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Judicial Rationalizations for Rationing Justice: How Sixth Amendment Doctrine Undermines Reform

Cover Page Footnote

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JUDICIAL RATIONALIZATIONS FOR RATIONING JUSTICE: HOW SIXTH AMENDMENT DOCTRINE UNDERMINES REFORM

*Bruce A. Green**

As Deborah Rhode describes, the quality of representation in criminal cases does not live up to the popular perception.¹ Most defendants have too little money to hire a lawyer of their own choosing. Therefore, a court ordinarily will appoint one, either from a public defender's office or from the private bar. Many public defenders carry onerous case loads. Many lawyers appointed from the private bar receive a flat fee or an hourly rate that is capped, and are therefore motivated to limit the amount of time spent on any individual case. Either way, Rhode concludes, the underfinancing of defense representation ensures that "overburdened and underprepared lawyers strike hasty plea bargains for indigent clients with no realistic alternatives."²

No one would suggest that equal justice requires everyone accused of a crime to be defended by a Clarence Darrow or an Edward Bennett Williams. But the criminal justice system fails to measure up to societal expectations of fairness and equality if, as Rhode suggests, defendants are pleading guilty because of their lawyers' careless advice or inability to find time for a meaningful defense. That is not equal justice but what Learned Hand might have referred to as "rationed justice."³

Rhode notes that courts may provide a remedy when individual defendants are poorly represented, whether because their lawyers are inadequately funded or for other reasons;⁴ however, even in cases where the defendant elects to go to trial, courts are generally reluctant to exercise their authority under the Sixth Amendment to overturn

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1. See Deborah L. Rhode, In the Interests of Justice 60-64 (2000).

2. *Id.* at 61.

3. Learned Hand, 75th Anniversary Address to the Legal Aid Society of New York (Feb. 16, 1951) ("If we are to keep our democracy there must be one commandment: Thou shalt not ration justice.")

4. Rhode, *supra* note 1, at 62-63.

convictions based on the ineffective assistance of defense counsel.⁵ This is understandable. Courts have an interest in conserving resources that otherwise would be expended on additional proceedings. They seek to be fair to the prosecution, whose ability to try a defendant successfully may diminish with the passage of time. They seek the respect of a public that may perceive that criminals are let loose because of technicalities.

Courts are particularly reluctant to overturn convictions stemming from guilty pleas. A guilty plea is seen as an admission that removes doubts about whether the defendant is guilty. Judges are suspicious of defendants who complain about the fairness of their guilty plea after being sentenced. They see this as an attempt to manipulate the criminal justice process by defendants who initially took the risk that they would fare better by pleading guilty than by standing trial and then, after seeing the result, concluded that they had made the wrong decision. Most significantly, there is the problem of sheer volume. The overwhelming majority of cases are resolved by guilty plea. Reviewing a significant number of those convictions, much less overturning them, would greatly burden the courts. There are, thus, enormous institutional pressures to resist challenges to convictions that resulted from guilty pleas—even in cases where defendants in fact got a raw deal.

If there were adequate judicial oversight and an adequate judicial remedy when lawyers perform poorly, there might be less need for institutional measures, such as better funding and better training, to reduce the incidence of bad lawyering. But the problem with the judicial doctrine based on the Sixth Amendment right to competent counsel is not simply that it is toothless and thus makes institutional reform more urgent. The judicial doctrine affirmatively impedes the progress of reform by making light of bad lawyers and bad lawyering. While reformers such as Rhode seek to persuade the public that bad lawyering is a problem that affects the quality of criminal justice, the courts, driven by other institutional interests, convey the opposite impression.

I have previously discussed one aspect of Sixth Amendment doctrine that is counter-factual in this way.⁶ Decisions presume that any lawyer is qualified to defend someone accused of a crime—a legal fiction that, in death penalty cases, can be lethal. Outside the context of Sixth Amendment case law, in contrast, it is well recognized that lawyers are generally unqualified to practice in unfamiliar areas of the law. Litigation is an area of specialization, and criminal litigation in particular requires special knowledge, training, and experience. By

5. *Id.*

6. See Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 Iowa L. Rev. 433 (1993).

promoting the idea that any lawyer can defend a criminal case, courts undermine efforts to persuade legislatures of the need to provide sufficient funding to support a corps of experienced criminal defense lawyers.

