



2001

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12 King's C. L.J. 137-173 (2001)

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February 2010

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PETER W. TAGUE*

FAULTY ADVERSARIAL PERFORMANCE BY CRIMINAL DEFENDERS IN THE CROWN COURT

WHO IS the more able advocate, the lawyer in the United States or the barrister in England and Wales?¹ Answering that question is extremely difficult because of a multitude of differences in the procedural regimes in which each works and in the scope of each's responsibility.² Yet, one facet stands out, like a full moon in a dark sky: The comparative number of defenders who on appeal have been accused of having provided inappropriate representation in the process leading to conviction.

The effective representation of the criminal defendant, especially in publicly funded cases, remains a pressing problem in the United States and an emerging one in England. If the defending advocate does not perform as expected, the defendant is denied the screening of the prosecution's case that is central to the adversary process. A legally not guilty defendant might therefore be convicted; more disturbingly, so might a factually innocent one.

For many years defendants in the United States have on appeal attacked their convictions by asserting that the lawyer failed to provide effective representation as guaranteed by the Constitution. Indeed, criminal defence lawyers in the United States must often feel wary of their clients, so often are they accused of acting ineptly.³

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1. Two devices are used to distinguish between barristers and solicitors in England and Wales and lawyers in the United States: first, while barristers and solicitors are also called "lawyers," that term is reserved exclusively for the defence lawyer in the United States; second, the masculine pronoun is used for defenders in England, the feminine for lawyers in the United States. Hereinafter, references to England include practice in Wales.
2. See Peter W. Tague, *Effective Advocacy for the Criminal Defendant: The Barrister vs The Lawyer* (Buffalo: W.S. Hein, 1996).
3. Numbers vary. Between 1970 and 1983 3.3% of federal appeals included an attack on counsel, of which 3.9% succeeded. In Michigan in the early 1980s 14.3% of appeals by the state's public defender office included the claim. In one district in California 21.7% of the reported appeals included the challenge, but only 1.7% succeeded. For the citations to these and other data, see Floyd Feeney and Patrick G. Jackson, "Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?" (1991) 22 *Rutgers L J* 361, 391, 426-427 (tables 13 and 14). Far more troubling are the numbers in death-penalty cases. Between 1973 and 1995, the defendant's conviction or sentence was reversed in 68% of those cases, with "egregiously incompetent defense lawyering" the cause 37% of the time. See James S. Liebman, Jeffrey Fagan and Valerie West, *A Broken System: Error Rates In Capital Cases 1973-1995* (Washington DC: The Justice Project, 2000) at 5. For the constitutional test, see below n121.

Although as a percentage of all cases the numbers are low, they are large in gross,⁴ and dwarf those in England.

In England it was only a little over a decade ago, in 1987,⁵ that a defendant's conviction was first overturned based on the barrister's performance.⁶ Even there, the reason for granting relief was not that the barrister's refusal to call two alibi witnesses was misguided, but that he had failed to discuss his decision with the defendant. A year later the Court of Appeal begrudgingly admitted that relief could be built on counsel's error, but then only if the conduct was "flagrantly incompetent".⁷ The next year it seemed to renounce even that imposing burden, observing that its "function [was not] . . . to review, still less to pass judgment upon, the advocacy of counsel who appear for the defendant at trial."⁸ Nonetheless, relief now is available for the defender's (barrister's or solicitor's) errors. Since 1987 the issue has been raised on appeal at least thirty times, with success coming in eight of those appeals.⁹

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4. The numbers were perhaps once inflated by the belief that aspects of the lawyer's work provided a ground for the claim that now do not. See *United States v DeCoster*, 487 F 2d 1197 (DC Cir 1973) (remanding case for hearing to determine whether, *inter alia*, lawyer's failure to move for bail constituted ineffectiveness). Later, the Supreme Court reversed a different appellate court's recognition of a defendant's constitutional right to a "meaningful relationship" with the lawyer. See *Morris v Slappy*, 461 US 1 (1983) (no right to expect "rapport" with lawyer). If affirmed, *Slappy* would have given defendants a relationship with the lawyer that defendants in England do not have with barristers who return briefs as cases are listed for the court's convenience rather than for the defendant's expectation that the chosen barrister will continue to represent him.
 5. Twenty years earlier, Lord Denning hinted that relief could be predicated on counsel's performance. See *Rondel v Worsley* [1967] 1 QB 443, 494-5. Because he expected the Court of Appeal to protect the defendant Lord Denning inferred that from its failure to grant leave to appeal it had concluded that counsel had not erred. One commentator on *Rondel*, reviewing pre-*Rondel* cases, could find no instance when the issue had even been alleged. P.M. North, "Rondel v Worsley and Criminal Proceedings" [1968] Crim LR 183 (counsel's conduct an issue only when he failed to appear). That said, from 1967 to 1987 I count no fewer than ten cases involving an alleged error by counsel even though the issue was not framed as a direct attack on counsel. Other than *Rondel*, the reported cases are: *R v Latimore* (1976) 62 Cr App R 53 (counsel overlooked importance of evidence); *R v Novac* (1977) 65 Cr App R 107 (failure to object); *R v Phillips* [1982] 1 All ER 245 (defendant pleaded guilty to more counts than expected); *R v Shepherd and Shepherd* [1980] 71 Cr App R 120 (admission of prior conviction); *R v Young and Robinson* [1978] Crim LR 163 (bungled cross-examination). The unreported cases are: *R v Johnson*, 18 March 1982 (CA) (failure to challenge police officer's testimony about defendant's statement); *R v Rattigan*, 15 March 1985 (CA) (failure to challenge complainant on one point); *R v Shields and Patrick*, 28 July 1976 (CA) (failure to find witnesses); *R v Singh*, 29 January 1982 (CA) (eliciting damaging evidence and failing to introduce evidence of mental instability).
 6. *R v Irwin* [1987] 2 All ER 1085; [1987] 1 WLR 902 (discussed below in Part 2(B)). In 1987 the tests on appeal were whether there was a material irregularity at the trial or the conviction was unsafe and unsatisfactory. Criminal Appeal Act 1968, s. 2. In 1995 the Act was amended to make the sole test whether the conviction was "safe."
 7. *R v Swain* [1988] Crim LR 109.
 8. *R v Ram* [1989] Crim LR 457 (it nonetheless evaluated counsel's conduct, favourably, by observing that he would have sought an interpreter if the witness would have made "a significant contribution to the defence case").
 9. In alphabetical order, the losers were: *R v Bevan* (1994) 98 Cr App R 354 (failure to call witnesses); *R v Bevelectric Ltd.* (1992) 157 JP 323 (failure to introduce evidence); *R v Bowler*, Times LR, 9 May 1995 (CA) (wrong defense); *R v Clark*, unreported, 29 July 1994 (CA) (failure to object to evidence); *R v Doherty and McGregor* [1997] 2 Cr App R 218 (admission of evidence); *R v Donnelly* [1998] Crim LR 131 (failure to exclude evidence); *R v Ensor* [1989] 2 All ER 586, (1989) Cr App R 139 (failure to apply for severance; relief on separate ground); *R v Farrell*, unreported 28 November 1996 (CA) (choice of defense); *R v Gautum* [1988] Crim LR 109 (disagreement over defense); *R v Green*, unreported 15 September 1995 (CA) (Should defendant have testified?); *R v Hobson* [1998] 1 Cr App R 31 (grounds not specified; relief on unrelated ground); *R v Hunt*, unreported, 5 May 1994 (CA) (abandonment of interlocutory appeal); *R v Iroegbu*, unreported 29 July 1988 (CA) (failure to object); *R v Matrix*, unreported 4 August 1997 (CA) (misinterpretation of statute); *R v Mills* [1995] 3 All ER 865 (failure to challenge eyewitness); *R v Nangle* [2001] Crim LR 506 (multiple alleged grounds); *R v Ram* [1989] Crim LR 457 (failure to ask for interpreter); *R v Raphaie* [1996] Crim LR 812 (failure to object); *R v Roberts* [1990] Crim LR 122 (failure to adduce evidence); *R v Satpal Ram*, Times LR, 7 September 1995 (CA) (choice of defence); *R v Swain* [1988] Crim LR 109 (faulty cross-examination); *R v*

From the imbalance in numbers, can we conclude that barristers are adversarial giants when compared with lawyers?¹⁰ It may be that more lawyers perform poorly, more of the time than do barristers, but the number of attacks is deceiving. It is both more difficult to raise the issue on appeal in England, and less important to do so.

Moreover, in applying that high burden of flagrant incompetence, the Court of Appeal has been inconsistent, dubiously affirming convictions in a few cases and surprisingly reversing them in others. It has seemed to struggle in answering the core questions. Is relief conditioned on proof that counsel's conduct was inept? If inept, must it also have harmed the defendant's case? Or, should proof of harm not be required because defendants are entitled to a competent performance by those who protect them? On the other hand, if counsel's performance did cause harm, why not grant relief even if his mistake was defensible?

The Court of Appeal's inconsistent decisions may have encouraged defendants to mount attacks unheard of fifteen years ago.¹¹ The Court of Appeal has tried to choke off these challenges, gruffly upbraiding counsel who lodge them. If, in the end, the Court of Appeal's approach remains uncertain, analysis of its cases reveals an interesting effort to resolve the tension between helping those defendants who deserve relief without being inundated by marginal if not spurious challenges to counsel's efforts.

Part 1 discusses the procedural hurdles that make challenging the trial barrister's conduct more difficult than objecting to the lawyer's, and the reasons why making this challenge is less important. Part 2 examines the law; Part 3 grades the Court of Appeal's decisions; Part 4 considers how the challenges, even when unsuccessful, reveal the loci of problems that arise in criminal defense in Crown Court.

Wellings, 20 December 1991 (CA). And the winners were: *R v Chatterjee* [1996] Crim LR 801 (failure to call experts); *R v Clinton* [1993] 2 All ER 998, (1993) 97 Cr App R 320, [1993] 1 WLR 1161 (multiple errors); *R v Fergus* (1994) 98 Cr App R 313, (1993) 158 JP 49 (multiple errors); *R v Irwin* [1987] 2 All ER 1085, [1987] 1 WLR 902 (failure to consult with defendant); *R v Kramer*, *The Times*, 14 May 1999 (failure to introduce evidence of defendant's good character); *R v Sankar* [1995] 1 WLR 194 (failure to call defendant to testify); *R v Scollan and Smith* [1999] Crim LR 566 (misunderstanding between counsel and defendant); *R v Ullah* (2000) 1 Cr App R 351 (failure to attempt to impeach witnesses). I may have missed other unreported decisions. In two other decisions counsel's conduct could have been challenged, but the appeal was pitched on a different ground. *R v Ahluwalia* [1992] 4 All ER 889 (failure to raise defence); *R v Holden* [1991] Crim LR 478 (failure to object). And in two malpractice actions it was clear the sued solicitors had performed very badly. *Acton v Graham Pearce & Co* [1997] 3 All ER 909 (failure to investigate; malpractice action permitted); *Smith v Linskills* [1996] 2 All ER 353, [1996] 1 WLR 763 (failure to investigate; collateral attack denied). And in *Boodram v Trinidad and Tobago*, 10 April 2001, the Privy Council reversed a murder conviction because of the incompetency of the defendant's legal advisers.

10. If the imbalance in the number of attacks on the defenders is striking, so is the comparative academic interest in the topic in the two countries. Library shelves in the United States groan from the numbers of articles and studies about the issue. In England, by contrast, only one article appears to have been published in a scholarly journal about the topic and two more in trade journals, all by solicitors. See Robert S. Shiels, "Blaming the Lawyer" [1997] Crim LR 740 (a Scottish solicitor); Neil Gow, "Flagrant Incompetency of Counsel", *New Law Journal*, 29 March 1996, at 453; Richard SJ Marshall, "Blame it on the barrister", *Solicitors Journal*, 18 February 1994, at 154. See also Archbold, *Criminal Pleading, Evidence and Practice* (1999 edn., London: Sweet & Maxwell, 1999), para 7.82 at 884 (cursory examination of the law).
11. Before 1987 a chief reason why barristers could not be sued for malpractice also seemed to justify rejecting appeals against conviction based on the barrister's same questionable conduct. In *Rondel v Worsley* [1967] 1 QB 443, [1967] 3 WLR 1666, the House of Lords conferred immunity on barristers in the hope that counsel would thereby be free to disagree with the lay client. Immunity would thus encourage efficient and ethical behaviour among advocates. Barristers recently lost this immunity. See *Arthur J S Hall & Co v Simons*, [2000] 3 All ER 673 (HL) (discussed below in text at n92). After *Hall*, it is important to distinguish between types of relief based on the advocate's error: reversing a conviction, the subject of this article, and suing for money in a civil action.

PART 1. WHY THERE IS LESS NEED TO CHALLENGE THE BARRISTER'S WORK AND MORE DIFFICULTY IN DOING SO.

A. LESS NEED

Convicted defendants in England have been less likely to attack the defender's performance leading to conviction for three reasons: first, they have reasons not to believe the barrister committed reversible error; second, trial judges protect defendants from the barrister's errors; third, the appellate process does not force defendants to accuse the barrister of incompetence as a condition of obtaining relief.

1. Barristers' adversarial skill

Defendants may not challenge counsel's performance because they have been misled by the reputation of barristers for adversarial prowess.¹² The vaunted reputation of the particular barrister or of the Bar in general may be exaggerated. The defendant's solicitor may inflate the barrister's ability as a way of defending his choice of that barrister (or of hiding his concern about the skill of a barrister with a returned brief who was recommended by the chambers' clerk). Also, barristers who sometimes flounder may bask in the reflected sun of the judiciary's skills. Crown Court judges, most of whom were once barristers, are chosen in part for their skill in speaking extemporaneously, as they announce a decision at the end of argument on an application or sum up to the jury. As this skill provides an aspirational benchmark for barristers, so it may also burnish the Bar's reputation.¹³

Next, if not misled about the barrister's skill, convicted defendants may nonetheless conclude it is senseless to challenge the barrister's performance because the standard of review is so formidable. While the Court of Appeal has rarely elaborated on its test of flagrant incompetency, even a stumbling performance will not often collapse into "glaring, notorious or scandalous" ineptitude.¹⁴ Barristers' advocacy should be at least adequate because they have so much practice.¹⁵ It does not take long to

12. As an example of the encomia bestowed upon English barristers, a former Chief Justice of the United States Supreme Court, Warren Burger, characterised their advocacy as the most "ardent . . . [and] effective" representation he had observed "in more than a dozen countries." Warren Burger, "The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?" (1973) 42 *Fordham LR* 227, 229.

13. By contrast, the adversarial reputation of lawyers receives no boost from the American judiciary. Experience as an advocate is not a condition for selection as a judge in the United States. Indeed, even litigators who become judges might have had few trials, especially if they practised in large law firms specialising in civil cases.

14. This is a dictionary definition of "flagrant", see *Concise Oxford Dictionary* (7th ed., Oxford: Oxford University Press, 1988), but not one ever used by the Court of Appeal. On the other hand, it was recently observed that while the most able barristers were "outstanding, and that many others were very good," a small number were "incompetent, prolix and poorly prepared." Aron Owen, "Not the Job of a Judge", *The Times*, 6 December 1994, at 39 reporting observation of Runciman Commission, *Report Of The Royal Commission On Criminal Procedure* (Cm 2263, London: HMSO, 1993) (hereinafter "Runciman Commission").

