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GOVERNMENT INTRUSION INTO THE ATTORNEY-CLIENT RELATIONSHIP: AN INTEREST ANALYSIS OF RIGHTS AND REMEDIES

PHILIP HALPERN*

INTRODUCTION

Government contact with members of the defense in criminal proceedings provokes examination in this Article of the relationship between adversary prejudice and the constitutional right to counsel in criminal cases. The central thesis presented is that the constitutional guaranty of counsel protects two distinct kinds of interests held by an accused. Commonly recognized is a defendant's interest in avoiding conviction and minimizing criminal sanctions. Less acknowledged is the interest in being treated with dignity and respect. If the right to counsel is viewed solely from the first perspective, the right only bars conduct that has an actual or potential adverse effect on the accused's chances of winning a favorable disposition of the charges against him. This perspective predominates in Supreme Court opinions.1 However, the Court on occasion implicitly has recognized in right-to-counsel cases that an accused is entitled to be treated with dignity and respect, regardless of whether such treatment improves his chances for an acquittal.2 This recognition, though, has not been applied consistently, and consequently the noninstrumental interest of an accused has not been afforded adequate protection.

This Article argues that the scope of the constitutional right to counsel and the remedies available for its protection should be responsive to these distinct interests since constitutional rights and remedies in general should be based upon the interests they protect.3 It further sets forth an understanding of the right to counsel


1. See infra text accompanying notes 38-43.
2. See infra text accompanying notes 48-85.
3. In Carey v. Piphus, 435 U.S. 247, 254 (1978), the Court stated: “Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect.”

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and responsive remedies that more appropriately acknowledge a defendant's claim to be treated with dignity and respect in the criminal justice process. Moreover, while the Court has clearly acknowledged a defendant's interest in being free from certain adversary prejudice, this interest sometimes has been afforded inadequate protection. Alternative methods available to courts to protect the instrumental interest are discussed and compared below.

In United States v. Morrison, the Supreme Court avoided resolving the question of whether adversary prejudice to the accused is an essential element of proof to establish infringement of the constitutional right to counsel. The Third Circuit Court of Appeals had dismissed an indictment against Morrison because of the deliberate and open efforts of federal law enforcement agents to undermine and sever the relationship between the defendant and her attorney. The government conceded in argument that the agents had acted improperly, but relied upon the absence of adversary prejudice to maintain there was no constitutional violation. Assuming without expressly deciding that the agents' conduct violated the sixth amendment, the Court held that dismissal was improper since the conduct neither adversely affected defense counsel's performance nor otherwise disadvantaged the defense.

Morrison involved unusual facts in that the accused was aware of the agents' connection with the government, she did not allege a detrimental effect on the defense from the intrusion, and the government conceded the impropriety of the intrusion. More typically, the government invokes a legitimate purpose for a surreptitious intrusion, and the defense claims adversary prejudice. For example, the Supreme Court has determined that no constitutional violation occurred where an undercover police officer participated in confidential meetings between an accused and his lawyer. It based its

In United States v. Morrison, 449 U.S. 361, 364 (1981), the Court advanced a similar purposive view of remedies, maintaining that relief "should be tailored to the injury suffered from constitutional violation."

8. Id. at 363-64.
decision on the grounds that a legitimate law enforcement purpose justified the intrusion and that the accused had not demonstrated prejudice. In view of the noninstrumental purposes behind the counsel guaranty, this Article contends that a defendant in a case similar to *Morrison* need not prove actual or possible effect on the outcome of the criminal proceeding in order to establish an infringement of the right to counsel. The absence of adversary prejudice should, however, influence the selection of a remedy; instead of dismissing the indictment, an action for damages is the appropriate remedy for such illicit conduct.

Recognizing important law enforcement objectives, the Court has refused to ban all surreptitious intrusion by government agents into confidential attorney-client relationships in criminal cases. Accepting the Court's recognition of law enforcement necessity, current decisional law nonetheless affords an accused insufficient protection against adversary prejudice from surreptitious intrusion. This Article proposes measures that afford increased protection to defendants while allowing pursuit of important law enforcement objectives.

Section I analyzes Supreme Court rulings on contact by law enforcement officers or their agents with members of the defense. Section II elaborates the two kinds of interests protected by the right to counsel and discusses decisions that support a noninstrumental view of that right. Section III sets forth a functional analysis of rights and remedies. Finally, Sections IV and V provide proposals for controlling government contact with the defense camp.

### I. LAW ENFORCEMENT CONTACT WITH THE DEFENSE

#### A. *United States v. Morrison*

In *United States v. Morrison*, two federal law enforcement agents approached Hazel Morrison, without her attorney's permission, to obtain her cooperation in a related investigation. They knew she was under indictment and represented by counsel. Disparaging her retained counsel, they advised her to replace him with

10. Id. at 558.
11. See infra text accompanying notes 87-129.
13. See infra text accompanying notes 125-43.
a public defender. They also warned her that she would suffer a long jail term unless she became an informant and accepted their promise to seek a lenient sentence. She declined, notified her attorney of what had transpired, and maintained his representation with undisturbed confidence. Morrison pled guilty after the district court denied a motion to dismiss the indictment. On appeal, the Third Circuit Court of Appeals reversed and dismissed the indictment.

The government conceded before the Supreme Court that the agents had acted improperly, but argued for reversal of the judgment dismissing the indictment on two alternative grounds: (1) There was no infringement of the right to counsel because the agents’ conduct, although blameworthy, had not adversely affected the accused’s defense; and (2) regardless of whether a sixth amendment violation had occurred, dismissal was not appropriate because there was no prejudice to the accused in the adversary process. Passing over the determination of whether the agents’ conduct violated the sixth amendment and assuming that it did, the Court ruled that since there was no showing of prejudice, dismissing the indictment was unwarranted. Justice White, writing for an undivided Court, stated that “remedies should be tailored to the injury suffered from the constitutional violation. . . .” He observed that Morrison

demonstrated no prejudice of any kind, either transitory or permanent, to the ability of her counsel to provide adequate representation in these criminal proceedings. There is no effect of a constitutional dimension which needs to be purged to make certain that respondent has been effectively represented and not unfairly convicted.

In Justice White’s view, the inapplicability of the remedies most commonly used in criminal proceedings, suppression of evidence and reversal, did not warrant utilization of the more drastic remedy of dismissal.

15. Id. at 363.
17. The government also acknowledged that the agents were subject to disciplinary action. Brief for the United States at 9, 22-23 n.7, United States v. Morrison, 449 U.S. 361 (1981).
19. Id.
20. Id. at 366.
21. Justice White explained:
B. Weatherford v. Bursey

In *Weatherford v. Bursey*, a Title 42 section 1983 action for damages, plaintiff Bursey had been convicted of state criminal charges based on the testimony of police undercover agent, Weatherford. Weatherford and Bursey were arrested together, charged as co-defendants, and retained separate counsel. Weatherford attended two meetings between Bursey and his lawyer at the lawyer’s request, and the authorities contended that Weatherford attended in order to maintain his cover. The district court ruled in favor of the prosecution, finding that Weatherford had neither initiated the meetings nor sought information from the defense, and had not communicated privileged information acquired at the meetings to his superiors or prosecuting attorneys. The Fourth Circuit Court of Appeals reversed, imposing a blanket prohibition on attendance by police agents at defense meetings.

The Supreme Court rejected this rule barring all attendance by undercover agents at confidential defense meetings on the ground that failure to attend such meetings could compromise these agents and undermine their effectiveness. The Court also acknowledged the importance of private attorney-client communi-
cations, but found no violation of the right to counsel in this case: "There being no tainted evidence . . . , no communication of defense strategy to the prosecution, and no purposeful intrusion by Weatherford, there was no violation of the Sixth Amendment insofar as it is applicable to the States by virtue of the Fourteenth Amendment."  

The Weatherford decision has not been interpreted uniformly by lower courts. They have categorically found no violation of the right to counsel in good faith attendance by undercover agents at defense meetings unless there was an appreciable possibility of adversary prejudice to the defense. They disagree, however, over whether Weatherford by implication condemns, absent prejudice, an intrusion that is not in good faith. The subsequent decision in

28. *Id.* at 558. The holding distilled three factors: The absence of (a) "tainted evidence," (b) "communication of defense strategy to the prosecution," and (c) "purposeful intrusion." *Id.* at 558. The first and second factors focus on the lack of benefit to the prosecution or prejudice to the defense, while the third stresses that the intrusion was not wrongfully motivated. The opinion is unclear as to whether the presence of all three factors is necessary to avoid a sixth amendment violation. The Court mentioned the absence of wrongful motive elsewhere in its opinion, stating: "[T]his is not a situation where the State's purpose was to learn what it could about the defendant's defense plans and the informant was instructed to intrude on the lawyer-client relationship or where the informant has assumed for himself the task and acted accordingly." *Id.* at 557. However, it seemed primarily to emphasize the absence of adversary prejudice to the defense:

Had Weatherford testified at Bursey's trial as to the conversation between Bursey and [his attorney]; had any of the State's evidence orginated in these conversations; had those overheard conversations been used in any other way to the substantial detriment of Bursey; or an undercover agent, the details of the [attorney-client] conversations about trial preparations, Bursey would have a much stronger case. . . .

. . . As long as the information possessed by Weatherford remained uncommunicated, he posed no substantial threat to Bursey's Sixth Amendment rights. *Id.* at 554, 556.

29. *See, e.g.,* Klein v. Smith, 559 F.2d 189, 197 (2d Cir. 1977), were the court stated: The essence of the Court's holding [in Weatherford] appears to be that, at least, where the intrusion by an "agent" of the prosecution is unintentional or justifiable, there must be some communication of valuable information derived from the intrusion to the prosecutor or his staff in order that there can appear some realistic possibility of prejudice to the defendant.

30. The Third Circuit has concluded that a wrongfully motivated intrusion into the attorney-client relationship violates the sixth amendment regardless of whether the defense is thereby prejudiced. Morrison v. United States, 602 F.2d 529 (3d Cir. 1979), rev'd on other grounds, 449 U.S. 361 (1981); United States v. Levy, 577 F.2d 200, 210 (3d Cir. 1978). On the other hand, the majority of courts that have confronted this issue have determined that an appreciable possibility of adversary prejudice is a necessary element of a sixth amendment claim in these circumstances. *See* New Jersey v. Sugar, 84 N.J. 1, 20 n.12, 417 A.2d
Morrison has not resolved the disagreement.31

II. TWO PERSPECTIVES ON THE RIGHT TO COUNSEL

The sixth amendment guarantees an accused "the right . . . to have the Assistance of Counsel for his defence."32 This Article employs a purposive analysis of this guaranty in accordance with the Supreme Court's view that constitutional rights exist "to protect persons from injuries to particular interests, and [that] their contours are shaped by the interest they protect."33 Sixth amendment interests may be seen as instrumental and intrinsic. Instrumental interests concern the outcome of a criminal proceedings; an adverse effect upon the accused's ability to win a favorable disposition of his case constitutes the constitutional injury to this interest. In contrast, injury to intrinsic interests may occur without any diminution in the likelihood of an advantageous result.

The Supreme Court34 and commentators35 have distinguished

474, 483 n.12 (1980); United States v. Irwin, 612 F.2d 1182, 1186-87 (9th Cir. 1980); United States v. Glover, 596 F.2d 857, 863-64 (9th Cir. 1979); United States v. Kilrain, 566 F.2d 979, 982 n.4 (5th Cir. 1978).

