A Criminal Defendant's Inability to Sue His Lawyer for Malpractice: The Other Side of the Exoneration Rule
[*Canaan v. Bartee*, 72 P.3d 911 (Kan. 2003)]

Amy L. Leisinger*

I. Introduction

Imagine you were charged with the murder of your partner in Shawnee County, Kansas. You told your attorney that when your partner was murdered, you were visiting a friend across the country. Your defense attorney made no effort to check your story; he has told you that the case is hopeless. Across town, the prosecutor, believing that the witness who will place you at the scene of the murder lacks credibility, contacted your attorney to discuss the possibility of a plea bargain. Your attorney did not mention this opportunity. The case proceeded to trial.

You sat at the defense table next to your lawyer as the prosecutor approached her witness and asked whether you have a reputation for violence; the witness said you and your partner seemed to argue a "good deal." The prosecutor then asked, "Did you know that on two occasions, the victim was treated for injuries inflicted by the defendant?" The witness said "No." Despite clear violations of the Kansas evidence rules,[1] your attorney, asleep at the defense table, did not object. You were convicted.

You have no appellate remedy because no objections appear in the trial record.[2] While in prison, you retained another attorney to help you file an ineffective assistance of counsel claim. This attorney failed to file the claim within the requisite statute of limitations pe-

* B.A. 2003, University of Iowa; J.D. Candidate 2006, Washburn University School of Law.

1. *See* Kan. Stat. Ann. §§ 60-445, 60-447 (1994). Section 60-445 of the Kansas Statutes Annotated states that "the judge may in his or her discretion exclude evidence if he or she finds that its probative value is substantially outweighed by the risk that its admission will unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered." *Id.* § 60-445. Therefore, your lawyer could validly object. Second, in Kansas, "evidence of specific instances of conduct other than evidence of conviction of a crime which tends to prove the trait to be bad [is] inadmissible . . . ." *Id.* § 60-447. Moreover, character evidence "if offered by the prosecution to prove guilt, may be admitted only after the accused has introduced evidence of his or her good character." *Id.* Again, your lawyer has excellent grounds for objection, based on knowledge of the Kansas evidence rules, which any reasonable criminal lawyer should have.

2. *See id.* § 60-404. Section 60-404 of the Kansas Statutes Annotated states that "[a] verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection." *Id.*

riod, so the claim was barred.[3] You remain in prison. According to the Kansas Supreme Court, you have not yet been harmed, and even if you have been harmed, your attorneys would not be the legal cause of the harm.

In *Canaan v. Bartee*,[4] the Kansas Supreme Court adopted the exoneration rule, which requires a criminal defendant to obtain postconviction relief before maintaining a malpractice action against his defense attorney.[5] In doing so, the court not only adopted a judge-made law[6] based solely on legal and policy justifications that the court failed to fully analyze, but also permitted derogation of duly enacted law.[7] The court failed to recognize that the adoption of the exoneration rule leaves many criminal defendants without redress for their attorney's malpractice and insulates defense attorneys from liability for negligent representation.

Canaan followed the majority of courts that have considered this issue.[8] Nevertheless, the court failed to consider arguments against the rule before adopting justifications with virtually no discussion. Moreover, the court mistakenly did not respect principles of duly enacted law, but rather took on a legislative function. The court should have found that the exoneration rule protects undeserving defense attorneys and unduly burdens criminal defendants who deserve competent and careful legal counsel.

Certain measures, however, could be taken to minimize the detrimental effects of the exoneration rule. Courts should continue to use their existing definitions of "harm" as a guidepost for proving a legal malpractice claim, which are more realistic than those used under the exoneration rule. In addition, courts should use the "more favorable outcome" standard, as opposed to full exoneration, to aid in determining whether actual injury or harm has occurred. Finally, courts should take a different view of damages in legal malpractice claims arising out of criminal proceedings. The courts should: use comparative negligence to apportion fault; consider monetary awards as punitive to alleviate concerns about awarding damages to a criminal; and allow

3. *Id*. § 60-1507(f).

4. 72 P.3d 911 (Kan.), *cert. denied*, 540 U.S. 1090 (2003).

5. *Id*. at 921.

6. The term "judge-made law" refers to the common law, "[t]he law established by judicial precedent rather than by statute." BLACK'S LAW DICTIONARY 858 (8th ed. 2004).

7. *See Canaan*, 72 P.3d at 916-20.

8. *See, e.g.*, Levine v. Kling, 123 F.3d 580, 583 (7th Cir. 1997) (applying Illinois law); State v. Shaw, 816 P.2d 1358, 1360 (Alaska 1991); Steele v. Kehoe, 747 So. 2d 931, 933 (Fla. 1999); Stephens v. Denison, 150 S.W.3d 80, 83 (Ky. Ct. App. 2004); Morgano v. Smith, 879 P.2d 735, 737 (Nev. 1994); Stevens v. Bispham, 851 P.2d 556, 566 (Or. 1993); Bailey v. Tucker, 621 A.2d 108, 115 (Pa. 1993); Gibson v. Trant, 58 S.W.3d 103, 117 (Tenn. 2001); Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995); Adkins v. Dixon, 482 S.E.2d 797, 801 (Va. 1997).

recovery under the lost-chance theory used in medical malpractice proceedings.

II. Case Description

In 1995, Marvin Canaan was convicted of first-degree murder, aggravated robbery, and aggravated burglary in Johnson County, Kansas.[9] On January 5, 1998, Canaan filed suit against his trial attorneys, Michael Bartee and Kelly Jernigan; his appellate attorney, Mary Curtis; and an investigator from the Johnson County Public Defender Office, Allen Bush.[10] Canaan claimed that he could prove his innocence and that he was wrongfully convicted as a direct result of his attorneys' malpractice.[11] Canaan listed several causes of action; the district court deemed all of his claims either legal malpractice or negligence.[12] In addition, he claimed damages of over $50,000.[13] Canaan also filed an ineffective assistance of counsel claim against his attorneys, seeking acquittal; the claim ran simultaneously with the legal malpractice/negligence action.[14]

On February 14, 2000, the Johnson County District Court entered a default judgment against the defendants "for their failure to comply with Canaan's discovery requests" in his legal malpractice/negligence case.[15] The defendants filed a motion to set aside the default judgment; the motion was denied, but the district court "certified its decision for interlocutory appeal."[16]

On appeal, the Kansas Supreme Court set aside the default judgment, finding that the district court abused its discretion not only in failing to impose lesser sanctions on the defendant attorneys before entering a default judgment, but also in failing to set aside the judgment.[17] The court reversed the trial court and remanded the case for further consideration.[18]

After the reversal and remand, Canaan filed a motion in the district court for monetary sanctions against the defendants and for at-

9. *Canaan*, 72 P.3d at 913.
10. *Id*.
11. *Id*.
12. *Id*.
13. *Id*.
14. *Id*. at 914. Judge William Cleaver denied Canaan's ineffective assistance of counsel motion. *Id*. Canaan sought rehearing and, after a hearing in which he presented evidence, Judge Cleaver ruled that there was no basis for Canaan's claim and again denied the motion. *Id*.
15. *Id*. at 913. During the time of discovery, the defendant attorneys were represented by Assistant Attorney General James Coder. *Id*. As a result of Coder's conduct in the discovery proceedings in Canaan's case, he was suspended from the practice of law. *Id*. The defendants then retained new representation. *Id*.
16. *Id*.
17. *Id.*
18. *Id.*

torney fees.[19] The defendants moved for summary judgment, alleging that no valid cause of action existed because Canaan had not obtained exoneration.[20] The defendants also alleged that collateral estoppel barred Canaan's claims because the issue of his counsel's effectiveness had been litigated and decided against him in his 1998 ineffective assistance of counsel proceeding.[21]

On March 15, 2002, the district court granted summary judgment for the defendants, holding that exoneration by postconviction relief is required before a criminal defendant can bring a legal malpractice action against his defense attorney.[22] The district court did not impose the monetary sanctions, but it awarded Canaan $1,500 for the attorney fees of the lawyer who worked on Canaan's discovery requests at the district court level.[23]

All of the parties filed motions to amend the judgment; the district court denied the motions.[24] Canaan appealed, and the Kansas Supreme Court granted his motion to transfer the case from the Kansas Court of Appeals.[25] The Kansas Supreme Court affirmed the district court's decision, holding that a criminal defendant must obtain postconviction relief before maintaining a legal malpractice action against his criminal defense attorney.[26]

III. Background

A. *History of Legal Malpractice and Ineffective Assistance of Counsel*

Legal malpractice has its roots in early English case law.[27] In the 1600s and 1700s, legal associations organized to protect the profession from outside threats.[28] Because of the success of these associations, negligence in the legal profession became prevalent.[29] Courts began to realize that professional policing was necessary, so they created a standard of care for legal professionals to follow, thereby creating the tort action of legal malpractice.[30]

19. *Id*. at 914.
20. *Id*.
21. *Id*.
22. *Id*.
23. *Id*.
24. *Id*.
25. *Id*.
26. *Id*. at 921. The Supreme Court of Kansas affirmed the district court as to its adoption of the exoneration rule, but affirmed and reversed the district court's additional holdings, which will not be discussed herein. *Id*. at 922-25.
27. Cara Ulbricht, *Legal Malpractice*, University of Calgary, *at* http://www.ucalgary.ca/MG/inrm/industry/Professional/attorney/info.htm#background (last visited April 16, 2005).
28. *Id*.
29. *Id*.
30. *Id*.

Throughout the last 300 years, legal malpractice law has developed into its present form. The tort now reflects the basic requirements of negligence claims: the defendant lawyer owed a duty of care to the plaintiff client; the lawyer breached his duty; a causal connection existed between the lawyer's breach and the client's harm; and the client suffered actual harm.[31]

In contrast to legal malpractice, ineffective assistance of counsel arose to remedy violations of a criminal defendant's Sixth Amendment rights to counsel and to a fair trial.[32] In *Strickland v. Washington*,[33] the United States Supreme Court defined the standard for effective counsel.[34] It stated, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[35] Prejudice can be inferred, for example, when counsel is not present or fails to subject testimony to meaningful adversarial testing.[36]

Ineffective assistance of counsel claims focus on the fairness of the original proceeding to the criminal defendant.[37] One commentator has noted that "[o]nly very serious errors, such as would likely have produced an entirely different outcome at trial, will suffice to require a new trial" following a finding of ineffective assistance of counsel.[38] The Sixth Amendment does not specify what constitutes effective assistance; finding assistance effective "relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions."[39]

B. *Kansas Law on Legal Malpractice and Ineffective Assistance of Counsel Claims*

1. Legal Malpractice

Kansas courts have held fast to the basic requirements of negligence actions when evaluating legal malpractice claims.[40] Therefore, a plaintiff in a legal malpractice action must establish: (1) that his law-