15. Barristers are assumed to appear in court 210 days a year. See The Senate of the Inns of Court and the Bar, *Study Of Remuneration Of Barristers Carrying Out Criminal Legal Aid* (London: Coopers and Lybrand, 1985), para 2.3(a), at 26. While I know of no similar study of the number of appearances lawyers make, my impressions and own experience as a criminal defence lawyer suggest that they advocate far less frequently. A weakness in the study for the Bar, however, is the failure to indicate in how many trials barristers participate each year. Arguing a bail application in the magistrates' court or even appearing in a Pleas and Directions Hearing in Crown Court is not the same as representing a defendant in a jury trial.

develop a formulaic way of cross-examining eyewitnesses or of fashioning a mediocre jury speech on self-defence. Moreover, barristers, unlike lawyers in many jurisdictions in the United States, have no excuse for not being prepared to defend because, despite recent restrictions on the disclosure by the Crown of unused material,¹⁶ they receive the prosecution's entire evidence in advance of trial. Also, the barrister has much less responsibility than does the lawyer, who must undertake the work of both the barrister and solicitor. Responsibility for investigating both sides' positions, for example, falls not on the barrister, as it does on the lawyer, but on the solicitor. If an aspect of the defendant's case has not been developed, barristers are often prepared to overlook the gap as not their responsibility. They take their instructions from the materials in the brief. What is surprising about the challenges to the defenders' conduct, in light of the importance of the solicitor's efforts in preparing the brief, is how infrequently the work of the solicitor has been alleged as a basis of the appeal against conviction.¹⁷

Differences in legal aid remuneration in the two countries, together with certain structural features of the barrister's work, also explain the relative paucity of complaints against barristers. Of the attacks on lawyers on appeal in the United States, no data indicate the division between retained and appointed lawyers. One expects, however, that the vast bulk of the cases involve lawyers representing indigent defendants. The chief reason is money. Privately retained lawyers are presumably paid sufficiently to encourage them to provide the sort of representation that will satisfy the defendant. In many jurisdictions, by contrast, the amount paid by legal aid is disgracefully low, so low as to snuff out whatever flickering interest skilled lawyers might have in taking publicly funded cases.¹⁸ The performance of those who accept appointments will sometimes match the pitiable compensation they receive. Defendants on legal aid, then, are often not represented by able advocates with an incentive to provide thorough representation.

In the Crown Court, by contrast, three institutional features of the barrister's and solicitor's work make it likely that the publicly funded defendant will be adequately represented (or at least that the representation will not collapse to the level warranting relief). First, barristers are required by the cab-rank rule to accept any brief so long as the compensation is acceptable. Second, because the Bar accepts that legal aid compensation is adequate, barristers cannot escape the cab-rank rule by declaring that legal aid fees are insufficient.¹⁹ Those two features mean that the solicitor has many barristers from whom to select the defendant's advocate. The solicitor also has the

16. See Criminal Procedure and Investigations Act 1996 (Crown no longer required to disclose all unused material). While barristers grumble that the Crown does not always provide what it is expected to disclose, the defence should discover so much more information in Crown Court than in federal court. See Tague, above n2, at 196-203.

17. For an instance, see *R v Fergus* (1994) 98 Cr App R 313, (1993) 158 JP 49 (discussed in the text below beginning at n113).

18. For amounts, see Peter W. Tague, "Economic Incentives in Representing Legally-Aided Criminal Defendants in England's Crown Court" (2000) 23 *Fordham Intl LR* 901 n3.

19. And the fees are very handsome when compared with what lawyers receive. For a comparison with compensation in the United States, see *Ibid.* and Peter W. Tague, "Representing Indigents in Serious Criminal Cases in England's Crown Court: The Advocates' Performance and Incentives" (1999) 36 *Am Crim L Rev* 171, 220.

responsibility, and the incentive, to choose one whose skill and style match the defendant's needs. By contrast, the publicly funded defendant in the United States cannot select the lawyer.²⁰ Typically with no knowledge about the lawyer's experience or skill, the defendant is likely to be suspicious of the lawyer's prowess and allegiance. Third, in England the defendant, if disgruntled with the barrister, can dismiss him almost with impunity, and select another one. Of course, that replacement may not be thoroughly steeped in the case's intricacies because cases are not postponed for him to prepare at leisure. Nonetheless, because barristers pride themselves on their ability quickly to assimilate a brief, the defendant may not be handicapped by exercising his power to sack one barrister for another. And he may be pleased to find that the replacement does not resist his instructions, by, for example, agreeing to try the case rather than pressing for a guilty plea.

2. *The judiciary's responsibility to protect the defendant*

In the Crown Court judges are expected to intervene to protect the defendant from his defenders' mistakes,²¹ even in the absence of a complaint by the defendant, in ways that judges in the United States are forbidden or reluctant to undertake.

The summing-up is an excellent example. It is rare for judges in the United States to comment on the evidence, either because they are forbidden to do so,²² or because they defer to the lawyers to try the case as each sees fit. In the Crown Court, by contrast, in summing up to the jury the judge must identify the defendant's defence,²³ indicate defences counsel may have overlooked, and evaluate the defendant's position as attractively as appropriate. In one case where the defendant challenged his barrister's and solicitor's performances, for example, relief was granted, not because of the defenders' obvious failures, but because those failures denied the trial judge the information needed to sum up more favorably for the defence.²⁴ Trial judges are also expected to scrutinize the Crown's evidence carefully. In another case the trial judge was criticised for not having ended the trial at the completion of the Crown's evidence even though not asked to do so by the barrister.²⁵

The Court of Appeal has itself intervened on occasion to protect defendants when an attack on the barrister would fail. In *R v Boal* the defendant was accused of neglect in connection with fire hazards found in a bookstore he was in charge of while the manager was on vacation.²⁶ After being convicted at trial of seven counts and pleading guilty to three others, Boal complained on appeal about his sentence but not

20. See Peter W. Tague, "An Indigent's Right to the Attorney of his Choice" (1974) 27 *Stan L Rev* 73.

21. Trial judges ask barristers, for example, if they know they are about to elicit damaging evidence. See *R v Young and Robinson* [1978] Crim LR 163 (noting that while "[i]t has long been a principle that judges should protect the accused . . . [it] was rare that they had to protect them from their own counsel"); *R v Singh*, unreported, 29 January 1982 (CA) (barrister ignored warning that he was about to open the door to damning character evidence on cross-examination).

22. See Tague, above n2, at 212-14. Judges in federal court are permitted to summarise and comment on the evidence. See Proposed Federal Rules of Evidence 105.

23. See *R v Curtin* [1996] Crim LR 831 (the judge should summarise the defendant's testimony or his statement to the police; if the defendant gave neither, the judge should remind the jury of counsel's speech).

24. *R v Clinton* [1993] 1 WLR 1161, 2 All ER 998, (1993) 97 Cr App R 320 (discussed in the text below beginning at n112).

25. *R v Fergus* (1994) 98 Cr App R 313; (1993) 153 JP 49 (discussed in the text below beginning at n113).

26. [1992] QB 591.

about the merits of the convictions. On its own, the Court of Appeal raised the issue of Boal's status under the law. The defence—Boal was not covered by the act—“would have had a realistic prospect of success”.²⁷ The defending barrister's advice about the law was thus mistaken, but hardly incompetent. Nor did the trial judge err in failing to spot the legal point. All convictions, even Boal's guilty pleas, were nonetheless quashed. Even if the result in *Boal* is rare,²⁸ the possibility that relief can be granted without attacking the defender reduces the need to do so.²⁹

The Court of Appeal has taken a similarly robust view of its role in evaluating the evidence. In one case involving an attack on counsel as one of various problems with the process, it concluded that the defendant was innocent rather than simply not proven guilty.³⁰ Here too, less interventionist American courts are more reluctant to evaluate the merit of the jury's verdict to convict. While recognising that the federal constitution protects against an erroneous conviction, the United States Supreme Court has cautioned that a reviewing court should not ask whether it would convict on the evidence. Instead, it must ask whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt” when the evidence is viewed “in the light most favorable to the prosecution”.³¹ By contrast, the Court of Appeal will reverse even if it thought a jury might have convicted.³² This approach is much less conservative than the Supreme Court's, on the assumption that judges are more skeptical of certain evidence than are jurors.³³

3. Appeals based on fresh evidence or the advocate's failure to object at trial

There are two more reasons to explain the greater number of attacks on lawyers apart from the obvious assumption that they are meritorious. The so-called “contemporaneous objection” rule is one; the treatment of newly discovered, or “fresh” evidence on appeal is another.

27. *Ibid.* at 598.

28. While conceding that it must reverse unsafe convictions, the Court of Appeal obviously worried that the outcome would be an invitation to appeal, and warned not to regard the decision as a “license to appeal by anyone who discovers that following conviction . . . some possible line of defence has been overlooked.” *Ibid.* at 599.

29. For a useful contrast, see *People v Denison*, 67 Cal App 4th 943, modified and rehearing denied, 68 Cal App 4th 1283 (1st Dist CA 1998). There, the issue of whether the police had probable cause to continue to search after finding certain pills was overlooked by the defense lawyers at trial and on appeal. Only on habeas attack did Denison's third lawyer argue that the first two were wrong in believing probable cause was supplied by the seizure of the pills. The appellate court agreed, holding that Denison's lawyers' interpretation of the law was wrong. To provide relief, this court was required to find, as it did, that those lawyers' misinterpretation constituted ineffective representation. In England, by contrast, the Court of Appeal could grant relief without finding that the same error by a barrister constituted flagrant incompetency. It should be noted that while *Denison* cannot be cited and has been ordered not published by the California Supreme Court, 1999 Cal Lexis 1343, the defendant's conviction was, nonetheless, overturned. The case thus illustrates that an attack on the lawyer is often procedurally necessary to raise the issue of a wrongful conviction.

30. *R v Fergus* (1994) 98 Cr App R 313; (1993) 158 JP 49.

31. *Jackson v Virginia*, 443 US 307, 319 (1979).

32. See *R v Trevor* [1998] Crim LR 652 (effect of fresh evidence on verdict).

33. Identification and expert evidence come to mind. That said, judges might be more ready to credit circumstantial evidence than are jurors. Whether judges or jurors would be more or less convinced by evidence, the Court of Appeal has two avenues to grant relief: it thinks the verdict is unsafe, no matter how jurors would regard the issue; or it can be influenced to reverse if it thinks that jurors would have voted to acquit. See *Ibid.*

a. The “contemporaneous objection” rule

Defendants in the United States are normally blocked from raising issues for the first time on appeal.³⁴ For example, if the defence lawyer, no matter the reason, failed to apply to exclude a weapon, the defendant loses the ability on appeal to challenge its admission at trial on the ground the police acted improperly in obtaining it. Yet, the defendant is not invariably thwarted by these “contemporaneous objection” rules. He can convert the lawyer’s decision or oversight into an attack on the lawyer’s competence.³⁵ If he loses that challenge on direct appeal,³⁶ he can obtain federal habeas review only by establishing that “cause” existed to excuse the failure to comply with the contemporaneous objection rule. He can show cause by proving that the lawyer’s performance was constitutionally ineffective.³⁷ In England, by contrast, the defendant can raise issues on appeal that were not litigated at trial.³⁸ The merits of a claim not made, then, can be reviewed without being repackaged as an attack on counsel.

Moreover, while defendants in the United States must frame a substantive claim as an attack on the lawyer, prior to 1987, when the barrister’s performance was first recognised as a ground on appeal, defendants in England ironically had to repackage an attack on counsel as a different sort of failing. The claim was pitched more gener-

34. See *Turner v Murray*, 476 US 28 (1986) (at trial defendant must ask for judge to question venire on racial prejudice to preserve the right to appeal); Federal Rules of Criminal Procedure 51 (must “make known to the court the action which that party desires to court to take”). For a review of when the rule applies, see “Twenty-Ninth Annual Review of Criminal Procedure” (2000) 88 *Georgetown LJ* 879, 1614-1621. On the other hand, error so “plain” it should have been rectified at court can on occasion be reached on appeal even with no objection at trial. See Federal Rules of Criminal Procedure 52(b).

35. See *Murray v Carrier*, 477 US 478 (1986) (importance of comity between jurisdictions requires raising lawyer’s constitutional ineffectiveness first in state proceedings as a condition of its review by federal court in habeas action). Nonetheless, if the record of the lawyer’s conduct is not clear, the defendant will lose because appellate courts in the United States, unlike the Court of Appeal, will not take evidence to develop a record to evaluate a claim. See *US v Tuesta-Toro*, 29 F3d 771 (1st Cir 1994).

36. These are the steps in the appellate process. If prosecuted in a state court, for example, the convicted defendant can appeal to the State’s intermediate court of appeal. If he loses, he can petition to the State’s supreme court (“petition” because this court, like the Court of Appeal in England, has discretion to refuse to consider the appeal), and then to the United States Supreme Court. Those three steps are called a “direct” appeal. So long as the US Supreme Court has not decided the merits of the claim(s) against him, he can institute a “collateral” attack on his conviction, by means of a writ of habeas corpus, first in the State’s system and, if that fails, then in the federal courts.

37. See *Coleman v Thompson*, 501 US 722 (1991). A noticeable example is *Virginia v Strickler*, 527 US 263 (1999). At trial, defence counsel had not requested exculpatory information from the prosecution, lulled by the latter’s policy of providing access to its evidence. Unfortunately for the defence, the prosecution had hidden a critical prosecution witness’s inconsistent statements that would have undermined her credibility. In state habeas corpus proceedings a new lawyer claimed trial counsel had been constitutionally ineffective in not making the request. But that lawyer had himself not pressed to see whether there were documents not disclosed by the prosecution. Thus, on federal habeas the defendant was forced to claim that the state habeas lawyer had himself acted ineffectively. Because the substantive issues involving non-disclosure paralleled the ineffective claims, the Supreme Court never decided whether the lawyers had provided constitutionally ineffective representation.

38. Two striking examples are *R v Ahluwalia* [1992] 4 All ER 889 and *R v Raphael* [1996] Crim LR 812. In *Ahluwalia*, the defendant, convicted of murdering her abusive husband, raised the defence of diminished capacity for the first time on appeal. At trial, the defence had been pitched instead on grounds of lack of intent and provocation. A psychiatric report concluding that the defendant suffered from a “major depressive disorder” was overlooked. Reversing the conviction, but without scolding counsel or even exploring why they had not used this report, the Court of Appeal politely observed that “there may well have been an arguable defence which, for reasons unexplained, was not put forward at the trial.” [1992] 4 All ER at 900. In *Raphael* the barrister failed to apply to exclude the defendant’s statements without which, the Crown conceded on appeal, he could not have been convicted. Relief was granted when the Court of Appeal concluded that, if asked, the trial judge would have granted the application.

ally, as a reason why the conviction was unsafe or unsatisfactory, often because the trial judge had failed to protect the defendant.³⁹ This way of presenting the claim masked the incidents of alleged ineffectiveness.⁴⁰

b. Fresh evidence

In judging whether to grant relief, the Court of Appeal also seems more willing to consider evidence that was not adduced at trial than are courts in the United States.⁴¹ To encourage the defence to prepare thoroughly and to strive not to make tactical and strategic mistakes, and to honour the integrity of the jury's verdict, the Court of Appeal is presumably reluctant to exercise its discretion to consider "fresh" evidence for the first time on appeal.⁴² Nonetheless, it has agreed to ponder the significance of evidence not offered at trial where the reason for that failure was almost surely the solicitor's negligence in not finding it or the barrister's failure to appreciate its significance. In one recent example, the defendant implored the Court of Appeal to consider two witnesses not called at trial who could challenge the veracity of the thirteen-year-old complainant's accusation of sexual abuse.⁴³ Each would say that the girl had revealed to them that she had lied in accusing the convicted defendant of indecent assault. The trial barrister knew about both witnesses, but had chosen to call neither, the first because she was expected to be unwilling, the second because she was in a hospital and her testimony was not thought to be critical. In granting relief after considering their testimony, the Court of Appeal did not excoriate counsel, but instead said simply that advocates, faced with the same choices in the future, should seek a continuance or a summons rather than proceed without the witnesses.

It would be very surprising to find *Trevor* decided on the same ground in the United States. American courts seem to enforce the procedural requirements to consider newly-discovered evidence much more rigorously.⁴⁴ Here again, though, the defence

39. See *R v Lattimore* (1976) 62 Cr App R 53 (defending barristers' failure to understand evidence led them not to object to trial judge's too-favorable evaluation for Crown in summing up to jury).

40. For cases involving counsel's errors where the error was not itself viewed as the basis for relief, see above n4.

41. As illustration of its generosity, the Court of Appeal has remarked: "[E]ven if the defence were not at fault, if the court was satisfied that new evidence showed that if a particular line had been followed and evidence produced which could have affected the outcome of the trial, the court would not hesitate to receive the evidence and, if appropriate, set aside the conviction." *R v Bowler*, above n9, at 262.

