Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment

Bruce A. Green
*Fordham University School of Law, bgreen@law.fordham.edu*

Follow this and additional works at: [http://ir.lawnet.fordham.edu/faculty_scholarship](http://ir.lawnet.fordham.edu/faculty_scholarship)

Part of the [Constitutional Law Commons](http://ir.lawnet.fordham.edu/faculty_scholarship), and the [Criminal Law Commons](http://ir.lawnet.fordham.edu/faculty_scholarship)

**Recommended Citation**
Available at: [http://ir.lawnet.fordham.edu/faculty_scholarship/268](http://ir.lawnet.fordham.edu/faculty_scholarship/268)

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment

Bruce A. Green*

Charles Bell, Donald Paradis, and Shirley Tyler were tried in different states for murder. Each was convicted and sentenced to death. Charles Bell was represented at trial by a recent law school graduate who had never before tried a criminal case to completion. Donald Paradis's lawyer had passed the bar exam six months earlier, had never previously represented a criminal accused, and had not elected courses in criminal law, criminal procedure, or trial advocacy while in law school. Shirley Tyler's trial lawyer was also a member of the bar for only a few months. He had defended one previous assault case and one previous robbery case, each lasting half a day. Each condemned prisoner later asserted that he or she had been denied the Sixth Amendment right of a criminal accused "to have the assistance of counsel for his defence" on the ground that the defense attorney had rendered ineffective legal assistance. In asserting this claim, each undertook the difficult burden of demonstrating the likelihood that he or she had received a sentence of death only because of the attorney's unreasonably poor performance.

Not surprisingly, none of the three death-row defendants claimed to have been deprived of "counsel" altogether, since courts unwaveringly adhere to the view that "counsel" under the Sixth Amendment includes any duly licensed attorney. This Article argues, however, that a narrower construction of the constitutional term is warranted: "counsel" should include only those attorneys who are qualified to render legal assistance to a person accused of a crime. By that standard, these three defendants, and many others who similarly have been tried, convicted, and sentenced to death with an unqualified attorney by their side, have been deprived of their right to "counsel."

*Associate Professor, Fordham University School of Law. A.B. 1978, Princeton University; J.D. 1981, Columbia University.

I am grateful for the research assistance provided by Dina DeGiorgio, Francine Goodman, Yasho Lahiri, and Marybeth Whitehouse as fellows of the Stein Institute on Law and Ethics. In addition, I am grateful to Vivian Berger, Richard Bernstein, Victor Brudney, Daniel Capra, Deborah Denno, Martin Flaherty, James Kainen, Henry McGee, Russell Pearce, James Robertson, Kate Stith, and Ronald Tabak for their helpful comments on earlier drafts of this Article.

1. Bell v. Watkins, 692 F.2d 999, 1008 (5th Cir. 1982).
4. U.S. Const. amend. VI.
INTRODUCTION

The Sixth Amendment ensures that "[i]n all criminal proceedings, the accused shall . . . have the Assistance of Counsel for his defence." But who is "counsel"? To the limited extent that courts have addressed this basic question about the scope of the constitutional right, they have invariably defined "counsel" with reference to state processes for licensing attorneys. With modest exceptions, courts have held that those who are licensed to practice law qualify as "counsel" and those who are unlicensed do not. The right of access to counsel, therefore, is satisfied when a defendant receives legal assistance from a member of the bar, however ill-trained or inexperienced that lawyer may be. Conversely, a criminal accused seeking to exercise the qualified constitutional right to "counsel of choice" may choose only from among licensed practitioners, however well-suited unlicensed individuals may be to provide a criminal defense.

The assumption underlying the prevailing definition of "counsel" is that individuals who satisfy the requirements for obtaining a license to practice law, and only those individuals, are qualified to provide a criminal defense. This premise is half true. Those who are unlicensed to practice law are generally not qualified to provide a competent criminal defense. This premise, however, is also half fiction. Like nonlawyers, most licensed practitioners are also unqualified to provide a competent criminal defense, because candidates for admission to the bar are never required to acquire or demonstrate the skills and legal knowledge generally recognized as necessary to represent competently a criminal defendant. Moreover, in most jurisdictions, upon admission a lawyer needs no additional training or experience before assuming responsibility for a criminal defense.

For the most part, it does little harm for courts to indulge in the fiction that a lawyer's license denotes competence to practice in virtually all areas, including criminal cases. Most criminal defendants do not arbitrarily obtain counsel from the general pool of licensed practitioners, but retain or are appointed experienced members of the criminal defense bar to represent them. In those cases in which criminal defendants receive substandard assistance from ill-trained, inexperienced, or otherwise unqualified lawyers, the Sixth Amendment right to effective assistance of counsel sometimes affords a remedy.

For capital defendants, however, indulging the fiction of universal attorney competence may have lethal consequences. In many jurisdictions, criminal defendants charged with capital offenses typically obtain trial counsel from a less qualified pool than criminal defendants in noncapital cases. At the same time, capital cases are far more complex than noncapital criminal cases, so that the level of skill required to provide a competent defense in a death penalty case is higher. And at the sentencing stage, when

5. Id.
6. See infra Part I(B).
7. See infra notes 37-39 and accompanying text.
8. See infra Part IV(A).
the quality of lawyering does make a difference, the difference is more than a matter of degree. It is a difference between a sentence of imprisonment and a sentence of death.

This Article argues for a narrower definition of “counsel” that encompasses only those licensed attorneys with the requisite skill and knowledge to wage an adequate criminal defense. A less inclusive definition would reduce the incidence of death sentences imposed only because of the unsuitability of defense counsel.9 At the outset, however, candor compels an acknowledgement of what is obvious—that this proposed redefinition of “counsel” is unlikely to win favor soon in the Supreme Court or in any other court in which capital cases are decided. Nevertheless, this Article serves, at the very least, as a critique of the current system of criminal justice, and particularly of capital justice, in this country. In addition, it provides support for the adoption of qualification standards for criminal defense attorneys by means other than constitutional adjudication. Establishing a qualified criminal defense bar through court rules or statutes is, at once, the most likely prospect for criminal justice reform in the short term and, in the

---

9. There is nothing novel about the idea that capital defendants ought to have lawyers whose training and experience make them especially qualified to try criminal cases. Henry Monaghan made this point, albeit in passing, more than a quarter-century ago in the context of an article arguing in favor of using law students to fulfill the mandate of Gideon v. Wainwright, 372 U.S. 335 (1963). See Henry P. Monaghan, Gideon's Army: Student Soldiers, 45 B.U. L. Rev. 445, 446-61 (1965) (While society cannot afford to interpret the right to counsel to require affording experienced counsel to all criminal defendants, “where the stakes are higher, where the penalties which can be imposed are more severe, perhaps we can now afford the luxury of demanding an additional safeguard—the presence of experienced counsel at the very outset.”). Since then, opponents of the death penalty have cited the inexperience of lawyers for capital defendants as one of several reasons why the quality of representation for capital defendants is generally poorer than for other defendants. See, e.g., Stephen B. Bright, Death By Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants, 92 W. Va. L. Rev. 679, 680 (1990) (“Poor people accused of capital crimes are frequently represented by inadequately compensated, inexperienced, and incompetent court-appointed attorneys.”); Ronald J. Tabak, Gideon v. Wainwright in Death Penalty Cases, 10 Pace L. Rev. 407, 408-09 (1990).

This Article departs from previous commentary in arguing that a right to a qualified lawyer is rooted in the very meaning of the term “counsel.” Until now, commentary on the quality of representation in capital cases has focused on how the right to “effective assistance of counsel” applies to such cases. See, e.g., Gary Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. Rev. 299 (1983); Ivan K. Fong, Note, Ineffective Assistance of Counsel at Capital Sentencing, 39 Stan. L. Rev. 461 (1987); Helen Gredd, Comment, Washington v. Strickland: Defining Effective Assistance of Counsel at Capital Sentencing, 89 Colum. L. Rev. 1544 (1989), Some early commentators argued that a right to an experienced lawyer should arise out of the right to effective assistance of counsel, see, e.g., Jon R. Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases, 59 Nw. U. L. Rev. 289, 307 (1965); Nancy C. Lefvin, Note, The Right to Counsel and the Neophyte Lawyer, 24 Rutgers L. Rev. 378 (1970), but courts have rejected that argument because claimed denial of that right are now evaluated on the basis of an ex post inquiry into the quality of the defense lawyer's performance. See Strickland v. Washington, 466 U.S. 668 (1984). In contrast, this Article argues that only qualified attorneys can be considered “counsel” within the meaning of the Sixth Amendment—an interpretation of the Sixth Amendment right that calls for an ex ante inquiry into the defense lawyer's knowledge and experience.
long term, it is an essential precursor to the courts' eventual decision to recognize that the Sixth Amendment provides the right to a qualified lawyer.

This Article begins in Part I by briefly discussing contemporary Supreme Court decisions which provide necessary background to an exploration of the meaning of "counsel." It then goes on to describe lower-court decisions which define "counsel" to include all duly licensed attorneys based in part on the assumption that duly licensed attorneys are generally qualified to represent criminal defendants. Part II critiques those decisions in light of the historical underpinnings of the right to counsel and the purposes served by the right. It accepts that the term "counsel" should exclude individuals who are untrained in the law, but argues that the term should encompass only those attorneys possessing the skill, knowledge, and character needed to provide a competent criminal defense. It argues, moreover, that neither an originalist nor a functional interpretation justifies relying on bar admissions processes to guarantee a lawyer's possession of the requisite attributes.

Part III acknowledges that defining "counsel" to include duly licensed attorneys might be acceptable if judicial decisions were correct in their premise that contemporary licensing processes assure that qualified attorneys defend criminal cases. It demonstrates, however, that this premise is false. In criminal cases, and particularly in capital cases, a license is far from a guarantee that a lawyer is capable of providing adequate representation.

Part IV explains why the prevailing legal fiction has lethal consequences. In many jurisdictions, practices governing the provision of counsel to capital defendants seem to ensure that capital defendants are more likely than the general run of criminal defendants to be denied qualified counsel. Reported decisions and anecdotal studies of capital cases support this intuition. Moreover, the Sixth Amendment right to "effective assistance of counsel" provides inadequate relief for many of those defendants who are sentenced to death at the hands of unqualified lawyers. That right allows a convicted defendant to challenge only the trial lawyer's performance, not his qualifications. Under the present standard for reviewing a claimed denial of the right to effective representation, a defendant can win relief only upon showing both that his trial lawyer performed unreasonably and that counsel's errors probably affected the outcome of the trial.

10. Although the Sixth Amendment speaks only of "the Assistance of Counsel," the provision has been read to include the right to "effective" assistance of counsel, that is, a right to minimally competent legal assistance. References to an "effective appointment of counsel" or "effective assistance of counsel" in the Supreme Court's jurisprudence appeared as early as 1932, see Powell v. Alabama, 287 U.S. 45, 71 (1932), and continued throughout the Court's decisions concerning the right to counsel under the Due Process Clause. See, e.g., Reece v. Georgia, 350 U.S. 85, 90 (1955). See generally Bruce A. Green, Note, A Functional Analysis of the Effective Assistance of Counsel, 80 Colum. L. Rev. 1053, 1057 & n.30 (1980). In McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970), the Court acknowledged a Sixth Amendment "right to effective assistance of counsel," by which it meant a right to competent assistance. But it was not until 1984, in Strickland v. Washington, 466 U.S. 668 (1984), that the Court announced the contemporary standard for evaluating claims that an attorney's inadequate performance amounted to a denial of the right to effective assistance of counsel. See infra Part IV(C).
Finally, Part V describes what redefining "counsel" would mean for the criminal justice system. To be regarded as "counsel" for constitutional purposes, a member of the bar should possess the skill and knowledge understood within the profession as prerequisites to defending criminal cases adequately. The right to "counsel," meaning a qualified advocate, would not supplant the presently recognized right to effective assistance of counsel, but would supplement it. Criminal defendants would be entitled, at the threshold, to a qualified attorney. In individual cases in which a seemingly capable lawyer provided substandard representation, a convicted defendant could claim that he was denied the right to effective assistance of counsel.

Because most lawyers do not possess the requisite skill and knowledge to be qualified to defend a criminal case, some mechanism to train and certify those lawyers must be established. Courts are undoubtedly capable of establishing such a mechanism. The judiciary is, after all, responsible for the existing licensing process, and some courts already have established processes either for certifying criminal lawyers as specialists or for determining which lawyers are qualified to serve by assignment in criminal cases. Moreover, legislatures are equally capable of devising a process for upgrading the quality of criminal defense lawyers. Congress, for one, recently considered legislation designed in part to improve the quality of defense lawyers in death penalty cases.11

This Article recognizes that, at least in the foreseeable future, courts are unlikely to reinterpret the Sixth Amendment to require a complete overhaul of the process for providing legal assistance to criminal defendants. Until a significant number of jurisdictions, by court rule or statute, have established processes for certifying criminal defense lawyers or have set minimum qualifications for assigned counsel in criminal cases, courts cannot be expected to recognize a constitutional right to qualified counsel in all criminal cases. This Article concludes, however, that at the very least, qualified attorneys should now be made available in capital cases, where it is especially inappropriate to invoke the fiction that a license to practice law guarantees one's fitness to practice, and where the invocation of that fiction has the most harsh and undeserved consequences.


I. How Courts Define "Counsel"

A. The Right to Counsel and Supreme Court Interpretations

In England prior to the American Revolution as well as for some time thereafter, a defendant accused of a felony or capital offense generally was not permitted to appear through counsel.12 Some American colonies initially applied this rule,13 but all abandoned it by the mid-eighteenth century.14 Colonial legislatures recognized that legal assistance was necessary to protect against the conviction of innocent defendants who were ignorant of the law.15 Indeed, in some colonies by the time of the Revolution, a defendant charged with a capital crime who could not afford an attorney was entitled by law to have one assigned to him or her.16

The principal purpose of the Sixth Amendment right of a criminal accused "to have the assistance of counsel for his defence" was to forbid laws, like those in England, which required criminal defendants to repre-

12. 4 William Blackstone, Commentaries on the Laws of England 355 ("It is the settled rule at common law that no counsel be allowed a prisoner upon his trial, upon the general issue in any capital crime, unless some point of law shall arise proper to be debated."); 1 Anton-Hermann Chroust, The Rise of the Legal Profession in America 42 & n.115 (1965) (quoting 3 Coke, Institutes of the Laws of England 137) ("Where any person is indicted of treason or felony and pleadeth to the treason or felony, not guilty ... it is holden that the party in that case shall not have counsel."). The common law rule was modified in England in 1695 to permit representation of counsel in treason cases, 7 Will. 3, ch. 3, § 1 (1695) (Eng.), but was not entirely abandoned until 1836, when a statute was enacted to provide: "all persons tried for felonies shall be admitted ... to make full answer and defence ... by counsel learned in the law, or by attorney in courts where attorneys practice as counsel." 6 & 7 Will. 4, ch. 144, § 1 (1836) (Eng.).

13. Professor Chroust cites an aberrational case in East New Jersey in 1692 in which the accused was denied the opportunity to be assisted by counsel. 1 Chroust, supra note 12, at 42 n.115.

14. Id. at 43-44.

15. For example, a provision adopted in South Carolina in 1731 stated:

And whereas many innocent persons under criminal prosecutions, may suffer for want of knowledge in the laws, how to make a just defence: And whereas the judges and justices in the several courts here, who ought to assist the prisoners in matters of law, cannot be presumed to have so great knowledge and experience as the great judges and sages of the law sitting in his Majesty's court at Westminster, for which reasons persons under criminal prosecutions ought to have proper assistance, and all just and equal means allowed them to defend their innocences ... [e]very person so accused and indicted, arraigned or tried ... shall be received and admitted to make his or their full defence by counsel learned in the law ....

Id. (quoting Public Laws of S.C., 1682-1792, Act 552, § 41, August 20, 1731).

16. 1 Chroust, supra note 12, at 44. For example, a 1718 Pennsylvania law provided "that upon all Trials of ... capital cases ... learned counsel [be] assigned to the prisoners." Id. at 43 (quoting 1 Laws of Pa. (1700-81), Act of May 31, 1718, ch. 217, § 4 (Dallas ed.)). South Carolina's 1751 provision similarly allowed that if the prisoner or prisoners lack counsel, the "court shall and is hereby authorized and required, immediately upon his or their request, to assign to such person or persons, such and so many council not exceeding two, as the person or persons shall desire ...." 1 Chroust, supra note 12, at 43-44 (quoting Public Laws of S.C., 1682-1792, Act 552, § 41, August 20, 1731). And, in 1784, a law was enacted in Virginia to provide that "in all trials for capital cases the prisoner, upon his petition to the court, shall be allowed counsel." 1 Chroust, supra note 12, at 44 (quoting 4 Hening, The Statutes-at-Large, Being a Collection of the Laws of Virginia, 1619-1792, at 404 (1825)).
sent themselves. 17 Although the constitutional provision was not initially read to guarantee the appointment of counsel to indigent defendants, it did protect the right of those who could procure counsel to have an attorney. 18 Moreover, as originally understood, the Sixth Amendment guaranteed "the assistance of counsel of [the accused's] own selection." 19 Thus, courts could not dictate who would be retained by the accused. The Supreme Court's modern-day decisions have built upon both of these original themes: access to counsel and choice of counsel.

Recognizing the importance of legal assistance for unsophisticated defendants, the Court held in 1938 in Johnson v. Zerbst 20 that indigent felony defendants in federal courts were entitled to the appointment of an attorney if they were unable to retain one. 21 Moreover, the Court decided, those defendants who could afford to retain counsel, but nonetheless appeared in court unrepresented, had to be adequately apprised of their Sixth Amendment right to counsel and could not be tried without representation unless they voluntarily and knowingly relinquished that right. 22 For a quarter-century, however, the Court declined to extend the Sixth Amendment right to indigent felony defendants in state court proceedings. Instead, the Court held that the Due Process Clause entitled an indigent defendant to appointed counsel only when, in light of such factors as the seriousness and complexity of the allegations and the defendant's lack of sophistication, compelling the defendant to represent himself would be fundamentally unfair. 23 Underlying this ad hoc standard was a fiction that criminal defendants, although untrained in the law, were nevertheless competent in most cases to defend themselves at the level necessary to avoid the conviction of an innocent person who is accused of a crime. 24 In death-penalty cases, where the stakes were highest, the Court recognized this fiction for what it was. In every capital case that came before it, the

19. Anderson v. Treat, 172 U.S. 24, 29 (1898); see Powell v. Alabama, 287 U.S. 45, 53, 60-65, (1922) ("[T]he right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."); William M. Beaney, The Right to Counsel in American Courts 21 (1955); 1 Thomas M. Cooley, A Treatise in the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 696-708 (8th ed. 1927); Winick, supra note 17, at 786-89 (tracing historical origins of right to counsel of choice).  
20. 304 U.S. 458 (1938).  
21. Id. at 467-69.  
22.  
Court held that the indigent defendant should have been provided counsel. However, largely out of concern that some states would encounter administrative or financial difficulties in providing lawyers to all indigent felony defendants, the Court delayed extending Zerbst to indigent defendants in state court proceedings who were not facing the death penalty.

Finally, thirty years ago, in Gideon v. Wainwright, the Court held that all felony defendants in state court must be provided access to counsel. The constitutional guarantee was further extended several years later when the Court concluded in Argersinger v. Hamlin that indigent misdemeanor defendants could not be sentenced to a term of imprisonment unless they, too, had been afforded access to counsel. As the Court's decisions recognize, the criminal defendant's right of access to counsel is essential to

25. In its earliest decision, Powell v. Alabama, 287 U.S. 45 (1932), decided several years before Betts, the Court acknowledged that counsel would be essential to enable virtually any innocent defendant to prevail in criminal proceedings:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Id. at 69. Nevertheless, in determining that due process required the appointment of counsel in Powell, the Court pointedly limited its ruling to the extreme facts of the case before it:

[T]he necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . . .

Id. at 71.

In decisions subsequent to Betts, the Court came to acknowledge that capital charges were enough in themselves to require the appointment of counsel, wholly apart from whether special circumstances incapacitated defendants from mounting defenses on their own. See Hamilton v. Alabama, 368 U.S. 52, 55 (1961) ("When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted."); see also Bute v. Illinois, 333 U.S. 640, 674 (1948) ("if these charges had been capital charges, the court would have been required, both by the state statute and by the decisions of this Court interpreting the Fourteenth Amendment, to take some such steps [to appoint counsel]").


promote the reliability of the criminal process,29 the availability of other constitutional and procedural protections afforded criminal defendants,30 and relative equality between the opposing sides of a criminal controversy and among different classes of criminal defendants.31

The right of access to counsel recognized in Zerbst and Gideon is absolute, save for those cases in which a defendant who understands the right decides voluntarily and expressly to relinquish it.32 Thus, a criminal conviction must be overturned if the defendant was deprived of counsel, even if the proof against the defendant was overwhelming and the presence of counsel was unlikely to have affected the outcome of the case. As the Court stated a half-century ago: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."33 In the intervening years, the Court has unwaveringly adhered to this view,34 which has essentially two premises. First, the types of harm that are likely to result from the absence of counsel will not often be reflected in the trial record and will not easily be susceptible to proof, yet they are pervasive.35 Therefore, regardless of the strength of the prosecution's case in the absence of counsel, one can rarely say with absolute assurance that counsel would not have made a difference. Second, and more importantly, the guarantee of counsel is so fundamental to fair process that a trial without that right would be wholly undeserving of public respect, regardless of whether, with or without counsel, the defendant invariably would be convicted.36

Consistent with the earliest understanding of the right to counsel, contemporary Supreme Court decisions recognize that the Sixth Amendment protects not only access to counsel, but also a defendant's right to select counsel, at least in those cases where the defendant does not require a court-appointed representative. The right to choose counsel promotes the fairness and reliability of criminal proceedings by enabling an accused to select the available representative in whom he or she believes to be best suited to defend the

29. See, e.g., United States v. Cronic, 466 U.S. 648, 655-56 (1984) ("[T]he 'very premise' that underlies and gives meaning to the Sixth Amendment" is that "'partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.'") (quoting Herring v. New York, 422 U.S. 853, 862 (1975)).
31. See Green, supra note 10, at 1056.
34. See, e.g., Arizona v. Fulminante, 111 S. Ct. 1246 (1991); Geders v. United States, 425 U.S. 80 (1976) (reversing conviction where court refused to let counsel confer overnight with accused); Chapman v. California, 386 U.S. 18, 24 (1967) (citing the right to counsel as a paradigm of those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error").
36. See, e.g., United States v. Cronic, 466 U.S. 648, 659 (1984) ("The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial.").
particular case. This aspect of the right to counsel also respects the individual defendant's interest, as a matter of personal autonomy, in making critical decisions concerning the course of the criminal defense.  

Unlike the right of access to counsel, the right to counsel of choice is not absolute. At times, a court may curtail a criminal defendant's efforts to select a particular representative. For example, to ensure the orderly disposition of cases, a trial court may schedule a criminal trial to occur on a date that is inconvenient to the attorney initially selected by the defendant, thereby imposing an indirect restriction on the accused's ability to appear with counsel of preference. Moreover, in order to promote other institutional interests, a court may disqualify a particular attorney from representing a criminal accused. In particular, the Court has recognized a trial judge's discretion to disqualify defense counsel when there is a serious risk that the attorney has a conflict of interest.

Whether a particular individual qualifies as "counsel" under the Sixth Amendment may arise in the context of either of the above-described bodies of doctrine—that dealing with access to counsel or that dealing with choice of counsel. For example, an indigent defendant may oppose the appointment of a particular representative on the ground that the individual does not qualify as "counsel" or, similarly, a convicted defendant may claim deprivation of his or her Sixth Amendment right because the individual who represented the defendant did not qualify as "counsel." On other occasions, the prosecution, in moving to disqualify a particular individual from defending the accused, may make the argument that the would-be defender does not qualify as "counsel." Each of these claims calls for a determination of the meaning of the constitutional term.

The Supreme Court has never directly addressed the meaning of "counsel," and its opinions interpreting other elements of the Sixth Amendment right provide only limited guidance. The Court's decisions seem to assume that anyone who is an attorney meets the definition of "counsel" and anyone who is not an attorney does not. Thus, in its opinions, the Court has used the terms "attorney" and "lawyer" interchangeably with


39. Wheat, 486 U.S. at 161-62. For commentary on Wheat, see Green, supra note 37 (criticizing Wheat on the grounds that it gave inadequate weight to the defendant's interest in autonomy and the integrity of the attorney-client relationship, while exaggerating the importance of the countervailing judicial interests); William J. Stuntz, Waiving Rights in Criminal Procedure, 75 Va. L. Rev. 761, 797-91 (1989).
the term "counsel" when referring to the constitutional guarantee. In only one case, United States v. Cronic, did the Court have an opportunity explicitly to consider whether all attorneys should be deemed "counsel." However, the Court failed to acknowledge, much less decide, whether its usual understanding of the term was overinclusive.

The defendant in Cronic had been represented at a trial on mail fraud charges by a young lawyer with a real estate practice who had never previously tried a case before a jury and who had only twenty-five days to prepare the case for trial. On review of the ensuing conviction, the court of appeals concluded that Cronic had been denied the right to "assistance of counsel," not because trial counsel had committed any identifiable errors or omissions at trial, but because the lawyer's late entry into the case, combined with his inexperience and other factors, warranted an inference that the lawyer's representation had been inadequate. In rejecting this analysis, the Supreme Court assumed that the trial attorney in Cronic was "counsel," and focused on whether Cronic had received the effective "assistance" of counsel, an inquiry calling for an after-the-fact review of the trial attorney's conduct of the trial, rather than a before-the-fact inquiry into the attorney's general qualifications. The Court determined that, except in the unusual case "in which the surrounding circumstances make it unlikely that the defendant could have received the effective assistance of counsel," a defendant must point to specific errors made by trial counsel in order to prevail on a claim that he had been denied that right. Finding that the circumstances surrounding Cronic's representation did not make it such an unusual case, the Court remanded the case for reconsideration under the general standard.

The Court in Cronic might have considered whether the guarantee of "counsel" is fulfilled by an individual who, although licensed to practice law, has never tried a case before a jury and apparently has no familiarity with the criminal trial process. That the Court failed to do so is not surprising, since Cronic's challenge to his conviction had never been framed in this way and, thus, the question had not been considered by the courts below. Justice Stevens's opinion leaves little room for doubt, however, that the Court considered Cronic's trial lawyer to be sufficiently

40. See, e.g., Cronic, 466 U.S. at 658 ("we presume that the lawyer is competent to provide the guiding hand that the defendant needs"); Engle v. Isaac, 456 U.S. 107, 134 (1982) (the accused is guaranteed "a fair trial and a competent attorney"); McMann v. Richardson, 397 U.S. 759, 770 (1970) (the accused is entitled to "a reasonably competent attorney").
42. Id. at 649.
43. Id. at 650, 652 (citing Cronic v. United States, 675 F.2d 1126, 1129 (10th Cir. 1982)).
44. Id. at 666.
45. Id. at 666-67. On remand, the Tenth Circuit concluded that Cronic had been denied effective assistance because of the trial lawyer's failure to interpose a "good faith" defense to the mail fraud charges. United States v. Cronic, 839 F.2d 1401, 1404 (10th Cir. 1988). Cronic was convicted again after a retrial, but the conviction was reversed and the charges dismissed upon the Tenth Circuit's finding that there was insufficient evidence to prove guilt beyond a reasonable doubt. United States v. Cronic, 900 F.2d 1511, 1517 (10th Cir. 1989).
qualified to wage a criminal defense to a mail fraud prosecution, notwithstanding his inexperience. The opinion notes:

Every experienced criminal defense attorney once tried his first criminal case. Moreover, a lawyer's experience with real estate transactions might be more useful in preparing to try a criminal case involving financial transactions than would prior experience in handling, for example, armed robbery prosecutions.\(^{46}\)

Thus, in the Court's view, while it might be prudent for trial courts "to take greater precautions to ensure that counsel in serious criminal cases are qualified," the inexperience of Cronic's counsel did not justify a presumption that his performance at trial was ineffective.\(^{47}\)

Undoubtedly, the *Cronic* Court exaggerated the possible utility of a real estate practice to the trial of a criminal fraud case, perhaps deliberately so. Without question, it would be far easier for a lawyer practiced in defending charges of violent crimes to master the financial transactions at issue in a mail fraud prosecution than it would be for someone skilled in financial transactions to learn criminal law and procedure and develop trial skills on the spot. Yet, as a practical matter, it would be difficult for some jurisdictions to comply with the mandates of *Gideon* and *Argersinger* if all criminal defendants were entitled not just to a lawyer, but to a "qualified" lawyer. A defendant would likely be far better served by having a lawyer, however unfamiliar he or she may be with criminal practice, than with no lawyer at all. While the Court's comments do not necessarily compel the conclusion that anyone who holds a license to practice law will be presumed qualified to defend against criminal charges, lower courts have reasonably read them for the proposition that inexperience alone does not disqualify a lawyer from serving as "counsel" in a criminal proceeding.\(^{48}\)

Against this background of Supreme Court decisions, which give only indirect guidance as to the meaning of "counsel," state courts and lower federal courts have had relatively free rein to define the term. As described in the following subpart, they have generally endorsed the common understanding of the term—that "counsel" means "lawyer." In exceptional cases, however, courts have been compelled to opt for a definition that is

\(^{46}\) *Cronic*, 466 U.S. at 665.

\(^{47}\) Id. at 665 & n.38.