31. *See, e.g.*, Bergstrom v. Noah, 974 P.2d 531, 553 (Kan. 1999); Hunt v. Dresie, 740 P.2d 1046, 1056 (Kan. 1987).
32. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 689 (1984); Krahn v. Kinney, 538 N.E.2d 1058, 1062 (Ohio 1989).
33. 466 U.S. 668 (1984).
34. *Id.* at 684-96.
35. *Id*. at 686.
36. United States v. Cronic, 466 U.S. 648, 659 (1984).
37. *Strickland*, 466 U.S. at 696.
38. Jethro K. Lieberman, The Evolving Constitution: How Supreme Court Has Ruled on Issues from Abortion to Zoning 263-64 (1992).
39. *Strickland*, 466 U.S. at 688.
40. *See, e.g.*, Bergstrom v. Noah, 974 P.2d 531, 553 (Kan. 1999); Hunt v. Dresie, 740 P.2d 1046, 1056 (Kan. 1987).

yer had a duty to use ordinary skill and knowledge in the representation; (2) that the lawyer breached that duty; (3) that a causal connection between the breach and the client's injury existed; and (4) that the plaintiff suffered actual loss or damage.[41]

Before *Canaan v. Bartee*, only two Kansas cases had dealt with legal malpractice claims arising out of criminal proceedings.[42] In *Bowman v. Doherty*,[43] the Kansas Supreme Court detailed the standard of care for attorneys: "An attorney is obligated to his client to use reasonable and ordinary care and diligence in the handling of cases he undertakes, to use his best judgment, and to exercise that reasonable degree of learning, skill and experience which is ordinarily possessed by other attorneys in his community."[44] The court in *Bowman* found that all attorneys have the same duty of care in both civil and criminal actions.[45] In *Rice v. Barker & Bunch, P.C.*,[46] the Kansas Court of Appeals held that a plaintiff in a legal malpractice action must show that, but for his attorney's negligence, the underlying lawsuit would have been successful.[47] Neither *Bowman* nor *Rice* discussed whether a demonstration of exoneration was necessary to maintain a successful criminal legal malpractice claim.

2. Ineffective Assistance of Counsel

Unlike legal malpractice, which is founded on the law of torts, ineffective assistance of counsel is founded on constitutional rights.[48] Section 60-1507 of the Kansas Statutes Annotated permits ineffective assistance of counsel claims by prisoners.[49] A prisoner can request postconviction relief from the court that imposed the sentence that violated the prisoner's constitutional rights.[50] If the prisoner prevails, the court can vacate or correct the sentence, discharge the defendant, or order a new trial.[51]

41. *See, e.g.*, *Bergstrom*, 974 P.2d at 553; *Hunt*, 740 P.2d at 1056. To prove malpractice in the handling of civil litigation, however, the plaintiff "may be asked to prove three additional factors: that the underlying claim was valid; that it would have resulted in a favorable judgment had it not been for the attorney's error; and that the judgment was collectable." Webb v. Pomeroy, 655 P.2d 465, 468 (Kan. Ct. App. 1982).

42. Bowman v. Doherty, 686 P.2d 112 (Kan. 1984); Rice v. Barker & Bunch, P.C., 972 P.2d 786 (Kan. Ct. App. 1998).

43. 686 P.2d 112 (Kan. 1984).

44. *Id*. at 120.

45. *Id*.

46. 972 P.2d 786 (Kan. Ct. App. 1998).

47. *Id*. at 786. The court found that Rice had made no such showing in his claim. *Id*. at 786-87.

48. *See* U.S. CONST. amend. VI; State v. Graham, 952 P.2d 1266, 1274 (Kan. 1998) (citing Strickland v. Washington, 466 U.S. 668, 689 (1984)).

49. KAN. STAT. ANN. § 60-1507 (1994).

50. *Id.*

51. *Id*.

In order to prevail in an ineffective assistance of counsel action, the criminal defendant must first show that his counsel's performance was truly deficient, resulting in such serious errors that the legal service was less than what the Sixth Amendment requires.[52] In addition, the defendant must show that counsel's deficiency actually prejudiced the defense and impeded a fair trial.[53] To show the required prejudice, the defendant must demonstrate that it is reasonably likely that, but for his attorney's negligent errors, the trial's outcome would have been different.[54] A court hearing an ineffective assistance claim must consider all of the evidence that the trier of fact considered and must recognize a strong presumption that the attorney behaved reasonably and performed effectively.[55]

3. Differences Between Legal Malpractice and Ineffective Assistance Claims in Kansas

Reasonableness is the standard of judgment in both legal malpractice and ineffective assistance claims, and the burden of proof in both actions is preponderance of the evidence.[56] Though the claims are similar, they have one critical difference. In an ineffective assistance action, courts presume that counsel performed reasonably; however, in a legal malpractice claim, there is no such presumption.[57] Therefore, the two causes of action are distinct.

In addition, ineffective assistance of counsel is a constitutionally based action, and legal malpractice is a tort claim.[58] As a result, the available remedies are different. With ineffective assistance of counsel, a criminal defendant may have his conviction overturned,[59] but with legal malpractice, the criminal defendant receives only monetary compensation.[60]

C. *Legal Malpractice and the Exoneration Rule in Other Jurisdictions*

1. Majority View

The majority of courts considering legal malpractice claims brought by convicted criminals have held that a criminal must show

52. State v. Thomas, 993 P.2d 1249, 1252 (Kan. Ct. App. 1999).
53. *Id.*
54. *Id.*
55. *Id.*; State v. Betts, 33 P.3d 575, 591 (Kan. 2001).
56. KAN. SUP. CT. R. 183(g); Strickland v. Washington, 466 U.S. 668, 687-88 (1984); *Betts*, 33 P.3d at 591.
57. *Betts*, 33 P.3d at 591.
58. *See* Bergstrom v. Noah, 974 P.2d 531, 553 (Kan. 1999); State v. Graham, 952 P.2d 1266, 1274 (Kan. 1998) (citing *Strickland*, 466 U.S. at 689).
59. KAN. STAT. ANN. § 60-1507 (1994).
60. *See, e.g.*, Kan. Pub. Employees Ret. Sys. v. Reimer & Koger Assocs., Inc., 936 P.2d 714, 720 (Kan. 1997).

exoneration by some form of postconviction relief before maintaining a legal malpractice action against his defense attorney.[61] The exoneration rule is not based on statutory authority.[62] Instead, courts rely on legal and procedural rationales, public policy justifications, and likely consequences to support applying the exoneration rule to legal malpractice actions arising out of criminal proceedings.[63]

a. *Legal and Procedural Support for the Exoneration Rule*

Among the justifications offered by courts in the majority, several focus on existing law and principles of legal procedure.[64] These courts have found that in a legal malpractice action, causation and harm cannot be proven without exoneration.[65] Further, the courts contend that the exoneration rule not only prevents legal malpractice actions from contravening the doctrine of collateral estoppel, but also provides a clear event on which the statute of limitations begins.[66]

i. Proving Causation Without Exoneration

The causation element of a legal malpractice claim requires the plaintiff to prove that the attorney was both a cause-in-fact and a

---

61. *See, e.g.*, Levine v. Kling, 123 F.3d 580, 583 (7th Cir. 1997) (applying Illinois law); State v. Shaw, 816 P.2d 1358, 1360 (Alaska 1991); Steele v. Kehoe, 747 So. 2d 931, 933 (Fla. 1999); Stephens v. Denison, 150 S.W.3d 80, 83 (Ky. Ct. App. 2004); Morgano v. Smith, 879 P.2d 735, 737 (Nev. 1994); Stevens v. Bispham, 851 P.2d 556, 566 (Or. 1993); Bailey v. Tucker, 621 A.2d 108, 115 (Pa. 1993); Gibson v. Trant, 58 S.W.3d 103, 117 (Tenn. 2001); Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995); Adkins v. Dixon, 482 S.E.2d 797, 801 (Va. 1997). Some courts have also held that the criminal defendant must show actual innocence. *See, e.g.*, Wiley v. County of San Diego, 966 P.2d 983, 991 (Cal. 1998); *Morgano*, 879 P.2d at 738; *Bailey*, 621 A.2d at 113; *Adkins*, 482 S.E.2d at 802. In addition, some jurisdictions have granted public defenders total immunity from legal malpractice lawsuits. *See, e.g.*, Browne v. Robb, 583 A.2d 949, 952 (Del. 1990); Dziubak v. Mott, 503 N.W.2d 771, 773 (Minn. 1993).

62. *See Levine*, 123 F.3d at 582; *Shaw*, 816 P.2d at 1360-62; *Wiley*, 966 P.2d at 986; *Steele*, 747 So. 2d at 933; *Stevens*, 851 P.2d at 560-65; *Bailey*, 621 A.2d at 112-14; *Gibson*, 58 S.W.3d at 111-17; *Peeler*, 909 S.W.2d at 497-98; *Adkins*, 482 S.E.2d at 801. As for other authority, the United States Supreme Court has held that a plaintiff in a 42 U.S.C. § 1983 civil rights action based on unconstitutional conviction or imprisonment must demonstrate exoneration. Heck v. Humphrey, 512 U.S. 477, 486-87 (1994). However, a § 1983 claim is a federal civil rights claim, and a legal malpractice claim is a tort action, generally governed by state law. *See* United States v. Swiss Am. Bank, Ltd., 191 F.3d 30, 43 (1st Cir. 1999). Therefore, *Heck v. Humphrey* is not binding in legal malpractice actions. *See id.*

63. *See, e.g.*, *Levine*, 123 F.3d at 582; *Shaw*, 816 P.2d at 1360-62; *Steele*, 747 So. 2d at 933; *Stevens*, 851 P.2d at 560-65; *Bailey*, 621 A.2d at 112-14; *Gibson*, 58 S.W.3d at 111-17; *Peeler*, 909 S.W.2d at 497-98; *Adkins*, 482 S.E.2d at 801. Other policy justifications have been offered in other jurisdictions, but the policy rationales discussed herein are those considered and adopted by the Kansas Supreme Court in *Canaan v. Bartee*.

64. *See, e.g.*, *Levine*, 123 F.3d at 582; *Shaw*, 816 P.2d at 1360-62; *Steele*, 747 So. 2d at 933; *Stevens*, 851 P.2d at 560-65; *Bailey*, 621 A.2d at 112-14; *Gibson*, 58 S.W.3d at 111-17; *Peeler*, 909 S.W.2d at 497-98; *Adkins*, 482 S.E.2d at 801.

65. *See, e.g.*, *Shaw*, 816 P.2d at 1361; Rodriguez v. Nielsen, 609 N.W.2d 368, 374 (Neb. 2000); *Stevens*, 851 P.2d at 562, 566; *Gibson*, 58 S.W.3d at 111; *Peeler*, 909 S.W.2d at 498; *see also infra* notes 67-80 and accompanying text.

