself that a reasonable person would assume that he was making a representation of fact meant to be acted on? What is a fair price in a quantum meruit? Has *A* exercised proper care for the safety of those to whom the law says he owes a duty of care (the standard varying according to the legal relationship of the persons in question)? Had *B* reasonable and probable cause for arresting *C*, or preferring a prosecution against him? . . .
>
> The law does not return an answer in advance to any of these questions, which arise both at common law and under statute: all must await the answer of the tribunal. They could be almost indefinitely multiplied.
>
> Nor are such situations limited to the civil law. The breaches of duty under the Factories Acts give rise to criminal as well as civil liability. Whether conduct causing death falls so far short of a proper duty of care as to amount to manslaughter cannot be known until the jury returns its verdict. . . .
>
> . . . The driver of a motor vehicle may be accompanied by leading and junior counsel and by his solicitor as well; but he will still not know whether or not he has committed the offence of driving in a manner dangerous to the public or without due care and attention or without reasonable consideration for others or at an excessive speed until jury or justices so find. Again, in criminal libel everyone must await the jury's adjudication before it can be ascertained whether the statement complained of was defamatory of the prosecutor; or, if justification is pleaded, whether publication was for the public benefit. Similarly with those many offences which depend on whether admitted conduct was perpetrated dishonestly. Again, did the accused convene an assembly in such a manner as to cause reasonable people to fear a breach of the peace? Did the alleged blackmailer have reasonable grounds for making the demand and was the use of menaces a proper means of reinforcing it? (Theft Act 1968, section 21) Was it a public mischief that the accused conspired to effect? Did the accused publish an article or perform a theatrical play which had a tendency to deprave or corrupt? If so, was its publication or performance nevertheless on balance for the public good by reason of any of the matters set out in section 4 of the Obscene Publications Act 1959, or section 3 of the Theatres Act 1968? In none of these cases, which again could be greatly multiplied, can it in advance be said with certainty whether an offence has been committed: and those who choose, in such situations, to sail as close as possible to the wind inevitably run some risk.

Knuller Ltd. v. Director of Public Prosecutions 1973 A.C. 435, *quoted in* S. KADISH, S. SCHULHOFER & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 362-63 (4th ed. 1983).

mean that we think it was a good contest between adversaries. We decide whether a contest was good by reference to a norm, or a standard derived from other, similar contests. Only a comparative standard can measure the trustworthiness of trial results.

A trial attorney's performance is a critical variable in the trial contest. We must therefore assess the attorney's performance comparatively to determine the trial's adequacy. We can make such an evaluation only if we articulate basic attorney trial conduct norms. Courts can ensure that trials result in the most accurate verdicts possible by ensuring that each defense counsel meets minimum standards of competency.

A similar argument can be made if we assume a purpose of adversary trial is to produce publicly acceptable conclusions bearing a normative message. In order to achieve the credibility necessary to convey such messages, each trial must be a real contest between similarly dedicated and resourceful opponents. In addition, for adversary trial to be credible, similar contests should produce similar results. In advocacy theory, the effective attorney's singleminded commitment to the interests of her client ensures both that particular trials produce believable results and that all criminal trials are sufficiently similar as contests to produce results that are relatively reliable. Thus, each defense attorney must use every lawful and reasonable tactic to win or to achieve the best possible result for her client.

Finally, an advocacy view of effective assistance assumes a criminal defense attorney who fights hard at every step. Such championing may create trust and confidence in a client, encourage closer communication, and persuade judge, jury, and prosecutor about some merit of the defendant's case or person which was not apparent. It also tests for the prosecution's case severely and appropriately interferes with the otherwise overwhelming power and resources of the state,[127] ensuring both real fairness and the fullest possible protection of constitutional rights. In sum, in the context of a criminal trial, an effective assistance of counsel standard defined by advocacy norms serves all four purposes of the adversary system—namely, truth-finding,[128] producing publicly acceptable conclusions which project substantive legal norms,[129] being fair to the defendant,[130] and protecting constitutional

127. The government has far more resources than the defendant. *See* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1199 (1960); Ostrow, *The Case for Preplea Disclosure*, 90 YALE L.J. 1581, 1583-84 (1981). By and large, only the well-heeled defendant can effectively use the system against itself to defeat a prosecution. *See* K. MANN, *supra* note 86, at 235-36. The indigent criminal defendant can only put on those defenses the government will finance, and the government's generosity here is not great. Even in these straitened circumstances, however, there is a value to defense attorneys committed to winning and getting the best possible results for their clients. Against the government's advantages, only those committed to using every lawful means to winning are at all likely to test the government's case.

128. *See supra* notes 20-22 and accompanying text; *see also supra* text accompanying note 53.

129. *See supra* text accompanying notes 58-63.

130. *See supra* text accompanying note 53.

rights.[131]

Yet the committed advocate plays an important, and perhaps even greater role in the proper disposition of bargained, as well as tried, cases. The issue in plea-bargained cases is determining the appropriate disposition for the defendant under the circumstances. But what is appropriate for a given defendant depends on the bargains which are being struck by similarly situated defendants.

