Criminal Law Practitioner

Volume 5 | Issue 1 Article 4

2019

Punished for Poverty

Andrew Rock
University of Mississippi

Punished For Poverty

Andrew Rock[*]

Ineffective assistance of counsel is rampant in death penalty cases. Lawyers defending capital cases are frequently inexperienced, overworked, and underfunded. This results in defendants receiving the death penalty not because of their crimes, but because of their lawyers. This is due in large part to the lax standards for effective assistance of counsel the Supreme Court established in Strickland v. Washington. Strickland *also imposes a massive burden upon defendants who seek relief for ineffective assistance of counsel. This enables ineffective assistance of counsel to continue unabated. This system violates the Sixth Amendment right to effective assistance of counsel and undermines the crucial moral imperatives of retributivism. Retributivism requires that each offender receive punishment for their individual deeds, not the failings of their attorney. These massive injustices violate the values of people on both sides of the political divide. Thus, this problem represents an opportunity for a fractured country to unite behind a common cause of justice. Solving it will require legislatures to fund public defenders and appointed defense counsel, and for the Supreme Court to modify* Strickland *and replace it with a new standard.*

[*] J.D. Candidate 2020, University of Mississippi School of Law. I would like to thank Professor Berry for his guidance in this endeavor and my mother and father for their constant encouragement.

Introduction

"I have yet to see a death case, among the dozens coming to the Supreme Court on [the] eve of execution petitions, in which the defendant was well represented at trial."
—Justice Ruth Bader Ginsburg[1]

Justice Ginsburg made this remark in 2001, when speaking about the grave injustices inadequate defense counsel creates. This problem is even more serious in the context of capital punishment, as it is literally a matter of life and death. The death penalty represents the ultimate punishment for those who have committed the worst offenses. Unfortunately, the state often executes defendants who had the worst lawyer instead of those who committed the worst offenses.[2]

This violates the Sixth Amendment, which protects a defendant's right to effective assistance of counsel.[3] It also violates the moral requirements of retributivism, which demand that the state punish offenders for their heinous deeds and not for the incompetence of their lawyers.[4]

One striking example of this problem is the story of Jerry White, who was on trial for capital murder in Florida.[5] The judge required White's defense attorney to report for inspection in chambers each morning to see if he was drunk or on drugs.[6] A witness later reported that the defense attorney had used cocaine, methamphetamines, marijuana, and morphine during trial recesses.[7] He also drank frequently.[8] A man's life was at stake, and his defense was in the hands of a man who needed daily inspections to ensure he was not too drunk or high to function. Florida executed White in 1995.[9]

White is one of many defendants whose lawyers' incompetence had potentially lethal consequences.[10] Judy Haney went to trial in Alabama after having a hitman kill her abusive husband.[11] Hers was a sympathetic case—there were hospital records of his physical abuse of both her and their children.[12] It is also rare for someone who does away with their abusive spouse to receive the death penalty.[13] Despite these relatively favorable conditions, she received a death sentence.[14] This is likely due in part to the atrocious behavior of her lawyers.[15] One of them was so drunk the court had to temporarily delay Haney's trial and held him in contempt for his conduct.[16] The lawyers also failed to find extant hospital records demonstrating the abuse her husband had inflicted on the family.[17] In addition, they failed to put

1 Ruth Bader Ginsburg, J., In Pursuit of the Public Good: Lawyers Who Care (Apr. 9, 2001).
2 Kenneth Williams, *Ensuring the Capital Defendant's Right to Competent Counsel: It's Time for Some Standards*, 51 Wayne L. Rev. 129, 131 (2005).
3 U.S. Const. amend. VI.
4 Nelson T. Potter, Jr., *The Principle of Punishment is a Categorical Imperative*, *in* Autonomy and Community: Readings in Contemporary Kantian Social Philosophy (Jane Kneller & Sidney Axinn eds., 1998).
5 Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 Neb. L. Rev. 425, 426 (1996); *see* White v. Florida, 664 So. 2d 242, 243 (1995).
6 Kirchmeier, *supra* note 5, at 426.
7 Kirchmeier, *supra* note 5, at 426.
8 Kirchmeier, *supra* note 5, at 426.
9 Kirchmeier, *supra* note 5, at 426.
10 Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835, 1837 41 (1994) [hereinafter Bright, *Counsel for the Poor*].
11 Bright, *Counsel for the Poor*, *supra* note 10, at 1835 36.
12 Bright, *Counsel for the Poor*, *supra* note 10, at 1835.
13 Bright, *Counsel for the Poor*, *supra* note 10, at 1836. *But see* Haney v. Alabama, 603 So. 2d 368 (Ct. Crim. App. 1991), *cert. denied*, 507 U.S. 925 (1993) (affirming a death penalty conviction for a defendant who hired a hitman to murder her husband).
14 Bright, *Counsel for the Poor*, *supra* note 10, at 1836.
15 Bright, *Counsel for the Poor*, *supra* note 10, at 1835 36.
16 Bright, *Counsel for the Poor*, *supra* note 10, at 1835.
17 Bright, *Counsel for the Poor*, *supra* note 10, at 1835.

the defendant in contact with their expert witness on domestic abuse until the night he was supposed to testify on their behalf.[18] This incompetence likely contributed to Haney receiving an unusual death sentence.[19]

A more recent example of the perils of capital attorney incompetence is *Maples v. Thomas*.[20] In this case, the defendant's lawyers quit and left their firm without filing his appeal.[21] The defendant was not aware of this until after the deadline for his appeal had expired.[22] His new attorney explained that Alabama might have executed this man for a careless bureaucratic oversight.[23] In 2012, the Supreme Court granted his habeas petition and remanded the case.[24] The Court held that he deserved another chance in court after his lawyers abandoned him.[25] His case remains ongoing.[26]

There are a litany of stories like these, tales of lawyers entrusted with matters of life and death who cannot be bothered to sober up or do basic research on their client's case.[27] There are also the well-meaning but hopelessly overworked public defenders who genuinely try to help their clients.[28] They are overrun with hundreds of indigent clients and simply lack the time and funding to prepare a proper capital defense.[29] Still other capital defendants receive appointed lawyers who know nothing about the unique intricacies of a capital case. They are thus woefully unprepared to adequately represent their clients.[30]

This problem has repeatedly appeared before the Supreme Court. The Court's jurisprudence surrounding effective assistance of counsel ultimately led to the case *Strickland v. Washington*. In *Strickland,* the Court held that a petitioner must demonstrate both incompetence by his attorney and that the incompetence likely prejudiced his trial in order to prevail on an ineffective assistance of counsel claim.[31] Courts are to measure deficiency by the standard of a reasonable lawyer in the attorney's field of practice.[32]

While it sounds functional on paper, in practice, this standard makes it nearly impossible for petitioners to demonstrate deficient performance by their attorney.[33] Ineffective assistance of counsel often means that attorneys fail to preserve errors for appeal, making it difficult for an appellate court to see their ineffectiveness.[34] Even if an appellant manages to demonstrate ineffectiveness of counsel, they

