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Ineffective Assistance of Counsel Before "Powell v. Alabama": Lessons from History for the Future of the Right to Counsel

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INTRODUCTION 2162

I. THE COMMON LAW AGENCY RULE STARTS TO BEND, 1882–1924 2169
A. *THE COMMON LAW RULE: COUNSEL INCOMPETENCE IS NOT GROUNDS FOR REVERSAL* 2169
B. *THE EXCEPTION:* STATE V. JONES, *1882* 2171
C. *STATE COURTS EMBELLISH THE COMMON LAW RULE, 1883–1924* 2173

II. THE COMMON LAW AGENCY RULE SNAPS, 1924–1927 2174
A. *ILLINOIS DEPARTS FROM THE COMMON LAW RULE:* PEOPLE V. NITTI, *1924* 2175
B. *INDIANA FOLLOWS:* SANCHEZ V. STATE, *1927* 2178

III. THE SUPREME COURT RATIFIES THE NEW RULE: *POWELL V. ALABAMA*, 1932 2180

CONCLUSION 2182

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INTRODUCTION

Isabella Nitti—the first woman sentenced to death in Illinois—was national news in her time.[1] Today she is remembered (if at all) as one of the notorious "husband killers" who inspired the Broadway play *Chicago*.[2] Less well remembered is that Nitti was also one of the first Americans to have her conviction reversed, and her death sentence vacated, on the basis that her lawyer was grossly incompetent.[3] Reviewing Nitti's trial on appeal, the Illinois Supreme Court described her attorney as "ignoran[t]," "stupid[]," and "unfamiliar with the simplest rules of evidence."[4] To uphold Nitti's conviction under these circumstances, the court reasoned, would reduce the federal and state constitutional guarantees of the right to counsel to "mere empty formalities."[5]

What may surprise lawyers and legal scholars about *People v. Nitti* is not its Broadway-ready facts, but its date: 1924. Today, we would classify *Nitti* as a case about "ineffective assistance of counsel" ("IAC"). Although rarely successful,[6] IAC claims now comprise the majority of challenges to criminal convictions in the United States.[7] Yet legal scholars typically frame IAC doctrine as a more recent invention. Some date its origins as recently as 1984, when the Supreme Court announced its modern restatement of the

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1. DOUGLAS PERRY, THE GIRLS OF MURDER CITY: FAME, LUST, AND THE BEAUTIFUL KILLERS WHO INSPIRED *CHICAGO* 118 (2010).

2. *See id.* at 245–46; Marianne Constable, *Chicago Husband-Killing and the "New Unwritten Law,"* 124 TRIQUARTERLY 85, 88 (2006). Nitti's birth name was Isabella and her nickname Sabella, while the Chicago press called her Sabelle. *See* PERRY, *supra* note 1, at 116. For consistency with legal records, I use Isabella.

3. *See infra* Part II.A.

4. People v. Nitti, 143 N.E. 448, 452 (Ill. 1924).

5. *Id.* at 453.

6. Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1074 & n.17 (2009); Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 632 (1986) (explaining that in a study of IAC claims from 1970 to 1983, only 3.9% were successful). Conversely, many meritorious IAC claims are never pursued. *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 683 (2007).

7. NANCY J. KING ET AL., NAT'L CTR. FOR STATE COURTS, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 5, 10 (2007), *available at* http://cdm16501.contentdm.oclc.org/cdm/ref/collection/criminal/id/102 (reporting that 81% of capital cases and 50.4% of non-capital cases raised an IAC claim in the early 2000s); JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONER PETITIONS IN THE FEDERAL COURTS, 1980–96, at 14 (1997), *available at* http://www.bjs.gov/content/pub/pdf/ppfc96.pdf (reporting that 25% of habeas petitions were based on IAC claims in the early 1990s). *See* Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. REV. 425, 427 (2011) (most federal habeas petitions include an IAC claim). IAC challenges "are the most frequently filed claims in both federal and state post-conviction relief proceedings." Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1118 (1999).

doctrine in *Strickland v. Washington*.[8] Others point to *Gideon v. Wainwright*, which incorporated the Sixth Amendment right to counsel against the states.[9] At the earliest, most legal scholars point to the 1932 case of *Powell v. Alabama* as the seminal case establishing a right to effective assistance.[10]

What these standard chronologies share is that they benchmark the right to effective counsel to Supreme Court cases interpreting the federal Constitution.[11] What they thereby miss is the fact that these Supreme Court cases did not emerge out of nowhere. To the contrary, *Powell* was itself the culmination of—and expressly drew upon—fifty years of doctrinal development in the state courts. Isabella Nitti's case, along with other state cases from the 1880s through the 1920s, shows that there is a longer history

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8. *E.g.*, Craig M. Bradley, *The Sixth Amendment Lives! A Reply to Professor Jonakait*, 83 J. CRIM. L. & CRIMINOLOGY 526, 534 (1992) (stating that *Strickland* "extended *Gideon* by holding that the Sixth Amendment required . . . effective assistance").

9. *See, e.g.*, Voigts, *supra* note 7, at 1120–21 (skipping from the 1791 Sixth Amendment to *Gideon*). Other scholars identify *McMann v. Richardson*, 397 U.S. 759 (1970), as the Supreme Court's "acknowledg[ment] that the right to counsel means the right to 'effective assistance of counsel.'" Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 59 n.3 (1986) (citation omitted).

10. *E.g.*, Fred Warren Bennett, *Toward Eliminating Bargain Basement Justice: Providing Indigent Defendants with Expert Services and an Adequate Defense*, 58 LAW & CONTEMP. PROBS. 95, 96 (1995) ("[T]he Supreme Court began as early as 1932 in *Powell v. Alabama* to define the boundaries of an indigent's right to appointed counsel . . . ." (footnote omitted)); Randolph N. Jonakait, *Foreword: Notes for a Consistent and Meaningful Sixth Amendment*, 82 J. CRIM. L. & CRIMINOLOGY 713, 721 (1992) (footnote omitted) ("The Court's mention of [the] right [to effective assistance] can be traced back to *Powell v. Alabama* . . . ."); Klein, *supra* note 6, at 627 (footnote omitted) ("The Supreme Court first acted in 1932 in *Powell v. Alabama* to redress the injustices confronting indigent defendants."); Joe Margulies, *Resource Deprivation and the Right to Counsel*, 80 J. CRIM. L. & CRIMINOLOGY 673, 683 (1989) (*Powell* is "the case upon which all right to counsel jurisprudence builds . . . ."); Michael B. Mushlin, Gideon v. Wainwright *Revisited: What Does the Right to Counsel Guarantee Today?*, 10 PACE L. REV. 327, 332 (1990) (footnote omitted) ("As early as 1932 the Court held that the right to appointed counsel means the right to 'effective' aid."); David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1280 n.185 (2002) (identifying *Powell* as the moment when the Supreme Court recognized a defendant's need for counsel); Jon R. Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U. L. REV. 289, 290–91 (1964) ("*Powell* interpolated the adjective 'effective' in the Sixth Amendment's requirement of 'the Assistance of Counsel.'"); Arthur J. Rotatori, Comment, Decoster III: *New Issues in Ineffective Assistance of Counsel*, 71 J. CRIM. L. & CRIMINOLOGY 275, 275 (1980) (identifying *Powell* as "[t]he earliest claim regarding the performance of counsel"); Note, *Effective Assistance of Counsel*, 49 VA. L. REV. 1531, 1531 (1963) ("The . . . question of what constitutes 'effective assistance of counsel' arises from the landmark decision of *Powell v. Alabama*."); *cf.* Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1031 (1964) (claiming that "[f]rom 1791 until 1932 state and federal courts saw practically no cases on the right to counsel").

11. *See, e.g.*, Bennett, *supra* note 10 (benchmarking the origin of the right to the Supreme Court's "defin[ition] [of its] boundaries"); Jonakait, *supra* note 10 (benchmarking the origin of the right to the "[Supreme] Court's [first] mention"); Klein, *supra* note 6, at 627 (dating origins of IAC jurisprudence to when "[t]he Supreme Court first acted" on it).

of IAC doctrine than many jurists have recognized.[12] To be sure, in these early state cases, courts referenced not just the Federal Constitution but also state constitutional and statutory provisions, the common law of new trials, and equitable principles. But these differences in how judges framed their IAC rulings before *Powell* and how they have framed them since are more rhetorical than substantive.[13] By charting these early state cases in the same doctrinal lineage as modern IAC jurisprudence, we can more fully understand the history of the American right to counsel.