66. *See, e.g.*, *Shaw*, 816 P.2d at 1361; *Stevens*, 851 P.2d at 566; *Gibson*, 58 S.W.3d at 113; *Adkins*, 482 S.E.2d at 801; *see also infra* notes 81-98 and accompanying text. However, some jurisdictions have found that the statute of limitations period begins before exoneration. *See, e.g.*, *Bailey*, 621 A.2d at 115; *Gibson*, 58 S.W.3d at 117.

proximate cause of the alleged harm.[67] In analyzing the exoneration rule, courts recognize the inherent difficulty of determining causation and find the difficulty amplified when postconviction relief has not been obtained.[68] In addition, exoneration-rule jurisdictions have found that until exoneration, a criminal defendant's own criminal activity is the proximate cause of his injury.[69]

In *Gibson v. Trant*,[70] the Tennessee Supreme Court discussed the difference between proving causation in legal malpractice claims arising out of civil litigation and proving it in claims arising out of criminal prosecutions.[71] The court found that in civil cases, the fault of an attorney is easier to ascertain because the plaintiff's failure to win damages was most likely not caused by any malfeasance on the part of the plaintiff.[72] As a result, the focus is on the attorney's alleged error.[73] In a criminal case, however, the harm—conviction—is suffered primarily because of the criminal's conduct.[74] A presumption that a criminal caused his own injury does not constitute an additional burden on criminals because of constitutional protections available only in criminal proceedings.[75]

ii. Proving Harm or Damages Without Exoneration

Many courts have found that no harm can be proven because no injury has occurred until exoneration.[76] The injury has not yet occurred because until a criminal defendant has been exonerated his conduct is the proximate cause of any injury he has suffered.[77] Therefore, the fourth element of legal malpractice cannot be proven, and a criminal defendant has no valid claim.

Moreover, harm and damages that do result from legal malpractice in a criminal proceeding would be impossible to quantify without

67. *See, e.g.*, Herrera v. Quality Pontiac, 73 P.3d 181, 196 (N.M. 2003); Archer v. Warren, 118 S.W.3d 779, 782 (Tex. Ct. App. 2003); Natrona County v. Blake, 81 P.3d 948, 955 (Wyo. 2003). In some jurisdictions, the negligent conduct must be a *substantial factor* in causing the harm. RESTATEMENT (SECOND) OF TORTS § 431 (1965).

68. *See, e.g.*, *Shaw*, 816 P.2d at 1361; *Gibson*, 58 S.W.3d at 111.

69. *See, e.g.*, *Wiley*, 966 P.2d at 987; *Gibson*, 58 S.W.3d at 112; *Peeler*, 909 S.W.2d at 498. A voluntary guilty plea has also been considered an intervening proximate cause. Schlumm v. Terrence J. O'Hagan, P.C., 433 N.W.2d 839, 846-47 (Mich. Ct. App. 1988).

70. 58 S.W.3d 103 (Tenn. 2001).

71. *Id*. at 111-12.

72. *Id*. at 112.

73. *Id*.

74. *Id*.

75. Morgano v. Smith, 879 P.2d 735, 738 n.3 (Nev. 1994); Stevens v. Bispham, 851 P.2d 556, 563 (Or. 1993).

76. *See, e.g.*, Shaw v. State, 816 P.2d 1358, 1361 (Alaska 1991); *Stevens*, 851 P.2d at 560-62 (stating that a criminal defendant has not been harmed in the "legal" sense); *Gibson*, 58 S.W.3d at 111.

77. *See, e.g.*, Wiley v. County of San Diego, 966 P.2d 983, 987 (Cal. 1998); *Gibson*, 58 S.W.3d at 112; Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995).

exoneration.[78] Inherent in this difficulty is the belief that a guilty defendant is not harmed by a conviction, but is harmed only following exoneration resulting from a wrongful conviction.[79] As the Tennessee Supreme Court stated in *Gibson*, "Tort law provides damages only for harms to the plaintiff's legally protected interests . . . and the liberty of a guilty criminal [who is not exonerated] is not one of them."[80]

iii. Collateral Estoppel and Preserving Judicial Economy

Courts have expressed concern that legal malpractice claims will overrule findings in ineffective assistance of counsel actions, so they find no need to expend sparse judicial resources to accomplish such a task.[81] This justification is intertwined with the doctrine of collateral estoppel, which prevents relitigation of issues that have been actually and necessarily litigated and decided in prior proceedings, even when the two causes of action are distinct.[82] Further, barring such efforts at relitigation of previously determined issues promotes judicial economy.[83]

If a criminal defendant succeeds in his ineffective assistance action, he is afforded a remedy for the unjust conviction in the form of freedom.[84] In *Gibson*, the court found that if a defendant is unsuccessful, a final decision on ineffective counsel has been made.[85] The court reasoned that the issue of whether the attorney violated his duty to provide effective assistance is virtually the same as whether the attorney breached his duty of care for a legal malpractice claim.[86] Therefore, a subsequent legal malpractice action would violate the doctrine of collateral estoppel.[87]

In an ineffective assistance of counsel proceeding the defendant is still legally guilty if he cannot show that but for his attorney's negligence the result in his case would have been different.[88] A conviction cannot be both legal and wrongful.[89] However, such a dichotomy would exist if a legal malpractice action asserting that the conviction was wrongful followed a postconviction proceeding in which the conviction was found legal.[90]

---

78. *See Wiley*, 966 P.2d at 990.
79. *See Gibson*, 58 S.W.3d at 111.
80. *Id*. (citation omitted).
81. *See, e.g.*, *Shaw*, 816 P.2d at 1361; *Gibson*, 58 S.W.3d at 113.
82. *Gibson*, 58 S.W.3d at 113.
83. *See, e.g.*, *Shaw*, 816 P.2d at 1361; *Gibson*, 58 S.W.3d at 113.
84. Wiley v. County of San Diego, 966 P.2d 983, 989 (Cal. 1998).
85. *Gibson*, 58 S.W.3d at 114-15.
86. *Id*. at 115.
87. *Id.*
88. Noske v. Friedberg, 656 N.W.2d 409, 413 (Minn. Ct. App.), *aff'd*, 670 N.W.2d 740 (Minn. 2003).
89. *Id.* at 413-14.
90. *Id*.

iv. Providing a Clear Rule on Statute of Limitations Commencement

Exoneration-rule jurisdictions have found that if a criminal defendant must obtain postconviction relief before maintaining a legal malpractice action, the statute of limitations may run before he can make a claim.[91] Therefore, courts in these jurisdictions have found that the statute of limitations on a legal malpractice claim arising out of criminal proceedings commences after the criminal defendant has obtained postconviction relief.[92]

Statutes of limitations give parties an opportunity to litigate claims while simultaneously preventing stale claims and fear of future litigation.[93] In many jurisdictions, a statute of limitations exists for legal malpractice claims.[94] The period can be short, and the postconviction relief process can be lengthy: obtaining relief on appeal can take years.[95] Exoneration-rule jurisdictions, however, state that "harm" does not occur, and a legal malpractice action does not accrue, until exoneration.[96] For example, a criminal defendant's claim does not accrue until his conviction has been overturned, his sentence vacated, or his case remanded for a new trial.[97] Until the defendant obtains such postconviction relief, the statute of limitations is tolled.[98]

b. *Policy-Based Support for the Exoneration Rule*

Courts have also discussed public policy reasons for adopting the exoneration rule. Principles of fairness and equity suggest that a criminal defendant should not be able to shift responsibility for his crime to his attorney and profit from his own wrong.[99] In analyzing the exoneration rule, a majority of courts have also found that adequate al-

---

91. *See* State v. Shaw, 816 P.2d 1358, 1361 (Alaska 1991); *Gibson*, 58 S.W.3d at 117.

92. *See, e.g.*, Stevens v. Bispham, 851 P.2d 556, 566 (Or. 1993); Adkins v. Dixon, 482 S.E.2d 797, 801 (Va. 1997).

93. Gebhardt v. O'Rourke, 510 N.W.2d 900, 908-09 (Mich. 1994).

94. *See, e.g.*, KAN. STAT. ANN. § 60-513 (1994); MO. ANN. STAT. § 537.684 (West 2001 & Supp. 2005); NEB. REV. STAT. § 25-208 (1995 & Supp. 2004).

95. Barry Tarlow, *Rico Report*, 23 CHAMPION 38, 46 (May 1999). For example, in California, the appellate process in a death penalty case, the action with the largest number of appeals, can take up to 17 years. Sam Stanton, *Long Appeal Process Stands Between Peterson, Execution*, SACRAMENTO BEE, Dec. 15, 2004, *available at* http://sacbee.com/content/news/courts_legal/story/11772762p-12657592c.html.

96. *See, e.g.*, *Stevens*, 851 P.2d at 562, 566; *Adkins*, 482 S.E.2d at 801.

97. *See Stevens*, 851 P.2d at 566.

98. *See, e.g.*, *id.*; *Adkins*, 482 S.E.2d at 801. However, some jurisdictions have found that the statute of limitations period begins at some point before exoneration. Bailey v. Tucker, 621 A.2d 108, 115-16 (Pa. 1993) (stating that the statute of limitations commences at the end of the attorney-client relationship); Gibson v. Trant, 58 S.W.3d 103, 117 (Tenn. 2001) (stating that the statute of limitations starts upon discovery of attorney's wrongdoing).

99. *See, e.g.*, Wiley v. County of San Diego, 966 P.2d 983, 986 (Cal. 1998); Rodriguez v. Nielsen, 609 N.W.2d 368, 374 (Neb. 2000); Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995); Adkins v. Dixon, 482 S.E.2d 797, 801 (Va. 1997); *see also infra* notes 102-17 and accompanying text.

ternative remedies exist for defendants who claim their attorneys have injured them.[100] These courts have also examined other consequences of the exoneration rule, including a flood of prisoner litigation and defensive lawyering by criminal defense attorneys.[101]

i. Guilty Criminals Should Not Be Awarded Damages and Should Not Be Allowed to Shift Responsibility for Their Wrongful Conduct

Courts adopting the exoneration rule realize that society may not wish to award damages to a convicted criminal.[102] These courts emphasize that allowing recovery without exoneration contravenes a fundamental principle of tort law: damages are provided only for legally protected interests, and the liberty of a guilty criminal is not a protected interest.[103] In *Levine v. Kling*,[104] the United States Court of Appeals for the Seventh Circuit reasoned, "A guilty criminal may be able to obtain an acquittal if he is skillfully represented, but he has no *right* to that result."[105] The court held that a criminal should not be compensated for his loss of freedom while he was rightfully in prison.[106] According to the majority of courts, a guilty criminal does not deserve compensation for his attorney's negligence.[107] The Florida Supreme Court noted in *Steele v. Kehoe*[108] that monetary damages are insufficient to compensate harm such as incarceration, and adequate compensation for a conviction resulting from an attorney's negligence is some form of equitable postconviction relief.[109]

Exoneration-rule jurisdictions have also found that providing relief to a criminal defendant for his attorney's legal malpractice would shift the consequences of the original crime to the attorney.[110] The consequences shift because even if the defendant is legally guilty, as he is if he is unable to obtain exoneration, the attorney would have to

100. *See, e.g.*, *Wiley*, 966 P.2d at 989; *Gibson*, 58 S.W.3d at 115; *see also infra* notes 118-24 and accompanying text.

101. *See, e.g.*, *Wiley*, 966 P.2d at 991; *Stevens*, 851 P.2d at 563; *Gibson*, 58 S.W.3d at 115-16; *see also infra* notes 125-29 and accompanying text.

102. *See, e.g.*, *Wiley*, 966 P.2d at 986; *Peeler*, 909 S.W.2d at 497-98.

103. *See, e.g.*, Levine v. Kling, 123 F.3d 580, 582 (7th Cir. 1997) (citing RESTATEMENT (SECOND) OF TORTS §§ 1 cmt. d, 7(1) (1965)).

