Fordham Urban Law Journal

Volume 11 | Number 1 Article 3

1983

The Effective Assistance of Counsel: Chance or Guarantee?

Joanne Legano

Follow this and additional works at: https://ir.lawnet.fordham.edu/ulj

 Part of the Constitutional Law Commons

Recommended Citation

Joanne Legano, *The Effective Assistance of Counsel: Chance or Guarantee?*, 11 Fordham Urb. L.J. 85 (1983).
Available at: https://ir.lawnet.fordham.edu/ulj/vol11/iss1/3

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

THE EFFECTIVE ASSISTANCE OF COUNSEL: CHANCE OR GUARANTEE?

The constitutional guarantee of "effective assistance" of counsel is a guarantee with a purpose. That purpose is not, as some people seem to believe, to "shift the balance" against the "peace forces" in favor of the "criminal element." It is to assure that our adversary system of justice really is adversary and really does justice.[1]

I. Introduction

Appellate courts have been receiving a growing number of appeals based on attorney incompetence.[2] While case loads in the criminal courts are increasing,[3] public defense programs have suffered massive budget cuts.[4] These factors have placed criminal defendants in danger of losing one of their most precious constitutional rights:[5] the right to effective assistance of counsel guaranteed by the sixth amendment.[6]

---

1. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 1-2 (1973) (footnote omitted) [hereinafter cited as Bazelon, *Defective Assistance*].

2. There were more than 10,000 published opinions dealing with claims of ineffective assistance of counsel between 1970 and 1980, representing an increase from the early 1960's. Ranii, *Appealing A Lawyer's 'Mistakes,'* Nat'l L.J., Oct. 5, 1981, at 1, col. 4 & 14, col. 1. The proliferation of claims has been attributed to: "the increased use of habeas corpus proceedings to challenge sentences; the increasing complexity of criminal cases; [and] the increase in the number of attorneys involved in criminal trials as a result of the expanded right to counsel . . . ." *Id.* at 14, col. 1.

3. For example, in 1976, the total number of cases disposed of by the Criminal Court of the City of New York was 220,734. In 1977, the number of dispositions increased by over 10,000, to 231,500. TWENTY-THIRD ANN. REP. N.Y. JUD. CONFERENCE 65 (1978). Trial courts are not alone in being overburdened by unmanageable case loads. Justice Stevens recently commented on the number of cases pending before the Supreme Court. He stated that because of the great number of cases, he is unable to look at the papers in over 80% of the cases that are filed. 68 A.B.A.J. 1201 (1982). *See also* Bazelon, *Defective Assistance*, *supra* note 1, at 5 (describing the case loads of criminal courts in urban areas as reaching "crisis proportions"); Schwarzer, *Dealing With Incompetent Counsel—The Trial Judge's Role*, 93 HARV. L. REV. 633, 634 (1980) (maintaining that "staggering case loads and limited resources" are causes of marginal performance by counsel).

4. In 1981, funding for the Legal Services Corp. was slashed by 25%, a decrease of $80 million in funding, creating a loss of more than 1,700 of the agency's 6,300 lawyers. Further reductions in funding are expected, leaving a gap in legal representation of the indigent which the private bar will be unable to fill. Morrison, *Is Pro Bono Filling the LSC Gap?*, Nat'l L.J., June 14, 1982, at 1, col. 4.

5. "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 assert any other rights he may have." Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956). The importance of the right to effective assistance of counsel is perhaps most apparent in view of the more than 1,000 inmates on death row who lack skilled

Members of the judiciary[7] and other commentators[8] have expressed grave concern over the increase in claims of ineffective assistance of counsel. Those authors have advanced a variety of theories addressing both the causes[9] of and possible remedies[10] for attorney incompetence.

---

attorneys to prosecute their appeals. *See generally* Clendinen, *Rising Death Row Population Burdens Volunteer Lawyers*, N.Y. Times, Aug. 23, 1982, at 1, col. 5 ("the condemned may soon begin to be executed not for lack of legal appeals to be made, but for the lack of skilled lawyers to make them").

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

7. Several judges have written extensively and demonstrated grave concern on the subject of attorney incompetence. *See, e.g.*, Bazelon, *The Realities of* Gideon *and* Argersinger, 64 GEO. L.J. 811 (1976) [hereinafter cited as Bazelon, Gideon *and* Argersinger]; Bazelon, *Defective Assistance, supra* note 1; Burger, *Some Further Reflections on the Problem of Adequacy of Trial Counsel*, 49 FORDHAM L. REV. 1 (1980); Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973) [hereinafter cited as Burger, *Special Skills*]; Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233 (1979); Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A.J. 175 (1974); Schwarzer, *supra* note 3. *But see* Frankel, *Curing Lawyers' Incompetence: Primum Non Nocere*, 10 CREIGHTON L. REV. 613 (1977) (expressing skepticism over the growing concern about attorney incompetence).

8. *See, e.g.*, Bines, *Remedying Ineffective Representation in Criminal Cases: Departures From Habeas Corpus*, 59 VA. L. REV. 927 (1973); Smithburn & Springmann, *Effective Assistance of Counsel: In Quest of a Uniform Standard of Review*, 17 WAKE FOREST L. REV. 497 (1981); Tague, *The Attempt to Improve Criminal Defense Representation*, 15 AM. CRIM. L. REV. 109 (1977); Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U.L. REV. 289 (1964); Note, *Ineffective Assistance of Counsel: The Lingering Debate*, 65 CORNELL L. REV. 659 (1980) [hereinafter cited as Note, *The Lingering Debate*]; Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After* United States v. Decoster, 93 HARV. L. REV. 752 (1980) [hereinafter cited as Note, *Identifying and Remedying Ineffective Assistance*]; *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review*, 13 COLUM. J.L. & SOC. PROBS. 1 (1977) [hereinafter cited as *Basis for Relief*].

9. Judge Kaufman has stated that the three essential causes of poor advocacy are: the lack of experience, competence and integrity. Kaufman, *supra* note 7, at 176. Chief Justice Burger has maintained that our historic insistence on treating every person admitted to the bar as qualified to render all types of legal advice is to blame. Justice Burger has also criticized certain aspects of law school education for promoting poor advocacy. Burger, *Special Skills, supra* note 7, at 231-32. Judge Bazelon has suggested that the burden of heavy case loads promotes the rationalization of ineffective performance by attorneys, the toleration of incompetence by the courts, and the institutionalization of ineffectiveness by the system. Bazelon, *Defective Assistance, supra* note 1, at 5. Judge Schwarzer has asserted that economic considerations often cause criminal cases to be processed on an "assembly line basis." Schwarzer, *supra* note 3, at 635.

10. Two distinct approaches have emerged in the area of reform. The specialization approach advocates developing separate requirements for trial lawyers. The continuing education approach would require all lawyers to update their legal

Yet, while the debate continues, and courts remain reluctant to deal with ineffectiveness claims,[11] defendants continue to suffer serious consequences from the derelictions of indifferent or inept counsel.[12]

The sixth amendment is silent on the questions of when counsel must be provided and what minimum level of attorney competence will satisfy constitutional scrutiny.[13] The Supreme Court has not yet defined a meaningful standard, leaving lower courts to fashion their own criteria based on dicta drawn from Supreme Court decisions. The standards by which effective assistance has been evaluated vary widely among federal and state courts,[14] producing considerable confusion concerning what constitutes effective assistance. As a result of that confusion, courts have tolerated attorney incompetence seriously prejudicial to defendants.[15] Compounding the problem is the uncertainty concerning whether a showing of prejudice is required for a defendant to prevail on an ineffectiveness claim.[16] As one judge has

---

education periodically by taking specialized courses. *See* Bazelon, Gideon *and* Argersinger, *supra* note 7, at 816-17.

11. *See, e.g.*, Schwarzer, *supra* note 3, at 635. Several reasons have been suggested for the courts' reluctance to deal with ineffectiveness claims, including: the fear of the number of claims, the desire to preserve the pretense that justice is being done, and the unwillingness to harm the reputations of fellow attorneys. Bazelon, *Defective Assistance*, *supra* note 1, at 22-25. This traditional reluctance has been strongly criticized. *See, e.g.*, Maryland v. Marzullo, 435 U.S. 1011, 1012-13 (1978) (White, J., dissenting from denial of *cert.*) (asserting that the Supreme Court "shirks its central responsibility as the court of last resort" by refusing to review a case involving minimum standards for attorney competence).

12. "No matter upon whose doorstep the judge cared to lay blame for counsel's lack of preparation, the cost of the failure should not have been visited upon the defendant who was without responsibility." Brescia v. New Jersey, 417 U.S. 921, 926 (Marshall, J., dissenting from denial of *cert.*) (defendant's conviction upheld although his appointed counsel was required to begin trial with slightly more than an hour's preparation).

13. It has been suggested that the Framers of the Constitution intended to provide the accused with the limited right to hire counsel for his defense. Note, *The Lingering Debate*, *supra* note 8, at 659 n.3 (citing W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 29 (1955)).

14. *See* Smithburn & Springmann, *supra* note 8, at 528-33 (surveying the various standards applied by federal and state courts).

15. Examples of unmonitored attorney misconduct may be found in the following cases: United States v. Katz, 425 F.2d 928, 931 (2d Cir. 1970) (counsel asleep during co-counsel's examination of a witness); Hudspeth v. McDonald, 120 F.2d 962, 967 (10th Cir. 1941) (although testimony established that counsel was drunk during the entire trial, the court's attitude was encapsulated by the response "[w]hat of it?"); People v. Smith, 61 A.D.2d 91, 101, 401 N.Y.S.2d 353, 359 (4th Dep't 1978) (Cardamone, J., dissenting) (in response to the court's question about a case counsel had just cited, he commented: "[T]hat was just a wild stab . . . . I didn't read the opinion, so I can't properly argue that it is on the nose, that it might even be pertinent").

16. *See* notes 61-78 *infra* and accompanying text.

noted, the sixth amendment's guarantee of effective assistance of counsel is in danger of becoming mere rhetoric unless a uniform set of standards is applied by the courts.[17]

This Comment will review the historical development of the right to effective assistance of counsel as defined by the Supreme Court, and discuss the various standards applied by lower federal courts. This Comment will next examine *United States v. Decoster*,[18] which provides the most comprehensive judicial analysis of the right to effective assistance of counsel to date. The standards applied by the New York State courts will also be analyzed. Finally, uniform guidelines for evaluating claims of ineffective assistance of counsel will be recommended.