Despite IAC doctrine's core significance to American criminal procedure, its history has received relatively little scholarly attention.[14] To be sure, law reviews offer a steady flood of commentary on the present contours of the IAC doctrine.[15] Yet this vast literature is almost entirely doctrinal and policy-oriented, both in methodology and source base. Since *Strickland*, and even before, jurists have churned out strident critiques of the prevailing IAC doctrine,[16] drawing upon Supreme Court and federal case law, policy

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12. But for works acknowledging this pre-*Powell* state-level history, see Sanjay K. Chhablani, *Disentangling the Right to Effective Assistance of Counsel*, 60 SYRACUSE L. REV. 1, 5–10 (2009) (tracing multiple strands of state court IAC cases); Thomas Hagel, *Toward a Uniform Statutory Standard for Effective Assistance of Counsel: A Right in Search of Definition After* Strickland, 17 LOY. U. CHI. L.J. 203, 204 (1986) (citing a state court case to show that IAC doctrine "is not a recent development"); James A. Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443, 443 (1977) (referring to the century-old "lineage" of IAC cases in the state courts).

13. *See supra* note 12. For the same reason, I refer interchangeably to cases of "negligence," "incompetence," "mistake," "inefficacy," and "ineffectiveness" of counsel. *But cf.* Harvey E. Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927, 934, 936 n.47 (1973) (attributing significance to the change from viewing effective assistance as a general due process right to viewing it as a Sixth Amendment right).

14. But for notable exceptions, see *supra* note 10.

15. *See* Chhablani, *supra* note 12, at 2–4 (summarizing doctrinal critiques of *Strickland*); Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 438–39 nn.74–77 (1996) (collecting articles criticizing *Strickland*); *infra* note 16.

16. *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1858 & n.138 (1994); William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 93 (1995); Goodpaster, *supra* note 9, at 59–60 (*Strickland* "do[es] nothing to improve the quality of criminal defense"); Hagel, *supra* note 12, at 209 (saying *Strickland* is unworkable); Jonakait, *supra* note 10, at 716 (*Strickland* "deprive[s] the Sixth Amendment of separate meaning" beyond due process); Klein, *supra* note 6, at 641–45; Cecelia Klingele, *Vindicating the Right to Counsel*, 25 FED. SENT'G REP. 87 (2012); Mushlin, *supra* note 10, at 332–33; Sklansky, *supra* note 10, at 1282 (*Strickland* "requirements have proven almost impossible to meet"); Gerald F. Uelmen, *2001: A Train Ride: A Guided Tour of the Sixth Amendment Right to Counsel*, 58 LAW & CONTEMP. PROBS. 13, 25 (1995) (implying that *Strickland* resurrects pre-*Gideon* standards for right to counsel); Richard L. Gabriel, Note, *The* Strickland *Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1261 (1986); David J. Gross, Note, *Sixth Amendment—Defendant's Dual Burden in Claims of Ineffective Assistance of Counsel*, 75 J. CRIM. L. & CRIMINOLOGY 755, 756 (1984).

reports, legal scholarship, and personal experience. In such commentary, the pre-*Powell* cases are mentioned in passing (if at all), and without sustained analysis of how the doctrine changed over time within those cases.[17]

This doctrinal literature has served to maintain awareness of the permanent crisis in indigent defense, and it may have had some influence on courts.[18] But although we have thousands of pages identifying problems with IAC doctrine, this literature offers little understanding of where the doctrine came from. Focusing on *Strickland*, or even the 1960s and 1970s federal cases that immediately preceded *Strickland*, does not go back far enough and thereby risks misidentifying the causes of—and overestimating the prospects for solving—the doctrine's flaws.[19] As Sanjay Chhablani has also recognized in an essay drawing on many of the same state cases that I use here, these early state cases "sowed the seeds" for the flaws in present-day IAC doctrine.[20] This Essay views IAC through the lens of doctrinal history, rather than doctrinal analysis, and draws upon the undertapped source base

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17. Prior to *Strickland*, doctrinal scholarship on the right to counsel sometimes included the early state cases in its analysis but did not trace historical change within this body of cases. *See, e.g.*, Bines, *supra* note 13, at 927–29, 944 n.78; David Fellman, *The Right to Counsel Under State Law*, 1955 WIS. L. REV. 281, 309–15; Waltz, *supra* note 10, at 293; Bruce Andrew Green, Note, *A Functional Analysis of the Effective Assistance of Counsel*, 80 COLUM. L. REV. 1053, 1058 & n.35 (1980); Comment, *Assuring the Right to an Adequately Prepared Defense*, 65 J. CRIM. L. & CRIMINOLOGY 302, 302–03 & n.5 (1974); Note, *Effective Assistance of Counsel*, *supra* note 10.

Post-*Strickland*, the early state cases dropped out of the IAC scholarship almost entirely, with a few exceptions, most of which still did not analyze them in detail. *See, e.g.*, Kirchmeier, *supra* note 15; Uelmen, *supra* note 16, at 13–15; *supra* note 12. Klein notes that lawyer incompetence was not grounds for reversal of a conviction in English law and that American courts generally followed that rule. Klein, *supra* note 6, at 629 n.14 (citing *State v. Dreher*, 38 S.W. 567 (Mo. 1897)). But Klein does not acknowledge what I show in this Essay: that state-level American courts were moving toward modifying this rule in the early twentieth century.

18. *See* Martinez v. Ryan, 132 S. Ct. 1309, 1318 (2012) (citing Primus, *supra* note 6).

19. An objection might be made that the doctrine's origins are irrelevant to its future, because courts can always rewrite doctrine. But I would argue that the origins of doctrinal concepts can set enduring, even if invisible, outer limits on that doctrine's flexibility. By way of comparison, James Whitman has shown how the theological origins of the "reasonable doubt" doctrine may limit its comprehensibility for present-day jurors. *See generally* JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT (2008).

20. Chhablani, *supra* note 12, at 5. Although I agree with Chhablani that these early state cases are important precursors to modern doctrine, my analysis and conclusions differ from Chhablani's. He divides the early cases into two groups, those grounded in the right to counsel and those grounded in more general due process concerns, and argues that the former approach provided "a more robust view of attorneys' obligation" to clients. *Id.* at 6–10. In contrast, I view the early cases as one group in which we can trace movement over time towards a more flexible rule. My argument also differs from Chhablani's in that he uses these early state cases as support for a conventional argument for doctrinal reform of *Strickland* (specifically, for the elimination of the prejudice prong), *see id.* at 45, whereas I view these state cases as reason for skepticism about the utility of doctrinal reform altogether. *See infra* text accompanying notes 25–34.

of early state court IAC opinions to suggest a new way of thinking about the past, but also the future, of the right to counsel.[21]

Specifically, this Essay reverses the standard chronology in the literature on IAC. Instead of beginning with *Powell*, this Essay ends there, tracing the origins and early evolution of IAC doctrine in state courts beginning in the 1880s and culminating in the Supreme Court's oblique ratification of the emergent doctrine in 1932. The traditional common law agency rule stated that counsel incompetence was never grounds for a new trial. Between the 1880s and the 1920s, state appellate judges chipped away at that rule, developing a more flexible doctrine that allowed appellate courts to reverse criminal convictions in cases where, because of egregious attorney ineptitude, there was reason to think the verdict might have been different with a competent lawyer.

In other words, state judges had already invented the *Strickland* rule long before Justice O'Connor did.[22] This historical narrative suggests two lessons for criminal procedure scholarship. First, legal scholars sometimes frame the right to effective assistance of counsel as "derivative" of the primary right to counsel.[23] The IAC doctrine's history demonstrates instead that effective assistance has long been understood as intertwined with the right to counsel.[24]

Second, and more significant for the purposes of this Symposium, the early history of IAC doctrine illuminates the limitations of trying to use right-to-counsel jurisprudence to reform the criminal justice system. To be sure, many scholars and practitioners acknowledge these limitations to the extent that they criticize the current version of IAC doctrine as inadequate.

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21. A note about methodology: This Essay's source base, published state appellate opinions, admittedly does not tell us much about how law is lived and understood on the ground. *See* William E. Forbath, Hendrick Hartog & Martha Minow, *Introduction: Legal Histories from Below*, 1985 WIS. L. REV. 759, 760–62 (suggesting that legal historians should not assume that American law is fully contained within authoritative, official texts); Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 654–55 (2001) (observing that legal rules as articulated by appellate courts are often irrelevant to actual practice in lower-level courts). Nevertheless, published opinions remain the logical first step for tracing the history of doctrine. *See, e.g.*, Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 121–22 (1984) (defending the study of elite legal consciousness because it "may represent . . . an elaborated, purified, and formalized version" of ideas held throughout society); Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, 83 J. AM. HIST. 44, 50 n.15 (1996) (explaining that appellate cases can be significant for legal history, even if they are "by definition atypical," because of their policymaking influence and because they "hint at how judges conceptualized particular legal problems"). I have, however, focused not upon Supreme Court or well-known state cases, but upon more obscure state court opinions that tell us at least something about how members of bench and bar thought about the right to counsel. Certainly this Essay is offered as part of the conversation about the history of the right to counsel, not as the final word.

