SYSTEMIC REFORM: SOME THOUGHTS ON TAKING THE HORSE BEFORE THE CART

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INTRODUCTION

In their articles, "Litigative Approaches to Enforcing the Right to Effective Assistance of Counsel in Criminal Cases,"[1] and "The Right to Counsel and the Indigent Defense System,"[2] Richard Wilson and Suzanne Mounts contend that failings in the delivery of criminal defense services are principally attributable to ill-structured defense systems, excessive caseloads, insufficient resources, and underfunding.[3] The authors argue that the judiciary remains the best hope for reforming defense systems, particularly because the legislative branch has been unwilling to provide adequate financing to enforce the constitutional right to counsel.[4] The authors contend that broad systemic litigation can compel state and local governments to provide adequate financing and resources, thereby guaranteeing effective representation of the poor.[5] Wilson advises those interested in litigating systemic issues to pursue injunctive and declaratory relief in either federal or state courts.[6] Mounts considers the application of systemic defects to a criminal defendant's sixth amendment claim on appeal and at the trial level. A successful appellate claim would necessitate the reversal of a criminal conviction.[7] The trial-level remedies contemplated involve dismissal of the pending charges, replacement of the attorney, and provision of additional resources.[8]

I concur with the authors' observation that systemic reform is essential. Nevertheless, the question remains: How are we most likely to assure that indigent defense services achieve the "reasonably competent" standard, which the Court adopted in *Strickland v. Washington*[9] and *United States v.*

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1. Wilson, *Litigative Approaches to Enforcing the Right to Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 203 (1986).

2. Mounts, *The Right to Counsel and the Indigent Defense System*, 14 N.Y.U. REV. L. & SOC. CHANGE 221 (1986).

3. Mounts & Wilson, *Systems for Providing Indigent Defense: An Introduction*, 14 N.Y.U. REV. L. & SOC. CHANGE 193, 193-95, 197-200 (1986) [hereinafter cited as Mounts & Wilson]; Mounts, *supra* note 2, at 221-22; Wilson, *supra* note 1, at 203.

4. Mounts, *supra* note 2 at 222; Wilson, *supra* note 1, at 203, 205.

5. Mounts, *supra* note 1, at 222-23, 231-33; Wilson, *supra* note 1, at 208-09.

6. Wilson, *supra* note 1, at 215-16.

7. Mounts, *supra* note 2, at 223-24.

8. *Id.* at 238.

9. 466 U.S. 668 (1984). The Court in *Strickland* adopted a standard which at the time of the decision had been adopted by all federal courts of appeals. Citing McMann v. Richardson,

Cronic[10] as the constitutional minimum. I disagree with the means posited by the authors to effectuate systemic change. The authors' approaches, I believe, are not only inconsistent with the Court's interpretation of the right to effective assistance of counsel, but more importantly, deflect inquiry away from a more central problem: the failure of the profession to train qualified attorneys willing to undertake the task of representing the poor.[11]

I will briefly review the recent opinions of the Court related to the issues of ineffective assistance to test the validity of the authors' contentions. In addition, I will consider the posture of state courts, which Wilson contends present a viable "by-pass" to the risks of federal litigation in the post-*Strickland-Cronic* era.[12] Finally, I will review the issue of qualification for service of court appointed counsel, recognizing that the Court has replaced the lowly "farce and mockery" standard, as a measure of counsel's effectiveness, with a uniform standard of "reasonable competence."[13] In undertaking this inquiry, I will consider whether the profession has engaged in sufficient oversight to assure that attorneys assigned to the poor are willing and capable of providing effective representation.

I
THE CONCERNS OF THE JUDICIARY

Wilson contends that a broad, systemic attack based upon demonstrated inadequacies can be packaged either as a sixth amendment claim to protect against denial of effective assistance,[14] or as constitutional claims arising from undercompensation of attorneys.[15] Mounts hypothesizes that broad systemic defects are tantamount to a "constructive denial" of counsel. Claims raising

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397 U.S. 759, 770-71 (1970), the Court held that "a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not 'a reasonably competent attorney' and the advice was not 'within the range of competence demanded of attorneys in criminal cases.' " *Id.* at 687.

10. 466 U.S. 648 (1984).

11. See N. LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING 2 (1982), where the author states:

> Defendants suffer quite directly, and the criminal justice system functions inefficiently, unaided by well trained and dedicated defense lawyers. There also are intangible costs, as our nation's goal of equal treatment for the accused, whether wealthy or poor, remains unattained.

