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# Ineffective Assistance of Counsel: The Lingering Debate

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# INEFFECTIVE ASSISTANCE OF COUNSEL: THE LINGERING DEBATE

The right to counsel[1] has a checkered history in American jurisprudence.[2] Originating as merely the right to retain a lawyer,[3] it now assures a defendant legal assistance in all criminal

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[1] The relevant portion of the sixth amendment states, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

[2] Historically, the right to counsel has differed in state and federal courts. In Powell v. Alabama, 287 U.S. 45 (1932), the Court created a constitutional right to counsel in state trials under the rubric of procedural due process. In *Powell,* eight indigent and illiterate black youths, unassisted by counsel until the morning of trial, were convicted of rape. The Supreme Court reversed the convictions, holding that

> in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense . . . it is the duty of the court . . . to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.

*Id.* at 71. Sweeping dictum in *Powell* also provided a basis for extending the right into noncapital cases where the defendants are neither illiterate nor uneducated. *Id.* at 69. In subsequent cases, however, the Court limited *Powell* to its facts, specifically refusing to hold that the assistance of counsel is a necessary component of a fair trial. *See* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 164-88 (1955) (summarizing all fourteenth amendment assistance of counsel claims that the Supreme Court heard between 1942 and 1950). Finally, in Gideon v. Wainwright, 372 U.S. 335, 344 (1963), the Court departed from its procedural due process methodology, applying the sixth amendment guarantee directly to the states through the fourteenth amendment.

For federal trials, the Supreme Court first defined the right to counsel in Johnson v. Zerbst, 304 U.S. 458 (1938). Relying on *Powell,* the Court stated that the "Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives assistance of counsel." *Id.* at 463. The Court expanded this interpretation in Glasser v. United States, 315 U.S. 60, 76 (1942), by guaranteeing a defendant's right to *effective* assistance undiminished by conflicts of interests resulting from joint representation.

After *Gideon,* the scope of the assistance of counsel clause became identical in federal and state courts. It now applies equally to felony and misdemeanor offenses. (Argersinger v. Hamlin, 407 U.S. 25, 37 (1972)) and guarantees legal assistance at each "critical stage of the prosecution." United States v. Wade, 388 U.S. 218, 236-37 (1967). Under the "critical stage" rule, the government must provide counsel during arraignments (Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (decided on fourteenth amendment grounds)), interrogations (Escobedo v. Illinois, 378 U.S. 478, 488, 492 (1964)), preliminary hearings (Coleman v. Alabama, 399 U.S. 1, 10 (1970)), and pretrial line-ups (*Wade,* 388 U.S. at 236-37).

[3] W. BEANEY, *supra* note 2, at 29. Beaney argues that the Framers of the Constitution intended merely to guarantee the accused the right to hire counsel for his defense. Thus, for criminal proceedings, the assistance of counsel clause constitutionalized the Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73 (1789), which provided that "in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said court. . . ." Beaney

proceedings that result in a prison sentence.[4] Implicitly, the sixth amendment also guarantees a right to effective assistance,[5] but the Supreme Court has never fully defined the scope of this right.[6]

emphasizes the limited scope of the right to counsel in the American colonies, and sees the lack of debate that accompanied this constitutional provision as evidence that the states intended to retain the narrow meaning. W. BEANEY, *supra* note 2, at 14-26. Furthermore, notes that Congress statutorily defined a special right to counsel for capital cases in the Act of April 30, 1790, ch. 9, § 29, 1 Stat. 112 (1790). Although this act preceded ratification of the sixth amendment by seven months, Beaney writes, "[i]t is logical to conclude that Congress passed the act because the Sixth Amendment was irrelevant, in its view, to the subject of appointment of counsel. . . ." W. BEANEY, *supra* note 2, at 28.

[4] "We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." Scott v. Illinois, 440 U.S. 367, 373-74 (1979). *Scott* clarified Argersinger v. Hamlin, 407 U.S. 25 (1972), which held "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Id.* at 37. *Scott* refused to extend the right to counsel to cases where no actual imprisonment results.

[5] "It has long been recognized that the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). The Supreme Court first considered the effectiveness of counsel in Powell v. Alabama, 287 U.S. 45 (1932). *See* note 2 *supra*. Subsequent opinions have continued to examine the effectiveness of counsel as a requirement of due process and the sixth amendment itself. *See, e.g.*, Holloway v. Arkansas, 435 U.S. 475, 490 (1978) (sixth amendment guarantee denied when joint representation ineffective); Reece v. Georgia, 350 U.S. 85, 90 (1955) (effective assistance of counsel "a constitutional requirement of due process"); Glasser v. United States, 315 U.S. 60, 76 (1942) (effective assistance of counsel "guaranteed by the Sixth Amendment"); Avery v. Alabama, 308 U.S. 444, 446 (1940) (guarantee of assistance of counsel not not satisfied "by mere formal appointment").

[6] The Supreme Court has defined ineffectiveness in some limited situations. *See, e.g.*, Holloway v. Arkansas, 435 U.S. 475 (1978) (joint representation of conflicting interests); Geders v. United States, 425 U.S. 80 (1976) (instructions denying defendant the right to consult with counsel during trial recess); Herring v. New York, 422 U.S. 853 (1975) (statute dispensing with summation arguments in nonjury trial). Significantly, the Court has never defined effective assistance of counsel as it pertains to standards of attorney performance. This provoked a strong dissent from Justice White in Maryland v. Marzullo, 435 U.S. 1011 (1978) (dissenting from denial of certiorari):

> Despite the clear significance of this question, the Federal Courts of Appeals are in disarray. . . .
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> . . .[I]t is this Court's responsibility to determine what level of competence satisfies the constitutional imperative. It also follows that we should attempt to eliminate disparities in the minimum quality of representation required to be provided to indigent defendants. In refusing to review a case which so clearly frames an issue that has divided the Courts of Appeals, the Court shirks its responsibility as the court of last resort, particularly its function in the administration of criminal justice under a Constitution such as ours.

*Id.* at 1011-13. The Court's unwillingness to address this issue is particularly ironic in light of Chief Justice Burger's often quoted criticism of the bar, that "from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation." Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 234 (1973).

Without firm guidance, the circuits have experimented with numerous definitions of "effective aid,"[7] and a consensus has finally emerged. Nearly every federal court now equates effective assistance of counsel with competent representation.[8]

A conflict lingers over whether an accused must prove prejudice to support an ineffective assistance claim. Some courts hold that proof of attorney incompetence does not by itself dem-

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[7] For examples of the different definitions, see Marzullo v. Maryland, 561 F.2d 540, 547 (4th Cir. 1977), (within "the range of competence expected of attorneys in criminal cases") *cert. denied,* 435 U.S. 1011 (1978); United States v. Easter, 539 F.2d 663, 666 (8th Cir.), ("customary skills and diligence that a reasonably competent attorney would perform under similar circumstances") *cert. denied,* 434 U.S. 844 (1976); Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) ("the exercise of the customary skill and knowledge which normally prevails at the time and place"); United States v. Reincki, 383 F.2d 129, 132 (2d Cir. 1967) ("so 'horribly inept' as to amount to 'a breach of his legal duty faithfully to represent his client's interests' ") (quoting Kennedy v. United States, 259 F.2d 883, 886 (5th Cir. 1958), *cert. denied,* 359 U.S. 994 (1959)); Bruce v. United States, 379 F.2d 113, 116-17 (D.C. Cir. 1967) ("gross incompetence . . . that . . . has in effect blotted out the essence of a substantial defense"); Hickock v. Crouse, 334 F.2d 95, 100-01 (10th Cir. 1964), ("good-faith representation, with all the skill which counsel possesses"); *cert. denied,* 379 U.S. 982 (1965) Edgerton v. North Carolina, 315 F.2d 676, 678 (4th Cir. 1963) ("not afforded in any substantial sense professional advice and guidance"); MacKenna v. Ellis, 280 F.2d 592, 599 (1960), ("counsel reasonably likely to render *and rendering* reasonably effective assistance") *cert. denied,* 368 U.S. 877 (1961); United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949) (representation "such as to make the trial a farce and a mockery of justice") *cert. denied,* 338 U.S. 950 (1950). *See also* Stone, *Ineffective Assistance of Counsel and Post-Conviction in Criminal Cases: Changing Standards and Practical Consequences,* 7 COLUM. HUMAN RIGHTS L. REV. 427 (1975). *See generally* Brody, *Ineffective Representation as a Basis for Relief from Conviction,* 13 COLUM. J.L. SOC. PROB. 1 (1977); Grano, *The Right to Counsel: Collateral Issues Affecting Due Process,* 54 MINN. L. REV. 1175 (1970); Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases,* 59 NW. U. L. REV. 289 (1964).

[8] Originally, courts treated effective assistance of counsel as an ordinary due process guarantee. *See* note 2 *supra.* For this reason, most circuits would reverse a conviction only if the representation was "such as to make the trial a farce and a mockery of justice." United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied,* 338 U.S. 950 (1950). In the last 13 years, however, 10 circuits have abandoned the "farce and mockery" test. Dyer v. Crisp, No. 78-1772 (10th Cir. Jan. 11, 1980); Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978) (en banc), *cert. denied,* 440 U.S. 974 (1979); United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978); Marzullo v. Maryland, 561 F.2d 540 (4th Cir.), *cert. denied,* 435 U.S. 1011 (1978); United States v. Easter, 539 F.2d 663 (8th Cir. 1976); United States *ex rel.* Williams v. Twomey, 510 F.2d 634 (7th Cir.) *cert. denied,* 423 U.S. 876 (1975); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974); Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974); Moore v. United States, 432 F.2d 730 (3d Cir. 1970) (en banc); Bruce v. United States, 379 F.2d 113 (D.C. Cir. 1967). Except for the Seventh Circuit, which requires a "minimum standard of professional representation," *Twomey,* 510 F.2d at 641, these courts all apply a competence standard to measure effective aid. Furthermore, the Second Circuit has indicated that it may consider switching to a competence standard at an appropriate opportunity. Rickenbacker v. Warden, 550 F.2d 62, 66 (2d Cir. 1976).

onstrate ineffectiveness. These judges, the incorporationists,[9] will only reverse a conviction if the accused proves that the alleged deficiencies harmed him.[10] The nonincorporationists, however, determine ineffectiveness by focusing solely on the adequacy of the attorney's performance.[11] For these judges, the impact of the alleged incompetence is relevant only if they apply a harmless error analysis.[12]

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[9] This Note uses "incorporation" as shorthand for a requirement that the accused prove prejudice as an element of an ineffective assistance claim. The reader should not confuse this usage with the standard meaning of "incorporation" in fourteenth amendment analysis.