Another body of Sixth Amendment case law provides an even more serious impediment to reform by purveying the notion that bad lawyering rarely makes a difference in the overwhelming majority of criminal cases—that is, in cases that end in a guilty plea. The main culprit here is the requirement that defendants show that they were adversely affected by their lawyers' bad advice, and the cases interpreting and applying this requirement. The theme of this case law is that the quality of legal advice rarely makes a difference, because defendants will plead guilty whether their lawyers' advice is good or bad. This presupposition impedes efforts by reformers like Rhode to show that inadequate funding leads to slipshod lawyering, ill-advised plea bargains, and, ultimately, unjust results.

When the Supreme Court upheld the constitutionality of plea bargaining in 1970, it recognized that, to make an intelligent guilty plea, a defendant must receive competent advice from an attorney.⁷ While a conviction resting on a plea of guilty is not defective simply because, in hindsight, the attorney's advice was wrong, the Court held that a conviction could be challenged when the attorney's advice fell outside "the range of competence demanded of attorneys in criminal cases."⁸ Fifteen years later, however, the Court qualified the defendant's Sixth Amendment right to competent advice of counsel. Building upon its decision the previous term in *Strickland v. Washington*,⁹ which announced the standard governing claims of incompetent trial representation,¹⁰ the Court held that a defendant who pleaded guilty after receiving substandard legal advice must show a reasonable probability that he was "prejudiced."¹¹ In other words, he must show "that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."¹²

When a defendant challenges a lawyer's trial representation, the court can ordinarily dispose of the claim without a hearing by concluding that the lawyer's work was reasonably competent. Even if, in hindsight, the lawyer appears to have performed poorly, many mistakes can be justified as the product of a reasonable strategic judgment. Not so, however, when a defendant complains of an ill-advised decision to plead guilty. Once the defendant shows that his

7. *McMann v. Richardson*, 397 U.S. 759, 769-70 (1970).

8. *Id.* at 771.

9. 466 U.S. 668 (1984).

10. *Id.* at 687-96.

11. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985).

12. *Id.* at 59.

lawyer provided erroneous or incomplete advice,¹³ the apparent error or omission can rarely be justified as tactical or strategic. Is there a "tactical" reason to misadvise a client about the benefits of a guilty plea; for example, is there ever a reason to grossly understate the length of the prison sentence that would or could be imposed if the defendant pleaded guilty¹⁴ or the amount of time the defendant would have to serve in prison before being eligible for parole?¹⁵ Is there a "strategic" reason not to explain the significant consequences of a guilty plea, such as that, in the case of a non-citizen, the conviction may lead to deportation?¹⁶ Why would a defense lawyer, having failed to conduct rudimentary investigation, persuade the defendant to plead guilty by exaggerating the strength of the prosecution's case?¹⁷

Of course, not every claim of bad advice is genuine, and most guilty pleas are not the product of bad advice. But erroneous and incomplete advice will be given with some frequency when criminal defense lawyers with too little time to allocate to each case have an incentive to push their clients to plead guilty. In the guilty plea cases, therefore, the courts have a powerful institutional incentive to minimize the significance of bad lawyering. Courts do so in a variety of ways, relying at times on dubious assumptions about criminal defense lawyers, criminal defendants, and the criminal process. Consider the following eight examples.

First, the Supreme Court has authorized courts to dismiss these constitutional claims out of hand if the defendant, while alleging that his lawyer gave incomplete or wrong advice, failed additionally to allege that he would have gone to trial if he had received complete or correct advice.¹⁸ The underlying premise appears to be that bad advice ordinarily does not affect the defendant's decision whether to plead guilty, and that, therefore, if a convicted defendant does not allege otherwise, it is fair to presume that he would have pleaded guilty regardless of how he was counseled. Of course, this presumption overlooks the greater likelihood that the omission is

13. In general, there is a strong presumption that the defense lawyer provided competent representation, and therefore a defendant has a difficult evidentiary burden to show that the lawyer's advice was in fact erroneous or incomplete. *See, e.g., Slevin v. United States*, 71 F. Supp. 2d 348, 356-58 (S.D.N.Y. 1999).