\(^{48}\) See, e.g., Burden v. Zant, 903 F.2d 1252, 1361 (11th Cir. 1990), *rev'd on other grounds*, 111 S. Ct. 862 (1991); Beasley v. Holland, 649 F. Supp. 561, 567 (S.D. W. Va. 1986); *see also* United States v. Lewis, 786 F.2d 1278, 1281 (5th Cir. 1986) ("An attorney can render effective assistance of counsel even if he has had no prior experience in criminal advocacy."); United States v. Badolato, 701 F.2d 915, 926 (11th Cir. 1983) (defendant's complaint that trial attorney "lacked sufficient experience in federal criminal trials alone is unrelated to the question whether [he] received reasonably effective assistance of counsel."); cf. Achtien v. Dowd, 117 F.2d 989, 992 (7th Cir. 1914) ("There is a rather well-defined recollection on the part of the court, backed by our observations, that all lawyers must have their first cases, that in said first case diligence and anxious effort are often quite the equivalent of experience."). *But see* United States v. Merritt, 928 F.2d 650, 651 (7th Cir. 1991) (counsel's inexperience, together with other factors, including that he failed the bar examination three times and that his performance called into question his professional judgment and skill, warranted conclusion that he failed to meet the minimum constitutional standard).
more inclusive or less inclusive. An analysis of those cases reveals the inadequacy of both the common understanding and the courts' efforts at a more nuanced definition.

B. How Lower Courts Define "Counsel"

Discussions about the meaning of "counsel" have centered to a large extent on how the framers of the Sixth Amendment would have originally understood the term. No one has been able to point to any discussion or debate about the meaning of "counsel" during the period when the Bill of Rights was drafted and ratified. As a result, courts, commentators, and litigants have looked to laws and practices governing the representation of parties to judicial proceedings during the colonial, revolutionary, and post-revolutionary period for insight into the framers' original understanding.

Considerable disagreement surrounds the interpretation of early legal practices. The most inclusive definition put forward is that "counsel" means anyone who is chosen to represent the accused. Criminal defendants have made this argument most often in seeking to be defended by a nonlawyer. On occasion, the question of whether a lay person qualifies as "counsel" has also arisen in cases in which, after trial, the convicted defendant learned


Besides arguing that "counsel" under the Sixth Amendment includes lay representatives, defendants have relied on Faretta v. California, 422 U.S. 806 (1975), in support of their claimed right under the Sixth Amendment to be represented at a criminal trial by a nonlawyer. In Faretta, the Court held that an individual has a constitutional right to waive the right to appear through counsel and to represent himself at trial. Some have argued that the right of self-representation should include as a corollary the right to be represented by a nonlawyer. See, e.g., Block, supra, at 466-77. Courts have been unimpressed with this argument, however. For example, the Third Circuit in Wilhelm noted that the Faretta decision found a right of self-representation to be "rooted in the structure of the Sixth Amendment, which personally guarantees the defendant the rights to be 'informed of the nature and cause of the accusation' and to be 'confronted with the witnesses against him.'" 570 F.2d at 466 (quoting Faretta, 422 U.S. at 819-20). It found that "[t]here is no comparable Sixth Amendment source of a right to delegate the power of self-representation to lay persons who do not qualify to render the assistance of counsel." 570 F.2d at 466; accord United States v. Kelley, 539 F.2d 1199, 1202 (9th Cir. 1976), cert. denied, 429 U.S. 963 (1976); Skuse v. State, 714 F.2d 368, 369-70 (Alaska Ct. App. 1986); State v. Peterson, 266 N.W.2d 103, 105-06 (S.D. 1978); see also Wheat v. United States, 486 U.S. 155, 159 & n.3 (1988) ("Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court. . . . Our holding in Faretta . . . that a criminal defendant has a Sixth Amendment right to represent himself if he voluntarily elects to do so, does not encompass the right to choose any advocate if the defendant wishes to be represented by counsel.") (emphasis in original).

Moreover, some defendants have relied unsuccessfully upon other constitutional provisions as a purported source of a right to be represented by a lay person. For example, the defendant in Turnbull argued that, in light of his religious aversion to lawyers, his right to free exercise of religion entitled him to the appointment of a nonlawyer to defend him at a trial for failure to pay income taxes. The Ninth Circuit rejected this argument, finding that even if the appointment of a lawyer interfered with a tenet central to the accused's religious practice, that interference was warranted by the state's paramount "interest in a fair and orderly trial." Turnbull, 888 F.2d at 638-40.
that the person who represented him or her was not in fact a lawyer.50

Two originalist arguments have been advanced in favor of defining "counsel" broadly to include lay representatives. The first is that lay representation was a common practice in many colonies, and that the framers would therefore have "thought of 'counsel' as including lay persons."51 The second rests on Congress's adoption of the Judiciary Act of 178952 contemporaneously with its proposal of the Bill of Rights.53 Section 35 of the Judiciary Act provided for parties to be represented personally in federal court proceedings "or by the assistance of such counsel or attorneys at law" as the rules of court permitted.54 Some litigants have asserted that the term "attorneys at law" in the Judiciary Act referred to the attorneys who were licensed or otherwise authorized by the courts to practice law, and that "counsel" referred to any other individual whose assistance could be procured.55 Moreover, they have argued, the drafters of the Sixth Amendment must have had the same understanding when they employed the term "counsel."

Courts have uniformly rejected the argument that "counsel" may include nonlawyers who are entirely lacking in legal training.56 Although courts have not settled on a single alternative approach, all have defined "counsel" with reference to the contemporary process for licensing attorneys. Currently, that process, although nominally under judicial control, is generally delegated within each state to licensing authorities.57 The process typically involves several steps. Applicants must first graduate from law school,58 then pass a bar examination,59 and then satisfy authorities that

51. See Block, supra note 49, at 464-65.
52. 1 Stat. 73 (1789).
53. As the Third Circuit noted in United States v. Wilhelm, 570 F.2d 461, 465 n.2 (3d Cir. 1978), the Judiciary Act was signed into law by President Washington one day before Congress proposed the Bill of Rights to the states.
54. 1 Stat. 73, 92 (1789) (emphasis added) (codified as amended at 28 U.S.C. § 1654 (1982)).
55. See, e.g., Block, supra note 49, at 463.
56. See, e.g., United States v. Turnbull, 888 F.2d 636, 638-40 (9th Cir. 1989) (defendant not entitled to representation by a nonlawyer who shared "his religious belief that the teachings of Jesus require him to avoid associating with lawyers"); United States v. Wilhelm, 570 F.2d 461, 465 & n.9 (3d Cir. 1978) (federal courts of appeals "have uniformly rejected the contention that criminal defendants have a constitutional right to be represented by a friend who is neither a law school graduate nor a member of the bar.") (citing cases); State v. Spurgeon, 265 N.W.2d 224 (Neb. 1978).
57. See Charles W. Wolfram, Modern Legal Ethics 850 (1986) ("The rules [governing admission to the bar], although nominally made by courts, are in fact almost everywhere generated by committees of lawyers operating in close alignment with bar associations."). For a description of how admissions standards have evolved in one state over the past 150 years, see Stephen K. Huber & James E. Myers, Admission to the Practice of Law in Texas: An Analytical History, 15 Hous. L. Rev. 465 (1978).
58. In the vast majority of states, a bar applicant must graduate from a law school that was accredited by the American Bar Association. In a few, graduates of particular non-accredited law schools are also eligible for admission to the bar. In addition, in
they possess requisite traits of character. After meeting those requirements, applicants must pay a licensing fee and take a prescribed oath, whereupon they will be added to the list of attorneys and permitted to practice law, subject to discipline for conduct reflecting adversely on their fitness. From case to case, courts take differing views about which aspects of this process are essential to qualify an individual as "counsel."

A common approach, put succinctly by one court, is that: "'Counsel' means 'attorney.'" Under this interpretation, the defining characteristic of "counsel" is that one's name has been placed on the roll of individuals licensed to practice law. This interpretation has been adopted both in decisions rejecting a criminal defendant's asserted right to select a nonlawyer as counsel and in cases overturning convictions when it was revealed after trial that the defendant was assisted by a nonlawyer.

Courts equating "counsel" with "attorney" have rejected the argument that the framers must have meant to endorse the practice of lay represen-

---

some states, applicants for admission may serve an apprenticeship as an alternative to graduating from law school.


59. The traditional bar examination is an entirely closed-book test combining multiple choice and essay questions. Although the examination is intended to test a variety of skills, including the ability to carry out certain types of legal analysis and to communicate effectively, it puts a premium on the knowledge of legal rules drawn from a broad variety of subjects.

Id. at 277; see David M. White, The Definition of Legal Competence: Will the Circle Be Unbroken?, 18 Santa Clara L. Rev. 641 (1978).

The State of Wisconsin provides a 'diploma privilege' for graduates of law schools within the state; thus, graduates of University of Wisconsin School of Law and Marquette University School of Law may forgo the bar examination. In addition, many states waive the bar examination for attorneys who have practiced in another jurisdiction for a specified number of years.

MacCrate Report, supra note 58, at 273 n.2.

60. In most jurisdictions, the process by which admitting authorities assess the character of applicants to the bar involves a review by a committee of volunteer lawyers of a candidate's response to a questionnaire seeking information about prior arrests, convictions, civil judgments and similar problems. Few candidates are rejected in the absence of a public record of misconduct. Thus, the process is intended simply to weed out the exceedingly small number of candidates whose past misconduct is viewed as a portent of future wrongdoing.


61. United States v. Turnbull, 888 F.2d 636, 638 (9th Cir. 1989); accord Lopez-Torres v. United States, 700 F. Supp. 631, 634 (D.P.R. 1988) ("[T]he sixth amendment guarantee of counsel signifies representation by an attorney admitted to practice law."); People v. Felder, 391 N.E.2d 1274, 1276-77 (N.Y. 1979) ("Counsel, as the word is used in the Sixth Amendment, can mean nothing less than a licensed attorney at law.").
tation that was common during the colonial period. For example, in
United States v. Wilhelm, the Third Circuit noted that, while some colonies
permitted the right to plead by a friend, most often a trained advocate
represented the accused in criminal cases, both in English and colonial
courts. Moreover, the court reasoned, there was no suggestion in the
ratifying debates that the framers of the Bill of Rights meant to depart from
this practice. Likewise, these courts have rejected the argument made by
advocates of lay representation premised on section 35 of the Judiciary
Act. For example, in a frequently cited Second Circuit decision, United
States v. Solina, Judge Friendly opined that the alternative use of the terms
“counsel” and “attorneys at law” in the 1789 statute reflected its drafters’
awareness of the bifurcated nature of the legal profession in England,
where “counsel” (also known as “barristers”) were permitted to appear as
advocates in all court proceedings, while “attorneys” (known today as
“solicitors”), principally acted as legal advisors outside court. Congress
intended to make it clear in the Judiciary Act “that members of both
branches were accorded the right to appear in federal courts,” but not
that individuals who were unlicensed to practice law should be permitted to
represent others in federal court. Under this interpretation, the term

62. See, e.g., Turner v. American Bar Ass’n, 407 F. Supp. 451, 474 (N.D. Tex. 1975);
Fielder, 391 N.E.2d at 1276-77; accord Sheldon Krantz, Right to Counsel in Criminal Cases: The
Mandate of Argersinger v. Hamlin 269-70 (1976) (“Of course, states are free to determine who
may or may not be an attorney at law. Anyone so certified would meet the threshold
qualification of ‘counsel’ in the Sixth Amendment. This result is mandated by the historical
development of the legal profession.”).

63. 570 F.2d 461 (3d Cir. 1978).

64. Id. at 465; accord Turner, 407 F. Supp. at 472-74:
For centuries prior to the enactment of the Sixth Amendment, the English forerun-
ner of the American lawyer was called or invited to practice for a Court only after the
Court had satisfied itself that a person was fit to practice by virtue of his character
and/or training. On the American side of the ocean, this practice continued
throughout the colonial, revolutionary and post-revolutionary era of our history.
Although standards of admission were not all uniform and were not always very
stringent, the tradition of admission upon qualification continued to exist from even
the earliest times of the American legal experience. The Court cannot find even a
suggestion in the history of the Common Law after its primeval inception or in the
history of the American lawyer that the word “counsel,” as used in the Sixth
Amendment, was meant to include a layman off the street without qualification as to
either training or character.

See also People v. Cox, 146 N.E.2d 19 (Ill. 1957); Higgins v. Parker, 191 S.W.2d 668 (Mo.
1945).

65. See, e.g., Reese v. Peters, 926 F.2d 668, 669 (7th Cir. 1991); United States v. Solina, 709
66. 709 F.2d 160, 166-67 (2d Cir. 1983).
67. Id.

68. Id. Judge Friendly bolstered his view of Congress’s original understanding by reference to another contemporaneous statute, Act of April 30, 1790, § 29, 1 Stat. 112 (1790),
which provided:
Every person so accused and indicted for [treason or other capital offences] shall
also be allowed and admitted to make his full defence by counsel learned in the law.
In Judge Friendly’s view, Congress’s use of the phrase “counsel learned in the law lays to rest
any speculation that the phrase ‘the assistance of counsel’ in the Sixth Amendment was meant
“counsel” excludes nonlawyers, even those who have received legal training but have not been admitted to practice because they have not passed the bar examination or met the standards of character required for admission to the bar. Accordingly, the court in Solina held that a defendant was automatically entitled to reversal of his conviction when it turned out that his trial representative, a law school graduate, had never passed the bar examination or been licensed to practice law.69

A different definition of “counsel” was put forward by Judge Easterbrook in Reese v. Peters70 when he stated: “‘Counsel’ to which the [S]ixth [A]mendment refers is a professional advocate who meets the standards set by the court.”71 In this view, the defining characteristic of “counsel” is not the possession of a license to practice law, but the satisfaction of those licensing requirements that bear on an applicant's fitness to practice—graduation from law school, passing a bar examination, and satisfying a review of one's character. Under this interpretation, an individual who is not authorized to practice law will nevertheless qualify as “counsel” if unlicensed solely because of failure to satisfy licensing requirements thought to be unrelated to one's fitness to render legal assistance. Thus, courts have widely held that a defendant is not deprived of “counsel” when represented by someone who is unlicensed only because of failure to be “sworn in” or failure to pay bar dues.72

to signify anything less than representation by a licensed practitioner.” Solina, 709 F.2d at 167.

69. Solina, 709 F.2d at 168-69 (defendant denied right to counsel when he was represented at trial by an unlicensed individual who had graduated from law school and had handled an extensive number of arbitrations over the course of more than fifteen years, but had failed to pass the bar examination and had never previously represented anyone in judicial proceedings); accord Hucklebury v. State, 337 So. 2d 400 (Fla. Dist. Ct. App. 1976) (defendant denied right to counsel when he had been represented at guilty plea proceedings by a law school graduate who had passed the bar examination but had been denied admission to practice following a determination by the Florida Board of Bar Examiners that he had withheld information from his bar application, altered academic transcripts, and testified falsely before the Board); see also People v. Cox, 146 N.E.2d 19 (Ill. 1957); People v. Schlaiss, 528 N.E.2d 394, 396 (Ill. App. Ct. 1988) (law student “cannot be considered ‘counsel’ for constitutional purposes” when he represented the defendant without written consent as required by court rules); People v. Felder, 591 N.E.2d 1274 (N.Y. 1979); People v. Leslie, 586 N.Y.S.2d 197 (Sup. Ct. 1992); Baker v. State, 130 P. 820 (Okla. 1912).

70. 926 F.2d 668 (7th Cir. 1991).

71. Id. at 669.

Conversely, under this approach, possession of a license is not necessarily enough in itself to make one “counsel.” Thus, in United States v. Novak, the Second Circuit held that an individual who fraudulently obtained a license to practice law was not “counsel” under the Sixth Amendment. The defendant in Novak was represented at trial by Joel Steinberg several years before Steinberg’s own highly publicized arrest and conviction on child abuse charges. Following Steinberg’s arrest, an inquiry into the circumstances surrounding his admission to practice law revealed that he had made misrepresentations to the Board of Law Examiners in order to obtain dispensation from taking the bar examination. Even though Steinberg possessed a license to practice law, the Second Circuit found that he was not “counsel” as required by the Constitution because he did not in fact qualify for the license, having obtained it by means of “a fraud that both prevented the state from assessing his legal ability and revealed a want of moral character.”

73. 903 F.2d 883 (2d Cir. 1990).
74. Id. at 890; accord People v. Chin Mon Foo, 545 N.Y.S.2d 55, 57 (Sup. Ct. 1989) (“the term ‘counsel’ does not include one who has procured the privilege of practicing law by fraud upon the licensing authorities in the first instance”).

A Pennsylvania appellate court reached an opposite conclusion in Commonwealth v. Vance, 546 A.2d 632 (Pa. Super. Ct. 1988). Following the defendant’s guilty plea and sentencing on murder charges in that case, he learned about disciplinary proceedings against his defense lawyer that ultimately resulted in the revocation of the lawyer’s license. It turned out that Potak, Vance’s lawyer, had come to Pennsylvania after relinquishing his license to practice law in California in the wake of disciplinary proceedings based on various allegations of misconduct. To gain admission to the Pennsylvania bar some years later, Potak made false statements in his application. Because of the false statements and a finding that Potak “was not of good character,” he was disbarred several months after Vance’s conviction. On appeal from that conviction, the state court found that because Potak was a member of the Pennsylvania bar at the time of the criminal proceedings, his representation satisfied the right to counsel. The appellate court did not pause over the fact that, but for his false statements, Potak in all likelihood would not have been admitted to practice law in Pennsylvania. See also People v. Williams, 530 N.Y.S.2d 472 (Sup. Ct. 1988).

75. Novak, 903 F.2d at 885. A Vietnam-era provision of state law excused veterans from taking the bar examination if “their course of law school study was interrupted by active service in the armed forces.” Steinberg procured a certificate of dispensation on the basis of this provision, but had not been entitled to one, because his law studies had not in fact been interrupted by military service. Rather, after attending law school for two years, Steinberg was dismissed for poor scholarship, and did not enter the military until a year later. Id.

76. Id. at 890. Relying on Solina, the court in Novak found that the defendant was automatically entitled to reversal of his conviction, without inquiry into the quality of representation he received. Novak, 903 F.2d at 890. At the same time, however, the court suggested that the quality of Steinberg’s representation might have been impaired in unseen ways by his concern over having deceived licensing authorities more than a decade earlier. It explained:
The eventual investigation into Steinberg’s licensure was a response to his outrageous conduct. In this instance, that conduct was directed toward his family; but such an investigation could as easily have been triggered by a vigorous legal defense that irritated the prosecutor. The government states that it had routinely inquired before Novak’s trial as to whether Steinberg had been admitted to practice. But the fact that a superficial routine check may be unrevealing is irrelevant. There remained the underlying risk that a vigorous defense could have led to a deeper probe and a discovery that Steinberg had not been “duly” admitted.

Id.
The view that “counsel” means someone who meets the licensing standards relating to fitness and character, like the view that “counsel” means a licensed attorney, has been justified by reference to legal practices prevailing when the Sixth Amendment was ratified. In Reese, Judge Easterbrook explained:

“Counsel” in 1791 meant a person deemed by the court to act as another’s legal representative and inscribed on the list of attorneys. See § 35 of the Judiciary Act of 1789. There were no bar exams, no unified bars, no annual dues, no formal qualifications. Although there were a handful of law schools, none was accredited by the ABA (there was no ABA), and few students completed the program. John Marshall dropped out of law school after a few months of study . . . . Would-be lawyers earned the right to practice through apprenticeship, appearing in court under the tutelage of a practitioner until they satisfied the presiding judge that they could handle cases independently. Part of the tradition survives in the practice of admission pro hac vice. Courts grant motions allowing representation by persons who do not belong to their bars. Usually the person admitted pro hac vice belongs to some bar, but it may be the bar of a distant state or a foreign nation. The enduring practice of admission pro hac vice demonstrates that there is no one-to-one correspondence between “Counsel” and membership in the local bar.77

Under this conception, according to Judge Easterbrook, an individual’s status as counsel turns not on whether that person is licensed, but on “whether the court has satisfied itself of the advocate’s competence and authorized him to practice law.”78 The definition takes in “persons who satisfied the court of their legal skills but later ran afoul of some technical rule” such as the requirement of paying bar dues, noncompliance with which does not cast doubt on one’s possession of the requisite fitness and character to practice law.79 However, Judge Easterbrook’s definition ex-

The court’s suggestion that Steinberg may have been influenced by fear of discovery to defend his client less than vigorously seems rather far-fetched for several reasons. So much time had passed since his admission to the bar, that if he ever thought of the deception at all, it must have been with confidence that he would never be discovered. Moreover, he must have realized that the amount of investigation required to discover his deception would be far more than a prosecutor would ever conduct simply for the purpose of determining the bona fides of a vigorous advocate. Finally, the prosecutor would be more likely to inquire into Steinberg’s credentials if Steinberg provided an adequate defense than if he provided a vigorous one. Therefore, in the unlikely event that he was concerned about being unmasked, Steinberg would have been motivated to provide vigorous representation, not a substandard defense.

77. Reese v. Peters, 926 F.2d 668, 668-70 (7th Cir. 1991) (emphasis in original).
78. Id. at 670.
79. Id. In Judge Easterbrook’s view, this is merely a “technical” rule because it does not reflect on a lawyer’s competence or character:

Lawyers who do not pay their dues violate a legal norm, but not one established for the protection of clients; suspensions used to wring money from lawyers’ pockets do not stem from any doubt about their ability to furnish zealous and effective assistance.

Id; accord Jones v. Maryland, 616 A.2d 422 (Md. 1992) (defense attorney’s “default in payment of the requisite assessment and resulting decertification differs from a disciplinary suspension
or disbarment; it has no connection with the lawyer's character, intellectual acuity, or dedication to the client's interests.

There is a superficial anomaly created by Judge Easterbrook's approach. If a lawyer who has been suspended for failing to pay bar dues is "counsel" under the Sixth Amendment, it would seem to follow that a defendant's right to counsel of choice extends to a lawyer suspended for that reason. "Counsel" is, after all, a concrete term, like others in the Sixth Amendment, such as "jury," "district," and "witnesses." "Counsel" must refer to a discrete group of individuals from among the general populace. Those individuals who are "counsel" ought to be the same, whether one is considering counsel-of-choice claims or right-of-access claims under the Sixth Amendment. Yet courts undoubtedly would refuse to allow a defendant to choose to retain a suspended lawyer, even though they might hold, postconviction, that representation by that same lawyer satisfied the Sixth Amendment right to counsel.

This anomaly might be explained on the ground that the right to counsel of choice is a qualified one, and that the judicial interest in enforcing the "technical" legal requirements for admission to the bar outweigh a defendant's interest in counsel of choice. Therefore, even if individuals who are unlicensed for "technical" reasons are "counsel" for constitutional purposes, a trial court would be justified in refusing to allow a defendant to select as counsel someone who lacks a license to practice law. See, e.g., Panzardi-Alvarez v. United States, 879 F.2d 975, 980-81 (1st Cir. 1989) (although defendant's application to be represented by attorney licensed in another jurisdiction implicates the right to counsel of choice, that right is limited when it would interfere "with the ethical and orderly administration of justice;" therefore, in ruling on the application for admission pro hac vice, a court may "consider the effect of the attorney's past actions (especially past ethical violations) on the administration of justice within the court").

This explanation may not be wholly satisfactory, however. To say that a suspended attorney is "counsel" but may never be retained to defend a criminal accused, because the state's administrative interests invariably outweigh the defendant's interest in choice of counsel, seems little different from saying that a suspended attorney is not "counsel" at all for Sixth Amendment purposes. The difference, simply semantic, is not necessarily supported by decisions such as Wheat v. United States, 486 U.S. 133 (1988), holding that the right to counsel is a qualified right. Those decisions have determined that, in individual cases, such as when an attorney has a conflict of interest, the attorney may not be selected to defend a particular criminal accused. Those decisions do not suggest that, although an individual may be "counsel," the choice of that attorney may be denied categorically to every defendant in every case because of that attorney's status, as is the case for suspended attorneys.

80. 903 F.2d 883 (2d Cir. 1990).
81. See People v. Johnson, 822 P.2d 1317 (Cal. 1991) (defendant denied right to counsel under state constitution when he was represented by a former attorney who had resigned from the state bar following a conviction for selling cocaine); People v. Hinkle, 238 Cal. Rptr. 272 (Cal. Ct. App. 1987) (defendant denied right to counsel when he had been represented at trial by an attorney under suspension for reasons reflecting on his competency); State v. Kasuboski, 275 N.W.2d 101, 106-08 (Wis. 1978) (disbarred attorney is not "counsel"; therefore, defendants had no right to retain disbarred attorney to represent them at trial). But see State v. Smith, 476 N.W.2d 511, 513-14 (Minn. 1991) (no denial of counsel where defendant was represented at trial by an attorney who was suspended for misconduct relating to his fitness to practice law, for which he was eventually disbarred).

In Johnson, the court elaborated on this principle. Prior to the defendant's trial, the trial attorney in that case had been suspended by operation of law upon his conviction for selling cocaine and had thereupon resigned from the state bar. The court found that because of his resignation, the lawyer could not serve as "counsel" under the state constitution, but that he otherwise could have served, because the statutory suspension would not have denoted that he was unfit to represent the accused. It reasoned that an attorney suspended because he lacked professional competence or because he lacked the requisite moral character to practice law
A third judicial gloss on the term "counsel," not accepted by many other courts, was adopted by the Sixth Circuit in *United States v. Whitesel*,\(^8^2\) which found the distinguishing characteristic of "counsel" to be one's possession of learning in the law, and recognized that the licensing process is not the exclusive means of demonstrating one's learning. This reading was based on a different view of the drafters' understanding than that taken by other courts. In the *Whitesel* court's view, "it seems probable that the proposers of the Sixth Amendment did not mean to limit representation exclusively to 'attorneys at law.'"\(^8^3\) Therefore, a nonlawyer would qualify as "counsel" if he were "sufficiently learned in the law to be able adequately to represent his client in court."\(^8^4\) The appellate court gave no indication of how "learned in the law" a nonlawyer must be to serve as "counsel"; nor did it explain what would substitute for the licensing process as a method of determining that a nonlawyer was sufficiently familiar with the law. The court did reject, however, the accused's claim that the district court should have permitted an accountant to defend him on tax fraud charges, since there had been no showing that the accountant had any legal training whatsoever.\(^8^5\)

Although the courts thus glean somewhat different lessons from early American legal practice, and the precise contours of their definitions of "counsel" therefore vary, they concur to a large extent both on whom the term "counsel" excludes and on whom it includes. On one hand, "counsel" excludes untrained lay representatives; on the other hand, it includes duly licensed attorneys—those attorneys who have satisfied the licensing requirements. Courts disagree only in how they regard individuals who have received legal training but who are not duly licensed. Courts defining "counsel" to mean "attorney" would include licensed practitioners within the ambit of the term, even if they have not satisfied the licensing requirements of fitness and character. Courts understanding "counsel" to mean "a professional advocate who meets the standards set by the court" would exclude attorneys who obtained their licenses by wrongfully circumventing requirements relating to character and fitness, but include practitioners who, although unlicensed, have satisfied those requirements. And, the *Whitesel* court would include individuals who are neither licensed nor in

---

\(^8^2\) 543 F.2d 1176 (6th Cir. 1976).
\(^8^3\) Id. at 1179.
\(^8^4\) Id. at 1180; accord *United States v. Stockheimer*, 385 F. Supp. 979 (W.D. Wis. 1974).
\(^8^5\) *Whitesel*, 543 F.2d at 1180.
compliance with substantive licensing standards but who are nevertheless "sufficiently learned in the law to be able adequately to represent [a criminal accused] in court."

The judicial interpretations of "counsel" seem to share a single presumption: that if an individual is "counsel," he is qualified to defend a criminal case. For some courts, the possession of a license itself apparently justifies a presumption that an individual is qualified. As one court explained:

Admission to the bar allows us to assume that counsel has the training, knowledge, and ability to represent a client who has chosen him. Continued licensure normally gives a reliable signal to the public that the licensee is what he purports to be—an attorney qualified to advise and represent a client.86

A comparable assumption is implicit in the distinction made between substantive and technical defects in licensure in decisions such as Reese. For courts which discount the significance of being placed on the rolls of attorneys, it is presumably the satisfaction of licensing requirements relating to character and fitness that ensures an attorney's ability to advise and represent the defendant.

Remarkably, however, the courts defining "counsel" make no attempt to justify the assumption that duly licensed attorneys are qualified. They neither explain what an attorney must know and be able to do in order to represent a criminal defendant competently, nor explain how the licensing process ensures an attorney's possession of the requisite knowledge and ability. They neither demand that the licensing standards are exacting enough to ensure that attorneys are in fact qualified, nor review the licensing process to satisfy themselves that the requisite standards are maintained. In essence, courts interpreting "counsel" allow licensing authorities standardless discretion to establish processes for allocating law licenses and then presume that those processes, whatever they may entail, guarantee that all practitioners will be capable of adequately representing criminal defendants upon receipt of a license.

Of equal note, if the courts' premise is, in fact, that defense lawyers must be qualified in order to serve as "counsel," then the case law that has developed upon this premise contains a significant anomaly: attorneys who cease to meet the standards set for licensure may nevertheless serve as

86. United States v. Mouzin, 785 F.2d 692, 698 (9th Cir. 1986); accord Achtien v. Dowd, 117 F.2d 989, 992 (7th Cir. 1941):

It would seem tolerably clear, that an accused is entitled, if he desires counsel, not only to be represented by one admitted to the bar, but to be represented by competent counsel,—by a capable practitioner.

The fact that one is admitted to practice law in the state where the crime was committed is not, of itself, sufficient if incompetency be charged and proven. Doubtless admission to practice, and the presence of counsel's name on the roll of attorneys in the court where the accused is to be tried, create a presumption of competency. The presumption, however, is rebuttable, not conclusive.