104. 123 F.3d 580 (7th Cir. 1997).

105. *Id*. at 582 (emphasis added).

106. *Id*.

107. *See, e.g.*, Glenn v. Aiken, 569 N.E.2d 783, 788 (Mass. 1991); Adkins v. Dixon, 482 S.E.2d 797, 801 (Va. 1997).

108. 747 So. 2d 931 (Fla. 1999).

109. *Id*. at 933. Moreover, quantifying the amount of damages is simple in civil malpractice claims; usually what was lost in the litigation was monetary. Wiley v. County of San Diego, 966 P.2d 983, 990 (Cal. 1998). Calculating damages, however, is very difficult in legal malpractice claims arising out of criminal proceedings. *Id*.

110. *See, e.g.*, *Wiley*, 966 P.2d at 986; Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995).

answer for the conviction.[111] The Texas Supreme Court in *Peeler v. Hughes & Luce*[112] found that this shift would "drastically diminish[ ] the consequences of the convicts' criminal conduct and seriously undermine[ ] our system of criminal justice."[113] Moreover, the California Supreme Court in *Wiley v. County of San Diego*[114] stated that "[r]egardless of [an] attorney's negligence, a guilty defendant's conviction and sentence are the direct consequence of his own perfidy."[115] The court found that a defense attorney's failure to make a deal with the prosecution "may warrant postconviction relief, but it does not translate into civil damages, which are intended to make the plaintiff whole."[116] The court held that Wiley's attorney's failure did not warrant compensation: "While a conviction predicated on incompetence may be erroneous, it is not unjust."[117]

ii. Alternative Postconviction Remedies Are Available

Most courts believe postconviction relief from an ineffective assistance of counsel claim or other proceeding offers what competent representation would have offered: a different result.[118] If a serious trial error occurred, then a new trial will be held to correct the error.[119] If the concern is counsel's negligence, then the presiding court will dismiss the charges or adjust the defendant's sentence.[120] Moreover, one court has found that postconviction relief is a remedy uniquely available in criminal actions, and legal malpractice offers only monetary damages.[121] According to the California Supreme Court, "it is inimical to sound public policy to afford a civil remedy, which in some cases would provide further boon to defendants already evading just punishment on 'legal technicalities.' "[122]

Courts have also noted that constitutional safeguards, such as requiring competent counsel and a fair trial, are present in criminal proceedings, but are not afforded to civil litigants.[123] As a result of these unique protections, these courts claim that a civil remedy for attorney malpractice is unnecessary.[124]

111. Stephens v. Denison, 150 S.W.3d 80, 83 (Ky. Ct. App. 2004); *Peeler*, 909 S.W.2d at 498.
112. 909 S.W.2d 494 (Tex. 1995).
113. *Id*. at 498.
114. 966 P.2d 983 (Cal. 1998).
115. *Id*. at 987.
116. *Id*.
117. *Id*.
118. *See, e.g.*, *id*. at 989.
119. *Id*.
120. *See id*.
121. Stevens v. Bispham, 851 P.2d 556, 563 (Or. 1993).
122. *Wiley*, 966 P.2d at 989.
123. *See id*.; *Stevens*, 851 P.2d at 562.
124. *Stevens*, 851 P.2d at 562.

iii. Unfavorable Consequences of Failure to Adopt the Exoneration Rule

Concerns of a flood of legal malpractice litigation by prisoners are another justification for the exoneration rule. Courts have recognized that a large number of prisoners file petitions for postconviction relief, and if their petitions are denied, they frequently appeal.[125] One court found that "[t]he goal of fairly dispensing justice is compromised when courts are forced to devote their limited resources to the processing of repetitious and frivolous requests."[126] Prisoners have a lot of time and little else to do,[127] and if prisoners must obtain postconviction relief before maintaining a legal malpractice action, a great deal of litigation can be avoided.

Moreover, some courts have found that preventing a criminal defendant from bringing a legal malpractice claim against his attorney will not only allow defense attorneys to thoroughly represent their criminal clients, but will also avoid defensive lawyering by attorneys fearing potential malpractice claims.[128] According to the California Supreme Court, "[i]n our already overburdened system it behooves no one to encourage the additional expenditure [of] resources merely to build a record against a potential malpractice claim," and lawyers should focus on legal representation without worry about prospectively defending themselves.[129]

2. Minority View

Courts that have rejected the exoneration rule disagree with many aspects of the majority's reasoning on legal and policy issues and have found the exoneration is not necessary to state a claim of legal malpractice. According to these courts, harm and causation can occur long before postconviction relief is obtained.[130] In addition, the doctrine of collateral estoppel does not necessarily apply.[131] In the minority of courts, the statute of limitations on a legal malpractice claim can begin before or at the time of exoneration.[132] Finally, these courts have examined alternatives to the exoneration rule.[133]

---

125. *See, e.g.*, *Ex parte* Coleman, 728 So. 2d 703, 705 (Ala. Crim. App. 1998) (stating that 26.6% of appeals filed in 1997-1998 were from denials of postconviction relief proceedings).

126. Cotner v. Creek County Dist. Court, 911 P.2d 1215, 1221 (Okla. Crim. App. 1996).

127. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL LEGAL STUDIES 459, 469 (2004).

128. *See, e.g.*, *Wiley*, 966 P.2d at 991; Gibson v. Trant, 58 S.W.3d 103, 115-16 (Tenn. 2001).

129. *Wiley*, 966 P.2d at 991 (quoting Bailey v. Tucker, 621 A.2d 108, 114 (Pa. 1993)).

130. *See infra* notes 134-44 and accompanying text.

131. *See infra* notes 145-50 and accompanying text.

132. *See infra* notes 151-57 and accompanying text.

133. *See infra* notes 158-63 and accompanying text.

a. *Harm and Causation*

A minority of courts have found that exoneration is not necessary to prove a criminal defendant has been harmed by his attorney's malpractice. For example, in *Krahn v. Kinney*,[134] the Ohio Supreme Court recognized the inequity in requiring a defendant to obtain postconviction relief before commencing a legal malpractice action.[135] The court reasoned that the harm in such a criminal case "is not a bungled opportunity for vindication, but a lost opportunity to minimize [a] criminal record."[136] The court found that Krahn was forced into a precarious situation: choosing whether to plead guilty or risk a greater sentence with no knowledge of the prosecution's offer to dismiss the charges.[137] Krahn would have been better off if she had accepted the offer, the court stated, and she was harmed by her lawyer's failure to convey it.[138]

Moreover, criminals who receive lengthy prison sentences can be injured by the length of their sentence, not just by their conviction.[139] In *Silvers v. Brodeur*[140] the Indiana Court of Appeals found that criminals with short sentences would have to pursue postconviction relief for the sole purpose of proving harm and actual damages in a legal malpractice action.[141] In addition, the court stated that "requiring exoneration or other relief from conviction denies relief to those persons who most need it: those defendants who, by virtue of their attorneys' malpractice, are unable to challenge their criminal convictions."[142]

In addition to recognizing that harm can occur independent of exoneration, a minority of courts have found that causation can also be proven before obtaining postconviction relief.[143] The court in *Krahn* recognized that proving proximate cause or harm without a reversal of conviction would be rather difficult, but it found that the proximate cause analysis should be made in tort law and on a case-by-case basis, not by a rule of thumb requiring any certain preceding relief.[144]

134. 538 N.E.2d 1058 (Ohio 1989).
135. *Id.* at 1061.
136. *Id*. (quoting Krahn v. Kinney, No. CA 10413, 1987 WL 31137, at *4 (Ohio Ct. App. Dec. 22, 1987)).
137. *Id*. at 1059, 1061.
138. *See id*. at 1061.
139. *See* Silvers v. Brodeur, 682 N.E.2d 811, 818 (Ind. Ct. App. 1997).
140. 682 N.E.2d 811 (Ind. Ct. App. 1997).
141. *Id*. at 818.
142. *Id*.
143. *See, e.g.*, Gebhardt v. O'Rourke, 510 N.W.2d 900, 904-05 (Mich. 1994); *Krahn*, 538 N.E.2d at 1062.
144. *Krahn*, 538 N.E.2d at 1062.

b. *Collateral Estoppel*

Courts have also found that ineffective assistance of counsel actions and legal malpractice claims are distinct, and that proof of the former does not necessarily establish the latter.[145] In *Krahn*, the court found that collateral estoppel may bar a legal malpractice action if attorney negligence was litigated in the postconviction proceedings; the plaintiff, however, challenged the voluntariness of her original plea, which was not the same issue as attorney negligence.[146] Therefore, the negligence issue had not yet been litigated so collateral estoppel did not apply.[147]

In *Gebhardt v. O'Rourke*,[148] the Michigan Supreme Court did not decide if collateral estoppel broadly applied in legal malpractice cases arising out of criminal proceedings, but stated, "Before barring a criminal malpractice claim on the basis of collateral estoppel, a court should carefully determine what issues were adjudicated in the prior litigation."[149] The court found that when issues are clearly different, as they were in *Krahn*, the plaintiff should be provided the opportunity to prove his case.[150]

c. *Statutes of Limitations*

Some jurisdictions that have rejected the exoneration rule have found difficulty in applying the statutes of limitations to the exoneration rule. In *Jepson v. Stubbs*,[151] the Missouri Supreme Court found that Missouri law required a cause of action to accrue at the time damage was capable of ascertainment.[152] The court found that the legislature had prescribed the ascertainment test via statute and that the court should not circumvent legislative intent by adopting a rule that cannot be reconciled with the existing statute of limitations.[153] In *Gebhardt*, the Michigan Supreme Court noted that if the statute of limitations did not begin to run until postconviction relief was obtained, then the threat of a claim could be indefinite.[154] The court rejected the exoneration rule, calling it "a legal fiction with serious analytical flaws," deciding in favor of the policy underlying the al-

145. *See, e.g.*, *id.*; *Gebhardt*, 510 N.W.2d at 907 (discussing the two-track approach and the manner in which both claims can be filed simultaneously).
146. *See Krahn*, 538 N.E.2d at 1063.
147. *See id*.
148. 510 N.W.2d 900 (Mich. 1994).
149. *Id*. at 906 n.15 (quoting David H. Potel, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, DUKE L.J. 542, 556 (1981)).
150. *See id*. at 906-07.
151. 555 S.W.2d 307 (Mo. 1977) (en banc).
152. *Id*. at 312-13.
153. *Id*. at 313.
154. *See Gebhardt*, 510 N.W.2d at 904-05. The threat of a claim appeared indefinite to the court because efforts at postconviction relief can go on for years before avenues for relief are exhausted. *See id*.

ready-existing statute of limitations for legal malpractice claims: two years from the last day of the lawyer's service.[155]

Finally, one court has also recognized that the exoneration rule may violate the policy of equitable treatment and expressed concern about the inherent unfairness of requiring proof of postconviction relief prior to filing a legal malpractice action.[156] The court in *Jepson* analogized between civil and criminal cases, noting that because a civil claimant would not have to get back the money he had paid in satisfaction of a judgment before commencing a legal malpractice action against his attorney, a criminal should not have to meet a different standard in the same type of negligence action.[157]

