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## Why Strickland is the Wrong Test for Violations of the Right to Testify

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# Why *Strickland* is the Wrong Test for Violations of the Right to Testify

Daniel J. Capra\*  
Joseph Tartakovsky\*\*

## *Abstract*

*A criminal accused has a constitutional right to testify in his own defense. The right has an undisputed place alongside the most important “personal” rights, like the right to remain silent or the right to represent oneself. But in the 1990s, courts began to apply the ineffective-assistance test of Strickland v. Washington to evaluate claims by a defendant that his right to testify was abridged. In practice this nullifies the right. Moreover, the Strickland test is inapposite because it focuses on counsel and not the defendant’s right to testify. This Article proposes a new test to better secure and enforce the right, without subjecting courts to burdensome post-trial motions.*

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### *I. What Is the Constitutional Right to Testify?*

#### *A. Origins and Meaning Today*

Anyone born since the invention of television knows that the “Fifth” allows you to keep silent in the face of a prosecution.<sup>1</sup> But what about the converse right—the right, during that prosecution, to speak up, to give your side, to explain the mistakes of witnesses, to justify yourself? This is the right to testify, and like the right against compelled self-incrimination, it is a right that defendants decide whether to exercise in every criminal trial. Yet the accused’s right to choose to testify is often violated with impunity by lawyers.

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1. See U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”).

A century and a half ago, American states followed the common law in disabling criminal defendants from testifying.<sup>2</sup> The notion behind these so-called “incompetency” statutes was that the self-serving testimony of a defendant was inherently untrustworthy (if not perjurious)<sup>3</sup> and that incompetency statutes actually did the accused a favor—these laws protected the right against self-incrimination by relieving defendants of the negative inference that would be drawn if they were permitted to take the stand but refused.<sup>4</sup> Yet according to Justice Brennan in *Ferguson*

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2. See *Ferguson v. Georgia*, 365 U.S. 570, 570 (1961) (describing “the common-law rule that a person charged with a criminal offense is incompetent to testify on his own behalf at his trial”).

3. See JAMES FITZGERALD STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 202 (1863) (“[I]t is not in human nature to speak the truth under such a pressure as would be brought to bear on the prisoner, and it is not a light thing to institute a system which would almost enforce perjury on every occasion.”). For a good state case on this subject, see *State v. Wilcox*, 175 S.E. 122, 123 (N.C. 1934), in which the Supreme Court of North Carolina reversed a trial judge who instructed that “the law presumes when a man is being tried for crime that he is naturally laboring under a temptation to testify to whatever he thinks may be necessary to clear himself of the charge.” *But see* *McVeigh v. United States*, 78 U.S. 259, 267 (1870) (rejecting the rationale that a defendant should be disqualified from testifying because he has the incentive to testify falsely). The Court stated:

If assailed there, he could defend there. The liability and the right are inseparable. A different result would be blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principle of the social compact and of the right administration of justice.

*Id.*

4. See *Ferguson*, 365 U.S. at 571–76, 581–82 (describing the historical justifications for incompetency statutes). For this reason, the federal competency statute, first enacted in 1878, but provided in its present form in 1948, reads as follows:

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. *His failure to make such request shall not create any presumption against him.*

18 U.S.C. § 3481 (2006) (emphasis added); see also 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 579 (J. Chadbourn rev. 1979) (examining competency laws in the United States). *But see* *Benson v. United States*, 146 U.S. 325, 335–36 (1892) (discussing the erosion of competency laws in the United States); *United States v. Murphy*, 41 U.S. 203, 210–11 (1842) (describing exceptions to the common law incompetency rule); 3 WILLIAM BLACKSTONE, COMMENTARIES \*370 (“But as it is perfectly obvious that any witness who can throw any light upon the subject, should be allowed to state what he knows . . . ,

*v. Georgia*,<sup>5</sup> decided in 1961, experience made us wiser.<sup>6</sup> Maine acted first, in 1864, enacting a general competency act for criminal defendants;<sup>7</sup> by the end of the nineteenth century, every state but Georgia followed.<sup>8</sup> “In a vast number of instances,” the Supreme Court explained in *Wilson v. United States*,<sup>9</sup> in 1893, discussing the effects of the federal competency statute enacted fifteen years earlier, “the innocence of the defendant of the charge with which he was confronted has been established.”<sup>10</sup>

Lawyers came to believe that the “shutting out of his sworn evidence could be positively hurtful to the accused, and that innocence was in fact aided, not prejudiced, by the opportunity of the accused to testify under oath.”<sup>11</sup> The defendant, wrote the

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the stringent rules of our former law have been gradually relaxed by a series of modern statutes.”); William A. Maury, *Validity of Statutes Authorizing the Accused to Testify*, 14 AM. L. REV. 753, 754 (1880) (attacking the validity of competency statutes).

5. *Ferguson v. Georgia*, 365 U.S. 570 (1961).

6. *See id.* at 580–81 (“Experience under the American competency statutes was to change the minds of many who had opposed them. It was seen that the shutting out of his sworn evidence could be positively hurtful to the accused . . .”).

7. *See* Act of Mar. 25, 1864, ch. 280, 1864 Me. Laws 214 (codified as amended at ME. REV. STAT. tit. 15, § 1315 (2011)) (providing that defendants are competent witnesses in prosecutions for all crimes). Prior to enacting the 1864 law, Maine enacted a competency law in 1859. *See* Act of Apr. 2, 1859, ch. 104, 1859 Me. Laws 97 (providing that defendants are competent witnesses in prosecutions for certain minor crimes); *see also Ferguson*, 365 U.S. at 577 (describing Maine’s adoption of competency statutes in 1859 and 1864 and similar actions by other states).

8. *See Ferguson*, 365 U.S. at 577 n.6 (listing the years in which states adopted competency acts). Congress enacted the federal analogue in March 1878. *See* 18 U.S.C. § 3481 (2006) (discussing federal and state competency legislation).

9. *Wilson v. United States*, 149 U.S. 60 (1893).

10. *Id.* at 66; *see also Rosen v. United States*, 245 U.S. 467, 471 (1918) [T]he truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent, with the result that this principle has come to be widely, almost universally, accepted in this country and in Great Britain.

11. *Ferguson v. Georgia*, 365 U.S. 570, 580–81 (1961). The Court made a similar statement in a case decided after the common law rule was abrogated:

This rule, while affording great protection to the accused against

Court, “above all others may be in a position to meet the prosecution’s case.”<sup>12</sup> *Ferguson* invalidated a Georgia statute that limited a defendant’s presentation to unsworn statements without questioning from counsel.<sup>13</sup> The Court rested on the Assistance of Counsel Clause.<sup>14</sup> It implied, but did not recognize, a right to testify under the Constitution.<sup>15</sup>

That task was left to *Rock v. Arkansas*<sup>16</sup> in 1987. “At this point in the development of our adversary system,” wrote Justice

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unfounded accusation, in many cases deprived him from explaining circumstances tending to create conclusions of his guilt which he could readily have removed if permitted to testify. To relieve him from this embarrassment the law was passed. In mercy to him, he is by the act in question permitted upon his request to testify in his own behalf in the case. In a vast number of instances the innocence of the defendant of the charge with which he was confronted has been established.

*Wilson*, 149 U.S. at 65–66.

12. *Ferguson*, 365 U.S. at 582.

13. *See id.* at 596 (“We therefore hold that, in effectuating the provisions of § 38-415, Georgia, consistently with the Fourteenth Amendment, could not, in the context of § 38-416, deny appellant the right to have his counsel question him to elicit his statement.”).

14. *Id.*; U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.”).

15. *See id.* at 572 n.1, 596 (crafting a narrow holding). Justice Clark, however, concurring, thought this was *precisely* what the Court was doing, as a matter of logical necessity, and that it was needlessly formulaic and foolish not to acknowledge this. *See id.* at 602 (Clark, J., concurring) (“Reaching the basic issue of incompetency . . . I do not hesitate to state that in my view § 38-416 does not meet the requirements of due process and that, as an unsatisfactory remnant of an age gone by, it must fall as surely as does its palliative, § 38-415.”). In *Fowle v. United States*, the Ninth Circuit relied on Justice Clark’s concurrence to find a constitutional right, apparently because all the judges agreed that such a right existed. *See Fowle v. United States*, 410 F.2d 48, 53 (9th Cir. 1969) (“The Government says that if [the defendant] had wished to avoid all adverse inferences which might be drawn from his original silence in reliance on his constitutional rights, he should have sacrificed his *constitutional right to testify in his own defense*.” (emphasis added)).

16. *Rock v. Arkansas*, 483 U.S. 44 (1987) (“The right to testify on one’s own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that [is] essential to due process of law in a fair adversary process.” (citation omitted)). For a typical pre-*Rock* discussion of the right in a U.S. Court of Appeals, see *Sims v. Lane*, 411 F.2d 661, 664 (7th Cir. 1969), in which the Seventh Circuit stated:

In the federal courts, the privilege of an accused to testify in his own defense is merely statutory, abrogating the common law rule of incompetence . . . . No case has been brought to our attention to

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support petitioner's contention that the Fourteenth Amendment accords a defendant in a state court a federal constitutional right to testify. To the contrary, the federal rule seems to be that the exercise of this right is subject to the determination of competent trial counsel and varies with the facts of each case.

On the other hand, *United States v. Von Roeder* seemed to suggest that if a trial judge went too far in dissuading a willing defendant from testifying (say, by pointing out the dangers of cross-examination or perjury), this might violate a constitutional right or result in some other impropriety. See *United States v. Von Roeder*, 435 F.2d 1004, 1008–09 (10th Cir. 1970) (analyzing a judge's role in notifying a defendant of the possible effects of testifying at trial). *Winters v. Cook* stated that there exist certain "inherently personal fundamental right[s]" that "can be waived only by the defendant and not by his attorney," which include the "right to testify personally." *Winters v. Cook*, 489 F.2d 174, 179 (5th Cir. 1973). In *United States v. Poe*, the D.C. Circuit reversed a jury verdict, in accord with the ruling of the district court, which felt the trial was unfair because defense counsel gave legally incorrect advice about impeachment. See *United States v. Poe*, 352 F.2d 639, 640–41 (D.C. Cir. 1965) ("The trial judge found that appellant was deprived of a fair trial because he was misinformed as to the consequences of taking the stand to deny the charges against him."). But otherwise lawyers are "free to keep defendants from testifying whenever counsel see fit. Any suggestion to the contrary is chimerical." *Id.*

Courts of decades past were also in the habit of holding that if a defendant retained his choice of counsel, no error by that attorney, however grave, could constitute "a denial of due process chargeable to the state." *United States ex rel. Darcy v. Handy*, 203 F.2d 407, 425–26 (3d Cir. 1953); see also *Hudspeth v. McDonald*, 120 F.2d 962, 967–68 (10th Cir. 1941) (stating that counsel was drunk for most of trial and finding no error).

Yet, in the 1970s, a number of states held that the right to testify existed. See, e.g., *State v. Noble*, 514 P.2d 460, 461 (Ariz. 1973) ("It is well established that in criminal prosecutions an accused has the right to testify in his own behalf." (citations omitted)); *People v. Robles*, 466 P.2d 710, 716 (Cal. 1970) ("We are satisfied that the right to testify in one's own behalf is of such fundamental importance that a defendant who timely demands to take the stand contrary to the advice given by his counsel has the right to give an exposition of his defense before a jury."). The Supreme Court of Alaska, in *Hughes v. State*, stated:

[I]t is preferable that a defendant be permitted to testify if he so requests. The right to testify in one's own behalf is often of vital importance in a trial. No defendant requesting to testify should be deprived of exercising that right and conveying his version of the facts to the court or jury, regardless of competent counsel's advice to the contrary.

*Hughes v. State*, 513 P.2d 1115, 1119 (Alaska 1973). But it did not explicitly ground this in any constitution, state or federal, and found waiver of the right in any event. See *id.* at 1120 ("In the instant case, based on all of the testimony we conclude that Hughes knowingly and intelligently waived his right to testify.").

Other states held that a criminal defendant had no constitutional right to testify on his own behalf. See, e.g., *State v. Hutchinson*, 458 S.W.2d 553, 554 (Mo. 1970) (referencing *Ferguson* and stating that "the assumption that the

Blackmun, “it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense.”<sup>17</sup> The right had its “source” in three provisions.<sup>18</sup> The Due Process Clause<sup>19</sup> secures “an opportunity to be heard . . . a right to [a] day in court.”<sup>20</sup> The Compulsory Process Clause<sup>21</sup> guarantees an accused’s right to call witnesses in his favor—and the “most important witness . . . in many criminal cases is the defendant himself.”<sup>22</sup> Finally, the right to testify was seen as a “necessary corollary” of the Self-

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right to testify is a constitutional right is erroneous” and that “the assumption ignores the history of the right”).

17. *Rock*, 483 U.S. at 49. One court, a few years earlier, observed that it seemed “surprising” that the Supreme Court had not yet explicitly ruled on this question, but noted that incompetency statutes had been abrogated in every jurisdiction in the country and that “as a practical matter a defendant’s right to testify is rarely questioned.” *Alicea v. Gagnon*, 675 F.2d 913, 920 (7th Cir. 1982). *Alicea* contains a rich discussion of the development of the right and its gradual recognition by one court after another. *See generally id.*; *see also* United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 118–19 (3d Cir. 1977) (discussing the right to testify in light of the “due process requirements of the Fourteenth Amendment”).

18. *See* United States v. Bifield, 702 F.2d 342, 349 (2d Cir. 1983) (providing an intelligent discussion of the history of the right and finding the right implicit in the Due Process Clause of the Fifth Amendment and the Compulsory Process Clause of the Sixth Amendment). Judge Cardamone, for the panel, found that because the right exists but is not enumerated, the Ninth Amendment was worth invoking. *See id.* (“That this unmentioned right is a constitutional one is further fortified by the rule of construction contained in the Ninth Amendment . . .”); *see also* United States v. Looper, 419 F.2d 1405, 1406 (4th Cir. 1969) (noting the maturation from incompetency to apparent constitutional right and stating that “in a federal court, it is not less than a statutory right, and it may not be denied a defendant if, being advised, he elects to exercise it”).

19. U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”); *id.* amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .”).

20. *Rock*, 483 U.S. at 51 (quoting *In re Oliver*, 333 U.S. 257, 273 (1948) and citing *Ferguson v. Georgia*, 365 U.S. 570, 602 (1961) (Clark, J., concurring)). The standards of review under the Due Process Clause, whether the Clause appears in the Fifth or Fourteenth Amendment, are the same.

21. 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 . . .”).

22. *Rock v. Arkansas*, 483 U.S. 44, 52 (1987).



Incrimination Clause,<sup>23</sup> because every defendant is “privileged to testify in his own defense, or to refuse to do so.”<sup>24</sup>

*Rock* relied heavily on *Faretta v. California*,<sup>25</sup> the case from 1975 that established the constitutional right of self-representation.<sup>26</sup> *Faretta* read the Sixth Amendment<sup>27</sup> to secure a “personal” right to represent oneself: “It is the accused, not counsel, who must be ‘informed of the nature and cause of the accusation,’ who must be ‘confronted with the witnesses against him,’ and who must be accorded ‘compulsory process for obtaining witnesses in his favor.’”<sup>28</sup> It is the “defendant, and not his lawyer or the State, [who] will bear the personal consequences of a conviction.”<sup>29</sup> And though it may be “undeniable” that most defendants could “better defend with counsel’s guidance than by their own unskilled efforts,” wrote Justice Stewart, “his choice must be honored out of ‘that respect for the individual which is the lifeblood of the law.’”<sup>30</sup> The right to self-representation was thus grounded in personal autonomy; the Court in *Rock* emphatically recognized the right to testify in that light. *Rock* not only drew on *Faretta*, but it explicitly stated: “*Even more fundamental* to a personal defense than the right of self-representation . . . is an accused’s right to present his own version of events in his own words.”<sup>31</sup>

23. U.S. CONST. amend. V (“No person shall be . . . compelled in any criminal case to be a witness against himself . . .”).

24. *Rock*, 483 U.S. at 52–53 (quoting *Harris v. New York*, 401 U.S. 222, 225 (1971)).

25. *Faretta v. California*, 422 U.S. 806 (1975); *see also Rock*, 483 U.S. at 51–52 (discussing *Faretta*).

26. *See Faretta*, 422 U.S. at 807 (ruling that a state may not “constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense”).

27. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.”).

28. *Faretta*, 422 U.S. at 819.

29. *Id.* at 834.

30. *Id.* (quoting *Illinois v. Allen*, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)).

31. *Rock v. Arkansas*, 483 U.S. 44, 52 (1987) (emphasis added). The right was reaffirmed unanimously in *United States v. Dunnigan*. *See United States v. Dunnigan*, 507 U.S. 87, 96 (1993) (stating that the right to testify is “made

If the accused's right to testify is unquestionably a fundamental constitutional right, grounded in personal autonomy, what is the remedy for violations of it? This Article considers the virtually uniform assessment by federal courts that the denial of the right to testify is a product of faulty lawyering and as such the remedy lies in *Strickland v. Washington*<sup>32</sup> and its progeny—under which the defendant gets a retrial only if he can show that had he testified, there is a “reasonable probability” that the outcome of his trial would have been different.<sup>33</sup> This *Strickland* “prejudice” standard has been nearly impossible for defendants to meet—resulting in a constitutional right without a remedy.

### *B. The Right to Testify as Part of the Autonomy Line*

When the Supreme Court in *Rock* relied on *Faretta*, it placed the right to testify in what one might call the “free choice” line of cases.<sup>34</sup> The principle behind these holdings is that certain rights are personal to the defendant—a matter of “dignity” and “autonomy” rather than “strategy” or “tactics”—which only the defendant, not his lawyer, can waive, and then only if knowingly and voluntarily.<sup>35</sup> *Faretta* was one instance of such “[f]reedom of

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explicit by federal statute” and is “implicit in the Constitution”); *see also* *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring) (“It is well established that the defendant has the right to testify on his own behalf, a right we have found essential to our adversary system.”). One circuit called *Rock*'s holding a “dictum” and assumed without deciding that the right to testify was “fundamental.” *See* *Lema v. United States*, 987 F.2d 48, 52 n.3 (1st Cir. 1993) (listing circuit court cases recognizing the right as fundamental).

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

33. *Id.* at 694.

34. *See, e.g., United States v. Hung Thien Ly*, 646 F.3d 1307, 1313 (11th Cir. 2011)

Although often framed as a right to testify, it is more properly framed as a right to choose whether to testify. The “choice” concept reflects the competing considerations that make up this right; while the Fifth Amendment gives the accused the right to remain silent, courts have recognized that the accused also has the absolute right to break his silence and to testify.

(citations omitted).

35. *See id.* (“This right to choose is personal as well as fundamental, and the defendant must make this decision himself.”).

choice.”<sup>36</sup> So, too, is the “‘profound’ choice” about whether to stand trial or plead guilty (*Cooper v. Oklahoma*)<sup>37</sup> or the personal “choice of the petitioner” in deciding whether to appeal (*Fay v. Noia*).<sup>38</sup> Other cases in this line include *Brookhart v. Janis*<sup>39</sup> (a lawyer cannot “overrid[e] his client’s desire” to exercise his “personal” right to confront witnesses);<sup>40</sup> *McKaskle v. Wiggins*<sup>41</sup> (right to self-representation “affirm[s] the dignity and autonomy of the accused” and can be undermined by intrusive standby counsel);<sup>42</sup> *Adams v. United States*<sup>43</sup> (defendant can insist on bench trial as matter of “free choice by a self-determining individual,” which to deny is to

36. See *Faretta v. California*, 422 U.S. 806, 834 n.45 (1975) (citing the constitutional protection afforded to a defendant’s free choice to testify in a criminal proceeding). For a good illustration of how the right is grounded in autonomy and not trial result, see *Johnstone v. Kelly*, 812 F.2d 821 (2d Cir. 1987). See also *infra* notes 185–89 and accompanying text.

