

TO PLEAD OR NOT TO PLEAD: EFFECTIVE ASSISTANCE AND CLIENT-CENTERED COUNSELING

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INTRODUCTION

Following the advice of his counsel, Hernando Williams pleaded guilty to murder, kidnapping, rape and robbery. He was sentenced by a jury to death.¹ On appeal, Mr. Williams claimed that his guilty plea was coerced and involuntary. At a post-verdict hearing, one of his defense attorneys had testified in detail to what the Court of Appeals described as the defense team's "methods of persuasion."²

As a response to our client's position, the four of us as well as [the psychologist] attempted to persuade [sic] the defendant that a plea of not guilty would be a mistake In this case *the psychological pressure and the sophisticated tactics* used with Hernando Williams to convince him to adopt our approach *were unlike any other conversations I ever had with any other client*. Also, it goes without saying, that in this case there were no plea bargaining offers from the State. *All of the psychiatric and psychological information which had been gathered and developed by [the doctors] was used by me and my associates to compel Mr. Williams to accept our point of view. This constituted a unique form of coercion. We took advantage of our client,* maximizing the use of the information we had gathered for a purpose other than which it was intended. *Our strategy was developed to accommodate us and not our client.* There is no

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¹ See *Williams v. Chrans*, 945 F.2d 926, 931 (7th Cir. 1991) (plea entered in 1978).

² *Id.* at 932.

question that during this period (which lasted over a year) *we did not act in accordance with our client's wishes*. Rather, we used every means available to force him to change his plea.³

The court denied the defendant's motion and observed that "Mr. Williams' attorneys concluded that a guilty plea was in his best interests and used verbal persuasion to convince [him] to plead guilty . . . '[a]dvise—even strong urging' by counsel does not invalidate a guilty plea."⁴

Wesley Trahan pleaded guilty to rape and was sentenced to life imprisonment, the maximum permissible sentence.⁵ Mr. Trahan filed a petition for a writ of habeas corpus, claiming that his plea was involuntary and without the effective assistance of counsel:

[Defense counsel] explained that his practice was to advise clients of the factual strength of the state's case in light of applicable law and then to allow them to make their own decisions as to how to plead to the extent they were capable.⁶

Commenting on the attorney's neutrality when counseling clients about the advisability of accepting a plea offer, Judge Goldberg wrote in a concurring opinion that "this practice is certainly to be commended in the general run of cases"⁷

Williams and *Trahan* present two vastly different counseling methods, yet in both cases the conviction by plea was upheld. Courts approve polar opposite approaches to counseling—utilizing "a unique form of coercion" versus remaining neutral. The fundamental question thus becomes what counseling obligations the Constitution requires.

The importance of this inquiry is clear. There are presently a record number of inmates in American penal institutions.⁸ At the end

³ *Id.* (emphasis added).

⁴ *Id.* at 933 (quoting *Lunz v. Henderson*, 533 F.2d 1322, 1327 (2d Cir. 1976)). The court went on to note that the defendant's statements during his plea that the plea was voluntary and not the result of any threats or promises were additional support for the conclusion that the plea was not coerced. *See id.*; *see also* *Miles v. Dorsey*, 61 F.3d 1459, 1470 (10th Cir. 1995).

⁵ *See Trahan v. Estelle*, 544 F.2d 1305, 1306 (5th Cir. 1977) (plea entered in 1969).

⁶ *Id.* at 1319 (Goldberg, J., concurring).

⁷ *Id.* (Goldberg, J., concurring). Judge Goldberg noted that in certain situations (i.e., where, as in *Trahan*, the defendant was young and had met with the prosecutor in the absence of counsel), it might be appropriate for the attorney to take a more active role. *See id.* at 1319-20.

⁸ The nation's jail and prison incarceration rate has nearly doubled in the last ten years. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 162843. At the end of 1996, 1,182,690 prisoners were under federal or state jurisdiction. This represents a 5% increase from 1995, but is less than the average annual growth of 7.3% since 1990. There were an estimated 427 prison inmates per 100,000 U.S. residents, up from 292 at the end of 1990. *See id.*

of 1995, 5.3 million people were incarcerated, on probation or on parole.⁹ The vast majority of the convictions in these cases were the result of plea bargains,¹⁰ where the defendants agreed to forego the right to a trial¹¹ and to enter pleas of guilty in exchange for guaranteed sentences or ranges of sentences.¹²

The Sixth Amendment¹³ and the Supreme Court's rulings in *Gideon v. Wainwright*¹⁴ and *Argersinger v. Hamlin*¹⁵ guarantee that all of those defendants had the right to be represented by counsel. The right to counsel incorporates the right to the effective assistance of counsel.¹⁶ Given the enormous number of people arrested and then convicted by guilty plea, and the right of each of those individuals to the effective assistance of counsel, it is critical to examine defense counsel's role in the plea decision. What does the Constitution require with respect to counseling a defendant during the plea bargaining process and the decision whether to plead guilty? Are the parameters of counseling left to defense attorneys' own devices so that some may adopt a neutral stance while others may do everything within their power to convince someone to accept a plea? Far too little attention has been focused on this vital inquiry.

The effective-assistance-of-counsel standard has been the subject of numerous articles, and many scholars deplore the quality of defense

⁹ See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1995 (1996).

¹⁰ The Supreme Court has recognized plea bargaining as "an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971); see also *Blackledge v. Allison*, 431 U.S. 63, 71 (1977) ("Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system."). For proof of the prevalence of plea bargaining, see, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 512-13 (1992); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE BULLETIN, FELONY SENTENCES IN THE STATE COURTS 1992 (1995) (pleas account for 92% of all felony state court convictions).

¹¹ "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." U.S. CONST. amend. VI.

¹² One scholar defined plea bargaining as "the process by which the defendant in a criminal case relinquishes his right to go to trial in exchange for a reduction in charge and/or sentence." MILTON HEUMANN, PLEA BARGAINING (1978).

¹³ "In all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

¹⁴ 372 U.S. 335 (1963) (providing that states must provide attorneys for indigent defendants accused of felonies in state courts).

¹⁵ 407 U.S. 25 (1972) (holding that a defendant could not be incarcerated in any case unless he or she had been provided counsel).

¹⁶ See, e.g., *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (defendants are "entitled to the effective assistance of counsel . . . [and] cannot be left to the mercies of incompetent counsel . . ."); *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (counsel must not be appointed "under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case").

counsel in criminal cases.¹⁷ In particular, commentators assail the state of indigent defense and the inadequacy of the representation that poor people accused of crime receive.¹⁸ These articles often stress the deficiencies of institutional defenders, due to insufficient funding¹⁹ or bureaucratic allegiances to other criminal justice personnel.²⁰ Criticism of defense counsel's advocacy has focused on trial representation.²¹ The actual performance of the defense attorney in the counseling process has been overlooked.

Defendants frequently raise ineffective assistance of counsel claims on appeal.²² Typically, the defendant alleges deficiencies in the preparation for or performance at trial.²³ Claims of inadequate trial

¹⁷ See, e.g., David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973); David L. Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811 (1976); William J. Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 AM. CRIM. L. REV. 181, 201 (1984) ("[T]here are far too many defendants who are represented by inadequate counsel . . .").

¹⁸ See, e.g., AMERICAN BAR ASSOCIATION, SPECIAL COMMISSION ON CRIMINAL JUSTICE IN A FREE SOC'Y, *CRIMINAL JUSTICE IN CRISIS* (1988); SHIELDON KRANTZ ET AL., *THE RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF ARGERSINGER V. HAMLIN* 1976; Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986); Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581 (1986-87). The number of articles concerned with indigent defense comports with the reality that most criminal defendants are represented by government-appointed counsel. See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *INDIGENT DEFENSE*, 1996 (in 1992, about 80% of defendants charged with felonies in the 75 largest counties in the country were represented by government-supplied counsel); Paul C. Drecksell, *The Crisis in Indigent Criminal Defense*, 44 ARK. L. REV. 363, 367 n.21 (1991) (citing Jim Neuhaard, *Free Counsel, A Right Not a Charity*, 14 N.Y.U. REV. L. & SOC. CHANGE 101, 109 (1986) ("In metropolitan communities, over 90% of all criminal defendants cannot afford counsel.")).

¹⁹ See, e.g., NATIONAL LEGAL AID AND DEFENDER ASS'N, *THE OTHER FACE OF JUSTICE* (1973); Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 B.C. L. REV. 531, 532 (1988) (inadequate funding leads to too few attorneys, excessive caseloads and substandard preparation); Klein, *supra* note 18.

²⁰ See, e.g., Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15 (1967) (analyzing the defense attorney's allegiance to the "organizational goals" and "bureaucratic priorities" of the criminal court); HEUMANN, *supra* note 12.

²¹ See, e.g., Jake Dear, *Adversary Review: An Experiment in Performance Evaluation*, 57 DEN. L.J. 401 (1980).

²² "Ineffective assistance of counsel is one of the most—if not the most—common appeal grounds asserted by convicted criminal defendants as appellants." JOHN M. BURKOFF & HOPE L. HUDSON, *INEFFECTIVE ASSISTANCE OF COUNSEL* 1-3 (1994) (emphasis in original). The number of reported state and federal cases in which the defendant claimed ineffective assistance on appeal increased by 250% from 1985 to 1992. See *id.* at v. For compilations of ineffective assistance claims, see generally *id.*; LARRY FASSLER, *INEFFECTIVE ASSISTANCE OF COUNSEL* (1993).

²³ See, e.g., Dorothy Linder Maddi, *Trial Advocacy Competence: The Judicial Perspective*, 1978 AM. B. FOUND. RES. J. 105, 144 (1978) (a survey of trial judges found that pretrial preparation was the most common area of defense counsel incompetence).

preparation focus on whether the attorney investigated the case,²⁴ interviewed witnesses²⁵ or performed other important tasks in the course of getting ready for trial.²⁶ Allegations of ineffective assistance at trial usually relate to the attorney's performance of advocacy skills such as cross-examination,²⁷ raising objections²⁸ or jury selection.²⁹

Ineffective assistance litigation in the plea context has also tended to concentrate on trial-related issues. Common appellate issues include whether, prior to the plea, defense counsel investigated the case,³⁰ interviewed witnesses³¹ and researched possible defenses.³²

Although there is no dearth of scholarly support for the validity of many ineffective assistance claims,³³ the courts have not been receptive.³⁴ Cases where questionable lawyering satisfied the effective assistance standard are legion. There are cases where ineffective assistance claims failed even though counsel had little or no experience with

²⁴ See, e.g., *United States v. Avery*, 15 F.3d 816, 817-18 (9th Cir. 1993); *Schwander v. Blackburn*, 750 F.2d 494, 500 (5th Cir. 1985); Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 90-91 (1986) (one of the major deficiencies of defense counsel is the failure to conduct adequate pretrial investigation); Barbara R. Levine, *Preventing Defense Counsel Error—An Analysis of Some Ineffective Assistance of Counsel Claims and Their Implications for Professional Regulation*, 15 U. TOR. L. REV. 1275, 1371 (1984) (the most frequent ineffective assistance claim is the failure to investigate).

²⁵ See, e.g., *Lema v. United States*, 987 F.2d 48, 55 (1st Cir. 1993); *Lewis v. Mazurkiewicz*, 915 F.2d 106, 113 (3d Cir. 1990); *Ingrassia v. Armontrout*, 902 F.2d 1368, 1370 (8th Cir. 1990); *Solomon v. Kemp*, 735 F.2d 395, 402 (11th Cir. 1984); *McNamara v. United States*, 867 F. Supp. 369, 373 (E.D. Va. 1994) (ineffective assistance claims commonly involve challenges to factual research such as the interviewing of witnesses).

²⁶ See generally Levine, *supra* note 24, at 1336-53.

²⁷ See, e.g., *United States v. Treff*, 924 F.2d 975, 980 (10th Cir. 1991).

²⁸ See, e.g., *Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993); *Mason v. Scully*, 16 F.3d 38, 44 (2d Cir. 1994); Levine, *supra* note 24, at 1357 (discussing the failure to object to inadmissible evidence, improper prosecutorial arguments or erroneous jury instructions).

²⁹ See, e.g., *Spencer v. Murray*, 18 F.3d 229, 234 (4th Cir. 1994); *United States v. Simpson*, 974 F.2d 845, 847-48 (7th Cir. 1992); *White v. Singletary*, 972 F.2d 1218, 1222-23 (11th Cir. 1992).

³⁰ See, e.g., Levine, *supra* note 24, at 1343.

³¹ For a discussion of the need to prepare thoroughly prior to engaging in plea bargaining, see generally Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLIN. L. REV. 73 (1995).

³² See *id.*

³³ See, e.g., William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL OF RTS. J. 91 (1995); Joseph D. Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1246 (1970) ("the problem of counsel's failure to investigate and prepare a defense is a real one").

³⁴ See, e.g., Martin C. Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 414 n.11 (1988) (finding only 4.3% of ineffectiveness claims substantiated by the circuit courts); Klein, *supra* note 18, at 632 (citing Brief of Amici Curiae, National Legal Aid and Defender Association, The Association of Trial Lawyers of America and the American Civil Liberties Union at 22, *United States v. Cronin*, 466 U.S. 648 (1984) (of 4000 federal and state reported appellate decisions from 1970 to 1983, only 3.9% of ineffective assistance claims were successful)).

criminal law and only a brief time to prepare,³⁵ was intoxicated,³⁶ used illegal drugs,³⁷ had mental disabilities³⁸ or slept through parts of the trial.³⁹ It is abundantly clear that, as the court stated in *Trahan*, "it is not difficult to receive a passing grade as effective counsel."⁴⁰

³⁵ See, e.g., *Cronic*, 466 U.S. at 663-75 (not ineffective assistance when defense counsel, who had no previous jury trial and criminal law experience, had 25 days to prepare a case that took the government four and one-half years to put together); *United States v. Lewis*, 786 F.2d 1278, 1281 (5th Cir. 1986) (not ineffective assistance even if no prior experience in criminal advocacy); *Avery v. Proconier*, 750 F.2d 444, 447 (5th Cir. 1985) (not ineffective counsel even though appointed on the morning of trial).

³⁶ See, e.g., *Burnett v. Collins*, 982 F.2d 922, 930 (5th Cir. 1993) (even though defendant alleged that counsel had been intoxicated during the trial and counsel entered an alcohol treatment program after the trial, there were no specific instances where counsel's performance was deficient); *Fowler v. Parratt*, 682 F.2d 746, 750 (8th Cir. 1982) (although defense counsel admitted being an alcoholic and suffering from blackouts during the trial, there was no evidence that it affected his representation of the defendant); *Hernandez v. Wainwright*, 634 F. Supp. 241, 245 (S.D. Fla. 1986) ("Even if this court were to credit . . . Petitioner and his wife and determine that the mere presence of alcohol on [counsel's] breath signified inebriation, Petitioner has not shown how this condition caused [counsel] to render deficient legal representation or how this state resulted in prejudice to Petitioner's case."); *People v. Garrison*, 765 P.2d 419, 440 (Cal. 1989) (en banc) (it was undisputed that counsel was an alcoholic and consumed large amounts of alcohol each day of the trial, but defendant failed to prove that counsel's performance was deficient).

³⁷ See, e.g., *Berry v. King*, 765 F.2d 451, 454 (5th Cir. 1985) ("[T]he fact that an attorney used drugs is not, *in and of itself*, relevant to an ineffective assistance claim. The critical inquiry is whether . . . counsel's performance was deficient and whether that deficiency prejudiced the defendant." (emphasis in original)); *Young v. Zant*, 727 F.2d 1489, 1492-93 (11th Cir. 1984) (even though counsel admitted that he had a drug problem and was convicted for marijuana possession shortly after the trial, there was no showing of ineffective assistance); *State v. Coates*, 786 P.2d 1182, 1187 (Mont. 1990) ("[A]bsent any specific errors or conduct identified in the trial that affected the trial's outcome, [counsel's] cocaine abuse is irrelevant to the issue of ineffective assistance of counsel.").

³⁸ See, e.g., *McDougall v. Dixon*, 921 F.2d 518, 534 (4th Cir. 1990) (although counsel was on medication and receiving treatment for depression and severe migraines, and was hospitalized several times during the trial, the defendant did not show that this affected counsel's ability to render adequate legal assistance); *Smith v. Ylst*, 826 F.2d 872, 876 (9th Cir. 1987) (even though there was evidence of counsel's mental instability, defendant's claim of ineffective assistance was properly denied without a hearing); *Bucklew v. United States*, 575 F.2d 515, 520-21 (5th Cir. 1978) (no adequate showing of specific prejudice resulting from counsel's alleged infirmities).

³⁹ See, e.g., *United States v. Petersen*, 777 F.2d 482, 484 (9th Cir. 1985) (allegation that counsel was sleeping during trial was not sufficiently made out); *McFarland v. Texas*, 928 S.W.2d 482, 505 n.20 (Tex. Crim. App. 1996) (not ineffective assistance even though counsel slept through parts of the trial; the court opined that perhaps co-counsel let the attorney sleep as a strategic choice in order to gain the jurors' sympathy for the defendant); *Ex parte Burdine*, 901 S.W.2d 456, 456-57 (Tex. Crim. App. 1995) (even though three jurors testified that they observed the attorney dozing and the trial judge found that counsel had slept during the trial, the application for a writ of habeas corpus was denied). But see *Javor v. United States*, 724 F.2d 831, 833-34 (9th Cir. 1984) (court found ineffective assistance where counsel slept through substantial parts of the trial).

⁴⁰ 544 F.2d at 1316 (Goldberg, J., concurring); see also Alan W. Clarke, *Procedural Labyrinths*

The question of trial-related activities has been overemphasized. It is time to focus on the constitutional requirements of counseling criminal defendants. What must defense counsel do in order to satisfy the constitutional mandate of effective assistance of counsel in the context of the acceptance or rejection of a plea?

The recent decision by the Court of Appeals for the Second Circuit in *Boria v. Keane*⁴¹ addresses this crucial question. This case's holding and analysis have profound implications for the caliber of representation provided to all criminal defendants, as well as for long-standing clinical legal educational notions of client-centered counseling.⁴² Oscar Boria was convicted after a jury trial and sentenced to twenty years to life imprisonment. He moved to set aside his conviction, claiming that his attorney, in failing to advise him to accept an offered plea bargain of one to three years incarceration, did not provide effective assistance of counsel.⁴³

Defense counsel readily admitted that he never counseled the defendant whether or not to accept the plea—a decision, in his view, for a defendant to make.⁴⁴ He did, however, discuss the plea repeatedly with the defendant, point out the implications of rejecting it, review the suppression hearing issues and inform the defendant that in his view the chances of prevailing at trial were slim.⁴⁵ According to defense counsel, the defendant steadfastly maintained his innocence, and told him that he would not plead guilty, especially if a plea included a jail sentence.⁴⁶

Granting the defendant's petition for a writ of habeas corpus, the court of appeals held that the Constitution requires that defense coun-

and the Injustice of Death: A Critique of Death Penalty Habeas Corpus, 29 U. RICH. L. REV. 1327, 1362 (1995) (to succeed on ineffective assistance claim, the defendant must have had "truly abysmal" lawyering).

⁴¹ 99 F.3d 492 (2d Cir. 1996).

⁴² By "client-centered" counseling, I refer to the model proposed originally in DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977). Although others have delineated aspects of client-centeredness, see, e.g., THOMAS L. SHAFER, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* (1976), the Binder and Price text has been the most influential within clinical legal education. See, e.g., Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 504 (1990). For an analysis of client-centered counseling, see *infra* notes 218-48 and accompanying text.

⁴³ See *supra* notes 13-16 and accompanying text.

⁴⁴ Post-conviction hearing on defense motion to vacate the judgment of conviction on the ground, among others, of ineffective assistance of counsel. February 26-28, 1992 (transcript on file with author). Counsel's approach is consistent with a traditional view of client-centered counseling. See discussion *infra* notes 218-48 and accompanying text.

⁴⁵ *Id.* at 15, 18, 27-29, 42-44.

⁴⁶ *Id.* at 10.

sel provide an informed opinion on whether to plead guilty or go to trial.⁴⁷ The court ruled that the defendant had a "constitutional right to be advised whether or not the offered bargain 'appeared to be desirable.'"⁴⁸ Because the defense attorney never actually advised his client whether or not he should accept the plea offer, he failed to provide the requisite effective assistance of counsel.

In order to appreciate the magnitude of the court's holding, one need only contrast the actions of counsel in *Boria* with those of the attorneys in some of the more notorious cases where claims of ineffective assistance were denied. The attorney in *Boria* was not drunk or on drugs. He did not fall asleep during court proceedings. He was experienced in criminal law and had ample time to prepare.⁴⁹ He met with his client on many occasions, spelled out the charges, the consequences of a plea, the likelihood of success at pretrial suppression hearings and at the trial itself, and yet a court found that his conduct amounted to one of the rare cases of ineffective assistance because he did not advise his client whether or not to accept the plea offer. He was judged to be ineffective solely on the basis of deficient counseling. In fact, the opinion states emphatically, "[I]t would be impossible to imagine a clearer case of a lawyer depriving a client of constitutionally required advice."⁵⁰ The undeniable message is that the attorney's constitutional counseling obligations have come to the forefront and taken on increased significance. *Boria* portends that defense lawyers must reevaluate their approaches to counseling, and that ineffective-assistance-of-counsel litigators need to recognize an under-utilized component of competent representation.

Boria is also significant in the challenge it presents to prevailing themes in clinical legal scholarship. A dominant issue in clinical legal education is the attorney's role in the counseling process. Scholars who advocate client-centered counseling emphasize the value of client autonomy.⁵¹ They describe a type of legal counseling that is premised on the assumption that clients should be the decisionmakers in their cases.⁵² In an early and very influential formulation, Professors David

⁴⁷ See *Boria*, 99 F.3d at 497.

⁴⁸ *Id.* at 498 (quoting Model Code of Professional Responsibility EC 7-7 (1992)).

⁴⁹ See *supra* text accompanying notes 35-39.

⁵⁰ *Boria*, 99 F.3d at 497.

⁵¹ See, e.g., Dinerstein, *supra* note 42, at 512 ("The core argument supporting client decision-making is that it enhances the client's individual autonomy."); John K. Morris, *Power and Responsibility Among Lawyers and Clients: Comment on Ellmann's Lawyers and Clients*, 34 UCLA L. REV. 781, 782, 809 (1987).