II. The Historical Development of the Right to Effective Assistance of Counsel

A. The Supreme Court Decisions

The Supreme Court first addressed the issue of the scope of the sixth amendment right to counsel in *Powell v. Alabama*.[19] Using a fourteenth amendment due process analysis,[20] the Court held that in capital cases, the state must assign counsel to assist indigent criminal defendants who would be incapable of conducting their own defense.[21] Justice Sutherland, writing for the majority, asserted that defendants require "the guiding hand of counsel,"[22] and emphasized the fundamental character of that right.[23] Although there is some question concerning whether *Powell* required either the timely ap-

---

17. *See* Bazelon, *Defective Assistance*, *supra* note 1, at 20.

18. 487 F.2d 1197 (D.C. Cir. 1973) (*"Decoster I"*), *on remand*, Crim. No. 2002-71 (D.D.C. 1975), *rev'd*, 624 F.2d 300 app. (D.C. Cir. 1976) (*"Decoster II"*), *aff'd en banc*, 624 F.2d 196 (D.C. Cir.) (*"Decoster III"*), *cert. denied*, 444 U.S. 944 (1979).

19. 287 U.S. 45 (1932). In *Powell*, the Supreme Court reversed the rape convictions of eight indigent and illiterate youths who had been assigned counsel on the morning of trial.

20. The Court stated that counsel must be provided "as a necessary requisite of due process of law." *Id.* at 71. Reliance on a fourteenth amendment due process analysis for evaluating ineffectiveness claims has been criticized for focusing on the overall fairness of the trial, rather than on the particular conduct of counsel. A sixth amendment analysis has the advantage of being more thorough, by requiring courts to look directly at counsel's conduct. *Basis for Relief*, *supra* note 8, at 7.

21. *Powell*, 287 U.S. at 69. The Court later extended the right to indigent defendants accused of felonies in federal courts in Johnson v. Zerbst, 304 U.S. 458 (1938).

22. The Court specified that those defendants who are "ignorant and illiterate, or those of feeble intellect" are particularly in need of an attorney's guidance. *Powell*, 287 U.S. at 69.

23. *Id.* at 68, 73.

pointment of counsel or the broader right to effective assistance of counsel,[24] dicta in the opinion suggests the broader reading.[25]

Betts v. Brady[26] represented a regression from the expansive reading of the sixth amendment right to counsel provided in *Powell*. In *Betts*, the Court again used a fourteenth amendment analysis,[27] and declined to extend the right to counsel to indigent criminal defendants in state courts, except in limited circumstances.[28]

Twenty years later the Court overruled *Betts* in *Gideon v. Wainwright*.[29] The Court expanded the sixth amendment right to counsel to the status of "a fundamental right, essential to a fair trial,"[30] and made that right applicable to the states through the fourteenth amendment.[31] Thus, *Gideon* afforded to indigent criminal defendants in state courts the same right to counsel enjoyed by their counterparts in federal courts.[32] Moreover, with the more stringent sixth amendment analysis employed by the Court in *Gideon*, it is clear that the right to counsel affords the defendant more than just pro forma representation.[33]

---

24. *See, e.g.*, Note, *Identifying and Remedying Ineffective Assistance*, *supra* note 8, at 754 n.11 (citing Tague, *The Attempt to Improve Criminal Defense Representation*, 15 AM. CRIM. L. REV. 109, 113) (advocating the theory that *Powell* is limited to timely appointment of counsel). *But see* Erickson, *supra* note 7, at 235; Waltz, *supra* note 8, at 293-94 (maintaining that *Powell* should be read broadly to include the rendering of effective aid).

25. Erickson, *supra* note 7, at 235. The Court warned that the duty to assign counsel "is not discharged by an assignment at such a time *or under such circumstances* as to preclude the giving of effective aid . . . . *Powell*, 287 U.S. at 71 (emphasis added).

26. 316 U.S. 455 (1942), *overruled*, Gideon v. Wainwright, 372 U.S. 335 (1963).

27. *Betts*, 316 U.S. at 471.

28. The Court mandated court appointed counsel only where the lack of such representation would result in "a denial of fundamental fairness, shocking to the universal sense of justice . . . ." *Id.* at 462.

29. 372 U.S. 335 (1963). *Gideon* involved a defendant who represented himself at trial and was convicted of a felony after a Florida state court denied his request for appointed counsel.

30. *Id.* at 340. The Court noted that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344.

31. *Id.* at 342.

32. The Court maintained that both the national and state constitutions emphasize fair trials in which "every defendant stands equal before the law." *Id.* at 344.

33. *See, e.g.*, Erickson, *supra* note 8, at 236 (asserting that *Gideon's* more stringent sixth amendment analysis established an expanded theoretical and constitutional basis for the right to counsel). The Court has extended the right to counsel to indigent defendants accused of misdemeanors for which imprisonment is actually imposed. Scott v. Illinois, 440 U.S. 367, 373-74 (1979).

The Supreme Court has long recognized that the right to counsel is the right to *effective* counsel.[34] Yet, the Court has found ineffective assistance per se only in certain narrowly defined situations. These include cases of direct governmental interference preventing counsel from rendering effective aid,[35] and cases of joint representation resulting in an actual conflict of interest.[36] The Court has yet to define when attorney incompetence based on an attorney's misconduct will result in a sixth amendment violation.

In *McMann v. Richardson*,[37] the Court was called on to determine the validity of a guilty plea allegedly based on erroneous advice of counsel.[38] In dicta, the Court implied a standard for evaluating attorney performance, stating that counsel's advice must be "within the range of competence demanded of attorneys in criminal cases."[39] The Court declined to provide a more explicit standard, relegating the responsibility to the lower courts.[40] A warning was given, however, that "defendants cannot be left to the mercies of incompetent counsel . . . ."[41]

---

34. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970), *citing* Reece v. Georgia, 350 U.S. 85, 90 (1955); Glasser v. United States, 315 U.S. 60, 69-70 (1942); Avery v. Alabama, 308 U.S. 444, 446 (1940); Powell v. Alabama, 287 U.S. 45, 57 (1932).

35. *See, e.g.*, Geders v. United States, 425 U.S. 80 (1976) (counsel restricted from conferring with defendant during trial recess); Herring v. New York, 422 U.S. 853 (1975) (defense counsel denied closing argument in nonjury case); Brooks v. Tennessee, 406 U.S. 605 (1972) (defendant required to testify prior to other defense witnesses); Ferguson v. Georgia, 365 U.S. 570 (1961) (defendant prevented from testifying through direct examination).

36. *See* Cuyler v. Sullivan, 446 U.S. 335, 350 (1980) (sixth amendment violation established where defendant proves that an actual conflict of interest adversely affected his counsel's performance); Holloway v. Arkansas, 435 U.S. 475, 488 (1978) (automatic reversal where court improperly required joint representation over timely objection).

37. 397 U.S. 759 (1970).

38. The Court held that a defendant who alleges that his guilty plea resulted from a prior coerced confession is not, without more, entitled to a hearing on his petition for a writ of habeas corpus. *Id.* at 771.

39. *Id.* However, this standard has been criticized for not providing meaningful guidance for the lower courts. The "reasonable competence" standard has been referred to as "an empty shell." Note, *Identifying and Remedying Ineffective Assistance*, *supra* note 8, at 755. *See also* Smithburn & Springmann, *supra* note 8, at 504 n.38 ("gross error" may be the standard, as *McMann* "reasonableness" standard is unclear).

40. *McMann*, 397 U.S. at 771.

41. The Court added that judges should strive to maintain proper standards for performance by criminal defense counsel who are practicing in their courts. *Id. See also* Tollett v. Henderson, 411 U.S. 258 (1973) (counsel's advice not within the range of reasonable competence may serve as a basis for a constitutional challenge). More recently, in a multiple representation case, the Court reaffirmed its position that the

Thus, although it is well established that the sixth amendment guarantees the effective assistance of counsel,[42] it is still unclear precisely what level of attorney competence is required. As a result, lower federal and state courts have been left to devise their own criteria, leaving a defendant's ineffectiveness claim largely to an ad hoc determination.

B. Lower Federal and State Court Standards

Initially, all lower federal and state courts applied the "farce and mockery" standard enunciated by the Court of Appeals for the District of Columbia in *Diggs v. Welch*.[43] This test requires that the circumstances surrounding the trial must shock the conscience of the court and make the proceedings "a farce and mockery of justice"[44] for a claim of attorney incompetence to be successful. Thus, a heavy burden is placed on the defendant. He must prove not only his attorney's incompetence, but also that the entire proceedings were reduced to a sham.[45] Not surprisingly, application of this test resulted in few reversals of convictions.[46]

The "farce and mockery" test has been widely criticized as being so peremptory as to deprive defendants of their sixth amendment rights.[47] The test fails not only to examine the attorney's conduct

---

sixth amendment requires more than just the mere appointment of counsel. The Court added that it would not distinguish between retained and appointed counsel for purposes of the sixth amendment analysis. Cuyler v. Sullivan, 446 U.S. 335 (1980).

42. *See* note 34 *supra* and accompanying text.

43. 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945). In *Diggs*, the court denied the appellant's petition for a writ of habeas corpus, which alleged that his counsel had coerced him into entering a guilty plea.

44. *Id.* at 670.

45. The "farce and mockery" standard derives from the fifth amendment due process clause. *Id.* at 669. As such, the standard examines the conduct of the attorney during trial, which necessarily precludes an examination of counsel's conduct before trial. The narrowness of the standard is one ground on which it has been criticized. *See, e.g.*, Erickson, *supra* note 7, at 239.

46. *See Basis for Relief, supra* note 8, at 28 (noting that the universal attitude of the courts following the "farce and mockery" standard is that "the errors, faults or omissions of an attorney, except those of the most serious sort are insufficient to constitute a denial of the right to effective representation").

47. *See, e.g.*, Erickson, *supra* note 7, at 238-39. Judge Erickson criticized the "farce and mockery" standard on four grounds: (1) the test requires too minimal a level of attorney performance; (2) the standard requires less of lawyers than the law requires of other professionals, namely doctors; (3) the standard provides little guidance for courts and attorneys; and (4) the standard fails to monitor attorney conduct at all stages of the proceedings. *See also* Bazelon, *Defective Assistance*, *supra* note 1, at 28 ("[t]he 'mockery' test requires such a minimal level of performance from

during the crucial pre-trial stage,[48] but also fails to provide a uniform standard for the lower courts.[49] Although several justifications have been advanced in support of this standard,[50] it has been abandoned by all circuits but the Second Circuit[51] and a minority of state courts.[52]

Gideon and *McMann* heralded the trend away from the earlier fifth amendment "farce and mockery" standard toward variations of the sixth amendment "reasonable competence" approach.[53] Adopted by a majority of circuits, the sixth amendment analysis demands a higher level of attorney performance than the "farce and mockery" standard.[54] The "reasonableness" standard represents an improvement over the "farce and mockery" standard in that it measures the attorney's performance against accepted norms within the legal community,[55]

---

counsel that it is itself a mockery of the sixth amendment"); Tague, *supra* note 8, at 115 (calling the test "inappropriate if not unconstitutional").