22. *See infra* Part I.C.

23. *E.g.*, Bradley, *supra* note 8, at 534, 536.

24. *See, e.g.*, Uelmen, *supra* note 16, at 28–29.

However, in arguing that modern IAC doctrine fails to protect defendants' rights or to ensure a robust adversary process, many scholars blame the specifics of *Strickland*[25] and propose doctrinal solutions.[26] The fault is not, perhaps, *Strickland*'s, as long before *Strickland* state judges were already applying a similar test.[27] And the failures of IAC doctrine—whatever its particulars—are not surprising in light of the doctrine's origins. IAC emerged as a quasi-equitable response to individual instances of extremely egregious counsel incompetence.[28] It was not designed as a lever for systemic reform or an all-purpose guarantor of the adversary process.[29]

I wish to emphasize that this Essay has modest aims and does not attempt to provide a comprehensive account of present-day IAC doctrine or to propose grand strategies for reform. Rather, I offer this historical narrative in the hope that it may offer useful fodder for thought and discussion for criminal procedure practitioners and scholars who spend their days litigating and pondering present-day IAC cases, but who may not be familiar with the doctrine's early origins. I expect that others may draw different lessons from this history than I do, and, of course, the entire business of attempting to draw lessons from history is risky; the past has a way of resisting neat characterizations or morals.

For my own part, however, I see this Essay as joining a contrapuntal strain of the IAC scholarship that questions not just *Strickland*, but whether right-to-counsel litigation is capable of imposing meaningful discipline on

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25. *See supra* note 16 (collecting criticisms of *Strickland*); *see generally* Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1 (arguing that psychological biases hinder evaluation of IAC claims); Hessick, *supra* note 6 (arguing that IAC jurisprudence as applied to sentencing is insufficiently developed); Primus, *supra* note 6 (arguing that since IAC claims must often be brought on collateral review, prisoners serving short sentences have no incentive to press IAC claims).

26. *E.g.*, Chhablani, *supra* note 12, at 53–54 (arguing that *Strickland*, and not just resource disparities, is responsible for the poor performance of many defense lawyers, thus implying that modifying *Strickland* would improve outcomes); Geimer, *supra* note 16, at 96 (proposing "[a] campaign to secure the overruling of *Strickland* and replace it with a doctrine that can make the right to counsel meaningful"); Goodpaster, *supra* note 9, at 91 (arguing that *Strickland* should be modified to impose a "more rigorous" standard of effective assistance, though also calling for systemic reforms); Suzanne E. Mounts, *The Right to Counsel and the Indigent Defense System*, 14 N.Y.U. REV. L. & SOC. CHANGE 221, 222 (1986) (arguing that if defendant proves systemic pressures on public defenders, burden should shift to government to prove that defendant was competently represented).

27. *See infra* Part I.C.

28. *Cf.* Bines, *supra* note 13. Some critics charge that *Strickland* insulates *even* the most egregious incompetence. *E.g.*, Bright, *supra* note 16, at 1858 & n.138; Geimer, *supra* note 16, at 147–48, 160.

29. *Cf.* Goodpaster, *supra* note 9, at 64 (arguing that IAC doctrine should be designed so as to "help insure that criminal adjudications deliver results as correct as reasonably possible" and "that the criminal justice system accords fairness to the defendant"). Goodpaster assumes that "a reasonably rigorous effective assistance standard would inferentially require states to provide the resources necessary" for indigent defense. *Id.* at 92.

the adversary system.[30] More generally, some criminal procedure scholars, in recent years, have called for prioritizing systemic legislative and policy reforms over doctrinal adjustments[31] or even for rethinking the adversarial system altogether.[32] I see the history that I describe as providing additional evidentiary support for arguments that prioritize structural over doctrinal reforms, although I take no position here on what such reforms should look like in particular.[33] The question of how appellate judges should respond to trial counsel incompetence has been a recurring one in American law, predating *Strickland* by at least a century. It may not be the specifics of *Strickland*, but the structure of the American adversary system that disadvantages indigent defendants.[34]

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30. *E.g.*, Richard L. Abel, *What Is the Assistance of Counsel Effective For?*, 14 N.Y.U. REV. L. & SOC. CHANGE 165, 170–71 (1986) (criticizing lawyers for relying on "sporadic and ineffective appellate reviews" rather than addressing indigent defense at the front end); Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 75 (1993) ("[P]lac[ing] little store in reliance on case-by-case litigation of ineffective assistance claims or in efforts to strengthen doctrinal formulations of the Sixth Amendment standard."); Peter W. Tague, *Ensuring Able Representation for Publicly-Funded Criminal Defendants: Lessons from England*, 69 U. CIN. L. REV. 273, 274 (2000) ("Appellate review of effectiveness claims is an inefficient and unrealistic way of approaching the problem [of adequate representation]."). *Cf.* Geimer, *supra* note 16, at 161–64, 172–76 (calling for bar action to complement doctrinal reform); Klein, *supra* note 6, at 681–83, 693 (calling on the bar to address indigent defense); Chester L. Mirsky, *Systemic Reform: Some Thoughts on Taking the Cart Before the Horse*, 14 N.Y.U. REV. L. & SOC. CHANGE 243, 243–44 (1986) (commenting that some scholars believe the courts and not the legislature can bring change to indigent defense).

31. *E.g.*, Donald A. Dripps, *Up from* Gideon, 45 TEX. TECH. L. REV 113, 123 (2012) (suggesting that "telling the Supreme Court" how to improve indigent defense has failed and proposing instead to consider reforms that would lower the cost of indigent defense); Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049 (2013). *Cf.* Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy*, 42 AM. CRIM. L. REV. 1219, 1222 (2005) (calling for a "shift [in] focus from post-conviction strategies and evidence-related flaws . . . to broader questions about the structure and administration of the justice system"); Zimpleman, *supra* note 7, at 461 (calling for "reforms . . . beyond simply tinkering with procedural rules, doctrine, and standards of review").

32. *See, e.g.*, Stephanos Bibas, Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence?*, *in* CRIMINAL PROCEDURE STORIES 29, 146 (Carol S. Steiker ed., 2006) (advocating "a quasi-inquisitorial system"); Christopher Slobogin, *Lessons from Inquisitorialism* 2, (Vanderbilt Univ. Law Sch. Pub. Law & Legal Theory Working Paper No. 12-36, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2320103 (proposing reforms that borrow "from the inquisitorial model of criminal process favored in Europe").

33. I do not intend here to take a position in the perennial debate on the utility of seeking reform through the courts more generally; conceivably, systemic criminal justice reforms might well be spurred by court orders. *Cf.* Margaret A. Costello, *Fulfilling the Unfulfilled Promise of* Gideon*: Litigation as a Viable Strategic Tool*, 99 IOWA L. REV. 1951 (2014). I suggest only that individual IAC cases are unlikely to prove the most effective doctrinal vehicle for such reform litigation.

34. *See* JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 1–2 (A.W. Brian Simpson ed., 2003) ("[A]dversary procedure bestows [a built-in advantage] upon persons who

In the first Part of this Essay, I outline the common law agency rule that precluded reversal of a judgment on the basis of counsel negligence. While this rule was developed in civil litigation, state judges also applied it in criminal appeals. In many states, judges continued to apply the rule strictly through the 1920s or even later.[35] However, from the 1880s through the 1920s, some state judges moved toward a more flexible application of the rule in criminal cases. Though judges still recited the traditional rule that counsel negligence could not be grounds for a new trial, they now embellished that rule with caveats suggesting that there might be a loophole for exceptional cases.

In the second Part, I trace how state judges opened up that loophole in the 1920s and began to reverse criminal convictions in cases of egregious attorney incompetence. I describe two of these cases in detail: *People v. Nitti*, the 1924 Illinois case with which I opened the Essay[36]; and *Sanchez v. State*, a 1927 Indiana case.[37] Finally, I conclude with a brief discussion of *Powell v. Alabama*, in which the U.S. Supreme Court ratified and constitutionalized the nascent doctrine on "ineffective" counsel.[38] As I show with this Essay, *Powell* was not the beginning it is often portrayed as, but a turning point in the long history of the American right to counsel.

I. THE COMMON LAW AGENCY RULE STARTS TO BEND, 1882–1924

A. *THE COMMON LAW RULE: COUNSEL INCOMPETENCE IS NOT GROUNDS FOR REVERSAL*

Historically, mistake or negligence of counsel was simply not grounds for a new trial. An attorney-client relationship was legally defined as "a relation of agency . . . governed by the same rules which apply to other agencies."[39] Under this agency model of representation, a lawyer's client was presumed to have ratified and assumed the risk of any action taken on his

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can afford to hire skilled trial counsel . . . . Because most persons accused of serious crimes are indigent or near indigent, the wealth effect is a profound structural flaw in adversary criminal procedure.").