31. Prior to its decision in Weatherford, the Court once before, in Hoffa v. United States, 385 U.S. 293 (1966), had addressed without resolving whether adversary prejudice is a necessary element of a sixth amendment claim based on intrusion into the defense camp. The government infiltrated an informant, named Partin, into James Hoffa's entourage during his prosecution for violations of the Taft-Hartley Act. Partin overheard statements by Hoffa regarding efforts to bribe members of the jury. That trial ended in a hung jury. Hoffa was subsequently tried and convicted of bribery on the basis of Partin's testimony concerning Hoffa's statements. The defense contended that Partin's testimony was inadmissible because it was the tainted "fruit" of an intrusion into defense trial preparations in violation of the right to counsel. Id. at 304-09.

The Court assumed, without deciding, that Partin's intrusion into the defense camp violated the right to counsel such that a conviction following the first trial would have been "presumptively . . . defective." Id. at 307. However, it did not follow from this premise that Partin's testimony was, therefore, inadmissible. Since the incriminating statements were not made in the presence of counsel and did not involve a legitimate defense, the Court rejected the argument that Partin's testimony was the fruit of the assumed sixth amendment violation. In Hoffa, like Morrison, the Court concluded that the remedy sought was inappropriate.

32. U.S. CONST. amend. VI.


34. Some Supreme Court decisions take a decidedly instrumental approach to procedural due process. See Codd v. Velger, 429 U.S. 624, 627-28 (1977) (per curiam) (hearing unnecessary when plaintiff fails to challenge substantial truth of material facts); Mathews v. Eldridge, 424 U.S. 319 (1976) (procedural due process important only as means of ensuring an accurate decision). Other decisions acknowledge noninstrumental purposes of a fair hearing. See, e.g., Carey, 435 U.S. at 262 ("to convey to the individual a feeling . . . that the govern-
between the instrumental and intrinsic interests of litigants when defining the content of due process as regards civil and administrative adjudications. As an instrumental matter, procedural due process guarantees are "valued . . . for their anticipated consequences as means of ensuring that the society's agreed upon rules of conduct, and its rules for distributing various benefits, are in fact accurately and consistently followed."36 Professor Michelman, in describing what he termed the "dignity" and "participation" values underlying the opportunity to litigate civil disputes, has articulated the intrinsic values implicated by litigation:

Dignity values reflect concern for the humiliation or loss of self-respect which a person might suffer if denied an opportunity to litigate. Participation values reflect an appreciation of litigation as one of the modes in which persons exert influence, or have their wills "counted," in societal decisions they care about.37

An individual's dignity and participation interests are served, whatever the outcome of the decision-making process, if he is left with the feeling that he has been dealt with respectfully and fairly.

A. The Instrumental Perspective

According to prevailing legal folkways, defense counsel's singular duty is to employ all legitimate means at his disposal to avoid conviction of his client and, where that is not possible, to minimize the sanctions imposed.38 This depiction of counsel's role mirrors


38. The ABA Code of Professional Responsibility postulates that the "duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of law. . . ." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1979). For the duty of defense counsel to seek mitigation of punishment, see AMERICAN BAR ASS'N PROJ. ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE DEFENSE FUNCTION §§ 6.1, 8.1; at 245, 285 (1970).
the instrumental understanding of the counsel right; the govern-
ment accordingly contended in Morrison that conduct violative of
the counsel guaranty must entail a likelihood of actual adversary
prejudice to the accused.\textsuperscript{39} Supreme Court elaboration of the coun-
sel guaranty is based primarily upon this instrumental perspective.

The Court's initial, important right-to-counsel decision dealt
with the states' obligation under the fourteenth amendment due
process clause to appoint counsel for indigent defendants in order
to assure a reliable adjudication of guilt. Powell v. Alabama\textsuperscript{40} re-
versed the convictions of several uneducated black youths for lack
of an effective appointment of counsel. The Court reasoned that
without a lawyer's aid, an innocent person "faces the danger of
conviction because he does not know how to establish his inno-
cence."\textsuperscript{41} Professional representation was seen as necessary to as-
sure accurate verdicts. Appointed counsel was also viewed as ad-
vancing the principle of equality in Gideon v. Wainwright.\textsuperscript{42} There,
the Court declared that "in our adversary system of criminal jus-
tice, any person haled into court, who is too poor to hire a lawyer,
cannot be assured a fair trial unless counsel is provided for him."\textsuperscript{43} Even if it is known that an unrepresented indigent is in fact guilty,
convicting him when he would have been acquitted had he the
means to retain counsel offends our sense of fairness. Both reliabil-
ity and fairness are instrumental in that they look to effects upon
the outcome of criminal proceedings.

B. The Intrinsic Perspective

Although an adversary's ultimate goal is to obtain favorable
judicial determinations, outcomes are not everything. I contend
that dignity and participation values, as well as instrumental con-
siderations, pervade Supreme Court decisions defining the right to

\begin{itemize}
  \item \textsuperscript{39} 449 U.S. at 365.
  \item \textsuperscript{40} 287 U.S. 45 (1932). Powell was a fourteenth amendment due process decision. The
Court, per Justice Sutherland, maintained that the due process right to be heard in a crimi-
nal case entails the right to be heard through counsel, since "[e]ven the intelligent and
educated layman . . . lacks both the skill and knowledge adequately to prepare his defense.
. . ." Id. at 69. This forceful endorsement of the necessity of counsel was later qualified in
Betts v. Brady, 316 U.S. 455 (1942), which held that appointment of counsel in criminal
cases is not an absolute requirement of due process.
  \item \textsuperscript{41} Powell, 287 U.S. at 69.
  \item \textsuperscript{42} 372 U.S. 335 (1963).
  \item \textsuperscript{43} Id. at 344.
\end{itemize}
counsel—an albeit with less explicitness and perhaps less judicial commitment. Dignity and participation interests surfaced in pre-
Gideon decisions forbidding interference with retention of counsel and enjoyment of retained counsel’s services by the accused. They have been reiterated in more recent decisions striking down certain restrictions on retained or appointed counsel’s representational activities during trial. Further, the Court’s approval of self-representation in criminal cases reflects recognition of a defendant’s legitimate interest in direct participation in his trial as a means of expressing individual dignity and autonomy. Finally, respect for intrinsic integrity of the accused provides a plausible foundation for the controversial and little-understood rule announced in Massiah v. United States.

1. Interference with defense counsel. A consistent instrumental theme underlies the analysis in the appointed counsel cases from Powell v. Alabama to Gideon v. Wainwright: matching a layman against a professional prosecutor in a contest operated under complex substantive, procedural, and evidentiary rules creates an unacceptable risk that innocent persons will be convicted. This mismatch amplifies the unconscionable disparity between the ability of rich and poor defendants to navigate the criminal justice process successfully. In contrast, this theme is muted in contemporaneously decided cases involving interference with retained counsel. In such cases, one can perceive the prelude to an intrinsic

44. Professor Griffiths has proposed an alternative “family model” of criminal procedure in which respect for dignity and individuality of criminal defendants would be primary, rather than an “extrinsic value for which sacrifices of ‘efficiency’ are made” or “something stimulated artificially for the promotion of some other end. . . .” Griffiths, Ideology in Criminal Procedure or a Third “Model” of the Criminal Process, 79 YALE L.J. 359, 384 (1970). I believe that recognition of the personhood of the accused need not be linked to revolutionary conceptions of the criminal justice process, believing instead that current decisional law provides a basis for advancement of this interest.

45. See infra notes 54-64 and accompanying text.

46. See infra notes 70-85 and accompanying text.

47. See, e.g., Johnson v. Zerbst, 304 U.S. 458 (1938) (mandating counsel in all federal felony prosecutions), in which the Court, per Justice Black, observed: “[The sixth amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is represented by experienced and learned counsel.” Id. at 462-63. Justice Brennan has depicted a lawyer’s instrumental function more generally, stating that implementation of the counsel guaranty is necessary “to give substance to other constitutional and procedural protections afforded criminal defendants.” Scott v. Illinois, 440 U.S. 367, 377 (1979) (Brennan, J., dissenting).
theme, more fully developed in later decisions.

Glasser v. United States,48 decided in 1942, established that a person who hires a lawyer to represent him in a criminal case possesses an absolute sixth amendment right to that lawyer’s exclusive services. Thus, by requiring a lawyer retained by one of several co-defendants to represent a second defendant, the district court in Glasser was found to have deprived the fee-paying client of the right to counsel. Whether joint representation impaired the lawyer’s effectiveness was determined to be immaterial.49 In House v. Mayo,50 the Supreme Court held that a denial of due process occurred when a state defendant was required to plead to a criminal charge without the advice of his retained counsel whose presence had been requested. Subsequently, Chandler v. Fretag51 ruled that requiring a defendant to answer a state habitual offender charge without affording him an opportunity to retain counsel violated due process. House and Chandler were decided when the “fundamental fairness” standard of Betts v. Brady52 governed the right to appointed counsel in a state prosecution. Significantly, the Court did not inquire in House or Chandler as to whether failure to appoint counsel in a similar circumstance would have violated fundamental fairness under Betts.53

48. 315 U.S. 60 (1942).

49. The Supreme Court in Glasser employed three separate lines of analysis to hold that the trial court’s insistence upon joint representation denied the fee-paying client assistance of counsel. First, there was evidence in the record showing that an actual conflict arose at trial between the defendants, which impaired counsel’s performance on behalf of Glasser. Id. at 72-75. Second, regardless of whether an actual conflict arose, the trial judge erred in seeking joint representation after counsel alerted him to the possibility of a conflict. Id. at 76. Third, and most pertinent here, a person who retains counsel has an absolute right to that lawyer’s exclusive services, without regard to actual or possible prejudice. The Court noted: “Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire... should be respected. Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel’s effectiveness.” Id. at 75.

50. 324 U.S. 42 (1945).


52. 316 U.S. 455 (1942). For discussion of Betts’ “fundamental fairness” standard, see infra notes 153-61 and accompanying text.

53. In House, the Court stated: “We need not consider whether the state would have been required to appoint counsel for petitioner on the facts alleged in the petition. It is enough that petitioner had his own attorney and was not afforded a reasonable opportunity to consult with him.” 324 U.S. at 46 (citations omitted). In Chandler, the Court rejected the state’s argument that provision of counsel was not required under Betts, since “[r]egardless of whether petitioner would have been entitled to the appointment of counsel, his right to
More recently, the Court has reversed three convictions on right-to-counsel grounds because of restrictions imposed upon defense counsel's activities during trial. The convictions were overturned without a finding of prejudice to the particular accused and without relying on the need for a broad rule to ensure reliability and fairness generally. In the first of these cases, *Brooks v. Tennessee*, the Court struck down a requirement that a criminal defendant wishing to testify be the first defense witness, because that restriction burdened counsel with having to advise his client whether to testify too soon, without important information that comes from presentation of the defense case. Justice Rehnquist, in dissent, took issue with the majority's reliance on the right to counsel instead of the more general and difficult ground of due process procedural fairness.

Subsequent to *Brooks*, the Court struck down a state statute authorizing trial judges to dispense with final summations in non-jury trials as a denial of the assistance of counsel in *Herring v. New York*. Justice Rehnquist, dissenting, once again argued that the majority had transformed a due process issue into a right-to-counsel case to avoid "the difficulties of being unable to character-

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55. The defendant chose not to testify after the trial judge, pursuant to a Tennessee statute, denied a motion to delay his testimony until after other defense witnesses had testified. The Court reasoned that "requiring the accused and his lawyer to make that choice without an opportunity to evaluate the actual worth of their evidence... deprived [the accused] of the 'guiding hand of counsel' in the timing of this critical element of his defense." 406 U.S. at 612-13. The Court held alternatively that requiring the defendant to testify first, or not at all, infringed upon his privilege against self-incrimination by imposing a penalty on his initial silence. Id. at 610-11.