[18] Bright, *Counsel for the Poor*, *supra* note 10, at 1835–36.
[19] Bright, *Counsel for the Poor*, *supra* note 10, at 1835–36.
[20] *Supreme Court: Alabama Man Facing-Execution Because Attorneys Left Without Filing Appeal*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/supreme-court-alabama-man-facing-execution-because-attorneys-left-without-filing-appeal.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] Maples v. Thomas, 565 U.S. 266, 289–90 (2012).
[25] *Id.* at 288–89.
[26] Maples v. Ala. Dep't of Corrections, 729 F. App'x. 817, 820 (11th Cir. 2018) (vacating the conviction and remanding the case).
[27] See Robert R. Rigg, *The T-Rex Without Teeth: Evolving* Strickland v. Washington *and the Test for Ineffective Assistance of Counsel,* 35 Pepp. L. Rev. 77, 91 (2008), Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. Rev. L. & Soc. Change 59, 62–63 (1986), and Bright, *Counsel for the Poor*, *supra* note 10, at 1835, for heart-rending stories of lawyer incompetence that caused death or serious consequences.
[28] Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: Still a National Crisis?*, 86 Geo. Wash. L. Rev. 1564, 1578–79, 1603 (2018).
[29] Karen Houppert, Chasing Gideon: The Elusive Quest for Poor People's Justice 234 (2013).
[30] Bright, *Counsel for the Poor*, *supra* note 10, at 1842.
[31] Strickland v. Washington, 466 U.S. 668, 698 (1984).
[32] *Id.* at 689.
[33] *See generally* Rigg, *supra* note 27, at 84–94 (detailing various key accounts of petitioners' struggle to overcome the *Strickland* threshold).
[34] Bright, *Counsel for the Poor*, *supra* note 10, at 1862.

still must prove that it prejudiced their trial.[35] Courts are loathe to find that even egregious errors prejudiced an accused. This means that defendants, in particular capital defendants, often have no recourse when their lawyers have given them a lukewarm and shoddy defense instead of a zealous and thorough one.[36]

Another problem with this system is that it violates the moral requirements of retributivism. Retributivism demands that society punish offenders according to their just deserts.[37] The key to this approach that each individual is responsible for his or her own actions and should receive punishment or reward accordingly.[38] Thus, to give someone less punishment than their crime warranted would be unjust, as would punishing them for something they never did.[39] To punish capital defendants for the ineptitude of their lawyer—the deeds of another individual—is thus abhorrent to a retributivist. It is no more logical than executing someone for a murder they did not commit. The current system often executes the wrong offenders because of inadequate lawyering, which makes it incompatible with retributivism.[40]

In addition to the injustice of punishing the innocent (or meting out overly-harsh punishments), it is also wrong to let those who deserve execution live.[41] Kant spoke extensively about the duty of a society to execute those who deserve death.[42] The massive injustices of the status quo create backlash against the death penalty, prompting over-zealous attempts at reform.[43] The result is that some of those who deserve to die live. The governor of Illinois once went so far as to stop the execution of every single inmate on Illinois' death row as a result of the flaws in the system.[44] While there were some on death row who deserved to live, there were also those whose deeds warranted death as retribution.[45] It was an injustice to spare them, and the present flawed system is to blame for this travesty of justice.[46]

Retributivism also mandates that the state restrict its punitive power to those who have voluntarily committed crimes.[47] This is because a society based upon personal liberty requires that restraint.[48] It is also because retributivism mandates that both institutions and individuals accept the consequences of their actions.[49] Since the state's actions have drastic effects on offenders' lives, it is responsible to them. This includes responsibility for providing them with a fair trial.

Thus, this article argues that the status quo of rampant ineffective assistance of counsel in capital cases violates both Sixth Amendment requirements and the moral demands of retributivism. The Sixth Amendment mandates assistance of counsel for criminal defendants.[50] Both logic and volumes of precedent dictate

[35] Goodpaster, *supra* note 27, at 64.
[36] *See* Goodpaster, *supra* note 27, at 78.
[37] Arthur Shuster, Punishment In The History of Political Philosophy 11 (2016).
[38] *Id.*
[39] *Id.*
[40] Williams, *supra* note 2, at 131.
[41] Shuster, *supra* note 37, at 86.
[42] Shuster, *supra* note 37, at 104.
[43] *See, e.g.*, Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutations of Death Row and the Abolition of the Death Penalty*, 40 Harv. C.R.-C.L. L. Rev. 407, 408 (2005) (detailing Illinois governor's controversial decision to commute several convicted criminals' sentences).
[44] *Id.* at 408 09.
[45] Shuster, *supra* note 37, at 41.
[46] Shuster, *supra* note 37, at 43.
[47] *See generally* Anthony Duff & Andrew von Hirsch, *Responsibility, Retribution and the Voluntary: A Response to Williams*, 56 Cambridge L.J. 103 (1997) (questioning whether universal morals should guide state activities and institutions).
[48] Duff & von Hirsch, *supra* note 47, at 105.
[49] Shuster, *supra* note 37, at 102.
[50] U.S. Const. amend. VI.

that assistance of counsel means effective assistance of counsel, so systemic ineffective counsel for defendants is unconstitutional.[51] It is also morally abhorrent under retributivist penal principles. Retributivism calls for offenders' punishment to be a result of their deeds.[52] It also requires the state to take responsibility for those whose liberty it truncates. Since ineffective counsel results in offenders receiving punishment for another's incompetence, it is incompatible with retributivism. Failure to provide defendants with adequate counsel also means that the state is abdicating the duty it incurred when it took the defendant's liberty.

This is especially true in the context of the death penalty, because any errors in matters of life or death are final and irrevocable.[53] Indeed, the unique nature of death has prompted the Supreme Court to impose unique restrictions upon the death penalty in the past.[54] This enormous problem will require both Congress and state legislatures to provide adequate funding for the death penalty. It will also require the Supreme Court to overturn *Strickland* and implement a new standard for ineffective assistance of counsel claims. This standard will require the defendant to prove his lawyer made errors "reflecting counsel's lack of skill, judgment, or diligence."[55] The burden of proof will then be on the state to prove that these errors were not prejudicial to the defendant's trial.[56]

In Part I, this article will explore the current problems with ineffective assistance of counsel in capital cases. Part II will give a brief overview of Sixth Amendment jurisprudence and explain how current Sixth Amendment standards under *Strickland* are woefully lax and therefore unconstitutional. Part II will also demonstrate how this contributes to the problems in Part I by enabling them to continue. Part III will explain retributivism and why it makes effective assistance of counsel a moral imperative, especially in capital cases. Finally, Part IV will demonstrate how the depth and breadth of this problem mean that it tramples on both conservative and progressive values. This creates an incentive for a divided nation to unify in solving the problem. Both the constitutional and moral arguments against the status quo require legislatures to provide adequate funding for defense counsel. These arguments also require the Supreme Court to overturn *Strickland* and replace it with a new standard. This standard will make it easier for defendants to demonstrate incompetence by their attorneys. It will also require the government to prove a lack of prejudice to the defendant once he or she has established incompetence by their attorney.