35. *See* Waltz, *supra* note 10, at 296–97.

36. People v. Nitti, 143 N.E. 448 (Ill. 1924)

37. Sanchez v. State, 157 N.E. 1 (Ind. 1927).

38. Powell v. Alabama, 287 U.S. 45 (1932).

39. FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY § 807, at 665 (1889). *But see* Charles Snitow, Note, *Attorney and Client: Negligence or Misconduct of Attorney: New Trial*, 14 CORNELL L.Q. 469, 469–70 & n.9 (1929) (questioning whether attorneys should be treated as ordinary agents and noting that North Carolina law distinguishes between the two).

behalf.[40] In cases rising to malpractice, the client could pursue tort remedies against the attorney,[41] but could not expect reversal of a judgment.[42]

This rule and its rationale were developed in civil litigation, but courts also applied the rule in criminal cases.[43] As one commentator put it: "A client and his attorney must ordinarily 'hang together,' so far as the trial and its outcome are concerned, although it may be the client alone who hangs afterwards."[44] If a convict's lawyer had truly mismanaged his defense, he was best advised to seek extrajudicial relief, such as executive clemency.[45]

The agency rule applied most logically where the defendant had retained counsel; "[h]aving selected counsel to his own liking," he must be prepared to "suffer the accompanying inconveniences or detriment."[46] But judges were equally unwilling to reverse convictions in cases of court-appointed counsel. In such appeals, the notion that counsel had acted as the defendant's freely chosen agent was a patent fiction.[47] But judges' hesitation to criticize fellows of the bar was real. Thus, where the agency theory fell

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40. *See* MECHEM, *supra* note 39, § 811, at 671 ("So whatever the attorney does in the prosecution of the remedy, if it be not done fraudulently or collusively, is binding upon the client, although it may result disastrously to him."). *Cf.* State v. Fontenot, 19 So. 112, 113 (La. 1896) ("The defendant must be bound by the conduct of his counsel . . . .").

41. *See* MECHEM, *supra* note 39, § 828, at 695–96 (discussing attorney liability for negligence in trial of an action); Recent Cases—*Attorney and Client—Criminal Law—New Trial Because of Incompetency of Counsel*, 14 IOWA L. REV. 476, 477 (1929) ("In cases of gross negligence and incompetency, the client of course has a right of action against his attorney.").

42. *See, e.g.*, Gehrke v. Jod, 59 Mo. 522 (1875); Field v. Matson, 8 Mo. 686 (1844). This is still the rule in England; moreover, English barristers also enjoy civil immunity for negligence in criminal cases. Strazzella, *supra* note 12, at 443 n.1.

43. *See, e.g.*, State v. Dreher, 38 S.W. 567, 569–70 (Mo. 1897); Vowells v. Commonwealth, 15 Ky. L. Rptr. 574, 574 (Ky. 1894); State v. Currens, 27 P. 140, 140–41 (Kan. 1891); Darbey v. State, 3 S.E. 663, 666 (Ga. 1887); Hudson v. State, 76 Ga. 727, 729 (1886); State v. Benge, 17 N.W. 100, 102 (Iowa 1883); *see also* Jack R. Bailey, Comment, *Defense Counsel Incompetence in Criminal Trials: Past—Present—Future*, 10 S. TEX. L.J. 121, 126 n.26 (1967–1968) (collecting cases denying relief pre-1932). Generally these cases produced published opinions when a defendant appealed the denial of a new trial motion. Of course, there is no way to know how many lower judges (if any) granted a new trial on IAC grounds without producing a published opinion or responded to egregious attorney mistakes by stretching other doctrines to grant relief without so stating on the record.

44. *Incompetence of Attorney as Ground for New Trial*, 65 U.S. L. REV. 6, 6 (1931).

45. *See Benge*, 17 N.W. at 102 (upholding conviction but noting "that if the defendant is innocent, and has been wrongfully convicted through the notorious incompetency of his attorney below . . . we have no doubt that such showing could be made to the executive as would address itself strongly to his clemency."). In one 1920s case, the New York Court of Appeals affirmed the conviction but "wrote to the Governor recommending that he commute the death sentence to life imprisonment" on the grounds "that the condemned man had been improperly defended at the trial." D.F.M., Note, *Incompetency of Counsel as the Basis for a New Trial in Criminal Cases*, 71 U. PA. L. REV. 379, 383 n.32 (1923).

46. State v. Dangelo, 166 N.W. 587, 588 (Iowa 1918); *cf.* O'Brien v. Commonwealth, 115 Ky. 608, 621–22 (Ky. 1903) (refusing to reverse conviction where defendant's mother had selected counsel).

47. *See* Waltz, *supra* note 10, at 297.

logically short, professional solidarity made up the difference to justify adherence to the common law rule. The Illinois Supreme Court observed that it was improper to "reverse a judgment in a criminal case where, in looking backward over the trial, it might seem defendant's counsel, had made some tactical blunder."[48] The Missouri Supreme Court refused "to condemn the counsel, who gave defendant his services without reward."[49]

B. THE EXCEPTION: STATE V. JONES, *1882*

Before the 1920s, only a very few published opinions reversed convictions on counsel incompetence grounds (either directly or indirectly).[50] The most notable of these exceptions was *State v. Jones*, in which an intermediate Missouri court reasoned that in criminal cases, the agency rule might not strictly apply.[51] *Jones* also departed from the rhetoric of similar cases of its era, which typically strained to portray trial counsel's alleged mistakes as litigation tactics. In contrast, *Jones* did not hold back, describing the trial lawyer's performance as "an exhibition of ignorance, stupidity, and silliness that could not be more absurd or fantastical, if it came from an idiot or a lunatic."[52] Anticipating modern IAC doctrine, the St. Louis Court of Appeals acknowledged the ordinary agency rule but asked, "must there be absolutely no limit to the operation of this rule, even where a human life is at stake?"[53] Whether the court meant to suggest that all criminal cases should be treated as exceptions, or just capital cases,[54] this

48. People v. Barnes, 110 N.E. 881, 884 (Ill. 1915).

49. State v. Dreher, 385 S.W. 567, 571 (Mo. 1897).

50. *See* Bailey, *supra* note 43, at 126 n.27 (collecting cases granting relief; after a total of only four such cases between 1880 and 1920, he lists six such cases in the 1920s alone).

51. State v. Jones, 12 Mo. App. 93 (Mo. Ct. App. 1882). Notably, the same judge who wrote the *Jones* opinion had, two years earlier, written a similar opinion suggesting that defendants should not be strictly bound to the attorney's mistakes if the attorney had acted out of deliberate treachery or sabotage, not mere negligence: "Men must not be murdered by technicalities." State v. Lewis, 9 Mo. App. 321, 324 (Mo. Ct. App. 1880). In that case, however, the precise ground for reversal was not counsel's incompetence but the trial court's erroneous refusal to grant the defendant's requested continuance upon discovering counsel's failure to complete, prior to trial, several tasks he had promised to complete, such as taking depositions and issuing subpoenas of several defense witnesses. *Id.* at 325.

52. *Jones*, 12 Mo. App. at 94–95.

53. *Id.* at 94.

54. *Id.* Elsewhere the opinion suggests that the relevant distinction may not be the type of case, but the degree of incompetence:

> While it is true . . . that there can be no relief against a mere negligent omission of an attorney presumably competent . . . yet there is high authority for the granting of relief in extreme cases, where the client's loss results, not merely from negligence, but from the gross ignorance, incompetence, or misconduct of the attorney.

Id. at 97 (citation omitted).

line from *Jones* introduced into American law something new: the possibility of a more lenient approach to some set of counsel incompetence claims.

Despite *Jones*'s innovative quality, the court portrayed its opinion as simply an extension of existing law, in line with common law conventions, reasoning that upholding the result of a farcical trial would make "a mockery of the purposes of the constitution and the law."[55] More specifically, *Jones* characterized its holding as an obvious corollary to the right to counsel: the core right that, in the court's description, elevated American law above "the barbarity of the ancient law."[56] As this case demonstrated, a defendant could be nominally represented but "*in effect* . . . without counsel, such as the law would secure to every person accused of crime."[57]

By standard measures, such as number of citations, *Jones* had little influence. In the decades that followed, *Jones* was referenced only a few times by other courts, and not as authority but as an outlier.[58] In the 1897 case of *State v. Dreher*, the Missouri Supreme Court appeared to overrule *Jones*, noting that it had never been followed "in this or any other state."[59] *Dreher* observed that after "a most laborious search" it appeared that *Jones* was the only case on record "in which an appellate court has reversed a sentence or judgment on the ground of the negligence or incompetency of an attorney."[60] *Jones* had been based on "no authority" and was "accordingly disapproved."[61]

Yet beneath the surface, the idea of ineffective counsel introduced by *Jones* would have a long half-life in American law. In fact, it was not clear whether *Jones* had actually been overruled. Even while pronouncing *Jones* a dead letter, the Missouri Supreme Court admitted that its ruling had "wrought justice."[62] The *Jones* court had "suffered a hard case to make bad law," and its holding could not be "sanction[ed] as a rule of practice or procedure."[63] Had Missouri's high court really overruled *Jones*, then? Or did it mean to affirm that lower courts might equitably skirt the agency rule in egregious cases of counsel incompetence?

