

REMEDYING PRETRIAL INEFFECTIVE ASSISTANCE

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Imagine three separate defendants. Defendant One is facing serious criminal charges, and his lawyer, without any investigation or serious thought, advises him to speak freely with law enforcement regarding the circumstances surrounding the crime. In counsel's view, if the client says he is innocent, there is nothing for the defendant to lose by submitting to an extended interrogation. Defendant Two is represented by a lawyer who is operating under a conflict of interest, and Two's lawyer advises him to speak to law enforcement and incriminate himself so that counsel is better able to serve another, perhaps better paying, client. Defendant Three is represented by a defense lawyer whose misunderstanding of the procedural law governing pretrial proceedings is so deficient that counsel mistakenly advises his client that anything he says is subject to a grant of immunity such that neither the statements nor their fruits can be used at trial. Imagine further that each of these instances of misadvice by counsel led to statements and other evidence that materially assisted the prosecution's case and, therefore, prejudiced the defendant.

As serious as these errors are, it is quite possible that none of these wronged clients will be entitled to a constitutional remedy. Whereas many commentators have lamented the shortcomings of the right to effective assistance of counsel under *Strickland v. Washington*, this Article observes that

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even when the *right* is adequate, in certain circumstances the *remedy* may not be.¹

To put the above examples in relative context, consider the passage in *Marbury v. Madison* where Chief Justice Marshall famously extols that “where there is a legal right, there is also a legal remedy.”² Or, consider Justice Sutherland’s observation in *Mapp v. Ohio* that, without a remedy, a constitutional right is in jeopardy of becoming “valueless and undeserving of mention.”³ Of course, much has changed in the law of constitutional remedies in recent decades. Increasingly, courts and scholars have recognized—even celebrated⁴—the judicial practice of honoring, primarily in the breach, the rule that every right must have a remedy, much less a full and effective remedy.⁵ Put differently, the gap between the ideal of the right and its real application, or the abstract and the actual, is increasingly stark. As developed below, the Court’s recent decisions in *Missouri v. Frye* and *Lafler v. Cooper* demonstrate a willingness on the part of the Court to announce ground rights with trivial remedies—the bark of the right lacks meaningful remedial bite in many instances.⁶

This Article explores a particular example of the right-remedy gap in the right to counsel context that has previously evaded scholarly attention—that is, the question of federal constitutional remediation when defense counsel provides incompetent representation resulting in the discovery of inculpatory evidence against the defendant.⁷ Although instances of pretrial errors of counsel resulting in the discovery of materially incriminating evidence are numerically rare in the published case law, such cases provide a useful lens for

1. See *Strickland v. Washington*, 466 U.S. 668 (1984).

2. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

3. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

4. See, e.g., Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 587 (1983); J. Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 CALIF. L. REV. 277, 278 (2010).

5. See, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778 (1991); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 87-88 (1999).

6. See *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012). In *Lafler*, the Court emphasized the broad remedial discretion vested in the state trial court when a defendant suffers ineffective assistance in rejecting a guilty plea. *Lafler*, 132 S. Ct. at 1388-90. The Court explained that if the violation of the right has been established, the court retains the discretion to determine whether the defendant should receive full remediation (the term of imprisonment offered in the original plea), no remediation (the full sentence that the defendant received after trial), or partial remediation (a sentence “in between” the offered plea and the trial sentence). *Id.* As Justice Scalia pointed out, it is “extraordinary . . . that the remedy for an unconstitutional conviction should ever be subject at all to a trial judge’s discretion.” *Id.* at 1397 (Scalia, J., dissenting).

7. The phrase “right-remedy gap” seems to have its origins in Professor John C. Jeffries’s article. See Jeffries, *supra* note 5. Professor Jeffries was not, however, the first to identify this dilemma; he was simply the first to coin the very aptly descriptive phrase. See, e.g., Gewirtz, *supra* note 4, at 507 (grouping such gaps under the general label “jurisprudence of deficiency”).

understanding, more generally, the scope and nature of Sixth Amendment remedies in federal court.⁸

The Article proceeds in three parts. Part I briefly recaps the governing law regarding the right to counsel itself and identifies a few concrete examples of instances in which the deficiency of counsel might contribute to the discovery of critical incriminating evidence against the defendant. Then, in Part II, I explain why the traditional remedy for right to counsel violations, reversal, is inadequate in this context. In addition, I consider and assess three remedial alternatives to mere reversal. First, the viability of applying an exclusionary rule in this context is considered. Next, civil actions for damages under 42 U.S.C. § 1983 are considered, and the limitations on such actions are analyzed. Third, the viability of injunctive or declaratory relief is considered as a possible alternative remedy to mere reversal. Finally, in Part III, the possibility of a novel remedy for pretrial ineffective assistance is considered. Specifically, the extent to which the recent decisions in *Missouri v. Frye* and *Lafler v. Cooper* signal a willingness on the part of the Court to engage in remedial creativity is considered.

I. THE RIGHT TO A LAWYER WHO DOES NOT AFFIRMATIVELY INCRIMINATE THE CLIENT

As is now familiar to students of criminal law, the 1984 decision in *Strickland v. Washington* made the *Gideon v. Wainwright* promise of an attorney for all indigent defendants facing serious charges meaningful by insisting that the mere appointment of counsel, standing alone, was inadequate to comply with the Sixth Amendment.⁹ Defendants are entitled not just to the presence, but to the effective assistance, of counsel.¹⁰ And as is now clear, the right to effective assistance of counsel applies to pretrial proceedings, even

8. The most likely explanation for the paucity of cases on this topic is the fact that post-conviction review raising such claims will generally be altogether unavailable. See *Kimmelman v. Morrison*, 477 U.S. 365, 382-83 (1986). Because right to counsel claims generally cannot be raised until post-conviction, and because this sort of misconduct is less likely to occur in the more serious cases in which more qualified and experienced counsel are appointed, there is good reason to believe that the sort of ineffective assistance that results in the discovery of incriminating evidence is rarely cognizable. Most non-serious offenses, particularly first offenses, do not result in any custody, and when custody is imposed, the term is often too short to permit habeas relief. See *Heck v. Humphrey*, 512 U.S. 477, 500 (1994). Equally, if not more important, the fact of errors by counsel that materially incriminate a defendant will often leave the defendant with no choice other than to plead guilty. The fact of the guilty plea, of course, waives claims unrelated to the court's jurisdiction or the voluntariness of the plea. Accordingly, the frequency of this sort of ineffectiveness is able to recur without being detected in the published reports.

9. See *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984); *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963); Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1070 (2009) (noting that the "right to effective assistance of counsel is an undisputed feature of the Sixth Amendment right to counsel" (emphasis omitted)).

10. See *Strickland*, 466 U.S. at 686.

proceedings that do not implicate directly the fairness of the trial.¹¹ Under the *Strickland* test, a defendant alleging that his right to counsel was violated through the ineffective assistance of his attorney bears the burden of proving that his lawyer's performance was below the "prevailing professional norms,"¹² and he must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."¹³ The dual requirement of proving deficient performance and prejudice has proven "notoriously difficult" for all defendants.¹⁴ Commentators have gone so far as to conclude that the *Strickland* standard, in practice, rarely provides more robust protections than the core *Gideon* right because, as applied, *Strickland* requires "little more than a warm body" standing beside the defendant.¹⁵ Along these lines, there are scholarly and judicial criticisms of both the deficient performance and prejudice standards as taking an overly parsimonious approach to the right to counsel.¹⁶

Notably, however, this Article is not addressing the scope of the right itself. This Article addresses a class of cases for which everyone would agree that both the deficient performance and the prejudice prongs of *Strickland* were satisfied. The question here is whether an unequivocal violation of the right to pretrial effective assistance always justifies a *remedy*. The issue is one of remedy, not of right.

Specifically, there are instances when certain gross pretrial errors by defense counsel result in the prosecution affirmatively obtaining additional, non-cumulative evidence of guilt. In these circumstances, the errors of counsel unquestionably impede the fairness of the trial, if not necessarily the reliability

11. See *Frye*, 132 S. Ct. at 1407-09; *Lafler*, 132 S. Ct. at 1380-81.

12. *Strickland*, 466 U.S. at 688.

13. *Id.* at 694. There remains some debate as to whether the harmless error standard applies in addition to the *Strickland* standard, but it seems that a showing of prejudice under the *Strickland* standard, just like a showing of prejudice in the context of a *Brady v. Maryland* violation, satisfies harmless error without more. See *Lafler*, 132 S. Ct. at 1393-94; *Brady v. Maryland*, 373 U.S. 83 (1963).

14. Hessick, *supra* note 9, at 1074 & n.16 (compiling authority for this point); Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 1.

15. Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1446 (1999). Notably, Professor Klein's paper was published at a time when not a single case granting relief under *Strickland* had been decided by the Supreme Court. This changed just a couple of years later in (*Terry*) *Williams v. Taylor*, 529 U.S. 362, 362 (2000). Indeed, the Supreme Court granted *Strickland* relief in three capital sentencing cases in short succession—*Williams*, 529 U.S. at 362; *Wiggins v. Smith*, 539 U.S. 510, 537-38 (2003); and *Rompilla v. Beard*, 545 U.S. 374, 376 (2005). As of 2012, there have been four cases granting *Strickland* relief, each of which was for sentencing relief alone in a capital case: (1) *Williams*, 529 U.S. at 362; (2) *Rompilla*, 545 U.S. at 376; (3) *Wiggins*, 539 U.S. at 537-38; and (4) *Porter v. McCollum*, 130 S. Ct. 447, 455-56 (2009). A prisoner also prevailed in at least three other *Strickland* cases before the Court: *Kimmelman v. Morrison*, 477 U.S. 365 (1986); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485-87 (2010); and (*Michael*) *Williams v. Taylor*, 529 U.S. 420, 444 (2000).

16. See *Strickland*, 466 U.S. at 706-19 (Marshall, J., dissenting) (explaining that even a manifestly guilty client ought to be entitled to Sixth Amendment relief if he received manifestly incompetent representation). Thurgood Marshall's dissent in *Strickland* itself is difficult to improve upon. See *id.*

of the verdict.¹⁷ And thus, even under a limited notion of the purpose of the right to counsel like that enunciated in *Lockhart v. Fretwell*, which suggested that errors of counsel only justify relief when the “reliability of the trial process” is called into question, when defense counsel facilitates or improves the prosecution’s case against the defendant, the Sixth Amendment is violated.¹⁸ The question remains, however, whether it is appropriate to provide a remedy for all errors of counsel that unfairly undermine the trial process or, instead, whether in certain instances fully remedying the harm would be too extreme.

To put this in context, whereas *Lafler v. Cooper* and *Missouri v. Frye* presented the question of whether ineffective assistance that does not impinge on the fairness of one’s trial constitutes a violation of the Sixth Amendment,¹⁹ the question presented in this Article is whether, at a minimum, remedying ineffective assistance of counsel requires that the defendant be provided with a fair trial, untainted by improperly obtained evidence of guilt. It is sort of an inversion of *Lafler* and *Frye*.

Ordinarily, ordering that a defendant subjected to ineffective assistance of counsel be retried is a sufficient remedy insofar as it puts all the parties back in an equal and fair position to litigate the question of one’s guilt.²⁰ However, where the errors of counsel incriminate the defendant, the Sixth Amendment harm cannot be cured by mere reversal and retrial. A retrial predicated on the same illegally obtained evidence that resulted from counsel’s errors does not remedy the harm insofar as the government continues to benefit from the deficient performance of original counsel.²¹ In the words of Justice Alito during oral argument in *Lafler v. Cooper*, a retrial in these circumstances simply makes “zero sense.”²²

Accordingly, the remaining sections of this Article directly confront the question of how, in light of the fact that mere reversal is inadequate, this sort of right to counsel violation should be remedied. First, however, to put this

17. See Hessick, *supra* note 9, at 1093. Akhil Amar has advanced a narrower vision of the right to counsel such that “innocence protection and truth-seeking are, or should be, central” to the right. AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 138 (1997).

18. *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993); see also *Kimmelman*, 477 U.S. at 387 (recognizing that errors by counsel leading to the admission of reliable evidence justifies Sixth Amendment relief).

19. *Lafler v. Cooper*, 132 S. Ct. 1376, 1383 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1404 (2012).

20. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 686 (1984). *Frye* and *Lafler* are also cases in which the prisoners sought a remedy other than simply a remand for a new prosecution and trial. *Frye*, 132 S. Ct. at 1404; *Lafler*, 132 S. Ct. at 1383. *Frye* and *Lafler* were not seeking a new trial, but an old plea offer that had long since lapsed. *Frye*, 132 S. Ct. at 1401; *Lafler*, 132 S. Ct. at 1380. To be put back in the position he was in before the ineffective assistance of counsel, *Frye* requested that the prosecution be forced to renew a plea offer that was ignored and not communicated by original counsel. *Frye*, 132 S. Ct. at 1405. In many ways, remedying the harm in *Frye* is more difficult than remedying the harm in the class of cases identified in this Article because the cases I am discussing do not require the Court to intrude on prosecutorial discretion.

21. Transcript of Oral Argument at 45, *Lafler*, 132 S. Ct. 1376 (No. 10-209).

22. *Id.*

problem in context, it is necessary to have some examples of when this sort of dilemma might arise—that is to say, examples of the use of incriminating evidence against a defendant that would not have been discovered but for the blunders and missteps of defense counsel.²³

First, consider a scenario in which a defense lawyer unreasonably, and without basis in the law, assumes that a prosecutor will “go easy” on his client if the client speaks openly and candidly about the crime with investigators, and the result is that the client makes admissions that turn out to be the most damaging evidence against him for the most serious charges available.²⁴ Instances in which counsel either abandons his client during critical interrogations or inexplicably advises him to concede guilt are unsettlingly common.²⁵ In a murder case in Michigan, for example, the defendant met with defense counsel after being arraigned, and counsel expressly advised the client to talk to the police before counsel had considered or investigated possible defenses.²⁶ Making matters even worse, this same lawyer mistakenly assumed

23. Lurking just below the surface of questions about attorney incompetence for revealing incriminating evidence is the scope of the crime of obstruction of justice. A lawyer’s avoidance of criminal charges certainly must not constitute deficient performance, even if the evidence she turns over is ultimately critical to the prosecution’s case. Stephen Gillers, *Guns, Fruits, Drugs, and Documents: A Criminal Defense Lawyer’s Responsibility for Real Evidence*, 63 STAN. L. REV. 813, 817-18 (2011). On the whole, the scope of obstruction of justice laws are a source of considerable debate and disagreement. *Id.* at 818. There are, however, certain accepted general principles that reflect the professional norms as reflected in the trade and practice journals. See Evan A. Jenness, *Ethics and Advocacy Dilemmas—Possessing Evidence of a Client’s Crime*, CHAMPION, Dec. 2010, at 16, 17 (“Most tangible evidence of a client’s crime will fall into two broad categories: (1) contraband, instrumentalities or fruits of a crime; or (2) ordinary items that were not directly involved in the perpetration of a crime but implicate a client because of their content. Possessing the former typically requires a lawyer to sua sponte take remedial action, but possessing the latter usually does not.”). Some of the key examples of deficient performance resulting in the prosecution obtaining new evidence of guilt may arise when defense counsel has an insufficient understanding of the limits of her disclosure duties under the obstruction of justice statutes. Gillers, *supra*, at 818.

