An Originalist Argument for a Sixth Amendment Right to Competent Counsel

Erica J. Hashimoto[*]

ABSTRACT: The Treason Act of 1696 provided a right to counsel in treason cases in England and laid the framework for the right to counsel both in England and in the United States. Evidence suggests that the Treason Act may have influenced the Framers of the Constitution; thus, any historical understanding of the Sixth Amendment right to counsel should consider the quality of representation treason defendants received. If, as appears to be the case, treason defendants had competent, experienced lawyers representing them, then the Sixth Amendment right to counsel may well include the right to such representation. This Essay suggests that the Court's current ineffective assistance of counsel doctrine does not adequately reflect this historical understanding of the Sixth Amendment right to counsel.

* Associate Professor of Law, University of Georgia School of Law.

INTRODUCTION

More than twenty years ago, Professor Bruce Green argued that an original understanding of the word "counsel" for purposes of the Sixth Amendment (at least in capital cases) should include only those lawyers *qualified* to serve as defense counsel.[1] Since that time, the Court not only has accepted original arguments regarding the meaning of certain Sixth Amendment phrases, but also has significantly reformulated Sixth Amendment doctrine as a result.[2] The Court's recent willingness to entertain arguments regarding the original meaning of the Sixth Amendment's text provides a timely opportunity to revisit Professor Green's definition of counsel and to explore the effect that definition would have on the standard for ineffective assistance of counsel set forth in *Strickland v. Washington*.[3]

In the past decade, the Court has repeatedly emphasized the importance of original meaning in determining (or redefining) the parameters of the Sixth Amendment rights to confront witnesses and to be tried before a jury.[4] This shift to originalist analysis has required that the Court completely change the doctrine in each of these Sixth Amendment areas.[5] Symmetry of logic suggests that the Court may bring a similar

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1. *See* Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993).

2. *See, e.g.*, Blakely v. Washington, 542 U.S. 296, 313–14 (2004) (holding that the Sixth Amendment requires that facts that raise the maximum sentence under the guidelines must be proven to the jury); Crawford v. Washington, 541 U.S. 36, 51 (2004) (drawing on the history of the Confrontation Clause to hold that the word "witnesses" for purposes of the Sixth Amendment's Confrontation Clause encompasses those who "bear testimony" against defendants); Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183 (2005).

3. Strickland v. Washington, 466 U.S. 668 (1984).

4. *See, e.g.*, Giles v. California, 554 U.S. 353, 359–61 (2008) (setting forth the practice at the time the Bill of Rights was ratified in limiting the forfeiture by wrongdoing exception to the Confrontation Clause to instances when the defendant intended to cause the witness to be unavailable); *Blakely*, 542 U.S. 296 (defining the "elements" of an offense that must be proven to a jury by reference to historical practices); *Crawford*, 541 U.S. at 51 (defining the meaning of the word "witnesses" for purposes of the Sixth Amendment's Confrontation Clause with reference to the historical meaning of the word); Apprendi v. New Jersey, 530 U.S. 466, 478–80 (2000) (reviewing history in England and during the founding years here to reject the state's distinction between elements of the offense and sentencing factors).

5. *Crawford* is perhaps the best example of that, rejecting the balancing framework set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980), and holding that testimonial statements are categorically barred by the Confrontation Clause. To be sure, the Court's historical account of the Confrontation Clause has been the subject of excoriating academic criticism. *See* Randolph N. Jonakait, *The Too-Easy Historical Assumptions of* Crawford v. Washington, 71 BROOK. L. REV. 219 (2005). But *Crawford*'s doctrine nonetheless has survived.

originalist perspective to the Sixth Amendment's "assistance of counsel" guaranty.[6]

As it turns out, however, the existing historical account of the English right to counsel is incomplete. This Essay offers a new account, arguing that any assessment of the original meaning of the right to counsel must focus on the Treason Act of 1696. Consideration of that Act suggests that the Sixth Amendment right to the "assistance of counsel" may well be more robust than the Court has previously recognized. In particular, although the Court perhaps should maintain a *Strickland*-like framework for Due Process claims, the Sixth Amendment right to counsel should encompass the right to be represented by experienced defense counsel.[7]

I. THE ENGLISH HISTORY OF COUNSEL IN CRIMINAL CASES

Where should one look to unearth the original meaning of our Constitution's safeguard of the right to counsel? The colonial practice has received some scholarly attention,[8] as have some aspects of English law in the period leading up to the ratification of the Sixth Amendment.[9] But English practice under the Treason Act of 1696 has received almost no consideration by scholars addressing the Sixth Amendment right to counsel. This omission is significant because that Act was the one and only statute that guaranteed a right to counsel in England prior to the adoption of the Bill of Rights.[10] To be sure, scholars have composed detailed histories of Parliament's passage of the Treason Act of 1696 and the impact that Act had on English criminal procedure in non-treason felony cases. None of this