When later courts referenced *Jones*, they described it in ambiguous terms. In 1918, the Iowa Supreme Court described *Jones* as "an extreme

55. *Id.* at 98.

56. *Id.* at 97.

57. *Id.* at 98 (emphasis added).

58. *E.g.*, State v. Benge, 17 N.W. 100, 102 (Iowa 1883).

59. State v. Dreher, 38 S.W. 567, 570 (Mo. 1897).

60. *Id.* It is not clear whether the court meant the only case in Missouri, or the only case anywhere. Either way, *Jones* was exceptional.

61. *Id.* at 570–71.

62. *Id.* at 570.

63. *Id.* at 570–71.

case" that had been "overruled in *State v. Dreher*."[64] But the Iowa court then suggested that *Jones* might provide authority for ordering a new trial in a case of "manifest[] miscarr[iage]" of justice.[65] Also with reference to *Jones*, the Nevada Supreme Court suggested that a new trial might be granted in "an extreme case" amounting to "a palpable miscarriage of justice," but not because of any legal authority; rather, "[t]he common dictates of humanity would prescribe such a course, especially where human life is involved."[66]

C. *STATE COURTS EMBELLISH THE COMMON LAW RULE, 1883–1924*

When state courts heard counsel-incompetence claims in coming decades, they issued rulings that adhered, in result, to the agency rule reaffirmed in *Dreher*.[67] But the spirit of *Jones* hovered in these opinions, too, whenever judges hedged around the doctrine's edges or implied that they might rule differently in a more troubling case. Few courts actually described the seemingly simple agency rule as dispositive. In almost all of the state counsel incompetence cases from 1883 through 1924, the opinion began by stating that attorney negligence was not grounds for reversing a judgment.[68] But many opinions added caveats, hinting that the rule might be "less strict[]" in criminal cases, "especially where the attorney defending has been appointed by the court."[69] Others trimmed the rule with considerations such as whether the attorney's alleged mistakes could be characterized as reasonable decisions. Even knowledgeable lawyers, one court pointed out, often disagree over "whether tenable objections are advantageous."[70] Courts also used the language of "prejudicial error."[71] For

64. State v. Dangelo, 166 N.W. 587, 588 (Iowa 1918).

65. *Id.*

66. State v. Jukich, 242 P. 590, 595 (Nev. 1926).

67. Many cases cited *Dreher* as authority for the rule. *See, e.g.*, Commonwealth v. Dascalakis, 140 N.E. 470, 476 (Mass. 1923); State v. Dangelo, 166 N.W. 587, 588 (Iowa 1918); *see also* Waltz, *supra* note 10, at 309 (*Dreher* "was once a frequently cited opinion in support of the widely held view that intrinsic ineffectiveness of counsel afforded no basis for post-conviction relief").

68. This analysis is based upon the cases cited in this section of the Essay, which I found by following citations backward from the secondary literature on IAC doctrine and opinions and briefs in leading right-to-counsel cases, then snowballing to include any cases cited in the cases I found. The fact that in each of these opinions, the highest court of a particular state was limited in its search for precedent to scattered citations and decisions from other states suggests that the number of these cases was not great, but I do not claim to have found all of them. An exception to the pattern was *State v. Currens*, 22 P. 140 (Kan. 1891). There the court disposed of a counsel negligence claim simply by finding "no indication of negligence."

69. *Dangelo*, 166 N.W. at 588.

70. *Id.* at 589; *see also Dascalakis*, 140 N.E. at 476–77; People v. Martin, 177 N.W. 193, 193 (Mich. 1920).

71. *E.g., Dascalakis*, 140 N.E. at 477; State v. Benge, 17 N.W. 100, 102 (Iowa 1883). The Georgia Supreme Court weighed a lawyer's neglect and experience against whether the defendant had "suffered detriment." Hudson v. State, 76 Ga. 727, 729–31 (1886).

instance, the Georgia Supreme Court affirmed a conviction because "[n]o lawyer, . . . however great his ability, could have produced a different result . . . under the evidence in this case."[72]

Once courts opened the door to guilt or innocence as a relevant factor in the counsel incompetence analysis, they had left behind a strict agency rule. In a telling caveat, the Georgia Supreme Court admitted that it "would hesitate to hold" that a prisoner could not have a new trial "if the evidence established [his] innocence" and his counsel had been drunk or unskilled.[73] Such caveats would provide the doctrinal opening that judges needed to begin reversing convictions in the 1920s.

In sum, by the mid-1920s, the common law agency rule remained in place, but had started to bend. The high court of Massachusetts insisted as late as 1923 that it was "beyond the power of the court to set aside a verdict because of the inefficiency of counsel."[74] But some states had shifted, at least rhetorically, to a more flexible approach. In 1924, the Colorado Supreme Court gave a telling summary of the state of the law.[75] An appellant argued on a writ of *coram nobis* that his counsel had failed to make a defense. The Colorado court dismissed the claim, but on the procedural ground that the appropriate vehicle was a motion for new trial, not a writ of *coram nobis*. The court acknowledged that "inefficient" defense was "a recognized ground for a new trial, if the appropriate facts exist."[76]

II. THE COMMON LAW AGENCY RULE SNAPS, 1924–1927

The agency rule, which had been bending since the 1880s, snapped in the 1920s. To be sure, many state courts continued to uphold convictions over claims of attorney mistakes.[77] But a few state courts ordered new trials in counsel incompetence cases—for the first time since the 1882 Missouri

72. Darbey v. State, 3 S.E. 663, 666 (Ga. 1887); *see also Dangelo*, 166 N.W. at 591.

73. *Hudson*, 76 Ga. at 731.

74. *Dascalakis*, 140 N.E. at 476; *see also* Sayre v. Commonwealth, 238 S.W. 737, 738–40 (Ky. 1922) (acknowledging incompetence of defendant's counsel but finding no authority to justify reversal on that basis). *Dascalakis* is further discussed in Alan Rogers, *"A Sacred Duty": Court Appointed Attorneys in Massachusetts Capital Cases, 1780–1980*, 41 AM. J. LEGAL HIST. 440, 451–56 (1997). Notably, in that case the defendant's court-appointed attorney was "one of a handful of African-American lawyers practicing in Massachusetts in the 1920's"— much to the defendant's dismay—and thus, Rogers identifies racism as a motive behind the defendant's later claims that his attorney had mismanaged his defense. *Id.*

75. *See* Mandell v. People, 231 P. 199 (Colo. 1924).

76. *Id.* at 202.

77. *E.g.*, People v. Gourdin, 291 P. 701, 702 (Cal. Dist. Ct. App. 1930); State v. Lindstrom, 231 N.W. 12, 14 (Minn. 1930); State v. Thompson, 219 N.W. 218, 223 (N.D. 1928); State v. Blight, 273 P. 751, 752 (Wash. 1929). A few states introduced the benchmark of "fair trial," presaging later due process jurisprudence. *See, e.g.*, State v. Jukich, 242 P. 590, 595 (Nev. 1926); *see also* People v. Voelker, 221 N.Y.S. 760, 767 (N.Y. App. Div. 1927).

case of *State v. Jones*.[78] At first, courts funneled these rulings into other doctrinal containers, pointing to attorney incompetence not as an independent basis for a new trial but to justify relaxing procedural default rules.[79] But a few courts went further and directly identified counsel incompetence as the grounds for reversal.[80] Perhaps not coincidentally, two of these early reversals emerged from the notoriously corrupt courts of metropolitan Chicago.