24. The Court has observed that a defendant’s own “confession may have a more dramatic effect on the course of a trial than do other trial errors—in particular cases it may be devastating to a defendant.” *Arizona v. Fulminante*, 499 U.S. 279, 312 (1991).

25. See, e.g., *United States v. Zazzara*, 626 F.2d 135, 138 (9th Cir. 1980) (recognizing inapplicability of effective assistance prior to attachment); *People v. Claudio*, 453 N.E.2d 500, 502 (N.Y. 1983) (considering circumstances, arising in pre-attachment phase in which retained counsel advised the client to confess to police despite fact that police acknowledged that they lacked substantial evidence of defendant’s guilt); see also *Peek v. Hooks*, No. 3:03cv423-MEF, 2006 WL 3883964, at *11 (M.D. Ala. Dec. 5, 2006) (noting that counsel told defendant to continue providing incriminating information and evidence to the police during interrogation).

26. *People v. Frazier*, 733 N.W.2d 713, 724 (Mich. 2007) (considering remand instructions from federal habeas court); *Frazier v. Berghuis*, No. CIV A 02-CV-71741DT, 2003 WL 25195212, at *1 (E.D. Mich. Aug. 6, 2003); Warren J. White, Case Digest, *Professional Responsibility—Ineffective Assistance of Counsel—Strickland v. Washington Provides the Appropriate Standard to Be Applied When Determining Whether a Claim of Ineffective Assistance of Counsel Is Grounds for Barring a Defendant’s Confession*. *People v. Frazier*, 733 N.W.2d 713 (Mich. 2007), 86 U. DET. MERCY L. REV. 53, 53-54 (2008) (summarizing the case); see also *Rachlin v. United States*, 723 F.2d 1373, 1378 (8th Cir. 1983) (considering a claim that “counsel breached his duty to prepare adequately by failing to investigate the extent of the government’s evidence before advising cooperation” and analyzing the defendant’s argument that counsel should have understood the facts surrounding the case before advising the defendant to make a statement to law enforcement); *United*

that defense counsel was not permitted to be present for the police interrogation and so the defendant was left alone.²⁷ These interrogations resulted in the defendant making incriminating statements that became an essential part of the prosecution's case-in-chief.²⁸ Presumably, when this sort of error by counsel occurs, the defendant is often backed into a corner. The defendant pleads guilty because the prosecution now has a strong case against him, and the guilty plea constitutes a waiver of all antecedent, non-jurisdictional claims.²⁹

Second, there are documented instances in which defense counsel misunderstands the scope of immunity offered to their clients. For example, counsel might erroneously believe that an informal promise of immunity by federal prosecutors will bar a state prosecution, and such a mistake may result in a state murder conviction.³⁰ For example, in *Sweeney v. Carter*, the Seventh Circuit had little difficulty concluding that both prongs of *Strickland* were satisfied when counsel relied on an informal grant of immunity to protect his client's statements from use at a future trial: "Any lawyer worth her salt should

States v. Armstrong, No. 1:07-cr-26-SJM-1, 2010 WL 3981005, at *13 (W.D. Pa. Oct. 8, 2010) (denying a claim of ineffective assistance of counsel because the right to counsel had not yet attached at the point when counsel advised the defendant to cooperate, and making the confusing statement that the court is "aware of no case holding that the right to effective assistance of counsel applies in the Fifth Amendment context"); United States v. Sumlin, 567 F.2d 684, 688-89 (6th Cir. 1977) (addressing a claim of ineffective assistance of counsel in a case in which counsel advised the defendant to cooperate with FBI agents and provide incriminating statements and refusing relief, in significant part, simply because the ineffective assistance did not render the trial verdict unreliable insofar as there is no claim that "the evidence in question is untrustworthy"); Commonwealth v. Moreau, 572 N.E.2d 1382, 1386 (Mass. App. Ct. 1991) (remanding for an evidentiary hearing to review the claim that counsel had advised the defendant to confess without having properly investigated or reviewed the case); People v. Farrell, 42 A.D.3d 954, 954-55 (N.Y. App. Div. 2007) (describing the attorney's recommendation that the defendant cooperate with the police and noting that the "attorney was not present" during the police interview). For a discussion of a similar phenomena in a recent Department of Justice terrorism prosecution, see Jacob Freeze, *Did Zazi's Lawyer Sell Him Out to the FBI?*, OPEN SALON (Sept. 23, 2009, 8:03 PM), http://open.salon.com/blog/jacob_freeze_x/2009/09/23/did_zazis_lawyer_sell_him_out_to_the_fbi. "Najibullah Zazi, who is now charged with knowingly making false statements to the FBI in a matter involving terrorism" resulted entirely from statements Zazi made during interviews Arthur Folsom, his attorney, arranged. Freeze, *supra*. With no details of the FBI's case, no immunity, and only denials from his client, Folsom allowed Zazi to spend twenty-eight hours talking to the FBI. *Id.* Folsom is a DUI and divorce court attorney with no experience in federal law and he may have sold out his client to the FBI to position himself as a "premier attorney." *Id.*; see also Albert Wan, *Making of a Terrorist Part II*, INVISIBLE MAN (Sept. 22, 2009), <http://georgiadefenderblog.com/2009/09/22/making-of-a-terrorist-part-ii/> ("Even though [Zazi's] attorney . . . has had minimal federal criminal defense experience, he should have known better. At the very least, he could have conducted his own investigation to see what information the Feds might have had . . . on Zazi before serving his client up on a platter as he did.").

27. *Frazier*, 2003 WL 25195212, at *7.

28. *Id.* (recognizing that the defendant's statements "tainted the whole trial process").

29. See, e.g., United States v. Garcia-Valenzuela, 232 F.3d 1003, 1004-05 (9th Cir. 2000). Theoretically, the defendant is still entitled to bring an ineffective assistance of counsel claim challenging his plea as a product of counsel's errors, but these claims are notoriously difficult to prevail on, and the Supreme Court has never granted relief in such a case. Hill v. Lockhart, 474 U.S. 52, 56, 59 (1985) (challenging the guilty plea). However, it is generally accepted that "[i]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

30. See, e.g., *Sweeney v. Carter*, 361 F.3d 327, 334 (7th Cir. 2004).

have known that an extrajudicial [immunity] agreement that has not received the imprimatur of the court is unenforceable [against state prosecutors].”³¹ A formal grant or use of transactional immunity would have protected the defendant from state or federal prosecution, but the lawyer had failed to appreciate the limited nature of the protections actually offered to his client.³² Although the *Sweeney* case happened to arise before the initial appearance of the defendant, and thus, the Sixth Amendment was unable to provide the defendant protection, there was no reason that counsel could not have made a similar mistake after the Sixth Amendment’s protections had formally attached through the commencement of criminal proceedings; indeed, there are such examples.³³ Other reported cases confirm that defense lawyers continue to advise their clients that initial “proffer statement[s]” or confessions cannot “be used . . . at trial,” advice that is patently incorrect in some jurisdictions.³⁴ It is also possible that inexperienced counsel might confuse a proffer letter with a grant of immunity; the former, however, precludes only the direct use of the statements and does not preclude fruits of the statements or the use of the

31. *Id.* (concluding that on these facts there was no deprivation of the right to counsel because the mistakes of counsel occurred prior to the attachment of the right to counsel). Professor Pamela Metzger has explained in some detail pitfalls for “inexperienced attorneys” attempting to navigate the complicated realm of pretrial negotiations involving proffers and partial immunity. Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1666-69 (2003). Through the errors of counsel prior to trial “the defendant may well have sealed his fate at trial by providing statements and evidence that will guarantee his conviction.” *Id.* at 1666.

32. 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 8.11(a) (3d ed. 2011) (“[T]o be constitutionally acceptable, the immunity granted to a witness had to provide adequate protection against both federal and state prosecutions.”).

33. *See, e.g.,* *People v. Frazier*, 733 N.W.2d 713, 717-19 (Mich. 2007). The prosecution of Zazi on terrorism-related charges is a revealing example; Zazi’s lawyer (Folsom), who had only met his client the day before, did not have a deal in place when he advised his client to speak with the FBI. *Id.* at 717. Folsom discovered that Zazi was lying about having nothing to do with terrorism after the first day of FBI questioning and decided it would be best to make a deal with the government. *Id.* However, Zazi was only offered a proffer letter, not immunity. *Id.* With no prior federal court or terrorism case-related experience, the FBI considered Folsom the MVP of the case. *See, e.g.,* Jeralyn, *In Depth Report on Najibullah Zazi Case*, TALKLEFT (Nov. 10, 2011, 4:53 PM), <http://www.talkleft.com/story/2011/11/10/175324/51>; *see also* *United States v. You Hong Chen*, 104 F. Supp. 2d 329, 330-31 (S.D.N.Y. 2000) (considering a case in which counsel conceded that he did not understand “what a proffer agreement was”).

34. *Rodriguez v. United States*, No. 10 Civ. 5259(KTD), 2011 WL 4406339, at *2 (S.D.N.Y. Sept. 22, 2011); *accord* Benjamin A. Naftalis, “*Queen for a Day*” *Agreements and the Proper Scope of Permissible Waiver of the Federal Plea-Statement Rules*, 37 COLUM. J.L. & SOC. PROBS. 1, 28 (2003) (“[D]istrict and circuit courts have upheld Queen for a Day agreement provisions that permit the use of the defendant’s proffer statements in rebuttal (even if the defendant does not testify), allow affirmative use of proffer testimony in the government’s case-in-chief (even prior to any defense witnesses being called), and authorize other applications.”); Naftalis, *supra*, at 2 (“Before entering into a cooperation agreement with or granting immunity to a criminal defendant, federal prosecutors will generally require him to make a ‘proffer’ of the information that he will provide in exchange for leniency. Under Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(f), statements made during plea discussions with the government are generally not admissible in evidence. In practice, however, a proffer session is governed by the terms of a proffer agreement, known in legal circles as a ‘Queen for a Day,’ which requires that a defendant make a broad waiver of these exclusionary rights.” (footnotes omitted)).

statements for impeachment, which could make a huge difference in the strength of a prosecutor's case.³⁵ To date, the most substantial critique of lawyer errors in this realm has argued, quite reasonably, that advisements regarding proffer statements must be included within the protections of the Sixth Amendment.³⁶ Notably, however, even if pre-plea bargaining was deemed to be a critical stage such that the right to counsel applied, there is no obvious remedy for ineffective assistance in this context. In other words, curing the defects with the right might provide cold comfort to a defendant who learns he is nonetheless without a federal remedy.

Also, some defense lawyers may, in a fit of rage triggered by the client's conduct, intentionally reveal confidential information that harms the client.³⁷ Or defense counsel might just carelessly discuss problems with the defense strategy or credibility problems with defense witnesses within earshot of an agent of the prosecution.³⁸

35. See, e.g., *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) (holding that "an agreement to waive the exclusionary provisions of the plea-statement Rules is valid and enforceable"); 2 SUSAN W. BRENNER & LORI E. SHAW, *FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE*, Appendix B Form 33 (2d ed. 2011) (providing a sample DOJ proffer letter); BRENNER & SHAW, *supra* ("The indirect use of his statements, or other information, is permitted by this agreement. This indirect use includes pursuing leads based on the statements and information provided by Mr. Doe, as well as the use of the statements and information themselves for impeachment."). One commentator has provided a nice summary of the law governing proffer statements:

Initially, Queen for a Day agreements forbade the use of proffer statements as substantive evidence against the defendant. Proffer statements could only be used for leads to other evidence and for impeachment depending on how the defendant testified. Hence, proffer agreements provided only limited use immunity, not the statutory use and derivative use immunity granted under 18 U.S.C. § 6002. . . .

Over the past two decades, however, the terms of Queen for a Day agreements have changed, markedly weakening the already limited immunity previously reserved to the defendant. Today, Queen for a Day agreements commonly allow the use of proffer statements not only to pursue clues and leads—limited use immunity—but also to cross-examine the defendant should he testify, for rebuttal purposes even if the accused does not testify, and potentially in the government's case-in-chief.

Naftalis, *supra* note 34, at 6-7 (footnotes omitted); *id.* at 9-12 (explaining the importance to a defendant of obtaining a letter from the prosecution concluding that the defendant has provided "substantial assistance" in order to get a sentence reduction).

36. See Metzger, *supra* note 31, at 1667-69 (arguing that the "bright-line critical stage doctrine cannot guarantee fair process or fair results" because "[p]re-charge bargaining is an important aspect of effective advocacy").

37. See, e.g., *In re Prescott*, 57 Cal. Rptr. 3d 126, 130 (Ct. App. 2007). It is not inconceivable that a frustrated defense lawyer, confronted with claims that he has not been serving his client adequately, would reveal confessions or incriminating statements made by the client. *Id.* at 131 ("By acting as an advocate for the court rather than for his client, Prescott's appointed counsel provided ineffective assistance . . ."); *id.* at 135-36 (holding that a defendant whose attorney responded to the defendant's request to file a motion to retract his guilty plea by revealing privileged attorney-client communications to the court and arguing against his client's motion was entitled to relief). In the *Prescott* case, a retrial would be a sufficient remedy because the statements counsel made were harmful only as to the client's effort to withdraw his plea, and not as to the ultimate merits of the case. *Id.* at 136.

38. Cf. *Lenford v. State*, No. 01-97-00586-CR, 1999 WL 164472, at *3 (Tex. App.—Houston [1st Dist.] Mar. 25, 1999, pet. ref'd). While examples of reported decisions detailing advantages gained by the

Likewise, consider the harm worked upon a defendant when his attorney erroneously assumes that his client's confession at a bail hearing will result in his client's pretrial release and be inadmissible in the criminal case. In *United States v. Frappier*, defense counsel inexplicably advised his client to testify at a bail hearing and subjected her to damaging cross-examination despite the fact that such testimony was completely unnecessary for purposes of the judge's assessment of bail and was damaging to the defendant's ultimate defense at trial.³⁹ Perhaps most importantly, a defense lawyer may fundamentally misunderstand the governing obstruction of justice statute and mistakenly believe that he has a duty to turn over an incriminating diary entry or letter from the client, or letter from a third party, even when the law only requires the disclosure of fruits and instrumentalities of the crime.⁴⁰ Similarly, a lawyer may mistakenly and inadvertently impose disclosure duties on himself by disturbing or gathering physical evidence when a sound understanding of the law would have led him, perhaps, to look at and investigate without himself taking possession (and thus incurring a disclosure duty) of evidence of his client's crime.⁴¹ Moreover, defense counsel, operating on a mistaken understanding of his disclosure obligations, may reveal to the prosecution the existence of an

prosecution by overhearing defense counsel appear to be rare, there are plenty of examples illustrating that counsel is sometimes careless in discussing the case such that third parties may overhear. See *Harris v. Carlton*, No. 2:05-CV-24, 2007 WL 776517, at *2-3 (E.D. Tenn. Mar. 9, 2007); *Paskins v. State*, 513 A.2d 1319, at *1 (Del. 1986) (unpublished table decision); *Jones v. State*, 951 N.E.2d 312, at *4 (Ind. Ct. App. Aug. 2, 2011) (unpublished table decision).