[10] *See, e.g.*, United States v. Decoster, No. 72-1283 (D.C. Cir., July 10, 1979) (en banc), *cert. denied*, 100 S. Ct. 302 (1979); United States v. Ritch, 583 F.2d 1179, 1183 (1st Cir.), *cert. denied*, 439 U.S. 970 (1978); Beran v. United States, 580 F.2d 324, 327 (8th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979); United States *ex rel.* Johnson v. Johnson, 531 F.2d 169, 177 (3d Cir.), *cert. denied*, 425 U.S. 997 (1976); People v. Pope, 23 Cal. 3d 412, 425, 590 P.2d 859, 866 152 Cal. Rptr. 732, 739, (1979).

[11] *See* United States v. Decoster, No. 72-1283 (D.C. Cir. July 10, 1979) (concurring opinion, Robinson, J.) (dissenting opinion, Bazelon, J.), *cert. denied*, 100 S. Ct. 302 (1979); Cooper v. Fitzharris, 586 F.2d 1325, 1334 (9th Cir. 1978) (en banc) (concurring and dissenting opinion, Hufstedler, J.) ("[d]efendants who have been denied their Sixth Amendment right to the assistance of reasonably competent counsel at trial should be entitled to relief without a showing of prejudice"), *cert. denied*, 440 U.S. 974 (1979); Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970) (en banc) ("[t]his standard also makes it clear that the ultimate issue is not whether a defendant was prejudiced by his counsel's act or omission, but whether counsel's performance was at the level of normal competency"); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.) ("[a]n omission or failure to abide by these requirements constitutes a denial of effective representation of counsel unless the state, on which is cast the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby"), *cert. denied*, 393 U.S. 849 (1968). *See also* Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974) (implicitly presuming prejudice in holding harmless error analysis inapplicable).

Some courts have adopted a flexible approach, deciding on a case-by-case basis whether to require a showing of prejudice. *See, e.g.*, Davis v. Alabama, 596 F.2d 1214, 1223 (5th Cir. 1979) ("the facts of each case must be examined; in each case we must assess the advisability of requiring a showing of prejudice"); Thomas v. Wyrick, 535 F.2d 407, 414 (8th Cir.) ("generally imposing the burden of demonstrating unfairness on the petitioner," but "[i]f the particular circumstances of the case require a different allocation of the burden, that allocation will be adopted), *cert. denied*, 429 U.S. 868 (1976); United States *ex. rel.* Green v. Rundle, 434 F.2d 1112, 1115 (3d Cir. 1970) (requiring petitioner to prove prejudice when "failure of counsel [is] with respect to a narrow issue," but applying automatic reversal when counsel's deficiencies "have . . . so pervasive an effect on the process of guilt determination that it is impossible to determine accurately the presence or absence of prejudice").

[12] For an explanation of harmless error, see note 69 *infra*. Nonincorporationists differ over the propriety of using harmless error in an ineffective assistance of counsel case. *Compare* United States v. Decoster, 487 F.2d 1197, 1204 (D.C. Cir. 1973) *and* Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968) (permitting government to prove harmless error) *with* Cooper v. Fitzharris, 586 F.2d 1325, 1334-42 (9th Cir. 1978) (concurring and dissenting opinion, Hufstedler, J.) (arguing harmless error inapplicable), *cert. denied*, 440 U.S. 974 (1979).

This Note analyzes these conflicting approaches by examining the relationship between the "effective aid" guarantee and the underlying constitutional right to counsel, and concludes that an accused should not have to prove prejudice. The Note demonstrates, however, that harmless error analysis is appropriate for certain ineffectiveness cases, and it proposes a method for identifying such claims.

## I

## ANALYSIS OF THE CONFLICT

### A. *United States v. Decoster: Framing the Dispute*

*United States v. Decoster*[13] provides a useful framework for examining the conflict between incorporationist and nonincorporationist methodologies. On its facts, *Decoster* typifies many ineffective assistance of counsel cases. Willie Decoster was convicted of aiding and abetting an armed robbery and an assault with a dangerous weapon.[14] On appeal, the District of Columbia Circuit Court rejected the basis of the appeal,[15] but raised *sua sponte* the issue of ineffective assistance of counsel.[16] It remanded the rec-

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[13] No. 72-1283 (D.C. Cir. July 10, 1979) (en banc), *cert. denied*, 100 S. Ct. 302 (1979). *See generally*, Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After* United States v. Decoster, 93 HARV. L. REV. 752 (1980).

[14] United States v. Decoster, 487 F.2d 1197, 1199 (D.C. Cir. 1973) *aff'd*, No. 72-1283 (D.C. Cir., July 10, 1979) (en banc), *cert. denied*, 100 S. Ct. 302 (1979). The appellate court vacated the conviction for assault with a dangerous weapon because it was a lesser included offense to the charge of armed robbery. *Id.* at 1199 n.2.

[15] Decoster's two accomplices had pleaded guilty to ordinary robbery only. On appeal, Decoster alleged that because of this, he could not be convicted of aiding and abetting an armed robbery and an assault with a dangerous weapon. The appellate court accepted this paradox—an aider and abettor without a principal—as "a necessary result of the irrationality of plea bargaining." *Id.* at 1199 n.1.

[16] *Id.* at 1199. The court was primarily concerned with evidence of the defense attorney's inadequate trial preparation:

1) Counsel was delinquent in filing proper motions to arrange for Decoster's pre-trial custody release. Id. at 1199-1200.
2) Counsel announced "ready" for trial, but was unable to satisfy the government's alibi notice demand. As a result, the attorney announced that he would proceed with the trial without relying on an alibi defense. *Id.* at 1200.
3) Counsel attempted to waive a jury trial although the presiding judge had already heard related evidence in connection with the guilty pleas by Decoster's companions. *Id.*
4) Before trial, Decoster petitioned the court and expressed dissatisfaction with his appointed attorney. Evidence at trial indicated that counsel had failed to communicate with Decoster on important tactical matters. *Id.*
5) During the trial, the defense called only one witness other than Decoster, and on direct examination this witness contradicted the accused on crucial facts. *Id.* at 1201.

ord for supplemental hearings and granted Decoster leave to file a motion for a new trial.[17] After a district court judge denied the motion,[18] a circuit court panel reversed, holding that the defense attorney's failure to conduct a pretrial investigation had denied Decoster effective assistance of counsel.[19] On rehearing, the District of Columbia Circuit en banc reinstated the conviction, holding that the representation Decoster received at trial satisfied the requirements of the sixth amendment. The divided court[20] unanimously criticized counsel's conduct, but ruled that Decoster had failed to prove his trial attorney's deficiencies prejudiced his case.[21]

The conflicting *Decoster* opinons crystallized the incorporation debate. All judges agreed that the defendant must show his lawyer committed a substantial breach of duty to prove ineffectiveness.[22] But in defining "substantial," they revealed the essence of the lingering debate. For Judge MacKinnon, "substantial" meant that the accused must demonstrate actual prejudice from the alleged breach.[23] In his plurality opinion, Judge Leventhal

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[17] *Id.* at 1205. Procedurally, *Decoster* differs from most ineffective assistance of counsel cases. Usually the accused is not permitted a direct appeal because of the significant time delay. Green, Ward & Arcuri, *Plea Bargaining: Fairness and Inadequacy of Representation,* 7 COLUM. HUMAN RIGHTS L. REV. 495, 523 n.223 (1975). As an alternative, the prisoner petitions for habeas corpus relief, and must prove that the "sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255 (1976). On direct appeal, however, a federal court may reverse a conviction without finding that counsel's representation is constitutionally defective. 28 U.S.C. § 2106 (1976). *See, e.g.,* Dyer v. United States, 379 F.2d 89, 89-90 (D.C. Cir. 1967); Bruce v. United States, 379 F.2d 113, 117 (D.C. Cir. 1967). Nonetheless, the *Decoster* court considered on direct appeal the constitutional merits of the ineffective assistance claim.

[18] No. 72-1283, slip op. at 5 (Leventhal, J.).

[19] *Id.*

[20] Joining Judge Leventhal's plurality opinion were Judges McGowan, Tamm, and Wilkey. Judges Tamm and Robb joined a second opinion by Judge MacKinnon. Judge Robinson filed an opinion concurring in the result only, while Chief Judge Wright joined Judge Bazelon's dissenting opinion.

[21] Judge Leventhal held that Decoster had failed to prove the *likelihood* of prejudice. No. 72-1283, slip op. at 34 (Leventhal, J.). Judge MacKinnon determined that the accused had failed to prove *substantial* prejudice. *Id.* at 33 (concurring opinion, MacKinnon, J.).

[22] Judge Leventhal, citing Judge Kaplan's opinion in Commonwealth v. Saferian, 366 Mass. 89, 315 N.E.2d 878 (1974), concluded that a "substantial" breach has to be "egregious and probably prejudicial." No. 72-1283, slip op. at 17 (Leventhal, J.). Judge Robinson spoke of a "substantial deviation from a norm of reasonable competence." *Id.* at 4 (concurring opinion, Robinson, J.). Judges MacKinnon and Bazelon referred to a "substantial violation of a duty owed . . . by . . . counsel." *Id.* at 33 (concurring opinion, MacKinnon, J.); *id.* at 26 (dissenting opinion, Bazelon, J.).

[23] Judge MacKinnon stated that "the defendant lacks a substantial claim unless he makes out a *prima facie* case showing (1) that counsel's constitutional duty toward him was

incorporated a requirement of likely prejudice.[24] The nonincorporationists, Judges Robinson and Bazelon, defined "substantial" without referring to prejudice. They suggested instead that the court examine the "frequency and pervasiveness" of the lawyer's deficient conduct.[25] The nonincorporationists would only examine prejudice *after* finding a substantial breach of duty by counsel, and only as part of a harmless error analysis, in which the government bears the burden of proving beyond a reasonable doubt that the ineffectiveness did not injure the defendant.[26]

### B. *Incorporationist Theory*

Incorporationists encounter two major problems in imposing a prejudice requirement. They can neither satisfactorily justify the rule nor adequately explain why the Supreme Court has failed to impose this requirement in several ineffectiveness cases. Whether the incorporationists require proof of actual harm or merely likely prejudice, they fail to resolve these problems.

#### 1. *Analytical Models*

The incorporationist approach appears to conflict with several Supreme Court rulings that overturned convictions automatically when effective assistance of counsel had been denied.[27] In each case the Court refused to require a showing that the constitutional infraction had prejudicial impact. The incorporationists have constructed two analytical models to distinguish these cases.

a. *Actual-Constructive Model.* This model attempts to distinguish the actual denial of assistance, where the accused has no lawyer, from the constructive denial of assistance, where the ac-

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breached and (2) that he suffered unfair prejudice as a result of that breach." *Id.* at 19 (MacKinnon, J.).

[24] *Id.* at 18 (Leventhal, J.).

[25] *Id.* at 14 (concurring opinion, Robinson, J.); *id.* at 54 (dissenting opinion, Bazelon, J.).

