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## Agency and Equity: Why Do We Blame Clients for Their Lawyers' Mistakes

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*New York Times*

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## FOREWORD

### AGENCY AND EQUITY: WHY DO WE BLAME CLIENTS FOR THEIR LAWYERS' MISTAKES?

*Adam Liptak\**

If you were to ask a child whether it would be fair to execute a prisoner because his lawyer had made a mistake, the answer would be no. You might even get a look suggesting that you had asked a pretty stupid question. But judges treat the issue as a hard one, relying on a theory as casually accepted in criminal justice as it is offensive to principles of moral philosophy.<sup>1</sup>

This theory holds that the lawyer is the client's agent.<sup>2</sup> What the agent does binds the principal. But clients and lawyers fit the agency model imperfectly. Agency law is built on the concepts of free choice, consent, and loyalty, and it is not unusual to find lawyer-client relationships in which some or all of these elements are missing.

Let us put to one side the ideal case: a sophisticated client with money. That client presumably chooses a good lawyer, monitors and controls the lawyer's work, and fires her if she turns out to be disloyal or incompetent. The lawyer in that case really is the instrument of her client's will, and so the client may fairly be tagged with the lawyer's errors.<sup>3</sup>

Now consider a client who is poor, uneducated, mentally troubled, scared, or imprisoned—or perhaps all of these things at once. And then add to this mix a lawyer who is not retained but a volunteer or assigned by the state.<sup>4</sup> Does it still make sense to consider such a lawyer an authentic agent of the client?

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1. See Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1085 (1977) (noting that “the moral bases of attribution in the counsel/client relationship” are “deeply intertwined with the contradictions in the attempt to preserve the defendant’s autonomy while protecting the adversary process”).

2. See RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (“Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”).

3. H. Richard Uviller, *Calling the Shots: The Allocation of Choice Between the Accused and Counsel in the Defense of a Criminal Case*, 52 RUTGERS L. REV. 719, 755–56 (2000) (“Retained counsel may state the terms of their engagement in contractual terms. The private lawyer may always offer a prospective client the option to shop elsewhere if the proposed terms are unsatisfactory. Institutional and assigned counsel do not have the luxury of that clause.”).

4. In *Strickland v. Washington*, Justice Marshall wrote the following:

It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly, usually can obtain better

The splendid reviews collected here are all concerned with aspects of what justice means, and they generally take for granted that courts can sort things out. But that presupposes competent advocacy that actually advances the interests of those involved. For instance, both *Habeas for the Twenty-First Century*—a valuable book by Nancy J. King and Joseph L. Hoffman—and Eve Brensike Primus’s sometimes skeptical review of it share the common ground that, as Professor Brensike Primus puts it, “there is a crisis of counsel” for indigent criminal defendants.<sup>5</sup>

In 1962, one year before the Supreme Court said that the government must provide lawyers to poor people accused of serious crimes,<sup>6</sup> the Court decided *Link v. Wabash Railroad Co.*,<sup>7</sup> a foundational case about agency in the context of lawyers and their clients. The question in *Link* was whether a civil case could be dismissed because a lawyer had failed to prosecute it diligently.<sup>8</sup>

“There is certainly no merit to the contention that dismissal of petitioner’s claim because of his counsel’s unexcused conduct imposes an unjust penalty on the client,” the second Justice John Marshall Harlan wrote confidently for the majority in the 4–3 decision:<sup>9</sup>

Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent, and is considered to have “notice of all facts, notice of which can be charged upon the attorney.”<sup>10</sup>

This statement has since taken on the air of a first principle. But the decision was a close one, and Justice Hugo Black decried what he called a

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representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case.

466 U.S. 668, 708 (1984) (Marshall, J., dissenting). In an earlier case, *Jones v. Barnes*, Justice Brennan stated a similar proposition:

[W]ith regard to issues involving the allocation of authority between lawyer and client, courts may well take account of paying clients’ ability to specify at the outset of their relationship with their attorneys what degree of control they wish to exercise, and to avoid attorneys unwilling to accept client direction.