⁵² See Dinerstein, *supra* note 42, at 507 ("Client-centered counseling may be defined as a legal counseling process designed to foster client-decisionmaking.").

Binder and Susan Price suggested that in order to avoid influencing the client improperly, the attorney should "make every effort to communicate neutrality,"⁵³ and should, except in certain limited circumstances, decline to give an opinion regarding the appropriate decision even if the client asks directly.⁵⁴ To the extent that the analysis and holding in *Boria* mandate a different, constitutionally required role for defense counsel in criminal cases, clinical legal scholars must reassess their approaches to client counseling.

In this Article, I explore the defense attorney's constitutional obligations to clients in the context of the decision whether to plead guilty or to go to trial. I examine the implications of the Second Circuit's analysis in *Boria* for courts' evaluations of effective assistance of counsel and for clinical legal scholarship's formulations of client-centered counseling.

Part I describes the development of the effective assistance of counsel doctrine and its relation to client counseling. Part II analyzes the concept of client-centered counseling and its implications for an attorney's role in advising clients, concentrating on clinical legal scholars' attempts to apply client-centered counseling to clients in criminal cases. Part III evaluates in greater detail the history and holding of *Boria*: a curious succession of opinions in the case evidences the court's struggle to define an attorney's constitutional obligations when counseling a client. I analyze the effect of the Court of Appeals's final opinion in *Boria* on the provision of services to defendants in criminal cases, and on the continued viability of traditional definitions of client-centered counseling.

Part IV argues that the final, published holding in *Boria* did not go far enough to ensure that defense attorneys provide the effective assistance of counsel. Rather, the court's original opinion—one imposing an obligation on criminal defense attorneys to advise their clients, whether or not they are asked, on the wisdom of accepting or rejecting a plea, and also to try to persuade their clients to accept their advice—was more likely to breathe life into the constitutional guarantee of effective assistance.

⁵³ BINDER & PRICE, *supra* note 42, at 166.

⁵⁴ See *id.* at 187–88, 198–200.

I. DEVELOPMENT OF THE CONSTITUTIONAL REQUIREMENT OF EFFECTIVE ASSISTANCE OF COUNSEL AND ITS APPLICATION TO COUNSELING DEFENDANTS IN CRIMINAL CASES

For the past sixty-five years, the right to counsel has been understood to incorporate the right to the effective assistance of counsel. In *Powell v. Alabama*,⁵⁵ the Court considered the timing of the appointment of counsel and held that counsel must not be appointed "under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."⁵⁶ Almost three decades ago, in *McMann v. Richardson*,⁵⁷ the Court ruled that defendants are "entitled to the effective assistance of competent counsel . . . [and] cannot be left to the mercies of incompetent counsel."⁵⁸

Following the *McMann* decision, many convictions were challenged on the basis of counsel's failure to provide effective assistance. Without clear guidance from the Supreme Court in the form of standards for assessing whether a defendant received the effective assistance of counsel, appellate courts employed a variety of tests. At one time, the query was whether counsel's performance rendered the trial a "mockery of justice."⁵⁹ Eventually, most courts rejected the "mockery of justice" analysis. The majority viewed the correct analysis to be whether the lawyer's conduct measured up to that of a "reasonably competent attorney."⁶⁰ In 1983, the Second Circuit became the last federal court of appeals to replace the "farce and mockery" standard with a "reasonable competency" test.⁶¹

Despite the evident struggle in the courts of appeals to define effective assistance of counsel, the Supreme Court did not address the

⁵⁵ 287 U.S. 45 (1932).

⁵⁶ *Id.* at 71.

⁵⁷ 397 U.S. 759 (1970).

⁵⁸ *Id.* at 771.

⁵⁹ See, e.g., *Bottiglio v. United States*, 431 F.2d 930, 931 (1st Cir. 1970) (per curiam); *Cofield v. United States*, 263 F.2d 686, 689 (9th Cir.), *rev'd per curiam on other grounds*, 360 U.S. 472 (1959); *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949) ("A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice."); *Diggs v. Welch*, 148 F.2d 667, 670 (D.C. Cir. 1945).

⁶⁰ See, e.g., *Cooper v. Fitzharris*, 586 F.2d 1325, 1328 (9th Cir. 1978) (en banc); *United States v. Bosch*, 584 F.2d 1113, 1121 (1st Cir. 1978); *United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976) ("[T]rial counsel fails to render effective assistance when he [sic] does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances.").

⁶¹ *Trapnell v. United States*, 725 F.2d 149, 153 (2d Cir. 1983) ("[T]he time has come to declare that 'effective' assistance means 'reasonably competent assistance,' which we regard as shorthand for the standard that the quality of defense counsel's representation should be within the range of competence reasonably expected of attorneys in criminal cases.").

issue until *Strickland v. Washington*.⁶² In the face of mounting numbers of ineffective assistance challenges, and a growing body of literature criticizing the state of trial advocacy generally⁶³ and of advocacy in criminal courts particularly,⁶⁴ the Court declined to delineate standards illuminating the component parts of effective assistance.⁶⁵ Instead, the Court set up a two-pronged test for reviewing claims that counsel's assistance was ineffective. The defendant must show (1) that the attorney's performance "fell below an objective standard of reasonableness,"⁶⁶ and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."⁶⁷

Among the vast number of claims of ineffective assistance of counsel, the focus is usually on activities related to trial.⁶⁸ The high incidence of trial-related claims is at first blush surprising. The overwhelming majority of criminal cases are resolved by plea bargain.⁶⁹ There are, however, explanations for the many post-trial opinions. For one thing, trials are more easily susceptible to appellate review than are decisions to plead guilty.⁷⁰ Trials yield full transcripts.⁷¹ Secondly, reviewing a

⁶² 466 U.S. 668 (1984).

⁶³ See, e.g., ANTHONY PARTRIDGE & GORDON BERMANT, *THE QUALITY OF ADVOCACY IN THE FEDERAL COURTS* (1978); Maddi, *supra* note 23.

⁶⁴ See *supra* notes 17-18.

⁶⁵ The Court held that "[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. More specific guidelines are not appropriate. The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance." *Strickland*, 466 U.S. at 687-88. Justice Brennan wrote, "With respect to the performance standard, I agree with the Court's conclusion that a 'particular set of detailed rules for counsel's conduct' would be inappropriate." *Id.* at 703 (Brennan, J., concurring in part and dissenting in part). Scholars have expressed similar sentiments. See, e.g., Vivian Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 86 (1986) ("I believe that at this stage of development of the law on ineffective assistance, the difficulty of articulating a comprehensive list of duties justifies the Court's reluctance to constitutionalize any specific directives to counsel."). Justice Marshall, on the other hand, criticized the majority's refusal to delineate specific standards and praised the Eleventh Circuit for its "sound attempt to develop particularized standards designed to ensure that all defendants receive effective legal assistance." *Strickland*, 466 U.S. at 709 (Marshall, J., dissenting).

⁶⁶ *Strickland*, 466 U.S. at 688.

⁶⁷ *Id.* at 694.

⁶⁸ See *supra* notes 22-32 and accompanying text.

⁶⁹ See *supra* notes 10-12.

⁷⁰ See, e.g., Albert W. Alschuler, *Personal Failure, Institutional Failure, and the Sixth Amendment*, 14 N.Y.U. REV. L. & SOC. CHANGE 149, 149 (1986) ("[A] plea negotiation system insulates attorneys from review and often makes it impossible to determine whether inadequate representation has occurred . . ."); Berger, *supra* note 65, at 65 ("[O]ften the sins of counsel are buried in guilty pleas . . .").

⁷¹ See, e.g., Goodpaster, *supra* note 24, at 81 ("[T]he ineffective assistance problem is much harder to reach in guilty plea cases because there is no evidentiary record from which to assess counsel's alleged failings . . .").

claim of ineffectiveness at trial generally involves evaluating concrete or objective actions, such as, for example, whether counsel prepared adequately (i.e., investigated, researched, interviewed witnesses, filed motions, etc.), and/or performed competently (i.e., cross-examined witnesses, made a closing statement, etc.).⁷² Contrast that inquiry with an examination of the adequacy of the attorney's counseling. Not only is counseling less tangible, but it is also harder to reconstruct after the fact. There is also a sense that representing someone who ends up pleading guilty is less demanding, or requires less expertise, than representing someone at a trial.⁷³

When a defendant challenges the validity of a guilty plea, the court must examine whether the plea was voluntarily, knowingly and intelligently entered.⁷⁴ The year after *Strickland*, in *Hill v. Lockhart*,⁷⁵ the defendant alleged that his guilty plea was involuntary due to the ineffective assistance of counsel. Specifically, he alleged that his attorney provided him with erroneous information regarding his parole eligibility date, and that he relied on this inaccurate information when he decided to plead guilty. The Supreme Court held that the ineffective assistance standard enunciated in *Strickland* was applicable to claims arising from the plea process.⁷⁶ In order to prevail, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."⁷⁷ The Court concluded that there was no evidence that the defendant would have insisted on a trial if he had received accurate information, and therefore the defendant failed to show the necessary prejudice.

An examination of the contours of effective assistance of counsel in cases where the defendant has pleaded guilty illuminates the de-

⁷² The record on these claims will likely have been developed at a hearing on post-verdict motions.

⁷³ See, e.g., *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974) ("Reasonably effective assistance is an easier standard to meet in the context of a guilty plea than in a trial, but counsel still must render competent service.").

⁷⁴ See *North Carolina v. Alford*, 400 U.S. 25, 31 (1970) ("The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.").

⁷⁵ 474 U.S. 52 (1985).

⁷⁶ *Id.* at 57 ("Although our decision in *Strickland v. Washington* dealt with a claim of ineffective assistance of counsel in a capital sentencing proceeding, and was premised in part on the similarity between such a proceeding and the usual criminal trial, the same two-part standard seems to us applicable to ineffective assistance claims arising out of the plea process.").

⁷⁷ *Id.* at 58. The Court's stated purpose for requiring a showing of prejudice was to promote the finality of guilty pleas. See *id.*

fense attorney's counseling obligations. When do a defense attorney's actions render a plea involuntary, unknowing or unintelligent? To focus the inquiry, assume that defense counsel completed a thorough investigation. Assume further that the attorney spoke with witnesses, researched the legal issues, and conveyed the offer to the defendant, and that the lawyer was not overburdened by inadequate resources and divided loyalties. The critical question heretofore left unexamined is what is the lawyer's role—the constitutional obligation—in the decision whether to plead guilty or go to trial.

Clearly, the defendant has the "ultimate authority" as to whether to plead guilty.⁷⁸ The issue then, properly framed, is whether defense counsel may, should or must advise a client, or offer any opinion, as to what decision the client should make, regardless of whether the client specifically asks for advice. Consider as well the even more controversial question of whether defense counsel may, should or must attempt to persuade the client to accept her advice.

A. *Guilty Pleas*

In many cases, defendants claim that, because they did not receive effective assistance of counsel, their pleas were not voluntary, knowing and intelligent.⁷⁹ In analyzing these claims, appellate courts focus on whether the attorney's actions were within the range of competence demanded of attorneys in criminal cases.⁸⁰ If not, the courts examine whether the defendant would have gone to trial but for the deficient performance of counsel.⁸¹

1. Inaccurate Information

Often the alleged ineffectiveness involves claims that the attorney provided inadequate information to the defendant regarding the nature of the charges, possible defenses or the range of allowable sentences. The crux of the issue is whether the attorney's statements in the course of counseling the client amounted to inaccurate factual information, insufficient information or an inaccurate opinion or prediction. The core of the defendant's argument is that the ineffective assistance—the provision of deficient information—was what induced

⁷⁸ *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (the accused has the "ultimate authority" to decide whether to plead guilty, waive a jury, testify in his or her own behalf or take an appeal).

⁷⁹ See *supra* notes 74–76.

⁸⁰ See *Strickland*, 466 U.S. at 688.

⁸¹ See *id.* at 694; *Hill*, 474 U.S. at 59.

him to enter a plea, and therefore the plea was not voluntary, knowing and intelligent.

For example, in *Cooks v. United States*,⁸² the defense attorney informed the defendant that he faced sixty years in prison, ten years on each of the six counts in the indictment, if he were convicted after trial. Defense counsel advised the defendant that he should therefore accept the offer of ten years on a plea to only one count. The defendant decided to accept the offer and pleaded guilty. In fact, only one count of the indictment was legally valid, and as a result, the defendant was facing only a ten-year prison sentence. In finding the attorney's performance to be ineffective, the court addressed the nature of the counseling requirements in criminal cases. The court stated that "clairvoyance" was not a necessary feature of effective representation, but that:

[a]lthough counsel need not be a fortune teller, he must be a reasonably competent legal historian. Though he need not see into the future, he must reasonably recall (or at least research) the . . . controlling Supreme Court precedents which demonstrate unequivocally that defendant could not possibly receive a total sentence of 60 years on the indictment Effective counsel should have been aware of and advised the defendant of, at a minimum, the maximum—that is, the maximum penalty as the law was then understood.⁸³

A more difficult question arises when counsel's information is not inaccurate, but rather, incomplete. In *People v. Thew*,⁸⁴ the defendant pleaded guilty and received life without parole, the maximum permissible penalty. In order to determine whether defense counsel was constitutionally ineffective, the court examined whether the plea was voluntary and knowing, and observed that "[t]he question is not whether a court would, in retrospect, consider counsel's advice to be right or wrong, but whether the advice was within the range of competence demanded of attorneys in criminal cases."⁸⁵ Although defense counsel did not provide any inaccurate information, the court found him to be ineffective. The court noted that there was a question whether the

⁸² 461 F.2d 530 (5th Cir. 1972).

⁸³ *Id.* at 532; see also *O'Tuel v. Osborne*, 706 F.2d 498, 500 (4th Cir. 1983); *Strader v. Garrison*, 611 F.2d 61, 63 (4th Cir. 1979); *Hammond v. United States*, 528 F.2d 15, 18 (4th Cir. 1975) (defense counsel's erroneous calculation of the maximum allowable sentence held to be ineffective assistance rendering the plea involuntary).

⁸⁴ 506 N.W.2d 547 (Mich. Ct. App. 1993).

⁸⁵ *Id.* at 552.

defendant was made aware of the nature of the charges, the consequences of a plea and the availability of possible defenses. Therefore the plea was not the result of a "sufficiently informed choice that constituted a voluntary and knowing act."⁸⁶

Harder still is the situation where defense counsel offers solely an opinion, the defendant relies on it and it turns out to be wrong. Courts analyze whether defense counsel's prediction, albeit wrong, was unreasonable.⁸⁷ In *State v. DiFrisco*,⁸⁸ the defendant pleaded guilty and was sentenced to death. He claimed that he was misinformed regarding the likelihood of a death sentence, and that he pleaded guilty on the basis of defense counsel's opinion that the court would not enter a death sentence on a guilty plea. Defense counsel testified that, indeed, he "never thought for a second" that the court would impose the death penalty.⁸⁹ The court determined that this was an opinion as opposed to a promise or guarantee, and that erroneous sentencing predictions did not warrant vacating guilty pleas where the prediction was wrong but not unreasonable.⁹⁰ After an analysis of the strength of the prosecution's case, the court held that although defense counsel's prediction was erroneous, it was not unreasonable.⁹¹

A plea will not be overturned merely because a defendant pleaded guilty based on defense counsel's inaccurate prediction. The linchpin

⁸⁶ *Id.* at 555.

⁸⁷ See, e.g., *Tollett v. Henderson*, 411 U.S. 258, 266 (1973) (the issue is whether counsel's assistance was "within the range of competence demanded of attorneys in criminal cases").

⁸⁸ 645 A.2d 734 (N.J. 1994).

⁸⁹ *Id.* at 744.

⁹⁰ See *id.* at 745; see also *Little v. Allsbrook*, 731 F.2d 238, 241 (4th Cir. 1984) ("An attorney's 'bad guess' as to sentencing does not justify the withdrawal of a guilty plea and is no reason to invalidate a plea."); *United States v. Hollis*, 718 F.2d 277, 280-81 (8th Cir. 1983).

⁹¹ The court ruled that the erroneous prediction did not render the plea involuntary or unknowing, nor did it amount to the ineffective assistance of counsel. *DiFrisco*, 645 A.2d at 745; see also *Chichakly v. United States*, 926 F.2d 624, 630-31 (7th Cir. 1991) (quoting *Stout v. United States*, 508 F.2d 951, 953 (6th Cir. 1975) ("A plea is not rendered involuntary merely because a prediction that a guilty plea will result in a light sentence does not come true.")). The court in *Chichakly* noted further that a "mere inaccurate prediction, standing alone . . . does not constitute ineffective assistance." 926 F.2d at 630 n.11; see also *United States v. Arvanitis*, 902 F.2d 489, 494 (7th Cir. 1990); *United States v. Garcia*, 909 F.2d 1346, 1348-49 (9th Cir. 1990); *People v. Jones*, 579 N.E.2d 829, 840-41 (Ill. 1991); cf. *United States v. Wilson*, 922 F.2d 1336, 1340 (7th Cir. 1991) ("There are two strands of argument here—a due process argument, that the pleas were involuntary, and also a sixth amendment argument, that [counsel] provided ineffective assistance. These arguments are doctrinally distinct. Effective assistance from counsel 'within the range of competence demanded of attorneys in criminal cases,' will usually guarantee a knowing, intelligent and voluntary plea—but not always." (internal citations omitted)); *Berger*, *supra* note 65, at 111 ("Regardless whether the claim is couched in terms of involuntariness or ineffectiveness, the prisoner is making the same complaint—that grossly deficient representation induced him to enter a plea of guilty.").

is whether the prediction was reasonable. Compare counsel's inaccurate predictions with her provision of incorrect information (for example, advising the defendant that he is facing sixty years when the maximum is only ten), or her failure to provide sufficient information for the defendant to make an informed choice. While an erroneous prediction could still be deemed to be reasonable, it is more difficult to imagine situations where providing inaccurate or insufficient information is defensible. It is also important to recognize that although these cases involve issues that arise in the course of counseling about the case generally, as opposed to the specific issue of counseling the defendant whether to accept or reject a plea, they are often related—defense counsel could well provide inaccurate information and then recommend that the defendant plead guilty as a result.

2. Coercion

Other plea cases examine the limitations on counsel's efforts to convince a client to plead guilty. Put another way, what does it take to render a plea involuntary because it is the result of defense counsel's coercion? When do defense counsel's efforts to convince the defendant to accept a plea become ineffective assistance? Surely, this is the most contentious aspect of ineffective assistance litigation in the plea context. The perception exists among many, if not most, indigent defendants that their lawyers are interested only in getting them to plead guilty.⁹² How far is an attorney permitted to go in attempting to persuade the client to plead guilty?

Several courts' of appeals decisions reveal that attorneys are given a wide berth. In *Iaea v. Sunn*,⁹³ in order to convince the defendant to plead guilty, defense counsel told her client that his chances of acquittal were slight, that if convicted he would be subject to mandatory minimum sentencing laws and that if he pleaded guilty there was a good chance of getting probation and an "almost zero" chance of getting an extended sentence.⁹⁴ When the defendant still did not appear receptive to pleading guilty, defense counsel threatened to withdraw from the case. She testified, "I took pride in myself as an attorney and that I would never *allow* a client to hurt himself . . . [I]f . . . I had *allowed* him to go to trial, I would have done him a disservice so that if he insisted on going to trial another attorney would handle it because it

⁹² See, e.g., Steven Zeidman, *Sacrificial Lambs or the Chosen Few?: The Impact of Student Defenders on the Rights of the Accused*, 62 BROOK. L. REV. 853, 908 n.224 (1996).

⁹³ 800 F.2d 861 (9th Cir. 1986).

⁹⁴ See *id.* at 863.

would be against my conscience to a client not to take a deal and go through a trial, get convicted, and face the extended term."⁹⁵ Ultimately, the defendant pleaded guilty and was sentenced to life imprisonment. The defendant then claimed that his counsel had been ineffective and that his plea was involuntary.⁹⁶

The court found that counsel's performance was deficient because it was not within the range of competence demanded of attorneys in criminal cases.⁹⁷ Specifically, the court noted that defendant was not subject to the minimum sentencing statute as defense counsel thought, and that counsel's advice that probation was likely and that the chances of an extended term were practically non-existent was faulty. The court observed that mere inaccurate predictions do not constitute ineffective assistance, but the "gross mischaracterization" of the likely outcome, combined with the erroneous advice on the possible effects of going to trial, fell below the level of competence required of defense attorneys.⁹⁸ The court remanded the case for an evidentiary hearing to determine whether there was any prejudice (i.e., that but for counsel's errors, the defendant would have gone to trial), and whether the plea was rendered involuntary by defense counsel's threat to withdraw.⁹⁹ Interestingly, the court was concerned with the coercive nature of defense counsel's comments only insofar as they referred to a threat to withdraw from the case. The other aspects that appeared coercive in nature (i.e., counsel's statements about what decision she would "allow" her client to make) went uncriticized.

In contrast, defense counsel in *Uresti v. Lynaugh*¹⁰⁰ negotiated a thirty-five year plea bargain, down from an original sixty-year offer. When he told his client of the offer, his client indicated that he wanted a few days to think it over. Defense counsel feared that the offer would be withdrawn and that jailhouse lawyers would advise the defendant to his detriment, so he told his client that "if he did not accept the recommended thirty-five (35) year plea on that day he, the attorney,

⁹⁵ *Id.* (emphasis added).

⁹⁶ For discussion of the relationship between ineffectiveness and involuntariness, see *supra* note 91.

⁹⁷ See *Iaea*, 800 F.2d at 865.

⁹⁸ *Id.*

⁹⁹ One scholar has argued that counsel should not be permitted to withdraw or threaten to withdraw from representing a client when the client declines to accept the attorney's advice. See Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L. J. 1179, 1310 (1975) ("A defense attorney should neither withdraw nor threaten to withdraw from a case because his client has refused to enter the plea that the attorney has recommended. Professional codes should, in my view, be revised to make this action grounds for professional discipline.").