48. *See* note 45 *supra* and accompanying text.

49. *See* note 47 *supra* and accompanying text.

50. Common justifications for this standard include the fear of "putting defense counsel on trial before the reviewing court," the overwhelming case load and the need to eliminate frivolous appeals, and the need to prevent feigned cases of ineffectiveness. *Basis for Relief*, *supra* note 8, at 30-31.

51. *See* Barnes v. Jones, 665 F.2d 427, 431 n.4 (2d Cir. 1981), *cert. granted*, 102 S.Ct. 2902 (1982) (commenting that the Second Circuit is alone in adhering to the "farce and mockery" standard). The Second Circuit has been urged, however, to abandon its position and adopt a less stringent standard. *See, e.g.*, Brinkley v. LeFevre, 621 F.2d 45, 48 (2d Cir.) (Weinstein, J., dissenting), *cert. denied*, 449 U.S. 868 (1980) ("[t]he Second Circuit's test demeans the Sixth Amendment's guarantee of meaningful counsel, [and] the guarantee of equality before the law . . . . Surely the state bars of Connecticut, New York and Vermont are no less capable than the rest of the American legal profession . . . .").

52. A recent survey indicates that only 21 states still utilize the "farce and mockery" standard. Smithburn & Springmann, *supra* note 8, at 530-33.

53. *See, e.g.*, United States v. Williams, 631 F.2d 198 (3d Cir. 1980) (exercise of "customary skill and knowledge"); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978) (adopting the *McMann* "reasonable competence" standard); Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974) (counsel must render "reasonably effective assistance").

54. One commentator has stated that the "reasonable competence" standard is, by definition, superior to the "farce and mockery" standard. *See* Tague, *supra* note 8, at 115 n.31 (1977). *See also* Cooper v. Fitzharris, 586 F.2d 1325, 1329 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979) (commending the shift from the "farce and mockery" standard to the "reasonable competence" approach because an objective reference replaced a "peculiarly subjective one").

55. Measuring the attorney's performance against community norms is inherently more objective than the "farce and mockery" approach. *See* Erickson, *supra* note 7, at 241 ("reasonable competence" standard more objective because courts seek independent criteria by which to measure the claim). *See also* Cooper v. Fitzharris, 586 F.2d 1325, 1329-30 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979) ("the judgment is made with reference to a fact the court knows or can determine by inquiry"). Where the prevailing values within a community are less than desirable, however, the reasonableness approach may not be acceptable. *See* Erickson, *supra*

rather than against the less certain standard of the outcome of the trial as a whole.[56] Furthermore, the "reasonableness" standard measures the attorney's conduct from the time of appointment, not from the commencement of trial.[57]

Despite its apparent superiority to the "farce and mockery" standard, however, the "reasonableness" standard effectively offers little improvement. The standard has been criticized as being unnecessarily subjective.[58] As with its predecessor, the "farce and mockery" standard, the "reasonableness" standard fails to provide adequate guidance for the lower courts,[59] and may represent a change in form only.[60]

C. The Requirement of Demonstrating Prejudice

Two dominant issues may arise in evaluating a claim of ineffective assistance of counsel. First, the court must determine whether the attorney's performance rendered effective assistance. Second, notwithstanding a finding of inadequate attorney performance, several circuits require proof of prejudice to a defendant's case before a sixth amendment violation will be found. Although all circuits but the Sixth Circuit maintain the prejudice requirement, there emerges no general standard which defines the kind or degree of prejudice which the defendant or government must show.[61]

---

note 7, at 241-42 (citing Tollett v. Henderson, 411 U.S. 258 (1973), in which the Supreme Court held that an attorney's failure to challenge a racially segregated grand jury was not ineffective assistance of counsel. The Court noted that the attorney's conduct conformed to local norms. *Id.* at 269).

56. *See* note 20 *supra* and accompanying text.

57. *See* Cooper v. Fitzharris, 586 F.2d 1325, 1329 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979) (inquiry focuses on constitutionally sufficient performance rather than on what occurred at trial).

58. Judge Erickson has criticized the "reasonable competence" approach on two grounds: (1) the test depends on the court's subjective perception of the legal community; and (2) the standard itself is highly subjective because, like the "farce and mockery" standard, it lacks intrinsic meaning. Erickson, *supra* note 7, at 241.

59. Courts have failed to define which acts fall outside the range of "reasonable competence." The subjective nature of this approach leaves few guidelines for lower courts to follow. *See, e.g.*, Smithburn & Springmann, *supra* note 8, at 507; *Basis for Relief, supra* note 8, at 42 ("courts still are not told what they ought to expect of defense counsel . . . .").

60. Commentators have recently noted that while the range of competence standard may appear to be progressive, "the change is of form and not of substance." Smithburn & Springmann, *supra* note 8, at 507.

61. A comprehensive analysis of the prejudice requirement in the circuit courts is provided in Washington v. Strickland, 673 F.2d 879, 896-900 (5th Cir. 1982).

The District of Columbia, Third, Fifth, Eighth, Ninth and Eleventh Circuits clearly require a showing of prejudice. *See* Ford v. Strickland, 676 F.2d 434 (11th Cir. 1982); United States v. Decoster, 624 F.2d 196 (D.C. Cir.) (en banc), *cert. denied*, 444 U.S. 944 (1979); United States v. Swinehart, 617 F.2d 336 (3d Cir.

As a result of the Supreme Court's decision in *Glasser v. United States*,[62] some lower courts concluded that prejudice need not be shown whenever the right to counsel had been violated.[63] In *Glasser*, the joint representation of two co-defendants gave rise to a conflict of interest.[64] The Court stated that "[t]he 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."[65] Indeed, many courts[66] and commentators[67] have expressed

---

1980); Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979); McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974).

The Second and Fourth Circuits also require a showing of prejudice, although their positions are less clearly defined. *See* United States v. Aulet, 618 F.2d 182 (2d Cir. 1980); Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968).

The First and Seventh Circuits have indicated that a showing of prejudice may be required. *See* United States v. Ritch, 583 F.2d 1179 (1st Cir.), *cert. denied*, 439 U.S. 970 (1978) (habeas corpus relief denied where no prejudice shown). However, one week later, the First Circuit indicated that there was still confusion regarding the showing of prejudice. United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978). There is similar confusion in recent Seventh Circuit decisions. *Compare* United States v. Berkwitt, 619 F.2d 649 (7th Cir. 1980) (denial of habeas corpus relief based in part on petitioner's failure to demonstrate prejudice) *with* United States *ex rel.* Healey v. Cannon, 553 F.2d 1052 (7th Cir.), *cert. denied*, 434 U.S. 874 (1977) (stating that the harmless error doctrine should never be applied to ineffectiveness claims).

The Tenth Circuit appears to be undecided whether a demonstration of prejudice is necessary in all cases. *See* United States v. Golub, 638 F.2d 185 (10th Cir. 1980) (court did not hold that prejudice is never relevant, but declined to require a showing of prejudice in the case before it); United States v. Porterfield, 624 F.2d 122 (10th Cir. 1980) (rejecting the requirement that the defendant show prejudice, placing the burden of proof on the government to establish the lack of prejudice).

The Sixth Circuit is apparently the only circuit to reject the prejudice requirement. *See* Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974) (harmless error tests do not apply to the evaluation of ineffectiveness claims). There is reason to believe that the Sixth Circuit may be re-evaluating its position in light of United States v. Morrison, 449 U.S. 361 (1981). *See* Turner v. Engle, No. 80-3302 (N.D. Ohio Dec. 30, 1981), *aff'd*, 673 F.2d 1331 (6th Cir. 1981) (indicating that a showing of prejudice may be required). The Ninth Circuit may be joining the Sixth Circuit in rejecting the prejudice requirement. *See* Slappy v. Morris, 649 F.2d 718 (9th Cir. 1981), *cert. granted*, 102 S.Ct. 1748 (1982) (prejudice need not be shown where sixth amendment violation resulted from trial court's unreasonable refusal to grant continuance).

62. 315 U.S. 60 (1942).

63. *See* Cooper v. Fitzharris, 551 F.2d 1162, 1165 (9th Cir. 1977), *aff'd*, 586 F.2d 1325 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979) (relying on *Glasser* to dispense with the prejudice requirement); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974). *But see* cases cited in note 61 *supra*, which require a showing of prejudice.

64. The Court set aside Glasser's conviction, stating that the conflict of interest resulting from the joint representation constituted a sixth amendment violation. *Glasser*, 315 U.S. at 76.

65. *Id.*

66. *See* Cooper v. Fitzharris, 551 F.2d 1162 (9th Cir. 1977), *aff'd*, 586 F.2d 1325

disapproval of the prejudice requirement, although others rigorously adhere to it.[68] In *Chambers v. Maroney*,[69] the Supreme Court refused to apply a per se rule[70] regarding the showing of prejudice in a case in which counsel was unprepared as a result of late appointment.[71] *Chambers* is not dispositive of the prejudice issue, however, as the Court did not indicate whether prejudice is an indispensable element of all constitutional claims of ineffective assistance of counsel.[72]

Recently, in *United States v. Morrison*,[73] the Supreme Court refused to dismiss an indictment without a showing of prejudice although the defendant had been denied the effective assistance of counsel.[74] In *Morrison*, the Court labelled the conduct of federal agents who had met with the defendant without defense counsel's knowledge or permission as "egregious."[75] However, it was held that the relief requested, dismissal of the indictment, was not appropriate absent "demonstrable prejudice, or substantial threat thereof . . . ."[76] *Morrison* should not be interpreted to mandate a requirement of prejudice for an appellant to prevail on every ineffectiveness claim. Some courts have wisely adopted a narrower interpretation, limiting

---

(9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979); Beasley v. United States, 491 F.2d 887 (6th Cir. 1974).

67. *See, e.g.*, Bazelon, *Defective Assistance*, *supra* note 1, at 29; Note, *A Functional Analysis of the Effective Assistance of Counsel*, 80 COLUM. L. REV. 1053, 1067-68 (1980) [hereinafter cited as Note, *Functional Analysis*]; Note, *Ineffective Assistance and the Harmless Error Rule: the Eighth Circuit Abandons* Chapman, 43 GEO. WASH. L. REV. 1384, 1397-1401 (1975).