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6. There are certain cases that are so "watershed" and have become so ingrained in American culture that the Court likely could not abandon them. Described as a "watershed" constitutional rule, *Gideon* is perhaps the most widely acknowledged example of untouchable precedent. *See, e.g.*, John H. Blume & Sheri Lynn Johnson, Gideon *Exceptionalism?*, 122 YALE L.J. 2126, 2131 (2013) (noting that "*Gideon* is the only decision ever cited by the Supreme Court as an example of the kind of watershed rule of criminal procedure that so implicates fundamental fairness as to require retroactive application in habeas corpus"). But other than *Gideon*, very little of the Sixth Amendment right to counsel doctrine likely falls in that category.

7. Professor George Thomas also has argued that *Strickland*'s framework is inconsistent with the historical meaning of counsel in England. *See* George C. Thomas III, *History's Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543, 570 (arguing that "counsel" in the colonial period encompassed the role of the attorney as specialized advisor, rather than the attorney as alter ego to the defendant).

8. *See, e.g.*, WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 14–22 (1955); JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 9–13 (2002); George C. Thomas III, *Colonial Criminal Law and Procedure: The Royal Colony of New Jersey 1749–57*, 1 N.Y.U. J. L. & LIBERTY 671 (2005).

9. *See, e.g.*, TOMKOVICZ, *supra* note 8, at 2–6; J.M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 LAW & HIST. REV. 221 (1991); Alexander H. Shapiro, *Political Theory and the Growth of Defensive Safeguards in Criminal Procedure: The Origins of the Treason Trials Act of 1696*, 11 LAW & HIST. REV. 215 (1993).

10. *See* John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 309–10 (1978); *see also* Shapiro, *supra* note 9.

scholarship, however, has focused on how the Treason Act may have informed the thinking of late eighteenth-century Americans about the meaning of the right to counsel. This Part will summarize the history of the Treason Act of 1696 and the impact the Act had on criminal procedure in non-treason felony cases in England.

A. THE HISTORICAL CONTEXT OF THE TREASON ACT OF 1696

Prior to the eighteenth century, English law prohibited counsel from appearing in *any* felony criminal cases (unless the court, in its discretion, permitted counsel to appear), and until the middle of the eighteenth century, judges regularly denied felony defendants the opportunity to be represented by counsel.[11] In other words, felony defendants had to represent themselves.[12] The first exception to this prohibition on counsel in felony cases came when Parliament passed the Treason Act of 1696.[13]

Understanding the significance of the Act requires an understanding of the historical context in which it was adopted. In seventeenth century England, both prominent political parties of the day—the Whigs and Tories—used treason prosecutions as a political tool against each other.[14] Before the Revolution of 1688—the so-called "Glorious Revolution"—which resulted in the overthrow of King James II, the Stuart regime used treason laws to arrest, try, and execute many members of the radical Whig opposition movement, including Lord William Russell and Algernon Sydney.[15] Indeed, many of the practices in treason cases in the late seventeenth century were carried over from the notorious Star Chamber, which subjected treason defendants to a "disregard of basic individual rights."[16] The Star Chamber was abolished in 1641, but the Crown

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11. A statutory right to counsel was granted in 1836, but counsel began to appear with more regularity in felony cases throughout the eighteenth century. *See* BEANEY, *supra* note 8, at 8–12; Beattie, *supra* note 9, at 221–22.

12. For reasons that are not altogether clear, counsel was permitted to appear for defendants in misdemeanor cases. *See* BEANEY, *supra* note 8, at 8.

13. An Act for Regulateing of Tryals in Cases of Treason and Misprision of Treason, 1696, 7 & 8 Will. 3, c. 3 (Eng.), *in* 7 STATUTES OF THE REALM 6 (John Raithby ed., 1820); *see* TOMKOVICZ, *supra* note 8, at 6–7; Shapiro, *supra* note 9, at 217–18.

14. *See* Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 476–77 (1996) (noting the spectrum of political figures who had been subject to prosecution for treason); Craig S. Lerner, *Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 632–33 ("After the Restoration of the Crown in 1660 . . . the Whigs charged many of those closest to King Charles II with a papist conspiracy . . . . But the wheel of fortune turned and the opposition Whigs soon found themselves on the receiving end of treason accusations."); Shapiro, *supra* note 9, at 219–20.

15. Shapiro, *supra* note 9, at 219–20.

16. Faretta v. California, 422 U.S. 806, 821–22 (1975) (describing the Star Chamber as having "symbolized disregard of basic individual rights" and noting that impact on the drafting and ratification of the Sixth Amendment); *see also* Colin Miller, *Impeachable Offenses?: Why Civil*

continued to bring treason prosecutions against those who made statements against the King, and it offered virtually no protections to defendants in those cases. Of particular importance, defense counsel were permitted only at the discretion of the court even though the Crown generally was represented by a lawyer.[17] Because both Tories and Whigs endured the injustices of treason prosecutions, both parties sensed the need for reform.