56. Id. at 618 (Rehnquist, J., dissenting). Justice Rehnquist elaborated:

I could understand, though I would not agree with, a holding that under these circumstances the Fourteenth Amendment conferred a right upon the defendant, counseled or not, to decide at what point during the presentation of his case to take the stand... The crucial fact here is not that counsel wishes to have a witness take the stand at a particular time, but that the defendant—whether advised by counsel or otherwise—wishes to determine at what point during the presentation of his case he desires to take the stand.

Id. (emphasis original).

57. 422 U.S. 853 (1975).
ize appellant's trial as fundamentally . . . unfair."58

Finally, in *Geders v. United States*69 the trial court had prohibited a defendant from consulting with his attorney during an overnight recess of the trial as a safeguard against improper coaching of the defendant prior to his cross-examination scheduled to commence the following morning. Despite the absence of allegation or specification of adversary prejudice from sequestration,60 the Court unanimously held that the denial of attorney consultation deprived the accused of the assistance of counsel. While noting that "[s]uch recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed,"61 the Court also observed:

At the very least, the overnight recess during trial gives the defendant a chance to discuss with his counsel the significance of the day's events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance.62

The Court thus recognized that a defendant, as an autonomous human being participating in a complex process of vital concern to him, has a constitutionally protected interest in obtaining a timely explanation of trial developments from his lawyer and in discussing them with him. Whether such exchanges increase the chances for an acquittal is irrelevant to the accused's interest in informed participation.

In sum, the assistance of counsel foundation of these rulings reflects dignity and participation values. To be sure, the restrictions might have affected the outcome in the instant and other cases.63 The Court, however, did not invoke an instrumental rationale. Further, not even the possibility of such a rationale can be attributed to the Court's recent recognition of the right of self-representation in *Faretta v. California*.64

58. *Id.* at 871 (Rehnquist, J., dissenting).
60. *Id.* at 86.
61. *Id.* at 88.
62. *Id.*
63. *See, e.g.,* Herring v. New York, 422 U.S. 853, 864 (1975) (suggesting defense arguments that could have been made had summation been allowed and concluding that "[t]here is no way to know whether [they] . . . might have affected the ultimate judgment in this case").
64. 422 U.S. 806 (1975).
2. The right of self-representation. The Supreme Court in *Faretta v. California* held that the sixth amendment affords an accused the right to conduct personally his defense without the assistance of a lawyer; hence, a state may not force counsel upon a defendant who wishes to proceed *pro se*. The Court did not deem this to be an instance of waiver, since it rejected the notion that the ability to waive counsel implies the right to proceed *pro se*. Instead, it concluded that the sixth amendment affirmatively guarantees a right of self-representation.65

The defendant’s voluntary and intelligent decision to represent himself, according to the six-member majority, embodied a constitutionally protected expression of self. The majority opinion did not seriously dispute that persons appearing *pro se* are less likely to win acquittals than those represented by counsel,66 nor did the majority refute the dissenters’ argument that an unjust conviction wrongs not only the defendant, but also diminishes public confidence in the accuracy of guilt determinations.67 Rather, the members of the majority and dissent disagreed upon whether a defendant legitimately may pursue objectives in criminal proceedings other than avoidance of conviction and punishment. The dissenters equated self-representation with employing the criminal justice process as an “instrument of self-destruction,”68 while the majority concluded that an individual’s interest in self-expression and identity outweighed society’s instrumental interest in an accurate verdict. The majority wrote: “although he may conduct his own defense ultimately to his own [and society’s] detriment, his choice must be honored out of ‘that respect for the individual which is the

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65. “Our concern is with an independent right of self-representation. We do not suggest that this right arises mechanically from a defendant’s power to waive the right to the assistance of counsel.” *Id.* at 819-20 n.15 (emphasis original).

66. The Court observed:

It is undeniable that in most criminal prosecutions defendants could better defend with counsel’s guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer’s training and experience can be realized, if at all, only imperfectly. . . . [I]t is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense.

*Id.* at 834.

67. *Id.* at 849 (Blackmun, J., dissenting).

68. *Id.* at 840 (Burger, C.J., dissenting).
lifeblood of the law.' 69 Faretta accordingly acknowledges the principle that an accused is entitled to pursue intrinsic ends in the litigation process, even at the expense of his and society's instrumental objectives.

3. Intrinsic values and Massiah v. United States. In Massiah v. United States, 70 a co-defendant cooperating with law enforcement agents elicited incriminating postindictment statements from the accused. Relying on the right to counsel, the Court prohibited use of the statements at trial because they had been deliberately procured from the accused after the initiation of criminal proceedings and in the absence of his lawyer. The opinion posited two rationales for its result: (1) that failure to provide counsel during interrogation defeats the right to counsel at trial; 71 and (2) that commencing with arraignment, an accused is entitled to a lawyer's assistance at all "critical stages" of a criminal proceeding. 72 Neither theory provides a tenable basis for Massiah.

Despite its invocation by the Court, fifth amendment concern with compelled self-incrimination cannot be the basis for Massiah, for no inherently coercive police interrogation took place. Thus, the counsel right as conceived in Massiah differs significantly from that expounded in Escobedo v. Illinois, 73 where counsel was viewed as a "protective device to dispel the compelling atmosphere of interrogation." 74 Finally, the conduct forbidden by Massiah—"deliberately elicit[ing]" incriminating statements—has not been limited to affirmative interrogation or its functional equivalent. 75

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69. Id. at 834 (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1969) (Brennan, J., concurring)).
70. 377 U.S. 201 (1964).
71. Reference was made to the view expressed by four concurring justices in Spano v. New York, 360 U.S. 315 (1959), that a person under indictment is entitled to the assistance of counsel at a police interrogation, since "[a]nything less . . . might deny a defendant 'effective representation at the only stage when legal aid and advice would help him.'" 377 U.S. at 204 (quoting from Spano v. New York, 360 U.S. at 326 (Douglas, J., concurring)).
72. The Court reiterated the observation earlier made in Powell v. Alabama that the time between arraignment and trial is a "critical period" during which an accused is entitled to a lawyer's services. 377 U.S. at 205.
Also implausible is the Court's reasoning in *Massiah* that deliberate elicitation of inculpatory statements without counsel deprives the accused of legal assistance at a "critical stage," customarily understood as any pretrial proceeding at which a lawyer's specialized knowledge and expertise are relevant to protecting a defendant's substantive and procedural rights. There is no professional role for counsel in the circumstances of *Massiah*. Established fourth amendment doctrine teaches that individuals bear the risk that those in whom they confide may betray their confidence to the authorities and that they accept this risk when speaking to others. The plight of an individual, such as Massiah, who unknowingly speaks to a government informant, results from misplaced confidence for which the speaker bears full responsibility. Such misplaced confidence by itself does not implicate a right to a lawyer's advice.

Despite these implausible justifications for *Massiah*, the rule announced therein has prevailed for nearly twenty years and indeed was reaffirmed recently in *United States v. Henry*. As suggested in *Henry*, such abiding commitment implies that *Massiah* has an acceptable foundation. The Court stated: "By intentionally creating a situation likely to induce [the accused] to make incrimi-


77. "[T]he Fourth Amendment . . . [does not protect] a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa v. United States*, 385 U.S. 293, 302 (1966). *See also United States v. White*, 401 U.S. 745, 752 (1971) (a wrongdoer assumes the risk that those he confides in may be cooperating with the police).

78. The Court's recent application of the *Massiah* rule in *United States v. Henry*, 447 U.S. 264 (1980), further illustrates the dubiousness of a critical stage justification. Henry was placed in the Norfolk City Jail to await trial after his federal indictment for bank robbery. Nichols, an FBI paid informant under sentence for forgery, was imprisoned in the same cellblock as Henry. When Nichols informed an FBI agent of this fact, the agent told him to be alert to any statements made by Henry. Nichols testified at Henry's trial to incriminating statements concerning the bank robbery allegedly made by Henry, who was convicted. The Court reversed the conviction on *Massiah* grounds, but did not specify the professional aid that a lawyer might have rendered Henry had he been present with him in the cellblock. Conceivably, the attorney might have quelled Henry's impulse to speak about the bank robbery by warning him of the risk that one's cellmates may be government informants. Such advice, however, hardly would qualify as professional counseling or the exercise of legal expertise.

nating statements without the assistance of counsel, the Government violated [his] Sixth Amendment right to counsel." 80 Justice Powell, concurring, elaborated upon this idea, explaining the purpose of the Massiah rule to be that of "preventing police interference with the relationship between a suspect and his counsel once formal proceedings have been initiated." 81

These declarations implicate two separate interests of the accused, both of which were infringed in Massiah, although at different points in time. The first invasion occurred when the informant sought incriminating statements from the accused and consisted of injury to a personal autonomy interest. The interest protected there is that of being free from certain types of government exploitation and deception, regardless of whether inculpatory evidence is obtained and used. The other invasion occurred when an incriminating statement was obtained and then used at trial. This injury is, of course, instrumental.

Massiah and its progeny ultimately rest upon the Court's realization that persons facing criminal charges are particularly vulnerable and therefore deserving of special safeguards against exploitation by the government. The Massiah rule in part protects interests of the accused that are not dependent upon outcome. These interests are similar to the dignity and participation interests already discussed. 82 The intrinsic interests protected by Massiah, however, are antecedent and distinct from the defendant's participation in or understanding of the criminal trial.

There is admittedly certain language in the Massiah opinion

80. Id. at 274.
81. Id. at 276 (Powell, J., concurring).
82. This is not to say, however, that judicial recognition of the intrinsic interests protected by Massiah has no utilitarian benefit for the administration of criminal justice. For example, in Brewer v. Williams, 430 U.S. 387 (1977), a lawyer arranged for his client's surrender on a felony warrant in reliance upon assurance by the authorities that the client would not be questioned until he had an opportunity to consult with his lawyer. Despite being aware of this representation, a police detective extracted incriminating statements from Williams by means of the now infamous "Christian burial speech." The Court reversed the conviction on Massiah grounds in a 5-4 decision. Justice Stevens, concurring in the judgment, stressed the importance of lawyers being able to rely upon commitments from law enforcement authorities in advising their clients, since lawyers are "the essential medium through which the demands and commitments of the sovereign are communicated to the citizen. If, in the long run, we are seriously concerned about the individual's effective representation by counsel, the State cannot be permitted to dishonor its promise to this lawyer." Id. at 415 (Stevens, J., concurring).
which is seemingly inconsistent with this understanding. First, the Court does not disapprove continued investigation of an accused's suspected criminal activities under the sixth amendment. Second, the Court expresses exclusion of incriminating evidence as the holding of *Massiah*. The first point can be dealt with briefly. The Court approved the employment of some, but not all, investigatory tactics against a person under indictment. For example, his conversations may be the target of electronic eavesdropping under the fourth amendment, for a defendant's fourth amendment privacy interest is no greater than that of citizens generally. However, a noninstrumental sixth amendment interest is infringed when the government seeks to inveigle the guilty words from the accused. Therefore, this investigatory tactic is forbidden. The Court's emphasis on exclusion in *Massiah* generates a larger, often overlooked issue; the important distinction between rights and remedies. This distinction, central to this Article, is elaborated in Section III.

III. A Functional Analysis of Rights and Remedies

Constitutional litigation normally involves two types of claims: (1) that the Constitution protects certain interests which government has a duty to foster or at least not hinder; and (2) that a litigant is entitled to specified relief because of forbidden government conduct. The former are termed "rights" and the latter "remedies" in conventional legal usage.

The Supreme Court teaches that rights are functionally de-

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83. The United States Solicitor General contended before the Supreme Court that the government's conduct in *Massiah* was warranted because of suspicion that the accused was part of a larger criminal conspiracy, to which the Court replied:

We may accept and, at least for present purposes, completely approve all that this argument implies, Fourth Amendment problems to one side. We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. 377 U.S. at 206-07.