I. The Problem of Ineffective Assistance

A. An Overview of the Problem of Ineffective Assistance of Counse

Fighting a criminal conviction in the United States without an attorney is akin to a ship navigating dangerous waters without proper maps or navigational equipment. The modern American legal system is complex and difficult to navigate, with arcane rules of procedure and evidence that would baffle even an in-

[51] McMann v. Richardson, 397 U.S. 759, 771 (1970).
[52] Duff & von Hirsch, *supra* note 47, at 107.
[53] *See* William W. Berry III, *More Different Than Life, Less Different Than Death: The Argument for According Life Without Parole Its Own Category of Heightened Review Under the Eighth Amendment After* Graham v. Florida, 71 Ohio St. L.J. 1109, 1111 n.3 (2010).
[54] Berry, *supra* note 53, at 1111.
[55] Haw. v. Aplaca, 837 P.2d 1298, 1305 (1992).
[56] William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 Wm. & Mary Bill Rts. J. 91, 165 (1995).

telligent and well-educated layman.[57] There is a significant risk that even someone who is innocent could receive a conviction simply because they had no idea how to defend themselves.[58]

The Founders recognized this problem when dealing with a far less complex legal system than the one in place today. They accordingly enshrined the right to counsel into the Sixth Amendment to the Constitution.[59] Ensuring the right to counsel is thus crucial to the legitimacy of a criminal conviction. Indeed, the Supreme Court has made it clear that this right is necessary to obtain a valid criminal conviction.[60]

Unfortunately, the current system often falls woefully short of the requirement of effective assistance, especially in capital cases. It is not uncommon for capital defendants to receive extremely poor assistance from incompetent lawyers, some of whom even admit their own incompetence and seek permission to withdraw.[61] Many attorneys defending capital cases have little experience with them. They therefore lack the specialized knowledge required to navigate the rules and procedures of a death penalty trial.[62] For example, a capital trial involves unique processes for juror selection. Juror selection is crucial for the outcome of a trial. An inexperienced lawyer who makes mistakes at this phase of the proceedings could thus condemn his client to death.[63]

The lawyers defending capital cases are often inexperienced. In some instances a judge appoints them to defend a capital case after they have only five days of legal practice behind them.[64] Even those attorneys who have trial experience may have such an overwhelming case load that they cannot devote nearly enough time to any individual case to adequately prepare for trial.[65] This state of affairs is shocking enough in non-capital cases, but in a death penalty case someone's life is on the line.

While poor lawyering is not the only problem in death penalty cases, the competence of a lawyer can often be the factor that determines whether someone lives or dies.[66] There are striking examples where two defendants have virtually identical cases but only the defendant with the better lawyer lives.[67] One such example is the case of John Eldon Smith.[68] Georgia executed him despite a violation of his Constitutional rights in the case.[69] His lawyer was apparently ignorant of this matter.[70] Conversely, his codefendant received a new trial because of the exact same constitutional issue.[71] He ultimately received only a life sentence, thanks in part to his lawyer's superior knowledge.[72]

Georgia bears the grim distinction of hosting another such injustice soon after Smith's case.[73] A mentally disabled defendant lost his case after a jury instruction that unconstitutionally flipped the burden of proof.[74]

---

57 Johnson v. Zerbst, 304 U.S. 458, 463 (1938).
58 Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (citing Powell v. Alabama, 287 U.S. 45, 69 (1932)).
59 Stephanos Bibas & Jeffrey L. Fisher, *The Sixth Amendment*, Constitution Center (last visited Dec. 20, 2019), https://constitutioncenter.org/interactive-constitution/interpretation/amendment-vi/interps/127.
60 Zerbst, 304 U.S. at 467.
61 Bright, *Counsel for the Poor*, *supra* note 10, at 1862.
62 Houppert, *supra* note 29, at 35.
63 Williams, *supra* note 2, at 134.
64 Bright, *Counsel for the Poor*, *supra* note 10, at 1862.
65 Houppert, *supra* note 29, at 33 34.
66 Williams, *supra* note 2, at 133.
67 Williams, *supra* note 2, at 131.
68 Bright, *Counsel for the Poor*, *supra* note 10, at 1839 40.
69 Bright, *Counsel for the Poor*, *supra* note 10, at 1840.
70 Bright, *Counsel for the Poor*, *supra* note 10, at 1840.
71 Bright, *Counsel for the Poor*, *supra* note 10, at 1840.
72 Bright, *Counsel for the Poor*, *supra* note 10, at 1840.
73 Bright, *Counsel for the Poor*, *supra* note 10, at 1859.
74 Bright, *Counsel for the Poor*, *supra* note 10, at 1859.

Because his lawyer did not preserve the error for appeal, he did not receive relief and Georgia executed him.[75] His codefendant, who had a higher level of culpability, received a new trial over the same issue.[76] This is another situation where the defendants' lawyers, not their blameworthiness, determined their respective sentences. Another illustrative example of how a trial can hinge on quality lawyering is the trial of Robert Durst. A Texas jury acquitted Durst for killing and dismembering his elderly neighbor, then dumping the body in a river. Durst claimed self-defense. Durst was the son of a wealthy New York real estate magnate, and was able to hire an expensive legal team. This enabled him to escape charges that would have sent someone with lesser means to prison, if not death row.[77] Consider what would likely have happened if Durst had received an inexperienced and over-worked public defender instead of an expensive team of lawyers. It is highly unlikely that a jury would have acquitted him for killing his neighbor, chopping apart his body with an ax, then dumping it in a river in "self-defense" without elite lawyers to sell the story. This strange case helps to illustrate that the quality of one's lawyers, and not one's deeds, often determines the level of punishment afforded to a defendant.

Such cases serve to illustrate the problems within the death penalty system generally. The presence of a codefendant in some cases allows for precise side-by-side comparisons that demonstrate the danger of ineffective counsel. Other cases show that a good lawyer can sell a defendant's dubious self-defense claim after mutilating his elderly neighbor with an ax. These instances illustrate that "it is better to be rich and guilty than poor and innocent." When cases hinge on lawyer performance, incompetent lawyering can condemn someone to death regardless of their deeds.[78] A key factor enabling this problem to continue is the lax standards the Supreme Court set forth in *Strickland v. Washington*.[79]

B. How Strickland Enables Ineffective Assistance of Counsel

The Supreme Court held in *Strickland* that in order to prevail on an ineffective assistance of counsel claim, the petitioner must prove that his attorney acted in a manner that no reasonable attorney would, and that this incompetence so prejudiced his case that the results would likely have been different but-for this unreasonable behavior.[80] The Court made it clear from the start that they intended this standard to be "highly deferential" to lawyers, and that it would be a difficult burden for offenders to meet.[81]

Subsequent cases have entrenched this deference to lawyers. In *Harrington v. Richter*, the Court reiterated that their approach to lawyers is a "most deferential one," and that there is a "strong presumption" in favor of the lawyers whose performance they review.[82] This strong presumption makes prevailing on ineffective assistance of counsel claims a daunting task. In the decades following the decision, it became apparent that the burden of *Strickland* was almost impossible for defendants to over-

[75] Bright, *Counsel for the Poor*, *supra* note 10, at 1859.
[76] Bright, *Counsel for the Poor*, *supra* note 10, at 1859.
[77] Meghan Keneally et al., *Why Robert Durst Killed His Neighbor in His Own Words*, ABC News (Mar. 17, 2015), https://abcnews.go.com/US/robert-durst-killed-neighbor-words/story?id=29689667; Williams, *supra* note 2, at 129 31.
[78] Williams, *supra* note 2, at 130 31.
[79] Bright, *Counsel for the Poor*, *supra* note 10, at 1858.
[80] Strickland v. Washington, 466 U.S. 668, 699 700 (1984).
[81] *Id.* at 689.
[82] Harrington v. Richter, 662 U.S. 86, 105, 105 (2011) (quoting Yarborough v. Gentry, 540 U.S. 1, 8 (2003)).

come.[83] Justice Blackmun criticized *Strickland* for creating a high burden that fails to protect the rights of petitioners.[84] Other factors, such as the poverty of many defendants and difficulty of conducting appeals from prison make this situation even worse. Poor defendants often cannot afford counsel capable of navigating the appeals process. Even when good counsel is available, coordinating a case from prison is difficult, and deadlines are easy to miss.[85] All of this combined makes claims of ineffective assistance of counsel almost impossible to win.[86]