14. *See, e.g., Ventura v. Meachum*, 957 F.2d 1048 (2d Cir. 1992); *Iaca v. Sunn*, 800 F.2d 861 (9th Cir. 1986).

15. *See, e.g., Garmon v. Lockhart*, 938 F.2d 120, 121 (8th Cir. 1991); *Sparks v. Sowders*, 852 F.2d 882, 885 (6th Cir. 1988); *Czere v. Butler*, 833 F.2d 59, 63 (5th Cir. 1987).

16. *See, e.g., People v. Huante*, 571 N.E.2d 736 (Ill. 1991); *Mott v. State*, 407 N.W.2d 581 (Iowa 1987).

17. *See, e.g., United States v. Giardino*, 797 F.2d 30 (1st Cir. 1986); *Commonwealth v. Chetwynde*, 574 N.E.2d 407 (Mass. App. Ct. 1991).

18. *Hill v. Lockhart*, 474 U.S. 52, 60 (1985); *see, e.g., United States v. Horne*, 987 F.2d 833, 835-36 (D.C. Cir. 1993); *United States v. Harris*, 894 F. Supp. 20, 24 (D.D.C. 1995). *Contra Chetwynde*, 574 N.E.2d at 411.

simply a pleading error.¹⁹ A defendant who complains that his lawyer wrongly advised him to plead guilty may think it obvious that he would have gone to trial if he had been properly counseled—otherwise, why would he now ask for the chance to withdraw his guilty plea?

Second, courts dismiss these claims when the defendant failed to produce “objective evidence” that the lawyer’s bad advice affected his decision.²⁰ This requirement presupposes that, leading up to a guilty plea, a defendant will generally express how he is making the decision to plead guilty and, in particular, the defendant will explain and memorialize precisely what weight he is giving to different aspects of counsel’s advice or non-advice. Absent such an expression, which survives in some provable form after the defendant has pled guilty, it may therefore be presumed that the defendant’s decision-making was unaffected by what the lawyer did or did not do. The problem, of course, is that defendants are unlikely to articulate their decision-making processes, much less to memorialize them. The decision whether to plead guilty will be subjective and largely internal.

Third, courts may dismiss these claims if the defendant, responding to the trial judge’s questions at the guilty plea proceeding, expressed satisfaction with his lawyer’s representation.²¹ The theory is either that the defendant’s later complaint must be contrived or that the defendant was, in any event, satisfied to receive bad advice and therefore was not harmed. The theory is questionable, not only because the defendant may have been unaware of the defense lawyer’s inadequacy at the time of the guilty plea, but because the guilty plea proceeding is hardly conducive to getting a straight answer about whether the defendant is pleased with his attorney’s assistance. The proceeding often takes place hurriedly and pro forma; the defense attorney’s presence makes it hard for the defendant candidly to criticize him; a defendant who has decided to plead guilty has little

19. See *Sepulveda v. United States*, 69 F. Supp. 2d 633, 638 (D.N.J. 1999) (construing pro se complaint liberally and examining merits of the claim even though defendant failed to allege that he would have elected to go to trial but for counsel’s alleged errors).

20. See, e.g., *Moses v. United States*, No. 97-3938, 1999 WL 195675 (8th Cir. Apr. 2, 1999) (per curiam); *Fields v. Attorney Gen. of Md.*, 956 F.2d 1290, 1298-99 (4th Cir. 1992); *Toro v. Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991); *Diaz v. United States*, 930 F.2d 832, 835 (11th Cir. 1991); *Williams v. Smith*, 888 F.2d 28, 30 (5th Cir. 1989); *Slevin v. United States*, 71 F. Supp. 2d 348, 360-61 (S.D.N.Y. 1999); *Green v. Johnson*, 46 F. Supp. 2d 614, 623 n.14 (N.D. Tex. 1999). But see *Garmon v. Lockhart*, 938 F.2d 120, 121 (8th Cir. 1991) (crediting attorney’s testimony that defendant said he wanted to get out to see his children grow up).