See also R. HERMANN, E. SINGLE & J. BOSTON, COUNSEL FOR THE POOR: CRIMINAL DEFENSE IN URBAN AMERICA 20-23 (1977); Bazelon, *The Realities of* Gideon *and* Argersinger, 64 GEO. L.J. 811, 835-36 (1976). *See generally* Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973), *cited in* S. KRANTZ, D. ROSSMAN, P. FROYD & J. HOFFMAN, RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF *Argersinger v. Hamlin* 272-73 (1976); Watson, *On the Low Status of the Criminal Bar: Psychological Contributions of the Law School*, 43 TEX. L. REV. 289, 292-93 (1964-65).

12. Wilson, *supra* note 1, at 210-11.

13. *Strickland*, 466 U.S. at 696-97.

14. Wilson, *supra* note 1, at 216.

15. *Id.* at 216.

such issues, according to Mounts, will serve to reverse a criminal conviction without any showing of prejudice to the outcome of the criminal proceeding.[16]

These contentions, in my opinion, although worthy of some consideration in the Warren Court era, are today wishful thinking. Over the last fifty years, the Court has reversed only one conviction where a systemic complaint, of the type contemplated by Mounts, resulted in a finding of constitutional error.[17] That occasion occurred in 1932 in *Powell v. Alabama*, a case where indigent defendants were tried for a capital offense "within a few moments after counsel for the first time charged with any degree of responsibility began to represent them."[18] Under those conditions, the Court chose to forego consideration of the probability of prejudice and equated the practice of assignment with a total denial of counsel. In 1963, in *Gideon v. Wainwright*, the Court held that a state court's denial of appointed counsel to indigent defendants violated the sixth amendment.[19]

The decisions of the Court subsequent to *Powell*, with one exception in the Warren Court era,[20] have displayed a willingness to overlook the possibility of inadequate representation, absent proof that counsel's performance prejudiced the proceedings' outcome.[21] In recent decisions, the Burger Court

16. Mounts, *supra* note 2, at 228-30.

17. Mounts contends that the Court has reversed criminal convictions upon a showing of a constructive denial of counsel absent prejudice to the outcome of a case. As examples of such Court decisions, Mounts cites Holloway v. Arkansas, 435 U.S. 475 (1977) (multiple representation conflict); Geders v. United States, 425 U.S. 80 (1976) (court order precluding defendant from consulting with attorney between direct and cross examination); Herring v. New York, 422 U.S. 853 (1975) (statute empowering the court in a nonjury trial to preclude defense counsel from making a closing argument); Brooks v. Tennessee, 406 U.S. 605 (1972) (rule requiring defendant to testify before any other defense witnesses); and Ferguson v. Georgia, 365 U.S. 570 (1961) (statute precluding defendant from having testimony elicited by counsel on direct examination). Mounts, *supra* note 2, at 230 n.43. None of these cases referred to by Mounts contemplates systemic inadequacies in defense systems. Rather, the cases involve some interference with the defense function resulting from rules of evidence or procedure, or from conflicts of interest, entirely extraneous to the system utilized in the delivery of defense services.

18. 287 U.S. 45, 58 (1932).

19. 372 U.S. 335, 344 (1963).

20. The deliberate bypass rule of Fay v. Noia, 372 U.S. 391 (1963), permitted judicial review of constitutional error, despite the absence of a contemporaneous objection, so long as the failure to object was attributed to inadequate representation and not the defendant's intentional relinquishment of a "known right or privilege." *Id.* at 438-39. This rule, however, was basically aberrational. Traditionally the courts have looked for cause for counsel's failure to object and prejudice to the defendant. *See, e.g.*, Francis v. Henderson, 425 U.S. 536 (1976), *cited in* Wainwright v. Sykes, 433 U.S. 72, 82 (1977); Davis v. United States, 411 U.S. 233 (1973); Brown v. Allen, 344 U.S. 443 (1953).

21. Prior to the 1963 incorporation of the sixth amendment right to counsel in *Gideon*, 372 U.S. at 339-45, the Court measured denial of the right to counsel according to a basic due process standard of fairness of the proceeding. *See* Chewning v. Cunningham, 368 U.S. 443 (1962); Betts v. Brady, 316 U.S. 455 (1942).