In 1688, the Whigs joined forces with some Tories to overthrow King James II and to install William of Orange and his wife Mary (the daughter of James II) as the King and Queen.[18] As a result, Parliament gained significantly more power than it had had under King James II.[19] With that power, Parliament quickly tried to limit the extent to which political opponents could use treason charges to persecute each other.

Reformers identified many problems with the prosecution of treason cases, including: (1) the expansive definition of treason to include "treason by words" (essentially libel); (2) blatant perjury by witnesses; and (3) the lack of impartiality on the part of judges, who strongly favored the Crown.[20] Also problematic was the inability of treason defendants to make use of counsel. The lack of counsel in treason cases was particularly problematic for two reasons. First, the crime of treason had become very legally complex (far above the comprehension of lay defendants). Second, the Crown was represented by counsel in treason cases, unlike in most other felony prosecutions.[21] In the period following the Glorious Revolution, reformers tried to gain greater protection for treason defendants.[22] Those early reform efforts failed, however, at least in part because some Whigs believed that the Revolution would remove the conditions that had produced past abuses.[23]

Several treason trials in the 1690s showed that those hopes were misplaced.[24] The result was the Treason Act of 1696, which provided broad access to counsel in treason cases.[25] The Act initially specified that every

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Parties in Quasi-criminal Cases Should Be Treated Like Criminal Defendants Under the Felony Impeachment Rule, 36 PEPP. L. REV. 997, 1004 (2009).

17. *See* Langbein, *supra* note 10, at 309–11.

18. *See* William Ewald, *James Wilson and the Scottish Enlightenment*, 12 U. PA. J. CONST. L. 1053, 1078–79 (2010) (documenting the Glorious Revolution and its religious underpinnings). The roots of the Glorious Revolution related to religious conflict, most prominently the fact that King James II was Catholic and proposed offering rights to Catholics, giving rise to fears among Protestants that they soon would be persecuted. *Id.*

19. *See* Michael Tonry, *Determinants of Penal Policies*, 36 CRIME & JUST. 1, 25 (2007) (noting that the aim of the Revolution was to "confirm the power of the political classes by limiting the power of the monarch").

20. *See* Shapiro, *supra* note 9, at 222–24.

21. Langbein, *supra* note 10, at 309–11; Shapiro, *supra* note 9, at 222–24.

22. *See* Shapiro, *supra* note 9, at 244.

23. *Id.* at 245–46.

24. *Id.* at 246–49.

25. *Id.* at 246.

person charged with treason "shall bee received and admitted to make his and their full Defence by Counsel learned in the Law."[26] The reference to "full defence" made clear that counsel could participate in all aspects of representation, arguing both facts and law for the defendant.[27] This textual protection marked a significant step because Parliament did not protect assistance of counsel on both factual and legal grounds in non-treason felony cases until well into the nineteenth century.

More remarkable for its time, the Act went on to state that if any treason defendant "shall desire Counsel the Court before whom such Person . . . shall bee tryed . . . shall and is hereby authorized and required imediately upon his . . . request to assigne to such Person . . . such and soe many Counsel not exceeding Two as the Person or Persons shall desire."[28] Although there is not extensive documentation of treason prosecutions in the eighteenth century, anecdotal evidence suggests that treason defendants had counsel in reported cases.[29] Indeed, there is at least one example of a judge appointing two lawyers to an indigent treason defendant—James Hadfield—upon the defendant's request that those specific attorneys represent him.[30]

Although the Treason Act clearly guaranteed defendants an unprecedented right to counsel, the precise meaning of "counsel" in the Treason Act is less clear. Dictionaries of the time defined "counsel" as "an Advocate or Counsellour, one who pleads for his Client at the Bar of a Court of Justice,"[31] and "bar" was defined as "the Place where Lawyers Stand to Plead Causes in Courts of Judicature."[32] At the very least, then, the phrase "assistance of counsel" encompassed the right to be represented by a lawyer admitted to the Bar.

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26. An Act for Regulateing of Tryals in Cases of Treason and Misprision of Treason, 1696, 7 & 8 Will. 3, c. 3, § 1 (Eng.), *in* 7 STATUTES OF THE REALM 6 (John Raithby ed., 1820).

27. Langbein, *Criminal Trial*, *supra* note 10, at 312 (noting that during the 1730s counsel could cross-examine witnesses and offer observations about the evidence to the jury).

28. Treason Act, 1696, 7 & 8 Will. 3, c. 3, § 1 (Eng.). Professor Langbein has explained that this provision required not that counsel be appointed to indigent defendants in treason cases, but rather served only "to legitimate the service of defense lawyers as a professional activity that might otherwise be treated as conspiracy in the alleged treason." JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 94 (2003).