¹⁰⁰ 821 F.2d 1099 (5th Cir. 1987).

would request permission . . . to withdraw"¹⁰¹ Defense counsel admitted that he did "use what persuasion he could reasonably muster to convince [the defendant] to plead guilty."¹⁰² Even though defense counsel initiated the same-day ultimatum and admitted using whatever persuasion he could in order to convince the client to plead guilty, including threatening to withdraw from the case, the court found that the plea was not involuntary due to ineffective assistance of counsel. The court stated that "[w]e have here an attorney who on the record is acting in good faith and affording sound representation when he decides that a client should plead guilty under a plea bargain."¹⁰³ The court went on to state that "[t]here is no evidence that in any other way the advice to Uresti as to the plea bargain fell short of the requisite level of thoroughness and professional competence required."¹⁰⁴ Although the tactics used to convince the client to plead guilty seem heavy-handed, the court focused instead on the reasonableness of the advice itself, and determined that it was not unreasonable for counsel to urge a plea.

Perhaps the clearest example of the courts' willingness to allow, if not condone, defense counsel's extreme efforts to convince a client to plead guilty can be found in *Williams v. Chrans*.¹⁰⁵ In the face of clear and unequivocal testimony by defense counsel that he and his colleagues "used every means available" to "force" the defendant to plead guilty,¹⁰⁶ the court concluded that the plea was voluntary. Quoting *Lo Conte v. Dugger*,¹⁰⁷ the court observed that "[s]imply because the [defendant] was subjected to pressure from sources not associated with the state or prosecutors does not mean that [the defendant's] guilty plea was necessarily involuntary. It is not an uncommon occurrence that a criminal defendant is pressured to some extent by co-defendants, friends and relatives. These types of influences are inevitable and unavoidable."¹⁰⁸ Implicitly equating the inevitable and unavoidable pressure of co-defendants, family and friends with that of defense counsel, the court went on to note simply that "Mr. Williams' attorneys concluded that a guilty plea was in his best interests and used verbal persuasion to convince their client to plead guilty."¹⁰⁹ As to the limits

¹⁰¹ *Id.* at 1101.

¹⁰² *Id.*

¹⁰³ *Id.* at 1102.

¹⁰⁴ *Id.*

¹⁰⁵ 945 F.2d 926 (7th Cir. 1991).

¹⁰⁶ *Id.* at 932; see *supra* note 3 and accompanying text.

¹⁰⁷ 847 F.2d 745 (11th Cir. 1988).

¹⁰⁸ *Williams*, 945 F.2d at 933 (quoting *Lo Conte*, 847 F.2d at 753).

¹⁰⁹ *Id.*

of how far an attorney can go before their counseling, or "verbal persuasion," rises to the level of coercion, the court held only that "[a]dvice—even strong urging' by counsel does not invalidate a guilty plea."¹¹⁰

Although it is not constitutionally required, the law thus permits (if not condones) defense counsels' going well beyond merely advising their clients to accept a plea offer. Attorneys are given wide latitude in their efforts to influence their clients to plead guilty. Attempts to persuade, even those that amount to "strong urging," are acceptable, and rarely will such efforts result in a finding that the defendant's plea was involuntary. As the court observed in *United States v. Wilson*,¹¹¹

[a]dmittedly, it is not easy to tell when a plea has been unlawfully coerced. Distinguishing coercion, of the constitutionally offensive kind, from sound anodyne advice, which raises no constitutional concerns but just as surely pressures pleas, is difficult. In any guilty-plea system, pricks, prods, and provocations—whether from a lawyer, a mother, a father, a friend or anybody else—will frequently steer a defendant's thoughts, in that sense "coercing" pleas. But not every piece of advice or pressure from a private party amounts to *unconstitutional* coercion.¹¹²

3. Neutrality

At the other extreme is the situation where defense counsel offers no advice on the wisdom of a plea and the defendant opts to plead guilty. For many criminal defense attorneys, this neutrality is surely a reaction to the studies that document defendants' negative reactions to being told what to do by their lawyers.¹¹³ For other defense attorneys, this method of counseling is premised on notions of fostering client autonomy and empowerment.¹¹⁴ And still others are no doubt motivated by fear of lawsuits or allegations of misconduct.¹¹⁵ The constitu-

¹¹⁰ *Id.* (quoting *Lunz v. Henderson*, 533 F.2d 1322, 1327 (2d Cir. 1976)). The court went on to note that the defendant's statements during his plea that the plea was voluntary and not the result of any threats or promises, were additional support for the conclusion that the plea was not coerced. See *id.*; see also *Miles v. Dorsey*, 61 F.3d 1459, 1470 (10th Cir. 1995).

¹¹¹ 922 F.2d 1336 (7th Cir. 1991).

¹¹² *Id.* at 1341; see also *Alschuler*, *supra* note 99, at 1309 ("[T]he line between advice and coercion seems virtually non-existent in the guilty-plea system.").

¹¹³ See *infra* note 200.

¹¹⁴ See *infra* notes 228–30.

¹¹⁵ For a discussion of other possible rationales for attorney neutrality, see *infra* notes 396–407 and accompanying text.

tional question that arises is whether a defendant received effective assistance when the attorney did not offer an opinion on the advisability of accepting a plea and the defendant's decision to plead guilty was arguably ill-advised (i.e., the defendant pleaded guilty to the highest charge and received the maximum sentence).

Several cases from the Fifth Circuit have considered this issue in detail. In *Walker v. Caldwell*,¹¹⁶ among the factors resulting in a finding of ineffective assistance was the attorney's failure to advise an illiterate defendant whether or not to plead guilty. The court stated that the effective assistance of counsel requires that the attorney "actually and substantially assist his client in deciding whether to plead guilty."¹¹⁷ A few years after *Walker*, the Fifth Circuit again addressed the constitutional requirements for counseling criminal defendants. In *Trahan v. Estelle*,¹¹⁸ defense counsel testified that "his practice was to advise clients of the factual strength of the state's case in light of applicable law and then to allow them to make their own decisions as to how to plead to the extent they were capable."¹¹⁹ The seventeen-year-old defendant pleaded guilty and received a life sentence, the maximum possible sentence had he been convicted after trial. The court of appeals remanded the case for consideration of the issues of voluntariness and effectiveness of counsel. Judge Goldberg, in a concurring opinion, attempted to explicate the constitutional requirements of counsel's role in the plea decision. Judge Goldberg wrote that the defense attorney's practice was to be "commended in the general run of cases,"¹²⁰ but that courts must "be alert to circumstances that call for counsel to impart to his client more than an explanation of the factual case, the nature of the charges, and the benefits and burdens of pleading guilty."¹²¹ In those cases, "it may be incumbent upon [the] attorney to go beyond a relatively passive characterization of the state's case to a more active ferreting out of the defendant's reasons for agreeing to plead guilty."¹²²

The very next year, in *Jones v. Estelle*,¹²³ the Fifth Circuit was again confronted with a situation where a defendant pleaded guilty and then complained that his attorney offered no advice on the wisdom of that

¹¹⁶ 476 F.2d 213 (5th Cir. 1973).

¹¹⁷ *Id.* at 224.

¹¹⁸ 544 F.2d 1305 (5th Cir. 1977).

¹¹⁹ *Id.* at 1319 (Goldberg, J., concurring).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 1320.

¹²³ 584 F.2d 687 (5th Cir. 1978).

decision. On the morning of trial, the prosecutor presented defense counsel with the statement of a witness who discredited his client's claim of self-defense. Defense counsel showed the statement to the defendant, explained the effect that it had on his defense, explained the possible sentence after trial compared to the prosecutor's plea offer and left the final decision up to the defendant. The defendant cited Judge Goldberg's concurrence in *Trahan* and claimed that counsel was ineffective for failing to advise him what to do. The court held that *Trahan* sanctioned specifically this sort of counseling, and that only in "special circumstances" is counsel required to take a more active role.¹²⁴ The court ruled that counsel's assistance enabled the defendant to make an informed and conscious choice between trial and a guilty plea, and that more in the nature of advising the defendant whether or not to accept the offer was not required.

Decisions of other courts echo the same theme; the attorney is not required to counsel a client against a plea even if it appears that a plea is not, by some objective measure, the best result. In *People v. Stewart*,¹²⁵ the defendant pleaded guilty and received life imprisonment without parole, the highest permissible sentence. The Supreme Court of Michigan reversed the lower court's finding that the defendant had received ineffective assistance of counsel. The dissent argued that defense counsel has an obligation to try to prevent the client from entering a plea of this nature: "[P]leading guilty to a life without parole offense, Michigan's equivalent of the death penalty, is something a defendant should be allowed to do only over the strenuous objections of his attorney. We are not dealing here with a plea to a lesser bargained-for offense or to an offense for which some sentence consideration is possible. Under circumstances such as these, I can conceive of no justification for defense counsel not insisting that the people be put to their proofs"¹²⁶

Two years later, the Michigan courts were again confronted with a defendant who pleaded guilty to the maximum sentence without any advice from his attorney on the advisability of accepting or rejecting the plea. In *People v. Corteway*,¹²⁷ the defense attorney counseled his client regarding the nature of the charges, the sentencing consequences, possible defenses, the strength of the prosecution's case and the advantages and disadvantages of a trial as opposed to a plea.

¹²⁴ See *id.* at 690.

¹²⁵ 498 N.W.2d 430 (Mich. 1993).

¹²⁶ *Id.* at 430 (Cavanagh, C.J., dissenting).

¹²⁷ 538 N.W.2d 60 (Mich. Ct. App. 1995).

Counsel, however, "did not specifically recommend which course of action the defendant should take."¹²⁸ The defendant pleaded guilty and received the maximum sentence, life imprisonment without parole. The Michigan Court of Appeals noted that the trial court found that "although counsel's representation was otherwise adequate, counsel's 'neutrality'—his failure to make a specific recommendation that defendant either plead guilty or go to trial—constituted ineffective assistance of counsel."¹²⁹ The Court of Appeals ruled that "[w]hile an attorney may elect to offer a client a specific recommendation whether to go to trial or to plead guilty in the course of that consultation, we decline to hold that such a recommendation is required or that the failure to provide such a recommendation necessarily constitutes ineffective assistance of counsel,"¹³⁰ and further, that "[a]bsent unusual circumstances,"¹³¹ an informed and voluntary choice can be made without a specific recommendation from counsel. Finding that the attorney's assistance enabled the defendant to make an informed and voluntary choice, the court reinstated the defendant's conviction.¹³²

The preceding review of appellate decisions suggests that an attorney can sit by and watch a client make a seemingly illogical decision such as pleading guilty without gaining any benefit, and yet still have provided the effective assistance of counsel. When this understanding is coupled with the courts' views regarding the lengths to which attorneys are permitted to go in trying to persuade their clients to accept their advice regarding decisions, it becomes clear that there are few limits on the attorney's role in counseling clients who decide to plead guilty—it can be effective assistance to use all sorts of verbal and psychological methods to persuade, as well as to choose to decline to offer any opinion at all. Although there are few limitations on what counsel is permitted to do in the course of counseling a client about a plea offer, the remaining question is what, if anything, counsel is required to do.

¹²⁸ *Id.* at 62.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² The dissent took a more expansive view of the role of defense counsel and agreed with the trial court that "the essence of an attorney's function . . . is to give advice." *Corteway*, 538 N.W.2d at 65 (Hood, P.J., dissenting).

B. *Not Guilty Pleas*

Less commonly, the defendant is convicted after trial and argues that the decision to reject a plea and proceed to trial was due to ineffective assistance of counsel. These claims are rare. For one thing, trials are infrequent.¹³³ Also, the claim of ineffectiveness by defendants convicted after trial usually involves the attorney's preparation for or performance at the trial.¹³⁴ The focus here, though, is on the counseling. The claim is that if the attorney had provided effective assistance, the defendant would have pleaded guilty.

The threshold issue is whether the Sixth Amendment guarantee of effective assistance is even applicable in this context. In the case of a plea, the concern is that the relinquishment of constitutional rights (i.e., the right to a trial; the right to confront and cross-examine one's accusers; and the right to remain silent) be voluntary, knowing and intelligent.¹³⁵ Effective assistance of counsel is required to assist the defendant in that endeavor.¹³⁶ In the case of a defendant who complains of ineffective assistance where he did not accept the plea, those constitutional rights were not waived, but rather, were asserted.¹³⁷

Courts have approached post-trial claims of ineffective assistance at the plea negotiation stage somewhat warily. The opinions suggest that it is one thing to join the many defendants who complain that their lawyer insisted they plead guilty, and that had they not pleaded guilty they would have prevailed at trial. It is quite another thing to

¹³³ See, e.g., MALCOLM F. FEELEY, *THE PROCESS IS THE PUNISHMENT—HANDLING CASES IN A LOWER CRIMINAL COURT* 127 (1979); Thomas Hagel, *Toward a Uniform Statutory Standard for Effective Assistance of Counsel: A Right in Search of Definition After Strickland*, 17 LOY. L.J. 203, 223 & n.144 (1986).

¹³⁴ See *supra* notes 22–29.

¹³⁵ When a defendant pleads guilty, he waives the constitutional right to a jury trial, the right to confront his accusers and the privilege against self-incrimination. See *Boykin v. Alabama*, 395 U.S. 238, 242–43 (1969). The courts must ensure that guilty pleas are voluntary, knowing and intelligent. See, e.g., *McCarthy v. United States*, 394 U.S. 459, 467 (1969).

¹³⁶ See *Hill*, 474 U.S. at 58–59.

¹³⁷ See, e.g., *State v. Kraus*, 397 N.W.2d 671, 674 (Iowa 1986) ("There is a vast difference between what happens to a defendant when he pleads guilty as opposed to what occurs when a plea agreement is rejected. The rejection of a plea agreement, in most instances, will result in the defendant going to trial with all of the concomitant constitutional safeguards that are part and parcel of our judicial process. The defendant who pleads guilty, on the other hand, waives many of these protections . . .") (quoting *Johnson v. Duckworth*, 793 F.2d 898, 900 (7th Cir. 1986)); *Commonwealth v. Thomas*, 350 A.2d 847, 850 n.3 (Pa. 1976) ("It is particularly significant that counsel is not here accused of persuading appellant to waive any of his rights but rather suggested that he avail himself of all the protection provided under our system of jurisprudence. It would be in only the most unusual cases where such advice could be deemed a basis for an ineffective assistance of counsel claim.").

argue that their lawyer forced them to go to trial, and that any competent lawyer would have insisted that they plead guilty. In *United States v. Faubion*,¹³⁸ the court noted that "[t]his argument is unusual, to say the least. Usually, a prisoner challenges an attorney's advice to plead guilty. With excellent hindsight, prisoners often contend that, had they gone to trial, they would have presented a stellar defense and, ultimately, received an acquittal. The originality of Faubion's claim outpaces its merit, however."¹³⁹

A related concern is that if claims of this nature are successful, attorneys might become less likely to advise clients to assert their constitutional rights to a trial. The court in *Faubion* stated directly, "[w]e underscore our hesitancy to impose the badge of deficiency on an attorney's measured judgment to go to trial instead of pleading guilty. To hold otherwise would put attorneys on notice that their zealous pursuit of an acquittal when the government offers no concessions might result in a successful claim that he or she performed deficiently."¹⁴⁰

The ambivalence toward these claims is also a product of the difficulty in fashioning a remedy. If a court finds that a defendant received ineffective assistance of counsel when she pleaded guilty, the remedy is to give her the plea back so that she can assert her constitutional rights and proceed to trial. On the other hand, assume that a defendant who received ineffective assistance at the plea bargaining stage subsequently received a fair trial. Surely, the remedy is not to reverse the trial in order to hold another one. Two fair trials will not undo the ineffective assistance that led to the defendant's rejecting a plea prior to trial in the first place. The issue of the effectiveness, the constitutionality, of the counseling takes on paramount importance.

¹³⁸ 19 F.3d 226 (5th Cir. 1994).

¹³⁹ *Id.* at 228-29; see also *United States v. Holcomb*, 943 F. Supp. 13, 17 (D.D.C. 1996) ("[T]here is little case law on the consequences of a defendant's rejection of a plea offer in favor of going to trial, with a subsequent attempt to recover the benefit of the unaccepted plea bargain. Most claims of ineffective assistance by counsel of this type result from guilty pleas that leave defendants dissatisfied with their sentences."); *McClenithan v. Dugger*, 767 F. Supp. 257, 258 (M.D. Fla. 1991) ("While there is considerable case law addressing ineffective assistance of counsel in conjunction with defendant's acceptance of a plea bargain, case law concerning this issue in conjunction with defendant's rejection of a plea bargain is sparse."); *Kraus*, 397 N.W.2d at 673-74 (observing that cases of attorney misadvice during plea bargaining usually involve plea cases, and that the court had not yet decided a case where the misadvice led to a not guilty plea); *Judge v. State*, 471 S.E.2d 146, 148 (S.C. 1996) (noting that the question of a defendant's Sixth Amendment rights when he asserts that ineffective assistance resulted in the rejection of a plea had not yet been resolved by the South Carolina Supreme Court or the Supreme Court of the United States).

¹⁴⁰ 19 F.3d at 230.

The question becomes whether the court can or should direct the prosecution to reoffer the plea that was rejected, or whether there are other appropriate remedies available.

Some have argued that permitting defendants who are convicted after trial to raise these claims gives defendants two bites at the apple. In *Kates v. United States*,¹⁴¹ the court noted the prosecution's position that the defendant's argument was a "post-conviction effort to eat his cake and have it, to grab the benefit of a deal which he had spurned, having already put the government to the test of trial."¹⁴² Similarly, in *State v. Kraus*,¹⁴³ the court noted that "[i]t would be anomalous if an accused were to enjoy an enviable advantage by virtue of the misadvice. Upon receiving misleading advice an accused could, under the proposed rule, proceed with the comforting knowledge there was no risk in the trial; an acquittal would free the defendant and an unfavorable verdict could be set aside."¹⁴⁴ In *United States v. Busse*,¹⁴⁵ the prosecution argued that acceptance of defendant's claim would mean that any defendant convicted after trial could argue that she was not properly counseled about a plea. The court agreed that this was a legitimate concern, but held that it should not result in a "blanket prohibition" against all such claims.¹⁴⁶

Notwithstanding the issues noted above, the majority of courts have concluded that the Sixth Amendment right to the effective assistance of counsel is applicable to the decision to reject a plea offer and proceed to trial. The premise is that the "defendant has the right to make a reasonably informed decision whether to accept a plea offer."¹⁴⁷ The Supreme Court of California considered the issue at length and determined that ineffective assistance resulting in rejection of a plea is similar to the converse. "Both alternate decisions—to plead guilty or instead to proceed to trial—are products of the same attorney-client interaction and involve the same professional obligations of counsel. Application of the constitutional guarantee of effective assistance of counsel to the advice given a defendant to plead guilty necessarily encompasses the counterpart of that advice: to reject a proffered plea

¹⁴¹ 930 F. Supp. 189 (E.D. Pa. 1996).

¹⁴² *Id.* at 192.

¹⁴³ 397 N.W.2d 671, 674 (Iowa 1986).

¹⁴⁴ *Id.* at 674; see also *Young v. State*, 608 So. 2d 111, 112 (Fla. Dist. Ct. App. 1992) (a defendant who pleads guilty due to misadvice gets a new trial whereas a defendant who went to trial due to misadvice has "nothing to lose").

¹⁴⁵ 814 F. Supp. 760 (E.D. Wis. 1993).

¹⁴⁶ *Id.* at 765.

¹⁴⁷ *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992).

bargain and submit the issue of guilt to the trier of fact."¹⁴⁸ In *Barentine v. United States*,¹⁴⁹ a district court held that "[w]here defense counsel has failed to inform a defendant of a plea offer, or where defense counsel's incompetence results in a defendant's deciding to go to trial rather than pleading guilty, the federal courts have been unanimous in finding that such conduct constitutes a violation of the defendant's Sixth Amendment constitutional right to effective assistance"¹⁵⁰ As the court concluded in *United States v. Day*,¹⁵¹ "the Sixth Amendment right to effective assistance of counsel guarantees more than the Fifth Amendment right to a fair trial,"¹⁵² and fair trials subsequent to ineffective assistance at the plea bargaining stage do not cure the underlying constitutional defect.¹⁵³

1. Failure to Inform of Offer

Often, the defendant is convicted after trial and then claims that counsel was ineffective for failing to inform her of the prosecution's plea offer. Pursuant to *Strickland*,¹⁵⁴ the defendant must show that the attorney's performance was unreasonable under prevailing professional standards,¹⁵⁵ and that there was a reasonable probability that but for counsel's errors, the result would have been different.¹⁵⁶ Numerous courts have held that the failure to inform the defendant of a plea

¹⁴⁸ *In re Alvernaz*, 2 Cal. 4th 924, 925 (Cal. 1992); see also *Toro v. Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991); *Beckham v. Wainwright*, 639 F.2d 262, 265-66 (5th Cir. 1981); *Turner v. State*, 664 F. Supp. 1113, 1120 (M.D. Tenn. 1987) ("To accept or to reject a plea offer presents a binary choice at a fork in the road; providing constitutional protection against an incompetent shove in one direction, but not against an equally incompetent shove in the other, may produce unwanted skewing of the results."); *Lyles v. State*, 382 N.E.2d 991, 993 (Ind. Ct. App. 1978); *People v. Carter*, 520 N.W.2d 133, 134 n.1 (Levin, J., dissenting) (Mich. 1994).

¹⁴⁹ 728 F. Supp. 1241 (W.D.N.C. 1990).

¹⁵⁰ *Id.* at 1251; see also *Turner v. Tennessee*, 858 F.2d 1201, 1205 (6th Cir. 1988) ("[A]n incompetently counseled decision to go to trial appears to fall within the range of protection appropriately provided by the Sixth Amendment."); *Johnson*, 793 F.2d at 902; *Caruso v. Zelinsky*, 689 F.2d 435, 438 (3d Cir. 1982); *United States v. Jerome*, 933 F. Supp. 989, 994 (D. Nev. 1996) (incompetently counseled decision to plead not guilty and to proceed to trial does fall within the range of protection of the Sixth Amendment right to effective assistance).

¹⁵¹ 969 F.2d 39 (3d Cir. 1992).

¹⁵² *Id.* at 45.