21. See, e.g., *Fields*, 956 F.2d at 1299; *Stano v. Dugger*, 921 F.2d 1125, 1131 (11th Cir. 1991); *Panzardi-Alvarez v. United States*, 879 F.2d 975, 983 (1st Cir. 1989); *United States v. Rivera Martinez*, 693 F. Supp. 1358, 1364-65 (D.P.R. 1988). But see *Giardino*, 797 F.2d at 32.

incentive to complicate or scuttle the guilty plea proceeding by interjecting concerns about counsel's performance.

Fourth, courts hold that the defense lawyer's erroneous advice does not matter as long as, at the guilty plea proceeding, the judge accurately advised the defendant on the same subject.²² For example, it does not matter that the lawyer overstated the sentence that the defendant would face after trial or understated the sentence he would receive after a guilty plea, as long as the judge gave a proper explanation at the guilty plea proceeding. The assumption must be that the defendant heard and understood what the judge said, understood that the judge's advice was inconsistent with the defense lawyer's earlier advice, made a quick recalculation of the risks and benefits of pleading guilty (without a lawyer's counsel regarding this new decision), and resolved to plead guilty, while continuing to listen to the judge's additional advice and to answer the judge's further questions.

This reasoning ignores any number of alternative explanations for the defendant's failure to say, after hearing the judge's advice, that he no longer wants to plead guilty. Perhaps the defendant did not understand and recognize the significance of what the judge told him, because his lawyer prepared him to answer by rote or because the judge's litany numbed him into answering reflexively. Perhaps the defendant did not recognize the inconsistency between the lawyer's advice and the judge's advice. For example, he may have understood that, when the lawyer advised him that he faced no more than ten years' imprisonment if he pled guilty, and the judge later said he faced a sentence of up to thirty years' imprisonment, the lawyer had been talking about the realistic maximum while the judge was merely speaking theoretically. The defendant may have recognized the inconsistency but, having come this far, and with the proceeding moving rapidly, he may not have understood that he could back out or he may have felt that he was being swept away in some fashion. It may be that, had he been given the chance to discuss the decision with counsel after receiving correct information, the defendant would have made a considered decision to stand trial.

22. See, e.g., *United States v. Martinez*, 169 F.3d 1049, 1054 (7th Cir. 1999); *United States v. Foster*, 68 F.3d 86, 88 (4th Cir. 1995); *Gonzalez v. United States*, 33 F.3d 1047, 1051-52 (9th Cir. 1994); *Ventura v. Meachum*, 957 F.2d 1048, 1058 (2d Cir. 1992); *Chichakly v. United States*, 926 F.2d 624, 631 & n.12 (7th Cir. 1991); *Doganieri v. United States*, 914 F.2d 165, 168 (9th Cir. 1990); *United States v. Garcia*, 909 F.2d 1346, 1348 (9th Cir. 1990); *Sepulveda*, 69 F. Supp. 2d at 641 (citing case law to support "[t]he established . . . rule . . . that where an adequate guilty plea hearing has been conducted, an erroneous prediction or assurance by defense counsel regarding the likely sentence does not constitute grounds for invalidating a guilty plea on grounds of ineffective assistance of counsel"). *But see* *Risher v. United States*, 992 F.2d 982 (9th Cir. 1993). Likewise, a court may find there was no prejudice when the defense lawyer's erroneous advice was contradicted by the pre-sentence report. E.g., *Key v. United States*, 806 F.2d 133, 139 (7th Cir. 1987).

Fifth, courts find that a defendant is not prejudiced when his lawyer's miscalculation of the amount of prison time the defendant faced if he stood trial, or similar misunderstandings, led to the lawyer's possible failure to negotiate a more favorable plea bargain.²³ It is not enough for a defendant to argue that he would have gotten a better deal; he must prove that, but for counsel's errors, he would have gone to trial. Perhaps the courts are implying that defendants are not really "prejudiced" when defense counsel's errors lead to a harsher penalty. But, of course, the severity of the sentence is enormously significant. Alternatively, the assumption may be that prosecutors are immovable: defense lawyers can say nothing to influence a prosecutor's plea offer. The reality, of course, is quite the contrary. Prosecutors look to defense lawyers for information and arguments on which to base the prosecutor's charging or plea bargaining decision.²⁴ Therefore, when the defense lawyer is laboring under a significant misunderstanding, it is quite possible that he will be less effective in advocating with the prosecution for a result that mitigates the harshness of the criminal conviction.