463 U.S. 745, 757 n.2 (1983) (Brennan, J., dissenting); see also *id.* at 761 (“It is no secret that indigent clients often mistrust the lawyers appointed to represent them.”).

5. Eve Brensike Primus, *A Crisis in Federal Habeas Law*, 110 MICH. L. REV. ##, ## (2012) (reviewing NANCY J. KING & JOSEPH L. HOFFMAN, *HABEAS FOR THE TWENTY-FIRST CENTURY* (2011)).

6. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

7. 370 U.S. 626 (1962).

8. *Link*, 370 U.S. at 628–29.

9. *Id.* at 633.

10. *Id.* at 633–34 (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1880)).

“mechanical rule” that “ignore[s] the practicalities and realities of the lawyer-client relationship” and can result in a “deplorable kind of injustice.”<sup>11</sup>

“[I]t seems to me,” Justice Black wrote, “to be contrary to the most fundamental ideas of fairness and justice to impose the punishment for the lawyer’s failure to prosecute upon the plaintiff who, so far as this record shows, was simply trusting his lawyer to take care of his case as clients generally do.”<sup>12</sup> Justice Black went on:

If a general rule is to be adopted, I think it would be far better in the interest of the administration of *justice*, and far more realistic in the light of what the relationship between a lawyer and his client actually is, to adopt the rule that no client is ever to be penalized, as this plaintiff has been, because of the conduct of his lawyer unless notice is given to the client himself that such a threat hangs over his head. Such a rule would do nothing more than incorporate basic constitutional requirements of fairness into the administration of justice in this country.<sup>13</sup>

*Link* involved a paying client and a civil case. A year later, the Supreme Court decided *Gideon v. Wainwright*<sup>14</sup> and extended the principles that troubled Justice Black in *Link*, more or less, to cases involving lawyers appointed to poor people in criminal and habeas cases.<sup>15</sup>

The decades passed, and no one seemed to give Justice Black’s concerns a lot of thought.<sup>16</sup>

In 1998, more than thirty-five years after the *Link* decision, the Seventh Circuit considered whether it should affirm the dismissal of a § 1983 lawsuit<sup>17</sup> brought by a prisoner represented by a court-appointed lawyer.<sup>18</sup> The prisoner claimed that his jailers had violated his civil rights by denying a

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11. *Id.* at 645–46 (Black, J., dissenting).

12. *Id.* at 643.

13. *Id.* at 648.

14. 372 U.S. 335 (1963).

15. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 753 (1991) (allowing execution of a petitioner whose lawyer filed a late appeal on the grounds that, because the lawyer is the petitioner’s agent, the petitioner must bear the risk of the lawyer’s error).

16. For example, consider this exchange between Justice Ruth Bader Ginsburg and Scott D. Makar, the Florida Solicitor General, at a 2010 Supreme Court oral argument over whether a defendant whose appointed lawyer missed a filing deadline should be executed.

JUSTICE GINSBURG: The State has no responsibility even though it made this appointment? So you agree there’s no difference, whether it was paid counsel, somebody that the . . . defendant picked to represent him, and someone that he just had to take because it’s what the State gave him?

MR. MAKAR: Exactly.

Transcript of Oral Argument at 35, *Holland v. Florida*, 130 S. Ct. 2549 (2010) (No. 09-5327) [hereinafter *Holland* Transcript].

17. Section 1983 permits suits against state officials for their violations of private parties’ constitutional rights. 42 U.S.C. § 1983 (2006).

18. *Dunphy v. McKee*, 134 F.3d 1297, 1298 (7th Cir. 1998).

medical request for, among other things, a low bunk.<sup>19</sup> As in *Link*, the lawyer had failed to meet deadlines, and the case had been dismissed for want of prosecution.<sup>20</sup>

In other words, the case was perfectly routine—except that, as Judge Diane P. Wood wrote for a unanimous three-judge panel, there were questions about whether the appointed lawyer should be considered his client's agent. This, she said, was an issue that no court had yet considered:

The legal question before us is one of first impression: do the standards for dismissing an action for want of prosecution in a case where an indigent plaintiff has court-appointed counsel, or counsel recruited by the court to serve in a *pro bono* capacity, vary at all from the standards that would apply if counsel were retained?<sup>21</sup>