42. See Criminal Appeal Act 1968 s. 23. No longer must the Court of Appeal accept evidence, but is now guided by four tests under s. 23: Is the evidence "capable of belief"? Would it afford ground for relief? Would it be admissible at trial? Is there a reasonable explanation why it was not offered at trial? These tests create only a "relatively low" burden to meet to convince it to review the evidence. *Smith v Linskills* [1996] 2 All ER 353, 362, [1996] 1 WLR 763 (explaining that this low burden for admitting fresh evidence on appeal against conviction is one reason to deny collateral attack through malpractice action against solicitors).

43. *R v Trevor* [1998] CrimLR 652. The Court of Appeal was equally generous in *R v Ahluwalia* [1992] 4 All ER 889, discussed above in n38. One would have thought possession at trial of the psychiatric report supporting a defence not advanced would sink a claim of newly-discovered evidence. Instead, it was used to support a successful request to consider additional psychiatric information indicating diminished responsibility.

44. For the factors the defendant must meet to win a new trial on the basis of newly-discovered evidence in federal courts, see *United States v Frost*, 61 F3d 1518 (1995) (the evidence must have been discovered after the trial (not so in *Trevor*), and must be material and neither cumulative nor merely impeaching (as was so in *Trevor*); the defence must have been diligent in finding it (not so in *Trevor*); its admission would probably have led to a different result), modified on other grounds, 77 F 3d 1319 (11th Cir 1996).

might prevail by repackaging the rejected claim of fresh evidence as an attack on the lawyer for not finding or introducing the evidence.⁴⁵

The fresh evidence cases support the claim that the Court of Appeal is concerned more with achieving the proper substantive outcome for the defendant than an error-free determination of guilt.⁴⁶ Moreover, the discussion in this Part suggests that to prevail on appeal it is not so important for the defendant in England to establish that any particular professional acted poorly as it is for the defendant in the United States to accuse the defence lawyer of incompetence.

B. MORE DIFFICULTY

If there are reasons why defendants should be pleased by barristers' efforts, there are also impediments to raise the issue for those who are not. The defendant's difficulties in learning of the barrister's ostensible error and in convincing the Court of Appeal to consider the issue explain why the small number of litigated cases challenging the defenders' work do not accurately indicate the number of displeased defendants. Indeed, of those defendants unhappy with the defenders' performance, those unable to litigate their complaints probably considerably outnumber those who have.⁴⁷

A glance at the American experience again helps to explain why there are more challenges to the advocacy of lawyers than of barristers. In the United States every defendant has the right to have one appellate review of his complaints about his conviction,⁴⁸ and, having lost, the right to institute a second, collateral attack on the constitutionality of the conviction. Even if indigent, the defendant will have a lawyer to assist his direct appeal.⁴⁹ That lawyer, typically different from the lawyer at the guilt stage, scours the record for evidence of the first lawyer's failings. If that first lawyer gave inaccurate advice, if she failed to convince the defendant to adopt her view of the defence rather than the unconvincing one the defendant demanded be advanced,⁵⁰ if her failure to invoke an exclusionary rule precluded the defendant's

45. See *Schlup v Delo*, 513 US 298 (1995) (on remand, district court found that defendant's new evidence established, more likely than not, that no reasonable juror would have convicted, and that the defense lawyer was ineffective in failing to find this evidence).

46. See Rosemary Pattenden, *English Criminal Appeals 1844-1994* (Oxford: Clarendon Press, 1996), 137.

47. *Ibid.*, at 166: "There must be vast numbers of convicted persons who are dissatisfied with the way counsel handled their defence." On the other hand, for a heartening conclusion that most convicted defendants are generally satisfied with their defenders' assistance, see Michael Zander and Paul Henderson, *Crown Court Study* (London: HMSO, 1993) para 2.6.8, table 2.24 at 67: 59% of defendants thought barrister's work was "very good," 26% said it was "good," and only 5% said it was "bad" or "very bad". That conclusion prompted Justice to review its records of those defendants, typically imprisoned for long terms, who had sought its help. Its report was far more sobering. See Justice, *Miscarriages Of Justice: A Defendant's Eye-View* (London: Justice, 1993) [hereinafter "*Defendant's Eye-View*"] at 4: in 1300 cases, 47% of the defendants complained about the barrister and 28% about the solicitor. In a different report Justice describes several of the cases. See Justice, *Miscarriages Of Justice* (London: Justice, 1989) [hereinafter "*Miscarriages*"]. Of them, Burke's case (*ibid.* at 89) reveals egregious conduct by counsel. This defendant's conviction was reversed, although not because of his Queen's Counsel's mistakes (the failure to call eyewitnesses and a forensic expert whose report the leader had misunderstood), but because the Crown's scientific evidence failed to support the verdict. For other critical comments on counsel's conduct, see below nn148 and 156.

48. This is called a direct appeal. For a description of the appellate process in the United States, see above n36.

49. He may also be entitled to legal help in pressing a collateral attack, but representation is not automatically available. See *Ross v Moffitt*, 417 US 600 (1974).

50. See *Taylor v Alabama*, 291 Ala 756, 287 So.2d 901 (1973) (lawyer accused of ineffectiveness for failing to persuade defendant to claim self-defence rather than inaccurate identification).

ability to raise the issue on appeal, to name but three of the multifarious number of possible complaints, the lawyer becomes a tempting target on appeal.⁵¹

In England, by contrast, the defendant has more difficulty in learning about the errors of his legal advisers, and surely more difficulty in gaining appellate review. While his barrister in the Crown Court is expected to advise him whether grounds exist to appeal against the conviction,⁵² that barrister is not likely to impugn his own work.⁵³ Barristers are not apt, for example, to concede they were unprepared. To do so would undercut their professed skill as advocates. It would cost them returned briefs, as neither the chambers' clerk nor solicitors would trust the barrister's facility to prepare quickly. Moreover, in the barristers' insular world, an attack by one on another would be unwelcome, and the need to allege that the trial barrister was flagrantly incompetent must increase the barrister's reluctance.⁵⁴ Nor for several reasons is the

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51. Even marginal instances of ineffectiveness may be alleged because of a peculiar aspect of the right of appeal. Even if the appellate lawyer concluded that no error occurred, she once had nonetheless to write a brief indicating the possible grounds and the reasons why they lack merit. See *Anders v California*, 386 US 738 (1966). *Anders* invited appeals. And while appealing, why not charge that tempting target, the trial lawyer, with incompetent performance? This may provide another reason for the imbalance between the two countries in the number of challenges to the defenders' efforts. A recent decision may reduce this incentive to attack the trial lawyer. See *Smith v Robbins*, 528 US 259 (2000) (no longer necessary to write brief on appeal unless appellate lawyer concludes that an appeal would be "wholly frivolous," the *Anders* standard; instead, sufficient to summarise the factual and legal history of the case and invite the appellate court to search for contestable issues).
52. The Legal Aid order authorising an advocate for the trial requires the barrister to advise about an appeal. Legal Aid Act 1988 section 2(4)(c). Many barristers fail in this obligation. See Runciman Commission, above n14, para 13, at 164 (32% of defendants said they received no advice about an appeal from barrister or solicitor). This is the most obvious reason why so few defendants mount an appeal in England. (In the United States the lawyer's failure to discuss with the defendant whether to file an appeal, even after a guilty plea, can itself constitute constitutionally ineffective representation. See *Roe v Flores-Ortega*, 528 US 470 (2000) (duty to consult when defendant does or a rational defendant might want to appeal).) In 1992, the Runciman Commission found that only 10% of those convicted after pleading not guilty sought leave to appeal. Of those who did, 33% received leave from the single judge. Of those refused, 40% renewed the application to the full court, of whom 12% were given leave. Thus, of those applying for leave, 36% got it, with 45% of them gaining relief: Runciman Commission, above n14, para 7, at 163. Similar data in federal courts are not separated as finely. Approximately 51350 defendants were convicted by trial (3157) or plea (48194) in 1998. US Department of Justice, *Compendium Of Federal Justice Statistics 1998*, (Washington DC: US Department of Justice, 2000) Table 4.2 at 54. Approximately 7484 defendants filed appeals against conviction in that year (nearly 15%). It appears that many defendants who pleaded guilty were among those who appealed (but coding errors and interlocutory appeals mislabeled as appeals against conviction may account for part of data).
53. For example, one barrister, in drafting the grounds for appeal, did not mention those aspects of his performance that led to a finding of professional misconduct by Bar Council. See Justice, *Miscarriages*, above n47, at 5. The trial had been delayed for him to have his first conversation with the defendant; he failed to call witnesses; he fell asleep during the trial. That said, Justice does not evaluate whether these problems jeopardised the conviction's safety. Even if a barrister thought he had made a mistake, the test of whether to advise taking an appeal is high enough to provide a reason for him not to reveal his concern. See *A Guide To Proceedings In The Court Of Appeal* (London: Criminal Appeal Office, 1990) para. 2.4: Would an appeal have a "real prospect of success"? In only one case has a barrister admitted error. In *R v Kamar*, *The Times*, 14 May 1999, counsel admitted as error his failure to ask the trial judge for a direction about the defendant's good character in a case pitting the defendant's credibility against his wife's. Nonetheless, to protect himself counsel claimed he must have appreciated the importance of such a direction at the beginning of the case but simply forgot to seek it at the appropriate point during the trial.
54. See Justice, *Defendant's Eye-View*, above n47, at 5 (one reason for so few complaints about trial barrister's conduct is that barristers are unlikely "to advance . . . conduct of their own or of colleagues which they regard as tactical decisions at trial"). Challenges have been sufficiently unusual that several have made news. See "Barristers' courtroom clashes brought before the Bar", *The Times*, 25 September 1995 (noting three public attacks by different barristers on another's work). Rather than characterising these challenges as appropriate, if not fearless efforts by the appellate barristers, the then-chairperson of the Bar blamed them on the defendants. "It was not so much the old courtesies going [that explains these challenges], or Bar standards dropping—far from it. It is that the lay client, the defendant, is becoming much more

solicitor likely to reveal counsel's errors. The solicitor may not consider even palpably egregious behavior as error, bowing to the barrister's purported expertise.⁵⁵ Or the solicitor may have been unaware of counsel's choices because his view was not sought and the minion he sent in his place to accompany the barrister at trial lacked the legal acumen to recognise the barrister's failings. And if the problem was the solicitor's fault,⁵⁶ the solicitor is also not apt to confess his failure, and the barrister may say nothing, as well, to protect the solicitor. By accusing the solicitor of having made mistakes, the barrister risks losing briefs that the solicitor would otherwise provide.

It is no surprise, then, that convicted defendants who draft their own papers on appeal challenge their defenders' conduct far more frequently than do barristers, even barristers other than the trial barrister,⁵⁷ who advise an appeal and prepare the grounds for it. Indeed, bereft of help from his barrister and solicitor in challenging either's work, many defendants will not know they themselves can appeal. The solicitor may have prepared the defendant to expect the barrister to make the decisions, so that the defendant will not express a desire or will not complain if his desires are not carried out. Or, he may not even recognise that a change in plan has occurred or an error was made if, separated from his legal advisers as he sits aloft on a dias in the back of the courtroom, he does not hear or understand what is said or done.

If the barrister does not recommend an appeal, the defendant loses legal aid should he want to press on. Only an intrepid defendant is likely to draft papers on his own, accusing the barrister of ineffectiveness, when the barrister has advised against an appeal.⁵⁸ Such a defendant risks being denied credit for time served in jail while the appeal is pending.⁵⁹ But if the attack is not one of the grounds for appeal, the

assertive, more aggressive, and when they are convicted they actively look around and go through everything to see if they can find their barrister at fault." *Ibid.*

55. This ought not to occur. In developing the case to present in the brief, a solicitor experienced as an advocate in magistrates' court should recognise the tactical decisions to be made. Through conversations with the barrister the solicitor ought to learn, and be able to evaluate, what the advocate plans to do. He could also police the barrister to ensure that he does not stray from any tactical plan devised by the solicitor and defendant. Instead, many solicitors seem to defer to counsel's choices, as illustrated by the perfunctory, deferential conclusion in many briefs, something like "of course counsel will decide what is best," or "counsel is asked to do his best effort."
56. The solicitor might fail to investigate, for example, with the result that the barrister has no witnesses to dispute a point. For two cases in which this happened, see *R v Clinton* [1993] 2 All ER 998, (1993) 97 Cr App R 320, [1993] 1 WLR 1161; *R v Fergus* (1994) 98 Cr App R 313, (1993) 158 JP 49.
57. See Justice, *Defendant's Eye-View*, above n47, at 5 (only 9 of 300 appeals by defendants who eventually sought help from Justice included challenge to counsel's conduct; all had been made by unrepresented defendants and all were refused leave to appeal); Pattenden, above n46, at 105-6 (unfortunately not citing data, however). For an example, see *Green*, above note 9. Granted leave to appeal by the Court of Appeal. *Green* alleged that counsel had incompetently pressurised him not to testify, an issue counsel had not included in his grounds for appeal. Although counsel had exaggerated the scope of cross-examination, *Green's* appeal was denied because counsel's view that *Green* would not have been a good witness was accepted as an accurate assessment by the Court of Appeal. If his appeal is heard the defendant receives a barrister, but not necessarily the one who appeared in Crown Court. Such a defendant no longer has the right to select the barrister, but his wishes are considered. See Legal Aid in Criminal and Care Proceedings (General) Regulations 1989 reg. 46(2). This new barrister has no special incentive to add a claim of ineffectiveness by trial counsel to those settled by that barrister. Nor without permission may the new barrister add a ground not included in those advanced by the trial barrister.
58. It is also far less likely that such a defendant will receive leave to appeal. See Runciman Commission, above n14, para. 9, at 164.
59. Criminal Appeal Act 1968, section 29 (loss of credit possible if defendant appeals without barrister's advice to appeal and grounds settled by him, or if he presses the application to the full court when the single judge has refused to grant leave to appeal). While few defendants suffer this punishment for instituting a frivolous appeal, many fear they will. See Runciman Commission, above n14, para. 19, at 165 (finding

defendant is precluded from raising the issue in a later action. A defendant in England has no right of collateral attack,⁶⁰ an avenue for review that is actually the defendant's most effective way of litigating the issue in American courts.⁶¹

Even if an attack on the defenders is included in the grounds for appeal,⁶² the issue may not be reviewed because leave to appeal is refused.⁶³ The trial judge is not likely to certify an appeal,⁶⁴ and the Court of Appeal has little reason or appetite to consider the issue. The Court of Appeal has no reason to grant leave to appeal for the purpose of instructing barristers on practice questions because it sees no divisive issues over the barrister's role.⁶⁵ Nor does it have reason to instruct trial judges about ineffectiveness because they lack the authority to overturn a verdict,⁶⁶ even if gained through the defenders' ineptitude, and trial judges already know of their obligation to protect the defendant to ensure the trial is fair.

The Court of Appeal also has practical reasons to discourage such appeals. For one, resolving the allegation consumes much time. Evidence needs to be taken: the defendant must support the attack;⁶⁷ the trial barrister receives the option of responding, and may be called to testify.⁶⁸ Although it has the power to delegate fact-finding,⁶⁹

that over one year only 5 defendants lost credit, with 28 days the most time lost). Because the Court of Appeal has chastised barristers for accusing the trial barrister of ineffectiveness, see below n138, defendants might with reason fear they will be chastised, too, by losing credit for time served.

