A Functional Analysis of the Effective Assistance of Counsel, A Note

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NOTES

A Functional Analysis of the Effective Assistance of Counsel

The sixth amendment provides that in all criminal prosecutions the accused shall enjoy the right "to have the Assistance of Counsel for his defence." ¹ The Supreme Court has construed this clause to guarantee to criminal defendants the "effective" assistance of counsel performing within a minimum standard of competency.² Prevalent lower court interpretations of the right to effective assistance require a showing that counsel’s inadequate performance caused actual prejudice to the defendant’s interest in obtaining an acquittal.³ Because most defendants are unable to demonstrate the actual impact upon the outcome of their trial of an attorney’s departure from normal competency, courts infrequently grant relief for claims of ineffective assistance. Recently, the requirement of actual prejudice has come under attack as a vestige of due process analysis of the right to counsel inappropriate to the trial rights guaranteed by the sixth amendment.⁴

After tracing the due process origins of current standards for evaluating ineffectiveness claims, this Note suggests that the prejudice requirement is not responsive to the broader interests protected by the sixth amendment. It then examines the various rationales for a showing of actual prejudice and concludes that the requirement is not compelled by Supreme Court precedent, the congruence between the sixth amendment and due process rights to counsel, institutional considerations, or the "harmless error" rule. In place of current standards, the Note develops a functional analysis, derived from the Supreme Court’s approach to related constitutional problems, that evaluates ineffectiveness claims in accordance with the potential for substantial prejudice to specific interests protected by the sixth amendment. Finally, this analysis is applied to claims of ineffectiveness of defense attorneys in their roles as advocate, advisor, and intermediary on behalf of the accused.

1. THE DUE PROCESS ORIGINS OF CURRENT STANDARDS OF EFFECTIVE REPRESENTATION

A defendant’s right to counsel may arise either under the due process clauses of the fifth and fourteenth amendments or under the sixth amendment. Although both federal and state criminal courts traditionally had discretionary power to appoint counsel for an indigent defendant,⁵ the Constitution was not originally understood to guarantee assistance to those who could not otherwise

¹. In Gideon v. Wainwright, 372 U.S. 335 (1963), the Court held that the fourteenth amendment's due process clause incorporated the sixth amendment's right to the assistance of counsel.
³. See note 54 and accompanying text infra.
⁴. See note 56 and accompanying text infra.
⁵. See 1 T. Cooley, Constitutional Limitations 700 (8th ed. 1927).
obtain counsel. The Supreme Court first acknowledged in *Powell v. Alabama* that due process requires an appointment of counsel when compelled by fundamental fairness. A few years later it interpreted the sixth amendment to guarantee counsel to all felony defendants in federal courts. In state criminal proceedings, the due process approach to the right to counsel, under which courts examined whether the lack of counsel in a particular case amounted to a denial of fundamental fairness, continued to be applied until *Gideon v. Wainwright* made the sixth amendment’s assistance of counsel clause applicable to the states by incorporation into the fourteenth amendment.

Although due process analysis is no longer relevant in criminal prosecutions, courts grappling with the sixth amendment’s right to effective assistance of counsel have persisted in drawing upon case law developed under the fourteenth amendment’s due process clause. Therefore, to understand the current formulations of “effectiveness” it is useful first to distinguish the due process from the sixth amendment analysis in assistance of counsel cases.

A. **The Right to Assistance of Counsel**

1. **Due Process Analysis.** The Supreme Court first found a constitutional guarantee of assistance of counsel in a case decided under the due process clause of the fourteenth amendment. In *Powell v. Alabama*, the Supreme Court held that due process required “an effective appointment of counsel” to a young and poorly educated defendant charged with a capital offense. Subsequently, the Court limited a state’s duty to appoint counsel to cases in which the assistance of counsel is essential to maintain “fundamental fairness.” In *Betts v. Brady*, it held the lack of counsel did not offend common notions of fairness and right because the indigent defendant in the case was capable of waging his own defense against a charge of robbery. This decision established that due process does not dictate a per se right to counsel in all proceedings that would be considered “criminal” under the sixth amendment.

   By rejecting a prophylactic rule that would apply equally to capital cases and to “trials in the Traffic Court,” the *Betts* Court hoped to strike the proper balance between an accused’s interest in procedural fairness and a state’s interest

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6. The sixth amendment was understood to guarantee only “the assistance of counsel of [the accused’s] own selection.” *Andersen v. Treat*, 172 U.S. 24, 29 (1898). See *Powell v. Alabama*, 287 U.S. 45, 60-65, 68 (1932); I T. Cooley, supra note 5, at 696-708.

7. 287 U.S. 45 (1932).


10. 287 U.S. 45, 71 (1932).

11. 316 U.S. 455 (1942).

12. **[Due process]** formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

Id. at 462. See also *Avery v. Alabama*, 308 U.S. 444, 446-47 (1940).

13. 316 U.S. at 473.
in conserving its resources, preserving convictions, and maintaining the integrity of its judicial system.\textsuperscript{14} Only when both the magnitude of an accused's interest in life or liberty and the risk of unwarranted deprivation outweighed a state's interests would "fundamental fairness" require an appointment of counsel or, in its absence, reversal for deprivation of due process. As originally applied, the \textit{Betts} rule focused upon whether, at the outset of a criminal proceeding, due process provided an affirmative guarantee of counsel.\textsuperscript{15} The Court took into account such factors as the gravity of the crime,\textsuperscript{16} the age and education of the defendant,\textsuperscript{17} and the complexity of the offense charged.\textsuperscript{18} In practice, the "fundamental fairness" standard defied consistent application by trial courts, not only because of the imprecision of the formulation, but also because many elements of the due process calculus, such as the nature of the evidence against the accused, the accused's factual and legal defenses, and his familiarity with legal procedures, were rarely known by the trial judge at the outset of the trial, when an appointment of counsel, in order to be effective, must be made.\textsuperscript{19} As a result, the due process inquiry eventually shifted to whether "the disadvantage from absence of counsel [was] ... aggravated by circumstances showing that it resulted in the prisoner actually being taken advantage of, or prejudiced."\textsuperscript{20}

Although after \textit{Gideon v. Wainwright},\textsuperscript{21} "pure" due process is no longer the primary source of the right to counsel in "criminal proceedings," assistance of counsel claims arising in other contexts continue to be analyzed on a case-by-case basis in accordance with the \textit{Betts} concern for fundamental fairness.\textsuperscript{22}

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\textsuperscript{14} See notes 108-19 and accompanying text infra.
\textsuperscript{15} See Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948).
\textsuperscript{16} In capital cases after \textit{Powell} the interest in life generally was regarded as sufficiently grave to require an appointment of counsel as a matter of fundamental fairness. See, e.g., Reece v. Georgia, 350 U.S. 85 (1955); Hawk v. Olson, 326 U.S. 271 (1945).
\textsuperscript{17} See, e.g., Wade v. Mayo, 334 U.S. 672, 683-84 (1948); DeMeerleer v. Michigan, 329 U.S. 663, 665 (1947) (per curiam).
\textsuperscript{18} See, e.g., Chewning v. Cunningham, 368 U.S. 443, 446 (1962); Rice v. Olson, 324 U.S. 786, 789-91 (1945).
\textsuperscript{19} See Gibbs v. Burke, 337 U.S. 773, 780 (1949); Green, The Bill of Rights, the Fourteenth Amendment and the Supreme Court, 46 Mich. L. Rev. 869, 897-99 (1948).
\textsuperscript{21} 372 U.S. 335 (1963). Until the Court's decision in \textit{Gideon}, the fourteenth amendment due process right and sixth amendment right to counsel had evolved independently. In \textit{Gideon} the Supreme Court was faced with a case virtually identical to \textit{Betts}, which the Court, applying its balancing test, had determined did not give rise to a right to appointed counsel. Id. at 338. Rejecting the \textit{Betts} analysis as applied to criminal prosecutions within the meaning of the sixth amendment, the Court held that the assistance of counsel is so fundamental to a fair trial that an indigent defendant has an absolute right to counsel.
\textsuperscript{22} For example, in Gagnon v. Scarpelli, 411 U.S. 778 (1973), the Supreme Court concluded that an indigent probationer did not have an absolute right to appointed counsel in a revocation proceeding as a matter of due process, but remanded for a hearing on whether, under the \textit{Betts} analysis, the particular probationer had a right to appointed counsel. The Court suggested balancing against the state's interest in informality, flexibility, and economy, the probationer's capability of speaking effectively on his own behalf, and the complexity of the factual and legal questions involved. Id. at 788-91.

In general, due process may require an appointment of counsel either when the proceedings against a defendant fall outside the sixth amendment definition of "criminal" prosecution, see, e.g.,
2. The Sixth Amendment Right. Unlike the due process right, the sixth amendment right to assistance of counsel has been regarded since *Johnson v. Zerbst* as a procedural guarantee to which an ad hoc balancing of interests is inappropriate. In refusing to extend the *Betts* inquiry into fundamental fairness to claims arising under the sixth amendment, the Court has acknowledged that the assistance of counsel clause, unlike due process, is not defined exclusively by a concern for the reliability of the adjudicative process. The guarantee of a skilled partisan advocate is intended also "to give substance to other constitutional and procedural protections afforded criminal defendants."  


23. 304 U.S. 458 (1938). In *Zerbst*, the Court acknowledged for the first time that the sixth amendment not only protects against governmental obstruction of counsel's performance, but also grants indigent defendants an affirmative right to an appointment of counsel in criminal prosecution in federal courts. "Criminal prosecution" has since been interpreted to include all prosecutions, whether felony or misdemeanor, that might result in imprisonment, Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972), and all critical stages in the prosecution, from postindictment confrontations to appeals as of right, see, e.g., United States v. Wade, 388 U.S. 218 (1967) (pretrial confrontation); Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing). Cf. Kirby v. Illinois, 406 U.S. 682 (1972) (no right to appointed counsel at preindictment confrontation); Ross v. Moffitt, 417 U.S. 600 (1974) (no right to appointed counsel in discretionary state appeal).


25. The reliability of the trial outcome is of course one of the basic interests underlying the sixth amendment guarantee. See, e.g., Herring v. New York, 442 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").


In adopting a right to counsel, the framers were abandoning common law restrictions upon the role of defense attorneys in criminal-proceedings. See Powell v. Alabama, 287 U.S. 45, 60 (1932); 1 T. Cooley, supra note 5, at 696-700. The assistance of counsel clause reflected the framers' recognition of the growing role played by skilled prosecutors and their desire to redress the imbalance created at common law by the state's procedural and factfinding advantage.

Opinions interpreting the assistance of counsel clause have also emphasized the importance of the guarantee in assuring "equal justice" for criminal defendants. Counsel is recognized as essential both "to equalize the sides in [the] adversary criminal process," Scott v. Illinois, 440 U.S. 367, 377 (1979) (Brennan, J., dissenting), and to equalize access to legal resources among different classes of criminal defendants, see, e.g., Argersinger v. Hamlin, 407 U.S. 25, 36 (1972) (noting significantly greater statistical likelihood that misdemeanor defendant represented by counsel will have charges against him dismissed); Anders v. California, 386 U.S. 738, 744-45 (1967). See generally United States v. Decoster, No. 72-1283, slip op. at 1-8 (D.C. Cir. July 10, 1979) (en bane) (Bazelon, J., dissenting), cert. denied, 100 S. Ct. 302 (1979). The inability of unrepresented defendants to take advantage of opportunities to mitigate the harshness of a criminal prosecution would necessarily result in unequal justice based upon the wealth of the defendant. Therefore, the sixth amendment guarantee extends the assistance of counsel to such processes as plea bargaining and sentencing, which do not implicate so much the fairness of the truth-determining process as the fairness of the criminal system.
Our adversary system is premised upon defense counsel's function as a protector of procedural rights that otherwise would be of no value to a defendant untrained in the law. Certain rights, such as the sixth amendment's guarantees to confrontation and compulsory process, are preserved only if a defendant or his representative affirmatively exercises them in an effective manner. The personal inability of the accused to conduct an adequate cross-examination or select appropriate witnesses to present on his behalf does not vitiate an otherwise valid conviction. Defendants are permitted to waive traditionally unrelinquishable rights, such as trial by jury, because their counsel are able to safeguard the interests normally protected by the waived procedure. The right to effective representation, therefore, should be defined by the accused's need for a skilled partisan to protect his procedural and substantive interests, rather than in accordance with the abstract principle of "fundamental fairness."

B. Effective Representation

In decisions following Powell and Zerbst the Supreme Court acknowledged that, since the mere presence of counsel does not adequately protect the interests underlying the assistance of counsel clause, the right to counsel additionally contemplates "effective assistance." These decisions culminated in McMann v. Richardson, which expressly recognized that the sixth amendment "right to the effective assistance of counsel" precludes not only impediments to counsel's performance imposed by a state or court, but also an inadequate performance by counsel unimpeded by state action. McMann held that a counselled guilty plea, although immune from collateral attack on the ground of involuntariness,

The assistance of counsel clause also serves basic interests of human dignity. The right to counsel looks not only to the ultimate question of guilt, but equally to the apparent justness of the process by which the outcome is determined. Whether or not access to counsel is, in a particular case, essential to a reliable outcome, the apparent necessity of counsel makes the guarantee essential to the respect the government must accord to the dignity of the criminal accused. See Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Glasser v. United States, 315 U.S. 60, 75 (1942).