37. *Cooper v. Oklahoma*, 517 U.S. 348, 364 (1996) (citing *Godinez v. Moran*, 509 U.S. 389, 398 (1993)).

38. *Fay v. Noia*, 372 U.S. 391, 439–40 (1963); see also *Wainwright v. Sykes*, 433 U.S. 72, 92 (1977) (Burger, C.J., concurring) (noting that in *Fay* the “critical procedural decision—whether to take a criminal appeal—was entrusted to a convicted defendant” and that the case’s touchstone was “the exercise of volition by the defendant himself with respect to his own federal constitutional rights”); *Anders v. California*, 386 U.S. 738, 744 (1967) (stating that counsel must support the defendant’s appeal to the best of counsel’s ability).

The Supreme Court said as recently as 1983 that “[t]here is, of course, no constitutional right of appeal,” *Jones v. Barnes*, 463 U.S. 745, 751 (1983), though it is hard to imagine that if such a question arose today, in a case in which a substantial liberty or property interest was at stake, a majority of the Court would care to say so again. For an illuminating discussion of this proposition, see *Shifflett v. Virginia*, 447 F.2d 50 (4th Cir. 1971). The issue was the extent to which lawyers must explain the rights of appeal to a client in order to enable the client to make an informed decision about whether to exercise the right. See *id.* at 53–54 (“To assure that the decision to take or forego an appeal would depend only on the defendant’s own informed choice, we required in *Nelson* that he be given complete information, by his lawyer or by the court, about his right to appeal . . .”).

39. *Brookhart v. Janis*, 384 U.S. 1 (1966).

40. *Id.* at 7. The Court seemed to be relying on the defendant’s rights to cross-examine and confront witnesses against him, opportunities that a guilty plea (or “prima facie” trial—apparently an Ohio state procedure of convenience) would of course foreclose.

41. *McKaskle v. Wiggins*, 465 U.S. 168 (1984).

42. *Id.* at 176–77.

43. *Adams v. United States*, 317 U.S. 269 (1942).

“imprison a man in his privilege and call it the Constitution”);<sup>44</sup> and *United States v. Gonzalez-Lopez*<sup>45</sup> (defendant usually has a “right to counsel of choice”).<sup>46</sup> These defendant-only decisions are not among the multitude entrusted to counsel—even if the accused’s choice is inimical to his best interests in view of the bench and bar.<sup>47</sup> Thus the Tenth Circuit wrote that a lawyer “lacks authority to prevent a defendant from testifying in his own defense, even when doing so is suicidal trial strategy.”<sup>48</sup> “If a defendant insists on testifying,” said the Seventh Circuit, “however irrational that insistence might be from a tactical viewpoint, counsel must accede.”<sup>49</sup>

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44. *Id.* at 280–81; *see also* *Patton v. United States*, 281 U.S. 276, 298 (1930) (affirming a defendant’s choice to waive his right to a trial by jury composed of twelve members).

45. *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

46. *See id.* at 147 (“The right to select counsel of one’s choice, by contrast, has never been derived from the Sixth Amendment’s purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee.”). *But see infra* note 206 and accompanying text (discussing *Gonzalez-Lopez* and *Wheat*).

47. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983)

It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal, . . . [though an] indigent defendant [does not] ha[ve]] a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points.

*See also Faretta v. California*, 422 U.S. 806, 834 (1975) (“And although he may conduct his own defense ultimately to his own detriment, his choice must be honored . . .”).

48. *Cannon v. Mullin*, 383 F.3d 1152, 1171 (10th Cir. 2004); *see also United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992) (“The wisdom or unwisdom of the defendant’s choice does not diminish his right to make it.” (quoting *Wright v. Estelle*, 572 F.2d 1071, 1079 (5th Cir. 1978) (Godbold, J., dissenting))); *Ortega v. O’Leary*, 843 F.2d 258, 261 (7th Cir. 1988) (“If a defendant insists on testifying, no matter how unwise such a decision, the attorney must comply with the request.”). Such a “suicidal” strategy may have been undertaken in *People v. Robles*, where it appeared that the defendant was perfectly indifferent to the success of his defense. *See People v. Robles*, 466 P.2d 710, 716–18 (Cal. 1970) (describing how the defendant insisted on testifying in his own defense, was impeached by prior convictions, made damaging admissions, engaged in offensive outbursts, and told jurors that they were “just a bunch of fools”).

49. *United States v. Curtis*, 742 F.2d 1070, 1076 (7th Cir. 1984).

## II. Why Strickland Should Not Be Applied in Right-to-Testify Cases

### A. The Results of Applying Strickland to Right-to-Testify Claims

Allegations by a defendant that his right to testify was coercively abridged are common. The culprit is usually a lawyer who said something like, “I make all decisions concerning this case and I say you’re not going to testify.”<sup>50</sup> At other times the lawyer is alleged to have told the accused that he would call him and then rested the case before doing so.<sup>51</sup> Almost all such allegations are brought on habeas petitions under the Antiterrorism and Effective Death Penalty Act<sup>52</sup>—with its forbidding “doubly deferential” standards<sup>53</sup>—because discussions between counsel and client are usually outside the record. They occur in whispers at counsel table, in prison chambers, hallways, or lawyers’ offices.<sup>54</sup>

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50. Cannon v. Mullin, 383 F.3d 1152, 1171 (10th Cir. 2004).

51. See United States v. Tavares, 100 F.3d 995, 996–97 (D.C. Cir. 1996) (stating that defendant by all appearances planned to testify, fell ill on the day he was to do so, and was persuaded by counsel not to testify). The defendant argued that counsel might have sought a continuance. *Id.* at 997.

52. Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 18 U.S.C.).

53. See Morris v. Sec’y, Dep’t of Corr., 677 F.3d 1117, 1126 (11th Cir. 2012) (stating that “as a federal habeas court we are not applying *Strickland de novo*, but rather through the additional prism of AEDPA deference” and determining that “under this doubly deferential standard, [t]he pivotal question is whether the state court’s application of the *Strickland* standard was unreasonable” (citations omitted)). For the phrase “doubly deferential,” see Knowles v. Mirzavance, 556 U.S. 111, 123 (2009) (citing Yarborough v. Gentry, 540 U.S. 1, 5–6 (2003) (per curiam)).

54. See Massaro v. United States, 538 U.S. 500, 504–05 (2003) (“When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose.”); see also Guinan v. United States, 6 F.3d 468, 476 (7th Cir. 1993) (Easterbrook, J., concurring) (“Lawyers who raise ineffective-assistance claims on direct appeal do their clients a grave disservice, because the inevitable loss will prevent the accused from raising the same claim later, when factual development would permit accurate resolution.”). The Supreme Court in *Massaro* adopted this reasoning. See *Massaro*, 538 U.S. at 504 (“In light of the way our system has developed, in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance.”).

Federal courts are loath to entertain these claims, usually because the facts are that the defendant was advised to keep quiet, wisely heeded his lawyers, and now regrets it. But courts do look askance at instances in which a lawyer really seems to have silenced a defendant against his will. The inquiry is conducted under *Strickland v. Washington*, which states the test for whether a lawyer was constitutionally adequate under the Assistance of Counsel Clause.<sup>55</sup> Why *Strickland*? The most-cited case applying a *Strickland* analysis to deprivation of the right to testify is *United States v. Teague*,<sup>56</sup> an Eleventh Circuit case from 1992.<sup>57</sup> But that circuit (and the Fifth Circuit, from which it was

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55. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (stating that a convicted defendant must show that his counsel's performance was deficient and that this deficiency prejudiced the defendant in some way).

56. *United States v. Teague*, 953 F.2d 1525 (11th Cir. 1992) (en banc).

57. See *id.* at 1534 (“[W]e believe the appropriate vehicle for claims that the defendant’s right to testify was violated by defense counsel is a claim of ineffective assistance of counsel under *Strickland* . . .”). As it happened, the original panel that heard the case applied harmless-error review. See *United States v. Teague*, 908 F.2d 752, 757 (11th Cir. 1990), *vacated*, 932 F.2d 899 (11th Cir. 1991) (“Thus, the court concluded, because Teague’s testimony would have been largely duplicative, any error in not allowing him to testify was harmless.”). Before *Teague*, but after *Strickland*, that court reviewed such claims under *Chapman v. California* as a sort of independent constitutional violation of the right to testify, independent of any ineffectiveness claim. See *Chapman v. California*, 386 U.S. 18, 24 (1967) (holding “that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt”); see also *Nichols v. Butler*, 917 F.2d 518, 521 n.2 (11th Cir. 1990), *vacated*, 932 F.2d 900 (11th Cir. 1991) (finding that a *Strickland* analysis was unnecessary because “such conduct by defense counsel amounts to a violation of the right to testify regardless of whether it also amount to ineffectiveness of counsel”). Because this case was vacated after an en banc poll and redecided after *Teague*, *Strickland* now applied. See *Nichols v. Butler*, 953 F.2d 1550, 1552–54 (11th Cir. 1992) (en banc) (applying *Strickland*).

The earliest case we find to connect *Strickland* and the right to testify is *United States v. Curtis*, decided a few months after *Strickland*. See *United States v. Curtis*, 742 F.2d 1070, 1074–76 (7th Cir. 1984) (citing the *Strickland* presumption that a decision not to testify might be considered sound trial strategy). The first post-*Rock* case we find specifically applying *Strickland* to a right-to-testify claim is *Isom v. Lockhart*. See *Isom v. Lockhart*, 847 F.2d 484, 486 (8th Cir. 1988) (applying the two-prong *Strickland* test, which requires objectively unreasonable representation by counsel and a reasonable likelihood that the result of the proceeding would have been different but for this representation). It was a habeas case in which the court applied *Strickland* without much discussion. *Id.* The other claim involved the lawyer’s failure to dismiss the venire after three veniremen—asked by the defendant’s attorney

split) skirmished for years over how, judicially, to enforce the right to testify, reaching a high point in *Wright v. Estelle*,<sup>58</sup> a brilliant en banc battle royale in 1978, and as eloquent a discussion on the subject as can be found in the Federal Reporter.

In that case Archie Wright, on trial for murder and robbery, was told by his lawyer that if he, Wright, testified, the lawyer would withdraw; the attorney felt Wright's version did not match up with other accounts and that if the jury thought he, Wright, was lying, he would get a death sentence.<sup>59</sup> The circuit judges split into two camps and put the case strikingly, worth relating at length because they so capably capture the considerations surrounding protection of the right to testify. One group, led by Judge Thornberry, acknowledged that a defendant of course has

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whether they understood that her client had the right both to testify and to refuse to do so—said things like “I understand the law but I think if I was in it I would want to testify . . . I think I would be man enough to want to tell my side.” *Id.* at 485. This latter claim is a classic *Strickland* question; perhaps the court simply did not consider whether a different standard might apply to the former claim.

The Ninth Circuit appears to have been second: in *United States v. Hood*, it applied *Strickland* because the “right to testify certainly may implicate the sixth amendment”—in a case in which the defendant argued that bad advice dissuaded him from testifying to his advantage. *United States v. Hood*, No. 88-4046, 1989 WL 102017, at \*4 (9th Cir. Aug. 25, 1989). *Galowski v. Murphy* provides another early statement, but it appears that the petitioner also tried to assert the claim as an “independent constitutional violation,” but the claim was barred for not having been asserted before. *Galowski v. Murphy*, 891 F.2d 629, 636 n.12 (7th Cir. 1989).

The district court in *United States v. Butts*, an impassioned decision given shortly before *Rock*, rejected both parties' argument that right-to-testify claims were *Strickland* questions. See *United States v. Butts*, 630 F. Supp. 1145, 1148 (D. Me. 1986) (“The Court does not find *Strickland* applicable in this case.”). Judge Carter said this was because the attorney's conduct was “troublesome not just for its possible impact on the reliability of the verdict, i.e., for its Sixth Amendment implications,” but because of concerns for a fair trial under the Fifth Amendment and the right to meet and deny accusations against a defendant under the Sixth Amendment. *Id.* He also thought “a defendant's right to testify in a criminal proceeding against him [is] so basic to a fair trial that its infraction can never be treated as harmless error, which is in essence the inquiry required to be made by the second prong—prejudice to the defense—of *Strickland*.” *Id.*

58. *Wright v. Estelle*, 572 F.2d 1071 (5th Cir. 1978) (en banc).

59. *Wright v. Estelle*, 572 F.2d 971, 972–74 (5th Cir. 1977), *aff'd en banc*, 572 F.2d 1071 (5th Cir. 1978).

the right to reject or accept a lawyer to conduct his defense.<sup>60</sup> But once the defendant chooses to entrust his life and liberty to a person versed in the law, that delegation includes the decision as to whether the client testifies:

Trial attorneys are professional artisans working in a highly competitive arena that requires all the skills which education, training, and experience have given them. Criminal defendants are entitled to no less. A defendant has a right to necessary surgery, but he does not have the right to require the surgeon to perform an operation contrary to accepted medical practice. If, despite his counsel's advice, a defendant continues to believe that his testimony is more important than the continued services of an attorney who insists he should not take the stand, the conflict must be resolved by the court. Only in this way may the right to testify be reconciled with the right to effective assistance of counsel . . . .

While *Faretta* allows a defendant to have a fool for a client . . . , there is nothing in its logic that commands that the defendant may also have a fool for an attorney . . . . [T]he decision whether to testify is properly allocated to the defendant's attorney and not to the defendant. An attorney is not necessarily ineffective if he determines not to allow his client to testify, even though he should give great deference to a defendant's desire to testify[;] however, we are here concerned with constitutional requirements and there is no constitutional requirement that a court-appointed attorney must walk his client to the electric chair.<sup>61</sup>

Judge Godbold answered for himself and two others, relying on a personal autonomy argument:

The rationale of *Faretta v. California* and its precursors, relating to the right of the accused to defend himself, leads to the conclusion that the right to testify is a fundamental right reserved to the defendant for decision. In making the choice on whether to testify, just as the choice on whether to represent himself, the defendant elects whether to become an active participant in the proceeding that affects his life and liberty and to inject his own action, voice and personality into the process to the extent the system permits.

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60. See *Wright*, 572 F.2d at 1073 (Thornberry, J., specially concurring) (“The defendant, of course, has the authority in the first instance to accept or reject court-appointed representation.”).

61. *Id.* at 1073–74 (citation omitted).



In the narrow world of the courtroom the defendant may have faith, even if mistaken, in his own ability to persuasively tell his story to the jury. He may desire to face his accusers and the jury, state his position, and submit to examination. His interest may extend beyond content to the hope that he will have a personalized impact upon the jury or gain advantage from having taken the stand rather than to seek the shelter of the Fifth Amendment. Or, without regard to impact upon the jury, his desire to tell “his side” in a public forum may be of overriding importance to him. Indeed, in some circumstances the defendant, without regard to the risks, may wish to speak from the stand, over the head of judge and jury, to a larger audience. It is not for his attorney to muzzle him.

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Indeed, our history is replete with trials of defendants who faced the court, determined to speak before their fate was pronounced: Socrates, who condemned Athenian justice heedless of the cup of hemlock; Charles I, who challenged the jurisdiction of the Cromwellians over a divine monarch; Susan B. Anthony, who argued for the female ballot; and Sacco and Vanzetti, who revealed the flaws of their tribunal. To deny a defendant the right to tell his story from the stand dehumanizes the administration of justice. I cannot accept a decision that allows a jury to condemn to death or imprisonment a defendant who desires to speak, without ever having heard the sound of his voice.<sup>62</sup>

Fourteen years later, in 1992, the Eleventh Circuit, sitting en banc in *Teague*, revisited the question. Without any considered discussion, the court simply settled on this:

Because it is primarily the responsibility of defense counsel to advise the defendant of his right to testify and thereby to ensure that the right is protected, we believe that the appropriate vehicle for claims that the defendant’s right to testify was violated by defense counsel is a claim of ineffective assistance of counsel under *Strickland* . . . .<sup>63</sup>

No authority was cited. *Rock*, decided five years earlier, certainly never invoked the Assistance of Counsel Clause in support of the right to testify.<sup>64</sup> Nonetheless, other circuits, largely relying on

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62. *Id.* at 1077–78 (Godbold, J., dissenting).

63. *United States v. Teague*, 953 F.2d 1525, 1534 (11th Cir. 1992) (en banc).

64. *See Rock v. Arkansas*, 483 U.S. 44, 51–53 (1987) (indicating that the

*Teague*, were persuaded to adopt *Strickland* because the choice of whether to testify is usually made in consultation with the attorney.<sup>65</sup> Today every circuit uses *Strickland* to evaluate right-to-testify claims, which can range from allegations of a mere

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right to testify on one's own behalf in a criminal trial is grounded in the Constitution's Compulsory Process Clause, Due Process Clause, and Self-Incrimination Clause).

65. See *United States v. Espinoza*, 392 F. App'x 666, 668 (10th Cir. 2010) ("Because the choice whether to testify is often made in consultation with an attorney, violations of the right to testify are 'best treated' as ineffective assistance of counsel claims." (citing *Cannon v. Mullin*, 383 F.3d 1152, 1170 (10th Cir. 2004))). The panel in *United States v. Tavares* seemed to apply a sort of heightened *Strickland* test:

A more reasonable approach, and one in keeping with *Strickland's* two-part test, is to continue to assign special significance to the defendant's precluded right to testify and at the same time to inquire whether it is reasonably probable that the defendant's testimony would have changed the outcome of the trial in his favor.

*United States v. Tavares*, 100 F.3d 995, 998 (D.C. Cir. 1996).

Yet as late as 1998, the Eighth Circuit was willing to assert that, when the error is defense counsel's, "it is unclear if harmless error analysis applies to the denial of a defendant's right to testify." *Frey v. Schuetzle*, 151 F.3d 893, 898 n.3 (8th Cir. 1998); see also *United States v. Leggett*, 162 F.3d 237, 248 n.11 (3d Cir. 1998) (emphasizing that it is a matter of judicial discretion to determine whether a harmless-error analysis should be applied to actions committed by the district court). These musings have been abandoned. See *infra* note 66.

In a few published (and still cited) opinions, the Seventh Circuit applied a harmless-error test when the allegation of abridgment of the right was directed at defense counsel. In *Ortega v. O'Leary*, the panel wrote that it "has previously ruled that the *Chapman* standard applies when a petitioner has been denied the right to testify." *Ortega v. O'Leary*, 843 F.2d 258, 262 (7th Cir. 1988) (citing *Alicea v. Gagnon*, 675 F.2d 913, 925 (7th Cir. 1982) (per curiam)). Curiously, years later, in *Ward v. Sternes*, that Circuit again applied *Chapman's* harmless-error standard (as had the district court under review) and found that:

[H]ad the jury been given the opportunity to observe Ward testify while sober yet still exhibiting these signs of his mental deficiencies, it is conceivable that the jury would have given more credence to the expert psychiatric testimony and particularly Dr. Traugott's opinion that Ward's brain injury alone, regardless of his intoxication, would have rendered him incapable of conforming his actions to the law. On this close question, the inability to hear Ward testify was not harmless error.

*Ward v. Sternes*, 334 F.3d 696, 708 (7th Cir. 2003). But the discussion in *Alexander v. United States* suggested that *in most cases* the circuit applies *Strickland*. See *Alexander v. United States*, 219 F. App'x 520, 523 (7th Cir. 2007) (applying *Strickland*).

failure to adequately inform a defendant about his right, all the way to instances of genuine coercion that prevent its exercise.<sup>66</sup>

What has been the result? *Strickland* requires a petitioner (usually proceeding pro se) to prove deficient performance by the lawyer and prejudice to the client.<sup>67</sup> The first prong usually involves a dispute over what the defendant told his lawyer about his desire to testify. Far more important is the “prejudice” prong. It is here that the right is rendered a nullity. Under *Strickland*’s second prong, the petitioner must show a “reasonable probability

66. See *Owens v. United States*, 483 F.3d 48, 57–59 (1st Cir. 2007) (applying *Strickland* to a defendant’s ineffective assistance of counsel claim relating to counsel’s alleged failure to inform defendant of his right to testify at trial); *Brown v. Artuz*, 124 F.3d 73, 74 (2d Cir. 1997)

We conclude that the decision whether a defendant should testify at trial is for the defendant to make, that trial counsel’s duty of effective assistance includes the responsibility to advise the defendant concerning the exercise of this constitutional right, and that the two-part test established in *Strickland v. Washington*, should be used to assess a defendant’s claim that defense counsel rendered ineffective assistance by preventing him from testifying or at least failing to advise him concerning his right to testify.