The standard for ineffectiveness remained basically the same in the post-*Gideon* era. As the Court indicated in *Strickland*, 466 U.S. at 696-97, the farce and mockery standard, as well as other standards previously adopted by the courts, measured effectiveness based on the effect of counsel's performance on the fairness of the proceedings. *See* Trapnell v. United States, 725 F.2d 149, 151-153 (2d Cir. 1983) (reasonably competent standard); Cooper v. Fitzharris, 586

has transformed that willingness into an enthusiasm to penalize defendants for failings attributable solely to their lawyers. At least since 1977, in *Wainwright v. Sykes*,[22] the Court has virtually precluded habeas review of constitutional errors which infected the trial, but which remained uncorrected because of a lawyer's mistake. The Court has made it clear that even egregious mistakes by lawyers are not enough to overturn a conviction unless the resulting error has worked to the defendant's "actual and substantial disadvantage."[23]

Although I consider *Sykes* and its progeny to be evidence of the Court's unwillingness to scrutinize the quality of representation provided by counsel, these decisions may be considered indicative of counterbalanced policies of finality and comity applied to the collateral review of constitutional errors other than ineffective assistance.[24] One could hypothesize, as does Mounts, that had the Court been presented with a claim of constructive denial of counsel, untainted by any procedural default, it would have taken into account the effect of undercompensation, excessive caseload, and other systemic failings, without having required proof that these factors prejudiced the defendant's opportunity to obtain a reliable result.[25]

The Court's opinion in *Cronic*, however, dispelled whatever doubts remained regarding the Court's attitude towards ineffective assistance of counsel claims. There, when confronted directly with systemic failings of a court assigned counsel, the Court insisted that in order to support a finding of ineffectiveness, counsel's performance must have a probable effect on the outcome of the proceedings.[26] When Cronic's lawyer was appointed by the court, he had no previous experience in the practice of criminal law. He was given only

F.2d 1325, 1328 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979) (same); United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973) (same); Snead v. Smyth, 273 F.2d 838, 842 (4th Cir. 1959) (farce and mockery standard); Cofield v. United States, 263 F.2d 686, 689 (9th Cir.), *vacated*, 360 U.S. 472 (1959) (same).

22. In *Sykes*, 433 U.S. 72, counsel failed to raise a timely objection to the admissibility of certain statements, the admission of which arguably violated defendant's fifth amendment rights. Despite counsel's ineffectiveness, the Court refused to hear the merits of the constitutional claim. Instead the Court adopted the "cause-and-prejudice" standard set forth in *Davis*, 411 U.S. 233, which had been previously applied only to federal cases, and held that since defendant had not demonstrated cause for counsel's failure to object, nor shown actual prejudice resulting from the violation, his claim for review should be barred. In denying defendant's petition, the Court refused to inquire as to why counsel failed to object. *Sykes*, 433 U.S. at 86-87; *see also* Engle v. Isaac, 456 U.S. 107, 134 (1982) (no guarantee that defense counsel will raise every conceivable claim).

23. In United States v. Frady, 456 U.S. 152, 170 (1982), counsel failed to object to a charge that improperly shifted the burden of proof to the defendant on the issue of malice. Despite the constitutional error resulting from counsel's ineffectiveness, the Court concluded "that the strong uncontradicted evidence of malice in the record, coupled with Frady's utter failure to come forward with a colorable claim that he acted without malice, disposed of his contention that he suffered such actual prejudice." *Id.* at 172.

24. *Sykes*, 433 U.S. at 83, 88.

25. *See* Mounts, *supra* note 2, at 231-32.

26. The Court stated that "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Cronic*, 466 U.S. at 658.

twenty-five days for pretrial preparation in a case of some complexity. By comparison, the government, represented by experienced criminal lawyers, had over four and one-half years to review thousands of documents relevant to the bringing of criminal charges.[27] By any objective yardstick, this system of assignment resulted in the constructive denial of counsel. Nonetheless, the Court insisted "on an evaluation of [counsel's] actual performance."[28] According to the Court, no justification existed to conclude that the defendant was constructively denied the right to counsel absent proof "that counsel was unable to discharge his duties."[29]

In *Strickland*, the Court expressly held that the principles governing review on direct appeal of ineffective assistance claims applied equally to collateral review of criminal convictions. The Court found that the standard of review of ineffectiveness is one of "fundamental fairness of the proceeding whose result is challenged," and that standard is the "central concern of the writ of habeas corpus."[30] Moreover, the purpose of the sixth amendment guarantee, as understood by the Court, "is simply to ensure that criminal defendants receive a fair trial."[31] It "is *not to improve the quality of legal representation*."[32] Lack of compensation, supportive services, and similar issues are all properly considered by the organized bar, the entity traditionally charged with the maintenance of standards. The Court's concerns were expressed in the following terms:

> The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions.[33]

Wilson maintains that challenges to the delivery of defense services need not be "constrained by an examination of actual performance,"[34] even though the Burger Court's sixth amendment jurisprudence focuses entirely upon the reasonableness of the attorney's "particular act or omission" and the resulting prejudice to the defendant, assuming that the lawyer's performance was unreasonable.[35] Wilson acknowledges concern about the jurisdictional basis for federal relief, given the Court's restrictive rulings in *Cronic* and *Strickland*. He contends, nonetheless, that a lawsuit raising federal claims derived from sys-

27. *Id.* at 649, 663.
28. *Id.* at 665.
29. *Id.* at 658.
30. *Strickland*, 466 U.S. at 697.
31. *Id.* at 689.
32. *Id.* (emphasis added). The Court indicated, however, that improving legal representation, although not of constitutional concern, is a goal of considerable importance to our legal system.
33. *Id.* at 688 (citing Michel v. Louisiana, 350 U.S. 91, 100-01 (1955)).
34. Wilson, *supra* note 1, at 218.
35. *Strickland*, 466 U.S. at 687-89, 691-92.

temic inadequacies in the delivery of defense services can be pursued. The importance of federal claims, according to Wilson, "arises not so much from an endorsement *of* them as from historical reliance *on* them."[36]

While Wilson contends that a sixth amendment claim of ineffective assistance is the "most frequently invoked federal constitutional provision in suits challenging the adequacy of defense systems," he also recommends pursuit of equal protection and due process claims, argued on behalf of the defense attorney and related to inequities in the system of compensation.[37] Such a claim, of course, directly confronts the tradition of *pro bono* representation which courts have steadfastly maintained is the justification for undercompensation, even at the expense of a particular group of lawyers.[38] Most states provide statutory compensation which is unequal to the fees afforded attorneys in private cases.[39] Courts have continuously held that these statutory rates serve merely to "ease the burden" of the court appointed attorneys. The assumption is, albeit without a demonstrated factual basis, that the lawyers who participate do so "in the highest traditions of the profession."[40] The *quid pro quo* for the license to practice law, it is argued, obligates attorneys, as officers of the court, to provide free representation to indigent defendants. Hence, federal and state courts have held that an attorney who volunteers to provide such services, or who is conscripted to do so, cannot contend that the provision of these services involves a taking of property in violation of the constitution.[41]

In addition, Wilson contends that lawsuits based on alternative "state grounds" present a "viable way" to avoid entirely the "risk" inherent in federal litigation.[42] Following the tone of some familiar critics of the Burger Court, Wilson emphasizes that state courts are not bound to interpret analagous provisions of state constitutions in a manner consistent with the Court's sixth amendment pronouncements.[43] His article recognizes that under differing separation of power theories, the state judiciary may exercise their supervisory powers and preclude practices detrimental to effective

36. *See* Wilson, *supra* note 1, at 216.

37. *Id.* at 216.

38. See United States v. Dillon, 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966), where the court held that undercompensation did not involve a taking of property without due process of law. Contrary to the arguments advanced by Wilson and Mounts, *Dillon*, although decided in 1965, has been continuously followed by the majority of state and federal courts to date. *See, e.g.*, Williamson v. Vardeman, 674 F.2d 1211, 1214-15 (8th Cir. 1982) and cases cited therein.

39. For an overview of assigned counsel fees in the fifty states, see NEW YORK STATE DEFENDERS ASSOCIATION, ASSIGNED COUNSEL FEES IN NEW YORK STATE: TIME FOR A CHANGE app. B (Mar. 1985); *see also* ALTMAN & WEIL, INC., THE 1984 SURVEY OF LAW ECONOMICS 3 (1984) (table comparing hourly billing rates for attorneys in northeastern United States); N. LEFSTEIN, *supra* note 11, at Appendix B (D1-D104).

40. Matter of Werfel v. Argesta, 36 N.Y.2d 624, 626-27, 331 N.E.2d 668, 669, 370 N.Y.S.2d 881, 882 (1975).

41. *Dillon*, 346 U.S. at 635, 636-38.