A. *ILLINOIS DEPARTS FROM THE COMMON LAW RULE:* PEOPLE V. NITTI, *1924*

The ordeals of Isabella Nitti began in 1922, when her husband Frank disappeared. Shortly thereafter, Isabella remarried Peter Crudelle, a much younger farmhand on her family's small property outside Chicago. A year after Frank's disappearance, a body was found in a nearby ditch,[81] killed by a blow to the head. Isabella Nitti and Peter Crudelle were jointly convicted of murder and sentenced to death. While Nitti and Crudelle were represented by an attorney at trial, they did not choose to employ him. According to affidavits filed on appeal, the attorney had been "employed by someone else" or had "volunteered," but no one knew for sure.[82] Nitti "had very few and limited conversations with [her lawyer] through an interpreter previous to her trial," as she did not speak English and he did not speak Italian.[83]

As later described by the Illinois Supreme Court, Nitti and Crudelle's trial was somewhat chaotic. With no eyewitnesses or confessions, the case came down to circumstantial evidence. Various relatives and acquaintances alleged that the co-defendants had begun a love affair prior to Frank's disappearance.[84] One of Isabella's and Frank's sons had contributed funds to the prosecution.[85] A second son was initially charged as a co-defendant,

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78. *See* D.F.M., *supra* note 45, at 379–83 (collecting cases); Bailey, *supra* note 43, at 126 n.27 (collecting cases granting relief); *Incompetence of Attorney*, *supra* note 44, at 6 (noting "rare instances" of courts granting relief in cases of "flagrant" attorney incompetence). One example is State v. Keller, 223 N.W. 698, 699–700 (N.D. 1929) (reversing conviction where defendant was "ignorant of his rights" and attorney "was so drunk that in effect [defendant] had no counsel"); *cf.* Cornwell v. State, 140 N.E. 363, 363–64 (Ohio 1922) (per curiam) (reversing conviction where court appointed additional counsel for the defendant notwithstanding that defendant had already retained counsel, and trial was marred by the two attorneys' conflicting views and lack of cooperation, violating defendant's right to fair trial).

79. *See, e.g.*, Lloyd v. State, 175 P. 374, 374–75 (Okla. Crim. App. 1918).

80. *See infra* Part II.A–B.

81. The face had decomposed, but witnesses testified that a ring found with the body belonged to Frank Nitti. People v. Nitti, 143 N.E. 448, 449–51 (1924); *see* Supreme Court of Ill. Case Files 1820–1970, Case No. 15740, People v. Nitti, Part 1, 71–82, 86–91, Part 3, 7–8 (Micrographics Div., Ill. State Archives) [*hereinafter* Nitti Case File].

82. People v. Nitti, 143 N.E. 448, 457 (Ill. 1924).

83. Nitti Case File, *supra* note 81, at Part 6, 89.

84. *See Nitti*, 143 N.E. at 451–52; Nitti Case File, *supra* note 81, at Part 4, 44–46, 56.

85. *Nitti*, 143 N.E. at 450.

until he agreed to testify for the state.[86] A third son had been seen fighting with his father shortly before his disappearance, but this evidence was kept from the jury because the son made death threats to the witness to the fight.[87] Language and ethnic barriers added further confusion; the defendants and key witnesses spoke a Southern Italian dialect that the courtroom interpreters could not translate.[88]

Throughout, the co-defendants' attorney proved "unfamiliar with the simplest rules of evidence and incapable of comprehending the rules when suggested to him by the trial court."[89] On several occasions, he posed questions to witnesses that risked eliciting incriminating evidence.[90] The trial judge finally interjected, "This court cannot stand by and permit you constantly to ask questions that are detrimental to your clients."[91] Indignant, the attorney replied, "Your honor, I think I have practiced law long enough to know how to try a case."[92] The Illinois Supreme Court, assessing trial counsel's examination of the state's key witness, proposed that "[a] layman of ordinary intelligence" would have done better.[93]

Italian community leaders "did not think it a coincidence" that Chicago's first woman sentenced to death was "a poor, unattractive, non-English-speaking Italian immigrant."[94] Six young Italian-American lawyers took on Nitti's appeal pro bono.[95] They also took Nitti to a hairdresser, bought her a suit, and taught her some English; some observers attributed

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86. *See id.* at 449; Nitti Case File, *supra* note 81, at Part 4, 79–80, Part 5, 40–41, 67.

87. *Nitti*, 143 N.E. at 454, 456–57; Nitti Case File, *supra* note 81, at Part 6, 85–86.

88. *Nitti*, 143 N.E. at 451; *see* Nitti Case File, *supra* note 81, at Part 2, 54–55 (court and attorneys discussing whether translator of "Bari dialect" could be located); *id.* at Part 3, 1–3 (court hiring Bari translator); *id.* at Part 4, 26–29 (discussing whether interpreter should be switched out given difficulty understanding dialect).

89. *Nitti*, 143 N.E. at 452.

90. *See, e.g.*, Nitti Case File, *supra* note 81, at Part 1, 80 ("You are asking a lot of questions here that are highly improper and detrimental to your client . . . ."); *id.* at Part 2, 71 ("I dont [sic] think it is a proper line of examination to ask this man whether [co-defendant Peter Crudelle], charged with killing his father, ever did him any harm.") At another point, trial counsel attempted an objection to which the court replied, "Your grounds are ridiculous, Mr. Moran, you don't know what you are talking about. Now, listen, if you don't know how to protect the rights of parties, I will protect them." *Id.* at Part 2, 18.

91. *Nitti*, 143 N.E. at 452. The appellate opinion misquoted the trial transcript. *See* Nitti Case File, *supra* note 81, at Part 1, 80–81 ("The court cannot stand by and ask [handwritten: allow] you constantly to ask questions that are detrimental to your clients.").

92. *Nitti*, 143 N.E. at 452; *see also id.* at 453 ("You seem to think I don't know my case, but I do know more about this case than any other man in Cook county [sic]."); Nitti Case File, *supra* note 81, at Part 3, 87.

93. *Nitti*, 143 N.E. at 453.

94. PERRY, *supra* note 1, at 119.

95. *Id.* at 117, 119–20; *see* Nitti Case File, *supra* note 81, at Part 1, 31 (affidavit signed by "Isabella Nitti Crudele, Illiterate," discharging her trial lawyer and delegating her defense to "Rocco DeStefano, Alberto Gualano, Nuncio Bonelli, Helen Ciresi, and Francis Allegretti"); *id.* at Part 1, 33 (court order entering new counsel).

Nitti's appellate victory to her "new look."[96] But Nitti's appellate team provided her effective representation, not just a makeover. Their motion for a new trial began by arguing that counsel "was incompetent [and] wholly incapable of protecting [defendants'] rights," and that the trial judge's failure "to appoint competent counsel" had denied the defendants "the benefit and assistance of counsel as provided in both the State and Federal Constitutions."[97] Similarly, the Assignment of Errors filed in the Illinois Supreme Court listed first that defendants "did not have the benefit or assistance of counsel within the meaning of the law and constitutions of the State of Illinois, and the United States of America."[98]

Whatever its motivation, this emphasis on Nitti's inept trial counsel was shrewd given the trend of Illinois case law. In the years leading up to *Nitti*, the Illinois Supreme Court had issued several pro-defendant rulings in cases where defense counsel had been outmatched. In 1911, the court ordered a new trial in a murder case where the trial judge had appointed two inexperienced lawyers against four "superior" prosecutors brought in from two counties.[99] In 1921 and 1922, the same court had overturned guilty verdicts by juries that heard streams of inadmissible evidence because defense counsel neglected to object.[100] Still, it cannot have been a foregone conclusion that Nitti's IAC claim would prevail. Though the 1921–1922 cases hinged on attorney incompetence, the Illinois court framed them as evidentiary appeals.[101] In contrast, in a 1915 appeal that more straightforwardly claimed counsel incompetence, the court upheld the conviction.[102]

Yet the Illinois Supreme Court did overturn Nitti's conviction, and thereby began to reconceptualize effective counsel as a constitutional guarantee. Referring to the federal and state rights to counsel, the court observed that these provisions must be more than "mere empty formalities."[103] The court described at length how trial counsel had taken advantage of his clients' ignorance:

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96. PERRY, *supra* note 1, at 120, 122. Cirese, 23, was "an extremely fashionable and photogenic Italian-American lawyer and, at age 20 in 1920, the youngest woman to graduate from DePaul Law School." Constable, *supra* note 2, at 94; *see* PERRY, *supra* note 1, at 116–17. She later established a criminal practice focusing on women clients. *Id.* at 122.

97. Nitti Case File, *supra* note 81, at Part 6, 80.

98. *Id.* at Part 6, 99.

99. People v. Blevins, 96 N.E. 214, 217 (Ill. 1911); *see* Waltz, *supra* note 10, at 320–21. The *Illinois Law Review* responded: "Are the racing rules to be imported into court and each jockey weighed to see that there is no weight handicap?" Case Comment, *Technicalities in Criminal Cases—New Trial Because Accused had Fewer Lawyers than Prosecution*, 6 ILL. L. REV. 409, 409 (1912).

100. People v. Gardiner, 135 N.E. 422, 423 (Ill. 1922); People v. Schulman, 132 N.E. 530, 531–32 (Ill. 1921).

101. *See supra* note 100.