39. *United States v. Frappier*, 615 F. Supp. 51, 52 (D. Mass. 1985). The court explained, Mrs. Frappier has succeeded in proving that Mr. Malloy failed to exercise reasonable professional judgment when he advised defendant to take the stand at the detention hearing. At the time of the hearing, Mr. Malloy had not properly acquainted himself with either the law governing the proceeding or the facts surrounding his client's case. Mr. Malloy was unaware of the option available to him under the Bail Reform Act of 1984, which permits an attorney to present a defendant's testimony by proffer at a detention hearing, 18 U.S.C. § 3142(f), thereby eliminating the need for a defendant to incur the risks of cross-examination.

Id.

40. As one recent summary of the law in this area noted, If a client provides ordinary materials (i.e., items that are not contraband, instrumentalities or fruits, and were not directly involved in the perpetration of a crime) that evidence the client's wrongdoing, ordinarily you need not disclose them to law enforcement unless required to do so by a subpoena, court order, discovery obligation or the like.

Jenness, *supra* note 23, at 20. Applying the ABA Standards for Criminal Justice, Professor Gillers noted that if a statute does not clearly require disclosure, and the item "is not contraband," then the lawyer need not disclose it unless retaining the item "pose[s] a risk of physical harm to anyone." Gillers, *supra* note 23, at 848.

41. See, e.g., Gillers, *supra* note 23, at 858-59 (warning lawyers not to simply take evidence from a client, but rather instructing that if they take possession they may have a duty to disclose it to the prosecution); see also *id.* (discussing *Hitch v. Pima Cnty. Superior Court*, 708 P.2d 72, 80 (Ariz. 1985) (Feldman, J., dissenting) ("[C]autious and common sense dictate that as a general rule [counsel] should never actively seek to obtain such evidence and should refuse possession even if it is offered to him. His guiding principle should be to leave things as they are found."); *Brown v. United States*, 551 F.2d 619, 620 (5th Cir. 1977) (reviewing facts of a case in which defense counsel advised their client to obtain evidence of the crime, provide it to the lawyer, and turn it over to the police, and noting that counsel had even advised the client that such evidence "could not be used against him as evidence in the trial").

incriminating witness that the defense investigation discovered.⁴² It is even possible that a defense lawyer may assume that his consulting expert's opinion or report, which he does not plan to use at trial because it is incriminating, must be turned over to the prosecution despite rather obvious confidentiality and potential attorney-client privilege implications raised by such disclosures.⁴³

In short, the range of pretrial attorney errors that could assist the prosecution's case-in-chief are almost as varied and plentiful as the range of errors that can prejudice a client at trial.⁴⁴ Moreover, the effect on the trial is no less significant than paradigmatic acts of ineffective assistance of counsel like the failure to adequately investigate or the failure to understand the governing procedural rules such as the need to file a motion to suppress as to illegally obtained evidence.⁴⁵ It is worth pointing out that there are precious few reported decisions on this issue, but this is likely due, in large part, to the fact that pretrial errors of counsel resulting in the discovery of incriminating evidence by the prosecution will often leave defendants with little choice other than to plead guilty. They are backed into a corner and forced to plead guilty. And the guilty plea, of course, insulates these attorney errors from the light of judicial review and denies many such defendants an opportunity to even seek a remedy.⁴⁶ Accordingly, this Article's goal is to spur judicial innovation so that the clients who are victims of this sort of ineffective assistance of counsel can have confidence that an adequate remedy exists, short of pleading guilty under the pressure of the evidence revealed to the prosecution through the errors of counsel.

42. See Gillers, *supra* note 23, at 842. Obviously, hiding evidence is obstruction of justice. But obstruction of justice statutes typically only apply to physical evidence. See, e.g., 18 U.S.C. § 1512(c) (2006). Accordingly, the defense is not generally required to make the prosecution's case for them, so long as the defense investigation does not conceal or otherwise impede the prosecution's discovery of evidence. Kevin R. Reitz, *Clients, Lawyers and the Fifth Amendment: The Need for a Projected Privilege*, 41 DUKE L.J. 572, 644-45 (1991). By contrast, if defense counsel discovered and took possession of physical evidence of a crime, the obligations of disclosure are considerably more rigid. See Gillers, *supra* note 23, at 845.

43. Cf. FED. R. CRIM. P. 16(b)(1)(B)-(C), (b)(2)(A) (requiring defense counsel to disclose expert reports only if the defense plans to use the report at trial or call the witness who prepared the report and the report relates to the witness's testimony); *Sechrest v. Ignacio*, 549 F.3d 789, 798 (9th Cir. 2008). By contrast, competent counsel will fight the disclosure of client confidences, even when made as part of a diagnosis pertaining to a defense, for example incompetency. See, e.g., *Pawlyk v. Wood*, 248 F.3d 815, 820 (9th Cir. 2001).

44. A lawyer could, for example, fail to cross-examine during a deposition a material witness who was likely to be unavailable for trial and, as a result, effectively deprive his client of the right to confront witnesses against him. Cf. *United States v. Hayes*, 231 F.3d 663, 673-74 (9th Cir. 2000) (addressing whether the right to counsel attaches for pre-charge depositions). Or perhaps a lawyer's actions during a corporeal identification could have been suggestive as to his client, thus contributing to his client's identification as the culprit.

45. See *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986).

46. See *United States v. Garcia-Valenzuela*, 232 F.3d 1003, 1005 (9th Cir. 2000) (recognizing that a guilty plea waives all non-jurisdictional defenses).

II. THE REMEDY PROBLEM

In law, a remedy is deemed adequate if it provides a full “means of enforcing a right . . . or redressing a wrong.”⁴⁷ When the errors of counsel result in the prosecution obtaining materially incriminating evidence against the defendant, there are adequate remedies. But these remedies may well strike courts as too extreme and, therefore, facilitate a stunted view of the right. As Professor Karlan has observed, “when courts cannot calibrate the remedy, they fudge on the right instead.”⁴⁸ Or as Justice Scalia recently remarked during oral argument, “one of the things that causes us to be suspicious of whether there’s a constitutional violation [is when] . . . there really isn’t any perfect remedy.”⁴⁹

Historically, the Supreme Court has confidently asserted that “Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation.”⁵⁰ And yet, in the vast majority of cases, the remedy for a Sixth Amendment violation is obvious and effective. For example, a violation of the right to counsel through post-attachment police interrogation is fully remedied by a pretrial suppression of the defendant’s statements and the fruits of these statements.⁵¹ Likewise, a violation of the *Gideon* right to appointed counsel or the *Strickland* right to effective assistance does not require a dismissal with prejudice of the charges; instead, the more tailored remedy of a reversal and retrial suffices.⁵² The process, then, is one of fitting the remedy to the violation such that the defendant does not get more or less than he would have been entitled to had the constitutional injury never occurred.⁵³ The goal is to put the defendant in the position he would have been in but for the Sixth Amendment violation, and for the most part, this goal produces unremarkable results. Unfortunately, remedying ineffective assistance of counsel that results in the affirmative creation or discovery of incriminating evidence does not lend itself to obvious

47. BLACK’S LAW DICTIONARY 1407 (9th ed. 2009) (defining “remedy”).

48. Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2015 (1998).

49. Transcript of Oral Argument at 42, *Missouri v. Frye*, 132 S. Ct. 1399 (2012) (No. 10-444) [hereinafter *Frye* Oral Argument Transcript].

50. *United States v. Morrison*, 449 U.S. 361, 364 (1981) (explaining that not all intrusions on the lawyer-client relationship prejudice the defendant so as to warrant a reversal); *id.* at 366 (“[In this case, there] is no effect of a constitutional dimension which needs to be purged to make certain that respondent has been effectively represented and not unfairly convicted.”).

51. *Massiah v. United States*, 377 U.S. 201, 207 (1964).

52. Where competent counsel would have obtained a dismissal with prejudice, a court might grant dismissal with prejudice, but such circumstances are exceedingly rare. *State v. Allah*, 787 A.2d 887, 899 (N.J. 2002) (holding that counsel’s ineffective assistance in failing to move for dismissal of charges based on double jeopardy entitled the defendant to a reversal of the conviction and a dismissal with prejudice of the charges). Perhaps a similar result would flow from errors of counsel in failing to move for a dismissal with prejudice based on *Brady* violations discovered during trial.

53. See Karlan, *supra* note 48, at 2015, 2019.

solutions.⁵⁴ The available remedies are either insufficient or impractical. I will discuss three main remedial options.

A. Suppression as an Adequate but Unlikely Remedy

First, consider the remedy of suppression. A reversal of the conviction accompanied by a suppression order would make the defendant whole and would put all of the parties in the position they would have been in but for the errors of counsel.⁵⁵ However, the suppression of evidence obtained as a result of the defense attorney's errors would result in the exclusion of *reliable* evidence of guilt obtained *without* any government misconduct.⁵⁶ Suppression in such circumstances seems unlikely given the Court's increasingly parsimonious application of the exclusionary rule in other contexts.⁵⁷

As a general matter, the exclusionary remedy is regarded by the modern Court as a "harsh medicine" that is best avoided.⁵⁸ There is a considerable fear that the exclusionary rule results in the release of "guilty and perhaps dangerous

54. The Court has been reluctant to provide a remedy to a defendant even when there was government misconduct resulting in an intrusion on the attorney-client relationship. *Weatherford v. Bursey*, 429 U.S. 545, 558 (1977) ("There being no tainted evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion by Weatherford, there was no violation of the Sixth Amendment."); *id.* at 557 (recognizing that a "per se rule . . . would operate prophylactically and effectively" but is unnecessary).

55. Presumably, the fruits of the constitutional injury would also have to be suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 485 (1963).

56. *United States v. Morrison*, 449 U.S. 361, 365 (1981). In *Frazier*, the federal habeas court adopted this approach and held that "the only appropriate remedy is to not allow use of the tainted statements, should the State decide to initiate a new trial in this matter." *Frazier v. Berghuis*, No. CIV A 02-CV-71741DT, 2003 WL 25195212, at *7 (E.D. Mich. Aug. 6, 2003).

57. When, for example, the evidence is a confession by the defendant, it seems most unlikely that the government would be able to reproduce any similar evidence if the defendant wins a suppression remedy. It will be rare that there is a true independent source or inevitable discovery of any incriminating evidence that is discovered because of defense counsel's errors. But it will probably never happen that the defendant will confess again such that the prosecution would be able to benefit at retrial from similar evidence. Perhaps this would motivate the Court to treat such confessions, though the product of defense counsel ineffectiveness, as attenuated from defense counsel errors insofar as the defendant was not coerced into making such a statement. That is to say, perhaps a free-willed confession by a defendant cannot be suppressed as ineffective assistance because it is, per se, attenuated from the errors of defense counsel. *Cf. United States v. Ceccolini*, 435 U.S. 268, 279 (1978) (treating a witness's decision to provide testimony as "an act of her own free will" that was sufficient to dissipate the taint of prior police illegality); *see also* 1 WILLIAM F. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 3:11 (2012) (explaining that the passage of time is less likely to give rise to attenuation for "inanimate" evidence but relying on *Ceccolini* to conclude that the passage of time between illegality and the statements of an individual suggests attenuation).

58. Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099, 1135 (2002). As one scholar has observed,

The exclusionary rule is generally seen by the Court as harsh medicine that prevents a tribunal from considering reliable, probative evidence, and often allows those who would otherwise be found guilty to escape the consequences of their ill deeds. The Court has thus applied a fastidious and none-too-generous cost-benefit analysis to the rule, refusing to impose it when its perceived deterrence benefits are outweighed by the substantial social costs the rule imposes.

Id. at 1134-35.

defendants.”⁵⁹ For the Court’s part, the Justices seem increasingly content with regarding suppression of evidence as a remedy of last resort that must “pay its way by deterring official unlawfulness.”⁶⁰ Elaborating on the limits of the modern exclusionary rule, Professor Orin Kerr has explained, “[T]he scope of the suppression remedy depends on whether the deterrent impact of exclusion outweighs the costs of potential lost evidence.”⁶¹ The focus of the exclusionary rule, in other words, is on deterring government actors, primarily law enforcement.⁶² Indeed, in the absence of government overreaching or misconduct, the Supreme Court has never applied the quintessential criminal remedy, the exclusionary rule.

Over the past few years, the Court has gone to considerable lengths to ensure that the exclusionary rule is a doctrine limited to deterring law enforcement misconduct.⁶³ Just a few striking, recent examples suffice to make this point. In *Herring*, the Court held that an illegal seizure could not justify suppression when the police had relied in good faith on erroneous records showing that there was an outstanding warrant for the defendant’s arrest.⁶⁴ Revealing of the Court’s underlying reluctance to impose an exclusionary remedy, the *Herring* majority explained that suppression was unavailable in the absence of “deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence” on the part of law enforcement.⁶⁵ Similarly, the Court’s recent decision in *Davis v. United States* also bespeaks an overriding desire by the Court to avoid suppression, even when the Constitution was violated by officers, so long as the officers were

59. Todd E. Pettys, *Instrumentalizing Jurors: An Argument Against the Fourth Amendment Exclusionary Rule*, 37 *FORDHAM URB. L.J.* 837, 840 (2010) (arguing that the exclusionary rule, at least in the Fourth Amendment context, infringes upon jurors’ deliberative autonomy and should be abandoned and replaced with some sort of financial remedy system).

60. Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 *GEO. L.J.* 1077, 1078 (2011) (quoting *United States v. Leon*, 468 U.S. 897, 908 n.6 (1984)) (internal quotation marks omitted).

61. *Id.* at 1118. I have previously addressed the shortcomings of this narrow view of the exclusionary rule, particularly in view of the limitations on other constitutional remedies. Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 *ALA. L. REV.* 687, 710-54 (2011).

62. *Illinois v. Krull*, 480 U.S. 340, 359-60 (1987) (holding that the exclusionary rule cannot be justified by an attempt to deter legislatures from adopting unconstitutional statutes); *Leon*, 468 U.S. at 918 (holding that exclusionary rule is not an appropriate vehicle for deterring magistrate judges who issue search warrants).

63. See *Herring v. United States*, 555 U.S. 135, 141 (2009). At least initially, the exclusionary rule was justified on the theory of ensuring the integrity and fairness of the judicial process. See *Mapp v. Ohio*, 367 U.S. 643, 659 (1961). But cases like *Herring v. United States* have made it clear that deterrence is now the sole factor underlying suppression determinations. *Herring*, 555 U.S. at 141 (“[T]he exclusionary rule is not an individual right and applies only where it ‘result[s] in appreciable deterrence.’” (second alteration in original) (quoting *Leon*, 468 U.S. at 909) (internal quotation marks omitted)); *id.* at 140-41 (emphasizing that the culpability of law enforcement errors is relevant in assessing the deterrent value of the exclusionary rule in a particular case).