[26] *Id.* at 36 (concurring opinion, Robinson, J.); *id.* at 59-61 (dissenting opinion, Bazelon, J.). Judge MacKinnon, who requires that the defendant prove actual prejudice, would never engage in harmless error analysis. *But see* note 72 *infra.* Because Judge Leventhal incorporated only a requirement of likely prejudice, he would permit the government to demonstrate harmless error after a defendant meets the likelihood burden. *See* notes 77-88 and accompanying text *infra.*

[27] *E.g.*, Holloway v. Arkansas, 435 U.S. 475 (1978); Geders v. United States, 425 U.S. 80 (1976); Herring v. New York, 422 U.S. 853 (1975); Glasser v. United States, 315 U.S. 60 (1942).

cused has an ineffective lawyer.[28] In guaranteeing the "Assistance of Counsel," the express language of the sixth amendment makes an actual denial of the right impermissible per se.[29] The model suggests that this rule does not apply when a court considers a constructive denial of the underlying right. The distinction "rests on the difference between the right explicitly granted in the Constitution and the different formulation of the right created by a judicial gloss on the Constitutional provision."[30] The model's adherents see all automatic reversals as examples of an actual denial of assistance. This frees them to incorporate a prejudice requirement for constructive denial claims.

In *Decoster,* Judge MacKinnon supported this model with a linguistic analysis: "It is plain from a glance at any dictionary that when the [Supreme] Court used the term 'ineffective' it was concerned with the *impact* that counsel's alleged failure may have on the trial."[31] He asserted that because the Court consistently focuses on effectiveness, rather than on attorney competence, the accused must demonstrate prejudice to establish a constructive denial.[32]

This analysis is misleading because it ignores the circumstantial use of "effective." The Supreme Court first considered the effectiveness of counsel in *Powell v. Alabama,*[33] where the defend-

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[28] United States v. Decoster, No. 72-1283, slip op. at 8-9, 30-33 (D.C. Cir., July 10, 1979) (concurring opinion, MacKinnon, J.), *cert. denied,* 100 S. Ct. 302 (1979).

[29] *See, e.g.,* Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938).

[30] United States v. Decoster, No. 72-1283, slip op. at 33 n.28 (D.C. Cir. July 10, 1979) (concurring opinion, MacKinnon, J.).

[31] *Id.* (emphasis in original).

[32] [I]f the Supreme Court had intended the one-dimensional inquiry proposed by the dissent it could have focused solely on competence or performance. Its use of the term "ineffective" is consistent with the view adopted by this and the plurality opinion that prejudice is an element of an accused's constitutional claim of ineffectiveness.

*Id.*

In McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974), the court justified this model differently:

> [W]e believe that there is an important and obvious difference between the total absence of counsel in *Gideon* and the ineffective assistance of counsel in the instant case. Since advice of counsel is so crucial to the exercise of a defendant's other rights, a total absence of counsel cannot but be harmful. Yet where a defendant is represented by counsel and it is the effectiveness of his counsel's performance that has slipped below the acceptable standard, the seriousness of this constitutional violation must be judged in terms of the particular factual circumstances of that case.

*Id.* at 218.

[33] 287 U.S. 45 (1932). *See* note 5 *supra.*

ants alleged that appointment of their attorney on the morning of trial had rendered the aid ineffective. The attorney's competence was not at issue, and understandably, the Court's language focused on counsel's effectiveness. Indeed, in the forty-seven years since *Powell,* the Supreme Court has never directly considered a sixth amendment allegation of incompetent performance by counsel.[34] There is, therefore, little support for the argument that the Supreme Court purposefully chose the word "ineffective" to impose a prejudice requirement on defendants.

Moreover, to distinguish cases successfully, supporters of the actual-constructive model must classify every automatic reversal case as an actual denial of assistance. Several cases, however, do not fit comfortably within this model. For example, the Supreme Court automatically reversed the convictions of jointly represented defendants because their attorney had a potential conflict of interest.[35] An incorporationist, applying the actual-constructive model, would classify this case as an actual denial. The Court, however, was clearly concerned with the effectiveness of the lawyer, rather than his complete absence.[36] Similarly, the Supreme Court found an automatic denial of counsel, when a judge dispensed with summation arguments in a non-jury trial.[37] In-

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[34] *See* note 6 *supra.* In McMann v. Richardson, 397 U.S. 759 (1970), the Supreme Court confronted a closely related issue. The defendant unsuccessfully sought habeas corpus relief from a guilty plea, alleging that the plea had been motivated by a prior forced confession. The defendant had failed to challenge the validity of the confession in state court, which he could have done by pleading not guilty and attacking the admissibility of the confession at trial. The Court declared that a habeas corpus hearing was unavailable unless the defendant received incompetent advice. *Id.* at 772. "[W]hether his plain bypass of state remedies was an intelligent act depends on whether he was so incompetently advised by counsel concerning the forum in which he should first present his federal claim that the Constitution will afford him another chance to plead." *Id.* at 768-69. The Court found no such incompetence. *McMann* is often cited to support a competence standard for ineffective assistance claims. Cooper v. Fitzharris, 586 F.2d 1325, 1329 (9th Cir. 1978) (en banc), *cert. denied,* 440 U.S. 974 (1979); Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977), *cert. denied,* 435 U.S. 1011 (1978); United States v. Easter, 539 F.2d 663, 666 n.2 (8th Cir.), *cert. denied,* 434 U.S. 844 (1976); Beasley v. United States, 491 F.2d 687, 693 (6th Cir. 1974). In *Decoster,* both incorporationists and nonincorporationists used *McMann* to support their positions. No. 72-1283, slip op. at 9, 11, 14 (Leventhal, J.); *id.* at 27-28 n.24 (concurring opinion, MacKinnon, J.); *id.* at 11 (concurring opinion, Robinson, J.); *id.* at 6 n.11, 58 n.129 (dissenting opinion, Bazelon, J.).

[35] Holloway v. Arkansas, 435 U.S. 475 (1978); Glasser v. United States, 315 U.S. 60 (1942).

[36] "More than 35 years ago, in *Glasser v. United States,* ... this Court held that by requiring an attorney to represent two co-defendants whose interests were in conflict the District Court had denied one of the defendants his Sixth Amendment right to the *effective* assistance of counsel." Holloway v. Arkansas, 435 U.S. 475, 481 (1978) (emphasis added).

[37] Herring v. New York, 422 U.S. 853 (1975).

corporationists would also classify this case as an actual denial since the Court did not require proof of prejudice. Like the joint representation claim, however, this case focused on the effectiveness of the attorney, rather than his absence. By awkwardly classifying such cases as actual denials, incorporationists undermine any linguistic justification for the actual-constructive model.[38]

b. *Governmental Involvement Model.* Judge Leventhal identified four categories of ineffective assistance claims, positioned on a continuum of governmental involvement:[39] (1) direct governmental interference involving statutes or court rulings—claims in this category require no showing of prejudice and reversal is automatic;[40] (2) multiple representation[41]—the accused carries the burden of showing that his lawyer has a likely conflict of interest[42]—prejudice is irrebuttably presumed from the conflict and

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[38] Another example of this problem is Geders v. United States, 425 U.S. 80 (1976). The defendant in *Geders* challenged a state court ruling that prohibited him from speaking with his attorney during an overnight recess. The recess had come at the end of direct testimony by the accused, but before cross-examination. Without requiring a showing of prejudice, the Supreme Court reversed the conviction, holding that the state court had denied the defendant the assistance of counsel. Although the accused had been represented by competent counsel throughout his trial, and although the denial involved only 17 hours, Judge MacKinnon classified *Geders* as another actual denial case. *Decoster,* No. 72-1283, slip op. at 40 (concurring opinion, MacKinnon, J.).

United States v. Wade, 388 U.S. 218 (1967), forces the model into an apparent inconsistency. In *Wade,* a pretrial line-up was conducted in the absence of a defense attorney. The Court ruled that assistance of counsel was guaranteed in such pretrial proceedings "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *Id.* at 224. Yet in *Wade* the Court did not apply an automatic reversal rule. Instead, it remanded the case to determine whether the denial was harmless error. *Id.* at 242. *See also* Coleman v. Alabama, 399 U.S. 1 (1970); Gilbert v. California, 388 U.S. 263 (1967).

All theories of ineffective assistance have difficulty accounting for the results in these cases. Commentators, however, sometimes ignore the problem by focusing exclusively on social policy issues. *See, e.g.,* Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 93 HARV. L. REV. 752 (1980); Comment, *Current Standards for Determining Ineffective Assistance of Counsel: Still a Sham, Farce or Mockey?,* 1979 S. ILL. U.L. REV. 132; Comment, *Ineffective Assistance of Counsel: Who Bears the Burden of Proof,* 29 BAYLOR L. REV. 29 (1977).

[39] *Decoster,* No. 72-1283, slip op. at 5-9 (Leventhal, J.).

[40] *Id.* at 7. This category includes the complete absence of counsel cases. *E.g.,* Gideon v. Wainwright, 372 U.S. 335 (1963), Johnson v. Zerbst, 304 U.S. 458 (1938). Judge Leventhal noted that all these cases involve identifiable impediments to the right to counsel and "are susceptible to easy correction by prophylactic rules." *Decoster,* No. 72-1283, slip op. at 7 (Leventhal, J.). This suggests that automatic reversal hinges on considerations of judicial efficiency as well as state involvement.

[41] *Id.* at 7-8. This category restates the law of Holloway v. Arkansas, 435 U.S. 475 (1978) and Glasser v. United States, 315 U.S. 60 (1942).

[42] In Holloway v. Arkansas, 435 U.S. 478 (1978), The Court was unwilling to mandate that every defendant have separate representation. The Court explained that joint rep-

reversal follows;[43] (3) late appointment of counsel[44]—injury to the accused is presumed, but the government may prove harmless error;[45] (4) no governmental action affecting the defense lawyer's performance.[46] In this category, which includes incompetent

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resentation may sometimes be beneficial to the defense. "Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack." *Id.* at 482-83 (quoting Glasser v. United States, 315 U.S. 60, 92 (1942) (dissenting opinion, Frankfurter, J.)).

[43] *Id.* at 489-90. In *Holloway,* the basis for finding potential conflict was unmistakable. During the trial, three jointly represented co-defendants asked to testify. Their attorney explained to the court that under the circumstances he was unable to direct examination properly, and that separate counsel should be appointed. The trial court denied this request without a hearing. The Supreme Court did not assess the validity of the attorney's conflict of interest allegation, reasoning that the attorney performed a dual role as an officer of the court. The court postulated that the attorney was precluded "from exploring possible plea negotiations," and therefore presumed the existence of prejudice. *Id.* at 489-90. Having determined that prejudice was inherent, the Court refused to apply harmless error. *See* note 88 *infra.*

[44] *Decoster,* No. 72-1283, slip op. at 8-9 (Leventhal, J.).

[45] Judge Leventhal deduces this rule from Chambers v. Maroney, 399 U.S. 42 (1970). The defense attorney in *Chambers* failed to object to clearly inadmissible evidence, and the petitioner claimed that late appointment of counsel caused the failure. The Supreme Court clearly defined the scope of the claim when it stated that "No charge is made that [defense counsel] was incompetent or inexperienced; rather the claim is that his appearance for petitioner was so belated that he could not have furnished effective legal assistance. . . ." *Id.* at 53. The Court determined, however, that the erroneous admission of evidence was harmless. Reasoning that the ineffectiveness was necessarily without prejudice, the Court denied relief.