Under advocacy theory, the attorney who secures the bargains for these other defendants would use every legal means at her disposal to help her clients. Such a defense counsel imposes great costs on the prosecution. She may change the quality and character of the prosecution's evidence and thus weaken its case. She may cause the prosecution to make a misstep. The time, effort, and money expenses which she imposes on the prosecution may force it to reassess the case and perhaps become willing to downgrade charges or to bargain. Unless a given defendant's counsel abides by the same advocacy norms as the attorneys who struck bargains for these other, similarly situated defendants, she would be unable to effect the bargain that is proper for her client.

Thus, the effective criminal defense attorney who, in both plea bargaining and trial advocacy, is attitudinally committed to serving her client, and who is able to do and does all those lawful things necessary and reasonably likely to advance her client's interest is the only advocate who can meaningfully test the prosecution's case. Standards for effective assistance of counsel should therefore be based on advocacy norms which define this kind of attorney, and not on system purposes.

## CONCLUSION

Focusing on advocacy norms allows us to to determine whether there are some tasks which all effective advocates do or should do.[132] If such tasks exist, we can ask why they are not done and what it would require to see that they get done.

A review of ineffective assistance cases suggests that the major generic deficiencies of criminal defense attorneys are:

1. *Failure to attempt to develop an effective working relationship with the client.*[133] This may result from lack of time, devotion, or communication and counseling skills; it sometimes results from excessive caseload pressures or from a working presumption that the case will be bargained.

2. *Failure to conduct an adequate pre-trial investigation,*[134] including

131. *See supra* text accompanying notes 54-57.

132. To suggest that there are certain generic tasks which all criminal defense advocates should perform does not mean there may not be additional tasks that should be performed in individual cases, as they require.

133. 2 W. LAFAVE & J. ISRAEL, *supra* note 9, at § 20.3.

134. *Id.* at § 11.10.

legal research, evidence examination, and witness interviews. This, too, results from lack of time, devotion, caseload pressures, and the bargaining presumption; it may also result from lack of investigative resources, overreliance on discovery from the prosecution, or unexamined assumptions of counsel.

3. *Failure to develop an "adversarial" or "fighting" attitude toward the prosecution and its case.*[135] This may result from lack of experience or knowledge, lack of training and association with appropriate mentors or advocacy role models, or lack of devotion.

4. *Lack of knowledge or skill*[136] *and failure to seek the advice of other counsel.* This may result from lack of training and association with other defense counsel; as self-development is partly a matter of time, it may result from being too busy.

From this list of negative factors, we can readily see that at the minimum, a criminal defense attorney has an affirmative obligation to act as a conscientious, diligent advocate, who attempts to develop an effective working relationship with the client, conducts an investigation, develops knowledge and skill and seeks advice when necessary.

These problems can be resolved, to a significant degree, in two related ways. First, the Supreme Court should adopt an effective assistance standard which is reasonably rigorous in requiring attorneys to seek an effective working relationship with the client, to research, and to investigate. Second, criminal justice system institutions should focus on defense training, support, performance review or certification, and the development of better attorney appointment screening systems. Although, it is possible to implement the latter suggestion without changing the *Cronic-Strickland* effective assistance rules, it is unlikely to occur without the incentive of legal requirements. An effective asssistance standard more rigorous than the *Cronic-Strickland* standard can provide a benchmark useful in defining the level of funding and other resources necessary to support a system which guarantees basically competent representation to all criminal defendants.

Realistically, there is no chance that the Court will convert to an advocacy model to test or assess effective assistance claims. Nonetheless, the model is a vital one, well-supported by adversary system theory, and by the practice of many criminal defense attorneys.

What may be possible is to urge the advocacy/equal-protection model as a supplement to the *Cronic-Strickland*/due process model. Such an argument would assert that defendants are entitled not only to attorneys who assure the state that their convictions are fair, but also to attorneys capable of testing the state's power and ability to convict. At a minimum, these attorneys could and would thoroughly prepare by researching the relevant law, by investigating and interviewing witnesses, and by asserting all a defendant's constitutional rights which may be useful in advancing the client's goals. These

135. *Id.*
136. *Id.*

attorneys could and would communicate closely with their clients, providing information and discussing strategy.

Such a minimum equal treatment advocacy standard would require a specific statement of minimum standards for evaluating defense attorney competence. Evaluation would focus primarily on attorney research, investigation, witness interviews, and attorney-client relationships. These standards would have educational and guidance functions, and, contrary to the *Strickland* standards, would anticipate problems rather than seek ineffectually to remedy them after they arose. Just as *Gideon v. Wainwright*[137] and *Argersinger v. Hamlin*[138] forced states to provide defense counsel to all criminal defendants, a reasonably rigorous effective assistance standard would inferentially require states to provide the resources necessary to support the activities of attorneys held to these standards. Most importantly, the standards would openly acknowledge the important relationship between adequate defense funding and adequate performance by defense attorneys.

If we really wish to ensure effective assistance of counsel, we must create rigorous advocacy-based standards of defense counsel competency, provide adequate teaching and support systems for the provision of criminal justice defense services, and depend less on after-the-fact judicial scrutiny of individual performance.

137. 372 U.S. 335 (1963).
138. 407 U.S. 25 (1972).