See also People v. Leslie, 586 N.Y.S.2d 197, 201 (Sup. Ct. 1992) ("Only a person educated, tested, and duly admitted to practice as an attorney may be presumed to have provided [competent representation]").
“counsel” as long as they retain a license. While courts are willing to assume that those who meet the standards of character and fitness set by licensing authorities are qualified to defend criminal cases, they refuse to assume that licensed attorneys who fail to meet those standards are not qualified. Two recent decisions illustrate this anomaly.

The first decision, Bellamy v. Cogdell, involved a lawyer who was unqualified in part because he was mentally impaired. At the time of the defendant's trial on murder charges, the defense attorney was suffering from polyneuropathy, a neurological problem whose symptoms included "an inability to concentrate." The attorney was the subject of disciplinary proceedings that had been adjourned because of his illness, and which later resulted in his suspension. After the suspension, of course, the attorney could no longer serve as "counsel." Moreover, at the time of the trial, the attorney suffered from the same deficiencies of character and mental ability that eventually warranted his suspension. Nevertheless, in a closely divided en banc decision, the Second Circuit concluded that the defendant's attorney, still licensed at the time of trial, qualified as "counsel" under the Sixth Amendment.

87. 974 F.2d 302 (2d Cir. 1992) (en banc).
88. Id. at 304.
89. Unknown to defendant Bellamy at the time of trial, Guran, the 70-year-old trial attorney, was the subject of disciplinary proceedings based on his alleged conversion of client funds and negligence in handling a real estate transaction. Id. at 303-04. Three months before Bellamy's criminal trial commenced, Guran had obtained an adjournment of the disciplinary proceedings based on his lawyer's representation that Guran was "not mentally capable of preparing for the hearing" and on his treating physician's accompanying note to the same effect. Id. at 303. Moreover, Guran had forestalled the disciplinary committee's efforts to suspend him indefinitely by representing that his assistance was needed on the Bellamy trial and by promising—as it turned out, falsely—that he would secure a competent co-counsel for Bellamy. Id. at 307.
90. In his majority opinion in Bellamy, Judge Altimari took the view that, as long as Guran was duly licensed and admitted to the bar at the time of trial his representation satisfied the "jurisdictional" requirement that the accused receive the assistance of "counsel." Id. at 306. Moreover, he rejected Bellamy's argument that a per se rule of ineffective assistance should be invoked. Particularly in light of the trial judge's "favorable observations of Guran's mental acuity and physical [condition] during the trial," he found such a rule inappropriate. Id. In the absence of a showing that trial counsel either had an actual conflict of interest or committed identifiable mistakes that prejudiced the defendant, he concluded, the right to counsel should be satisfied. Id. at 307.

The court's approach was consistent with the weight of prior authority. Although occasionally acknowledging that an attorney's mental impairment may compromise his trial representation in ways that are unprovable, most courts have nevertheless declined to adopt a rule that a conviction should automatically be reversed when defense counsel was mentally impaired. See, e.g., Smith v. Ylst, 826 F.2d 872, 876 (9th Cir. 1987) ("mental illness is too varied in its symptoms and effects to justify a per se reversal rule without evidence that the attorney's performance fell below the constitutional norm"); Bucklew v. United States, 575 F.2d 515, 521 (5th Cir. 1978); Pilchak v. Camper, 741 F. Supp. 788, 792-93 (W.D. Mo. 1990), aff'd, 935 F.2d 145 (8th Cir. 1991); Hernandez v. Wainwright, 634 F. Supp. 241, 245 (S.D. Fla. 1986), aff'd, 813 F.2d 409 (11th Cir. 1987); United States ex rel. Pugach v. Mancusi, 310 F. Supp. 691 (S.D.N.Y.), aff'd, 441 F.2d 1073 (2d Cir. 1970), cert. denied, 404 U.S. 849 (1971). But see Javor v. United States, 724 F.2d 831, 833 (9th Cir. 1984) ("when an attorney sleeps through a substantial portion of the trial, such conduct is inherently prejudicial and thus no separate showing of prejudice is necessary").
The second decision, United States v. Mouzin,\(^91\) involved a defense lawyer who lacked the requisite character to practice before the court. Prior to the defendant's trial, the defense attorney had been disbarred from practicing before the federal court of appeals for failing to comply with various court rules and engaging in conduct "unbecoming a member of the bar."\(^92\) A local rule required his immediate disbarment in the district court as well, but that court delayed entering an order of disbarment until Mouzin's trial could be completed. After trial, when Mouzin first learned about the lawyer's disciplinary problems, he argued that the trial attorney was not "counsel" under the Sixth Amendment, but a divided panel of the Ninth Circuit disagreed, based on the view that "the Sixth Amendment guarantee of counsel means assistance by an attorney who has been found qualified to represent a client as evidenced by admission to the bar."\(^93\) Once found qualified, an attorney is presumed to remain qualified until he or she loses the license to practice law,\(^94\) and the presumption holds even in the

In a dissenting opinion joined by five of the other thirteen active judges of the circuit, Judge Feinberg argued that, like the defendants in Solina and Novak, Bellamy had been denied the right to counsel. Bellamy, 974 F.2d at 309 (Feinberg, J., dissenting). He reasoned:

"We have previously applied a per se rule where a lawyer is not licensed (Solina) and where a lawyer obtains a license through misrepresentation (Novak). In this case, a lawyer, who had admitted that he did not have the mental capacity to defend himself, avoided immediate suspension and thereby retained his authority to defend someone else only by a promise to the Appellate Division that ultimately went unfulfilled. Had there been no such misrepresentation, Guran's suspension would have taken place before Bellamy's trial and Guran could not have defended him."

Id. at 313. (Feinberg, J., dissenting). Moreover, he took the view that, insofar as Guran's mind was not impaired, Guran would have been inhibited from mounting a vigorous defense "by a reluctance to have the judge or the prosecutor find out that he was trying the case alone in violation of his promise to the Appellate Division to act only to assist another attorney, a promise given to forestall a suspension order." Id.

91. 785 F.2d 682 (9th Cir.), cert. denied, 479 U.S. 985 (1986).
92. Id. at 694. According to the court, the attorney had missed deadlines in pending appeals, failed to prosecute an appeal, and paid a court reporter with an insufficient check. Id.
93. Id. at 696 (citing United States v. Hoffman, 733 F.2d 596, 599 (9th Cir. 1984)). Therefore, the court held, to secure reversal of a criminal conviction, the defendant must show that his defense was prejudiced by the defense lawyers' specific errors or omissions. Id; accord Commonwealth v. Vance, 546 A.2d 652 (Pa. Super. Ct. 1988) (discussed supra note 74); McDougall v. Rice, 685 F. Supp. 533, 539 (W.D.N.C. 1988); cf. United States ex rel. Ortiz v. Sielaff, 542 F.2d 377, 380 (7th Cir. 1976) ("the subsequent disbarment of the counsel for reasons having nothing to do with the instant case was irrelevant to his performance at petitioner's trial"); United States v. Messer, 647 F. Supp. 704, 707 (D. Mont. 1986) ("an attorney's [subsequent] suspension or disbarment does not, without more, arise to the constitutional significance of ineffective assistance of counsel"); Hernandez v. Wainwright, 634 F. Supp. 241, 246 (S.D. Fla. 1986) (court may not conclude that trial lawyer's performance was deficient based exclusively on lawyer's subsequent disbarment for unrelated conduct).
94. Mouzin, 785 F.2d at 698.

In State v. Smith, 476 N.W.2d 511 (Minn. 1991), the Minnesota Supreme Court went even farther, finding that an attorney qualifies as "counsel" even after he has been suspended or disbarred "for substantive reasons, i.e., reasons bearing on counsel's character or competence." Id. at 513. In reaching this determination, the court mistakenly relied in part on decisions such as Mouzin and Commonwealth v. Vance, 546 A.2d 632 (Pa. 1988), which were clearly distinguishable because they involved an attorney who was licensed at the time of trial. At the time of the criminal trial in Mouzin, for example, the attorney had been disbarred by the appellate court but was still licensed to practice before the trial court before which he
face of evidence that the attorney no longer satisfies the standards of fitness or character established by the court. Thus, as the majority saw it, a licensed attorney is presumed to be qualified even if, prior to trial, the attorney has “revealed incompetence or untrustworthiness or turpitude such as to deserve no client’s confidence.”

represented the accused. Likewise, in Vance, the attorney was licensed during the criminal trial but, as the Minnesota court recognized, his license was revoked after the representation. Unlike the decision in Smith, the decisions in Mouzin and Vance can be explained by the view that a duly licensed attorney remains “counsel” unless and until his license is suspended or revoked because of his unfitness. See also United States v. Stevens, 978 F.2d 565, 567-68 (10th Cir. 1992) (no denial of counsel when defendant’s attorney had been disbarred in the federal district but was still admitted to practice in state court); United States v. Hoffman, 733 F.2d 596, 598-601 (9th Cir. 1984) (no denial of counsel when defendant’s attorney was disbarred mid-trial in the state in which he was licensed, but was admitted to practice in federal court until the trial concluded).

In large measure the Smith court was concededly influenced by a reluctance to overturn the conviction of an individual whose guilt seemed to have been fairly established at trial:

On the one hand, the integrity of the criminal justice system is at stake. It seems incongruous to entrust a person’s liberty to counsel in whom the court has formally declared its lack of trust. On the other hand, there is a reluctance to set aside a criminal conviction where guilt has been fairly established by the evidence in proceedings conducted with reasonable competence by counsel.

476 N.W.2d at 514. This reluctance is undoubtedly shared by all courts in cases in which the question of whether an individual qualified as “counsel” is raised after conviction, but most courts have been unwilling to articulate this concern, recognizing that it has little if any relevance, as an interpretive matter, to the question of who is “counsel.”

Because it regarded the suspended defense lawyer as “counsel,” the Smith court reviewed the defendant’s claim under the standard of Strickland v. Washington, 466 U.S. 668 (1984), which requires the defendant to prove that the outcome of the trial was adversely affected by the mistakes of a lawyer who “failed to meet the standard of a reasonably competent defense attorney.” 476 N.W.2d at 514 (citing Strickland, 466 U.S. at 688). Under the Strickland standard, a defendant must overcome a strong presumption that the defense attorney's conduct reflected a reasonable tactical choice among available alternatives. See infra note 282 and accompanying text. Whether or not this presumption is justified as a general matter, it certainly seems unwarranted in a case like Smith, in which, in advance of trial, the trial attorney has been ruled to be unfit to practice law and therefore unworthy of retaining his license.

95. In his dissenting opinion, Judge Ferguson took the view that the trial attorney's failure to disclose his disbarment to Mouzin created an egregious conflict of interest warranting automatic reversal of the conviction:

This situation presents the worst sort of conflict of interest; attorney deception and self-interest surely destroy the fiduciary relationship with the client . . . . When attorney misconduct is so severe as to offend one's sense of justice or is so contrary to the notion of ethical behavior as to completely undermine the trust relationship, reversal of a conviction should be automatic.

Mouzin, 785 F.2d at 703-04 (Ferguson, J., dissenting).

96. Id. at 698. The view that an attorney who is demonstrably unfit qualifies as “counsel” until he is suspended or disbarred for that reason, is implicit in some of the decisions holding that “counsel” includes attorneys whose licenses have been suspended for “technical” reasons. While in some cases, the trial lawyers may have been unaware of their suspension, in most the lawyers knew that they were unauthorized to practice law, if only temporarily. While the grounds of suspension may not have reflected on these attorneys’ fitness and character to practice, their character was certainly called into question by their conduct in engaging in a law practice when they were unauthorized to do so—conduct which is unethical and, in some jurisdictions, illegal. Presumably, in these cases the attorneys were motivated by pecuniary gain to defy the rule against practicing law without a license. One might therefore be concerned
As these decisions illustrate, courts see the law license, once properly obtained, not simply as a "signal" that attorneys are qualified to represent a criminal accused, but as a surrogate for being qualified. In essence, courts have elevated the assumption that duly licensed attorneys are qualified into a conclusive or irrebuttable presumption. Attorneys, once duly admitted to practice law, are included as "counsel" even if, at the time of a criminal trial, they no longer meet the standards of fitness and character set by the courts.

The judicial decisions obviously leave much unsaid. While it is generally clear that the courts understand the term "counsel" to exclude untrained lay representatives and to include duly licensed attorneys, it is not clear why they do so. Courts fail to explain precisely why duly licensed attorneys should be presumed to be capable of defending a criminal accused, much less why the presumption should be conclusive. Broadly speaking, two possible justifications might be advanced. First, one might take the view that, in light of the origins and purposes of the Sixth Amendment right to counsel, duly licensed attorneys should qualify as "counsel" regardless of what the licensing process entails and regardless of whether those attorneys possess the attributes that the licensing process purports to require. Alternatively, one might take the view that defining "counsel" to include any duly licensed attorney is a reasonable, bright-line rule inasmuch as the contemporary licensing process gives assurance that most, if not all, duly licensed practitioners are in fact competent to represent criminal defendants.

The next two Parts of this Article explore these two possible justifications for the prevailing judicial approaches and demonstrate why each one fails. Part II argues that it is inappropriate to include duly licensed attorneys as "counsel" without regard to the content of the licensing standards for two reasons: first, the historical background to the Sixth Amendment does not support a conclusion that the framers meant for satisfaction of licensing requirements to stand as conclusive proof of

that, in the course of the representation, they might place their personal interests ahead of other rules of professional responsibility, including the requirement that they zealously represent their client. See People v. Medler, 223 Cal. Rptr. 401, 408-09 (Cal. Ct. App. 1986) (White, P.J., dissenting) ("I find it unthinkable that a reasonably competent attorney acting as a diligent advocate would willfully undertake to assist a criminal defense knowing that such representation subjected him or her to prosecution and conviction of a misdemeanor."); see also People v. Brewer, 279 N.W.2d 307, 309 (Mich. 1979) ("the failure of an attorney to remit his state bar dues is strong evidence that such attorney is no longer sufficiently interested in the practice of law to adequately defend his client's interest"). Courts have generally failed to address this concern, however. For example, in United States v. Dumas, 796 F. Supp. 42 (D. Mass. 1992), the defendant learned after trial that his attorney had been suspended from his state bar for failing to pay bar dues in 1981 and had subsequently engaged in the unethical practice of law for the next eleven years, facilitated in part by the use of a false identification number on court documents. In rejecting the defendant's claim of denial of counsel, the district judge found that the attorney's conduct did "not raise serious questions about his competence to practice," id. at 46 (emphasis in original), apparently viewing competence to be a matter exclusively of litigation ability, and not of character. See also Commonwealth v. Thibeault, 556 N.E.2d 403, 405-07 (Mass. 1990) (where attorney represented criminal defendant even though he knew he had been suspended for failure to register, the attorney "should suffer condign discipline for his violation of the suspension order," but the defendant should not be granted a new trial).
LETHAL FICTION: THE MEANING OF COUNSEL

459

qualification to serve as "counsel"; and, second, the purposes of the right to counsel are not served by defining "counsel" solely with reference to the requirements for licensing attorneys. Part III argues that reliance on the contemporary licensing process in particular is inappropriate because the legal profession's fitness and character requirements do not in fact ensure, and, indeed, are not intended to ensure, that a candidate is capable of defending criminal cases.

II. Why "Counsel" Should Mean "Qualified" Practitioner

A. The Lessons of History

Courts have construed the term "counsel" largely on the basis of how they perceived the framers originally understood it, as inferred from contemporaneous usage and legal practice. As discussed in the previous subpart, courts have derived two principal lessons from history. First, "counsel" excludes untrained advocates. Second, "counsel" includes all duly licensed practitioners, without regard to whether they are in fact qualified to practice law in general or to defend criminal cases in particular. On the second point, the readily available history is far less conclusive than the courts would believe. A strong case may be made that, as a matter of "original intent," unqualified attorneys should not be included as "counsel." 97

1. The Exclusion of Lay Advocates

The courts seem to be right that the framers did not intend "counsel" to include untrained lay representatives, but not necessarily for the reasons courts have given. The arguments typically advanced on both sides of the question, based on contemporaneous usage and practice, seem unpersuasive. The stronger argument, overlooked by courts and commentators, is that the framers did not mean to forbid laws, like those adopted in some colonies for the protection of parties to litigation, which limited courtroom representation to licensed advocates.

a. Contemporaneous Usage.

Little insight can be gleaned from contemporaneous usage of the term "counsel." The term was employed in a variety of ways in colonial and post-revolutionary statutes. In a 1785 Massachusetts statute providing for

97. This section should not be read to make the strong claim that a reading of the contemporaneous history of the Sixth Amendment compels the conclusion that "counsel" means a qualified attorney. Such a claim would be inappropriate. There is a dearth of significant historical research into the "original intent" of the drafters of the Sixth Amendment based on the historical record that remains. Cf. Gaspare J. Saladino, The Bill of Rights: A Bibliographic Essay, in Contexts of the Bill of Rights 93 (Stephen L. Schechter & Richard B. Bernstein eds., 1990). Most importantly, the framers' original understanding provides an incomplete answer to how the Right to Counsel Clause should be interpreted today. See infra note 138. The principal point of this section is simply that the readily available historical record supports a claim that "counsel" means qualified advocate and that there is nothing in the record to sufficiently overcome such a claim.
the right to “counsel,” the term seems to have meant any advocate selected by a party, whether or not licensed to practice before the courts. In other contexts, the term was used to refer to licensed advocates. Looking at the Sixth Amendment in isolation, one cannot say which of those possible meanings was intended.

Moreover, contrary to the assumption of both courts and litigants, it is doubtful that much guidance can be derived from how the word “counsel” was used in the Judiciary Act, notwithstanding that the statute was adopted at almost the same time as the Sixth Amendment. Drawing guidance from the Judiciary Act is unhelpful for two reasons: first, it is unclear what “counsel” meant in the statute; and second, there is no reason to believe the term was used the same way in both contexts.

Judge Friendly was almost certainly wrong to conclude that the terms “counsel” and “attorney” as employed in the Judiciary Act referred to the two classes of practitioners (corresponding to barristers and solicitors today) who were licensed under Great Britain’s bifurcated system. The drafters of the Judiciary Act had little reason to refer to the two “branches” of British practitioners. The colonies had overwhelmingly rejected the English practice of dividing up practitioners based on the courts before which they could appear. In some colonies, each court admitted attorneys to practice exclusively before it; in other colonies, a court of general jurisdiction admitted attorneys to practice in courts throughout the colony. Nor was Great Britain’s bifurcated system adopted for federal courts after the Revolution. Moreover, the drafters of the Act had no reason to refer to those individuals practicing law in the United States who had previously been licensed as attorneys or barristers in England, since, after the

98. In Massachusetts, for example, courtroom representation had to be opened to nonattorneys before the Revolution because many attorneys sympathetic to the crown had returned to the mother country or ceased practicing; thus, a 1785 enactment, apparently designed to allow access to representatives other than attorneys, provided that parties could plead “by the assistance of such counsel as they see fit to engage.” 1 Chroust, supra note 12, at 89 (quoting Laws and Resolves of Massachusetts ch. 23 (1785)).

99. For example, a 1745 Virginia statute referred to “council, learned in the law, and attorneys, practicing in the [General Court].” 1 Chroust, supra note 12, at 275 (quoting 5 Hening, supra note 16, at 275).

100. 1 Chroust, supra note 12, at xvii. Some colonies and states had a “graded” system, which required attorneys to possess greater expertise or experience before practicing before the higher courts. See, e.g., W. Raymond Blackard, Requirements for Admission to the Bar in Revolutionary America, 15 Tenn. L. Rev. 116, 119-20, 122 (1938) (discussing graded bars in post-revolutionary Massachusetts, New Hampshire, and New York); 1 Chroust, supra note 12, at 87, 274 (discussing graded bars in Massachusetts and Virginia). Sometimes, different titles were used to denote the different grades of attorneys. For example, in Massachusetts, a distinction between “barristers” and “attorneys” was adopted around 1760, with only barristers being allowed to argue before the Superior Court. Id. at 106. A similar distinction between “attorneys” and “counsellors” was adopted in New York in 1797, and in New Jersey both before and after the Revolution. See Blackard, supra, at 122-23. This was not the equivalent of Great Britain’s bifurcated system, however. Unlike in the colonies with a “graded” bar, in Great Britain the two classes of practitioners had different training, underwent a different process for admission to practice, and practiced before separate sets of courts.

101. See 1 Chroust, supra note 12, at 277-78 (identifying Massachusetts, Maryland, and New Hampshire); id. at 22 (identifying Pennsylvania).

102. Id. at 278 (identifying Connecticut, Pennsylvania, Delaware, and Rhode Island).
Revolution, training for the bar in England ceased to be a viable route for entry into the legal profession in America.  

If the term "counsel" in the Judiciary Act did not refer to barristers, it does not follow that "counsel" referred to lay representatives. Contemporaneous colonial and state licensing statutes did make distinctions between different classes of practitioners—including distinctions between "attorneys" and "counsel" or "councillors"—which either reflected how one had gained authorization to practice or denoted "professional rating, rank, [or] distinction." While it is plausible that the drafters of the Judiciary Act used "counsel" to include lay representatives, it is at least as likely that they used the term to refer to a class of licensed practitioners distinct from "attorneys."

In any event, it is clear that "counsel" in the Sixth Amendment meant something different from what it meant in the Judiciary Act. In the Act, it may have meant lay representatives (as distinguished from licensed prac-

103. The states' departure from English legal practice after the Revolution was manifested in a variety of ways. Several states adopted constitutional provisions "expressly stipula[ting] that only those parts of the common law which had been developed in America after the year 1775 or 1776, or after the adoption of the respective state constitutions, should be in force, unless otherwise indicated." 2 Chroust, supra note 12, at 62-63 (citing constitutional provisions of Delaware, Maryland, Massachusetts, New Hampshire, New York, New Jersey, and Rhode Island). Some states adopted loyalty oaths directed at denying attorneys loyal to Great Britain the right to practice law. See, e.g., id. at 245 (citing November 20, 1781, New York statute).

104. In Southern Colonies, "counsel" or "barrister" was used to refer to lawyers who had been educated at the Inns of Court, while "attorney" was used to refer to those whose right to practice depended on their admission to the court rolls. 1 Chroust, supra note 12, at xvii n.10. For example, a 1732 Virginia law governing the discipline of "attorneys" provided that the law "shall not be construed to extend . . . to any counsellor or barrister at law, whatsoever." Id. at 274 (quoting 4 Hening, supra note 16, at 362). Similarly, under a 1769 South Carolina law one could practice before the courts only if one had been "admitted a barrister at law" by membership in one of the Inns of Court or if one were "an attorney" who had been admitted by the South Carolina court. Id. at 302 (quoting 4 Statutes at Large of South Carolina, 1752-1786, at 306 (Cooper ed., 1838) [hereinafter Statutes at Large of South Carolina]).

105. 2 Chroust, supra note 12, at xvii; see id. at 200 (from 1755 to 1839, New Jersey recognized "the ancient order of serjeant-at-law").

A 1767 New Jersey licensing statute provided that an "attorney" who had practiced for three years could obtain a license as "attorney and councillor at law" by passing "such an Examination in open Court touching his Abilities & Knowledge in the Law as the Court shall think proper." Id. at 201 (quoting Rules of the Supreme Court of the State of New Jersey, app. 57 (1889)).

106. Although Judge Friendly took the view in Solina, 709 F.2d at 167, that the reference in a 1790 federal statute to "counsel learned in the law" indicates that "counsel" in the Sixth Amendment meant attorney, see supra note 68, one could take the contrary view. It might be argued that "counsel" as used in the Sixth Amendment is not synonymous with "counsel learned in the law" as used in the 1790 statute providing for representation in capital cases. Rather, the phrase "learned in the law" is a term of limitation intended to distinguish attorneys (who were "counsel learned in the law") from lay representatives (who otherwise were included among those who might serve as "counsel"). Just as there were two classes of judges—lay judges and judges with legal training who were "learned in the law"—it might be argued that there were two classes of "counsel," lay representatives and learned counsel, only the latter of whom were permitted to serve in capital cases. The problem with this argument, however, is that if "counsel" in 1790 had been understood to include lay representatives, it is unlikely that Congress would have enacted a provision that, insofar as it precluded lay representation in capital cases, was clearly unconstitutional.
tioners), or one class of licensed practitioners (as distinguished from another). It had neither meaning in the Sixth Amendment. It would have been contrary to the principal aim of the Sixth Amendment to provide a right to lay representation but not representation by a licensed practitioner, and there is no apparent reason for Congress to have provided for a right to representation by one class of licensed practitioners, but not another. That being so, the contemporaneous adoption of the Judiciary Act provides no insight whatsoever.  

b. Contemporaneous legal practices.

The argument that "counsel" must include lay representatives in light of contemporaneous legal practices is stronger than the courts have acknowledged. The Third Circuit's view in Wilhelm that the predominant colonial practice was for trained advocates to represent criminal defendants fails to take account of the considerable variation in colonial practices, both over time and from colony to colony. During the early colonial period, courtroom advocacy was far from the exclusive province of trained professionals. On the contrary, popular mistrust of lawyers led to the enactment of laws banning representation for hire entirely. Even after all the colonies permitted courtroom advocates to charge a fee, advocacy was not universally limited to trained professionals, nor could it be, given the dearth of trained advocates in some of the colonies. Thus, a common

107. In any event, it is unlikely that the congressional drafters of the Judiciary Act took account of the wording of the Right to Counsel Clause of the Sixth Amendment, and that the drafters of the Sixth Amendment took account of the wording of section 35 of the Judiciary Act. The different provisions originated in different houses of Congress—the Judiciary Act in the Senate, and the Sixth Amendment, as part of the Bill of Rights, in the House of Representatives. See Richard B. Morris, The Forging of the Union 317-21 (1987); see also Richard B. Bernstein & Kim S. Rice, Are We To Be a Nation? 259 (1987). Therefore, there is reason to believe that the representatives responsible for drafting each of these respective provisions — preoccupied as they were with creating a new government — likely failed to pay close attention to what their counterparts were doing.

108. See 1 Chroust, supra note 12, at 269, 297, 317 (citing 1645 Virginia law and 1669 South Carolina law); Lawrence M. Friedman, A History of American Law 45 (2d ed. 1985). The colonists' mistrust of lawyers has been attributed to various sources: Puritans and Quakers blamed lawyers in part for their sufferings under English law; lawyers were identified with the law officers of the crown; and many who practiced as lawyers had no training or competence, and engaged in abusive practices. 1 Chroust, supra note 12, at 27-28.

109. In some instances, this permission was less than wholehearted. For example, in 1725, hostility to attorneys in Maryland led to the first of several enactments severely limiting the amount of fees that might be charged. Five years later, in response to petitions from the bar, Lord Baltimore disallowed these provisions. 1 Chroust, supra note 12, at 255-56. At various times, other colonies adopted similar provisions. See, e.g., id. at 88 (citing 1700-01 Massachusetts law setting maximum attorneys' fees); id. at 139-40 (citing Rhode Island laws enacted in 1728 and 1766 to regulate attorneys' fees); id. at 269 (citing 1642 Virginia statute which "limited attorneys' fees to a maximum of twenty pounds of tobacco in the County Court and fifty pounds in the Quarter Court—a ridiculously small fee, indeed, in a prosperous colony"); id. at 317 (citing 1715 North Carolina statute providing for maximum fees); id. at 327 (citing laws enacted in Georgia in 1755, 1757, and 1773 to limit attorneys' fees).

110. Often, parties were represented by agents chosen either because they had time to appear in court or because they had some skill in writing or persuasion. Id. at 25 ("At first the need was not so much for a skilled advocate as for someone who could attend at the courthouse
colonial practice was to allow parties the option of appearing through lay advocates.\textsuperscript{111}

Indeed, one might argue that "counsel" must have included lay representatives for the simple reason that, in 1791, there were not enough attorneys to go around. The dearth of trained advocates, which had been a problem throughout the colonial period in some regions, was particularly serious after the Revolution, because attorneys sympathetic to Great Britain had left the colonies.\textsuperscript{112} Defining "counsel" in 1791 to mean a licensed practitioner—so that those defendants who could retain an attorney would be protected by the Sixth Amendment guarantee, while the rest could be compelled to fend for themselves—would have rendered this right essentially meaningless for defendants in many parts of the country.

The persuasive answer to this is that the framers of the Sixth Amendment did not intend to preclude courts from closing the door to lay representatives in those jurisdictions that did have enough lawyers to go around. During the colonial period as well as after the Revolution, several jurisdictions adopted laws forbidding lay representation, either for hire or altogether, in order to protect parties from incompetent and unethical practitioners.\textsuperscript{113} There is no reason to believe the framers viewed these

---

on behalf of some litigant who was unable to spare the time away from the fields or the shop.

In the early colonial period, few individuals made legal representation a full-time pursuit, and there was little or no restriction on who might serve as an advocate or hold oneself out as attorney. For example, an act adopted in Massachusetts in 1692 allowed each party in court to appear "with the assistance of such other as he shall procure, being a person not scandalous or otherwise offensive to the court." Id. at 85 (quoting 1 Acts and Resolves of the Province of Massachusetts Bay 287 (1692-1714)); see also id. at 199 ("At first there were no requirements of special qualifications for leave to practice law in the courts [of New Jersey].").

In response to the dearth of trained advocates, several colonies enacted laws prohibiting a party from retaining more than two attorneys. See id. at 89 (quoting 1785 Massachusetts law); id. at 130 (quoting 1718 New Hampshire law).

\textsuperscript{111} In some colonies, lay representation was permitted as long as the representative was not compensated. See, e.g., 1 Chroust, supra note 12, at 300 (quoting An Act for Establishing County and Precinct Courts \$ 29 (1771), 7 Statutes at Large of South Carolina, supra note 104, at 173). Moreover, in one colony, New Hampshire, lay representation was always the norm. Although New Hampshire adopted provisions for licensing attorneys, it had few trained, competent practitioners during the colonial period. Id. at 128-29.