60. See *Smith v Linskills* [1996] 2 All ER 353, 362 ("No reasonable observer could view this outcome"—the possibility of inconsistent decisions between the appeal and a collateral review—"with equanimity.").
61. This is so because unless the trial lawyer's infelicitous conduct was obvious, the defendant has no factual basis to allege incompetence on direct appeal, and is not entitled to a hearing to develop the facts. On collateral attack, by contrast, the defendant often receives a hearing to develop his factual allegations, including the lawyer's failings. At such a hearing the defendant and trial lawyer will be pitted against each other, with each testifying about their conversations, the lawyer's choices and the defendant's guilt. The same, of course, happens in England as the barrister defends himself by refuting the defendant's allegations. See *R v Roberts* [1990] Crim LR 122 (Queen's Counsel told Court of Appeal that psychiatrist, whom defendant said should have been called as a witness, would not have helped).
62. See above n57 (Justice's findings). See also Runciman Commission, above n14, para. 58 and n17, at 174 (similar finding of attacks by defendants on counsel in separate study of 84 cases where leave to appeal was denied).
63. There appear to be no data indicating how often leave is denied to defendants who include an attack on the defenders as a ground of appeal. That said, the denial of leave does not invariably mean the barrister's conduct was not examined. On occasion the Court of Appeal has denied leave after reviewing the defendant's attack on counsel, and finding it unpersuasive. See *R v Ram*, above n8.
64. Only a minuscule number of defendants receive a certification from the trial judge. See Christopher Emmins, *A Practical Approach To Criminal Procedure* (4th ed., London: Blackstone, 1988), at 314 (only ten in 1986). One might be suspicious that the trial judge is protecting himself in denying a request for certification that includes an attack on the defenders. After all, an attack on counsel could be viewed as an implicit attack on the judge for failing to execute his duty of protecting the defendant. But that suspicion is ill-founded. Trial judges are discouraged from certifying appeals, even when the allegation involves criticism of the judge's performance. See Pattenden, above n46, at 96.
65. More accurately, the Court of Appeal has not thoroughly addressed two potentially contentious advocacy issues: the division of responsibility between the defendant and barrister, and the barrister's role in discussing whether the defendant should plead guilty or, at trial, testify.
66. By contrast, trial judges in the United States can grant a new trial based on any error. See Federal Rules of Criminal Procedure 33.
67. The defendant will need to defend his complaint and waive privilege so that the trial defenders can respond. See "Bar Council Guidance: Criticism of Former Counsel" para. 2, found in Archbold, above n10, App. B-48, at 2646, 2647. See also *R v Doherty and McGregor* (1997) 2 Cr App R 218 (defendant's allegations unlikely to persuade unless supported by his oral testimony).
68. Whereas in the earlier cases the barrister was invited to reply, in one recent one I was told that the Queen's Counsel, the junior and solicitor were all subpoenaed to appear, and all testified. Cf *R v Bevans* (1994) 98 Cr App R 354 (barrister and two solicitors testified).
69. See Criminal Appeal Act 1968 s. 23(4).

the Court of Appeal has itself conducted the hearing in these cases.⁷⁰ Second, adjudicating the merits of the attack is difficult. What did counsel know, what were his choices, why did he act as he did, what was the effect of his conduct? These are not easy questions to answer. Third, perhaps the judges on the Court of Appeal, former barristers, tried to dissuade attacks on counsel to protect the Bar during its bruising battles with the Government over extending rights of audience to solicitors. The Court of Appeal's willingness to look carefully at barristers' conduct would invite more attacks, a process that might undermine the Bar's claim that advocacy before juries was a skill limited to those who undertook it continuously. In turn, once solicitors obtained the right of audience, a willingness to review the advocate's conduct might encourage attacks on solicitor-advocates who would not be as experienced as barristers in conducting jury trials. A fourth problem is the remedy. If re prosecution following reversal were forbidden, barristers might be suspected of conniving with defendants to lard the trial with error. However, now that the Court of Appeal can order a retrial when warranted by the interests of justice,⁷¹ the threat of such collusion, though unlikely to have occurred,⁷² can be ignored. Nonetheless, perhaps the Court of Appeal's failure to scrutinise counsel's conduct closely can be explained because it continues to end prosecutions rather than permit retrials.⁷³ By contrast, any concern over the effect of the remedy does not trouble American courts because a defendant who wins appellate reversal of his conviction can always be re prosecuted.⁷⁴

There are two other possible explanations for the Court of Appeal's hostile attitude toward attacks on barristers. One is to protect the individual barrister,⁷⁵ not just the

70. Appellate courts in the United States might be less willing to tolerate attacks on the lawyer if they had the responsibility to conduct hearings like the one that lasted five days in one case. See *Cuyler v Sullivan*, 446 US 335 (1980) (possible conflict of interest). Fact-finding hearings are instead the responsibility of the federal district court.

71. See Criminal Appeal Act 1998 s. 43. The Court of Appeal gained this right in 1988.

72. The Privy Council once expressed this suspicion of counsel. See *Sankar v Trinidad and Tobago* [1995] 1 WLR 194, 197 (to make leave to appeal readily available for counsel's alleged errors would invite counsel deliberately to misbehave to ensure a successful appeal). That said, barristers, concerned about their reputations, would not inappropriately introduce error once the Court of Appeal chastised by name the first suspected of having done so.

73. See *R v Ullah* (2000) 1 Cr App R 351. *Ullah* provides a sharp contrast with American practice. The defendant was convicted of indecent assault on a 17-year old woman but acquitted of raping her. For an unspecified reason his counsel had not used transcripts of tape-recorded conversations between that woman and others, including her boyfriend, that could have seriously damaged each's credibility as a witness. The conviction was reversed as the appellate judges, placing themselves in trial counsel's position, concluded that each would have utilised the tapes. The Court of Appeal refused to order a retrial, however, agreeing with the prosecuting barrister who had "properly and fairly recognise[d] the difficulties which might very well arise if a retrial were to be ordered." *Ibid.* at 359. Those "difficulties" were not named, and remain a mystery. In the United States, by contrast, an appellate court could not have forbidden the prosecution of *Ullah* from continuing. The outcome of such a re prosecution in an American state might likely have been a guilty plea by *Ullah* on terms favourable to him as both sides sought to avoid a jury assessment of the complainant's credibility during a second trial. Granting retrials has been recommended as a way of encouraging closer examination of alleged error and of more reversals. See Runciman Commission, above n14, para. 64, at 175; Justice, *Remedying Miscarriages of Justice* (London: Justice, 1994), 13.

74. The Supreme Court would have encountered even more resistance to its revolutionary extension of procedural protection in state criminal cases in the 1960s if every reversal had ended the prosecution. Critics might have been slightly mollified by controversial decisions like *Miranda v Arizona*, 384 US 436 (1966), upon learning that *Miranda* was re convicted on retrial.

75. Analogously, in its directions advising barristers how to attack each other, the Bar Council cautions restraint. Because "[a]llegations against former counsel may receive substantial publicity whether accepted or rejected by the court[,] [c]ounsel should not settle or sign grounds of appeal unless he is satisfied that

Bar itself. The other is to protect the image of the criminal process. Even to be accused of “flagrant incompetency” could sully the barrister’s reputation. And what solicitor would brief a barrister found to have been flagrantly incompetent? Perhaps this explains why, on the occasional times it has granted relief in cases where the barrister’s performance was challenged, the Court of Appeal has never found that the barrister’s conduct sank to the level of flagrant incompetence. And its refusal to evaluate the sagacity of the barrister’s tactical choices is an invitation to the appellate barrister to refrain from alleging ineffectiveness even when he thought the tactical decision, even assuming one was made, was a blunder.⁷⁶

The other explanation—fear that reversing convictions based on counsel’s error would undermine public confidence in the process⁷⁷—is not persuasive. There is no reason to single out problems in representation as a special concern; any error, whether by the judge in summing up or by the police in disobeying their regulations, could sour the public about the fairness of the process. Moreover, the public should be disturbed to learn that a defendant was not protected from errors by those supposedly helping him.

In summary, a multitude of reasons suggests why the complaints of defendants in the Crown Court about their legal advisers’ conduct may not be heard. While there are many reasons why defendants in the Crown Court should be pleased with the representation they receive,⁷⁸ the possibility exists that a pool of irritated and disgruntled defendants is growing, damned by the practical and formal impediments created by the process of appeal.

PART 2. THE LAW

The Court of Appeal has reluctantly come to accept that barristers can err, and that their errors can warrant relief. That recognition has forced it to decide how to evaluate the barrister’s performance and the relationship of performance to conviction. In this Part the discussion turns to the allocation of responsibility between barrister and defendant, and to the barrister’s allegedly defective performance. Those issues could have been avoided, however, if addressed in a different way. Agency law could be imported to hold that the decisions or mistakes by the barrister (the agent) bind the defendant (the principal). In England, but not in the United States, the analogy seems apt as a description of the defendant–defender relationship.

they are reasonable, have some real prospect of success and are such that he is prepared to argue before the court.” “Bar Council Guidance”, above n67, para. 1.

76. Barristers must be relieved that their tactical judgments are immune from criticism on appeal.

77. See *R v Green*, unreported, 15 September 1995 (CA) (Attacks on counsel are “more often than not the last resort of the disappointed criminal and if frequently made will serve to undermine the confidence and judgement of counsel in the heat of battle and, if unfounded, the criminal justice system itself and, in particular, trial by jury”).

78. For reasons, see Tague, above n2 at 119–28.

A. THE PRINCIPAL-AGENT MODEL

The Court of Appeal has flirted with treating the barrister as the defendant's agent without explicitly adopting the model.⁷⁹ *Irwin*, the first case in which a defendant prevailed by attacking counsel, could be explained by this model. Discussed at length in the next section, *Irwin's* controversy involved the barrister's decision not to call two alibi witnesses whom the defendant expected would testify. The reason for relief—a barrister was not entitled “to bind his client by his decision”⁸⁰ (even though his tactical reasoning was convincing)—is consistent with agency law whereby an agent cannot deviate from his principal's instructions.⁸¹

In *Ensor*,⁸² the next case involving the defendant-defender relationship, the Crown's contention that the barrister's every decision binds the defendant, other than how to plead and whether to testify,⁸³ was implicitly built upon this model. The Crown's assumption must have been that the defendant cedes authority to make decisions to the barrister because of the latter's supposed adversarial skill. That said, mistakes by the barrister, no matter how egregious, could also be imputed to the defendant.⁸⁴

Treating the barrister as an agent could be defended in view of the way the barrister is chosen and directed. Not so with the lawyer. The publicly-funded defendant in American courts cannot select the lawyer; one is thrust upon him. Even with the right of selection, the defendant, hampered by lack of information about the lawyers' strengths and foibles, might choose one of modest talent.⁸⁵ In the Crown Court, by contrast, the defendant's lack of information about barristers is no impediment because the solicitor chooses the barrister. Even if unschooled in selecting an able solicitor, the defendant can trust that the solicitor will (or at least will want to) choose an able barrister. An important aspect of the solicitor's work is evaluating barristers and assembling a stable of barristers from which he will choose one whose skills seem

79. The only explicit modern support for the model appears in a case from Scotland, *M'Carroll v HM Advocate* [1949] SLT 74, 76 (“... the client and his agent or/and counsel who are authorized to represent him are ... one”). *M'Carroll* was overruled in *Anderson v HM Advocate* [1996] SLT 155.

80. [1987] 2 All ER at 1088. Without naming the case(s) the Court of Appeal indicated that authority existed in civil cases for counsel to bind the client, but that the issue had never been discussed in criminal prosecutions.

81. That said, a disobedient agent can bind a principal to a third party if the acts typically accompany authorized activity and the third party has no reason to suspect the agent's disobedience. See *Restatement (Second) Of Agency* (1958), §§ 161, 194. If the judge were regarded as the third party, he would rely on counsel's apparent authority not to call witnesses to refrain from interceding. See *Iroegbu*, above n9 (judge need not intervene *sua sponte* because it is appropriate to infer that counsel had made a tactical decision not to make an obvious objection). On this view, *Ensor*, discussed immediately below in the text, is more consistent than *Irwin* with the agency model because the trial court could assume counsel had authority not to apply for a severance even though they were disobeying the principal's (the defendant's) instructions.

82. *Ensor*, above n9. This case is also discussed in detail in the next section.

83. Presumably the Crown excluded these two because the entry of a guilty plea by the barrister for the defendant would clash with the right to trial, and because the barrister has no way to force the defendant to testify. The importance of these decisions also explains why the defender cannot prevent the defendant from pleading guilty or from testifying.

84. The Court of Appeal has agreed, at least so long as the barrister discussed the point with the defendant. See *R v Gautum* [1988] Crim LR 109 (counsel's discussion of options with defendant precludes attack on choice as mistaken or unwise).

85. For a way that American courts could adopt part of English practice to help the defendant make an informed choice, see Peter W. Tague, “Ensuring Able Representation for Publicly-Funded Criminal Defendants: Lessons From England” (2000) 69 U Cinn L Rev 273.

sued to the defendant's position. Thus, defendants could be held to cede responsibility over tactical issues to the barrister.

Moreover, the barrister is "instructed" in the brief prepared by the solicitor about the defendant's position and the legal and factual issues. The barrister is to follow his instructions, a term that itself implies an agency relationship. Thus, at least in theory, the barrister has no responsibility for preparing the defence, but is instead retained to execute a plan devised by the solicitor and defendant.

The solicitor is also expected to oversee the barrister, to ensure that he acts as instructed, all the while welcoming the barrister's insights and perhaps changing the defence or attack on the Crown's evidence in light of the barrister's thoughts. Indeed, the defendant can fire and replace the barrister if he does not perform as expected. Thus, the barrister does seem to act very much like an agent: chosen, directed, controlled. It would not be farcical to hold that the defendant could not protest about the barrister's errors.

Despite the model's fit, in the end the courts in England must reject it for various reasons.⁸⁶ In the first place, there must be someone to police the barrister's performance, to ensure that he understands and follows his instructions, and performs appropriately. Defendants are not in a position to do this, and they are often not protected by the solicitor.⁸⁷ Solicitors fail to guard the defendant's interests by sending an inexperienced assistant to accompany the barrister to court. And solicitors are themselves sometimes the reason why the defence falters. By failing to investigate, for example, the solicitor may deprive the barrister of the means to attack a prosecution witness or present a defence.

A second problem with using the model would arise were the defendant to direct the barrister to act in a way the barrister thought was ineffective tactically or inappropriate ethically. While the barrister could resign to eliminate his clash with the defendant, resignation is disruptive and inefficient if the proceeding must halt while a new barrister is found. Moreover, withdrawal does not invariably protect the judicial system from illegal behaviour.⁸⁸ Barristers must have the freedom to contravene the defendant's desires when asked to violate their duty to the judicial process.⁸⁹

86. Barristers would also resist its adoption. A requirement to follow the defendant's desires would undercut barristers' claim to adversarial prowess. After all, tactical judgments demand as much skill as persuading the jury in the final speech.

87. For example, the solicitor in *Ensor* could be scored for having failed to insist that the barristers apply for a severance as the defendant wanted.

88. While expected to withdraw if the defendant proposes to commit perjury, the barrister is forbidden to share with the replacement his reason for resigning. Hence, the defendant might be able to lie by hiding from the new barrister his intent to commit perjury.

89. In truth, however, the loci of possible ethical conflicts between barrister and defendant are so few that they could be regarded as exceptions to the principal-agent model. To illustrate, while barristers "must not deceive or knowingly or recklessly mislead the Court," General Council of the Bar of England and Wales, *Code Of Conduct For The Bar Of England And Wales* (7th ed., London: General Council of the Bar, 2000) para. 302, the concrete examples of this prohibition are few. One important one is not to let the defendant commit perjury. But perjury poses more of a problem for the solicitor (and for the lawyer) because he is the one who in interviewing the defendant must decide what his shifts in position mean. Moreover, the barrister need not be worried unless the defendant has "clear[ly] confess[ed] that he did commit the offence charged." General Council of the Bar of England and Wales, *Written Standards For The Conduct Of Professional Work* (London: General Council of the Bar, 2000) para. 13.6. In other areas the barrister has no duty to ensure factually accurate outcomes obtained via proper procedure. See e.g. *R v Holden* [1991] Crim LR 478 (no obligation to inform judge of a fatal error in summing up, although silence may be

A political point provides a third reason to reject the model.⁹⁰ The barrister's independence was an important defence advanced by the Bar to justify its now lost monopoly over the right of audience. Appellate court judges, themselves former barristers at the acme of that profession, are not apt to view their former colleague as nothing but agents.

Last, the agency model is also inconsistent with the reasons why barristers were once given immunity from malpractice lawsuits brought by defendants unhappy with the barrister's performance.⁹¹ That immunity was grounded on the assumption that barristers are not agents, slavishly following the client's desires. If exposed to lawsuits, barristers supposedly would not prune their presentations to the points they thought persuasive, but instead would burden the courts with whatever the defendant wanted them to do.