27. See notes 176-183 and accompanying text infra.
29. In some settings, the presence of counsel, by itself, may serve to protect valuable interests of the accused. See, e.g., United States v. Wade, 388 U.S. 218, 236 (1967) (presence of counsel may discourage suggestive police procedure at lineup); Miranda v. Arizona, 384 U.S. 436, 470 (1966) (presence of counsel may discourage coercive police interrogation).
30. That the sixth amendment contemplates minimally competent assistance of counsel was suggested first in Powell, in which a denial of "an effective appointment of counsel" was deemed a due process violation because of the lack of adequate time to prepare a defense. 287 U.S. at 71. In Avery v. Alabama, 308 U.S. 444, 446 (1940), the Court held that the denial of a continuance did not violate the accused's fourteenth amendment right to counsel, but noted that the constitutional guarantee of assistance of counsel "cannot be satisfied by mere formal appointment," and may be violated where appointed counsel is denied an opportunity "to confer, to consult with the accused and to prepare his defense." Two years later, the defendant in Glasser v. United States, 315 U.S. 60 (1942), challenged a federal judge's appointment of his retained counsel to represent a codefendant. The Court expressly acknowledged that the sixth amendment, independently of due process, guarantees the effective assistance of counsel, and held that counsel's conflict of interest had violated that guarantee. Id. at 76.
32. Id. at 771 n.14.
might be challenged if counsel's advice fell below "the range of competence demanded of attorneys in criminal cases." 33 The Court reserved for the lower courts the task of articulating a minimum standard of attorney competence in criminal cases. 34

The two prevailing tests by which lower courts have evaluated claims of "ineffective" or "inadequate" assistance of counsel are the subjective "farce and mockery" and the objective "reasonableness" standards. The "farce and mockery" formulation is grounded in the notion that the right to a competent attorney is exclusively a matter of due process. Early state decisions held that due process is violated when counsel's negligence is so great or his mistake of law so serious as to deprive the defendant of important and material evidence that might reasonably have resulted in a favorable verdict. 35 In Diggs v. Welch, 36 the United States Court of Appeals for the District of Columbia Circuit declared that counsel's carelessness deprives a defendant of due process only if his poor trial performance renders "the proceedings . . . a farce and a mockery of justice." 37 Like earlier due process standards, this concededly conservative formulation contemplates both a grossly inadequate performance by counsel and some significant resulting harm to the defendant's interests. 38 The stringent standard employed in Diggs was calculated to deter habeas corpus claims premised on defense counsel's malfeasance by limiting reversals to those cases in which counsel's defective assistance was sufficiently visible to implicate the trial judge and prosecutor in the failure to protect the accused. 39

For many courts that now acknowledge the independent sixth amendment underpinnings of the right to effective assistance, the "farce and mockery" standard seems to have become little more than a metaphor for the heavy burden imposed upon defendants to demonstrate attorney ineffectiveness. 40 Other courts, 41 joined by commentators on the subject, 42 with increasing frequency

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33. Id. at 770-71.
34. Id.
35. See, e.g., People v. Nitti, 312 Ill. 73, 88-89, 143 N.E. 448, 453-54 (1924); State v. Gunter, 30 La. Ann. 536, 540 (1878); State v. Gleeman, 170 Minn. 197, 205, 212 N.W. 203, 207 (1927).
37. Id. at 669.
38. See, e.g., United States v. Aulet, 618 F.2d 182, 187-88 (2d Cir. 1980).
39. 148 F.2d at 669.
40. See, e.g., McQueen v. Swenson, 498 F.2d 207, 214 (8th Cir. 1974). The failure of McQueen either to embrace or reject an independent sixth amendment standard bedeviled the district courts of the Eighth Circuit. For a discussion of the co-existence of inconsistent standards and the problems of habeas review that result, see Garton v. Swenson, 417 F. Supp. 697, 707-30 (W.D. Mo. 1976).
41. Only the Second Circuit has retained a "farce and mockery" standard. See United States v. Yanishasfsky, 500 F.2d 1327, 1333 (2d Cir. 1974). A small number of state courts also apply this standard, see, e.g., Deason v. State, 263 Ark. 56, 60-61, 562 S.W.2d 79, 82 (1978); People v. Elder, 73 Ill. App. 3d 192, 199-200, 391 N.E.2d 403, 408-09 (1979); Nickell v. Commonwealth, 565 S.W.2d 145, 149 (Ky. 1978); Turnbough v. State, 574 S.W.2d 400, 402-03 (Mo. 1978) (en banc). But even courts that traditionally have applied this standard increasingly express a willingness to adopt a less stringent formulation. See, e.g., Indiviglio v. United States, 612 F.2d 624 (2d Cir. 1979); State v. Williams, 122 Ariz. 146, 151-52, 593 P.2d 896, 901-02 (1979); Donovan v. State, 94 Nev. 671, 674-75, 584 P.2d 708, 710-11 (1978); State v. Richards, 294 N.C. 474, 497-98, 242 S.E.2d 844, 859 (1978).
have explicitly rejected this test, criticizing the due process formulation of effective assistance as too narrow to encompass the broader interests of the sixth amendment. Furthermore, courts have argued that, like the analogous Betts rule that deprivation of counsel violates due process only when it is "shocking to the universal sense of justice," "farce and mockery" is too subjective a notion to sustain uniform application. At least as traditionally applied, the "farce and mockery" analysis focuses primarily on the fairness of a trial as a whole, instead of particular instances of attorney misconduct. For example, failure to raise a potentially exculpatory defense, although concededly unreasonable and prejudicial, might not be deemed to render a trial a farce and mockery if counsel's representation was otherwise professional and adequate.

In place of the "farce and mockery" standard, courts have adopted various tests based upon "reasonableness." Focusing upon specific purported derelictions, courts typically measure counsel's performance against the norms of the legal profession, as embodied in the hypothetical reasonable defense attorney.


43. Prior to the recent Supreme Court decision in Cuyler v. Sullivan, 100 S. Ct. 1708 (1980), some jurisdictions extended the sixth amendment right to effective assistance only to state criminal defendants with appointed attorneys, in accordance with the traditional rule that inadequacies of a criminal defendant's retained lawyer do not constitute state action and therefore may not establish a constitutional violation. These courts reversed convictions for ineffectiveness of retained attorneys only where counsel's conduct represented a denial of a fair trial under the due process clause or where counsel's errors were so egregious as to implicate the state and prosecutor in his misconduct. See, e.g., Perez v. Wainwright, 594 F.2d 158, 161-63 (5th Cir. 1979), cert. granted, 100 S. Ct. 1012 (1980). In Cuyler, the Court rejected this distinction. It held that a state criminal trial is itself state action under the fourteenth amendment so that, if a retained attorney's conflict of interests adversely affected his representation, it would violate the defendant's right to effective assistance of counsel. 100 S. Ct. at 1716.

44. See note 26 supra.


48. Compare United States v. Edwards, 488 F.2d 1154, 1164-65 (5th Cir. 1974) (failure to pursue insanity defense unreasonable, although not rendering trial a farce and mockery) with United States ex rel. Marcelin v. Mancusi, 462 F.2d 36, 45 (2d Cir. 1972) (rejecting sixth amendment claim because failure to raise plausible insanity defense did not render trial a farce and mockery).

49. See, e.g., Dycr v. Crisp, 613 F.2d 275, 278 (10th Cir.) (en banc) ("the skill, judgment and diligence of a reasonably competent defense attorney"), cert. denied, 100 S. Ct. 1342 (1980); Cooper v. Fitzharris, 586 F.2d 1325, 1328 (9th Cir. 1978) (en banc) ("reasonably competent and effective representation"), cert. denied, 440 U.S. 974 (1979); United States v. Gray, 565 F.2d 881, 887 (5th Cir. 1978) ("reasonably likely to render and did render reasonably effective counsel"), cert. denied, 435 U.S. 955 (1978); United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976) ("the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances"), cert. denied, 434 U.S. 844 (1977); United States v. Toney, 527 F.2d 716, 720 (6th Cir. 1975) ("reasonably likely to render and does render reasonably effective assistance"), cert denied, 429 U.S. 838 (1976).
in community expectations, or in the articulated standards of the profession. The reasonableness tests prescribe a higher standard of skill than the "farce and mockery" formulation, yet do not contemplate an error-free defense. Assistance that was reasonably sound when undertaken is not constitutionally defective merely because it appears in hindsight to have caused unforeseeable harm to the accused.

Most courts that assess counsel's performance by a standard of reasonableness require the defendant to demonstrate not only that his defense counsel performed below a minimum standard of skill, but also that his questionable performance caused prejudice to the defendant's interests. This requirement, a vestige of the narrow due process formulation of the right to competent counsel, has gradually come under attack as inappropriate to the specific guarantee of the sixth amendment. Yet, thus far, of the courts that have rejected the "farce and mockery" standard, few have lifted from the defendant the burden of demonstrating that his attorney's inadequate representation prejudiced his interests.

50. See, e.g., United States v. Decoster, No. 72-1283, slip op. at 21 (D.C. Cir. July 10, 1979) (en banc) (Leventhal, J.) ("the performance ordinarily expected of fallible lawyers"), cert. denied, 444 U.S. 944 (1979); United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978) ("within the range of competence demanded of attorneys in criminal cases"); United States ex rel. Ortiz v. Sielaff, 542 F.2d 377, 379 (7th Cir. 1976) ("the minimum standard of professional representation"); Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) ("exercise of the customary skill and knowledge which normally prevails at the time and place").


53. The prejudice requirement for ineffectiveness claims should be distinguished from the showing of prejudice required to obtain federal habeas corpus review of claims barred from direct review by a procedural default. See Wainwright v. Sykes, 433 U.S. 72 (1977); Davis v. United States, 411 U.S. 233 (1973). See generally Hill, The Forfeiture of Constitutional Rights in Criminal Cases, 78 Colum. L. Rev. 1050 (1978). Unlike prejudice in ineffectiveness cases, the showing of actual prejudice in cases of procedural default is not regarded as an element of the constitutional claim. The "cause and prejudice" showing is a jurisdictional requirement for federal habeas relief, designed principally to promote the enforcement of procedural rules and to encourage attorneys to raise all claims at trial. Wainwright v. Sykes, 433 U.S. 72, 89-92 (1977). This rationale is irrelevant to ineffectiveness claims, which are not cognizable at the trial level. But cf. note 183 and accompanying text infra (claims alleging that ineffective representation caused procedural default).


55. See text accompanying notes 36-39 supra.


57. See Beasley v. United States, 491 F.2d 687, 696-97 (6th Cir. 1974). See also United States v. Bosch, 584 F.2d 1113, 1122-23 (1st Cir. 1978) (leaving question open). Cf. Wood v. Zahradnick,
II. THE REQUIREMENT OF ACTUAL PREJUDICE

Before a court will reverse a conviction on grounds of ineffective assistance of counsel, the defendant usually must show that he has suffered actual, rather than only potential, prejudice.\(^{58}\) Several imprecise formulations of prejudice have been used, all of which reflect a defendant's obligation to demonstrate that, in hindsight, his counsel's errors influenced the verdict.\(^{59}\) These formulations demand varying degrees of likelihood that inadequacy of counsel affected a trial's outcome,\(^{60}\) with the prevalent approach apparently requiring a defendant to demonstrate that his lawyer's deficiencies were material to the result.\(^{61}\)


58. See note 54 and accompanying text supra. Courts distinguish potential, inherent, or presumptive prejudice from actual, demonstrable, special, or specific prejudice. Actual prejudice refers to harm resulting from an error in the context of a particular case, and calls for a retrospective examination of trial transcripts in order to determine the effect of the given error. In contrast, potential prejudice refers to the likelihood of harmful effect intrinsic to a particular error, whether or not actual prejudice occurred. Cf. Davis v. United States, 411 U.S. 233, 245 (1973) (presumptive prejudice not inconsistent with absence of actual prejudice).


The most expansive notion of prejudicial error would embrace all relevant exculpatory errors or omissions by counsel. See, e.g., Garton v. Swenson, 417 F. Supp. 697, 704 (W.D. Mo. 1976); cf. Chapman v. California, 386 U.S. 18, 23-24 (1967) ("An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot ... be conceived of as harmless"). Under this standard, a failure to object to admissible evidence or a failure to present inadmissible or irrelevant evidence would be deemed nonprejudicial, as having no conceivable impact on the trier. See, e.g., Twitty v. Smith, 614 F.2d 325, 334 (2d Cir. 1979).

The Ninth Circuit adopted a somewhat more stringent standard in Cooper v. Fitzharris, 586 F.2d 1325, 1333 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979). Looking at counsel's error in relation to the substance, though not the weight, of all other evidence properly before the trier, the reviewing court will find prejudice only where a proper defense would have brought out exculpatory information or suppressed inculpatory information that is both significantly relevant and nonduplicative of evidence already presented.

The prevalent approach to prejudicial error embraces only material errors or omissions by counsel. Cf. Harrington v. California, 395 U.S. 230, 254 (1969) (admission of co-defendant's confession in violation of right to confrontation held harmless under Chapman in light of overwhelming evidence properly admitted against defendant). Error is analyzed with regard to the weight of admissible evidence in order to determine the likelihood that an adequate performance would have induced a more favorable verdict. The required degree of likelihood—whether reasonable possibility, probability, or near certainty—varies from court to court.

The most restrictive interpretation of prejudicial error would allow reversal only where counsel's error has resulted in an unreliable outcome. See Bines, Remedying Ineffective Representation in Criminal Cases: Departures From Habeas Corpus, 59 Va. L. Rev. 927, 962 (1973) (supporting a requirement that defendant make a "colorable showing of innocence"). This approach seems to be limited to courts still adhering to the "farce and mockery" formulation of ineffectiveness. See Com-
Two rationales have been advanced to support the requirement that a defendant demonstrate prejudice from his attorney’s inadequate performance. In recent en banc decisions, two circuits have concluded that actual prejudice is an element of constitutionally defective assistance under the sixth amendment. Because the party alleging constitutional error conventionally bears the burden of proof, the defendant must show actual prejudice to obtain reversal of his conviction under this approach. Other cases have adopted an alternative rationale, reasoning that, although prejudice is irrelevant to the issue of ineffectiveness as a constitutional matter, the “‘harmless error’ rule precludes reversal for a violation of the right to effective assistance absent a demonstration of prejudice by the defendant. As this section will attempt to show, neither of these rationales for a requirement of actual prejudice is convincing.

A. Prejudice as an Element of Ineffective Assistance

Courts have supported their inclusion of actual prejudice as a substantive element of a claim of ineffectiveness by reference to the Supreme Court’s opinion in Chambers v. Maroney, by analogy to due process cases in which a showing of prejudice is an element of the claim, and by purely institutional considerations. Upon examination, none of these reasons is persuasive. Neither Chambers nor Supreme Court cases construing other aspects of the sixth amendment provides authority for a prejudice requirement in ineffectiveness claims. Furthermore, the doctrinal basis of the right to counsel distinguishes claims of ineffective assistance from cases decided under the due process clause. Finally, although judicial economy and proper adversariness are worthy concerns, a more satisfactory analysis of attorney misconduct than is currently employed would serve these concerns without burdening defendants with a prejudice requirement of questionable relevance to sixth amendment analysis.

1. Supreme Court Precedent. The Supreme Court has repeatedly refused to require that defendants show prejudice in order to establish a violation of the assistance of counsel clause. For example, a court’s refusal to let counsel

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ment, Current Standards for Determining Ineffective Assistance of Counsel: But see United States v. Decoster, No. 72-1283, slip op. at 38 (D.C. Cir. July 10, 1979) (en banc) (MacKinnon, J., concurring) (‘‘[T]here is not a shred of evidence in the record suggesting that Decoster was prejudiced in any way by the conduct of his counsel. We now know . . . that he was guilty . . . .’’), cert. denied, 444 U.S. 944 (1979).

61. For a recent discussion of different degrees of ‘‘materiality,’’ see United States v. Agurs, 427 U.S. 97, 103-07 (1976).


63. See, e.g., Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979), vacated as moot, 100 S. Ct. 1827 (1980); McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974).