\textsuperscript{112} See Bernstein & Rice, supra note 107, at 259 (1987) ("many of the most eminent colonial attorneys tended to oppose the Revolution, and most were forced to flee the United States at war's end; in addition, most prominent lawyers who supported the Revolution gave up private practice for service in the Confederation and state governments"). In Massachusetts, for example, courtroom representation had to be opened to nonattorneys before the Revolution because many attorneys sympathetic to the crown had returned to the mother country or ceased practicing; thus, a 1785 enactment, apparently designed to allow access to representatives other than attorneys provided that parties could plead "by the assistance of such counsel as they see fit to engage." Id. at 89 (quoting Laws and Resolves of Massachusetts ch. 23 (1785)).

\textsuperscript{113} See, e.g., id. at 197 (quoting Grants, Concessions, and Original Constitutions of the Province of New Jersey 223 (Leaming & Spicer ed., 1758)) (1698 law enacted in East New Jersey provided "that no Attorney or other Person be suffered to Practice or Plead for Fee or Hire, in any Court of Judicature, in any Suit or Cause or Process in Law whatsoever, but such as are admitted to Practice by License of the Governor of the Province for the Time being"); id. at 253 (quoting Laws of Maryland, 1715 ch. 48, §§ 12 & 13) (1715 Maryland act provided that "no Attorney, or other Person whatsoever, shall practice the Law in any of the Courts of
statutes unfavorably. The framers unquestionably meant to forbid laws compelling criminal defendants to represent themselves. That result is achieved by construing "counsel" to include only trained advocates. There is no evidence that, additionally, the framers were hostile to laws that excluded unlicensed practitioners from practicing before the courts, as would occur if "counsel" were interpreted to include lay advocates.

In this instance, the silence of the ratifying debates may be telling. Among those who participated in drafting, debating, and ratifying the Bill of Rights were many beneficiaries of state licensing provisions. Many if not most would have been sympathetic to licensing statutes designed to limit courtroom advocacy to individuals of good character who were trained in the law. Such statutes were apparently considered to be consistent with state constitutional provisions guaranteeing the right to counsel. One can assume that if the Sixth Amendment, when it was proposed, was understood to make comparable laws inapplicable in federal criminal cases, the framers would have indicated their intention more clearly either in the ratifying debates or in the Sixth Amendment itself, and there would have been opposition from those who supported laws excluding nonlawyers from representing parties to litigation.

One might argue, however, that interpreting "counsel" to exclude lay representatives puts at risk the original purpose of the right to counsel—to proscribe laws barring representation in criminal cases. If "counsel" meant "attorney," courts could use their licensing authority to do indirectly what the Sixth Amendment proscribed them from doing directly. By adopting impossibly difficult standards for licensure, or by applying existing standards discriminatorily, courts could ensure that no "counsel" would be

this Province, without being admitted thereto by the Justices of the several Courts, who are hereby empowered to admit and suspend them"; id. at 300 (quoting 4 Statutes at Large of South Carolina 306) (1721 South Carolina law provided "[t]hat no person whatsoever shall practice or solicit the cause of any other person, in the said county or precinct courts, or any other court of law and equity in this Province, unless he hath been heretofore admitted and sworn as an attorney"); see also supra notes 109-12 and accompanying text.

114. One must be cautious in placing much reliance on the silence of the documentary record relating to the drafting and ratification of the Bill of Rights as did the Third Circuit in Wilhelm, see supra text accompanying note 63, because the silence may be a function of the incompleteness of the record, rather than the absence of discussion. See generally James Hutson, The Creation of the Constitution: The Integrity of the Documentary Record, 65 Tex. L. Rev. 1 (1986).


116. Of the original thirteen states, twelve included a right to counsel in their constitution. See Powell v. Alabama, 287 U.S. 45, 64 (1932).

117. Some indication that the Sixth Amendment right to counsel was thought to be consistent with licensing statutes which had the effect of excluding lay representatives from practicing before the courts might be gleaned from the contemporaneous adoption of licensing provisions by some of the newly established federal courts, including the U.S. Supreme Court. See 2 Chroust, supra note 12, at 226-27.

118. As Professor Winick describes it, the 1735 trial of John Peter Zenger, an important aspect of the historical background to the Sixth Amendment, was a case study in the court's discriminatory use of its authority over admission to the bar. The trial judge in the Zenger case disbarred James Alexander and William Smith, the two New York lawyers initially retained by Zenger, and appointed an inexperienced and less aggressive lawyer in their stead. Alexander
available to provide representation, even for those defendants who otherwise could afford legal assistance. The answer to this is not that "counsel" includes all lay representatives, but simply that the Sixth Amendment places some constraint on the licensing process, as the Sixth Circuit apparently concluded in Whitesel when it held that "counsel" includes individuals who, although unlicensed, were qualified to defend a criminal case. The Sixth Amendment might be read to forbid the implementation of restrictive licensing standards that exclude qualified candidates, at least insofar as criminal defendants find it impossible to procure attorneys as a result.

2. The Inclusion of Unqualified Advocates

While the courts' view about whom "counsel" excludes—untrained, lay representatives—seems persuasive as a matter of the framers' original understanding, it is doubtful that the same can be said of the courts' view about whom "counsel" includes. The prevailing judicial view is that "counsel" includes duly licensed attorneys, without regard to whether they are in fact qualified to practice law in general or to defend a criminal case in particular. Thus, for the courts, the crux of being "counsel" is not necessarily being qualified, but satisfying certain licensing requirements which are thought to warrant a presumption that one is qualified. A review of the contemporaneous history of the Sixth Amendment indicates, however, that the courts have it backwards: the crux of being "counsel" is being qualified to defend a criminal accused.

In the early colonial period, many clients suffered at the hands of untrained and unethical advocates. For example, several English prisoners who had been transported to Virginia in punishment for masquerading as attorneys subsequently resumed their iniquitous calling upon arrival in that colony. Colonial licensing statutes often cited problems such as charging excessive fees, engaging in deleterious practices, and bringing frivolous

Hamilton stepped in on the eve of trial, however, and waged the successful defense. See Winick, supra note 17, at 791-96.

119. Essentially the same result could be achieved through statutes, like those adopted in some colonies, severely constricting the amount of compensation that might be received from parties who retained counsel. See supra note 109.

Today, of course, the unavailability of legal services, to the extent it is a problem, cannot be attributed to licensing requirements designed to keep down the number of attorneys. There is now a lawyer for every 320 persons in the United States. See U.S. Industrial Outlook 1991, Professional Services: Legal Services (SIC81). The distribution of lawyers varies, with the ratio of total population to lawyers ranges from 21 to 1 in Washington, D.C., to 658 to 1 in North Carolina. MacCrate Report, supra note 58, at 13-15.

120. In the late eighteenth century, although far less so today, it was conceivable that an educated individual might lack a law license but nevertheless be sufficiently "learned in the law" to practice competently in the courts. Cf. Letter of Thomas Jefferson to Robert Skipwith (Aug. 5, 1771), in Thomas Jefferson 740-45 (1984) (advising that, although "a knowledge of the minutiae of that science [of law] is not necessary for a private gentleman," an educated gentleman's library should include "Ld. Kiam's Principles of Equity, Blackstone's Commentaries, and Cunningham's Law Dictionary.

121. See supra Part I(B).

122. 1 Chroust, supra note 12, at 277.
lawsuits.\textsuperscript{123}

In response to the perceived abuses, several colonies passed laws placing restrictions on who may represent parties in judicial proceedings. These laws, designed principally for the protection of clients, provided that only those who were knowledgeable in the law and of good character would be admitted to practice before the courts. For example, under a 1732 Virginia statute,\textsuperscript{124} to be licensed by the governor and Council to practice in county courts and inferior courts, one had to present a petition “setting forth his qualification,” and be examined by persons “learned in the law” who would report on “the fitness or unfitness of such petitioner, for office of attorney.”\textsuperscript{125} In 1767, New Jersey enacted laws providing that to be admitted to practice as an attorney, one had to serve as a clerk for an attorney for at least five years, present a certificate from the supervising attorney “purporting . . . that he is properly qualified both as to Integrity and Ability in his Profession,” and pass an examination given in open court.\textsuperscript{126} Other colonies adopted comparable provisions.\textsuperscript{127}

After independence, states retained requirements that attorneys be qualified by virtue of learning and character.\textsuperscript{128} In some cases, they set

\textsuperscript{123} The preambles to colonial statutes governing the licensing of attorneys generally recounted the abuses. For example, a 1721 South Carolina licensing provision recited: “And whereas, divers unskilful persons do often undertake to manage and solicit business in the courts of law and equity, to the unspeakable damage of the clients, occasioned by the ignorance of such solicitors, who are in no ways qualified for that purpose, tending to the promoting litigiousness, and encouraging of vexatious suits . . . .” 1 Chroust, supra note 12, at 300 (quoting 7 Statutes at Large of South Carolina, supra note 104, at 173). Similarly, a 1745 Virginia statute decried “the great number of ignorant and unskilful attorneys practicing in the county courts [who have become] a grievance to the country, in respect of their neglect and mismanagement of their clients causes.” Id. at 275 (quoting 5 Hening, supra note 16, at 345).

Colonies enacted various other laws besides licensing provisions in response to these abuses, including laws governing legal fees, see, e.g., id. at 199 (describing 1750 New Jersey law); id. at 88 (quoting Massachusetts law); id. at 317 (quoting 1715 North Carolina law), and laws requiring attorneys to pay costs occasioned by their neglect. See, e.g., id. at 274, 276 (describing laws enacted in Virginia in 1732 and 1745).

\textsuperscript{124} This was one in a series of statutes enacted in Virginia beginning in 1680 requiring that practicing attorneys had to be licensed. Id. at 271-79.

\textsuperscript{125} Id. at 273 (quoting 4 Hening, supra note 16, at 360-61). Similarly, a 1745 statute provided that to obtain a license to practice in the General Court, an applicant was required to be examined by “council, learned in the law” as to one’s “capacity, ability and fitness” to practice and to submit a certificate from a county court or inferior court “of his probity, honesty, and good demeanor.” Id. at 275 (quoting 5 Hening, supra note 16, at 345).

\textsuperscript{126} Id. at 201 (quoting Rules of the Supreme Court of the State of New Jersey, app. 57 (1889)).

\textsuperscript{127} A 1785 Massachusetts statute provided: “No person shall be admitted as Attorney of any Court in this Commonwealth, unless he is a person of good moral character, . . . and hath had opportunity to qualify himself for the office, and hath made such proficiency as will render him useful therein.” Id. at 89 (quoting Laws and Resolves of Massachusetts ch. 23 (1785)). South Carolina’s 1712 law regarding the admission of attorneys provided that only those found to “be good and virtuous, and of good fame” might be added to the rolls. Id. at 299 (quoting 2 Statutes at Large of South Carolina, supra note 104, at 401 ff., 447); see also id. at 290 (New York adopted a statute in 1767 on which the New Jersey statute was based).

\textsuperscript{128} For example, a 1785 South Carolina law provided for the admission of applicants who had “acquired a sufficient knowledge of the laws of this State to qualify him to practice the law in this State,” upon satisfying the judges of the court of common pleas of “his capacity, ability
specific educational requirements for applicants or prescribed a minimal length of clerkship in order to ensure the competence of the trial bar.\textsuperscript{129} Indeed, during the period leading up to the ratification of the Bill of Rights, the regulation of the legal profession in America reached a height from which it descended steadily over the next eight decades.\textsuperscript{130}

The qualifications set by courts throughout the colonial and and post-revolutionary period were designed specifically to ensure an attorney's competence to serve as trial advocate.\textsuperscript{131} Indeed, all that the license denoted was a right to represent parties at judicial proceedings. Literate nonlawyers were fully entitled to draft contracts and wills and perform other services out of court that today are performed principally or exclusively by lawyers. Moreover, unlike today, virtually all attorneys were courtroom advocates.\textsuperscript{132} In sum, licensed practitioners in the year 1791 were individ-

\textasteriskcentered{and fitness} "after being examined, and "producing] satisfactory testimonials of his probity, honesty and good demeanor." Id. at 267-68 (quoting 4 Statutes at Large of South Carolina, supra note 104, at 668-69). Similarly, a 1786 Virginia statute provided that an applicant who had not previously been licensed would be admitted to practice "as a counsel, attorney at law, or proctor . . . if, after examination, it be [the judges'] opinion, that he is duly qualified." Id. at 261 (quoting 12 Hening, supra note 16, at 339). The adoption of these provisions coincided with continued expressions of concern about abuses by members of the bar. See, e.g., Bernstein & Rice, supra note 107, at 71-72 (quoting Benjamin Austin, Observations on the Pernicious Practice of the Law by Honestus (Boston, 1819)).

\textsuperscript{129} 2 Chroust, supra note 12, at 35-38.

\textsuperscript{130} See Harlan F. Stone, The Lawyer and His Neighbors, 4 Cornell L.Q. 175, 177-79 (1919). During the Revolutionary period, however, there was already a cross-current against professional regulation. Because the Revolution had reduced the number of trained attorneys, states were compelled to allow nonlawyers to plead in the courts, see supra note 98, and judges had to demand less in the way of training for new applicants. See 2 Chroust, supra note 12, at 35-86; see also supra note 100.

As the new nation expanded westward, a variety of factors, not least of which being aversion to lawyers, led to what Pound called the "deprofessionalization" of the legal profession. 2 Chroust, supra note 12, at 47 (quoting Roscoe Pound, The Lawyer From Antiquity to Modern Times 232 (1953)). Professor Chroust recounts that "[i]n many states the aversion to lawyers went so far that almost anyone but a trained lawyer was regarded as fit to sit on the bench." See id. at 59. Particularly in the new states, standards for admission and discipline were not taken seriously by the courts, which themselves came to be dominated by nonlawyers. Id. at 38-39, 48-49. Professional regulation reached its nadir shortly before the Civil War, by which point several states had adopted statutes or constitutional provisions allowing anyone of good moral character to practice law. See id. at 158-59 (citing New Hampshire Revised Statutes, 1842, ch. 177, sec. 2; Maine, Acts and Resolves of 1843 ch. 12; Wisconsin Laws of 1849 ch. 152; Ind. Const. of 1851, art. 7, sec. 21 (1851)).

\textsuperscript{131} See, e.g., 2 Chroust, supra note 12, at 234-35 (under 1721 Delaware licensing provision, "[t]he attorneys' business was defined as follows: 'Attorneys actions may be entered, and writs, process, declarations and other pleadings; and records in all such actions and suits as they shall respectively be concerned to prosecute or defend from time to time, may be drawn, and with their names and proper hands signed').

\textsuperscript{132} The career of John Adams illustrates the point. As a lawyer, Adams was best known for his constitutional theory and advocacy. See, e.g., The Briefs of the American Revolution 119-43 (John P. Reid ed., 1981); Gordon S. Wood, The Creation of the American Republic, 1776-1787, at 567-69, 580-87 (1969); Martin S. Flaherty, Note, The Empire Strikes Back: Amesley v. Sherlock and the Triumph of Imperial Parliamentary Supremacy, 87 Colum. L. Rev. 593, 593 n.1 (1987). Yet Adams also served as a trial lawyer in many cases, including criminal cases. He participated in representing Captain Thomas Preston in his defense to murder charges arising out of the Boston Massacre. See Merrill Jensen, The Founding of a
ors who had been found qualified to try cases by virtue of knowledge of the law and legal practice as it existed at that time; who had been found to possess good moral character; and who, upon demonstrating legal knowledge and good character, had received permission from a court to practice before it.

If one concludes that "counsel" in the Sixth Amendment referred to licensed practitioners, as thus described, the question for an originalist becomes: which characteristics of 1791 attorneys were meant to be preserved by the term "counsel" when applied over time? While the term is not open-textured like many of the terms in the Bill of Rights, such as the Fifth Amendment right to "due process of law" or the Sixth Amendment right to a "speedy" trial, its meaning is still susceptible to change over time, as changes occur in the nature of law practice in general, or criminal advocacy in particular, or in the manner in which attorneys are licensed and disciplined.133

The historical background suggests that the critical, distinguishing feature was not the receipt of authorization to appear before the court. The colonial licensing statutes were, after all, a reaction against the profligate dispensation of licenses. Nor was the distinguishing feature that an individual had undertaken a particular process for obtaining the license. The process for admission to the courts varied considerably from colony to colony. Applicants prepared for law in a variety of ways.134 Generally, courts did not prescribe any one route.135 Likewise, the process for ascertaining an applicant's fitness and character varied.136 Rather, the

---

133. The framers obviously would not have intended to preserve all characteristics of 1791 attorneys. Over time, some characteristics would obviously become impossible to satisfy. Thus, they would not have required that, to be "counsel" in 1992, an individual must have been admitted to practice at the time the Sixth Amendment was ratified, although that is what "counsel" may have meant at the time. Other characteristics would also become irrelevant. Thus, the framers would not have required that, to be "counsel," one must be trained in the law as it existed circa 1791. And still other characteristics of "counsel" would not have been considered important enough to preserve in the face of changes that would invariably take place in legal and judicial practices, as well as in society, over time. Thus, the framers would not have expected that, to be "counsel," one must train for the law as one trained in 1791 or demonstrate one's fitness and character through precisely the same means that one demonstrated them at the time.

134. Some engaged in self-study; others served as an assistant to the clerk of a court or as clerk in a law office; others became a member of one of the four Inns of Court in England; and others attended college in the colonies. See 1 Chroust, supra note 12, at 30-39.

135. In Virginia, for example, members of one of the Inns of Court were automatically admitted to practice before the courts, while others were admitted only after independently demonstrating their fitness to practice. Id. at 275-78. Similarly, in Maryland, a 1707 law provided that to be admitted, an applicant either had to be a member of one of Inns of Court or had to an pass an examination as to his professional qualifications, honesty, and good behavior. Id. at 259.

136. In early eighteenth-century North Carolina, attorneys were licensed on the basis of "a perfunctory examination." Id. at 317. In contrast, in Massachusetts, demanding educational standards adopted by the Suffolk bar, although not officially adopted by the courts, were used as the basis for the bar's recommendations, which influenced the courts in deciding who was
distinguishing characteristic of licensed practitioners in 1791 was that they were qualified, by virtue of their legal knowledge and good character, to practice competently before the courts. This is not to say that those other characteristics were unimportant. One might very well conclude that the framers expected an individual to be qualified, to demonstrate qualifications to the courts' satisfaction, and to receive a license, in order to be "counsel." But the most important of those characteristics, as a matter of original intent, was that "counsel" be qualified.

The contemporary notion that a court may deem licensed practitioners to be "counsel" in the face of demonstrated evidence that they are unqualified would have been foreign to the framers. The colonial statutes presupposed that attorneys would remain licensed only so long as they remained qualified to practice law. In general, the courts retained responsibility to determine whether attorneys had engaged in conduct that reflected adversely on their fitness or character. Colonial laws authorized courts to suspend attorneys from practice or to remove them from the rolls for engaging in wrongful conduct either in their representation of clients or outside their role as attorneys.137

Moreover, in 1791, the courts before which attorneys tried cases were the same courts that licensed and disbarred attorneys. Courts did not delegate the functions of licensing and disciplining attorneys, as occurs today. Therefore, the framers would not have contemplated cases, such as

qualified. Id. at 90-91, 105-06.

137. Once admitted to practice, attorneys were required to act ethically and in their clients' interest. For example, the Virginia oath of office required attorneys to act "according to [their] learning and discretion" and proscribed various specific conduct. Id. at 273-74 (quoting 4 Hening, supra note 16, at 361). New Hampshire and Massachusetts prescribed the same oath, which was adopted from the attorney's oath that had been administered in England. Id. at 85, 373. Other colonies prescribed similar oaths. See, e.g., id. at 222 (attorneys in Pennsylvania swore an oath pledging honesty, fidelity, and competence).

As these oaths reflected, attorneys committed various misconduct "upon pain of being disabled to practice as an attorney for ever." Id. at 273-74 (quoting 4 Hening, supra note 16, at 361). The courts' authority to remove attorneys from the rolls was also established by statute. For example, both a 1721 Delaware law and a 1722 Pennsylvania law provided that if attorneys "misbehave themselves" in their practice before the courts, "they shall suffer such penalties and suspensions as attorneys at law in Great Britain are liable to in such cases". Id. at 222, 235. A 1745 Virginia law governing attorneys licensed to appear before the General Court established that if an attorney "shall misdemean himself, and shall act contrary to his duty in his practice," the judges shall suspend him from his practice for a time or he shall be "disabled for ever, from practicing as an attorney." Id. at 276 (quoting 5 Hening, supra note 16, at 367). A similar law enacted in Virginia in 1732 provided for the suspension or disbarment of attorneys who appeared before the county courts and inferior courts. Id. at 274 (quoting 4 Hening, supra note 16, at 361).

Similar provisions were adopted after the Revolution. For example, a 1799 New Jersey law provided that any attorney found "guilty of malpractice ... shall be put out of the roll, and never after be permitted to act or practice ... unless he shall obtain a new license." 2 Chroust, supra note 12, at 252 (quoting Laws of the State of New-Jersey 413-27 (1821)).

Only on rare occasions did courts exercise their authority to suspend and disbar attorneys for acting incompetently or unethically. See, e.g., 1 Chroust, supra note 12, at 157-58 (quoting 3 Hamlin & Baker, Supreme Court 156 (1959) (Paroculus Parmyer disbarred by New York Supreme Court in 1704 for "unmannerly behaviour and Expressions" and "undue and dishonest practices as an Attorney and Councill at Law"); see also supra note 118 (two New York lawyers disbarred in 1785 in connection with their representation of John Peter Zenger).
Bellamy and Mouzin, in which trial courts allowed an individual to serve as an attorney while disciplinary proceedings were pending before a disciplinary body in the same jurisdiction or after another court in the jurisdiction has found the attorney unfit. In 1791, a court that found an attorney to be unqualified would have been expected to suspend or disbar that attorney. Thus, whatever else the framers expected "counsel" to be, they expected someone who was qualified to serve as an advocate in a criminal proceeding.

B. A Functional Interpretation of "Counsel"

For more than a half-century, the Supreme Court has interpreted the Right to Counsel Clause to provide procedural protections which serve the purposes of the constitutional guarantee while going well beyond what the drafters ever contemplated. Consequently, even more important than the question of the framers' understanding is the question of which definition of "counsel" most fully accords with the purposes of the Right to Counsel Clause as understood today. Viewed in that light, the prevailing judicial approaches are far preferable to the interpretation, urged by some, that "counsel" includes lay representatives. Of the various approaches taken by courts, the best is probably Judge Easterbrook's definition in Reese. However, none of the judicial constructions serves the purposes of the constitutional guarantee as well as the view that "counsel" means a qualified advocate.

1. The Exclusion of Lay Representatives

An argument for interpreting "counsel" to include lay representatives might be premised on the interest in individual autonomy underlying the Sixth Amendment right to counsel. Unquestionably, a narrow construc-

138. Contemporary decisions depart in a variety of respects from the original understanding that the right to counsel guaranteed nothing more than a right to retain counsel of one's choosing, thus forbidding federal courts from outlawing professional advocacy, as some colonies had done. As noted above, the right to counsel now guarantees appointed counsel to indigent defendants in state and federal court as well as a right to competent counsel. See supra notes 21-31 and accompanying text. Moreover, the Right to Counsel Clause has been read as a limitation on police interrogation practices. See Massiah v. United States, 377 U.S. 210 (1964). Thus, it is hard to justify defining "counsel" strictly in terms of the framers' original understanding, even assuming for argument's sake that their original understanding could be discerned.

Moreover, even if the framers' original understanding would otherwise be important, one must focus on the contemporary function served by counsel because of the inconclusiveness of the historical background to the Sixth Amendment. See Apodaca v. Oregon, 406 U.S. 404, 410 (1972) (plurality opinion of White, J.) (because of the inconclusiveness of the history relating to the meaning of "jury" under the Sixth Amendment, "[o]ur inquiry must focus on the function served by the jury in contemporary society.").

139. See Block, supra note 49, at 470:

The interests in dignity and autonomy that support the defendant's right to appear pro se also support the right of a defendant to the assistance of lay counsel. A defendant may feel just as strongly about having a third party represent him as he does about representing himself. Similarly, the denial of lay representation may make the defendant feel just as oppressed by the legal system as does the denial of self
tion of the term undermines the defendant’s interest in making decisions relevant to a defense. If “counsel” does not refer to lay advocates, then defendants who would prefer to be defended by nonlawyers are denied respect for their preferences. Were autonomy the only interest protected by the right to counsel, one would have difficulty justifying this construction.

The Supreme Court has recognized, however, that the right to counsel also serves other, paramount functions that would be seriously undermined by defining untrained advocates as “counsel.” In particular, the right to counsel is intended to protect against the conviction of innocent defendants and “to give substance to other constitutional and procedural protections afforded criminal defendants.”140 To fill the role contemplated by the Supreme Court’s decisions, “counsel” must possess both the skill and training necessary to wage a competent criminal defense and the attributes of character necessary to ensure full employment of talents to advocate zealously and loyally on the defendant’s behalf. But if “counsel” included any lay representative, defendants would then be free to retain untrained individuals, and courts could satisfy the mandate of Gideon v. Wainwright by appointing untrained individuals as “counsel” to represent indigent defendants. In determining whether “counsel” should include untrained advocates, one must therefore decide which interests protected by the right to counsel are more important: the interests in reliability and procedural fairness or the interest in personal autonomy. If one accepts the Supreme Court’s view that the primary interests protected by the Right to Counsel Clause are the former,141 one must conclude that untrained advocates do not qualify as “counsel.”

It is less clear, however, that to serve the primary purposes of the Right to Counsel Clause one must reject the approach taken in Whitesel. There, the Sixth Circuit found that an individual may qualify as “counsel” not only by meeting the standards set by licensing authorities for admission to the bar but also by demonstrating, in some other way, possession of the legal knowledge and skill (and, presumably, the character) expected of attorneys. When it comes to protecting the interests of the accused, it should not matter whether an advocate has navigated the bar admissions process; what should matter is that, through some means, the advocate has demonstrated representation. In both situations, licensed counsel is unwanted and possibly not trusted.

140. Scott v. Illinois, 440 U.S. 367, 377 (1979) (Brènnan, J., dissenting); see Gideon v. Wainwright, 372 U.S. 335, 344 (1963); see also supra notes 29-31 and accompanying text.

141. See, e.g. Wheat v. United States, 486 U.S. 153, 159 (1988) (“while the right to select and be represented by one’s preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers”). One might argue, of course, that even if the interest in personal autonomy or dignity is second in importance to other interests protected by the right to counsel, it deserves greater weight than the Supreme Court has accorded it. See, e.g., Alfredo Garcia, The Right to Counsel Under Siege: Requiem for an Endangered Right?, 29 Am. Crim. L. Rev. 35, 92-98 (1991) (arguing that contemporary Supreme Court decisions unduly abridge the “dignitary values” underlying the right); Green, supra note 37, at 1233-38.
the necessary qualifications to provide a competent defense.142

The prevailing view is perhaps best explained, not by reference to either the history or the purposes of the right to counsel, but by reference to the judiciary's institutional interests. Interpreting "counsel" to include individuals who are "learned in the law" but who have not satisfied predesignated requirements for admission to the bar would create a variety of problems for courts. First, it would require judges to devise and employ a mechanism for testing the qualifications of nonlawyers on a case-by-case basis—a pursuit that would be difficult, time-consuming, and expensive. Moreover, the invocation of such an ad hoc process for deciding who is "counsel" would encourage judges to act arbitrarily if not vindictively in many cases, or, in the very least, expose judges to an accusation that they had done so. For example, in a case in which the defendant seeks lay representation, a judge with broad discretion to determine whether the would-be advocate is qualified would be tempted to conclude that the lay advocate is not.143 Conversely, in a case such as Solina, in which the defense lawyer is exposed after trial as an impostor, a court would be tempted to determine that the nonlawyer was nonetheless qualified to serve as "counsel." In that way, the court would preserve judicial resources that would otherwise be expended on a retrial, avoid the possible unfairness to the prosecution of proving a case after evidence had been lost or memories dimmed, spare witnesses from recounting events they may prefer to put behind them, and prevent the possible public perception that a guilty person was freed on a "technicality."

Perhaps most importantly, allowing legally trained nonlawyers to serve as defense advocates would undermine the judicial interest in maintaining ethical standards.144 Unlike lawyers, those who are not licensed to practice law have no obligation to comply with the standards of professional ethics. While a court might hold nonlawyers to those standards as a condition of allowing them to defend criminal cases, nonlawyers would have far less incentive than lawyers to act ethically. While lawyers face disbarment and thus the loss of their professional livelihood for serious ethical lapses, lay representatives do not.

In light of these institutional interests, courts have reasonably concluded that the term "counsel" excludes those individuals who are either unlicensed to practice law or have failed to satisfy licensing standards relating to character and fitness. While a trial judge might have discretion to permit a defendant to obtain the assistance of a lay representative at

142. See Block, supra note 49, at 476 (arguing that a criminal defendant should have the right to control "his own defense by using a qualified lay counsel of his choice") (emphasis added).

143. Cf. Green, supra note 37, at 1250 (most judges will exercise discretion to disqualify lawyers with potential conflicts of interest because they consider "the institutional interests in rendering just verdicts and in preserving public confidence in the integrity of the legal system [to be] more important than" the defendant's interest in choice of counsel).

144. This is one of the institutional interests identified by the Supreme Court in Wheat v. United States, 486 U.S. at 160, as a justification for disqualifying lawyers who appear to have a conflict of interest. See Green, supra note 37, at 1212-22 (arguing that Wheat was premised on a misunderstanding of the ethical rules).
trial, a defendant should not be able to assert a qualified right to appear at trial with a lay representative, however well versed in the law that person may be. Similarly, as the Second Circuit recognized in Solina, an accused who, without knowledge and consent, is defended at trial by an individual who does not qualify for admission to the bar should subsequently receive a new trial even if the nonlawyer received extensive legal training and seems to have provided as good a defense as a licensed practitioner would have provided.