See also *Palmer v. Hendricks*, 592 F.3d 386, 397 (3d Cir. 2010) (“[E]very authority we are aware of that has addressed the matter of counsel’s failure to advise a client of the right to testify has done so under *Strickland*’s two-prong framework.”); *Sayre v. Anderson*, 238 F.3d 631, 634 (5th Cir. 2001) (“Sayre contends only that his attorney interfered with his right to testify, not that the state trial court (or prosecutor) did so.”); *Sexton v. French*, 163 F.3d 874, 882 (4th Cir. 1998) (“[A] criminal defendant’s claim that his trial counsel was constitutionally ineffective because trial counsel failed to inform him of his right to testify or because trial counsel forced him to testify must satisfy the two-prong test established in *Strickland v. Washington* . . .”). In *United States v. Brown*, the Fifth Circuit recently held that “[t]he appropriate vehicle for such claims is a claim of ineffective assistance of counsel.” *United States v. Brown*, 217 F.3d 247, 258–59 (5th Cir. 2000) (citation omitted); see also *United States v. Hubbard*, 638 F.3d 866, 870 (8th Cir. 2011) (applying *Strickland*); *Matylinsky v. Budge*, 577 F.3d 1083, 1097 (9th Cir. 2009) (“The *Strickland* standard is applicable when a petitioner claims his attorney was ineffective by denying him his constitutional right to testify.”); *Cannon v. Mullin*, 383 F.3d 1152, 1170 (10th Cir. 2004) (“We agree [with other circuits] that Mr. Cannon’s claim is best treated as an ineffective-assistance-of-counsel claim and analyze it as such.”); *Rodriguez v. United States*, 286 F.3d 972, 983 (7th Cir. 2002) (en banc) (applying *Strickland*); *United States v. Webber*, 208 F.3d 545, 551 (6th Cir. 2000) (same); *United States v. Teague*, 953 F.2d 1525, 1534 (11th Cir. 1992) (citing *Strickland*).

67. See *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984) (“A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction or death sentence has two components.”).

that, but for counsel's unprofessional errors, the result of the proceeding would have been different."<sup>68</sup> When the claim is deprivation of the right to testify truthfully, the defendant loses almost every time. The court usually finds some or all of the following: the accused would not have been found credible;<sup>69</sup> his testimony would have been cumulative;<sup>70</sup> he would have been exposed to impeachment with prior convictions;<sup>71</sup> the evidence

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68. *Id.* at 694.

69. *See, e.g.,* *Morris v. Sec'y, Dep't of Corr.*, 677 F.3d 1117, 1130 (11th Cir. 2012) (finding that petitioner, a first-degree murderer of an elderly lady, "would not have been credible"); *Alexander v. United States*, 219 F. App'x 520, 524 (7th Cir. 2007) ("It is not reasonably likely that Alexander's testimony, given his diminished credibility as a convicted felon, would have swayed the jury's verdict in any way."); *United States v. Mullins*, 315 F.3d 449, 456 (5th Cir. 2002) ("The difficulty is that a denial by Mullins from the stand would come at a high price. It would juxtapose a police officer whose account is supported by Mullins's signed statement with a felon with a large incentive to lie.")

70. *See, e.g.,* *Morris*, 677 F.3d at 1130 (finding that the defendant "would not have been credible in reasserting his innocence and that his proposed testimony would have been cumulative," although the record was "unclear" about whether counsel told him of his right to testify); *Washington v. Kemna*, 16 F. App'x 528, 530 (8th Cir. 2001) ("Washington's testimony at trial would have merely reiterated the alibi defense already provided through the trial testimony of his mother, Patricia Washington."); *United States v. Tavares*, 100 F.3d 995, 998 (D.C. Cir. 1996) (assuming that defendant would have testified "absent his counsel's actions" but finding that his "proposed testimony would have been largely cumulative and, to the extent it was not cumulative, largely peripheral").

71. *See, e.g.,* *Dows v. Wood*, 211 F.3d 480, 487 (9th Cir. 2000)

Moreover, [attorney] Egger had very good reason for suggesting that Dows not testify. Dows had three prior convictions for robbery and assault, which, in all likelihood, would have been admitted to impeach Dows on the stand if he had testified . . . . As noted with some irony by the trial court, if Egger *had* allowed Dows to testify under this scenario, that would be definite proof he was suffering from Alzheimer's disease. Dows cannot prove deficient performance or prejudice based upon his failure to testify at trial.

*See also* *Medley v. Runnels*, 506 F.3d 857, 861–62 (9th Cir. 2007) ("Medley's lawyer recommended that Medley not testify because he would have been impeached by his prior convictions and statements he made during a lengthy interview he gave police, which apparently were inconsistent with what Medley intended to testify."); *Rodriguez v. United States*, 286 F.3d 972, 983 (7th Cir. 2002) (en banc) ("First, Rodriguez cannot show that his counsel's advice concerning the impeachment value of his prior crime was unreasonable.")

For an example of the analysis under the old, pre-*Rock* state of the law, see *Hudgins v. United States*, 340 F.2d 391, 396 (3d Cir. 1965), in which the Third Circuit stated:

Any statements made by him in his testimony at the hearing upon

against him was “overwhelming”;<sup>72</sup> or his testimony was weak and would not have helped.<sup>73</sup> Often a court simply passes over the

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the motion, had he been permitted to testify, could have been used against him by way of impeachment at the trial. We regard the refusal of his counsel, if in fact there was a refusal, to permit him to testify at the hearing on the motion as an example of good trial tactics by an attorney versed in the criminal law.

72. See, e.g., *United States v. Ailemen*, 473 F. App'x 754, 755 (9th Cir. 2012) (“[E]ven if we assume that Ailemen was prevented from testifying by his attorneys, he has failed to show that he could have overcome the overwhelming evidence against him.”); *Battle v. Sirmons*, 304 F. App'x 688, 693 (10th Cir. 2008) (“To counter the overwhelming weight of the evidence presented against him, Battle argues that his testimony would have explained away all of the state’s evidence. Even if we entertain Battle’s arguments presented in brief, which reflect the 20/20 wisdom of hindsight, we cannot find prejudice.”); *Franklin v. United States*, 227 F. App'x 856, 857 (11th Cir. 2007) (“Franklin’s proposed testimony . . . would not have been credible nor would it have refuted the overwhelming evidence of his guilt. Franklin failed to establish prejudice because there was no reasonable probability that his self-serving testimony would have convinced the jury to reject the evidence and acquit him.”); *Donato v. United States*, No. 98-2991, 208 F.3d 202, at \*1–2 (2d Cir. 2000)

Donato wrote the court a letter dated June 16, 1998 stating that “the defendant *never* informed defense counsel, that the defendant *did not wish to testify*” and that “this decision not to testify was made by counsel Cohen, and the defendant *did not* have any decision input on this matter.” In its decision, the district court was apparently unaware that Donato had sent this letter, as it found that “Donato has not answered” the court’s request for his response to Cohen’s letter. Therefore, when the district judge made a finding of fact that Cohen’s account was credible, he may have assumed that the issue was uncontested. Nonetheless, even assuming that there was a deficient performance by counsel denying Donato his right to testify, unless Donato’s potential testimony could have established a defense, he cannot demonstrate prejudice.

73. See, e.g., *United States v. Willis*, 273 F.3d 592, 599 (5th Cir. 2001) (finding that the defendant’s “ineffective assistance of counsel claim [was] without merit”). The court, considering *Strickland* deficiency, concluded without discussing the allegation that “counsel interfered with his right to testify,” that the defendant had “not convincingly argued that his testimony would have assisted him at either the pretrial hearing or at trial[,]” and that the defendant did “not even address the viability of the countervailing tactical reasons that his counsel might have had for declining to call him to the stand.” *Id.* at 598. This, in our view, is not supposed to be part of the test.

question of lawyer deficiency—as *Strickland* allows it to do<sup>74</sup>—to reach a finding of no prejudice.<sup>75</sup>

A typical case might explain that even though counsel should not have rested after defendant expressed a wish to “contribute[] something new and substantive” to his defense, the evidence of his guilt in “possessing the 8,440 doses of LSD found in the record album in his house was so strong that there is no reasonable probability that his testimony would have altered the outcome of the trial.”<sup>76</sup> Dozens of cases have sentences like: “We need not address whether Lee’s counsel was deficient for failing to call Lee to testify, because Lee cannot show that he was prejudiced under *Strickland*,”<sup>77</sup> or “[E]ven if Liriano could establish that her counsel’s conduct was deficient, she has made no showing of prejudice.”<sup>78</sup> Frequently it is left entirely mysterious what the actual allegations against the attorney were.<sup>79</sup> Was there

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74. See *Strickland v. Washington*, 466 U.S. 668, 697 (1984) (“In particular, a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.”).

75. See, e.g., *United States v. Ailemen*, 473 F. App’x 754, 756 (9th Cir. 2012) (“Further, ‘[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.’” (quoting *Strickland*, 466 U.S. at 697)); *United States v. Tavares*, 100 F.3d 995, 997 (D.C. Cir. 1996) (“Although it does not expressly concede that Werdig’s performance was inadequate, the government does not contest Tavares’s arguments on this point. The only question before us is whether Tavares was prejudiced by his counsel’s actions—specifically by Werdig’s failure to ensure that Tavares had an opportunity to testify.”).

76. *Tavares*, 100 F.3d at 999.

77. *Lee v. Culliver*, 300 F. App’x 689, 690 (11th Cir. 2008).

78. *United States v. Betancur*, 84 F. App’x 131, 135 (2d Cir. 2004). See, e.g., *Brown v. Artuz*, 124 F.3d 73, 80 (2d Cir. 1997) (“We need not remand for a finding on this point because, even if Brown’s conclusory allegation raised an issue on the performance prong of *Strickland* . . . Brown cannot satisfy the prejudice prong of the *Strickland* test.”).

79. See, e.g., *Hester v. United States*, 335 F. App’x 949, 951–52 (11th Cir. 2009) (per curiam) (containing no discussion of what happened); *Battle v. Sirmons*, 304 F. App’x 688, 693 (10th Cir. 2008) (stating “[i]f Battle were prevented from testifying” but containing no discussion of what happened). It may be that no hearing or inquiry into the matter was conducted at the district court level and that these panels simply did not have any specifics in their record.

coercion?<sup>80</sup> A threat by the lawyer to withdraw if the client testified?<sup>81</sup> An unfulfilled promise to call the defendant?<sup>82</sup>

But under *Strickland's* prejudice prong, it does not matter that the accused was left in ignorance of his rights, misled, lied to, or ignored.<sup>83</sup> It does not even matter that a defendant was coerced, threatened, cajoled, or otherwise improperly influenced into relinquishing his right.<sup>84</sup> Such acts go to the deficient-performance prong; they are irrelevant to whether the accused suffered prejudice. Thus, in *United States v. Mullins*,<sup>85</sup> a lawyer admitted that her client “repeatedly requested to testify, and that she ‘prevented’ him from doing so against his wishes.”<sup>86</sup> Yet the court found no prejudice because the defendant’s testimony “would [have] come at high price” by opening him to impeachment and because it was doubtful that a felon would be credited over an officer.<sup>87</sup> In *Gross v. Knight*,<sup>88</sup> a lawyer testified, “I’m sure I just told him it wasn’t going to happen . . . [It was] a kind of discussion I’d have with my 9-year-old about whether he’s going to clean his room.”<sup>89</sup> The court could not descry a “better

80. See, e.g., *Nichols v. Butler*, 953 F.2d 1550, 1553 (11th Cir. 1992) (“[T]o coerce his client into remaining silent by threatening to abandon him mid-trial goes beyond the bounds of proper advocacy.”).

81. See, e.g., *United States v. Scott*, 909 F.2d 488, 492 (11th Cir. 1990) (stating that defense “counsel moved to withdraw shortly after the prosecution rested its case” and that the trial court assumed that counsel “made the motion because she discovered that [the defendant] intended to commit perjury”).

82. This was the specific allegation in *United States v. Burnell*, but what actually happened between the client and his attorney was left undetermined because the court found that no prejudice was demonstrated. See *United States v. Burnell*, No. 11-8100, 2012 WL 1664124, at \*1 (10th Cir. May 14, 2012) (“Because Mr. Burnell has not made an adequate showing of prejudice, the district court has not abused its discretion in denying him an evidentiary hearing on his ineffectiveness claim concerning the right to testify.”).

83. See, e.g., *Foster v. Delo*, 39 F.3d 873, 883–84 (8th Cir. 1994) (stating that trial lawyers admitted that they could not recall whether they informed the defendant that he was permitted to testify at the penalty phase of his capital trial).

84. See, e.g., *Nichols*, 953 F.2d at 1553 (stating that the defendant’s attorney threatened to abandon him mid-trial).

85. *United States v. Mullins*, 315 F.3d 449 (5th Cir. 2002).

86. *Id.* at 455.

87. *Id.* at 456.

88. *Gross v. Knight*, 560 F.3d 668 (7th Cir. 2008).

89. *Id.* at 670.

than negligible chance his testimony [as to remorse] would have resulted in a different outcome,” largely because it would only have added to a “vast amount of [other] mitigating evidence.”<sup>90</sup>

Defendants prevail on ineffectiveness claims only in those exceedingly rare instances where the government’s case is so weak that the accused’s failure to testify is found actually to render a result unreliable.<sup>91</sup> *Nichols v. Butler*<sup>92</sup> was a “very close” robbery case in which the only evidence against the defendant was an eyewitness who glimpsed him briefly.<sup>93</sup> The court found that permitting the defendant to present his account “in his own words” would have allowed the jury to “weigh his credibility” against that of the witness.<sup>94</sup> In *Cannon v. Mullin*,<sup>95</sup> the “power of a face-to-face appeal” might have convinced a jury that what the prosecutor called murder was in fact manslaughter in self-defense.<sup>96</sup> And in *Canaan v. McBride*,<sup>97</sup> an attorney testified that it never “crossed [his] mind” to call his capital defendant during the penalty phase even though the testimony “would have been the only mitigating evidence the jury heard” and “may have

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90. *Id.* at 673.

91. *See, e.g.*, *United States v. Lore*, 26 F. Supp. 2d 729, 739–40 (D.N.J. 1998) (finding prejudice in counsel’s refusal to permit defendant to testify, reasoning that the evidence against defendant was weaker than against codefendants and that defendant could have provided a noncriminal explanation for the government’s alleged extortionate activity); *Campos v. United States*, 930 F. Supp. 787, 793–94 (E.D.N.Y. 1996) (finding prejudice in lawyer’s refusal to allow defendant to testify, noting that testimony could have made a difference because the government’s case turned almost entirely on the testimony of a DEA agent); *see also* *United States v. Walker*, 772 F.2d 1172, 1178–79 (5th Cir. 1985) (relying on the notion that the accused, with his knowledge of facts, his testimony, and his demeanor, is of “prime importance” in a trial in which the “very point” is to determine guilt); *United States v. Irvin*, 450 F.2d 968, 971 (9th Cir. 1971) (Kilkenny, J., dissenting) (“The facial expressions of a witness may convey much more to the trier of the facts than do the spoken words.”).

92. *Nichols v. Butler*, 953 F.2d 1150 (11th Cir. 1992).

93. *See id.* at 1551 (“A store employee testified that he glanced at this man for ‘not even a second.’”).

94. *Id.* at 1554.

95. *Cannon v. Mullin*, 383 F.3d 1152 (10th Cir. 2004).

96. *See id.* at 1152 (finding that live testimony from the defendant may have been more persuasive to the jury than the recorded statement by the defendant that was offered at trial).

97. *Canaan v. McBride*, 395 F.3d 376 (7th Cir. 2005).



persuaded the jury to be lenient.”<sup>98</sup> To summarize the state of the law, one might say one of two things. At best, defendants have a right with a very unpromising remedy; at worst, the right to testify does not exist unless its denial renders the trial unfair.

Defense counsel causes most of these errors. But a trial court, a statute, or a prosecutor can also infringe the right. *Rock* itself involved an Arkansas rule of evidence that excluded hypnotically refreshed testimony.<sup>99</sup> In such circumstances *Strickland* makes absolutely no sense.

If a source other than defense counsel causes a violation of the right to testify, reviewing courts apply a harmless-error standard,<sup>100</sup> or if the defendant failed to object, plain-error review.<sup>101</sup> Trial-court errors include instances where, for instance, a judge failed to correct an obvious misapprehension on the part of a pro se defendant who did not know that he had a right to testify in narrative form.<sup>102</sup> Another court erred when it failed to make inquiry after an attorney stated that his client wished to remain silent, yet the defendant interrupted, calling the lawyer a liar and insisting, “I want to take the stand.”<sup>103</sup> A court also erred when it circumscribed a defendant’s planned testimony on motive by ruling, incorrectly, that aspects of it were irrelevant.<sup>104</sup>

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98. *Id.* at 385–87.

99. *See Rock v. Arkansas*, 483 U.S. 44, 54–56 (1987) (describing the rule of evidence that affected defendant’s right to testify and providing a balancing test to be applied in cases of conflict between a statute and the right to testify).

100. *See, e.g., United States v. Leggett*, 162 F.3d 237, 248, 248 n.11 (3d Cir. 1998) (reviewing for harmlessness where the district court discouraged the defendant from testifying by advising him “if my son were on trial here, I would tell him to follow his lawyer’s advice[,]” and “[i]f I were on trial, I would follow my lawyer’s advice”).

101. *See, e.g., United States v. Lechner*, 341 F. App’x 443, 447–48 (10th Cir. 2009) (using a plain-error standard to review the appropriateness of the trial court telling a defendant who did not object at trial “your failure to testify will not have any impact on my decision making whatsoever”).

102. *See United States v. Hung Thien Ly*, 646 F.3d 1307, 1317 (11th Cir. 2011) (“By not informing Ly that he could testify in narrative form, the district court denied his right to choose whether to testify ‘knowingly and intelligently.’”).

103. *See Ortega v. O’Leary*, 843 F.2d 258, 259–60, 259 n.1 (7th Cir. 1988) (describing the defendant’s attempts to testify and the trial judge’s failure to permit the testimony).

104. *See United States v. Leo*, 941 F.2d 181, 194–95 (3d Cir. 1991) (finding that the court’s failure to provide the defendant with an “opportunity to explain

Finally, a common court error arises when a judge, concerned with perjury, discourages a defendant who indicated interest in testifying.<sup>105</sup> A United States Attorney could infringe the right by engaging in misconduct like threatening a defendant with a perjury indictment without any basis to suspect an intent to lie.<sup>106</sup> These cases show that using a *Strickland* analysis in evaluating a deprivation of the right to testify is misguided—the right denied is not the right to effective counsel, but the right to testify. And that right should have the same remedy as the denial of other constitutional rights.

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in his own words” a theory of motive inconsistent with that offered by the government “infringed upon his constitutional right to put forth a complete defense”). In *Leo*, the error did not provide the basis for a new trial because it was “harmless beyond a reasonable doubt.” *Id.* at 195. For a case in which the defendant’s testimony was found irrelevant, see *United States v. Fazio*, 487 F.3d 646, 656–57 (8th Cir. 2007).

In *United States v. Canty*, a defendant was charged with counterfeiting. *United States v. Canty*, 499 F.3d 729, 730 (7th Cir. 2007). He wished to testify that his intent was to use the bills to help the police make drug busts. *Id.* The Government argued this was in fact a public-authority defense, which under the rules required advance notice to them. *Id.* The trial court restricted Canty’s testimony on his intent. *Id.* The circuit court found that this restriction was an error because Canty had never actually claimed he was ordered to print the fake money by police. *Id.* at 732. However odd or improbable Canty’s scheme, he should have been allowed to put it before the jury. *Id.* Failure to do so was error and it was not harmless. *Id.* at 734.