¹⁵³ See *id.* at 44; see also *Beckham*, 639 F.2d at 267. Interestingly, the issue of the appropriate remedy remains. Most courts attempt to adjust the judgment and sentence in a manner consistent with the offer, or order a new trial with a direction that plea bargaining begin anew. See, e.g., *Alvernaz*, 2 Cal. 4th at 926.

¹⁵⁴ 466 U.S. 668 (1984).

¹⁵⁵ See *id.* at 687.

¹⁵⁶ See *id.* at 694.

offer amounts to ineffective assistance.¹⁵⁷ Generally, if counsel does not convey a plea offer to a client, it is a "gross deviation from accepted professional standards."¹⁵⁸ Obviously, the failure to convey an offer does not go directly to the issue of the attorney's counseling obligations on the decision whether to enter a plea. Rather, it establishes that counsel must at a minimum inform the defendant of an offer.

2. Inaccurate Information

The issue again is the nature of the alleged deficiency. Did counsel provide objectively incorrect advice about matters such as the sentencing parameters, the elements of the charge or the existence of possible defenses? Was counsel's advice, although not inaccurate, impermissibly inadequate? Or was counsel's advice more in the nature of a prediction that ultimately proved to be wrong?

In *United States v. Day*,¹⁵⁹ the defendant turned down an offer of five years incarceration, went to trial, was convicted and sentenced to twenty-two years. The defendant claimed that he rejected the offer because of ineffective assistance of counsel. Specifically, the defendant alleged that defense counsel provided substandard advice regarding sentence exposure under the Sentencing Guidelines ("Guidelines") by failing to explain the possibility of career offender status, and by miscalculating the maximum possible sentence as eleven years. The court held that "a defendant has the right to make a reasonably informed decision whether to accept a plea offer,"¹⁶⁰ and that "the advice that he received was so incorrect and so insufficient that it undermined his ability to make an intelligent decision about whether to accept the offer."¹⁶¹ The court addressed the difficulty of delineating the constitutional counseling obligations regarding the decision whether to accept a plea offer: "We cannot state precisely what standard defense counsel must meet when advising their clients about the desirability of a plea bargain and, concomitantly, about sentence exposure."¹⁶² The court

¹⁵⁷ See, e.g., *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994); *United States v. Rodriguez*, 929 F.2d 747, 752 (1st Cir. 1991); *Johnson*, 793 F.2d at 902; *Caruso*, 689 F.2d at 438; *Beckham*, 639 F.2d at 266; *United States v. Barber*, 808 F. Supp. 361, 378 (D.N.J. 1992); *Barentine*, 728 F. Supp. at 1243; *Lloyd v. State*, 373 S.E.2d 1, 2 (Ga. 1988); *Lyles*, 382 N.E.2d at 993; *State v. James*, 739 P.2d 1161, 1166 (Wash. Ct. App. 1987) (may constitute ineffective assistance).

¹⁵⁸ *Caruso*, 689 F.2d at 438.

¹⁵⁹ 969 F.2d 39 (3d Cir. 1992).

¹⁶⁰ *Id.* at 43.

¹⁶¹ *Id.*

¹⁶² *Id.*

observed, however, that while a "detailed exegesis"¹⁶³ of the Guidelines was not necessary for compliance with the Sixth Amendment, familiarity with their structure and basic content was necessary for effective assistance.

The Fifth Circuit applied a similar analysis in *Beckham v. Wainwright*.¹⁶⁴ In *Beckham*, the defendant had withdrawn a negotiated plea of five years after counsel told him that the five-year sentence remained in effect even if convicted after trial. The defendant was convicted after trial and sentenced to fifty years. The court distinguished counsel's actions from tactical decisions and found that the conduct fell outside the "range of competence demanded of attorneys in criminal cases."¹⁶⁵ The district courts and state courts have also concluded that where defense counsel provides incorrect information that leads a defendant to go to trial rather than plead guilty, the defendant has established a Sixth Amendment violation.¹⁶⁶

More difficult to decide are those cases where the alleged ineffectiveness is not the provision of erroneous information, but a failure to furnish sufficient information for the defendant to make a reasoned decision whether to plead guilty or go to trial. In *Kates v. United States*,¹⁶⁷ the defendant was offered five to forty years with a possible downward departure from the five-year minimum. The defendant rejected the offer and was convicted after trial and sentenced to thirty years. The defendant alleged that none of his attorneys advised him that he faced thirty years if convicted after trial. All three of his attorneys testified, and although they each claimed to have told him things like, "if he lost he was going to go to jail for a long time,"¹⁶⁸ none of them discussed the Guidelines fully or told him he faced thirty years. The court held that the "failure to inform Mr. Kates about his actual sentence exposure was unreasonable. Absent that vital, bottom-line

¹⁶³ *Id.*

¹⁶⁴ 639 F.2d 262 (5th Cir. 1981).

¹⁶⁵ *Id.* at 267 (citing *Tollett*, 411 U.S. at 266 (quoting *McMann*, 397 U.S. at 771)).

¹⁶⁶ For cases that address inaccurate information regarding sentencing, see, e.g., *In re Alvernaz*, 831 F. Supp. 790, 793, 799 (S.D. Cal. 1993) (turned down five years, went to trial and received an indeterminate life sentence); *McClenithan*, 767 F. Supp. at 258-59 (offered fifteen years with a minimum of five, went to trial and got thirty with a minimum of fifteen); *Barentine*, 728 F. Supp. at 1244 (turned down offer of five years, went to trial, was convicted and sentenced to thirty-five years). For examples of cases that discuss erroneous advice in other contexts, see, e.g., *Kraus*, 397 N.W.2d at 672 (misadvice as to whether the prosecution had to prove specific intent); *Carter*, 520 N.W.2d at 134 (Levin, J., dissenting) (misinformation as to whether the defendant could be convicted as an aider and abettor).

¹⁶⁷ 930 F. Supp. 189 (D. Pa. 1996).

¹⁶⁸ *Id.* at 191.

information, he could not make an intelligent decision"¹⁶⁹ Since defense counsel insufficiently advised the defendant about the plea offer so that the defendant could not make a reasoned, intelligent decision, counsel was ineffective. Similarly, in *United States v. Busse*,¹⁷⁰ defense counsel advised the defendant that probation was the "likely worst scenario" if the defendant was convicted after trial.¹⁷¹ The defendant went to trial, was convicted, and was sentenced to five months in jail. The court found that counsel, who was inexperienced with the Guidelines, failed to discuss their application and ramifications fully and, as a result, performed deficiently.¹⁷²

In the final scenario, counsel provides advice in the form of an opinion that turns out to be incorrect. In these cases, the attorney did not provide inaccurate information (for example, the wrong sentencing structure), or insufficient data. Rather, counsel offered an opinion, the defendant relied on it and it turned out to be wrong. The general rule was noted in *In re Alvernaz*:¹⁷³ "[W]e caution that a defense attorney's simple misjudgment as to the strength of the prosecution's case, the chances of acquittal, or the sentence a defendant is likely to receive upon conviction, will not, without more, give rise to a claim of ineffective assistance of counsel."¹⁷⁴ In order for counsel's erroneous prediction to amount to ineffective assistance, it must fall clearly below an objective standard of reasonableness.¹⁷⁵

3. Coercion

Just as there are numerous cases involving claims that attorneys coerced or pressured their clients into pleading guilty, one might expect many cases where the allegation is that the attorney insisted, urged or pushed the client to reject a plea offer, or more affirmatively, to insist on a trial.¹⁷⁶ Instead, the cases have tended to focus on the reasonableness of the advice rather than the possible coercive aspects

¹⁶⁹ *Id.* at 192.

¹⁷⁰ 814 F. Supp. 760 (E.D. Wis. 1993).

¹⁷¹ *Id.* at 761.

¹⁷² *See id.* at 764; *see also* *Williams v. State*, 605 A.2d 103, 109 (Md. 1992).

¹⁷³ 2 Cal. 4th 924 (Cal. 1992).

¹⁷⁴ *Id.* at 937.

¹⁷⁵ *See, e.g., Judge*, 471 S.E.2d at 150 (observing that advice to reject a plea is not unreasonable simply because, in hindsight, the advice was wrong or the tactics backfired, and that tactical or strategic choices will amount to ineffective assistance only if they are so patently unreasonable that no competent attorney would have so chosen).

¹⁷⁶ Although it is one thing to urge the client to reject a plea bargain, and quite another to urge the client to go to trial, the result is the same—if the advice is followed, the case will proceed to trial.

of it. Under what circumstances will counsel's advice to reject a plea offer in favor of a trial amount to ineffective assistance of counsel? In *Turner v. State*,¹⁷⁷ the defendant declined an offer of two years incarceration, was convicted after trial, and received a life sentence. Prior to trial, one of his co-defendants pleaded guilty for a two-year sentence. The other co-defendant went to trial. At that trial, an eyewitness and the co-defendant who had previously pleaded guilty testified against him. He was convicted and sentenced to seventy years in prison.

Turner's local counsel "recommended strongly" that he accept the plea and advised that a decision to go to trial was "ludicrous."¹⁷⁸ Co-counsel also believed that Turner would "be crazy not to take" the offer.¹⁷⁹ Even the prosecutor testified that the offer "obviously . . . was a great offer and should have been accepted."¹⁸⁰ Nevertheless, Turner's lead counsel advised him against accepting the offer. Counsel testified that he was "optimistic" about the outcome of the trial, and did not recommend that the defendant plead guilty.¹⁸¹ The trial court determined that any competent attorney would have recommended acceptance of the offer, and stated that counsel was overly optimistic about the outcome, imparted this unrealistic feeling to his client, and greatly understated the risks involved in taking the case to trial.¹⁸² On appeal, the prosecution conceded ineffective performance, but argued that there was no showing of prejudice. The court reversed the conviction, finding that the defendant had been denied the effective assistance of counsel.

Turner is an anomaly. As a justice of the Pennsylvania Supreme Court noted recently, "[M]y research reveals only one case (*Turner*) in which a federal court granted a writ of habeas corpus based solely on a claim that trial counsel's advice to reject a plea offer and to proceed to trial was ineffective."¹⁸³

¹⁷⁷ 858 F.2d 1201 (6th Cir. 1988).

¹⁷⁸ *Turner*, 664 F. Supp. at 1121.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (ellipses in original).

¹⁸¹ *Id.* at 1115 n.6.

¹⁸² *Id.* at 1117 n.11. At the hearing on the defendant's motion for a new trial, there was evidence that counsel had "an inflated estimate of his own abilities, an unrealistic estimate of the probabilities of outcome at trial, and a casual attitude toward trial preparation." *Id.* at 1115 n.6. There was also testimony that he had indulged in cocaine and patronized prostitutes during the weekend prior to trial. *See id.*

¹⁸³ *Commonwealth v. Boyd*, 688 A.2d 1172, 1177 (Pa. 1997) (Castille, J., concurring in part and dissenting in part); *see also Faubion*, 19 F.3d at 228-29; *Rodriguez*, 929 F.2d at 752-53 (counsel's advice to go to trial was tactical matter and tactical errors, even egregious ones, do not provide basis for postconviction relief).

A case in point is *United States v. Rodriguez*.¹⁸⁴ The defendant was offered twenty years in prison. He claimed that his attorney "insisted" he go to trial, thereby causing him to expose himself to a potential term of seventy-five years, and that counsel "misled" him into rejecting the offer by misstating and minimizing the prosecution's evidence and failing to explain the potential consequences of trial.¹⁸⁵ The defendant went to trial, was convicted, and received a sentence of fifty-four years. The court ruled that counsel was not ineffective, and observed that claims of ineffectiveness based on counsel's recommending that a defendant go to trial rather than plead guilty are merely attacks on counsel's tactics: "[E]rrors, even egregious ones, in this respect do not provide a basis for postconviction relief. Thus, while [defendant's] allegations of specific misconduct, [by counsel]—such as not informing [defendant] of a plea offer . . . may require an evidentiary hearing, the mere allegation that [counsel] wrongly recommended to go to trial was properly dismissed."¹⁸⁶ Significantly, the court expressed little concern about whether counsel pushed the defendant to reject the plea by overstating the prospects at trial, or whether the advice to go to trial was reasonable.

The state courts have reached similar results.¹⁸⁷ In *People v. Jordan*,¹⁸⁸ the defense attorney counseled the defendant to reject an offer of twenty years in prison. The defendant was convicted and sentenced to sixty years incarceration with the possibility of an additional fourteen years. The court distinguished *Turner* on the ground that the case against the defendant was not so overwhelming, and held that the advice to reject the offer was not ineffective. In *Judge v. State*,¹⁸⁹ the defendant was offered a sentence with a seven-year maximum. On the advice of counsel, he rejected the plea bargain in favor of a trial.¹⁹⁰ He was convicted after trial and sentenced to life imprisonment. The

¹⁸⁴ 929 F.2d 747 (1st Cir. 1991).

¹⁸⁵ *Id.* at 748.

¹⁸⁶ *Id.* at 753.

¹⁸⁷ One exception is *Larson v. State*, 766 P.2d 261, 262 (Nev. 1988). In *Larson*, defense counsel advised his client to go to trial because he thought a trial would receive national attention. Not surprisingly, the court found his conduct to fall below an objective standard of reasonableness. The court contrasted counsel's actions with those where an attorney makes reasoned plea recommendations which in hindsight prove unwise, or relies on ultimately unsuccessful tactics.

¹⁸⁸ 540 N.E.2d 941 (Ill. App. Ct. 1989).

¹⁸⁹ 471 S.E.2d 146 (S.C. 1996).

¹⁹⁰ Testimony at the postconviction hearing revealed the following counseling between attorney and client: "[Lawyer] told Mr. Judge what the offer was [voluntary manslaughter with a seven-year cap]. At that point Mr. Judge basically asked [lawyer], 'What should I do? What do you think I should do?' [Lawyer] basically said, 'Well, I would reject it. I think we ought to reject

central issue was not the reasonableness of the advice to reject the plea offer per se, but rather that the advice was given prior to defense counsel's having received various discovery items. Finding that counsel could not have known about these items when the advice was given, the court found that the attorney's performance was not deficient.

Two cases from the Pennsylvania Supreme Court highlight the difficulty facing defendants raising these claims. In *Commonwealth v. Thomas*,¹⁹¹ the defendant turned down six to twelve years and received a life sentence after trial. The court, reflecting an uneasiness with post-trial allegations of ineffective assistance at the plea bargaining stage, observed initially that counsel was accused not of persuading his client to waive rights by pleading guilty, but rather of advising his client to avail himself of his constitutional rights. Determining that it was not an ironclad case for the prosecution, the court found no Sixth Amendment violation, and noted that only in the most unusual cases could advice to go to trial be ineffective.¹⁹² Two decades later, the court decided *Commonwealth v. Boyd*.¹⁹³ After trial, the defendant was sentenced to four to eight years. He had been offered six months to one year and his attorney advised him to reject it. The court held that, in order to establish that the attorney was ineffective, the defendant must show that there was "no reasonable basis for [counsel's] advice."¹⁹⁴ Counsel testified that the defendant was interested in the plea offer, but that he "discouraged him from taking it."¹⁹⁵ Counsel testified further that he felt no jury would convict because the complainant was a poor witness who had given inconsistent testimony and had admitted to perjury. Satisfied that counsel provided a reasonable basis for his advice, the court found that he was not ineffective for advising the defendant to reject the plea offer.

It is thus apparent that a defense attorney's recommendation that a client reject a plea offer and opt for a trial will rarely amount to ineffective assistance of counsel. *Strickland* requires that judicial scrutiny of counsel's performance should begin with a "strong presumption" that the conduct fell within "the wide range of reasonable professional assistance."¹⁹⁶ Deference is particularly due to decisions of

it and go to trial.' At that point Mr. Judge said something to the effect, 'Whatever you say . . . that is what I will do.' We then went to the trial." *Judge*, 471 S.E.2d at 151 n.2.

¹⁹¹ 350 A.2d 847 (Pa. 1976).

¹⁹² See *id.* at 850 n.3.

¹⁹³ 688 A.2d 1172 (Pa. 1997).

¹⁹⁴ *Id.* at 1175.

¹⁹⁵ *Id.*

¹⁹⁶ *Strickland*, 466 U.S. at 689.

strategy and tactics.¹⁹⁷ It follows then that "advice by counsel to reject a plea offer will constitute ineffective assistance only when the advice was 'so patently unreasonable' that no competent attorney would have so advised her client."¹⁹⁸

4. Neutrality

Given that an attorney must convey a plea offer to the client, must provide accurate and adequate information and is permitted to urge certain decisions and offer estimations and opinions about likely outcomes, the question becomes what happens when defense counsel chooses to stand mute or remain neutral as to the plea decision, and the defendant opts for trial, is convicted and is sentenced to a much higher term than the government originally offered. Defense lawyers attempt to justify a neutral approach to counseling on several grounds, including adherence to principles of client-centered counseling,¹⁹⁹ and responsiveness to studies documenting defendants' complaints that their attorneys simply told them what to do rather than provided advice and counsel.²⁰⁰

In *United States v. Holcomb*,²⁰¹ the defendant was offered a plea with a sentence in the range of twelve months. Counsel testified that he did not specifically advise the defendant whether to accept or reject the plea, as he believed the decision was for the defendant to make.²⁰² The defendant went to trial, was convicted and was sentenced to forty-six months imprisonment. The court hardly discussed defense counsel's neutrality, focusing instead on his advice regarding the possible sentence after trial. Finding that counsel properly informed the defendant

¹⁹⁷ See *id.* at 689–90. In *United States v. Rodriguez*, the court ruled that advice to go to trial was tactical in nature, and that tactical errors, even if "egregious," should not sustain an ineffective assistance claim. 929 F.2d at 753.

¹⁹⁸ Jerome, 933 F. Supp. at 994 (quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983)); see also *Washington v. Watkins*, 655 F.2d 1346, 1355 (5th Cir. 1981); *Judge*, 471 S.E.2d at 150. The "patently unreasonable" standard ensures that lawyers who recommend that a client reject a plea in favor of a trial will rarely be found to be ineffective. As a result, attorneys who previously were disinclined to make such a recommendation for fear of appellate scrutiny should be more likely to advise a client to go to trial, and attorneys who enjoy trials and often urge clients to turn down plea offers will no doubt feel fortified.

¹⁹⁹ See discussion of client-centered counseling *infra* text accompanying notes 219–49.

²⁰⁰ See, e.g., JONATHAN D. CASPER, *AMERICAN CRIMINAL JUSTICE—THE DEFENDANT'S PERSPECTIVE* (1972); Alan F. Arcuri, *Lawyers, Judges, and Plea Bargaining: Some New Data on Inmates' Views*, 4 INT'L J. CRIMINOLOGY & PENOLOGY 177 (1976); Glen Wilkerson, *Public Defenders as Their Clients See Them*, 1 AM. J. CRIM. L. 141 (1972). For a discussion of other justifications for neutrality, see *infra* notes 397–404 and accompanying text.

²⁰¹ 943 F. Supp. 13 (D.D.C. 1996).

²⁰² See *id.* at 15.

about his potential sentence, the court held that the attorney's performance was not deficient. In *United States v. Jerome*,²⁰³ the defendant was offered a sentence with a maximum of twenty years. Counsel testified that he "did not recommend to Mr. Jerome that he accept or reject the government's plea offer," and that he told the defendant "that the decision was up to him."²⁰⁴ After trial, the defendant received a sentence of thirty-five years. The defendant appealed, claiming that "no competent attorney would, in the face of such overwhelming evidence of Jerome's guilt, have failed to urge acceptance of the offer."²⁰⁵ In order to frame the issue, the court noted significantly that counsel never advised the defendant to reject the plea. Rather, counsel took no position as to whether the defendant should accept or reject the prosecution's offer. In other words, perhaps the assistance might have been ineffective, or at least the court would have had to examine the reasonableness of the advice, had counsel advised the defendant to reject the plea; instead, counsel remained neutral. The court ruled that it was not aware of any authority for the proposition that the failure to recommend acceptance of an offer can amount to ineffective assistance of counsel, and denied the defendant's motion to vacate his conviction.

The Fourth Circuit addressed the issue directly in *Jones v. Murray*.²⁰⁶ On the morning of the first day of trial, the prosecution offered the defendant a plea with a sentence of, essentially, two consecutive life terms. Counsel reviewed with his client the evidence against him and the strengths and weaknesses of the prosecution's case. He informed Jones that there was a seventy percent chance of conviction and a forty to fifty percent chance of receiving the death penalty. He also told his client that he would likely receive eventual parole if he pleaded guilty. Counsel left the decision whether to accept the plea offer to the defendant, and offered no recommendation as to the wisdom of pleading guilty. The defendant rejected the offer on the ground that he was innocent. He was convicted at trial and sentenced to death.

On appeal, the defendant claimed that counsel was ineffective for failing to recommend that he accept the plea bargain and for not attempting to persuade him to do so. Analyzing counsel's conduct pursuant to the dictates of *Strickland*, the court held that "[w]e cannot

²⁰³ 933 F. Supp. 989 (D. Nev. 1996).

²⁰⁴ *Id.* at 995.

²⁰⁵ *Id.* at 994.

²⁰⁶ 947 F.2d 1106 (4th Cir. 1991).

conclude that counsel's decision, at this point and in the context of his client's rejection of the plea offer for the stated reason that he was innocent, to refrain from a vigorous attempt to change his client's mind was 'outside the wide range of professionally competent assistance.'"²⁰⁷ By sanctioning lawyer neutrality even in a death penalty case, the court sent a clear message about the role of counsel in criminal cases.

A requirement of non-neutrality is not, however, without support. In *Commonwealth v. Napper*,²⁰⁸ the offer was twelve months to three years. Counsel informed his client of the terms of the offer but did not give any advice or recommendation on the advisability of accepting it. The defendant stated that he would not accept any plea that included "state time" (more than two years). The defendant went to trial, was convicted, and received a sentence of ten to forty years. At a postconviction hearing, counsel testified that the case was a "stone cold loser," but that since he was interested in having his first jury trial, he "offhandedly" told his client about the offer.²⁰⁹ The court ruled that defense counsel has a duty to inform a client of the merits of a plea bargain and to provide advice as to whether the defendant should accept the offer.²¹⁰ As a result, even though counsel did not provide any inaccurate information, and notwithstanding that the defendant had told counsel that he would not accept any offer that involved "state time," the court held that trial counsel was ineffective.