29. John H. Langbein, *The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors*, 58 CAMBRIDGE L.J. 314, 341 nn.145–47 (1999) (documenting instances of representation in treason cases in the eighteenth century); Richard Moran, *The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield (1800)*, 19 LAW & SOC'Y REV. 487, 498–508 (1985) (describing the representation of Hadfield by the Hon. Thomas Erskine).

30. *See* Moran, *supra* note 29, at 498 (noting that Hadfield, "[a]cknowledging his poverty," requested that the court appoint the Hon. Thomas Erskine and Mr. Serjeant Best as his counsel, and they did in fact represent him).

31. *See* N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY 217 (1721).

32. *Id.* at 93.

What kind of proficiency was expected of these lawyers? Anecdotal evidence suggests that the attorneys representing treason defendants after the passage of the Treason Act of 1696 had broad experience in the law, and in particular often had significant experience representing treason defendants. For instance, Lord Thomas Erskine, one of the most successful barristers of his day who would later become the Lord Chancellor in the Ministry of All Talents, represented many treason defendants, including William Davis Shipley on seditious libel charges, Lord George Gordon for his role in the riots of 1780, Thomas Paine and other radical society members, and James Hadfield.[33] Of particular note, Erskine represented James Hadfield after Hadfield, who was indigent, requested that Erskine represent him and the presiding judge so ordered.[34] Similarly, John Hungerford, a Tory politician, represented four defendants charged with treason, including George Purchase on appeal of a treason conviction; Francis Francia in 1717; John Matthews, charged in 1719 with treason for printing a libel against the King; and Christopher Layer in 1722.[35] In short, many of the lawyers representing treason defendants after passage of the Act stood at the highest levels of the Bar and gained significant experience in those cases.[36] It appears, then, that by guaranteeing the right to "Counsel learned in the Law,"[37] the Treason Act in practice provided defense by an experienced practitioner knowledgeable in the area of law in which he was to represent the defendant.

B. EFFECT OF THE TREASON ACT

Beyond its direct impact on treason cases, the right to counsel guaranty of the Treason Act influenced the development of right to counsel both in non-treason felony cases in England and, of most importance, in the Sixth Amendment. To be sure, the Treason Act protected only a relatively small subset of felony defendants.[38] And many (although certainly not all) treason

33. Moran, *supra* note 29, at 498.

34. *Id.*

35. *See* THE ROUTLEDGE HANDBOOK OF FORENSIC LINGUISTICS 192–94 (Malcolm Coulthard & Alison Johnson eds., 2010); Langbein, *supra* note 29, at 341 & n.147. Sir Bartholomew Shower, another prominent Tory activist, also represented a number of Tories charged with treason. *See* Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1889 n.214 (2009) (noting that Bartholomew was a "noted Tory lawyer"). As discussed above, the Tories were as much victims of treason prosecutions as the Whigs.

36. Of course, because prior to the passage of the Treason Act, counsel could appear in treason cases only with the permission of the court, it is unlikely that many lawyers were experienced in treason cases at the time the Act passed.

37. An Act for Regulateing of Tryals in Cases of Treason and Misprision of Treason, 1696, 7 & 8 Will. 3, c.3, § 1 (Eng.), *in* 7 STATUTES OF THE REALM 6 (John Raithby ed., 1820).

38. *See* George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 618 (1997) (noting that although there was a "proliferation of treason trials" in the last decade of the Stuarts' reigns, "[a]ccused traitors had not been the only criminal defendants to lose their lives for want of counsel").

defendants were political elites, so it is entirely possible that post-Act treason defendants attracted high quality lawyers precisely because they were wealthy and charged with political crimes.[39] Lessons from the Treason Act therefore may not necessarily apply across the spectrum of all felony cases.

That fact notwithstanding, the Treason Act appears to have set the course for a broader right to counsel both in England and in the colonies. Although Parliament did not provide felony defendants with a right to counsel until 1836, by the 1730s, many courts in England exercised their discretion to allow counsel to appear for felony defendants.[40] The Treason Act's right to counsel guarantee appears to have prompted the trend towards permitting representation by counsel in felony cases.[41] In general, counsel in felony cases played a more limited role than in treason cases. In particular, although counsel could address questions of law and cross-examine witnesses, they could neither discuss facts nor address the jury in argument or present a defense.[42] Because the role of counsel in England appears to have been much more limited than in at least some of the colonies, some scholars have argued that the framers of the Constitution did not look to England in protecting the rights of the defendant under the Sixth Amendment.[43] But this position ignores the Treason Act and the broad conception of the right to counsel to which it gave rise.