2. The Inclusion of Unqualified Practitioners

The Sixth Amendment is now understood to promote the reliability of the verdict and to protect an accused's other procedural rights by guaranteeing the accused an advocate capable of dealing with the legal complexities of a criminal proceeding and testing the prosecution's proof. These purposes are served if "counsel" is defined as advocates who, by virtue of

145. United States v. Stockheimer, 385 F. Supp. 979, 983-85 (W.D. Wis. 1974) (finding that chosen representatives were not sufficiently qualified to constitute "counsel," but exercising discretion to permit them to assist the defendant), aff'd, 534 F.2d 391 (7th Cir.), cert. denied, 429 U.S. 966 (1976). Other courts have held, however, that state statutes proscribing the practice of law by nonlawyers preclude trial courts from permitting representation by lay people in criminal cases. See, e.g., Skuse v. State, 714 P.2d 368 (Alaska Ct. App. 1986); State v. Peterson, 266 N.W.2d 103 (S.D. 1978); Seattle v. Shaver, 597 P.2d 935 (Wash. 1979).

146. See, e.g., United States v. Taylor, 569 F.2d 448 (7th Cir. 1978) (since a disbarred attorney is not "counsel," there is no Sixth Amendment right to retain a disbarred attorney in a criminal case).

147. Solina, 709 F.2d at 168-69; accord People v. Johnson, 822 P.2d 1317 (Cal. 1992); People v. Felder, 391 N.E.2d 1274, 1277 (N.Y. 1979) ("We perceive no difference between an absolute deprivation of counsel and 'representation' by an unlicensed lay person—in both instances defendant is denied the right that the Sixth Amendment was designed to guarantee, the right to representation by an attorney."). In fact, in Solina, both the district court and the court of appeals found that Solina had received reasonably competent representation and that, given the overwhelming evidence of his guilt, there was no reason to believe that a licensed practitioner could have secured a better result. 709 F.2d at 161-64, 169. Nevertheless, the court concluded that Johnson v. Zerbst, 304 U.S. 458 (1938), and other Supreme Court decisions required automatic reversal of a conviction procured in the absence of counsel or a waiver of the right to counsel. Similarly, in Felder the court concluded that the defendant's conviction must be reversed automatically, notwithstanding a lower court's determination that the nonlawyer's representation did not prejudice the defendant. Felder, 391 N.E.2d at 1277.

The courts' requirement that a conviction be reversed automatically when the defendant is represented by someone other than "counsel" distinguishes this violation of the right to counsel from other violations. For example, a violation of the right to effective assistance of counsel is not established unless the defendant was prejudiced by counsel's poor performance. See Strickland, 466 U.S. at 694. Similarly, proof of a violation of the right to conflict-free representation ordinarily requires a showing that defense counsel's performance was adversely affected by his conflict of interest. Cuyler v. Sullivan, 446 U.S. 355, 348 (1980). Indeed, in Solina the court noted the defendant's right to conflict-free representation may have been violated by the nonlawyer's representation, since the impostor's fear of being unmasked may have interfered with his ability to give zealous advocacy, but that this problem might not automatically require reversal of a conviction. See Solina, 709 F.2d at 164-65.

These cases also stand in contrast to those in which it was the prosecutor, rather than the defendant's representative, who turns out to have been unlicensed. In such cases, a new trial will not be ordered in the absence of a showing that the defendant suffered some prejudice because the prosecutor was not admitted to practice law. See, e.g., Linares v. Senkowski, 964 F.2d 1295 (2d Cir. 1992); People v. Carter, 566 N.E.2d 119 (N.Y. 1990).
training and character, are qualified to defend a criminal case. They are not necessarily served, however, if “counsel” is defined to include individuals who possess a law license or once satisfied licensing requirements, without regard to whether they are qualified to practice law in general or to defend criminal cases in particular.

Defining "counsel" to mean a “qualified” defense advocate comports with the fundamental premise of the decisions recognizing a right to counsel—that partisan advocacy is needed on both sides of the case to ensure that the truth emerges at trial. Thus, “when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor,” the reliability of the trial verdict depends on the presence of an advocate for the accused who will navigate those legal intricacies and test the prosecutor's proof. Defense counsel's capacity to fill the role contemplated by the constitutional guarantee presupposes that counsel possesses the “skill and knowledge [that] is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled.” Thus, an accused must be represented by someone who has some knowledge of criminal law and procedure and some skill as a trial advocate. Moreover, to fulfill the role contemplated by the Sixth Amendment right, defense counsel must be committed to the values and ethical precepts of the legal profession. In particular, an advocate must accept ethical responsibilities to act competently and loyally on the client’s behalf. It is not enough that a lawyer possesses the skill and knowledge necessary to defend the accused skillfully: the responsibility to do so must be taken seriously.

On the other hand, if “counsel” includes all those individuals who satisfy particular aspects of the licensing process, then there is no assurance that “counsel” will satisfy the role ascribed by the Sixth Amendment. Whether duly licensed attorneys, who come within the judicial definitions of “counsel,” possess the requisite knowledge, skill, and character to ensure partisan advocacy in criminal cases will depend entirely on the vagaries of the licensing process in a given jurisdiction at a given time. Consider the

148. Cronic, 466 U.S. at 655; Strickland, 466 U.S. at 685.
150. Strickland, 466 U.S. at 685 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275 (1942)).
151. The importance of this commitment is underscored by several of the Court's right-to-counsel decisions which rely on presumptions regarding the quality of defense counsel's representation at trial. For example, the Court has held that, in determining whether trial counsel provided effective assistance, a court must presume that the attorney exercised reasonable professional judgment. Strickland, 466 U.S. at 690. This presumption is warranted as a factual matter only if “counsel” is taken to mean an attorney not only who, by virtue of his training and experience in the law, is capable of exercising reasonable judgment about the conduct of a criminal defense, but also who is committed to doing so. Similarly, in the context of conflict-of-interest cases, the Court has instructed trial judges to assume that defense counsel will uphold his ethical obligations. See, e.g., Cuyler v. Sullivan, 446 U.S. 343, 346-47 (1980); see also Holloway v. Arkansas, 435 U.S. 475, 485-86 (1978). See generally Green, supra note 37, at 1223-30 (discussing Court's view of the defense attorney's role in maintaining ethical standards). This assumption is valid only if the definition of “counsel” excludes those attorneys who lack familiarity with, and fealty to, prevailing ethical standards.
following possible methods of licensing attorneys, some of which, if unthinkable today, were easily imaginable at other points in our history.

States A, B, and C abolish all fitness and character requirements, trusting to the marketplace to ensure that licensed attorneys are fit to provide the legal services that they are retained to provide. State A allocates law licenses to anyone who will pay a predesignated fee.\textsuperscript{152} State B allocates licenses by auctioning them off to the highest bidders. State C distributes a predesignated number of licenses and permits lawyers to transfer them.\textsuperscript{153}

State D preserves character and fitness requirements, but adopts a cursory process for ascertaining a candidate's qualifications like those that existed in the western states and territories prior to the Civil War, so that anyone who knows "some law" will be admitted to practice.\textsuperscript{154}

State E, responding to Supreme Court decisions expanding access to counsel, permits anyone with a college degree to become a licensed attorney with authorization to provide a criminal defense. However, to protect clients other than criminal defendants, State E requires a law degree and other qualifications for a "specialized license" to provide all other legal services.

State F redefines the practice of law to include a wide range of professional services, including accounting, real estate brokerage and psychological counseling, and adopts arduous training and testing requirements that are designed, not to ensure the competence of lawyers to provide the designated services, but to discourage most individuals from seeking a law license, thereby preserving lawyers' monopoly of practice and enhancing the value of the license. State F assumes that, once licensed, lawyers will specialize in particular areas of practice and, over time, acquire the necessary skills and knowledge.

Under the prevailing judicial approaches, an individual who became an attorney under any of these licensing schemes would be "counsel." Yet the advocate would not necessarily be capable of protecting a defendant's rights and testing the prosecution's evidence, as contemplated by the Sixth Amendment.

It follows, then, that "counsel" cannot include duly licensed attorneys at all times and in all places without regard to the standards under which they qualified for a license. Such a construction would be vastly overinclusive. If law licenses were dispensed indiscriminately, or by standards unrelated to fitness to defend a criminal accused, then there would be no

\textsuperscript{152} Several state legislatures in the 1840s and 50s abolished educational and training requirements for admission to the bar. See supra note 130.

\textsuperscript{153} Along these lines, Professor Chroust recounts the story of Simon Suggs, an early nineteenth-century Arkansas lawyer, who practiced under a license that he won from a young lawyer at a card game. 2 Chroust, supra note 12, at 105 (citing Baldwin, Flush Times in Alabama and Mississippi (1854)).

\textsuperscript{154} See 2 Chroust, supra note 12, at 106; Robert B. Stevens, Law School: Legal Education in America from the 1850's to the 1880's 25 (1983).
reason to expect licensed attorneys to be capable of fulfilling the functions prescribed by the Sixth Amendment. If the licensing process in a given jurisdiction were designed, however, to ensure that those who are authorized to represent criminal defendants are generally capable of doing so competently, then one could fairly construe "counsel" to include attorneys duly licensed in that jurisdiction. One simply cannot say that duly licensed practitioners are "counsel" without scrutinizing the process by which they were licensed.

III. WHY MOST ATTORNEYS ARE UNQUALIFIED TO REPRESENT CRIMINAL DEFENDANTS

A. Interpreting "Counsel" in Light of Contemporary Licensing Processes: The Factual Premises

One might accept the view that, to be included as "counsel," an individual must be qualified to represent a criminal accused competently, but argue nonetheless that attorneys who are duly licensed under the existing licensing schemes are "counsel" under the Sixth Amendment. This argument might be based on either or both of the following factual claims about the contemporary processes: first, that these processes are in fact designed to assure that licensed practitioners are qualified to defend criminal cases competently; and, second, that these processes succeed in that aim. If these factual premises are correct, then it might be argued duly licensed attorneys should qualify as "counsel" categorically even if, in any given case, the attorney's conduct after admission to the bar suggests incompetence in representing criminal defendants.

One might argue, first, that appropriate deference to judicial authority requires regarding duly licensed attorneys as "counsel" in jurisdictions in which courts employ their licensing processes at least in part to ensure that attorneys are qualified to defend criminal cases. Deference to the determinations made by courts is warranted for several reasons. To begin with, the Constitution presupposes that the courts will determine the necessary attributes for competent criminal defense attorneys and will determine who possesses them. Courts have traditionally controlled the admission and disbarment of lawyers because the experience and objectivity of judges place them in the best position to resolve these questions, and because their obligation to oversee the administration of criminal justice gives them the greatest incentive to do so. The issue of whether an individual qualifies as "counsel" for purposes of the Sixth Amendment is ultimately a question of constitutional interpretation which, like most such questions, is entrusted

155. See, e.g., Ex partis Secombe, 60 U.S. (19 How.) 9 (1856) ("It has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed."); Thomas M. Alpert, The Inherent Power of the Courts to Regulate the Practice of the Law: An Historical Analysis, 32 Buff. L. Rev. 525 (1983).

156. See, e.g., People ex rel. Karlin v. Culkin, 162 N.E. 487, 493 (N.Y. 1928) (Cardozo, C.J.) ("If the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work.").
to the courts to resolve. Moreover, a considerable degree of judgment and discretion are required both to identify the attributes of a competent defense lawyer and to test whether an individual qualifies. Courts must first identify those attributes of knowledge, skill, and character that an attorney must generally possess in order to be capable of waging an adequate criminal defense; they must then develop a process for ascertaining whether an attorney possesses those attributes. Both determinations are subjective; neither can be made with any degree of precision. Therefore, a judicial determination that a particular individual is qualified to serve as a criminal defense counsel is entitled to an extraordinary measure of deference.

In addition, one might argue that, as a matter of sensible line-drawing, all duly licensed practitioners are "counsel," because the contemporary licensing processes successfully assure that most practitioners are capable of defending criminal cases. While some practitioners who obtain a license are not qualified, and some who later cease to be qualified are not weeded out by the disciplinary process, the overwhelming majority of presently licensed attorneys are qualified to serve as defense attorneys. The only alternative to including all duly qualified attorneys as "counsel" would be to require an ad hoc judicial inquiry into the qualifications of defense counsel before every criminal trial. Such an inquiry would be extremely burdensome, but possibly no more successful, than the existing processes as a device for distinguishing between qualified and unqualified practitioners. Moreover, as noted earlier, it would provide an undesirable opportunity for discriminatory judicial practices.\(^{157}\)

If the factual premises of these arguments are correct—if courts have successfully devised procedures for assuring that the vast majority of attorneys are qualified to defend criminal cases—then duly licensed attorneys should, indeed, qualify as "counsel." Constitutional provisions, particularly in the criminal context, commonly are interpreted in light of generalizations that hold true in most, but not all, cases.\(^{158}\) Such a mode of interpretation would be appropriate in defining "counsel" as well. In other words, in determining who is "counsel," it is reasonable to defer to a standardized judicial process that is reasonably calculated to identify those individuals who are qualified to represent criminal defendants.

The question, however, is whether the contemporary licensing processes actually meet the constitutional standard by assuring that the vast majority of practitioners are qualified to play the role in a criminal case contemplated by the Sixth Amendment right.\(^{159}\) As discussed in the next

---

157. See supra note 118 and accompanying text.

158. See, e.g., Coleman v. Thompson, 111 S. Ct. 2546, 2558 (1991) (presumption is justified when case-specific inquiries are inappropriate and "a per se rule will achieve the correct result in almost all cases"); Miranda v. Arizona, 384 U.S. 436 (1966) (statements made to the police in response to custodial interrogation and without a waiver of rights are presumed to be coerced because the police-dominated atmosphere is inherently coercive and the secrecy of custodial interrogation prevents accurate case-by-case determinations of whether individual prisoners were in fact coerced).

159. See Coleman, 111 S. Ct. at 2358 ("Per se rules should not be applied, however, in situations where the generalization is incorrect as an empirical matter; the justification for a
subparts, they do not. A license to practice law is not intended by licensing authorities to denote that an individual possesses the knowledge and skill adequately to represent a criminal accused. And, in fact, most attorneys who receive a license are not immediately qualified.

B. Qualifications for Representing a Criminal Accused

The Supreme Court decisions interpreting the Sixth Amendment right to counsel presuppose that a criminal defense attorney is capable of serving competently on behalf of the accused during the course of the criminal process. Throughout the process, defense counsel functions variously as advocate, as advisor, and as negotiator:

In his role as advocate, a defense counsel preserves the accused's interests in procedural fairness during the trial and an advantageous outcome. In his advisory capacity, a defendant's lawyer ensures that his client has access to information relevant to the pretrial and trial decisions that the accused must make himself. Finally, when he acts as negotiator, counsel gives the accused the advantage of the procedural means for mitigating the harshness of an otherwise deserved deprivation.

Often, defense counsel serves more than one role at once. For example, prior to trial, defense counsel may seek information from various sources, including the defendant, witnesses, and the prosecution, in connection with all three functions. The information learned from the investigation is necessary: to enable counsel to evaluate the prospects for acquittal so that the defendant can make an informed decision whether to plead guilty; so that the defense attorney can negotiate effectively with the prosecutor in the event the defendant decides to pursue a negotiated plea of guilty; and to enable the attorney to advocate on the defendant's behalf in the event the defendant decides to stand trial.

conclusive presumption disappears when application of the presumption will not reach the correct result most of the time."

160. The stages of the criminal process during which a criminal accused has the right to counsel extend from the formal commencement of criminal proceedings until the conclusion of an appeal as of right. See Coleman, 111 S. Ct. at 2566 (no right to counsel in postconviction proceedings after first appeal); Kirby v. Illinois, 406 U.S. 682, 688 (1972) (right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated"); Douglas v. California, 372 U.S. 353 (1963) (right to counsel under the Equal Protection Clause for indigents on appeal as of right). Although a criminal defense lawyer may perform a variety of functions prior to the filing of criminal charges, see, e.g., Kenneth Mann, Defending White Collar Crime (1985) (principal aim of white collar defense attorney retained prior to or during a criminal investigation is to forestall the filing of criminal charges), at that stage of a criminal process the accused has no constitutional right either to the appointment of counsel or to competent counsel. See, e.g., Claudio v. Scully, 791 F. Supp. 985 (E.D.N.Y. 1992) (no relief where lawyer incompetently advised defendant to confess to murder, because defendant had not yet been charged, and therefore the right to counsel did not apply); Commonwealth v. Moreau, 572 N.E.2d 1382 (Mass. 1991).

161. Green, supra note 10, at 1076; see also id. at 1079-91 (addressing claims of ineffective assistance of counsel in the context of defense counsel's functions as an advocate, counselor, and negotiator).
There is substantial agreement within the organized bar and the judiciary that an attorney representing a criminal accused must possess particular attributes to perform these functions competently. It would take a multi-volume treatise to describe fully the skills and knowledge a criminal defense attorney must possess and their importance. In general terms, however, the professional literature reflects a consensus that, at the very least, a criminal defense attorney must possess certain lawyering skills which are employed in virtually all areas of practice, that the attorney must possess trial skills and be familiar with trial procedure generally, and that the attorney must be versed particularly in criminal law and procedure. In addition, the attorney may need detailed knowledge of individual areas of criminal law or procedure to be qualified to represent criminal defendants in certain especially complex criminal cases.

The legal profession has identified skills with which lawyers must be familiar before being qualified to assume ultimate responsibility for representing a client in any type of matter. The most comprehensive, contemporary elaboration of those skills is contained in the July, 1992 report of the American Bar Association (ABA) Task Force on Law Schools and the Profession, whose members included prominent judges, academics, and leaders of the organized bar.162 The centerpiece of the report is a Statement of Fundamental Lawyering Skills and Professional Values which, drawing upon the prior professional literature and surveys of lawyers, describes in detail ten lawyering skills that virtually any lawyer needs in order to be equipped to practice capably.163 "Fundamental" lawyering skills included problem solving,164 legal analysis and reasoning,165 legal research,166 factual investigation,167 communication,168 counseling,169 and negotiation.170

162. MacCrate Report, supra note 58. The author of this Article served as a consultant to the Task Force.

163. Id. at 135-221. The Statement of Fundamental Lawyering Skills and Professional Values has also been published as a free-standing document.


165. MacCrate Report, supra note 58, at 151-57; accord American Bar Ass'n Section of Legal Education and Admissions to the Bar, Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools 11 (1979); Amsterdam, supra note 164, at 613.


All are employed as a matter of course in defending a criminal accused.

As a trial lawyer, defense counsel must also possess trial skills and be versed in trial procedure. While a rudimentary knowledge of litigation procedure may be necessary for most lawyers,171 for criminal defense attorneys and others who serve as trial lawyers familiarity with litigation procedures obviously must be both detailed and practical. For example, a litigator must know how to prepare a case for trial. This requires facility in obtaining information from clients, witnesses, and adversaries, and in selecting and making appropriate pretrial motions.172 Likewise, a litigator must know how to try a case effectively. This calls for an ability to develop trial strategy, prepare and examine witnesses, make appropriate evidentiary objections, handle evidence, and make effective opening and closing arguments.173

Moreover, to litigate on behalf of criminal defendants in particular, one must be familiar with criminal law and procedure. To be sure, an attorney need not be conversant in all the intricate details of these constantly developing areas of law because opportunities are provided during the criminal process, especially prior to the commencement of a trial, to conduct research into those particular aspects that are relevant to the case. However, a considerable grounding in criminal law and procedure is necessary, both because the opportunity for pretrial study and preparation is too limited for an attorney to engage in extended self-education,174 and because many immediate decisions must be made throughout the criminal process which presuppose a knowledge of criminal law or procedure.175 Besides a general grounding, detailed knowledge of discrete

281; Schwartz, supra note 166, at 324-25.

168. MacCrater Report, supra note 58, at 172-76; accord Zemans & Rosenblum, supra note 167, at 125-26; Baird, supra note 166, at 273-74; Mudd & La Trielle, supra note 166, at 18-19.


172. Id. at 192-94.

173. Id. at 194.

174. Courts have considerable discretion in scheduling criminal cases and need not afford defense counsel much time to prepare a case for trial. Courts have found it reasonable to permit as little as three or four days for trial preparation. See, e.g., Avery v. Alabama, 308 U.S. 444 (1940) (three days to prepare defense in capital case); United States v. Cicale, 691 F.2d 95, 106-07 (2d Cir. 1982), cert. denied, 460 U.S. 1082 (1983). In federal criminal cases, the trial may not begin less than thirty days after the defendant first appeared in court with counsel. 18 U.S.C. § 3161(b)(2) (1988). Thus, defense counsel in federal cases will ordinarily have at least thirty days in which to prepare for trial.

175. For example, decisions about how to question a witness, either in the course of investigation or in the course of criminal proceedings, must be made almost spontaneously with an eye toward possible procedural motions and substantive defenses. Similarly, at trial, objections to the admission of testimony or evidence, to the prosecutor's statements to the jury, or to the trial judge's jury instructions, must be made immediately. Even advice to a defendant about whether or not to plead guilty often must be provided within a limited span of
areas of criminal law and procedure are needed to represent an accused competently in certain complex cases—death penalty cases being the most prominent example.176

C. The Inadequacy of the Licensing Process

The organized bar recognizes that the licensing process is not meant to ensure, and does not in fact ensure, that an attorney possesses the attributes needed to provide a competent criminal defense. The inadequacy of a license as a measure of qualification becomes clear upon review of that process. No part of the licensing process—law school training, a bar examination, and character review—is directed at ensuring that candidates for admission to the bar possess fundamental lawyering skills, a working knowledge of the trial process, or practical familiarity with criminal law and procedure. On the contrary, those who oversee the different aspects of the process assume that few if any licensed practitioners will possess these attributes.

First, the legal training required for admission to the bar—typically, a three-year program of law school education177—is not designed to produce candidates for the bar who are qualified to represent clients generally, much less those particular clients whose lives or liberty are jeopardized by a criminal prosecution. Accreditation standards do not require law schools to ensure that students are qualified to practice law; they simply require law schools to “qualify [students] ... for admission to the bar,” that is, to pass the bar examination,178 which principally measures candidates' knowledge of substantive legal principles and facility in legal analysis. Accordingly, the central undertaking of law schools in this country has traditionally been to

---

176. See Amadeo v. State, 384 S.E.2d 181, 182 (Ga. 1989) (“it has become apparent that special skills are necessary to assure adequate representation of defendants in death penalty cases”); Irving v. Smith, 441 So. 2d 846, 856 (Miss. 1983) (“death penalty litigation has become highly specialized ... [F]ew attorneys have ‘even a surface familiarity with seemingly innumerable refinements’ ” on Supreme Court's decisions in this area); State v. Savage, 577 A.2d 455 (N.J. 1990) (Handler, J., dissenting) (“a myriad of complexities, substantive and procedural, ... characterize all death-penalty trials”); Steven B. Bright, Minority Report, in ABA Background Report, supra note 11, at app. 19-20 (discussing standards of qualification that should be set for the defense of capital cases), reprinted in 40 Am. U. L. Rev. 209, 217-18 (1990); Goodpaster, supra note 9, at 303; Fong, supra note 9, at 490; see also Thurgood Marshall, Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit, 86 Colum. L. Rev. 1, 1 (1986) (“Death penalty litigation has become a specialized field of practice”).

177. Although some jurisdictions require some additional training prior to or shortly after admission to the bar, the transitional courses, usually referred to as “bridge-the-gap” courses, are generally cursory and focus on substantive legal knowledge—rather than on developing lawyering skills. MacCrate Report, supra note 58, at 295.

178. MacCrate Report, supra note 58, at 261 (citing American Bar Ass'n Section of Legal Education and Admissions to the Bar, Standards for Approval of Law Schools and Interpretations, Standard 301(a) (1991) [hereinafter ABA Standards]).

Thus, law schools do not necessarily accept the responsibility that one might ordinarily associate with their traditional role as gatekeepers to the profession. Neither standards for admission nor standards for graduation are intended to exclude those who are unlikely to become qualified lawyers.
impair substantive law and instruction in legal analysis.\textsuperscript{179}

Law school students may graduate although deficient in much of the skill and knowledge that the professional literature deems essential to provide a competent criminal defense. Until two decades ago, legal research was the only lawyering skill other than legal analysis in which students received instruction.\textsuperscript{180} Even today, substantive law and legal analysis and research are the principal focus of a legal education for virtually all law students, and the exclusive focus for many. While law schools offer course instruction in other lawyering skills through clinical programs or simulations, such instruction is generally offered on an elective basis and rarely made available to all students.\textsuperscript{181} Consequently, most law students receive little or no training in such fundamental skills as problem solving, factual investigation, interviewing, negotiation, and client counseling.\textsuperscript{182} Similarly, many students do not elect courses in either trial advocacy or criminal procedure,\textsuperscript{183} and elective courses in these areas rarely aim to develop students' skill or knowledge to the level expected of competent defense attorneys.

Later stages in the licensing process also fail to ensure the fitness of those who practice law. Like law schools, bar examiners do not demand that candidates for admission to the bar possess the skills and knowledge necessary to serve clients competently. Although some attention is occasionally paid to the notion that licensing authorities should use the examination to ensure that candidates for admission to the bar are qualified to render legal assistance,\textsuperscript{184} bar examinations are in fact devoted principally to testing candidates' substantive knowledge and, to a lesser extent, their skills in legal analysis and writing.\textsuperscript{185} At present, the bar examinations of only three states include any questions at all designed to test other lawyering skills.\textsuperscript{186} Thus, the bar examination does not demand any type of

\textsuperscript{179} See, e.g., Cort & Sammons, supra note 164, at 415 ("If legal educators agree on anything, it is that legal analysis is taught in law schools").

\textsuperscript{180} MacCrate Report, supra note 58, at 236-37.

\textsuperscript{181} Id. at 240. Accreditation standards do not require law schools to offer instruction in professional skills to all students. Id. at 265 (citing ABA Standards, supra note 178, Standard 302(a)(iii)).


\textsuperscript{183} A course in substantive criminal law is required for all, or virtually all, law students in their first year of law school. The course is typically used largely for the purpose of introducing new students to legal analysis. Few would argue that the course aims to provide the knowledge of criminal law needed to represent criminal defendants competently.

\textsuperscript{184} See, e.g., White, Lawyer Competency and the Law School Curriculum: An Opportunity for Cooperation, 53 The Bar Examiner 4, 7-8 (Feb. 1984) (quoting Statement of the Council of the ABA Section of Legal Education and Admissions to the Bar and the Board of Managers of the National Conference of Bar Examiners (July 1971)) ("public authority ... by examination should determine that the content of the applicant's education is such that, upon admission he [or she] will be able to adequately serve the public.").

\textsuperscript{185} MacCrate Report, supra note 58, at 277-80 (discussing traditional bar examinations).

\textsuperscript{186} See id. at 280-82 (discussing "performances tests" included as part of the bar examination in Alaska, California, and Colorado).
training beyond what is traditionally provided by law schools.

In light of the limited demands of the licensing process, the organized bar assumes that newly admitted attorneys will be unprepared to represent clients without supervision. The bar has traditionally assumed, however, that new attorneys will develop lawyering skills and necessary legal knowledge in legal practice settings. Ideally, they will receive training and supervision in practice and will not assume ultimate responsibility for a client's cause until, through that means, they have become qualified to do so. But nothing requires them to wait. Newly admitted attorneys in the United States may immediately assume responsibility for representing clients. Moreover, the new lawyer may provide representation in virtually any matter, including the defense of a criminal case, since special authorization is required for few specialized areas of legal practice. Although most new lawyers do not immediately enter small or sole practices in which they represent clients without supervision, some do, much to the increasing concern of the organized bar.

While most practicing lawyers undoubtedly do acquire greater legal knowledge and proficiency following admission to the bar (albeit, sometimes at the expense of their initial clients), it does not follow that they eventually develop the skills and knowledge needed to represent a criminal accused. Over the past half-century, the practice of law has become increasingly complex. Today, most lawyers specialize in one or more areas of practice. Criminal law is one among a variety of specialties identified by practitioners which also include real estate practice, civil litigation, corporate law, probate law, negligence law, family law, trusts and estates, and tax law. In urban and metropolitan suburban areas, most defense counsel in serious criminal cases are either attorneys in private practice specializing in criminal defense representation or full-time public defenders. Prosecution of criminal cases is, likewise, an area of specialty. Attorneys who specialize in the practice of criminal law may

187. Id. at 285 ("[I]t is unrealistic to expect even the most committed law schools . . . to produce graduates who are fully prepared to represent clients without supervision. Licensing authorities must be concerned with the problem of how to regulate entry into the profession of those partially-prepared lawyers."); Committee on Legal Education and Admission to the Bar, Ass'n of the Bar of the City of New York, Discussion Draft Report on Admission to the Bar in New York in the Twenty First Century—A Blueprint for Reform, 47 The Record of the Association of the Bar of the City of New York 464, 499-502 (Jan. 2, 1992) [hereinafter Blueprint for Reform].

188. See, e.g., Report and Recommendations of the Commission on Lawyering Skills of the State Bar of California (Oct. 11, 1991); Blueprint for Reform, supra note 187.

189. MacCrate Report, supra note 58, at 40-46.

190. Id. at 41. Criminal law is one of thirty-five areas of specialization listed in the 1990-91 Manhattan telephone directory, id. at 43 n.44, and one of twenty-four specialty areas identified by the American Bar Association. See American Bar Ass'n Standing Comm. on Specialization, Model Standards for Specialty Areas (1990).