84. The Court in *United States v. Henry* distinguished between listening and active stimulation of incriminating comments; *Massiah* forbids only the latter. 447 U.S. at 271 n.9. See also id. at 276 (Powell, J., concurring) (sixth amendment is only violated when incriminating statements are induced; the use of a passive listening device is not forbidden).

85. The Court wrote: "[W]e hold . . . that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial." 377 U.S. at 207.
fined in terms of the interests they are designed to protect. Two kinds of interests protected by the right to counsel have been identified: (1) an intrinsic interest of persons charged with crime in being treated with dignity and respect; and (2) an instrumental interest in accurate and fair determination of guilt. These categories are not mutually exclusive, but they are distinct. Prosecutorial conduct may invade an intrinsic interest without prejudicing the verdict or vice versa. Further, such conduct may infringe upon both types of interests, but at different points in time, as in Massiah.

As the Supreme Court has stated, remedies "should be tailored to the injury suffered from the constitutional violation." More precisely, remedies should be responsive to the particular interest or interests infringed, since rights, such as the right to counsel, often consist of several divisible interests. The most common remedies available in criminal proceedings—exclusion of evidence and reversal of conviction—are well suited to prevent or rectify instrumental harm. These remedies, however, do not function as well in redressing injury to intrinsic interests.

A comparison of the fourth and fifth amendment rules of evidentiary exclusion is illustrative. The fifth amendment rule prescribing evidentiary use of a coerced confession effectuates a defendant's instrumental interest in not being convicted on the basis of his own compelled testimony. To be sure, human dignity values are among the underpinnings of the privilege against self-incrimination. However, the fifth amendment privilege is instrumental in that it addresses the impact of certain conduct in criminal proceedings rather than the primary conduct itself. In contrast, the fourth amendment prohibition against unreasonable searches and seizures expressly provides a limitation on primary conduct. A de-

86. *See supra* text accompanying notes 48-85.
87. *See supra* text accompanying notes 38-43.
88. *See supra* text accompanying notes 79-82.
89. *Morrison*, 449 U.S. at 364.
90. Compulsion of testimony by itself does not violate the fifth amendment privilege, since the testimony compelled must also be incriminating. Accordingly, testimony may be compelled under threat of contempt if a witness is guaranteed that the testimony will not be used against him in a future criminal prosecution. *See Kastigar v. United States*, 406 U.S. 441 (1972).
fendant is empowered to exclude evidence derived from a fourth amendment violation. It is now recognized, however, that the purpose of such exclusion is to deter violations of the fourth amendment rather than redress a constitutional injury to the defendant. Redress for such injury is the function of a civil action for damages.

The Massiah doctrine combines attributes of both the fourth and fifth amendment prohibitions. Like the fourth, it protects interests unrelated to events at trial; like the fifth, it protects against certain adverse consequences in the trial process. Accordingly, the victim of a Massiah violation should be able to sue for damages to redress injury to his nontrial related interest. No appropriate remedy is available in the criminal justice process, however, to vindicate these interests.

Although adversary prejudice is not relevant to infringement of intrinsic interests protected by the sixth amendment, that factor has preoccupied the Court. This preoccupation exists in part because the remedies most often sought in counsel cases are conviction-nullifying, such as dismissal in Morrison and reversal in Weatherford. These remedies impose high social costs: delay, retrials, and nonconvicted defendants. These costs have been accepted as justified where a violation impugns the reliability of the guilt-determining process, but where reliability is not compromised, the Court has developed rules to mitigate the costs of conviction-nullifying remedies, such as the harmless error and retroactivity doctrines. If a constitutional error could not have affected the outcome of the trial, it is deemed harmless and reversal is not

95. See supra text accompanying notes 79-82.
96. Cf. United States v. Glover, 596 F.2d 857, 864 n.10 (9th Cir. 1979).
97. A prejudice requirement has also been used to limit federal habeas corpus review of certain claims barred from direct review. See Wainwright v. Sykes, 433 U.S. 72 (1977); Davis v. United States, 411 U.S. 233 (1973). The “cause and prejudice” standard announced in these cases is a jurisdictional prerequisite for federal habeas corpus relief in the circumstance of a procedural default rather than an element of the constitutional claim. See generally Hill, The Forfeiture Of Constitutional Rights In Criminal Cases, 78 COLUM. L. REV. 1050 (1978).
required. If a newly announced constitutional rule does not affect the reliability of the criminal justice process, it will not be applied retroactively to overturn final convictions.

These remedial limitations, while focusing on adversary prejudice and reliability, do not alter the substantive content of the underlying constitutional rights. The Court on occasion, though, has incorporated adversary prejudice as an essential element of proof. Hence, although the right to a speedy trial protects nonoutcome related interests of the accused, relief for undue delay typically requires a showing of prejudice. The Court undoubtedly imposed this requirement because it assumed that the only remedy was dismissal of the indictment and subsequent immunity from prosecution. As Professor Amsterdam has argued, this assumption is questionable, and the preferable response would be to formulate alternative, less costly remedies.

Accordingly, it is important, especially in criminal cases, to differentiate between a demonstration of prejudice required to establish infringement of a right from that required to establish entitlement to a particular remedy. Nonobservance of this distinction restricts the use of conviction-nullifying remedies. It also distorts, however, the appropriate contours of constitutional rights and prevents recognition of constitutionally relevant interests of an accused where they are not instrumentally related to guilt. Careful recognition of the distinction between rights and remedies, together with the formulation of relief tailored to the particular interest at issue, is plainly a better method for limiting conviction-nullifying remedies.

Adversary prejudice is the principal occasion for conviction-nullifying remedies. As the Court has recognized, however, an exceptional need for deterrence of unconstitutional conduct may

100. The speedy trial clause of the sixth amendment protects the accused against "unduly prolonged pretrial detention," "overlong subjection to the vexations and vicissitudes of a pending criminal accusation," and impairment of the defense at trial from such things as lost evidence and faded memory. Amsterdam, Speedy Criminal Trial: Rights and Remedies, 27 Stan. L. Rev. 525, 532-33 (1975). See also, Godbold, Speedy Trial—Major Surgery for a National Ill, 24 Ala. L. Rev. 265, 268-72 (1972).
103. Amsterdam, supra note 100, at 532-39.
warrant such relief, notwithstanding the absence of prejudice. The Morrison Court observed that dismissal might have been appropriate if the law enforcement conduct there had been part of "a pattern of recurring violations by investigative officers . . . ."104 Such relief, of course, would not be for the purpose of redressing injury to the accused.

Whether a defendant may invoke conviction-nullifying relief to deter unconstitutional conduct that did not affect the outcome of his case depends upon such factors as the importance of the interest or principle at stake, the adequacy of alternative remedies, and the social cost of implementing the particular relief at issue. Weighing these factors, the Court has refused to treat racial discrimination in selecting a grand jury as harmless error, even where the defendant was convicted by a properly constituted petit jury after an error free trial.105

IV. OPEN INTRUSION INTO THE ATTORNEY-CLIENT RELATIONSHIP AND INTRINSIC INTERESTS OF THE ACCUSED

A. The Injury to Intrinsic Interests in Morrison

Conditioning the right to counsel on adversary prejudice ignores an accused's interest in expressing his dignity and autonomy through participation in the criminal justice process and also his interest in being accorded respect prior to trial. The agents' conduct in Morrison is comparable to an unsuccessful attempt to elicit incriminating statements in violation of Massiah. The failure of both ventures, and hence no finding of prejudice, does not alter the initial injury to dignity and respect. Assuming no prejudice in Morrison, the prosecutorial conduct nonetheless probably caused embarrassment and insecurity, and consequently injury to a constitutionally protected dignity interest.

The Court did not deny that Hazel Morrison experienced distress, nor did it seek to justify such injury as a necessary incident of a criminal prosecution. Rather, it focused on the irrelevance of

104. 449 U.S. at 66 n.2.
105. Rose v. Mitchell, 443 U.S. 545 (1979). The Court noted the country's deep and long-standing commitment to combating racial discrimination in the administration of criminal justice, the demonstrated ineffectiveness of civil suits and criminal prosecutions in attaining this goal, and the fact that the remedy of reversal would not prevent subsequent reindictment and retrial or render that task more difficult by denying the prosecution use of relevant evidence. Id. at 554-58.
dismissal of the prosecution to her injury. Concern with the costs of that remedy, though, does not warrant disregard of constitutional injury. Instead, alternative remedies should be employed to vindicate the intrinsic interests of the accused. 108

When government officials make a deliberate and bad faith attempt to interfere with the relationship between an accused and his attorney, damages are an appropriate remedy. Awarding damages would accomplish not only the primary objective of personal redress; it also would punish the persons responsible, deter similar misconduct in the future, and affirm the sanctity of the attorney-client relationship.

B. The Measurement of Damages

The yardstick for measuring damages 107 in an instance of nonmonetary injury is critical to the efficacy of the suggested remedy. 108 The threshold question is the applicability of Carey v. Piphus, 109 the 1978 Supreme Court decision barring presumed damages for a violation of procedural due process and setting forth

106. In Morrison, the Court was careful not to preclude alternative remedies to dismissal, stating: "[W]e do not condone the egregious behavior of the Government agents. Nor do we suggest that in cases such as this, a Sixth Amendment violation may not be remedied in other proceedings." 449 U.S. at 367.

107. The common law of torts recognizes three types of damages: nominal, punitive and compensatory. Nominal damages are a trivial sum of money awarded to establish a legally protected interest on the part of a plaintiff where a defendant's violation of that interest did not cause actual injury. Their purpose is declaratory and vindicatory rather than compensatory. Punitive damages are levied against a defendant for particularly outrageous misconduct in order to punish and deter him and others from similar activity. Compensatory damages are awarded to a plaintiff in order to make up for some actual injury suffered as a consequence of a defendant's wrongful act. See D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES, §§ 3.1, 3.8, 3.9 (1973).

Compensatory damages may be special or general. Special damages are awarded to compensate for items of pecuniary loss that are more or less peculiar to a particular plaintiff. General damages, which may be either pecuniary or nonpecuniary, are awarded to compensate for harm normally expected to flow from particular tortious conduct. In either case, a plaintiff ordinarily has the burden of proving the amount of compensable loss recoverable as special or general damages. Id. at § 3.2. However, the common law made an exception where the cause of action is based upon harm to certain "dignitary" interests, such as voting rights, reputation and privacy, allowing damages to be presumed in such cases without proof of actual harm. Id. at § 7.3.


the framework for damage awards for complaints of constitutional injury in Title 28, section 1983110 and Bivens-type actions.111 The plaintiffs in Carey complained of suspension from high school in violation of procedural due process; the issue was whether they could recover substantial nonpunitive damages absent proof of individualized injury. The Court insisted on proof of actual injury for compensatory damages;112 without such proof, only nominal damages are permissible,113 except perhaps where malicious conduct renders punitive damages appropriate.114

In stating that "'[t]he cardinal principle of damages in Anglo-American law is that of compensation. . . .',"115 the Court rejected the idea of nonpunitive damages as vindication of the constitutional right independent of consequential harm to an individual or deterrence. Vindication, the Court held, is satisfied by nominal damages;116 deterrence, beyond the secondary by-product of compensatory awards, is the function of punitive damages.117

The Court further observed that the common law of torts provides a "starting point" for reckoning damages, while keeping in mind that this body of doctrine may not provide a complete solution.118 If the constitutional violation parallels closely a common law tort, the common law rule may be borrowed; if a common law analogue is lacking, the process is one of adaptation.119 The Court's analysis of the procedural due process claim illustrates the methodology. The plaintiffs invoked the common law doctrine of presumed damages by analogizing violations of procedural due process with defamation per se.120 According to the Court, damages may be presumed in the case of dignitary torts, such as defamation per se,

110. See supra note 23.
112. Carey, 435 U.S. at 262-64.
113. Id. at 266.
114. Id. at 257 n.11.
115. Id. at 254-55 (quoting 2 HARPER & JAMES, LAW OF TORTS, § 25.1 (1956)).
116. Id. at 266.
117. Id. at 257 n.11 & 266.
118. Id. at 257.
119. Id.
120. Id. at 261.
where injury is both likely and primarily intangible, and where loss is exceptionally difficult to prove. The Court rejected the analogy between defamation and procedural due process, while expressly leaving open the possibility of presumed damages for violations of other constitutional rights.