Sixth, courts assume that a lawyer's erroneous advice was insignificant when there were other persuasive considerations—including, especially, the strength of the prosecution's case—that would have led a reasonable defendant to plead guilty even if defense counsel had not erred.²⁵ By presupposing that a defendant, being reasonable, will plead guilty when the case against him is strong, these decisions come close to imposing a requirement that defendants show that they are innocent, or that they would have secured an acquittal at trial, in order to overturn a guilty plea.²⁶ The problem is that defendants do not necessarily make rational decisions whether to plead guilty—weighing the most important considerations and discounting the least important ones. The decision is individual, subjective, and idiosyncratic. Bad advice that would not matter to the hypothetical "reasonable defendant" may matter to the actual, flesh-and-blood defendant.

23. See, e.g., *Gargano v. United States*, 852 F.2d 886, 889-91 (7th Cir. 1988); see also *Fields*, 956 F.2d at 1297-98; *Craker v. McCotter*, 805 F.2d 538, 542 (5th Cir. 1986). For a rare example where this hurdle was overcome, see *Mask v. McGinnis*, 28 F. Supp. 2d 122, 126 (S.D.N.Y. 1998) (noting prosecutor's testimony that he would have made a more favorable plea offer if defense counsel had told him that the defendant was not a persistent violent felony offender).

24. See generally Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *Fordham L. Rev.* 2117 (1998).

25. See, e.g., *United States v. Horne*, 987 F.2d 833, 836 (D.C. Cir. 1993); *United States v. Hoskins*, 910 F.2d 309, 311 (5th Cir. 1990); *Hale v. Lockhart*, 903 F.2d 545, 550 (8th Cir. 1990); *Williams v. Smith*, 888 F.2d 28, 30 (5th Cir. 1989); *Gargano*, 852 F.2d at 891; *United States v. Harris*, 894 F. Supp. 20, 24-25 (D.D.C. 1995); *People v. Huante*, 571 N.E.2d 736, 742 (Ill. 1991); *People v. Hughes*, 580 N.E.2d 179, 181 (Ill. App. Ct. 1991). But see *Garmon v. Lockhart*, 938 F.2d 120, 122 (8th Cir. 1991).

26. See *Hill v. Lockhart*, 474 U.S. 52, 59-60 (1985).

Seventh, courts often assume that information concerning certain consequences of a conviction is inherently unimportant to a defendant. In particular, courts assume that defendants do not care about, and therefore do not have to be correctly advised about, consequences that, unlike the sentence to be imposed, are indirect or "collateral," such as that the defendant will lose his employment or livelihood or be deported after pleading guilty,²⁷ or that the conviction may be used to enhance the defendant's sentence if he is convicted of a future offense.²⁸ Here, again, is a generalization about how defendants make decisions that just may not be true in particular cases. It is easy to imagine that some defendants would elect to stand trial in order to prevent the loss of their livelihood or deportation, even at risk of a more substantial prison sentence if convicted after trial.

Lastly, courts assume that erroneous predictions about the sentence that will be imposed similarly do not matter, even when defense counsel seems certain about the prediction.²⁹ The assumption appears to be that, because sentencing is indeterminate and defense counsel obviously cannot guarantee a particular sentence, defendants do not take their lawyers' predictions into account but only consider the maximum sentence that may be imposed under the law. This assumption is unrealistic, however, because a lawyer's prediction may be the most important factor in a defendant's decision. There is no reason for a defendant to ignore the lawyer's prediction simply