191. MacCrate Report, supra note 58, at 41.

192. See id. at 55-56 (approximately 1500 offices operated by public defender programs and legal services programs provide defense representation).

193. In 1991, there were more than 20,000 district attorneys and assistant district attorneys practicing in the United States. Id. at 96-97.
take advantage of opportunities to develop the skills and acquire the knowledge identified as essential to be a competent criminal defense lawyer, but the overwhelming majority of licensed attorneys will not. Most lawyers never engage in courtroom advocacy after admission to the bar.\textsuperscript{194} Of those who do, many do not engage in criminal advocacy. No lawyer can be competent in all or even many areas of practice, and attorneys expend considerable effort simply to keep abreast of developments in the few areas of the law in which they concentrate.\textsuperscript{195} Because most newly licensed attorneys go on to practice outside the area of criminal law, most never will acquire the attributes of a qualified criminal defense advocate.

The prevailing standards of professional conduct reflect the realities that the mere possession of a license does not mean an attorney is qualified to practice in all areas of law, and, in particular, that a license does not mean that an attorney is qualified to represent criminal defendants. The ethical standards drafted by the American Bar Association and subsequently adopted in most states as the basis of professional discipline recognize that, as the practice of law has become increasingly specialized and complex, it takes considerable work simply to become and remain proficient in even a narrow area of law practice.\textsuperscript{196} Lawyers are therefore enjoined from accepting work that they are unqualified to perform.\textsuperscript{197} Moreover, the American Bar Association, in enacting standards for the defense of criminal cases, has stressed in particular that licensed practitioners are not necessarily qualified to represent an accused.\textsuperscript{198} It has therefore recommended that

\textsuperscript{194} Id. at 116.

\textsuperscript{195} Id. at 42.


\textsuperscript{197} Disciplinary Rule 6-101(A)(1) of the ABA Code of Professional Responsibility provides that a lawyer should not handle a matter "which he knows or should know that he is not competent to handle, without associating himself with a lawyer who is competent to handle it." Ethical Consideration 6-3 of the ABA Code of Professional Responsibility elaborates on this rule, as follows: "While the licensing of an attorney is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified." Model Rule 1.1, a counterpart provision of the ABA Model Rules of Professional Conduct, enjoins attorneys to provide "competent representation," which requires, among other things, "the legal knowledge [and] skill . . . reasonably necessary for the representation."

Other professional standards reflecting the recognition that lawyers are not qualified to practice in all areas of the law include Disciplinary Rule 2-108(b) and Model Rule 5.6(b), which make it unethical for a lawyer to agree to restrict his right to practice as part of a settlement agreement. These rules are designed to ensure clients free access to competent legal representation. See, e.g., Shebay v. Davis, 717 S.W.2d 678 (Tex. Ct. App. 1986); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1039 (1968); Mich. Op. CI-1165 (1986); Co-opting the Competition, 78 A.B.A. J. 101 (Aug. 1992) ("Buying off the most experienced plaintiff's lawyers clearly deprives the public of top-flight representation.").

\textsuperscript{198} See American Bar Ass'n, Standards for Criminal Justice § 5-2.2 commentary at 27-29 (1986) (footnotes omitted):

"[T]he standard rejects the notion that every member of the bar admitted to practice in a jurisdiction should be required to provide representation. The practice of criminal law has become highly specialized in recent years, and only lawyers
when courts appoint attorneys to represent indigent defendants, they choose only from among lawyers in the jurisdiction who are "experienced and active in trial practice, and familiar with the practice and procedure of the criminal courts." 199

The licensing process provides no guarantees, however, that criminal representation will be undertaken only by qualified attorneys. The attorney disciplinary process is not adequately designed to eliminate attorneys who are demonstrably unqualified to perform the legal work they undertake. Discipline traditionally has been directed at only those attorneys who engage in the most egregious conduct, such as the commission of a crime or the theft of a client's funds. 200 At one time, because of the self-protectiveness of the bar, and today because many disciplinary offices are underfunded and the relevant disciplinary rules are vague, disciplinary authorities generally decline to proceed against attorneys who perform incompetently except where they are guilty of the grossest neglect. 201 Over the years, some judges and bar leaders have identified the particular need to take disciplinary action against trial lawyers who practice ineptly, but disciplinary authorities have not taken up the charge. 202 The judiciary bears particular responsibility for their failure to do so, not only because the courts oversee the disciplinary process, but also because trial judges rarely institute disciplinary proceedings against the attorneys they see in court.

experienced in trial practice, with an interest in and knowledge of criminal law and procedure, can properly be expected to serve as assigned counsel. While it is imperative that assigned counsel possess advocacy skills so that prompt and wise reactions to the exigencies of a trial may be expected, this alone is not deemed sufficient. There must also be familiarity with the practice and procedure of the criminal courts and knowledge in the art of criminal defense.

See also id. § 4-1.5 commentary at 19-21 (1986):

[L]awyers and judges are unanimous in acknowledging that not every lawyer licensed to practice is actually able to try a case in court effectively. Though only a fraction of all criminal cases go to trial, the judgment and experience of a trial lawyer are also essential in the process of negotiation leading to a disposition without trial. But the nature of a trial lawyer's experience in civil trial practice is such as to qualify the lawyer for participation in criminal practice if additional training and experience in criminal law and procedure is acquired.


who appear to be incompetent as trial advocates.203

Judges have recognized that the licensing process does not ensure that attorneys are fit to perform the tasks they undertake.204 Indeed, judges frequently have complained that even among the minority of licensed practitioners who serve as trial lawyers, many lack the requisite skill, knowledge, or character to do so competently. For example, Chief Justice Burger's observations, made exactly two decades ago, continue to resonate:

Our failure to inquire into advocates' qualifications—as is done, for example, in separating surgeons from doctors generally—reveals itself in the mounting concern of those who see the consequences of inadequate courtroom performance and look for its causes.

First, and perhaps overriding other causes, is our historic insistence that we treat every person admitted to the bar as qualified to give effective assistance on every kind of legal problem that arises in life, including the trial of criminal cases in which liberty is at stake . . . . It requires only a moment's reflection to see that this assumption is no more justified than one that postulates that every holder of an M.D. degree is competent to perform surgery on the infinite range of ailments that afflict the human animal.

There is no parallel in any area of life's problems having serious consequence to our naive assumption that every graduate of a law school is, by virtue of that fact, qualified for the ultimate confrontation in a courtroom.205 Other leading jurists have similarly decried the poor quality of trial advocates.206

A 1975 survey of 1422 judges indicated that these concerns were widely shared. Most of the judges who responded to the survey reported that twenty percent or more of the attorneys who had appeared before


204. See, e.g., Chief Judges Report, supra note 201, at 14-15 (the law school and bar admissions processes assure that a lawyer has basic knowledge of broad areas of the law, skill in legal problem identification and legal reasoning, and basic intellectual capacity, but do not assure, inter alia, specific knowledge in a field of practice or sufficient skills in interviewing, counseling, drafting, or advocacy).


them in the previous year were incompetent.\textsuperscript{207} On average, the judges believed that almost one-eighth of the litigants who appeared before them were prejudiced by their attorney's incompetence.\textsuperscript{208} Judges cited inadequacy of experience or training as a principal reason for the incompetence of trial lawyers.\textsuperscript{209} Some lawyers considered to be incompetent were found lacking in fundamental lawyering skills, such as the analytic ability to frame issues and objectives properly. Others were deemed deficient in litigation skills in particular; for example, they lacked adequate knowledge of the rules of evidence and procedure, were unfit to conduct a cross-examination or argue before a jury, or were unable to handle evidence and present expert testimony. Others lacked sufficient familiarity with the substantive law at issue in the case on trial.\textsuperscript{210} It follows, of course, that if significant numbers of trial lawyers are unqualified to litigate the cases they take on, the majority of lawyers, who never try cases, are even more unqualified to conduct trials.

More recently, a special committee of the Judicial Conference of the United States appointed by Chief Justice Rehnquist to review the Criminal Justice Act issued an interim report which found that, because of the complexity of federal criminal law, even "an experienced state court criminal defense practitioner" who appears occasionally in a federal court cannot "be expected to perform competently."\textsuperscript{211} The committee criticized the practice prevalent in some federal districts of requiring every member of the bar to accept appointments to represent indigent criminal defendants, "regardless of whether the lawyer has experience in criminal cases," and recommended that appointed counsel "possess at least basic, minimum qualifications," including "minimum levels of experience in criminal defense, as well as specific experience or training in criminal practice in federal court."\textsuperscript{212}

On the bench, judges have nevertheless indulged the assumption—dismissed by Chief Justice Burger as unjustified and naive—that any lawyer can try a criminal case competently.\textsuperscript{213} Pressed by the exigencies of providing representation to indigent criminal defendants, courts often assign criminal cases to members of the private bar who lack the requisite

\begin{itemize}
\item \textsuperscript{207} Maddi, supra note 202, at 116.
\item \textsuperscript{208} Id. at 144.
\item \textsuperscript{209} Id. at 124. This was the second most frequently cited explanation, the first being lack of preparation. Id.
\item \textsuperscript{210} Id. at 125-28.
\item \textsuperscript{212} Id. at 2343-44. The committee further noted that, "because of the wide range of complexity in federal criminal cases, a 'tiering' of the Criminal Justice Act panel is advisable to qualify attorneys for appointment for different levels or types of cases, depending upon their experience and training." Id. at 2344.
\item \textsuperscript{213} \textit{See, e.g.,} United States v. Lewis, 786 F.2d 1278, 1281 (5th Cir. 1986) (court rejected challenge to effectiveness of attorney who had practiced law for only one year, had never tried a criminal case, and was unfamiliar with local court rules and rules of evidence, noting; "[a]n attorney can render effective assistance even if he has no prior experience in criminal advocacy").
\end{itemize}
training and experience in trying criminal cases. By way of example, in Stern v. County Court, a county court judge in a rural Colorado county was forced to appoint a private attorney to represent an indigent defendant on felony assault charges when it turned out that the state public defender's office had a conflict of interest that precluded its participation in the case. The judge selected a local lawyer who had not represented a criminal defendant in eleven years and had not kept up with criminal law during that period. When the lawyer sought to withdraw from the representation because he was confessedly unqualified to defend the accused, the trial court denied the motion and the appellate court agreed with its decision, finding that the lawyer had not met his "burden of showing he is incompetent"—a burden premised on the assumption, known by judges to be unrealistic, that licensed practitioners are almost invariably qualified to defend criminal cases.

The bottom line is that attorneys are far less qualified to be "counsel" today than they were two hundred or more years ago, notwithstanding the self-congratulatory claims of the organized bar that today's attorneys are far better prepared for the practice of law than were attorneys at earlier stages in this country's history. While it is true that far more training is required of attorneys today, and examinations for the bar are far more rigorous than they once were, educational demands have not kept pace with the increasing complexity of law practice. Although licensing standards were not rigorous in the colonial and post-revolutionary periods, the level of skill required of practitioners was roughly commensurate with the complexity of law practice: in the colonies in the seventeenth century, and in the western frontier in the early eighteenth century, licensing standards were low, but the law was not well developed and courtroom procedures

214. See, e.g., Indigent System is Voided, Nat'l L.J., Feb. 24, 1992, at 3 (New Orleans judge struck down system for compensating appointed lawyers in criminal cases, and, finding that public defenders were overworked, ordered the appointment of private attorneys to represent defendants in lesser felony and misdemeanor cases).


216. Although a court might ordinarily be skeptical of a lawyer's profession of incompetence in such a context, seeing it as a pretext to avoid taking an assignment for little or no compensation, Stern's past willingness to represent civil litigants on assignment from the court strongly suggested that, in this case, the protestation was sincere. See id. at 1079 n.3.

217. Id. at 1079. The court gave no clue about what more, beyond Stern's eleven-year hiatus from criminal defense representation, was needed to meet this burden.

For additional cases rejecting an attorney's claimed inability to represent criminal defendants, see De LISIO v. Alaska Superior Court, 740 P.2d 437 (Alaska 1987) and Wood v. Superior Court, 690 P.2d 1225 (Alaska 1984), both of which are discussed in Stern, 773 P.2d at 1079-80.

218. Because judges in early colonial courts were not lawyers, "[t]he law itself was extremely flexible and amateurish" and judicial proceedings were informal. Therefore, knowledge of the law was unnecessary; it would in any event have been virtually impossible to come by, since law books and published decisions were not yet available. 1 Chroust, supra note 12, at 25-26.

219. See 2 Chroust, supra note 12, at 107-08 (discussing the practice of frontier lawyers).

220. In some respects, early bar admission practices, although superficially less rigorous, may have been more demanding than contemporary practices. Applicants for the bar in 1791 were members of a small society, and judges and others who considered their applications for admission to the bar would have had easy access to information about their abilities and character. Moreover, unlike today, the judges who determined admission to the bar had an
were informal, therefore little was needed by way of training and experience to provide competent representation. Moreover, lawyers almost by definition were courtroom advocates; in examining candidates for the bar to determine their fitness to be attorneys, the precise question for the court was whether they were qualified to serve as trial lawyers.\textsuperscript{221} Therefore, licensing requirements were specifically tailored to the lawyer's role as trial lawyer. For these reasons, it might have been reasonable to assume at one time that a duly licensed attorney was qualified to provide any manner of legal service, including the defense of a criminal accused. Today, that is demonstrably untrue.

IV. \textbf{Why the Fiction is Lethal: The Impact of Unqualified Attorneys in Capital Cases}

Defining "counsel" to include all duly licensed lawyers has dire consequences in death penalty cases for three reasons. First, capital defendants in many jurisdictions have limited access to qualified attorneys. Second, an inadequate defense rendered by an unqualified attorney is particularly likely to influence the outcome of a death penalty case. Finally, many condemned defendants have no appellate remedy in cases in which the imposition of the death sentence was attributable to the poor quality of the defense.

A. \textbf{The Unavailability of Qualified Lawyers}

Most capital defendants are indigent and therefore rely on assigned counsel to represent them.\textsuperscript{222} In some jurisdictions, courts assign attorneys who have expertise in capital representation. For example, Virginia,\textsuperscript{223} Ohio,\textsuperscript{224} and Oklahoma\textsuperscript{225} have established programs for assigning quali-
fied lawyers to capital defendants. In contrast, Alabama, Georgia, Mississippi, Louisiana, and Texas, five of the southern states in which the death penalty is imposed most frequently, have no statewide system for providing representation to indigent defendants generally, much less to indigent defendants facing the death penalty. In most of the counties in those states, indigent defendants are assigned attorneys from the private bar. The assigned attorney may be completely unfamiliar with criminal, much less capital, representation.

dence for Courts of Common Pleas, Appendix of Ohio Death Penalty Indigent Defense Regulations, Reg. II (Baldwin 1991). Specialized training seminars must include at least six hours of instruction in investigation, preparation and presentation of the trial or appeal. Id. at Reg. IA (Baldwin 1991).

225. Okla. Stat. tit. 22, § 1355.10 (1991) establishes a Capital Litigation Division to act as lead counsel unless it contracts with county defender programs; the trial court may also appoint local attorneys from a list of attorneys who volunteer and meet qualifications of the Oklahoma Indigent Defense System Board. An Oklahoma House Bill advocates that defenders be licensed to practice within the state, have criminal defense experience, and be licensed for at least four years before appointment. 1991 Okla.ALS 1612 § 1355.11(F); 1991 Okla. HB 1612.

226. Georgia has been reviewing its provisions which allow counties to determine the indigent defense delivery system, as provided in Ga. Code Ann. § 17-12-4 (1991) (counties determine mechanism of indigent defense system, after which court rules can require assignment on "equitable basis through a systematic, coordinated defender plan" or arrange for a nonprofit legal aid agency to provide defense). A Senate Bill would establish a multicounty public defender for capital cases, who "must have been licensed to practice law" in Georgia for at least five years and "must be competent to counsel and defend a person charged with a capital felony." 1992 Ga. ALS 1143 § 17-12-95, 1992 Ga. Laws 1143, 1992 Ga. Act 1143, 1992 Ga. SB 545.

227. Bright, supra note 9 at 689 n.51.

228. Id. (citing Bureau of Justice Statistics, U.S. Dep't of Justice, Criminal Defense for the Poor, 1986 at 3 (1988)).

229. Some states impose no limits whatsoever on whom may be assigned. See, e.g., Fla. Stat. Ann. § 925.039 (West Supp. 1991) (court appoints public defender; if conflict of interest, court appoints one or two members of bar); Tex. Code Crim. Proc. Ann. art. 26.04 (West 1992) (court appoints one or more "practicing attorneys"). Other states have provisions requiring appointed lawyers to have experience defending criminal cases, although not necessarily any familiarity with capital representation. See, e.g., Ala. Code § 15A-5-54 (1991) (counsel must have minimum five years "active" criminal law experience); La. Code Crim. Proc. Ann. art. 512 (West Supp. 1990) (counsel must have been admitted to the bar for five years); S.C. Code Ann. § 16-3-25(B) (Law. Co-op. 1990) (court appoints two attorneys, one of whom must have five years experience as a licensed attorney and at least three years in actual trial of felonies; only one attorney may be from the Public Defenders' staff). Moreover, the level of prior experience in the defense of criminal cases required by these statutes is fairly slight, as illustrated by the decision in Parker v. State, 587 So. 2d 1072, 1100-03 (Ala. Crim. App. 1991). In that case, the trial court appointed two lawyers to represent the capital defendant, and both sought unsuccessfully to be relieved because they had inadequate experience in defending criminal cases and considered themselves incompetent to defend the accused. On appeal, the court found that E. Thomas Heflin, one of the two lawyers, had satisfied that statutory requirement of "no less than five years' prior experience in the active practice of criminal law," even though he was principally engaged in civil practice. As evidence of Heflin's "active practice of criminal law," the court pointed to evidence that he had tried a murder case several years prior to his appointment, and that in the seven prior years, he had also "handled" three other felony cases and around a dozen misdemeanor cases, none of which, as far as the trial courts' findings reflected, went to trial.
In the states where assigned lawyers do not necessarily specialize in the defense of criminal cases, the assignment of unqualified attorneys appears, by virtually all accounts, to be a common occurrence. Although judicial decisions in capital cases only occasionally allude to the inexperience or inexpertise of trial counsel, it is often plain from a reviewing court’s description of trial counsel’s conduct that the attorney came to the case almost completely unfamiliar with trial advocacy, with criminal defense generally, or with the death penalty law and procedure in particular. Moreover, there is considerable anecdotal information about the inexperience of trial lawyers in many capital cases as well as their lack of

230. See, e.g., Andrews v. Deland, 943 F.2d 1162, 1181-82 (10th Cir. 1991) (defense lawyer, a county public defender, had been a member of the bar for less than a year and had never before handled a capital murder trial); Armstrong v. Dugger, 833 F.2d 1430, 1433 (11th Cir. 1987) (defense lawyer had been admitted to the bar for only eight weeks and had never handled a serious criminal trial); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984) (discussed at length in Vivian Berger, The Chiropractor As Brain Surgeon: Defense Lawyer in Capital Cases, 18 N.Y.U. Rev. L. & Soc. Change 245, 248-49 (1990-91)), cert. denied, 471 U.S. 1016 (1985); House v. Balkom, 725 F.2d 608, 611-13 (11th Cir.) (retained local counsel had never represented a capital defendant and had never read the state statute governing capital cases), cert. denied, 469 U.S. 870 (1984); Johnson v. Kemp, 615 F. Supp. 355, 361 (S.D. Ga. 1985), aff’d, 781 F.2d 1482 (11th Cir. 1986) (per curiam); supra notes 1-3 and accompanying text (citing cases).

For the most part, courts make no mention of the trial lawyer’s qualifications. It is easy to understand why. Trial counsel’s background would rarely be reflected in the trial record. Subsequent attorneys challenging the quality of the trial representation in postconviction proceedings do not generally develop a record of trial counsel’s inexperience. And courts issuing opinions in capital cases, insofar as they are aware of the inadequacy of trial counsel’s qualifications, often have no reason to make a point of it.

231. See ABA Background Report, supra note 11, at 53-55, reprinted in 40 Am. U. L. Rev. at 66-68; Washington v. Murray, 952 F.2d 1472, 1480 (4th Cir. 1991) (defense counsel failed to object to jury instruction because he was “conceded[ly] ignorant of” the relevant Supreme Court decision); Young v. Zant, 677 F.2d 792, 797-99 (11th Cir. 1982) (attorney did not present mitigating evidence at the sentencing stage of the capital case because he was not familiar with the death penalty statute); see also infra note 284 and accompanying text (citing cases).

232. For example, Ronald Tabak recounts the case of John Eldon Smith, whose trial attorney, a utilities lawyer, failed to challenge the composition of the jury pool. A challenge to the identical pool was raised by counsel for Smith’s wife, Machetti, who was a co-defendant in the case. Both were convicted and sentenced to death. Machetti’s claim was eventually upheld on appeal and she won a life sentence on retrial. The appeals court refused to consider Smith’s claim on appeal, because it had not been preserved at trial, and he was subsequently executed. Ronald J. Tabak, The Death of Fairness: The Arbitrary and Capricious Impression of the Death Penalty in the 1980s, 14 N.Y.U. Rev. L. & Soc. Change 797, 840-41 (1986) (citing Smith v. Kemp, 715 F.2d 1459 (11th Cir.), cert. denied, 464 U.S. 1003 (1983), and Machetti v. Linahan, 679 F.2d 256 (11th Cir. 1982), cert. denied, 459 U.S. 1127 (1983)).

Stephen Bright tells the story of a lawyer for two capital defendants who, when later asked to name any criminal law decisions from any court, could name only two cases, Miranda and Dred Scott, the latter of which is not in fact a criminal case. Bright, supra note 9, at 689; see also ABA Background Report, supra note 11, at 55-56, reprinted in 40 Am. U. L. Rev. at 68-69; Bright, supra note 9, at 680 n.4 (citing State v. Leatherwood, No. DP-70 (Miss. 1986), a capital case in which half of the cross-examinations of the prosecution witnesses were conducted by a third-year law student); Fatal Defenses; Fatal Flaws, Lawyer’s Sentence: A Client, Nat’l L.J., June 11, 1990, at 44 (defense lawyer in State v. Wille, 87-KA-1309, had previously been convicted of submitting a false statement to a government agency and had received a suspended sentence; in fulfillment of his obligation to perform community service as part of the sentence, he was assigned to represent Wille in a capital trial, although he had no
adherence to professional values. The view that lawyers for capital defendants are typically unfit has been expressed often by knowledgeable judges as well as by academics and practitioners who specialize in death-penalty litigation.

Two principal factors make it likely that lawyers appointed from the private bar will be unfit to represent capital defendants. The first is the inadequacy of provisions for compensating lawyers in death penalty cases. Since the vast majority of capital defendants are impecunious, lawyers have no financial incentive to develop expertise in death penalty litigation in order to attract paying clients. The paltry compensation provided to lawyers who are appointed to defend capital cases in many states likewise discourages members of the private bar from developing an expertise in death penalty litigation and seeking out assignments. In many states, the hourly rate for defending criminal cases is exceedingly low to begin with, and many also limit the number of hours that will be reimbursed. Since a competent defense of a capital case demands experience in trying criminal cases; Miriam Rozen, The Right to a Probate Lawyer, Am. Law., Jan.-Feb. 1993, at 79 (in Louisiana, private attorneys, some of whom lack experience in criminal defense representation, are regularly appointed to represent indigent criminal defendants in cases, including capital cases, that public defenders cannot handle because of conflicts of interest or overloaded dockets); Sherill, Death Row on Trial, N.Y. Times, Nov. 13, 1983, § 6 (Magazine), at 80, 100.

233. One study revealed that in the five southern states listed above, defense attorneys in death penalty cases were far more likely to be disciplined or disbarred than other lawyers. Nat'l L.J., June 11, 1990, at 44; see also Ronald J. Tabak & J. Mark Lane, The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty, 23 Loy. L.A. L. Rev. 59, 74 & n.92 (1989).

234. The late Judge Alvin Rubin of the U.S. Court of Appeals for the Fifth Circuit was quoted in 1990 as observing that most lawyers in capital cases were of the kind "who passes the bar but barely can pass muster." Marianne Lavelle & Marcia Coyle, Effective Assistance: Just a Nominal Right?, Nat'l L.J., June 11, 1990, at 42.

235. See, e.g., Berger, supra note 230, at 249 ("Approximately 90% of capital defendants are poor, and the poor all too frequently are represented by the incompetent or inexperienced. Amazingly, one-quarter of Kentucky's death row inmates had trial attorneys who have since been disbarred or resigned rather than face disbarment!") (emphasis in original). Bright, supra note 9, at 689 ("Many capital cases are defended by small town lawyers who do not specialize in criminal law, much less the subspecialty of capital punishment law."); Stephen B. Bright, In Defense of Life: Enforcing the Bill of Rights on Behalf of Poor, Minority and Disadvantaged Persons Facing the Death Penalty, 57 Mo. L. Rev. 849, 857-62 (1992).

236. See ABA Background Report, supra note 11, at 62, reprinted in 40 Am. U. L. Rev. at 77 ("It is practically impossible to interest recent law school graduates in this area of law, because it is almost impossible to make a living practicing capital cases.").

considerable investigation and preparation, lawyers assigned to defend such cases face the prospect of expending many hours for little pay.\textsuperscript{238} As a result, this has become work that few lawyers voluntarily undertake and that many seek to avoid.\textsuperscript{239}

maximum in capital cases); S.C. Code Ann. § 17-3-50 (Law. Co-op. 1990) (maximum $750 in capital case; public defender paid same hourly rate of $10 per hour out of court, $15 per hour for in-court time); Tenn. Code Ann. § 40-14-207 (1991) (maximum $1000 to any trial attorney except public defender); see also In re Berger, 111 S. Ct. 628 (1991) (appointed counsel in capital case in the Supreme Court may receive no more than $5000; an amount sufficient "to induce capable counsel to represent capital defendants in this Court").

Not surprisingly, commentators have harshly criticized fee-cap provisions. See Anthony Paduano \& Clive A. Stafford Smith, The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases, 43 Rutgers L. Rev. 281 (1991); Albert L. Vreeland, Note, The Breath of the Unfee'd Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation, 90 Mich. L. Rev. 626 (1991). Perhaps more surprisingly, some courts have found fee cap provisions so financially burdensome that they violate the constitutional rights of the attorneys who are required to accept assignments in criminal cases. See, e.g., DeLisio v. Alabama Superior Court, 740 P.2d 437 (Alaska 1987); Arnold v. Kemp, 813 S.W.2d 770 (Ark. 1991); Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986); State ex rel. Stephan v. Smith, 747 P.2d 816 (Kan. 1987).

To put in perspective the unreasonableness of compensation provided to assigned lawyers in capital cases, one need only compare the statutory fees that have been awarded as "reasonable" under the federal Ethics in Government Act, 28 U.S.C. § 599(f) (1988), in white collar cases that do not even involve trials. That Act provides for the payment of "reasonable attorneys' fees and litigation expenses" incurred by a federal employee who successfully defends against charges relating to his public employment or duties. Pursuant to the Act, former Attorney General Edwin Meese was reimbursed $460,509 out of a claimed $575,598 for expenses in connection with defending against an investigation by a court-appointed Independent Counsel that never resulted in criminal charges. In re Edwin Meese, III, 907 F.2d 1192 (D.C. Cir. 1990); see also In re Olson, 884 F.2d 1415 (D.C. Cir. 1989) (former Assistant Attorney General reimbursed $861,589 in attorneys' fees incurred in defending against filing of criminal charges). See generally Joel Cohen, Can a Criminal Defendant or Subject Recover the Costs of a Successful Defense?, N.Y. L.J. Jan. 14, 1992, at 1.

238. Counties commonly pay attorneys $20-$30 per hour for preparation time and $30-$50 per hour for court appearances in capital cases. Robert L. Spangenberg, U.S. Dep't of Justice, National Criminal Defense Systems Study: Final Report 19 (1986). Most fee cap provisions impose a maximum allowance of $500 to $1000 in capital cases. See supra note 237. Hence, after 50 hours, most appointed attorneys would be working for free; overhead and additional expenses result in an economic loss for appointed counsel. The enormous task of defending a capital client can cost, according to one estimate, $106,350. New York State Defenders Ass'n, Capital Losses: The Price of the Death Penalty for New York State 18 & n.48 (1982).

Stephen Bright recounts the experience of two attorneys representing a capital defendant in Mississippi who received the maximum of $1000, resulting in payment of $2.98 and $2.56 per hour respectively; upon factoring in overhead expenses, they lost more than $20 per hour defending the case. Bright, supra note 9, at 680 n.3 (citing Brief for Appellant at 11-12, State v. Wilson, Nos. 89- 301, 89-302 (Miss. 1989)).

239. Tabak, supra note 232, at 801-02 (quoting Walker, State's Law Fees Said to Create "Disaster" in Legal Help to Poor, Richmond Times-Dispatch, May 29, 1985, at 1A (Former Virginia State Bar president noted that capital defense lawyers are paid, in effect, only $1 per hour in some cases; as a result, "asking [an attorney] to take a court-appointed case, especially a capital murder case, is asking [an attorney] to take an economic bath and lawyers are beginning to say no.").

Guidelines developed by the U.S. Judicial Conference to assist federal courts in interpreting and applying provisions of the Criminal Justice Act regarding the appointment and compensation of lawyers in death penalty proceedings recognize both that licensed practitioners are not invariably qualified to defend capital cases and that adequate compensation is necessary to secure qualified counsel. See 7 Guidelines for Administration of Criminal Justice Act § 6.02(A)
In addition, lawyers are discouraged from specializing in the defense of capital cases because of the community antipathy which generally surrounds these cases. Lawyers understandably fear that they, as well as their client, will become the object of local outrage. This not only adds to the emotional toll of representing an individual whose life is at stake, but it also exacts a financial toll for a lawyer who must enjoy a positive reputation in the community to succeed in private practice. Concern for their community standing is thus another factor leading attorneys to resist assignments of capital cases.