102. People v. Barnes, 110 N.E. 881, 883–84 (Ill. 1915).

103. People v. Nitti, 143 N.E. 448, 453 (Ill. 1924).

> At the time the attorney appeared for these defendants he held a license from this court which certified to the public that he was competent to properly represent any client who might employ him, and any person employing him had a right to rely upon that certificate. The fact that the defendants were ignorant, illiterate foreigners, unacquainted with law or court procedure in this or any other country, and unable to speak and understand the English language, requires that we take into consideration the gross incompetency and stupidity of counsel appearing for them. . . . It is quite clear from an examination of the record that defendants' interests would have been much better served with no counsel at all than with the one they had.[104]

Given the weakness of the evidence and the life-or-death stakes, the court concluded that "there ought to be a further investigation, with competent counsel representing the accused. Safety and justice require that this cause be submitted to another jury."[105] As it happened, Nitti never was retried. In December 1924, the state's attorney dropped all charges against both her and Peter Crudelle.[106]

B. INDIANA FOLLOWS: SANCHEZ V. STATE, *1927*

Soon thereafter, Illinois' neighboring state followed *Nitti* in a case arising out of the hardscrabble industrial suburb of Gary, Indiana. On a March evening in 1925, an 18-year-old Mexican immigrant named Vito Sanchez was leaving a Gary poolroom when he ran into three men; a scuffle ensued, shots were fired, and one of the three ended up dead.[107] Sanchez was convicted of murder and sentenced to death. Sanchez's primary appellate claim concerned new affidavits supporting his argument that he had acted in self-defense. Because the Indiana Supreme Court found that these affidavits were material and could not have been obtained any earlier, it could have granted a new trial solely on the basis of new evidence.[108]

However, the court also addressed Sanchez's claim that his attorney's incompetence had deprived him of the "fair and impartial trial" guaranteed by the Indiana Constitution.[109] Among his many missteps, Sanchez's lawyer never notified the Mexican Consul about the trial; informally asked the defense witnesses to appear rather than issuing formal subpoenas, leaving Sanchez without recourse when they never showed up; failed to challenge

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104. *Id.* at 454.

105. *Id.* at 457.

106. PERRY, *supra* note 1, at 262.

107. Sanchez v. State, 157 N.E. 1, 3–4 (Ind. 1927).

108. *Id.* at 3.

109. *Id.* (quoting IND. CONST. art. I, § 13: "In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel").

the use of a courtroom interpreter hired by the victim's family; and neglected to request any jury instructions.[110]

Two years before, another Mexican immigrant sentenced to death had appealed to the same court on similar grounds.[111] The court upheld that conviction, but hinted that it might reverse in the next case involving "a poor person" whose attorney had offered a "perfunctory" defense, particularly if the appellant proffered new evidence.[112] *Sanchez* was just that case, transforming what had been a hypothetical caveat into a precedential holding: "the fact that the accused was poorly defended will not justify . . . reversal" only "*where [the conviction] is reasonably supported by satisfactory evidence.*"[113] To support this proposition, *Sanchez* cited several of the cases discussed above and rehearsed the language from *Nitti* that "incompetency and stupidity of counsel" could be taken into account in cases of "ignorant, illiterate foreigners."[114]

Moreover, *Sanchez* implicitly rejected the common law agency rule. Although Sanchez had "voluntarily employed" his attorney, the attorney could not meaningfully be described as Sanchez's agent, given Sanchez's youth, Mexican citizenship, and ignorance of "legal procedure" and "the English language."[115] Sanchez had simply "employed the attorney who tendered his services to him" in the jailhouse, "naturally believing that he had sufficient experience and enough ability to conduct properly his defense."[116] A jury might have bought Sanchez's self-defense claim if the case had been properly tried. "Justice demands that [he] should not be put to death," the court concluded, but instead "should be given another trial in which he will have an opportunity to present his evidence and to be represented by competent counsel."[117]

Indeed, Sanchez enjoyed quite prominent counsel both on appeal and at his second trial: Colonel Russell Harrison, son of President Benjamin Harrison, who was then serving as the Mexican consul at Indianapolis.[118] Along with a veteran Valparaiso, Indiana, attorney, Harrison represented Sanchez at a second trial held in late 1927, in which Sanchez took the stand and testified to his version of events. Toward the end of the trial, the press

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110. *Id.* at 4–5.

111. Castro v. State, 147 N.E. 321, 322 (Ind. 1925).

112. *Id.* at 323. The brief *Castro* opinion did not cite any authority. However, *Castro* was perhaps litigated and decided with *Nitti* in mind, as the facts—an illiterate, non-English-speaking capital murder defendant represented by counsel not of his choosing—were similar.

113. *Sanchez*, 157 N.E. at 5 (emphasis added).

114. *Id.* at 5 (quoting People v. Nitti, 143 N.E. 448, 454 (1924)).

115. *Id.* (internal quotation marks omitted).

116. *Id.*

117. *Id.*

118. *Death Sunday of Harrison Recalls Case*, THE VIDETTE-MESSENGER (Valparaiso, Ind.), Dec. 14, 1936, at 1.

reported, "it was evident that Sanchez stood a good chance of securing acquittal."[119] Nevertheless, rather than leave his fate in the hands of the jury, Sanchez played it safe and accepted a last-minute plea deal. Just before the close of the trial, he pled guilty to manslaughter and was sentenced to an indeterminate term of one to ten years in state prison.[120] Sanchez was paroled early in 1929, after serving about a year of his term, and thereafter faded into obscurity. As of July 1929, he had failed to report to his parole officer "for some time" and Harrison, along with Indiana state prison officials, was attempting to locate him.[121]

III. THE SUPREME COURT RATIFIES THE NEW RULE: *POWELL V. ALABAMA*, 1932

In 1932, the questions about counsel incompetence that had arisen intermittently in state courts for decades rose to the United States Supreme Court in the vehicle of *Powell v. Alabama*, the first of the infamous Scottsboro rape cases.[122] The question presented was whether the nine defendants' right to counsel had been violated when they were forced to trial without time to retain attorneys of their choice. Instead, the trial judge had made a perfunctory appointment of the entire Scottsboro bar.[123] The morning of trial a local lawyer stepped up to defend the case, but, just shy of seventy and reportedly senile, he had only met the defendants thirty minutes before.[124] A second lawyer, sent from Tennessee by two of the defendants' family, also offered his assistance. But he was unfamiliar with Alabama practice and, perhaps to steel his nerves—a lynch mob awaited outside the courthouse door—drank throughout the trial.[125]

Textbooks and reference guides often present *Powell* as a case about the right to appointed counsel, an early precursor to *Gideon*.[126] *Powell* did

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119. *Defense Plays Surprise Card, Takes a Term*, THE VIDETTE-MESSENGER (Valparaiso, Ind.), Dec. 8, 1927, at 1.

120. *Id.*; *see also Sanchez Still Inmate Porter County's Jail*, THE VIDETTE-MESSENGER (Valparaiso, Ind.), Dec. 13, 1927, at 1.

121. *State Reformatory Heads Seek Mexican*, THE INDIANAPOLIS NEWS, July 27, 1929, at 6; *see Young Mexican, Was Once Found Guilty of Murder by Porter Jury Then Given Liberty, Again Sought*, THE VIDETTE-MESSENGER (Valparaiso, Ind.), July 29, 1929, at 1.

122. On the Scottsboro cases and their legacy, see generally DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (rev. ed., 2007); ESTELLE B. FREEDMAN, REDEFINING RAPE: SEXUAL VIOLENCE IN THE ERA OF SUFFRAGE AND SEGREGATION 253–70 (2013); JAMES GOODMAN, STORIES OF SCOTTSBORO (1995).

123. One member of that bar had already agreed to assist the prosecution. *See* Powell v. Alabama, 287 U.S. 45, 56–57 (1932).

124. *Id.* at 57.

125. This description of the trial is drawn from CARTER, *supra* note 122, at 18–23.

126. *See, e.g.*, RANDALL KENNEDY, RACE, CRIME AND THE LAW 103 (1st ed. 1997) (noting that *Powell* held that "in at least certain circumstances, states have an affirmative obligation to provide criminal defendants with the rudiments of effective representation"); RICHARD G. SINGER, EXAMPLES & EXPLANATIONS: CRIMINAL PROCEDURE II: FROM BAIL TO JAIL 215–16 (2005)

establish a right to appointed counsel in certain capital cases; but it was really an IAC case,[127] and before *Strickland*, many lower courts understood it that way.[128] Unlike Gideon, who represented himself—and like the defendants in the early state cases discussed in this Essay—the Scottsboro Nine did nominally have lawyers.[129] Yet, the lawyers they had were ineffective, partly because of lack of preparation time, but also because of personal characteristics. (Of course, it may have been impossible for any lawyer to defend a black man charged with rape in 1932, though neither the Alabama courts nor the Supreme Court would say so.[130])

With *Powell*, then, the Supreme Court was asked to grant its imprimatur to the nascent legal principle that attorney incompetence could be grounds for a new trial. The Scottsboro Nine's resemblance to Isabella Nitti and Vito Sanchez was not lost on Walter Pollak, the prominent civil rights attorney who briefed and argued *Powell* before the Supreme Court.[131] Pollak cited both *People v. Nitti* and *Sanchez v. State* prominently in his briefs.[132] In other words, to support his argument that nine illiterate, black teenagers had been denied the effective assistance of counsel in rural Alabama, he pointed to precedents in which illiterate immigrants had been denied that assistance in the urban Midwest.