64. *Herring*, 555 U.S. at 146.

65. *Id.* at 144. For a detailed discussion of the implications of *Herring* and a survey of the early literature discussing the case, see Marceau, *supra* note 61, at 742.

acting in actual (or presumed) good faith.⁶⁶ As the Court put it, “Because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, we hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.”⁶⁷

A third recent, final example of the Court’s hostility to suppressing evidence in the absence of deterrable police misconduct comes in a less noticed case from this term, *Perry v. New Hampshire*.⁶⁸ In *Perry*, the Court held by an 8-1 vote that the Due Process Clause does not justify suppression or even a review of the reliability of an eyewitness identification when law enforcement did not engage in unnecessarily suggestive behavior.⁶⁹ In other words, suppression is not required when an identification is unreliable, but that unreliability was not caused by law enforcement misconduct.⁷⁰

The Court’s staunch refusal to extend the suppression remedy to circumstances in which there is not a causal link between the constitutional injury and law enforcement misconduct suggests that the exclusionary rule is not a likely remedy for instances of ineffective assistance of counsel cases.⁷¹ Of course, it is true of virtually all ineffective assistance of counsel claims that there is no government misconduct to speak of, but only in this class of cases in which there is pretrial ineffective assistance resulting in the prosecution obtaining material inculpatory evidence is this fact legally significant. Only when the errors of counsel result in the discovery of incriminating evidence does a tension arise between the violation of the right and the absence of a remedy. Far from police conduct that the law should seek to deter, this sort of check-with-the-lawyer-first approach to interrogation is precisely the model of interaction with defendants that many scholars and defense lawyers regard as

66. *Davis v. United States*, 131 S. Ct. 2419, 2429 (2011) (“[I]n 27 years of practice under *Leon*’s good-faith exception, we have ‘never applied’ the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct.” (quoting *Herring*, 555 U.S. at 144)). For a particularly thorough and useful summary of the *Davis* decision’s reasoning, see 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.3 (4th ed. 2011) [hereinafter LAFAVE, SEARCH AND SEIZURE].

67. *Davis*, 131 S. Ct. at 2423-24.

68. See *Perry v. New Hampshire*, 132 S. Ct. 716, 726 (2012). In *Perry*, the Court applied *Neil v. Biggers*, 409 U. S. 188 (1972), and *Manson v. Brathwaite*, 432 U. S. 98 (1977), which require the suppression of identifications that are unreliable. *Perry*, 132 S. Ct. at 718.

69. *Perry*, 132 S. Ct. at 730.

70. *Id.* at 721 (“Our decisions, however, turn on the presence of state action and aim to deter police from rigging identification procedures . . .”).

71. There does not appear to be a single instance in which the Supreme Court has applied the exclusionary rule when there has not been law enforcement misconduct. Cf. *Arizona v. Roberson*, 486 U.S. 675, 682 (1988) (suppressing a defendant’s statement obtained by police through a negligent violation of interrogation rights); see also *Payton v. New York*, 445 U.S. 573, 574 (1980) (suppressing evidence obtained by officers who relied on the public arrest rule (and a statute) to enter a home without a warrant).

ideal.⁷² Moreover, even if the deterrence function of the exclusionary rule could conceivably be extended so as to include the deterrence of defense counsel from making grievous errors,⁷³ there is certainly no reason to believe that the exclusion of evidence gained through the errors of counsel would have a deterrent effect on defense counsel,⁷⁴ and the total absence of any government misconduct suggests that suppression would not be available.

In sum, certain instances of pretrial ineffective assistance of counsel could be fully cured by an application of the exclusionary rule.⁷⁵ And yet such a remedy seems unlikely. A remedy of reversal without suppression does the defendant little service, and the remedy of reversal plus suppression will likely be regarded as indefensible in this era of the Court's suppression jurisprudence.⁷⁶

72. See, e.g., Martin R. Gardner, *The Sixth Amendment Right to Counsel and Its Underlying Values: Defining the Scope of Privacy Protection*, 90 J. CRIM. L. & CRIMINOLOGY 397, 404, 415 (2000); Brooks Holland, *A Relational Sixth Amendment During Interrogation*, 99 J. CRIM. L. & CRIMINOLOGY 381, 425 (2009).

73. Based on the Court's suppression jurisprudence, most of which arises in the Fourth Amendment context, there is no reason to believe that the Court would be willing to extend the deterrent function beyond law enforcement. The Court has held that the exclusionary rule is not appropriate as a means of deterring magistrate judges, *United States v. Leon*, 468 U.S. 897 (1984); that it may not be used to deter legislatures, *Illinois v. Krull*, 480 U.S. 340 (1987); and most recently, that it cannot be used to shape or deter lower court conduct, *Davis v. United States*, 131 S. Ct. 2419, 2423 (2011).

74. See Kyle Graham, *Tactical Ineffective Assistance in Capital Trials*, 57 AM. U. L. REV. 1645, 1648-50 (2008). In other contexts, it has been argued that ineffective assistance of counsel claims provide an incentive for defense counsel to sandbag or provide less than fully competent representation. See, e.g., *id.* at 1646, 1690 (considering whether it is possible that "defense attorneys deliberately [are] providing ineffective representation at the penalty phase of capital trials" and concluding that "sandbagging at the penalty phase is usually bad strategy").

75. Of course, it is worth pointing out that the State "did nothing wrong" in the pending cases *Lafler* and *Frye*. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1383 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1404-05 (2012). In these cases, all errors were just those of defense counsel. See *Lafler*, 132 S. Ct. at 1383; *Frye*, 132 S. Ct. at 1404-05. The remedy of suppression is not being sought; however, it is arguably just as unusual to require a prosecutor, who operates in a realm of nearly complete discretion as to plea bargains, to re-issue an old, expired plea deal.

76. In a pathmarking article, Professor Arnold Loewy distinguished between constitutional violations in "obtaining" evidence and unconstitutionally "used" evidence. Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 907 (1989). Professor Loewy noted that if the violation of the Constitution occurs when evidence is used at trial, then the violation "can have only one remedy," exclusion. *Id.* at 933. As Loewy explained, "If the only constitutional wrong inheres in using the evidence, the Court has no business considering concepts of deterrence. The Court should prohibit only use of such evidence. Conversely, when obtaining evidence is the constitutional wrong, exclusion should be subjected to a cost/benefit analysis." *Id.* at 939 (emphasis added). If *Frye* and *Lafler* had signaled a trial-oriented right to effective assistance, this might, by analogy, lend support to the view that the right to effective assistance could only be violated by injuries worked on the defendant at trial, but the Court expressly rejected this approach and held that the "right to effective assistance of counsel applies . . . before trial." *Frye*, 132 S. Ct. at 1405. Thus, although the *Frye* and *Lafler* decisions might help countless other defendants, insofar as they expressly hold that the right to effective assistance extends beyond the trial, such a holding may actually hurt the defendants I am discussing in this Article. If the right to effective assistance can be violated outside of and in contexts unrelated to the fair trial, then the violation of the Sixth Amendment is not simply the errors of counsel at trial or that impact trial. See *Frye*, 132 S. Ct. at 1405. In this way, it may be inaccurate to say that

B. A Damage Action Under § 1983 Is an Inadequate or Unavailable Remedy

As the previous section makes clear, suppression may be an unlikely remedy for ineffective assistance of counsel. For defendants who are convicted on the basis of their attorney's incompetence, the inability to challenge their conviction directly will likely leave them feeling as though there is no adequate recourse for their constitutional injury.⁷⁷ In the Fourth Amendment context, however, many scholars have advocated for damage actions as an alternative to the exclusionary rule.⁷⁸ For example, Professor Slobogin has pointed out that

the right to effective assistance of counsel is a unique right, one that is violated only by the use of evidence at trial (or misconduct during trial). *Cf.* *Kansas v. Ventris*, 556 U.S. 586, 592 (2009) (recognizing the *Massiah* right as a non-trial right that is violated prior to trial and subject to the cost-benefit balancing). Most rights—the Fourth Amendment, the right to fair identification procedures, for example—are violated prior to trial and subject to the cost-benefit balancing. *Perry v. New Hampshire*, 132 S. Ct. 716, 721 (2012). And the *Miranda* right, which is violated prior to trial, involves police misconduct. *See Chavez v. Martinez*, 538 U.S. 760, 774-75 (2003). In this way, the right to effective assistance of counsel is a unique right; it is violated only by the use of evidence at trial (or misconduct during trial) and there is no requirement of misconduct on the part of the government.

77. *Polk Cnty. v. Dodson*, 454 U.S. 312, 325 n.18 (1981) (“For an innocent prisoner wrongly incarcerated as the result of ineffective or malicious counsel, [reversal] normally is the most important form of judicial relief.”).

78. *See, e.g., Pettys*, *supra* note 59, at 864 (“[W]e might design a schedule of fixed monetary awards, under which non-trivial sums are automatically awarded—even in the absence of physical, reputational, or mental harm—upon proof that specified kinds of Fourth Amendment violations have occurred . . . [or] deter misconduct . . . by increasing our reliance on punitive damages. Under the law as it exists today, punitive damages are available in actions brought under § 1983 . . .”). Notably, however, punitive damages are not available under § 1983 in actions against municipalities. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981); *see also* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 385 (proposing an administrative damages regime to replace the exclusionary rule); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 899-918 (1991); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 796 (1994) (“[The defendant] cares only about exclusion—and can get only exclusion—even if other remedies (damages or injunctions) would better prevent future violations.”); Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: “Here I Go Down that Wrong Road Again,”* 74 N.C. L. REV. 1559, 1565 (1996) [hereinafter Dripps, *Akhil Amar on Criminal Procedure*] (“The practical weakness of damage actions as remedies for police excess cannot be cured by any foreseeable change in the technical details of the rules governing suits against police.”); Dripps, *Akhil Amar on Criminal Procedure*, *supra*, at 1610 (“The exclusionary rule is as natural a constitutional remedy as reversing the conviction of a white defendant because the prosecution discriminated against blacks during jury selection. The Fifth Amendment Takings Clause, after all, is unique in providing a textual escape hatch contingent on compensation.” (footnote omitted)). Professor Dripps has also proposed, quite innovatively, a system of contingent exclusion wherein “suppression orders . . . are contingent on the failure of the police department to pay damages set by the court.” Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 2 (2001). Under this model, it is suppression, but only if the defendant is not fully compensated by the offending party. *See id.* at 3. The problem, of course, is that there is no incentive whatsoever for defense counsel to pay damages to the client so that he can go about serving his prison term—both parties prefer the exclusionary remedy. Perhaps, however, some sort of court imposed award paid out of the public coffers would be deemed sufficient to offset the harm of non-exclusion when the error resulting in evidence of guilt was the fault of defense counsel.

[b]ecause a damages suit can be brought even when no prosecution occurs or when the prosecution ends in a plea bargain, it permits a more consistent response to illegal actions than does the exclusionary rule [and b]ecause damages can be imposed directly on the offending officer or on his or her employer, the punishment is always communicated to the culprit.⁷⁹

Setting aside the question of whether that is the best way to handle Fourth Amendment violations, damage actions have little traction in the context of the right to counsel violations discussed in this Article because it is the defense lawyer, and not the state or the police officer or the prosecutor, that has violated the defendant's constitutional rights.

The unique nature of the Sixth Amendment right to counsel—as an individual right that is violated by the actions of one's own agent, rather than by any misconduct by a state actor—makes it peculiarly difficult to remedy, even if suppression is off the table.⁸⁰ In addition to the shortcomings commonly associated with damage remedies in the Fourth Amendment context, such as the unwillingness of the jury to award damages to a criminal, or the difficulty in properly measuring compensatory damages in these cases, two specific problems plague a damages remedy in the ineffective assistance of counsel context. There is a problem of figuring out *who to sue*, and there is the array of complex *procedural barriers* to damage actions in this context.

Under 42 U.S.C. § 1983, “[e]very person’ who acts under color of state law to deprive another of a constitutional right shall be answerable to that person in a suit for damages.”⁸¹ Relying on § 1983 in the Fourth Amendment context, the Supreme Court has offered damage actions as a viable alternative to the exclusionary rule.⁸² Indeed, the decline of the suppression rule has seen a concomitant increase in the Court's willingness to expound on the effectiveness of damage actions under § 1983.⁸³ A notable example is *Hudson v. Michigan*, the decision holding that the exclusionary rule does not apply to knock-and-

79. Slobogin, *supra* note 78, at 385.

80. See Jennifer E. Laurin, *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1015 (2010). Professor Nancy Leong has argued that the development of constitutional rights is facilitated by litigation in a variety of contexts. Nancy Leong, *Making Rights*, 92 B.U.L. REV. 405, 480 (2012) (concluding that when a right is litigated exclusively, or primarily in the context of a challenge to a criminal charge or conviction, then the right tends to be construed more narrowly and against the defendant); accord Laurin, *supra*. Unfortunately, not all constitutional rights are amenable to litigation in a variety of contexts. The right to counsel, for the reasons set forth in this Article, is an example for which the richness of the right cannot be enhanced by multi-context litigation.

81. The Honorable Michael J. Satz, 1988 Fla. Op. Att’y Gen. 47, at *2 (1988) (referencing 42 U.S.C. § 1983 (2012)).

82. See *Hudson v. Michigan*, 547 U.S. 586, 597 (2006).

83. See *id.* at 596-600.

announce violations of the Fourth Amendment.⁸⁴ Explaining that suppression was unnecessary as a remedy for this constitutional violation, the Court noted,

We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago. [Previously, persons] could not turn to . . . 42 U.S.C. § 1983, for meaningful relief; *Monroe v. Pape*, 365 U.S. 167 (1961), which began the slow but steady expansion of that remedy, was decided the same Term as *Mapp*. It would be another 17 years before the § 1983 remedy was extended to reach the deep pocket of municipalities.⁸⁵

Hudson, then, reflects an effort by the Court to prioritize, whenever possible, damage actions over the suppression of reliable evidence of guilt.⁸⁶ The problem with this solution, however, is that damage actions are much more difficult to win than the *Hudson* majority suggests.⁸⁷ Cases like *Hudson* suggest that damage actions are a sufficient substitute for suppression, but as Professor Karlan pointed out, the doctrine in this field is beginning to look like “a shell game, in which [the Court] uses the presence of each [alternative remedy] as a rationale for weakening the other.”⁸⁸ Simply put, immunities, abstention doctrines, and other constitutional and prudential limitations on damage actions make civil damage cases an unsatisfactory alternative to the exclusionary rule in many contexts.