42. Wilson, *supra* note 1, at 211.

43. *Id.* at 211 & n.48.

assistance.[44]

While all this may be true, doctrinal constraints alone are insufficient reason to recommend state courts as a jurisdictional alternative for systemic reform. The state judiciary has countenanced the very systemic abuses which form the basis of the author's complaint.[45] The state judiciary's attitude toward systemic inadequacies is exemplified in the replacement of court appointed attorneys at different stages of a criminal case.[46] To process large numbers of criminal defendants expeditiously, some state courts have insisted that a court appointed attorney be assigned to each successive courtroom in which cases are assigned to represent all the indigent defendants appearing on the day's calendar. This arrangement avoids the "down time" expended in waiting for the same attorney who was appointed at a defendant's initial court appearance to appear on any subsequent occasion. This arrangement also reduces the cost of indigent representation by limiting the number of attorneys needed to staff the court parts.[47] Unfortunately, such a system of replacement seriously hampers the ability to provide effective assistance because no attorney assumes principal responsibility for case preparation and interviewing and counseling. Such a system, in which a defendant is represented by different court appointed attorneys at each stage of the case—from initial appearance to indictment to trial—effectively "wall[s] off" the defendant from "any genuine assistance by a facade of 'representation.' "[48]

To plausibly anticipate, as Wilson contends, that state courts are now prepared to declare unlawful such practices as "replacement" implies that the state judiciary is willing to disregard what is perceived as their own self-interest. State courts located in large urban settings are often inundated with cases that, if not disposed of at the initial court appearance or within a brief period thereafter, will quickly result in calendar backlog and overcrowding of pre-

44. *Id.* at 208-09, 214-15.

45. Mounts & Wilson, *supra* note 3, at 200 n.36. For a discussion of the failure of states to provide adequate resources for the appointed lawyer system, see N. LEFSTEIN, *supra* note 11, at 7-24.

46. For a general discussion of this problem, see Gilboy & Schmidt, *Replacing Lawyers: A Case Study of the Sequential Representation of Criminal Defendants*, 70 J. CRIM. L. & CRIMINOLOGY 1 (1979).

47. *Id.* at 7; see also H. TWEED, THE LEGAL AID SOCIETY: NEW YORK CITY, 1871-1951, at 82-90, where the author chronicles the history of the Society's accomodation to the demands of New York City courts, which resulted in the adoption of "stage" representation. In the 1970s, the Society discarded "stage," or "horizontal," representation and replaced it with "vertical" representation aimed at providing continuity of representation from initial appearance through disposition. The Society's efforts in this regard have been hampered by the recent adoption of a "catcher" system. This system, which I observed in criminal court and state supreme court in 1984-85, enables the Society to utilize a single attorney to cover daily court appearances when the initially assigned counsel is detained elsewhere. Unfortunately, "catchers" are often asked to undertake substantial tasks which impact on the outcome of the case, including representing defendants during a guilty plea, when the catcher is unfamiliar with either the defendant or the facts and circumstances of the case.

48. United States *ex rel.* Thomas v. Zelker, 332 F. Supp. 595, 599 (1971); *see* Gilboy & Schmidt, *supra* note 46, at 1-3 and authorities cited therein.

trial detention facilities. State court judges perceive their role as controlling and reducing case backlog, and employing such practices as replacement and assembly line plea bargaining, in the disposition of large numbers of criminal cases.[49] State courts may encourage decisions by uninformed attorneys without adequate knowledge of the legal and factual implications of their acts in order to achieve a disposition rate considered compatible with calendar control.[50] Some courts, as evidenced in the examples contained in Wilson's article, may be willing to invalidate practices clearly detrimental to "reasonably competent" representation.[51] Given the interests of state courts in maintaining the status quo, I question whether state courts, in general, will accede to Wilson's concerns and enable a concerted strategy for reform to emerge.