Justice Harlan objected to the majority's narrow interpretation of the ineffectiveness claim. The real harm in late appointment of counsel, he stated, is that it may result in the denial of the "opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense." *Id.* at 59 (quoting Avery v. Alabama, 308 U.S. 444, 446 (1940)). He continued:

> It is not an answer to petitioner's claim for a reviewing court simply to conclude that he has failed after the fact to show that, with adequate assistance, he would have prevailed at trial. . . . Further inquiry might show, of course, that counsel's opportunity for preparation was adequate to protect petitioner's interests. . . .

*Id.* at 60 (Harlan, J., dissenting in part).

Since *Decoster* did not involve late appointment of counsel, Judge Leventhal did not pursue the analysis of this category. In particular, he failed to consider whether prejudice should be examined as part of the prima facie claim or as harmless error. Since he segregated late appointment cases from inadequate performance cases. (*See* notes 46-48 and accompanying text *infra*) it is possible he believed the treatment of prejudice should be different in each category, and that in a late appointment case, the government must prove harmless error. Judge MacKinnon, however, explicitly applied *Chambers* to support his assertion that the burden of proving actual prejudice rests with the accused. *Decoster,* No. 72-1283, slip op. at 45-46 (concurring opinion, MacKinnon, J.). But *Chambers* did not say who bears the burden of demonstrating prejudice. *See* note 124 and accompanying text *infra.*

[46] In these cases, counsel's performance is " 'untrammelled and unimpaired' by state action." No. 72-1283, slip. op. at 9 (Leventhal, J.) (quoting Holloway v. Arkansas, 435 U.S. 478, 482 (1978)).

performance claims like *Decoster,* the accused must always prove that the ineffectiveness has prejudiced his case.[47] Thus, under this model, as governmental involvement decreases, the defendant assumes a greater burden of proving that he was prejudiced.

By conceding that in some constructive denial cases the accused need not prove prejudice, the governmental involvement model appears to explain the automatic reversal cases.[48] But the reasoning behind the continuum is unclear. Prosecutorial involvement satisfies the "state action" requirement[49] regardless of whether the ineffectiveness results from statutory restrictions, joint representation, late appointment, or attorney incompetence.[50] Since each category involves a denial of the same constitutional guarantee, defendants should have like protection at all levels of governmental involvement.[51] State action is a threshold issue; it should not define the right.

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[47] In *Decoster,* Judge Leventhal required the accused to show "a likelihood that counsel's inadequacy affected the outcome of the trial," but permitted the government to avoid reversal by proving that the conviction "is not tainted by the deficiency, and that in fact no prejudice resulted." *Decoster,* No. 72-1283, slip op. at 21 (Leventhal, J.). For a discussion of the "likelihood compromise," see notes 84-88 and accompanying text *infra.* Alternatively, incorporationists could apply the governmental involvement model and require proof of *actual* prejudice when such involvement is minimal. *See, e.g., id.,* at 31, 33 (concurring opinion, MacKinnon, J.). A tougher standard for the accused would require proof that the government knowingly or negligently permitted the ineffective representation. *See* Fitzgerald v. Estelle, 505 F.2d 1334, 1336-37 (5th Cir. 1975) (en banc) (applying this standard to cases including privately retained counsel).

[48] Like the actual-constructive model, however, the governmental involvement model fails to account for pre-trial denial cases such as United States v. Wade, 388 U.S. 218 (1967). *See* note 38 *supra.*

[49] "[T]he Bill of Rights and the Fourteenth Amendment apply only to those acts which are somehow connected to governmental or 'state' action." Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement,* 1976 SUP. CT. REV. 221, 221.

[50] *See* Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief,* 59 NW. U. L. REV. 289, 296-301 (1964). *Cf.* Shelley v. Kraemer, 334 U.S. 1 (1948) (finding state action from judicial enforcement of restrictive covenants). Some courts have questioned the presence of sufficient state action when a defendant alleges ineffective assistance from privately retained counsel. *See* United States *ex rel.* Darcy v. Hardy, 203 F.2d 407 (3d Cir.), *cert. denied,* 346 U.S. 865 (1953). *Compare* Garton v. Swenson, 497 F.2d 1137, 1139 n.4 (8th Cir. 1974) *and* People v. Pope, 23 Cal. 3d 412, 421 n.9, 590 P.2d 859, 863 n.9, 152 Cal. Rptr. 732 736 n.9 (1979) (suggesting that standards vary when counsel is retained rather than appointed), *with* West v. Louisiana, 478 F.2d 1026, 1032-33 (5th Cir. 1973) (applying same standard, whether counsel court appointed or privately retained).

[51] The focus in effectiveness-of-counsel cases should be on the representation a defendant gets, not on whether his inadequate representation results on the one hand from his lawyer's sloth, indifference or lack of capacity, or on the other from denial of an opportunity for the lawyer to do his job. The effect on the defendant in either event is the same, and the issue is whether he received the representation he was constitutionally entitled to. The only thing that distinguishes this class of factors causing ineffectiveness is that the state is implicated

2. *The Prejudice Requirement*

Even if incorporationists can satisfactorily explain the automatic reversal cases, they must still justify the imposition of a prejudice requirement. Their approach derives from at least three sources: (a) the fifth amendment underpinnings of the right to effective aid; (b) traditional common law principles allocating the burden of proof; and (c) the privacy of attorney-client relationships, and the adversary criminal justice system.[52]

a. *The Fifth Amendment Analogy.* In *Decoster,* Judge MacKinnon asserted that because the right to counsel comes from both the fifth and sixth amendments, courts may transfer fifth amendment methodology to sixth amendment cases.[53] *Murphy v. Florida*[54] is the focus of this analogy. In *Murphy,* the defendant alleged that the jury's knowledge of his notorious criminal record had denied him due process. Unwilling to apply an automatic reversal rule, the Supreme Court searched for "any indications in the totality of circumstances that petitioner's trial was not fundamentally fair."[55] After concluding that the accused had failed to demonstrate prejudice, the Court denied relief.[56] "[I]n light of Fifth

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> for acting in a fashion which unreasonably affects the guilt-determining process. Although the involvement of the state may be a more serious matter than the conduct of defense counsel when it comes time to determine the relief to be provided, the constitutional question is still the same: Under all the circumstances, has the accused received representation of the quality to be expected from a lawyer of ordinary skill and care?

Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus,* 59 VA. L. REV. 927, 938-39 (1973) (footnote omitted).

[52] Incorporationists also use case precedent to support their argument. *See Decoster,* No. 72-1283, slip op. at 3-20 (concurring opinion, MacKinnon, J.). But precedent provides limited support for imposition of a prejudice requirement, since some courts have never directly focused on the incorporation debate. On a case-by-case basis, they avoid the issue either by finding prejudice without declaring it a necessary requirement (*see, e.g.,* United States v. Bosch, 584 F.2d 1113, 1122-23 (1st Cir. 1978)), or by holding that counsel's performance is not substantially inadequate (*see, e.g.,* United States v. Yelardy, 567 F.2d 863, 865-66 (6th Cir.), *cert. denied,* 439 U.S. 842 (1978); Rickenbacker v. Warden, 550 F.2d 62, 65-66 (2d Cir. 1976)). Furthermore, recent changes in the standards that define ineffectiveness (*see* notes 4-5 *supra*) undermine the usefulness of precedent in many circuits. The debate in *Decoster* illustrates this problem. *Compare* No. 72-1283, slip op. at 18-23 (Leventhal, J.) *and id.* at 3-20 (concurring opinion, MacKinnon, J.), *with id.* at 36-39 (concurring opinion, Robinson, J.) *and id.* at 6-8 (dissenting opinion, Bazelon, J.).

[53] *Decoster,* No. 72-1283, slip op. at 21 (concurring opinion, MacKinnon, J.).

[54] 421 U.S. 794 (1975).

[55] *Id.* at 799.

[56] The Court stated, "Petitioner has failed to show that the setting of the trial was inherently prejudicial, or that the jury-selection process of which he complains permits an inference of actual prejudice." *Id.* at 803.

Amendment cases like *Murphy,*" Judge MacKinnon wrote in *Decoster,* "courts should be wary of declaring certain acts or omissions of counsel, without proof of prejudice, to be *per se* Constitutional violations. . . ."[57]

This analogy overlooks the significant distinction between fifth and sixth amendment claims. Although the early right to counsel cases treated effective representation as an "incident of a fair trial," solely within the scope of the due process clause, subsequent cases directly applied the sixth amendment.[58] In cases like *Murphy,*[59] courts apply broad due process concepts of fundamental fairness. Unlike cases involving more specific constitutional guarantees, such as the right to counsel, a due process claim inherently requires proof of prejudice. A preferable analogy would involve other specific constitutional rights. For example, the Supreme Court protects a defendant's right to confront witnesses, a sixth amendment guarantee, without incorporating a prejudice requirement.[60] Similarly, a criminal defendant need not prove prejudice to demonstrate a denial of the privilege against self-incrimination, a specific fifth amendment guarantee.[61] Even fourth amendment violations carry a presumption of prejudice, although the government may prove harmless error to avoid reversal.[62] In effect, Judge MacKinnon assumed a result by selecting his analogy.[63]

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[57] *Decoster,* No. 72-1283, slip op. at 23 (concurring opinion, MacKinnon, J.).

[58] *See* note 2 *supra.*

[59] *See, e.g.,* United States v. Agurs, 427 U.S. 97 (1976).

[60] *See* Davis v. Alaska, 415 U.S. 308, 318 (1974) (petitioner denied right of effective cross-examination; government proof of absence of prejudice unavailing). *Cf.* Brown v. United States, 411 U.S. 223 (1973) and Harrington v. California, 395 U.S. 250 (1969) (determining that although confrontation right denied, government proved harmless error).

[61] *See* Haynes v. Washington, 373 U.S. 503, 518 (1963) (admission of involuntary confession reversible error regardless of "substantial independent evidence tending to demonstrate the guilt of the petitioner"); Lynumn v. Illinois, 372 U.S. 528, 537 (1963) (admission of involuntary confession reversible error; harmless error inapplicable). *Compare* Griffin v. California, 380 U.S. 609, 613 (1965) (automatically reversing conviction because of prosecutor's comments to jury on defendant's failure to testify) *with* Chapman v. California, 386 U.S. 18 (1967) (comments by trial judge regarding failure of defendant to testify reversible error because prosecution could not prove harmlessness beyond a reasonable doubt).