Some of the courts that have rejected the exoneration rule have found a middle ground called the two-track approach.[158] The approach requires a defendant to file a legal malpractice complaint within the applicable statute of limitations, measured from the date of accrual of the cause of action.[159] These courts recognize that a criminal defendant, who has initiated postconviction proceedings, knows he has a possible claim and knows the statute of limitations period has started.[160] The defendant then either seeks a stay in the malpractice claim until the postconviction proceeding is resolved, or the two can run simultaneously, depending on the jurisdiction's demand for exoneration.[161] The two-track approach avoids stale claims and indefinite statutes of limitations while allowing criminal defendants a fair opportunity to make a claim.[162] In addition, the attorney is on notice soon after the alleged malpractice occurred.[163]

IV. Analysis

In *Canaan v. Bartee*, the Supreme Court of Kansas analyzed the exoneration rule and considered whether a criminal defendant in Kansas should be required to obtain postconviction relief before maintain-

155. *Id*. at 904, 906. The court went on to adopt the two-track approach discussed in *Wiley*. *Id.* at 907.
156. *See Jepson*, 555 S.W.2d at 313-14.
157. *Id*.
158. *See, e.g.*, *Gebhardt*, 510 N.W.2d at 907; Ereth v. Cascade County, 81 P.3d 463, 469 (Mont. 2003); Duncan v. Campbell, 936 P.2d 863, 868 (N.M. Ct. App. 1997).
159. *See Gebhardt*, 510 N.W.2d at 907; *Ereth*, 81 P.3d at 469; *Duncan*, 936 P.2d at 868. The point of accrual varies among jurisdictions. Accrual of a malpractice cause of action can occur when the client's injury was discovered, when the injury was capable of ascertainment, when the malpractice actually occurred, or even when the last day of the lawyer's professional service took place. *See, e.g.*, *Gebhardt*, 510 N.W.2d at 908; *Jepson*, 555 S.W.2d at 311; *Duncan*, 936 P.2d at 865.
160. *See generally Gebhardt*, 510 N.W.2d at 907 (stating that the fact that a claim has already been discovered by a criminal defendant is clear from the existence of postconviction proceedings).
161. *Id*.
162. *Id*. at 908-09.
163. *Id*. at 907.

ing a legal malpractice action against his criminal defense attorney. Canaan argued that the exoneration rule was inherently unfair and full of analytical flaws.[164] The defendant attorneys cited the majority of courts to argue that exoneration was necessary[165] and asserted that the policy justifications favoring the rule were persuasive and were correctly relied upon by the district court.[166]

A. *The Parties' Arguments*

1. Marvin Canaan

Canaan first contended that the collateral estoppel doctrine did not justify the exoneration rule and that collateral estoppel should not apply because ineffective assistance of counsel is distinct from legal malpractice.[167] Canaan argued that proximate cause should be found in tort law and not by automatic application of collateral estoppel.[168] Next, arguing that harm can be inflicted by an attorney's failure to minimize a defendant's criminal record, Canaan asserted that legal malpractice should be viewed in the same manner as a lost chance for better recovery in medical malpractice claims.[169] Canaan claimed that a criminal defendant, like a medical patient, has a preexisting injury: the charge against him.[170] As a result, the attorney's job is "to minimize the consequences of the charge[ ]" with plea negotiations, immunity, and other negotiation tactics.[171]

Canaan further asserted that using the exoneration rule to prevent a criminal defendant from bringing a legal malpractice action would allow defense attorneys to escape liability if the defendant could not obtain postconviction relief.[172] He claimed that civil and criminal attorneys have the same duty of care, so legal malpractice arising out of a criminal proceeding should be proved using the same elements as those in a malpractice claim arising from a civil proceeding.[173] Canaan also contended that the exoneration rule violated his constitutional right to seek a judicial remedy for the consequences of

---

164. Brief of Appellant at 21, Canaan v. Bartee, 72 P.2d 911 (Kan. 2003) (No. 02-89023).

165. *See* Brief of Appellees at 8-9, *Canaan* (No. 02-89023). Canaan also concedes that this is the majority position in his brief to the court. Brief of Appellant at 21, *Canaan* (No. 02-89023).

166. Brief of Appellees at 8-9, *Canaan* (No. 02-89023); *see supra* notes 64-129 and accompanying text.

167. Brief of Appellant at 13-16, *Canaan* (No. 02-89023). He argued that the issues presented in his malpractice claim were not actually litigated and determined in a previous action and that the issues also were not identical to those in his ineffective assistance of counsel action. *Id*. at 13-14.

168. *Id*. at 16-17.

169. *Id*. at 28-30.

170. *Id*. at 29.

171. *Id*.

172. *Id*. at 29-30.

173. *Id*. at 20 (citing Bowman v. Doherty, 686 P.2d 112, 120 (Kan. 1984)).

attorney malpractice.[174] In addition, Canaan explained that an ineffective assistance of counsel claim would not be an adequate remedy, even if his constitutional rights are not violated, because the presumption favoring attorneys in ineffective assistance actions makes proving a legal malpractice claim more difficult for criminal defendants.[175]

Finally, Canaan argued that the exoneration rule would judicially amend section 60-513 of the Kansas Statutes Annotated and derogate the two-year statute of limitations.[176] Because the exoneration process could take several years, Cannan noted that the rule might conflict with the ten-year statute of repose for maintaining a legal malpractice action.[177]

2. Michael Bartee, Allen Bush, Mary Curtis, and Kelly Jernigan

The defendants contended that the district court correctly adopted the exoneration rule based on policy rationales,[178] claiming that until exoneration has been obtained, the criminal's conduct is the proximate cause of his conviction.[179]

Allowing legal malpractice claims without exoneration would permit criminal defendants to second-guess a conviction, the attorneys contended, because the standard of proof in a civil action is preponderance of the evidence, a lower standard than found in criminal actions.[180] Therefore, the defendants argued that without the exoneration rule, every convicted criminal will file a malpractice action, even if it is frivolous.[181] The defendants further claimed that the criminal justice system adequately provides redress for attorney error with ineffective assistance of counsel actions, noting that these actions are based on the same principles as a legal malpractice claim because both use the "reasonably competent" standard.[182] Therefore, ineffective assistance of counsel and legal malpractice are so similar that collateral estoppel should apply.[183]

The defendants further contended that no statutory or constitutional violation results from adopting the exoneration rule because it does not close the court system to incarcerated individuals, but only requires postconviction relief before maintaining the legal malpractice

174. *Id*. at 33-35.
175. *Id*. at 35.
176. *Id*. at 38-41.
177. *See id*. at 39.
178. Brief of Appellees at 8-9, *Canaan* (No. 02-89023); *see supra* notes 64-129 and accompanying text.
179. Brief of Appellees at 10-11, *Canaan* (No. 02-89023).
180. *Id*. at 9.
181. *Id*.
182. *Id*. at 13-17.
183. *See id*.

action.[184] Finally, the defendants asserted that the statute of limitations under section 60-513 of the Kansas Statutes Annotated is unaffected by the exoneration rule, because a legal malpractice cause of action does not even accrue until postconviction relief is obtained.[185]

B. *The Court's Opinion*

In a unanimous opinion authored by Justice Marla J. Luckert, the Kansas Supreme Court held that exoneration by postconviction relief is a prerequisite to the maintenance of a legal malpractice action by a criminal defendant against his defense attorney.[186] In reaching its decision, the court adopted policy rationales set forth by other courts that have adopted the exoneration rule.[187] The court reasoned that "because of the antecedent criminal conduct, it cannot be said that 'but for' the attorney's conduct the outcome of the criminal proceeding would differ;" therefore, a conviction is a direct result of a criminal defendant's conduct.[188] The court further found that "the adoption of the exoneration rule could be construed simply as a recognition that a plaintiff has no cause of action until he or she can establish the causation element of his of her claim."[189]

In light of the difficulty in proving causation without exoneration, the court reasoned that a defendant would also have difficulty in proving harm.[190] The court stated, "In a civil malpractice action, the focus is solely upon the attorney's negligence; in a criminal action, however, any harm suffered is principally because of the criminal's antecedent conduct."[191] The court also noted that the criminal justice system provides postconviction relief—a remedy unique to criminal proceedings.[192] The exoneration rule, the court determined, promotes judicial economy and encourages representation of criminal defendants by preventing defensive lawyering.[193]

The court rejected Canaan's argument that a legal malpractice action is analogous to a medical malpractice lawsuit, instead favoring policies underlying the exoneration rule.[194] The court, quoting the Texas Supreme Court, stated, "The lost opportunity of an admittedly guilty person to escape prosecution because of her lawyer's negligence

184. *Id*. at 19-20.
185. *Id*. at 20-22. The defendants also suggest that Kansas adopt the two-track approach. *Id*.
186. *Canaan*, 72 P.3d at 921. Justice Bob Abbott did not participate in the decision. *Id*. at 925.
187. *Id*. at 916-20; *see supra* notes 64-129 and accompanying text.
188. *Id*. at 916.
189. *Id*. at 920.
190. *Id*. at 917 (quoting Gibson v. Trant, 58 S.W.3d 103, 111 (Tenn. 2001)).
191. *Id*.
192. *Id*.
193. *Id*. at 917-18.
194. *Id*. at 918-19.

does not override the public policy against shifting the consequences of a crime to a third party."[195]

The court continued to recognize ineffective assistance of counsel and legal malpractice as distinct actions, but stated it that any difficulty with collateral estoppel was offset by the sound policies underlying the exoneration rule.[196] The court attacked Canaan's statute of limitations argument by citing its opinion in *Pancake House, Inc. v. Redmond*,[197] in which the court stated that Kansas courts have recognized a variety of theories as to when a cause of action accrues, and that the theory used in each case is fact-specific.[198] Finally, the court rejected Canaan's claim that the exoneration rule prevents access to courts.[199]

C. *Commentary*

In *Canaan v. Bartee*, the Kansas Supreme Court erred by adopting the exoneration rule, which requires a criminal defendant to obtain postconviction relief before maintaining a malpractice claim against his criminal defense attorney.[200] The adoption of the exoneration rule was an inappropriate exercise of judicial fiat based on a minimal study of legal and policy rationales in other jurisdictions.[201] The court never considered the law and policies of jurisdictions that have rejected the rule.[202] In addition, the court never examined the arguments contrary to the justifications it adopted or how the exoneration rule offends statutory text.[203] The court failed to recognize how the rule will affect criminal defendants' rights to counsel and to recover for injuries sustained because of their attorneys' malpractice. The court also failed to recognize the unjustified protection the exoneration rule affords to criminal defense attorneys, who are now insulated from malpractice liability.

195. *Id*. at 918 (quoting Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995)).

196. *See id.* at 919-20. A presumption applies in ineffective assistance of counsel claims that an attorney was reasonable in his representation of a defendant. *Id*. at 920 (citing State v. Baker, 755 P.2d 493 (Kan. 1988)). The court acknowledged that this presumption was a "troubling aspect[ ]" of the exoneration rule. *Id*.

197. 716 P.2d 575 (Kan. 1986).

198. *Id*. at 579.