65. See notes 83-107 and accompanying text infra.

66. See notes 108-19 and accompanying text infra.

67. See, e.g., Glasser v. United States, 315 U.S. 60, 76 (1942) (‘‘The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.’’). See also Hamilton v. Alabama, 368 U.S. 52, 55 (1961).
confer overnight with his client, a state statute barring final summation by defense counsel, and a court’s demand that appointed counsel serve conflicting interests have each warranted reversal under the sixth amendment without regard to whether the defendant was demonstrably prejudiced at trial. While conceding that the right to effective assistance derives from the sixth amendment’s assistance of counsel clause, lower courts have rejected the implication that demonstrable prejudice is inapplicable to claims of inadequate counsel, as it is to other right to counsel cases. Instead, these courts have concluded that alleged deprivations of the right to counsel that do not involve state action form a special class of claims to which a showing of prejudice is peculiarly applicable. To

The Court’s recent decision in Cuyler v. Sullivan, 100 S. Ct. 1708 (1980), is not to the contrary. In Sullivan, the majority held that a defendant who fails to object at trial to his attorney’s conflict of interests must demonstrate that the alleged conflict adversely affected his counsel’s performance in order to establish a denial of effective assistance. Id. at 1718-19. Although the opinion is unclear on this point, the rule in Sullivan, like the approach based on potential prejudice developed in this Note, see notes 152-59 and accompanying text infra, appears to focus on specific deprivations in an attorney’s performance, to determine whether his assistance has been ineffective, rather than on the outcome of the trial, which is the focus of the traditional prejudice requirement criticized here.

71. See, e.g., United States v. Decoster, No. 72-1283, slip op. at 7-10 (D.C. Cir. July 10, 1979) (en banc) (Leventhal, J.), cert. denied, 444 U.S. 944 (1979); id., slip op. at 39-44 (MacKinnon, J., concurring); Davis v. Alabama, 596 F.2d 1214, 1222 (5th Cir. 1979), vacated as moot, 100 S. Ct. 1827 (1980); Cooper v. Fitzharris, 586 F.2d 1325, 1332 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979).
72. Four characteristics have been isolated to distinguish claims of ineffectiveness from other purported violations of the assistance of counsel clause: (1) the absence of state complicity in the violation, see, e.g., United States v. Decoster, No. 72-1283, slip op. at 9, 39 (D.C. Cir. July 10, 1979) (en banc) (Leventhal, J.), cert. denied, 444 U.S. 944 (1979); id., slip op. at 40 (MacKinnon, J., concurring); Cooper v. Fitzharris, 586 F.2d 1325, 1332 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979); (2) the greater factual complexity of the inquiry into the quality of counsel’s representation, see, e.g., United States v. Decoster, slip op. at 7-10 (Leventhal, J.); (3) the lesser likelihood of harm from inadequate assistance than from other violations of the right to counsel, see, e.g., id., slip op. at 42-43 (MacKinnon, J., concurring); and (4) the greater susceptibility of claims of ineffectiveness to a showing of prejudice, see, e.g., id. at 42-48; Davis v. Alabama, 596 F.2d 1214, 1222-23 (5th Cir. 1979), vacated as moot, 100 S. Ct. 1827 (1980); Cooper v. Fitzharris, 586 F.2d at 1332 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979).

These differences do not adequately account for a prejudice requirement in ineffectiveness cases. First, the absence of state involvement in the sixth amendment violation does not distinguish the cases in which the Supreme Court has required automatic reversal, because in many such cases the state was not implicated by affirmative interference with the right to counsel but, at most, by its failure to recognize a deprivation and undertake remedial action. See, e.g., Holloway v. Arkansas, 435 U.S. 475 (1978); Argersinger v. Hamlin, 407 U.S. 25 (1972). The equation of inadequate pretrial advice in McMann with instances of state complicity in the denial of counsel, McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970), indicates that the Court draws no such distinction.

See also note 75 infra.

Second, the greater complexity of an inquiry into attorney competence hardly justifies the prejudice requirement, since this task is no more complex than an inquiry into an attorney’s conflict of interests, see Holloway v. Arkansas, 435 U.S. 475 (1978), or, for that matter, an inquiry into the presence of actual prejudice itself.

Third, the lesser likelihood of harm from attorney incompetence does not support a prejudice requirement. On the contrary, a defendant is more likely to have been harmed by his attorney’s inadequacy than by many of the sixth amendment violations for which the Court has refused to require a showing of prejudice. See notes 67-70 supra.

Finally, the susceptibility of ineffectiveness claims to a showing of prejudice would not distinguish attorney incompetence from the instances of government obstruction that have merited auto-
support this conclusion, both the Ninth and District of Columbia Circuits have relied on the Supreme Court's opinion in *Chambers v. Maroney*. In *Chambers*, the defendant argued that his attorney's lack of trial preparation, due to late appointment, resulted in a constitutionally defective trial performance. The court of appeals regarded the belated appointment as "inherently prejudicial," but found that the state successfully overcame the presumption of harm because the trial contained affirmative evidence that counsel had rendered an adequate defense. Rejecting a suggestion that late appointment is per se a sixth amendment violation, the Supreme Court affirmed the determination that trial counsel's level of preparation did not fall below the constitutional norm. The Court's summary discussion of the ineffectiveness claim referred to the lower court's finding that the late appointment "had not resulted in prejudice to the petitioner." This language has been cited to support the imposition of a prejudice requirement in ineffectiveness claims.

*Chambers* provides scant support for a separate prejudice element in ineffectiveness cases. At most, the decision indicates that belated appointment is not in itself a deprivation of the right to counsel, and that the proper inquiry in such cases is whether counsel's trial performance is adequate. Although the significance of the reference to prejudice in the *Chambers* opinion is unclear, it is...
unlikely that the Court was advocating that prejudice, in addition to counsel’s inadequacy, is a necessary element in a sixth amendment claim. Because the Court accepted the finding below regarding the adequacy of counsel,\textsuperscript{81} it was unnecessary to go beyond the threshold question of the defense attorney’s competence to consider whether Chambers suffered any prejudice.

Aside from Chambers, no Supreme Court decision supports the view that demonstrable prejudice is an element of ineffective assistance. In fact, there is no sixth amendment right for which the Court has demanded a showing of prejudice. Nevertheless, as will be discussed below, “potential” prejudice may be relevant both to sixth amendment claims in general and effective assistance of counsel claims in particular.\textsuperscript{82}

2. The Analogy to Due Process. Proof of actual prejudice is frequently an essential element of a due process claim.\textsuperscript{83} In his concurring opinion in United States v. Decoster,\textsuperscript{84} Judge MacKinnon argued that, because the sixth amendment right to effective assistance is similar to the traditional due process right to attorney competence, the due process requirement of prejudice ought to be extended to sixth amendment claims as well.\textsuperscript{85} This reasoning may also underlie the continuing adherence by many courts to due process formulations of the right to adequate representation, even after McMann and Gideon made the sixth amendment right to effective assistance applicable to all criminal proceedings.\textsuperscript{86}

Defendants must show prejudice to establish a denial of due process both because of the societal interests served by the guarantee and because of the vagueness of its operative principle of fairness. In Snyder v. Massachusetts,\textsuperscript{87} the Supreme Court observed that due process rights that are not “obviously fundamental” may be susceptible to “an inquiry whether prejudice to a defendant had been wrought through their denial.”\textsuperscript{88} Since due process embraces not
dissenting), cert. denied, 440 U.S. 974 (1979). A fourth explanation for the reference to prejudice is that, in the Court’s view, late appointment does not embody sufficient potential prejudice to the accused’s interests at trial to justify a finding of ineffectiveness independent of an inquiry into counsel’s actual trial conduct. Either of the latter two explanations would be consistent both with the Court’s uniform refusal to require actual prejudice in order to obtain a reversal for lack of assistance of counsel, see notes 67-70 supra, and with the functional analysis of ineffectiveness claims proposed below. See text accompanying notes 152-56 infra.

81. 399 U.S. at 54.
82. See text accompanying notes 152-56 infra.
84. To the extent that the prejudice requirement originated as a rule of judicial economy, it is now obviated by the application of the harmless error rule to constitutional errors, including due process violations. See, e.g., Doyle v. Ohio, 426 U.S. 610, 619-20 (1976). The application of the harmless error rule to ineffective assistance claims is discussed in notes 120-38 and accompanying text infra.
85. Id., slip op. at 21-23 (MacKinnon, J., concurring). Both Judge MacKinnon and the remainder of the District of Columbia Circuit acknowledged that the sixth amendment independently prescribes a minimum standard of attorney competence.
86. See notes 35-57 and accompanying text supra.
87. 291 U.S. 97 (1934) (viewing scene of crime in absence of accused not a denial of due process).
88. Id. at 116. Justice Cardozo’s opinion delineated three types of constitutional rights in the trial context: guarantees explicitly conferred by the Constitution, such as the provisions of the fourth and sixth amendments; guarantees of due process that are “obviously fundamental,” although not
only respect for the individual interests of the accused, but also recognition of societal concerns, \(^{89}\) such as the integrity of state judicial procedure, \(^{90}\) the Court reasoned that broad prophylactic rules are generally inappropriate. Instead, lower courts should evaluate alleged violations of due process on a case-by-case basis in accordance with the principle of "fairness." \(^{91}\) Because fairness is a "relative" concept, it must be measured "with reference to particular conditions or particular results." \(^{92}\) This is precisely the approach later adopted in \textit{Betts v. Brady}. \(^{93}\) to deal with claimed deprivations of counsel. \(^{94}\)

Although prejudice has remained an element of ad hoc due process analysis since \textit{Snyder}, Judge MacKinnon overstates the importance of actual, as distinguished from potential, prejudice. \(^{95}\) The Court has frequently found denials of due process in criminal procedures that were only potentially prejudicial. \(^{96}\) In

expandedly conferred; and nonenumerated procedural guarantees which, although not fundamental, may be dictated by fairness in particular cases. Only the third category of rights leaves room, according to Cardozo, for an inquiry into prejudice.

89. Id. at 122 ("[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."). Cf. Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (applying due process balancing analysis in non-criminal case).

90. Snyder v. Massachusetts, 291 U.S. 97, 116-17, 122 (1934). Similarly, the accused's interests in procedural fairness may be susceptible to countervailing state interests in orderly judicial administration, see, e.g., Illinois v. Allen, 397 U.S. 337, 343 (1970) (shackling defendant in courtroom not violative of due process when needed to curtail his disruptive behavior), or effective criminal investigation, see, e.g., Stovall v. Denno, 388 U.S. 293, 302 (1967) (suggestive identification procedure permissible when witness's incapacitation made usual police station line-up impossible).


92. Id. at 116.


94. The relevance of prejudice to procedural due process became an element of the controversy over whether fourteenth amendment due process "incorporated" the enumerated rights of the fourth, fifth, sixth, and eighth amendments. See generally Gorfinkel, The Fourteenth Amendment and State Criminal Proceedings— "Ordered Liberty" or "Just Deserts," 41 Calif. L. Rev. 672, 690-91 (1953); Green, The Bill of Rights, The Fourteenth Amendment and the Supreme Court, 46 Mich. L. Rev. 869, 897-99 (1948). To the extent that the prejudice requirement in sixth amendment cases is a vestige of pre-incorporation due process analysis, the requirement represents one more example of the "dilution of federal rights" that occasionally results from "jot-for-jot" incorporation of the sixth amendment. Apodaca v. Oregon, 406 U.S. 404, 375 (1972) (opinion of Powell, J.).

95. Judge MacKinnon makes this mistake in his opinion in \textit{United States v. Decoster}. He cites only a single line of due process cases—those concerned with the prosecutor's obligations to disclose information in its defense—in which defendants must show more than potential prejudice to establish a constitutional violation. United States v. Decoster, No. 72-1283, slip op. at 22-23 (D.C. Cir. July 10, 1979) (en banc) (MacKinnon, J., concurring) (citing United States v. Agurs, 427 U.S. 97 (1976)), cert. denied, 444 U.S. 944 (1979). In \textit{Agurs}, the Court held that absent a specific request for information, the prosecutor need disclose only highly "material" information. 427 U.S. at 106-13. Because "materiality" implies a "concern that the suppressed evidence might have affected the outcome of the trial," id. at 104, a showing of some prejudice is intrinsic to this particular procedural guarantee, rather than an additional element as MacKinnon suggests.

96. See, e.g., Gardner v. Florida, 430 U.S. 349 (1977) (death sentence based on undisclosed presentencing report impermissible regardless of accuracy of report); Manson v. Brathwaite, 432 U.S. 98 (1977), discussed in note 100 infra; Estelle v. Williams, 425 U.S. 501 (1976), discussed in notes 97-98 and accompanying text infra; Sheppard v. Maxwell, 384 U.S. 333 (1966) (pretrial publicity denied due process, despite failure to show that jurors were actually biased); Estes v. Texas,
Estelle v. Williams 97 the Court articulated this alternative approach to due process claims:

The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience. 98

A standard focusing on potential, rather than actual, prejudice serves to balance the societal interest in efficient judicial administration against the countervailing interests in procedural regularity 99 and deterrence of improper judicial, prosecutorial, or police procedures. 100 Under the standard applied in Williams, only if a challenged procedure is not substantially likely to prove harmful in a particular case 101 is an affirmative showing of actual prejudice needed to establish a violation of due process. 102 Therefore, even if due process analysis is deemed

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97 381 U.S. 532 (1965) (televising trial); Turner v. Louisiana, 379 U.S. 466 (1965) (continuous association between jurors and principal prosecution witness); In re Murchison, 349 U.S. 133 (1955) (judge presiding at contempt hearing was same judge who acted as "grand jury" out of which the contempt charges arose). But see Turner v. Louisiana, 379 U.S. 466, 474 (1965) (Clark, J., dissenting); Stroble v. California, 343 U.S. 181, 198 (1952).

98 In some cases the nature of the challenged procedure is likely to blur the distinction between an inquiry into potential or actual prejudice. See, e.g., Henderson v. Kibbe, 431 U.S. 145, 154-55 (1977) (To rise to level of due process violation, omitted or incomplete jury instruction must have been "likely to be prejudicial .... [T]he probability that it substantially affected the jury's deliberations" must not be remote.); Cupp v. Naughten, 414 U.S. 141 (1973) ("presumption of truthfulness" instruction did not violate due process). Similarly, the distinction may be obscured by the definition of the underlying procedural guarantee. See, e.g., United States v. Agurs, 427 U.S. 97 (1976), discussed in note 95 supra.