II
SYSTEMIC FAILURES

In analyzing the reasons for widespread failure in the delivery of defense services, Wilson and Mounts focus upon systemic inadequacies that purportedly could be remedied through judicial intervention. The case for systemic change is juxtaposed with the plight of defenders, who are portrayed as toiling under systemic conditions that hinder any lawyer's ability to render competent representation.[52] I agree that increased compensation and better working conditions would ameliorate the plight of competent and dedicated attorneys who perform under adverse conditions. I am troubled, however, by the authors' failure to recognize that ineffective assistance often results principally from the personal and professional failings of many court appointed attorneys.[53]

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49. For example, in 1984, the initial Criminal Court of the City of New York (lower court) disposed of 244,380 cases. In order to dispose of such a large number of cases, the court relied on the complicity of the defense system, which remained underfunded and unable to fully litigate each of the cases processed. To achieve expeditious calendar control, the court tried only 0.5% of all docketed dispositions (n=1,193), while the average life span of an individual case (arraignment to disposition) was between three and four appearance dates. Furthermore, to ensure the immediate reduction of calendar backlog, the court, at the initial appearance, summarily disposed of 39% (n =92,265) of all the arraignment dockets (n=237,463). *See* Office of Court Administration—Criminal Court of the City of New York, Caseload Activity Report—Arrest Cases (1984).

50. *See* Alschuler, *Personal Failure, Institutional Failure, and the Sixth Amendment*, 14 N.Y.U. REV. L. & SOC. CHANGE 149, 153 (1986) [hereinafter cited as Alschuler, *Personal Failure*]; Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1269 (1975) [hereinafter cited as Alschuler, *Plea Bargaining*]; Schulhofer, *Effective Assistance on the Assembly Line*, 14 N.Y.U. REV. L. & SOC. CHANGE 137, 142-43 (1986). *See generally* Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984).

51. Wilson, *supra* note 1, at 214-15.

52. Mounts & Wilson, *supra* note 3, at 193-95.

53. Over the past decade, as a clinician, I have represented indigent criminal defendants and supervised students in this endeavor. Recently, as a researcher for The Center for Crime and Justice, New York University School of Law, along with Professor Michael McConville, I have observed court appointed attorneys representing the poor in the New York City criminal courts. In both experiences, as a participant and as an observer, I have witnessed countless instances in which attorneys for the poor fail to engage in the basic lawyering tasks of interview-

Although the Supreme Court in *Strickland* assumed that the profession would maintain standards to qualify attorneys available for court appointment, the organized bar has only recently begun to address the problem, and few efforts have been undertaken to certify counsel as eligible for court assignment.[54] Some jurisdictions have adopted quantitative criteria which require attorneys seeking to represent indigent defendants to demonstrate familiarity with the practice of criminal law.[55] Lacking, however, has been a uniform set of qualitative standards which test the willingness and capacity of those available for service to provide "reasonably competent" representation. Simulation and training in interpersonal skills, useful in any analysis of competency, are not considered in most eligibility determinations.[56]

Moreover, as the authors note, court appointed counsel are often selected because they are thought to be malleable to systemic pressures and willing to participate in the assembly line processing of large numbers of cases.[57] Attorneys who substitute for one another at each stage of the case, as noted earlier, enable ill-defined defense systems to reduce the delay resulting from continuity of representation.[58] Although such "stage" representation has an invidious effect on any attempt to establish an attorney-client relationship, and raises serious questions regarding the degree to which court appointed attorneys provide "zealous" representation, the practice is quite common.[59]

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ing, counseling, and case preparation. Although workload is often described as the principle reason for these shortcomings, my observations have revealed that personal shortcomings of attorneys, including inadequate training, poor motivation, class and racial biases, and stereotyping, are often the root causes of these failures.

For additional discussion of the personal and professional failings, including emotional instability, of lawyers, see McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME LAW. 67, 99 (1984).

54. See Burger, *supra* note 11, at 238 (quoting Robert B. McKay, Former Dean of New York University Law School and current President of the Association of the Bar of the City of New York, who stated that the legal profession has "marched up the hill of specialist certification only to march right down again in the face of opposition from practitioners not discontent with the absence of regulation").

55. Wilson, *supra* note 1, at 218 n.100; see N.Y. SUP. CT., RULES TO IMPLEMENT A CRIMINAL COURTS PANEL PLAN, PART 612, § 612.3, (App. Div. 1980); *New Admission Rules Proposed for Federal District Courts*, 61 A.B.A.J. 945 (1975); *Standards for Specialization Announced*, 48 CAL. ST. B. J. 80, 80-83 (1973), which discusses the requirement for the Criminal Law specialty developed by The California Board of Legal Specialization under California's Pilot Program in Legal Specialization.

56. For a discussion of the problem of attorney qualifications and inadequate advocacy by attorneys, see Burger, *supra* note 11, at 231-33.

57. Mounts & Wilson, *supra* note 3, at 200 n.36.

58. *See supra* text accompanying notes 46-48.