In light of the intangible, dignity interest within the purview of the right to counsel, there is a sound basis for presuming damages in Morrison. First, the intentional invasion of the accused's intrinsic interest in Morrison closely parallels the common law tort of intentional infliction of emotional distress for which presumed damages are recoverable. Further, the reasons for the Court's refusal to presume damages in Carey are inapplicable for the most part in Morrison. Unlike the procedural deprivation in Carey, the disparagement of counsel and threats against the accused in Morrison were virtually certain to cause an ordinary person distress and humiliation. Additionally, causal ambiguity is far less troublesome in Morrison than in Carey. The trauma connected with Hazel Morrison's presumably valid conviction is comparable to the distress accompanying a substantively justified but procedurally defective school suspension. In both instances, the substantive deprivation is noncompensable. However, emotional distress flowing from the unconstitutional assault on the accused's dignity in Morrison was separate in time and place from the criminal justice process leading to conviction. This distinction thereby alleviated the causal ambiguity that concerned the Court in Carey, and thus permitted the separation of compensable from noncompensable in-

121. Id. at 262.
122. The opinion presented three reasons for rejecting the analogy. First, a procedural deprivation in and of itself is less likely to cause emotional injury than statements that are defamatory per se. Such statements will almost always arouse strong feelings, while a person denied due process "may not even know that procedures were deficient until he enlists the aid of counsel to challenge a perceived substantive deprivation." Id. at 263. Secondly, defamation per se is virtually certain to cause reputational injury, more difficult to prove than either the emotional distress or tangible harm from a procedural deprivation. Id. Finally, procedural due process claims may involve "an ambiguity in causation" that is absent from defamation cases. Id. This ambiguity stems from the fact that if the substantive deprivation is justified despite a denial of due process, only that portion of the emotional distress incident to the procedural deprivation is compensable. Id. at 263-64.
123. "[T]he elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another." Id. at 264-65.
124. See D. Dobbs, supra note 107, at § 7.3 (1973).
125. See supra note 122.
jury. Hazel Morrison thus should be able to recover presumed damages.

This analysis accepts Carey's premise that presumed damages are justified because of difficulty inherent in calculating actual damages suffered by the victim of the dignitary tort. However, a strong argument can be made that deterrent and public values also justify presumed damages in a situation like Morrison. As Professor Dobbs has observed, presuming damages for dignitary torts "often operates to enforce limits upon the official or unofficial power of persons in authority and to preserve rights of the public generally to be free from oppressive conduct."126 Similarly, another commentator has maintained that a "superliability rule" is needed to achieve deterrence by awarding damages in excess of typical compensatory recoveries for actual injury and typical exemplary damages for malicious intent.127 Such a rule would protect the "merit-good" quality of the human dignity interests at stake.128

Finally, a person able to demonstrate that conviction was the result of a deliberate bad faith violation of the right to counsel should recover compensatory damages for pecuniary and nonpecuniary loss stemming from the conviction itself, in addition to presumed damages for noninstrumental harm. Reversal on appeal is not sufficient, since it does not undo the financial and emotional harm of an invalid conviction. Only damages can compensate for such injuries.129

128. Yudof, supra note 127, at 1379.
129. See Berlin Dem. Club v. Rumsfeld, 410 F. Supp. 144 (D.C.D.C. 1976), where the court detailed the inadequacy of reversal to remedy completely the harm from a conviction obtained in violation of a defendant's sixth amendment rights:

The right to reversal on appeal . . . is far more limited an interest than the right to a fair trial, which the sixth amendment protects. A criminal . . . convicted, . . . regardless of appellate reversal, has suffered obvious harm through loss of his reputation, his financial resources, and perhaps his freedom pending appeal. Reversal on appeal may ameliorate the extent of these damages; it cannot eradicate them. If a conviction has been caused at least in part by violation of the criminal's sixth amendment rights, there is no adequate remedy other than damages to redress fully the resultant harm.

Id. at 162.
V. Surreptitious Intrusion Into the Attorney-Client Relationship and Instrumental Interests of the Accused

If one accepts the premise that undercover agents are an indispensable part of modern law enforcement and that the government has a legitimate interest in veiling their identity for as long as possible, then covert attendance at defendant-lawyer meetings, if necessary to maintain the agents’ cover, does not constitute a violation of the right to counsel. However, the possibility, if not the likelihood, of adversary prejudice to an accused consequent to such intrusion presents a separate problem. Even where an accused suffers adversary prejudice, this injury arguably is not compensable in damages. For, as discussed below, adversary prejudice is frequently unavoidable and may occur without any intentionally wrongful conduct on the part of the agent. In these circumstances a damage award against the agent would not be feasible or warranted. Accordingly, other measures designed to prevent and neutralize adversary prejudice from such conduct are called for.

A. Inadequate Protection from Adversary Prejudice in Weatherford

Covert intrusion into the defense camp poses a serious threat to balance and fairness in criminal proceedings; both would be illusory if the prosecution were permitted to obtain convictions through spying on the accused and his attorney. Although the Court in Weatherford acknowledged that a conviction actually obtained through such methods cannot stand, it imposed formidable and excessive obstacles of proof to establish adversary prejudice. A showing that a police undercover agent acquired information related to the pending prosecution would not be enough. A defendant must demonstrate that evidence or defense strategy has been communicated to the prosecutor. The Court refused to accept

130. The Court’s analysis in Weatherford rests on these premises. 429 U.S. at 557.
131. See infra notes 132-50 and accompanying text.
133. “[H]ad the prosecution learned ... the details of the Bursey-Wise conversations about trial preparations, Bursey would have a much stronger case.” Weatherford, 429 U.S. at 554. “As long as the information possessed by Weatherford remained uncommunicated,
that such communication would occur as a matter of course, endorsing instead the district court’s finding that nothing learned by the undercover agent in Weatherford was relayed to the prosecuting attorney or his staff.134

he posed no substantial threat to Bursey’s Sixth Amendment rights.” Id. at 556.

134. Id. Since the district court found that the prosecution had acquired neither evidence nor information concerning defense strategy as a result of the intrusion, the Court did not expressly decide whether such communication creates an irrebuttable presumption of prejudice. Two lower courts, however, have addressed this issue.

In United States v. Levy, 577 F.2d 200 (3d Cir. 1978), government lawyers learned through an informant that the defense planned to concentrate on attacking the credibility of two prosecution witnesses. The district court denied a motion to dismiss the indictment, finding that the prosecution had proven beyond a reasonable doubt that the defense would not be prejudiced at trial by this premature disclosure of defense strategy. The Court of Appeals for the Third Circuit reversed, ruling that the indictment should have been dismissed. It reasoned that the prosecution’s advance knowledge of defense strategy creates opportunities for prejudice too diverse and subtle for a court to predict prejudice pretrial or to detect its occurrence posttrial. Id. at 208. Further, even if such determinations could be made with accuracy, it maintained that the very fact of the inquiry would tend to chill free and open communication between defense attorneys and their clients. Accordingly, it concluded that:

The inquiry into prejudice must stop at the point where attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case. Any other rule would disturb the balance implicit in the adversary system and thus would jeopardize the very process by which guilt and innocence are determined in our society.

Id. at 209.

In New Jersey v. Sugar, 84 N.J. 1, 417 A.2d 474 (1980), the New Jersey Supreme Court observed that disclosure of defense strategy to the prosecution “puts the defense at an immeasurable disadvantage” for which dismissal is the only effective remedy. Id. at 19, 417 A.2d at 483. However, where the state acquires tainted evidence as a result of an unlawful intrusion into confidential attorney-client communications, the court would permit the prosecution to proceed provided the state first establishes beyond a reasonable doubt that it can prove a prima facie case using untainted evidence and witnesses. Id. at 25, 417 A.2d at 484.

Although Weatherford did not directly address the rebuttal issue, one passage in the Court’s opinion seems pertinent:

As long as the information possessed by Weatherford remained uncommunicated, he posed no substantial threat to Bursey’s Sixth Amendment rights. Nor do we believe that federal or state prosecutors will be so prone to lie or the difficulties of proof will be so great that we must always assume not only that an informant communicates what he learns from an encounter with the defendant and his counsel but also that what he communicates has the potential for detriment to the defendant or benefit to the prosecutor’s case.

429 U.S. at 556-57 (emphasis added). One could argue, based upon the italicized language, that the Court left open the possibility of rebutting prejudice where evidence or defense strategy is disclosed to the prosecutor. However, the language is more reasonably read as permitting such rebuttal, if at all, only where the information communicated to the prosecutor in no way relates to the pending prosecution, as where the conversation reported to the prosecutor concerned the weather. On the other hand, if the information relayed, whether it
This communication demand is questionable for several reasons noted in Justice Marshall's dissent. First, communication of defense strategy to the prosecution may not be the essence of the harm where, as in Weatherford, the key prosecution witness at trial was privy to confidential attorney-client discussions. Such witnesses are "in a position to formulate in advance answers to anticipated questions, and even to shade their testimony to meet expected defenses." Second, an undercover agent's silence implicitly informs the prosecutor that the defense has no surprises planned for trial. Third, proving communication of defense strategy frequently poses an insurmountable barrier "because such proof requires an informer or prosecutor to admit his own wrongdoing (and open the door to damage suits and attacks on convictions)." In addition, whatever factual support underlies the Court's assumption of no communication where the relationship between law enforcement and prosecution staffs is that of witness and attorney, none exists where the law enforcement agents help prepare the case and assist government counsel at trial. In these circumstances, to assume that privileged information possessed by law enforcement officials has not been incorporated into the prosecution's case, whether with or without the prosecuting attorney's knowledge, would be contrary to experience.

Prejudice to the defense from surreptitious intrusion by police agents goes beyond acquisition of evidence or premature disclosure of defense strategy, for harm in a particular case may consist of impairment or indeed destruction of the attorney-client relationship. The seeds of distrust and their consequences are strikingly illustrated in a recent California case in which multiple defendants, including an undercover police officer, faced misdemeanor charges resulting from a nonviolent protest at a nuclear power facility. For nearly two months after arraignment the undercover officer attended attorney-client meetings and actively participated in planning defense strategy. This, the state argued, was necessary to

relates to evidence or strategy, "has the potential for detriment to the defendant or benefit to the prosecutor," id., the presumption of prejudice should be irrebuttable.