A case where the defendant successfully prevailed on an ineffective assistance claim demonstrates the extreme difficulty of doing so. The defendant's attorney in *Buck v. Davis* introduced an expert who testified that the defendant was more likely to reoffend because he was black.[87] The Supreme Court held that knowingly introducing evidence so incredibly damaging to one's own client was outside the bounds of what any reasonable lawyer would do.[88] The defendant's appeal thus satisfied the first prong of the *Strickland* test, and the Court found that he had received ineffective assistance of counsel.[89]

Although the outcome of *Buck v. Davis* was correct, it illustrates the extreme difficulty of prevailing under *Strickland*. It took the defendant's lawyer making an incredible blunder to reach this standard. It is also telling that the issue of race came up—this is an extremely sensitive topic. The fact that it required the lawyer to make such an obvious mistake with such a taboo issue to help the defendant succeed shows just how high a burden *Strickland* presents. What makes the situation even more worrisome is that numerous trial and appellate courts in Texas upheld this miscarriage of justice before it reached the Supreme Court.[90]

Other cases where the defendant's claim was unsuccessful further illustrate this point. In *Strickland* itself, the defendant's attorney decided not to present key mitigating evidence on his behalf.[91] The Court held that this arguable failure was a merely a strategic decision.[92] In *Wheat v. Johnson*, a psychiatrist found the defendant was delusional.[93] Subsequent MRI evidence revealed an empty cavity in a part of his brain regulating impulse and aggression.[94] The psychiatrist was willing to testify that the defendant was insane at the time of his crimes, and this was the "only viable defense available."[95] The lawyer decided not to have the psychiatrist testify, which occluded his client's best hope.[96] The Fifth Circuit held that this did not constitute ineffective assistance of counsel under *Strickland*.[97]

Even if one accepts the core assumption of *Strickland* and grants its unspoken premise that trial attorneys almost invariably deserve the benefit of the doubt, this situation would still be grim. Death is final and irrevocable, so even one instance of a defendant dying because of an attorney's incompetence would be a blight upon the justice system. But the situation is far worse—there is little basis for *Strickland's* key assumption that trial lawyers are overwhelm-

83 Williams, *supra* note 2, at 139.
84 Kirchmeier, *supra* note 5, at 438.
85 Goodpaster, *supra* note 27, at 79 80.
86 Goodpaster, *supra* note 27, at 79.
87 Buck v. Davis, 137 S. Ct. 759, 776 77 (2017).
88 *Id.* at 776.
89 *Id.* at 775.
90 *Id.* at 767 69.
91 Williams, *supra* note 2, at 138.
92 Williams, *supra* note 2, at 140.
93 *Id.* at 140; Wheat v. Johnson, 238 F.3d 357, 362 63 (5th Cir. 2001).
94 *Wheat*, 238 F.3d at 362 63.
95 *Id.* at 363.
96 *Id.*
97 *Id.*

ingly competent.[98] Indeed, even the justice who wrote *Strickland* conceded this point and wrote a scathing piece on the prevalence of trial lawyer incompetence.[99] Thus, *Strickland's* extreme deference to attorney performance is unwarranted, as it has no basis in fact.[100]

Strickland's false assumptions about attorney competence serve to enable deep-rooted problems in the criminal justice system. Recall the host of problems surrounding ineffective assistance of counsel in criminal cases—underfunded, overworked, and inexperienced lawyers—all of which point to deep flaws in the system.[101] By setting such an incredibly high bar for defendants to overcome and granting lawyers an unwarranted amount of deference, *Strickland* allows these problems to continue, which defrauds defendants of their right to counsel. This is a travesty when it occurs in any case. It is especially egregious in capital cases, when attorney incompetence can mean not only loss of liberty, but life itself.

Strickland's requirement that petitioners show prejudice to their case makes this situation even worse. Even if defendants can demonstrate that their lawyers were ineffective, *Strickland* requires them to prove that this prejudiced their case. This is a significant problem. It implicitly contradicts much earlier precedent, notably *Hamilton v. State of Alabama*.[102] In *Hamilton,* the Court explained that when someone lacks counsel (or, by logical extension, effective counsel), "the degree of prejudice can never be known."[103] That which "can never be known" is almost impossible to prove.[104] The Supreme Court therefore requires petitioners to prove something they admitted someone cannot prove.

One reason for this is that what is *missing* from the record is often the crucial factor that prejudiced a case.[105] For example, a major mistake of incompetent counsel is failing to preserve errors on the record for appeal.[106] If the error is not on the record, there is scant evidence of it, and little recourse for those it harms., This means that it is difficult to prove, and difficult to act upon if one can prove it. Another frequent error is failure to investigate important avenues of evidence or witness testimony.[107] Incompetent attorneys have failed to investigate alibi witnesses for their clients, damaging their cases irreparably.[108] Since the problem is what did not happen, there is little or no record of it.[109] Although these mistakes likely did prejudice the defendant's case, it will be almost impossible for the defendant to prove any of it on appeal.[110]

Strickland's problems thus mean in practice that defendants can only prevail on ineffective assistance of counsel claims in the most extreme cases.[111] Courts will rationalize an attorney's oversights as tactical decisions, even when the attorney stated that they were not.[112] Even if the defendant manages to overcome this prong of *Strickland*, he or she still must

98 Bright, *Counsel for the Poor*, *supra* note 10, at 1863.
99 Bright, *Counsel for the Poor*, *supra* note 10, at 1863.
100 Bright, *Counsel for the Poor*, *supra* note 10, at 1863.
101 Houppert, *supra* note 29, at 33 35.
102 Hamilton v. Alabama, 368 U.S. 52, 52 (1961).
103 *Id.* at 57.
104 *See id.*
105 Williams, *supra* note 2, at 138.
106 Williams, *supra* note 2, at 137.
107 Stephen B. Bright, *The Right to Counsel in Death Penalty and Other Criminal Cases: Neglect of the Most Fundamental Right and What We Should Do About It*, 11 J.L. Soc'y 1, 17 (2010) [hereinafter Bright, *Right to Counsel*].
108 Williams, *supra* note 2, at 137.
109 Williams, *supra* note 2, at 137.
110 Williams, *supra* note 2, at 137.
111 Williams, *supra* note 2, at 137.
112 Richard L. Gabriel, *The* Strickland *Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. Penn. L. Rev 1259, 1271 (1986).

prove that the errors prejudiced the case.[113] The Supreme Court has admitted that this is virtually impossible.[114] Justice Marshall pointed this out in his scathing dissent in *Strickland*.[115] Thus, claimants can only prevail in the most egregious cases such as *Buck v. Davis*, where the defense attorney calls an expert who testifies *against* the defendant.[116]

Conversely, claimants whose attorneys' performances were deficient, but not egregiously deficient enough to overcome the hurdles of *Strickland* will have no recourse.[117] If the attorney's performance was of dubious competence but not glaringly mistaken, the courts will likely rationalize any mistakes or oversights as strategic choices.[118] Even if the attorney's errors are so obvious that a court will acknowledge their existence, the defendant must still prove prejudice.[119] The Supreme Court has admitted that proving prejudice is nearly impossible.[120] The practical result of this is that courts brush over volumes of attorney error and treat defendants as if they are guilty either way.

Strickland's standard thus creates a massive burden for anyone seeking to prove ineffective assistance of counsel. By making its existence hard to prove, *Strickland* enables this problem to continue without recourse for those it harms.