For example, suing a prosecutor for prosecuting a case and securing a conviction on the basis of a clear violation of the right to counsel is absolutely barred. Specifically, the Supreme Court has granted “those performing judicial, legislative, and prosecutorial functions” absolute immunity from lawsuit.⁸⁹ In

84. *See id.*

85. *Id.* at 597 (citing *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978)).

86. David J.R. Frakt, *Fruitless Poisonous Trees in a Parallel Universe: Hudson v. Michigan, Knock-and-Announce, and the Exclusionary Rule*, 34 FLA. ST. U. L. REV. 659, 695 (2007) (“*Bivens* suits have been available since 1971, and § 1983 claims have been available since *Monroe v. Pape* was decided in 1961. If the threat of civil suits were as effective a deterrent as Justice Scalia suggests, one would assume that police violations of constitutional rights should have been virtually eliminated by now. But Justice Scalia [in *Hudson*] offers no empirical evidence that the threat of being sued has deterred the police or resulted in a measurable diminution of serious violations of the rights of criminal suspects.”); accord 6 LAFAYETTE, SEARCH & SEIZURE, *supra* note 66, § 11.4, at 15-16 (Supp. 2011); Sharon L. Davies, *Some Reflections on the Implications of Hudson v. Michigan for the Law of Confessions*, 39 TEX. TECH L. REV. 1207, 1208 (2007); Marceau, *supra* note 61, at 717.

87. *See* Pamela S. Karlan, *Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78 UMKC L. REV. 875, 877 (2010).

88. *See id.*; *see also* Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of Monroe v. Pape*, 78 UMKC L. REV. 889 (2010); Marceau, *supra* note 61, at 694 (“[P]rovid[ing] a comprehensive account of the complex and varied procedural barriers to relief that make substantive constitutional development in the Fourth Amendment context unlikely.”).

89. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 532 (5th ed. 2007).

order to shield the prosecution from the fear of a lawsuit as they perform their judicial functions, in *Imbler v. Pachtman* the Court held that prosecutorial acts are entitled to absolute immunity from damages.⁹⁰ In *Imbler*, the Court approved absolute immunity even when the allegations were of a deliberate conspiracy by the prosecution to rely on knowingly false or perjured testimony to convict an innocent person.⁹¹ Accordingly, any claim that a prosecutor might be liable for damages when she prosecutes a defendant in the face of patent ineffective assistance of counsel that facilitated the success of the prosecution is, under current precedent, spurious.⁹² Absolute immunity also shields the legislators whose enactments might be the cause of a crippling underfunded indigent defense system.⁹³

Even if the wronged client could find a plausible plaintiff who was not entitled to the absolute immunity enjoyed by prosecutors, the Supreme Court has also limited damage actions by holding that § 1983 actions cannot serve as a vehicle for challenging the legality of one's conviction.⁹⁴ Accordingly, any damages action that would "necessarily impl[y] the unlawfulness of the State's custody" is prohibited.⁹⁵ This is the *Heck v. Humphrey* rule—that is, challenges under § 1983 to the lawfulness of one's incarceration, as opposed to the conditions of one's confinement, are not cognizable unless one's conviction has already been overturned on direct or habeas review.⁹⁶ Under *Heck*, then, the more robust the exceptions to the exclusionary rule, the more likely it is that a damages action is permitted.⁹⁷ The absence of an exclusionary remedy means that an illegality did not necessarily taint the conviction and, thus, a damage action is likely permitted. For example, because the knock-and-announce violation of the Fourth Amendment is entirely without remedy in the criminal case because suppression is not permitted, a damage action is more likely.

Similarly, because a police officer's excessive force during an otherwise legal search and seizure does not justify the suppression of evidence or nullify a conviction—that is, because the question of "whether police used excessive force is completely distinct from whether the defendant committed the crime."⁹⁸ *Heck* is generally not regarded as a bar on a damage action for excessive force claims. By the same logic, then, one could argue that the absence of an exclusionary remedy in the context of ineffective assistance of counsel claims

90. See *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976).

91. See *id.* at 422-23.

92. See *id.* *Imbler* had obtained federal habeas relief on the basis of the prosecutorial misconduct leading to his conviction. See *id.* at 413.

93. See, e.g., *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

94. See *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973).

95. *Skinner v. Switzer*, 131 S. Ct. 1289, 1293 (2011) (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005)).

96. See *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).

97. See *id.*

98. CHEMERINSKY, *supra* note 89, at 532.

ought to justify permitting damages actions to vindicate ineffective assistance of counsel claims that cannot be remedied through suppression.

Such a reading of *Heck*, however, is unlikely to be adopted by the Supreme Court for two related reasons. First, the compensatory damages that a victim of ineffective assistance suffers are the damages of the conviction—that is, the injury he would be compensated for is his unconstitutional conviction. By contrast, in excessive force claims or failure-to-knock claims, the compensatory damages are the injuries the defendant incurred from the police harm, entirely distinct from the conviction—it is the mental, physical, and property damage that was actually inflicted by the misconduct. Second, and closely related, while it is true that the less likely it is that exclusion is an available remedy—as under *Hudson v. Michigan*—the more likely it is that a damage action is permitted, this does not mean that the unavailability of suppression necessitates the conclusion that a damage action is available.⁹⁹ The weaker the claim to exclusion the more plausible the claim to overcoming *Heck*, but the former does not dictate the latter.¹⁰⁰ A claim for damages based on allegations of an unlawful arrest and trial, would seem to be precluded.¹⁰¹ Stated more directly, the principal barrier to a damage action to vindicate a claim of ineffective assistance of counsel is that such an award would “necessarily imply” the invalidity of one’s conviction, a result that has been foreclosed by *Heck*.¹⁰²

Moreover, even assuming that barriers like the *Heck* limitation could be overcome and civil damage actions could be brought by defendants subjected to ineffective assistance, there is a serious question as to who should be sued—that is, who is the appropriate defendant? Most of the obvious potential candidates for liability enjoy immunity from such liability. For example, § 1983 limits damages actions to “persons” who, while acting on behalf of the state, violated an individual’s constitutional rights, and the Supreme Court has

99. See *Hudson v. Michigan*, 547 U.S. 586, 598 (2006).

100. See *Heck*, 512 U.S. at 482-83 (1994). For example, the police could violate the Fourth Amendment and illegally enter one’s home. However, if the evidence they find is subject to an independent source or inevitable discovery, then suppression is not appropriate. See *United States v. Jackson*, 596 F.3d 236, 240-41 (5th Cir. 2010). Likewise, then, the Fourth Amendment violation is cognizable in a § 1983 action because a showing that the officers violated the Fourth Amendment does not necessarily imply the invalidity of the conviction. See *id.* at 242. Because the exclusionary rule did not apply, the conviction is not called into question, and presumably damages are permitted under *Heck*. See *Heck*, 512 U.S. at 486 (holding that § 1983 actions are not available unconstitutional actions “whose unlawfulness would render a conviction or sentence invalid”).

101. The Court has recently reiterated its holding in *Heck*. See *Skinner v. Switzer*, 131 S. Ct. 1289, 1298 (2011) (“Pathmarking here is *Heck v. Humphrey*. . . . Plaintiff in that litigation was a state prisoner serving time for manslaughter. He brought a § 1983 action for damages, alleging that he had been unlawfully investigated, arrested, tried, and convicted. Although the complaint in *Heck* sought monetary damages only, not release from confinement, we ruled that the plaintiff could not proceed under § 1983.”).

102. *Id.* (“When ‘a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence,’ the Court held, § 1983 is not an available remedy.” (quoting *Heck*, 512 U.S. at 487)).

held that a state is not a person.¹⁰³ In *Will v. Michigan Department of State Police*, the Court held that the state police department could not be a defendant in a § 1983 action.¹⁰⁴ Even though the Michigan police department had conspired to violate Will's rights, the Court held that a damage action against the responsible officers in their official capacity was precluded insofar as state officials acting in their official capacity are immune from suit.¹⁰⁵

So an action against the State would be barred because the State is not a *person* for purposes of § 1983. Notably, however, in *Polk County v. Dodson*, the Court held that the actions of the *person* responsible for the defendant's unconstitutional conviction, the defense lawyer, even a publicly funded one, could not be attributed to the state for purposes of establishing the state action necessary to subject the State to liability.¹⁰⁶ You cannot sue the State because it is not a person, and you cannot sue the responsible person because they are not sufficiently linked to the State.¹⁰⁷ In *Dodson*, the Court recognized that a

103. See *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 76 (1989) (“[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official’s office.” (citing *Brandon v. Holt*, 469 U.S. 464, 471 (1985))).

104. *Id.*

105. *Id.* at 66 (“Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties.”); *id.* (holding that a suit against an official in his official capacity is equivalent to suing the State and, thus, barred by the Eleventh Amendment). It is worth noting that municipalities and counties are considered persons for purposes of § 1983. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). But, in order to impose liability on a county or municipality for a constitutional violation, the plaintiff must satisfy an onerous burden of showing that the unconstitutional conduct was a product of an official county policy. See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 470 (1986) (“*Monell* held that recovery from a municipality is limited to acts that are, properly speaking, ‘of the municipality,’ *i.e.*, acts that the municipality has officially sanctioned or ordered.”); *Polk Cnty. v. Dodson*, 454 U.S. 312, 326 (1981) (“In *Monell v. New York City Dept. of Social Services*, we held that official policy must be ‘the moving force of the constitutional violation’ in order to establish the liability of a government body under § 1983.” (citations omitted)). Obviously, discrete acts of attorney ineffectiveness will never amount to a county policy or custom. However, perhaps, if a county public defender system put in place various procedures that limited an attorney’s ability to make strategic decisions, meet with the client, or investigate the circumstances of the crime, or if the policy required counsel to request that their client speak to law enforcement, then representation consistent with this policy could well violate the Sixth Amendment and give rise to county or municipal liability. For an example of a court finding a sufficient policy or custom to justify county liability, see *Miranda v. Clark Cnty.*, 319 F.3d 465, 470 (9th Cir. 2003) (en banc). “The resource allocation policy alleged in this case constitutes a viable claim and subjects Harris to suit as a policymaker on behalf of Clark County.” *Id.* at 471 (discussing “a policy of assigning the least-experienced attorneys to capital cases without providing any training”). *But cf.* *McMillian v. Monroe Cnty.*, 520 U.S. 781, 783 (1997) (holding that the county sheriff is a “policymaker” for *Monell* purposes but holding that he is a policymaker for the state rather than the county, and thus protected by sovereign immunity under the Eleventh Amendment). See also 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 9:4 (2012) (compiling cases holding that government agencies are not liable “for alleged negligence of public defender organizations and their employees”).

106. *Dodson*, 454 U.S. at 321; see also *Vermont v. Brillion* 129 S. Ct. 1283, 1291 n.7 (2009) (“A public defender may act for the State, however, ‘when making hiring and firing decisions on behalf of the State’ and ‘while performing certain administrative and possibly investigative functions.’” (quoting *Dodson*, 454 U.S. at 325)).

107. *Dodson*, 454 U.S. at 318-19. The Court explained,

public defender acted as a state actor “when making hiring and firing decisions” and “while performing certain administrative and possibly investigative functions.”¹⁰⁸ But as to the actual adversarial representation of a client, “[f]ederal courts in every United States circuit have declined jurisdiction in actions under the Civil Rights Act [§ 1983] on the ground that an attorney does not act under color of law, regardless of whether the attorney is privately retained or court-appointed.”¹⁰⁹ This is consistent with the general rule that the errors of defense counsel are charged against the defendant himself.¹¹⁰

Notably, however, a recent Supreme Court decision in the Sixth Amendment speedy trial context indicated that “[d]elay resulting from a systemic ‘breakdown in the public defender system,’ could be charged to the State.”¹¹¹ Applying this logic, arguably, a defendant could assert that a “systemic breakdown” of the defense system prejudiced his particular case and, thus, justifies a damage action. If systemic breakdowns in the defense system might give rise to a constitutional harm in the speedy trial context, then it is not too much of a stretch to argue that relief should be available in similar circumstances to protect another right embedded in the Sixth Amendment, the right to counsel. To date, however, such actions seem to have had no traction in the circuit courts post-*Dodson*.¹¹² And moreover, it is not plausible to think

In our system a defense lawyer characteristically opposes the designated representatives of the State. The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing ‘the undivided interests of his client.’ This is essentially a private function, traditionally filled by retained counsel, for which state office and authority are not needed.

Id. (footnote omitted); *see also id.* at 321 (“[A] public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client.”).

108. *Id.* at 325 (citing *Branti v. Finkel*, 45 U.S. 507 (1980), and comparing that case with *Imbler v. Pachtman*, 424 U.S. 409, 430-31 & n.33 (1976)). For an interesting case limiting *Dodson* to circumstances in which there is a lawyer-client relationship, and thereby subjecting office supervisors to liability under § 1983 for office policies, see *Miranda*, 319 F.3d at 469. “[T]he administrative head of the County Public Defender’s Office” may be a state actor insofar as he was “not acting under any of the ethical standards of the lawyer-client relationship” and his function in creating policies was “administrative.” *See also id.* (addressing, *inter alia*, a polygraph policy under which “clients who claimed innocence, but appeared to be guilty [based on the polygraph], were provided inadequate resources to mount an effective defense” and describing this as an administrative policy regarding the best allocation of office resources).

109. MALLEN & SMITH, *supra* note 105, § 9:4 (“Attorneys often are described as ‘officers of the court,’ but that does not create state action since this status does not create a state agency or officership. An attorney is not a state officer because of a state license or membership in the state bar. A private attorney does not act as a state functionary.”).

110. *Coleman v. Thompson*, 501 U.S. 722, 753 (1991).

111. *Brillon*, 129 S. Ct. at 1292 (quoting *Vermont v. Brillon*, 955 A.2d 1108, 1111 (Vt. 2008), and comparing to *Dodson*, 454 U.S. at 324-25).

112. For a summary of the history of the litigation in this area, see MALLEN & SMITH, *supra* note 105, § 9:4. “In 1978, the Seventh Circuit, in *Robinson v. Bergstrom*, concluded that an individual public defender acts under color of law when representing a criminally charged client. The court ultimately concluded that the public defender was entitled to absolute immunity. The court found sufficient state action since the public defender’s office was a state agency, the attorney was a compensated employee of the state, and the client had no choice but to accept that individual as his attorney. . . . Finally, in 1981, the United States Supreme Court

that economic damages against attorneys would be available without some sort of immunity—absolute or at least qualified immunity. If public defender systems and individual defenders are subject to § 1983 actions, then surely they are also entitled to, at the very least, qualified immunity.¹¹³

In sum, damages for the constitutional violation of one's right to the effective assistance of counsel are extremely unlikely in light of current immunity doctrines and prudential concerns. Such actions are often barred by *Heck v. Humphrey* if the conviction has not been set aside, and even if the actions are not precluded, there is unlikely to be a viable defendant from whom the convicted person could recover damages. Prosecutors enjoy absolute immunity; states enjoy sovereign immunity; and liability against counties for particular errors of counsel will be similarly rare.¹¹⁴ Likewise, § 1983 actions against defense counsel are generally barred by the *Dodson* decision.¹¹⁵ Constitutional tort actions for relief from ineffective assistance of counsel, in short, are not available. There is no reliable way to vindicate the Sixth Amendment through damages in this context. There is, however, a tort action that could theoretically bring the same level of compensatory or even punitive damages to an injured defendant: a malpractice lawsuit.¹¹⁶

granted certiorari in *Dodson* to resolve the issue. The Court endorsed the reasoning of most of the decisions that held neither state employment nor state compensation created color of law, since an attorney's loyalty was determined by ethical obligations, not by the source of the lawyer's employment or compensation." *Id.*

113. See *Dodson*, 454 U.S. at 316. The lower court in the *Dodson* case had rejected "the argument that a public defender should enjoy the same immunity provided to judges and prosecutors. It held that the defendants were entitled to a defense of 'good faith,' but not of 'absolute,' immunity." *Id.*

114. See *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 67 (1989); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986); *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976).