Barristers (and all advocates) were recently stripped of this immunity by the House of Lords in *Hall v Simons*.⁹² *Hall*, however, has no substantive impact on the convicted defendant's attack on counsel as a ground of appeal because it concerns whether and when an advocate can be sued for a bungled performance. Nor does the decision improve the defendant's chance of airing on appeal counsel's performance at trial, because the House of Lords continued to regard a malpractice action as a collateral attack on the conviction, and thus permitted only after the conviction is overturned, no matter the reason. On the margin, *Hall* may encourage more appeals against conviction based on faulty performance by the defenders, but only because the decision suggests the judiciary is less hostile to attacks on advocates.

By dumping *Rondel's* reason for insulating advocates from malpractice actions—to encourage them to resist the defendant's desire that they do something tactically unwise or ethically inappropriate—*Hall* does not change *Rondel's* implicit rejection of the principal-agent model. But the effect of the decision ironically may be to encourage barristers to regard themselves more as agents than as independent actors. At least with testy, demanding defendants—the sort who might sue—barristers may choose to defer to the client's desires rather than override or ignore them if unwise. Why risk being challenged on appeal, and eventually being sued, if a pugnacious defendant can

considered in evaluating size of error). A recent decision holding that a client in a civil action should have revealed information that would have reduced his relief is probably not relevant in criminal cases, because the holding clashes with a criminal defendant's privilege against self-incrimination. See *Vernon v Bosley* [1997] 1 All ER 614.

90. Another problem with using the model would be the need to work out, with greater certainty than now is so, the appropriate allocation of authority between barrister and defendant. Must that allocation be negotiated in every case? Or will the barrister be permitted to assume, in the absence of explicit, contrary instructions, that he can act without consulting with, or obtaining permission from the defendant? These matters remain unclear.
91. See *Rondel v Worsley* [1967] 1 QB 443. *Rondel's* reasoning persuaded certain barristers that their performance was also immune from challenge by the convicted defendant as he sought leave to appeal. Expressing surprise that his conduct could become a ground of appeal, one Queen's Counsel (in Australia, to be true) observed that this result "will certainly not be welcomed by the bar at large, since this result of the possibility of an additional trial of counsel's conduct of a case was precisely one of the consequences which the House of Lords thought should be avoided when it upheld the immunity of counsel . . . [in *Rondel*]." J.G. Starke, "Practice Note" (1990) 64 Aust LJ 91.
92. Above n11. While the case involved lawsuits against solicitors for their performance in civil litigation, the House of Lords, in dictum and by a 4–3 vote, said the judgment applied to criminal cases as well.

be placated by acting as he wants, once he rejects the barrister's explanation for why his desires are folly?⁹³

B. THE BARRISTER'S RELATIONSHIP WITH THE DEFENDANT

In two settings the Court of Appeal has explored the relationship between advocate and defendant. The first arises when in making a tactical decision the barrister does not obtain the defendant's approval (or even acts against his instructions). The second involves the defendant's decision not to testify.⁹⁴

The Court of Appeal's initial, intriguing statement about the first setting warned of a major shift in the barrister's relationship with the defendant. *Irwin* marked the first time a defendant prevailed on appeal by attacking counsel, even though not on the ground that counsel's decision was inept. *Irwin*'s first trial for damaging two automobiles ended when the jury could not decide. At retrial, *Irwin* testified again. His wife and daughter, however, did not. Representing *Irwin* at both trials, the barrister had examined, and watched the cross-examination of, the wife and daughter. Without informing *Irwin*, he decided not to call them, for either of two reasons: if they repeated their testimony from the first trial, it would be "valueless," as it had been during that earlier trial; or if they improved their evidence their credibility could have been "destroyed."⁹⁵ The barrister's first reason was an exaggeration because the first jury's split verdict indicated that the defence had cast doubt on the Crown's evidence. His second was perceptive because the barrister knew the witnesses' weaknesses and probably mentioned them to *Irwin* or his solicitor. Alerted about the weaknesses in their story, they might have padded what they would say.⁹⁶ Doing that would not only destroy their credibility but impugn *Irwin*'s testimonial denial as well. Risk assessment no doubt persuaded the barrister not to call them. Moreover, it is possible that during the second trial the other evidence had been developed in a sufficiently different way to render their testimony less important. Although the Court of Appeal did not

93. Various barristers made this point in conversations with me about *Hall*. On the other hand, one trusts that barristers will continue to resist demands to act unethically, and the ease of withdrawing from a case by asserting professional embarrassment supports the barrister's resolve in this area. Moreover, that resolve is bolstered by the House of Lords' indication in *Hall* that obeying one's duty to the court could not constitute malpractice.

94. Defendants often carp about being pressurised not to testify. See *R v Green*, above n9; *R v Bevan* (1994) 98 Cr App R 354 (defendant, a police officer, would have known value of testifying). With the exception of one case, *R v Clinton* [1993] 2 All ER 998, (1993) 97 Cr App R 320, (1993) 1 WLR 1181, where the defendant's failure to testify was thought to be a momentous mistake, the Court of Appeal has not been impressed by the claim. Indeed, one suspects that the Court of Appeal's purpose in urging barristers to obtain the defendant's written acknowledgment of his decision not to testify, as it did in *Bevan*, is to provide a way of eliminating this claim as a ground on appeal rather than to regulate how counsel advises the defendant.

95. [1987] 2 All ER at 1085, 1087. Left unclear was whether *Irwin* and his barrister had had any exchange about the decision to call the two witnesses. After they testified in the first trial, did the barrister share his concerns with *Irwin* or his solicitor that they had not been persuasive and might be impeached at the second trial? Did the brief specifically direct that they be called? The Court of Appeal did not address these questions, and my investigation proved unsuccessful in finding the answers.

96. That this concern was valid is supported by the Court of Appeal's observation that their testimony, offered to demonstrate that *Irwin* was home, with them, at the time of the crime, while not "in any way hostile to him," did "not . . . close the curtains so there was no chink through which could be seen the appellant committing the crime." *Ibid.* at 1087. Moreover, the prohibition preventing barristers from talking with witnesses about the substance of their testimony blocked *Irwin*'s barrister from testing what they would say if called at the second trial.

evaluate the wisdom of the barrister's choice, his decision seems, on the reported facts, to have been sagacious.

But the barrister had not discussed his tactical choice with Irwin. This was an error. The barrister "needed to take clear instructions . . . before not calling such evidence".⁹⁷ By implication, Irwin had not insisted in his instructions that his relations should testify. Whether he expected that they would is but one of many unknown facts. Nor do we know whether he (or his solicitor) protested counsel's decision as soon as it was convenient.

The barrister, the Court of Appeals noted, would be entitled to give "very strong advice" against calling the wife and daughter.⁹⁸ But the issue must be discussed. If the defendant disagreed, the barrister could accept that decision or ask to be discharged.⁹⁹

Irwin's reasoning portended a change in the barrister's role. Like game alerted by the breeze to uncertain danger, barristers must have been made wary by that decision. Irwin's barrister had not unilaterally changed the defence, but the way of presenting it. Previously, barristers had exercised unfettered authority over tactical decisions.¹⁰⁰ Now, what other tactical decisions must be negotiated? What sort of discussion is needed? Would a terse, harried conversation between defendant and counsel suffice, as they met for the first time only moments before the trial's commencement? These questions remain unanswered.

Instead, Irwin was neutered in the only other important case discussing the allocation of authority between counsel and defendant. In *Ensor*, the defendant was charged with raping two women in separate incidents. He told his Queen's Counsel and junior to apply for separate trials. Without informing Ensor, they defied his instruction to make the application for severance, expecting it to fail. On appeal, the Crown conceded that their prediction was wrong,¹⁰¹ and the Court of Appeal agreed that Ensor's chance for acquittals, had the counts been severed, would have improved.

Ensor's position was even stronger than Irwin's. Ensor had told his barristers what he wanted; Irwin had only expected the witnesses to be called. But Ensor did not prevail because the Court of Appeal took an extraordinary view of a defendant's responsibility. Characterising Ensor as "no stranger to court procedure," the Court of Appeal concluded that he would have asked counsel why the application had not been made if he had wanted it to be pressed. Sitting a "few feet" from counsel, Ensor was held to have "tacitly accepted . . . counsel's decision not to make that application."¹⁰²

97. *Ibid.* at 1088. Oddly, the only support offered by the Court of Appeal for this conclusion was inapt. Its citation to a provision (para 156(a)) in the Bar's then-current Code of Conduct indicating that it is for the defendant to decide whether to testify has nothing to do with whether counsel has unilateral authority to decide which other witnesses to call.

98. *Ibid.* at 1087.

99. In suggesting that the defendant could also fire the barrister and seek an adjournment to find a more compliant advocate, the Court of Appeal also implied it would tolerate considerable delay in completing the process.

100. Irwin, by contrast, requires the barrister to consult with the defendant immediately before calling or not calling a witness unless the matter had been "thoroughly discussed" earlier. [1987] 2 All ER at 1088.

101. Joinder was authorised, but severance would have been granted for lack of similarity between the two events.

102. [1989] 2 All ER at 589. With the rape counts joined, Ensor's defenders claimed the woman involved in the earlier incident had lied in denying consent. In support, they pointed out that she had waited ten days before speaking with the police, and then spoke only after learning of the second woman's "less strong" accusation: [1989] 2 All ER at 588, 589 ("less strong" because of the absence of "scientific

This conclusion is wrong for many reasons. No matter how close he sat to counsel, Ensor may not have appreciated the procedural significance of the second woman's appearance as a witness.¹⁰³ He probably inferred that the application had been made, and rejected, while he was out of the courtroom. On appeal Ensor insisted that had he known of counsel's decision he would have complained.¹⁰⁴ Left unsaid by the Court of Appeal was whether it would welcome the next defendant's interjection from the dock, complaining loudly before the jury about counsel's disobedience.

With its facts later characterised as "wholly exceptional,"¹⁰⁵ *Irwin* has thus been sent to a legal dustbin—not overruled, but ignored.¹⁰⁶ It does not follow, however, that the only inducement for a barrister to communicate more with the defendant, or to let the defendant decide important tactical issues will come from the fear of being fired by the defendant or denied briefs in the future by a solicitor who was upset by counsel's arrogance. The Court of Appeal has provided some incentive for barristers to discuss matters with the defendant by noting that a barrister's decision "could not possibly be said to render a subsequent verdict unsafe or unsatisfactory" if made in "good faith after proper consideration of the competing arguments, and, where appropriate, after due discussion with his clients".¹⁰⁷ None of these points has been explained, however. When is a discussion "appropriate"? What sort of conversation qualifies as a "due" one? Why does "good faith" cogitation insulate the barrister's mistakes? Whatever the answers, the inference is that the barrister has no obligation to speak with the defendant. The Court of Appeal's observation thus seems designed more to provide a way for barristers to protect themselves from attack than to induce them to discuss the alternatives with the defendant.

C. DEFECTIVE PERFORMANCE AND HARM

Apart from *Irwin* and *Ensor*, cases involving the allocation of authority between barrister and defendant, the Court of Appeal must explain the significance of defective performance and its relationship to the harm it might have caused. In those two cases

support" for it). But their effort was not persuasive because the first woman had no motive to lie. Moreover, she had telephoned her boyfriend and her solicitor to complain of being raped very shortly after returning home from her encounter with Ensor, but resisted their advice to report the incident for fear Ensor would retaliate.

103. Because Birmingham's courtrooms are not intimate, as Ensor's barrister on appeal told me, a "few feet" could be twenty or more. In the large courtrooms in several Crown Court centres in London, a defendant may not even hear the exchange between the barristers and judge, especially if the defending barrister is not intent on impressing the defendant with his performance, and thus addresses the court almost as if holding a private conversation.
104. Author's conversation with Ensor's barrister on appeal.
105. *R v Clinton* [1993] 2 All ER 998 at 1003, (1993) 97 Cr App R 320 at 325. It is unclear whether this characterisation applied to the facts in *Irwin* or to the substance of the decision. Whether or not *Irwin's* particular facts arise frequently, the general issue does whenever the barrister arrogates the decision over tactics.
106. "Confined to its own facts" by *Ensor* [1989] 2 All ER at 590, *Irwin* may have been implicitly overruled if one commentator's interpretation of a later decision that "counsel alone should have the final say" is accurate. "Defendant's Decision not to Give Evidence" (1994) 58 J Crim L 259 at 260 (commenting on *R v Bevan* (1994) 98 Cr App R 354). The problem with this interpretation of *Bevan* is that, while counsel was said to have decided carefully not to call witnesses, he had also conferred with his instructing solicitor over the decision.
107. *R v Clinton* [1993] 2 All ER at 1004, (1993) 97 Cr App R at 326. This observation also protects barristers too much. Ensor's counsel presumably made their decision in "good faith," but it was flatly wrong, and arguably harmed Ensor.

the legal issue was framed as whether counsel's conduct constituted a "material irregularity," not whether it had made the conviction "unsafe or unsatisfactory".¹⁰⁸ What of the separate claim that counsel's performance was defective? Was such conduct not also a material irregularity? Would it not also imperil the conviction's safety?

In the early cases the Court of Appeal both refused to evaluate counsel's performance and conceded that relief could be built upon his error.¹⁰⁹ Perhaps it vacillated because it doubted whether barristers would ever err, or whether their errors could justify relief.¹¹⁰ In rejecting a defendant's claim that his barrister had damaged the defence by eliciting damning information on cross-examination, the Court of Appeal intoned that no appellant would prevail unless he "suffered some injustice as a result of flagrantly incompetent advocacy by his advocate".¹¹¹

While, as initially conceived, the test emphasised the enormity of counsel's error, it did include the hint that the execrable performance had also to have harmed the defence. But as flagrant incompetence was left undefined in *Swain*, so was "some injustice." The term floated free of the relevant tests for granting relief in the Appeal Act of 1968. Was it unjust to deprive a defendant of the performance to be expected from counsel? Or did an injustice occur only if the defendant should not have been convicted, but for counsel's misconduct, because either factually innocent or legally not guilty? Or was "some injustice" another way of expressing the proviso that relief was available only when the material irregularity had led to a "miscarriage of justice"?

Another interpretive problem soon developed. A number of defendants have won appeals because of their barrister's work. But how is this possible when not one of those barristers' efforts was branded as flagrantly incompetent? Moreover, by testing counsel's performance against the standard of material irregularity, then by limiting material irregularities to instances of inept performance, the Court of Appeal had blocked itself from helping a truly deserving defendant. What could it do if not "some" but true injustice had occurred to a defendant whose barrister had made a mistake, but not a flagrantly incompetent one? The Court of Appeal found a way around these

108. These were the relevant parts of the legislation then structuring appellate review. See Criminal Appeal Act 1968 section 2(i). In 1995 this Act was amended to ask only whether the conviction was "safe."

109. Compare *R v Ram* above n8 (it is "not the function of this Court to review, still less to pass judgment upon, the advocacy of counsel who appear for the defendant at trial") with *R v Clinton* [1993] 2 All ER 998, 1003, (1993) 97 Cr App R 320, 325 (grant of relief based on counsel's conduct "must of necessity be extremely rare"). *Clinton* left unexplained the meaning of that peculiar caveat "of necessity."

110. In evaluating the harm caused by error, the Court of Appeal has even interpreted counsel's failure to object as evidence that he knew he could object but thought the damage was insufficient to warrant doing so. See *R v Holden* [1991] Crim LR 478. Occasionally, this imputation of insight is absurd. See *Iroegbu*, above note 9. In this case the Crown's case hinged on the defendant's alleged admissions about possessing marijuana. Yet counsel failed to apply to exclude them, an application that probably would have succeeded. On appeal, the defence faulted the judge for not instructing the jury, despite counsel's failure to object, to ignore the admissions. The Court of Appeal rejected that claim because counsel might have had "good tactical reasons for not raising [an] objection." Even if plausible elsewhere, that observation was nonsense in this case. Counsel was never asked to justify why he had not made the application and none was apparent on the facts. Later, in an identical setting—counsel inexplicably failed to apply to exclude evidence admissions without which the Crown's case would have collapsed; no attack on counsel; trial judge need not intervene—the defendant prevailed when the Court of Appeal concluded the trial judge would have excluded the admissions if asked! See *R v Raphaie* [1996] Crim LR 812.

111. *R v Swain* [1988] Crim LR 109, 110 (relief if "lurking doubt" that those conditions met). Because this judgment could not be found in the Royal Courts of Justice's repository for decisions, we do not know the details of counsel's bungled cross-examination that not only elicited damaging information but prompted the judge to question the witness in a way that uncovered more damning evidence.

problems in two cases decided in 1993, *R v Clinton*¹¹² and *R v Fergus*.¹¹³ But in doing so it treated precedent disingenuously, made unclear the measure of counsel's conduct, and unintentionally opened the way for more attacks on counsel.