105. See, e.g., *United States v. Scott*, 909 F.2d 488, 492 (11th Cir. 1990) (determining that the trial court erred in telling the defendant that he could keep his current lawyer or proceed pro se, forcing him to choose between the right to testify and the right to counsel). The court forced the defendant to make that choice after assuming that the defense lawyer’s motion to withdraw was occasioned by the concern that the defendant would commit perjury. *Id.* at 492 n.3.

106. See *United States v. Davis*, 974 F.2d 182, 185 (D.C. Cir. 1992) (describing a prosecutor’s request that the court “instruct Davis about the possibilities and penalties of a perjury charge were he to take the stand and lie”). And this, too, incidentally, is not structural error. See *United States v. Simmons*, 670 F.2d 365, 372 n.4 (D.C. Cir. 1982) (per curiam) (noting that the defendant must prove “substantial prejudice” to obtain a reversal of conviction on the grounds that the prosecutor deprived him of defense testimony by threatening a witness).

*B. The Inconsistency Between the Autonomy-Based Right to Testify and Strickland's Purpose of Ensuring "Reliability" of Trial Results*

The problem is that *Strickland's* concern is with whether a lawyer's incompetence was so egregious that the "trial cannot be relied on as having produced a just result."<sup>107</sup> By contrast, "personal" rights, like taking the stand, involve a defendant's autonomy, his day in court, the right to meet his accusers himself, the chance to participate in settling his own legal fate, and the notion (as Justice Frankfurter wrote) that the "most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."<sup>108</sup> These considerations, under this "free choice" line, hold even if a defendant's election—like the choice to proceed pro se—is an ill-advised one that makes an unreliable conviction *more* likely. Courts consider an adverse result to be fair because the accused, so long as his lawyer has reasoned with him about the perils, alone bears the consequences of his choice.<sup>109</sup> It is an irony that a right in which outcome is irrelevant is reviewed under a test that focuses on outcome.

*Strickland's* inquiry asks whether a lawyer fails his client, yet suppressing a clear constitutional right seems *ipso facto* failure.<sup>110</sup> *Strickland* requires us to "indulge a strong

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107. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see also* *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993) (explaining that the *Strickland* inquiry asks whether the "result of the proceeding was fundamentally unfair or unreliable").

108. *Green v. United States*, 365 U.S. 301, 304 (1961) (plurality opinion) (Frankfurter, J.).

109. *See* *Faretta v. California*, 422 U.S. 806, 834 (1975) ("The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction" and so his choices regarding his defense, even if "ultimately to his own detriment[,] . . . must be honored out of 'that respect for the individual which is the lifeblood of the law.'").

110. Theoretically, *Strickland* might remain appropriate in true ineffectiveness cases: say, a defendant claims counsel was deficient in failing to inform him of his right to testify. *See* *Sexton v. French*, 163 F.3d 874, 882 (4th Cir. 1998) ("Because the burden of ensuring that a criminal defendant is informed of the nature and existence of the right to testify rests upon trial counsel, the burden shouldered by trial counsel is a component of effective assistance of counsel."); *see also* *Palmer v. Hendricks*, 592 F.3d 386, 397 (3d Cir. 2010) ("[E]very authority we are aware of that has addressed the matter of counsel's failure to advise a client of the right to testify has done so under

presumption that counsel's conduct falls within the wide range of reasonable professional assistance,"<sup>111</sup> but can a lawyer make a valid *choice* to violate his client's prerogative?<sup>112</sup> *Strickland* demands that the defendant "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy,'"<sup>113</sup> yet what of pronouncements that the decision to testify is never merely a matter of strategy but *always* a matter of personal right?<sup>114</sup> Clearly there is tension

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*Strickland's* two-prong framework."). Or when a defendant claims counsel was deficient in telling him that the court will not let him testify. *See* United States v. Hubbard, 638 F.3d 866, 868–70 (8th Cir. 2011) (evaluating an ineffectiveness claim where defense counsel told defendant that the district court would not permit defendant to testify in his own defense). Or when a defendant claims counsel was deficient in failing to seek a stay to allow an ill defendant to testify upon recovery. *See* United States v. Tavares, 100 F.3d 995, 996–97 (D.C. Cir. 1996) ("Tavares argues that his counsel's failure to take appropriate measures in light of his health problems effectively deprived him of his right to testify."). Or when a defendant claims counsel was deficient in advising him to testify but neglecting to prepare him adequately or misjudging its scope. *See* United States v. Smith, 421 F. App'x 889, 898–99 (10th Cir. 2011) ("Together, Smith contends, these shortcomings contributed to her decision to give limited testimony at trial, led to the government's allegedly damaging cross-examination, and prejudiced her defense."). Or when a defendant claims counsel was deficient in failing to explain that whether to testify is ultimately the defendant's decision. *See* United States v. Herschberger, No. 90-3237, 1991 WL 136337, at \*3 (10th Cir. July 24, 1991) (stating that the defendant asserted an ineffective assistance of counsel claim "that his counsel failed to advise him he had the right to decide whether he would testify"). But our view is that, for purposes of doctrinal clarity and consistency, such allegations of error ought to be considered together with actual coercion cases and with purported violations by a court, a prosecutor, or a statute, under an independent, freestanding right-to-testify analysis.

111. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

112. In the words of Judge J. Skelly Wright, sitting as a district judge in *Poe v. United States*:

The right to testify is personal to the accused. He must make the ultimate decision on whether or not to take the stand. In this regard it is unlike other decisions, which are often called "trial decisions," where it is counsel who decides whether to cross examine a particular witness or introduce a particular document. Here it is the accused who must decide and it is the duty of counsel to present to him the relevant information on which he may make an intelligent decision.

*Poe v. United States*, 233 F. Supp. 173, 176 (D.D.C. 1964), *aff'd*, 352 F.2d 639 (D.C. Cir. 1965).

113. *Strickland*, 466 U.S. at 689 (citation omitted).

114. *See, e.g., United States v. Curtis*, 742 F.2d 1070, 1076 (7th Cir. 1984) ("We hold that a defendant's personal constitutional right to testify truthfully in his own behalf may not be waived by counsel as a matter of trial strategy.").

between concessions that a defendant may choose to testify, “however irrational that insistence might be,”<sup>115</sup> and denial of relief because that testimony “would [have] come at a high price.”<sup>116</sup> *Strickland* is concerned with ensuring an “adversarial process,” but our scenario involves relations between attorney and client, not attorney and attorney.<sup>117</sup> Finally, there is a poor fit between *Strickland*’s concern with the “justice of the finding of guilt” and the *Faretta–Rock* concern with the propriety of the *mode* by which guilt is found.<sup>118</sup> The right to choose to testify is akin to the right to choose counsel, which under *Gonzalez-Lopez* endures regardless of how effective—or ineffective—one’s preferred lawyer may prove.<sup>119</sup>

*Powell v. Alabama*,<sup>120</sup> the famous Scottsboro Boys case from 1932, in which the lawyer did not interview his nine capital defendants until hours before the trial,<sup>121</sup> is the patron saint of Assistance of Counsel Clause decisions. Justice Sutherland wrote a stirring tribute to the “guiding hand” of a defense lawyer.<sup>122</sup> But the problem in coercive right-to-testify cases—the reason it is not a *Strickland* matter—is not too little but too *much* counsel, a guiding hand that has become overmastering. When this happens, as in *Faretta*, “in a very real sense, it is not *his* defense.”<sup>123</sup> The right to self-representation, unlike the right to testify, is exercised only while unrepresented, but a client-thwarting lawyer can still become, like an unwanted lawyer, “an

115. *Id.*

116. *United States v. Mullins*, 315 F.3d 449, 456 (5th Cir. 2002).

117. *See United States v. Cronic*, 466 U.S. 648, 657 n.21 (asserting that when evaluating Sixth Amendment claims, “appropriate inquiry focuses on the adversarial process, not on the accused’s relationship with his lawyer as such”).

118. For the phrase “justice of the finding of guilt” see *United States v. Agurs*, 427 U.S. 97, 112 (1976), the case from which *Strickland* purported to take its “prejudice” test. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *see also infra* note 267.

119. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (finding that the defendant was erroneously deprived of his right to choice of counsel when the court prevented him from “being represented by the lawyer he want[ed], regardless of the quality of the representation he received”).

120. *Powell v. Alabama*, 287 U.S. 45 (1932).

121. *See id.* at 52–58 (describing the factual circumstances relating to the appointment of counsel for the defendants).

122. *See id.* at 68–69 (describing the importance of the right to counsel).

123. *Faretta v. California*, 422 U.S. 806, 821 (1975).

organ of the State interposed between an unwilling defendant and his right to defend himself personally.”<sup>124</sup>

Thus, we have a constitutional right without a remedy. If a defendant is intimidated, pressured, or tricked by his lawyer into remaining seated—a typical threat is to withdraw midtrial—the defendant is all the same denied relief unless he can show that his testimony would have had decisive, but-for evidentiary effect, even though the right is not supposed to turn on evidence but autonomy. To that extent, he is denied his full opportunity to be heard, which the Supreme Court has never hesitated to call the “fundamental requisite of due process.”<sup>125</sup>

### *C. The Ethical Consideration*

A lawyer is required to exercise most rights on the client’s behalf. A lawyer is also required to stand down if the client decides, contrary to his advice, to testify. Model Rule of Professional Conduct Rule 1.2(a)<sup>126</sup> says: “In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and *whether the client will testify*.”<sup>127</sup> To be sure, the Supreme Court reminds us that the “Constitution does not codify the

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124. *Id.* at 820.

125. *Grannis v. Ordean*, 234 U.S. 385, 395 (1914); *see also California v. Trombetta*, 467 U.S. 479, 485 (1984) (stating that the Constitution guarantees criminal defendants “a meaningful opportunity to present a complete defense”); *Jackson v. Virginia*, 443 U.S. 307, 314 (1979) (stating that it is “axiomatic” that “a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend”). This basic principle of legality sweeps well beyond the criminal context. *See Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (probation revocation); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (parole revocation); *Goldberg v. Kelly*, 397 U.S. 254, 267–68 (1970) (welfare recipient facing termination of assistance).

126. MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2012).

127. *Id.* (emphasis added). *See* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 87-353 (1987) (“If the lawyer does not offer the client’s testimony and, on inquiry by the court into whether the client has been fully advised [of his] right to testify, the client states a desire to testify . . . the lawyer may have no other choice than to disclose . . . the client’s intention to testify falsely.”); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE § 4-5.2(a) (3d ed. 1993) (listing “whether to testify in his or her own behalf” among the “decisions relating to the conduct of the case . . . ultimately for the accused”).

ABA's Model Rules,"<sup>128</sup> but, with equal sureness, it tells us that the judiciary has an "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession."<sup>129</sup> Mild reproof is often the sole consequence of a lawyer's right-to-testify violation.<sup>130</sup> Counsel must advise on exercise of the right—and the line between advice and coercion is a question of fact on which many right-to-testify cases turn.<sup>131</sup>

### *III. Is a Violation of the Right to Testify a "Structural" Error?*<sup>132</sup>

*Arizona v. Fulminante*<sup>133</sup> reaffirmed the rule that "most constitutional errors can be harmless."<sup>134</sup> The varieties of harmless error are legion,<sup>135</sup> and they even include errors that

128. *Montejo v. Louisiana*, 556 U.S. 778, 790 (2009).

129. *Wheat v. United States*, 486 U.S. 153, 160 (1988).

130. *See, e.g., Jiles v. United States*, 72 F. App'x 493, 493 (7th Cir. 2003) ("If counsel actually said this, it is inexcusable behavior that likewise has the potential to establish prejudice for purposes of *Strickland*.").

131. *See, e.g., Lema v. United States*, 987 F.2d 48, 52–53 (1st Cir. 1993) (describing the principles guiding courts in drawing the "difficult line" between "earnest counseling and over coercion").

132. In Part III we discuss four categories largely of our devising. There is probably a fifth category for judgments rendered by tribunals without jurisdiction, which is irrelevant here. *See Nguyen v. United States*, 539 U.S. 69, 71 (2003) (determining that a Ninth Circuit panel comprised of two Article III judges and one Article IV judge from the Northern Mariana Islands did not have the authority to decide the appeal); *Wingo v. Wedding*, 418 U.S. 461, 472 (1974) (concluding that the habeas corpus statute requires district courts, not magistrate judges alone, to conduct evidentiary habeas hearings); *United States v. Amer.-Foreign S.S. Corp.*, 363 U.S. 685, 685–86 (1960) (concluding that retired circuit judges were ineligible to participate in the decision of a case on rehearing en banc).

133. *Arizona v. Fulminante*, 499 U.S. 279 (1991).

134. *Id.* at 306.

135. There are probably hundreds of examples. *See, e.g., Neder v. United States*, 527 U.S. 1, 8–15 (1999) (failure to charge jury on materiality element in tax-fraud prosecution subject to harmless-error review); *Pope v. Illinois*, 481 U.S. 497, 501 (1987) (misstatement of element of offense subject to harmless-error review); *United States v. Hasting*, 461 U.S. 499, 503–05 (1983) (improper comment on defendant's silence at trial subject to harmless-error review); *Moore v. Illinois*, 434 U.S. 220, 232 (1977) (admission of identification obtained in violation of right to counsel subject to harmless-error review); *Harrington v. California*, 395 U.S. 250, 252 (1969) (admission of nontestifying codefendant's statement subject to harmless-error review).

cripple the presentation of a defense. For example, in *Crane v. Kentucky*,<sup>136</sup> a defendant sought to introduce testimony attacking the credibility of his confession, a move the judge erroneously blocked as an attempt to relitigate a suppression motion.<sup>137</sup> In *Delaware v. Van Arsdall*,<sup>138</sup> a judge improperly prevented the accused from impeaching a government witness over his alleged dealmaking with the prosecution.<sup>139</sup> These errors, the Court wrote in *Fulminante*, were subject to harmless-error analysis because they involved “trial error” that “occurred during the presentation of the case to the jury” and so could be “quantitatively assessed in the context of other evidence presented in order to determine whether its admission [was] harmless beyond a reasonable doubt.”<sup>140</sup> Under that definition of trial error, the Court in *Fulminante* used harmless-error review in evaluating the admission of a coerced confession.<sup>141</sup> By contrast, said the Court, “structural” errors occur when the “entire conduct of the trial from beginning to end is obviously affected” by the errors and so “defy analysis by ‘harmless-error’ standards.”<sup>142</sup>

The inquiry into whether an error is structural really turns on the nature of the right and the effect of the error. The main complication is that the right to testify has two natures: first, as recognition of the defendant’s dignity, and second, as a means for him to strive for an acquittal. With respect to dignity, suppression *is* the error and only reversal can remedy it. But with respect to acquittal, the denial of the right is a reversible error only if the denial diminished his chance of acquittal; if it would not have helped in the end, there is nothing for a reviewing court

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136. *Crane v. Kentucky*, 476 U.S. 683 (1986).

137. *See id.* at 690–91 (“Under these principles, the Kentucky courts erred in foreclosing petitioner’s efforts to introduce testimony about the environment in which the police secured his confession.”).

138. *Delaware v. Arsdall*, 475 U.S. 673 (1986).

139. *See id.* at 675–77 (describing the court’s failure to permit defense counsel to impeach a government witness during cross-examination).

140. *Arizona v. Fulminante*, 499 U.S. 279, 307–08 (1991).

141. *See id.* at 307–09 (analyzing precedent and determining that harmless-error review was appropriate).

142. *Id.* at 309–10.



to do. No circuit court has held that a right-to-testify error is structural,<sup>143</sup> yet some seem to consider the question open.<sup>144</sup>

### A. Structural Because Unassessable?

Errors are structural for different reasons. Probably the most common reason is the difficulty of assessing the error's effect.<sup>145</sup> In *United States v. Gonzalez-Lopez* a defendant was denied counsel of choice.<sup>146</sup> The Court found the harmless-error and *Strickland* tests inapposite because they concern "identifiable mistakes" that judges can "assess" as they bear on the "outcome."<sup>147</sup> But to assess a wrongful denial of choice of counsel, judges would need to speculate on the probable acts of the

143. See, e.g., *United States v. Tavares*, 100 F.3d 995, 997–98 (D.C. Cir. 1996) (describing the standard for reviewing defense counsel's failure to permit defendant to testify and citing cases that support the court's choice of standard).

144. See, e.g., *United States v. Flores-Martinez*, 677 F.3d 699, 712 n.8 (5th Cir. 2012) (arguing that "the right to testify is a constitutional right so basic to a fair trial that its infraction can never be treated as *harmless error*" yet stating that the Court "*need not decide this question*" (emphasis added)); see also *Barrow v. Uchtman*, 398 F.3d 597, 608 n.12 (7th Cir. 2005) (per curiam)

It is an interesting question whether defendant's forfeiture of his constitutional right to testify, standing alone, is sufficiently "prejudicial" to warrant reversal of a conviction, or whether the decision not to testify—even when based on erroneous legal advice—is not prejudicial unless it actually affects the outcome of the trial. Seventh Circuit precedent seems to support the latter view that defendants who allege they waived their right to testify still must show that this waiver was prejudicial, i.e., that the failure to testify affected the outcome of the trial.

145. We cite some better-known cases below, but there are others. In *Stirone v. United States*, a judge in a Hobbs Act case permitted a defendant to be tried on a charge not made in the indictment. *Stirone v. United States*, 361 U.S. 212, 214 (1960). The Court stated that this error could never be harmless because "we cannot know whether the grand jury would have included [the added charge] in its indictment," and yet "this might have been the basis upon which the trial jury convicted petitioner." *Id.* at 219. In *Ballard v. United States*, violation of a statutory scheme resulted in an all-male jury panel. *Ballard v. United States*, 329 U.S. 187, 193 (1946). The Court considered the "subtle interplay of influence[s]" that women have on men, and men on women, to be "among the imponderables," and reversed without any examination of prejudice. *Id.* at 193, 195–96.

146. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) (discussing the trial court's limitations on defendant's choice of counsel).

147. *Id.* at 150–51.

rejected counsel—from his relations with prosecutors to cross-examination questions to courtroom style.<sup>148</sup> In *Holloway v. Arkansas*,<sup>149</sup> the Court found that unconstitutional multiple representation was not subject to harmless-error analysis because “to assess the impact of a conflict of interests on the attorney’s options, tactics, and decisions in plea negotiations would be virtually impossible.”<sup>150</sup> In *Waller v. Georgia*,<sup>151</sup> the Court held that the violation of the public-trial guarantee was not reviewable for harmless error<sup>152</sup> because the “benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance.”<sup>153</sup> In *Vasquez v. Hillery*,<sup>154</sup> the Court held that when black citizens are “systemically excluded” from grand-jury service, the error is not “amenable” to harmless-error review because the “effect of the violation cannot be ascertained.”<sup>155</sup> In *Price v. Georgia*,<sup>156</sup> a state court reversed a manslaughter conviction because of an erroneous jury instruction,<sup>157</sup> but the Court prohibited retrial on the original murder charge because it could not “determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence.”<sup>158</sup> In *Gray v. Mississippi*,<sup>159</sup> the Court rejected the argument that an improper for-cause exclusion of a prospective juror reluctant to impose the death penalty could be harmless, even when a prosecutor would otherwise have exercised a peremptory challenge, for “we cannot know whether

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148. *Id.*

149. *Holloway v. Arkansas*, 435 U.S. 475 (1978).

150. *Id.* at 491.

151. *Waller v. Georgia*, 467 U.S. 39 (1984).

152. *Id.* at 49.

153. *Id.* at 49 n.9.

154. *Vasquez v. Hillery*, 474 U.S. 254 (1986).