100 Id. at 504 (emphasis added) (citations omitted).

101 See, e.g., Manson v. Brathwaite, 432 U.S. 98, 111-13 (1977). In Manson, the Court applied a functional analysis, see notes 142-47 and accompanying text infra, to determine when unnecessarily suggestive police identification procedures violate due process. The Court rejected a prophylactic rule that procedures that are suggestive in the abstract automatically bar admission of identification evidence, because so broad a rule would be unresponsive to the state interest in the administration of justice. 432 U.S. at 112-13. Instead, the Court adopted a rule that due process is violated if, under the totality of the circumstances, the challenged identification procedure lacks "reliability." Id. at 114. The majority found that this standard adequately accounts for the competing interests in reliability, deterrence, and judicial administration. Id. at 112-13. The question whether, in hindsight, the identification procedure reached an accurate result did not enter into the analysis of reliability in context. Id. at 116. Although the harmless error rule may preclude reversal in cases of unconstitutional identification procedures, see, e.g., Foster v. California, 394 U.S. 440, 444 (1969), a showing of actual prejudice has never been an element of a due process violation in this line of cases. See Neil v. Biggers, 409 U.S. 188, 198 (1972).

102 A showing of actual prejudice, however, will obviate the need to make a substantial showing of potential prejudice. See, e.g., Chambers v. Mississippi, 410 U.S. 284, 298 (1973).

103 See, e.g., Murphy v. Florida, 421 U.S. 794 (1975). In Murphy the Court indicated that, when pretrial publicity has not been sufficiently pervasive to give rise to a presumption of prejudicial impact upon juror impartiality, due process will nevertheless be violated if the jurors selected were in fact biased by the publicity. See also Dobbert v. Florida, 432 U.S. 282, 303 (1977).
relevant to sixth amendment rights, it does not follow that actual prejudice should be an element of an ineffective assistance claim: failure to render assistance meeting a minimum constitutional standard of skill itself creates a sufficient risk of harm to preclude a requirement of specific prejudice.\footnote{103}

Furthermore, the analogy between due process analysis and sixth amendment claims is itself suspect. Explicit guarantees of the Bill of Rights are generally not susceptible to the ad hoc balancing of state and individual interests that, in due process analysis, requires an inquiry into prejudice.\footnote{104} Even nonliteral constructions of explicit rights, of which effective assistance of counsel is an example, are usually put into effect through rules sufficiently broad to further the prophylactic purposes of the constitutional text.\footnote{105} Although rebuttable under principles of judicial efficiency, such as the harmless error rule, the presumption of prejudice normally arising from the deprivation of an enumerated right is sufficient in the first instance to establish a violation of these derivative guarantees. As a result, the scope of a right under the due process clause has never been coextensive with a similar guarantee rooted in an explicit provision.\footnote{106}

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Even when the defendant must rely on actual prejudice to support his due process claim because he has failed to raise a sufficient presumption of the potential for harm in a challenged procedure, the Court generally has not required a showing of effect on outcome, as advocated in \textit{Decoster}. United States v. Decoster, No. 72-1283, slip op. at 29 (D.C. Cir. July 10, 1979) (en banc) (Leventhal, J.), cert. denied, 444 U.S. 944 (1979). For example, in publication cases such as \textit{Murphy}, inflammatory pretrial publicity will be deemed actually prejudicial upon a showing of juror partiality, without consideration of whether the prosecutor’s case would have overcome the presumption of innocence in the minds of even an impartial jury. See, e.g., \textit{Irvin v. Dowd}, 366 U.S. 717 (1961).

\footnote{103} The Supreme Court’s syllogism in \textit{McMann}—“that the right to counsel is the right to the effective assistance of counsel”—\textit{McMann} v. Richardson, 397 U.S. 759, 771 n.14 (1970), acknowledges that inadequate representation is no less prejudicial than state-created impediments to the assistance of counsel. See United States v. Decoster, No. 72-1283, slip op. at 58 n.129 (D.C. Cir. July 10, 1979) (en banc) (Bazelon, J., dissenting), cert. denied, 444 U.S. 944 (1979); id. at 34 (Robinson, J., concurring in result); Cooper v. Fitzharris, 586 F.2d 1325, 1338 (9th Cir. 1978) (en banc) (Hufstedler, J., with Ely & Hug, JJ., concurring and dissenting), cert. denied, 440 U.S. 974 (1979).


\footnote{105} For example, in \textit{Herring v. New York}, 422 U.S. 853 (1975), a denial of the opportunity for final summation in a nonjury criminal trial was held to violate the right to assistance of counsel guaranteed by the sixth amendment as applied to the states by the fourteenth. In his dissenting opinion, Justice Rehnquist argued against a “jot-for-jot” incorporation of the sixth amendment. He would have applied a pure due process analysis based on fundamental fairness, under which the opposite result was likely. Id. at 865-72.

A final reason against relying on the due process analogy is the difference between the fundamental concerns of the due process clause and of the sixth amendment. The sixth amendment’s right to counsel does not embody a generalized concern for fairness—although fairness lies at the heart of all trial rights—but instead seeks to preserve procedural rights in the criminal context. In light of the independent doctrinal basis for the right to effective assistance of counsel in the sixth amendment, courts should determine whether a defendant has received adequate legal help without regard to the fairness or reliability of the proceedings as a whole.

3. Institutional Considerations. Two benefits to the proper functioning of our judicial system have been preferred to justify a prejudice requirement: preserving the integrity of the adversarial system and deterring unmeritorious claims for the sake of judicial economy. Neither of these concerns adequately supports a requirement of actual prejudice as an element of a defendant’s claim of ineffective assistance of counsel.

Some courts have feared that scrutinizing the effectiveness of the legal assistance a defendant receives will chill the freedom of defense attorneys to make quick tactical judgments or pressure prosecutors to supervise the trial conduct of their adversaries in order to preserve convictions. By discouraging ineffectiveness claims and limiting the likelihood of reversal, a prejudice requirement presumably would relieve these checks on the independence and adversariness of defense and prosecuting attorneys. But, viewed realistically, the risk of undermining the adversarial system seems illusory. The threat of stigmatization is as likely to encourage diligence on the part of defense counsel as to impede it. Furthermore, courts have assiduously emphasized that reversal for ineffective assistance does not necessarily reflect upon the ability of defense counsel. Similarly, maintenance of prosecutorial independence is a questionable basis for so harsh a rule, since even under the most liberal standards, the likelihood of reversal is minimal.

The prejudice requirement also introduces into sixth amendment analysis an element calculated to reduce the burden of unfounded claims of substandard performance and to avoid reversals of convictions based on innocuous instances of ineffectiveness, out of a regard “for finality of judgments and conservation of judicial resources.” The right to effective assistance is regarded as a peculiar source of unmeritorious claims, since much potentially reversible error, such as incomplete investigations or inadequate advice, is not reflected in the trial

107. See notes 24-28 and accompanying text supra.
109. Id. at 26 (MacKinnon, J., concurring).
record and, therefore, is susceptible to fabrication by a convicted defendant.\textsuperscript{112} Moreover, the complex factual inquiry demanded by a colorable claim of ineffectiveness precludes summary treatment by a reviewing court. More significantly, counsel’s substandard assistance is treated as a procedural irregularity, unlikely to have affected the result of the trial.\textsuperscript{113} According to this view, granting a new trial without some assurance, afforded by a showing of prejudice, that the outcome will differ taxes scarce judicial resources for no practical purpose.\textsuperscript{114}

Although judicial economy is unquestionably a legitimate concern,\textsuperscript{115} the inclusion of prejudice as an element of a sixth amendment claim is ill-suited to furthering this goal. Like claims of attorney ineffectiveness, allegations of prejudice are conjectural and readily fabricated, and entail no less complex a factual inquiry for reviewing courts. Furthermore, to the extent that the prevalent formulations have proven overinclusive in practice, a reconsideration of the existing standards of “ineffectiveness” seems a more appropriate solution than the imposition of a remedial prejudice component upon defendants.\textsuperscript{116} The current standards of effective assistance, applied literally, would reach innocuous lapses by defense counsel either because the standard imposes overly rigorous requirements or because it is unwieldy for reviewing courts to apply.\textsuperscript{117} On the other hand, a formulation incorporating actual prejudice may prove too restrictive, both because actual prejudice is difficult to demonstrate and because it is antithetical to prophylactic guarantees like the right to counsel.\textsuperscript{118}

A more precise definition of “ineffectiveness,” encompassing only a performance by counsel so defective as to threaten serious harm to the interests underlying the sixth


\textsuperscript{113} For example, in \textit{McQueen v. Swenson} the Eighth Circuit distinguished ineffective assistance from total absence of counsel, suggesting that counsel’s presence, though not his adequate performance, “is so crucial to the exercise of a defendant’s other rights [that its absence] cannot but be harmful.” 498 F.2d 207, 218 (8th Cir. 1974). Judge MacKinnon in \textit{Decoster} similarly distinguished ineffectiveness in trial conduct from the conflict of interest that the Supreme Court, in Holloway v. Arkansas, 435 U.S. 475 (1978), held constitutionally defective regardless of a showing of prejudice. MacKinnon argued that “the conflict of interest creates a presumption of prejudice,” United States v. Decoster, No. 72-1283, slip op. at 42 (D.C. Cir. July 10, 1979) (en banc) (MacKinnon, J., concurring), cert. denied, 444 U.S. 944 (1979), whereas “there is no showing that a defense lawyer’s mistakes usually cause prejudice to an accused.” Id. at 43.

\textsuperscript{114} Ironically, courts that define the right to effective assistance narrowly have also advanced the opposite justification: that convicted defendants should not be given a second chance because of the risk that they may profit from their tactical mistakes at the original trial. See Mitchell v. United States, 259 F.2d 787, 793 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958); see also Bines, supra note 60, at 940.

\textsuperscript{115} This does not mean that finality and judicial economy should be permitted to assume paramount importance in the analysis of ineffectiveness claims. In any adversarial setting, finality is premised upon the integrity of the adjudicative process, and should bow before a showing that the process itself may have been corrupted by inadequate representation. See Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570-71 (1976).

\textsuperscript{116} Viewed most unfavorably, the prejudice requirement impels courts to abdicate their responsibility to enunciate a proper standard for attorney effectiveness. See Thomas v. Wyrick, 535 F.2d 407, 417-20 (8th Cir.) (Henley, J., dissenting), cert. denied, 429 U.S. 868 (1976).


\textsuperscript{118} See notes 104-07 and accompanying text supra.
amendment guarantee, would serve the interest in judicial economy without en-
cumbering potentially meritorious claims.119

B. Applicability of the Harmless Error Rule

In Chapman v. California,120 the Supreme Court held that in certain cases the “harmless error” rule may preclude, as a matter of judicial economy, reversal for constitutional defects in the trial process that have not contributed to the verdict.121 Although the Court cited the right to counsel as a paradigm of those “constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error,”122 a number of courts have subsequently applied the harmless error rule to require a finding of prejudice before reversing a conviction for ineffective assistance of counsel.123 Moreover, some of these courts have imposed on the defendant the burden of demonstrating harmlessness.

The Supreme Court’s recent decision in Holloway v. Arkansas124 cast into doubt the applicability of the harmless error doctrine to cases of ineffective assistance. In Holloway, the Court held that three felony co-defendants represented by a single appointed attorney were deprived of the effective assistance of counsel because of the ethical dilemma confronting a lawyer responsible for representing clients with conflicting interests.125 After finding a sixth amendment violation, the Court rejected the applicability of the harmless error doctrine. The “automatic reversal” rule adopted in Holloway was premised on the fundamental importance of the right to effective assistance of counsel, the presumption that prejudice results from ineffective assistance, and the practical difficulty of demonstrating prejudice in cases of defense counsel’s conflict of interest.126

Regardless of the general relevance of the reasoning in Holloway to cases involving the denial of effective assistance of counsel,127 the decision indicates

119. This Note develops such an analysis, which defines ineffective representation in terms of the potential of substantial prejudice to the various interests protected by the right to counsel. See pt. III infra. The application of an appropriate harmless error rule will also further interests in judicial economy. See notes 120-38 and accompanying text infra.

120. 386 U.S. 18 (1967).

121. Id. at 24.

122. Id. at 23.

123. See, e.g., Davis v. Alabama, 596 F.2d 1214, 1221 (5th Cir. 1979), vacated as moot, 100 S. Ct. 1827 (1980); Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978); United States v. Sumlin, 567 F.2d 684, 689 (6th Cir. 1977), cert. denied, 435 U.S. 932 (1978); McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974). The harmless error rule of course applies only if prejudice is rejected as an affirmative element of the constitutional claim, since proof of prejudice as part of the claim would logically preclude the possibility of harmlessness.


125. Id. at 476-77.

126. Id. at 488-90.

127. It is possible to read Holloway as suggesting the inappropriateness of harmless error doctrine to any denial of effective assistance. Assistance satisfying the constitutionally prescribed standard is as “fundamental” as assistance un restrained by a conflict of interest, and its absence may be equally prejudicial. In dismissing the applicability of harmless error doctrines, the Court may thus have been endorsing automatic reversal for all denials of effective assistance. For commentators arguing that the harmless error is inapplicable to sixth amendment assistance of counsel claims, see Mause, Harmless Constitutional Error: The Implications of Chapman v. California, 53 Minn. L. Rev. 519, 540-41 (1969); Note, Harmful Use of Harmless Error in Criminal Cases, 64 Cornell L.
three classes of cases in which counsel’s ineffective assistance should not be subject to harmless error analysis: \(^{128}\) errors prejudicing counsel’s decisionmaking, such as conflicts of interest, failure to consult with the accused, or inadequate trial preparation; errors, such as misinformation at the pleading stage, that affect the accused’s own decisions; and trial errors, such as an inadequate summation or a failure to call or cross-examine witnesses, that demand excessive speculation as to the impact a hypothetical reasonable performance would have had upon a trier of fact. In each of these classes, the effect of an error upon the outcome of the trial is inherently indeterminate, either because the error has a pervasive influence upon trial decisions or because its impact upon the jury is too uncertain to permit evenhanded application of the harmless error rule. \(^{129}\)

In cases falling within the categories of attorney ineffectiveness to which the harmless error rule properly applies, the state would bear the burden of proving the absence of prejudice under the rule as formulated in Chapman. \(^{130}\) Nevertheless, the Eighth Circuit in McQueen v. Swenson \(^{131}\) held the state need not carry this burden with regard to error springing from "acts over which it [had] no control." \(^{132}\) Because the court believed that the facts needed to prove prejudice were more likely to be within the knowledge of the accused, \(^{133}\) it required the defendant to demonstrate that his attorney’s inadequate investigation was not "harmless beyond a reasonable doubt." \(^{134}\)

To the extent that this rule is only another way of requiring a defendant to produce evidence that his attorney’s conduct at trial risked potential prejudice to his interests, it is unobjectionable. \(^{135}\) But, as a rationale for reallocating the


Alternatively, the attorney conflict of interests in Holloway may be regarded as sui generis. The harmless error rule would still be applicable to denials of ineffective assistance that generically are likely to give rise to demonstrable harm, an approach recently adopted by the Fifth Circuit in Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979) (holding counsel’s failure to investigate insanity defense a breach of counsel’s duty to accused, but remanding on issue of prejudice), vacated as moot, 100 S. Ct. 1827 (1980).