68. *See* note 61 *supra* and accompanying text. *See also Basis for Relief*, *supra* note 8, at 75-77 (arguing that a per se rule is inapplicable to ineffectiveness claims, because the right to effective assistance is only a "gloss" on the right to counsel).

69. 399 U.S. 42 (1970).

70. *Id.* at 53-54.

71. In *Chambers*, the Court found that reversal of every conviction is not required following late appointment of counsel. The Court affirmed the denial of a hearing to the appellant who based his ineffectiveness claim on the fact that his newly appointed counsel for his second trial did not confer with the appellant until the morning of trial. *Id.* at 54.

72. *See, e.g.*, *"Decoster III,"* 624 F.2d 196, 292 n.140 (D.C. Cir.) (Bazelon, J., dissenting), *cert. denied*, 444 U.S. 944 (1979) (arguing that *Chambers* does not address the issue of the burden of proving prejudice); Cooper v. Fitzharris, 586 F.2d 1325, 1336-37 (9th Cir. 1978) (en banc) (Hufstedler, J., concurring and dissenting), *cert. denied*, 440 U.S. 974 (1979) (arguing that *Chambers* does not require a separate showing of prejudice); Note, *Functional Analysis*, *supra* note 67, at 1064 (maintaining that *Chambers* is not dispositive of the prejudice issue).

73. 449 U.S. 361 (1981).

74. The Court assumed, without deciding, that the respondent's sixth amendment rights had been violated under the circumstances of the case. *Id.* at 364. Yet, as the respondent failed to demonstrate prejudice, the Court refused to uphold the court of appeals' dismissal of the indictment. *Id.* at 366-67.

75. *Id.* at 367.

76. *Id.* at 365.

Morrison to a requirement of a showing of prejudice by the appellant only when the drastic remedy of dismissal of an indictment is sought.[77]

The requirement of showing prejudice in every case of ineffectiveness places an unduly harsh burden on the defendant whose attorney's incompetence keeps out of the record the very evidence that an appellate court would require for a showing of prejudice.[78] A uniform requirement concerning the showing of prejudice, like a uniform standard by which to measure ineffectiveness claims, is necessary to insure a uniform application of the sixth amendment.

III. *United States v. Decoster*: The Explosive Debate of the Standards

A. The Judgmental Approach v. The Categorical Approach

United States v. Decoster[79] is a procedurally complex case whose history typifies the confusion concerning both the standards by which attorney competence should be measured and the necessity of demonstrating prejudice. Two contrasting judicial philosophies are presented: Judge Leventhal's judgmental approach[80] and Judge Bazelon's categorical approach.[81]

In *"Decoster I,"*[82] the appellant appealed his conviction for aiding and abetting an armed robbery and assault with a deadly weapon.[83] In a panel opinion written by Judge Bazelon, the court noted *sua sponte* five grounds on which a claim of a sixth amendment right to counsel violation could have been based.[84] The court specifically re-

---

77. *See, e.g.*, United States v. Cronic, 675 F.2d 1126, 1128 (10th Cir. 1982) (maintaining that *Morrison* would not preclude reversal of a conviction).

78. For example, a failure to investigate a case or to interview a witness before trial would not be evident in the trial record which the appellate court would review. *"Decoster I,"* 487 F.2d at 1204 (D.C. Cir. 1973). *See also* Smithburn & Springmann, *supra* note 8, at 511 (citations omitted).

79. 487 F.2d 1197 (D.C. Cir. 1973) (*"Decoster I"*), *on remand*, Crim. No. 2002-71 (D.D.C. 1975), *rev'd*, 624 F.2d 300 app. (D.C. Cir. 1976) (*"Decoster II"*), *aff'd en banc*, 624 F.2d 196 (D.C. Cir.) (*"Decoster III"*), *cert. denied*, 444 U.S. 944 (1979).

80. The judgmental approach entails a case-by-case analysis. The court justified the use of this approach by stating that the defense attorney's function is largely a matter of professional judgment, and that in such a "fact-laden atmosphere, categorical rules are not appropriate." *"Decoster III,"* 624 F.2d at 203.

81. The categorical approach articulates basic minimum duties owed by defense counsel to his client. These duties would apply to all attorneys. *"Decoster III,"* 624 F.2d at 267 (Bazelon, J., dissenting) (discussing the standards set forth in *"Decoster I"*).

82. 487 F.2d 1197 (D.C. Cir. 1973).

83. Decoster was sentenced to 2-8 years on each count, to be served concurrently. *Id.* at 1199.

84. These five grounds were: (1) counsel's delay in filing a bond review motion after filing the motion in the wrong court; (2) counsel's declaration that he was ready

jected the "farce and mockery" standard, stating that "a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate."[85] The court adopted a categorical approach, asserting that counsel should be guided by the American Bar Association (ABA) Standards for the Defense Function.[86] The court then used these standards to set forth three specific duties owed by a defense counsel to his client.[87]

Judge Bazelon considered the prejudice issue in a three part test which would determine whether a sixth amendment violation has occurred: (1) Did counsel violate any of the specified duties?; (2) Was the violation substantial?; (3) If the first two questions are answered affirmatively, a sixth amendment violation exists unless the government proves a lack of prejudice.[88]

On appeal after remand,[89] the court, in a panel opinion (*"Decoster II"*), held that Decoster had been denied the effective assistance of counsel, and reversed his conviction.[90] Judge Bazelon first noted that counsel had violated the duty to investigate, previously derived from the ABA Standards.[91] Then, without applying the second part of the

---

for trial although he was not prepared to begin; (3) counsel's failure to inquire into the status of the alleged accomplices' cases, resulting in a waiver of a jury trial before the same judge who accepted guilty pleas from those alleged accomplices; (4) counsel's lack of communication with the appellant; and (5) counsel's failure to call any witnesses other than the appellant and an alleged accomplice who contradicted the appellant's testimony. *Id.* at 1199-1201. Concerning this final ground, the court commented that it "stripped [the defense case] of its credibility." *Id.* at 1201.

85. *Id.* at 1202. The court added that the "reasonable competence" standard was only a short-hand label which could not be readily applied. *Id.* at 1203.

86. *Id.* The ABA Standards are the product of a comprehensive study by a committee chaired by Chief Justice Burger. The standards have been approved by the ABA House of Delegates. *Id.* at 1203 n.24. Although the standards were not intended to serve as criteria for judicial evaluation of ineffectiveness claims, the court added, they could serve as relevant guidelines. *Id.* at 1203 n.25.

87. The court specified the following three duties: (1) counsel should confer with his client without delay and as often as necessary to discuss matters of defense, potential strategies and tactical choices; (2) counsel should promptly advise his client of his rights, and take all actions necessary to preserve these rights; (3) counsel must conduct appropriate factual and legal investigations to determine what defenses may be developed. The duty to investigate also requires adequate legal research. *Id.* at 1203-04.

88. *Id.* at 1204, *citing* Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968). The court justified placing the burden of proof on the government by noting that the burden is on the government to prove guilt. A requirement that the defendant show prejudice would shift the burden to him to prove the likelihood of his innocence.

89. On remand, the district court held supplementary hearings and denied the defendant's motion for a new trial. *"Decoster III,"* 624 F.2d at 200.

90. 624 F.2d 300, 310 app. (D.C. Cir. 1976).

91. *Id.* at 309. *See also* note 87 *supra* and accompanying text.

test, concerning the scope of the violation, the court found that there was "inherent prejudice"[92] in the nature of the violation.

The court relied on the harmless error analysis set forth by the Supreme Court in *Chapman v. California*.[93] This doctrine provides that certain constitutional violations will result in automatic reversal, without reference to the showing of prejudice.[94] Other constitutional violations,[95] however, would not require reversal if the government could establish harmless error beyond a reasonable doubt.[96] Judge Bazelon stated that the *Chapman* standard should apply "with greater force"[97] in ineffectiveness cases, since a finding of a sixth amendment violation "necessarily casts doubt on the entire adjudicative process."[98] Dissenting vehemently, Judge MacKinnon criticized the majority opinion for transforming the ABA Standards into inflexible duties, creating a situation in which nearly every ineffectiveness claim would result in a constitutional violation.[99] With specific reference to the burden of proving prejudice, Judge MacKinnon contended that the

---

92. *"Decoster II,"* 624 F.2d at 309-10. The court found that counsel's failure to investigate was comparable to those cases involving governmental interference or a clear conflict of interest. *Id. See also* notes 29-30 *supra* and accompanying text. The court reasoned that investigation is so central to the defense function that almost any violation of the duty to investigate would adversely affect a defendant's rights. *"Decoster II,"* 624 F.2d at 310.

93. 386 U.S. 18 (1967). In *Chapman*, the Supreme Court was called on to decide whether the denial of petitioners' right against self-incrimination which resulted from the prosecutor's comments on petitioners' failure to testify could be harmless error. *Id.* at 20. The Court held that the error was not harmless to the petitioners and reversed the convictions. *Id.* at 26.

94. *Id.* at 23 n.8 (citing Payne v. Arkansas, 356 U.S. 560 (1958) (coerced confession)); Gideon v. Wainwright, 372 U.S. 335 (1963) (deprivation of the right to counsel); Tumey v. Ohio, 273 U.S. 510 (1927) (violation of the right to trial before an impartial judge).

95. The Court concluded that some constitutional errors may be so unimportant and insignificant in the setting of a particular case that they may be deemed harmless, thus not requiring reversal of the conviction. *Chapman*, 386 U.S. at 22.

96. The Court recognized that certain constitutional error places the burden of showing that the error was harmless on someone other than the prejudiced party. Thus, the original common-law harmless error rule placed the burden on the beneficiary of the error either to show that no injury was caused, or to have the judgment in his favor reversed. *Id.* at 24 & n.9 (citing 1 J. WIGMORE, EVIDENCE § 21 (3d ed. 1940)).

97. *"Decoster II,"* 624 F.2d at 311.

98. *Id.* The Court added that there is authority for the proposition that such violations can never be harmless. *Id.* at 311 & n.41 (citing Glasser v. United States, 315 U.S. 60 (1942); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974)). However, the court refused to adopt a per se approach for evaluating ineffectiveness claims, holding that harmlessness must be established beyond a reasonable doubt. *"Decoster II,"* 624 F.2d at 311.