155. *Id.* at 263–64; *see also* *Batson v. Kentucky*, 476 U.S. 79, 86–87 (1986) (reviewing the effects of racial discrimination in jury selection not only on the accused but also on society, the public’s impression of the court’s competence, and the excluded juror).

156. *Price v. Georgia*, 398 U.S. 323 (1970).

157. *Id.* at 324.

158. *Id.* at 331.

159. *Gray v. Mississippi*, 481 U.S. 648 (1987).

in fact he would have had this peremptory challenge left to use.”<sup>160</sup> And in *Sullivan v. Louisiana*,<sup>161</sup> the Court found that an erroneous instruction on reasonable doubt could never be harmless because the consequences were “necessarily unquantifiable and indeterminable.”<sup>162</sup>

Does the unassessability rationale apply in the right-to-testify context?<sup>163</sup> Courts do identify the “special significance” that a defendant’s testimony can have, considering the “power of a face-to-face appeal”<sup>164</sup> and “inherent significance” of his word.<sup>165</sup> The dissenters in *Foster v. Delo*,<sup>166</sup> for instance, felt that the

160. *Id.* at 664–65. *See Witherspoon v. Illinois*, 391 U.S. 510, 522 (holding that a death sentence “cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction”).

161. *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

162. *Id.* at 281–82.

163. Other mainstays of due process jurisprudence certainly partake of this unassessability rationale but are better discussed under different subheadings below. *See, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel in criminal cases); *Tumey v. Ohio*, 273 U.S. 510 (1927) (biased judge).

164. *See, e.g.*, *Cannon v. Mullin*, 383 F.3d 1152, 1172 (10th Cir. 2004) (“We are also cognizant of the power of a face-to-face appeal . . . . Mr. Cannon’s testimony, and his demeanor while testifying, could have special significance to the jury on this matter.”). In addition, a defendant’s testimony allows the jury to assess the defendant’s physiognomy and demeanor. *See Riggins v. Nevada*, 504 U.S. 127, 137–38 (1992) (reversing a conviction after the accused had been forcibly medicated with antipsychotics during trial—in part because medication could have “effects” on his “outward appearance” that “cannot be shown from a trial transcript”). In *Sell v. United States*, the Court noted that involuntary medications can “diminish the ability to express emotions” at trial, which can “undermine” its fairness. *Sell v. United States*, 539 U.S. 166, 185–86 (2003). There are also cases teaching that elements of appearance in the form of clothing—like, presumably, elements of appearance in facial expressions—can have consequences not capturable by a transcript. *See, e.g.*, *Estelle v. Williams*, 425 U.S. 501, 504–05 (1976) (forced wearing of prison clothing); *Illinois v. Allen*, 397 U.S. 337, 344 (1970) (binding and gagging accused during trial).

165. *See, e.g.*, *Nichols v. Butler*, 953 F.2d 1550, 1553 (11th Cir. 1992) (“The testimony of a criminal defendant at his own trial is unique and inherently significant.”); *United States v. Walker*, 772 F.2d 1172, 1178–79 (5th Cir. 1985) (stating that the accused, with his knowledge of facts, his testimony, and his demeanor, is of “prime importance” at trial); *United States v. Irvin*, 450 F.2d 968, 971 (9th Cir. 1971) (Kilkenny, J., dissenting) (“The facial expressions of a witness may convey much more to the trier of the facts than do the spoken words.”).

166. *Foster v. Delo*, 39 F.3d 873 (8th Cir. 1994).

accused's testimony could have been decisive against a prosecutor who "dehumanized" the defendant by labeling him a "that"—as in "that (indicating) is no man."<sup>167</sup> There is a sense in which the force of ungiven testimony is immeasurable.<sup>168</sup> It goes beyond the *substance* of his testimony, but rather is a matter of a willingness to speak directly to those judging you, to refuse to hide behind the Fifth Amendment, to put on display any emotion that testifying arouses, whether a tremble in the voice of one falsely accused or the manufactured confidence of one seeking to lie his way out of guilt.

The elusive effect of all this is hardly captured by words on a page. This sort of evidence is of a quality different from other types that a defendant might present. Testimony from the individual at the heart of events is uncommonly probative. Confessions—another form of defendant testimony—may be the "most probative and damaging evidence that can be admitted against him."<sup>169</sup> They "come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct" and have such a "profound impact on the jury"

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167. *Id.* at 885–86 (Bright, J., dissenting).

168. See *Wright v. Estelle*, 572 F.2d 1071, 1081 (5th Cir. 1978) (Godbold, J., dissenting)

[T]he right to testify resembles other rights recognized as requiring automatic reversal because it is impossible, and perhaps improper, to attempt to judge the effect that the defendant's appearance on the stand would have had on the jury . . . . Judges can, with a reasonable degree of assurance, identify and sort out merely trivial or cumulative evidence and form a reasoned judgment on possible impact upon the jury of what it erroneously heard or failed to hear. There is a degree of speculation, but the risk is acceptable. Where the error is in keeping the defendant from the stand the judge can consider the content of what the defendant might have said the same as for a nonparty witness. But he cannot weigh the possible impact upon the jury of factors such as the defendant's willingness to mount the stand rather than avail himself of the shelter of the Fifth Amendment, his candor and courtesy (or lack of them), his persuasiveness, his respect for court processes. These are elusive and subjective factors, even among persons who might perceive and hear the defendant, but more significantly, they are matters neither communicated to an appellate judge nor susceptible of communication to him. Appellate attempts to appraise impact upon the jury of such unknown and unknowable matters is purely speculative.

169. *Bruton v. United States*, 391 U.S. 123, 139–40 (1968) (White, J., dissenting).

that we “may justifiably doubt its ability to put them out of mind even if told to do so.”<sup>170</sup> If a defendant’s testimony can doom him in compelled-confession cases, why might not it *save* him in right-to-testify cases?

On the other hand, the unadmitted testimony can almost always be described later in hearings and affidavits (e.g., “I would have said this, to establish that”) and at that point it can be weighed alongside the rest of the record.<sup>171</sup> If *Fulminante* holds that the erroneous admission of a defendant’s testimonial statement can be harmless,<sup>172</sup> why should the erroneous *exclusion* of testimony require reversal? Compelled testimony, too, is a matter of the gravest dignity, volition, and fairness. *Fulminante* suggests that, if the criterion is assessability of the error’s effect, the denial of the right to testify is a trial error.<sup>173</sup> The accused in

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170. *Id.*

171. But this is not permitted in all circumstances. In *Luce v. United States*, the Court held that to preserve a claim of improper impeachment with a prior conviction under Fed. R. Evid. 609(a), a defendant must testify—otherwise a court cannot assess harmlessness. *Luce v. United States*, 469 U.S. 38, 43 n.5 (1984). Thus, a defendant could not use an offer of proof on appeal as a way to allow an evaluation of harmlessness.

172. See *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (“When reviewing the erroneous admission of an involuntary confession, the appellate court, as it does with the admission of other forms of improperly admitted evidence, simply reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt.”).

173. One could argue that *Gonzalez-Lopez* supports the proposition that right-to-testify errors are structural. Under its rule, the dissent observed, a “defendant who is erroneously required to go to trial with a second-choice attorney is automatically entitled to a new trial even if this attorney performed brilliantly.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 160 (2006) (Alito, J., dissenting). The majority required the stringent remedy because of the unassessability of what might have been, see *id.* at 150 (majority opinion) (“We have little trouble concluding that erroneous deprivation of the right to counsel of choice . . . unquestionably qualifies as ‘structural error. . . .’ It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings.”), but why does it even matter that a defendant gets his counsel of choice? It seems linked to autonomy. Certainly Justice Scalia made clear it was not merely about a fair trial. See *id.* at 146 (“In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous.”). Nonetheless, because the Court did not invoke that rationale, and in fact labeled it a different “criterion” for finding structural error, *id.* at 149 n.4, our reliance is hesitant.

the right-to-testify context, unlike a *Faretta* defendant,<sup>174</sup> does not get an entirely different proceeding as a result of the error, but rather a trial that is simply missing a piece of evidence—an important piece, but one that can be ascertained post-trial. *Gonzalez-Lopez* explained that we cannot know what the lawyer-who-might-have-been would have done at trial;<sup>175</sup> similarly, we cannot know how a *Faretta* defendant might have acquitted himself. But where the defendant is prohibited from testifying, no alternate universe of possibility has been cut off. And this, under this particular line of structural-error precedent, seems to make all the difference.

### *B. Structural Because Risk of Prejudice Too Great?*

A second rationale for structural error, especially in prejudicial-publicity cases,<sup>176</sup> appears when there is “such a probability that prejudice will result that it is deemed inherently lacking in due process.”<sup>177</sup> The concern is that a pervasive, insinuating press is likely (even if undetectably) to erode juror objectivity.<sup>178</sup> Or, in *Tumey v. Ohio*,<sup>179</sup> the Court invalidated a procedure whereby a judge, the village mayor, received fees and

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174. See *Faretta v. California*, 422 U.S. 806, 835–36 (1975) (vacating the judgment and remanding *Faretta*’s case for new proceedings after *Faretta* was forced to accept appointed counsel despite requests to represent himself).

175. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (describing the Court’s inability to determine how a different lawyer would have handled a case and the impact those decisions might have had on the outcome of the proceedings).

176. See generally *Estes v. Texas*, 381 U.S. 532 (1965) (concluding that the defendant was deprived of due process by the televising of his criminal trial); *Irwin v. Dowd*, 366 U.S. 717 (1961) (finding that defendant was denied right to an impartial jury due to extensive media coverage of the case in months prior to the trial); see also *Sheppard v. Maxwell*, 384 U.S. 333, 353–58 (1966) (describing the courtroom as a “carnival atmosphere” and the press’ impact on jurors who became “celebrities,” subject to months of skewed press coverage urging death penalty).

177. *Estes*, 381 U.S. at 542–43.

178. See *id.* at 545 (noting that it is “highly probable” that invasive press coverage “will have a direct bearing on [a juror’s] vote as to guilt or innocence” due to the juror feeling “the pressures of knowing that friends and neighbors have their eyes upon them”).

179. *Tumey v. Ohio*, 273 U.S. 510 (1927).

costs upon convictions but not acquittals;<sup>180</sup> this would “offer a possible temptation to the average man as a judge to forget the burden of proof.”<sup>181</sup> But the impartiality concerns that justify structural-error analysis in these cases do not relate to the autonomy concerns underlying the right to testify.

### C. Structural Because Harm at Trial Irrelevant?

A third rationale is the “irrelevance of harmlessness.”<sup>182</sup> This is the reason why *Faretta* errors are structural. In *McKaskle v. Wiggins*,<sup>183</sup> the Supreme Court said: “Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to ‘harmless error’ analysis. The right is either respected or denied; its deprivation cannot be harmless.”<sup>184</sup> In *Johnstone v. Kelly*,<sup>185</sup> defendant Johnstone wanted to represent himself, yet the trial court appointed counsel.<sup>186</sup> This ruling was reversed.<sup>187</sup> On retrial, the judge told Johnstone he had to go pro se—as he had demanded.<sup>188</sup> But the circuit court rejected the argument that Johnstone could not make a fresh election this time around: the trial court’s error was that it “denied him the *choice* whether to have counsel or proceed pro se. It is that *choice* that must be accorded at a retrial.”<sup>189</sup>

If *Rock v. Arkansas* declared the right to testify “[e]ven more fundamental to a personal defense” than the right of self-representation,<sup>190</sup> would not the right to testify, logically, be in

180. *Id.* at 520.

181. *Id.* at 532.

182. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148–49, 149 n.4. (2006).

183. *McKaskle v. Wiggins*, 465 U.S. 168 (1984).

184. *Id.* at 177 n.8.

185. *Johnstone v. Kelly*, 808 F.2d. 214 (2d Cir. 1986).

186. *Id.* at 215–16.

187. *Id.* at 218.

188. *See* *Johnstone v. Kelly*, 812 F.2d 821, 821 (2d Cir. 1987) (discussing the State’s argument that it could “satisfy its obligation to [the defendant] by affording him a retrial at which he would be *required* to represent himself” (emphasis added)).

189. *Id.* at 822 (emphasis added).

190. *Rock v. Arkansas*, 483 U.S. 44, 52 (1987).

the structural class? Judge Godbold made the argument in his dissent in *Wright v. Estelle*: “[w]hen personal rights are involved, the harmless error rule does not apply because we are not concerned with the ‘ultimate consequences’ of trial, but with preventing the individual from being overcome by the criminal process.”<sup>191</sup> Is this right?<sup>192</sup> If a defendant was silenced, but would have testified only on some entirely peripheral point, must this *require* retrial? In one sense, the error would not “affect” his “substantial rights,” which obligates courts to ignore it.<sup>193</sup> On the other hand, if the right is simply to be able to choose to testify truthfully, no matter how significant the testimony might be as a piece of evidence, a violation eliminates the right. The answer hinges on what you believe to be the particular harm being reviewed for harmlessness: if the wrong is the denial of choice, error is never harmless; if the wrong is impairing a defense as it affects a jury’s verdict, error here could very well be harmless.

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191. *Wright v. Estelle*, 572 F.2d 1071, 1081 (5th Cir. 1978) (Godbold, J., dissenting) (explaining that the harmless-error rule is inapplicable to double-jeopardy analysis (citing *Price v. Georgia*, 398 U.S. 323, 331 (1970))). Judge Reinhardt made the argument in his dissent in *United States v. Martinez*. See generally *United States v. Martinez*, 883 F.2d 750 (9th Cir. 1989) (Reinhardt, J., dissenting), *vacated*, 928 F.2d 1470 (9th Cir. 1991). He argued: (1) because the *Chapman* inquiry “involves delicate judgments about fact specific situations, errors that have an indeterminate impact upon the appellate record cannot be harmless” and (2) “harmless error analysis, designed to insure correct outcomes, is essentially irrelevant to a panoply of constitutional rights that protect individual dignity.” *Id.* at 770 n.23. Many a petitioner has echoed this argument; all have been met with rejection. See, e.g., *Skeens v. Haskins*, 4 F. App’x 236, 238 (6th Cir. 2001) (“Skeens’s argument that his championed error was ‘structural error’ is without merit. Most errors do not automatically render a trial unfair and thus, can be harmless.” (citing *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991))).

192. The Supreme Court reiterated in 2006 that “[o]nly in rare cases” should an error be deemed “structural, and thus requir[ing] automatic reversal.” *Washington v. Recuenco*, 548 U.S. 212, 218 (2006). A good example of structural error occurred in *Gomez v. United States*: a magistrate judge, exceeding his statutory power, picked a jury in a felony trial without meaningful district court review; the Court said there would be no harmless-error analysis. *Gomez v. United States*, 490 U.S. 858, 876 (1989).

193. See 28 U.S.C. § 2111 (2006) (“On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.”); FED. R. CRIM. P. 52(a) (defining harmless error as “[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded”).



*D. Structural Because Procedurally Intolerable?*

Sometimes the Court refuses to consider harmlessness because the right is “fundamental and essential to a fair trial.”<sup>194</sup> These include the rights to counsel in criminal cases (*Gideon v. Wainwright*);<sup>195</sup> to trial in serious criminal cases (*Duncan v. Louisiana*);<sup>196</sup> and to have appointed counsel prosecute certain meritorious appeals (*Anders v. California*).<sup>197</sup> These holdings invoke some of the rationales already described, but the thrust is that in such cases the problem is not merely a reliable conviction but “fair procedure”<sup>198</sup> and preventing an individual from simply being hustled through the system. It is not just an evidentiary matter or a concern about just outcomes but a problem with *means*.<sup>199</sup> It is no rhetorical excess to say that we adhere to forms of procedure, for their own sake, almost religiously, because those procedures work to minimize discretion and safeguard justice and because that is just how we do things in this country.

The rationale of procedural impermissibility may apply here in that a silenced defendant has had a right withdrawn from him—regardless of whether he faced overwhelming evidence or wished to say things that would have angered jurors and provoked a more severe sentence. Like a man who is forced to plead guilty, he is wronged in a way independent of concerns about accuracy of result. He is wronged like a convict who is denied a right to allocute, though he could hardly have swayed a judge. Or like a man who sought jury trial but got a bench trial, though clearly he would have been convicted under either fact-

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194. *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963).

195. *See generally* *Gideon v. Wainwright*, 372 U.S. 335 (1963).

196. *See generally* *Duncan v. Louisiana*, 391 U.S. 145 (1968).

197. *See generally* *Anders v. California*, 386 U.S. 738 (1967).

198. *See id.* at 741 (“We have concluded that California’s action does not comport with fair procedure and lacks that equality that is required by the Fourteenth Amendment.”).

199. *See* *Blackburn v. Alabama*, 361 U.S. 199, 206–07 (1960) (explaining that the accused’s guilt or innocence is not the only consideration in a proceeding and noting that “important human values are sacrificed” when the government is permitted to use unfair procedures to secure a conviction); *see also* *Spano v. New York*, 360 U.S. 315, 320–21 (1959) (noting that “in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves”).

finder. These are simply choices a man facing the State has. On this theory, the question that most federal courts ask when a defendant claims his right to testify was abridged—Did it matter in the end?—is the wrong one. The proper question is: Was this an invalid proceeding? Is gagging a man at this dramatic crossroad in his life very different from trying him in absentia?

It comes down to how one reads this sentence from *Fulminante*:

[T]he harmless error doctrine is essential to preserve the “principle that the central purpose of a criminal trial is to decide the factual question of the defendant’s guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.”<sup>200</sup>

So are we talking here about the factual question of guilt? Or underlying fairness? Or both? Or autonomy? We know trial fairness is not the sum of things. In *Lafler v. Cooper*,<sup>201</sup> the Supreme Court said that when pleas are mishandled by defense counsel, the issue was not the “fairness or reliability of the trial but the fairness and regularity of the processes that preceded it.”<sup>202</sup> Even if the trial reaches an accurate result, there remains a sense that a wrong was done which requires its own remedy. This is why, under *Hamilton v. Alabama*,<sup>203</sup> we “do not stop to determine whether prejudice resulted”<sup>204</sup> to a defendant left to face arraignment without a lawyer—even if it can be shown that the lack of counsel had no effect whatsoever on the trial.<sup>205</sup> In *Gonzalez-Lopez*, the Court similarly declared that the “right to

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200. *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)).

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

202. *Id.* at 1388.

203. *Hamilton v. Alabama*, 368 U.S. 52 (1961).

204. *Id.* at 55.

205. *See id.* (“When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted. . . . [T]he degree of prejudice can never be known. Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently.”).

select counsel of one's choice" has "never been derived from the Sixth Amendment's purpose of ensuring a fair trial."<sup>206</sup>

This is a difficult question. On the one hand, there is doubtless precedent to support the notion that the right to testify truthfully, bound up with the notion of not treating a man as a voiceless object to be disposed of by lawyers, demands reversal to remedy error.<sup>207</sup> It is a question of process, not evidentiary weight.<sup>208</sup> At the same time, other precedent suggests that this right, despite its uncontested importance, is still at bottom a trial

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206. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006). There is something of a tension, however, with the choice rationale and *Wheat v. United States*, 486 U.S. 153 (1988). In *Wheat*, Chief Justice Rehnquist (who dissented in *Faretta*) wrote that the right to counsel exists to ensure that a man does not get railroaded by the State. *See Wheat*, 486 U.S. at 158–59 (asserting that the right to counsel exists to ensure that criminal defendants receive a fair trial and noting that "an unaided layman may have little skill in arguing the law or in coping with an intricate procedural system"). Once that guarantee is enforced, the defendant has some latitude in choice, but a fair trial is always the main thing. *Id.* A bigger problem is that *Wheat* rejects the argument that a man should have his lawyer of choice and that if his lawyer has a conflict of interest, it is simply the client's choice to waive. *See id.* at 164 ("The District Court must recognize a presumption in favor of petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict."). Chief Justice Rehnquist said that courts have an independent interest in ethical standards and in trials with the appearance of integrity. *See id.* at 160 ("Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them."). Perhaps this represents a shift away from autonomy, but in any event our situation is still nearer to *Faretta* than *Wheat*. *Faretta*, like the right to testify, concerns what a man whose liberty is at stake may do for himself. *Wheat* involves what one is allowed to have another man do on one's behalf. Perhaps *Gonzalez-Lopez* shifted us back toward choice. Justice Scalia, speaking of *Wheat*, wrote: "It is one thing to conclude that the right to counsel of choice may be limited by the need for fair trial, but quite another to say that the right does not exist unless its denial renders the trial unfair." *Gonzalez-Lopez*, 548 U.S. at 147 n.3. Besides, if courts have an interest in ethical standards, one worthy way to uphold these standards would be to properly remedy the unethical misconduct of defense lawyers who prevent their clients from testifying.