[62] *See* Chambers v. Maroney, 399 U.S. 42, 52-53 (1970) (upholding conviction because illegaliy sezied and admitted evidence harmless beyond a reasonable doubt). Since Mapp v. Ohio, 367 U.S. 643 (1961), the Supreme Court has limited the scope of the exclusionary rule. *See, e.g,* Stone v. Powell, 428 U.S. 465, 481-82 (1976) (finding no constitutional requirement of habeas corpus relief from a state court conviction where illegally seized evidence introduced at trial); United States v. Calandra, 414 U.S. 338 (1974) (exclusionary

b. *Common Law Allocation of the Burden of Proof.* Pointing to fundamental common law principles,[64] Judge MacKinnon noted that a claimant has the burden of persuasion on each element of his claim except where " 'the material necessary to prove or disprove an element "lies particularly within the knowledge" of the defendant.' "[65] He concluded that in an ineffective assistance of counsel claim, both the general rule and the exception require that the accused prove prejudice.[66]

This argument is conclusory, not explanatory. It first assumes that prejudice is an element of the claim, and then applies common law rules to allocate burdens of proof.[67] As a reason for

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rule not applicable to grand jury proceedings); Brown v. United States, 411 U.S. 223 (1973) (standing to invoke exclusionary rule granted only to victim of illegally obtained evidence). Nonetheless, the Court has not altered its requirement that the government prove harmless error to avoid reversal. *See* Franks v. Delaware, 438 U.S. 154, 162 (1977); Fahy v. Connecticut, 375 U.S. 85, 91-92 (1963).

[63] A more appropriate analogy supporting Judge MacKinnon's analysis is the treatment of the sixth amendment right to a speedy trial. The Supreme Court recognizes that proof of prejudice is one of several factors to be weighed in judging a speedy trial claim. Barker v. Wingo, 407 U.S. 514, 532-33 (1972). Judge Robinson, anticipating this analogy, pointed to features of the right to a speedy trial that distinguish it from other sixth amendment guarantees. He noted that the guarantee is not solely for the defendant's protection; it also protects society's interest in having criminals promptly incarcerated. Furthermore, the deprivation of the right may work to an accused's advantage. "Finally, unlike many other protections that can be safeguarded through exclusion of tainted evidence or reversal for a new trial, the only remedy for a speedy-trial violation is dismissal of the charge." *Decoster,* No. 72-1283, slip op. at 31 n.119 (concurring opinion, Robinson, J.). In Dickey v. Florida, 398 U.S. 30 (1970), Justice Brennan noted the Court's deviation from traditional sixth amendment analysis.

> Within the context of Sixth Amendment rights, the defendant generally does not have to show that he was prejudiced by the denial of counsel, confrontation, public trial, an impartial jury, knowledge of the charges against him, trial in the district where the crime was committed, or compulsory process. . . . Because concrete evidence that their denial caused the defendant substantial prejudice is often unavailable, prejudice *must* be assumed, or constitutional rights will be denied without remedy. Prejudice is an issue . . . only if the government wishes to argue harmless error.

398 U.S. at 54-55 (concurring opinion) (emphasis in original) (citations omitted).

[64] 9 WIGMORE ON EVIDENCE § 2486 (3d ed. 1940).

[65] *Decoster,* No. 72-1283, slip op. at 24 (concurring opinion, MacKinnon, J.). (quoting Nader v. Allegheny Airlines, 512 F.2d 527, 538 (D.C. Cir. 1975), *rev'd on other grounds,* 426 U.S. 290 (1976)).

[66] *Id.* at 25.

[67] Judge Robinson responded to the assertion that because ineffective representation is particularly within the knowledge of the accused, the defendant should bear the burden of proof: "This argument overlooks the distinction between establishing substantially deficient representation, and identifying the effect of the deficiency. . . . [O]nce counsel's deficiencies have been documented, resolution of an issue of injury to the defendant's interests does not require peculiar reference to evidence controlled by the defendant." *Id.* at 35 n.137 (concurring opinion, Robinson, J.).

incorporating a prejudice requirement, the argument is unpersuasive.[68]

More fundamentally, the argument contradicts the underlying principles of the harmless error doctrine.[69] The Supreme Court has strictly limited the use of "harmless-constitutional-error"[70] by requiring proof that the constitutional error is harmless beyond a reasonable doubt.[71] This rule creates an explicit presumption that all constitutional violations are prejudicial. Accordingly, the burden of proving harmlessness always rests with the government. Incorporationists avoid this result by including the prejudice requirement in the definition of the constitutional error. But in forcing the accused to prove injury, they reverse the explicit presumption that all constitutional errors are harmful.[72]

c. *Attorney-Client Relations and the Adversarial System.* The incorporationists also argue that a proof of prejudice requirement protects attorney-client relations and preserves the adversarial process,[73] making the requirement a necessary alternative to

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[68] Judge MacKinnon posed this argument to justify incorporating prejudice into the effectiveness claim, not merely to alter traditional burden of proof allocations in harmless error analysis. *Id.* at 3 (concurring opinion, MacKinnon, J.).

[69] Harmless error is a statutory privilege permitting the government to avoid reversal of criminal convictions "for small errors or defects that have little, if any, likelihood of having changed the result of the trial." Chapman v. California, 386 U.S. 18, 22 (1967). A typical statutory formulation of the harmless error rule is FED. R. CRIM. P. 52(a): "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." *See also* 28 U.S.C. § 2111 (1976): "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." *See generally* Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale,* 125 U. PA. L. REV. 15 (1976); Note, *Principles for Application of the Harmless Error Standard,* 41 U. CHI. L. REV. 616 (1974).

[70] Chapman v. California, 386 U.S. 18, 22 (1967).

[71] *Id.* at 24.

[72] Ironically, Judge MacKinnon rejected the propriety of using harmless error at all, as it "does not apply to 'constitutional' errors that 'affect substantial rights' of a party." *Decoster,* No. 72-1283, slip op. at 29 n.24 (concurring opinion, MacKinnon, J.) (quoting Chapman v. California, 386 U.S. at 23). "It is our view that the Constitutional violation is not made out *until* the defendant has carried his complete burden; at that point in inadequate assistance cases, the analysis is over and the harmless error doctrine does not apply." *Id.* (emphasis in original). In another portion of his opinion, Judge MacKinnon contradicted this analysis. Responding to Judge Bazelon's interpretation of *Chapman,* that "the burden in each case rests squarely on the government to prove beyond a reasonable doubt that [the] error was harmless" (*id.* at 60-61 (dissenting opinion, Bazelon, J.)), Judge MacKinnon stated, "I have no quarrel with that interpretation of *Chapman:* once a constitutional error is proven the burden of proceeding does shift to the government to prove that the error is harmless." *Id.* at 44 (concurring opinion, MacKinnon, J.).

[73] *Id.* at 25-29 (concurring opinion, MacKinnon, J.).

harmless error.[74] They allege that the difficult burden of proving harmlessness[75] encourages the government to monitor the defense's activities in order to shelter convictions from potential sixth amendment attacks. They charge that prosecutors might actively investigate the adequacy of counsel's trial preparation and ultimately invade the privacy of attorney-defendant relationships.[76]

But this overstates the problem. Even the nonincorporationists require that a defendant prove a substantial breach of duty before they examine harmlessness.[77] Little incentive exists for a prosecutor to conduct an overly aggressive investigation of the defense. And to the extent that an incentive arises, courts could establish procedures for monitoring a prosecutor's investigatory conduct.[78]

Incorporationists also fear that the harmless error approach could alter the role of the trial judge. They envision prosecutors, in an effort to protect their cases, requesting that the judge correct erroneous decisions of the defense. "[T]he result could well be judicial supervision of many of the tactical trial decisions of defense counsel."[79] Nevertheless, "[i]t is the judge, not counsel,

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[74] *See* notes 69-72 and accompanying text *supra.*

[75] The government must prove harmless error "beyond a reasonable doubt." Chapman v. California, 386 U.S 18, 22 (1967). This is not an insurmountable task, however, as Judge Robinson's opinion demonstrates. *See Decoster,* No. 72-1283, slip op. at 42 (concurring opinion, Robinson, J.).

[76] *See id.* at 25-27 (concurring opinion, MacKinnon, J.). The government may already have a moral obligation to investigate defense attorney deficiencies. *See* ABA STANDARDS, The Prosecution Function § 3.11(C), at 93 (1974). This corresponds with the Supreme Court's description of the unique role of a prosecutor:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935).

The incorporationists' concern for protecting the privacy of attorney-client relations is questionable for another reason. As Judge Bazelon noted, "[T]he attorney-client privilege is designed to protect the client, not the attorney. It is incongruous to suggest that the sanctity of that privilege should act as a shield to block efforts at safeguarding the defendant's rights." *Decoster,* No. 72-1283, slip op. at 75 n.162 (dissenting opinion, Bazelon, J.).

[77] *See* note 100 and accompanying text *infra.*

[78] Courts could establish informal procedures for authorizing and controlling an investigation. For example, a court could require the prosecutor to show just cause, as a prerequisite, and could demand a list of particulars narrowly defining the scope of the proposed investigation. Furthermore, the court could impose sanctions if the prosecutor abuses the investigatory privilege. For an example of similar proposals concerning the judge's direct control over defense counsel, see note 82 and accompanying text *infra.*

[79] *Decoster,* No. 72-1283, slip op. at 26 (concurring opinion, MacKinnon, J.).

who has the ultimate responsibility for the conduct of a fair and lawful trial."[80] A judge need not violate principles of judicial neutrality by taking an active role in this context.[81] Indeed, by supervising the effectiveness of a defendant's representation, the judge protects the adversarial quality of the system.[82] It is speculative, at best, to assume that because ineffective assistance is defined without reference to prejudice, "[o]ur adversary system will be tortured out of shape."[83]

3. *The Likelihood Compromise*

In *Decoster,* Judge Leventhal formulated a slightly different incorporationist theory. Under his approach, the accused must show a "likelihood" that the alleged ineffectiveness had an impact on the trial;[84] once he does, the government must prove harmless error to avoid reversal. This compromise attempts to balance the social costs of a more liberal standard[85] against the legal inconsistencies of an actual prejudice requirement. Judge Leventhal

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[80] Lakeside v. Oregon, 435 U.S. 333, 341-42 (1978). *See also* McMann v. Richardson, 397 U.S. 759, 771 (1970): "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel .... [J]udges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts."

[81] *Cf.* Frankel, *The Search for Truth: An Umpireal View,* 123 U. PA. L. REV. 1031 (1975) (questioning the utility and propriety of the criminal adversary system as a means of finding truth).

[82] One method of monitoring effectiveness is to abandon the mere "Is defense ready?" interrogation at trial. This could be replaced with an extensive checklist of inquiries to insure adequate trial preparation. *Decoster,* No. 72-1283, slip op. at 72-73 (dissenting opinion, Bazelon, J.). *See also* Tague, *The Attempt to Improve Criminal Defense Representation,* 15 AM. CRIM. L. REV. 109, 164 n.285 (1977); Finer, *Ineffective Assistance of Counsel,* 58 CORNELL L. REV. 1077, 1119 (1973).

[83] *Decoster,* No. 72-1283, slip op. at 35 (Leventhal, J.).