There is, moreover, at least some evidence suggesting that the Treason Act influenced the colonists and, later, the drafters of the Bill of Rights. First, there is reason to believe that Americans during and after the Revolution would have known of, and reacted to, the experience of defendants in treason trials in particular. For instance, Thomas Paine—the leading popular theorist of the American Revolutionary movement—had been prosecuted for treason in England.[44] No less important, in debating a

39. *Id.* (noting that the Treason Act "expose[d] men of high rank and conspicuous position to the calamities which must have been felt by thousands of obscure criminals without attracting even a passing notice") (quoting 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 402 (1883)).

40. Beattie, *supra* note 9, at 223–24; Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 83–84 (1995); Langbein, *supra* note 10, at 307.

41. In addition, as Professor Langbein has documented, this trend toward permitting counsel in felony cases also corresponded to an increase in prosecutions undertaken by the Crown. *See* Langbein, *supra* note 10, at 313 (describing both the relaxation of the rule prohibiting defense counsel and the increase in the number of prosecutions).

42. Beattie, *supra* note 9, at 221; Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147, 1165 (2010).

43. *See* Jonakait, *supra* note 40, at 94 (arguing that "[i]n drafting the Amendment, the Framers were not incorporating English law. Instead, they were constitutionalizing an existing American practice that had emerged before the Bill of Rights").

44. Paine was tried in absentia after he fled to France. Sir Thomas Erskine represented Paine at the trial, and although he mounted a vigorous defense, the jury convicted Paine. *See* Moran, *supra* note 29, at 498.

number of provisions of the Constitution, the Framers specifically focused on the use of treason prosecutions to quell dissenting speech.[45]

Second, both colonial history and post-Revolutionary experience demonstrate the influence of the Treason Act. As scholars have noted, many colonies and later states guaranteed the right to counsel in their state charters or by statute prior to the date on which Parliament guaranteed the right to counsel in non-treason felony cases.[46] The path of the colonies, and ultimately the Constitution, therefore appears to have hewed more closely to the Treason Act than the right in English courts as a general matter.[47]

Third, the Treason Act laid the foundation for other Sixth Amendment rights.[48] In addition to the counsel guarantee, the Treason Act required: (1) that any prosecution be commenced with an indictment; and (2) that defendants have a right to "compell their Witnesses to appeare for them att any such Tryal or Tryale as is usually granted to compell Witnesses to appeare against them."[49] The Bill of Rights provided these very same protections in the Fifth[50] and Sixth[51] Amendments, respectively. And although, unlike with the right to counsel, Parliament acted relatively quickly after the Treason Act to extend at least the right to compulsory process to all felony cases,[52] the Treason Act provided the first English basis for both of these criminal process guarantees.

Nor are the parameters of the right to counsel that arise from incorporating practice under the Treason Act anomalous. As Professor Green sets forth in his history of counsel in this country prior to 1791, the "critical distinguishing feature" of counsel in 1791 "was not the receipt of authorization to appear before the court" or the obtaining of a license to do

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45. Article III provides that "[n]o Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act." U.S. CONST. art. III, § 3. This mirrors the language in the Treason Act's requirement that prosecutions be upon "the Oaths and Testimony of two lawfull Witnesses," An Act for Regulateing of Tryals in Cases of Treason and Misprision of Treason, 1696, 7 & 8, Will. 3, c. 3, § II (Eng.), *in* 7 STATUTES OF THE REALM 6 (John Raithby ed., 1820).

46. BEANEY, *supra* note 8, at 14–22 (tracing the colonial history of the right to counsel and concluding that in the post-Revolutionary period, most states provided a right to counsel); Jonakait, *supra* note 40, at 95.

47. *See* Jonakait, *supra* note 40, at 109 ("The Sixth Amendment, in granting a full right to counsel in all cases, was not constitutionalizing English law. It was rejecting, or at least going beyond, the existing common law.").

48. *See generally* Fisher, *supra* note 38.

49. Treason Act, 1696, 7 & 8 Will. 3, c. 3, § 1 (Eng.).

50. *See* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .").

51. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . .").

52. *See* Fisher, *supra* note 38, at 616 (noting that six years after the Treason Act, Parliament extended the requirement of sworn defense witnesses to all felony cases).

so.[53] Instead, "the distinguishing characteristic of licensed practitioners in 1791 was that they were qualified, by virtue of their legal knowledge and good character, to practice competently before the courts."[54] The Treason Act history described above therefore buttresses this argument that the right to counsel guaranteed by the Sixth Amendment encompassed the right to a competent legal representative.

Two potential counterarguments to this interpretation of the Sixth Amendment merit a response. First, although the Treason Act may have led to the appointment of well-qualified lawyers, the language of the Treason Act contains a critical phrase missing from the Sixth Amendment. Recall that the Treason Act required the court, upon request by the defendant, to assign "*such* and soe many Counsel not exceeding two as the Person or Persons shall desire."[55] This phrase appears to have required court to accede to the defendant's choice of counsel. Because that critical phrase does not appear in the Sixth Amendment, one could argue that practice under the Treason Act has no relevance to the Sixth Amendment.