135. Id. at 561 (Marshall, J., dissenting).
136. Id. at 564.
137. Id. at 565.
138. Id.
obtain information about possible terrorist infiltration of antinuclear power groups. The California Supreme Court ruled that the officer's conduct had violated state law and ordered dismissal of the charges.\textsuperscript{141} It concluded that dismissal was necessary since the paranoia and mistrust engendered among the defendants upon learning of the intrusion rendered effective representation impossible.\textsuperscript{142}

Additional cases illustrate direct assaults upon the attorney-client relationship when, for example, law enforcement agents disparage a defendant's attorney. Although federal decisions recognize that derogatory remarks to a defendant about the competence of his counsel may warrant dismissal or reversal under the sixth amendment, no federal defendant yet has been able to demonstrate the resulting impairment of counsel's performance necessary to warrant these remedies.\textsuperscript{143} State defendants, on the other hand, have fared somewhat better with disparagement claims.\textsuperscript{144}

Surreptitious intrusion not only threatens the integrity of a particular criminal proceeding, but also undermines the effectiveness of counsel generally. Fear of police intrusion on confidential attorney-client communications tends to inhibit a candid and full exchange of information and ideas between attorneys and defendants. This is obviously necessary for meaningful implementation of the right-to-counsel guaranty.\textsuperscript{145} Mindful of the importance confidence and candor play in the attorney-client relationship, the Supreme Court has forbidden on constitutional grounds surreptitious electronic interception of conversations between defendants and their attorneys during trial preparations.\textsuperscript{146} Consequently, the Court in \textit{Weatherford} distinguished between the presence of undercover agents at confidential defense meetings and electronic eavesdropping by asserting that the chilling effect from the poten-

\begin{itemize}
  \item \textsuperscript{141} \textit{Id.} at 760, 598 P.2d at 834, 157 Cal. Rptr. at 668.
  \item \textsuperscript{142} \textit{Id.} at 756, 598 P.2d at 833, 157 Cal. Rptr. at 665.
  \item \textsuperscript{143} \textit{See Morrison}, 449 U.S. 361; United States v. Irwin, 612 F.2d 1182, 1188-89 (9th Cir. 1980).
  \item \textsuperscript{145} \textit{See Fisher v. United States}, 425 U.S. 391, 403-04 (1976) (establishing that the common law attorney-client privilege has constitutional dimension because of the necessity for full disclosure by the client "to obtain fully informed legal advice").
  \item \textsuperscript{146} \textit{See O'Brien v. United States}, 386 U.S. 345 (1967) (per curiam); Black v. United States, 385 U.S. 26 (1966) (per curiam).
\end{itemize}
tial presence of undercover agents is less than that accompanying the threat of electronic surveillance. As Justice White explained, third parties can be excluded from confidential meetings, or defense strategy need not be revealed when third parties are present.

These assertions rest upon questionable assumptions about human behavior. Moreover, they fail to conform to the situation where a police officer or informant masquerades as a defendant in a multiple party prosecution. Even if the defendants are represented by separate counsel, the need for coordinated defense strategy requires communication among the various defendants and their respective attorneys. A fortiori, the Court’s measures are unworkable in instances of joint representation. Finally, the Court’s assurance that the prosecution is barred from using privileged information at trial will not appreciably reduce the chilling effect, since the possibilities of prejudice take subtle and varied forms; defense lawyers, if not their clients, well appreciate the possibilities. In sum, the no-communication rule announced in Weatherford is seriously inadequate to prevent surreptitious intrusion from influencing the outcome in particular cases and, more generally, to maintain candid and full exchanges between defendants and their lawyer.

B. Three Methods for Protecting the Accused from Adversary Prejudice

At least three methods for coping with improper adversary prejudice to the accused can be observed in the Court’s right-to-counsel decisions: (1) case-by-case analysis of particular circumstances; (2) per se rules; and (3) prophylactic rules. Under a case-by-case approach, trial judges are charged with appraising the facts in each case to determine whether preliminary action designed to ensure fairness in the proceedings is necessary; appellate courts normally decide whether the trial court’s failure to act adversely affected the accused. Under a per se rule, potentially prejudicial conduct is absolutely prohibited; failure to comply with the rule

147. 429 U.S. at 554-55 n.4.
148. Id.
149. Id. at 564 n.2 (Marshall, J., dissenting).
150. See supra text accompanying notes 135-42.
typically calls for reversal on appeal without inquiry into whether the particular defendant suffered prejudice. A prophylactic rule represents a broad curative measure designed to prevent, detect and neutralize prejudice to the accused; it often combines case-by-case analysis with per se mandates. This third category of rules maintains a unique constitutional status. Prophylactic rules are judicially created and designed to safeguard interests protected by the Constitution, but they neither delineate those interests nor prescribe indispensable means for their protection. The postarrest warnings set forth in *Miranda v. Arizona*\(^\text{151}\) are an example. The *Miranda* Court expressly acknowledged that the decision's mandate is subject to legislative modification, provided that alternative mechanisms are employed to alleviate the inherent compulsion of custodial interrogation.\(^\text{152}\)

By establishing that appointment of counsel to represent indigent defendants in state felony prosecutions was not an invariable requirement of fourteenth amendment due process, *Betts v. Brady*\(^\text{153}\) illustrates certain strengths and weaknesses of the case-by-case approach. *Betts* demanded appointed counsel only where the circumstances of a particular case indicated that without counsel the trial would be devoid of "fundamental fairness."\(^\text{154}\) Consequently, the trial judge prior to trial would consider such factors as the gravity of the offense,\(^\text{155}\) the personal characteristics of the accused,\(^\text{156}\) his familiarity with criminal proceedings,\(^\text{157}\) and the complexity of the case\(^\text{158}\) in order to decide whether counsel was necessary. The fundamental fairness standard proved elusive and difficult to apply for even the most conscientious trial judges; the challenge of evaluating before trial the complexity of the prosecution's case, defenses thereto, and level of legal sophistication

\(^{151}\) 384 U.S. 436 (1966).

\(^{152}\) Id. at 467. See generally Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975).

\(^{153}\) 316 U.S. 455 (1942).

\(^{154}\) It was thought that flexibility was necessary to preserve the integrity of local court procedures. See Bute v. Illinois, 333 U.S. 640, 658-60 (1942).


\(^{158}\) See, e.g., Chewning v. Cunningham, 388 U.S. 443, 446 (1962) (complex recidivist statute).
needed for a defendant to represent himself pro se was too often overwhelming. Further, such an elusive standard provided an opportunity for circumvention by state courts opposed to the Betts rule. The flexibility of Betts' case-by-case approach, intended to preserve the integrity of local court procedures, engendered the very federal-state friction that it was designed to avoid, as manifested in the relative frequency with which federal habeas courts ordered the release of state prisoners because of failure to appoint counsel.

When implementing a case-by-case balancing test, courts sometimes place a thumb on the scales by weighing a particularized interest of an individual against a larger, abstract interest of a class. Almost invariably the balance comes out in favor of the latter. The analysis of the Court in Weatherford illustrates balancing skewed by such unequal characterization of the relevant interests. Having asserted as a general proposition that an absolute ban on covert intrusion into the defense camp would harm society by unnecessarily restricting an indispensable investigatory method, the Court did not pause to consider whether the facts justified the intrusion in the instant case. Instead, it accepted the assertion that the agent's continued work in other undercover investigations was critical, and that by declining the invitation to attend the defense meetings he would have jeopardized his undercover status. In contrast, the Court refused to speculate on prejudice to the ac-

159. See, e.g., Gibbs v. Burke, 337 U.S. 773, 781 (1949) (due process clause "not susceptible of reduction to a mathematical formula"). It proved even more difficult for appellate courts to apply a forward-looking standard with the result that the due process inquiry on appeal shifted from a determination of whether the facts as they appeared at the inception of the proceeding warranted appointment of counsel, to an after-the-fact determination of whether the absence of counsel resulted in the accused "actually being taken advantage of, or prejudiced." Townsend v. Burke, 334 U.S. 736, 739 (1948). See generally Green, The Bill of Rights, The Fourteenth Amendment and the Supreme Court, 46 Mich. L. Rev. 869, 897-99 (1948).

160. "In some states, the courts had twisted the rule to the point where the right to appointed counsel was almost non-existent no matter what the nature of the case." See Israel, supra note 53, at 264.


163. The record does not support a conclusion that pretrial disclosure of Weatherford's true identity would have either endangered his life or frustrated other on-going investigations. Weatherford, 429 U.S. at 545, 566 n.5 (1977) (Marshall, J., dissenting).
cused absent actual proof in the record that evidence or defense strategy was communicated to the prosecution.\footnote{164}

By requiring the appointment of counsel in all state felony trials, \textit{Gideon v. Wainwright}\footnote{165} alleviated the institutional costs involved in administering \textit{Betts}.\footnote{166} Additionally, such a \textit{per se} rule precludes comparisons between inherently unequal interests of the type in \textit{Weatherford}. The widespread acclaim for \textit{Gideon}'s \textit{per se} rule should not obscure, however, the costs of this approach: the rule imposes financial burdens upon the states and federally dictates local court procedures. Moreover, \textit{per se} rules may spawn disingenuous decisions at a later time, because the logic of \textit{per se} rules often implicates more than courts are willing to impose. Subsequent decisions dealing with the right to appointed counsel are illustrative.\footnote{167}

Although the charge in \textit{Gideon} was a felony, the Court's rationale for its \textit{per se} rule was that "any person . . . who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."\footnote{168} \textit{Gideon} thus was relied upon in \textit{Argersinger v. Hamlin},\footnote{169} which required appointed counsel in state court misdemeanor prosecutions if the defendant faced possible imprisonment. The Court observed the need for counsel to defend petty offense prosecutions, such as vagrancy, which "often bristle with thorny constitutional questions."\footnote{170} The Court also invoked equality in referring to data showing that unrepresented misdemeanants fare worse in plea negotiations than represented defendants.\footnote{171}

\begin{thebibliography}{9}
\bibitem{164} \textit{Id.} at 556-57.
\bibitem{165} 372 U.S. 335 (1963).
\bibitem{166} \textit{Gideon} did not end case-by-case, multi-factor analysis as the underpinning of the right to counsel in noncriminal contexts, where the availability of counsel continues to be governed by a \textit{Betts}-type analysis. \textit{See} Wolff \textit{v. McDonnell}, 418 U.S. 539 (1974) (prison disciplinary proceeding); \textit{Gagnon v. Scarpelli}, 411 U.S. 778 (1973) (probation revocation proceeding).
\bibitem{167} \textit{See infra} notes 169-85 and accompanying text.
\bibitem{168} 372 U.S. at 344.
\bibitem{169} 407 U.S. 25 (1972).
\bibitem{170} \textit{Id.} at 33. \textit{See also} Papachristou \textit{v. Jacksonville}, 405 U.S. 156 (1972) (municipal vagrancy ordinance which levied criminal penalties on “rogues and vagabonds,” “persons wandering or strolling around from place to place without any lawful purpose or object; habitual loafers; disorderly persons,” and many other categories of persons, found void for vagueness because it both failed to give notice and encouraged arbitrary and erratic arrests and convictions).
\bibitem{171} \textit{Argersinger}, 407 U.S. at 36.
\end{thebibliography}
More recently, the Burger Court in *Scott v. Illinois*\(^{172}\) has halted the logical application of *Gideon* by refusing to require appointed counsel in state misdemeanor prosecutions in which no jail sentence is imposed. The advantages of *Scott* are obvious; states are spared the expense of providing counsel in a large number of cases. Furthermore, since the rule is categorical—no appointment unless imprisonment is imposed—its application does not involve the institutional costs entailed in a case-by-case determination of the need for counsel to assure fundamental fairness.

The reasoning of *Scott*, however, is far from obvious. Specifically, the principle upon which *Gideon* and *Argersinger* were distinguished is unclear. The Court, per Justice Rehnquist, did not link imprisonment with the complexity of the issues and consequent need for counsel. Instead, he stated that “actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment,”\(^ {173}\) thereby implying that *Gideon*’s values, reliability and equality were not controlling in *Scott* because of the insignificance of the sanction. Similar reasoning supported the capital offense exception to *Betts v. Brady*; counsel was constitutionally required in all capital cases, without regard to issues of complexity or the defendant’s ability to defend.\(^ {174}\) However, *Gideon* categorically rejected this type of balancing to determine the right to counsel in criminal cases.\(^ {175}\) Its reappearance as the implicit intellectual basis of the decision in *Scott* demonstrates that per se rules often beget borders or limits that cannot be justified in terms of the underpinnings of the rule.