[84] *Id.* at 36-37. *See* Commonwealth v. Saferian, 366 Mass. 87, 315 N.E.2d 878 (1974).

[85] "Our approach toward the minimum legal obligations of our democratic society to ward off injustice may be more earthbound, but in our view it is more salutary." *Decoster,* No. 72-1283, slip op. 42 (Leventhal, J.). This reflects the concern that under a more stringent approach, "judgments would be under constant attack, and judges 'would become Penelopes, forever engaged in unravelling the webs they wove.' " Commonwealth v. Saferian, 366 Mass. 89, 99, 315 N.E.2d 878, 884 (1974) (quoting L. Hand, J., in Jorgensen v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir.), *cert. denied,* 332 U.S. 764 (1947)). But the nonincorporationist approach may be more efficient, since it attempts to define counsel's duties objectively. *See* notes 97-99 and accompanying text *infra.* Such objective standards decrease judicial discretion and the consequent possibility of reversible error. *See, e.g.,* United States v. Pinkney, 543 F.2d 908, 916-17 (D.C. Cir. 1976) (affirming denial of motion for new trial because appellant failed to support ineffective assistance claim with documentary evidence).

argued that requiring the government to demonstrate harmlessness is unnecessary and unreasonable where the defendant has not shown a likelihood of prejudice. Consider, for example, the case of an accused who tells his lawyer that he has no alibi defense. This defendant can hardly claim ineffective representation if his lawyer fails to interrogate potential alibi witnesses. Judge Leventhal would say that no likelihood of prejudice exists. But courts would reach the same result without applying a likelihood rule by examining the reasonableness of the attorney's conduct. In the above example, there is no basis for claiming ineffectiveness because counsel's actions are not demonstrably unreasonable. Moreover, even if special circumstances indicate lawyer negligence,[86] the absence of a likelihood of prejudice will surface during the harmless error analysis.

Ultimately, the likelihood compromise fails to reconcile the conflict between incorporation theory and harmless error. A court cannot logically hold that ineffectiveness is harmless beyond a reasonable doubt if the defendant has already proved a likelihood of prejudice.[87] The likelihood ruling decides the claim and therefore accomplishes the same result as the actual prejudice rule; it improperly places the burden of proving harmfulness on the defendant.[88]

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[86] For example, extraneous evidence might indicate that the attorney could not reasonably have relied on his client's assertions. Under these circumstances, the duty to investigate would not automatically vanish.

[87] For a discussion of the practical meaning of different harmless error proof standards, see Note, *Harmful Use of Harmless Error in Criminal Cases,* 64 CORNELL L. REV. 538, 550-52 (1979). Some commentators have suggested that a beyond-a-reasonable-doubt standard requires a 76-95% certainty. *Id.* at 550 n.55.

[88] Holloway v. Arkansas, 435 U.S. 475 (1978), suggests another practical problem with the likelihood rule — the probability that ineffective assistance will prejudice a defendant's ability to negotiate a favorable plea. The *Holloway* Court stated that harm during plea bargaining automatically establishes a presumption of prejudice:

> Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. For example, in this case it may well have precluded defense counsel ... from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution, provided a lesser charge or a favorable sentencing recommendation would be acceptable. ... [T]he evil ... is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process.

*Id.* at 489-90 (emphasis in original).

The ramifications of prejudice during plea negotiations are significant. The Supreme Court has endorsed plea bargaining as "an essential component of the administration of justice," Santobello v. New York, 404 U.S. 257, 260 (1971), and commentators estimate that 90% of all criminal convictions are the result of guilty pleas. D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966); H. MILLER, W.

C. *Nonincorporationist Theory*

The nonincorporationists carefully distinguish between procedural due process and substantive sixth amendment law. "Fundamental fairness" is the standard of ordinary due process.[89] When a court reviews an alleged denial of this guarantee, it appraises the "totality of facts in a given case" and determines whether the accused has been prejudiced.[90] In *Gideon v. Wainwright*,[91] the Supreme Court shunned this approach, recognizing that the right to counsel comes from the sixth amendment, not the due process clause.[92] The Court therefore reversed Gideon's conviction without requiring a showing of prejudice. Nonincorporationists follow this distinction when they assert that prejudice is also irrelevant to a claim of ineffective assistance.[93]

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McDONALD & J. CRAMER, PLEA BARGAINING IN THE UNITED STATES 18-22 (1978) (suggesting that statistics vary widely regardless of size of jurisdiction, but confirming that Newman's estimates are reasonable).

*Decoster* illustrates the importance of this issue. Evidence during the trial indicated that a possible plea bargain had been discussed. *Decoster*, No. 72-1283, slip op. at 53 n.120 (dissenting opinion, Bazelon, J.). Also, Decoster's accomplices, represented by other lawyers, pleaded guilty to a lesser charge. United States v. Decoster, 487 F.2d 1197, 1199 (D.C. Cir. 1973). These circumstances suggest the likelihood that Decoster's ability to bargain a plea effectively was prejudiced. Judge Robinson rejected this argument, noting that Decoster did not raise the issue on appeal, He also noted that Decoster failed to allege specific facts to support his contention, as required by United States v. Pinkney, 543 F.2d 908 (D.C. Cir. 1976), and failed to demonstrate his amenability to such a plea. *Decoster*, No. 72-1283, slip op. 42 n.158 (concurring opinion, Robinson, J.).

[89] "The phrase [due process] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule." Betts v. Brady, 316 U.S. 455, 462 (1942).

[90] Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

*Id.* at 462.

[91] 372 U.S. 335 (1963).

[92] In Betts v. Brady, 316 U.S. 455 (1942), the Court had ruled that the more "fluid" due process analysis applied to assistance of counsel claims in state courts. *Gideon* overruled *Betts* by deciding that because the assistance of counsel is fundamental to a fair trial, this sixth amendment right is a constitutionally protected liberty interest, applicable to the states through the fourteenth amendment due process clause. *Gideon*, 372 U.S. at 338-39.

[93] "The Sixth Amendment right to counsel proscribes with equal force denials of reasonably competent and effective counsel, for '[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.' " Cooper v. Fitzharris, 586 F.2d 1325, 1338 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979) (concurring and dissenting opinion, Hufstedler, J.) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)). *See* note 5 *supra*.

Nonincorporationists also argue that a prejudice requirement conflicts with the harmless-constitutional-error doctrine,[94] which protects fundamental rights by requiring the government to prove an absence of prejudice beyond a reasonable doubt. They assert that courts should examine prejudice in an ineffective assistance of counsel case, if at all,[95] only in a harmless error analysis. Incorporationist theories, they argue, improperly shift burdens of proof.

Nonincorporationists measure effective representation by focusing on the reasonableness of the attorney's conduct, rather than its impact. Accordingly, "the defendant establishes a constitutional violation when he makes out a substantial breach of duty by his counsel. . . ."[96] Adherents to this approach identify specific obligations of counsel by referring to accepted performance guidelines.[97] These guidelines[98] provide an objective yardstick for measuring the "frequency and pervasiveness of defense counsel's omissions and failures"[99] and permit the nonincorporationists to determine whether a breach is substantial without examining prejudicial impact.[100]

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[94] *See* notes 69-72 and accompanying text *supra.*

[95] *See* note 12 *supra.*

[96] *Decoster,* No. 72-1283, slip op. at 14 (concurring opinion, Robinson, J.).

[97] *See* Marzullo v. Maryland, 561 F.2d 540, 544 (4th Cir.), *cert. denied,* 435 U.S. 1011 (1978); United States v. Decoster, 487 F.2d 1197, 1203 (D.C. Cir. 1973). The following sources provide sucb guidelines: ABA CODE OF PROFESSIONAL RESPONSIBILITY AND JUDICIAL CANONS CODE OF JUDICIAL CONDUCT (1978); ABA STANDARDS, RELATING TO THE DEFENSE FUNCTION (1974); NATIONAL ADVISORY COMMISSION, ON CRIMINAL JUSTICE STANDARDS AND GOALS (1973).

[98] *See, e.g.,* ABA STANDARDS, *supra* note 97, at § 3.2(a) (duty to interview accused promptly to determine facts known); § 3.6(a) (duty to inform accused of his rights, including duty to make pretrial release motions); § 3.8 (duty to inform client of case developments and defense preparation); § 4.1 (duty to investigate and explore "all avenues leading to facts relevant to guilt . . . to secure information in the possession of the prosecution and law enforcement authorities. . . . [and] to investigate . . . regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or . . . desire to plead guilty"); § 5.1(a) (duty to advise accused concerning all aspects of case including probable outcome); § 5.2(b) (duty to make strategic and tactical decisions after consultation with clients). *But cf.* Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978) (en banc), *cert. denied,* 440 U.S. 974 (1979) ("[I]t would be unwise to restrict the constitutional requirement to a list of essential elements applicable to all of the infinite variety of factual situations that arise.").

[99] *Decoster,* No. 72-1283, slip op. at 42 (dissenting opinion, Bazelon, J.).

[100] The nonincorporationists do not allege that every breach of duty rises to the level of ineffective representation. They specifically require that the violation be substantial. *See Decoster,* No. 72-1283, slip op. at 41-42 (dissenting opinion, Bazelon, J.); Cooper v. Fitzharris, 586 F.2d 1325, 1340 (9th Cir. 1978) (en banc) (concurring and dissenting opinion, Hufstedler, J.), *cert. denied,* 440 U.S. 974 (1979). The substantiality requirement comes in part from McMann v. Richardson, 397 U.S. 759, 774 (1970), where the Supreme Court

Also, nonincorporationists argue that a prejudice requirement improperly distinguishes between the rights guaranteed the innocent, and those guaranteed the guilty.[101] In American jurisprudence, "guilt" is a function of legal processes, not a description of factual circumstances.[102] By requiring the accused to prove prejudice, the incorporationists are ultimately demanding evidence of innocence.[103] But such evidence may be missing from the trial record *because* of the lawyer's ineffectiveness. Therefore, the prejudice requirement undermines important process values of criminal procedure.[104]

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referred to the necessity of proving "serious derelictions on the part of counsel." This requirement also avoids a conflict with the plain error doctrine. *See* FED. R. CRIM. P. 52(b) ("Plain errors or defects affecting *substantial* rights may be noticed although they were not brought to the attention of the court") (emphasis added). The plain error doctrine permits a court to review isolated trial errors, and to reverse a conviction when the defendant can show a high probability of prejudice. United States v. Dixon, 562 F.2d 1138, 1143 (9th Cir.) (prosecutorial error), *cert. denied,* 435 U.S. 927 (1977). Without a substantiality requirement, plain errors could be advanced as ineffective assistance of counsel claims, thus permitting the accused to avoid the burden of demonstrating plain error prejudice. *See* Cooper v. Fitzharris, 586 F.2d at 1333 (advancing this anomaly as a reason for requiring prejudice in ineffectiveness claims). *Cf.* United States v. Easter, 539 F.2d 663, 665-66 (8th Cir. 1976) (refusing to find plain error, but remanding case because of ineffective assistance of counsel).