128. 435 U.S. at 489. See Davis v. Alabama, 596 F.2d 1214, 1223 (5th Cir. 1979), vacated as moot, 100 S. Ct. 1827 (1980).

129. Because the potential harm created by counsel’s conflict is in what it compels counsel to refrain from doing, the resultant prejudice will be absent from the trial record. Counsel’s ethical dilemma also may affect his decisions in stages of the criminal process, such as plea negotiations, during which no record is created. Therefore, any inquiry into prejudice would be so speculative as to defy "intelligent, evenhanded application." Holloway v. Arkansas, 435 U.S. at 489-91. See Davis v. Alabama, 596 F.2d 1214, 1223 (5th Cir. 1979), vacated as moot, 100 S. Ct. 1827 (1980).

130. 386 U.S. at 24.

131. 498 F.2d 207, 219 (8th Cir. 1974).

132. Id. at 219.


134. 498 F.2d at 220. See also Davis v. Alabama, 596 F.2d 1214, 1221 (5th Cir. 1979), vacated as moot, 100 S. Ct. 1827 (1980).

135. In McQueen, the court deemed counsel’s failure to interview any witnesses, including the witnesses endorsed on the indictment for first degree murder and other witnesses who might have supported his client’s theory of self-defense, to be constitutionally ineffective assistance. 498 F.2d at 213. Instead of reversing the conviction, the court remanded for the petitioner to make a showing of
burden under the harmless error rule of showing an actual impact on the outcome of a criminal case, this reasoning is subject to two criticisms. First, it is not clear that facts regarding the impact of counsel's ineffectiveness, as distinguished from the facts necessary to establish constitutionally inadequate representation, are peculiarly within the accused's control. The impact of a proven dereliction upon the course of a trial may be as speculative for the accused as for the prosecutor. Second, reallocating the burden denigrates the balance established in Chapman between the accused's interest in procedural fairness and the state's interest in judicial economy. Because the use of a harmless error rule can usurp the role of the jury, as well as disparage "the notion that constitutional protection is due all citizens, the guilty as well as the innocent," relative certainty of harmlessness has been required to uphold a constitutionally defective conviction. Shifting this burden in ineffective assistance cases, which tend to incorporate "errors with intrinsic but unmeasurable prejudice," would unacceptably increase the likelihood of wrongful deprivation of liberty.

III. A FUNCTIONAL ANALYSIS OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

In defining the right to effective assistance of counsel, it is necessary to reconcile countervailing remedial and institutional considerations. Courts responsive to the demands of judicial economy and traditional adversariness have premised relief upon a demonstration of actual prejudice. But the prophylactic interests protected by the sixth amendment counsel against such an approach,

admissible evidence that a reasonable investigation could have uncovered and that would have proven helpful to the defendant either on cross-examination or as part of his case-in-chief. Id. at 220. See also Davis v. Alabama, 596 F.2d 1214, 1221 (5th Cir. 1979), vacated as moot, 100 S. Ct. 1827 (1980). On its facts, therefore, the case applies a rule similar to the functional analysis developed below. See notes 152-56 and accompanying text infra.

137. Field, supra note 60, at 33. See also Cornell Note, supra note 127.
139. Eliminating the prejudice component from ineffectiveness claims serves other goals besides protection against unfair deprivations of liberty. First, recognition that patently substandard assistance does not satisfy the sixth amendment will help define the constitutional expectations of a defense attorney's performance. Under standards incorporating a prejudice requirement, counsel may render assistance plainly below the level "of competence demanded of attorneys in criminal cases," McMann v. Richardson, 397 U.S. 759, 771 (1970), without provoking a finding of constitutional error, if the reviewing court concludes that reasonably competent assistance would not have overcome the strength of the state's case. This failure to deem substandard performance constitutionally impermissible places a judicial imprimatur upon the defective assistance, intimating that defendants with weak cases do not enjoy a right to competent legal help. In contrast, by eliminating the actual prejudice component, courts would have to distinguish between acceptable and unacceptable assistance.

A rule of automatic reversal might also serve several other goals: encouraging trial judges and prosecutors to assume a more active role in preventing inadequate defense performance; discouraging the appointment of incompetent lawyers; providing an incentive for reducing the caseloads of appointed counsel, who are less likely to render effective help if they are overburdened; and stimulating legislative reform. United States v. Decoster, No. 72-1283, slip op. at 66 n.145 (D.C. Cir. July 10, 1979) (en banc) (Bazelon, J., dissenting), cert. denied, 444 U.S. 944 (1979).
and have prompted a few courts and commentators to urge adoption of specific obligations for defense attorneys. This approach too is open to criticism, because it ignores the merit of the concerns for finality and the avoidance of unfruitful relitigation and encumbers defense attorneys with predetermined duties that may not be called for in particular cases. The Supreme Court has resolved comparable legal tensions by employing a "functional analysis,"141 in which potential prejudice serves as a touchstone for defining procedural guarantees in the trial context.

A. The Functional Analysis of Trial Rights

The first step in the functional analysis of a constitutional right is to identify the interests that the particular guarantee is designed to protect. A challenged procedure is then assessed to determine whether it presents an intolerable risk of prejudice to the protected interests.142 The Supreme Court has adopted this approach to deal with "speedy trial" claims143 and, at least implicitly, with challenges brought under the sixth amendment's confrontation clause.144


Enumerated standards would not be sufficient in themselves to deal with all allegations of attorney ineffectiveness; therefore, even courts that measure counsel's performance against such standards would require a more general analytic framework to handle errors not provided for in advance.

141. Barker v. Wingo, 407 U.S. 514, 522 (1972). The analysis is premised upon the prophylactic nature of the enumerated rights necessary to a full defense. Each sixth amendment right reflects a judgment by the Constitution's framers that the "probability of unfairness in the absence of a particular right is so great that denigration of the right will not be countenanced under any circumstances." Herring v. New York, 442 U.S. 853, 868 (1975) (Rehnquist, J., dissenting). A functional analysis inquires whether a challenged procedure creates a probability of unfairness similar to the unfairness against which a particular trial right is designed to protect. See Manson v. Brathwaite, 432 U.S. 98, 111-13 (1977), discussed in note 100 supra.


143. See Barker v. Wingo, 407 U.S. 514 (1972). The speedy trial clause of the sixth amendment primarily protects against unreasonable and unconsented prosecutorial delay that impairs the accused's defense. In Barker, the Supreme Court determined that "any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case," id. at 522, and called for an ad hoc balancing of the "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant," id. at 530. The consideration of "prejudice" did not demand a showing of the actual loss of an exculpatory defense. A claim also might be established by showing potential prejudice resulting from a delay so long as to create a substantial likelihood of diminished access to exculpatory testimony or evidence. This approach is reasonable, since actual prejudice from a denial of the right to a speedy trial is not always susceptible to proof. See United States v. Mann, 291 F. Supp. 268, 271 (S.D.N.Y. 1968), cited with approval in Barker v. Wingo, 407 U.S. 514, 533 n.36 (1972).

144. In contrast, the "due process" right to a "speedy trial," which applies in cases of preindictment delay, is violated only if there is actual prejudice to the accused's defense. United States v. Lovasco, 431 U.S. 783, 789-90 (1977); United States v. Marion, 404 U.S. 307, 324-25 (1971).

144. The confrontation clause provides a right of cross-examination in order to protect against a conviction founded upon unreliable testimony. In Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court held that the right of confrontation was violated by the admission of a codefendant's confession that incriminated the petitioner, in spite of the court's limiting instructions, when the
On occasion the Court has also employed a functional approach in assistance of counsel cases. In *United States v. Wade*,¹⁴⁵ for instance, the Court held that a post-indictment line-up conducted in the absence of counsel violated the accused’s sixth amendment rights. The Court reasoned that pretrial line-ups are susceptible to improperly suggestive procedures of which counsel, unless present, could not easily become aware. Therefore, the absence of counsel at an identification proceeding severely compromises a defense attorney’s function of preserving the accused’s right to meaningful cross-examination, since he would be unable to challenge any questionable circumstances surrounding a witness’s identification of the defendant.¹⁴⁶ In contrast, other pretrial procedures, like fingerprint analysis or blood sampling, do not implicate the accused’s procedural guarantees in such a way that the presence of counsel is required to avoid prejudice.¹⁴⁷

A number of decisions have come close to fashioning a functional analysis of ineffective assistance claims, which would judge the “effectiveness” or “reasonableness” of a defense attorney’s performance against the procedural interests protected by the assistance of counsel clause.¹⁴⁸ In his opinion in *United States v. Decoster*, for example, Judge Leventhal argued that defense attorneys are not obliged to investigate all leads, raise all motions, or call all possible witnesses, but need act only when there is a material likelihood of benefitting the accused’s defense.¹⁴⁹ Therefore, whether counsel failed to perform a duty owing to the accused “cannot be established merely by showing that counsel’s acts or omissions deviated from a checklist of standards,”¹⁵⁰ but must be deter-

codefendant did not take the stand. This decision turned upon the risk of prejudice created by the likelihood that the jury would believe unchallenged incriminatory extrajudicial statements, id. at 127, and the “substantial, perhaps even critical, weight [thereby added] to the Government’s case in a form not subject to cross-examination,” id. at 128. By contrast, admission of a codefendant’s incriminating statements was held not to be a confrontation clause violation in *Parker v. Randolph*, 442 U.S. 62 (1979), when the defendant’s own confession “interlocked” with and supported the confession of his codefendant, because “possible prejudice” was not sufficiently substantial or imminent. Cf. *Manson v. Brathwaite*, 432 U.S. 98 (1977) (due process approach to confrontation right).


¹⁴⁶. The Court formulated the following standard:

[W]e [must] scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant’s basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant’s rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.


¹⁵⁰. Id. at 36. For courts advocating use of a checklist of responsibilities to judge the effectiveness of defense counsel, see note 140 supra.
determined "in terms of context." If this approach were pursued to its logical conclusion, a defendant could establish ineffectiveness by demonstrating a failure to undertake acts that, in light of the information that counsel reasonably should have known, would have been likely to result in a material benefit to the accused or, conversely, by showing acts of counsel threatening substantial potential prejudice to the accused in the context of the particular case.

Analyzing the adequacy of legal representation in terms of the underlying functions of the right to effective assistance of counsel involves two distinct questions. First, were interests protected by the right to counsel at stake during the particular stage of the criminal prosecution? Second, did counsel’s questionable performance threaten substantial potential prejudice to any of these interests? For convenience, it is possible to identify the interests furthered by the assistance of counsel according to the different functions a defense attorney performs. In his role as advocate, a defense counsel preserves the accused’s interests in procedural fairness during the trial and an advantageous outcome. In his advisory capacity, a defendant’s lawyer ensures that his client has access to information relevant to the pretrial and trial decisions that the accused must make himself. Finally, when he acts as a negotiator, counsel gives the accused the advantage of the procedural means for mitigating the harshness of an otherwise deserved deprivation.

The second step in a functional analysis is to determine whether counsel’s performance risked substantial potential prejudice to any of these protected in-

151. United States v. Decoster, slip op. at 36.
152. In fact, Judge Leventhal called for a showing of "a likelihood of effect on outcome," id. at 37, which he seemed to interpret not as potential or inherent prejudice but as actual prejudice to some degree of certainty short of "beyond a reasonable doubt." See id., slip op. at 12-13 (Robinson, J., concurring in result) (construing majority opinion as requiring actual prejudice). In his dissent, Judge Bazelon argued that the adequacy of a defense counsel's performance should be evaluated according to "a forward-looking inquiry into whether defense counsel acted in the manner of a diligent and competent attorney," an inquiry that might incorporate a potential prejudice standard while eschewing "an after-the-fact determination of whether [an established dereliction] nevertheless did not produce adverse consequences for the defendant." Id. at 53.

In a subsequent decision applying the Decoster standard, the District of Columbia Circuit made clear that attorney ineffectiveness must be "likely to have resulted in prejudice to appellant’s case." United States v. Wood, Nos. 73-1629 & 74-1004, slip op. at 10 (D.C. Cir. March 21, 1980) (en banc). Wood held that an attorney’s failure to call a psychiatrist as an expert witness to support the defendant’s insanity defense was not a denial of the right to effective assistance. Although counsel relied exclusively upon the insanity defense, id. at 3, and as a result his omission may well have been incompetent, id. at 12, the court rejected the ineffectiveness claim because the testimony of a court-appointed psychiatrist as to the mental competence of the accused “negated[d] the likelihood of any prejudice to the defendant.” Id. at 11. Relying upon a psychiatrist’s testimony to negate prejudice from counsel’s failure to present a strong defense seems inconsistent with the court’s suggestion that appellant, in order to show prejudice, need only "establish some basis for believing that a different kind of preparation would have resulted in the presentation of a contrary line of testimony.” Id. That a court-appointed psychiatrist believed the defendant to be sane in no way undercuts the likelihood that defense counsel could have retained an expert witness to testify that Wood, who had been hospitalized as a schizophrenic for two years prior to his trial, was mentally incompetent. The court’s failure to find prejudice must, therefore, reflect its conclusion either that the defendant was in fact mentally competent, or that even a defense expert’s favorable testimony could not have overcome the strength of the state’s case. In either case, it seems that the District of Columbia Circuit has
terests. In measuring this risk, reviewing courts should take account of the probability and gravity of harm. They should judge these factors neither in the abstract nor from hindsight in view of the entire record of the case. Rather, the evaluation of potential prejudice calls for a forward-looking analysis of counsel's acts or omissions in light of the facts or alternative courses that should have been apparent at the time he rendered assistance. Thus, even apparently disadvantageous representation cannot properly be considered prejudicial if it is the product of a reasoned weighing of the competing options available to a defense attorney. But courts should not assume that certain categories of defense conduct, such as the decision to call a particular witness or to object to evidence, always reflect reasonable strategic choices; nor should courts justify a questionable performance on the basis of hypothetical competing considerations. Instead, they should require the government to identify a significant interest actually protected by counsel's act or omission before condoning apparently ineffective representation as a reasonable election between conflicting options.

This standard has several advantages over the prevalent formulations of effective assistance based on actual prejudice and community norms of competence. It guarantees defendants legal assistance calculated to protect the interests underlying the various functions served by counsel in an adversary system. By defining effectiveness in terms of the quality of representation judged from the perspective of the lawyer performing the service, instead of referring to the ultimate consequences of his assistance, this approach also provides defense attorneys with an attainable standard to which they can conform their pretrial and trial conduct. Furthermore, it achieves these goals without ignoring important institutional considerations. By requiring that the potential for prejudice be substantial before relief is granted, this standard gives due regard to the burden of

adopted a standard of effectiveness more concerned with the effect on a trial's outcome than with protection of the procedural interests served by the assistance of counsel clause.