Here was “the classic problem of the faithless agent,” with the particular wrinkle that “the client had no voice in choosing the lawyer” and, indeed, had a lawyer assigned to him “who might as well have been a potted plant.”<sup>22</sup> In general, Judge Wood wrote, “courts do not distinguish between retained and appointed counsel.”<sup>23</sup> And then she had it both ways. On the one hand, she said, courts should apply general principles applicable to all lawyers in deciding whether severe sanctions may be meted out to clients when their lawyers make terrible blunders.<sup>24</sup> On the other hand, Judge Wood suggested, the settled understanding that all lawyers are their clients' authentic agents was worth reexamining. “The court must bear in mind, when counsel has been appointed or recruited for a § 1983 action,” she concluded, “that the usual assumptions about the agency relationship between the lawyer and client must be relaxed.”<sup>25</sup>

Relaxing those assumptions, she wrote, might involve directly notifying the client of impending dismissal.<sup>26</sup> Though Justice Black thought this step elementary, Judge Wood said that such notification was not an “ironclad requirement.”<sup>27</sup>

The question I want to explore in this brief essay is, why not? What would be the harm, particularly in capital cases involving deadlines, of adopting Justice Black's approach?<sup>28</sup> Would it be asking too much to tell a

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19. *Id.*

20. *Id.*

21. *Id.* at 1299.

22. *Id.* at 1300.

23. *Id.* at 1300–01.

24. *Id.* at 1301.

25. *Id.* at 1302.

26. *Id.* at 1301.

27. *Id.* (quoting *Ball v. City of Chicago*, 2 F.3d 752, 756 (7th Cir. 1993) (internal quotation marks omitted)).

28. The unhappy client of a criminal defense lawyer who has performed badly certainly has little recourse. Malpractice actions arising from criminal cases are all but unknown and face very high barriers. Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1195 (2003). Disciplinary proceedings are

person at risk of execution that his lawyer has failed to act and that he must take action himself if he is to preserve his rights and thus his life, at least when there is reason to question whether the lawyer was the client's agent in an authentic sense of the term?<sup>29</sup>

Two recent Supreme Court decisions, *Holland v. Florida*<sup>30</sup> and *Maples v. Thomas*,<sup>31</sup> explore this approach. They took only the most modest of steps toward the approach advocated by Justice Black, and the Court seems unlikely to do much more. On the whole, Supreme Court decisions in this area have constructed a variety of unsatisfactory doctrines built on the fiction of agency.<sup>32</sup>

In the criminal case proper, a lawyer's mistake that rises to the level of ineffective assistance of counsel—no small matter—is not attributed to the client but is, rather, imputed to the government.<sup>33</sup> In postconviction proceedings, where there is no constitutional right to counsel, clients lose even that crumb of comfort.<sup>34</sup> Indeed, postconviction capital litigation often marries a statutory right to a lawyer with constitutional strict liability for that lawyer's actions.<sup>35</sup>

In *Holland*, though, the Court hinted at escape hatches that may exist if the lawyer's conduct is so egregious as to amount to abandonment and if the client is exceptionally diligent.<sup>36</sup> Both the lawyer's egregiousness and the client's diligence are concepts sounding in agency. *Holland* concerned a

also vanishingly rare. See Dennis E. Curtis & Judith Resnik, *Grieving Criminal Defense Lawyers*, 70 *FORDHAM L. REV.* 1615 (2002).

29. Dismissal for failure to prosecute is not quite the same thing as enforcement of limitations periods like the ones imposed by the Antiterrorism and Effective Death Penalty Act of 1996 § 101, 28 U.S.C. § 2244(d) (2006) [hereinafter AEDPA]. See Anne R. Traum, *Last Best Chance for the Great Writ: Equitable Tolling and Federal Habeas Corpus*, 68 *MD. L. REV.* 545, 553 (2009). But the general principle is identical. What sensible client would want his lawyer to blow a deadline? What legal system that is meant to achieve a just result would have a case turn on such a lawyer's conduct?