*United States v. Wade*\(^ {176}\) and *Gilbert v. California*\(^ {177}\) are illustrative of the third method of implementing constitutional protections—prophylactic rules. The Warren Court in these cases relied upon the right-to-counsel guaranty as the textual basis for imposing novel requirements designed to safeguard criminal defendants from mistaken eyewitness identification at trial. Relying upon evidence that improper suggestiveness in the conduct of lineups and


\(^{173}\) Id. at 373.


\(^{175}\) “The Court has come to recognize . . . that the mere existence of a criminal charge constituted in itself special circumstances requiring the services of counsel at trial.” 372 U.S. at 351 (Harlan, J., concurring).

\(^{176}\) 388 U.S. 218 (1967).

\(^{177}\) 388 U.S. 263 (1967).
other identification procedures created a significant possibility of misidentification, the Court required the presence of defense counsel at pretrial identification proceedings as a means of preventing improper suggestiveness and of neutralizing its effect at trial.

The Court implemented the counsel requirement through two subrules: failure to provide counsel at a lineup bars any courtroom testimony about the out-of-court identification; in-court identification of a defendant by a witness who previously viewed him at a lineup without counsel is admissible, however, provided the prosecution first establishes that the witness would not rely upon recollection of the prior uncounseled identification in identifying the accused in court. The prosecution must show an "independent source" for the in-court identification.

These rules, particularly the per se exclusion of pretrial identification testimony, establish an incentive for the authorities to provide opportunities for counsel's presence at pretrial identifications. Greater compliance with the counsel mandate no doubt would have been achieved by excluding all identification testimony of witnesses who viewed the defendant at pretrial identification proceedings where counsel was absent, but the Court rejected this costly per se option because many lineups are conducted fairly even though counsel is not present. Still, some measure was needed to offset the temptation to use an uncounseled, pretrial identification confrontation to "crystallize the witnesses' identification of the defendant for future reference," and then rely solely on the witnesses' in-court identification. The independent source rule was designed to maintain the effectiveness of the requirement of counsel at pretrial identifications.

Experience under Wade-Gilbert has revealed a weakness in the independent source requirement. Courts almost always find

178. Id. at 272-73.
179. Id. at 241-42.
180. "Only a per se exclusionary rule as to such [out-of-court identification] testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." Id. at 273.
181. "[I]t may confidently be assumed that confrontations for identification can be and often have been conducted in the absence of counsel with scrupulous fairness and without prejudice to the accused at trial." Stovall v. Denno, 388 U.S. 293, 299 (1967) (holding Wade nonretroactive).
182. Wade, 388 U.S. at 240.
183. Id. at 240-41.
that the prosecution has satisfied its burden and thus permit in-court identification despite a *Wade* violation.\(^{184}\) In those few instances where the prosecution fails to prove an independent source, the in-court identification likely would be excludable without any assistance from *Wade* and *Gilbert* on the due process ground that the identification lacks reliability. The factors pertinent to independent source and due process are strikingly similar.\(^{185}\) The only significant difference is whether the prosecution must demonstrate the reliability of identification testimony or whether the defense must demonstrate its unreliability. In both instances, reliability is the crux of the inquiry.

The *Wade*-*Gilbert* rules are instructive. By qualifying per se exclusion with the case-specific, independent-source determination, the Warren Court sought to avoid adversary prejudice generally without sacrificing accurate guilt determination in particular cases. However, the weakness of this approach is that too lenient an application of the moderating subrule may unacceptably diminish the overall effectiveness of the counsel requirement.

C. Proposed Prophylactic Measures Against Adversary Prejudice from Surreptitious Intrusion into the Defense Camp

In *Weatherford*, the Court considered alternative rules for dealing with the hazard of adversary prejudice from covert intrusion by law enforcement agents into the defense camp. The majority rejected a per se rule forbidding the conduct and requiring reversal for violations; it instead adopted a case-by-case examination for prejudice. Neither alternative is satisfactory; a per se prohibition would unduly hinder legitimate and necessary law enforcement activity, while a case-by-case inquiry provides inadequate safeguards against adversary prejudice.

The *Wade*-*Gilbert* matrix suggests a distinct approach consisting of prophylactic rules designed to prevent and neutralize adversary prejudice while accommodating legitimate law enforcement

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needs. Covert government intrusion into the defense camp, like pretrial identification, may constitute legitimate law enforcement conduct. In a given case, however, they also may seriously derogate from the right to a fair trial, and that consequence may be unintended and indeed unrecognized by the prosecution. Additionally, in each instance defendants frequently cannot avoid the prejudice, for they will not be aware of it.

Covert contact by law enforcement officials with members of the defense threatens to disadvantage individual defendants in the adversary process in several ways. The prosecution may acquire evidence for use in the pending trial;\(^\text{186}\) the prosecution may learn defense strategy;\(^\text{187}\) or the intrusion, if it becomes known or suspected, may impair defense counsel's ability to obtain the client's cooperation.\(^\text{188}\) There are at least three measures that would tend to mitigate these adverse effects without frustrating legitimate law enforcement efforts. These measures would also serve to lessen the general chilling effect on attorney-client communications occasioned by the threat of intrusion.

First, permissible surreptitious contact by government agents with defendants and defense attorneys should be limited to conduct that is necessary to achieve a substantial law enforcement objective not reasonably attainable by other means. Second, where an intrusion satisfies this standard, the intrusion should be limited in extent and frequency to that necessary for essential law enforcement objectives, and the agent should take all reasonable steps to minimize the likelihood of overhearing privileged information.\(^\text{189}\) Finally, measures should be adopted to prevent communication of privileged information to those engaged in the preparation and presentation of the prosecution's case against the accused, such as isolating the agent from the prosecution team.\(^\text{190}\)

\(^{186}\) See, e.g., Sugar v. New Jersey, 84 N.J. 1, 417 A.2d 474 (1980).


\(^{189}\) Confidential informants of the Federal Bureau of Investigation within the confines of the Third Circuit are routinely instructed not to become involved in discussions of defense strategy. See United States v. Natale, 494 F. Supp. 1114, 1117 (E.D. Pa. 1979).

\(^{190}\) See United States v. Meinstein, 478 F. Supp. 1131, 1133 (S.D. Fla. 1979) (isolation of informant from the trial team considered in rejecting sixth amendment claim based on surreptitious intrusion into the defense camp). Cf. United States v. O'Neill, 484 F. Supp. 799 (E.D. Pa. 1980) (no sixth amendment violation found when government lawyers improperly obtained a tape of a conversation between the defendant and an informer, since no
Absent effective mechanisms for enforcement and monitoring, these standards for police and prosecutorial conduct are meaningless. Requiring prior judicial approval of covert contact with the defense upon a convincing showing that an alternative course of action would endanger the safety of the agent or thwart a significant law enforcement interest is a plausible enforcement measure. Experience with the administration of the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 teaches, though, that this type of prior review is largely pro forma. Although that Act mandates prior judicial authorization of electronic surveillance upon a satisfactory showing that alternative investigative procedures are impracticable or unsafe, judges are unwilling to review seriously police representations about the feasibility and necessity of taking investigatory action.

A post hoc judicial assessment of whether an intrusion was justified under the suggested standards and of whether the undercover agent sought to minimize the invasion also is not likely to be effective. As Weatherford demonstrates, courts do not deem themselves competent to review these kinds of investigatory, law enforcement determinations. Additionally, although Title III requires that law enforcement personnel minimize the intrusiveness of authorized electronic surveillance, courts have been unable to develop meaningful standards to implement this mandate. Judicial elaboration of a similar minimization standard proposed here promises no greater success.

What these considerations reveal is that law enforcement agencies and prosecutors' offices, instead of courts, should have the initial and primary responsibility for developing and enforcing guidelines which minimize the incidence and invasiveness of intrusion. Their duties should additionally extend to designing procedures for isolating undercover agents who have had contact with an accused or his lawyer from individuals engaged in preparing and presenting the case against the accused. Courts are not without responsibility, however. Their role is to ensure that law en-

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enforcement officials adopt and adhere to satisfactory safeguards. This division of labor acknowledges that law enforcement and prosecution officials are more competent than are judges to regulate investigatory activity, and are thus better able to protect citizens from its abuses.

The following proposal illustrates the envisioned interplay of courts and law enforcement officials. It would be appropriate to require the prosecution to disclose to the court in camera whether an undercover agent or informant has had contact with the accused or his attorney during the pendency of the prosecution. Failure to disclose should be sufficient for reversal of a conviction without proof of actual prejudice. It also should be grounds for disciplinary action against those responsible.

Upon disclosure of surreptitious contact, the prosecution should be required to verify: (1) that neither the prosecuting attorneys nor their assistants have acquired knowledge pertinent to the case or information about defense strategy as a result of the contact with the defense; and (2) that adequate guidelines to minimize the incidence and scope of intrusion and to avoid communication of privileged information have been followed in the instant case. If the prosecution cannot verify the first statement, the charges should be dismissed. If the first but not the second is verified, the prosecution should either drop the pending prosecution or make full revelation to the defense of all surreptitious contact. Under the latter course, the prosecution must demonstrate before trial that it acquired no evidence or information about defense strategy as a result of the contact. Finally, upon a satisfactory verification of both statements, the prosecution need not disclose surreptitious contacts to the defense if the court determines in camera that disclosure would endanger an undercover agent or informant or jeopardize an ongoing investigation. *Weatherford*’s minimal mandate of reversal if a defendant establishes that privileged information acquired through covert contact was communicated to the prosecution would remain effective.

The above rules are inspired by the procedures governing pretrial identification. *Weatherford*’s no-communication rule and the due process standard employed in identification cases are similar; each mandates reversal if the accused establishes a realistic possibility of adversary prejudice based upon the totality of facts and circumstances, without reliance upon other judge-made safeguards.
Requiring the authorities to adopt and use the guidelines and procedures proposed here is akin to requiring counsel's presence at pretrial identification proceedings. Each is a prophylactic measure designed to prevent and neutralize adversary prejudice. Since failure to utilize these suggested safeguards does not itself establish adversary prejudice, the proposal permits the prosecution to demonstrate that there has been none, just as *Wade-Gilbert* permits the prosecution to show an independent source for an in-court identification following a prior identification without counsel.\(^{195}\)

Requiring the prosecution to prove the absence of taint, however, is also designed to encourage utilization of the appropriate safeguards. Thus, the effectiveness of the proposed safeguards depends upon courts rigorously enforcing the no-prejudice requirement and thereby avoiding the deterrent weakness that has developed in implementation of the analogous independent-source rule under *Wade-Gilbert*.\(^{196}\)

**D. Prophylactic Constitutional Rules and the Burger Court**

Accurate guilt determination by eschewing impediments to convicting the guilty and by pursuing rules enhancing reliability is an often heard justification for the Burger Court's decisions on criminal procedure.\(^{197}\) Decisions curtailing federal habeas corpus review of fourth amendment claims,\(^{198}\) while liberalizing such review of insufficient evidence claims, lend credence to this observation.\(^{199}\) In contrast, the pursuit of social objectives extrinsic to reli-

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195. See supra text accompanying notes 176-83.
196. See supra note 184 and accompanying text.
198. *Stone v. Powell*, 428 U.S. 465 (1976) (where a state has provided an opportunity for full and fair litigation of a fourth amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that unconstitutionally obtained evidence was introduced at trial).
199. See *Jackson v. Virginia*, 443 U.S. 307 (1979) (rejecting the "no evidence" rule and applying instead the guilt beyond a reasonable doubt requirement for federal habeas attacks on state convictions).
able outcomes, sometimes through the creation of truth-defeating, prophylactic rules, is said to be the hallmark of the Warren Court.\textsuperscript{200} The decision in \textit{Mapp v. Ohio},\textsuperscript{201} which requires states to exclude illegally seized evidence, provides plausible support for this observation.