153. Courts universally acknowledge that counsel's assistance is not rendered ineffective because in hindsight his acts have proved actually prejudicial. See, e.g., Twitty v. Smith, 614 F.2d 325, 335 (2d Cir. 1979); Robinson v. United States, 448 F.2d 1255, 1256 (8th Cir. 1971). Similarly, courts should not deem assistance reasonably effective merely because counsel's omissions seem inconsequential in hindsight. But cf. notes 135-38 and accompanying text supra (discussing application of harmless error rule to ineffective assistance claims).

154. See Reynolds v. Mabry, 574 F.2d 978, 981 (8th Cir. 1978); United States v. Edwards, 488 F.2d 1154, 1164 (5th Cir. 1974). As the text indicates, inadequate preparation may constitute ineffective assistance of counsel if it prevents an attorney from adequately performing a particular function necessary to protect one of the specific interests safeguarded by the accused's right to counsel. See note 165 infra.

155. This standard should not be confused with formulations of effectiveness that judge the constitutional adequacy of representation according to community norms or reasonable competence in general. See notes 49-52 and accompanying text supra. Under the approach developed here, the issue is not whether a reasonably competent lawyer would have performed differently, but whether the defendant's lawyer adequately carried out his constitutional function of protecting selected interests of his client.


157. See notes 49-57 and accompanying text supra.
unnecessary reversals and frivolous motions, the lack of sufficient time and money to pursue all avenues of possible benefit to the accused, and the pressures upon counsel to make quick decisions in the course of an adversary proceeding.

A functional analysis offers a further advantage over a reasonableness formulation: it frames the inquiry into effectiveness by requiring defendants to isolate particular instances of potential prejudice to their interests. This should make more manageable the review of claims alleging pervasive deficiencies, such as a conflict of interest,\(^{160}\) unpreparedness,\(^{161}\) or a physical\(^{162}\) or educational impediment.\(^{163}\) Under a reasonableness analysis, the lack of guidance makes it difficult to derive standards for determining when the lack of adequate preparation or a joint representation denied a defendant effective representation.\(^{164}\) In contrast, if a functional analysis is used, the antecedent reason for deficient performance is relatively unimportant. The duties of defense attorneys will be defined in terms of what is necessary in a particular case to ensure the acceptable

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158. The harmless error rule also serves the function of avoiding pointless reProsecution, but it imposes the burden on the government to show in hindsight the lack of any actual prejudice resulting from a denial of effective assistance already established by the defendant. See notes 130-38 and accompanying text supra.

159. For cases raising these concerns in their analysis of effectiveness, see United States v. Moore, 554 F.2d 1086, 1093 (D.C. Cir. 1977) (Robb, J., concurring and dissenting); Harried v. United States, 389 F.2d 281, 286 (D.C. Cir. 1967); United States v. Dardi, 330 F.2d 316, 328 (2d Cir. 1964). For a discussion of claims alleging inadequate preparation, see note 165 infra.


161. In general, claims of inadequate pretrial preparation allege either that counsel failed to pursue particular avenues of investigation, see, e.g., United States v. McMillan, 606 F.2d 245, 246 (8th Cir. 1979) (interview witnesses), or that counsel failed to devote a sufficient amount of time to investigating or conferring with the defendant, see, e.g., Chambers v. Maroney, 399 U.S. 42, 54 (1970).


164. For example, deciding whether a reasonably competent attorney would have conducted a more thorough investigation, see United States v. Decoster, No. 72-1283, slip op. at 31-39 (D.C. Cir. July 10, 1979) (en banc) (Bazelon, J., dissenting), cert. denied, 444 U.S. 944 (1979); Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968), does not help a court determine whether a defendant has received constitutionally adequate assistance because the quality of the ultimate representation, not the antecedent investigation, is the issue. Only by examining the potential for prejudice to a protected interest, such as a well-advised waiver of rights or an adequate defense, can a court determine whether the representation was effective. See Rastrom v. Robbins, 440 F.2d 1251, 1253 & n.2 (1st Cir.) (preparation time cannot be said to be inadequate without considering why more time was needed), cert. denied, 404 U.S. 863 (1971). The lack of guidance from a reasonable competence standard is also apparent in cases looking to the "totality of circumstances" to determine whether counsel's representation was adequate. See, e.g., United States v. Carter, 566 F.2d 1265 (5th Cir.) (finding failure to request limiting instructions did not render assistance ineffective in light of other evidence of a vigorous defense), cert. denied 436 U.S. 956 (1978).
performance of counsel's constitutional functions. To establish ineffectiveness a defendant normally will have to identify specific instances in which his lawyer's unpreparedness,\textsuperscript{165} ethical conflict,\textsuperscript{166} or other deficiency threatened substantial potential prejudice to an interest protected by counsel in his role as advocate, advisor, or negotiator.

B. Counsel as Advocate

There are several prevalent perceptions of the function a defense counsel serves in his capacity as trial advocate:\textsuperscript{167} ensuring a reliable outcome, effecting

\textsuperscript{165} Lack of adequate preparation or investigation does not in itself establish ineffective assistance. See Chambers v. Maroney, 399 U.S. 42, 53-54 (1970); Carbo v. United States, 581 F.2d 91, 93 (5th Cir. 1978). Instead, courts should determine whether counsel's failure to pursue available lines of factual and legal investigation, by interviewing available witnesses, exploring avenues suggested by conferences with the accused, procuring information from the prosecutor, or researching relevant questions of law, risked substantial potential prejudice to specific interests implicated by his incompetent advice or advocacy. The inadequacy of counsel's preparation may also be raised for the purpose of demonstrating that counsel's performance was prejudicial in light of information he reasonably might have known. For example, failure to present an affirmative defense should be deemed ineffective representation, not a tactical choice, if counsel was in fact unaware of information regarding the strength of the defense that an adequate investigation would have revealed. See, e.g., Davis v. Alabama, 596 F.2d 1214, 1219-20 (5th Cir. 1979) (counsel failed to investigate insanity defense), vacated as moot, 100 S. Ct. 1827 (1980). Under this analysis, the scope of a defense attorney's constitutional obligation to conduct an investigation will be limited to those subjects likely to prove "material." See United States v. Decoster, No. 72-1283, slip op. at 24-27 (D.C. Cir. July 10, 1979) (en banc) (Leventhal, J.), cert. denied, 444 U.S. 944 (1979); cf. American Bar Ass'n Proj. on Standards for Criminal Justice, Standards Relating to the Administration of Criminal Justice, The Defense Function § 4.1 (1971) [hereinafter cited as ABA Standards, The Defense Function] (prescribing duty to explore all relevant areas).

\textsuperscript{166} In Holloway v. Arkansas, 435 U.S. 475 (1978), the Supreme Court held that a defense attorney's ethical dilemma in representing codefendants with conflicting interests was presumptively prejudicial and that reversal is appropriate even without a showing of prejudice at trial. Id. at 487-91. In practice, courts often are unable to presume the presence of a conflict of interests from the mere fact of joint representation, since in many instances it is advantageous to codefendants. See generally Dawson, Joint Trials of Defendants In Criminal Cases: An Analysis of Efficiencies and Prejudices, 77 Mich. L. Rev. 1379 (1979). As a result, courts must scrutinize defense counsel's trial conduct in precisely the manner Holloway seemed to eschew in order to determine whether a "real" conflict of interests existed. Courts may infer the presence of a debilitating ethical conflict from exculpatory testimony of one defendant that incriminates his codefendant, see White v. United States, 396 F.2d 822 (5th Cir. 1968), from facts at trial establishing a plausible defense that counsel failed to argue, see Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1975), or other seemingly prejudicial conduct.

The Supreme Court recently endorsed the examination of counsel's trial conduct in cases alleging a conflict of interests. Cuyler v. Sullivan, 100 S. Ct. 1708 (1980). Sullivan requires that, at least when a defendant has failed to object at trial to his attorney's conflict of interests, he must demonstrate that the alleged conflict adversely affected his lawyer's performance in order to establish a sixth amendment violation. Id. at 1718-19. In accordance with Sullivan, the functional analysis proposed in this Note would shift a court's inquiry from the presence of an antecedent conflict of interests to the occurrence of specific derelictions at trial or elsewhere. The possibility of an ethical dilemma might also be relevant to rebut an attempt by the state to demonstrate the tactical basis of counsel's questionable performance. Cf. United States v. Butler, 504 F.2d 220, 223-24 (D.C. Cir. 1974) (counsel's misrepresentation of bar affiliation and his lack of trial experience, although not ineffective in themselves, undercut presumption that trial errors were the product of tactical decisions). But the defendant would be required in the first instance to point to specific acts or omissions that risked substantial prejudice to his identifiable interests.

\textsuperscript{167} This section focuses on counsel's role as advocate at trial, but the same principles also apply to claims of ineffective advocacy at a sentencing hearing, see, e.g., O'Kelley v. North Carolina, 606 F.2d 56 (4th Cir. 1979), or on appeal, see, e.g., Miller v. McCarthy, 607 F.2d 854
the most advantageous result for the accused, or protecting his client's procedural as well as substantive interests. The errors that amount to constitutionally ineffective assistance vary according to the range of interests protected under each theory of a trial advocate's function. Under a narrow view of the advocate as merely a protector against an unreliable outcome,\textsuperscript{168} only errors potentially undermining the accuracy of the verdict, such as the failure to introduce exculpatory evidence,\textsuperscript{169} or to raise a complete defense such as insanity,\textsuperscript{170} would warrant reversal. On the other hand, a defense attorney's failure to move to suppress a coerced, but reliable, confession would not constitute a colorable claim of ineffectiveness under this view.

A more common conception of the advocate's function is implicit in the interpretation of prejudice as "effect on outcome."\textsuperscript{171} This view expects defense attorneys to act to obtain the most favorable decision for the accused, without regard to his actual culpability. Because an advocate's function is to protect the defendant's liberty by ensuring against conviction except upon proof beyond a reasonable doubt,\textsuperscript{172} he must take advantage of procedural or evidentiary opportunities to cast reasonable doubt upon the issues of law or fact material to a conviction. This standard affords relief not only for errors undercutting the trial's reliability, but also for allegedly inadequate representation that creates a risk of a disadvantageous outcome, in spite of its accuracy. These errors might include inadequate opening remarks, cross-examination, or summations\textsuperscript{173} or the failure to move to suppress inadmissible evidence\textsuperscript{174} or to request or object to instructions.\textsuperscript{175}

\textsuperscript{168} Trometer v. United States, 607 F.2d 662 (5th Cir. 1979); People v. Gonzalez, 47 N.Y.2d 606, 393 N.E.2d 987, 419 N.Y.S.2d 913 (1979), although the remedy in these cases would not be reversal, but a new sentencing hearing or a de novo appeal.

\textsuperscript{169} See, e.g., United States v. Decoster, No. 72-1283, slip op. at 38 (D.C. Cir. July 10, 1979) (en banc) (MacKinnon, J., concurring) ("There is not a shred of evidence in the record suggesting that Decoster was prejudiced in any way by the conduct of his counsel. We now know, on the basis of Decoster's admission at sentencing ..., that he was guilty. ..."), cert. denied, 444 U.S. 944 (1979); Thomas v. Wyrick, 535 F.2d 407, 414 (8th Cir. 1976) (alleged error must "undercut the reliability of the trial process").


\textsuperscript{172} See notes 58-61 and accompanying text supra.


\textsuperscript{175} Because it is difficult to demonstrate actual prejudice from such errors, courts often reject these claims on the merits. See, e.g., United States v. Childs, 571 F.2d 315 (5th Cir. 1978); Trombley v. Anderson, 439 F. Supp. 1250 (E.D. Mich. 1977). But see United States v. Easter, 539 F.2d 663 (8th Cir. 1976) (failure to challenge legality of search "materially prejudicial" to defense).

Increasingly, courts have adopted the view that the guarantee of effective assistance safeguards not only against an adverse judgment but also against loss of the benefit of important procedural protections. Since the decisions of defense attorneys in their capacity as advocates can profoundly affect a defendant's procedural rights, a functional analysis of ineffectiveness claims regarding trial conduct should take into account the full range of procedural rights confided to counsel's protection, as well as his influence on the trial's outcome. Except for decisions calling for the relinquishment of fundamental rights, such as the decision to plead guilty, to waive a jury trial, or to take the witness stand, strategic choices normally are entrusted exclusively to defense attorneys. Although a counsel's decisions about oratorical style or presentation of evidence rarely implicate substantial procedural interests of the accused, a significant portion of the conduct of a trial demands tactical choices with constitutional overtones. A lawyer's failure to invoke the exclusionary rule to suppress evidence seized in violation of the fourth amendment, to exercise the accused's sixth amendment rights of compulsory process and confrontation by presenting and cross-examining witnesses, to object to certain due process violations, or to conduct voir dire usually will result in the accused's loss of the constitutional right implicated by his attorney's omission. This happens because the procedural default may be interpreted as a tactical choice, even if in fact it results from an attorney's oversight.

Under the broader view of counsel's function as an advocate, the probability and gravity of prejudice to a defendant's interest either in obtaining a favorable
verdict or in vindicating collateral rights determine whether his attorney's trial performance amounted to ineffective representation. As stated earlier,184 the threat of prejudice should be judged in light of what a defense attorney should have known at the time of his questionable performance. If counsel's performance reflects a reasonable weighing of competing interests, it may properly be denominated a "tactical choice" within the range of effective assistance in spite of its apparently unfavorable consequences.185 A decision not to call an alibi witness, for example, might be justified if counsel believed that interjecting the alibi defense would undercut his client's stronger claim of self-defense. Certain categories of trial conduct, such as decisions to call or bypass individual witnesses or make objections, are particularly prone to the presumption that they are strategic choices.186 Most other decisions during a trial can be rationalized in retrospect on the basis of hypothetical countervailing considerations. But reviewing courts should hesitate to deny relief for representation that seems to have risked substantial potential prejudice unless the prosecutor identifies the actual tactical basis of defense counsel's conduct.187

In assessing the potential for substantial prejudice, the relative importance of the probability of harm and its gravity will depend on the nature of the claim. To establish an intolerable risk of prejudice from the failure to raise an exculpatory defense, for instance, which implicates the accused's interest in a favorable outcome, the defendant must show that counsel was or reasonably should have been aware of the existence of the defense; that the jury was likely to credit the defense; and that the defense would have been consequential in relation to other challenges raised at trial on behalf of the accused. Thus, if physical and testimonial evidence conclusively established the accused's commission of the charged offense, any significant doubt about the defendant's mental stability should render constitutionally defective counsel's omission of a competency or insanity defense.188 In contrast, the benefit to a defendant's case, and therefore the gravity of prejudice, is a less important factor when the vindication of a collateral constitutional guarantee is at stake. Instead, a showing that there was a

184. See text accompanying note 155 supra.
Even if counsel's performance resulted from an actual weighing of interests, the reviewing court must be satisfied that his choice among the available options was reasonable. See Mullins v. Evans, 473 F. Supp. 1321 (D. Colo. 1979) (ineffective assistance when counsel intentionally sought a verdict of first degree murder to avoid the sentencing discretion of the judge).
substantial basis for moving to suppress constitutionally tainted evidence or invoking a similar right should be sufficient to establish the requisite prejudice. If the suppression motion had been successful, counsel would have both vindicated his client's right not to be convicted on the basis of tainted evidence and weakened the prosecution's case to some extent. On the other hand, if the motion had failed, the groundwork would have been laid for challenging a conviction on appeal, at which time the government would have the burden of demonstrating that in light of the entire record the error was harmless beyond a reasonable doubt. Therefore, absent a showing by the prosecution that the decision was in fact a reasonable choice among conflicting options, the failure to pursue a nonfrivolous constitutional claim at trial should constitute ineffective representation.