Recognizing that the representation of capital defendants involves unusual financial and emotional burdens, courts are reluctant to impose repeatedly on the few local attorneys who specialize in defending criminal cases. The result is that no private lawyer with experience in defense representation will gain expertise in death penalty cases either of his own initiative or through recurrent assignments. Rather, lawyers assigned from the private bar will typically have no experience in capital representation, and often will be inexperienced in defending any kind of criminal case.

(1990) (counsel "shall be compensated at a rate and in an amount determined exclusively by the presiding judicial officer to be reasonably necessary to represent the [capital] defendant, without regard to CJA hourly rates or compensation maximums" that apply in noncapital cases), quoted in In re Berger, 111 S. Ct. 628 (1991).


One would not ordinarily expect the impact of community outrage to be reflected in the trial or appellate record in a capital case, but surprisingly, it often is manifest. See Bright, supra note 9, at 592-93 & n.67 (citing cases). For example, in Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991), the defense lawyer's closing argument was designed to distance the lawyer from an unpopular client:

Mr. Wallace explained that he and his co-counsel were appointed counsel; that they were local lawyers and not "bleeding heart, anti-death penalty lawyers"; that the reason they were representing Horton was because it was their "civic duty"; and they stated that they "have to deal with [the prosecutors] every day. It's important for me to stay in good with them. [I feel] there is a lot of peer pressure on me [but] nobody has tried to pressure me."

Id. at 1462-63.

241. See Vivian Berger, Born Again Death, 87 Colum. L. Rev. 1301, 1308 (1987) (reviewing Welsh S. White, The Death Penalty in the Eighties: An Examination of the Modern System of Capital Punishment (1987)) ("Capital defense probably would constitute one of the hardest, most draining roles a lawyer could assume even if the job commanded more pay—and respect, not antagonism, from the community.").


B. The Impact of Unqualified Lawyers in Capital Cases

The precise impact of unqualified lawyers in capital cases cannot be measured. Knowledgeable observers have often asserted, however, that many death-row prisoners would not have been sentenced to death if they had been represented by qualified trial lawyers.\textsuperscript{244} There are two obvious reasons why this should be so. First, unqualified trial lawyers ordinarily provide poorer representation than qualified trial lawyers. Second, the outcome of capital cases frequently turns on the quality of the defense.

The first reason—that unqualified trial lawyers ordinarily provide substandard representation—seems true almost by definition.\textsuperscript{245} To be sure, just as some qualified lawyers may occasionally perform inadequately, some unqualified lawyers may occasionally stumble onto an effective defense. For example, a decision not to call witnesses, although a product of the lawyer's inept investigation or lack of trial experience, will sometimes prove to be precisely the decision that a qualified lawyer would have made after locating and interviewing prospective witnesses and reviewing available options—but not often.\textsuperscript{246} One can ordinarily expect a strong correlation between the lawyer's qualifications and trial performance.

Unqualified lawyers are particularly likely to perform poorly in capital cases, which are procedurally more complex than other criminal trials.\textsuperscript{247} Legal standards that are uniquely applicable to capital cases have been developed with respect to different phases of the determination of guilt,

\textsuperscript{244} See, e.g., Riley v. McCotter, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring) ("accused persons who are represented by 'not legally-ineffective' lawyers may be condemned to die when the same accused, if represented by effective counsel, would receive at least the clemency of a life sentence"); ABA Background Report, supra note 11, at 51-52, reprinted in 40 Am. U. L. Rev. at 65; Bright, supra note 9, at 680; Tabak, supra note 232, at 810.

\textsuperscript{245} Cf. Report and Tentative Recommendations of the Committee to Consider Standards of Admission to Practice in the Federal Courts to the Judicial Conference of the United States, 79 F.R.D. 187, 196-98 (1978) ("survey data shows that lawyers without previous trial experience are much more likely to turn in inadequate performances").

\textsuperscript{246} In capital cases, for example, it is not uncommon for unqualified lawyers to fail to present evidence in mitigation of the defendant's sentence. See, e.g., Marshall, supra note 176, at 2 ("The federal reports are filled with stories of counsel who presented no evidence in mitigation of their client's sentences because they did not know what to offer or how to offer it, or had not read the state's sentencing statute.") (emphasis in original). Commentators recognize that this omission is rarely sound as a matter of strategy. See, e.g., Dennis N. Balske, New Strategies for the Defense of Capital Cases, 13 Akron L. Rev. 351, 361 (1979); Goodpaster, supra note 9, at 10 ("Reviewing courts should assume that a reasonably competent attorney could develop and present a meaningful mitigating case for any capital defendant."); Roy B. Herron, Defending Life in Tennessee Death Penalty Cases, 51 Tenn. L. Rev. 681 (1984). In rare cases, however, presenting no evidence may be sound strategy. See Darden v. Wainwright, 477 U.S. 168 (1986) (introduction of mitigating evidence would have opened the door to the state's introduction of damaging rebuttal evidence). Unqualified attorneys who happen to be assigned to represent capital defendants in such cases may therefore provide competent representation at the sentencing proceeding in spite of themselves.

\textsuperscript{247} See supra note 176 and accompanying text; Vreeland, supra note 237, at 645-50 (discussing the requisites of an effective capital defense); see e.g., Armstrong v. Dugger, 833 F.2d 1430, 1435 (11th Cir. 1987) (trial lawyer testified in evidentiary hearing that his negligible preparation for the penalty phase of the trial was attributable to his "inexperience coupled with the fact that it was a new procedure").
from jury selection to the judge's instructions on the law. Lawyers who are unfamiliar with these standards cannot effectively seek redress when the court or the prosecutor departs from them.

Moreover, in a series of decisions in the 1970s, the Supreme Court required trials in capital cases to include a penalty phase at which the defendant has the right to present mitigating evidence and the jury determines whether to impose or recommend the death sentence in accordance with statutory guidelines. A defense lawyer must be familiar with legal standards, such as those governing the admissibility of evidence and the propriety of prosecution arguments, that are uniquely applicable to the penalty phase of a capital case. Moreover, as Professor Goodpaster explained in an article a decade ago, the special procedures in capital cases

248. Most recently, the Supreme Court held that defense counsel is constitutionally entitled to inquire into whether prospective jurors would automatically impose the death sentence without regard to mitigating circumstances. See Morgan v. Illinois, 112 S. Ct. 2222 (1992). In earlier cases, the Court has held that prospective jurors may not be excluded from the jury because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction, see, e.g., Gray v. Mississippi, 481 U.S. 648 (1987); Adams v. Texas, 448 U.S. 38 (1980); Witherspoon v. Illinois, 391 U.S. 510 (1968), while also issuing decisions limiting the impact of this rule. See, e.g., Roass v. Oklahoma, 487 U.S. 81 (1988); Darden v. Wainwright, 477 U.S. 168 (1986); Wainwright v. Witt, 469 U.S. 412 (1985).


250. See, e.g., Sochor v. Florida, 112 S. Ct. 2114 (1992) (federal court's consideration of constitutional challenge to jury instruction at sentencing stage of a capital case was foreclosed by defense counsel's failure to object to the instruction at trial).


In more recent years, the Supreme Court has adhered to the requirement of a penalty phase in death penalty cases at which jurors must consider all mitigating circumstances before imposing the death sentence. See, e.g., McKoy v. North Carolina, 494 U.S. 433 (1990) (states may not require mitigating factors to be found unanimously); Hitchcock v. Dugger, 481 U.S. 393 (1987) (jury improperly barred from considering nonstatutory mitigating circumstances); Skipper v. South Carolina, 476 U.S. 1 (1986) (defendant unconstitutionally denied right to present mitigating evidence to the effect that he had adjusted well in jail between the time of his arrest and trial). But see Boyd v. California, 494 U.S. 370 (1990) (upholding instruction that the jury "shall impose a sentence of death" if aggravating circumstances outweighed mitigating circumstances); Blum v. Pennsylvania, 494 U.S. 299 (1990) (upholding state statute requiring jury to impose death sentence if it finds at least one statutory aggravating factor and no mitigating circumstances).

impose unique responsibilities on defense lawyers which include conducting an investigation prior to trial to uncover information that may be presented in mitigation of the sentence, attempting to select jurors who are least likely to impose a death sentence, and conducting the defense during the guilt phase of the trial in light of its potential impact on the jury's sentencing decision.

Most importantly, the defense lawyer's role at the sentencing proceeding calls for an unusual exercise of judgment in attempting to persuade the jury that the defendant should not be put to death. Counsel is relatively unconstrained in this task, and may attempt to portray the defendant's positive qualities, to demonstrate unusual circumstances in the defendant's background that make the heinous conduct understandable, or simply to make the jury see the defendant as a human being. The attorney may attempt to capitalize on lingering doubts about the defendant's guilt or seek to persuade the jury that a death sentence is not appropriate for the type of murder the defendant committed. The defense attorney is thus presented with a wide range of options about what evidence and arguments to present in mitigation of the sentence and how to present them. Representation at the sentencing hearing varies so greatly from the ordinary work of lawyers, including criminal defense lawyers, and draws on such a variety of skills and knowledge, that it would take incredible dumb luck for an ill-trained attorney to happen upon a competent approach.


Unfortunately, many attorneys who represent capital defendants do not understand the significance of the penalty trial. The typical defense attorney has had little or no prior experience in dealing with capital cases and does not understand that there is a vast difference between representing a defendant in an ordinary criminal trial and representing a capital defendant in the penalty trial. As a result, many of these attorneys do not even begin to prepare for the penalty trial until after their client has been adjudicated guilty of a capital crime—and as David Stebbins has said, "By then, it's too late."

See also Blanco v. Singleton, 943 F.2d 1477, 1501-02 (11th Cir. 1991) ("To save the difficult and time-consuming task of assembling mitigation witnesses until after the jury's verdict in the guilt phase almost assures that witnesses will not be available."); Blake v. Kemp, 758 F.2d 523, 533 (11th Cir.), cert. denied, 474 U.S. 998 (1985).

254. Goodpaster, supra note 9, at 325-28.

255. Id. at 328-34. For example, if the defense during the guilt phase is predicated on the defendant's denial of culpability (as opposed to simply putting the prosecution to its proof or admitting guilt but arguing lack of intent or relying on an affirmative defense), the jury at sentencing will be unlikely to credit any "admission of guilt or evidence of extenuating circumstances, remorse or rehabilitation." Id. at 330.

256. Id. at 334-39. In Florida, where the trial judge may override a jury's recommendation and impose the death sentence, see Spaziano v. Florida, 468 U.S. 447 (1984), broad discretion is provided to the judge in his role as sentencer as well as to the jury in its advisory role.


258. One study suggested that these are the most important factors influencing juries in deciding whether to impose the death sentence. See William S. Geimer & Jonathon Amsterdam, Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases, 15 Am. J. Crim. L. 1, 28, 47 (1988).
Of course, the poor quality of representation does not invariably affect the outcome of a capital case. There are undoubtedly cases in which, because of the heinousness of the crime or the depravity of the defendant, the jury will impose the death penalty no matter how persuasively the defense lawyer presents the case for mercy. And there are other cases in which the jury will decline to impose a death sentence no matter how poorly defense counsel performs. Nevertheless, there is empirical evidence that the quality of defense representation is an important factor in many cases. Moreover, given the unique characteristics of the capital sentencing process, the outcome is likely to turn on the quality of defense representation.

The quality of defense representation may have an impact in some capital cases, as in all types of criminal cases, upon the jury's decision on whether there is a reasonable doubt about the defendant's guilt. The jury will generally be unaware of exculpatory evidence unless defense counsel learns of it from the client, during investigation, or by way of discovery, and brings it to the jury's attention effectively through the testimony of defense witnesses or through cross-examination of prosecution witnesses. Through witness examinations and through arguments to the jury, defense counsel may raise doubts about the defendant's guilt that jurors might not otherwise perceive. Furthermore, the extent to which the jury is receptive to the defense may turn, in part, on the success of the defense attorney in the process of selecting the jury.

Nevertheless, in guilt or innocence, the quality of defense representation is likely to make a difference only in a limited number of marginal cases. In many if not most capital cases, the prosecution's proof will be so overwhelming that a competent defense will not result in an acquittal. On rare occasion, the prosecution's case may be so weak that even without the benefit of competent representation, a defendant will secure an acquittal. The quality of representation will affect the jury's determination of guilt or innocence only in cases in between those two extremes.

What makes the quality of the defense uniquely important in capital cases, however, is the sentencing process and the role of jurors in that process. In deciding whether to impose or recommend a sentence of death, the jury is generally instructed to determine whether one or more aggravating circumstances was present at the time of the crime and, if so,
whether one or more mitigating circumstances are present that outweigh the aggravating factors. While the court's instructions constrict the jury's discretion to impose the death sentence, they generally allow jurors wide, if not unconstrained, discretion to spare the defendant. Moreover, what little is known about how juries actually make their decisions in capital cases suggests that in practice jurors decide whether to impose the death sentence almost wholly on the basis of their own criteria, in part because of their inability to understand the court's instructions.

The quality of defense representation is likely to matter in the sentencing stage of the vast majority of capital cases. Because of the breadth of the jury’s discretion and the subjectivity of its decision, the imposition of a death sentence will rarely, if ever, be a foregone conclusion. Moreover, the quality of defense representation plays a critical role because of the vast range of information relevant to the sentencing decision that the jury can learn only through defense counsel's efforts and because of the jury's susceptibility to persuasive argument. Thus, in capital cases, more than any other class of criminal cases, the quality of representation will make a difference—and the difference will be between life or death for the accused.

C. The Inadequate Remedy for Inadequate Representation

When the jury's decision to impose the death sentence is attributable to inadequate representation by an unqualified lawyer, the defendant often has no recourse under the law. Any claim for relief must be premised on the right to effective assistance of counsel as interpreted by the Supreme Court.

263. Among other things, the Court has held that a state may not require that mitigating circumstances be found unanimously. Thus, the defense need only persuade a single juror of the existence of a mitigating circumstance that makes a death sentence unwarranted. See McKoy v. North Carolina, 494 U.S. 433 (1990). Next term, however, the Court will review Graham v. Collins, 950 F.2d 1009 (5th Cir. 1991) (en banc), cert. granted, 112 S. Ct. 2937 (1992), a decision upholding a statutory sentencing scheme for capital cases which considerably constrains the jury's discretion to consider possible mitigating circumstances.


265. "Improbable as it may seem to people unexposed to death litigation, even perpetrators of appalling crimes may evoke sympathy from twelve not unduly sentimental jurors if a well-prepared defense team can 'present the defendant in a way that will provoke the jury's understanding and empathy' . . . and, at the same time help them to 'understand why the defendant's devout behavior occurred.'" Vivian Berger, Born Again Death, 87 Colum. L. Rev. 1301, 1308-09 (1987) (quoting Welsh S. White, supra note 253, at 54, 57).

in its 1984 decision in Strickland v. Washington. In Strickland, which rebuffed a condemned prisoner's claim that he had been deprived of competent representation at the sentencing stage of a capital murder proceeding, the Court adopted a test with two components: a convicted defendant must show, first, "that counsel's representation fell below an objective standard of reasonableness" and, second, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

The Strickland standard does not entitle the defendant to a qualified attorney. The Strickland standard calls for an ex post inquiry into the lawyer's conduct and its influence on the outcome of a criminal proceeding, not an ex ante inquiry into the lawyer's capacity to provide an adequate defense. At most, the inadequacy of a defense attorney's skill or knowledge may be relevant in evaluating the reasonableness of his conduct. For a variety of reasons, a death row prisoner who suffered at the hands of an unqualified advocate often will be unable to satisfy the Strickland standard.

To begin with, Strickland instructs that the "reasonableness" of a defense lawyer's representation will be governed by "prevailing professional norms." If the quality of representation prevailing in a community is poor, then the expectations set by the Strickland standard will be correspondingly low. The Court's invocation of a standard that fluctuates with the quality of prevailing practices was calculated to promote a variety of administrative interests wholly separate from the defendant's immediate interest in undoing a conviction or sentence attributable to

268. Id. at 688.
269. Id. at 694.
270. See supra note 40 and accompanying text (citing cases).
271. Strickland, 466 U.S. at 681.
272. See ABA Background Report, supra note 11, at 53, reprinted in 40 Am. U. L. Rev. at 66-67 ("Even in cases in which the performances of counsel have passed constitutional muster under the test of Strickland v. Washington and executions have been carried out, the representation provided has nevertheless been of very poor quality.").

The inadequacy of the Strickland standard, particularly as it applies in capital cases, has been discussed at length by other commentators, and therefore is only sketched out in this Article. For earlier commentary critical of the standard governing ineffectiveness of counsel claims in capital cases, see Goodpaster, supra note 9, at 486-87; Tabak, supra note 9, at 409; Tabak & Lane, supra note 233, at 69-75; Fong, supra note 9; Gredd, supra note 9; James W. Hitzeman, Note, Effective Assistance of Counsel: Strickland and the Illinois Death Penalty Statute, 1987 U. Ill. L. Rev. 131.

Also, it should be noted that, in some cases, capital defendants who may have been denied effective representation will be procedurally barred from raising a claim under Strickland. See, e.g., Andrews v. Deland, 943 F.2d 1162, 1188-93 (10th Cir. 1991) (ineffective assistance claim barred by failure to raise it in first state postconviction hearing).

273. 466 U.S. at 688.
274. See id. at 689 ("the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation"); cf. Vivian O. Berger, The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?, 86 Colum. L. Rev. 9, 61 (1986) ("plainly the caliber of representation cannot exceed the caliber of counsel").
incompetent representation. Thus, while the standard for assessing attorney conduct is ostensibly intended to ensure “the proper functioning of the adversary process” and “that criminal defendants receive a fair trial,” it does not necessarily require defense representation of sufficient quality to achieve those ends. Therefore, in locales where indigent capital defendants are routinely assigned lawyers who are unqualified to defend criminal cases, a death sentence attributable to the defense lawyer's poor performance often must be upheld because of the laxity of the “prevailing professional norms.”

To bring the inadequacy of the Strickland standard into sharper relief, one need only extend Chief Justice Burger's analogy between lawyers and doctors. Suppose that in a community with few surgeons (because the compensation was too low to encourage doctors to specialize in surgery), patients in need of surgery were not referred exclusively to doctors who were trained and certified to perform surgical procedures but were assigned to doctors at random. Suppose further that under the law governing medical malpractice claims, the reasonableness of a doctor's treatment was based on the prevailing norm, rather than on the norm set by trained surgeons. Many mistakes that would be intolerable by the standard of surgeons would fall within the range of “prevailing professional norms,” and therefore would not be remediable through a malpractice action. So it is under the Strickland standard. Many errors that would not be made by a qualified criminal defense attorney—one versed in criminal law and procedure and familiar with trial practice—are “reasonable” under prevailing norms because unqualified lawyers set those norms.

Strickland imposes an additional barrier because it calls for “a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.” The rationale for the presumption is that there are “countless ways to provide effective assistance in any given case.”

275. See Strickland, 466 U.S. at 689-90.
276. Id. at 686.
277. Id. at 689.
278. See Goodpaster, supra note 9, at 341.
279. See Riles v. McCotter, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).
280. See Burger, The Special Skills of Advocacy, supra note 205, at 230-31 (quoted at supra text accompanying note 205). The analogy has been extended before to underscore the inadequacy of representation in capital cases. See Minority Report of Stephen B. Bright, in ABA Background Report, supra note 11, at A-46, reprinted in 40 Am. U. L. Rev. at 219 (“There are many communities that do not have surgeons. But that does not mean that we allow chiropractors to do brain surgery in those communities.”); see also Berger, supra note 290, at 254; cf. Brown v. McGerr, 774 F.2d 777, 781 (7th Cir. 1985) (“Young attorneys, like young physicians, must be trained by experienced practitioners.”); Irving R. Kaufman, The Court Needs a Friend in Court, 60 A.B.A. J. 175, 177 (1974).
281. Cf. Gian-Cursio v. State, 180 So. 2d 396 (Fla. Dist. Ct. App. 1965) (chiropractors found criminally negligent in their treatment of a patient with tuberculosis were properly held to the standard of skilled physicians who are familiar with accepted methods for treatment, rather than the standard accepted among “drugless healers”).
282. 466 U.S. at 689.
283. Id.
options is narrow, the presumption will be less difficult to overcome; conversely, the wider the range of available strategic options, the stronger the presumption.\footnote{284}

Because the range of options is particularly wide in a capital sentencing proceeding, \textit{Strickland} calls for courts to review the defense lawyer's conduct at that stage with particular deference. For example, experienced practitioners believe that it is almost invariably a mistake to present no evidence at the sentencing proceeding.\footnote{285} But, as a matter of law, reviewing courts indulge a strong presumption that defense counsel's failure to present evidence is a matter of reasonable defense strategy, since that is one of the many available strategic options. Relying on the factually unwarranted but legally mandated presumption, courts frequently reject ineffective assistance claims premised on defense counsel's failure to present a case at the sentencing proceeding or even to investigate the possibility of a defense.\footnote{286}

\footnote{284} It is hard to imagine a strategic justification for counseling a client to confess to the crime charged, and thus, such advice would not enjoy a strong presumption of reasonableness. \textit{See}, e.g., \textit{Commonwealth v. Moreau}, 572 N.E.2d 1582 (Mass. App. Ct. 1991). On the other hand, decisions about the content of opening statements and summations, about what evidence to introduce, about what objections to make, and about how to conduct cross-examination, are presumed to be strategic. For example, in \textit{Pilchak v. Camper}, 741 F. Supp. 788 (W.D. Mo. 1990), \textit{aff'd}, 935 F.2d 145 (8th Cir. 1991), the defense attorney failed to make an opening statement or to object to the prosecution's introduction of damaging proof about the defendant's prior criminal conduct. Although the defense lawyer was suffering from Alzheimer's disease at the time of the trial, the district court nevertheless held both lapses to be a "tactical decision" within the bounds of a lawyer's "trial strategy." \textit{Id.} at 792-93.

To overcome the presumption that a trial lawyer's conduct reflected sound strategy, and not inattention or ignorance, a defendant generally must call the trial lawyer as a witness in a collateral proceeding and elicit his reasons for the challenged conduct. Because lawyers are jealous of their professional reputation, they have an interest in placing their prior acts or omissions in the best possible light. On rare occasion, a court will decline to credit a lawyer's testimony that he acted reasonably. \textit{See}, e.g., \textit{id.} at 794 (defense lawyer's assertion that he conducted pretrial discovery "lacked credibility"). In most cases, however, a court will accept an explanation that accords with the presumption that trial lawyers act reasonably. As a consequence, on top of everything else, \textit{Strickland} imposes a difficult evidentiary hurdle.

\footnote{285} \textit{See supra note 231.}

\footnote{286} \textit{See}, e.g., \textit{Paradis v. Arave}, 954 F.2d 1483, 1491 (9th Cir. 1992); \textit{Schlup v. Armontrout}, 941 F.2d 631, 639, 643 (8th Cir. 1991); \textit{Schneider v. State}, 787 S.W.2d 718, 720-21 (Mo. 1990) (en banc); \textit{Sidebottom v. State}, 781 S.W.2d 791, 796 (Mo. 1989) (en banc); ABA Background Report, supra note 11, at 53 (citing Mitchell v. Kemp, 483 U.S. 1026, 1026-31 (1987) (Marshall, J., dissenting from denial of certiorari) (attorney presented no case in mitigation after failing to contact any mitigating witnesses and failing to investigate defendant's history); \textit{Messer v. Kemp}, 760 F.2d 1080, 1093-97 (11th Cir. 1985) (Johnson, J., dissenting, \textit{cert. denied}, 474 U.S. 1088 (1986) (Marshall, J., joined by Brennan, J., dissenting from denial of certiorari)); \textit{Fong}, supra note 9, at 476 n.103 (citing cases). In \textit{Messer}, defense counsel at the guilt phase made no opening statement, offered no defense case, performed a limited cross-examination, never objected, and emphasized the gruesome nature of the crime in a brief closing argument. During the sentencing trial, counsel offered no mitigating evidence of defendant's steady employment, military service, church attendance, or cooperation with police; additionally, counsel "repeatedly hinted that death was the most appropriate sentence." \textit{Messer}, 474 U.S. at 1089-91; \textit{see also} \textit{Mathis v. Zant}, 704 F. Supp. 1062, 1064 (N.D. Ga. 1989) (in addition to failing to present available evidence, counsel during closing argument in effect apologized to the jury for having served as defense attorney). \textit{But see Deutcher v. Whitley}, 946 F.2d 1443, 1446 (9th Cir. 1991); \textit{Blanco v. Singletary}, 943 F.2d 1477, 1501-02 (11th Cir. 1991)
LETHAL FICTION: THE MEANING OF COUNSEL

Furthermore, to prevail under Strickland the defendant must point to "specific errors made by trial counsel." This standard imposes a particular burden for defendants whose trial attorneys were unqualified. In such cases, the attorney's unfamiliarity with trial practice generally, or with criminal law and procedure in particular, is an impediment that will pervade the attorney's performance, often to the detriment of the accused. Yet the Strickland standard affords no relief in cases where unqualified defense counsel provides poor representation in every respect, but commits no single egregious error that, standing alone, cannot be explained away as a reasonable strategic option.

The second component of the Strickland standard—the need to show "a reasonable probability" that counsel's poor performance affected the outcome—creates yet one more hurdle for defendants with unqualified trial lawyers. Read literally, this requirement is especially imposing when trial counsel was incompetent at the sentencing phase of a capital case. Precisely because so little is understood about how juries exercise their discretion, it will be difficult to prove convincingly that the lawyer's poor performance made a difference, even if it did.

For these reasons, convictions will often be upheld under Strickland even though, had the defendant been represented by a qualified lawyer, the outcome of the trial would have been more favorable. In most cases, one can expect the unqualified lawyer's performance to fall below the standard

("To save the difficult and time-consuming task of assembling mitigation witnesses until after the jury's verdict in the guilt phase almost assures that witnesses will not be available."); Harris v. Dugger, 874 F.2d 756, 763 (11th Cir.), cert. denied, 110 S. Ct. 573 (1989); Blake v. Kemp, 758 F.2d 523, 533 (11th Cir.), cert. denied, 474 U.S. 998 (1985).


288. See supra notes 208-12 and accompanying text (describing survey of judges).

289. See Strickland, 466 U.S. at 692; Cronic, 466 U.S. at 662 & n.31. Thus, Strickland rejects the approach taken in Cuyler v. Sullivan, 446 U.S. 355, 345-50 (1980), which called for a presumption that the defendant was prejudiced when trial counsel's performance was adversely affected by a conflict of interest. In Strickland, the Court explained that this presumption is justified in conflict-of-interest cases because "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." 466 U.S. at 692. The same might be said of the trial counsel's lack of relevant skill and knowledge: it is impossible precisely to measure its effect, although its impact on counsel's performance is likely to be pervasive.

290. See, e.g., Wilkerson v. Collings, 950 F.2d 1054, 1065 (5th Cir. 1992) (failure to investigate and present evidence of background and mental capacity summarily determined insufficiently prejudicial); Schlup v. Armontrout, 941 F.2d 631, 639 (8th Cir. 1991) (finding that inexperienced defense attorney's failure to offer expert psychiatric or psychological testimony as mitigating evidence did not prejudice the case, because "the unexperienced testimony would not have been of sufficient weight to have changed the outcome...[in light of the numerous aggravating circumstances]). See generally State v. Davis, 561 A.2d 1082, 1116 (N.J. 1989) (Handler, J., dissenting) ("In determining the propriety of life or death, the jury's function is essentially normative rather than evaluative...[A]s a judgment becomes more subjective, the task of assessing the extent to which that judgment might have been influenced by more competent representation becomes more difficult."). But see Blodgett v. Mak, 970 F.2d 614, 619-21 (9th Cir. 1991); Deutscher v. Whitley, 946 F.2d 1443, 1445-47 (9th Cir. 1991); Schlup v. Armontrout, 941 F.2d at 643-44 (Heaney, J., dissenting); Kenley v. Armontrout, 937 F.2d 1298, 1304-07 (8th Cir. 1991); Stephens v. Kemp, 846 F.2d 642, 653-55 (11th Cir.), cert. denied, 488 U.S. 872 (1988).
set by attorneys with skill and experience in the defense of criminal cases. But the defendant cannot prevail under Strickland merely by showing that counsel's performance was incompetent in this ordinary, nontechnical sense, and that the case might have been defended successfully by an attorney who had performed competently. Because of Strickland's forgiving standard for reviewing counsel's performance and the various evidentiary obstacles established by that decision, the class of cases in which relief will be afforded to defendants who suffer at the hands of unqualified lawyers is bound to be fairly small.

This is a result that ought to be troubling in all cases, although perhaps less so in noncapital cases. While some convicted defendants, capital and noncapital alike, might complain that qualified lawyers would have won an acquittal, most of those defendants are in fact guilty of the crimes they were accused of committing. By some measures, the favorable verdict they might have secured would be undeserved. For those critics who are principally concerned with the reliability of the outcome of the trial, as well as for those who believe that a trial is fundamentally fair as long as the quality of defense counsel's performance satisfies the Strickland standard, the conviction of defendants who are in fact guilty but who would have established a reasonable doubt if better defended may seem acceptable.