199. *Canaan*, 72 P.3d at 920. The Kansas Supreme Court did not address other arguments made by Canaan in his brief to the court. *Compare Canaan*, 72 P.3d 911, *with* Brief of Appellant at 12-41, *Canaan* (No. 02-89023). The court dealt only vaguely with Canaan's constitutional argument. *Canaan*, 72 P.3d at 920.

200. *Canaan*, however, has been cited with approval. Stephens v. Denison, 150 S.W.3d 80, 83 (Ky. Ct. App. 2004).

201. *See* Tarlow, *supra* note 95, at 42-43.

202. *See supra* text accompanying notes 134-57.

203. *See* KAN. STAT. ANN. § 60-513 (1994); *Canaan*, 72 P.3d at 915-21.

1. The Court's Faulty Analysis of Legal, Procedural, and Policy Justifications Favoring the Exoneration Rule

Though the worst-case scenario outlined at the beginning of this Comment may seem farfetched and unrealistic, application of the exoneration rule has led and will lead to more unfair treatment of valid legal malpractice claims arising out of criminal proceedings.[204] "One problem with announcing a new, policy-based rule is that unintended consequences invariably follow,"[205] and courts favoring the exoneration rule have failed to adequately consider its downside.

Peeler v. Hughes & Luce is a prime example of the inequitable consequences of the exoneration rule. In *Peeler*, the defendant claimed that her attorney never informed her of an immunity offer before she pleaded guilty.[206] Peeler was unable to obtain exoneration by postconviction relief based on her plea.[207] Even though her attorney's negligence seemed to be the proximate cause of her incarceration, she could not successfully sue her attorney for malpractice.[208] The conviction would not have happened but for the attorney's negligence; if the immunity offer had been conveyed, Peeler would have taken it.[209] Peeler was harmed. However, she could not obtain exoneration because she had pleaded guilty to one of the originally charged crimes.[210] Therefore, she could not state a malpractice claim because of the exoneration rule.[211]

In *Canaan*, the Kansas Supreme Court adopted the exoneration rule based solely on legal and procedural rationales and public policy justifications from other exoneration-rule jurisdictions.[212] In its analysis, however, the court failed to consider the implications of the reasoning it cited and failed to analyze legal and policy arguments in opposition to the rule as well as the consequences of its adoption.[213]

a. *Legal and Procedural Justifications Offered for the Exoneration Rule Misapply Existing Legal Principles and Circumvent Existing Law*

Traditional legal principles and statutory law support a cynical view of a postconviction-relief requirement. The exoneration rule al-

204. *See* Peeler v. Hughes & Luce, 909 S.W.2d 494 (Tex. 1995).
205. Wiley v. County of San Diego, 966 P.2d 983, 992 (Cal. 1998) (Werdegar, J., concurring).
206. *Peeler*, 909 S.W.2d at 496.
207. *Id*. at 496, 498.
208. *Id*. at 498.
209. *Id*.
210. *Id.* at 496-98
211. *See id*.
212. *See* Canaan v. Bartee, 72 P.3d 911, 915-21 (Kan.), *cert. denied*, 540 U.S. 1090 (2003); *supra* notes 64-129 and accompanying text.
213. *See Canaan*, 72 P.3d at 915-21.

ters the definitions of causation and harm, making a legal malpractice claim require different proof than a typical negligence claim.[214] In addition, courts in exoneration-rule jurisdictions, including the Kansas Supreme Court, have misapplied the doctrine of collateral estoppel under the exoneration rule and have acted in derogation of the existing statute of limitations.[215]

i. Causation Should Be Determined Using Existing Definitions and Common Law Principles

The Kansas Supreme Court erred by concluding that causation might be difficult to prove without exoneration.[216] In *Krahn v. Kinney*, the Ohio Supreme Court determined that a causation analysis should be made in tort law and on a case-by-case basis, not by a "rule of thumb," like the requirement of exoneration.[217] It is also unclear whether, under the exoneration rule, a court can infer that proximate cause has been established if relief has been obtained. The Kansas Supreme Court never addressed this issue.

The Kansas Supreme Court incorrectly held that without exoneration, the criminal defendant is the proximate cause of his conviction.[218] This standard seems to reflect the doctrine of contributory negligence, because any part of the conviction caused by the defendant's conduct or guilt, no matter how minute, negates his ability to recover damages.[219] Contributory negligence, however, is no longer the prevailing view of causation and recovery in Kansas.[220] The present law, comparative negligence, allows a jury to apportion fault between a plaintiff and a defendant and diminish damages accordingly.[221] Because Kansas juries use comparative negligence to award damages in typical negligence actions, juries should be allowed to weigh the culpability of the criminal defendant against that of his attorney in legal malpractice claims.[222]

214. *See infra* notes 216-36 and accompanying text.

215. *See infra* notes 237-50 and accompanying text.

216. *Canaan*, 72 P.3d at 916.

217. Krahn v. Kinney, 538 N.E.2d 1058, 1062 (Ohio 1989).

218. *Canaan*, 72 P.3d at 916.

219. Meredith Duncan, *Criminal Malpractice: A Lawyer's Holiday*, 37 GA. L. REV. 1251, 1286 (2003). The contributory negligence standard bars a tort plaintiff from recovering damages for an injury he contributed to causing. *Id*. To say a criminal defendant's action is the *sole* proximate cause of his conviction "seems reminiscent of the antiquated doctrine of contributory negligence" where only one entity could be the proximate cause of harm. Gibson v. Trant, 58 S.W.3d 103, 118 (Tenn. 2001) (Birch, Jr., J., concurring in part and dissenting in part).

220. *See* KAN. STAT. ANN. § 60-258a (1994).

221. *Id*.

222. *See* Duncan, *supra* note 219, at 1286.

ii. The Exoneration Rule Employs an Unrealistic Definition of Harm

The court's policy justification, stating that harm does not occur until exoneration is obtained, is without foundation in reality[223] because this would mean that a criminal defendant is harmed "at the moment [he] obtains relief from harm" by exoneration.[224] The New Mexico Court of Appeals found the definition of harm equally implausible: "[T]he idea that defendants convicted and serving time because of their attorneys' malpractice are not legally harmed until they are exonerated and released would surprise not only those defendants, but any person whose thought processes are guided by common sense."[225] A criminal defendant can be harmed in any number of ways, despite his innocence. Therefore, harm can and should be measured by events occurring before exoneration.

For example, the length of a sentence can harm a defendant if the sentence would have been shorter absent attorney negligence.[226] Moreover, a guilty plea based on an attorney's advice can seriously harm a defendant when the prosecution has offered a more favorable deal.[227] Failure to disclose a settlement offer in a civil case would give rise to legal malpractice, and so should be the standard for unconveyed plea bargain opportunities.[228] The harm suffered by a defendant is not just imprisonment; it can be the length of imprisonment as well.[229] The exoneration rule "is mixing two discrete concepts, the occurrence of harm and the extent of damages."[230] A defendant convicted as a result of his attorney's negligence is *harmed* immediately; the *extent* of the harm is not certain until exoneration, if exoneration is ever obtained.[231]

Under the exoneration rule, a defendant has not sustained an injury until postconviction relief has been obtained.[232] The rule does not appreciate the situation in which a criminal defendant is harmed but has no basis for postconviction relief.[233] For example,

> [a] criminal defendant may (1) be wrongly convicted at trial and imprisoned because of ineffective assistance of trial counsel; (2) lose on appeal because of ineffective assistance of appellate counsel; and (3) lose on post-conviction relief proceedings because of ineffective

223. *See Canaan*, 72 P.3d at 917.
224. Silvers v. Brodeur, 682 N.E.2d 811, 815 n.2 (Ind. Ct. App. 1997).
225. Duncan v. Campbell, 936 P.2d 863, 868 (N.M. Ct. App. 1997).
226. *See Silvers*, 682 N.E.2d at 818.
227. *See* Peeler v. Hughes & Luce, 909 S.W.2d 494 (Tex. 1995).
228. *See id.* at 501-02 (Phillips, J., dissenting); Duncan, *supra* note 219, at 1279.
229. *See* Krahn v. Kinney, 538 N.E.2d 1058, 1061 (Ohio 1989).
230. *Stevens*, 851 P.2d at 576 (Unis, J., concurring).
231. *Id*. (Unis, J., concurring).
232. *Id*. at 560-62; *Gibson*, 58 S.W.3d at 111; *see supra* notes 76-80 and accompanying text.
233. *See Peeler*, 909 S.W.2d 494.

> assistance of post-conviction relief counsel, and have no other legal recourse with respect to that conviction[.][234]

In this circumstance, the defendant has not been harmed and cannot sue for malpractice.[235]

As seen above, harm can come in all shapes and sizes,[236] but the Kansas Supreme Court forced all types of harm into one mold by requiring criminal defendants to obtain postconviction relief in order to demonstrate harm and actual injury in a legal malpractice action.

iii. Collateral Estoppel Will Not Apply to Legal Malpractice Claims Following Failed Postconviction Proceedings

The Kansas Supreme Court also expressed concern that allowing malpractice lawsuits without exoneration may effectively overrule judgments in postconviction proceedings, such as ineffective assistance claims and that courts should preserve judicial economy by avoiding relitigation of previously decided issues.[237] On the contrary, judgments in ineffective assistance of counsel claims will not be overruled by subsequent civil actions for legal malpractice. The causes of action are distinct, with no overturning effect.[238]

Moreover, in Kansas, collateral estoppel may only be invoked when the following conditions have been met: "(1) a prior judgment on the merits . . . (2) the parties must be the same or in privity, and (3) the issue litigated must have been determined and necessary to support the judgment."[239] In postconviction proceedings, the attorney is not a party in the ineffective assistance of counsel action, and the attorney's representation of the defendant may not be at issue.[240] In these cases, the exoneration rule would be overreaching because the elements of collateral estoppel are not satisfied. Here, a criminal defendant should be allowed to assert a legal malpractice claim, even if he lost his ineffective assistance action.