In *State v. Bristol*,²¹¹ the court considered whether counsel had an obligation to go beyond neutrality, in fact beyond merely offering an opinion, and to try to persuade a client to accept the advice. The defendant was offered a plea to a reduced charge with an indefinite sentence from zero to ten years. Counsel informed the defendant of the offer and sent him a letter detailing the terms of the plea. Counsel recommended that the defendant "carefully consider" the offer, but when the client stated his opposition, counsel never urged him to reconsider or initiated further discussions about a plea.²¹² The defen-

²⁰⁷ *Id.* at 1111 (quoting *Strickland*, 466 U.S. at 690).

²⁰⁸ 385 A.2d 521 (Pa. 1978).

²⁰⁹ *Id.* at 523. Counsel testified that "had this case been presented to me two months after it was presented I would not have walked into Mr. Napper and offhandedly told him the plea. I would have walked into Mr. Napper . . . I would have walked in and told Mr. Napper that it was to his best interest to plea, and Mr. Napper, I would assume, would have pled." *Id.* at 523-24.

²¹⁰ *See id.* at 524.

²¹¹ 618 A.2d 1290 (Vt. 1992).

²¹² *See id.* at 1291.

dant was convicted at trial and sentenced to twenty-five years to life incarceration.

At a postconviction hearing, the Rutland Superior Court held that the defendant was entitled to "more advice than a mere recommendation to 'seriously consider' the State's offer," and that counsel had performed ineffectively.²¹³ The Vermont Supreme Court analyzed whether counsel's performance fell below objective standards of reasonableness as informed by prevailing professional norms.²¹⁴ The court characterized the alleged error not as counsel's failure to convey an offer, but as a failure to "aggressively pursue" the offer with his client after his client had rejected it.²¹⁵ The court noted that it was ineffective assistance if an offer was conveyed in an inadequate manner such as by advising a client not to take a clearly favorable offer,²¹⁶ or by providing inaccurate information.²¹⁷ However, the court found no authority for the proposition that an attorney who fails to persuade a client to accept a plea violates the standard of reasonable competence. As a result, the court held that counsel's conduct did not fall below prevailing standards of reasonable competence.

II. CLIENT-CENTERED COUNSELING

The concept of client-centered lawyering grew out of concerns about the attorney-client relationship and the allocation of decision-making authority. The so-called traditional view of lawyering assumed that clients should be passive and delegate decisionmaking responsibilities to their attorneys.²¹⁸ Counseling consisted of the lawyer spelling out the pertinent legal considerations, specifying what the attorney believed was the right decision and urging the client to accept that recommendation.²¹⁹

Client-centered counseling, on the other hand, requires that attorneys listen to their clients and ensure that clients assume an active and primary role in making decisions about their cases.²²⁰ The emergence of models of client-centered lawyering is related to the growth

²¹³ *Id.*

²¹⁴ See *id.* at 1291-92; *Strickland*, 466 U.S. at 687-88.

²¹⁵ See *Bristol*, 618 A.2d at 1292.

²¹⁶ See, e.g., *Turner*, 858 F.2d at 1205-07.

²¹⁷ See, e.g., *Kraus*, 397 N.W.2d at 673.

²¹⁸ See, e.g., Dinerstein, *supra* note 42, at 506; Mark Spiegel, *The Case of Mrs. Jones Revisited: Paternalism and Autonomy in Lawyer-Client Counseling*, 1997 B.Y.U. L. REV. 307 ("As with most professional-client relations, it was simply assumed that the power to make significant decisions was delegated to the professional.").

²¹⁹ See Dinerstein, *supra* note 42, at 504.

²²⁰ See, e.g., Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1742 (1993).

of clinical legal education in the 1960s and 1970s.²²¹ Clinical legal education was in many ways a response to the needs of poor people for legal assistance.²²² A majority of clinical faculty came from legal services or public defender offices and were well-versed in the problems inherent in the attorney-client relationship.²²³ Early on, clinicians criticized public interest lawyers for forcing decisions upon their clients, and emphasized the need to promote increased client participation in the resolution of their cases.²²⁴ Constructs of client-centered lawyering grew out of this backdrop.

The most widely utilized paradigm of client-centered lawyering is that proposed by Professors David Binder, Paul Bergman and Susan Price.²²⁵ In *Legal Interviewing and Counseling*,²²⁶ Binder and Price suggest a counseling method created to promote client decisionmaking, and exhort attorneys to ensure that clients are enabled to make their own decisions.²²⁷ To avoid unduly influencing the client, the attorney should "communicate neutrality"²²⁸ and not offer advice or opinions, even if the client asks directly.²²⁹ Scholars have posited a variety of justifications in support of the paramount importance of client decisionmaking. Chief among them is the argument that client decision-

²²¹ See, e.g., Dinerstein, *supra* note 42, at 518 ("The origins of client-centered lawyering are inextricably bound up with the development of 'modern' clinical legal education itself."). For a discussion of the history of clinical legal education, see George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162 (1974).

²²² See, e.g., David Barnhizer, *The University Ideal and Clinical Legal Education*, 35 N.Y.L. SCH. L. REV. 87 (1990) (observing that one of the themes of clinical education was the provision of legal services to disadvantaged groups).

²²³ See *id.*

²²⁴ See, e.g., Gary Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106 (Aug. 1977); Robert D. Dinerstein, *Clinical Texts and Contexts*, 39 UCLA L. REV. 697, 707 (1992) ("[C]lient-centeredness has been one of the key concepts in clinical education.").

²²⁵ See Anthony V. Alfieri, *The Politics of Clinical Knowledge*, 35 N.Y.L. SCH. L. REV. 7, 15 n.49 (1990) ("In 1989 and 1990, the West Publishing Co. estimated adoption of Binder and Price's *Legal Interviewing and Counseling* by over 100 law schools and colleges in the United States."). Clinical law teachers, in particular, rely on the Binder & Price text. See Dinerstein, *supra* note 42, at 504; Dinerstein, *supra* note 224, at 700 (Binder & Price's *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* had a tremendous influence on clinical law teachers and their students).

²²⁶ BINDER & PRICE, *supra* note 42.

²²⁷ See, e.g., Dinerstein, *supra* note 42, at 507; Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 720 (1987) ("Broadly we can say that client-centered practice takes the principle of client decisionmaking seriously, and derives from this premise the prescription that a central responsibility of the lawyer is to enable the client to exercise his right to choose."). Binder & Price, however, do recognize that in limited circumstances there may be exceptions to client-centered decisionmaking. See BINDER & PRICE, *supra* note 42, at 153-55, 192-210.

²²⁸ See BINDER & PRICE, *supra* note 42, at 166.

²²⁹ In certain carefully circumscribed situations, counsel may accede to the client's request and provide an opinion. *Id.* at 186-87, 197-200.

making reinforces the laudable ideal of individual autonomy.²³⁰ Some have argued that doctrines of informed consent applicable to the doctor-patient relationship should be adapted for use in the legal arena.²³¹ Just as a doctor cannot control a patient's treatment without the patient's consent, attorneys should have to involve clients unequivocally in the decisionmaking process.²³² Although Binder and Price seem to suggest that standards of professional ethics also support their conceptions of client-centered decisionmaking,²³³ others have argued that both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct are equivocal as to the proper allocation of decisionmaking authority.²³⁴

The Binder and Price model has not been free from criticism. In particular, many have argued that the requirements of neutrality and the concomitant withholding of the attorney's opinions are undesirable and nearly impossible.²³⁵ In 1991, Binder and Price, along with Paul Bergman, revamped their analysis of the propriety of lawyers giving advice.²³⁶ Binder, Bergman and Price still trumpet the need for lawyer neutrality as a central feature of client-centered counseling;²³⁷ they extol explicitly the value of autonomy.²³⁸ They now write, however, that considerations of autonomy dictate that in some situations, the attorney may provide an opinion.²³⁹ If the lawyer has counseled a client

²³⁰ See Dinerstein, *supra* note 42, at 512; Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 340 (1987) ("[A]utonomy establishes a presumption in favor of client decisionmaking over all aspects of the lawsuit.").

²³¹ See, e.g., BINDER & PRICE, *supra* note 42, at 160 n.2; Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979); Strauss, *supra* note 230.

²³² See, e.g., Dinerstein, *supra* note 42, at 530.

²³³ BINDER & PRICE, *supra* note 42, at 147-48.

²³⁴ See, e.g., Dinerstein, *supra* note 42, at 534-38; Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049, 1052-56 (1984); Mark Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 AM. B. FOUND. RES. J. 1003, 1004 (observing that the Model Code "is at best ambiguous in resolving this question of allocation of authority."); Strauss, *supra* note 230, at 319-20.

²³⁵ See, e.g., Ellmann, *supra* note 227, at 752-53 ("[T]he process of client-centered counseling affects, and in important respects manipulates its clients, both by denying them ready access to advice they might desire, and by engaging them in a decisionmaking process with the potential to shape their thinking subtly but profoundly.").

²³⁶ DAVID BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991).

²³⁷ *Id.* at 288 (lawyer should "strive to maintain an appearance of impartiality throughout the counseling process."). The authors do, however, recognize that some scholars believe that maintaining an appearance of neutrality may be impossible. See *id.* at 288 n.3.

²³⁸ *Id.* at 23, 261 ("[C]lient autonomy is of paramount importance.").

²³⁹ See *id.* at 279-80, 347-50. The authors now reject their own "radical" view which required attorneys to reject requests for advice in order to avoid unduly influencing the client's decisions.

thoroughly so that the lawyer can base her opinion on the client's subjective values, then she may provide an opinion to a client who requests it.²⁴⁰ Reflecting their newfound willingness to permit lawyer involvement in decisionmaking, the authors now also allow lawyers, in limited circumstances, to offer unsolicited opinions. When a client is unable to make a decision, whether due to the client's personality or the difficulty of the problem, a lawyer may offer an opinion in order to break a "decisional logjam."²⁴¹ Furthermore, Binder, Bergman and Price now authorize lawyers to intervene in their clients' decisions when they believe the decision is erroneous because the client has misjudged the likely outcome, or when they believe the decision is morally wrong.²⁴² By permitting lawyers to give opinions and intervene in certain situations, the authors appear to have responded to some of their critics. In relaxing the prohibitions against lawyer involvement in the decisionmaking process, however, they subject themselves to the criticisms leveled against the traditional lawyer-client relationship that led to the development of client-centered counseling in the first place.²⁴³

It is noteworthy that Binder, Bergman and Price have attempted to move beyond the public interest or poverty law arena. Although client-centered counseling was in many ways an outgrowth of the experiences of lawyers in legal services settings,²⁴⁴ Binder, Bergman and Price consciously provide examples of legal problems in a variety of litigation contexts, and discuss numerous issues that arise when counseling private parties in business transactions.²⁴⁵ This Article, however,

They now believe that the "radical" view of client-centered counseling "demeans clients' ability to make independent judgments; deprives clients of the opportunity to get advice from a person who has professional expertise and emotional distance from a problem; and may well defeat the expectations of most clients." *Id.* at 279.

²⁴⁰ In fact, if pressed by the client, the lawyer may even provide an opinion based on personal values. *See id.* at 280 n.49.

²⁴¹ *See* BINDER, *supra* note 236, at 353-54.

²⁴² *See id.* at 281-84, 356-59.

²⁴³ *See, e.g.,* Dinerstein, *supra* note 224, at 710-11 (arguing that "the authors may have lost sight of their original insight that opinions may tend to silence and dominate vulnerable clients," and that by "removing the strong constraints against lawyers expressing their opinions, the authors provide lawyers bent on providing those opinions ample support for doing so."). The Binder, Bergman & Price model of client-centered counseling has been criticized on other grounds as well. *See, e.g.,* Alfieri, *supra* note 225; Dinerstein, *supra* note 224, at 719-28 (discussing the failure of Binder, Bergman & Price to address contextual concerns such as the nature of the lawyer-client relationship with respect to the role of race, class and gender; the importance of client stories; and problems of professional responsibility); Ellmann, *supra* note 227, at 753-78; Shalleck, *supra* note 220, at 1743-48.

²⁴⁴ *See supra* notes 221-24.

²⁴⁵ *See* Dinerstein, *supra* note 224, at 699.

is concerned with counseling defendants in criminal cases, specifically indigent clients²⁴⁶ and clients with constitutional rights, both to counsel and to the effective assistance of that counsel.²⁴⁷ In-house, or live-client, law school clinics are, similarly, primarily involved with poor clients.²⁴⁸ This Article analyzes the applicability of the Binder, Bergman, and Price model in that context.

Robert Dinerstein's essay discussing an experience of his while supervising students in a law school criminal clinic, although not intended as an example of client-centered counseling in practice, raises difficult and important questions regarding the counseling responsibilities of lawyers in criminal cases.²⁴⁹ The criminal justice clinic received the case after the defendant had been convicted at a bench trial. Local procedures permitted a trial de novo, and the case was scheduled for a jury trial in less than four weeks. The defendant was charged with two counts of battery. At the initial interview, the client's factual recitation was similar to that told by the prosecution at the first trial, but she disputed her motivations for her acts. She claimed that the complainant had waved at her with an outstretched palm, a sign of disrespect in her culture. As a result, she swung a tennis racket at the complainant.

The defendant informed her student attorneys that she was unhappy with her first lawyer because he had "strongly urged" her to accept a negotiated disposition,²⁵⁰ and she insisted that she wanted to go to trial in order to "tell her story."²⁵¹ The students counseled the client thoroughly about her options, predicted the legal consequences of each choice and left the decision to the client. They informed her that based on their research, the likely result of a trial was a conviction. The student attorneys did not offer an opinion about the desirability of accepting or rejecting a plea offer, and did not in any way attempt consciously to influence their client's choice. The defendant opted for a trial.

²⁴⁶ See *supra* note 18.

²⁴⁷ See *supra* notes 13-16.

²⁴⁸ By "in-house" clinic, I refer to a clinic in which students, under faculty supervision, represent clients. For descriptions of these types of clinics, see, e.g., J. Michael Norwood, *Requiring a Live Client, In-House Clinical Course: A Report on the University of New Mexico Law School Experience*, 19 N.M. L. REV. 265 (1989).

²⁴⁹ See Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 HASTINGS L.J. 971 (1992).

²⁵⁰ *Id.* at 973.

²⁵¹ *Id.* at 972.

On the eve of trial, Dinerstein met with the student attorneys and emphasized the importance of telling the client that if she told the story that she had told them, their judgment was that there would be a conviction. Dinerstein observed that although he believed that such counseling was required by a client-centered approach, he worried whether it was a "subtle attempt" to convince the client to change her mind. Apparently, the possibility of advising the defendant as to the desirability of a plea offer (that is, whether in Dinerstein and the students' opinion it was the best choice) was not considered. The next day, the students spoke with their client and she still wanted a trial.

As Dinerstein notes, the trial was in many ways the least important part of the story.²⁵² In short, during deliberations the defendant and the students had a "heated discussion." She felt that her case had not been presented forcefully enough. The jury returned a verdict convicting her of one of two counts. As the judge began to address the students, their client grew increasingly agitated, yelling and interrupting the judge. The judge ordered the sheriffs to take her to a local emergency room for psychiatric evaluation.

William Simon also detailed his counseling experience representing a client in a criminal case.²⁵³ Although it was the only criminal case he ever handled and was not part of a law school clinic, it deliberately raises issues involving the counseling obligations of attorneys in criminal cases. The defendant, Mrs. Jones, was charged with leaving the scene of a traffic accident. She was black and the other driver was white. Mrs. Jones informed Simon that she had in fact stopped, but that it was the other driver who fled the scene. The police, without conducting any independent investigation, accepted the other driver's version and arrested Mrs. Jones. The prosecutor offered, in effect, a plea of *nolo contendere* which amounted basically to six months probation. Simon spoke to his client for about ten minutes. For about half the time, they argued over whether he would tell her what he thought she should do. She told him, "You're the expert. That's what we come to lawyers for."²⁵⁴ Simon insisted that because the decision was hers, he could not tell her what to do. He then spelled out the advantages and disadvantages and ended by saying, "If you took their offer, there probably wouldn't be any bad practical consequences, but it wouldn't be total justice."²⁵⁵ Mrs. Jones and her minister, attending as a friend

²⁵² *Id.* at 977.

²⁵³ See William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991).

²⁵⁴ *Id.* at 215.

²⁵⁵ *Id.*

and character witness, responded, "We want justice."²⁵⁶ Simon then spoke with co-counsel, a friend and lawyer with experience in traffic cases. Co-counsel next spoke with Mrs. Jones. He, too, did not tell her directly what he thought she should do, but went over the same considerations as did Simon. He, however, discussed the disadvantages last, described the possibility of jail in slightly more detail, and said nothing about "justice." Mrs. Jones decided to accept the plea offer.

In neither case did counsel offer an opinion about the desirability of accepting or rejecting the plea offer. In Dinerstein's case, the client never asked for the attorney's opinion. In Simon's case, the client asked expressly, and apparently repeatedly, for the lawyer's advice. In both cases, the attorneys spelled out the advantages and disadvantages. In Dinerstein's case, the student attorneys made a deliberate attempt at neutrality. In Simon's case, co-counsel made an apparently deliberate attempt to influence the client's decision.

III. THE IMPLICATIONS OF BORIA V. KEANE

In May 1988, in upstate New York, Oscar Boria was arrested inside the garage at O.B.'s Towing, his place of business, during a "buy and bust" narcotics operation conducted by state police.²⁵⁷ The arresting officers searched him and recovered \$2,000.00 in marked money from his shirt.²⁵⁸ Mr. Boria was indicted on one count of criminal sale of a controlled substance in the second degree,²⁵⁹ a Class A-II felony,²⁶⁰ for selling two ounces of cocaine to a police informant. Although he had no criminal record, he faced a minimum sentence of three years to life imprisonment, and a maximum sentence of eight years and four months to life.²⁶¹

Several weeks later, the District Attorney notified defense counsel that the prosecution would accept a plea of guilty to the reduced charge of criminal sale of a controlled substance in the third degree,²⁶² a Class B felony, with the minimum legally permissible sentence of one

²⁵⁶ *Id.* at 216.

²⁵⁷ *Boria v. Keane*, 99 F.3d 492, 494 (2d Cir. 1996).

²⁵⁸ The police had given an informant that money to use in making a narcotics purchase.

²⁵⁹ N.Y. PENAL LAW § 220.41(1) (McKinney 1997) [hereinafter P.L.] defines criminal sale of a controlled substance in the second degree as knowingly and unlawfully selling one-half ounce or more of a narcotic drug.

²⁶⁰ P.L. § 220.41.

²⁶¹ P.L. § 70.00(2), (3).

²⁶² P.L. § 220.39(1) defines criminal sale of a controlled substance in the third degree as knowingly and unlawfully selling a narcotic drug.

to three years incarceration.²⁶³ The District Attorney warned that if the offer was rejected, a superseding indictment for a Class A-I felony²⁶⁴ would be filed, making that plea offer no longer legally possible.²⁶⁵

Defense counsel spent much of the next two weeks speaking with Mr. Boria. He told him that there was an offer of a B felony with a one to three year sentence, and that if it was rejected there would be a superseding indictment carrying a minimum sentence of fifteen years to life. They discussed the facts of the case, the search and seizure issues and the likelihood of prevailing at trial. Defense counsel explained to his client that in his view, drug cases were extremely difficult to defend in upstate New York because of the strong, pervasive anti-drug attitudes of the jurors. Counsel, however, did not advise his client whether to accept or reject the plea.²⁶⁶

On each occasion when they discussed the case and the offer made by the prosecution, Mr. Boria informed defense counsel that he was absolutely innocent and would not accept any plea, especially one that required him to serve time in jail. Defense counsel advised the prosecutor that the plea offer was rejected. Shortly thereafter, a superseding indictment charging an A-I felony was filed. The defendant went to trial, was convicted and was sentenced to a term of imprisonment with a minimum of twenty years and a maximum of life.

In 1996, the Second Circuit granted the defendant's petition for a writ of habeas corpus,²⁶⁷ holding that the defendant did not receive

²⁶³ Under New York State's statutory scheme, this was the lowest permissible charge reduction and sentence for an adult accused of a Class A-II felony. See N.Y. CRIM. PROC. LAW § 220.10(5)(a)(ii) (McKinney 1997) [hereinafter C.P.L.]; P.L. § 70.00. In certain limited situations where the accused is "providing material assistance" to law enforcement officials, a sentence of lifetime probation is possible upon conviction of a class A-II felony. P.L. § 65.00(1)(b).

²⁶⁴ The superseding indictment would charge the defendant with criminal sale of a controlled substance in the first degree, a Class A-I felony. P.L. § 220.43(1) defines criminal sale of a controlled substance in the first degree as knowingly and unlawfully selling two or more ounces of a narcotic drug. A Class A-I felony carries a minimum sentence of fifteen years to life imprisonment and a maximum of twenty-five years to life. See P.L. § 70.00(2), (3).

²⁶⁵ The lowest permissible charge reduction and sentence for an adult charged with a Class A-I felony is to an A-II felony with a sentence of three years to life imprisonment. See C.P.L. § 220.10(5)(a)(I); P.L. § 70.00. In certain cases where the defendant is cooperating with law enforcement authorities, a sentence of lifetime probation is permissible upon conviction of an A-II felony. See *supra* note 263.

²⁶⁶ Defense counsel testified at length at a hearing on the defendant's motion for an order vacating his conviction on the ground, *inter alia*, of constitutionally inadequate representation of counsel. He stated repeatedly his view that it is the client's decision whether to plead guilty, and that his role does not include shepherding the client into doing what the lawyer thinks is best. As a result, he did not specifically advise his client whether to accept or reject the plea. Rather, he laid out numerous factors that were part of the calculus of that decision. See the transcript of the hearing [hereinafter H.] on file with the author at 27-28, 50, 52-53, 56, 60.

²⁶⁷ *Boria v. Keane*, 83 F.3d 48, 53, 54 (2d Cir. 1996).