99. *Id.* at 327 (MacKinnon, J., dissenting).

majority's application of the *Chapman* standard set the right to "adequate" assistance of counsel against "the adversary guarantees of the sixth amendment . . . . "[100]

In *"Decoster III,"*[101] Judge Leventhal, writing the plurality opinion,[102] affirmed Decoster's conviction and rejected the categorical approach used in *"Decoster I."* Judge Leventhal advanced a judgmental approach.[103] He asserted that "[t]he claimed inadequacy must be a serious incompetency that falls measurably below the performance ordinarily expected of fallible lawyers."[104]

Judge Leventhal constructed a continuum in which claims of attorney ineffectiveness could be evaluated.[105] At one end of the continuum, state imposed structural or procedural impediments[106] that per se deprive the accused of his sixth amendment rights mandate automatic reversal, even in the absence of prejudice.[107] At the opposite end of the continuum are cases in which counsel's performance is " 'untrammelled and unimpaired' by state action",[108] and the categorical approach is not applied. In a less certain area between both extremes fall cases involving multiple representation and late appointment, which are not as easily analyzed and thus less susceptible to a categorical analysis.[109]

---

100. *Id.* at 345. This panel opinion was vacated, and the court granted the government's motion for a rehearing en banc. *"Decoster III,"* 624 F.2d 196, 200 (D.C. Cir.) (en banc), *cert. denied*, 444 U.S. 944 (1979).

101. 624 F.2d 196 (D.C. Cir.) (en banc), *cert. denied*, 444 U.S. 944 (1979).

102. Judges McGowan, Tamm and Wilkey joined Judge Leventhal in the plurality opinion. *Id.* at 199.

103. "The court's appraisal requires a judgmental rather than a categorical approach." *Id.* at 208.

104. *Id.* The court also placed the initial burden of demonstrating prejudice on the accused to prove that counsel's inadequacy affected the outcome of the trial. It is only after the appellant has made this initial showing of prejudice that the burden passes to the government to prove that there was no prejudice to the appellant. *Id.*

105. *Id.* at 200. The court added that these differing approaches derive from how "the courts' perce[ive]. . . the exactness with which a denial can be identified and remedied, as well as their views of the need for a showing of prejudice." *Id.*

106. *See* note 35 *supra* and accompanying text.

107. *"Decoster III,"* 624 F.2d at 201. The court added that a categorical approach is appropriate because the impediments are subject to easy correction by prophylactic rules and because state interference is involved. *Id.*

108. *Id.* at 203. The court's rationale for rejecting the categorical approach in cases where the ineffectiveness is not government-induced may be found in the court's evaluation of the defense attorney's function. The court reasoned that professional judgment plays such a great part in the role of defense counsel, that "[i]n this fact-laden atmosphere, categorical rules are not appropriate." *Id.*

109. *Id.* at 202. Concerning multiple representation, the court noted that "because there is no absolute requirement that every defendant have his own attorney," some factual analysis is necessary, thus limiting the applicability of the categorical

The court concluded its analysis by focusing on the issue of prejudice, stating that the burden of proof is on the defendant to demonstrate a likelihood that his counsel's incompetence affected the outcome of the trial.[110] After the defendant satisfies this initial burden, the government would have to prove that no prejudice resulted.[111]

Judge Bazelon, in a strong dissent,[112] adhered to the three step inquiry set forth in *"Decoster I."*[113] He clarified his earlier approach by noting that it focuses on the quality of counsel's performance rather than on just the consequences evident in the outcome of the case.[114] Judge Bazelon criticized Judge Leventhal's state action continuum by contending that the issue is not whether the state is to blame for counsel's actions, but whether the accused suffered a constitutional deprivation.[115] Judge Bazelon further asserted that because state action "permeates the entire criminal process . . . . it is the state's responsibility, through the courts, to vindicate those rights."[116]

Addressing the prejudice issue, Judge Bazelon emphasized that the question of prejudice must remain distinct from the threshold question: whether the defendant has received effective assistance.[117] He

---

analysis. *Id.* at 202. Because the Supreme Court in Chambers v. Maroney rejected a per se rule requiring reversal of every conviction following late appointment of counsel, late appointment cases are even less susceptible to a categorical approach. *Id. See also* notes 69-72 *supra* and accompanying text.

110. *"Decoster III,"* 624 F.2d at 208.

111. *Id.* The court found that Decoster had failed to satisfy his burden of proof. *Id.* at 214. Judge Robinson filed a concurring opinion in which he agreed with the affirmance of the conviction, but "deplored" Judge Leventhal's allocation of the burden of proving prejudice to the accused. *Id.* at 245 (Robinson, J., concurring). Judge Robinson devised yet another standard for measuring ineffectiveness claims: "the defendant must point to some substantial deviation from a norm of reasonable competence." *Id.* at 246. Addressing the prejudice issue, Judge Robinson favored the application of the harmless error rule to ineffectiveness claims. *Id.* at 258.

112. Chief Judge Wright joined Judge Bazelon in his dissent. *"Decoster III,"* 624 F.2d at 264.

113. *Id.* at 275. *See also* note 88 *supra* and accompanying text. Judge Bazelon emphasized the overriding concern of eliminating inferior representation of indigent defendants. *"Decoster III,"* 624 F.2d at 275 (Bazelon, J., dissenting). He also clarified that the standards announced in *"Decoster I"* were relevant guidelines, not rigid criteria. *Id.* at 276.

114. Judge Bazelon explained that focusing on the quality of counsel's representation would be beneficial to defendants by reducing the likelihood that any particular defendant would be prejudiced by counsel's shortcomings. Additionally, Judge Bazelon maintained, the court would not have to engage in the speculative inquiry of the precise effect of counsel's error at trial. *Id.* at 275 (Bazelon, J., dissenting).

115. *Id.* at 289 n.126. Judge Bazelon asserted that the defendant suffers from the same degree of prejudice whether or not counsel's incompetence was induced by the state. *Id.*

116. *Id.*

117. *Id.* at 275. The only reason to consider prejudice, Judge Bazelon maintained,

reiterated that once it has been determined that the defendant was denied effective assistance, the *Chapman* rule should be applied.[118] To hold otherwise, Judge Bazelon stated, would strip the accused of his right to a constitutional presumption of innocence.[119]

B. A Comparison of the Views

The judgmental approach appears to be concerned with the maintenance of the adversarial system,[120] while the categorical approach seems to demonstrate a greater concern for a defendant's constitutional rights.[121] The categorical approach is preferable because of its ability to accommodate both concerns.

The judgmental approach embodies the historical reluctance of the courts to reverse convictions based on ineffectiveness claims.[122] Judge Leventhal justified his support for the approach by asserting that the court "must be wary lest its inquiry and standards undercut the sensitive relationship between attorney and client and tear the fabric of the adversary system."[123] Yet, while it is well established that attorney-client communications merit the highest degree of protection,[124] the courts must look beyond this barrier to protect defendants who have been victimized by attorney ineptitude. The majority's fear that the adversary system will be unduly burdened by the application of the categorical standard is unfounded. Attorney conduct is routinely evaluated to measure civil liability in malpractice cases without a detrimental effect on the attorney-client relationship.[125] Moreover, the Supreme Court has declared that trial courts should police attor-

---

is to spare defendants, prosecutors and the courts a "truly futile repetition of the pretrial and trial process." *Id.*

118. *Id.* at 290-91. *See also* notes 93-98 *supra* and accompanying text.

119. *"Decoster III,"* 624 F.2d at 291 & n.135 (citing Coffin v. United States, 156 U.S. 432 (1895)). Judge Bazelon further suggested that a per se rule may be appropriate in all cases where a sixth amendment violation has been found. *Id.* at 293 (Bazelon, J., dissenting). He added that a per se rule may serve as a necessary deterrent in preserving the right to effective assistance of counsel. *Id.* at 293 & n.145.

120. *See* note 123 *infra* and accompanying text.

121. *See* note 115 *supra* and accompanying text.

122. *See* note 11 *supra* and accompanying text.

123. *"Decoster III,"* 624 F.2d at 208. This statement contrasts sharply with Judge Bazelon's statement that *"for so very many indigent defendants, the adversary system is already in shreds."* *Id.* at 297 (Bazelon, J., dissenting) (emphasis in original).

124. The attorney-client privilege, the oldest of the privileges for confidential communications, dates back to the sixteenth century, where it then appeared as an unquestioned doctrine. Keeping the secrets of his clients was considered to be "[t]he first duty of an attorney." 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290 (McNaughton rev. 1961).

125. *"Decoster III,"* 624 F.2d at 249 (Robinson, J., concurring).

ney conduct in order to protect defendants' sixth amendment rights.[126] It is only after the courts are willing to vitalize this Supreme Court mandate that the sixth amendment's guarantee will be assured to every defendant.

Judge Leventhal also criticized *"Decoster I's"* use of the ABA Defense Standards, noting that the standards were meant to be a mixture of the "aspirational and obligatory" in character.[127] As the dissent noted, however, the duties set forth in *"Decoster I"* represent the minimum components of effective assistance, beneath which no reasonable attorney's conduct should fall.[128] If an attorney fails to meet these standards, it should be incumbent upon the courts to safeguard the defendant's sixth amendment rights by examining the breach. A flexible judgmental approach is not, in any event, necessarily irreconcilable with the adoption of minimum standards.[129] The standards as provided in *"Decoster I"*[130] have the combined benefit of setting forth a minimum level of competence as well as preserving a flexible approach to accommodate the factual circumstances of each case. The requirement that the alleged violation must be shown to be substantial should assuage the fear of the success of frivolous claims. Additionally, application of the harmless error doctrine should insure against unwarranted reversals.

Judge Bazelon's categorical approach is well reasoned and provides greater safeguards for criminal defendants. The most obvious advantage in using the categorical approach is that it is inherently less subjective than the judgmental approach. Once a minimum set of standards is established, the appellate courts will be given uniform guidance, and attorneys will be on notice as to the minimum standard of behavior that is required of them.

Furthermore, by requiring the government to bear the burden of proving prejudice, the defendant is freed from the unduly harsh burden of proof imposed on him by the judgmental approach.[131] To require the defendant to prove prejudice by way of an examination of

---

126. *Id.* (" '[J]udges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.' ") (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

127. *"Decoster III,"* 624 F.2d at 205. The court commented that these standards were not put forward by the ABA as per se rules. *Id.*

128. *Id.* at 276 (Bazelon, J., dissenting). Judge Bazelon emphasized that the standards " 'are certainly relevant guideposts in this largely uncharted area' ") (quoting *"Decoster I,"* 487 F.2d 1197, 1203 n.25).

129. *"Decoster III,"* 624 F.2d at 276-77 (Bazelon, J., dissenting).

130. *See* note 87 *supra* and accompanying text.