II. *Strickland* Is Unconstitutional

Strickland enables a system that denies defendants effective assistance of counsel. The Sixth Amendment to the United States Constitution grants defendants the right to counsel, and this necessarily entails a right to effective assistance of counsel.[121] Thus, a criminal justice system that denies defendants the right to effective assistance of counsel is unconstitutional because it violates the Sixth Amendment. Since *Strickland* enables this unconstitutional status quo via its loose standards, it is therefore unconstitutional.

The right to effective assistance of counsel is a logical consequence of the right to assistance of counsel. To argue otherwise would be absurd—there is no purpose to assigning a defendant an attorney if that attorney does not effectively help the defendant. This would be akin to proclaiming that someone has the right to free speech, but not allowing them to say anything. Thus, the right to effective assistance of counsel is logically concomitant with the right to counsel.

The Supreme Court has repeatedly acknowledged this in numerous cases. Indeed, the Court even went so far as to reiterate it in *Strickland* itself.[122] Quoting *McMann v. Richardson*, the Court emphasized that "the right to counsel is the right to the effective assistance of counsel."[123] The Court in *McMann* explained, "defendants facing felony charges are entitled to the effective assistance of competent counsel" because "if the right to counsel guaranteed by the Constitution is to serve its purpose, de-

[113] Gabriel, *supra* note 112, at 1260.
[114] *See* Hamilton 368 U.S. at 55.
[115] Strickland v. Washington, 466 U.S. 668, 707 08 (1984) (Marshall, J., dissenting).
[116] Buck v. Davis, 137 S. Ct. 759, 777 (2017).
[117] Williams, *supra* note 2, at 139.
[118] Williams, *supra* note 2, at 139.
[119] Williams, *supra* note 2, at 139.
[120] *See* Hamilton, 368 U.S. at 55.
[121] Strickland, 466 U.S. at 686.
[122] *Id.*
[123] *Id.* (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

fendants cannot be left to the mercies of incompetent counsel."[124]

Criminal defendants thus have a constitutional right to effective assistance of counsel.[125] Yet the current criminal justice system is rife with ineffective assistance of counsel. Indeed, the quality of one's lawyer has become determinative in many criminal cases.[126] The justice system consequently executes many capital defendants due to the poor quality of counsel their lawyers provided.[127] This denies them their Sixth Amendment right to counsel. This endemic ineffectiveness is unconstitutional, because each of those defendants had a right to effective assistance of counsel.[128]As demonstrated in Part I, *Strickland* enables this system to continue by making it difficult for defendants to prevail on ineffective assistance claims, even when their case is valid.[129] Strickland's two-prong test imposes an enormous burden of proof on defendants.[130] It requires them to prove ineffectiveness on the part of their lawyer.[131] Proving ineffectiveness by the lawyer post-facto is an incredibly difficult task. One of the key mistakes ineffective lawyers make is a failure to preserve key errors for appeal.[132] This makes it difficult to demonstrate their ineptitude, because the trial court's record will be devoid of the necessary evidence.[133]

Even if a defendant manages to adduce the necessary evidence, the Supreme Court was explicit that the *Strickland* standard is "highly deferential" to attorneys.[134] This means that courts will find that the attorney was not ineffective, even in the face of evidence to the contrary.[135] The deference to lawyers often results in appellate courts creating post-hoc rationalizations of attorneys' errors and neglect as tactical decisions.[136] Even if a defendant manages to overcome the first hurdle of *Strickland*, they must also demonstrate that their lawyer's errors prejudiced their trial. The Supreme Court previously acknowledged that prejudice from ineffective assistance of counsel is unknowable.[137] What one cannot know, one cannot prove. This tasks defendants with proving something that is impossible to prove. Even when defendants can adduce evidence to this effect, courts are hesitant to find that prejudice occurred.[138] This allows the flaws in the system to continue, with no consequences for anyone save for the hapless defendants whose inadequate lawyers doom them to death or incarceration.

Strickland thus places a massive burden upon petitioners who seek to demonstrate a violation of their rights. The result is that *Strick-*

[124] McMann, 397 U.S. at 771 n.14. The Court noted that, "[s]ince Gideon v. Wainwright (citation omitted), it has been clear that a defendant pleading guilty to a felony charge has a federal right to the assistance of counsel." *Id.*

[125] *Id.*

[126] Bright, *Counsel for the Poor*, *supra* note 10, at 1839 40.

[127] *See* Bright, *Counsel for the Poor*, *supra* note 10, at 1837 41. A similar problem exists in civil cases, and the Supreme Court has steadfastly refused to hold that civil litigants have a right to counsel. *See, e.g.* Lassiter v. Dep't of Soc. Serv., 452 U.S. 18 (1981). With many civil cases making life-changing determinations such as losing a home or even receiving jail time for civil contempt, this problem extends beyond the criminal justice side of the American legal system. *See* Robert Hornstein, *The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case for Reversing* Lassiter v. Department of Social Services, 59 Cath. U. L. Rev. 1057 (2010) (arguing that due process concerns remain compelling reasons for court-appointed representation in civil cases).

[128] U.S. Const. amend. VI.

[129] Bright, *Right to Counsel*, *supra* note 107, at 18.

[130] Bright, *Right to Counsel*, *supra* note 107, at 22.

[131] Bright, *Counsel for the Poor*, *supra* note 10, at 1862.

[132] Bright, *Counsel for the Poor*, *supra* note 10, at 1862.

[133] Bright, *Counsel for the Poor*, *supra* note 10, at 1862.

[134] Strickland, 466 U.S. at 669.

[135] Williams, *supra* note 2, at 138.

[136] Williams, *supra* note 2, at 140 41.

[137] Hamilton, 368 U.S. at 55.

[138] Rigg, *supra* note 27, at 87.

land's harsh standard serves to deny defendants their Sixth Amendment rights, because it effectively blocks their recourse when their counsel was ineffective.[139]

This undermines the entire purpose of the Sixth Amendment. The Sixth Amendment exists to ensure that each defendant receives a fair trial.[140] James Madison made it clear that the "prerequisites" of a fair trial were necessary to secure the rights of the people.[141] These prerequisites included the right to assistance of counsel.[142] In other words, effective assistance of counsel is a necessary condition for a fair trial.[143] Thus, to deny a defendant effective assistance of counsel is to undermine the Founders' purpose of the Sixth Amendment—a fair trial to preserve the liberty of the people.[144]

Denying a defendant their Sixth Amendment rights creates a Constitutional problem extending far beyond the Sixth Amendment.[145] As Justice Brennan said, a key role of the Sixth Amendment is "to give substance to other constitutional and procedural protections afforded criminal defendants."[146] Due to the complex nature of today's legal system, asserting the protections of the Bill of Rights often requires the assistance of counsel.[147] Thus, denying a defendant effective assistance of counsel taints the criminal procedure with potential violations of numerous Constitutional rights.[148]

Strickland's harsh burden of proof serves to enable ineffective assistance of counsel by making it almost impossible to "prove" under *Strickland's* test.[149] This allows ineffective lawyering to continue unabated, with the consequent violation of ever-more defendants' rights.[150] *Strickland's* current test is therefore unconstitutional, because it allows the criminal justice system to continually undermine the entire purpose of the Bill of Rights.[151]

III. The Status Quo Is Incompatible With Retributivism

Not only does this system violate defendants' Constitutional rights, it is fundamentally immoral. Retributivism provides a moral basis for rejecting the status quo. This stems from retributivism's analysis of what it is to be human.[152] To a retributivist such as Immanuel Kant, an essential part of what made someone human was possessing the ability to reason.[153] A result of this rationality was the ability to appreciate the consequences of one's actions.[154] Man's capacity to reason thus demands that society treat every individual as a rational being (with obvious exceptions for people such as children and the mentally disabled) who is capable of making their own decisions and accepting the consequences.[155]