- the effective assistance of counsel guaranteed by the Sixth Amendment.²⁶⁸ Although it was clear that counsel did relay the offer to his client,²⁶⁹ and did discuss many facets of the offer in relation to the charges against the defendant, counsel's failure to discuss with the defendant the advisability of accepting or rejecting the offered plea amounted to the ineffective assistance of counsel. Put another way, it was not enough for counsel to spell out the options, sentence implications and likelihood of success at trial; the defendant had a "constitutional right to be advised whether or not the offered bargain 'appear[ed] to be desirable.'"²⁷⁰

The number of opinions that the court issued in the case reflects the significance of the court's holding. In the first,²⁷¹ the court cited Professor Anthony G. Amsterdam's *Trial Manual 5 for the Defense of Criminal Cases* (hereinafter *Trial Manual*)²⁷² for the proposition that the defense attorney "must give the client the benefit of counsel's professional advice" on the crucial question of whether to plead guilty.²⁷³ The court went on to quote the *Trial Manual* at length:

[O]ften counsel can protect the client from disaster only by using a considerable amount of persuasion to convince the client that a plea which the client instinctively disfavors is, in fact, in his or her best interest. This persuasion is most often needed to convince the client that s/he should plead guilty in a case in which a not guilty plea would be destructive.²⁷⁴

Subsequently, the prosecution petitioned the court for rehearing on an unrelated issue.²⁷⁵ The court denied the prosecutor's motion, but used the occasion to try to clarify its initial holding.²⁷⁶ In a footnote,

²⁶⁸ U.S. CONST. amend. VI.

²⁶⁹ It is well-settled that the failure of defense counsel to inform the defendant of an offered plea bargain can amount to the deprivation of the right to the effective assistance of counsel. See *supra* notes 154-58 and accompanying text.

²⁷⁰ *Boria*, 83 F.3d at 54 (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1992)).

²⁷¹ See *id.* at 48.

²⁷² ANTHONY G. AMSTERDAM, *TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES* (1989).

²⁷³ 83 F.3d at 52 (emphasis in original) (quoting *TRIAL MANUAL* 5, § 201, at 339). The opinion says that "the word 'must' was emphasized by the author; otherwise, the emphasis is ours." 83 F.3d at 53. In fact, the author, Professor Amsterdam, did not use any emphasis.

²⁷⁴ *Id.* at 52-53 (emphasis in original). Interestingly, the court in *Napper*, *supra* note 208, one of the few cases to find that counsel's neutrality on the plea decision is ineffective assistance, also cited this passage from Amsterdam's *TRIAL MANUAL*.

²⁷⁵ The prosecution moved for rehearing, alleging that the Antiterrorism and Effective Death Penalty Act of 1996 should be applied retroactively to the defendant's habeas corpus petition.

²⁷⁶ *Boria v. Keane*, 90 F.3d 36 (2d Cir. 1996).

the court stated, "the initial opinion in this case did not hold that it is ineffective assistance of counsel when a lawyer's advice regarding the wisdom of accepting or rejecting a plea offer fails to convince the client. We held only that the absence of any advice constitutes ineffective assistance of counsel" ²⁷⁷

Several months later, apparently without motion by either the prosecution or the defense, the court refiled and reissued its opinion. ²⁷⁸ The third and final version of *Boria* continues to quote the *Trial Manual's* exhortation that counsel "must give the client the benefit of counsel's professional advice" on the decision whether to accept a plea, ²⁷⁹ but the rest of that paragraph, regarding the use of considerable persuasion to convince the client to plead guilty to avoid disaster, has been deleted without comment. ²⁸⁰

The court's repeated efforts to explain and limit its holding in *Boria* are subject to several interpretations. The ruling did not generate audible, resounding approval from criminal defense attorneys. In fact, a segment of the criminal defense bar voiced concerns with the court's decision. ²⁸¹ The author of the opinions, Judge Whitman Knapp, has said that the controversial language from Amsterdam's *Trial Manual* should have been deleted from the first opinion, but made it into the published opinion due to a "snafu." ²⁸² When asked why that language

²⁷⁷ *Id.* at 37 n.2.

²⁷⁸ See *Boria v. Keane*, 99 F.3d 492 (2d Cir. 1996).

²⁷⁹ *Id.* at 497 (emphasis in original). Once again, the court wrote that "the word 'must' was emphasized by the author; otherwise, the emphasis is ours." *Id.* In fact, the word "must" was not emphasized by Professor Amsterdam.

²⁸⁰ There is only one other change in the opinion. Originally, the court prefaced its quotation of the *TRIAL MANUAL* by noting that Professor Amsterdam "discusses the question (of the defense attorney's duty to advise regarding the desirability of a plea) in more detail." *Boria*, 83 F.3d at 52. The final opinion, in an apparent effort to minimize the significance of the language in the *TRIAL MANUAL*, states merely that Professor Amsterdam "observed." *Boria*, 99 F.3d at 496.

²⁸¹ See, e.g., Robert G. Morvillo, *Reasoned Strategic Choice or Ineffective Counsel?*, N.Y. L.J., Dec. 3, 1996, at 3 (observing that the court was indicating a "willingness to secondguess apparent 'strategic choices' made by defense attorneys," and that "[c]riminal defense practitioners should take note" because actions previously "shielded from ineffective assistance attack . . . might no longer be unassailable"). In a subsequent letter to the editor, Morvillo explained that his article referred to the first *Boria* opinion. In his view, the final decision, by eliminating any reference to the need for defense counsel to use "persuasion," avoided putting attorneys in the position of being accused of coercing clients, and therefore ameliorated the concerns he expressed in his article. See Robert G. Morvillo, Letter to Editor, N.Y.L.J., Dec. 6, 1996, at 2. In the President's Column in *The Champion*, a publication of the National Association of Criminal Defense Lawyers ("NACDL"), Judy Clarke communicated ambivalence about the decision, but pointed out the importance of the case and the necessity for defense attorneys to confront the myriad issues involved when counseling clients. NACDL, Judy Clarke, *President's Column: A Conscience Check*, *THE CHAMPION*, Apr. 1997, at 9.

²⁸² Telephone interview with Judge Whitman Knapp, United States Court of Appeals for the Second Circuit, (Mar. 24, 1997).

should have been deleted, Judge Knapp responded that he "agree[d] with it, but it's not constitutional."²⁸³ In his view, adopting a requirement that in certain circumstances counsel must attempt to convince clients to plead guilty would create appellate issues. He suggested the difficulty and impracticality of attempting to assess whether an attorney's efforts at convincing a client were sufficient.²⁸⁴

What *Boria* certainly highlights is the visceral reaction to the situation where a defendant rejects a plea, goes to trial and receives a sentence greatly in excess of the plea offer. Contrast that with a case where a defendant pleads guilty, receives a bargained-for sentence and now claims that she would have prevailed at trial had she not pleaded guilty. In the former case, the defendant actually serves a much longer sentence than she otherwise had to (for example, one to three years versus life); in the latter, there is only a claim that perhaps the defendant would have been acquitted.²⁸⁵ Within this framework, it becomes apparent that counsel must do more than simply advise a client whether to plead or not. In order to avoid the type of disaster that befell Oscar Boria, an attorney must attempt to persuade a client to accept the attorney's recommendation. One need only imagine the following hypothetical exchange between the defendant and his attorney in *Boria*:

Counsel: Based on all that we have discussed, I believe that you should accept the offer.

Boria: No.

It seems hard to imagine that the Second Circuit would have found this additional "counseling" to have satisfied the Sixth Amendment. Surely, some effort on the part of defense counsel to persuade the client is necessary.

Interestingly, the Second Circuit has considered the counseling obligations of defense attorneys in other recent cases. In *Dean v. Super-intendent*,²⁸⁶ the defendant claimed ineffective assistance because

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ I am grateful to my colleague David Garland for highlighting other troubling aspects of the case, particularly the questions raised by a system that deems sentences of one to three years and 20 years to life as appropriate for the same act. Much scholarship concerns the practice of defendants' receiving greater punishment when convicted after trial. See, e.g., FEELEY, *supra* note 133; Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 978-94 (1983); Alschuler, *supra* note 99; David Brereton & Johnathan D. Casper, *Does It Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 LAW & SOC'Y REV. 45, 55-61 (1981-82). That important and disturbing part of the criminal justice system is beyond the scope of this Article.

²⁸⁶ 93 F.3d 58 (2d Cir. 1996).

his attorney had put on an insanity defense over his objection. The court observed that "[d]efense counsel's task in tempering his or her judgment as a trained advocate with his or her responsibilities as counsel is a delicate one."²⁸⁷ The court then quoted with approval the entire passage from the *Trial Manual* (including the admonition that "*often counsel can protect the client from disaster only by using a considerable amount of persuasion to convince the client*").²⁸⁸ The court then noted that "a court reviewing an ineffective assistance of counsel claim based on the imposition of an insanity defense must be careful not to confuse, through the prism of hindsight, persuasion with coercion and disagreement with objection."²⁸⁹ The court ruled that, in order to prevail, the defendant must show that he objected to the insanity defense or that his will was overborne by counsel. In finding that the defendant failed to meet this test, the court alluded to the "vigor with which competent defense counsel advises a client on a strategic decision as significant as an insanity defense or plea,"²⁹⁰ and noted that although the defendant initially disagreed with defense counsel, "he ultimately acquiesced to the more experienced judgment of a trained advocate."²⁹¹

Even more recently, the court revisited the nature of defense counsel's counseling obligations. In *Brown v. Artuz*,²⁹² the issue was the attorney's role with respect to the defendant's right to testify at trial. The court determined that the right to testify is personal to the defendant, but that "the burden of ensuring that the defendant is informed of the nature and existence of the right to testify rests upon defense counsel,"²⁹³ and is a necessary component of the effective assistance of counsel. As to the parameters of the attorney's counseling requirements, the court noted that the attorney may "strongly advise the course that counsel thinks best."²⁹⁴

As the Second Circuit grapples with delineating the constitutional counseling obligations of defense attorneys, it is sending a clear signal that counsel may, and should, fully and forcefully voice their opinions as to the best course of action, and attempt to convince their clients to accept their advice. By noting approvingly the "vigor"²⁹⁵ with which competent counsel advises a client on significant decisions, and the

²⁸⁷ *Id.* at 62.

²⁸⁸ *Id.* (emphasis in original).

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ 93 F.3d at 63.

²⁹² 124 F.3d 73 (2d Cir. 1997).

²⁹³ *Id.* at 79.

²⁹⁴ *Id.*

²⁹⁵ *Dean*, 93 F.3d at 62.

client's "ultimately acquiesc[ing]"²⁹⁶ to the more experienced judgment of counsel, the court encourages defense lawyers to take an active role in the plea decision.

It is instructive to view counseling in terms of a continuum, with neutrality at one end and urging at the other.²⁹⁷

neutral — suggest — advise — urge

An attorney is neutral when she attempts to take no position with a client as to the advisability of accepting or rejecting a plea. The attorney refrains from phrases such as, "perhaps you might consider" or "in my opinion you should," and instead tries to convey impartiality. By suggest, I mean mentioning or implying as a possibility, or offering for consideration.²⁹⁸ Taken literally, suggestion includes an attorney's saying, "I suggest that you consider the possibility of . . ." For present purposes, to advise is to offer an opinion on the wisdom of pleading guilty or opting for trial,²⁹⁹ as, for example, "I advise you to accept/reject the plea offer." An attorney urges a particular choice when she advocates or demands earnestly or pressinglly that a client accept the decision that she recommends.³⁰⁰

In order to delineate counsel's constitutional counseling obligations, it is necessary to consider this continuum in the context of the permissive (what counsel may do), the hortatory or aspirational (what counsel should do), and the required (what counsel must do). Before *Boria*, the range of constitutionally permissible behavior was expansive, ranging from neutrality to aggressively urging a client to make a particular decision. Although there were some general pronouncements about what counsel should do, the only affirmative obligations were that counsel conform to the general standards of *Strickland* and, in essence, perform in a reasonable manner.³⁰¹ As a result, the attorney's role was circumscribed only to the limited extent that counsel must

²⁹⁶ *Id.* at 63.

²⁹⁷ The idea of a continuum is borrowed from Dinerstein, *supra* note 42, at 569.

²⁹⁸ WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1179 (9th ed. 1991) [hereinafter WEBSTER'S]. Dinerstein describes suggestion as "a mild form of advice stated in tentative terms." See Dinerstein, *supra* note 42, at 569 n.306 (citing A. BENJAMIN, THE HELPING INTERVIEW 128 (2d ed. 1974)).

²⁹⁹ See, e.g., Binder, Bergman & Price, *Lawyers as Counselors: A Client-Centered Approach*, 35 N.Y.L. SCH. L. REV. 29, 33 (1990).

³⁰⁰ WEBSTER'S, *supra* note 298, at 1298.

³⁰¹ See *Hill v. Lockhart*, 474 U.S. 52, 58 (1985); *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The only hint that there were in fact some counseling requirements appeared in cases where counsel took a neutral position and the client pleaded guilty to the highest charge and maximum sentence. Expressing some concern that the constitutional obligation of effective assistance might mandate more than neutrality, some courts observed that in "special" or "un-

inform the client of a plea offer,³⁰² must provide accurate and complete information,³⁰³ and must ensure that any advice, opinions or predictions she chooses to provide are reasonable.³⁰⁴

The counseling prohibitions were similarly general and uninformative. Put simply, counsel must not coerce a client into making a particular decision. In legal terms, a defendant has been impermissibly coerced when, as opposed to his disagreeing with and then ultimately acquiescing to his attorney, the defendant's will was overborne.³⁰⁵ Typically, coercion connotes images of attorneys browbeating clients into doing their bidding (usually in the form of pleading guilty). Viewed in this context, the issue becomes identifying the point at which efforts at persuasion crossed over into intolerable coercion. It is critical, though, to bear in mind that a lawyer's neutrality can be equally coercive. Contrast the effect on a defendant when counsel, who has investigated and researched the case thoroughly, takes the time and effort to try to persuade the client to make a particular decision, with that when counsel, in essence, says, "it's up to you." Similarly, a client's will can be overborne in subtle ways, such as the lawyer's choices of what to discuss and the way in which she presents those choices.³⁰⁶

The by-product of this lack of vigorous regulation was that counsel were permitted to offer no advice whatsoever. At the opposite end of the spectrum, counsel could go to great lengths to pressure clients to accept their advice. That this critical aspect of lawyering—counseling defendants as to the advisability of accepting or rejecting a plea—could be left to the vagaries of attorney preferences in individual cases is alarming.

The holding in *Boria* should be viewed in light of the situation described above, and in that context has profound implications for criminal defense lawyering. It is enlightening to return to the notion of a continuum and then to analyze the effects of *Boria*. It is now abundantly clear that an attorney's neutral stance on the wisdom of pleading guilty will not pass constitutional muster. Providing an opinion as to which alternative seems to be more advantageous is "consti-

usual" circumstances, counsel should take a more active role in the counseling process. See *supra* notes 116-24 and accompanying text.

³⁰² See *supra* notes 154-58 and accompanying text.

³⁰³ See *supra* notes 159-72 and accompanying text.

³⁰⁴ See *supra* notes 173-75 and accompanying text.

³⁰⁵ See, e.g., *Dean*, 93 F.3d at 62; *United States v. Teague*, 953 F.2d 1525, 1535 (11th Cir. 1992) (defendant's will not overborne regarding the decision whether to testify at trial).

³⁰⁶ See, e.g., Uphoff, *supra* note 31, at 81, 131 (noting that clients can be influenced in subtle ways, and that the line between "reasonable persuasion" and "manipulation" is not a bright one). See also text accompanying notes 343-44 *infra*.

tionally required advice" in the Second Circuit.³⁰⁷ Furthermore, the holding makes no distinction between cases where counsel's neutrality results in the defendant's pleading guilty and those in which it results in his opting for trial. The attorney must provide an opinion as to the best course of action in any case.³⁰⁸

The decision also does not countenance mere suggestion. Instead, effective assistance requires that counsel advise and offer an opinion on the crucial plea decision. In essence, the court constitutionalized the Model Code of Professional Responsibility, Ethical Consideration 7-7, which provides that "[a] defense lawyer in a criminal case has the duty to advise his [sic] client fully whether a particular plea to a charge appears to be desirable."³⁰⁹ The court stated that the defendant has a "constitutional right to be advised whether or not the offered bargain 'appeared to be desirable.'"³¹⁰

Moving along the continuum, the critical question arises as to whether counsel may, should or must urge a client to accept the attorney's advice. The court in *Boria* did not impose such a constitutional obligation on defense counsel, but nor did it address the issue directly. Rather, in its second opinion, the court explained that it did not hold that it is ineffective assistance when an attorney fails to convince a client to accept her advice regarding the wisdom of accepting a plea. The court, focusing on the result of the counseling, did not discuss whether the effort to persuade was necessary. There can be no doubt, however, that the court believed that such an effort should be made. The court observed that no cases in the Second Circuit dealt with the question of an attorney's obligation when the client refuses to accept an offer that is clearly in the client's "best interests." The court noted that "[t]his lack of specific decision undoubtedly arises from the circumstance that such *duty* is so well understood by lawyers practicing in this Circuit that the question has never been litigated."³¹¹ This view is consonant with the numerous decisions upholding attorneys' uses of all manners of pressure to convince clients to accept or

³⁰⁷ See *Boria*, 99 F.3d at 497.

³⁰⁸ The holding does not limit itself to cases of "special" or "unusual" circumstances. See *supra* notes 116-24 and accompanying text.

³⁰⁹ MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1992).

³¹⁰ *Boria*, 99 F.3d at 498 (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1992) (emphasis added)). The attorney's duty to offer an opinion has been recognized in related circumstances. See, e.g., *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948).

³¹¹ *Boria*, 99 F.3d at 496 (emphasis added); see also Dinerstein, *supra* note 249, at 977 n.15 ("In practice, judges often assume that experienced lawyers will be able to persuade their clients to accept what the lawyer believes is in their best interest, and that such persuasion is both appropriate and necessary.").

reject a plea.³¹² At a minimum, counsel has a "duty" to try to convince a client to accept the attorney's advice on the plea decision.

The unequivocal and clear language of *Boria*, requiring that counsel advise a client on the desirability of a proffered plea bargain, creates a split in the courts of appeals. In *Jones v. Murray*,³¹³ the Fourth Circuit held that neutrality, or the withholding of advice, was permissible. The court held that creating a "binding rule of conduct in all cases" ran afoul of the admonitions in *Strickland*,³¹⁴ and cited *Nix v. Whiteside*³¹⁵ for the proposition that "[a] court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct"³¹⁶ Yet, "constitutionaliz[ing] particular standards of professional conduct" is precisely what the court did in *Boria*.³¹⁷

The decisions in *Jones* and *Boria* both purport to find justification in professional ethical standards. The court in *Jones* began its analysis of the attorney's conduct by looking to the American Bar Association's standards in order to assess whether counsel violated prevailing professional norms.³¹⁸ The court focused on the ABA Standards for Criminal Justice III, Standard 4-3.2³¹⁹ and the ABA Standards for Criminal Justice II, Standards 4-5.1³²⁰ and 4-

³¹² See *supra* notes 92-112 and accompanying text. Although the court in *Boria* did not explicitly require that counsel seek to persuade a client to plead guilty in a case where the attorney believes a plea is necessary in order to avoid disastrous consequences, it seems that rarely, if ever, will such attempts be found to amount to the ineffective assistance of counsel.

³¹³ 947 F.2d 1106 (4th Cir. 1991).

³¹⁴ *Id.* at 1111 (citing *Strickland*, 466 U.S. at 688-89) ("No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.").

³¹⁵ 475 U.S. 157 (1986).

³¹⁶ 947 F.2d at 1111 (citing *Nix*, 475 U.S. at 165).

³¹⁷ See *supra* text accompanying note 270.

³¹⁸ In *Strickland*, the Court suggested that the American Bar Association standards were useful as "guides to determining what is reasonable." 466 U.S. at 688.

³¹⁹ ABA STANDARD FOR CRIMINAL JUSTICE § 14-3.2(a) states that "[d]efense counsel should . . . ensure that the decision whether to enter a plea of guilty . . . is ultimately made by the defendant." Subsection (b) provides that "[t]o aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and considerations deemed important by defense counsel or the defendant in reaching a decision." ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY § 14-3.2(a), (b) (2d ed. Supp. 1986) [hereinafter ABA PLEAS OF GUILTY].

³²⁰ ABA STANDARD FOR CRIMINAL JUSTICE § 4-5.1(a) specifies that "[a]fter informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome." Subsection (b) states that "[d]efense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea." ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE

5.2(a)(1).³²¹ The court held that counsel acted in accordance with these standards by fully advising his client about available alternatives and other important considerations, and by ensuring that the decision was ultimately made by the defendant. The court in *Boria* considered only one ethical standard, the Model Code of Professional Responsibility, Ethical Consideration 7-7.³²² The court in *Boria* did not discuss the standards explicated in *Jones*; in fact it made no reference to *Jones*.³²³

The decision in *Boria* mandates a reevaluation of the applicability of client-centered counseling to criminal cases. Defense counsel in *Boria* took a traditional client-centered approach to counseling. He testified at the post-conviction hearing that "in relationship to any plea it's the client's decision in regard to what he or she wishes to do."³²⁴ He testified unequivocally on the central issue: "I don't recall ever advising Mr. Boria to accept or reject the plea."³²⁵ When asked whether he was familiar with the duty to advise encompassed by Ethical Consideration 7-7,³²⁶ he answered that he was aware of it, and in his view, had complied with it.³²⁷ He described his role by stating, "I was giving

FUNCTION § 4-5.1(a), (b) (3d ed. 1993) [hereinafter ABA DEFENSE FUNCTION]. The commentary to this standard, after observing that the decision whether to plead is ultimately for the defendant to make, provides that "[o]nce the lawyer has concluded that it is in the best interests of the accused to enter a guilty plea, it is proper for the lawyer to use reasonable persuasion to guide the client to a sound decision." ABA DEFENSE FUNCTION § 4-5.1 commentary.

³²¹ ABA DEFENSE FUNCTION § 4-5.2(a)(1) states that the decision whether to accept a plea agreement is ultimately for the accused to make after full consultation with counsel. ABA DEFENSE FUNCTION, *supra* note 320. The commentary to this section adds that "[a]lthough it is highly improper for counsel to demand that the defendant follow what counsel perceives as the desirable course or for counsel to coerce a client's decision through misrepresentation or undue influence, counsel is free to engage in fair persuasion and to urge the client to follow the proffered professional advice. Ultimately, however, because of the fundamental nature of decisions such as these, so crucial to the accused's fate, the accused must make the decisions himself or herself." ABA DEFENSE FUNCTION, *supra* note 320, § 4-5.2 commentary.