115. See *Dodson*, 454 U.S. at 321-22.

116. See James L. Buchwalter, *Cause of Action for Malpractice Against Defense Attorney for Ineffective Representation During Pretrial Phase of Criminal Case*, in 42 CAUSES OF ACTION 707, 709, 721-24 (2d ed. 2009 & Supp. 2012). Some jurisdictions treat malpractice cases as contract actions. See *id.* at 722-23. There is, however, no apparent practical difference. Malpractice actions are premised on "instance[s] of negligence or incompetence on the part of a profession" and do not reflect necessarily a constitutional violation. BLACK'S LAW DICTIONARY 444 (3d pocket ed. 2006). Nonetheless, if one could satisfy the *Strickland* standard—because many courts regard the legal showing under *Strickland* and malpractice as functionally equivalent—one should be entitled to a malpractice award. *Alevras v. Tacopina*, 399 F. Supp. 2d 567, 572 (D.N.J. 2005), *aff'd*, 226 F. App'x 222 (3d Cir. 2007) (holding that "denial of Alevras' claim that he received ineffective assistance of counsel necessarily negates . . . his legal malpractice claim" and noting that "some courts recognize that the standard of proof for a claim of ineffective assistance of counsel and legal malpractice are equivalent, such that a decision in one would generally have preclusive effect in another."). Of course, malpractice is merely a civil tort action and no jurisdiction is constitutionally required to allow malpractice actions against attorneys. See *id.* at 575 (barring a malpractice claim in a civil suit under the doctrine of collateral estoppel). As long as every state permits malpractice actions, then the difference between a constitutionally required right to relief under the Sixth Amendment and a tort action for malpractice would be one of form not of function. See *id.* at 572.

C. A Malpractice Action Under State Tort Law Is an Inadequate or Unavailable Remedy

In the process of concluding that public defenders generally do not act “under color of state law” so as to subject them to § 1983 liability, the *Dodson* Court went on to say, “of course we intimate no views as to a public defender’s liability for malpractice in an appropriate case under state tort law.”¹¹⁷ Malpractice actions are permitted against criminal defense lawyers, private and public alike. Of course, malpractice is not a true substitute for a § 1983 action insofar as the question presented in a malpractice case is a question of state tort law and, thus, does not necessarily or naturally relate to the scope of the Sixth Amendment right, which will vary with the development of constitutional precedent. And historically, the Court has rejected the existence of state tort remedies as a substitute for a federal cause of action.¹¹⁸ Because the Sixth Amendment right to counsel and tort actions for criminal malpractice generally have many features in common, a brief consideration of the availability of tort damages when the Sixth Amendment is violated is justified.¹¹⁹

Although the particulars of malpractice actions are beyond the scope of this Article, a few relevant details are worth noting. Criminal malpractice generally requires four elements: (1) there must be an attorney-client relationship; (2) there must be a breach of the attorney’s duty to the client; (3) the defendant must be found to be actually innocent (or at the very least exonerated through appeals); and (4) there must be “a proximate causal link between . . . the defense counsel’s violation of the duty of care and the former client’s conviction or enhanced sentence.”¹²⁰ Both of the latter two

117. *Dodson*, 454 U.S. at 325.

118. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1973); see also *Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (recognizing an exception to *Bivens* “when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective” (emphasis omitted)). But see *Minnecci v. Pollard*, 132 S. Ct. 617, 620 (2012) (holding that “[b]ecause we believe that in the circumstances present here state tort law authorizes adequate alternative damages actions,” a *Bivens* action is not permitted); *id.* at 625 (“We note, as Pollard points out, that state tort law may sometimes prove less generous than would a *Bivens* action, say, by capping damages, or by forbidding recovery for emotional suffering unconnected with physical harm, or by imposing procedural obstacles, say, initially requiring the use of expert administrative panels in medical malpractice cases.” (citations omitted)).

119. Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 7 (1995). It is worth pointing out that, if civil malpractice is barred unless post-conviction relief is provided, then defense lawyers have an incentive to help the prosecution avoid a finding of ineffective assistance of counsel. *Id.* (“By creating this incentive for lawyers to oppose ineffectiveness claims, the courts threaten the right to effective assistance of counsel supposedly guaranteed by the Constitution, making its vindication less likely in some worthy cases.”).

120. See Buchwalter, *supra* note 116, at 707.

requirements may impose barriers to relief that the Sixth Amendment does not, making malpractice an inapt substitute.¹²¹

Most notably, “[t]o succeed in a lawsuit for criminal malpractice, many jurisdictions require the plaintiff to prove that she was actually innocent of the charged offense in the criminal prosecution”—that is, the defendant must show by a preponderance of the evidence that she is not responsible for the crime.¹²² According to the California Supreme Court, “the clear majority of courts” require a showing of actual innocence on the theory that

[p]ermitting a convicted criminal to pursue a legal malpractice claim without requiring proof of innocence would allow the criminal . . . to take advantage of his own wrong, . . . or to acquire property by his own crime . . . “would indeed shock the public conscience, engender disrespect for courts and generally discredit the administration of justice.”¹²³

In short, the default rule appears to bar malpractice actions even where the defendant can demonstrate that but for the errors of counsel there is a reasonable probability that the defendant would have been acquitted, which would suffice for Sixth Amendment relief. Instead, the malpractice standard requires not just proof of a likely different outcome at trial, but a showing by the defendant that he is *actually* and not merely *legally* innocent.¹²⁴ Professor

121. In a characteristically vivid discussion of the failures of malpractice as a substitute for constitutional protections, Professor Donald Dripps explained, “[B]y imposing significant costs on indigent defense lawyers (whether through insurance payments or the risk of adverse judgments), tort liability would only exacerbate the underlying resource deficiency. The courts understandably have given malpractice suits against public defenders a chilly reception.” Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 285 (1997) [hereinafter Dripps, *Ineffective Assistance of Counsel*].

122. Kevin Bennardo, Note, *A Defense Bar: The “Proof of Innocence” Requirement in Criminal Malpractice Claims*, 5 OHIO ST. J. CRIM. L. 341, 356 (2007); *id.* at 342 n.3 (compiling examples of states that require as an element of malpractice a showing of actual innocence); *see also* Susan M. Treyz, Note, *Criminal Malpractice: Privilege of the Innocent Plaintiff?*, 59 FORDHAM L. REV. 719, 727-28 (1991) (“Some jurisdictions, such as New York and Illinois, not only require that the criminal malpractice plaintiff successfully show ineffective assistance of counsel in a separate action but further require the plaintiff to show his actual innocence of the underlying offense.”). Many other jurisdictions require the lesser standard of exoneration, such that appellate or post-conviction relief suffices to satisfy this element of criminal malpractice. Treyz, *supra*, at 727-28. Notably, however, for a defendant whose ineffective assistance resulted in the prosecution obtaining new evidence of guilt, it is not clear that a post-conviction court would reverse the conviction and grant relief insofar as the reviewing court would likely realize that such a remedy would not cure the harm. That is to say, if mere reversal does not cure the constitutional injury, then perhaps a court would refuse even this lesser remedy because forcing a retrial on identical evidence is a largely indefensible use of resources. And yet, if the court did not grant habeas relief and order a new trial, then even under the less rigorous form of malpractice—requiring only appellate relief—the defendant could not bring a malpractice action.

123. *Wiley v. Cnty. of San Diego*, 966 P.2d 983, 985 (Cal. 1998) (quoting *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 497 (Tex. 1995)) (internal quotation marks omitted); *accord Gaylor v. Jeffco*, 999 A.2d 290, 293 (N.H. 2010); *Ang v. Martin*, 114 P.3d 637 (Wash. 2005) (en banc) (compiling authority on this issue).

124. Bennardo, *supra* note 122, at 365 (“Neither proof of actual innocence nor legal innocence should be a prerequisite for a criminal defendant to bring a malpractice action.”); Koniak, *supra* note 119, at 6 (“Most

Koniak has identified at least one jurisdiction where “not only [is] post-conviction relief and proof of innocence” required, so too is a “showing of reckless or wanton disregard of the plaintiff’s interest before the former criminal defendant can recover against the lawyer.”¹²⁵ Such a standard is many degrees more difficult to satisfy than the *Strickland* test. Indeed, some of the Supreme Court’s key ineffective assistance of counsel cases, like *Kimmelman v. Morrison* in which counsel failed to properly suppress reliable evidence of guilt, would not justify malpractice relief in many jurisdictions.¹²⁶ An innocence-centered malpractice regime presents many of the same barriers to relief that are currently stifling ineffective assistance claims—defendants like Lafler and Frye who were merely seeking guilty pleas would not be entitled to malpractice actions insofar as they were not alleging actual innocence. Likewise, the defendants discussed in this Article whose lawyer’s errors resulted in the prosecution obtaining reliable and admissible evidence of guilt would not be entitled to tort damages for malpractice.¹²⁷

It is also worth pointing out that the requirements of causation and “harm” for a successful malpractice action may not be equivalent to the prejudice standard under *Strickland*. Some have argued that the language in *Strickland*, insisting on a “strong presumption” of the reasonableness of counsel’s representation, makes the *Strickland* standard higher;¹²⁸ however, the law on this point seems to be unclear, and some authority suggests that the malpractice causation/harm standard is actually higher than the prejudice standard for relief required by the Sixth Amendment.¹²⁹ Under the *Strickland* standard, a

state courts make it significantly more difficult for criminal defendants to bring malpractice actions against their lawyers than for civil plaintiffs or defendants to do so.”)

125. Koniak, *supra* note 119, at 10-11.

126. *Kimmelman v. Morrison*, 477 U.S. 365 (1986); 7A C.J.S. *Attorney & Client* § 306 (2012) (“In a legal malpractice case arising out of a criminal proceeding, proof of actual innocence is generally required . . .”); Cort Thomas, Note, *Criminal Malpractice: Avoiding the Chutes and Using the Ladders*, 37 AM. J. CRIM. L. 331, 344 (2010) (observing that a “minority of jurisdictions choose . . . not to enforce an innocence requirement at all”).

127. Meredith J. Duncan, *Criminal Malpractice: A Lawyer’s Holiday*, 37 GA. L. REV. 1251, 1279 (2003) [hereinafter Duncan, *Criminal Practice*] (noting that an innocence-focused approach to malpractice “places negligence centering on the plea bargaining or sentencing completely beyond the pale”).

128. Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 36 (2002) [hereinafter Duncan, *The (So-Called) Liability of Criminal Defense Attorneys*] (pointing to the presumption of reasonable attorney performance as a basis for concluding that the *Strickland* standard requires more than a malpractice action but in the process blurring the deficient performance and prejudice inquiries).

129. It seems that most courts and scholars agree that the Sixth Amendment deficient performance standard is at least as demanding as the malpractice standard as to attorney error. Under either standard, reasonable mistakes of law or strategies are not held against the attorney. “One solid defense to a legal malpractice claim is that the attorney reasonably believed that the action was required by a law or a legal ethics rule.” MORTIMER D. SCHWARTZ ET AL., PROBLEMS IN LEGAL ETHICS 160 (9th ed. 2010) (citing MODEL RULES OF PROF’L CONDUCT R. 1.16(a)(1) (1983)); *Smith v. Singletary*, 170 F.3d 1051, 1054 n.5 (11th Cir. 1999) (“Because a lawyer’s performance must be evaluated under prevailing professional norms, cases involving allegations of attorney negligence—also evaluated based on an objective standard of

defendant is not entitled to relief unless, after demonstrating deficient performance by counsel, he can also “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” and a reasonable probability is defined as “a probability sufficient to undermine confidence in the outcome.”¹³⁰ That is to say, merely undermining confidence in the outcome is sufficient for *Strickland* prejudice once attorney error has been demonstrated.¹³¹ In the malpractice context, a plaintiff can only succeed if he is able to prove causation of the harm—that is, that the lawyer’s errors caused the conviction.¹³² Causation in malpractice actions is understood to require the plaintiff to “show that ‘but for’ the negligence of the attorney-defendant, the outcome of the underlying lawsuit would have been successful.”¹³³ In other words, malpractice actions require a showing of true or actual “[b]ut for’ causation.”¹³⁴ Or as one commentator has put it, “[t]he causation component of a negligence [malpractice] action requires a showing by a preponderance of the evidence that the defendant was a cause in fact of the alleged harm suffered by the plaintiff, as well as a proximate cause of that harm.”¹³⁵ By contrast, the *Strickland* “reasonable probability” standard permits relief even when the prisoner cannot show by a preponderance of the evidence that “but for counsel’s unprofessional errors, the result of the proceeding would have been different.”¹³⁶

reasonableness—can be useful to our analysis.” (citations omitted)); *Smith*, 170 F.3d at 1054 n.5 (concluding that “the civil liability standard and the constitutional standard do not exactly coincide” and suggesting that the constitutional standard is more onerous).

130. *Strickland v. Washington*, 466 U.S. 668, 703 (1984).

131. *Id.* at 669.

132. *Id.* at 700.

133. Buchwalter, *supra* note 116, at 734.

134. MALLEN & SMITH, *supra* note 105, § 8.5; *id.* § 8:13 (“In virtually all jurisdictions, most claims for legal malpractice are framed in terms of negligence and governed by tort law.”); *id.* § 8:5 (“The principles and proof of causation in a legal malpractice action do not differ from those governing an ordinary negligence”); *id.* § 8.5 (observing that the fact that most courts stop their causation analysis in malpractice actions at the “but for” causation stage “merely illustrates that the lack of ‘but for’ causation is fatal to . . . causation”); *see also* Gray v. Weinstein, 955 A.2d 1246, 1252 (Conn. App. 2008) (“The basic elements of a claim of legal malpractice are ‘(1) the existence of an attorney-client relationship; (2) the attorney’s wrongful act or omission; (3) causation; and (4) damages.’ To prove causation, the plaintiff must demonstrate that he ‘would have been successful in pursuing [his] claim [or defense] but for the defendant’s [wrongful act or] omission.’”); Thomas, *supra* note 126, at 337 (“Factual causation involves the traditional ‘but-for’ standard: a client will have to prove that ‘but for the attorney’s negligence, there should have been a better result.’”). On the other hand, the RESTATEMENT (SECOND) OF TORTS § 431 defines causation in a manner that might be regarded as substantially synonymous with the *Strickland*-prejudice inquiry: “The actor’s negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm.”