131. *See* note 119 *supra* and accompanying text.

the outcome of the trial may require the defendant to prove his innocence.[132]

Thus, although *Decoster* provides an extensive explication of different philosophies concerning the standards by which attorney effectiveness should be gauged, no definitive standard has emerged. It is not surprising that states such as New York apply a wide variety of standards, often leaving the defendant's right to effective assistance of counsel largely to chance. The refusal by the courts to accept the responsibility for monitoring a categorical standard has led in at least one New York case[133] to the court's failure to require any minimum level of competence, and has demonstrated in the extreme the failings of the judgmental approach.

IV. The Right To Effective Assistance of Counsel in New York State

The right to effective assistance of counsel was recognized in New York State long before the Supreme Court's pronouncements in *Powell*[134] and *Gideon*.[135] The New York State Constitution of 1777 recognized that a criminal defendant, lacking adequate skills and knowledge to prepare his defense, required the assistance of an attorney to interpose between himself and the state.[136] The criminal defendant in New York is protected by both the Federal and New York State Constitutions. In many ways, the New York State Constitution affords defendants greater rights than does the Federal Constitution.[137] For example, a lesser burden of proof to show a conflict of interest in joint representation cases[138] and a great expansion in the

---

132. *Id.*

133. People v. Claudio, 85 A.D.2d 245, 447 N.Y.S.2d 972 (2d Dep't), *appeal pending*, 56 N.Y. 2d 649 (1982). *See also* notes 142-54 *infra* and accompanying text.

134. Powell v. Alabama, 287 U.S. 45 (1932). *See also* notes 19-25 *supra* and accompanying text.

135. Gideon v. Wainwright, 372 U.S. 335 (1963). *See also* notes 29-33 *supra* and accompanying text.

136. *See* People v. Settles, 46 N.Y.2d 154, 160, 385 N.E.2d 612, 614, 412 N.Y.S.2d 874, 877 (1978) (construing N.Y. Const. of 1777, art. XXXIV).

137. The protections afforded by the New York State Constitution have also been recognized earlier than similar federal protections. *Id.* at 161, 385 N.E.2d at 615, 412 N.Y.S.2d at 877 (citing Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964)).

138. *Compare* Cuyler v. Sullivan, 446 U.S. 335 (1980) (trial court not required to initiate inquiry of jointly represented defendants unless the court has reason to know that an actual conflict of interest exists) *with* People v. Monroe, 54 N.Y.2d 35, 429 N.E.2d 97, 444 N.Y.S.2d 578 (1981) (per curiam) (trial court must ascertain on the record whether jointly represented defendants understand the risks of joint representation).

area of when the right to counsel attaches[139] provide additional safeguards for defendants in New York State courts.

New York courts have evaluated ineffectiveness claims involving governmental interference[140] in much the same manner as federal courts by presuming a constitutional violation without requiring proof of prejudice.[141] When defendants are denied their sixth amendment rights by attorney incompetence, however, New York courts have failed to apply a consistent standard.

A. *People v. Claudio:* A Failure to Require Any Level of Competence

People v. Claudio[142] reveals the weaknesses of the judgmental approach. In *Claudio*, the Appellate Division of the New York State Supreme Court was faced with the issue of whether the defendant's statements to law enforcement personnel made prior to the commencement of formal judicial proceedings should be suppressed because the statements resulted from incompetent advice rendered by defense counsel.[143]

Claudio involved a sixteen year old youth who was indicted for felony murder.[144] The defendant was delivered to the District Attorney's office by his retained counsel.[145] Significantly, the attorney never ascertained whether his client was wanted by the police,[146] nor did the

---

139. For a discussion of the expanding right to counsel in New York see Note, *The Expanding Right to Counsel in New York*, 10 FORDHAM URB. L.J. 351 (1982); *The Uncounselled Confession: A New York Variant*, 14 COLUM. J. OF L. AND SOC. PROB. 343 (1979).

140. *See* note 35 *supra* and accompanying text.

141. *See* People v. Chiarello, 82 A.D.2d 837, 439 N.Y.S.2d 664 (2d Dep't 1981) (mem.). In *Chiarello*, defense counsel was directed by the court not to divulge to anyone, including his client, information presented by the People during a bench conference. The Court held that this "gag rule" denied the defendant his sixth amendment right to effective assistance of counsel. *Id.* at 837-38, 439 N.Y.S.2d at 665.

142. 85 A.D.2d 245, 447 N.Y.S.2d 972 (2d Dep't 1982).

143. *Id.* at 246, 447 N.Y.S.2d at 974.

144. The defendant, Angel Claudio, was indicted with his cousin, Randolfo Maldonado, for murder in the second degree, attempted robbery in the first degree, and criminal possession of a weapon in the second degree. *Id.* at 251, 447 N.Y.S.2d at 976.

145. There was some dispute in the testimony at the suppression hearing whether Claudio surrendered of his own accord or on the advice of his attorney, Mark Heller. *Id.* at 247-48, 447 N.Y.S.2d at 974-75. The trial court found, however, that Claudio was acting on Heller's advice. *Id.* at 251, 447 N.Y.S.2d at 976. The Appellate Division stated that the trial court's conclusions were supported in the record and should not be disturbed on appeal. *Id.*

146. *Id.* at 248, 447 N.Y.S.2d at 975. Heller also admitted knowing that Claudio had been questioned two days previously, but had not been arrested. *Id.*

attorney take notice of the fact that the prosecutor lacked sufficient evidence without a statement to charge the youth.[147] Furthermore, the attorney lied to his client concerning the prosecutor's willingness to accept a plea.[148] Finally, defense counsel, in a televised press conference, publicly acknowledged his client's guilt by urging others involved in the crime to surrender themselves to the authorities.[149]

The court found that the defendant's right to counsel had attached, and that this right included the right to competent counsel.[150] Although the court acknowledged that defense counsel "failed to fulfill his responsibility to protect his client's interest diligently and competently"[151] and that defense counsel's conduct was "egregious" and incompetent,[152] the court unanimously denied the defendant's motion to suppress the statements.[153] Adopting Judge Leventhal's reasoning in *"Decoster III,"* the court stated that determining attorney competence is a " 'judgment call,' " and relied on a state action theory to deny the claim.[154] The court stated that there was no opportunity for judicial intervention.[155]

Reliance on a state action theory shifts the emphasis to the *cause* of the attorney's incompetence rather than to the *quality* of his performance. Although it may be easier for an appellate court to identify and remedy ineffectiveness of counsel when it can be monitored by the government,[156] the sixth amendment demands more. Attorney incompetence can deprive a defendant of his sixth amendment rights

---

147. *Id.*

148. Heller was "categorically" told by District Attorney Santucci that a plea bargain was not a possibility. Rather than relate this information to Claudio, Heller informed Claudio that he was still negotiating. *Id.*

149. 85 A.D.2d at 249, 447 N.Y.S.2d at 975.

150. 85 A.D.2d at 256, 447 N.Y.S.2d at 979-80 (citing People v. Baldi, 54 N.Y.2d 137, 429 N.E.2d 400, 444 N.Y.S.2d 893 (1981)).

151. *Id.* at 251, 447 N.Y.S.2d at 977. The court added that it is significant to note that on appeal, the People did not argue to the contrary. *Id.*

152. *Id.* at 258, 447 N.Y.S.2d at 981. The court emphasized that Heller's actions did not occur in the context of a trial or other formal judicial proceedings. *Id.* This distinction seems tenuous, however, as Heller's misconduct could have been prejudicial to Claudio regardless of the context in which the misconduct occurred. *See* note 115 *supra* and accompanying text.

153. *Claudio*, 85 A.D.2d at 264, 447 N.Y.S.2d at 984.

154. *Id.* at 259, 447 N.Y.S.2d at 981. The court relied on Judge Leventhal's opinion in *"Decoster III."* The court focused on the fact that Heller's incompetent actions occurred at a time when the state, through its judges, could not have been aware of the misconduct to correct it. *Claudio*, 85 A.D.2d at 259, 447 N.Y.S.2d at 981.

155. *Id.*

156. *See* note 115 *supra* and accompanying text.

whether or not the government had some influence over the incompetence.

Even in cases of less obvious government involvement, such as late appointment cases,[157] the state involves itself by certifying that an attorney is competent to practice law. Bar examinations and character committee evaluations give the state's imprimatur to an attorney's basic ability. Furthermore, it is the attorney who is giving life to *Gideon's* mandate that the state must provide counsel. Thus, the attorney acts as the state's agent for the sixth amendment guarantee.[158] Strict reliance on government interference results in serious prejudice to defendants whose attorneys' conduct has denied them of their sixth amendment rights without overt government action. Thus, in *Claudio*, in an effort not to "penalize the People for that which could not reasonably have been prevented" by the state,[159] the court effectively penalized the defendant for relying on the advice of a state certified attorney. *Claudio* evidences the detrimental consequences which may be suffered by a defendant when attorney incompetence goes uncorrected.[160]

B. New York: The Trend Toward Subjectivity

The New York Court of Appeals, like the federal and other state courts, initially applied the traditional "farce and mockery" standard.[161] However, following the trend set by *McMann*,[162] the court has recently adopted a more flexible approach.

In *People v. Bennett*,[163] the court focused on defense counsel's lack of pre-trial preparation, rather than on the outcome of the trial.

---

157. *See* note 109 *supra* and accompanying text.

158. *See* Wainwright v. Sykes, 433 U.S. 72, 114 (1973) (Brennan, J., dissenting) ("[i]ndeed, if responsibility for error must be apportioned between the parties, it is the State, through its attorney's admissions and certification policies, that is more fairly held to blame . . . ."); *"Decoster III,"* 624 F.2d at 289 n.126 (Bazelon, J., dissenting) ("[s]tate action permeates the entire criminal process"); Bines, *Remedying Ineffective Representation in Criminal Cases: Departures From Habeas Corpus*, 59 VA. L. REV. 927, 981-82 (1973).

159. *Claudio*, 85 A.D.2d at 260, 447 N.Y.S.2d at 982.

160. Claudio faces 25 years to life in prison if convicted of the charge. N.Y. PENAL LAW (McKinney 1982) (Sentence charts).

161. *See, e.g.*, People v. Cossentino, 38 N.Y.2d 760, 343 N.E.2d 768, 381 N.Y.S.2d 51 (1975) (applying the "farce and mockery" standard) (citing People v. LaBree, 34 N.Y.2d 257, 313 N.E.2d 730, 357 N.Y.S.2d 412 (1974); People v. Lampkins, 21 N.Y.2d 138, 233 N.E.2d 849, 286 N.Y.S.2d 844 (1967); People v. Brown, 7 N.Y.2d 359, 165 N.E.2d 557, 197 N.Y.S.2d 705 (1960); People v. Tomaselli, 7 N.Y.2d 350, 165 N.E.2d 557, 197 N.Y.S.2d 697 (1960)).