[101] *See* Bazelon, *The Realities of* Gideon *and* Argersinger, 64 GEO. L.J. 811 (1976); Bazelon, *The Defective Assistance of Counsel,* 42 U. CIN. L. REV. 1 (1973).

[102] *Cf.* Note, *supra* note 87, at 541 (discussing erosion of the distinction as a general problem of harmless error analysis).

[103] Judge MacKinnon implicitly expressed this view in *Decoster:* "We now know, on the basis of Decoster's admission at sentencing . . . that he was guilty. . . . Even without Decoster's admissions, it would be hard to imagine a case with more certain proof of guilt and with less room for creditable contrary evidence." *Decoster,* No. 72-1283, slip op. at 38-39 (concurring opinion, MacKinnon, J.).

Incorporationists also suggest that guilt or innocence should color the quality of representation. For example, responding to the dissent's claim that an attorney's duty to investigate is not relieved by a perception of his client's guilt or innocence, Judge MacKinnon wrote in *Decoster:* "This pronouncement is foreign to a lawyer's basic obligation to the court and his profession. When, as here, defense counsel has reasonable grounds for believing his client guilty, that perception *must* influence his representation of the client." *Id.* at 50-51 (emphasis in original). *See also* United States v. Yelardy, 567 F.2d 863, 865 n.2 (6th Cir.), ("As a matter of both *practical and constitutional significance,* we note that counsel's obligation to conduct an independent, factual investigation is substantially diminished once counsel has reasonable cause to believe his client guilty.") (emphasis added) *cert. denied,* 439 U.S. 842 (1978). *Cf.* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. CHI. L. REV. 142 (1970).

[104] Nonincorporationists also assert that a prejudice requirement negates "the educative impact that the 'reasonable competency' test could have in providing guidance to practicing attorneys about standards of professional competency." Cooper v. Fitzharris, 586 F.2d 1325, 134-42 (9th Cir. 1978) (en banc) (concurring and dissenting opinion, Hufstedler, J.), *cert. denied,* 440 U.S. 974 (1979). Bar association grievance procedures and post-conviction civil remedies have proved inadequate to improve lawyer quality. S. KRANTZ, RIGHT TO

## II

## RESOLVING THE CONFLICT

Nonincorporationists correctly assess the significance of *Gideon v. Wainwright.*[105] *Gideon* permanently altered constitutional law by holding that the right to counsel is a protected liberty interest, fully applicable to the states through the fourteenth amendment.[106] By abandoning ordinary due process methodology,[107] *Gideon* converted all assistance of counsel cases into sixth amendment claims. Because of *Gideon,* a denial of the right to counsel always requires automatic reversal.

Implicitly, *Gideon* also converted the right to *effective* assistance of counsel into a sixth amendment guarantee.[108] Accordingly, whenever ineffective aid is equivalent to a denial of the assistance of counsel, reversal must follow automatically. By demonstrating equivalence, an accused establishes a sixth amendment claim.

To measure equivalence, however, courts must formulate rules. In his article, *Constitutional Common Law,*[109] Professor

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COUNSEL IN CRIMINAL CASES 198-200 (1976). By focusing on lawyer impact, rather than performance, courts tacitly wink at attorney incompetence and ignore their responsibility "to ensure that a criminal defendant receives a fair trial." United States v. Bosch, 584 F.2d 1113, 1124 (1st Cir. 1978) (citations omitted). *See* notes 80-82 and accompanying text *supra.*

[105] 372 U.S. 335 (1963). *See* notes 89-93 and accompanying text *supra.*

[106] *Id.* at 339.

[107] *See* notes 90-91 and accompanying text *supra.*

[108] *See* Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus,* 59 VA. L. REV. 927 (1973), *supra* note 51, at 932-37.

> *Gideon* established that, because of the nature of the adversary system, it is inherently unfair to prosecute a defendant who is without benefit of counsel. The point is elementary that the right to counsel is hollow when counsel is not effective. The same policies that lie behind the *Gideon* right to counsel apply with equal force to the requirement that counsel be effective.

*Id.* at 935. Before *Gideon,* the Supreme Court had recognized that in federal proceedings the sixth amendment guaranteed effective representation. *See, e.g.,* Glasser v. United States, 315 U.S. 60, 76 (1942). As applied to state courts, the "effective aid" gloss developed as an element of due process. *See* notes 2 & 4 *supra.* Reflecting the implications of *Gideon,* the Court has repeatedly reviewed state proceedings and referred to the sixth amendment right to effective assistance. *See, e.g.,* Holloway v. Arkansas, 435 U.S. 475, 481 (1978); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). *See also* Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970) (en banc) ("[T]he standard which prevails in federal cases under the Sixth Amendment should be applied equally to state convictions, to which the same guarantee is made applicable by the Fourteenth Amendment under Gideon v. Wainwright.").

[109] Monaghan, *The Supreme Court, 1974 Term—Foreword: "Constitutional Common Law",* 89 HARV. L. REV. 1 (1975) A thorough consideration of the assumptions underlying Professor Monaghan's theory is beyond the scope of this Note. For a discussion that challenges its textual and philosophical justifications, see Schrock & Welsh, *Reconsidering the Constitutional Common Law,* 91 HARV. L. REV. 1117 (1978). *But see* Turpin v. Mailet, 579 F.2d 152, 157

Monaghan distinguishes between constitutional rules and constitutional common law. True constitutional rules permanently structure the constitution's meaning by defining the minimum requirements of a right.[110] The constitutional common law, however, expands these minimum requirements by implementing discretionary subconstitutional objectives.[111] The constitutional common law forms "a substructure of substantive, procedural and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions."[112]

> [T]he distinction between true constitutional rules and constitutional common law lies in the clarity with which the former is perceived to be related to the core policies underlying the constitutional provision. . . .
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> . . . .
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> . . . The more a rule is perceived to rest upon debatable policy choices or uncertain empirical foundations the more likely it will be seen to be common law.[113]

This theory provides a useful framework for understanding and formulating rules of equivalence for ineffective assistance of counsel cases.[114]

The Supreme Court has already established rules for some ineffective aid claims. For example, in *Holloway v. Arkansas,*[115] the

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(2d Cir. 1978) (en banc) (applying theory to create a private right of action from the fourteenth amendment), *vacated,* 439 U.S. 974 (1978) (holding doctrine, as applied, unnecessary).

[110] *See, e.g.,* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (protecting speech that advocates use of force "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (prohibiting "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.' ").

[111] *See, e.g.,* the exclusionary rule of Mapp v. Ohio, 367 U.S. 643 (1961), as applied in United States v. Calandra, 414 U.S. 338 (1974) and United States v. Peltier, 422 U.S. 531 (1975). This rule implements important fourth amendment policies, but is not itself an essential element of the Constitution. *Monaghan, supra* note 109, at 3-10. The "warnings" requirement of Miranda v. Arizona, 384 U.S. 436 (1966) is another example of constitutional common law. *Monaghan, supra* note 109, at 2, 20-23. Like the common law gloss on any ordinary federal statute, constitutional common law may be altered by the express word of Congress. *Id.* at 31.

[112] *Id.* at 2-3.

[113] *Id.* at 33-34.

[114] Professor Monaghan suggested such an approach when he stated that "[o]ne could also fashion common law, grounded on the right to counsel. . . ." *Id.* at 43.

[115] 435 U.S. 475 (1978).

Court determined that joint representation by a lawyer with conflicting interests is equivalent to a denial of the assistance of counsel.[116] Accordingly, when this occurs, reversal is automatic.[117] The rule is constitutional because it is closely "related to the core policies underlying the constitutional provision."[118] The right to counsel affects an accused's ability to assert all his other rights,[119] and for this reason, it is necessary for a fair trial. This policy is directly undermined, however, "when the advocate's conflicting obligations have effectively sealed his lips on crucial matters."[120] In *Holloway*, the Court protected the underlying policy by formulating a constitutionally compelled rule of equivalence.

*Geders v. United States*[121] provides another constitutional rule. In *Geders*, a trial court had prevented an accused from meeting with his attorney during an overnight recess. The Supreme Court overturned the conviction without considering whether the defendant had been prejudiced.[122] Thus, *Geders* equates the partial denial of assistance with the complete absence of counsel. Presumably, the Court did not formulate this constitutional rule to remedy an injustice in the case at hand, but rather, to curb the extraordinary potential for abuse. Only by creating a prophylactic rule could the Court advance the underlying fair trial policy.[123]

[116] *Id.* at 487-91. *See also* Glasser v. United States, 315 U.S. 60, 76, (1942).

[117] Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978). *See* note 41 *supra.*

[118] *Monaghan, supra* note 109, at 33.

[119] "Of all of the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to to assert any other rights he may have." Schaefer, *Federalism and State Criminal Procedure,* 70 HARV. L. REV. 1, 8 (1956).

[120] Holloway v. Arkansas, 435 U.S. 475, 490 (1978).

[121] 425 U.S. 80 (1976).

[122] *Id.* at 91.

[123] A prophylactic rule might be constitutionally compelled when it is necessary to overprotect a constitutional right because a narrow, theoretically more discriminating rule may not work in practice. This may happen where, for example, there is a substantial danger that a more finely tuned rule may be subverted in its administration by unsympathetic courts, juries or public officials. *Monaghan, supra* note 109, at 21. Professor Monaghan offers as an example New York Times Co. v. Sullivan, 376 U.S. 254 (1964), where "[a]n absolute privilege might be justified on the ground that any lesser protection would prove insufficient when administered by unsympathetic juries." *Monaghan, supra* note 109, at 21-22 n.113.

The Court apparently overprotected the right to counsel by requiring automatic reversal in Herring v. New York, 422 U.S. 853 (1975). In *Herring*, the Court held unconstitutional a statute that permitted a judge to dispense with summation arguments in nonjury cases. The right to counsel, however, should not constitutionally mandate that a judge permit summation arguments in all criminal cases. Even in jury cases, judges can exercise broad discretion to limit the scope of a defense attorney's closing arguments. *See, e.g.,* United States v. Busic, 592 F.2d 13 (2d Cir. 1978). Indeed, the refusal to permit summations appears to implicate questions of procedural due process rather than the right to counsel. The *Herring* dissent argued:

The Court has not defined rules of equivalence for late appointment of counsel claims.[124] Constitutionally, the minimum requirement for effective assistance is that the appointment of counsel permit a reasonable time for trial preparation. But to avoid a case-by-case examination of circumstantial prejudice, the methodology of ordinary due process, courts must define reasonableness substantively. For this reason, the Supreme Court should formulate constitutional common law rules for measuring late appointments. For example, the Court might impose specific time requirements according to offense classifications.[125] An accused

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> [B]eyond certain of the specified rights in the Bill of Rights, however, I do not understand the basis for abandoning the case-by-case approach to fundamental fairness. . . .
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> . . . The truth of the matter is that appellant received a fair trial, and I do not read the Court's opinion to claim otherwise. The opinion instead establishes a right to summation in criminal trials regardless of circumstances, by tagging that right onto one of the specifically incorporated rights. It thereby conveniently avoids the difficulties of being unable to characterize appellant's trial as fundamentally unfair, but only at the expense of ignoring the logical difficulty of adorning the specifically incorporated rights with characteristics which are not themselves necessary for fundamental fairness.