30. 130 S. Ct. 2549 (2010).

31. 132 S. Ct. 912 (2012).

32. This criticism is not new. See Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 *COLUM. L. REV.* 9, 13 (1986) (“[T]he Court had painted itself into a doctrinal corner, which left it little room to maneuver among the growing litter of precedents according a linchpin role to the lawyer . . . .”); *id.* at 115 (“In short, the Court's visions of the right to counsel and the role of counsel are incoherent, or downright cynical.”).

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

34. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (“We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions.” (citing *Johnson v. Avery*, 393 U.S. 483, 488 (1969))).

35. See Aaron G. McCollough, *For Whom the Court Tolls: Equitable Tolling of the AEDPA Statute of Limitations in Capital Habeas Cases*, 62 *WASH. & LEE L. REV.* 365, 396 (2005) (“By providing a meaningless grant of counsel, courts effectively dictate that defendants must file their federal habeas petitions *pro se* in order to positively ensure timely filing. And if the petitioner is obligated to personally comply with technical requirements of the AEDPA, the statutory guarantee of counsel is meaningless.”).

36. *Holland v. Florida*, 130 S. Ct. 2549, 2564–65 (2010).

death-row inmate in Florida who was given a second chance to argue that an otherwise strict one-year filing deadline should not apply to him in light of his lawyer's inaccessibility and incompetence.<sup>37</sup> The decision was vague even by the standards of a court noted for ambiguous and fractured decisions.<sup>38</sup> The vote was 7–2, with Justices Antonin Scalia and Clarence Thomas dissenting.

Mr. Holland was unusually savvy, while his lawyer Bradley Collins, who was appointed to handle a habeas challenge to Mr. Holland's murder conviction and death sentence, was a disaster. Eventually, Mr. Holland personally wrote the Florida Supreme Court to complain of "a complete breakdown in communication" with his lawyer, saying that he had not seen or spoken to Mr. Collins in fourteen months and felt abandoned.<sup>39</sup> He asked for a new lawyer.

Florida prosecutors responded that Mr. Holland was not allowed to communicate with the court directly because he was represented by counsel, an argument that the court accepted.<sup>40</sup> In a concurrence that was much more rigorous than Justice Stephen G. Breyer's majority opinion, Justice Samuel A. Alito Jr. called the Florida Supreme Court's ruling "perverse."<sup>41</sup>

Mr. Holland turned out to be a pretty good jailhouse lawyer. He peppered Mr. Collins with letters reminding him of the tight filing deadline in federal court that would follow a decision by the Florida Supreme Court, and he explained the relevant procedures.<sup>42</sup> ("Holland was right about the law," Justice Breyer wrote.<sup>43</sup>)

But Mr. Collins neither informed his client when the state court ruled against him nor filed the required papers in time to seek review of the ruling in federal court.<sup>44</sup> When Mr. Holland learned independently of the state court decision, he immediately filed his own paperwork, but it was too late.<sup>45</sup> Mr. Collins, in a rare response letter to Mr. Holland, wrote that the relevant deadlines had passed by the time he had been appointed to the case.<sup>46</sup> ("Collins was wrong about the law," Justice Breyer wrote.<sup>47</sup>)

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37. *Id.* at 2554–60.

38. Adam Liptak, *Justices Are Long on Words but Short on Guidance*, N.Y. TIMES, Nov. 18, 2010, at A1, available at <http://www.nytimes.com/2010/11/18/us/18rulings.html?pagewanted=all>.

39. *Holland*, 130 S. Ct. at 2555 (internal quotation marks omitted).

40. *Id.* at 2556.

41. *Id.* at 2568 (Alito, J., concurring).

42. *Id.* at 2556–57 (majority opinion).

43. *Id.* at 2557 (noting that Holland correctly informed his attorney that the AEDPA's statute of limitations is not tolled pending review of a petition for certiorari from a judgment denying postconviction review at the state level).

44. *Id.* at 2556–59.

45. *Id.* at 2556–57.

46. *Id.* at 2558.