27. The majority of decisions hold that defense counsel need not advise about the deportation consequences of a guilty plea. *See, e.g.*, *United States v. Gonzalez*, 202 F.3d 20, 25 (1st Cir. 2000) (holding that defendant may not withdraw guilty plea where defense counsel failed to warn of risk of deportation); *United States v. Romero-Vilca*, 850 F.2d 177 (3d Cir. 1988); *United States v. Yearwood*, 863 F.2d 6 (4th Cir. 1988); *United States v. Campbell*, 778 F.2d 764 (11th Cir. 1985); *Taveras-Lopez v. Reno*, 127 F. Supp. 2d 598 (M.D. Pa. 2000); *State v. Ginebra*, 511 So. 2d 960 (Fla. 1987); *Mott v. State*, 407 N.W.2d 581 (Iowa 1987); *Commonwealth v. Frometa*, 555 A.2d 92 (Pa. 1989). *But see* *State v. Pozo*, 746 P.2d 523 (Colo. 1987); *Daley v. State*, 487 A.2d 320 (Md. Ct. Spec. App. 1985); *Lyons v. Pearce*, 694 P.2d 969 (Or. 1985). *See generally* Timothy B. Jafek, Note, *Non-Citizens, Guilty Pleas, and Ineffective Assistance of Counsel Under the Arizona Constitution*, 42 *Ariz. L. Rev.* 549 (2000); Lea McDermid, Comment, *Deportation is Different: Noncitizens and Ineffective Assistance of Counsel*, 89 *Calif. L. Rev.* 741 (2001).

28. *See, e.g.*, *Saadique v. State*, 387 N.W.2d 315, 324-26 (Iowa 1986).

29. *See, e.g.*, *Ventura v. Meachum*, 957 F.2d 1048, 1058 (2d Cir. 1992); *Chichakly v. United States*, 926 F.2d 624, 631 n.12 (7th Cir. 1991); *Doganieri v. United States*, 914 F.2d 165, 168 (9th Cir. 1990); *United States v. Garcia*, 909 F.2d 1346, 1348 (9th Cir. 1990). *But see* *United States v. Messer*, 647 F. Supp. 704, 708 (D. Mont. 1986). Some decisions dispense with claims that the attorney erroneously predicted what sentence the defendant would receive under the first prong of the *Strickland* standard—that is, they hold that bad predictions are not unreasonable. *See, e.g.*, *United States v. Martinez*, 169 F.3d 1049, 1053 (7th Cir. 1999) ("In this circuit, an attorney's 'mere inaccurate prediction of a sentence' does not demonstrate the deficiency component of an ineffective assistance of counsel claim.") (citing prior cases).

because it may prove wrong. Lawyers in many areas of practice are employed precisely because of their ability to predict the legal consequences of a client's proposed conduct. No one can demand that every prediction be borne out, but it is fair for a defendant to assume that a lawyer's prediction is reasonable.

As these examples suggest, judges are pushed in opposite directions. Judges recognize that people accused of a crime should be competently represented. They give expression to this principle, at least as an ideal, in case law that generally recognizes a constitutional right to effective assistance of counsel. Outside the context of specific cases, some judges also work personally to promote the improvement of institutional processes for providing competent lawyers or to assist in programs to improve professional practice. At the same time, however, courts are motivated by other institutional interests to limit the cases in which they must overturn guilty pleas because of the defense lawyer's incompetence.³⁰ They have done so in a manner that frustrates efforts to achieve the ideal of competent representation, by developing case law that essentially denies the importance of competent representation for defendants individually and for the achievement of justice generally.³¹ While legislatures ration justice by failing adequately to fund the provision of lawyers for the poor in criminal cases, courts provide handy rationalizations for doing so.

30. The remedy is generally reserved for only the most egregious cases of erroneous representation in connection with the decision whether to plead guilty. *See, e.g., United States v. Gordon*, 156 F.3d 376, 380 (2d Cir. 1998) (lawyer grossly underestimated potential maximum sentence if defendant was convicted at trial); *Boria v. Keane*, 99 F.3d 492, 497-98 (2d Cir. 1996) (lawyer never discussed advisability of guilty plea).

31. Perhaps it is possible to limit ineffective assistance claims without denying the prevalence and significance of bad lawyering. Courts might say, frankly, that bad lawyering may often matter, but often it will not, and it is difficult to ascertain after the fact whether it did or did not. Because of the burden of overturning guilty pleas whenever a lawyer's advice was substandard, relief will be limited to cases where defense counsel's assistance was not merely outside the range of ordinary competence, but exceptionally so, such that there was a reasonable probability that the bad advice would have affected the decision making of a reasonable person in the defendant's position. *See Bruce A. Green, Note, A Functional Analysis of the Effective Assistance of Counsel*, 80 Colum. L. Rev. 1053 (1980). This standard would allow courts to develop a jurisprudence in which incompetent representation and its potential impact were acknowledged, even if the availability of a judicial remedy remained circumscribed.

Notes & Observations