Neither Clinton nor Fergus should have been convicted. In each, the Crown's effort stood or fell on the accuracy of the victim's identification of the defendant. None of the barristers escaped criticism. Clinton's first barrister had agreed to a misleadingly damning summary of the defendant's interview with the police. His replacement's failure to persuade a "shy" Clinton to testify meant that the jury never learned that he had distinguishing features (a scar and tattoos), not reported by the victim in her extensive description of the culprit on the date of the crime. Fergus' counsel erred in similar ways. He, too, did not call the defendant's relatives to establish discrepancies between the defendant's appearance and the victim's description. He did not insist that the solicitor re-interview potential alibi witnesses to confirm or eliminate his misgivings about calling them to testify. And he failed to ask the judge to withdraw the case from the jury at the end of the Crown's presentation.

But did the barristers' errors in these cases add up to flagrant incompetence? Clinton's trial barrister's failure to "wean the appellant from his reluctance to testify" was excessively "stigmatised as a grave error".¹¹⁴ Fergus's barrister's "performance fell markedly short of the standard to be expected".¹¹⁵ But the magic words—flagrant incompetency—were not used.

How was relief justified, then? The analysis was shifted from one part of the Appeals Act to another. The proper approach was to ask whether the conviction was unsafe or unsatisfactory. *Gautum's* and *Ensor's* stress on material irregularity and on flagrant incompetence was reinterpreted. Their analysis was not "restrictive [or] inflexible," but "general"; those cases did "no more than provid[e] general guidelines as to the correct approach".¹¹⁶ Escaping from the confines of precedent, the Court of Appeal stressed that the proper approach was to assess the effect of counsel's alleged misconduct "on the trial and the verdict" rather than its "qualitative value".¹¹⁷

This change in the legal test invited more attacks because counsel's mistake, even if defensible, could create doubts about a conviction's safety. But while the trickle of appellate challenges to trial counsel's conduct at trial did not grow into a flood, the Court of Appeal has nonetheless recently resurrected the flagrant incompetency test. Without even mentioning *Clinton* or *Fergus*, it now insists that trial

112. [1993] 2 All ER 998, (1993) 97 Cr App R 320, [1993] 1 WLR 1161. *Clinton's* and *Fergus's* facts are discussed in more detail in Part 4.

113. (1994) 98 Cr App R 313, (1993) 158 JP 49.

114. [1993] 2 All ER at 1001, (1993) 97 Cr App R at 322. This criticism is excessive because forcing a reluctant defendant to testify could result in a disastrous performance. Moreover, there were other, better (because not self-serving) ways than having the defendant testify to establish when he got the scars and tattoos (testimony by others, the police's records). Unfortunately, counsel did not find them. Others agree with the Court of Appeal's assessment, however, even though the Court of Appeal learned of Clinton's appearance from his family. See "Failure to Call Defendant" (1994) 58 J Crim Law 59, 60 ("could not be a case in which it could be more manifest that it was essential for the defendant to give evidence").

115. (1994) 98 Cr App R at 323.

116. *R v Clinton* [1993] 2 All ER at 1004, (1993) 97 Cr App R at 326.

117. *Ibid.*

counsel's conduct have been flagrantly incompetent as a condition of overturning the conviction.¹¹⁸

Given this apparent volte-face, would *Clinton* and *Fergus* have been decided differently today? The answer is probably no. And the answer helps to explain why the Court of Appeal cannot chock off appeals on this ground no matter how sternly it disapproves of them. In those cases counsel's conduct had a rippling effect on the performance of others. Because of counsel's error, the judge summed up too strongly for the Crown in each case. In *Clinton* the second barrister failed to detect that the summary of *Clinton*'s conversation with the police was inaccurate because he assumed that the first barrister had verified its correctness. In *Fergus* the judge should have invited a defence application to withdraw the case from the jury. But other professionals also failed to perform as expected. In *Fergus* the defendant's solicitors acted "in the most flagrant disregard of their duties."¹¹⁹ In both cases the police were negligent: in *Clinton* they had evidence in their files of the defendant's physical appearance at the time of the crime; in *Fergus* they ignored seven requests by the prosecution to interview the defendant's alibi witnesses.

In summary, two observations seem warranted. If the only error alleged, or held to have occurred, was by counsel, relief is conditioned on proof of flagrant incompetence. But to be counted counsel's conduct need not sink so low. If other errors occurred—in the admission of evidence, for example, or in the judge's summing-up or in the barrister's failure to appreciate the significance of evidence¹²⁰—counsel's error, even if a plausible tactical judgment, is included in the mix in calculating the conviction's safety.

PART 3. EVALUATING THE COURT OF APPEAL'S EFFORTS

The Court of Appeal's responsibility to ensure that convictions are safe is potentially at odds with its apparent goal of reducing the number of appeals alleging error by counsel.

A. ARE THE DECISIONS DEFENSIBLE?

Retreating from *Clinton* and *Fergus*, the Court of Appeal has re-embraced the test of flagrant incompetency.¹²¹ In so doing it jeopardises its responsibility to ensure that

118. See *R v Ullah* (2000) 1 Cr App R 351. *Ullah* rejected the view of the barristers' bible-like treatise on criminal law, Archbold, above n10, para. 7-82, that had interpreted the cases to say that the issue was "whether or not the conviction was safe, not whether counsel was competent, incompetent or flagrantly incompetent . . ." (2000) 1 Cr App R at 356.

119. (1994) 98 Cr App R at 323.

120. For a telling example see *R v Ahluwalia* [1992] 4 All ER 889 (conviction quashed when Queen's Counsel overlooked the significance of a medical report that supported a defense amplified by additional evidence on appeal).

121. In a recent case, *R v Ullah* (2000) 1 Cr App R 351, 358, the Court of Appeal hinted at how imposing this test is. Counsel's "fundamentally flawed reasons" provide a ground for relief only by meeting the test found in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, [1947] 2 All ER 680. *Wednesbury* held that an executive decision based on a statute could be overturned by a court only if it was "so unreasonable that no reasonable [person] could ever have come to [it]." [1947] 2 All ER at 685. The Court of Appeal has described the test in other ways, too. See *R v Doherty and McGregor* (1997) 2 Cr App R 218, 220 ("no reasonably competent counsel would sensibly have adopted the course taken by him at the time . . ."); *R v Clinton* [1993] 2 All ER 998, 1005, (1993) 97 Cr App R 320, 326 ("when all

convictions are safe. Its imposing test has drawn criticism. In ringing language, the Runciman Commission decried that “[i]t cannot possibly be right that there should be defendants serving prison sentences for no other reason than that their lawyers made a decision which later turns out to have been mistaken”.¹²² It urged overturning a conviction when the barrister’s “particular decision, whether reasonable or unreasonable, caused a miscarriage of justice”.¹²³ Unfortunately, however, the Commission identified no case it would have decided differently, and offered no illustrations of how it would apply its test.

The Court of Appeal was not impressed. In a frosty counterattack,¹²⁴ it agreed that no defendant should suffer imprisonment because of counsel’s mistake but refused to concentrate, as in had in *Clinton and Fergus*, on the effect of counsel’s error rather than on its nature or magnitude. To demand less than proof of flagrant incompetency would jeopardise the paramount value of finality. The number of challenges to counsel’s conduct would surge, and the resolution of appealed cases would be “indefinitely prolonged”.¹²⁵

These fears are exaggerated. There was no flurry of appeals following *Clinton, Fergus* and the Commission’s criticism.¹²⁶ This is to be expected. In preparing an appeal, barristers have no incentive to launch a cavalier attack on a fellow barrister. With briefs often incomplete and with only a short time to prepare to defend, barristers recognise they could make decisions they would rue if they had more time to reflect or more information. Thus, challenges to trial counsel whose error was not apparently inexcusable and likely to have damaged the defendant would put all barristers at risk of being attacked.¹²⁷ Moreover, the barrister who grounds an appeal simply on

the promptings of reason and good sense point [to a different decision]”). “Flagrant incompetency” resembles the now-rejected American test of conditioning a conviction’s reversal on proof that the lawyer’s efforts had reduced the trial to a “farce or mockery.” See *Diggs v Welch*, 148 F2d 667 (DC Cir), cert. denied 358 US 859 (1958). For a discussion of this test, see Peter W. Tague, “The Attempt to Improve Criminal Defense Representation” (1977) 15 *Am Crim L Rev* 109. In the current test the defendant must establish that he was prejudiced by the lawyer’s departure from an acceptable range of behavior. See *Strickland v Washington*, 466 US 668 (1984).

122. Runciman Commission, above note 14, para 59 at 174. Others have also criticised the flagrant incompetency test. See Justice, *Miscarriages*, above n47, at 12; Pattenden, above n46, at 166-8.
123. Runciman Commission, above n14, Recommendation 321, at 216. It did not define “miscarriage of justice” carefully, however, once suggesting that it occurred only when an innocent person was convicted, *Ibid.* Para. 9, at 2, but also when the verdict was simply wrong. *Ibid.* Para 1, at 162. Presumably it intended its recommendation to apply equally when counsel had overlooked an issue or argument.
124. See *R v Satpal Ram*, above n9 (defense at trial was provocation; better argument, said appellate counsel, was self-defence) (why those defenses could not have been advanced simultaneously was not discussed).
125. Its illustration of this concern involved the defendant’s claim that his case “would have stood a better chance of success” if “advanced within a different framework”, *Ibid.* Even if such a claim would extend the length of the case, however, other errors by counsel could be resolved more quickly.
126. Perhaps beguiled by *Clinton and Fergus*, appellate barristers in three cases challenged trial counsel without alleging flagrant incompetency. See *Donnelly* above n9 (appellate counsel pointedly did not contend that trial counsel’s conduct was flagrantly incompetent; relief denied); *R v Bowler*, above n9 (while alleging that “any competent solicitor or barrister” would have examined an alternative defence, appellate counsel did not characterise this failure as flagrantly incompetent; relief denied); *R v Clarke and Jones*, *The Times*, 14 August 1994 (CA) (while trial counsel should have pursued several points more thoroughly, his failure to do so was not even alleged to have been incompetent, let alone flagrantly so; relief denied).
127. Increasing this risk could have salutary consequences. Barristers might oversee the case’s preparation and insist that the solicitor undertake certain investigation. They might speak more frequently with the defendant. On the other hand, were they to strive to reduce the risk of being challenged by acceding to the defendant’s demands, they might lengthen the proceedings by tedious and unfruitful examinations on direct or cross.

trial counsel's error in judgment risks being embarrassed if the Court of Appeal disagrees.

The Court of Appeal's concern over not permitting the defendant to advance one defence at trial and a different one on appeal is superficially sensible. But defendants are not likely to reserve a defence to air on appeal if there is a chance its use will convince the jury to acquit. To bar defendants from seeking review on appeal of an alternative approach assumes both that the defendant, provided he was consulted, understood the tactical considerations in paring a defence and that the barrister's advice was defensible.¹²⁸ Moreover, as the trial barrister is not apt to plant error for an appeal by choosing the less persuasive defence, so the appellate barrister is not likely to disagree with the tactical decision to use one defence rather than the other unless the choice was obviously wrong. Also, this concern of the Court of Appeal's ignores the many other ways that the defenders can err.

Yet it would be wrong to suppose that deserving defendants have suffered because able to prove only that counsel had erred, but not that his error was flagrantly inept. The Court of Appeal has not transformed its hostility to the challenge into a hostility to particular claims. A surprising number of defendants have prevailed on appeal even while not proving flagrant incompetence.¹²⁹ Indeed, as a percentage of the attacks made against counsel, more defendants have won relief, at least in part on this ground, in England than in the United States.

The Court of Appeal's only disingenuous evaluation of counsel's behaviour was to term as "carefully considered" Ensor's defenders' decision not to apply for a severance.¹³⁰ On other occasions it has chided trial counsel, often too gently,¹³¹ but sometimes with deserved harshness.¹³² More importantly, it has protected defendants whose convictions appeared wrong on the facts.¹³³ It has interceded when the defendant was thwarted by counsel's conduct from presenting a more effective defence.¹³⁴

128. Or if the barrister chose the defence unilaterally, that his decision was defensible. For one case where the Court of Appeal reversed the conviction for this reason, despite its expressed reluctance to do so, see *R v Ahluwalia* [1992] 4 All ER 889, 899-900 (although "much persuasion" needed for relief when a defence was deliberately not used at trial, here the failure to adduce medical evidence warranted overturning conviction).

129. Only one defendant had serious cause to complain about being denied relief. See *R v Iroegbu*, above n9 (discussed above in n110). Whether others should have prevailed is difficult to say. Unfortunately, few of the appellate barristers in the cases reviewed in this article responded to my request to discuss the matter, as I attempted to clarify factual issues and obtain their assessment of the trial barrister's performance and of the Court of Appeal's decision. (Perhaps their lack of response is explained in part, as one barrister said, by concern over being sued for slander if they were to criticise the trial counsel.) My thanks to those who did help.

130. [1989] 2 All ER at 590, (1989) Cr App R at 144. The observation is made more remarkable by the fact that the Queen's Counsel attended the hearing on appeal but was not asked to defend why he thought the application would fail when the Crown conceded that it would not have. Nor was he asked to explain why he had ignored the defendant's instructions or whether he would have presented the defence differently if the charges had been severed. For a discussion of the case see text above at n101.

131. See *R v Ahluwalia* [1992] 4 All ER 889 (discussed above in n38).

132. Its criticism has occasionally been harsh. For its view on Clinton's and Fergus' barristers' performance, see text, above at nn114 and 115. See also *R v Ullah* (2000) 1 Cr App R 351, 359 ("very serious misjudgment" not to use transcripts of tape-recordings of two prosecution witnesses in an attempt to impeach them).

133. The defendants in *Clinton* and *Fergus* come to mind.

134. See *R v Ullah* (2000) 1 Cr App R 351 (discussed above in n73). For several reasons quashing the conviction was generous when the defence chose not to use transcripts of conversations between the female complainant, her boyfriend and others to impeach them. The Queen's Counsel, indisposed at the time

Most remarkably, perhaps, it has even interceded to protect a defendant who was “entitled to feel a sense of grievance” over a “misunderstanding” between him and counsel over one fact.¹³⁵

And recently it may even have created a new category of protection. In *R v Kamar* the jury was not instructed that the defendant was a person of good character because the barrister had not sought such a finding from the trial judge.¹³⁶ No tactical decision explained the absence of a request; on appeal the barrister candidly admitted that it had “escaped” his attention. The oversight deprived the defendant of valuable evidence in a case where the complainant was his wife and the dispute concerned the cause of her injuries. What had caused his spouse to jump from the upper storey of their house, the defendant’s threats or her “paranoid delusions”? Rather than labelling the barrister’s error as flagrant incompetence, the Court of Appeal granted relief because it was “negligent inadvertence.”

If *Kamar* becomes a distinct category it threatens to blow a large hole in the Court of Appeal’s efforts to limit the number of attacks on appeal. But if *Kamar* encourages more attacks, few will succeed. Not many barristers will admit to having failed to recognise that an application could have been made or a crucial line of examination explored.¹³⁷ Instead, they will learn from *Ensor* to claim they did not make the application because they expected it to fail, or to contrive a tactical reason for not having made it.

B. THE COURT OF APPEAL’S EFFORT TO LIMIT THE NUMBER OF ATTACKS ON COUNSEL

The Court of Appeal has actively discouraged appeals based on the defenders’ alleged mistakes at trial. It rebuffed the Runciman Commission’s plea for change. It has rebuked appellate barristers for attacking the defendant’s trial defenders almost as often as it has granted the appeal based, in part at least, on their errors.¹³⁸

of the hearing, never explained his reason. The junior gave a reason, but the Court of Appeal did not even describe it and it was not relied upon by the Crown. Second, the conversation was somewhat ambiguous, but neither the woman nor her boyfriend was asked to explain why they spoke and what they meant. Perhaps they could have satisfied doubts about their credibility. Last, the defendant had accepted counsel’s recommendation not to use the material.