Thus, those who work should receive a wage, and those who commit crimes should receive punishment. To deny a worker their fairly earned wages would be unjust, because those wages are a consequence of that per-

[139] Rigg, *supra* note 27, at 87.
[140] Randolph N. Jonakait, *Notes for a Consistent and Meaningful Sixth Amendment*, 82 J. Crim. L. & Criminology 713, 717 (1992).
[141] Gabriel, *supra* note 112, at 1268.
[142] Gabriel, *supra* note 112, at 1268. These prerequisites also included other rights encapsulated in the Sixth Amendment, such as the right to a jury trial. *Id.*
[143] Gabriel, *supra* note 112, at 1268.
[144] Gabriel, *supra* note 112, at 1268.
[145] Gabriel, *supra* note 112, at 1268.
[146] Gabriel, *supra* note 112, at 1268.
[147] Gabriel, *supra* note 112, at 1261.
[148] Gabriel, *supra* note 112, at 1268.
[149] Williams, *supra* note 2, at 133.
[150] Gabriel, *supra* note 112, at 1261.
[151] Gabriel, *supra* note 112, at 1261.
[152] Shuster, *supra* note 37, at 111.
[153] Shuster, *supra* note 37, at 111.
[154] Shuster, *supra* note 37, at 118.
[155] Shuster, *supra* note 37, at 133.

son's freely chosen actions. Likewise, to deny an offender their punishment is wrong, as the penalty is a consequence of their freely chosen actions.[156] Indeed, failing to properly punish an offender is dehumanizing, because to do so constitutes a refusal to accept their status as a rational being who chose the consequences of their actions.[157] This is akin to treating them as an animal that lacks the intelligence to make informed decisions.[158]

Retributivism therefore demands that the state give offenders the just deserts for their deeds, because punishing them for anything else is unjust.[159] This is because retributivism justifies punishment via the criminal's rational acceptance of the consequences of his actions.[160] Since the current American capital punishment system punishes offenders for having bad lawyers, it punishes them for the actions of another.[161] This is as unjust as locking someone up for a crime their neighbor committed. Further, it severs the causal chain between crime and punishment, which is the entire reason capital punishment is legitimate.[162] Retributivism justifies punishment as a fair and proportionate consequence that offenders rationally accept as a risk of committing crimes.[163]

Since retributivism incorporates proportionality as a key tenet of its justification of punishment, it follows that only proportionate punishments are just.[164] Proportional means that the punishment is neither too harsh nor too lax in relation to the crime in question.[165] Since death is a proportionate consequence for those who have deliberately taken the lives of others in particularly blameworthy ways, and people who commit these acts are aware of and accept the consequences, retributivism provides a legitimate basis for meting out capital punishment.[166] Since penalties must be both a result of and proportionate to offenders' crimes, it follows that those who commit particularly heinous crimes should receive the death penalty.[167]

This is because proportionality acts to moderate punishment ordinally. In other words, it does not provide its own complete framework, but can set upper and lower limits on a society's punishments.[168] Since Americans have chosen to keep death as the ultimate sanction, proportionality dictates that American society reserve it for the worst offenders.[169] Democratic principles of retribution warrant this use of societal norms to justify a punishment.[170] Scholars such as Dan Markel explain that democracy is a key aspect of retributivism.[171] This is because one element of retribution is communicating society's values to offenders.[172]

Conversely, offenders whose acts, while immoral, are relatively less blameworthy should not receive the ultimate sanction.[173] Thus, it is unjust when less culpable defendants like Judy Haney receive capital punishment based upon their lawyers' ineptitude, while murderers who committed much more atrocious crimes receive

[156] C.S. Lewis, *The Humanitarian Theory of Punishment*, 13 Issues in Religion & Psychotherapy 147, 147 (1987), https://scholarsarchive.byu.edu/cgi/viewcontent.cgi?article=1271&context=irp.
[157] Shuster, *supra* note 37, at 105.
[158] Shuster, *supra* note 37, at 105.
[159] Lewis, *supra* note 156, at 148.
[160] Potter, *supra* note 4, at 106.
[161] Bright, *Counsel for the Poor*, *supra* note 10, at 1839.
[162] Johnson v. Zerbst, 304 U.S. 458, 469 (1938).
[163] Shuster, *supra* note 37, at 104.
[164] Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 Crime & Just. 55, 56 (1992).
[165] von Hirsch, *supra* note 164, at 56.
[166] von Hirsch, *supra* note 164, at 79.
[167] von Hirsch, *supra* note 164, at 60.
[168] von Hirsch, *supra* note 164, at 75.
[169] von Hirsch, *supra* note 164, at 58.
[170] Markel, *supra* note 43, at 432.
[171] Markel, *supra* note 43, at 432.
[172] Markel, *supra* note 43, at 415.
[173] von Hirsch, *supra* note 164, at 62.

a mere life sentence.[174] There is no proportional relationship between the offense and punishment when the skill of one's lawyer determines the severity of one's punishment. Since this proportionality is a fundamental requirement of the punishment's legitimacy, this disconnect between offense and punishment delegitimizes the death penalty.[175]

Since the death penalty is a legitimate means of punishing offenders, it is detrimental to the justice system to allow flaws that delegitimize it to continue. Just as it is wrong to punish someone for something they did not do, it is wrong to allow them to receive less than their deserved punishment. The current problems in the system serve to delegitimize the death penalty and therefore prompt pushback against it. Another similar case is when the Illinois governor commuted the sentence of every offender on Illinois' death row.[176] This is wrong, as there are now offenders who deserve death but will never receive it.[177]

Another logical consequence of retributivism is that it imposes an obligation on the government to provide adequate defense counsel for those who cannot afford it.[178] This stems from the idea that individuals and entities are responsible for their own actions.[179] When someone does a deed, they accept the consequences and responsibilities that stem from that action.[180] Since the United States is a society predicated upon individual liberty, the government incurs a responsibility to defendants when it deprives them of their liberty.[181]

The government must only punish those who "voluntarily break the law" in a free society.[182] The state must restrict its use of coercive power to these wrongdoers because to do otherwise would trample on its citizens' liberty.[183] In an adversary system, effective counsel is necessary to determine whether the defendant has in fact transgressed the law.[184] Because of this system, the government accepts the responsibility to provide counsel to those who cannot afford it when it deprives them of their liberty.

The government incurs this hefty responsibility when it deprives defendants of their liberty yet spares their lives. This responsibility increases when lives are on the line because, as the Supreme Court is wont to note, "Death is Different."[185] Death is an irrevocable punishment. Any responsibility one incurs from depriving someone of liberty (which one can at least partly restore) is magnified when death enters the equation.