There is no excuse, however, for executing capital defendants for whom the poor quality of trial counsel meant the difference between life and death. This is true, in part, because "death is different" from other forms of punishment and there is therefore a need for greater reliability in the jury's factual determinations that go into the decision to impose the sentence. More importantly, however, this is true because there is no objective standard for determining when, in Justice Stevens's words, "an individual has lost his moral entitlement to live." Although some might think otherwise, the legal expectation or baseline for defendants convicted of capital crimes is not death but life. No particular set of circumstances establishes that a given case is an exceptional one warranting

291. Even the most vociferous critics of the criminal justice system concede this point. See, e.g., Alan M. Dershowitz, The Best Defense at xviii (1982) ("The American criminal justice system ... is not grossly inaccurate: large numbers of innocent defendants do not populate our prisons.").


294. See Geimer & Amsterdam, supra note 258, at 41-47 (survey of jurors who imposed the death sentence revealed that they generally began with presumption that a death sentence would be returned unless they could be convinced it was inappropriate).

295. See Gregg v. Georgia, 428 U.S. 153, 188 (1976) (death penalty process must separate "the few cases in which [the death penalty is appropriate] from the many cases in which it is not"); accord Godfrey v. Georgia, 446 U.S. 420, 427 (1980).
a sentence of death. The decision to impose a death sentence must be an individual, subjective one that takes all relevant mitigating circumstances into account. If trial counsel is incapable of adequately presenting a case for mercy, one cannot have confidence that the defendant deserves the resulting death sentence. Thus, one cannot take refuge in the notion that those death-sentenced defendants who would have received a life sentence with a better defense nevertheless deserve the death penalty.

One might ask, of course, why the inadequacies of the Strickland standard should not be redressed simply by improving the standard for reviewing ineffective assistance of counsel claims. Why not adopt a more demanding standard for reviewing defense counsel's performance, either in capital cases or in all criminal cases, rather than focusing on the defense attorney's qualifications? There are two answers to this question.

First, it would be extremely difficult to devise a standard for evaluating defense counsel's performance that captured all the cases in which one would conclude that the attorney performed inadequately. Efforts to establish that an attorney failed to meet a given standard of competent representation are necessarily susceptible to problems of proof in many cases. A defendant may not know, or may be unable to prove, that the defense attorney acted outside the courtroom in a manner which was either itself incompetent or which demonstrates the incompetence of the attorney's performance in court.

More importantly, an ineffective assistance standard which in fact captured all the cases in which the defense lawyer performed incompetently would create significant institutional problems which cannot fairly be discounted. If the attorney's conduct were judged by the standard of a

296. There is no benchmark at the sentencing phase equivalent to the relationship between factual and legal guilt. One might reasonably take the view that factually guilty defendants deserve to be convicted, and that an acquittal is in some sense undeserved. Therefore, convicted defendants who might have fared better with better lawyers are not particularly entitled to consideration. The same cannot be said of those who receive a death sentence because of inadequate representation.

To be sure, courts speak at times of the need for "reliability" or "accuracy" in the imposition of a death sentence. See, e.g., Dugger v. Adams, 489 U.S. 401, 412 n.6 (1989); Johnson v. Mississippi, 486 U.S. 578, 584 (1988) (there is "a special need for reliability in the determination that death is the appropriate punishment in any capital case") (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (White, J., concurring)); Smith v. Murray, 477 U.S. 527, 539 (1986). But courts do not and cannot measure reliability or accuracy by reference to an objective standard of moral deservedness. For example, in the context of decisions raising the question of whether a death sentence should be overturned because attorney incompetence or some other deficiency at the sentencing proceeding amounted to a "fundamental miscarriage of justice" which excuses a procedural default, the death sentence has been deemed sufficiently "reliable" or "accurate" as long as it might have been imposed in the absence of the error. See, e.g., Deutscher v. Whiteley, 946 F.2d 1414, 1444-45 (9th Cir. 1991); Stokes v. Armontrout, 893 F.2d 152, 156 (8th Cir. 1990); cf. Johnson v. Singletary, 938 F.2d 1166, 1183 (11th Cir. 1991) (en banc) ("The sentenced defendant must demonstrate ... that the error resulted in a sentencing outcome for which the defendant is not eligible by virtue of his conduct.").

297. See Woodson v. North Carolina, 428 U.S. 280, 304 (1976) ("fundamental respect for humanity ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death").
skilled criminal defense practitioner, a large number of convictions would have to be overturned. Indeed, convictions would be overturned in all those cases in which, as one would have expected, an unskilled attorney performed below the more demanding standard. This would be an enormously unfair result from the perspective of courts and prosecutors because, at least in cases in which the defendant retained counsel, they would have had little ability to protect against the reversal. When the defendant retained a duly licensed attorney, the court could not disqualify that attorney at the outset of a criminal case simply because the court anticipated that counsel’s performance would not satisfy the higher standard that replaced Strickland. Because the attorney would be “counsel” for Sixth Amendment purposes, the defendant would have the right to retain the attorney. Except perhaps in the rare cases in which the court witnessed the attorney’s poor performance at trial and could determine based on the performance alone that the attorney was acting incompetently, the court could not attempt to remove the attorney from the case. By the middle of trial, of course, 

298. In cases of indigent defendants, courts could make some effort to assign only skilled practitioners. However, courts would have no control over the defendants’ decisions about whom to retain. If a more demanding standard for judging ineffective assistance of counsel claims were adopted, it would apply equally to retained and appointed lawyers. See Cuyler v. Sullivan, 446 U.S. 355, 344 (1980) (“we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who choose their own lawyers”).

299. Smith v. Superior Court, 440 P.2d 65 (Cal. 1968). But see Lynd v. State, 414 S.E.2d 5 (Ga. 1992). In Lynd, a capital defendant retained an attorney who had been admitted to practice for one-and-a-half years, during which he had tried only one felony case before a jury. In addition, he had been assigned a lawyer who had been admitted to practice for little more than half a year and had never conducted a jury trial. The trial court, after ascertaining the attorneys’ inexperience, relieved the assigned lawyer and directed the defendant either to retain a more experienced lawyer or to accept the appointment of a more experienced lawyer to act as lead counsel. When the defendant failed to retain another lawyer, the trial judge appointed one over the defendant’s objection. On appeal, the Georgia Supreme Court held that the defendant had not been denied his right to counsel of choice. It explained: 

While the defendant’s retained attorney was not presumptively incompetent to represent a defendant in a death penalty jury trial, . . . his inexperience was justifiably a matter of concern in a case sufficiently more complicated than the run-of-the-mill criminal trial to give pause even to far more experienced attorneys. Claims of ineffectiveness are routine in death-penalty cases, and not the less so in cases in which the trial counsel was retained rather than appointed . . . . Given the serious potential of a post-trial claim of ineffectiveness resulting from retained counsel’s almost total lack of criminal trial experience, the trial court acted within its discretion to require the defendant either to retain a more experienced attorney or accept the appointment of one.

Id. at 10 (citations omitted). In light of the chosen attorney’s inexperience, the court concluded that the defendant’s right to counsel of choice was outweighed by the interests in preserving high professional standards, in preserving public confidence in the judicial process, and in promoting orderly judicial administration. Id. cf. United States v. Campbell, 874 F.2d 838, 848 (1st Cir. 1989) (trial court properly denied defendant’s request to admit lawyer pro hac vice and appoint him as stand-by counsel when the lawyer had not practiced law for twenty-five years).

300. Cf. Bruce A. Green, Her Brother’s Keeper: The Prosecutor’s Responsibility When Defense Counsel Has a Potential Conflict of Interest, 16 Am. J. Crim. L. 323, 341-42 & n.79 (1989) (the extent of a prosecutor’s responsibility to call the defense lawyer’s incompetent representation to the court’s attention is unsettled and, in any event, “[i]t is often hard for a prosecutor to identify ineffective assistance of counsel with any degree of certainty in the
considerable resources would have been expended. Indeed, one can imagine that some defendants would deliberately select unqualified attorneys in order to win two bites at the apple: if the attorney failed to secure an acquittal, the defendant could challenge successfully the attorney’s performance on the ground that it was ineffective. It is thus understandable why the Court in Strickland would not draw the line between constitutionally competent and incompetent representation at the same point at which the legal profession and judges might draw it for other purposes.

In light of the danger of an unacceptably high reversal rate, the only institutionally acceptable way to raise the standard for judging trial counsel’s performance to the standard expected of skilled practitioners would be, initially, to redefine “counsel” to include only skilled practitioners. Only then could courts protect against the predictable prospect that an incapable lawyer will render a substandard performance. Until the right to “counsel” means a right to a qualified advocate, rather than a right to any duly licensed attorney, it will be unreasonable to establish a far higher standard of defense representation.

V. WHAT A REDEFINITION OF “COUNSEL” SHOULD MEAN

A. The Right to a Qualified Lawyer

Suppose that courts accept that “counsel” means a qualified advocate and abandon the fiction that all duly licensed attorneys are qualified to defend criminal cases. What would follow?

To begin with, the number of individuals who qualify as “counsel” would be considerably reduced from the set of all duly licensed attorneys to the comparatively smaller subset of qualified practitioners—those licensed attorneys who possess the requisite skills and professional values that are generally necessary to provide a competent criminal defense. The right to “counsel” would therefore mean the right to retain a qualified attorney or, in the case of indigent defendants, to have a qualified attorney provided by the state.

While decreasing the number of lawyers who might be assigned to represent criminal defendants, the requirement of special certification for criminal defense lawyers would not necessarily reduce the pool of lawyers who might be retained. Courts would be free to permit defendants to waive the right to counsel in order to secure the representation of an unqualified lawyer. The trial judge would be required to question the defendant, however, to ensure that the decision was a voluntary and informed one, just as trial judges now do when defendants seek to be represented by a lawyer with a potential conflict of interest301 or when defendants seek to represent

course of a trial”).

301. See Wood v. Georgia, 450 U.S. 261 (1981); Holloway v. Arkansas, 435 U.S. 475 (1978). See generally Green, supra note 300, at 331 (“Although trial judges engage in varying types of inquiries, the court must ensure at minimum that the accused understands the general risks created by counsel's potential conflict and voluntarily accepts them.”).
In cases where the waiver was not knowing or voluntary, or where the defendant was never apprised that the defense lawyer was unqualified, a convicted defendant could justly assert a denial of the Sixth Amendment right to counsel.  

If a right to a qualified advocate were recognized, courts would have to devise a mechanism to ensure that attorneys whom they authorize to defend criminal cases are qualified. While it would be possible to raise the standards for membership in the bar to ensure that all lawyers were qualified, this approach would make little sense, since the vast majority of lawyers will never engage in criminal practice. The preferable course would be for courts or their surrogates to establish processes for ascertaining which particular attorneys are qualified to represent individuals accused of a crime. If the processes were reasonably calculated to identify qualified attorneys, then those attorneys categorically could be regarded as “counsel,” even if other licensed practitioners were in fact unqualified.

One possible means of distinguishing between qualified and unqualified attorneys would be for trial judges to make ad hoc determinations about the fitness of individual attorneys who seek to appear before them in criminal cases. This approach would raise a variety of practical problems, however. It would be administratively cumbersome for trial judges to assess every defense attorney’s qualifications at the threshold of every individual case.

302. See Faretta v. California, 422 U.S. 806 (1975); United States v. Balough, 820 F.2d 1485, 1487 (9th Cir. 1987) (“a criminal defendant must be aware of the nature of the charges against him, the possible penalties, and the dangers and disadvantages of self-representation”). For a model of the inquiry that judges should undertake when defendants wish to represent themselves, see 1 Bench Book for United States District Judges 1.02-2 to -5 (3d ed. 1986).

303. If a court were someday to define “counsel” to mean a qualified advocate, it would undoubtedly apply its decision prospectively only. Defendants whose appeals had already been decided certainly would not be allowed to benefit from the new interpretation. Cf. Griffith v. Kentucky, 479 U.S. 314 (1987) (rule against discriminatory use of peremptory challenges applied to cases pending on direct review when decision was announced, but not to cases in which review was concluded).

This is not to say that, under existing habeas corpus law, as restrictive as it has become, a retrospective application would be wholly unwarranted. Although the Supreme Court recently ruled in Teague v. Lane, 489 U.S. 288 (1989), that newly announced rules of criminal procedure are generally inapplicable in federal habeas corpus proceedings, it recognized an exception for “new procedures without which the likelihood of an accurate conviction is seriously diminished.” Id. at 313 (plurality opinion of O’Connor, J.); see also id. (“Because we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge.”). The right to a qualified lawyer, if it were to be recognized by a court, might fairly be characterized as a right “without which the likelihood of an accurate conviction is seriously diminished.” Id. Nevertheless, it is unrealistic to think that a court would announce a constitutional standard for attorney qualification if the consequence of its ruling was to place in jeopardy the many convictions that had previously been obtained in cases where defense counsel was unqualified. Cf. People v. Mitchell, No. 289, 535 N.Y.S. 2d 286, (Dec. 17, 1991) (rule requiring defendant’s presence when judge questions prospective jurors at sidebar held prospective in application; possibility of prospective application allows the court “to expand the protection accorded defendants when [the court] might otherwise hesitate to do so because retroactive application threatens to wreck more havoc in society than society’s interest in stability will tolerate”).

304. See supra Part III(A).
Moreover, this approach would create both uncertainty and a risk of inconsistent determinations among judges. Whether the determinations were made on the basis of an individual judge's own criteria or on the basis of the judge's subjective application of general standards, lawyers would not know in advance of a proceeding whether they qualified as "counsel," and defendants would not know when they retained lawyers whether the chosen representative would ultimately be deemed qualified. Defendants would expend resources and proceedings would be delayed in cases in which the retained trial attorneys had to be replaced because of inadequate qualifications.

Additionally, it would be difficult to develop general criteria on which ad hoc determinations could satisfactorily be based. This is true for two reasons. First, there are many alternative means by which attorneys could develop and demonstrate their ability to try criminal cases competently, and it would be hard to develop equivalences between various types of training and experience. Second, ad hoc decisions about whether individual attorneys were qualified to represent criminal defendants would rest on necessarily subjective and imprecise judgments. Especially at the margins, courts would struggle to distinguish qualified from unqualified attorneys.

The far preferable course would be for courts to develop an institutional process, like the current licensing process, to identify those attorneys who possess the qualifications to defend criminal defendants. Courts would have broad discretion both to determine what it means to be "qualified" and to decide how to guarantee the qualifications of attorneys. However, a reasonable process would have to do two things: certify lawyers who demonstrate they are fit, and decertify lawyers who later prove unfit.

Although no court has yet established minimal qualifications, beyond the possession of a law license, for all attorneys defending criminal cases, some courts have already established qualification standards for defense attorneys who seek to hold themselves out as specialists. Others have

305. See supra text accompanying note 143.
306. A decision about whether a particular attorney is qualified to defend criminal cases requires, first, a sense of what constitutes a competent criminal defense. That judgment is inherently subjective. The decision then requires an identification of the skills, knowledge and values which an attorney must possess in order to provide such a defense. This requires a necessarily imprecise assessment about the relationship between particular traits and the quality of a lawyer's performance. Finally, the decision requires a necessarily subjective determination about whether a given lawyer possesses the requisite traits. That determination can only be made inferentially based on the lawyer's training and experience or from other relevant achievements.
307. See, e.g., California Rules of Court, Standards for Certification and Decertification, Criminal Law Specialists (1985); Florida Rules of Court, Standards for Certification of a Board Certified Criminal Lawyer, Rule 6-8.3. For example, the requirements to be certified as a Criminal Law Specialist in California include, among other things: (1) that an applicant have a specified level of experience which ordinarily includes having served as counsel of record in at least five felony jury trials, in five additional jury trials, and in forty additional criminal matters; (2) that an applicant have received a specified amount of advanced instruction in such areas as criminal law, criminal procedure, and evidence within the previous three years; (3) that an applicant demonstrate a specified level of knowledge of criminal law and related fields either by passing a written examination given for that purpose or by other specified means; and (4) that an applicant demonstrate to the satisfaction of a committee that he or she is
established qualification standards for defense attorneys who seek assignments to represent indigent criminal defendants.\textsuperscript{308} Still others have special requirements for trial lawyers in general.\textsuperscript{309}

The various standards currently in use illustrate that courts have a broad range of options in devising a mechanism for certifying criminal defense lawyers. For example, courts might test lawyers to determine whether they possess the requisite skill and knowledge, just as candidates are now examined to receive a general license to practice law.\textsuperscript{310} They might require candidates to receive particular training, such as postgradu-
ate instruction in lawyering skills and criminal law and procedure. Or, they might require experience in defending criminal cases either as an assistant to a qualified advocate or under the supervision of a qualified advocate.

Under a more rigorous licensing process, courts would have the option of establishing a higher standard of qualification for the defense of more serious or more complex criminal cases. Thus, practitioners might be required to acquire experience in defending misdemeanor cases before representing felony defendants, experience in defending felony cases before representing defendants in homicide cases, and experience in noncapital homicide cases before representing capital defendants. The creation of a "tiered" or "graded" criminal defense bar, which has some antecedents in colonial practice, would address the problem that all criminal defense lawyers "must have their first cases." Attorneys who have never defended a criminal case without supervision should nevertheless be considered qualified to defend a criminal case that is relatively simple, as misdemeanor cases tend to be, if they have received adequate training and experience. For example, to be deemed qualified to represent misdemeanor defendants, lawyers might first be required to receive training in evidence, criminal law, and criminal procedure, to observe some number of criminal trials, and to defend some number of criminal cases either in a simulated setting or together with more experienced lawyers—all of which go beyond what is currently required to acquire a license to practice law.

Courts would have similar leeway in establishing a decertification process for criminal defense lawyers. Ideally, a system of review by judges and peers would be established to determine whether lawyers should

---

311. Cf. id.


313. Cf. Committee on Crim. Just., Ass'n of the Bar of the City of N.Y., The Criminal 18-B Panels 6 (1992) (in Bronx and New York Counties, courts have assigned trial lawyers to represent indigent defendants from three different panels—a Criminal Court, a Supreme Court and a Homicide panel); Criminal Just. Act Review Comm., Interim Report (1992), reprinted in 51 Crim. L. Rep. 2335, 2344 (1992) ("because of the wide range of complexity in federal criminal cases, a 'tiering' of the CJA panel is advisable to qualify attorneys for appointment for different levels of types of cases, depending on their experience and training").

314. See supra note 100.

315. Schien v. Dowd, 117 F.2d 989, 992 (7th Cir. 1941).

316. A system for decertifying lawyers is essential, in part, because lawyers who are at one time qualified may later cease to be capable practitioners. More importantly, some lawyers who satisfy the qualification standards will be "false positives," that is, they will not in fact be qualified to defend criminal cases. For example, lawyers who possess adequate skill and training may be uncommitted to the duty of zealous representation, and may therefore perform inadequately.
remain certified. At the very least, trial judges should have a responsibility under such a process to report lawyers who appear to be incompetent or unethical.\textsuperscript{317} Moreover, authorities overseeing the decertification process should have a responsibility to investigate all colorable complaints of attorney wrongdoing, and should not limit their attention to the most egregious complaints, as underfinanced licensing authorities typically do.\textsuperscript{318}

Recognition of a right to a qualified advocate would, of course, create practical problems in jurisdictions where there were too few skilled criminal defense lawyers to serve the entire population of criminal defendants. Additional public defenders might have to be hired and trained or, in jurisdictions where lawyers are appointed from the general bar, compensation would have to be increased to induce a portion of the bar to specialize in criminal defense representation. Moreover, special efforts would have to be made to develop a pool of lawyers with expertise in capital cases. To overcome the understandable reluctance of lawyers to represent indigent defendants who are on trial for their lives, states would have to increase considerably the amount of compensation provided for such work.\textsuperscript{319}

The certification of criminal defense lawyers would have the obvious benefit of improving the quality of defense representation, and thereby reducing the number of cases in which defendants are convicted or punished more harshly because of the failings of their attorneys. Of course, no certification process could be fool-proof. Some lawyers who were certified to defend criminal cases would nevertheless be unqualified. Defendants who received substandard representation from those lawyers, as well as defendants whose generally qualified lawyers committed uncharacteristic blunders, could attempt to take advantage of the existing constitutional remedy for defendants who receive inadequate legal assistance.

Redefining "counsel" to mean a qualified advocate would also benefit the standard governing claims of ineffective assistance of counsel. To begin, the narrower definition would make the current doctrine more rational. As noted in Part IV(C), the \textit{Strickland} standard is difficult to meet, in part, because it calls for a presumption that the defense lawyer's conduct was reasonable.\textsuperscript{320} This presumption, in turn, rests on a fiction that lawyers in criminal cases are generally qualified to exercise reasonable judgment about the conduct of their cases.\textsuperscript{321} If lawyers in criminal cases were qualified, this premise would no longer be false.

Moreover, the standard of performance that an attorney must meet under \textit{Strickland} would be raised. \textit{Strickland} calls for evaluating the reasonableness of the lawyer's performance in accordance with "prevailing professional norms." Consequently, by excluding unqualified lawyers from the group of lawyers who establish the professional norms for criminal

\textsuperscript{317} See supra text accompanying note 185-88.

\textsuperscript{318} See supra notes 200-01 and accompanying text.

\textsuperscript{319} See supra Part IV(A).

\textsuperscript{320} See supra notes 282-84 and accompanying text.

\textsuperscript{321} See supra note 151.
defense representation, the redefinition of "counsel" would have the effect of upgrading the expectations for a reasonable performance. Finally, as noted in Part IV, recognition of a right to a qualified advocate would remove institutional barriers to the courts' adoption of a more exacting standard than the one established in Strickland.

B. A First Step: The Right to a Qualified Attorney in Capital Cases

It is unlikely that courts will soon recognize a constitutional right to a qualified advocate in all criminal cases. This is true, in part, because of the unreceptivity of the current judicial climate. Whereas the judicial decisions leading up to Gideon v. Wainwright had gradually eroded the fiction that criminal defendants are qualified to represent themselves, the contemporary decisions on the meaning of "counsel" widely adhere to the fiction that lawyers are qualified to do anything. Thus, this fiction is firmly rooted in our jurisprudence, even if, off the bench, judges almost uniformly disavow it.

Moreover, various practical and administrative considerations discourage courts from examining the qualifications of defense advocates. A requirement of special certification would burden the judiciary, which would have to devise methods for ensuring that defense lawyers were fit; it would impose financially on states and counties that do not have a public defenders system; it would undermine the perceived interests of the organized bar by exposing the frailty of the notion that attorneys are qualified to provide all legal services; it would burden individual lawyers who would have to undergo additional training in order to serve in criminal cases; and it would invite public outrage whenever convictions were overturned for the failure to provide a qualified advocate. These considerations explain why, although it is feasible to design and implement a process for providing all criminal defendants access to qualified defense lawyers, there may be little enthusiasm for doing so in the near future.

If, as appears obvious, the provision of defense representation cannot be completely overhauled in the short term, then the current process should be reformed in capital cases, where its inadequacy is most keenly felt. Courts should recognize, at least in capital cases, that "counsel" in the Sixth Amendment means more than simply a licensed practitioner. Moreover, until such recognition is forthcoming, legislation and court rules should be adopted to ensure that criminal defense lawyers are qualified in capital cases.

Recognition of a constitutional right to qualified counsel in capital but not in noncapital cases may seem unprincipled at first glance. The Supreme Court has, after all, rejected a distinction between capital and noncapital

322. See supra notes 273-281 and accompanying text.
324. See, e.g., text accompanying supra note 86.
325. Those jurisdictions would have to subsidize the training of defense attorneys and provide sufficient financial incentives to attract attorneys to defense practice.
cases when deciding whether indigent defendants have a right to appointed counsel. Nevertheless, a principled rationale can be advanced to justify recognizing that a law license, although it may be enough to qualify one as “counsel” in other criminal cases, is not enough in capital cases.

The reasoning starts with the premise that “counsel” means a qualified advocate, but adheres to the traditional view that a license to practice law is generally a sufficient qualification for the defense of criminal cases. To defend capital cases, however, the level of skill and training that must be demonstrated to acquire a law license does not suffice. Because capital proceedings are uniquely complex, and law schools and licensing authorities require little if any familiarity with such proceedings, considerably more than a law license should be demanded in death penalty cases, even if a law license is enough in other serious felony cases. Of course, the overwhelming weight of professional literature takes the view that the licensing process fails to ensure a lawyer’s ability to defend any criminal case. Nevertheless, it is certainly well recognized that capital cases are more difficult to defend than most other criminal cases. Therefore, if the inadequacy of the law license is largely attributable to the increasing complexity of law practice in recent decades, then courts should begin by requiring qualifications beyond the law license for criminal cases conventionally deemed most complex—capital cases.

The practical and administrative considerations that impede recognition of the right to a qualified advocate in all criminal cases are not nearly as pressing in capital cases, which are comparatively infrequent. Nevertheless, in the current judicial climate, courts are unlikely to adopt even the more modest redefinition of “counsel,” which would apply only in capital

326. See Gideon v. Wainwright, 372 U.S. 335 (1963); see also Francis A. Allen, The Supreme Court, Federalism, and State Systems of Criminal Justice, 8 DePaul L. Rev. 213, 230-51 (1959) (criticizing distinction between capital and noncapital cases in Court’s Sixth Amendment jurisprudence prior to Gideon). For purposes of the indigent defendant’s right to appointed counsel, the Court has, instead, drawn the line between misdemeanor cases in which a prison sentence is imposed and those in which imprisonment, although it may be a potential sentence, is not imposed. The right applies only in the former cases. See Scott v. Illinois, 440 U.S. 367, 373 (1979) (the premise “that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment... is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel”).

327. This argument might be bolstered by reference to the unique nature of both the death sentence and of the defense lawyer’s role in the capital sentencing process. Because of the finality and qualitatively greater severity of a death sentence, greater reliability is needed in the adjudicative process in death penalty cases. Requiring defense lawyers to possess qualifications beyond those denoted by the simple acquisition of a law license would impart a higher level of reliability into the process.

Moreover, defense counsel plays a unique role under the capital sentencing processes that have been developed in response to the Supreme Court’s decisions under the “cruel and unusual punishment” clause. A capital defendant’s worthiness of the ultimate sanction is not measurable by any objective standard. Without confidence in the adequacy of the sentencing process, therefore, society cannot have confidence in the moral justness of the sentence. Adequate defense representation is essential to ensure that the sentencing process appropriately distinguishes between those who do and do not deserve to be put to death. Therefore, there is a need in capital cases, not present to the same degree in other criminal cases, to ensure that defense attorneys are qualified to play the role that is constitutionally entrusted to them.
cases. In the short term, there is, therefore, a need for law reform, both to create the appropriate climate for eventual judicial recognition of the right to a qualified advocate in capital cases, and to fill the gap created by the absence of such a right.

One possible source of reform is Congress. The ABA has urged Congress to revise federal habeas corpus provisions to encourage states to appoint qualified trial lawyers, as well as appellate lawyers, to defendants facing a death sentence. See ABA Report, supra note 11, at 1, reprinted in 40 Am. U. L. Rev. at 9. The ABA's guidelines propose that, to be appointed as lead trial counsel in a capital case, an attorney should have the following qualifications: the attorney should be a member of the bar admitted to practice in the jurisdiction or admitted pro hac vice; the attorney should be an "experienced and active trial practitioner" with at least five years experience in litigating criminal cases; the attorney should have experience as lead counsel in at least nine "serious and complex" cases that were tried to completion before a jury, including among them at least three murder cases or one murder and five other felony cases, and should have experience as lead counsel or co-counsel in at least one capital case; the attorney should be familiar with the practice and procedure in criminal cases in the jurisdiction; the attorney should be experienced in using expert witnesses and evidence; and, within the past year, the attorney should have completed a training or educational program focusing on the defense of capital cases. American Bar Ass'n, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 55-56 (1989).

328. See ABA Report, supra note 11. For commentary on the American Bar Association's recommendations, see Vivian Berger, Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus, 90 Colum. L. Rev. 1665 (1990).

329. ABA Report, supra note 11, at 1, reprinted in 40 Am. U. L. Rev. at 9. The ABA's guidelines propose that, to be appointed as lead trial counsel in a capital case, an attorney should have the following qualifications: the attorney should be a member of the bar admitted to practice in the jurisdiction or admitted pro hac vice; the attorney should be an "experienced and active trial practitioner" with at least five years experience in litigating criminal cases; the attorney should have experience as lead counsel in at least nine "serious and complex" cases that were tried to completion before a jury, including among them at least three murder cases or one murder and five other felony cases, and should have experience as lead counsel or co-counsel in at least one capital case; the attorney should be familiar with the practice and procedure in criminal cases in the jurisdiction; the attorney should be experienced in using expert witnesses and evidence; and, within the past year, the attorney should have completed a training or educational program focusing on the defense of capital cases. American Bar Ass'n, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 55-56 (1989).


331. Id. at 1, reprinted in 40 Am. U. L. Rev. at 9.

332. See supra note 11.


334. See, e.g., Ohio C.P. Sup. Rule 65(A)(4) (discussed in supra note 224).

335. See Achtien v. Dowd, 117 F.2d 989, 992 (7th Cir. 1941) (quoted in supra note 86).
Of comparable vintage is the presumption that duly licensed attorneys are qualified. It, too, predates the Supreme Court's 1963 decision in *Gideon v. Wainwright* by at least two decades.\(^{336}\) Had *Gideon* not extended the Sixth Amendment right to state court proceedings, courts might eventually have abandoned the fiction that possessing a license to practice law means being able to represent criminal defendants competently. After *Gideon*, however, no court will soon hold that the pool of attorneys from which a criminal accused is constitutionally entitled to retain or be assigned "counsel" should be limited to those few who possess adequate lawyering skills and sufficient familiarity with trial practice and criminal law and procedure.

At least in capital cases, where the consequences of the fiction are harshest, the need for qualified lawyers should be recognized by courts and legislatures. Court rules and statutes should ensure that competent representation is afforded to defendants who face the death penalty. Defendants do not deserve a death sentence if it is the result of the inadequate legal assistance provided by an unqualified lawyer.

\(^{336}\) See id.