Because \textit{Mapp} embodies a prophylactic constitutional rule that denies the fact-finder in a criminal trial access to reliable and probative evidence, it has been especially vulnerable to attack and retrenchment in subsequent Supreme Court decisions. \textit{Stone v. Powell}\textsuperscript{202} barred habeas corpus review of fourth amendment claims except where inadequate opportunity existed for adjudication in the state court. The Burger Court's hostility toward prophylactic constitutional rules, however, is not limited to those that deny probative evidence. Retrenchment extends to previous rules aimed at enhancing reliability as well; the restrictive applications of \textit{Miranda v. Arizona} and \textit{Wade-Gilbert}, both paradigms of Warren Court prophylactic rules, are illustrative. According to the Burger Court, pretrial statements obtained in defiance of \textit{Miranda} may be used to impeach an accused's testimony at trial.\textsuperscript{203} \textit{Wade-Gilbert}'s erosion has been especially marked and warrants elaboration, particularly since it provides the inspiration for the proposals in this Article.

The assault began with \textit{Kirby v. Illinois},\textsuperscript{204} which dispensed with \textit{Wade}'s counsel requirement for lineups that occur before formal initiation of criminal charges, typically arraignment, since the sixth amendment right to legal representation for other purposes is not triggered until arraignment. Earlier recognition of a prearraignment right to counsel at custodial interrogation in \textit{Escobedo v. Illinois}\textsuperscript{205} and \textit{Miranda} was put aside as fifth amendment, self-incrimination jurisprudence. Perhaps because such reasoning could not be logically supported, the Court chose to ignore the fact that lineups present hazards of mistake and suggestion, whether before or after a formal charge. Reducing this threat to reliability was, of course, the essence of \textit{Wade-Gilbert}'s counsel mandate.

\textsuperscript{200} See, e.g., Cover & Aleinikoff, supra note 197, at 1092-93.
\textsuperscript{201} 367 U.S. 643 (1961).
\textsuperscript{202} 428 U.S. at 465.
\textsuperscript{204} 406 U.S. 682 (1972).
\textsuperscript{205} 378 U.S. at 478.
Assault became a rout in *United States v. Ash*,206 which found counsel unnecessary at a postindictment photographic array during which a witness was presented with the defendant's photograph among other photos. The majority opinion reasoned that unlike a lineup, an accused is not present at a photographic identification and his lawyer therefore need not be present either. Authority for these assertions was found in decisions constitutionally mandating counsel at pretrial proceedings at which the accused is confronted with either legal complexities or prosecution officials.207 The Court discovered in this line of cases a principle that the pretrial right to counsel attaches only at "trial-like confrontations" at which the accused is present.208 That photographic identifications can be as suggestive and equally hazardous to reliability as corporeal identifications was of minor importance in light of the no-defendant, no-lawyer principle.209

It is obvious that the Burger Court is exceedingly dubious of *Wade-Gilbert*. A refusal to extend rulings in the slightest, coupled with a refusal to overrule, is the only plausible explanation for the departures in *Kirby* and *Ash* from the rationale of *Wade-Gilbert*. The Burger Court has not questioned, however, the constitutional authority of the Court to promulgate prophylactic rules.210 Indeed, the dissenting opinion in *Holloway v. Arkansas*211 described the Court's interpretation of the right to counsel in that case as "pro-

207. *Id.* at 311. The Court cited *Hamilton v. Alabama*, 368 U.S. at 52 (sixth amendment violated where accused is required to enter guilty plea without assistance of counsel); *White v. Maryland*, 373 U.S. 59 (1963) (accused's sixth amendment rights violated when forced to plead without presence of attorney); *Massiah*, 377 U.S. at 201 (statements obtained by ruse in the absence of counsel violates accused's right to counsel); *Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearing is "critical stage" requiring presence of counsel); and *Wade*, 388 U.S. at 263 (denial of counsel at lineup violated accused's sixth amendment rights). *Id.*
209. In contrast to the Court's analysis, Justice Stewart, in a concurring opinion, advanced a pragmatic distinction, contending that "[a] photographic identification is quite different from a lineup, for there are substantially fewer possibilities of impermissible suggestion when photographs are used, and those unfair influences can be readily reconstructed at trial." *Id.* at 324. For a critical analysis of the Burger Court identification decisions, see Grano, *supra* note 184.
The trial judge in *Holloway* had summarily denied a motion for appointment of separate counsel to represent three indigent co-defendants made by the public defender, who claimed that their interests were in conflict. The Court reversed without inquiring into whether a conflict had developed at trial, holding instead that the trial court should have either appointed separate counsel or conducted an inquiry to determine whether the risk of conflict was "too remote to warrant separate counsel."\(^{213}\) The decision may be fairly characterized as prophylactic, since it rejected a per se prohibition against compulsory joint representation,\(^{214}\) while reversing without any showing of actual conflict or other prejudice.\(^{215}\)

The subsequent decision in *Cuyler v. Sullivan*\(^{216}\) demonstrates the limited scope of *Holloway's* safeguards. Absent special circumstances, a trial court has no duty to inquire on its own initiative into the possibility of conflict from multiple representation.\(^{217}\) Furthermore, to prevail on a conflict of interest claim raised for the first time on appeal, a defendant "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."\(^{218}\) Apparently, this standard would also govern review where a trial court, after an adequate inquiry, determined the possibility of conflict too remote to justify separate counsel.\(^{219}\)

*Cuyler* rejected a rule that would require reversal where joint representation was not "too remote to warrant separate counsel."\(^{213}\)

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\(^{212}\) Id. at 493 (Brennan, J., dissenting).

\(^{213}\) Id. at 494.

\(^{214}\) The Court wrote:

> Requiring or permitting a single attorney to represent codefendants . . . is not *per se* violative of constitutional guarantees of effective assistance of counsel. . . . [I]n some cases . . . certain advantages might accrue from joint representation. In Mr. Justice Frankfurter's view: "Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack."

*Id.* at 482-83 (quoting Glaser, 315 U.S. at 92).

\(^{215}\) Justice Powell, in dissent, analogized *Holloway's* requirement of judicial inquiry into the possibility of prejudice to *Miranda's* mandate of warnings before interrogation. *Id.* at 493 (Powell, J., dissenting).

\(^{216}\) 446 U.S. 335 (1980).

\(^{217}\) *Id.* at 346-47.

\(^{218}\) *Id.* at 348. However, a defendant need not demonstrate that the conflict and resulting impairment of defense counsel's performance affected the outcome of his case, and such a sixth amendment violation is never harmless error. *Id.* at 349-50.

\(^{219}\) See People v. Madison, 81 Ill. App. 3d 471, 401 N.E.2d 571 (1980) (applying actual conflict standard on appeal where possibility of conflict between codefendants represented by the public defender was brought to the court's attention prior to trial).
representation created the mere possibility of conflict, however remote; according to Justice Powell, the resulting high rate of reversal would lead to a total ban on joint representation.\textsuperscript{220} This, he contended, would be detrimental to defendants, since they would be denied the benefits of this sometimes advantageous representational arrangement.\textsuperscript{221}

That result, however, is not inevitable. The more liberal standard need not apply to a defendant who, because of some anticipated benefit, elects joint representation after being advised of the risks entailed. Such a person raising a conflict claim could justly be required to demonstrate actual conflict and impaired representation under the \textit{Cuyler} standard.\textsuperscript{222} However, a defendant who has not elected multiple representation, indeed, who has had it foisted upon him, is entitled to application of the more liberal standard. Since the effects of conflict frequently are not apparent on the face of the record,\textsuperscript{223} it is grossly unfair to require the latter to demonstrate that an actual conflict affected his attorney's performance. Of course, the ensuing high rate of reversal probably would preclude requiring indigent co-defendants to accept joint representation; consequently, poor defendants would enjoy the same right to a lawyer's exclusive services now reserved for those with means to retain counsel.\textsuperscript{224}

The Burger Court evidently finds this result unacceptable because of the financial burden on the states in providing separate counsel and the increased potential for delay and disruption in a prosecution of multiple defendants with each additional defense attorney. As with the rule of \textit{Scott v. Illinois},\textsuperscript{225} the Court's underlying concerns are conservation of state finances and efficiency in criminal justice administration.\textsuperscript{226} Surely, it is no coincidence that the prophylactic rule mandated in \textit{Holloway} entails little or no

\textsuperscript{220} 446 U.S. at 348.
\textsuperscript{221} \textit{Id.} See also supra note 214.
\textsuperscript{223} As the Court acknowledged in \textit{Holloway}, a conflict between jointly represented defendants may preclude counsel on behalf of one of his clients "from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution..." 435 U.S. at 490. Such omissions seldom, if ever, will appear in the record.
\textsuperscript{224} \textit{See supra} note 49 and accompanying text.
\textsuperscript{225} 440 U.S. 367 (1979).
\textsuperscript{226} \textit{See supra} text accompanying notes 172-75.
cost to the states. Appointment of separate counsel is required only where the trial court finds an unacceptable risk of conflict. Any monetary or administrative cost from appointment of separate counsel under this standard is probably offset by a reduction in reversals and retrials because a defendant is able to show that an actual conflict impaired representation. Furthermore, inquiry into the possibility of conflict is not likely to cause significant delay, especially since there is no duty to inquire without prompting, unless the court "knows or reasonably should know that a particular conflict exists." Finally, the difficulty of demonstrating on appeal that conflict actually affected representation means that reversals under this standard will be few, as, for obvious reasons, will be reversals necessitated by a trial court's failure to inquire into the possibility of conflict.

Accordingly, the basis for the hostile reception given Wade-Gilbert by the Burger Court is more likely attributable to a desire to avoid the delay and disruption of a lawyer's presence at pretrial identifications than to general doubt over the legitimacy of prophylactic rules. Such hostility therefore does not doom the measures set forth here to ameliorate the hazards from surreptitious intrusion of undercover agents. These hazards, of course, are different in kind and severity from those associated with identification; the benefits and costs connected with the proposed measures vary also from Wade's counsel mandate. Assessment of the hazards of surreptitious intrusion and the effectiveness and cost of proposed safeguards ultimately should determine the viability of particular prophylactic measures.

**CONCLUSION**

The right to counsel embraces two separate interests: reliable and fair determinations in criminal proceedings, and treatment of defendants with dignity and respect regardless of the effect on the outcome of criminal proceedings. Experience has shown that gov-

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228. *But see* Wood v. Georgia, 450 U.S. 261 (1981) (duty imposed on trial court to inquire further, where hearing was possibly tainted by conflict of interest in that retail clerks convicted of selling obscene materials were represented by counsel retained by their employer).
ernment contact with the defense threatens both interests; open interference with the attorney-client relationship poses a threat to dignity, and surreptitious intrusion creates hazards of subtle and often undetectable adversary prejudice.

Safeguarding these interests requires that courts carefully evaluate the risks and benefits from intrusion into the attorney-client relationship in order to formulate appropriate remedies. Deliberate interference with that relationship for no legitimate purpose calls for damages against those responsible. Additionally, the Court’s approval of surreptitious intrusion when motivated by a legitimate purpose necessitates adoption of measures which minimize the possibility of adversary prejudice while accommodating law enforcement needs.

The formulation of such measures is a demanding and delicate task, one for which Burger Court jurisprudence, notwithstanding its self-proclaimed penchant for reliability and fairness, is inadequate. Warren Court jurisprudence, on the other hand, is too complex to be captured by facile generalizations about the pursuit of social objectives independent of reliable process. Nonetheless, decisions of the earlier Court provide a useful starting point for devising methods to cope with surreptitious intrusion into the attorney-client relationship.

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