47. *Id.*

You might think this an easy case. But all the Supreme Court said in ruling for Mr. Holland was that the appeals court had used too restrictive a standard in deciding whether equity overrode what passed for agency here.<sup>48</sup> The case was remanded for application of a more relaxed standard, one that the Court did not specify.<sup>49</sup> “Although I agree that the Court of Appeals applied the *wrong* standard,” Justice Alito wrote in his concurrence, “I think that the majority does not do enough to explain the *right* standard.”<sup>50</sup>

Justice Alito’s review of the relevant principles was as disturbing as it was instructive. “[A]ttorney negligence,” he wrote, “is not an extraordinary circumstance warranting equitable tolling.”<sup>51</sup> That is because “the mistakes of counsel are constructively attributable to the client, at least in the post-conviction context.”<sup>52</sup> All of the following shameful and life-threatening errors, Justice Alito said, are ordinarily to be imputed to the client: miscalculating a filing deadline, calculating it correctly but forgetting to file, or mailing the required papers to the wrong address.<sup>53</sup>

What does matter, Justice Alito suggested, and what seems to be the emerging exception to the application of agency principles in such settings, is whether (1) the lawyer effectively abandoned his client, and (2) the client took steps to fire the lawyer or otherwise take matters into his own hands.<sup>54</sup> “Common sense dictates,” Justice Alito wrote, “that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word.”<sup>55</sup> It is not entirely clear whether Justice Alito would require both factors to be present, though he added that the case for equitable relief would be stronger “if the litigant’s reasonable efforts to terminate the attorney’s representation have been thwarted by forces wholly beyond the petitioner’s control.”<sup>56</sup>

Both prongs of the solution are problematic, but they are at least rooted in an acknowledgement of the limits of agency. Justice Anthony M. Kennedy addressed each prong during oral argument in *Holland*.

First, he said, requiring that the lawyer’s conduct be so deficient that it amounts to abandonment provides a perverse incentive.<sup>57</sup> He posited two cases, involving two criminal defendants:

48. *Id.* at 2563. The Eleventh Circuit had held that even a lawyer’s “grossly negligent” conduct can never warrant tolling of a deadline unless there is also “bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer’s part . . .” *Holland v. Florida*, 539 F.3d 1334, 1339 (11th Cir. 2008), *cert. granted*, 130 S. Ct. 398 (2009), *rev’d*, 130 S. Ct. 2549 (2010).

49. *Holland*, 130 S. Ct. at 2565.

50. *Id.* at 2566 (Alito, J., concurring). *See also id.* at 2575 (Scalia, J., dissenting) (criticizing majority’s failure “to articulate an intelligible rule”).

51. *Id.* at 2566 (Alito, J., concurring).

52. *Id.*

53. *Id.* at 2567.

54. *Id.* at 2568.

55. *Id.*

56. *Id.*

57. *See Holland* Transcript, *supra* note 16, at 7.



One spends a lot of time trying to find the most competent lawyer he can, and he does. He finds a highly skilled lawyer, who makes one little mistake and it's negligence.

The other doesn't care. He gets a lawyer that's really incompetent, and the lawyer is grossly negligent.

Now, you would be penalizing the client who exercised the most diligence under your rule.<sup>58</sup>

Second, Justice Kennedy said, requiring clients to supervise their lawyers as vigorously as Mr. Holland did misapprehends what most of the relevant clients are capable of.<sup>59</sup> “[S]uppose you have a client who is just bewildered,” Justice Kennedy said. “He doesn't know AEDPA; he doesn't know [f]ederal court. Why should he be in any worse position than this client?”<sup>60</sup>

Justice Alito's approach in *Holland* may thus be both a step forward in thinking hard about agency and a recipe for perverse incentives.<sup>61</sup> A lawyer confused about filing deadlines, which are especially complex matters in capital habeas litigation, is better off abandoning her client entirely than making a diligent but unsuccessful attempt to comply. And it seems that only clients with legal acumen may be entitled to solicitude from the courts when their lawyers err.