207. *See, e.g., Wright v. Estelle*, 572 F.2d 1071, 1081 (5th Cir. 1978) (en banc) (Godbold, J., dissenting) (stating that "the right to testify resembles other rights recognized as requiring automatic reversal").

208. *See id.* at 1075 (stating the belief "that the federal constitution now requires state and federal courts to allow a defendant to testify" and that "[m]ost often the right is treated as part of due process").

right.<sup>209</sup> It allows an accused to proffer evidence to attempt to exonerate himself. A chance at trial victory is why the common law disability was lifted. It is why defendants speak. It is why they complain about denials of the right. And this right can only be exercised at trial. If testimony cannot under any circumstances have secured a defendant an acquittal, a new trial would be futile.

But we reason as follows: the right to testify derives in part from the Fifth Amendment. It mirrors the right against compelled self-incrimination; so said the Court in *Rock* when it called the right to testify the “necessary corollary” of the right to remain silent.<sup>210</sup> And there seems no logical reason to protect the right against forced speech more than the right against forced silence: compulsion to testify to your detriment is just as bad as compulsion against testifying to your benefit.<sup>211</sup> Yet *Fulminante* commands that a Fifth Amendment violation, even one involving

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209. See, e.g., *United States v. Hung Thien Ly*, 646 F.3d 1307, 1313 (11th Cir. 2011) (characterizing the right to testify as a “fundamental trial right[]”).

210. *Rock v. Arkansas*, 483 U.S. 44, 52–53 (1987).

211. Of course, the exercise of one right waives the other. If anything, it seems safer to presume that the right to silence is the default preference. See *Harvey v. Shillinger*, 76 F.3d 1528, 1535 (10th Cir. 1996) (“A defendant’s choice to exercise his right to allocution, like the choice to exercise the right to testify, is entirely his own . . . . Once a defendant chooses to testify . . . he waives his privilege against compelled self-incrimination.”); *United States v. Pennycooke*, 65 F.3d 9, 11 (3d Cir. 1995) (noting that “[e]xercise of either the right to testify or the right not to testify necessarily would waive the other right” and cautioning that a court’s advice regarding the right to testify could inappropriately influence a defendant to waive his or her right to remain silent).

Another interesting problem is how a pro se defendant testifies. See generally *United States v. Nivica*, 887 F.2d 1110 (1st Cir. 1989). In *Nivica*, the examination began and ended thus:

MR. WELLINGTON: The question is: Does Mark Pedley Wellington, a/k/a Jack Williams, have anything to hide?

The answer is No.

[PROSECUTOR]: Objection.

THE COURT: Sustained. Please strike the answer. Please wait until an objection is made, if any is made, before you answer.

MR. WELLINGTON: Well, I guess I can’t ask myself any more questions then.

THE COURT: Thank you. You are excused.

*Id.* at 1120.

actual coercion, does not mean automatic reversal.<sup>212</sup> A violation of the right to testify, even one involving suppression, likewise should not bring on instant reversal.<sup>213</sup> Both errors may involve egregious trappings on fundamental rights, but both errors occur within a larger record that allows a court to reconstruct the probable result had no mistakes been made. The right to testify emanates from the Compulsory Process Clause<sup>214</sup>: a defendant may almost always call witnesses, including himself.<sup>215</sup> *Washington v. Texas*<sup>216</sup> declared that the “right to present the defendant’s version of the facts” is a “fundamental element of due process.”<sup>217</sup> But like with the Fifth Amendment, errors under this Clause have not been declared, without more, to be structural.<sup>218</sup>

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212. See *Arizona v. Fulminante*, 499 U.S. 279, 295–302 (applying harmless-error analysis to a coerced confession).

213. Really the only lingering question is whether *Fulminante* would control if the right against compelled self-incrimination was flouted flagrantly enough in court to require a finding of mistrial. The Court in *Brecht v. Abrahamson* observed that certain “deliberate and especially egregious” errors could destroy the integrity of proceedings even if the error was normally of the “trial type.” *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993). If so, might the mirror-image analogue be a total suppression of the right to testify? It is interesting to recall that *Chapman v. California* said that “there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.” *Chapman v. California*, 386 U.S. 18, 23 (1967). Among these rights, the Court cites the defendant’s right, under *Payne v. Arkansas*, to not have coerced confessions produced against him. See *id.* at 25–26 (stating that a prosecutor commenting on a defendant’s failure to testify “can no more be considered harmless than the introduction against a defendant of a coerced confession”); *Payne v. Arkansas*, 356 U.S. 560, 568 (1958) (reversing a judgment because the court admitted a coerced confession into evidence). But *Payne* ceased being the law on the day *Fulminante* was announced. See *Arizona v. Fulminante*, 499 U.S. at 288 (stating that the decision “abandons” the Court’s previous rulings in cases such as *Payne*).

214. 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 . . .”).

215. *Id.*

216. *Washington v. Texas*, 388 U.S. 14 (1967).

217. *Id.* at 18.

218. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 (1987)

*Ritchie* is entitled to have the CYS file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial. If it does, he must be given a new trial. If the records maintained by CYS contain no such information, or if the nondisclosure was harmless beyond a reasonable doubt, the lower court will be free to reinstate the prior conviction.

Our conclusion is the only practical one. If right-to-testify errors are declared to be structural, courts will never find them, especially when the error can be asserted in most cases in which the defendant did not testify. It makes sense *not* to call it structural error and instead to seek other ways to invigorate the right.

#### *IV. The Proper Test: Harmless Error Under Chapman/Kotteakos*

If structural error and *Strickland* are not proper standards for assessing abridgements of the right to testify, that leaves us with the doctrine of harmless error.<sup>219</sup> The standard, on direct review, is set out in *Chapman v. California*<sup>220</sup>: “before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”<sup>221</sup> In collateral attacks, courts apply the supposedly more

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Compulsory Process errors are not structural, but they are also almost never harmless. See *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006) (holding that the South Carolina rule limiting the defendant’s evidence of third-party guilt to facts that are inconsistent with his own guilt violates the Compulsory Process Clause); *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973) (holding that a state “voucher” rule violates due process).

The right to testify, as noted above, also finds a source in the Due Process Clause, but that Clause comprehends too many rights in too many circumstances to make any informative generalization about structural error.

219. We realize that, generally, under the Federal Rules of Criminal Procedure, a failure to object to a supposed constitutional error entitles the complainant only to plain error review, where he has the burden. See FED. R. CRIM. P. 52(b) (“A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”). But the nature of the denial of the right to testify is such that, in the instances most concerning to us, the defending attorney would have to object to himself. It would also be unfair to require the defendant to object (where? how?) to his counsel’s effort to silence him. In any event plain-error review is more appropriate than *Strickland* review (same burdens, but no presumptions; and it does not turn on the wrong clause). In order to make our point we will leave this particular question—plain error or harmless error—aside.

220. *Chapman v. California*, 386 U.S. 18 (1967).

221. *Id.* at 24. *Chapman* also involved defendant testimony. *Id.* In that case, a prosecutor commented on petitioner’s *failure* to testify. *Id.* at 19. This was the very concern that prompted the common-law ban on an accused’s testimony, which *Rock v. Arkansas* finally did away with. See *Rock v. Arkansas*, 483 U.S. 44, 62 (1987) (rejecting Arkansas’s limitation on the defendant’s right to testify on his own behalf). *Chapman* speaks in terms of affecting the “result of the

error-forgiving standard of *Kotteakos v. United States*<sup>222</sup>: error requires reversal only if it had a “substantial and injurious effect or influence in determining the jury’s verdict.”<sup>223</sup> The principle behind all harmless-error tests—that courts will not bother with futile exercises—is expressed in 28 U.S.C. § 2111,<sup>224</sup> which directs courts to review for legal errors “without regard” to those that do not affect the parties’ “substantial rights.”<sup>225</sup> Consider how dramatically different this is from *Strickland*’s prejudice test, where the petitioner must establish “a reasonable probability that, *but for* counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>226</sup>

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trial,” *Chapman*, 386 U.S. at 22, but the standard today applies to pretrial proceedings, post-trial proceedings, plea negotiations, etc.

An amusing historical note: the lawyer who prevailed in *Chapman* was Mr. Morris Lavine of Los Angeles, the self-proclaimed “attorney for the damned.” See Cecilia Rasmussen, *Cathedral’s Site a Legal Battleground*, L.A. TIMES, Dec. 2, 1996, [http://articles.latimes.com/1996-12-02/local/me-4912\\_1\\_legal-battle-ground](http://articles.latimes.com/1996-12-02/local/me-4912_1_legal-battle-ground) (last visited Oct. 7, 2012) (on file with the Washington and Lee Law Review). He represented mobster Mickey Cohen, Teamster Jimmy Hoffa, and the kidnapers of Frank Sinatra, Jr. See *id.* (listing Lavine’s infamous clients). In 1932, he was himself convicted for extortion, served ten months in jail, received a full pardon, and again became a sought-after lawyer. See *id.* (discussing Lavine’s jail time and his reinstatement as a lawyer); see also David Rosenzweig, *POW Camp Atrocities Led to Treason Trial*, L.A. TIMES, Sept. 20, 2002, <http://articles.latimes.com/2002/sep/20/local/me-onthelaw20> (last visited Oct. 7, 2012) (elaborating on Lavine’s representation of traitor Tomoyo Kawakita) (on file with the Washington and Lee Law Review).

222. *Kotteakos v. United States*, 328 U.S. 750 (1946).

223. *Id.* at 776. The application of this standard to collateral attack was the work of *Brecht v. Abrahamson*. See *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993) (“The *Kotteakos* standard is thus better tailored to the nature and purpose of collateral review.”); see also *Fry v. Pliler*, 551 U.S. 112, 116 (2007) (favoring the *Kotteakos* standard for collateral review). In *Brecht*, Justice Stevens, whose concurrence provided the fifth vote, wrote that although the *Kotteakos* standard was “less stringent” than *Chapman*, “[g]iven the critical importance of the faculty of judgment in administering either standard . . . that difference is less significant than it might seem.” *Brecht*, 507 U.S. at 643 (Stevens, J., concurring).

224. 28 U.S.C. § 2111 (2006).

225. *Id.* See FED. R. CRIM. P. 52(a) (“Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”).

226. *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (emphasis added).

*A. Harmless Error Versus Strickland Prejudice?*

But aren't harmless error and *Strickland* prejudice essentially the same inquiry? Aren't both concerned with the question: Did it matter in the end? Only superficially. In *Strickland* the burden is on the defendant;<sup>227</sup> in *Chapman* and *Kotteakos* it is on the government.<sup>228</sup> *Strickland* imposes a "strong presumption of reliability" about the result;<sup>229</sup> the harmless-error statute expresses a "congressional preference for determining 'harmless error' without the use of presumptions."<sup>230</sup> *Strickland* tells us to presume in favor of attorney competence;<sup>231</sup> harmless error, again, is freighted with no such presumptions.<sup>232</sup> *Strickland* looks for a "reasonable probability" that the result was affected by the error;<sup>233</sup> harmless error asks whether error was harmless "beyond a reasonable doubt"<sup>234</sup> or caused a "substantial and injurious effect."<sup>235</sup> *Strickland's* thrust is to require a court to be quite sure, before reversing, that the verdict was attributable

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227. See *id.* at 696 (stating that the defendant has the burden of proving prejudice in a claim of ineffective counsel).

228. See *Chapman v. California*, 386 U.S. 18, 24 (1967)

Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.

See also *Kotteakos v. United States*, 328 U.S. 750, 771–72 (1946) (finding that the government did not meet its burden because it did not adequately justify the errors as harmless).

229. *Strickland*, 466 U.S. at 696.

230. *Shinseki v. Sanders*, 556 U.S. 396, 407–08 (2009). This does not apply in collateral attacks, where there are presumptions of various sorts. See 28 U.S.C. § 2254(e)(1) (2006) (stating that factual determinations should be presumed correct).

231. See *Strickland*, 466 U.S. at 690 (“[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”).

232. See *Kotteakos*, 328 U.S. at 765 (rejecting the use of presumptions in determining prejudicial effects of error).

233. *Strickland v. Washington*, 466 U.S. 668, 695 (1984).

234. *Chapman v. California*, 386 U.S. 18, 24 (1967).

235. *Kotteakos v. United States*, 328 U.S. 750, 776 (1946).



to counsel's error;<sup>236</sup> *Chapman's* thrust is to require a court to be quite sure, before affirming, that it was "surely *unattributable* to the error."<sup>237</sup> *Kotteakos*, meanwhile, tells a reviewing judge, when error is present in the record, to set aside the verdict unless he or she "is sure that the error did not influence the jury, or had but very slight effect."<sup>238</sup>

Both standards, to be sure, are rarely met. But the harmless-error test at least has the virtue of giving the defendant a shot, unburdened by irrelevant presumptions. The difference is borne out in the success rates. A 2007 study considered federal circuit habeas cases between 2003 and 2006 in which a state court found error but declared it harmless;<sup>239</sup> the circuits, on average, disagreed in 23.5% of cases.<sup>240</sup> By contrast, a study that same year found that less than 1% of *Strickland* challenges result in habeas relief.<sup>241</sup> This is the difference between asking a court to say that a mistake was made (what trial is free of them?) and

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236. See *Strickland*, 466 U.S. at 687 (requiring the defendant to show that "counsel's errors were so serious as to deprive the defendant of a fair trial").

237. See *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasis added) (discussing *Chapman*).

238. *Kotteakos v. United States*, 328 U.S. 750, 764 (1946).

239. See Jeffrey S. Jacobi, Note, *Mostly Harmless: An Analysis of Post-AEDPA Federal Habeas Corpus Review of State Harmless Error Determinations*, 105 MICH. L. REV. 805, 809–12 (2007) (discussing results from a survey of habeas corpus cases from January 2003 through June 2006).

240. *Id.* at 809. Similarly, a study coauthored by Judge Posner and William Landes considers the 963 federal appellate criminal cases (apparently direct appeals) decided between 1996 and 1998 in which the majority decided whether an error was "harmless." William M. Landes & Richard Posner, *Harmless Error 1* (Univ. Chi. Law Sch. John M. Olin Law & Econ., Working Paper No. 101 (2d Series), 2000), available at [http://www.law.uchicago.edu/files/files/101.WML\\_.Harmless.pdf](http://www.law.uchicago.edu/files/files/101.WML_.Harmless.pdf). In 19% of the cases, defendants had part of their sentence or conviction reversed, remanded, or vacated. *Id.* at 21.

241. Nancy J. King & Joseph L. Hoffman, *Envisioning Post-Conviction Review for the Twenty-First Century*, 78 MISS. L.J. 433, 440 (2008). Another study considering federal cases in 1990 and 1992 found that of 584 ineffective-assistance claims, the petition was "granted" in less than 1%. VICTOR E. FLANGO, NAT'L CTR. FOR STATE CTS., HABEAS CORPUS IN STATE AND FEDERAL COURTS 62 tbl. 17 (1994). A third study examined more than 2,500 California state and federal appellate decisions in which an ineffective-assistance claim was raised. Laurence A. Benner, *The Presumption of Guilt: Systematic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 323 (2009). It found only 104 decisions in which both deficiency and prejudice were found, a success rate of 4%. *Id.* at 323–24.

asking a court to declare an officer of the bar incompetent (rarely true, one hopes).<sup>242</sup> Professor Nancy J. King, Assistant Reporter to the Advisory Committee for the Federal Rules of Criminal Procedure and a coauthor of the latter study, writes that success under *Strickland* remains “essentially hypothetical” in noncapital cases.<sup>243</sup>

Courts are ill disposed toward ineffective-assistance petitions because they are the “inevitable” claim.<sup>244</sup> Worse yet, they are unlimited in scope: they can be alleged against everything from egregious acts like pleading a man guilty against his will<sup>245</sup> to (let us imagine) a simple Homeric nod over one possible objection that *could* have been made at some point during a ten-week trial. *Strickland* claims also evade the general prohibition on raising new arguments or presenting new evidence. A decade after *Strickland*, the Tenth Circuit, sitting en banc, described ineffectiveness claims as “the perfect tactical ‘open sesame’ to force re-reviews of close cases,” which exact a great toll, though

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242. See *United States v. Gaya*, 647 F.3d 634, 638–39 (7th Cir. 2011)

The defendant who has a lawyer, even an incompetent one, must to establish a violation of his constitutional right to effective assistance of counsel prove that he was prejudiced by the lawyer’s incompetence . . . and that’s a lot harder to do than opposing a prosecutor’s claim of harmless error, for the prosecutor must prove the harmlessness of a constitutional error—and prove it beyond a reasonable doubt.

(citations omitted).

243. King & Hoffman, *supra* note 241, at 438.

244. The term is Chief Judge Easterbrook’s. See *United States v. Ramsey*, 785 F.2d 184,193 (7th Cir. 1986) (“We are left with the inevitable claims of ineffective assistance of counsel.”); see also *Wallace v. Davis*, 362 F.3d 914, 919 (7th Cir. 2004) (“Thus we arrive at what seems to be the inevitable argument in capital cases: that counsel at sentencing was ineffective.”); *Palermo v. United States*, No. 98-2890, 1999 WL 417867, at \*1 (7th Cir. June 17, 1999) (stating that the motion included “the inevitable staple of § 2255 litigation—a claim that his prior lawyer was ineffective”). The best figures show that in U.S. district courts ineffective-assistance claims are raised in 81% of capital cases and 50.4% of noncapital cases. NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 64 tbl.15 (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>. This is consistent with the figures from 1990 and 1992. See FLANGO, *supra* note 241, at 45, 59 tbl.16.

245. See *United States v. Pellerito*, 701 F. Supp. 279, 281 (D.P.R. 1988) (claiming ineffective assistance of counsel because counsel allegedly encouraged the defendant to plead guilty against his will).

to little end, on courts, prosecutors, and defense lawyers alike.<sup>246</sup>

In one case, the two standards, harmless error and *Strickland*, were actually considered side-by-side to review the same acts.<sup>247</sup> In *United States v. Herschberger*,<sup>248</sup> decided before the Tenth Circuit adopted *Strickland* for right-to-testify claims, the defendant alleged that he told his attorney that he wanted to testify but “counsel said *he* would decide.”<sup>249</sup> The defendant made both a right-to-testify claim on grounds that this right was suppressed and a *Strickland* claim for counsel’s failure to advise him that it was the defendant’s decision.<sup>250</sup> The court assumed that the first claim was amenable to harmless-error analysis;<sup>251</sup> the other claim was under *Strickland*.<sup>252</sup> The panel remanded for a hearing on the first claim but not the second!<sup>253</sup>

Last year the Eleventh Circuit, apostle of *Strickland* in right-to-testify cases, was forced to revisit application of the harmless-error standard (as opposed to *Strickland*) because there *was* no assistance of counsel: the defendant acted *pro se*.

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246. *United States v. Galloway*, 56 F.3d 1239, 1242 n.2 (10th Cir. 1995) (en banc).

247. *See United States v. Herschberger*, No. 90-3237, 1991 WL 136337, at \*3 (10th Cir. Jul. 24, 1991) (evaluating the defendant’s claim of ineffective counsel).

248. *Id.*

249. *Id.* at \*2.

250. *See id.* at \*1, \*3 (describing the defendant’s claims).

251. *See id.* at \*2 (determining that the district court should have held an evidentiary hearing to assess whether the defendant’s right to testify was violated).