Ineffective assistance of counsel in death penalty cases thus creates multiple moral travesties: Execution of innocent (and comparatively less guilty) defendants, and sparing offenders who deserve death.[186] Neither group is receiving punishment (or relative lenience) based upon their deeds. Retributivism also im-

[174] *See* Haney v. Alabama, 603 So. 2d 368, 379 (Ct. Crim. App. 1991).
[175] Markel, *supra* note 43, at 437.
[176] Markel, *supra* note 43, at 437. Again, Markel would almost certainly disagree with my contention that abolishing the death penalty is a negative thing. Nevertheless, the information in his article is useful.
[177] Shuster, *supra* note 37, at 102. As Kant said, even if a society were to voluntarily dissolve itself, it would be the duty of its members to execute the last murderer in their prison before they left. *Id.* However, given the existence of mitigating circumstances, a modern society might not wish to execute every murderer. Still, the idea that it is unjust to spare those who deserve death holds true.
[178] *See* von Hirsch, *supra* note 164, at 79.
[179] von Hirsch, *supra* note 164, at 79.
[180] Lewis, *supra* note 156, at 148.
[181] von Hirsch, *supra* note 164, at 74.
[182] Duff & von Hirsch, *supra* note 47, at 104.
[183] Duff & von Hirsch, *supra* note 47, at 103.
[184] Hamilton, 368 U.S. at 54.
[185] Furman v. Georgia, 408 U.S. 238, 286 (1972) (Brennan, J., concurring); Berry, *supra* note 53, at 1111.
[186] Bright, *Counsel for the Poor*, *supra* note 10, at 1839.

poses a moral obligation on the government to provide assistance of counsel when it deprives offenders of their liberty.[187] Thus, retributivism requires effective assistance of counsel, especially in capital cases.

IV. A Solution That Offers Something For Everyone

As grim as the problem appears, its sheer enormity may be beneficial. The issue of ineffective assistance of counsel seems insurmountable, with so many disparate problems feeding into a complex and tangled nightmare of massive proportions. Yet the pervasiveness of this problem is a boon, because it is so extensive that it violates principles sacred to people on both the left and right of the political spectrum. Solving it therefore grants Americans an opportunity to bridge ideological differences and unite behind a common cause of justice.

A. Appeal to Conservatives

American conservatives deeply value following the Founders' beliefs for the Constitution and preserving the rights therein.[188] This group frequently speaks out when government overreach infringes on the rights in the First and Second Amendments. This stems from a strong belief in individual liberty and the accompanying suspicion of government power and its ability to tread on the rights of Americans.[189] Conservatives often speak out when government regulation interferes with someone's individual rights.[190]

The current criminal justice system deprives offenders of all three and does so in a manner that violates their constitutional rights.[191] Defendants' only line of defense between them and the leviathan of government power is often their attorney.[192] The Founders recognized this, and thus wrote the Sixth Amendment.[193] Anyone who claims to believe in individual liberty and values the Bill of Rights should thus oppose violations of the rights in the Sixth Amendment and vigorously support effective assistance of counsel.

In addition, conservatives often possess a strong sense of justice which corresponds with retributivism. Their individualistic belief system aligns with a penal philosophy that focuses on the merits of the individual.[194] They often support the death penalty because they believe that people who commit the worst offenses should receive the ultimate sanction as retribution for their actions.[195] With their strong belief in treating individuals according to their merits, conservatives will rankle at the thought of punishing people for their attorney's actions.

Conservatives can thus support the idea of reforming assistance of counsel. Indeed, to allow the status quo to continue should be anathema to them, as it entails a massive government overreach trampling upon the individual rights and Constitutional system the Founders established. It also means letting some offenders off, while those undeserving of

[187] von Hirsch, *supra* note 164, at 74.
[188] *See generally* Keith E. Whittington, *Is Originalism Too Conservative?* 34 Harv. J.L. & Pub. Pol'y 29 (1991) (arguing that originalism is a principled theory of constitutional interpretation).
[189] Rod Dreher, *Individualism and Conservatism,* Am. Conservative Online (Aug. 31, 2012), https://theamericanconservative.com/Dreher/individualism-and-conservatism.
[190] *Id.*
[191] Jonakait, *supra* note 140, at 746.
[192] Jonakait, *supra* note 140, at 732.
[193] Bibas & Fisher, *supra* note 59.
[194] Dreher, *supra* note 189.
[195] Matt K. Lewis, *The Conservative Case for Capital Punishment*, The Week (May 1, 2014), https://theweek.com/articles/447348/conservative-case-capital-punishment.

the ultimate punishment die unjustly, both of which offend conservative principles.

B. Appeal to Progressives

On the other side of the aisle, the progressive left has made criminal justice reform one of its key issues.[196] Progressive thinkers value equality in criminal justice and seek to make the legal system more accessible and equitable to the poor and minority groups.[197] The status quo of ineffective assistance of counsel creates massive inequalities in justice and has a particularly heavy impact on poor and minority defendants.[198]

A system that executes people who have not the worst records, but the worst lawyers, favors those who can simply buy their way out of justice. It also punishes lower-income defendants who cannot afford the high-priced lawyers one often needs to prevail.[199] Progressive groups value equal justice and equal treatment for all.[200] This system which blatantly favors the rich and disenfranchises the poor is thus antithetical to the social justice progressives seek in the justice system.[201]

In addition to the economic inequality that ineffective assistance of counsel promulgates, the flaws in the system hit minority groups particularly hard. African-Americans are far more likely to receive the death penalty than white offenders. Progressive thinkers see this as evidence of deeper racial inequalities and prejudices in the American system.[202] Ineffective assistance of counsel thus contributes to this issue, giving progressives ample incentive to support a solution.

Ineffective assistance of counsel is problem stemming from multiple issues that are deeply rooted in the justice system. The solution will thus require a multi-pronged approach, notably from legislatures and courts. It will first require extensive funding, and then the Supreme Court must overturn *Strickland* and establish a new standard for ineffective assistance of counsel.

C. Financial Solutions from Legislatures

Money remains one of the key problems with ineffective assistance of counsel. Many public defender offices are woefully underfunded, if they exist at all. Courts also sometimes appoint counsel which is not from a public defender office. This counsel is also heavily underfunded, in some cases paid below minimum wage.[203] The adversary system depends upon zealous advocacy from both sides if it is to function at all.[204] Given the sheer expense of investigating and trying a case, this requires well-funded attorneys on both sides. Hiring experts, paying paralegals to help with research, and simply compensating lawyers for their time soon adds up to thousands of dollars.[205] Pay below minimum wage, or the allocation of tiny amounts such as $500 for all experts and outside help, will not suffice. Indeed, no amount of strict standards for competence will matter

[196] Hugo A. Bedau, *The Case Against the Death Penalty*, ACLU (2012), https://www.aclu.org/other/case-against-death-penalty.
[197] *Id.*
[198] *Id.*
[199] Williams, *supra* note 2, at 131.
[200] Bedau, *supra* note 196.
[201] Bedau, *supra* note 196.
[202] Bedau, *supra* note 196. The various political factions are likely to disagree as to *why* this is. That is immaterial to this argument. The point here is that the problem of ineffective assistance of counsel creates issues that are offensive to both sides' values.
[203] Williams, *supra* note 2, at 146.
[204] Gabriel, *supra* note 112, at 1270.
[205] Houppert, *supra* note 29, at 5.

if there is no financial support to for good lawyers to remain in defense positions.

This means that state legislatures must allocate sufficient funds to underfunded public defenders where they exist. They must also create public defender offices where there are none, and then adequately fund them. There must be enough funds to keep public defenders in their jobs, to prevent the problem of experienced lawyers leaving as soon as possible. It also means that there must be enough public defenders so that they are not massively overworked.[206] This will in turn require hiring enough people for the job.

The exact pay amount must be a local matter. What might be enough to live comfortably in rural Alabama might not be enough for a small apartment in an expensive city like Washington, D.C. What matters is that public defenders (or external lawyers appointed to cases) receive pay sufficient to incentive them to remain in the position and prioritize defending their clients.