On the other hand, the opposite approach may also give rise to unintended consequences, as Justice Thomas explained for a five-justice majority in *Lawrence v. Florida* in 2007:<sup>62</sup>

[A] State's effort to assist prisoners in postconviction proceedings does not make the State accountable for a prisoner's delay. Lawrence [the inmate] has not alleged that the State prevented him from hiring his own attorney or from representing himself. It would be perverse indeed if providing prisoners with postconviction counsel deprived States of the benefit of the AEDPA statute of limitations.<sup>63</sup>

In January of this year, the Supreme Court applied its analysis in *Holland* in another extraordinary case, *Maples v. Thomas*.<sup>64</sup> *Maples* concerned a death-row inmate in Alabama, Cory R. Maples, who had the misfortune of being represented by lawyers from one of the fanciest firms in the nation, Sullivan & Cromwell.<sup>65</sup>

58. *Id.*

59. *See id.* at 19.

60. *Id.*

61. *See* Marni von Wilpert, Comment, *Holland v. Florida: A Prisoner's Last Chance, Attorney Error, and the Antiterrorism and Effective Death Penalty Act's One-Year Statute of Limitations Period for Federal Habeas Corpus Review*, 79 *FORDHAM L. REV.* 1429, 1467 (2010).

62. 549 U.S. 327, 336–37 (2007).

63. *Lawrence*, 549 U.S. at 337.

64. 132 S. Ct. 912, 923–24, 926–27 (2012).

65. *Ex parte Maples*, 885 So. 2d 845, 846 (Ala. Crim. App. 2004).

When a court clerk in Alabama sent two copies of a ruling in Mr. Maples's case to Sullivan & Cromwell's New York offices, the firm's mailroom sent the envelopes back unopened.<sup>66</sup> One envelope had "Return to Sender—Left Firm" written across the front along with a stamp that read "Return to Sender—Attempted Not Known."<sup>67</sup> The other envelope was stamped with slightly different language: "Return to Sender—Attempted Unknown."<sup>68</sup>

Two associates handling Mr. Maples's case had indeed left the firm, but it seems that no one had bothered to tell the court or the mailroom that new lawyers had been assigned to step in.<sup>69</sup> By the time Mr. Maples's mother called the firm, frantic that her son's time to appeal had run out.<sup>70</sup>

In his Supreme Court briefs, Mr. Maples's new lawyer, Gregory G. Garre, a former United States Solicitor General, relied heavily on the *Holland* decision in general and Justice Alito's concurrence in particular.<sup>71</sup> Mr. Maples certainly seemed capable of meeting Justice Alito's requirement that he show that his lawyers abandoned him. There is no evidence, however, to suggest that Mr. Maples had Mr. Holland's diligence and legal acumen. An amicus brief from Deborah A. DeMott, a law professor at Duke University, made the case that "agency law provides a natural framework for determining whether and how an attorney's conduct should be attributed to the client."<sup>72</sup> In Mr. Maples's case, she said, the New York lawyers "terminated the agency relationship by abandonment, if not also by renunciation."<sup>73</sup>

The *Maples* case had an additional element, one that brings matters full circle to Justice Black's consideration in 1962 of what responsibility courts should take before they sanction clients for their lawyers' conduct.<sup>74</sup> After the notices rejected by the Sullivan & Cromwell mailroom made their way back to Alabama, the court clerk there did nothing.<sup>75</sup> A divided panel of the

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66. *Id.* at 847.

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

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

69. *Id.* at 846.

70. *Id.*

71. *E.g.*, Brief for Petitioner at 3, 20, 34, *Maples v. Thomas*, 132 S. Ct. 912 (2012) (No. 10-63).

72. Brief of *Amica Curiae* Deborah A. DeMott in Support of Petitioner at 6, *Maples*, 132 S. Ct. 912 (No. 10-63).

73. *Id.* at 12.