With collateral estoppel, the exoneration rule promotes judicial economy by keeping many legal malpractice claims out of court. Judicial economy, however, should not be obtained at the expense of compromised legal protections. Compensating injured parties and holding

234. *Stevens*, 851 P.2d at 575 (Unis, J., concurring).
235. *Stevens*, 851 P.2d at 575 (Unis, J., concurring).
236. *See, e.g.*, Fischer v. Longest, 637 A.2d 517, 523 (Md. Ct. Spec. App. 1994) (concluding that defendant can sue former criminal defense counsel even if satisfied with the ultimate outcome as long as alleges other significant harm).
237. Canaan v. Bartee, 72 P.3d 911, 917 (Kan.), *cert. denied*, 540 U.S. 1090 (2003).
238. *See id*. at 919-20. Legal malpractice and ineffective assistance of counsel are not equivalent claims; a presumption favoring counsel's reasonableness applies in the latter type of proceeding. Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 Geo. J. Legal Ethics 1, 8 (1995); *see also supra* notes 40-60 and accompanying text.
239. McPherson v. Atkinson, No. 90292, 2004 WL 1087024 (Kan. Ct. App. May 14, 2004).
240. Gebhardt v. O'Rourke, 510 N.W.2d 900, 906 n.15 (Mich. 1994).

attorneys liable for their malpractice are crucial ideals of our country's concept of justice. Cutting off entire categories of litigation is not wise.[241]

iv. The Exoneration Rule Contravenes Kansas' Existing Statute of Limitations

The Kansas Supreme Court's assessment of the statute of limitations under the exoneration rule is likewise flawed.[242] To an extent, the point of accrual of a legal malpractice cause of action is not clear in Kansas. Kansas courts have recognized four different theories for when legal malpractice causes of action accrue: (1) when the malpractice occurred; (2) when the harm was actually suffered by the client; (3) when all material facts necessary to state a malpractice claim have been discovered or should have been discovered; or (4) when representation is terminated.[243] The theory used depends on the facts of each case.[244] The exoneration rule provides that a malpractice claim arising out of criminal proceedings accrues *only* at the point of exoneration, and thereby does provide clarification.[245]

Section 60-513 of the Kansas Statutes Annotated, however, states that a legal malpractice claim must be brought within two years after the claim accrues.[246] The statute further provides that a cause of action does not accrue until

> the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action.[247]

With the adoption of the exoneration rule, the court usurped legislative function by effectively overruling the statute of limitations prescribed by the legislature. Because an injury resulting from malpractice in a proceeding is "caused" by a lawyer and is "reasonably ascertainable" prior to exoneration, as is required by statute,[248] the exoneration rule circumvents legislative intent.

241. Wiley v. County of San Diego, 966 P.2d 983, 992 (Cal. 1998).
242. *Canaan*, 72 P.3d at 920.
243. Dearborn Animal Clinic v. Wilson, 806 P.2d 997, 1002 (Kan. 1991).
244. *Id*.
245. *See, e.g.*, Stevens v. Bispham, 851 P.2d 556, 566 (Or. 1993); Adkins v. Dixon, 482 S.E.2d 797, 801 (Va. 1997).
246. KAN. STAT. ANN. § 60-513(a)(4) (1994) ("An action for injury to the rights of another, not arising on contract, and not herein enumerated" shall be brought within two years.).
247. *Id*. § 60-513(b).
248. *See id.*

The court further contravened the statute by changing the period for bringing a legal malpractice claim from two years to an indefinite time. Appeals may not be exhausted for many years, so the time when "relief can no longer be obtained" may be long after the legal malpractice took place—at least more than two years.[249] In addition, Kansas law states that after ten years, there is no claim.[250] As a result, a criminal defendant whose appeals take longer than ten years may never get his day in court.

b. *Public Policy Arguments Opposing the Exoneration Rule*

Beyond the tragic real-world consequences of the exoneration rule and the legal principles that weigh against its adoption, public policy suggests that the rule is fundamentally unfair to criminal defendants.[251] The Kansas Supreme Court noted that society may not want to reward criminals with monetary damages or shift responsibility for the crime to their lawyers, but the court never explained why rewarding misbehaving lawyers with freedom from lawsuits is somehow acceptable.[252] In addition, unique remedies are available to criminal defendants for their attorneys' malfeasance, but these remedies are distinct from remedies available in legal malpractice actions.[253]

Finally, the consequences feared by the court are not realistic. Prisoners will not flood the courts with frivolous claims, and only justified cases will succeed.[254] Moreover, defensive lawyering is actually good because the threat of legal malpractice *should* scare attorneys and force bad lawyers out of the profession.[255] The Kansas Supreme Court should have looked at these arguments and analyzed both sides of the exoneration-rule debate.

i. Lawyers Should Not Be Rewarded and Should Not Be Allowed to Shift Responsibility for Their Own Wrongful Conduct

Certainly, society does not wish to award damages to a guilty criminal, but the Kansas Supreme Court took too narrow a view when adopting this policy justification for the exoneration rule.[256] Indeed, an individual should not be permitted to profit from his own wrong, but the court has allowed criminal defense attorneys to profit from their negligent conduct by insulating them from malpractice liabil-

249. *See supra* note 95 and accompanying text.
250. KAN. STAT. ANN. § 60-513(b).
251. *See infra* notes 256-61 and accompanying text.
252. *See Canaan*, 72 P.3d at 916.
253. *See supra* notes 262-66 and accompanying text.
254. *See infra* notes 267-70 and accompanying text.
255. *See infra* notes 271-74 and accompanying text.
256. *See Canaan*, 72 P.3d at 916.

ity.[257] In fact, the more negligent an attorney is, the more likely he will be protected by the exoneration rule. For example, if an attorney fails to object to improper trial procedure, fails to file a required form, or fails to even appear with or work diligently for the defendant, no documentation of error appears in the trial record, and postconviction relief becomes much more difficult to obtain.[258]

Even if a defendant's trial counsel is reasonably competent, he could fail to obtain exoneration because he had ineffective counsel for his postconviction-relief motion. As a result of such negligence, the defense attorney profits from his own wrong. Society may not want to reward convicted criminals, but society will respect the legal profession much more if the profession is willing to discipline its own negligent members.

The court also found that it is inequitable to shift responsibility for the conviction from the criminal to the defense attorney.[259] The court's justification is valid; however, no equitable principle supports shifting responsibility for an attorney's negligence to a defendant, yet this is precisely what happens under the exoneration rule.[260] As the Indiana Court of Appeals stated in *Silvers v. Brodeur*, "a rule requiring exoneration or other relief from conviction denies relief to those persons who most need it: those defendants who, by virtue of their attorneys' malpractice, are unable to challenge their criminal convictions."[261] A court should not presumptively favor the person who is already in the far more precarious position; rather, it is fair to expect a lawyer to take responsibility for his own malfeasance.

ii. Alternative Postconviction Remedies Do Not Provide Adequate Relief

The Kansas Supreme Court also wrongly held that satisfactory alternative postconviction remedies are available and are probably more adequate than legal malpractice to redress harm to a criminal defendant.[262] Remedies other than legal malpractice are not available to some defendants. For example, a defendant given a shorter sentence would have no need for exoneration other than to file a legal malpractice claim. Only legal malpractice will effectively compensate a person who has no need for a postconviction remedy because he has already served his sentence.

257. Duncan, *supra* note 219, at 1286-87; *see infra* text accompanying notes 282-86.
258. *See* Stevens v. Bispham, 851 P.2d 556, 575 (Or. 1993) (Unis, J., concurring).
259. *Canaan*, 72 P.3d at 916.
260. Duncan, *supra* note 219, at 1287.
261. Silvers v. Brodeur, 682 N.E.2d 811, 818 (Ind. Ct. App 1997); *see also infra* text accompanying notes 275-81.
262. *Canaan*, 72 P.3d at 920.

Moreover, an ineffective assistance of counsel claim is more difficult to prove than a criminal legal malpractice claim because the former recognizes a strong presumption that the attorney involved behaved reasonably and performed effectively.[263] When ineffective assistance of counsel becomes the only option for exoneration, the defendant must overcome the presumption or not obtain relief. This is fundamentally unfair to criminal defendants because it is possible that the attorney's actions rose to the level of legal malpractice but not ineffective assistance of counsel but since the criminal defendant cannot prove ineffective assistance for exoneration, he cannot file a claim for legal malpractice despite his attorney's liability.[264] The court recognized this as "one of the more troubling aspects" of requiring exoneration,[265] but nevertheless decided the problem was "offset by the adequacy of postconviction relief."[266]

iii. The Consequences Feared By the Majority of Courts and the Kansas Supreme Court Are Unrealistic

Though not specifically addressed by the court in *Canaan*, any concerns about floods of legal malpractice litigation by prisoners are unfounded. First, a lawyer should not take a baseless case because attorneys have an ethical duty to avoid frivolous lawsuits.[267] As for lawsuits filed by prisoners without counsel, the defense will move for a dismissal for failure to state a claim or for summary judgment.[268]

Moreover, no statistical evidence exists on whether the number of prisoner malpractice claims has increased or decreased as a result of the exoneration rule. Statistics do, however, show that though the United States prison population has increased six-fold from 1962 to 2001, the rate of prisoner petitions has been falling since the 1970s.[269] Prisoner litigation still accounts for 12.7% of all trials, but this "reflects not only the growth in prison populations but also the greater decline in the rate of trials of other types of cases."[270] Based on this trend, it can be inferred that without the exoneration rule, no tremendous "flood" of litigation will occur.

263. Wiley v. County of San Diego, 966 P.2d 983, 994 (Cal. 1998); Duncan v. Campbell, 936 P.2d 863, 867 (N.M. Ct. App. 1997).

264. *See supra* notes 81-90 and accompanying text.

265. *Canaan*, 72 P.3d at 920.

266. *Id*.

267. Model Rules of Prof'l Conduct R. 3.1 (2004).

268. Galanter, *supra* note 127, at 469-70. The Prison Litigation Reform Act requires federal district courts to review a prisoner's claim before processing the petition, or soon after docketing, and dismiss the petition if the prisoner fails to state a valid claim therein. *Id.* (citing 42 U.S.C. § 1997e(c)(1) (2000)).

269. *Id*. ("The rate of prisoner petitions rose rapidly during the 1960s from 12 per 1,000 prisoners in 1962 to over 80 per 1,000 in the early 1970s . . . [; however,] [t]he rate has been falling for 30 years to about 44 per 1,000 in 2001.").

270. *Id*. at 473.

The Kansas Supreme Court also incorrectly found that the exoneration rule encourages defense attorneys to represent indigent defendants and prevents them from practicing defensive lawyering.[271] The court never acknowledged that all lawyers should be constantly practicing law in such a competent manner as to defend themselves from liability.[272] As one commentator noted, "careful lawyers who provide non-negligent representation need not fear liability for malpractice."[273] If the threat of a malpractice lawsuit keeps bad lawyers from representing clients, then the tort of legal malpractice is working.[274]

2. The Exoneration Rule Has Dire Consequences for Injured Criminal Defendants

Criminal defendants suffer a loss of legal protection at the hand of the exoneration rule. The rule takes the possibility of compensation away from criminal defendants who deserve redress for the injuries caused by their attorneys, "making any recovery virtually impossible for those who truly have a meritorious legal malpractice claim."[275]

The Indiana Court of Appeals recognized the most unfair effect of the exoneration rule in *Silvers v. Brodeur*, stating that "requiring defendants to obtain exoneration will deny relief to those who need it most: those defendants who, by virtue of the attorney's negligence, cannot challenge convictions because issues were not raised at trial or on direct appeal."[276] The California Supreme Court agreed, finding that the exoneration rule virtually destroys a criminal defendant's ability to sue his attorney, especially in situations in which the attorney's negligence is most flagrant.[277]

In addition to this drastic effect, convicted defendants who are given relatively short sentences would be forced to pursue postconviction relief, even if the relief's only purpose is to pursue a legal malpractice claim.[278] Moreover, criminal defendants are harmed by legal malpractice in ways other than conviction, like lengthier sentences,

271. *Canaan*, 72 P.3d at 918.
272. *Compare Canaan*, 72 P.3d 911, *with* Duncan, *supra* note 219, at 1288-89.
273. Duncan, *supra* note 219, at 1289.
274. *Id*. at 1290.
275. Vahila v. Hall, 674 N.E.2d 1164, 1170 (Ohio 1997).
276. Silvers v. Brodeur, 682 N.E.2d 811, 818 (Ind. Ct. App. 1997); *see also* Stevens v. Bispham, 851 P.2d 556, 573 n.12 (Or. 1993) (Unis, J., concurring) ("[The] decision not to appeal or file for post-conviction relief may itself be the result of inadequate assistance of counsel, thereby compounding the harm done to the criminal defendant but making it more certain that the criminal defendant will receive no relief . . . . [I]n some situations, the less effective the legal assistance afforded a criminal defendant, the more likely it is that the criminal defendant will have no legal malpractice claim.").
277. Wiley v. County of San Diego, 966 P.2d 983, 993 (Cal. 1998) (Mosk, J., dissenting).
278. *Silvers*, 682 N.E.2d at 818.

and these individuals have no recourse for relief in a jurisdiction laboring under the exoneration rule.[279] Also, a criminal defendant may take his attorney's advice and plead guilty despite his innocence. An innocent man imprisoned is the worst kind of injury in the criminal justice system.