³²² EC 7-7 provides that "[a] defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable" MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1992).

³²³ Nor for that matter did the *Jones* court mention Ethical Consideration 7-7 and its clear language imposing a duty on defense counsel to inform clients whether a plea appears to be advisable. It seems that the ABA Standards are no more helpful than the Model Rules and the Model Code in delineating precisely counsel's role in the decisionmaking process. See *supra* notes 233-34 and accompanying text.

³²⁴ H., *supra* note 266, at 28.

³²⁵ H., *supra* note 266, at 56. At other points during his testimony he made the same point abundantly clear. See, e.g., H., *supra* note 266, at 60 ("Q - And when did you first advise Mr. Boria with respect to accepting or rejecting the proffered plea? A - I never did.").

³²⁶ See *supra* note 322.

³²⁷ H., *supra* note 266, at 236-37.

advice and counseling him. I am a lawyer. That is what I do."³²⁸ It seems clear that this counseling, deemed constitutionally deficient by the Second Circuit, comports quite well with the Binder, Bergman and Price model of client-centered counseling. Binder, Bergman and Price begin with the premises that "clients generally should have the opportunity to make decisions,"³²⁹ and that "[e]ffective counseling usually calls for the appearance of neutrality."³³⁰ Defense counsel in *Boria* expressed similar sentiments during his lengthy testimony. The authors now reject the radical view that advocates that counsel never provide advice or opinions about what a client ought to do.³³¹ Their position presently is that "[a]lthough you ultimately may provide a client with an opinion when asked, you should do so only after having thoroughly counseled a client."³³² By making advice-giving a permitted, rather than required, feature of counseling, and by limiting it to situations when the client solicits advice, the model runs afoul of the holding in *Boria*.³³³ The dissonance between the Binder, Bergman and Price model of counseling and the analysis in *Boria* reflects the authors' lack of careful attention to the demands of criminal defense practice. As the authors analyze and discuss the role of the attorney in the counseling process, they do not address the constitutional requirements imposed on attorneys in criminal cases by virtue of the Sixth Amendment right to the effective assistance of counsel.³³⁴

Boria also compels different counseling methods from those employed by Dinerstein³³⁵ and Simon.³³⁶ In Dinerstein's case, the student attorneys should, at a minimum, have advised their client about the desirability of the plea offer. Spelling out the options and predicting the legal consequences, much as did the lawyer in *Boria*, is insufficient.

³²⁸ *Id.* at 184.

³²⁹ Binder, Bergman & Price, *supra* note 299, at 33.

³³⁰ *Id.* at 64. The authors also state that "[n]eutrality requires that you appear to have no favorites among the available alternatives." *Id.*

³³¹ See *id.* at 54; see also *supra* note 240 and accompanying text.

³³² Binder, Bergman & Price, *supra* note 299, at 54.

³³³ Another scholar's view of client-centered counseling maintains the permissive nature of advice-giving, but allows attorneys to advise clients, in certain circumstances, without having to wait for the client's request. See Dinerstein, *supra* note 42, at 570.

³³⁴ As one scholar points out, Binder and Price do not confront the significance of Ethical Consideration 7-7's mandate that criminal defense attorneys have a duty to advise their clients as to whether a plea offer appears desirable. See Dinerstein, *supra* note 42, at 535 n.154. In fact, Dinerstein found that of the 140 times when it was possible to identify the subject matter of the examples used by Binder, Bergman and Price, only 13 related to the criminal law. See Dinerstein, *supra* note 224, at 699 n.5.

³³⁵ See *supra* notes 249-52 and accompanying text.

³³⁶ See *supra* notes 253-56 and accompanying text.

Attempting to persuade their client—the next step in the continuum—was, although a difficult proposition, necessary.³³⁷ Dinerstein's recounting of his thought processes on the eve of trial, leading him to emphasize to the students the importance of telling their client that they anticipated a conviction, suggests that in his opinion accepting the negotiated disposition was the best choice. If true, they should have informed the client and attempted to persuade her to adopt that recommendation. Simon's case is straightforward. His client, Mrs. Jones, asked for his advice. He, as well as his co-counsel, should have complied with that request.³³⁸ In fact, they were obligated to give their opinions even if their client had not sought them out. As Simon concludes, "[A]ny plausible conception of good practice will often require lawyers to make judgments about clients' best interests and to influence clients to adopt those judgments."³³⁹

IV. THE PROPER ROLE OF DEFENSE COUNSEL

It is no longer reasonable to argue that counsel should play a neutral role in the crucial decision of whether to plead guilty. It is not a matter of personal feelings, strategy or ethics, but a constitutional mandate. The result reached in *Boria v. Keane* was correct, but the court should have retained the language from its original opinion that exhorted defense attorneys to advise clients whether to plead guilty or proceed to trial, and, if necessary, to attempt to persuade clients to accept their advice.

Prior to *Boria*, the constitutional analysis of a lawyer's neutrality centered on whether counsel's performance, i.e., remaining neutral, was objectively reasonable under prevailing professional norms.³⁴⁰ *Boria*, in effect, holds that neutrality is per se unreasonable. Defense counsel is required by the Sixth Amendment's guarantee of the effective assistance of counsel to provide an opinion. This result is logical and appropriate. By countenancing neutrality, the courts created an anomalous situation. If a lawyer gave advice, she was subject to a

³³⁷ Given the client's statement that she was unhappy with her prior attorney because he had "strongly urged" her to accept a negotiated disposition, and that she apparently had some sort of emotional or mental problems, the prospects of trying to persuade her were daunting. On the other hand, by not weighing in, the student attorneys could be seen by their client as agreeing with her decision to litigate the case at trial, a decision that proved to be unfortunate.

³³⁸ Often, in the attorney's estimation, the advisability of accepting or rejecting a plea offer is not clear. In those situations, counsel should advise the client consistent with that proposition. See *supra* notes 353–58 and accompanying text.

³³⁹ See Simon, *supra* note 253, at 213.

³⁴⁰ See *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

reasonableness review, but if she declined to offer an opinion, she was in a sense insulated from scrutiny. Although the decision to withhold advice was subject to examination, there was no particular advice to analyze under prevailing professional norms. The message to defense attorneys was that venturing an opinion put you at greater risk of appellate review.³⁴¹

From a pragmatic standpoint, it is also prudent to mandate that attorneys provide opinions about the wisdom of accepting a plea offer. Pure neutrality is not possible.³⁴² Attorneys will inevitably imply what they think a client should do and influence a client's decision by selecting what information to present³⁴³ and how to convey it.³⁴⁴ There is also a distinct possibility that when the attorney attempts to convey data neutrally and not provide opinions, the client will attempt to guess which choice the attorney favors.

Once it is necessary to advise and urge acceptance of the advice, the remaining issues are determining what advice to impart, and how to convey it. The content of the advice, whether to accept or reject a plea offer, will depend on the particular case.³⁴⁵ Among the relevant considerations are the strength of the prosecution's case, the merits of the defense theory of the case, the possible consequences of a convic-

³⁴¹ See, e.g., *United States v. Jerome*, 933 F. Supp. 989, 995 (D.C. Nev. 1996) (the court emphasized that counsel did not advise the defendant what to do, and that it was unaware of any authority for the suggestion that the failure to make a recommendation can amount to ineffective assistance).

³⁴² See, e.g., Dinerstein, *supra* note 42, at 580 ("Client-centered lawyering stresses the desirability of the lawyer's neutrality towards the client's ends. But such neutrality is inevitably false; as sentient and feeling beings, lawyers cannot help but have opinions about what their clients should do, and cannot help but have those opinions affect how they relate to clients."); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1102 (1994) ("There is no value-free mode of communication in which clients could be presented with unfiltered information needed for decision."); THOMAS L. SHAFER & JAMES R. ELKINS, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* 131-32 (2d ed. 1987).

³⁴³ See, e.g., Ellmann, *supra* note 227, at 746 (counsel must simplify the vast possibilities; developing a list of options and their advantages and disadvantages offers countless opportunities for attorney influence); Simon, *supra* note 253, at 217; Spiegel, *supra* note 218, at 325 (a lawyer's decisions about what information to include can significantly affect client decisions).

³⁴⁴ See, e.g., Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 26-30 (1988); Simon, *supra* note 253, at 217 ("[L]awyers influence clients by myriad judgments, conscious or not, about what information to present, how to order it, what to emphasize, and what style and phrasing to adopt."); Spiegel, *supra* note 218, at 326 ("This problem of having an inevitable influence on client choice cannot be avoided There is no completely neutral point from which to decide what information to include, how to describe it, and what clarifying interventions are appropriate.").

³⁴⁵ Addressing all the sundry factors that go into this evaluative process, although critically important, is beyond the scope of this Article. Similarly, determining the optimal timing of this crucial counseling is an important consideration that merits a separate study. Ideally, the attorney

tion and, of course, the defendant's objectives and concerns.³⁴⁶ For many, if not most, defendants, the primary concern is maintaining, or regaining, their liberty.³⁴⁷ The likelihood of receiving a much more severe sentence if convicted after trial leads many defendants to enter guilty pleas in order to reduce their exposure.³⁴⁸

It is insufficient for a lawyer merely to give an opinion, devoid of the predicate for the recommendation. Counsel should provide her opinion and the bases for it. To do otherwise renders the advice hollow. The client is entitled to, and will need to know, the reasons why the attorney favors a particular decision. In the course of explaining thoroughly her rationale, the lawyer will inevitably engage in an effort to persuade the client of the wisdom of her advice. This marshaling of the factors that led the attorney to advocate for a particular decision should be done deliberately, consciously and openly, as a necessary component of counseling about the merits of a plea offer. The client's decision will then be the fully informed product of forthright, honest representation.

Even after thorough counseling, a client might disagree with the attorney's advice. The question then is the extent to which counsel should persist, and the method to be used, in urging the client to accept the recommendation. Professor Amsterdam writes that "[t]he limits of allowable persuasion are fixed by the lawyer's conscience."³⁴⁹ Another scholar observed that "some rather forceful language may be necessary," and referred to the use of "badgering," "cajolery," and "verbal abuse."³⁵⁰ Often, counsel's persuasion is of a more subtle nature.³⁵¹ Defense counsel should attempt to persuade a client to accept

will have developed a relationship of mutual trust and respect with his or her client, *see, e.g.*, ABA DEFENSE FUNCTION, *supra* note 320, § 4-3.1; Goodpaster, *supra* note 24, at 74 ("The major obligation of defense counsel is to try and make herself effective. This means . . . attempting to develop an effective working relationship with the defendant."), and will have completed factual and legal research, *see, e.g.*, ABA DEFENSE FUNCTION, *supra* note 320, §§ 4-3.2, 4-4.1, and 4-6.1(6) ("[u]nder no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation . . . has been completed . . ."). Often, counsel will not have had sufficient opportunity to achieve these goals prior to having to discuss the advisability of a plea offer, but it is the ideal to strive for.

³⁴⁶ *See, e.g.*, AMSTERDAM, *supra* note 272, at 340-43.

³⁴⁷ *See, e.g.*, Roy B. Flemming, *If You Pay the Piper, Do You Call the Tune? Public Defenders in America's Criminal Courts*, 14 L. & SOC. INQUIRY 393, 401-02 (1989); Jerome H. Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOL. 52, 62 (1967) (discussing the defense approach that "emphasizes decisions most likely to maximize gain and minimize loss in the negatively valued commodity of penal 'time.'").

³⁴⁸ *See supra* note 285.

³⁴⁹ AMSTERDAM, *supra* note 272, at 339.

³⁵⁰ Alschuler, *supra* note 99, at 1309-10.

³⁵¹ *See, e.g.*, Simon, *supra* note 253, at 216 (describing an attorney influencing a client to plead guilty by, among other things, choosing to discuss the disadvantages of a trial last).

advice in a manner consistent with an empathetic and compassionate approach to counseling.³⁵²

Obviously, the difficulty of the decision affects the attorney's approach to counseling. If, after weighing all the factors,³⁵³ the attorney believes that the best choice is insufficiently clear, the nature of the advising will be different from when the attorney believes the best choice is evident. One need only contrast the situation where counsel estimates that an acquittal is unlikely and a severe sentence after trial is expected, with one where counsel believes that the chances of a conviction and increased sentence are by no means clear. The clearer the choice, the more counsel should attempt to influence a client's decision.³⁵⁴ Counsel should assert her opinion commensurate with the clarity of her decision, and so as to ensure that the client understands completely her advice and its foundation.

Courts have recognized the need for this type of assessment. In *Commonwealth v. Napper*,³⁵⁵ counsel's neutrality was ineffective because the attorney determined that the case was a "stone cold loser"³⁵⁶ yet failed to advise his client to accept the plea offer. Similarly, in *Boria*,³⁵⁷ the court likely found ineffectiveness in large part because of counsel's statements that he believed the possibility of an acquittal was remote and that the decision to go to trial was, in effect, "suicidal."³⁵⁸

Even in situations where counsel exerts tremendous efforts to persuade the client, there will be occasions when the client rejects counsel's advice. In fact, because the accused makes the final decision, the attorney must strive to leave room for disagreement and must make sure that the client is aware that she will represent him zealously in any event.³⁵⁹ Obviously, this is a delicate task, and counsel must be vigilant

³⁵² See *infra* note 363 and accompanying text.

³⁵³ See *supra* note 345 and accompanying text; see also Uphoff, *supra* note 31, at 131 ("[H]ow hard counsel can lean turns on the seriousness of the case, the harm facing the defendant, the client's ability to make informed decisions, the certainty of the harm, the client's rationale for his or her decision and the means used to change the defendant's mind.").

³⁵⁴ What happens when counsel believes there is no clear best choice? That conclusion itself should become the advice required by *Boria*. Although it is neutral in that counsel is not making a particular recommendation, the client is not left alone trying to guess what the attorney thinks or what is the optimal choice. Contrast that "neutrality" with a lawyer who says nothing regarding the merits of a plea versus trial. The advice is "neutral" only to the extent that it does not recommend a particular choice; it is not neutral in the sense that counsel remains silent as to this critical decision.

³⁵⁵ 385 A.2d 521 (Pa. Superior Ct. 1978).

³⁵⁶ *Id.* at 522.

³⁵⁷ 99 F.3d 492 (2d Cir. 1996).

³⁵⁸ *Id.* at 495. Contrast with the situation in *Jones v. Murray* where counsel estimated a 70% probability of conviction. 947 F.2d at 1110.

³⁵⁹ See, e.g., AMSTERDAM, *supra* note 272, at 339 ("Of course, s/he must make absolutely clear to the client that if the client insists on pleading not guilty when the lawyer thinks a guilty plea

so as not to cause irreparable damage to the attorney-client relationship, especially in cases where the client chooses to proceed to trial. This necessary risk dictates that counsel must give careful thought to the method, as well as the content, of counseling.

Adopting this approach to counseling will necessitate changes in the analysis of ineffective assistance of counsel claims. Evaluating whether a lawyer offered an opinion is a straightforward inquiry. It is also not difficult to determine if a lawyer attempted to convince a client to accept that opinion. It is, however, a formidable challenge to assess the extent and quality of counsel's efforts to persuade. Prior to *Boria*, the issue was whether counsel's neutrality was reasonable, or, if counsel ventured an opinion that the client rejected, whether the decision not to try to persuade was reasonable. If counsel were required to offer an opinion and to try to prevail upon a client to accept it, the focus would become the nature and quality of the attempt. Although a difficult task,³⁶⁰ examining whether counsel's efforts were within the range of acceptable professional behavior is an analysis similar to that which the courts have already been undertaking.

The rationale for this view of counseling in criminal cases extends beyond constitutional interpretations of the meaning of effective assistance. As a general matter, when someone hires a professional, the client expects and demands the benefit of the professional's training, experience, and hopefully, wisdom. Although the plea decision is the defendant's, courts have observed that "it is the attorney, not the client, who is particularly qualified to make an informed evaluation of a proffered plea bargain."³⁶¹ Imagine that a medical emergency leads you to consult with a doctor. The doctor carefully and meticulously lays out your options but does not give an opinion as to which course of action she recommends. Surely, you would expect that you are entitled to her expert opinion and not just her information. In fact, we are all too familiar with stories of doctors, and indeed lawyers, declining to offer opinions for fear of being subjected to lawsuits if their advice turns out

wise, the lawyer will nevertheless defend the client vigorously and will raise every defense that the client legitimately has."); Alschuler, *supra* note 99, at 1310 (arguing that a lawyer should not be permitted to threaten a client that she will withdraw from the case unless the client accepts the advice).

³⁶⁰ See, e.g., Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 375-76 (arguing that counsel should have a duty to seek to establish a relationship of trust with the client, but acknowledging that the courts are not well-equipped to evaluate counsel's efforts in that regard).

³⁶¹ *In re Alvernaz*, 2 Cal. 4th 924, 933 (Cal. 1992); see also AMSTERDAM, *supra* note 272, at 339 ("[C]ounsel's appraisal of the case is probably better than the defendant's.").

to be incorrect.³⁶² The patient, or client, requires, and is entitled to, the professional's opinion, augmented by its underlying justifications.

It is critical, however, that the training, experience and wisdom must be combined with compassion and empathy.³⁶³ An attorney motivated by empathy, and acting with compassion, will provide the client with all the reasons, all that she is weighing, as part of a conversation with the client, so that the client will appreciate the grounds for the advice. Counsel must allow ample opportunity for the client to ask questions and voice concerns. Returning to the medical analogy, a patient's expectation, or hope, is that a doctor will not simply tell her which option to pursue, but instead will define the options, offer an opinion, and explain the bases for that opinion carefully, compassionately and responsively.

Professors Binder, Bergman and Price emphasize that "decisions should be made on the basis of what choice is most likely to *provide a client with maximum satisfaction*."³⁶⁴ They argue that client decisionmaking increases the likelihood that clients will attain "maximum satisfaction."³⁶⁵ This does not militate against an attorney attempting to persuade a client. If an attorney assumes a more active role in the decisionmaking process, offers advice, and when necessary, attempts to persuade a client to accept that advice, the goal of client satisfaction is more likely to be achieved because the client's decision will be the informed result of thorough attorney-client discourse.

Numerous studies document the dissatisfaction that many criminal defendants feel toward their appointed lawyers.³⁶⁶ Perhaps the primary complaint is that their attorneys tell them what to do rather

³⁶² See, e.g., Dinerstein, *supra* note 42, at 575 (suggesting that when lawyers decline to give advice, clients might suspect that the attorney's motivation is to avoid malpractice liability).

³⁶³ See, e.g., Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993) (an ethic of care leading to more intervention by the attorney); Charles Ogletree, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1271-75 (1993) (extolling the value of empathy in the practice of indigent defense). The American Bar Association Standards state that "defense counsel should seek to establish a relationship of trust and confidence with the accused . . ." ABA DEFENSE FUNCTION, *supra* note 320, § 4-3.1; see also Berger, *supra* note 65, at 52 ("Because a defense attorney plays so many roles in our system of justice—advocate, adviser, negotiator, spokesperson, champion and, sometimes, friend—the accused's interest in the quality of his rapport with counsel lies at the very core of the right to representation."). But cf. *Morris v. Slappy*, 461 U.S. 1, 14 (1983) (a "meaningful relationship" between defendant and counsel is not required by the Sixth Amendment); *Mann v. Reynolds*, 46 F.3d 1055, 1060 (10th Cir. 1995); *Siers v. Ryan*, 773 F.2d 37, 44 (3d Cir. 1985).

³⁶⁴ BINDER ET AL., *supra* note 236, at 261 (emphasis in original).

³⁶⁵ *Id.*

³⁶⁶ See *supra* notes 92, 200 and accompanying text.

than discuss strategy and options.³⁶⁷ Certainly, if an attorney takes that approach to counseling, the result will be dissatisfied clients. Imagine that after consulting a doctor about a medical condition, the doctor, without taking any time to explain, simply told you what to do. It is unlikely that you would be a satisfied patient. On the other hand, if the doctor, or attorney, counsels with empathy and compassion, and engages the patient, or client, in an active discussion which includes opinions and the bases for those opinions, then client satisfaction should be achieved since the client's decision will be the product of informed counseling.³⁶⁸

The dangers of paternalism, and the attorney's subordination of her client, are very real and cause for great concern. Certainly, criminal defendants can and do understand many of the complexities of their cases, and are the ones most acutely aware of the consequences and gravity of all decisions.³⁶⁹ It is painfully ironic that for many defendants, their attorneys serve only as another oppressive force that they must endure. In *Jones v. Barnes*,³⁷⁰ the Supreme Court held that appellate counsel may choose not to raise points requested by the defendant. Justice Brennan, in dissent, argued that the majority's decision meant that "[i]n many ways, having a lawyer becomes one of the many indignities visited upon someone who has the ill fortune to run afoul of the criminal justice system."³⁷¹ In what sounds like a paean to client-centered counseling, Justice Brennan also observed that "today's ruling denigrates the values of individual autonomy and dignity central to many constitutional rights, especially those Fifth and Sixth Amendment rights that come into play in the criminal process. . . . The role of the defense lawyer should be above all to function as the instrument

³⁶⁷ See *supra* notes 92, 200 and accompanying text.

³⁶⁸ Some commentators have argued that the perceived fairness of the process matters to defendants just as much as do the outcomes. See, e.g., Jonathan D. Casper, *Having Their Day in Court: Defendant Evaluations of the Fairness of Their Treatment*, 12 L. & Soc'y Rev. 237 (1978); Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 L. & Soc'y Rev. 51 (1984). To a defendant in a criminal case faced with the realization that an assertion of the constitutional right to a trial could result in an increased sentence, it is unlikely that the process will ever seem fair and equitable. Still, if an attorney takes the time and makes the effort to advise and attempt to persuade, the decisionmaking process should seem more fair than if the attorney merely tells the client what to do, or instead declines to offer any opinion.

³⁶⁹ See, e.g., Dinerstein, *supra* note 42, at 576 (observing that advocates of client-centered counseling "may improperly assume that clients are rational decisionmakers," but cautioning that "[w]e should be extremely suspicious of categorical judgments about client irrationality and impaired decisionmaking capacity."); Charles Ogleuree & Randy Hertz, *The Ethical Dilemmas of Public Defenders in Impact Litigation*, 14 N.Y.U. Rev. L. & Soc. Change 23, 38-39 (1986).