Such an argument, however, misses the key point that the Act created an understanding about the law's commitment to representation by skilled attorneys. Allowing treason defendants to select their lawyers was one way to ensure skillful representation. But the point of continuing salience is that the law embodied a commitment to this end—and that the law in fact operated to provide qualified lawyers.

Second, some might argue that the Treason Act represents just one very specialized statute with limited application that ultimately tells us nothing about the meaning of the Sixth Amendment. But as discussed above, the Act was a known and often-used statute.[56] Perhaps of most importance, it constitutes the *only* statute that required counsel in pre-Constitution England.

The historical record of the passage of the Treason Act, its operation in England, and its influence on the fledgling colonies and later the states provide persuasive evidence that the right to counsel the Framers conceived incorporated a conception of "counsel" that included experience in matters as to which the lawyer's work pertained. Particularly in conjunction with the arguments marshaled by Professor Green regarding what "counsel" meant in the states in 1791, the Sixth Amendment guarantee of the "right to counsel" encompasses not just access to a licensed lawyer but also representation by *knowledgeable* counsel.

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53. Green, *supra* note 1, at 468.

54. *Id.* at 468–69.

55. An Act for Regulateing of Tryals in Cases of Treason and Misprison of Treason, 1696, 7 & 8 Will. 3, c. 3, § 1 (Eng.), *in* 7 STATUTES OF THE REALM 6 (John Raithby ed., 1820) (emphasis added).

56. *See supra* Part I.B.

II. THE INCONSISTENCY BETWEEN THE HISTORICAL UNDERSTANDING AND CURRENT DOCTRINE

That leads to the question whether the Court's Sixth Amendment right to counsel doctrine is consistent with the right guaranteed by the Treason Act. I think the answer to that question is no, primarily because the right to counsel provided by current Sixth Amendment law guarantees only a right to an attorney who does not make egregious errors rather than representation by *knowledgeable* counsel.[57] The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[58] In right to counsel cases, the Court's focus has been limited to whether (1) a lawyer was provided; and (2) a lawyer assured that the defendant received a minimally fair trial. But the Sixth Amendment right to counsel operates independently of whether the defendant received a fair trial. Instead, the fair trial protection is a bedrock protection provided not by the Sixth Amendment but by the Fifth Amendment (and Fourteenth Amendment) Due Process Clause. This Part sets forth the current framework for right to counsel claims and identifies the ways in which this framework is inconsistent with the original meaning of the right to counsel.

Twenty years after *Gideon*, the Court issued its key decision governing the quality of counsel guaranteed by the Constitution. In *Strickland v. Washington*, the Court held that the Sixth Amendment's right to the "assistance of counsel" requires not only that a lawyer appear for the defendant, but also that the lawyer provide "effective" assistance of counsel.[59] The Court explained that if counsel's performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result," the defendant is entitled to reversal.[60] The Court then went on to articulate a standard for proving ineffectiveness that has proven to be virtually impossible to meet: a defendant must establish both that counsel performed deficiently and that counsel's errors affected the outcome of the proceedings, the so-called "prejudice" inquiry.[61]

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57. The Court's Sixth Amendment right to counsel doctrine has developed almost entirely without *any* consideration of original meaning. *See, e.g.*, Strickland v. Washington, 466 U.S. 668 (1984) (holding that the Sixth Amendment requires *effective* assistance of counsel with no discussion of original meaning); Scott v. Illinois, 440 U.S. 367 (1979) (holding that misdemeanor defendants sentenced to fines do not have right to counsel without any mention of original meaning); Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that felony defendants have a right to counsel without examining the original meaning of right to counsel).

58. U.S. CONST. amend. VI.

59. *Strickland*, 466 U.S. at 686.

60. *Id.*

61. *See id.* at 687; *see also* Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 1 ("Courts rarely reverse

In defining the practical operation of the Sixth Amendment, *Strickland* is probably no less important than *Gideon*. In striking contrast to *Gideon*, however, *Strickland* has not been celebrated but instead has endured extensive criticism.[62] Much of the critique stems from the fact that the Court's focus on the *accuracy* of the verdict—highlighted by its emphasis on reliability—essentially precludes relief unless the defendant can establish the likelihood that he would have been acquitted at trial had he received proper representation.[63] The Court, moreover, has set a nearly impossible standard for showing deficient performance, emphasizing that even a lawyer with no trial experience can meet the standard for effective assistance of counsel.[64] The *Strickland* Court's emphasis on counsel's effect on the fairness and accuracy of the proceedings may make sense as a due process matter.[65] But because the Court decided *Strickland* as a matter of the Sixth Amendment right to counsel, it has come to define the scope of the right to the "assistance of counsel."