Finally, to be fair to criminal defendants, courts should make the prerequisites for legal malpractice arising out of a criminal proceeding parallel to those in legal malpractice in a civil context. For example, an unsuccessful civil litigant need not have payment on a judgment returned before suing his attorney for legal malpractice.[280] The distinction between civil litigants and criminal defendants is fundamentally unfair, especially when considering that the criminal defendant has lost his freedom and a civil litigant has lost only money.[281]

3. The Exoneration Rule Insulates Defense Attorneys from Liability for Their Malpractice

The exoneration rule unduly benefits criminal defense attorneys by shielding them from liability. In effect, the rule permits a lawyer to behave in a negligent manner and never answer for the consequences. Moreover, treating civil and criminal legal malpractice claims differently, based on the exoneration rule, offers a protection to criminal defense attorneys that is not available to their civil counterparts.[282] Not requiring a civil litigant to have a judgment payment returned but requiring a criminal defendant to have his conviction overturned results in an unfair disparity of treatment between civil and criminal lawyers.[283]

The exoneration rule allows a criminal defense attorney to hide behind his malpractice[284] and allows him to assert that the conviction, though directly caused by his negligence, was caused by the defendant's actions.[285] Civil lawyers who are sued for malpractice certainly do not have the luxury of making such a claim against their clients. The protection afforded to criminal defense attorneys by the exoneration rule is undeserved and creates a real risk of substandard legal representation.[286] A negligent lawyer should be held responsible for his actions.

279. *Id.*; *see also Stevens*, 851 P.2d at 574 (Unis, J., concurring).
280. Jepson v. Stubbs, 555 S.W.2d 307, 313-14 (Mo. 1977) (en banc).
281. *Wiley*, 966 P.2d at 993 (Mosk, J., dissenting).
282. *Id.*; *see also Jepson*, 555 S.W.2d at 313-14.
283. *Jepson*, 555 S.W.2d at 313-14.
284. *See Stevens*, 851 P.2d at 575 (Unis, J., concurring). The more negligent an attorney is, the less likely a criminal defendant is to obtain exoneration. *Id*.
285. *Id*. *Peeler* is a prime example of this. *See* Peeler v. Hughes & Luce, 909 S.W.2d 494 (Tex. 1995).
286. Duncan, *supra* note 219, at 1292-93.

4. Proposed Solutions

Several measures can be taken to negate the potential damage of the exoneration rule. First, courts should continue using their existing method of analysis of harm on a case-by-case basis and recognize harm in more realistic situations than the exoneration rule permits. Second, courts should use the "more favorable outcome" standard to aid in their search for actual injury, as opposed to full exoneration. Third, courts should respect existing principles of common law and statutory text when adopting the exoneration rule. Finally, courts should take a different view of damages in legal malpractice actions, including respect for the comparative negligence system. Courts should consider damage awards as punishment for lawyers instead of concerning themselves with awarding compensatory damages to a criminal, and should offer damages similar to those offered in lost chance of better recovery medical malpractice proceedings.

a. *Modified View of Harm to a Criminal Defendant*

The definition of harm employed by exoneration-rule jurisdictions is not realistic: harm does not occur at the same time the criminal defendant is relieved from harm by exoneration.[287] Harm can befall a rightfully convicted criminal defendant by a lost opportunity to minimize his sentence. Therefore, whether an individual criminal defendant has been harmed should be determined in the same way as a typical negligence cause of action: on an individual basis.[288] Courts should continue using their existing definitions of harm and case-by-case analysis, as opposed to arbitrarily deciding that harm occurs at exoneration.

Under the exoneration rule, however, a criminal defendant is only harmed if the individual has been wrongfully convicted as a proximate result of his attorney's negligence and only if he can overcome the strong presumption in favor of his counsel's reasonableness. This standard is higher than the typical standard for harm in negligence actions.

Under the typical idea of harm, if counsel for a criminal defendant fails to file a motion to suppress unconstitutional evidence at trial, the defendant is harmed. If a defense attorney fails to communicate an offer of immunity, the defendant is harmed. If counsel fails to file a motion for postconviction relief following a bungled trial, the defendant is harmed.[289] The harm element of negligence in Kansas

287. *But see Stevens*, 851 P.2d at 562.
288. *Cf.* Nero v. Kansas State Univ., 861 P.2d 768, 775 (Kan. 1993).
289. *See generally* Baldayaque v. United States, 338 F.3d 145 (2d Cir. 2003) (concluding that counsel who failed to file a motion for postconviction relief despite specific directives to do so

requires only an *actual* loss or injury to the plaintiff—not a *completed* loss or injury.[290] Injury is *complete* when a defendant is exonerated, but a defendant convicted as a result of his attorney's malpractice suffered *actual* injury at the time of conviction. Therefore, a defendant should not need to obtain exoneration before maintaining a malpractice action against his attorney.

b. *The "More Favorable Outcome" Standard*

Harm is certainly easier to establish if the criminal defendant has been exonerated, but this is not the only way a criminal defendant can be harmed. Even if a criminal defendant would have been convicted and punished for a crime, he can still be harmed by the length of his sentence or by a failure to learn of a plea bargain. The exoneration rule ignores whether a criminal defendant has been harmed by his attorney's malpractice.[291] Proof that the result of the criminal proceeding could have been more favorable if his attorney had not been negligent should be considered sufficient proof of harm.[292]

The "more favorable outcome" standard takes into account the fact that it is not necessarily clear when exoneration is obtained—after reversal, after retrial, or after a second appellate process, and that years could pass between these stages, delaying a legal malpractice action even longer. A convicted defendant can prove a more favorable outcome was possible long before exoneration, making this standard less arbitrary than the exoneration rule.

c. *A Different View of Damages in Legal Malpractice Claims Arising Out of Criminal Actions*

Judges in our court system should reconsider their theories regarding monetary damage remedies in legal malpractice actions. Society may not wish to award damages to a convicted criminal defendant, so courts should focus less on compensatory damages in legal malpractice cases and more on punitive damages to punish negligent lawyers. Under this theory, the loss to the lawyer serves as a deterrent and protects future clients, who may then receive acceptable representation.[293] Courts may be concerned about compensating defendants even if damages are punitive, but the Kansas legislature is presently considering a bill that would direct all punitive damages awarded to

violated a basic duty of an attorney by refusing to perform on such a fundamental matter and failing to do what was asked by the client). This case was decided after *Canaan*. *Id.*

290. *See supra* note 41 and accompanying text.

291. Duncan, *supra* note 219, at 1297.

292. *Id*.

293. *See* Speer v. City of Dodge City, 636 P.2d 178, 181 (Kan. Ct. App. 1981).

criminal defendants to be paid to the state.[294] A system like this would avoid the compensation problem and still provide a major deterrent to legal malpractice.

Moreover, criminal legal malpractice claims should be viewed in the same manner as a lost chance for better recovery medical malpractice lawsuit.[295] When an attorney accepts the criminal defendant, the defendant has a pre-existing injury, and the attorney's job is to minimize or repair the injury.[296] An attorney can accomplish this task through plea negotiations and by providing competent counsel, and the defendant should remain informed about negotiations throughout the representation. As the Kansas Supreme Court stated in *Delaney v. Cade*,[297]

> Lost chance [in medical malpractice] is a concept which presents a better method to evaluate the tort victim's diminished chance of survival or recovery when the evidence establishes the plaintiff's possibility of survival or cure is less than probable. . . . [T]he loss of chance doctrine serves to fairly compensate the plaintiff for a . . . physical injury or condition inflicted by the defendant's wrongful act or omission.[298]

Similarly, courts should be able to evaluate the criminal defendant's lost chance—the number of months or years of freedom he has lost—especially when a "cure" for the defendant's conviction, by a postconviction proceeding, is not likely. Medical malpractice actions, however, require proof of the percentage of chance of recovery lost by the plaintiff in the action.[299] A percentage of chance of freedom would be nearly impossible to quantify, and more research would be necessary to make lost chance a feasible measure of damages in a legal malpractice action arising out of criminal proceedings.

Nevertheless, a defendant could be awarded damages for the difference between what his position would have been without attorney negligence and the "tortious deprivation" of freedom following a conviction resulting from legal malpractice. The most effective way to determine these amounts would be on the basis of certain classes of deprivation of freedom. For example, an uncoveyed plea bargain resulting in imprisonment would result in a specific amount of monetary damages, while damages for a longer prison sentence than would have resulted without attorney negligence would be a different set amount, perhaps based on each additional month of imprisonment. A classifi-

---

294. S. 96, 2005 Leg., Reg. Sess. (Kan. 2005).

295. Brief of Appellant at 28-30, Canaan v. Bartee, 72 P.3d 911 (Kan. 2003) (No. 02-89023).

296. *Id.* at 29.

297. 873 P.2d 175 (Kan. 1994).

298. *Id.* at 182 (emphasis omitted) (quoting Darrell L. Keith, *Loss of Chance: A Modern Proportional Approach to Damages in Texas*, 44 BAYLOR L. REV. 759, 760 (1992.).

299. *See, e.g.*, Pipe v. Hamilton, 56 P.3d 823, 827 (Kan. 2002).

cation system would serve to right the wrongs done to criminal defendants in an equitable, even-handed manner.

V. Conclusion

In *Canaan v. Bartee*, the Kansas Supreme Court erred in adopting the exoneration rule and holding that a criminal defendant must obtain postconviction relief before maintaining a malpractice claim against his criminal defense attorney. The court did not adequately analyze all aspects of the legal, procedural, and policy arguments offered by other jurisdictions before embracing the justifications as its own. The exoneration rule permits derogation of duly enacted law and fails to mesh with traditional common law principles. Finally, criminal defendants are left without redress for even the most egregious legal malpractice, while the rule insulates defense attorneys from full accountability for their negligent representation.

The Kansas Supreme Court should have continued to use its own definitions of causation and harm, as opposed to adopting the arbitrary standard of "exoneration." Above all else, the court should have broadened its view of damages in legal malpractice actions so those defendants injured by an attorney's negligence, but who are unable to obtain exoneration, will be able to obtain relief. The exoneration rule impedes the already precarious position of criminal defendants—those litigants who should be most protected by the justice system.