252. *See id.* at \*3 (using the *Strickland* test to evaluate the defendant’s claim that his counsel’s failure to advise him of his right to testify amounted to ineffective assistance of counsel).

253. *See id.* at \*4 (“Therefore, the district court did not abuse its discretion in failing to grant defendant a hearing on his claim for ineffective assistance of counsel. In the evidentiary hearing on remand, the district court need only consider whether defendant’s right to testify was violated.”). Petitioners still occasionally make this claim. *See, e.g., Franklin v. United States*, 227 F. App’x 856, 860 (11th Cir. 2007) (“Franklin makes a number of arguments on appeal, including that the question is not whether his testimony would have altered the final outcome, rather it is whether he was denied the right to testify. Franklin, however, must establish deficient performance and prejudice to obtain relief in this § 2255 motion.”).

In *United States v. Hung Thien Ly*,<sup>254</sup> the court recalled the Fifth Circuit's application of harmless error in the great case of *Wright v. Estelle*,<sup>255</sup> noted that it since applied the ineffectiveness framework in *Teague*, and concluded that the issue "will be resolved in another case."<sup>256</sup>

A 2012 case in the Fifth Circuit illustrates our proposition about the decisive significance of the standard of review. In *United States v. Wines*,<sup>257</sup> a man received a 35-year sentence for drug dealing.<sup>258</sup> The Government had one witness, another dealer, who testified under a plea; the defense had one real witness, Wines's mother.<sup>259</sup> Wines never testified.<sup>260</sup> In a postconviction hearing, Wines claimed he told his lawyer that he wanted a "chance to fight for [his] life"<sup>261</sup> by testifying; his attorney recalled that they had decided that Wines would not testify because of prior convictions.<sup>262</sup>

A dissenting Judge Higginbotham was sure that *Strickland* prejudice was established.<sup>263</sup> "This is no easy

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254. *United States v. Hung Thien Ly*, 646 F.3d 1307 (11th Cir. 2011).

255. *Wright v. Estelle*, 549 F.2d 971 (5th Cir. 1977), *aff'd*, 572 F.2d 1071 (5th Cir. 1978) (en banc). All the same, the fractures over the right and the standard of review for errors were clear. The en banc decision said it "adheres to the panel opinion as published," *Wright*, 572 F.2d at 1072, yet five judges, concurring, thought it a "disservice" to assume the existence of the right, and then declare a denial of it to be harmless error. *Id.* (concurring opinion). Three judges dissented on grounds that infringement of the right was structural error. *See id.* at 1080 (dissenting opinion) (arguing that harmless error should not be applied in this case). In *Hung Thien Ly*, Judge Tjoflat (by some accounts the longest serving active federal judge) counted six of fourteen judges who seemed to agree with harmless-error review. *Hung Thien Ly*, 646 F.3d at 1318 n.8. He himself was among the three dissenters some thirty-three years earlier! *Id.*; *Wright*, 572 F.2d at 1074 (dissenting opinion) (listing Judge Tjoflat as a dissenter).

256. *Hung Thien Ly*, 646 F.3d at 1318 n.8.

257. *United States v. Wines*, 691 F.3d 599 (5th Cir. 2012).

258. *Id.* at 601.

259. *See id.* at 600–01 (describing the witnesses' testimony).

260. *See id.* at 601 ("The defense attorney did not call Wines to testify.").

261. *Id.* at 602 (alteration in original).

262. *See id.* at 603 (discussing defense counsel's assertion "that if Wines had been called to testify, the government would have quickly asked him about his prior conviction of a drug-related charge").

263. *See id.* at 606 (Higginbotham, J., dissenting) ("I am persuaded that counsel's failure to call Wines was not an objectively reasonable strategic decision and that Wines was prejudiced.").

case,”<sup>264</sup> he wrote. Judges Jolly and Southwick, meanwhile, emphasized *Strickland*’s “heavy burden” and wrote that “as far as we can determine, no defendant in any court in the United States has been able to prove *Strickland* prejudice on the basis of his counsel advising him not to testify in his own defense at trial.”<sup>265</sup>

The point is that the case was close enough to require a tense, forty-page published opinion from a divided panel. Would review under a harmlessness standard have produced a different result? The judges would have considered the effect of the attorney’s deficiency in failing to call the defendant (they agreed on that much) without speaking of a “heavy” burden—so heavy it has never been satisfied. Nor would the majority have referred repeatedly to the “presumption” of reasonable, strategic action by the lawyer.<sup>266</sup> Losing under *Strickland* has a momentum of its own.

It is perhaps a final irony that when the *Strickland* Court chose to rely on a “materiality” standard (as with *Brady* violations) instead of a harmless-error standard,<sup>267</sup> it did so out of a belief that the materiality standard was actually easier for

264. *Id.* at 620.

265. *Id.* at 606 (majority opinion).

266. *See, e.g., id.* at 603 (discussing the magistrate judge’s finding “that Wines had not overcome the strong presumption that his counsel’s decision was the result of sound trial strategy”).

267. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984) (“[T]he appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution . . . and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness . . .” (citing *United States v. Agurs*, 427 U.S. 97, 104 (1976); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872–74 (1982))). *United States v. Valenzuela-Bernal* did not apply harmless error or constitutional standards of review. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 871 (1982) (“We thus conclude that the respondent can establish no Sixth Amendment violation without making some plausible explanation of the assistance he would have received from the testimony of the deported witnesses.”). *United States v. Agurs* explicitly avoided reliance on the harmless-error standard:

[S]ince we have rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel, we cannot consistently treat every nondisclosure as though it were error. It necessarily follows that the judge should not order a new trial every time he is unable to characterize a nondisclosure as harmless under the customary harmless-error standard.

*United States v. Agurs*, 427 U.S. 97, 111–12 (1976).

defendants to meet.<sup>268</sup> But despite this solicitude for the fate of defendants, the importation of that test into the area of denial of the right to testify has resulted in a right without a remedy.

One might argue that shifting from *Strickland* to harmless error will lose the *competence* prong of review for effective assistance of counsel. But this is not a problem because, as stated above, it is almost *never* within a lawyer's authority to prevent the defendant from exercising his personal right to testify.<sup>269</sup>

#### V. An Independent "Right to Testify," a Proposed Test, and Other Considerations

##### A. A Suggested Rule for Testing Claims and Ordering Hearings

We should simply speak of an independent "right to testify," an undisputed guarantee "implicit" in the Due Process, Self-Incrimination, and Compulsory Process Clauses. It bears a kinship to *Faretta* and the autonomy cases, but mostly it is an application of the foremost right of all: the opportunity to be heard.<sup>270</sup> Usually the accused speaks through his lawyer, but when a lawyer actively prevents a determined defendant from testifying, has that defendant really been heard? Claims about abridgement of the right to testify deserve a freestanding inquiry, decoupled from *Strickland*. Courts already use the harmless-error standard when a statute, a judge, or a prosecutor is to blame.<sup>271</sup> Our argument is to use this standard with defense errors, too.

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268. See *Strickland*, 466 U.S. at 697 (comparing the burden on the defendant imposed by the materiality standard to that of other tests).

269. We say "almost" because there are scenarios that could prove exceptions to the rule. Suppose a man is on trial while under medication for mental illness and one day is given the wrong pills. If in a schizophrenic state he demands to take the stand, the lawyer might properly reject his request and later claim that the defendant was not acting voluntarily or was incompetent to make the decision.

270. See *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876) ("A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.").

271. See *supra* notes 99–106 and accompanying text (discussing cases in which a statute, a court, or a prosecutor caused error). And *Rock*'s balancing test applies in cases of conflict between a statute and the right. See *Rock v. Arkansas*, 483 U.S. 44, 54–56 (1987) (balancing the interest served by a state's

The rule might read:

A defendant has a right at trial to testify truthfully in his own defense, contrary to advice of counsel, no matter the evidentiary or strategic detriment, if he timely and clearly announces his desire to do so to his attorney. A petitioner is entitled to a hearing as to the abridgment of this right if he makes a strong showing, based on specific allegations, that his attorney deprived him of this right.<sup>272</sup>

In collateral attack it is dangerously easy for a disgruntled convict to allege that he got bum advice;<sup>273</sup> or that he was pressured into abandoning his chance to testify;<sup>274</sup> or that some medical condition kept him off the stand;<sup>275</sup> or that he should have been asked to waive on the record, etc.<sup>276</sup> Before a time-

evidentiary rule with the limitation imposed on the defendant's constitutional right to testify).

272. We use the term "at trial" here, but one might also include other occasions, like crucial pre-trial proceedings.

273. *See, e.g.*, *United States v. Hood*, No. 88-4046, 1989 WL 102017, at \*1 (9th Cir. Aug. 25, 1989) (stating that the defendant claimed his attorney "provided ineffective assistance by giving [the defendant] inaccurate information").

274. *See, e.g.*, *Nichols v. Butler*, 953 F.2d 1550, 1552 (11th Cir. 1992) (describing how the defendant's attorney pressured the defendant into not testifying by threatening to withdraw mid-trial).

275. *See, e.g.*, *United States v. Pondelick*, No. 11-30057, 2012 WL 907488, at \*1 (9th Cir. Mar. 19, 2012) (noting that the defendant claimed that an abscessed tooth and infection kept him off the stand, even though he had stated earlier after "lengthy colloquy" that he did not wish to testify).

276. *See, e.g.*, *United States v. Aldea*, 450 F. App'x 151, 152 (3d Cir. 2011) ("Aldea admitted on cross-examination, '[b]asically, at the end, yeah, it was my decision [not to testify] . . ."); *Lott v. Attorney General of Florida*, 594 F.3d 1296, 1302-03 (11th Cir. 2010) (stating that the defendant replied "Yes, ma'am" when the court asked whether it was "a joint choice . . . that [he] would not testify in the trial"); *United States v. Bailey*, 245 F. App'x 768, 770-71 (10th Cir. 2007) (rejecting a claim of ineffective assistance because petitioner's affidavit was "ambiguous," and counsel submitted a "detailed" account advising Mr. Bailey to keep silent and listing the "numerous reasons for not wanting to testify," like dangers on cross-examination). Further, despite several opportunities, Mr. Bailey "never once suggested to the court that he wished to testify." *Id.* at 771; *see also* *Winfield v. Roper*, 460 F.3d 1026, 1035 (8th Cir. 2006) ("Winfield's claim that he did not waive his right to testify was fully explored at the evidentiary hearing in the post-conviction proceedings, and the state circuit court found that penalty counsel's testimony was credible, unlike that of Winfield, Kessler, and Bates."); *Gonzales v. Elo*, 233 F.3d 348, 357 (6th Cir. 2000) ("Indeed, as the magistrate noted, Petitioner did not raise this claim until nearly six years after his conviction, and after his appeal as of right was

consuming probe into uncertain credibility and faded (but self-serving) memory is permitted—sometimes years after the events in question—a defendant must be required to offer a detailed, who-said-what account of how his right was denied.<sup>277</sup> In rare circumstances the district court might require an affidavit from the lawyer.<sup>278</sup> If a persuasive showing is made, an evidentiary hearing could find facts and assess the probable effect of the ungiven testimony. Although a court sometimes may violate the right, violations by counsel pose the special problem of unreviewability, since his or her acts are almost always off the record. Unlike other “personal” rights—to plead guilty, to defend pro se, to appeal, to waive jury trial—the right to testify is usually waived behind closed doors, without any assurance that the client understands his rights beyond what his lawyer tells him.

Then a district court would need to make a preliminary inquiry under a harmless-error standard into whether it would have mattered. This would turn on the strength of the Government’s evidence, the likely significance to jurors of a defendant’s appearance on the stand, the centrality (or not) of the defendant’s ungiven testimony, the probable harms of cross-

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rejected[.] . . . let alone voice any such concern at trial.”); *El-Tabech v. Hopkins*, 997 F.2d 386, 388 (8th Cir. 1993) (“Although El-Tabech asserts that he raised his hand several times at trial and was admonished by the judge to address the court only through his attorneys, our review of the trial transcript has uncovered no reference to these events.”).

277. See *Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir. 1991) (stating that “particularity” is necessary to give defendant’s claim sufficient credibility to warrant further judicial investment); *Siciliano v. Vose*, 834 F.2d 29, 31 (1st Cir. 1987) (finding that no hearing was required over a claim that the defendant was forbidden to testify because no “specific” and “credible” allegations of compulsion by counsel were provided in the record).

278. For instance, in *Chang v. United States*, the court found that the defendant’s affidavit claiming his right to testify was not explained to him, although “generic,” could possibly have merited a hearing. *Chang v. United States*, 250 F.3d 79, 86 (2d Cir. 2001). But because the district court supplemented the record with a “detailed affidavit from trial counsel credibly describing the circumstances concerning appellant’s failure to testify,” it was justified in dismissing the complaint without a hearing. *Id.* at 85. But *Jiles v. United States* considered whether a defendant should be obliged to get an affidavit from his lawyer. *Jiles v. United States*, 72 F. App’x 493, 494 (7th Cir. 2003). The circuit held that a defendant’s “specific affidavit does not need corroboration from the very person accused of wrongdoing.” *Id.* (citing *Taylor v. United States*, 287 F.3d 658 (7th Cir. 2002)).



examination and impeachment, and the jury's presumptive view of the defendant's credibility.<sup>279</sup> If there was an erroneous abridgement of the right, and it might have mattered, a record now exists for district and circuit courts to consider alongside prior proceedings.

### B. The Waiver Question

The right-to-testify waiver jurisprudence is well-settled. All circuits agree that defendants need not waive on the record and that a court is not obliged to explain the right to the defendant,<sup>280</sup>

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279. In *Ortega v. O'Leary*, the panel felt that *Van Arsdall*, a Confrontation Clause case,

sets the framework for determining whether an error is harmless beyond a reasonable doubt under *Chapman*: “[The] factors [to consider] include the importance of the witness’ testimony to the . . . case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points . . . and of course, the overall strength of the . . . case.

*Ortega v. O'Leary*, 843 F.2d 258, 262 (7th Cir. 1998) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

280. See *Arredondo v. Huibregtse*, 542 F.3d 1155, 1165 (7th Cir. 2008) (“[T]he Supreme Court of the United States never has held that a trial court must engage in a personal colloquy with a defendant to determine whether he wishes to testify or that a waiver of the right to testify must occur formally on the record.”); see also *Berkovitz v. Minnesota*, 505 F.3d 827, 828 (8th Cir. 2007) (declining to adopt a rule requiring all defendants who do not testify to waive the right on the record); *United States v. Stover*, 474 F.3d 904, 908 (6th Cir. 2007) (stating that defendant’s waiver of his right to testify does not require a colloquy with the court); *United States v. Glenn*, 389 F.3d 283, 287 (1st Cir. 2004) (affirming that the trial court is not constitutionally required to advise the client of his right to testify); *United States v. Manjarrez*, 258 F.3d 618, 623 (7th Cir. 2001) (“[W]e have repeatedly held that the Constitution does not require a trial court to question a defendant *sua sponte* in order to ensure that his decision not to testify was undertaken knowingly and intelligently . . . .”); *United States v. Brown*, 217 F.3d 247, 258 (5th Cir. 2000) (agreeing with the majority of courts that say a “district court generally has no duty to explain to the defendant that he or she has a right to testify or to verify that the defendant who is not testifying has waived the right voluntarily”); *United States v. Richardson*, 195 F.3d 192, 197–98 (4th Cir. 1999) (stating that a trial court generally has no duty to inform a defendant of his right to testify); *United States v. Leggett*, 162 F.3d 237, 246 (3d Cir. 1998) (“[A] trial court not only has no duty to make an inquiry but, as a general rule, *should not* inquire as to the defendant’s waiver of the right to testify.”); *United States v. Van De Walker*, 141 F.3d 1451, 1452 (11th Cir. 1998) (affirming that the appellate court is not

unless perhaps if he is a pro se defendant.<sup>281</sup> This is because while a judge must inquire of the defendant before taking a guilty plea or allowing him to waive jury trial or forgo assistance of counsel,<sup>282</sup> there is too great a risk in this context of impeding his lawyer's strategy, interfering with the client-counsel relationship, leading the defendant to believe that testifying is being suggested, or tempting him to waive the right *not* to testify.<sup>283</sup> A defendant may not know whether he wishes to testify

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required to inquire into defendant's waiver of the right to testify); *Brown v. Artuz*, 124 F.3d 73, 79 (2d Cir. 1997) (placing "no general obligation on the trial court to inform a defendant of the right to testify and ascertain whether the defendant wishes to waive that right"); *United States v. Ortiz*, 82 F.3d 1066, 1071 (D.C. Cir. 1996) (concluding that the trial court does not have a *sua sponte* duty to inquire whether the defendant has waived his right to testify); *United States v. Joelson*, 7 F.3d 174, 177 (9th Cir. 1993) (finding that the trial court has no duty to advise a defendant of his right to testify or to obtain an on-the-record waiver); *United States v. Janoe*, 720 F.2d 1156, 1161 (10th Cir. 1983) ("[T]here is no constitutional or statutory mandate that a trial court inquire further into a defendant's decision not to testify . . .").

But some state courts, because of the "fundamental and personal nature of the right," have held that such a colloquy *is* necessary. *Brown v. Artuz*, 124 F.3d 73, 78 (2d Cir. 1997). *See, e.g.*, *State v. Neuman*, 179 S.E.2d 77, 81–82 (W. Va. 1988) (requiring the record to reflect a "voluntary, knowing and intelligent relinquishment" of the defendant's right to testify); *People v. Curtis*, 681 P.2d 504, 514 (Colo. 1984) ("[T]he constitutional right to testify is so fundamental that procedural safeguards are necessary to ensure that the defendant understands the significance of waiver of this right."); *Culberson v. State*, 412 So.2d 1184, 1186–87 (Miss. 1982) (suggesting to trial judges of the state to advise a defendant of his right to testify and to make a record of his waiver); *see also* Timothy P. O'Neill, *Vindicating the Defendant's Constitutional Right to Testify at a Criminal Trial: The Need for an On-the-Record Waiver*, 51 U. PITT. L. REV. 809, 810 (1990) (arguing that defense attorney should put defendant's waiver of the right to testify on the record in the judge's presence).

281. *See United States v. Hung Thien Ly*, 646 F.3d 1307, 1317 (11th Cir. 2011)

[T]he district court was required to correct Ly's misunderstanding of his right to testify. By not informing Ly that he could testify in narrative form, the district court denied his right to choose whether to testify "knowingly and intelligently." This case falls within one of the "exceptional, narrowly defined circumstances" that trigger a district court's duty to discuss with a criminal defendant his decision of whether to testify.

282. *See United States v. Ortiz*, 82 F.3d 1066, 1070–71 (D.C. Cir. 1996) (citing Supreme Court cases that require this inquiry).

283. *See United States v. Webber*, 208 F.3d 545, 551–52 (6th Cir. 2000) (recognizing that waiver of the right to testify "qualitatively differs" from the right to enter a plea of guilty, waive a jury trial, or forego the assistance of

until he hears the State's evidence; the court will not know until the defense rests.<sup>284</sup> Waiving at trial is unlike waiving at a plea hearing, for a plea is "itself a conviction."<sup>285</sup> A colloquy is probably necessary only when counsel or defendant tips off a court that a dispute between them over testifying has arisen.<sup>286</sup> A colloquy then helps to prove waiver later on.<sup>287</sup> If a colloquy occurs, however, caution is necessary so that the court explains to the defendant that he possesses the right without venturing into comment on advisability.<sup>288</sup>

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counsel); *United States v. Pennycooke*, 65 F.3d 9, 11 (3d Cir. 1995) (reasoning that it is "inadvisable for a court to question a defendant directly about his or her waiver of the right to testify"). In *United States v. Joelson*, the trial judge, apprised of the defendant's desire to testify, told him directly: "There's such a thing as crucifying yourself when you take the stand and testify. So once again, I can only say to you that your lawyer is an experienced lawyer and you ought to follow his advice." *United States v. Joelson*, 7 F.3d 174, 176–77 (9th Cir. 1993). Despite finding this "troubling" and "inadvisable," the court of appeals concluded that the advice "was not so egregious that Joelson's ability to knowingly and intentionally waive his right to testify was impaired." *Id.* at 178.