135. *R v Scollan and Smith* [1999] Crim LR 566. The defence was “cut-throat” in this prosecution for murder where pairs of defendants accused the other of having killed the victim. The date when Smith claimed to have learned of the murder became an issue. To the police, and at trial, he said 9 July. Smith claimed that in a 6 July telephone conversation with the third codefendant, he had only learned that the fourth co-defendant was arrested for kidnapping. Scollan, desirous of having his defence dovetail with Smith’s, said he learned of the murder from Smith on 9 July. In an interview, Scollan’s junior asked him whether he had instead learned of the murder from Smith three days earlier. The inquiry’s apparent purpose was to show Scollan how improbable Smith’s claim was. Harmonising everyone’s story would deny the Crown a ground to try to show division among the defendants. Cross-examining Smith at trial, Scollan’s counsel asked if he had not heard of the murder on the sixth. He said no. The question upset Scollan, who testified that his knowledge dated from 9 July. While the Crown and the co-defendants commented “vigorously” about this discrepancy, suggesting Scollan had changed his story to conform with Smith’s, nothing substantive turned on the date. Observing that counsel did not do “something without foundation,” and that the problem was little more than “a misunderstanding between client and counsel,” the Court of Appeal nonetheless reversed, when this dispute was joined with a separate error involving the judge’s misdirections in summing up.

136. *The Times*, 14 May 1999 (CA), at 36.

137. For Kramer’s barrister’s attempt to excuse himself, see above n53.

138. As defendants have won in eight cases, above n9, so barristers have been criticized in six cases for instituting the challenge (*Bowler, Doherty and McGregor, Donnelly, Farrell, Hobson and Hunt* (for citations see above n9)). In *Doherty and McGregor* the Court of Appeal did not even name the criticisms of trial counsel while observing that they were “without foundation . . . [and] should never have been advanced” (1997) 2 Cr App R 218, 219. In a seventh case the challenge was also criticised, but this time it had been instituted by the defendant himself before the barrister was appointed to help. See *Green*, above n9.

While its scepticism, even hostility to these challenges has not eliminated them, there is no way to know how often barristers have been dissuaded from challenging the trial defenders by the imposing test or by the Court of Appeal's attitude. For several reasons, however, the attacks on trial counsel continue. First, because the Court of Appeal has never illustrated how dreadful the advocacy must be to constitute flagrant incompetency, a barrister on appeal, if distressed by the conviction, might be tempted to inflate the size of the trial barrister's mistake. Second, the appellate barrister can attack trial counsel without finding other advocates who agree with his assessment. Defendants in the United States, by contrast, typically must adduce expert evidence—the opinions of other litigators—that the trial lawyer's conduct fell below the floor of constitutional effectiveness. A reason to require expert opinion is that appellate judges in the United States were not always litigators before ascending to the bench. A lawyer who specialised in municipal bonds, say, or in government contracts, may need help in assessing the challenge. Judges on the Court of Appeal, on the other hand, are all former advocates, presumably at the pinnacle of their practice at the time of appointment. Like the appellate barrister, they can judge counsel's conduct by what they would have done.¹³⁹

Third, the appellate barrister may challenge trial counsel because he cannot learn before preparing the appeal whether counsel's apparent error was defensible. There seems to be no procedure for the two barristers to discuss concerns about the trial barrister's conduct before the appeal must be lodged.¹⁴⁰ Because trial counsel is formally invited to explain his conduct only after the appeal is lodged,¹⁴¹ the appellate barrister has reason to include the challenge even if it is later withdrawn.¹⁴²

Next, uncertainty over the legal test invites attacks. Unless *Clinton* and *Fergus* are overruled, their emphasis on the verdict's safety, rather than on the quality of counsel's advocacy, warrants the claim that counsel's conduct contributed to an unsafe outcome. Those defendants won without proving that counsel's conduct was flagrantly incompetent (even if it should have been so held). Even a reasonable mistake by counsel could cause the judge to sum up more favourably for the Crown than warranted, or the jury to overlook some defect in the Crown's evidence.

Thus, the Court of Appeal might be persuaded to extend relief by the collective damage done by counsel's performance and other errors, no one of which justifies relief by itself. Or counsel's conduct might so unsettle the Court of Appeal that it is

139. The clearest illustration is *R v Ullah* (2000) 1 Cr App R 351, where the judge giving the judgment indicated he and his colleagues would have used the tape-recordings in an attempt to impeach the complainant and her boyfriend. See above n73.

140. Ensor's appellate barrister told me that he thought it was courteous to inform trial counsel of his challenge to their failure to apply for a severance. But he did not expect them to explain their conduct, and neither did.

141. Once leave for appeal is sought based on trial counsel's conduct, the registrar of the Criminal Appeal Office decides whether to send a letter to counsel asking him for information. See *Complaints against Counsel in the Court of Appeal (Criminal Division)* (London: Criminal Appeal Office, 1995), para. 2(b). Either side can ask or require him to give oral evidence to the Court of Appeal. *Ibid.* para. 3(a).

142. An appeal can be changed by "perfecting" it, but this process usually occurs only when the appellate barrister must wait for a transcript to be prepared before confirming the issues. Nonetheless, in one case the appellate barrister, in perfecting the appeal, dropped seven of the nine allegations of incompetency, apparently persuaded by the trial barrister's response to them. See *R v Doherty and McGregor* (1997) 2 Cr App R 218. Apart from this process of perfecting the appeal, permission must be obtained to make changes. See *Blackstone's Criminal Practice* (London: Blackstone, 1996) D22.5 at 1515.

prompted, while recoiling from labelling his performance as flagrantly incompetent, to exaggerate some other error to provide relief. *Ensor* illustrates the point.¹⁴³ That defendant won on appeal, but not for the more cogent reason. His conviction was quashed not for the failure to apply for a severance but on the separate ground that the trial judge had erred in instructing the jury about the need for corroboration of the sexual acts. To find a way to reverse, the Court of Appeal arguably magnified this reason when it was in fact troubled by *Ensor's* counsel's performance.¹⁴⁴

Yet another reason why the challenges continue is the Court of Appeal's willingness to predict how witnesses, especially defendants, would have testified. It has usually concluded that not calling a witness was justified because he would have been flayed on cross-examination.¹⁴⁵ But given its prediction that the "shy" defendant in *Clinton* would have been a persuasive witness, a barrister mulling over whether to make this claim might conclude that the odds were no worse than the Court of Appeal would make a similarly questionable estimate, this time in favour of his client.

Last, even while very unhappy about allegations that counsel erred in not using a defense, the Court of Appeal's way of reviewing such a claim invites its submission. For rather than summarily either refusing leave to appeal or rejecting the claim, it has occasionally painstakingly studied the facts to see whether there might have been merit to the foregone defence.¹⁴⁶ As a result, the optimistic barrister may hope that, despite its opposition to these claims, the Court of Appeal may be persuaded that in his case the trial counsel erred grievously in ignoring a defence.

PART 4. PROBLEMS IN REPRESENTATION

However one grades the Court of Appeal's efforts to fashion a test that protects defendants from inappropriate convictions, barristers from spurious attacks, and itself from multitudinous appeals, the cases illustrate that barristers—Queen's Counsel as well as juniors—can blunder. And the number of appellate cases understates the discontent experienced by defendants about the work of their defenders.¹⁴⁷ As illustration, one

143. For a discussion see text above at n101.

144. *Ensor's* barrister on appeal told me he was surprised by the judgment's basis because he thought the corroboration argument was not persuasive. Interestingly, even though *Ensor's* two barristers had not objected to the summing-up on corroboration, the Court of Appeal did not criticise them for this second mistake. Instead, it suggested that, before summing up, trial judges should seek counsel's views about the elements that had to be corroborated and the evidence that might provide corroboration.

145. See *Farrell*, above n9 (defendant would have left witness box "in tatters"); *R v Johnson*, unreported 18 March 1982 (CA) ("chances of acquittal . . . would have disappear[ed] rapidly" had either defendant testified).

146. See *R v Satpal Ram*, above n9 (while asserting that it is not enough that the defendant's defence "might have stood a greater chance of success if advanced on a different footing," the Court of Appeal nonetheless carefully reviewed the evidence to conclude that counsel "made a much deeper appraisal of the implications of the evidence likely to be given" than appreciated by the appellate barrister); *R v Bowler*, above n9 (same). In one case it made a similarly careful review even while refusing leave to appeal. See *R v Ram*, above n8 (examining role of witness tendered by Crown whose potential value was lost when counsel failed to seek interpreter for him).

147. See Justice, *Defendant's Eye-View*, above n47, and Pattenden, above n46. Another possible reason why questionable advocacy is overlooked in England is the dearth of academic comment. For articles about the issue, see above n10. Perhaps academics in England refrain from discussing the issue because, unlike their American counterparts, few have practised criminal law; or because until the last decade they evidenced little interest in questions of practice. See Donald Nicolson and Julian Webb, *Professional Legal Ethics* (Oxford: Oxford University Press, 1999) at 3; Ross Cranston (ed.), *Legal Ethics and Professional*

of the "most common" causes of complaint made by convicted defendants to the new Criminal Cases Review Commission, created to investigate whether convictions were erroneous, is the applicant's "feeling that his case was not adequately placed before the Court".¹⁴⁸

That said, the point of this Part is not to search for individual obtuseness. Lawyers and barristers alike could fail to understand the significance of evidence or could elicit damaging evidence by stumbling into a trap laid by the prosecutor.¹⁴⁹ Instead, the point is to explore whether adversarial problems are likely to arise because of the structure of barristers' and solicitors' practice, of the norms they treasure and of the compensatory scheme in publicly funded cases. Even the cases of the defendants who have lost on appeal reveal the loci of structural problems.

A. THE NORM TO ADVOCATE EFFICIENTLY

The one potentially troubling norm is efficient presentation. This norm can result in effective advocacy if the jugular weakness in the Crown's case is found and attacks on its less vital parts are let go. But in its instructions to act efficiently,¹⁵⁰ the barristers' Code of Conduct also directs them not to waste judicial time,¹⁵¹ and to make admissions to save the time and expense of trial,¹⁵² while omitting any advice to hesitate to proceed if the case is not prepared to their satisfaction.¹⁵³ The funding system in legal aid cases also encourages economy.¹⁵⁴ In serious cases, barristers were rewarded under the *ex post facto* scheme in force until 1997 for shortening the proceeding, whether by inducing the defendant to plead guilty or by streamlining the trial. Under the current scheme, the less time the barrister takes to prepare the brief, the higher his effective hourly return. Encouraged to act efficiently and motivated economically to do so, the barrister may prune more from the defence than is tactically appropriate.

Responsibility (Oxford: Clarendon Press, 1995) at v (noting traditional division between academic and vocational stages of legal education).

148. Communication from a member of the Commission. Created by the Criminal Appeal Act 1995, the Commission refers cases to the Court of Appeal when a "very high possibility" exists that the verdict would not be upheld on appeal had an argument been made or evidence introduced in the proceeding leading to conviction. Because the Commission has referred no cases based on counsel's error, and because it cannot reveal information about specific cases unless it makes a reference, this member could not provide information about particular complaints. That said, he indicated defendants' complaints to the Commission about counsel fall into five categories: "failure to advise adequately or correctly on the law, leading to ill-informed pleas of guilty"; "failure to call certain evidence"; "failure to ask the 'right' questions during examination or cross-examination"; "failure to obtain appropriate expert opinion;" and "general failure to prepare adequately, including the problem of 'returned briefs'."
149. An example of the former is the notorious case involving the prosecution of three teenagers for a strangulation death. See *R v Lattimore* (1976) Cr App R 53 (defendants' Queen's Counsel, as did the judge in summing up, missed significance of medical evidence about likely time of death). No examples of the latter could be found in the cases, but it must happen.
150. See General Council of the Bar of England and Wales, *Code Of Conduct*, above n89, para. 302 (barristers have "an overriding duty to the Court . . . to ensure in the public interest that the proper and efficient administration of justice is achieved").
151. *Ibid.* para. 701 (a) (barristers "must . . . take all reasonable and practicable steps to avoid unnecessary expense or waste of the Court's time").
152. General Council of the Bar of England and Wales, *Written Standards*, above n89, para. 12.2(h) (in criminal cases defending barristers "should consider whether any admissions can be made . . . to sav[e] time and expenses at trial, with the aim of admitting as much evidence as can properly be admitted in accordance with the barrister's duty to his client").
153. The closest Bar Council comes is to tell barristers to "consider whether any enquiries or further enquiry are necessary and, if so, [to] advise in writing as soon as possible." *Ibid.* para. 12.2(c).
154. For a discussion of the points in the text, see Peter W. Tague, above n18.

This norm of efficiency might have affected the representation in two illustrative cases. Why ever would the Queen's Counsel in *Ensor* not have applied for a severance even if he expected the application to fail?¹⁵⁵ By making it he would have pleased the defendant. If it won, *Ensor's* chances would have improved. With applications of that sort made orally, its presentation would not have consumed much time, of his or of the court's. A zealous lawyer would have made the motion, probing as she does for any advantage. Did *Ensor's* leading counsel view the barrister's role as limited to contesting only what he thought would have an appreciable chance of success?

The second case involved culling the number of witnesses who were called. Here, of course, a tactical judgment must often be made.¹⁵⁶ Fewer witnesses, for example, might be needed because the Crown's case seems less persuasive than expected. Or the anticipated problems with one's witnesses—their appearance, say, or the possibility of impeachment—prove impossible to solve.¹⁵⁷ Yet on occasion the norm of efficiency explains the questionable decision not to call witnesses. In *R v Chatterjee*,¹⁵⁸ the Queen's Counsel chose not to present impressive expert evidence that could have undercut the Crown's formidable case that the defendant had raped the female complainant. At the first trial, three experts testifying for the defence refuted the woman's claim that she had not consented to sex but had been made quiescent by chloroform. At retrial, the new Queen's Counsel made a different assessment of the evidence. He called only one expert, thinking that the testimony of the Crown's experts overlapped that of the three defence experts, and being "concerned about the possible length, cost and complexity of the trial should all the expert witnesses be called".¹⁵⁹ He was satisfied that a stipulation provided what he needed without calling the other two.

155. Similarly, in *R v Novac* (1977) 65 Cr App R 107, the defendant's barrister's decision not to apply for a severance of counts once the same application made by a co-defendant's barrister had been denied precluded the defendant from raising the issue on appeal, one that won for the co-defendant.

156. A very good illustration is found in one of Justice's alleged miscarriages of justice. See Justice, *Miscarriages Of Justice*, above n47, at 93 (Foran). Foran's solicitor had not interviewed either victim to evaluate each's story and ability to identify Foran. Nor did Foran's barrister insist that the two victims testify when the Crown read each's statement to the jury. The barrister's decision seems to have been disastrous once Justice investigated to learn that neither victim could identify Foran. But the barrister's decision was sensible in light of the information he had. Because neither's description of the culprit in his statement matched Foran's appearance, his barrister might have thought it was safer to claim Foran had been erroneously identified from their statements rather than risk having them come to court where they might have identified Foran. (Despite Justice's discovery, Foran's conviction was upheld on appeal because he had confessed.)

157. A related concern might have led the barrister in *Fergus* not to call the defendant's potential alibi witnesses. See text following n113. The barrister might have thought that *Fergus* was persuasive in testifying that he remembered being with his friends on the day of the crime because it was the last day of school. His friends' expected testimony that they could not remember where they were on that same day might have tarnished *Fergus's* credibility, as well as their own.

158. [1996] Crim LR 801.

159. This is from the Court of Appeal's judgment, and is what the Queen's Counsel said in his testimony during the hearing on the appeal. His added worry that the trial judge would criticise him for "calling witnesses whose evidence is already admitted" also reveals that his concern was to shorten the trial rather than to advance the defence through a tactical assessment. This Queen's Counsel's conduct was woeful in other ways. He did not speak with the one defence expert who did testify to review what he would say. That expert later said in an affidavit that the Queen's Counsel did not appear to understand the evidence he gave, or its significance. This expert also told the defendant's solicitors that the Queen's Counsel was not in a position to challenge the Crown's evidence and that *Chatterjee's* case "was inadequately argued." The Queen's Counsel decided not to call a second expert who had testified at the first trial without reading his testimony or speaking with him when he came to court. No doubt the Queen's Counsel thought such preparation was unnecessary because his aim was to avoid extending a trial that would last 15 days.