(discussing *Powell* in a section entitled "The Right to Appointed Counsel—*Gideon* and *Argersinger*").

127. Geimer, *supra* note 16, at 98–99 (noting characteristics making *Powell* more of an IAC case); *see also* Hagel, *supra* note 12, at 204–05 (discussing *Powell* as the first Supreme Court case to "articulate[] a constitutional right to effective assistance of counsel"); Hessick, *supra* note 6, at 1070 n.2 (describing Powell's discussion of "*effective* appointment of counsel" (quoting *Powell*, 287 U.S. at 71) (internal quotation marks omitted)); Mushlin, *supra* note 10, at 332 (*Powell* "held that the right to appointed counsel means the right to 'effective' aid" (footnote omitted)); *cf.* KENNEDY, *supra* note 126, at 102–03 (categorizing *Powell* as an "effective assistance of counsel" case, but construing its holding as relating to the duty to appoint counsel).

128. *See* Waltz, *supra* note 10, at 293–94; Comment, *Assuring the Right*, *supra* note 17, at 303.

129. *See generally* Weems v. State, 141 So. 215 (Ala. 1932); *cf. Powell*, 287 U.S. at 74 (Butler, J., dissenting) ("Many of the numerous questions decided were raised at the trial and reflect upon defendants' counsel much credit for zeal and diligence on behalf of their clients."). Even the *Powell* dissenters "conceded the right" to effective assistance of counsel, "but insisted that the record showed no denial of the right." Uelmen, *supra* note 16, at 18.

130. On the presumptions of guilt that black men faced when accused of rape in the segregated South, see FREEDMAN, *supra* note 122, at 254–55; on appellate reluctance to admit systemic injustices, see LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 257–58, 375 (1993).

131. On Pollak's career and work on *Powell*, see generally Louis H. Pollak, *Advocating Civil Liberties: A Young Lawyer Before the Old Court*, 17 HARV. C.R.-C.L. L. REV. 1 (1982).

132. 27 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 254–55 (Philip B. Kurland & Gerhard Casper eds., 1975) (citing *Nitti*, *Sanchez*, *Mitchell v. Commonwealth*, and *Sheppard v. State*). Pollak and his co-counsel on the briefs, Carl Stern, had previously cited *Mitchell* and *Sheppard* in Report No. 11 of the Wickersham Commission, "Lawlessness in Law Enforcement," which they drafted along with Zechariah Chafee. NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 275–77, 282, 284, 338 (1931).

The Supreme Court accepted the invitation to approve this new, broader conception of the right to counsel. To be sure, *Powell* did not go so far as the Illinois and Indiana courts in denigrating lawyers on the record. Justice Sutherland had begun his career as a frontier trial lawyer, and in his opinion for the *Powell* Court he invoked the traditional judicial hesitation to speak poorly of members of the bar. Justice Sutherland summarized the Alabama chief justice's dissenting opinion below as "disclaiming any intention to criticize harshly counsel who attempted to represent defendants at the trials."[133] Nevertheless, the Alabama chief justice could only conclude that the attorneys' representation "was rather *pro forma* than zealous and active."[134] Such representation, Justice Sutherland concluded—going one step further than the Alabama court—did not satisfy "the right of counsel in any substantial sense."[135] Justice Sutherland's opinion then pointed to "an overwhelming array of state decisions" supporting this result, citing thirteen examples from eight states—including *Sanchez*.[136] Thus, *Powell* obliquely rejected the common law rule that negligence of counsel could not be grounds for a new trial, and, in its stead, endorsed the conclusion that some state judges had already drawn: in egregious cases of counsel incompetence, reversal was an appropriate remedy.

CONCLUSION

My story leaves off here for two reasons. First, after *Powell* and other landmark decisions of the 1930s, the Supreme Court was irrevocably in the business of overseeing state criminal procedure.[137] No longer was criminal procedure law made by scattered state courts citing each other across borders. Second, by the 1940s, IAC claims were increasingly brought not on direct appeal, but as federal habeas petitions.[138] Implicating federalism concerns as it did, this tactic raised new doctrinal and policy questions.

It is impossible to know how IAC doctrine might have continued to develop in the absence of Supreme Court intervention. Yet it would be a mistake to view the early state cases merely as vestigial stumps of a line that died out. The concerns that animated those early decisions are the very same that animate modern IAC jurisprudence.[139] The American adversary

133. *Powell*, 287 U.S. at 58.

134. *Id.* at 58 (quoting Alabama Chief Justice Anderson).

135. *Id.*

136. *Id.* at 58–59.

137. *See generally* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000).

138. *Cf.* Zimpleman, *supra* note 7, at 433, 446–54 (explaining why IAC became the most common federal habeas claim). In the federal courts and in many states, defendants are now required to raise IAC claims on collateral review. *See* Martinez v. Ryan, 132 S. Ct. 1309, 1317–18 (2012).

139. *But cf.* Geimer, *supra* note 16, at 99–104 (arguing that *Powell* defendants could not have satisfied *Strickland* test had it been in place).

system relies upon attorneys to hold the state to its burden. How should the system account for the reality that attorneys, whether overworked, underfunded, or simply human, are imperfect guardians of defendants' rights?[140] What should appellate courts do, if anything, for a defendant whose lawyer slept through the trial,[141] or showed up at court a few beers into the day,[142] or neglected to call any witnesses, made a hash of cross examination, and failed to object to inadmissible evidence?[143]

Recovering the origins of the IAC claim opens these questions into the broader sweep of American legal history. Once the Supreme Court constitutionalized this line of cases, and especially with the expansion of federal habeas, IAC gained a life of its own.[144] It quickly expanded to every jurisdiction, rooted as it now was in the Fourteenth Amendment (and, after 1963, the Sixth Amendment). Federal judges collaged ever more complicated tests for determining when reversal was warranted. In the 1970s, jurists threw their hands up at the hodgepodge the doctrine had become. Ostensibly, every federal circuit had a different test, but actually judges cited interchangeably from all of these tests, following no common template.[145] Finally in 1984, with *Strickland*, the U.S. Supreme Court attempted to articulate a clear, nationwide standard for IAC cases.

Justice O'Connor's opinion in *Strickland* did not mention the early state cases discussed in this Essay.[146] Nor did the *Strickland* party briefs.[147] Nevertheless, as far back as the 1880s, state judges who heard counsel incompetence claims were already making the motions now required by *Strickland*: a presumption of competence and an analysis of prejudice. Regardless of the prevailing doctrine, judges have long been reluctant to overturn convictions when doing so would require criticizing, on the record, fellow lawyers.[148] They have occasionally overcome that reluctance in cases of extreme attorney ineptitude and at moments of breakdown in professional

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140. *See, e.g.*, William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 10–11 (1997) (describing structural pressures on public defender offices and appointed counsel).

141. *See, e.g.*, Kirchmeier, *supra* note 15, at 426; Henry Weinstein, *A Sleeping Lawyer and a Ticket to Death Row*, L.A. TIMES, (July 15, 2000), http://articles.latimes.com/2000/jul/15/news/mn-53250.

142. *See, e.g.*, O'Brien v. Commonwealth, 115 Ky. 608, 620–21 (1903); *see generally* Kirchmeier, *supra* note 15, at 426–27.

143. *See, e.g.*, Matthews v. Abramajtys, 319 F.3d 780, 789–90 (6th Cir. 2003).

144. *See, e.g.*, Diggs v. Welch, 148 F.2d 667, 669–70 (D.C. Cir. 1945); *see also* Waltz, *supra* note 10, at 309–10.

145. *See* Strazzella, *supra* note 12, at 446–49; *see also* Comment, *Assuring the Right*, *supra* note 17, at 303–04.

146. *See* Strickland v. Washington, 466 U.S. 668, 670–701 (1984).

147. *See* 146 LANDMARK BRIEFS & ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1983 TERM'S SUPPLEMENT 282–560 (Philip B. Kurland & Gerhard Casper eds., 1985).

148. *Cf.* Bright, *supra* note 16, at 1860–63; Klein, *supra* note 6, at 633–34.

solidarity, but those conditions suggest deep fissures within the legal system in their own right—fissures that reversing a conviction here or there cannot heal. The *Strickland* standard was not a doctrinal invention, nor a clarification of the state of the law in 1984, so much as a revival of themes first sounded by state court judges as many as a hundred years before. If *Strickland* has failed, the fault may lie deeper than doctrine.