C. Advice of Counsel

The exercise of certain constitutional guarantees, such as the right to a jury trial or to confront one's accusers, are deemed too fundamental to entrust exclusively to defense counsel. These rights may not be relinquished absent a

190. Of course, if the failure to move to suppress also threatens substantial prejudice to the defendant's interest in an acquittal, it can be challenged on that basis as well. Compare Salty's v. Adams, 465 F.2d 1023 (2d Cir. 1972) (identification during improper pretrial proceeding only evidence against defendant) and People v. Nation, 26 Cal. 3d 169, 604 P.2d 1051, 161 Cal. Rptr. 299 (1980) (same) with United States v. Daniels, 558 F.2d 122, 126 (2d Cir. 1977) (no apparent basis for challenging pretrial procedure and no real issue as to accused's identity).
191. See Chapman v. California, 386 U.S. 18, 21-24, 26 (1967) (reversal of conviction for violation of right against self-incrimination when government failed to show that repeated referral by trial judge and prosecutor to defendant's failure to testify was harmless error).
192. Recognizing that procedural default may constitute inadequate representation does not present a risk of reversing convictions for procedural errors that in hindsight clearly could not have affected the outcome of the trial. Errors such as the failure to challenge inadmissible testimony or evidence are peculiarly susceptible to application of a harmless error rule. Of course, the same cannot be said of some procedural defaults, such as failure to challenge the composition of the grand jury. In Kelly v. Warden, 468 F. Supp. 965 (D. Md. 1979), for example, the court found that counsel's failure to move to suppress incriminating statements on the grounds that the police obtained them without a waiver valid under Miranda was a denial of effective assistance. Nevertheless, the court did not reverse the conviction: counsel's ineffective representation was harmless error because the accused had in fact made a voluntary and intelligent waiver for the purpose of Miranda.

Claims based on the failure to invoke procedural rights at trial pose a particular problem when raised as grounds for habeas corpus, since the Court has required a showing of cause and prejudice as a threshold for federal review. See note 53 supra. See generally Tague, Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work To Do, 31 Stan. L. Rev. 1 (1978). Although it is possible that petitioners will attempt to refashion their claims to allege that a procedural default is the result of inadequate assistance, thus circumventing the cause requirement, it is unlikely that they will secure a more favorable result. A dereliction in counsel's performance substantial enough to be deemed constitutionally ineffective should also satisfy the threshold requirement of cause. See, e.g., United States v. Brown, No. 77-2106, slip op. at 10-12 (D.C. Cir. March 21, 1980); Boyer v. Patton, 579 F.2d 284, 288 (3d Cir. 1978); Sincox v. United States, 571 F.2d 876, 880 (5th Cir. 1978). Whether successfully showing that the underlying claim, for example, failure to suppress evidence, was not harmless error under Wingo would establish "prejudice" is unclear. See United States v. Brown, No. 77-2106, slip op. at 12-13 (D.C. Cir. March 21, 1980); Hill, supra note 53, at 1067-70, 1089-96.

knowing, voluntary, and competent waiver by the defendant himself.\textsuperscript{194} The advice of counsel is essential to safeguard the accused against a disadvantageous waiver of his fundamental trial rights.\textsuperscript{195} Part of the constitutional function of the assistance of counsel, therefore, is to advise defendants regarding the decision to make a statement to the police, to testify in their own behalf, to submit to a trial before a judge, or, most important, to plead guilty.\textsuperscript{196} Inadequate advice may amount to ineffective assistance of counsel warranting appropriate relief.\textsuperscript{197} Some courts have suggested that the function of counsel as an advisor is limited, at least for constitutional purposes, to ensuring that a client’s waiver of a constitutional right is a knowing and voluntary act.\textsuperscript{198} Under the current formulation of what constitutes a constitutionally valid waiver, the duties of counsel are thus limited to informing the accused of the implicated constitutional guarantees, explaining the immediate consequences of relinquishing his rights, and refraining from coercion.\textsuperscript{199} In light of the Supreme Court’s pronouncements on the subject and the breadth of functions defense counsel potentially could perform as advisors, this view is too narrow. In \textit{McMann v. Richardson},\textsuperscript{200} the Court delineated duties for defense counsel far in excess of those that would be necessary to guarantee an intelligent and voluntary waiver. A counseled defend-

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\textsuperscript{194} Johnson v. Zerbst, 304 U.S. 458 (1938).
\textsuperscript{196} Although often overlooked in discussions of effective counsel, this function is particularly significant because it is estimated that up to 90\% of all defendants plead guilty. See S. Buckle & L. Buckle, Bargaining for Justice: Case Disposition and Reform in the Criminal Courts 3 (1977).
\textsuperscript{197} See note 209 infra.
\textsuperscript{198} See, e.g., Carbo v. United States, 581 F.2d 91, 93 (5th Cir. 1978); United States ex rel. Healey v. Cannon, 553 F.2d 1052, 1056 (7th Cir.), cert. denied, 434 U.S. 874 (1977); United States ex rel. Watson v. Lindsey, 461 F.2d 922 (3d Cir. 1972). See generally Note, Effective Assistance of Counsel in Plea Bargaining: What is the Standard?, 12 Duquesne L. Rev. 321 (1973). These courts base their rule on a narrow interpretation of the Supreme Court’s pronouncement that a counseled defendant cannot attack a guilty plea as involuntary or unintelligent, but can only challenge it by claiming that his counsel’s advice was not within “the range of competence demanded of attorneys in criminal cases.” McMann v. Richardson, 397 U.S. 759, 771 (1970). Thus, competence of attorneys is read as a gloss for involuntariness. As a result, the need to remedy gross departures from the normal standard of competency requires a considerable expansion of the traditional notion of “involuntariness” for waiver purposes. See, e.g., Hammond v. United States, 528 F.2d 15 (4th Cir. 1975) (erroneous advice may have “induced” guilty plea otherwise in compliance with applicable standards); Roberts v. United States, 491 F.2d 1236 (3d Cir. 1974); Cooks v. United States, 461 F.2d 530 (5th Cir. 1972); Moorhead v. United States, 456 F.2d 992 (3d Cir. 1972).
\textsuperscript{199} See Fare v. Michael C., 442 U.S. 707, 725-26 (1979); cf. Fed. R. Crim. Pro. 11(c), (d) (standards for guilty plea in federal prosecutions). If this standard were strictly applied to ineffective-ness cases, colorable allegations of sixth amendment violations would be limited to such errors as a failure to inform the accused before testifying that he need not take the stand and that he will be subject to cross-examination or impeachment; a failure to inform the accused before pleading guilty of his right to stand trial, of the elements of the charge, and of the range of penalties for the offense to which he pleads; or counsel’s exercise of physical or mental coercion to induce a waiver. See note 204 infra.
\textsuperscript{200} 397 U.S. 759 (1970).
\end{notes}
ant's decision to plead guilty, which was at issue in *McMann*, must rest upon his attorney's judgment regarding the weight of the state's case; how the facts, as he understands them, would be viewed by a jury; the likelihood that those facts would establish guilt; and the admissibility of seized evidence or incriminating statements that contribute to the state's showing of culpability. 201 *McMann* thus suggests a standard requiring a range of advice calculated to assure that the exercise or relinquishment of fundamental rights is not only voluntary and intelligent, but also reasonably well-informed. 202

A narrow view of the constitutional function of legal advice is also inappropriate because it fails to reach several important interests that competent counsel protect in their advisory capacity. Besides providing the minimal information needed for a constitutionally effective waiver, a defense attorney guards against waivers that, although sufficiently knowledgeable to be effective, are nevertheless poorly considered. 203 Without competent advice, for instance, a defendant could plead guilty when the evidence against him is so weak that there is a likelihood of casting reasonable doubt on his guilt or when he has an exculpatory defense to the charge. 204 In addition, the advice of counsel protects collateral rights that may be lost when a defendant decides to relinquish a constitutional protection. 205 A guilty plea by an uncounseled defendant, for example, may be deemed ""intelligent"" even if the defendant is unaware that the main evidence could be suppressed at trial because the state obtained it through an illegal search. On the other hand, if the accused has chosen to exercise his right to be assisted by counsel in his plea, he should be able to expect that he has gained the right to obtain advice regarding the existence of this avenue of defense and the likelihood of success, assuming that a reasonably competent attor-

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201. Id. at 769-70. See also Tollett v. Henderson, 411 U.S. 258, 266-67 (1973).
202. Some courts have reached a similar result by straining the meaning of ""intelligent and voluntary."" See note 198 supra.
203. For cases recognizing that a well-advised choice is the touchstone of effectiveness in counseling waivers, see United States v. Winston, 613 F.2d 221 (9th Cir. 1980); Strader v. Garrison, 611 F.2d 61 (4th Cir. 1979); Tolliver v. United States, 563 F.2d 1117 (4th Cir. 1977).
204. See note 199 supra. Federal Rule of Criminal Procedure 11(c) imposes no duty on trial courts to ascertain the defendant's knowledge of such issues; courts need only inquire whether the defendant understood the nature of proceedings waived, explain the rights directly relinquished by a guilty plea and penalties to which a plea will subject him, and inquire whether the defendant's plea was induced by threats or promises. See Richardson v. United States, 577 F.2d 447 (8th Cir. 1978), cert. denied 442 U.S. 910 (1979). Thus, the defendant need not be informed of the collateral consequences of his plea, such as the potential deportation of an alien defendant, Michel v. United States, 507 F.2d 461, 465 (2d Cir. 1974), or the revocation of parole, Sanchez v. United States, 572 F.2d 210, 211 (9th Cir. 1977); nor need he be informed of constitutional rights, such as the right to confrontation and compulsory process, indirectly lost by his plea. Fruchtman v. Kenton, 531 F.2d 946, 948 (9th Cir.), cert. denied, 429 U.S. 895 (1976).
ney would be aware of the illegality of the search. Finally, a broader standard of effective advice would ensure that a defendant’s decision to exercise a constitutional right, as well as waive it, is well-informed. Since a guilty plea, a waiver of trial by jury, or a decision to testify in his own behalf often may promote the accused’s interests in a less severe sentence or an acquittal, the right to effective assistance should incorporate a duty to give advice conducive to an informed weighing of the factors in support of a waiver of procedural guarantees.

A functional analysis of the adequacy of legal advice, therefore, requires a determination of whether counsel’s advice threatened substantial potential prejudice to the accused’s interest in an informed election of procedural options. The issue is not the reasonableness of the accused’s actual decision or his counsel’s judgment concerning the advisability of a waiver. A defendant should be entitled to receive not only his counsel’s reasonably professional judgment regarding the wisdom of a waiver, but also all the information material to his own decision on the matter of which his counsel should have been aware at the time. Since only the defendant may make decisions regarding the fundamental rights at stake, advice that omits material factors, such as the possibility for acquittal or a lighter sentence if one choice or another is made, should constitute ineffective representation, even though counsel has made a reasoned judgment that a par-

206. For example, a defendant’s interest in a jury as a check upon the exercise of arbitrary government power may be undercut by the likelihood in a particular case that highly inflammatory or complicated evidence would be viewed more fairly by a judge. See, e.g., United States v. Winston, 613 F.2d 221 (9th Cir. 1980); cf. Brady v. United States, 397 U.S. 742, 743 (1970) (waiver of jury trial may reduce possibility of death sentence).

Similarly, a defendant’s right not to be forced to make incriminating statements at trial may conflict with his interest in making a personal plea for leniency or in overcoming the negative implications of his election not to testify. See, e.g., Poe v. United States, 233 F. Supp. 173, 177 (D.D.C. 1964); cf. Mcgautha v. California, 402 U.S. 183, 213 (1971) (jury determination of guilt and punishment in a single verdict gives rise to choice whether to remain silent or address jury on issue of punishment at risk of imprisonment on issue of guilt).

207. What is “material” to an informal election, although varying from case to case, generally will include information that is likely to affect an accused’s waiver decision. At the pleading stage, for instance, a defendant reasonably can expect his attorney to assess the likelihood of an acquittal if he stands trial and the chances of a less severe sentence if he pleads guilty, explain the possible constitutional challenges to nonjurisdictional defects preceding the guilty plea, and gauge the likelihood that such challenges will prevail.

Even jurisdictions receptive to allegations of ineffectiveness seem unwilling to embrace a standard of materiality to determine whether defense counsel’s advice was “competent” within the meaning of McMann, supra note 33, 397 U.S. at 771. In Johnson v. United States, 539 F.2d 1241, 1242-43 (9th Cir. 1976), for instance, the court held that the failure to inform a client of a reasonably strong basis for challenging the admissibility of the primary evidence in the government’s case was not sufficiently egregious to raise an issue of ineffective representation in advising a guilty plea. Yet this was precisely the kind of information deemed essential to competent advice in McMann, 397 U.S. at 769.

The accused’s interest in information material to a waiver decision is susceptible to few, if any, countervailing considerations, in light of the fundamental character of the constitutional guarantees at issue. Counsel’s duty to provide adequate advice may be limited, however, by the burdensomeness of obtaining factual and legal information necessary to a well-informed decision. See note 165 supra. Although on rare occasions courts might be able to infer the inadequacy of counsel’s advice from the paucity of his investigation or preparation, see, e.g., Hora v. Louisiana, 495 F.2d 1248, 1250 (5th Cir. 1974); Walker v. Caldwell, 476 F.2d 213, 221 (5th Cir. 1973), the functional analysis shifts the inquiry to the nature of the information actually provided the defendant by counsel in his advisory capacity.
ticular course is preferable in light of the probabilities for success. The correctness in hindsight of counsel's judgment may affect the relief the defendant should receive, but it is analytically separate from the adequacy of representation.