162. *See* notes 37-41 *supra* and accompanying text.

163. 29 N.Y.2d 462, 280 N.E.2d 637, 329 N.Y.S.2d 801 (1972). In *Bennett*, the defendant made numerous attempts to commit suicide prior to his arrest and was

Although the court upheld the defendant's claim by use of the "farce and mockery" standard, the court cautioned that counsel must "conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed . . . ."[164] Thus, although the court seemed to recognize that the evaluation of ineffectiveness claims requires more than just an examination of the trial's outcome, the court nevertheless adhered to the traditional standard.

It was not until 1976 that the court appeared to abandon the "farce and mockery" terminology. In *People v. Droz*,[165] defense counsel failed to prepare for trial, resulting in serious prejudice to the defendant. [166] The court found a sixth amendment violation without relying on the "farce and mockery" standard. The court did not provide a definitive standard, stating that the representation was not "adequate or effective in any meaningful sense of the words."[167]

Although the "farce and mockery" standard was abandoned for a time in New York after *Droz*, the court returned to it as an alternative standard in *People v. Aiken*.[168] In *Aiken*, the court developed a flexible approach by which to evaluate the defendant's claim.[169] The court found that where the defendant had been absent from the trial, and the attorney had engaged in reasonable trial strategy, under either the "farce and mockery" standard or the "reasonable competence" approach, the representation was effective.[170] Thus although after *Aiken* it may have been reasonable to assume that the court was still considering a more traditional standard, considerable confusion resulted in the lower courts because of the alternative standard.[171]

---

adjudged incompetent by psychiatrists. Defense counsel, however, did not read any records dealing with the defendant's mental condition prior to the trial. Counsel was so woefully unprepared on the insanity defense that the court requested the prosecutor and the psychiatrist retained by the prosecutor to assist defense counsel. The court concluded that the attorney was "so completely unfamiliar with either the facts or the law bearing on his client's case as to doom the defense to failure." *Id.* at 465, 280 N.E.2d at 638, 329 N.Y.S.2d at 803.

164. *Id.* at 466, 280 N.E.2d at 639, 329 N.Y.S.2d at 804 (citing Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968)).

165. 39 N.Y.2d 457, 348 N.E.2d 880, 384 N.Y.S.2d 404 (1976).

166. Counsel's errors included: the failure to meet with the defendant until the morning of trial, the failure to contact witnesses, advising the jury of the defendant's extensive criminal record, and the failure to request a copy of the defendant's testimony. *Id.* at 459-61, 348 N.E.2d at 881-82, 384 N.Y.S.2d at 405-06.

167. *Id.* at 463, 348 N.E.2d at 883, 384 N.Y.S.2d at 408.

168. 45 N.Y.2d 394, 380 N.E.2d 272, 408 N.Y.S.2d 444 (1978).

169. The court expressed its "desire to avoid the confining strictures of a standard presumptively applicable to all cases." *Id.* at 398, 380 N.E.2d at 274, 408 N.Y.S.2d at 447.

170. *Id.* at 399, 380 N.E.2d at 275, 408 N.Y.S.2d at 447.

171. In People v. Baldi, 76 A.D.2d 259, 429 N.Y.S.2d 677 (2d Dep't 1980), *rev'd*,

To date, the New York Court of Appeals has not attempted to reconcile these varying standards. In a recent case, *People v. Baldi*,[172] the court acknowledged that *Aiken* did not provide a definitive standard by which to measure attorney competence. The *Baldi* court expressed concern about confusing "true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis."[173] The court held that an unsuccessful defense will not necessarily provide the basis for an ineffectiveness claim.[174] Rather than adhering to a specified standard, the court stated that "so long as the evidence, the law and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met."[175]

The range of competency standards also varies within the departments of the Appellate Division of the New York State Supreme Court. The First Department recently applied the "reasonable competence" standard to deny a claim of ineffective assistance in a case where defense counsel failed to request a charge embodying a defense, even after he had been invited to do so by the trial judge.[176] Yet, in a later case, the court used the "meaningful representation" standard to uphold an ineffectiveness claim after defense counsel failed to properly present an alibi defense.[177]

---

54 N.Y.2d 137, 429 N.E.2d 400, 444 N.Y.S.2d 893 (1981), the court noted the remaining although diminished vitality of the "farce and mockery" standard. The Fourth Department interpreted *Aiken* as heralding the New York Court of Appeals' departure from the traditional standard, People v. Wise, 64 A.D.2d 272, 276, 409 N.Y.S.2d 877, 879-80 (4th Dep't 1978), but later returned to the use of the "farce and mockery" standard. *See* note 181 *infra* and accompanying text.

172. 54 N.Y.2d 137, 429 N.E.2d 400, 444 N.Y.S.2d 893 (1981). In *Baldi*, the defendant challenged his counsel's conduct on the following grounds: (1) counsel's failure to pursue the defendant's claim of actual innocence; (2) counsel's handling of the expert witnesses; (3) counsel's testimony at the trial and suppression hearing; (4) counsel's role in bringing about the interrogation of the defendant; and (5) the quality of counsel's efforts to suppress the defendant's confession. *Id.* at 147, 429 N.E.2d at 405, 444 N.Y.S.2d at 898. The court, however, labeled counsel's defense "well-grounded but unsuccessful." *Id.* at 140, 429 N.E.2d at 401, 444 N.Y.S.2d at 894.

173. *Id.* at 146, 429 N.E.2d at 405, 444 N.Y.S.2d at 898.

174. *Id.* at 140, 429 N.E.2d at 401, 444 N.Y.S.2d at 894.

175. *Id.* at 147, 429 N.E.2d at 405, 444 N.Y.S.2d at 898 (citations omitted). The court added that counsel's conduct was neither unreasonable nor a farce and mockery. *Id.* at 151-52, 429 N.E.2d at 408, 444 N.Y.S.2d at 901.

176. Counsel also failed to object to evidence of uncharged and unrelated criminal activities. *See* People v. Sellars, 74 A.D.2d 551, 425 N.Y.S.2d 117 (1st Dep't 1980) (mem.).

177. *See* People v. Long, 481 A.D.2d 521, 438 N.Y.S.2d 1 (1st Dep't 1981) (mem.). In *Long*, defense counsel examined a witness concerning defendant's where-

Similarly, the Second Department has applied two different standards. In one recent case, the court upheld the defendant's claim of ineffective assistance based on counsel's failure to utilize the insanity defense by applying the *Aiken* alternative standards.[178] In a later case, the court used the "reasonable competence" standard to find that counsel's failure to request a pre-trial suppression hearing was insufficient to support an ineffectiveness claim.[179] The Third Department has cited *Aiken* to deny ineffectiveness claims, but has yet to explicate a definitive standard.[180] The Fourth Department has employed the *Aiken* alternative standard to find that questionable trial strategy did not deprive a defendant of his sixth amendment rights.[181]

The New York Court of Appeals has not made any definitive statements as to whether the *Chapman* harmless error analysis is appropriate in reviewing ineffectiveness claims. In *People v. Crimmins*,[182] the court adhered to the *Chapman* rule, stating that errors of constitutional magnitude are nonprejudicial only when proof of guilt is overwhelming and where "there is no reasonable possibility that the error might have contributed to defendant's conviction and that it was thus harmless beyond a reasonable doubt."[183] The court also implied in dictum that a per se rule may be appropriate in certain ineffectiveness cases.[184]

The New York courts' use of three different standards: "meaningful representation," "reasonable competence," and "farce and mockery" suggests a judicial preference for a subjective, case-by-case analysis.

---

abouts not at the time of the crime, but twenty-four hours after the crime had been committed. The court found that this error "went to the heart of the alibi," and undermined the defense. *Id.* at 522, 438 N.Y.S.2d at 2.

178. *See* People v. Baldi, 76 A.D.2d 259, 429 N.Y.S.2d 677 (2d Dep't 1980), *rev'd*, 54 N.Y.2d 137, 429 N.E.2d 400, 444 N.Y.S.2d 893 (1981). *See also* note 172 *supra* and accompanying text.

179. *See* People v. Williams, ___ A.D.2d ___, 449 N.Y.S.2d 319, 321 (2d Dep't 1982) (mem.); *See also* People v. Jackson, 74 A.D.2d 585, 424 N.Y.S.2d 484 (2d Dep't 1980) (mem.).

180. *See* People v. Little, ___ A.D.2d ___, 451 N.Y.S.2d 257 (3d Dep't 1982) (mem.); People v. Early, 85 A.D.2d 752, 445 N.Y.S.2d 252 (3d Dep't 1981) (mem.); People v. Ellis, 83 A.D.2d 652, 442 N.Y.S.2d 184 (3d Dep't 1981)(mem.).

181. *See* People v. Smith, 61 A.D.2d 91, 401 N.Y.S.2d 353 (4th Dep't 1978). *See also* People v. Sanin, 84 A.D.2d 681, 446 N.Y.S.2d 636 (4th Dep't 1981); People v. Dietz, 79 A.D.2d 476, 437 N.Y.S.2d 185 (4th Dep't 1981) (adopting the *Aiken* approach).

182. 36 N.Y.2d 230, 326 N.E.2d 787, 367 N.Y.S.2d 213 (1975).

183. *Id.* at 237, 326 N.E.2d at 791, 367 N.Y.S.2d at 218.

184. The court stated that if an appellate court concludes that, *inter alia*, defense counsel's inadequacy was so great that it deprived the defendant of a fair trial, the court must reverse the conviction without regard to prejudice or overwhelming guilt of the defendant. *Id.* at 238, 326 N.E.2d at 791, 367 N.Y.S.2d at 218-19.

The lack of a uniform standard provides no guidance for lower courts to review ineffectiveness claims or for attorneys to measure their own conduct. New York's adoption of the judgmental approach, which rejects explicit minimum standards, seems anomalous in view of the increased judicial concern with attorney incompetence,[185] and the frequent citation of the ABA Standards and other guidelines by the courts.[186] More importantly, the criminal defendant is placed at a great disadvantage by the usage of a completely subjective standard. Such a standard effectively amounts to no standard at all.

V. Recommendations

Remedies for the increasing instances of attorney incompetence[187] can be divided into two major areas: (1) measures designed to prevent claims from arising by improving the quality of legal representation, and (2) uniform standards to guide the appellate courts after a claim of ineffectiveness has arisen.

A. Improving the Quality of the Legal Profession

There are certain disparities in the quality of representation afforded to criminal defendants which are not susceptible to mitigation, such as attorney inexperience[188] or the particular choice of trial tactics.[189] These differences in quality are to be expected, however, and

---

185. *See* note 7 *supra* and accompanying text.