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convictions for ineffective assistance of counsel . . . ."); Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 352–53 (2008) (noting that "successful ineffective assistance claims are infrequent at best" and that "[t]he *Strickland* approach is a prescription for disaster in capital cases"); Richard L. Gabriel, Comment, *The* Strickland *Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1277–79 (1986) (arguing that it is virtually impossible for defendants to prove that a jury would have reached a different result); Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1935 (1994) (arguing that the prejudice standard should not apply in capital trials because it is so difficult to meet).

62. *See, e.g.*, Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 82 (1986) (arguing that the majority's reasoning is unpersuasive); Meredith J. Duncan, *The (So-Called) Liability of Criminal Defenses Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 18 (arguing that the *Strickland* standard is too burdensome and that a defendant's right to effective counsel is virtually without substance); William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 93, 176 (1995) (arguing that *Strickland* undermines the effect of *Gideon* and calling for the decision to be overruled); Richard Klein, *The Constitutionalization of* In*effective Assistance of Counsel*, 58 MD. L. REV. 1433, 1446 (1999) (arguing that *Strickland* interprets the requirement of the right to effective assistance of counsel in "an ultimately meaningless manner").

63. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1837–41 (1994) (discussing the life and death implications of the low standard for effective assistance of counsel in death penalty cases); Klein, *supra* note 62, at 1468 (observing that the *Strickland* standard essentially requires a defendant to prove his innocence); Gabriel, *supra* note 61, at 1277 (noting that the prejudice standard "reverses the usual presumption that a defendant is innocent until proven guilty"); Note, *The Eighth Amendment*, *supra* note 61, at 1931 (noting *Strickland*'s emphasis on preventing hindsight bias and arguing that defendants can rarely establish that they would have been acquitted).

64. *See* United States v. Cronic, 466 U.S. 648, 663–66 (1984).

65. *See* John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 684 n.25 (1990) (noting that the *Strickland* standard is linked "with due process notions of fundamental fairness"); Gabriel, *supra* note 61, at 1288 (arguing that the decision sacrifices explicit Sixth Amendment rights for a judicially-created concept of fairness).

But the accuracy or reliability of the trial has no connection to the historical basis for the Sixth Amendment guarantee, particularly in light of lessons derived from the Treason Act of 1696. That Act, after all, did not concern itself with assuring a minimum level of fairness in discrete cases.[66] Rather, it focused on ensuring the availability of well-qualified and experienced counsel in across-the-board fashion.[67]

An example serves to illustrate the effect of *Strickland*'s confusion of the Fifth and Sixth Amendments. Until recently, the Southern District of Georgia required *every attorney* who joined the bar of that court to agree to represent criminal defendants under the Criminal Justice Act.[68] For instance, a lawyer specializing in bankruptcy who joined the Southern District Bar in order to file bankruptcy cases could be obligated to serve as defense counsel in criminal cases. Suffice it to say that representation by a bankruptcy lawyer with no experience in a criminal case is not analogous to the practice under the Treason Act, and thus—in light of the Act's importance to the founding generation—was not the sort of practice anticipated by the Framers of the Sixth Amendment.[69] As a result, the appointment of such a lawyer should, on originalist grounds, be held to violate the Sixth Amendment right to counsel in the vast majority of criminal cases.[70]

The essential difficulty is that a lawyer's inexperience in criminal cases does not necessarily render that lawyer ineffective under the *Strickland* standard.[71] For instance, the Court has held that a relatively inexperienced real estate attorney can provide effective assistance under the *Strickland* standard.[72] And this is so even though the risks associated with inexperienced defense counsel have been greatly magnified by changes over the past two centuries that have rendered modern criminal law practice a highly specialized endeavor that requires mastery of complex bodies of law such as federal and state sentencing guidelines; Fourth, Fifth, and Sixth Amendment jurisprudence; and massive criminal codes.[73] Even if the

66. An Act for Regulateing of Tryals in Cases of Treason and Misprision of Treason, 1696, 7 & 8 Will. 3, c. 3 (Eng.), *in* 7 STATUTES OF THE REALM 6 (John Raithby ed., 1820).

67. *Id.*

68. *See* Criminal Justice Act, 18 U.S.C. § 3006(A) (2012) (setting requirements for adequate representation of defendants).

69. *See supra* Part I.B.

70. There conceivably could be a narrow category of criminal cases for which a bankruptcy attorney might be qualified. For instance, if the charges against the defendant alleged bankruptcy fraud, a bankruptcy attorney might well be qualified to represent the defendant. That category of cases, though, would not include most of the criminal docket.

71. *See* United States v. Cronic, 466 U.S. 648, 665 (1984).

72. *Id.* at 665–66.