74. Alabama is the only state that does not provide all poor death row inmates with lawyers to challenge their convictions and sentences. In an appeals court brief in 2006, the state explained that it relied on firms like Sullivan & Cromwell to handle such cases. "The overwhelming majority of Alabama death-row inmates enjoy the assistance of qualified (and often über-qualified) counsel in collaterally attacking their convictions and sentences," the state's lawyers wrote, which is another way of saying that lawyers from prominent firms donate their services to fill the gap left by the state. Adam Liptak, *In Alabama, Execution Without Representation*, N.Y. TIMES, Mar. 26, 2007, at A12 (quoting Brief of Defendants-Appellees at 40, *Barbour v. Haley*, 471 F.3d 1222 (11th Cir. 2006) (No. 06-10920)) (internal quotation marks omitted), available at <http://www.nytimes.com/2007/03/26/us/26bar.html>.

75. *Maples v. Allen*, 586 F.3d 879, 884 (11th Cir. 2009).

Eleventh Circuit said that the clerk's inaction was Mr. Maples's fault.<sup>76</sup> "Maples never requested the clerk to give him personal notice in addition to his counsel," the majority said,<sup>77</sup> as though it were ordinary common sense for a death-row inmate to backstop an international law firm, just in case.

Mr. Maples responded by citing a civil case, *Jones v. Flowers*, in which the Supreme Court considered what sort of notice must be given when the government wants to sell a home for unpaid taxes.<sup>78</sup> If a letter is returned unopened, Chief Justice John G. Roberts Jr. wrote for the majority, officials must try harder to reach the owner.<sup>79</sup> "This is especially true," he wrote, "when, as here, the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house."<sup>80</sup>

The Supreme Court ruled for Maples in a 7–2 decision that applied the *Holland* framework. Writing for the majority, Justice Ginsburg first noted the general rule: "[W]hen a petitioner's postconviction attorney misses a filing deadline, the petitioner is bound by the oversight."<sup>81</sup>

"We do not," Justice Ginsburg added, "disturb that general rule." But abandonment is another matter, she wrote: "A markedly different situation is presented, however, when an attorney abandons his client without notice, and thereby occasions the default. Having severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client's representative."<sup>82</sup>

Maples, she wrote, satisfied both prongs of the *Holland* test: "Abandoned by counsel, Maples was left unrepresented at a critical time for his state postconviction petition, and he lacked a clue of any need to protect himself *pro se*. In these circumstances, no just system would lay the default at Maples' death-cell door."<sup>83</sup>

Justice Alito concurred, in a seeming effort to limit the case to its facts, which he called "a veritable perfect storm of misfortune."<sup>84</sup>

Justice Scalia, joined by Justice Thomas, dissented. He argued that Maples had not been abandoned, as other lawyers at Sullivan & Cromwell and the local lawyer continued to represent him. Though the majority had not addressed the *Jones* case or the conduct of the court clerk in Maples's case, Justice Scalia did so. The issue of whether the clerk should have done more was not squarely presented, he wrote, because it was undisputed that the local lawyer had received the required notice. But, Justice Scalia continued,

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76. *Id.* at 890.

77. *Id.*

78. *Jones v. Flowers*, 547 U.S. 220, 223 (2006).

79. *Id.* at 229–30.

80. *Id.* at 230.

81. *Maples v. Thomas*, 132 S. Ct. 912, 922 (2012) (citing *Coleman v. Thompson*, 501 U.S. 722, 753–754 (1991)).

82. *Id.* at 922–23.

83. *Id.* at 917.

84. *Id.* at 929 (Alito, J., concurring).

“I think it doubtful whether due process entitles a litigant to *any* notice of a court’s order in a pending case.”<sup>85</sup>

Allowing an abandonment exception to agency principles, he went on, provides death row inmates with a roadmap: “The trick will be to allege, not that counsel was ineffective, but rather that counsel’s ineffectiveness demonstrates that he was not a genuinely representative agent.”<sup>86</sup> Agency principles can only do so much work, and at some point equity must matter, too. But it is hard to locate the tipping point. This problem, of course, is just one instance of a tension that runs through many of the problems considered in the reviews that follow and in the books that they engage. In a perfect world, there would be no conflict between ensuring a just result in every case and administering a sprawling justice system that must attend to values like efficiency and finality. In the real world, as this volume demonstrates, those interests often collide.

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85. *Id.* at 933.

86. *Id.*