186. At least 2,000 appellate court opinions have cited various ABA Standards with favor. Jameson, *The Beginning: Background and Development of the ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 255, 269 (1974).

187. Four principal goals have been suggested for a proper system of remedies: (1) to provide redress by compensation for loss suffered; (2) to deter the responsible party and others similarly situated from repeating the misconduct; (3) to intervene timely and to prevent threatened injury; and (4) to eliminate undue advantage attained through the misconduct. Bines, *supra* note 8, at 970.

188. *But see* United States v. Cronic, 675 F.2d 1126 (10th Cir. 1982). In *Cronic*, the court appointed a real estate attorney to represent a defendant who faced a sentence of up to sixty-five years in prison in a complex fraud case. The court held that the attorney's lack of relevant experience in criminal law denied the defendant the right to effective assistance of counsel. *Id.* at 1129.

Extensive experience in the field, however, does not guarantee competent representation. *See* Young v. Zant, 677 F.2d 792, 799 (11th Cir. 1982) (writ of habeas corpus granted where a defendant was sentenced to death after being represented by an attorney with more than fifty years of criminal trial experience who "failed to inform himself of basic Georgia criminal procedure . . . .")

189. Courts are generally reluctant to inquire into matters of trial strategy. *See, e.g.*, People v. Baldi, 54 N.Y.2d 137, 429 N.E.2d 400, 444 N.Y.S.2d 893 (1981) (unsuccessful trial tactics do not necessarily indicate ineffective assistance); People v. Aiken, 45 N.Y.2d 394, 399, 380 N.E.2d 272, 275, 408 N.Y.S.2d 445, 447 (1978)

should not, by themselves, give rise to a claim of ineffective assistance of counsel. Yet, disparities that rise to the level of a sixth amendment violation can and should be corrected.

Many commentators have suggested that the process of upgrading the quality of legal representation should begin with the law schools.[190] Law schools have been criticized for failing to provide an education which includes practical and ethical considerations in addition to a sound theoretical base. It has also been suggested that law schools place an increased emphasis on clinical education.[191] Although law schools have the potential to improve the quality of legal representation significantly, their impact will necessarily be limited due to the short period of time they have to educate their students.[192]

The American Bar Association has suggested that there are three essential components of professional legal competency: (1) analytical ability and knowledge of the law, (2) ability to perform basic legal tasks and (3) diligence and ethical responsibility in applying those skills.[193] The limited utility of looking toward the law schools for improvement in attorney performance is most apparent in the third

---

("[t]he right to counsel was not intended to afford a defendant, aided by the wisdom of hindsight, to second guess matters of trial strategy . . ."). *But see* Wainwright v. Sykes, 433 U.S. 72, 115 (1977) (Brennan, J., dissenting) ("while I can agree that the proper functioning of our system of criminal justice . . . places heavy reliance on the professionalism and judgment of trial attorneys, I cannot accept a system that ascribes the absolute forfeiture of an individual's constitutional claims to situations where his lawyer manifestly exercises *no* professional judgement at all — where carelessness, mistake, or ignorance is the explanation for a procedural default.")

190. *See, e.g.*, Bazelon, *Defective Assistance*, *supra* note 1, at 19 (advocating the use of clinical programs); Burger, *Special Skills*, *supra* note 7, at 232 (one cause of inadequate advocacy is the law schools' failure to inculcate high enough standards of professional ethics and adequate programs of advocacy); Carrington, *The University Law School and Legal Services*, 53 N.Y.U. L. REV. 402, 402 (1978) ("[a]ll of the rhetoric by the lawyers and bar leaders, and all of the complaints by the public will not measurably improve the profession unless and until the original product - the law school graduate - is improved. If we want real improvement, it must come from the root source, the law school") (quoting Braverman, *Law Schools Should Teach Competency, Morality and Economics*, 65 ILL. B.J. 454, 455 (1977)).

191. *See, e.g.*, Bazelon, *Defective Assistance*, *supra* note 1, at 41; Burger, *Special Skills*, *supra* note 7, at 233; Kaufman, *supra* note 7, at 177.

192. There are other factors which must be taken into consideration in looking to the law schools as the primary source of reform. It is questionable whether law schools can closely monitor the student's individual progress when most classes are large in number. Also, standard law school examinations generally test only a limited area of a student's analytical ability. Finally, once a student graduates, the law school ceases to exert direct influence over him.

193. ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS 9 (1979).

component, diligence and ethical responsibility. Although the law schools may excel in teaching analytical skills, a lack of practical training may serve to transform an academically capable student into an ineffective advocate.[194]

In addition to advocating changes in the law school curriculum, other commentators have suggested that there is a need for continuing legal education programs.[195] Presently, two-thirds of the states have voluntary continuing legal education programs.[196] These voluntary programs may be of limited utility, however, as the participants are already likely to be highly motivated and competent.[197] Nine states have mandatory continuing legal education programs, which may also be of limited utility. Such programs, which necessarily operate on a large scale, may be forced to sacrifice quality due to the large number of participants.[198] Moreover, mandatory programs are not sensitive to those lawyers who keep themselves informed of new developments in the law. Forced participation in these programs is likely to generate resentment among attorneys.[199]

Selective mandatory continuing legal education programs may represent an appropriate compromise between voluntary and mandatory programs. A selective system could apply to those attorneys who have demonstrated incompetence, and could also serve as a deterrent against correctible incompetence.[200] As no failsafe system to insure attorney competence can be devised, appellate courts will need to

---

194. "The greatest intellect may be rendered ineffective in the practice of law by other traits such as excessive shyness, excessive aggressiveness, sloth, inattentiveness to detail, and poor judgment about people and their behavior." Carrington, *supra* note 190, at 421. *See also* Frankel, *supra* note 7, at 618 ("[t]he significant qualities distinguishing good from bad lawyers - and thus, the areas for truly major concern about 'competence' - are matters of character, judgment, wisdom, morals and attitude, not the business of technical proficiency").

195. *See generally*, Wolkin, *A Better Way to Keep Lawyers Competent*, 61 A.B.A.J. 575 (1975); Wolkin, *More on a Better Way to Keep Lawyers Competent*, 61 A.B.A.J. 1064 (1975).

196. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705, 725 (1981).

197. *Id.* In fact, a recent study indicates that there is no correlation between competent appellate advocacy and participation in continuing legal education programs. *Id.* at 726 (citing REPORT AND TENTATIVE RECOMMENDATIONS OF THE COMM. TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN THE FEDERAL COURTS TO THE JUDICIAL CONFERENCE OF THE UNITED STATES (1978), *reprinted in* 79 F.R.D. 187, 206-07 (1978)).

198. Wolkin, *A Better Way to Keep Lawyers Competent*, *supra* note 195, at 576.

199. *Id.* Mr.Wolkin advocates a selective monitoring system. *Id.* at 577.

200. *Id.* at 577-78. The deterrent benefit would not be an incident of the mandatory program.

adopt uniform standards to review claims of ineffective assistance of counsel.

B. Appellate Standards of Review

Courts should look toward adopting a categorical approach for evaluating claims of ineffective assistance of counsel. The ABA Standards should be relied on in an effort to develop such an approach. These standards represent the efforts of leading members of the legal profession to formulate minimum standards in the field of criminal justice.[201] Although the Standards were not intended to become inflexible guidelines,[202] they provide a well reasoned accordance of views of how the criminal justice system should ideally operate. The Standards seek to minimize the tensions between a defense counsel's duty to his client and his duty to the court.[203] Counsel must be sufficiently aggressive to safeguard his client's constitutional rights, but he also must cooperate with the court, so as not to prejudice his client's interests.[204] Once clear guidelines are established, attorneys would be on notice as to the minimum level of conduct expected of them, and the courts would have a uniform method for evaluating ineffectiveness claims.

As an alternative to the use of the ABA Standards, a minimum set of duties could be compiled[205] and used by the courts to measure whether an attorney has fulfilled his basic responsibilities to his client. Several duties could be formulated which represent the minimum responsibilities of a competent defense attorney. Certain procedures should be followed, including: extensive consultations with the client,

---

201. *See* Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 251, 251 (1974).

202. Originally, the ABA Standards were referred to as "minimum standards." The word "minimum" was dropped, however, when it was recognized that the standards were better described as desirable or acceptable. Jameson, *supra* note 186, at 258.

203. The tension may arise where the court asks defense counsel questions concerning confidential information obtained from his client. Counsel must then either breach his duty to protect his client's confidences, or appear uncooperative to the judge, which may itself prejudice his client's interests. AM. BAR. ASS'N PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 149 (1971).

204. *Id.*

205. These minimum guidelines could be implemented through five means: (1) by legislation; (2) by court rules promulgating criminal procedure; (3) by constitutional amendment; (4) by reform in practice or custom on the trial bench or at the bar, or (5) by appellate court opinions adopting the duties. Nichols, *Placing The Standards In The Marketplace: The Implementation Process*, 12 AM. CRIM. L. REV. 263, 269 (1974).

complete investigation of the facts and circumstances of the case and the filing of appropriate discovery and suppression motions.[206] Such a list would serve to benefit attorneys by putting them on notice, and may ultimately serve to decrease the number of ineffectiveness claims.

The courts should bear the responsibility for providing relief to the defendant who has been victimized by attorney incompetence. Other remedies may be available, such as disciplinary proceedings and civil damage actions, but in practice, these remedies are beyond the reach of most criminal defendants who lack the opportunities and the financial resources necessary to institute these actions.[207] Moreover, a monetary award hardly seems appropriate relief for the defendant who receives a jail sentence.

Thus, because of the inadequacy of other remedies, the appellate courts should bear the responsibility of formulating uniform standards by which to evaluate ineffectiveness claims.

V. Conclusion

Appellate courts are currently applying a variety of standards to evaluate claims of ineffective assistance of counsel. The need for a uniform set of standards is especially pertinent in view of the serious consequences suffered by criminal defendants who are deprived of their sixth amendment rights. Defendants are deserving of a uniform application of this fundamental right which should not "vary with the sensibilities and subjective judgments of various courts. The law demands objective explanation, so as to ensure the even dispensation of justice."[208] Until the courts develop a uniform standard, few convictions will be reversed based on sixth amendment violations, although instances of attorney incompetence will surely continue.

Joanne Legano

---

206. For a model investigative worksheet see Bazelon, *Realities of* Gideon *and* Argersinger, *supra* note 7, at 836-38.

207. For a criticism of alternative remedies see Bines, *supra* note 8, at 972-76.

208. Beasley v. United States, 491 F.2d 687, 692 (6th Cir. 1974).