³⁷⁰ 463 U.S. 745 (1983).

³⁷¹ *Id.* at 764 (Brennan, J., dissenting).

and defender of the client's autonomy and dignity in all phases of the criminal process.³⁷² The present issue, attempting to persuade a client to accept advice, is vastly different from the one raised in *Barnes*. The attorney does not overrule, ignore or retain the final authority, but rather attempts to persuade. The "ultimate authority" is, and must be, the defendant's.³⁷³ The issue is not whether counsel prevailed upon her client to accept her advice. What matters is that she provided her client with the benefit of her advice, and attempted to explain and persuade the wisdom of her view. In *Boria*, defense counsel gave no advice on the wisdom of accepting a plea. The court held that effective assistance of counsel requires counsel to offer an informed opinion on the plea decision. In an attempt to clarify its initial opinion, the court held subsequently that by no means did the original opinion hold that counsel was ineffective if she failed to convince a client to plead.³⁷⁴ That is quite a separate issue from whether counsel even has a duty to try to convince a client to plead. It is the effort that should matter with respect to counseling, not necessarily the result. Similarly, in *State v. Bristol*,³⁷⁵ the lawyer did no more than advise his client to "seriously consider" the offer. In response to the defense argument that additional persuasion was required by the Sixth Amendment,³⁷⁶ the court held that there was no authority for the position that an attorney who fails to convince a client to plead provides ineffective assistance.³⁷⁷ Again, the focus on the result is misplaced. As long as counsel made efforts to persuade, that should be sufficient. The court in *Jones v. Murray*³⁷⁸ made a similar leap of logic. The defendant claimed that counsel was ineffective for failing to make any recommendation regarding the plea offer, as well as for not attempting to persuade him to plead guilty. The court ignored the critical question of whether the lawyer was required even to offer an opinion on the desirability of the plea bargain, and held that counsel's decision "to refrain from a vigorous attempt to change his client's mind" was permissible.³⁷⁹

³⁷² *Id.* at 763 (Brennan, J., dissenting).

³⁷³ *See id.* at 751.

³⁷⁴ *See Boria v. Keane*, 90 F.3d 36, 37 n.2 (2d Cir. 1996) ("The initial opinion in this case did not hold that it is constitutionally ineffective assistance of counsel when a lawyer's advice regarding the wisdom of accepting or rejecting a plea offer fails to convince the client.").

³⁷⁵ 618 A.2d 1290 (Vt. 1992).

³⁷⁶ In fact, the defense called expert witnesses, two highly regarded and experienced defense attorneys, to testify as to the lengths to which they would have gone in an attempt to persuade the client to accept the plea offer.

³⁷⁷ The court noted that the defendant "cites no cases supporting his contention that an attorney who fails to persuade a client to accept a plea agreement violates the *Strickland* standard of reasonable attorney competence." *Bristol*, 618 A.2d at 1292.

³⁷⁸ 947 F.2d 1106 (4th Cir. 1991).

³⁷⁹ *Id.* at 1111.

The concerns of paternalism that fuel much of client-centered lawyering lead many to withhold their opinions or advice from clients. Such a strategy is itself susceptible to allegations of paternalism.³⁸⁰ The decision to deny this information to a client rests on the assumption that a client is incapable of listening, processing information and making an informed choice.³⁸¹

It must also be acknowledged that many criminal defendants, for a variety of reasons, are not well-suited to make such a critical choice. Numerous studies establish undeniable links between crime and mental illness, and the number of inmates with some form of mental disability is extremely high.³⁸² The prevalence of chronic alcohol and/or drug abuse among inmates has been documented by countless studies.³⁸³ Given that the urban poor comprise the majority of those who are incarcerated,³⁸⁴ it is important to acknowledge the effects of what has been referred to as socio-economic deprivation or "rotten social background."³⁸⁵ Malnutrition, lead poisoning, inadequate medi-

³⁸⁰ See, e.g., Ellmann, *supra* note 227, at 767 ("[T]he lawyer's advice may affect the client not by overpowering but by informing him.").

³⁸¹ See, e.g., Ellmann, *supra* note 227, at 767 ("It seems fair to say that a lawyer who avoids giving advice to a client capable of assessing it is acting with disrespect towards her client by failing to treat him as a competent person."); Dinerstein, *supra* note 42, at 577 ("[C]lient-centeredness may be seen as condescending towards clients. Why should not poor clients, the original subjects of client-centered practice, be able to receive advice from their lawyers without immediately acceding to it?").

³⁸² See, e.g., Torrey E. Fuller et al., *Criminalizing the Seriously Mentally Ill: The Abuse of Jails as Mental Hospitals*, A Joint Report of the National Alliance for the Mentally Ill and the Public Citizen's Health Research Group (1992); H.R. Lamb & R.W. Grant, *The Mentally Ill in an Urban County Jail*, 39 ARCH. GEN. PSYCHIATRY 17 (1982); John Petrich, *Rate of Psychiatric Morbidity in a Metropolitan County Jail Population*, 133 AM. J. PSYCHIATRY 1439 (1976); Linda A. Teplin, *Prevalence of Psychiatric Disorders Among Incarcerated Women*, 53 ARCH. GEN. PSYCHIATRY 505 (1996) (finding that 80% of her sample of women pretrial detainees met criteria for one or more lifetime psychiatric disorders, and 70% were symptomatic within six months preceding her interview of them); Fox Butterfield, *By Default, Jails Become Mental Institutions*, N.Y. TIMES, Mar. 5, 1998, at A1.

³⁸³ See, e.g., Associated Press, *Drugs and Booze Big Crime Factors*, DAILY NEWS, Mar. 23, 1998, at 14; Christopher S. Wren, *Connecticut Plan Would Cut Prison Time for Some Drug Offenders*, N.Y. TIMES, May 6, 1998, at B1; Christopher S. Wren, *Drugs or Alcohol Linked to 80% of Inmates*, N.Y. TIMES, Jan. 9, 1998, at A14 (discussing the findings of the National Center on Addiction and Substance Abuse).

³⁸⁴ See *supra* note 18 and accompanying text.

³⁸⁵ In *United States v. Alexander*, the court grappled with the admissibility of what defense counsel referred to as evidence of the defendant's "rotten social background." 471 F.2d 923, 959 (D.C. Cir. 1973). Writing in support of admitting the evidence, Judge Bazelon noted the possibility of a "significant causal relationship between violent criminal behavior and a 'rotten social background.'" *Id.* at 965. One scholar, addressing the implications of *Alexander*, discussed the effects of various types of environmental deprivation on individuals. See Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 J.L. & INEQUALITY 9 (1985).

cal care and other by-products of environmental deficits can certainly impact adversely on cognitive development.³⁸⁶ All these conditions may contribute in whole or in part to the possibility that a defendant may be unable, or ill-equipped, to make a decision of this magnitude.³⁸⁷

Even for those defendants unaffected by organic or physical impairment, the stress of this critical decision can act as an inhibitor to rational, careful decisionmaking.³⁸⁸ The medical analogy is once again illustrative. It is easy to imagine the magnitude of the decision adversely affecting someone's ability to choose among available options. One scholar, confronted with the difficulty in deciding between medical options available for his child, observed that when the decisionmaking involves anxiety and outcomes that evoke strong emotions, the ability to decide calmly and rationally is compromised.³⁸⁹ The "assembly line" nature of the criminal courts is also not conducive to calm reflection.³⁹⁰ Cases are heard only briefly, and there is pressure to resolve the charges quickly.³⁹¹ Defense counsel, accustomed to the pace and experienced in navigating through these obstacles, is often better able to parse through the available alternatives and reach a conclusion as to the best option.

It is important to recognize that it is far easier emotionally to refrain from attempting to influence a client. In those cases where counsel believes that the client's rejection of a plea offer is unwise, counsel will be spared the unpleasant and painful task of trying to convince someone to plead guilty.³⁹² This is an unrewarding endeavor. It often creates conflict between lawyer and client.³⁹³ Counsel is put in the position of being the bearer of bad news, and of having her

³⁸⁶ See, e.g., Delgado, *supra* note 385, at 35-36.

³⁸⁷ See, e.g., Alschuler, *supra* note 99, at 1313 ("The principal vice of the guilty-plea system is that it turns major consequences upon a single tactical decision, and few defendants seem truly capable of making the decision for themselves.").

³⁸⁸ See, e.g., G. Mandler, *Stress and Thought Processes*, in HANDBOOK OF STRESS: THEORETICAL AND CLINICAL ASPECTS.

³⁸⁹ Simon, *supra* note 253, at 216-19. Professor Simon noted the "sense of deliverance" he felt when the doctor informed him, "[i]n the case of my own child, I decided to give him the shot." Simon, *supra* note 253, at 217. He stated further that "I felt, and still do, that that sentence was all that I needed or wanted to know." Simon, *supra* note 253, at 217.

³⁹⁰ See, e.g., Zeidman, *supra* note 92, at 898; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS (1967).

³⁹¹ Certainly, part of the difficulty confronting the students and faculty in Dinerstein's case was that they were given only four weeks to prepare for trial. See Dinerstein, *supra* note 249, at 972; see also Dinerstein, *supra* note 42, at 586 n.377.

³⁹² See AMSTERDAM, *supra* note 272, at 339-40 ("[C]ounsel's difficult and painful responsibilities include making every reasonable effort to save the defendant from the defendant's ill-informed or ill-estimated choices.").

³⁹³ See, e.g., Alschuler, *supra* note 99.

motivations and allegiances questioned by her client. Most public defenders who have been in this situation are familiar with being called sellouts, functionaries or worse by their clients. Unlike when a trial ends in an acquittal, there is no feeling of elation if counsel succeeds in convincing the client to accept her advice. In fact, counsel and client are usually left discontented.³⁹⁴ From counsel's point of view, it would be much easier when a client says, "I don't want to plead guilty to that offer," to respond enthusiastically, "Great, let's go to trial." This response, although easier emotionally, avoids the larger concern: in counsel's judgment, a trial will result in a conviction and a greatly enhanced punishment.

Certainly, there are defense attorneys who impose their will on clients for invalid reasons and in overbearing, inappropriate ways. All too often, the results of those encounters are guilty pleas. The derogatory views of defendants toward their attorneys are no doubt grounded in the grim realities of courthouse regulars pleading everyone guilty in order to earn a quick fee, to avoid the preparation and work required by a trial and to appease the local criminal justice bureaucracy.³⁹⁵ Nevertheless, it is equally dangerous for an attorney to stand idly by when a client is set on a course that the attorney believes is self-destructive.

My own eight years of experience as a staff, and then supervising, attorney at a public defender office leads me to suggest the following reasons why many defense attorneys do not intervene in their clients' decisions whether to plead guilty or go to trial. Some adhere to the principle of client autonomy and make conscious efforts to avoid impacting the client's decisionmaking ability. For these defense attorneys, the goal of client empowerment motivates them to strive toward creating an environment free from their influence, so that the client can make a truly independent decision. Animated by the recognition that "the defendant does the time, not me," the attorney seeks to ensure client decisionmaking. It is debatable whether the criminal court is the place for someone to become empowered. I am reminded of an exchange at a public defender training. One lawyer stated that he became a public defender precisely to fight against the assembly line processing of guilty pleas, and that he would never try to persuade

³⁹⁴ It is not so much about convincing someone who proclaims his innocence to plead guilty, or persuading someone to give up his right to a trial. Often, the defendant wants not to plead guilty, with the resulting sentence of imprisonment, rather than affirmatively wanting to go to trial. Even so, the despondence remains.

³⁹⁵ See *supra* note 20 and accompanying text.

someone to plead guilty. Another lawyer surmised that that lawyer would have more clients in jail, serving longer sentences, than attorneys who intervened in their clients' decisions.³⁹⁶

In cases where the lawyer believes that a plea is the best option but the client decides on a trial, the defendant's professed innocence often compels defense attorneys to keep their opinions to themselves. There are defense attorneys who believe that once a client asserts innocence, professional ethics or individual morality render plea discussions inappropriate. In *Boria*, the defendant's insistence upon his innocence surely contributed to his attorney's reluctance to suggest that he accept the plea offer. Protestations of innocence aside, however, plea discussions should continue. For one thing, defendants are permitted to plead guilty, without admitting guilt, in order to avoid harsher punishment.³⁹⁷ Even when the defendant has a bona fide defense, counsel may still advise a guilty plea.³⁹⁸ There is also the possibility that a defendant will change his mind. As the court observed in *Kates v. United States*,³⁹⁹ "I have seen many a defendant, seemingly utterly intransigent as to the possibility of pleading guilty, finally cave in when confronted with the ugly reality of what probably would happen to him if he did not."⁴⁰⁰ Given the well-documented lack of trust between defendant and defense counsel,⁴⁰¹ it may well be the rare case where the defendant admits guilt to his attorney. The civil context presents an apt comparison. Imagine that a defendant in a civil lawsuit tells the lawyer, "I did nothing wrong and will not settle." It is hard to imagine that counsel would never, as a matter of counseling practice, advise the client to accept a settlement offer.⁴⁰²

³⁹⁶ For arguments that withholding advice is paternalistic and that neutrality is not actually possible, see *supra* notes 380-81, 342-44 and accompanying text.

³⁹⁷ *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970).

³⁹⁸ *United States v. Cronin*, 466 U.S. 648, 656 n.19 (1984).

³⁹⁹ 930 F. Supp. 189 (E.D. Pa. 1996).

⁴⁰⁰ *Id.* at 192. The court in *Jones v. Murray* found that counsel's decision not to try to change his client's mind, in the context of his client's professed innocence, was within the range of professionally competent assistance. See 947 F.2d at 1111. In *United States v. Gordon*, 979 F. Supp. 337 (E.D. Pa. 1997), the court considered whether counsel was required to recommend a plea offer to a client who vigorously asserted his innocence. Apparently overlooking *Boria*, the court stated, "[w]e found no case which holds that an effective defense lawyer in criminal cases must offer advice on sentence-triggering pleas to a client who insists he is actually innocent of the charges against him." *Id.* at 340. That, of course, was the precise situation in *Boria*. The defendant proclaimed his innocence repeatedly, the offer involved a sentence of incarceration and the court held that counsel was required to advise his client about the desirability of a plea.

⁴⁰¹ See, e.g., Zeidman, *supra* note 92, at 890 n.132.

⁴⁰² The Model Code of Professional Responsibility, Ethical Consideration 7-7 (1992) provides that "it is for the client to decide whether he will accept a settlement offer." EC 7-7 goes on to

A willingness to try to persuade involves the assumption of an awesome amount of responsibility. Many lawyers are simply loath to take on such a burden.⁴⁰³ Some prefer remaining detached rather than getting involved in the emotions and anxiety that attend a decision of this magnitude. Others are motivated by fear of lawsuits or appeals based on allegations of improper coercion. They believe that the more the decision is the client's, the more they are insulated from potential liability.⁴⁰⁴

Perhaps most important of all, many defense lawyers are not invested in, and empathetic toward, their clients. To these attorneys, the client is secondary. Take again the situation where counsel believes that a decision to go to trial is disastrous. The attorney conveys a plea offer and the client rejects it. Rather than intervene, counsel responds, "Fine, let's go to trial." For this lawyer, a trial breaks up the drudgery of defense work, is exciting, and in cases involving assigned counsel, results in additional money. After trial, if, as expected by counsel, the client is convicted and sentenced more severely than pursuant to the plea offer, counsel is unaffected because it was, after all, the defendant's decision.

It is the attorneys who care fundamentally about their clients who take an active role in decisionmaking. These are the attorneys who are affected when they see someone receive a sentence far in excess of what they had been offered. They are willing to put in the necessary time, effort and commitment to conduct thorough factual and legal preparation, and to expend the vast amount of energy often needed during counseling of this nature. Return again to the scenario where counsel believes that a plea is necessary to avoid disastrous conse-

state that counsel in criminal cases "has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable," but that "it is for the client to decide what plea should be entered." Some have argued that the severe potential repercussions and the specific constitutional protections make client decisionmaking and autonomy particularly appropriate for criminal defendants. See, e.g., Morris, *supra* note 51, at 795-96; Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court*, 1988 Wis. L. Rev. 65, 71 n.19. It is for precisely those reasons, among others, that I believe that the lawyer has an obligation to be actively involved in the decisionmaking process.

⁴⁰³ See, e.g., Simon, *supra* note 253, at 225 ("The crude autonomy view is attractive to lawyers because it absolves them of the burdens of connection and the responsibilities of power by suggesting that they can perform their duties simply by presenting a professionally defined package of information."); Spiegel, *supra* note 218, at 337 ("The attractiveness of the autonomy view can stem from its denial of responsibility and that is a substantial problem.").

⁴⁰⁴ See *supra* notes 281, 362 and accompanying text. Taken to its extreme, the attorney relegates himself to being a conduit. He passes along all relevant information but abstains from imparting any opinions or advice.

quences. Counsel conveys the offer and supplies her opinion and the bases for that opinion, but the client declines to plead guilty. An empathetic lawyer, motivated by concerns for her client, will, rather than responding, "Great. Let's go to trial," intervene in the client's decision and begin the process of trying to persuade. The ensuing counseling is difficult. It is often unpleasant. It is almost always unrewarding. Yet, she does it out of concern for her client.

It is threatening to many attorneys to take on this responsibility. A lawyer who has not prepared adequately will be exposed by the client's questions and resistance. An ill-prepared lawyer is vulnerable to being called, accurately, a pawn or functionary by the client. If, on the other hand, counsel has expended the necessary effort preparing the case, the attorney can cope with the client's resistance and accusations. Even though it is cold comfort, the attorney knows that she has the client's, not the court's, interests in mind.

It is important to emphasize that less common, but equally applicable, will be occasions when the attempt to persuade is aimed at convincing the client to reject a plea in favor of a trial. And it is important also to bear in mind that the decision is, of course, ultimately the client's. Unlike in *Jones v. Barnes*,⁴⁰⁵ where counsel was given the final authority to decide what issues should be raised on appeal, counsel cannot override the client's decision whether to plead or not. An attorney should not, and indeed cannot, enter a plea or go to trial against a client's wishes.⁴⁰⁶ Truly effective assistance, however, requires that attorneys attempt to convince clients to accept their advice. If the counseling is done with empathy, compassion and understanding, it should be the rare case where the client chooses to disagree.⁴⁰⁷

CONCLUSION

The state of criminal defense has undergone consistent criticism, and yet the appellate courts regularly reject ineffective assistance of

⁴⁰⁵ 463 U.S. 745 (1983).

⁴⁰⁶ *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring) (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 own behalf, or take an appeal). Indeed, in TRIAL MANUAL 5, Professor Amsterdam begins his discussion of the lawyer's counseling obligations by citing to *Jones v. Barnes* and noting that the decision to plead must ultimately be left to the client's wishes. "Counsel cannot plead a client guilty, or not guilty, against the client's will." AMSTERDAM, *supra* note 272, at 339.

⁴⁰⁷ See, e.g., White, *supra* note 360, at 371 ("If the attorney has investigated the case thoroughly, and at the same time has worked closely with the client so as to develop a relationship of trust and respect, the likelihood of inducing the defendant to accept an appropriate plea offer increases dramatically.").

counsel claims. Attention to the lawyer's counseling must supplement the exclusive focus on counsel's pretrial preparation and trial performance. The recognition that the overwhelming majority of the record number of inmates in American penal institutions were convicted by virtue of guilty pleas mandates this shift in emphasis. Delineating the contours of counsel's constitutional counseling obligations is a long overdue and vital task.

With scant guidance from the courts or professional ethical standards, defense lawyers' approaches to counseling clients as to the advisability of accepting a plea offer range from neutrality to arm-twisting. Clinical legal education, seeking to incorporate the ideals of autonomy and empowering clients, embraces a client-centered model of counseling. Attorneys strive to portray and maintain neutrality so that decisions will be made by the client, free from attorney influence.

The decision by the Second Circuit in *Boria v. Keane*, holding that counsel's opinion as to the desirability of accepting or rejecting a proffered plea comprises constitutionally required advice, has dramatic implications for the practice of criminal defense, as well as for conceptions of client-centered counseling. This Article argues that although the ruling in *Boria* was correct and will result in enhanced effectiveness of counsel, the court did not go far enough. To breathe life into the constitutional guarantee of effective assistance, the court should have required attorneys to offer their opinions, and to attempt to convince clients to accept their recommendations.

Whether or not neutrality is a laudable goal, it is not possible to achieve. Attorneys will convey what they believe a client should do by the choices they make in what to present and how to present it. Although posited as a response to lawyers' paternalistically telling their clients what to do, neutrality, premised on notions that clients will be unable to make independent judgments once their lawyer advises a particular choice, treats clients as inherently incapable of listening to advice, weighing it and reaching an autonomous decision. In order to free clients from attorney influence, counsel withholds information—her opinion—which might be important for the client to evaluate in order to make a fully informed decision.

Once counsel provides an opinion, it becomes incumbent upon her to explicate the bases for the opinion. Advice without the underlying justifications and rationales is of limited value to a client. In fact, when we utilize the services of professionals, we expect and demand the benefits of their training, experience, wisdom and advice. Criminal defense lawyers in particular must take on the responsibility of advising and attempting to persuade clients. Although most criminal defen-

dants are well aware of the implications of the plea decision and, obviously, are the ones who must suffer the consequences, the prevalence of mental illness, drug and alcohol use and addiction, and other factors may result in an individual not being well-suited to make a decision of this magnitude without the guidance and input of counsel. The impact of the anxiety and stress that attend decisions of this gravity, along with the pressure-packed atmosphere of criminal courts, may also serve as inhibitors to careful, thoughtful and independent decisionmaking.

The attorney will be required to invest herself, to offer an opinion and try to persuade, but not to usurp the decision from the client. Ultimately it is, and must be, the client's choice. The attorney, however, should assume the responsibility and take on the burden of advising her client, with compassion and empathy, as to whether to accept or reject a plea offer. By supplying the bases for her opinion, she should try to persuade the client to accept her recommendation. The result will be fully counseled decisionmaking based on truly effective assistance of counsel.