He was wrong; it did not.¹⁶⁰ Lawyers, by contrast, would not likely give away such an opportunity. No matter the time it takes to present, live testimony is so much more dramatic than a stipulation, even one that accurately covers the evidence not adduced. Moreover, jurors might not understand a stipulation's effect or scope. Or, in summing up, the judge might interpret its effect differently than the defenders had expected.¹⁶¹

Achieving efficiency might also explain why barristers sometimes advance fewer than all available defences. Of course, the defendant's insistence about the facts may limit the alternative defences ordinarily available.¹⁶² When that is not so,¹⁶³ however, the reason not to argue diminished responsibility, say, along with self-defence and provocation is elusive, unless it is to conserve judicial resources. A lawyer would advance any defence so long as it does not war with another, better one. Even inconsistent defences can be presented, if done deftly. The different approach of barristers is not an indictment of their adversarial prowess but is explained by their obligation to follow the defendant's instructions.¹⁶⁴

Another troubling aspect of efficiency concerns postponing cases if the barrister is unprepared or occupied with another brief, or if witnesses are unavailable. In not one case of those mentioned in this article did the barrister ask for a continuance for him to prepare more thoroughly. Given the number of returned briefs, it is difficult to believe that every barrister was as prepared as he would like. But were the case postponed, he would have no court work for the day, and probably need to return the brief. Barristers hesitate to seek a continuance for the investigation to be completed for fear of jeopardising their relationship with the solicitor, himself embarrassed for not having prepared the brief thoroughly. Yet, as in *Fergus*, when barristers are bold enough to request a postponement for alibi witnesses to be interviewed, judges are apt to deny it even when concerned about defence preparation. But granting *Fergus*'s application would have created other problems. Because the goal is to keep trial judges continuously occupied in trials,¹⁶⁵ another case would have been called. If occupied

160. Given the expert's scathing criticism of this Queen's Counsel, and his dubious decisions, this is one performance where a finding of flagrant incompetency would not have been surprising. While less explicit in scoring this barrister, the Court of Appeal, in reversing, was nonetheless deadly in remarking that for there "to be a fair trial, . . . the material available to the defence counsel [must be] properly understood and properly set before the judge and jury."

161. In *Chatterjee* the judge's summing-up about the stipulation might have been different if one of the other two experts had testified.

162. See *R v Farrell*, unreported 28 November 1996 (CA). The facts surrounding Farrell's murder of another man suggested provocation, even self-defence. But Farrell insisted that the gun had fired accidentally.

163. An issue is whether the barrister should be required to try to persuade the defendant to tell a different story, one that is more consistent with the evidence. A lawyer would do this by explaining to the defendant how his position is inconsistent with facts not likely to be successfully disputed. Barristers have told me, however, that they would never suggest to the defendant that a different, more effective defence was warranted by the facts than that stated by the defendant's instructions.

164. Consider *Farrell*, above n162, where the choices were self-defence, provocation and accident. In addressing the jury a lawyer might say: "The defendant has told you the gun went off accidentally. He did not intend to kill. There is much to support his claim; think about it carefully. But if you come instead to believe the prosecution's view that Farrell shot to kill, you must consider other parts of the evidence as well, evidence that points to self-defence." A barrister, bound to follow his client's instructions, probably could not make that same argument.

165. See *Tague*, above n2, at 133.

elsewhere, that second defendant's barrister would need to return the brief,¹⁶⁶ a brief arguably no better prepared than was the one for the first defendant.

B. THE BARRISTER'S AND SOLICITOR'S ROLES

The limits of the barrister's role can also make him less effective than the lawyer could be. Barristers ought to have sufficient experience to make defensible tactical choices over whether, say, the risk of having the defendant's convictions revealed is worth running given the expected benefits of cross-examining a prosecution witness in a particular way. When the barrister lacks information, however, all sorts of problems can occur. He does not learn the vulnerabilities of a prosecution witness, cannot support the defence convincingly, and risks having the judge sum up too favourably for the Crown. The cause of this problem, however, is not the barrister but the solicitor, at least so long as the barrister continues to carry no responsibility for acquiring information. The barrister works with what he receives. In *Clinton*, for example, neither barrister apparently recommended to the solicitor that he interview family members and others to pinpoint when Clinton acquired the distinctive physical features not described by the victim.

The brief will have lacunae when the solicitor fails to investigate. Some solicitors seem reluctant to interview witnesses, especially the Crown's, for fear of being accused of tampering.¹⁶⁷ Others may trust that the police have fulfilled their role of interviewing witnesses, and the Crown has fulfilled its by disclosing the contents of those interviews. In *Fergus*, for example, the police were pilloried for repeatedly failing to interview Fergus's four friends with whom he told them he had been. Yet, why had Fergus's solicitors not interviewed them before the date of trial? Surely, responsibility to do that had spread from the police to them. The interviews they arranged during the trial were conducted by a junior employee who did not explore the crucial point of whether the day they were together was the last day of school.¹⁶⁸ And Fergus's barrister could not clarify the point and assess their credibility because barristers are forbidden to talk with lay witnesses like these about the substance of their stories. Thus, he probably concluded it was too risky to call them.

The problem of investigation exposes a more central issue, one lurking beneath the cases, but never identified in them. What is counsel's responsibility for the defence? It is not to create the defence.¹⁶⁹ That is the solicitor's role, through interviewing the defendant and assembling the evidence. The barrister presents what he is given in the brief, as convincingly as he can. For him to deviate from the defendant's instructions is to violate the reason for having a barrister appear. Advocacy is a skill, it is assumed, and the defendant needs a skilled advocate to unveil the defence effectively. For the barrister to depart from the defendant's instructions is also inconsistent with the assumption that barristers are impartial, willing to represent either side, and thus

166. The same is true for Fergus's second barrister. He might no longer have had the brief when Fergus's case came on for trial for the second time.

167. For a discussion, see Tague, above n2, at 44, and above n19, at 200-1.

168. The likely reason for delegating this important work is that solicitors and senior solicitors would not be paid by legal aid at their hourly rate for conducting such an interview.

169. See above n163.

indifferent about the outcome. Were the barrister to choose the defence, he would need to accept responsibility for its development—to interview the defendant to persuade him to adopt one defense over another, to organise the acquisition of evidence, to direct the solicitor to pursue possible witnesses and physical evidence. Queen's Counsel, not in court every day, have time to reflect about, and thus to direct, the defence. But junior counsel, often in court day after day, with returned briefs filling in the days when no brief has been sent to them, lack the time and the involvement with the defendant to ensure the most plausible defence has been selected and thoroughly prepared. Yet, so long as barristers do not assume more control, cases like *Clinton* and *Fergus* will occur.¹⁷⁰ Perhaps the surprise is that more breakdowns of this sort do not turn into fights on appeal.

C. COMPENSATION

The system for paying barristers and solicitors in publicly-funded cases creates certain negative incentives that could affect practice.¹⁷¹ Barristers, especially juniors, are not encouraged to prepare in advance of trial because not paid for preparing a brief they return. Even if the barrister returning the brief had undertaken some preparation, there is no system through which the replacement could learn what his predecessor had done.¹⁷² Nonetheless, the replacement may not be paid for repeating the first barrister's work. This last point may explain a major blunder in *Clinton*. The barrister who returned the brief listened to the tape-recording of Clinton's interview with the police. He accepted the Crown's highly misleading summary of that conversation. At trial, Clinton's barrister could expect the summary to be accurate. That said, he would not have been inclined to repeat the work because he would probably not have been paid for doing so.¹⁷³

Solicitors may also not fulfill their role because of the compensatory scheme.¹⁷⁴ The solicitor is expected to act as the intermediary between defendant and barrister, to ensure that the barrister knows the defendant's position and acts as instructed.

170. Another example is *Acton v Graham Pearce & Co* [1997] 3 All ER 909. Acton sued his solicitors for malpractice. (They had lost the advocate's then-immunity from malpractice actions because it was unnecessary to retry the case to determine whether Acton had been harmed because his conviction had been reversed.) Acton had received information suggesting a reason to suspect an employee had framed him. He asked his solicitors to investigate her and have incriminating documents analysed to see if she had forged them. This work was not done. The reason is not certain, but it appears there was a misunderstanding between Acton's counsel and his solicitors. Despite Acton's request, the solicitors refrained from acting without the direction of the barrister, who they claimed did not advise an investigation. The barrister's conduct was disputed. But if he did not recommend an investigation it was because he lacked information to appreciate its value; or, if he did recommend an investigation he did not ensure that the solicitors undertook it.

171. See Tague, above n85.

172. The exception would occur if the first barrister informed the solicitor about his thoughts, who in turn conveyed them to the next barrister.

173. In public defender offices in the United States, different lawyers often undertake parts of the representation. The lawyer who appears at trial relies on the work of her predecessors. But public defenders are trained to make accurate records of their efforts. Whether one would repeat work done by another has no certain answer. A good lawyer probably would do so on a matter as important as the client's interview with the police. She would listen to search for nuance, for exaggeration, for police pressure or defendant hesitation. On the other hand, as a salaried employee, the public defender can reduce her workload by relying on others.

174. In none of the cases cited in this article, however, was it clear that the defendant alleged on appeal that his trial solicitor had committed professional error.

Ensor's solicitor should have queried his barristers to learn why they had not applied for a severance. Clinton's solicitor should have made sure the replacement knew Clinton's version of the facts.¹⁷⁵ That solicitor, and Fergus's as well, should have told the barrister that other witnesses existed who could counter the prosecution's evidence. To police the barrister and shepherd the defendant, the solicitor needs to watch the barrister in court, to correct or to help when needed. They often do not, however, instead sending an underling with no legal experience, whose attention might even be divided between defendants in different courtrooms. Solicitors fail in this important role because they are rarely compensated at their hourly rate for attending the trial to perform this critical role.¹⁷⁶

D. OTHER PROBLEMS

Of some surprise in the cases appealed is the absence of attacks on defenders for other problems that obviously irritate defendants:¹⁷⁷ the barrister's tardiness in talking with the defendant; the number of briefs that are returned; the pressure imposed by the barrister on the defendant to plead guilty.¹⁷⁸ The first two problems strip from the defendant the benefit of the cab-rank rule and belie the promise of assistance from a skilled, prepared, sympathetic advocate. The defendant's nervousness about the process may not be assuaged by the terse conversation with the barrister, replacement or not, immediately before the proceeding. Or his expectation to challenge the Crown's evidence is dashed as the replacement views the prospects differently, and urges a guilty plea. Or during trial the barrister overlooks or fails to appreciate a point he would have spotted if he had had time to ruminate about the case. Perhaps these problems do not become appellate issues because of the difficulty in fitting them within the legal framework. Except for the last one (the barrister overlooked something), the other two will not often impugn the barrister's efforts. If the brief is well crafted, the barrister should be able to prepare sufficiently on short notice to escape being branded as flagrantly incompetent. Despite the concern that innocent defendants plead guilty, the barrister's advice is not necessarily an inappropriate prediction of the likely outcome. A brusque delivery, a threat to withdraw, an abbreviated conversation—these are problems that do not necessarily imply inaccurate advice. Given the difficulty of changing these problems of structure or of personality, the Court of Appeal is probably relieved that they have not arisen.

175. He should have told counsel, for example, that the police had exaggerated the incriminating effect of Clinton's conversations with them.

176. See Peter W. Tague, "Ex Post Facto Payments In Legally-Aided Criminal Cases In The Old Bailey" (1999) 28 *Anglo-Am L Rev* 415, 443. While solicitors are not now automatically authorised by legal aid to send someone to court to accompany the defendant and barrister, barristers tell me that judges readily authorise this help.

177. The absence of appeals on these grounds does not mean that defendants are not distressed by these issues. Of the defendants in Justice's database, for example, many were aggrieved by the brevity of their conversation with the barrister, by the returned brief and by the pressure to plead guilty. Justice, *Defendant's Eye-View*, above n47.

178. Another important difference in procedure between the two countries is that a defendant in the United States can seek to overturn his guilty plea by alleging the lawyer's ineffectiveness, see *Hill v Lockhart*, 474 US 52 (1985), while the defendant in England cannot. Cf. *R v Phillips* (1982) 74 Cr App R 199.

PART 5. CONCLUSION

Not yet an American Mississippi, the steady number of ineffectiveness challenges to counsel's conduct following the Court of Appeal's 1987 decision in *Irwin*¹⁷⁹ suggests the discontent felt by defendants is no trickle either. Their number calls into question whether the Court of Appeal should so actively discourage attacks on barristers as a ground of appeal. In the face of the Court of Appeal's hostility, barristers may persuade defendants not to advance the ground, or even choose not to inform the defendant about the possible support for such a ground. The cases thus reveal this interesting tension. On the one hand, the Court of Appeal wishes to staunch the flow of attacks on trial counsel and appellate barristers may wish to protect their colleagues and ultimately themselves. On the other, those appellate barristers and the judiciary must ensure that defendants are appropriately represented on appeal and at trial and not inappropriately convicted. This tension has led to a contrast between the imposing legal test created to reduce the number of attacks and the surprisingly generous outcomes in a number of cases.¹⁸⁰

Given the experience and skill of barristers, one might expect that no barrister's performance would collapse into flagrant incompetency. It is therefore surprising to find that so many defendants have won on appeal. The explanation seems to be that the Court of Appeal uses the test of flagrant incompetence more as a bluff to discourage challenges than as a true condition that must be met.

The Court of Appeal probably prefers to leave its decisions ambiguous, with its emphasis in *Clinton* and *Fergus* on the effect of counsel's conduct on the trial's outcome and, in the cases that precede and follow those two, its emphasis on counsel's performance. If interpreted to impose the seemingly daunting burden of flagrant incompetency, its cases will discourage appeals by those who do not feel genuinely aghast over the defenders' performance. For those defendants, probably few in number, who have a plausible complaint about counsel's performance, the Court of Appeal can provide relief whether or not it brands counsel's performance as flagrantly inept.¹⁸¹

The cases, however, do reveal the structural problems in what would appear to be a seamless way of providing effective representation. Those problems suggest that the Court of Appeal may need to look more closely at complaints than it has. That said, rectifying these problems could be done more effectively in ways other than by appeals challenging the barrister's conduct. Instead, efforts could be made to encourage barristers to prepare and to discuss the case with the solicitor and defendant, and to discourage them from returning briefs.

179. *Irwin*, recall, was the first case where the conviction was reversed on appeal based on the barrister's conduct. For a discussion see text above following n94.

180. Instances were *Ullah*, discussed above in nn73 and 134, and *Kamar*, discussed above in text at n136.

181. That said, in a recent case holding that the defendant's legal advisers' questionable performance had not been flagrantly incompetent, the Court of Appeal suggested the European Convention for the Protection of Human Rights and Fundamental Freedoms may require it to reconsider the level of incompetence necessary for relief. *R v Nangle* [2001] Crim LR 506. While the Court of Appeal mentioned s. 6(1) (a criminal defendant is entitled to a "fair . . . hearing"), the more apt provision is probably s. 6(3) (the right to legal assistance). Although that latter section is said to guarantee the lawyer's "effective assistance," see *Artico v Italy* (1980) 3 EHRR 1, 13, the European Court of Human Rights has interpreted that guarantee restrictively. See *Kamasinki v Austria* (1989) 13 EHRR 36, 62 (intervention necessary only if counsel's "failure . . . to provide effective representation is manifest").

In the end, barristers may be better advocates than lawyers. Certainly, given the many places where mistakes or oversights could occur in the defendant-solicitor-barrister arrangement, the relatively few instances of ineptitude suggest that most defenders are delivering acceptable representation. But the analysis in this article also suggests that lawyers need not feel as outclassed as the difference in the numbers of ineffective challenges implies might be so. Complaints involving the barrister's conduct can be framed in ways other than as a direct challenge to counsel's behaviour. It is also more difficult to air the issue in England. With no right to appellate review, few defendants seek leave to appeal, and of those who do, few receive it. The cases reveal that barristers, even if generally able, do not invariably perform as they should. And the infrequency of discussions between counsel and accused, often held only shortly before trial, together with the number of returned briefs will create anxiety in many defendants, as these problems also create the risk of mistake or oversight.