73. *See* Douglas A. Berman, *From Lawlessness to Too Much Law? Exploring the Risk of Disparity from Differences in Defense Counsel Under Guidelines Sentencing*, 87 IOWA L. REV. 435, 444–46 (2002) (noting that both "the sheer amount of law" and the substance of the law "heighten the

defendant can establish an inexperienced lawyer's deficient performance, unless she has persuasive evidence of a defense that should have been presented at trial or a sentencing claim that would have prevailed, moreover, she cannot prevail on an ineffective assistance of counsel claim under *Strickland*.[74]

A lawyer who has not previously represented a defendant in any criminal case may be able to eke out a sufficient performance to meet the minimum requirements imposed by *Strickland*.[75] But if the Framers intended that the Sixth Amendment right to counsel mirror the right to counsel provided by the Treason Act of 1696—namely, by ensuring representation by a suitably qualified attorney—such representation would fall far short of that guarantee, regardless of the purported accuracy of the result in any particular defendant's case.

III. AN ORIGINALIST SIXTH AMENDMENT STANDARD

If the right to "assistance of counsel" under the Sixth Amendment means something more than the right to have a lawyer—in other words, if the right encompasses the right to *qualified* counsel—then a court violates the defendant's Sixth Amendment right to counsel when it appoints, to represent him, a lawyer unversed in criminal law. In this way, the Sixth Amendment, properly understood, shifts the responsibility for providing competent representation back to the state rather than placing the burden of proving ineffective assistance on the defendant.

Of course, the Court would have to determine the precise standard for identifying a properly qualified lawyer. At the very least, however, the outside limits of that standard could be readily ascertained: In felony cases, lawyers with no experience in criminal cases could not provide the "assistance of counsel" guaranteed by the Sixth Amendment.[76]

Two objections to requiring qualified lawyers deserve response. First, some may argue that this standard is impractical. After all, defense counsel

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challenges for defense counsel and may exacerbate the impact of differences in the quality of defense counsel").

74. *See* Strickland v. Washington, 466 U.S. 668, 669 (1984) (holding that defendant must establish a reasonable probability of a different outcome absent counsel's errors). The challenges of establishing ineffective assistance are magnified if the trial lawyer represents the defendant on direct appeal, as often happens. Under those circumstances, counsel likely will not raise ineffectiveness, and the defendant then has to raise the issue on post-conviction review, when he is not entitled to representation by counsel. As many have pointed out, developing the record that counsel's errors were prejudicial without the assistance of counsel can be prohibitively difficult. *See, e.g.*, Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 680–81 (2007).

75. *See Strickland*, 466 U.S. at 669–70.

76. I recognize that experience is not necessarily an adequate substitute for skill. In other words, there are many experienced but inept lawyers. The *performance* of those lawyers should be examined to assure that defendants receive a fair trial under the *Strickland* standard.

need to gain experience somewhere.[77] How can defense lawyers gain that experience? There are a number of ways that a lawyer could get the necessary experience. For instance, law students who know they want to practice criminal law could participate in a criminal justice clinic during which they could either try a case under the supervision of a practicing lawyer or assist in the trial of a case. Similarly, new public defenders could second-chair cases being handled by a more senior attorney.[78] Lawyers with no criminal experience, however, could not meet the Sixth Amendment standard for a routine felony case.[79]

Second, what should happen with criminal defendants who wish to hire an inexperienced attorney? Defendants, of course, can waive virtually all of the rights guaranteed by the Constitution, including the right to counsel itself.[80] Accordingly, so long as a defendant waives the Sixth Amendment right to be represented by counsel, the defendant could hire an inexperienced lawyer. In short, any practical objections to requiring qualified counsel are surmountable.

CONCLUSION

Because the history of the Sixth Amendment provides persuasive evidence that the Framers used the word "counsel" to encompass only competent, qualified lawyers, the Court should adopt a new framework, protecting the right to representation by a qualified or competent advocate under the Sixth Amendment, and, assuming representation by constitutionally adequate counsel, assessing the *performance* of that counsel under the Due Process Clause.

77. *See Cronic*, 466 U.S. at 665 ("Every experienced criminal defense attorney once tried his first criminal case.").

78. Some courts require lawyers to have either conducted a trial or second-chaired a trial before appearing as sole or lead counsel in a trial. *See, e.g.*, D.D.C. Cr. R. 44.1(b), *available at* http://www.dcd.uscourts.gov/dcd/sites/www.dcd.uscourts.gov.dcd/files/2010_MARCH_LOCAL_RULES_REVISED_July2011_July2013.pdf. Many states also have a similar rule for attorneys representing capital defendants.

79. As discussed above, if the criminal charges relate to an area within the lawyer's expertise, that lawyer might be qualified even if she had not previously represented a criminal defendant.

80. *See, e.g.*, Faretta v. California, 422 U.S. 806, 835 (1975) (internal quotation marks omitted) (holding that a defendant may "knowingly and intelligently" waive the right to counsel).