59. See also Morris v. Slappy, 461 U.S. 1 (1983), where the Supreme Court approved the substitution of one public defender for another, on the eve of trial and over the defendant's objection. According to the Court, since the substitute attorney was capable of participating in the adversarial testing process at the trial stage, no sixth amendment violation had occurred. More astonishing was the Court's statement that the sixth amendment does not contemplate the provision of a "meaningful attorney-client relationship." *Id.* at 13-14. But see MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981), which states that a lawyer should represent a client zealously within the bounds of the law. *See generally* Gilboy & Schmidt, *supra* note 46.

Most court appointed lawyers are probably competent enough to participate in the adversarial testing process envisioned in *Cronic* and *Strickland*. Nevertheless, as Professor Alschuler has demonstrated, criminal cases are most often resolved through guilty pleas involving lawyering tasks ordinarily beyond the scrutiny of courts.[60] A lawyer's ability to counsel effectively and negotiate may depend on humanistic training and interpersonal skills that law schools and attorneys have traditionally failed to embrace.[61] Furthermore, the process of selection of court appointed attorneys has not been based upon a demonstrated capacity to engage in the non-adversarial resolution of criminal cases.[62] No effort has been made to determine whether an attorney's lack of sensitivity to racial and socioeconomic differences will result in the stereotyping of defendants and block an attorney's ability to effectively negotiate.[63] Certainly, no thorough analysis has been undertaken to determine whether attorneys available for assignment are comfortable counseling those accused of criminal behavior and are able to impart adequate advice regarding a course of action.[64]

Improved compensation, supportive services, and better defined defense systems are unlikely to alter the behavior of court appointed attorneys who exhibit insensitivity to the needs of the poor and are unable to engage in the tasks of effective advocacy. Some defendants may benefit from the provision of enhanced resources, if the court appointed counsel is willing and qualified to utilize them to undertake an investigation or to consider diversion from the adjudicatory process. Attorneys who are impervious to the concerns of their clients, however, will forego the opportunity and perform poorly, regardless of the available resources.

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60. *See* Alschuler, *Personal Failure, supra* note 50, at 152-56; Alschuler, *Plea Bargaining, supra* note 50, at 1269.

61. See Redmount, *Attorney Personalities and Some Psychological Aspects of Legal Consultation*, 109 U. PA. L. REV. 972, 973 (1960-61), where the author recognizes that "[t]he sharp and discriminatory influences of personality are keenly felt in the adjustive process of law: litigation, negotiation, conciliation and counseling." In light of this, he states that "[i]t is curious that the impact of the attorney's personality is ignored in the common view of legal services." *Id.* at 978; *see also* Goodpaster, *The Human Arts of Lawyering: Interviewing and Counseling*, 27 J. LEGAL EDUC. 5, 16 (1975-76); Griswold, *Law Schools and Human Relations*, 1955 WASH. U. L.Q. 217, 222.

62. Burger, *supra* note 11, at 236 n.18.

63. For an interesting discussion on the impact of stereotyping on the ability to think creatively, see J. ADAMS, CONCEPTUAL BLOCKBUSTING, A GUIDE TO BETTER IDEAS 13-21 (2d ed. 1979).

64. See Kelso & Kelso, *Conflict, Emotion and Legal Ethics*, 10 PAC. L.J. 69, 76-79 (1978), where the authors discuss the psychological problems a lawyer has in representing a criminal defendant whom the lawyer believes is guilty: "A lawyer is pulled toward representation by the feeling that a client 'deserves' to be represented, even if he is morally blameworthy in some way. Simultaneously, the lawyer is pulled away from representation by the force of lifelong values associated with telling the truth and seeing that guilty people do not escape appropriate punishment."

CONCLUSION

To conclude, as Wilson and Mounts have, that the judiciary holds the key to enforcement of the constitutional right to counsel through post-conviction relief, the appointment of a master, and injunctive or declaratory relief, assumes that lawyers will be willing to undertake tasks they may, in fact, be unsuited to perform. Even if the judiciary were willing to intervene in the manner suggested by the authors, which I seriously question, improvement in the delivery of defense services will not occur until the profession, through legal education and the process of certification, is able to provide some assurance that lawyers assigned to represent the poor are truly qualified for this purpose. Once the issue of attorney qualification is properly addressed, I would have greater confidence that reform of inadequate defense systems will appreciably improve the lot of those defendants unable to afford the services of an attorney.