This aspect of the solution might require significant expenditure, especially in the beginning. However, it has the potential to save money in the long term. Botched cases result in clogging of the court system and a lengthy appeals process, both of which drain the public coffers. With competent counsel on both sides, the system would be far more efficient, which will result in fewer delays and fewer protracted appeals. In addition, both incarceration and executions are incredibly expensive. For example, Dr. Ernest Gost estimates that the death penalty costs states $23.2 million per year more than states without it.[207] Thus, not executing those whose deeds do not merit death will be a financial boon in addition to a moral obligation.

Even if funding defense counsel did not save the system any money, it is still a constitutional and moral obligation. The Constitution requires effective assistance of counsel as part of the defendants' Sixth Amendment rights (see Part II). There is no way to achieve this without sufficient funds.[208]

In addition, effective assistance of counsel is a moral requirement of retributivism. Since the adversary system depends upon both sides' zealous advocacy, and this in turn requires funding, reaching a just result that punishes offenders for the merits of their deeds necessitates adequate defense funding. Indeed, the government incurs this responsibility to defendants when it deprives them of their life or liberty (See Part III). Thus, retributivism requires adequate funding for defendants.

Adequate funding will go a long way towards solving the problem of ineffective assistance of counsel. One of the key problems in public defense work is that as soon as a lawyer gains any experience, he or she leaves for a more lucrative field as soon as possible.[209] Offering these young attorneys a competitive wage will ensure that they remain in the field after gaining the experience necessary to represent clients well.

Investigating a case is expensive. One of the recurring issues of ineffective assistance of counsel is that attorneys fail to investigate the case thoroughly. Providing adequate funding will allow them to thoroughly investigate cases, without having to work on unreasonable budgets.[210] Another problem with investigating cas-

[206] Houppert, *supra* note 29, at 13.

[207] Ernest Goss et al., The Economic Impact of the Death Penalty on the State of Nebraska: A Taxpayer Burden? 21 (2016).

[208] Williams, *supra* note 2, at 150.

[209] Houppert, *supra* note 29, at 250.

[210] Houppert, *supra* note 29, at 34.

es is the lack of time, as many of these attorneys are heavily overworked.[211]

Public defenders especially, often have caseloads twice those of other lawyers. This leaves them with precious little time to prepare or thoroughly investigate their cases. Indeed, they barely have time to address even the most rudimentary elements of a case, let alone parse out potential mitigating factors and other potential defense for capital clients. Sufficient funding for public defender offices will allow them to hire more attorneys, and thus relieve the workload. This, in turn, will give each attorney more time to invest in each case, and therefore they will be more able to investigate each defendant's case.

Adequate funding will therefore help solve the key issues of incompetent lawyers and inadequate investigation and preparation by the defense. It will allow public defender offices to retain experienced practitioners. Another benefit will be ensuring adequate funding and personnel to thoroughly investigate a case.

D. Court-Imposed Standards

Once there is available funding, courts will have a crucial role in the massive system overhaul needed to provide effective assistance of counsel. Although the problem extends far beyond lax standards, the low bar for effectiveness enables the problem. (See Parts II & III). To solve this, the Supreme Court must implement an approach closer to that of Hawaii than that of *Strickland*. This will require simultaneously lowering the burden of proof required for defendants to demonstrate ineffective assistance of counsel, and requiring the government to prove a *lack* of prejudice once they have done so. The Supreme Court must also outline clear minimum standards for attorneys defending capital cases.

An excellent model starting point for this is Hawaiian state precedent. Hawaii makes it easier for defendants to prevail in ineffective assistance of counsel cases than *Strickland*. Under the standard established in *State v. Antone*, Hawaii requires defendants to prove that their attorney committed errors "reflecting counsel's lack of skill, judgment or diligence."[212] Subsequent precedent has demonstrated that a crucial aspect of this is that "a decision not to investigate cannot be considered a tactical decision."[213] This will contribute to solving the issue of extreme and unwarranted deference to attorneys that *Strickland* implemented. This standard would help reverse many cases where courts invented post-hoc rationalizations of defense counsel's malfeasance as a deliberate tactic.

In one extreme instance, a lawyer explained that he slept during trial because he was elderly and enjoyed taking an afternoon nap.[214] The appellate court held that this did not constitute ineffective assistance of counsel because it could conceivably have been a ploy.[215] That the lawyer's explanation made no mention of a ploy was apparently immaterial. Under this standard, this would constitute behavior "reflecting counsel's lack of skill, judgement, or diligence," and there would be no op-

[211] Houppert, *supra* note 29, at 40.

[212] Hawaii v. Antone, 615 P.2d 101, 104 (1980). This standard also requires that "these errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." *Id.* The court should not adopt this half of the standard, because some malfeasance (like sleeping or being intoxicated at work) may not directly cause such specified problems.

[213] Hawaii v. Aplaca, 837 P.2d 1298, 1301 (1992).

[214] Williams, *supra* note 2, at 141.

[215] Williams, *supra* note 2, at 141.

tion for the court to fabricate a rationalization for it.[216]

A standard that the Supreme Court should implement would also require the government to prove *lack of* prejudice once the defendant has established errors "reflecting counsel's lack of skill, judgement or diligence."[217] Previous scholars have suggested this reversal of the burden of proof as a way of alleviating the extreme difficulty of showing prejudice by defendants.[218] Fusing this approach with Hawaii's system would go a long way towards solving this problem. Recall that the massive burden of proving prejudice is a driving factor behind *Strickland's* host of problems.[219] The Supreme Court has acknowledged that proving this is nearly impossible. Yet later jurisprudence demanded that defendants do just that.[220] This makes it nearly impossible for them to remedy the problems of ineffective assistance of counsel. Such an unjust state of affairs violates the Sixth Amendment right to counsel, as well as retributivism's demand that offenders receive the just deserts of their actions.

Removing the requirement that defendants prove prejudice would drastically reduce this problem. Instead, it will be incumbent upon the state to prove that the lawyer's deficient performance did not prejudice the defendant. This will take the burden off of the defendant, who is poorly equipped to shoulder such a high burden. The government is better positioned to make such a case. Such an arrangement will better balance the burden between the two parties, and thus make it easier for just claims to prevail. It will also allow the state to demonstrate a lack of prejudice, which addresses the concerns of those who fear that this will let too many guilty people go free. Since the government will have an opportunity to prove a *lack* of prejudice, small procedural errors that did not affect the case will not free guilty defendants. This is a far better way to balance the competing interests between the state and the rights of accused persons.

Conclusion

Ineffective assistance of counsel is a blight upon this country. It results in innocent and less-deserving offenders receiving death, while those who have better lawyers receive comparatively lighter punishments. This is unconstitutional under the Sixth Amendment and a moral travesty to under a retributivist penal philosophy. The sheer depth and breadth of the problem does mean that it violates both conservative and progressive values, which means that each side can unite behind the common cause of justice. This will involve expanding funding for indigent defense, and heavily modifying the problematic *Strickland* case.

[216] Antone, 615 P.2d at 101, 104.
[217] Antone, 615 P.2d at 101, 104.
[218] Geimer, *supra* note 56, at 165.
[219] Geimer, *supra* note 56, at 165.
[220] Geimer, *supra* note 56, at 165.

About the AUTHOR

Andrew Rock is a third-year law student at the University of Mississippi School of Law set to graduate in May 2020. He graduated Summa Cum Laude from Mississippi College in 2017. Since beginning law school, he has worked as a student attorney in the Low-Income Housing Clinic, as well as interning for a policy nonprofit, a plaintiff's firm, and in a district attorney's office. His articles "Punished for Poverty" and "Legal Fallout" are forthcoming in the *Criminal Law Practitioner* at American University, Washington College of Law and *The Indonesian Journal of International and Comparative Law*, respectively.