135. Duncan, *Criminal Practice*, *supra* note 127, at 1277-78.

136. *Rose v. Lee*, 252 F.3d 676, 689 (4th Cir. 2001) (quoting *Strickland*, 466 U.S. at 694). Interestingly, some courts seem to acknowledge the difference between malpractice causation and *Strickland* prejudice but prefer not to elaborate on the legal significance of the distinction. *See, e.g.*, *Rantz v. Kaufman*, 109 P.3d 132, 139 (Colo. 2005) (en banc). For example, in *Rantz v. Kaufman*, a district court judge faithfully reported that in order to “prove prejudice in an ineffective assistance claim, the criminal defendant must show that ‘there is a reasonable probability that but for the counsel’s unprofessional errors, the result of the proceeding would

Some judicial decisions seem to reflect the notion that the *Strickland* standard for prejudice is not as rigorous as the showing required to demonstrate that an attorney error caused an injury for malpractice purposes. The Arizona Supreme Court, for example, recently identified this dilemma but refused to resolve it:

In a legal malpractice action, the plaintiff has the burden of demonstrating by a preponderance of the evidence that “but for the attorney’s negligence, he would have been successful in the prosecution or defense of the original suit.” In a post-conviction criminal proceeding, the defendant is not required to show that counsel’s conduct actually altered the outcome of the case, but rather “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” We need not decide today whether there is any difference, practical or theoretical, between these standards.¹³⁷

A federal judge in Vermont was even more direct. In *Purdy v. Zeldes*, a judge explained that, because the standard for *Strickland* prejudice requires the defendant to show only that counsel’s errors “had some conceivable effect” on the outcome, the court concluded that the “reasonable probability standard is lower than the preponderance standard applicable in a civil malpractice action such as this.”¹³⁸ In sum, whereas relief under *Strickland* does not require that the prisoner demonstrate that “counsel’s deficient conduct more likely than not

have been different.” *Id.* The judge then went on to say that “to establish causation in a legal malpractice action, where the criminal defendant would have to show ‘that the claim underlying the malpractice action should have been successful if the attorney acted in accordance with his or her duties.’” *Id.* (quoting *Bebo Constr. Co. v. Mattox & O’Brien, P.C.*, 990 P.2d 78, 83 (Colo. 1999)). But the court concluded that under either standard the “criminal defendant must prove that had the attorney behaved non-negligently the outcome of the case would have been better.” *Id.* Certainly, the *Strickland* standard does not require that the defendant show that the actual outcome of the trial “would have been better.”

137. *Glaze v. Larsen*, 83 P.3d 26, 31 n.2 (Ariz. 2004) (en banc) (quoting *Phillips v. Clancy*, 733 P.2d 300, 303 (Ariz. Ct. App. 1986), and *Strickland*, 466 U.S. at 693-94).

138. *Purdy v. Zeldes*, 166 F. Supp. 2d 935, 941 (D. Vt. 2001). Similarly, in *Hunt v. Tomlinson*, the Court concluded that in a malpractice case the plaintiff must “demonstrate damage which resulted from the breach of the duty.” *Hunt v. Tomlinson*, 799 F.2d 712, 714 (11th Cir. 1986).

Phrased another way, if the plaintiff in the present case cannot show by a preponderance of the evidence that, had the defendant taken the actions which the plaintiff alleges a reasonable and prudent lawyer would have taken, the judgment would not have been entered against the plaintiff, or would have been entered in a lesser amount, then the defendant must prevail. A “might have” standard would lead to speculation and conjecture.

Id.; see also *Mylar v. Wilkinson*, 435 So. 2d 1237, 1238-39 (Ala. 1983) (refusing a malpractice award following a successful grant of habeas relief, reasoning that a “claim for malpractice . . . requires a showing that the client’s injury was caused by the lawyer’s malpractice,” and explaining that this “requires a showing that the result would have been different in the underlying action had his lawyer not been guilty of malpractice”); *Sanjines v. Ortwein & Assocs., P.C.*, 984 S.W.2d 907, 910-11 (Tenn. 1998) (“Because the elements for legal malpractice and ineffective assistance of counsel are different, we cannot agree with the plaintiff that the mere simultaneous prosecution of these claims results in an inherent conflict mandating a stay of pre-trial proceedings.”).

altered the outcome in the case,” relief in a malpractice action does appear to require, in addition to a showing of negligence by the lawyer, proof that the lawyer’s negligent actions caused, at least by a preponderance of the evidence, the conviction.¹³⁹ While the law on this point appears unsettled, it is, at the very least, a note of caution for those who would too quickly assume that a tort, malpractice action could serve as a ready substitute for ineffective constitutional remedies in the Sixth Amendment context.¹⁴⁰

139. See *Strickland*, 466 U.S. at 693. It is worth noting that some distinguished scholars have argued that the *Strickland* standard, insofar as it creates “presumptions” in favor of defense counsel is harder to satisfy than a civil malpractice standard. Koniak, *supra* note 119, at 8 (“*Strickland* sets out presumptions that make it much harder for a petitioner to meet his burden of showing substandard lawyer performance/negligence and prejudice/damages—presumptions that are nowhere to be found in malpractice law.”). To be sure, *Strickland* speaks in terms of presumptions, but the Court is also clear that when counsel’s performance is found to be below the professional norms, the defendant need not show that it is “more likely than not” that he was harmed by the negligent errors of counsel in order to obtain relief. See *Strickland*, 466 U.S. at 693-94. In this way, *Strickland* seems more generous than malpractice actions. More to the point, in instances where the deficiency of counsel is clear, to the extent the *Strickland* standard is not purely innocence-centered, and to the extent that prejudice does not require a preponderance of the evidence, a showing of Sixth Amendment injury may be easier to make than a showing of negligent malpractice. Quite distinct from a showing of innocence as many states require for malpractice, the Court has noted that “*Strickland* asks whether it is ‘reasonably likely’ the result would have been different.” *Harrington v. Richter*, 131 S. Ct. 770, 792 (2011) (noting that this “does not require a showing that counsel’s actions ‘more likely than not altered the outcome,’ but the difference between *Strickland*’s prejudice standard and a more-probable-than-not standard is slight and matters ‘only in the rarest case’” (quoting *Strickland*, 466 U.S. at 693, 697)).

140. See *Sanjines*, 984 S.W.2d at 910-11. Some courts have concluded that the denial of relief under *Strickland* is a barrier to malpractice relief based on principles of collateral estoppel. *Gray v. Weinstein*, No. X02CV010175974S, 2004 WL 3130552, at *6 (Conn. Super. Ct. Dec. 22, 2004) (“Accordingly, several courts, including the United States Court of Appeals for the Second Circuit, have applied collateral estoppel principles in this situation, based on the causation standards in their jurisdiction, on the theory that if a plaintiff cannot meet the prejudice prong in habeas court, then he cannot prove causation in malpractice court.”). If the *Strickland* analysis can serve to collaterally estop a subsequent malpractice action, then principles of mutuality would suggest that the *Strickland* standard must be lower, not higher than the malpractice standard. *Id.* at *12-14. If the *Strickland* standard was harder for the defendant to satisfy, then it would not make sense to estop him from litigating a similar tort cause of action with a lesser burden of proof. *Id.* at *14-19. But see *Belford v. McHale Cook & Welch*, 648 N.E.2d 1241, 1246 (Ind. Ct. App. 1995) (“The first step of the *Strickland* standard and the breach element of legal malpractice are identical, *i.e.*, counsel must act reasonably. In addition, the second step in the *Strickland* standard, prejudice, and the causation element of a malpractice claim are identical. Further, the burdens of proof applicable to a post-conviction relief petition and a legal malpractice claim are identical. Both are civil proceedings using a preponderance of the evidence standard.”). It appears that some courts conclude that the two inquiries require the same showing by noting that post-conviction claims typically require a preponderance of the evidence standard of proof. *E.g.*, *Johnson v. Raban*, 702 S.W.2d 134, 137-38 (Mo. Ct. App. 1985) (“We disagree with plaintiff’s contention that the burden of proof differs. Rule 27.26 (f) provides that ‘[t]he prisoner has the burden of establishing his grounds for relief by a preponderance of the evidence.’” (emphasis omitted)). To be sure, however, the prejudice standard under *Strickland* does not actually require the defendant to demonstrate by a preponderance of the evidence that his trial’s fairness was undermined. See *id.* at 137. Although there is no consensus on the issue identified by the Arizona court, some courts have identified a practical difference. See, *e.g.*, *Kerkman v. Varnum, Riddering, Schmidt & Howlett*, 519 N.W.2d 862, 864 (Mich. 1994). “It cannot properly be said that a convicted person who does not prevail in an ineffective assistance case would necessarily be unable to show prejudice in a legal malpractice case” in view of the “daunting standard for showing ineffective assistance.” *Id.* Numerous courts seem to assume that the *Strickland* standard and the malpractice standard are substantially similar. *E.g.*, *Webb v. Pomeroy*, 655 P.2d 465 (Kan. Ct. App. 1982);

In short, ineffective assistance of counsel damages actions are likely precluded in most cases, either because of *Heck* (when the defendant has not obtained post-conviction relief) or because of *Dodson* (when the defendant obtains post-conviction relief). And malpractice actions do not promise to provide an easier avenue to financial awards in most jurisdictions. As one commentator has observed, limitations on causation and innocence requirements present obstacles to recovery that render the “civil system . . . essentially unavailable as a means of monitoring” or remedying ineffective assistance of counsel.¹⁴¹

D. Equitable Relief Is Either Unavailable or Inadequate

Because both damages and suppression are unlikely remedies for ineffective assistance of counsel, it is worth considering whether injunctive relief might be available as a remedy for ineffective assistance of counsel resulting in the discovery of incriminating evidence against the defendant.¹⁴² Under § 1983, injunctive actions are expressly permitted insofar as the statute provides that any person who violates one’s constitutional rights “shall be liable to the party injured in an action at law (or) suit in equity.”¹⁴³ However, an injunctive remedy is also unlikely in this context.

There are two potential types of injunctive actions based on a defendant’s specific constitutional injuries in a particular case. First, a defendant could seek a prospective pre-trial injunction that would bar the state court from putting him on trial based on the unconstitutionally obtained evidence of guilt.¹⁴⁴ Prospective injunctive relief, however, is almost certainly barred by the abstention doctrine.¹⁴⁵ That is to say, even if a federal court was inclined to entertain a right to counsel claim in the pretrial context by conceiving of the right in non-trial based terms, *Younger v. Harris*, which generally prohibits

Alevras v. Tacopina, 399 F. Supp. 2d 567, 572 (D.N.J. 2005) (“Indeed, some courts recognize that the standard of proof for a claim of ineffective assistance of counsel and legal malpractice are equivalent, such that a decision in one would generally have preclusive effect in another.”); *Martinez v. Wurtz*, No. 08-3008-SAC, 2008 WL 1867986, at *3 (D. Kan. Apr. 24, 2008).

141. *Duncan, The (So-Called) Liability of Criminal Defense Attorneys*, *supra* note 128, at 1256 (examining “the monumental difficulties that criminal defendants encounter when suing their former lawyers for malpractice and [providing] an analysis of how criminal defense attorneys practice law free from any real threat of civil sanction for their negligent conduct”).

142. *See id.* In *Preiser v. Rodriguez*, the Supreme Court held that § 1983 may not be used as a vehicle to obtain an injunction entitling him “to immediate release, or a speedier release.” *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). But on its face, *Preiser* does not bar an alternative form of injunctive relief. *Id.* at 493-94. For example, such relief might perhaps include enjoining a particular attorney from being appointed to further criminal cases, or ordering additional resources for additional indigent funding.

143. 42 U.S.C. § 1983 (2006).

144. *See id.*

145. For a useful summary of the doctrine, see, for example, Brian Stagner, *Avoiding Abstention: The Younger Exceptions*, 29 TEX. TECH L. REV. 137 (1998).

federal interference with state prosecutions, would prohibit relief.¹⁴⁶ There are exceptions to the application of the abstention doctrine, but none of them would clearly apply to this context.¹⁴⁷

Alternatively, a defendant could seek injunctive relief based on a past injury—that is, the defendant could seek an injunction as a remedy for the pretrial ineffective assistance he received that resulted in a conviction (as opposed to attempting to prevent the prosecution of such a case prospectively). Unfortunately, when an injunction is sought based on a past injury, many of the same barriers that prevent damages in a § 1983 action will also preclude injunctive actions.¹⁴⁸ For example, just as a public defender is not acting “under color of state law” for purposes of a damage action, neither is he a state actor so as to provide the court jurisdiction under § 1983 when the relief sought

146. See *id.* at 137-40. As a general matter, the Court has signaled a preference for forward-looking remedies by, for example, suggesting that injunctions against the prosecution of pending criminal cases may be appropriate even where damage actions would not. See, e.g., *Green v. Mansour*, 474 U.S. 64, 70-72 (1985) (holding that even a mere notice of unconstitutionality or declaratory judgment as to past unconstitutionality is barred by the Eleventh Amendment); *Edelman v. Jordan*, 415 U.S. 651, 666 (1974) (refusing to extend *Ex parte Young* exception to claims for retrospective relief). Accordingly, there seemed to be space in a cramped remedial framework for defendants to allege “systemic deficiencies including inadequate resources,” as a basis for Sixth Amendment prospective relief. *Luckey v. Harris*, 860 F.2d 1012, 1013 (11th Cir. 1988) (“The [S]ixth [A]mendment protects rights that do not affect the outcome of a trial. Thus, . . . [w]hether an accused has been prejudiced by the denial of a right is an issue that relates to relief—whether the defendant is entitled to have his or her conviction overturned—rather than to the question of whether such a right exists and can be protected prospectively.”). Notably, however, such litigation seems destined for defeat on abstention grounds. *Luckey v. Miller*, 976 F.2d 673, 676 (11th Cir. 1992) (reproducing and affirming the district court order, noting that the plaintiff’s complaint survived FED. R. CIV. P. 12(b)(6) and a challenge under “the Eleventh Amendment,” but ultimately concluding that the complaint regarding Georgia’s defense system was barred by the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971)); see also Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 445 (2009) (“The Second, Fifth, and Sixth Circuits have followed suit when similar claims have been filed.”); Drinan, *supra*, at 439 (discussing the progress made in cases like those cited in the previous footnotes and explaining that “unsupportive legislatures, subsequent state judges, or both have eviscerated the . . . initial attempt[s] to improve the public defense system”); Rodger Citron, Note, *(Un)Luckey v. Miller: The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481, 494 (1991); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 319 (2011) (stating that “the current fiscal crisis has resulted in the recent rolling back” of the limited progress that was achieved in this area).