284. And at this point, of course, a desire to testify would come too late. See *Pennycooke*, 65 F.3d at 11 (stating that "a colloquy on the right to testify" when the defense rests "not only would be awkward . . . but more importantly inadvertently might cause the defendant to think that the court believes the defense has been insufficient" (citation omitted)).

285. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

286. See *Arredondo v. Huibregtse*, 542 F.3d 1155, 1157 (7th Cir. 2008) (involving such interruptions); *Ortega v. O'Leary*, 843 F.2d 258, 260 (7th Cir. 1988) (same). The Seventh Circuit's jurisdiction seems stocked with unruly defendants.

287. See *United States v. Ramsey*, 785 F.2d 184, 194–95 (7th Cir. 1986) (finding that despite the defendant's claim that his trial counsel would not allow him to take the stand, the defendant "bypassed an opportunity to support such a claim in the district court"). The court noted that "[n]othing in the record supports the assertion that counsel thwarted [the defendant's] desire to testify," and "[t]o the contrary, the district judge asked [the defendant] during the trial whether he wanted to testify." *Id.*

288. See, e.g., *United States v. Hung Thien Ly*, 646 F.3d 1307, 1315 (11th Cir. 2011) ("Experience demonstrates that district courts sometimes provide inappropriate commentary when they inject themselves into a defendant's choice of whether to testify."); *United States v. Yono*, 605 F.3d 425, 426 (6th Cir. 2010) (advising against a colloquy into the defendant's waiver of his right to testify); *United States v. Leggett*, 162 F.3d 237, 248 (3d Cir. 1998) (stating that a trial court should avoid encouraging or discouraging a defendant to testify); *United States v. Pennycooke*, 65 F.3d 9, 13 (3d Cir. 1995) (noting that sometimes a trial court might have to "inquire discreetly" to ensure that a defendant's constitutional rights are not suppressed); *Joelson*, 7 F.3d at 178 (discussing the danger of "judicial interference

The waiver inquiry tests whether the defendant made a knowing, intelligent relinquishment.<sup>289</sup> In nearly every case in which a defendant does not testify or inform the court of a desire to do so, waiver should be presumed or inferred.<sup>290</sup> Defense counsel would always have primary responsibility for advising the defendant on the right and the implications of exercising it.<sup>291</sup> A good test must catch instances in which a defendant is stripped of his right without adding new layers to the already extensive protections for criminal defendants.

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with this strategic decision”); *United States v. Goodwin*, 770 F.2d 631, 635–38 (7th Cir. 1985) (stating that “[t]he trial judge . . . went beyond his limited function of ensuring that Goodwin’s decision not to testify was voluntary when he expressed surprise . . . , explained some of the pros and cons of her taking the stand, and strongly implied that her only chance for acquittal was to testify”); *Arthur v. United States*, 986 A.2d 398, 407 (D.C. 2009) (stating that a trial judge has “responsibility to ensure that the weight of judicial authority does not unduly influence” the defendant’s exercise of his right to testify). *See also* *United States v. Anderson*, 695 F.3d 390, 396 (6th Cir. 2012) (holding that a trial court need not inquire into waiver, and that even if a court does inquire, it has no duty to ensure that waiver was knowing and voluntary). Such a rule “would actually disfavor criminal defendants by tending to discourage judges from conducting any inquiry at all of a silent defendant.” *Id.*

289. *See* *United States v. Hung Thien Ly*, 646 F.3d 1307, 1313 (11th Cir. 2011) (“Like other fundamental trial rights, the right to testify is truly protected only when the defendant makes his decision knowingly and intelligently.”); *United States v. Leggett*, 162 F.3d 237, 246 (3d Cir. 1998) (“If a defendant does waive this right [to testify], the waiver must be knowing, voluntary and intelligent.”).

290. *See* *United States v. Joelson*, 7 F.3d 174, 177 (9th Cir. 1993) (“Thus, waiver of the right to testify may be inferred from the defendant’s conduct and is presumed from the defendant’s failure to testify or notify the court of his desire to do so.”). Because the question arises in every trial, and is generally decided between client and counsel without inquiry, federal courts really have no choice *but* to make this presumption. *See* *Hodge v. Haeberlin*, 579 F.3d 627, 639 (6th Cir. 2009) (ruling that although the right to testify is a fundamental right subject only to knowing and intelligent waiver, “waiver of certain fundamental rights can be presumed from a defendant’s conduct alone, absent circumstances giving rise to a contrary inference” (quoting *United States v. Stover*, 474 F.3d 904, 908 (6th Cir. 2007))).

291. *See* *Hung Thien Ly*, 646 F.3d at 1313 (“In cases where a defendant is represented by counsel, counsel is responsible for providing the advice needed to render the defendant’s decision of whether to testify knowing and intelligent.”); *United States v. Ortiz*, 82 F.3d 1066, 1070 (D.C. Cir. 1996) (“Thus, defense counsel, not the court, has the primary responsibility for advising the defendant of his right to testify and for explaining the tactical implications of doing so or not.”).

The right to testify remains circumscribed by other legitimate trial interests and rules of evidence or procedure.<sup>292</sup> These operate to disallow testimony on subjects ruled inadmissible after in limine motions,<sup>293</sup> to prevent false testimony,<sup>294</sup> to prohibit unreliable forms of evidence,<sup>295</sup> to maintain fair, orderly proceedings,<sup>296</sup> to ensure that any testimony is given after oath or affirmation,<sup>297</sup> to keep an unruly defendant from degrading the trial,<sup>298</sup> or perhaps to inhibit a mentally defective defendant from sinking himself on the stand.<sup>299</sup> A defendant may not claim that his right to testify is

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292. See *United States v. Bifield*, 702 F.2d 342, 350 (2d Cir. 1983) (agreeing with the district court that although defendant wanted to testify about duress, such testimony was inadmissible because irrelevant under Fed. R. Evid. 402).

293. See *United States v. Flores-Martinez*, 677 F.3d 699, 709 (2012) (considering the rights of a defendant seeking to testify on matters specifically excluded by the ruling of the trial court).

294. See *Nix v. Whiteside*, 475 U.S. 157, 173–74 (1986) (stating there is “no permissible choice to testify falsely”).

295. See *Rock v. Arkansas*, 483 U.S. 44, 56 (1987) (“In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant’s constitutional right to testify.”). Arkansas could not, without better evidence, ban entirely a defendant’s use of hypnotically refreshed memory. See *id.* at 61.

296. See *United States v. Jones*, 880 F.2d 55, 59–60 (8th Cir. 1989) (allowing a court to exercise discretion, in the interests of fairness and order, to refuse to reopen evidence for testimony when defendant asserted his right to testify only after the evidence-taking stage of the trial was closed, though before it was sent to the jury). A court might find that the defendant is trying to engage in delay or other improper purpose.

297. See *United States v. Looper*, 419 F.2d 1405, 1406 (4th Cir. 1969) (disallowing a defendant who was a conscientious objector from testifying because of a religious inability to swear on the Bible and raise his hand). The circuit remanded for a new trial, instructing that “all the district judge need do is to make inquiry as to what form of oath or affirmation would not offend defendant’s religious beliefs but would give rise to a duty to speak the truth.” *Id.* at 1407.

298. See *United States v. Bentvana*, 319 F.2d 916, 944 (2d Cir. 1963) (discussing the misbehaving defendant’s right to testify). The defendant had engaged in “outbursts and serious misconduct” and the judge was bound to “maintain the order and decorum necessary for a fair trial.” *Id.* But the circuit nonetheless found that the court should have allowed the testimony “[i]n view of the importance of the privilege” and instead have had a marshal subdue or gag him if he continued to insist on disobeying court orders. *Id.*

299. See *People v. Robles*, 466 P.2d. 710, 716 n.1 (Cal. 1970) (“In some situations a defendant’s persistence in testifying contrary to his attorney’s advice might raise questions as to the defendant’s present sanity.”); see also

tread upon by rules allowing cross-examination or impeachment with prior convictions and bad acts.<sup>300</sup> The Supreme Court has also held that obstruction of justice enhancements are no burden on the right.<sup>301</sup> An accused who testifies is in the position of any other witness: duty-bound to speak truthfully, entitled to the same privileges, and exposed to the same perils of impeachment, stress, embarrassment, and so on.

It is well-established that the right to testify may be waived only by the defendant.<sup>302</sup> According to Chief Judge Frank

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Ward v. Sternes, 334 F.3d 696, 699–700 (7th Cir. 2003)

Ward’s counsel admitted that it wasn’t his client, but he who had made the decision to keep Ward off the stand. He further told the court that he didn’t believe he could have an informed discussion with Ward about the decision, since most of his prior exchanges with his client were one-sided, generating only an occasional ‘uh-uh’ response from Ward.

300. See *United States v. Siddiqui*, 699 F.3d 690, 705–06 (2d Cir. 2012) (discussing how an apparently unstable defendant took the stand, to her detriment, over counsel’s strenuous urging). On appeal, Ms. Siddiqui’s lawyer argued that “in some cases a defendant may be competent to stand trial yet incompetent to exercise her right to testify without the approval of defense counsel.” *Id.* at 705. The court declined to decide this question. *Id.* at 705–06. The case is also a fine example of the lengths to which a zealous defense lawyer and a concerned judge can go to help a defendant avoid self-inflicted wounds, short of compulsion. See *id.* at 698 n.4 (discussing the lengths to which they went). See also *People v. Robles*, 466 P.2d. 710, 716 n.1 (Cal. 1970) (“In some situations a defendant’s persistence in testifying contrary to his attorney’s advice might raise questions as to the defendant’s present sanity.”); *Ward v. Sternes*, 334 F.3d 696, 699–700 (7th Cir. 2003)

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301. See *United States v. Dunnigan*, 507 U.S. 87, 96 (1993) (rejecting the defendant’s argument that courts will enhance sentences whenever the accused takes the stand and is found guilty).

302. See *United States v. Babul*, 476 F.3d 498, 500 (7th Cir. 2007) (ruling that only the defendant may waive the right to testify in his own defense (citing *Rock v. Arkansas*, 483 U.S. 44 (1987))). Dozens of cases confirm this proposition. See, e.g., *Galowski v. Murphy*, 891 F.2d 629, 636 (7th Cir. 1989) (providing an early post-*Strickland*, post-*Rock* statement of this rule of law). *Teague* acknowledged that the “right is personal to the defendant and cannot be waived either by the trial court or by defense counsel . . . [T]here can be no effective waiver of a fundamental constitutional right unless there is an ‘intentional relinquishment or abandonment of a known right of privilege.’” *United States v.*

Easterbrook, the distinction between this and the ordinary rights of trial management (whether to call a witness, object to hearsay, etc.), is that the former are choices in which “one does not need a legal education to appreciate the issues.”<sup>303</sup>

The presumption against the waiver of constitutional rights<sup>304</sup> is why a judge who accepts a plea must ensure that the defendant grasps what he is waiving.<sup>305</sup> Federal Rule of Criminal Procedure 11 requires a court to inquire about the defendant’s awareness of his rights to plead not guilty, have a jury trial, and secure counsel.<sup>306</sup> Another provision of Rule 11 directs the court to inform the defendant of his “right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, *to testify and present evidence*, and to compel the attendance of witnesses.”<sup>307</sup> Each of the rights just listed appears in Madison’s Bill of Rights—except the “right to testify.” Yet today a plea is invalid unless the court ensures waiver of the right “personally in open court.”<sup>308</sup>

Finally, any rule requiring a defendant to gainsay his attorney in front of a judge to avoid an inference of waiver seems unfair; if anyone, it is the *lawyer’s* job to expose disagreement.<sup>309</sup>

Teague, 953 F.2d 1525, 1532–33 (11th Cir. 1992) (citation omitted).

303. *Babul*, 476 F.3d at 500.

304. *See* *Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (1973) (“A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial.”); *Glasser v. United States*, 315 U.S. 60, 70–71 (1942) (stating that the court must “indulge every reasonable presumption against the waiver of fundamental rights” but must also protect those rights by ensuring that the waiver is “intelligent” and “competent”); *see also* *Brookhart v. Janis*, 384 U.S. 1, 5 n.4 (1966) (“When constitutional rights turn on the resolution of a factual dispute we are duty bound to make an independent examination of the evidence in the record.”).

305. At the same time, there can really be no presumption against waiver of the right to testify without presuming an intent to *abandon* the right to remain silent. No presumptions should apply to this choice between silence and speech.

306. *See* FED. R. CRIM. P. 11(b)(1)(B)–(D).

307. *Id.* 11(b)(1)(E) (emphasis added). The right to testify is recognized elsewhere in the rules. *See, e.g., id.* 12.3(c) (stating that a public-authority defense can be barred under certain circumstances but that this “does not limit the defendant’s right to testify”).

308. *Id.* 11(b)(2).

309. *See* *United States v. Martinez*, 883 F.2d 750, 760–61 (9th Cir. 1989) (stating that a defendant may not waive his right to testify under his lawyer’s

Instances in which a defendant does pipe up seem to involve uncommonly self-assured men, like the one who shouted of his lawyer—“He lies. Lies. Lies.”—until the court threatened to remove him.<sup>310</sup> From the case law it also appears that a trial judge is likelier to regard such efforts as irksome impertinence rather than an alarm that a right is going unheeded.<sup>311</sup>

### *C. Due Process Clause Inquiry?*

The Due Process Clause generally applies to violations committed by the state, not a lawyer.<sup>312</sup> One might argue that because the State brings the case (prosecutor), conducts the trial

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advice and then try to invalidate the trial because he decided to abide by his lawyer’s counsel), *vacated*, 928 F.2d 1470 (9th Cir. 1991); *see also* United States v. McMeans, 927 F.2d 162, 163 (4th Cir. 1991) (holding that waiver was appropriate partly because the defendant’s testimony at an earlier trial evinced knowledge of the right to testify); United States v. Bernloehr, 833 F.2d 749, 751–52 (8th Cir. 1987) (emphasizing that the defendant did not object when his counsel rested without calling him to the stand). *But see* Chang v. United States, 250 F.3d 79, 84 (2d Cir. 2001) (recognizing the inconsistency of requiring a defendant to rely on his attorney to speak for him in the courtroom and holding that by failing to speak the defendant has waived his right to testify); United States v. Ortiz, 82 F.3d 1066, 1071 (D.C. Cir. 1996) (recognizing that it is impracticable to put a burden on the defendant who might not even be aware of the right he possesses and that the burden would conflict with the instruction that a defendant should speak through his counsel); Underwood v. Clark, 939 F.2d 473, 476 (7th Cir. 1991) (refusing to treat a defendant’s silence as a waiver of the right to testify because the defendant might feel “too intimidated to speak out of turn in this fashion”); United States v. Teague, 908 F.2d 752, 759–60 (11th Cir. 1990) (refusing to find “that by failing to speak out at the proper time a defendant has made a knowing, voluntary and intelligent waiver of a personal right of fundamental importance such as the right to testify”), *vacated*, 932 F.2d 899 (11th Cir. 1991).

310. *See* Arredondo v. Huibregtse, 542 F.3d 1155, 1157–64 (7th Cir. 2008) (containing a tense exchange); *see also* United States v. Leggett, 162 F.3d 237, 254 (3d Cir. 1998) (McKee, J., dissenting) (“How could he make such a request? Leggett could not very well have disrupted the proceedings by standing in open court and speaking directly to the judge without being asked anything.”).

311. *See, e.g., Leggett*, 162 F.3d at 254 (noting that the judge “feared” that Leggett might “jump to his feet and assert his right to testify”).

312. *See* County of Sacramento v. Lewis, 523 U.S. 833, 845–46 (1998) (describing the Due Process Clause as limiting what the government may do); *Lochner v. New York*, 198 U.S. 45, 52 (1905) (stating that under the Due Process Clause “no state can deprive any person of life, liberty, or property without due process of law”).



(judge), and executes the sentence (warden), failure to ensure a trial in which a defendant's right to testify is respected is state action. This is the theory behind why certain attorney conduct—like failing to disclose a material conflict of interest—still implicates state action.<sup>313</sup> But again, a stand-alone “right to testify” inquiry is needed.<sup>314</sup>

### VI. Conclusion

Taking the long view, the constitutional right to testify is a novelty. Over three centuries, what was prohibited to a defendant became a statutory privilege, then a sort of assumed right, and finally an explicit constitutional command.<sup>315</sup> In federal courts it took a century for the statutory privilege (1878)<sup>316</sup> to harden into constitutional right (1987).<sup>317</sup> During the 1960s and '70s it was

313. See *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980) (“This Court’s decisions establish that a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment.”).

314. Under the Sixth Amendment’s “presumed prejudice” line, courts decline to scour the record to ascertain the *degree* of prejudice. These are cases where, for instance, a lawyer carelessly forfeited an appeal. See *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000) (“The even more serious denial of the entire judicial proceeding itself . . . similarly demands a presumption of prejudice.”). Or where a lawyer failed to comply with *Anders* and left his client uncounseled on appeal. See *Penson v. Ohio*, 488 U.S. 75, 88–89 (1988) (“It is therefore inappropriate to apply either the prejudice requirement of *Strickland* or the harmless-error analysis of *Chapman*.”). Presumed prejudice is a form of structural error: both involve mistakes that foreclosed an avenue, disabled the creation of a record, or raised barriers to determining what *might* have happened. We feel prejudice should not be presumed for the same reasons the error here is not structural. Every circuit has rejected the claim, occasionally made, for presumed prejudice. See, e.g., *Palmer v. Hendricks*, 592 F.3d 386, 396–97 (3d Cir. 2010) (determining there is no presumption of prejudice for right-to-testify cases).

315. Few would argue that if competency statutes in the states and U.S. Code were repealed, courts of this country would once again be permitted to deny defendants the power to choose to testify. It might also be remembered that both the right to testify and the common law rule *against* defendant testimony were alike intended to bring out the truth and protect the defendant (which, as noted, was once thought best done by prohibiting *all* defendants from testifying, so that no harmful inferences for *failure* to speak would be made by the jury).

316. See 18 U.S.C. § 3481 (2006) (federal competency statute first enacted in 1878).

317. See *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (“The right to testify on

still treated as a trial tactic.<sup>318</sup> But when finally constitutionalized it became necessary for courts to decide how to review alleged infringements. Because it seemed like a matter of lawyer ineffectiveness, the U.S. courts of appeals, in the 1990s, reached for the familiar *Strickland* standard. The problem, we see, is that *Strickland* frustrates the right. Rarely will an overbearing attorney's conduct provoke a postconviction inquiry; almost never will it lead to a new result. The court is usually satisfied to concede a violation of right while squinting in vain to find prejudice. And no wonder: the lawyer is almost always right to restrain his client. Yet the proper avenue is not *Strickland* but an independent, constitutional inquiry. The first court to do so gets to name it.

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one's own behalf at a criminal trial has sources in several provisions of the Constitution.")

318. See *United States v. Von Roeder*, 435 F.2d 1004, 1009 (10th Cir. 1971) ("[T]he decision of counsel to place or not to place his client on the stand has been described as particularly difficult, and has generally been treated as a question of trial tactics."); see also *United States v. Garguilo*, 324 F.2d 795, 797 (2d Cir. 1963) (expressing the statement of old view, before *Rock* and *Strickland*, that denial of right to testify is strategic and there is no remedy for strategic error); Seth Dawson, *Due Process v. Defense Counsel's Unilateral Waiver of the Defendant's Right to Testify*, 3 HASTINGS L.Q. 517, 523 (1975) ("There is a growing recognition that the right to testify has transcended its statutory origins and is now emerging as a constitutionally protected right, inherent in the ever-broadening concept of due process."). In 1993, the Ninth Circuit said it "essentially is a strategic trial decision with constitutional implications." *United States v. Joelson*, 7 F.3d 174, 178 (9th Cir. 1993).