The application of a functional analysis to claims of ineffective advice is illustrated by Poe v. United States. The case also demonstrates the need for a standard of constitutionally adequate advice that reaches beyond the context of waivers. In Poe, the defendant decided not to take the witness stand upon the advice of his attorney, who mistakenly believed that the government could use otherwise inadmissible statements to impeach his client's testimony. Because the accused's testimony was the sole avenue of defense, he was convicted without ever presenting a case. In spite of this faulty advice, the defendant probably would have received no relief under a standard of effective representation limited to waiver decisions or one requiring a showing of actual prejudice, in the sense of an effect on the outcome. But the district court in Poe, using an analysis similar to that proposed here, granted the petitioner a new trial.

Sitting as a district judge in Poe, Circuit Judge J. Skelly Wright first isolated the interests implicated by counsel's questionable advice. He recognized that a right to testify is implicit in the fifth and sixth amendments and indicated that the decision to exercise this right by waiving the guarantee against self-incrimination rests ultimately with the accused. He then decided that coun-

208. The contrary standard, a form of "harmless error" rule, would in effect transfer to defense counsel unilateral authority to waive fundamental constitutional rights on behalf of the defendant. Cf. Jones v. Wainwright, 604 F.2d 414, 416 (5th Cir. 1979) (waiver not "involuntary" because counsel told client what his professional judgment was; court did not further require counsel to give accused the underlying facts so he could decide for himself). The standard would contravene the Zerbst line of cases, by abrogating the defendant's exclusive power to relinquish his rights, a result surely not intended in McMann. Cf. Henderson v. Morgan, 426 U.S. 637 (1976) (guilty plea unconstitutiona when neither counsel nor court informed defendant of all elements of crime, although counsel had reasonably determined that plea was advisable and that the defendant would not understand details of charge).

It is unclear to what extent a harmless error rule is ever appropriate in waiver cases. If, as Holloway indicates, it is impermissible to hypothesize about the impact of a conflict of interests upon the decisions of a defense attorney, it would seem equally inappropria for courts to conjecture about the effect of misleading, incomplete, or coercive advice upon the waiver decisions of a criminal defendant. See United States ex rel. Peabworth v. Conte, 489 F.2d 266, 268 (9th Cir. 1974). In some circumstances, in which no conjecture is needed, a harmless error rule may properly preclude reversal for inadequate advice, such as failure to provide the accused with material information of which the defendant, in retrospect, was demonstrably aware.

209. Ineffectiveness in advice concerning constitutional guarantees at trial, such as the right not to testify or the right to a jury, may be remedied by a reversal and retrial. Similarly, erroneous advice that results in a guilty plea may be cured by an opportunity to stand trial. In contrast, it is considerably more difficult to fashion an appropriate remedy for constitutionally defective advice that induces a decision to stand trial, rather than to plead guilty with the hope of drawing a more favorable sentence. Neither dismissal of the case nor a retrial addresses the alleged inadequacy. Perhaps the only appropriate remedy is to order the trial court to resentence the accused in light of the finding of constitutionally defective advice. Cf. notes 229-33 and accompanying text infra (discussing remedial difficulties arising from ineffective negotiation).


211. Id. at 176. Later cases have disagreed over whether the decision to testify is one that is constitutionally entrusted to a defendant. Compare Wright v. Estelle, 572 F.2d 1071, 1072 (5th Cir.) (en banc) (no personal right to testify; counsel may make decision over client's opposition), cert.
sel's misinformation regarding the consequences of a decision to testify was "highly prejudicial" in light of the absence of any alternative defense and of the general importance that juries attach to the accused's failure to take the stand.212 Accurate legal advice regarding the admissibility of Poe's prior inculminating statements was essential to a meaningful decision, because the possibility of impeachment was the only factor weighing against Poe's testifying in his own behalf. Finally, Judge Wright considered whether legitimate countervailing interests supported counsel's otherwise prejudicial performance. He indicated that even if counsel, unaware before trial of the prior inculpatory statements, understandably had not familiarized himself with the applicable law, counsel ought to have requested a recess in order to conduct the necessary research. Neither the limitations upon counsel's duty to prepare nor his desire to comply with the court's intention to submit the case quickly to the jury justified the failure to conduct the legal investigation necessary to advise his client. As a result, Judge Wright granted a new trial, holding that Poe had been denied the effective assistance of counsel essential to a well-informed decision whether or not to waive his fifth amendment right.213

D. Representation Before Trial and After Conviction

Defense attorneys increasingly serve as intermediaries between their clients and the court or prosecutor with the aim of tempering the severity of an otherwise deserved deprivation.214 Even though this kind of service is the only legal assistance many criminal defendants receive, courts have been reluctant to accept ineffectiveness claims based on the efforts of counsel to influence decisions regarding pretrial detention or sentencing or to negotiate with the prosecutor for a reduction of the charges or disposition without trial.215

There are two likely explanations for this apparent reluctance. First, unlike a defendant's interests in a favorable verdict or an informed waiver, the procedures invoked by counsel as intermediary generally are not of constitutional dimension. There is no absolute right to release on bail,216 to a plea bargain,217 or to a particular sentence within the applicable range of penalties.218 Second, several features of the discretionary processes at issue complicate review of these claims. The problems posed by claims alleging inadequate representation in plea bargaining are illustrative. These include the lack of an objective record of coun-

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212. 233 F. Supp. at 177.
213. Id. at 178.
216. E.g., United States v. Smith, 444 F.2d 61, 62 (8th Cir. 1971).
sel's performance; the idiosyncratic nature of the plea bargaining process, especially the procedural informality; the prosecutorial discretion to negotiate about the sentence or a reduction in charges; and the difficulty of formulating an appropriate remedy for constitutional error at this stage.\textsuperscript{219} Finally, there is probably an unstated reluctance to award relief to duly convicted or confessedly guilty defendants.

There are, nonetheless, persuasive arguments for extending the right to effective representation to the interests at stake in these discretionary processes. As a few courts have recognized,\textsuperscript{220} at least in dictum, the very fact that defendants enjoy a right to legal assistance at pretrial and post-conviction proceedings suggests that the constitutional adequacy of representation should be gauged by the functions defense attorneys perform at these stages. Furthermore, precisely because courts and prosecutors are afforded vast discretion with regard to setting bail, pressing charges, and imposing sentences, effective defense attorneys often have a greater opportunity to benefit their clients on these matters than at trial on the issue of culpability.\textsuperscript{221} The role of defense counsel in plea negotiations particularly needs to be subjected to scrutiny for ineffective assistance. Not only is plea bargaining the principal means of resolving criminal cases today,\textsuperscript{222} but defense attorneys are also peculiarly prone to performing contrary to their client's interests in negotiating pleas, because of inattention, lack of experience, or the ethical problems inherent in the process.\textsuperscript{223}

Since counsel acts primarily as an advocate in the role of intermediary or negotiator, a functional analysis of ineffectiveness claims challenging counsel's performance in these discretionary proceedings will resemble the review of coun-

\textsuperscript{219} See notes 229-33 and accompanying text infra.

\textsuperscript{220} In Holloway v. Arkansas, 435 U.S. 475 (1978), the Supreme Court regarded the opportunity to negotiate a plea as one of the primary interests jeopardized by a defense attorney's conflict of interests, since his ethical dilemma "may well have precluded defense counsel . . . from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution, provided a lesser charge or a favorable sentencing recommendation would be acceptable." Id. at 490. For other cases suggesting that counsel's constitutional role includes effective negotiation, see Mason v. Balcom, 531 F.2d 717, 724 (5th Cir. 1976); Loftis v. Estelle, 515 F.2d 872, 877 (5th Cir. 1975) (Rives, J., dissenting); Correa v. United States, 479 F.2d 944, 949 (1st Cir. 1973); Walker v. Caldwell, 476 F.2d 213, 222 (5th Cir. 1973). Some of these cases were decided on the closely related ground that the defendant's guilty plea was "involuntary." But in fact the defense attorney's negotiations, not his advice, were challenged. See, e.g., Cooks v. United States, 461 F.2d 530 (5th Cir. 1972) (counsel negotiated the dismissal of five clearly unenforceable charges in return for plea of guilty to a single count).

\textsuperscript{221} See ABA Standards, The Defense Function supra note 165, at 111-12. The Supreme Court has noted the influential role counsel can play at sentencing, when the judge is likely to be receptive to the arguments of counsel as aids to his discretion. Carter v. Illinois, 329 U.S. 173, 178 (1946).

\textsuperscript{222} See note 196 supra.

\textsuperscript{223} P. Urz, Settling the Facts 117 (1978); Alschuler, The Defense Attorney's Role in Plea Bargaining, 84 Yale L. J. 1179, 1201 (1975); Blumberg, The Practice of Law as Confidence Game, 1 Law & Soc'y Rev. 15, 21 (1967). The ethical problems posed by the plea bargaining process include the tendency of prosecutors and defense attorneys to develop ongoing relationships that obscure their adversarial roles, the incentives for defense attorneys to urge a plea bargain to avoid the expense of conducting a trial, and the possibility that a defense attorney with several pending cases may consciously or unintentionally bargain the sentence of one client against that of another. Alschuler, supra, at 1201; Note, The Representation of Indigent Criminal Defendants in the Federal District Courts, 76 Harv. L. Rev. 579, 603 (1963).
The main difference is that the interest at stake is mitigating an otherwise undesired loss of liberty by securing release on bail or a milder sentence. At a pretrial detention or sentencing hearing, counsel could seriously prejudice this interest by such lapses as a failure to furnish the court with legal or factual information that would materially influence a judge’s determination in favor of the defendant, or to dispute false allegations of the government that would be likely to induce a harsher judgment. When a defense lawyer fails to explore the possibility of a plea bargain or otherwise negotiates inadequately, the likelihood of prejudice will depend on the strength of the state’s case, what benefit the defendant could offer the state by pleading guilty besides the avoidance of a trial, and the general amenability of the prosecutor or the defendant to bargain in the case. The magnitude of harm threatened by counsel will turn on the usual difference in the jurisdiction between sentences imposed after a conviction and after a guilty plea in the particular kind of case. Because of the lack of documentation about plea bargaining and the absence of a record of the negotiations conducted in the individual case, the evaluation of potential prejudice is necessarily speculative. Nevertheless, when a defendant demonstrates that his counsel’s conduct risked substantial prejudice to his interest in a less severe sentence, the reviewing court should attempt to provide an adequate remedy in order to preserve the meaningfulness of the right to counsel for the majority of criminal defendants whose cases are disposed through negotiations.

The problem of selecting an appropriate remedy after finding a denial of sixth amendment rights further complicates review of ineffectiveness in these cases. Little difficulty arises if a court determines that a defendant has re-

224. See notes 184-87 and accompanying text supra. Adequate preparation is essential here, just as it is for a trial. See Correra v. United States, 479 F.2d 944, 949 (1st Cir. 1973). A negotiated plea may serve other interests as well. See Blackledge v. Allison, 431 U.S. 63, 71 (1977) ("The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, ... and a prompt start in realizing whatever potential there may be for rehabilitation."). Failure to secure release before trial not only subjects a defendant to potentially undeserved confinement, but also renders preparation of a defense more difficult. Barker v. Wingo, 407 U.S. 514, 533 (1972).

225. See United States ex rel. Boyd v. Morris, No. 77-C-2721 (N.D. Ill. June 18, 1979); Breedlove v. Beto, 276 F. Supp. 635, 637 (S.D. Tex. 1967), rev’d on other grounds, 404 F.2d 1019 (5th Cir. 1968). If counsel trades the dismissal of unenforceable charges for a guilty plea on another count, he has risked substantial prejudice to his client’s interests. See Cooke v. United States, 461 F.2d 530 (5th Cir. 1972).


228. This inquiry differs from the argument advanced by defendants challenging their sentences on the ground that they are excessive in relation to terms usually imposed in the jurisdiction or actually offered in a rejected plea bargain. See Note, Disproportionality in Sentences of Imprisonment, 79 Colum. L. Rev. 1119, 1155 & nn.176-78 (1979). In a functional analysis of effectiveness of counsel, the issue is whether at the time of negotiating it was likely that the defendant would have received a substantially more severe sentence after trial than from a plea bargain. If in fact the defendant did not receive a severe sentence after trial, then any ineffectiveness might be deemed harmless.

ceived inadequate representation at a sentencing hearing or in negotiations prior to a guilty plea. In such cases, the appropriate remedy is to vacate the sentence or reverse the conviction, allowing the state to resentence or the defendant to negotiate a new plea or stand trial. On the other hand, if a court determines that a defendant received ineffective representation at a pretrial detention hearing or in his counsel's failure to explore a plea bargain, the choice of a suitable remedy is less clear. On balance, reversing a conviction because of ineffective assistance at a pretrial detention hearing does not seem appropriate unless the accused can show substantial prejudice to the development of his case for trial. Otherwise, the error should be considered presumptively harmless. The defendant who is denied effective assistance in plea bargaining and receives a severe sentence after conviction at trial poses a more acute problem. The only meaningful relief for such a claimant would be the unusual step of reversing his conviction, thus returning to the accused the bargaining leverage he lost through his counsel's ineffectiveness.

CONCLUSION

Current standards for assessing whether a criminal defendant has received effective representation are not well suited to their task. Although it is attractive to judge counsel's performance according to community norms of legal competence, this test is not directed toward the particular interests safeguarded by the right to counsel. In a given case, this standard may demand too much or too little from a defense attorney. Guided by a desire to narrow the definition of ineffectiveness, as well as by concern for judicial economy, courts have required defendants to show actual prejudice to obtain relief. This requirement is inconsistent with the analysis employed by the Supreme Court for other trial rights enumerated in the sixth amendment and is especially incompatible with the prophylactic purposes of the right to counsel. The guarantee of effective assistance of counsel assures more than a fair trial with a reliable outcome. By affording every criminal defendant the means to benefit from available procedural protections, the sixth amendment protects specific interests in obtaining a favorable verdict, in preserving the constitutional rights at stake during trial, in exercising or waiving procedural rights intelligently, and in mitigating the harshness of the criminal process. It is appropriate, therefore, to decide whether an accused has received effective representation by determining if his attorney's performance threatened substantial potential prejudice to one of these interests. This functional analysis guarantees defendants legal assistance calculated to protect the interests underlying the right to counsel while responding to institutional considerations that have provoked a narrow definition of the right to effective assistance.

Bruce Andrew Green

232. Cf. Barker v. Wingo, 407 U.S. 514, 533 (1972) (a factor to be considered in deciding "speedy trial" claims is whether extended pretrial incarceration has unduly prejudiced the defendant's ability to prepare a defense).