147. See, e.g., Stagner, *supra* note 145, at 164-70. But see Dripps, *Ineffective Assistance of Counsel*, *supra* note 121, at 290 (arguing for ex ante right to counsel challenges that are not grounded in the typical *Strickland* framework and suggesting that if “the state courts hold that *Strickland* supplies the exclusive vehicle for litigating ineffective assistance, the federal courts should apply the *Gerstein* exception to the *Younger* doctrine”). Although not useful to an individual defendant who receives pretrial ineffective assistance, there is a new wave of systemic challenges to state systems that are proving somewhat successful. See Drinan, *supra* note 146, at 444. Professor Cara Drinan has nicely summarized the law in this area and noted that the “second-generation” of challenges to state defender systems focused less on particular cases, and more on generalized, objective failings in a state through, for example, class action litigation. *Id.* at 445 (noting success in such litigation in states like Montana and Connecticut).

148. *Polk Cnty. v. Dodson*, 454 U.S. 312, 315 (1981).

is in the form of an injunction.¹⁴⁹ Likewise, when a successful injunctive action would require a legal conclusion that implied the invalidity of a defendant's sentence or conviction, *Heck v. Humphrey* would seem to bar the injunctive action.¹⁵⁰ Even if the defendant sought an injunction other than one that would directly speed his release from custody—for example, he sought to enjoin the state from appointing this lawyer to other defendants in the future—if the litigation of this claim turned on a determination that the defendant's own conviction was invalid, then such litigation would presumably be precluded.¹⁵¹ Moreover, if a defendant sought to induce more systemic changes in the state's indigent representation system after he was already convicted, then the standing problems introduced by cases like *City of Los Angeles v. Lyons*, which established a higher standard for establishing Article III standing for injunctive as opposed to damages actions, would serve as substantial barriers to relief.¹⁵² That is to say, the more closely an injunctive action was tied to an individual defendant's conviction, the more likely the *Heck* problems, and the more general the litigation, the less likely the defendant would have Article III standing.¹⁵³ Accordingly, it seems that injunctive actions based on past injuries are an unlikely source of constitutional remediation in this context.¹⁵⁴

149. *See id.* In *Polk County v. Dodson*, the plaintiff sought injunctive relief as well as damages and the Court's holding was equally applicable to both—acting “under color of state law, [is] a jurisdictional requisite for a § 1983 action.” *Id.*

150. *See Heck v. Humphrey*, 512 U.S. 477, 489 (1994).

151. *See id.* In *Heck*, the complaint “sought monetary damages only, not release from confinement,” but the Court held that he could not “proceed under § 1983” because “[a]ny award in his favor . . . would ‘necessarily imply’ the invalidity of his conviction.” *Skinner v. Switzer*, 131 S. Ct. 1289, 1298 (2011) (discussing *Heck*, 512 U.S. at 487). Success in any injunctive action based on ineffective assistance of counsel in a particular case that has resulted in a conviction would also necessarily imply the invalidity of a conviction. *See id.*

152. *City of L.A. v. Lyons*, 461 U.S. 95, 101-02 (1983); 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.6 (3d ed. 2008) (recognizing that the Court had concluded that “while Lyons clearly had standing to seek damages he lacked standing to seek an injunction”).

153. *See* WRIGHT, MILLER & ALLEN, *supra* note 152, § 3531.6. General principles of comity also seem to undermine one's ability to obtain an injunction against a municipality or county program such as a public defender's office. *Cf. Rizzo v. Goode*, 423 U.S. 362, 372 (1976).

154. Such litigation might also raise concerns under the Anti-Injunction Act, 28 U.S.C. § 2283 (2006) (barring federal courts from granting “an injunction to stay proceedings in a State court except *as expressly authorized* by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments” (emphasis added)). Among other things, the Act only applies to proceedings that are actually pending in state court. *See* Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1199 (1977) (explaining that, in *Ex parte Young*, the “Act was held not an issue in the case, because Attorney General Young had not filed the state enforcement proceeding until the day *after* the trial judge issued the stay order [and] the Act applied only to pending proceedings, not to merely threatened ones” (citing *Ex parte Young*, 209 U.S. 1213, 191 (1908)); *see also* *Mitchum v. Foster*, 407 U.S. 225, 243 (1972) (“[T]he anti-injunction statute, § 1983 is an Act of Congress that falls within the ‘expressly authorized’ exception of that law.”). Perhaps a more relevant limitation would be *Younger* abstention, which could be applied so as to bar federal courts from interfering with the actions of state agencies such as a police department or, perhaps even the public defender system. CHEMERINSKY, *supra* note 89, at 820, 854 (citing *Rizzo*, 423 U.S. at 372; *O’Shea v. Littleton*, 414 U.S. 488, 500 (1974)).

III. DO *FRYE* AND *LAFLER* PROMISE A SOLUTION?

If exclusion, damages, and injunctive relief are all unlikely remedies under the current Sixth Amendment framework when a defense lawyer's mistakes lead to the discovery of incriminating evidence, then perhaps an alternative federal remedial framework is necessary. The availability of alternative remedial frameworks remains unclear in the wake of *Lafler* and *Frye*. On the one hand, *Lafler* suggests a new era of robust remediation by clarifying that "remedies should be 'tailored to the injury.'"¹⁵⁵ Likewise, over the objections of the Solicitor General and many states, the Court approved of the dramatic remedy of ordering the prosecution to reoffer a lapsed plea proposal, thus suggesting a willingness on the part of the Court to tolerate remedial flexibility and creativity in the right to counsel realm.¹⁵⁶ But on the other hand, the Court refused the suggestion that the defendant must be put back in the "precise position[he] occupied prior to" the ineffective assistance, and the Court also refused to force the trial court to accept the reoffered plea proposal.¹⁵⁷ Thus, while the expansion of the Sixth Amendment right in *Frye* and *Lafler* has gained most of the attention, it is the scope of the Court's remedial decisions in this context that may end up mattering most.

Only through true remedial creativity and flexibility, unique to the Sixth Amendment realm, will the sort of harms addressed in this Article find a judicial remedy.¹⁵⁸ One such alternative remedial framework that is available derives in a general way from suggestions Justice Breyer made during oral argument in the *Missouri v. Frye* case.¹⁵⁹ In both *Frye* and *Lafler*, it was assumed that the defendants' lawyers provided deficient representation that was outside the bounds of objective reasonableness, and the question was whether the defendants were sufficiently prejudiced to warrant relief.¹⁶⁰ Observing that a unilateral order from the Court requiring specific performance from the Executive Branch of the government by reoffering plea bargains was a rather novel and extreme remedy, Justice Breyer suggested remedial caution.¹⁶¹ Specifically, in order to accommodate an extreme remedy without risking the proverbial floodgate of prisoner litigation, Justice Breyer recommended that relief in these cases be conditioned on a higher showing of prejudice:

155. *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012).

156. *Id.* at 1391.

157. *Id.* at 1389.

158. Others have suggested general legislative fixes to alleviate the chronic problems with state defender systems. See Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation's Indigent Defense Crisis*, 47 HARV. J. ON LEGIS. 487, 487 (2010).

159. *Frye* Oral Argument Transcript, *supra* note 49, at 16-17.

160. *Missouri v. Frye*, 132 S. Ct. 1399, 1402; *Lafler*, 132 S. Ct. at 1391.

161. *Frye* Oral Argument Transcript, *supra* note 49, at 16-17, 40.

[T]he practical problem is that it would be too easy . . . to find that the lawyer, after the defendant is convicted, did a bad job during the plea negotiation, in which case everybody will get two or three bites at the apple So suppose what we did, instead of saying there was no right, you simply said you have to prove with some certainty . . . that there really was inadequate assistance during the plea bargaining, and you have to show something more than a reasonable probability that this would have led to the plea Or you have a—in other words, you have two tougher standards for this area, but you don't reject the idea of inadequate assistance of counsel during the plea bargaining stage.¹⁶²

Although the Court did not ultimately adopt this approach in *Lafler* and *Frye*, applying a heightened prejudice standard to the types of ineffective assistance described in this Article might reflect a reasoned middle ground. To be sure, this is the sort of tampering with a right in order to accommodate the remedy that scholars frequently condemn, but if the remedial medicine is very strong, perhaps it should be limited to the most extreme cases.¹⁶³

Under this view, a defendant would not be barred from relief when his defense attorney's mistakes resulted in evidence that may have undermined his case, nor would such a defendant automatically have his conviction set aside simply by satisfying the conventional two part test announced in *Strickland*. Instead, those defendants, and only those defendants, who could show something akin to a *high probability* that the attorney errors impacted the outcome would be entitled to a retrial and suppression of the tainted evidence. Just as lower courts have deviated from the *Strickland* formula and recognized prospective right-to-counsel claims by diminishing or eliminating the prejudice requirement, so too could courts impose a heightened prejudice standard when a defendant seeks a particularly robust retrospective remedy.¹⁶⁴ The standard might require the prisoner to show something less than actual innocence, but something more than the *Strickland* materiality standard.

In short, the *Lafler* and *Frye* cases may signal a new era of remedial creativity that is no less important than the recognition that the right to effective

162. *Id.* at 16-17. The danger sought to be prevented in cases like *Frye* is different insofar as there is a risk that anytime a defendant refuses a plea and then loses at trial, he can make out a colorable claim that he was prejudiced. *Id.* at 40. Nonetheless, the reasoning in support of a heightened prejudice standard, to limit the number of cases in which relief is granted, would have application to the cases for which suppression is necessary as discussed in this Article.

163. See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974) (when the medicine is too harsh, the courts prefer the disease).

164. See *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988). To be sure, the remedy an imprisoned person most desires is a suppression remedy. Suppression is the only remedy that would make him whole, or put him in the position he would have been but for the errors of counsel. *Frye* Oral Argument Transcript, *supra* note 49, at 41. And although the errors in this case are purely errors of defense counsel with no culpable misconduct by the State, the same is true in *Lafler* and *Frye* insofar as the State "did nothing wrong." *Id.* No less so than a suppression remedy, it is unusual to require a prosecutor, who operates in a realm of nearly complete discretion as to plea bargains, to re-issue an old, expired plea deal.

assistance is not solely a safeguard against unfair trials or unreliable verdicts. An array of previously unimaginable remedies must now be considered in light of the Court's demonstrated commitment to "neutralize the taint" of a Sixth Amendment violation.¹⁶⁵ Indeed, even the suppression remedy is conceivable in this new era of Sixth Amendment flexibility.¹⁶⁶

IV. CONCLUSION

In sum, when the failures of counsel result in prejudicial evidence that could be used to convict the defendant at trial, then a tension arises between what the Supreme Court itself has termed the "general and indisputable rule" that violations of constitutional rights require remedies¹⁶⁷ and the reality of

165. See *People v. Frazier*, 733 N.W.2d 713, 729-30 (Mich. 2007). One approach to addressing the disclosure of privileged materials in a civil case might suggest a second alternative for remedying the errors discussed in this Article. While courts have adopted conflicting approaches to dealing with the disclosure of privileged material, at least some federal courts have recognized that only a truly deliberate disclosure of privileged material by defense counsel should be regarded as forfeiting the attorney-client privilege. See, e.g., *U.S. ex rel. Bagley v. TRW, Inc.*, 204 F.R.D. 170, 176 (C.D. Cal. 2001). By analogy, criminal defendants could argue that only deliberate errors by counsel resulting in the discovery of incriminating evidence should be available to be used against the defendant. See Daniel J. Polatsek, *Effectively Managing an Inadvertent Disclosure of Privileged Materials*, 14 PRAC. LITIGATOR 33, 34, 42 (2003) (summarizing various approaches to addressing inadvertent disclosures of privileged material); see also ROGER S. HAYDOCK & DAVID F. HERR, DISCOVERY PRACTICE § 15.04[B] (5th ed. 2009 & Supp. 2012) ("Courts have adopted three approaches regarding the effect of inadvertent waivers. The first approach is the 'never waived' approach, which holds that an inadvertent disclosure can never constitute a waiver because the holder of the privilege lacks the subjective intent to disclose the information."). If, at least in some jurisdictions, attorney errors in the civil context cannot be understood to waive the privilege, then it is plausible that mere attorney errors in a criminal case must also not be permitted to advantage the opposing side. But see Elizabeth King, *Waving Goodbye to Waiver? Not So Fast: Inadvertent Disclosure, Waiver of the Attorney-Client Privilege, and Federal Rule of Evidence 502*, 32 CAMPBELL L. REV. 467, 469 (2010) (noting that federal "Rule 502 adopts the middle approach for resolving issues of waiver due to inadvertent disclosure" and thus requires a consideration of the totality of the circumstances). Even under the approach adopted by the Federal Rules, it is far from clear that the motivating purpose behind the rule—protecting the attorney client privilege—is any more important than protecting the right to competent counsel under the Sixth Amendment. Cf. *id.* at 505 ("Rule 502 is an explicit affirmation of the attorney-client privilege, and it represents Congress's value choice to offer the privilege broad protection. Rule 502 embodies the principle that '[t]he attorney-client privilege and work product protection are crucial to our legal system' and recognizes that a rule that results in a waiver of the privilege when privileged material is disclosed during the course of discovery by accident, despite care to prevent the inadvertent disclosure, would 'work unfair results.'").

166. See *Frazier*, 733 N.W.2d at 723-24. Some courts seem open to a suppression remedy even in the absence of a heightened prejudice requirement. See *id.* at 724 (considering remand instructions from federal habeas court); *Frazier v. Berghuis*, No. CIV A 02-CV-71741DT, 2003 WL 25195212, at *7 (E.D. Mich. Aug. 6, 2003); *White*, *supra* note 26, at 53-54.

167. This analysis assumes that the right to counsel is violated at the moment of counsel's pretrial errors that result in the discovery of prejudicial inculpatory evidence. Such an assumption is rooted in the *Kansas v. Ventris* decision's holding that, in the context of police interrogations, the right to counsel is violated at the time the incriminating evidence is obtained. *Kansas v. Ventris*, 556 U.S. 586, 590, 593-94 (2009). In a forthcoming project, I will address the consequences of the alternative assumption—that is, that the right to counsel is not violated until trial.

inadequate or absent remedies.¹⁶⁸ The remedy of reversal without suppression does the defendant little service, and the remedy of reversal and suppression seems, at least at first blush, to appear incompatible with the notion that exclusion is only warranted when it will prompt meaningful governmental deterrence.¹⁶⁹ Thus, the Sixth Amendment right to counsel—as an individual right that is violated by the actions of one’s own agent, rather than any misconduct by a state actor—is peculiarly difficult to remedy under a “last resort” notion of the exclusionary rule. But courts and lawyers should not abandon all hope. Considerably more than the resolution of the questions before the Court in *Frye* and *Lafler* was at stake in these two cases, and the prospect of remedial flexibility and creativity in the realm of pretrial ineffective assistance is much more likely today than it was a few weeks ago.

168. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

169. Fallon, Jr. & Meltzer, *supra* note 5, at 1778 (explaining that the promise that every right deserves a remedy is more a principle than an “ironclad” rule).