*Id.* at 868, 871 (dissenting opinion, Rehnquist, J.).

In Brooks v. Tennessee, 406 U.S. 605 (1972), the Supreme Court decided an analogous issue on grounds of procedural due process. In *Brooks,* the Court reviewed the constitutionality of a state statute requiring an accused who wishes to testify to take the stand immediately after the close of the prosecution's case. The Court stated that this rule impermissibly deprived the accused of the " 'guiding hand of counsel' in the timing of this critical element of the defense." *Id.* at 612-13 (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)). It concluded that "the accused and his counsel may not be restricted in deciding whether, and when in the course of presenting his defense, the accused should take the stand." Brooks v. Tennessee, 406 U.S. at 613. Unlike *Herring, Brooks* did not link this infraction directly to the sixth amendment right to counsel. Rather, it held that the statute denied the defendant due process. *Id.* at 612. This may explain why *Brooks,* unlike *Herring,* implied that it could have been appropriate to consider the harmlessness of the error, had the state raised that issue. *Id.* at 613.

[124] Chambers v. Maroney, 399 U.S. 42 (1970), is the only post-*Gideon* case on point. *See* note 43 *supra.* But in *Chambers,* the court did not reach the equivalence issue. The Third Circuit had applied a presumption-of-prejudice rule to determine that a late appointment of counsel had denied the defendant effective aid. The Court also had held that the ineffectiveness was harmless error. United States *ex rel.* Chambers v. Maroney, 408 F.2d 1186, 1189-90 (3d Cir. 1969). By affirming the conviction, the Supreme Court merely indicated that harmless error is appropriate in some ineffectiveness cases.

[125] The Supreme Court might also permit state courts to create their own rules to govern late appointment cases. *Monaghan, supra* note 109, at 37-38. The Court has the power to reject state law in view of its special competence in interpreting the Constitution and the need for a uniform national law of civil liberties. *Id.* at 38. *See also* United States *ex rel.* Frizer v. McMann, 437 F.2d 1312, 1315-17 (2d Cir. 1971) (en banc) (discussing need for specific rules to determine speedy trial violations).

would prove ineffectiveness by showing a violation of one of these rules.[126] The rules would not be "necessary dimensions of an underlying Constitutional right,"[127] but would "rest upon debatable policy choices or uncertain empirical foundations."[128] Therefore, they would form constitutional law.

The same approach would apply to effective performance cases. In *McMann v. Richardson,*[129] the Court determined that when an accused pleads guilty to a criminal charge on advice of counsel, he acts knowingly only if that advice is "within the range of competence demanded of attorneys in criminal cases."[130] Certainly the Supreme Court intended to offer as much protection to those who plead innocent as to those who plead guilty. Accordingly, the minimum constitutional requirement for effective assistance is that the attorney's performance fall "within the range of competence demanded of attorneys in criminal cases."[131] As with the reasonableness standard of the late appointment cases, a competence standard will duplicate due process methodology unless the Court identifies objective duties of competent behavior.[132] Such standards would implement the underlying guarantee of effective aid, and like the rules that protect an accused from late appointment of counsel, would be constitutional common law.[133]

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[126] A difficult problem arises when an accused alleges tbat the appointment was ineffective as applied to him. Consider, for example, a rule requiring the court to appoint counsel not less than one week before trial in all second-degree manslaughter cases. Assume also that an appointment is made seven days in advance of trial. Upon conviction, may the accused appeal, claiming that his case was extraordinarily complicated and that seven days was an unreasonably short amount of time for attorney preparation? To permit such a challenge would strip the rule of its utility. But other paths exist. The appellant might demonstrate that the rule is unreasonable on its face. He also might demonstrate that as applied, the "late appointment" rule denied him his right to fundamental fairness (due process). This would require a demonstration of prejudice.

[127] *Monaghan, supra* note 109, at 22.

[128] *Id.* at 34.

[129] 397 U.S. 759 (1970).

[130] *Id.* at 771.

[131] For a discussion of the use of *McMann* by circuit courts, see note 34 *supra.*

[132] For examples of these standard duties, see note 98 *supra.*

[133] By defining these rules as constitutional common law, the Court would avoid the problems that result from formulating rigid constitutional rules and remedies:

> So long as the rules are thought to be constitutional in character, however, pressures for change can be accommodated only through an express overruling of prior doctrine, or the whittling away of an original holding through spurious "distinctions" or through such devices as doctrines of waiver, standing and harmless error.

*Monaghan, supra* note 109, at 27. Unlike true constitutional rules, constitutional common law may be altered by congressional act. *See generally id.* Consider the analogous involvement of Congress in providing pre-trial investigation funds for the indigent. 18 U.S.C.

The rules discussed above, both constitutional and constitutional common law, define effective assistance of counsel without reference to prejudice. For this reason, incorporation can be rejected as an unnecessary and undesirable distortion of sixth amendment law. This theory, however, must still explain why the Supreme Court has used a harmless error analysis in some ineffective assistance situations.[134]

*Chapman v. California*[135] defines the contours of "harmless-constitutional-error." *Chapman* acknowledged that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."[136] The Court created a special constitutional harmless error rule for such cases by requiring that the beneficiary of the error prove harmlessness beyond a reasonable doubt.[137]

*Chapman* also declared that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error,"[138] but failed to explain when this more stringent standard of review would apply.[139] Significantly, the Court supported this proposition by citing *Gideon*,[140] suggesting that a de-

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§ 3006A(e) (1976). Although this act applies only to federal courts, one circuit has recognized its underlying constitutional basis, and by analogy, has used it to review a state court conviction. Mason v. Arizona, 504 F.2d 1345, 1351-55 (9th Cir. 1974), *cert. denied* 420 U.S. 936 (1975).

[134] *See* note 124 *supra*.

[135] 386 U.S. 18 (1967).

[136] *Id.* at 22.

[137] *Id.* at 24.

[138] *Id.* at 23.

[139] In Holloway v. Arkansas, 435 U.S. 475 (1978), the Court offered an explanation for its refusal to use harmless error:

> In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. . . . But in a case of joint representation of conflicting interests the evil—it bears repeating — is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. . . . Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

*Id.* at 490-91 (emphasis in original). Thus, despite the language of *Chapman*, the Court in *Holloway* focused on the measurability of the prejudice, rather than the nature of the right.

[140] Chapman v. California, 386 U.S. 18, 23 n.8 (1967). *See also* Glasser v. United States, 315 U.S. 60, 76 (1942) ("The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.")

nial of the assistance of counsel is never harmless.[141] Similarly, courts should never apply harmless error when ineffective assistance is equivalent to a violation of the underlying constitutional right.[142] By determining whether a ruling is constitutional or constitutional common law, one can also determine whether harmless error analysis is permissible.

This explains why the Court refused to apply harmless error in *Holloway*[143] and *Geders*.[144] In both cases, constitutional rules of equivalence were violated. Accordingly, harmless error could not be applied without contradicting *Chapman*. This analysis also explains why courts may use harmless error in late appointment[145] and inadequate performance of counsel cases.[146] Rules that measure ineffectiveness for these cases advance important policies, but do not define constitutional equivalence. They merely create "a subconstitutional penumbral area formed by emanations" from the constitutional right.[147] Therefore, no constitutional conflict

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[141] *See* 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE (CRIMINAL) § 855 (1969); Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519, 541 (1969).

[142] *Compare* Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974) ("Harmless error tests do not apply in regard to the deprivation of a procedural right so fundamental as the effective assistance of counsel") *with* McQueen v. Swenson, 498 F.2d 207, 218 (8th Cir. 1974) (permitting harmless error analysis when counsel ineffective, but not when assistance completely absent).

[143] *See* notes 115-17 and accompanying text *supra*.

[144] *See* notes 121-23 and accompanying text *supra*.

[145] *See* notes 125-28 and accompanying text *supra*.

[146] *See* notes 129-32 and accompanying text *supra*.

[147] *Monaghan, supra* note 109, at 18 n.98. This distinction also explains the Supreme Court's use of harmless error in pretrial right to counsel cases. *See* Coleman v. Alabama, 399 U.S. 1 (1970); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967). In *Wade*, the court stated that "the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *Id.* at 226. Although the accused in *Wade* was impermissibly denied counsel at a critical stage of the pretrial proceeding, the court did not apply automatic reversal. Rather, it remanded the case to determine if the error was harmless. *See also* Coleman v. Alabama, 399 U.S. at 11, and Gilbert v. California, 388 U.S. at 272 (remanding cases to determine whether denial of counsel at pretrial proceeding was harmless error). The Court's actions are explained by recognizing tbat the right to counsel in pretrial proceedings is an example of constitutional common law. "This extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself." United States v. Ash, 413 U.S. 300, 310 (1973). Thus, this expansion rests upon "debatable policy choices" and "uncertain empirical foundations" — a constitutional common law.

arises when a court determines that a violation is harmless beyond a reasonable doubt.[148]

## CONCLUSION

This Note has examined an important aspect of the right to effective assistance of counsel—the debate between incorporationist and nonincorporationist methodologies. The Note demonstrates that ineffective representation is a constitutional violation when it is equivalent to a denial of the "Assistance of Counsel." Equivalence is measured by either constitutional or subconstitutional rules. When the accused demonstrates that a constitutional rule is violated, reversal is automatic. When he proves a violation of a constitutional common law rule, the conviction will stand only if the government can prove harmless error. In both situations, incorporation is unwarranted.

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[148] Some may argue that because incompetent representation is inherently prejudicial, harmless error is inappropriate. *See* note 139 *supra*. But harmless error is necessary to avoid a greater injustice—incorporation. For example, assume that an attorney has failed to consult with his client more than once before trial. On its face, this appears to violate his duty "to keep his client informed of the developments in the case and the progress of preparing the defense." ABA STANDARDS, *supra* note 97 at § 3.8. Following conviction, the accused alleges that because of the attorney's breach of duty, he has been denied effective assistance of counsel. To evaluate this claim, a court must first consider whether the attorney substantially breached his duty to consult. The unreasonableness of the attorney's conduct is closely related to the likelihood that his conduct actually harmed the accused. If harmless error is not permitted, then a court will be compelled to consider tbe case-by-case circumstances to determine if prejudice resulted. As a practical matter, harmless error permits a court to defer judgment on this issue. Instead, it may rely on more general considerations of reasonable behavior, that is, whether the "reasonably competent criminal attorney" would consult more frequently with his client in this type of case (rather than this particular case). After determining that he would, the court then would permit the government to prove that in this particular case, the breach was harmless. If not for the availability of harmless error, the court would examine prejudice when initially examining the alleged breach. This would defeat the purpose of creating standards of attorney performance, and would convert the sixth amendment claim into a procedural due process claim.