THE RIGHT TO EFFECTIVE COUNSEL AND NEW YORK CITY LEGAL AID

In an age of rising crime and arrest rates,[1] the criminal justice system in the United States is being buried under an ever increasing burden of numbers.[2] At the same time, the legal profession is being challenged to provide representation for those indigents to whom the Supreme Court has recently extended the right to appointed counsel.[3] This extension, coupled with the increasingly large proportion of criminal defendants who are indigent,[4] has given rise to the proliferation of various systems and organizations whose purpose is to provide defense for those who cannot afford retained counsel.[5]

This paper will demonstrate that there is, in fact, a constitutional right to the effective assistance of counsel. It will also derive an identifiable judicial standard by which the effectiveness of counsel may be measured. The day to day operation of the Legal Aid Society of New York City, a defender organization whose purpose it is to provide counsel for the indigent,[6] will be evaluated on the basis of this judicial standard. The study will focus on the New York City Criminal Courts, where both misdemeanants and

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1. See FBI, Uniform Crime Reports (1969).

2. See President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967).

3. Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938).

4. It has been estimated that fully 60% of those charged with crime cannot afford to employ counsel. E. Brownell, Legal Aid in the United States 83 (1951); H. Tweed, The Legal Aid Society New York City 1876-1951 87, 99 (1954).

5. For a discussion of the various classifications of defender systems and their relative merits, see A Special Committee of the Association of the Bar of the City of New York and The National Legal Aid and Defender Association, Equal Justice for the Accused (1959) [hereinafter Equal Justice].

6. For general history see E. Brownell, supra note 4; 1 L. Silverstein, Defense of the Poor in Criminal Cases in American State Courts (1965); H. Tweed, supra note 4; N. Fabricant, The Legal Aid Society's Criminal Courts Branch, 44 Legal Aid Rev. 3 (Oct. 1946); R. Patterson, A Brief History of the Legal Aid Society, 65 Legal Aid Rev. 27 (1968-69).

assigned counsel.[7]

I. The Right to Counsel

The right to counsel is grounded in the very nature of the adversary system of justice, and counsel's presence is the hallmark of that system.[8] The assumption upon which the adversary system rests is that the litigant most interested in the proceeding will most effectively seek, discover and present the evidence which will strengthen his case and weaken his opponent's. As a result, the truth will emerge through the impartial tribunal charged with making the decision.[9]

In the age of complex criminal codes and procedures it is obviously essential for the criminal defendant to be represented by counsel if this assumption is to be vindicated.[10] The Supreme Court has observed:

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7. People v. Letterio, 16 N.Y.2d 307, 213 N.E.2d 670, 266 N.Y.S.2d 368 (1965), cert. denied, 384 U.S. 911 (1966); People v. Witenski, 15 N.Y.2d 392, 207 N.E.2d 358, 259 N.Y.S.2d 413 (1965); N.Y. Code Crim. Proc. §§ 308, 699 (McKinney Supp. 1970); N.Y. County Law §§ 716-721, 943 (McKinney Supp. 1970). The Supreme Court has left it unclear whether there is a constitutional requirement that all indigent misdemeanants be provided counsel. In Patterson v. Warden, 372 U.S. 776 (1963), vacating mem. 227 Md. 194, 175 A.2d 746 (1961), the Court held that counsel was required where the misdemeanant could be punished by a felony-length term of imprisonment. The court has subsequently denied certiorari in several cases in which state courts have refused to appoint counsel to defend indigent misdemeanants; e.g., Winters v. Beck, 239 Ark. 1151, 397 S.W.2d 364 (1966), cert. denied, 385 U.S. 907 (1966).

8. See Equal Justice at 36-37. The Constitution recognizes the pivotal position of counsel in the adversary system in the sixth amendment: "In all criminal prosecutions the accused shall enjoy the right... to have the Assistance of Counsel for his defense."

9. Id. at 36.

10. Id. at 36.

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[11]

In a proceeding in which the prosecutorial apparatus of the criminal justice system operates against a defendant without counsel, the adversary system is caused to operate at odds with the very principle upon which it rests.[12]

In 1938 the Supreme Court held that the "Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel",[13] and that a criminal defendant in federal prosecutions is constitutionally guaranteed assigned counsel if he cannot afford to hire his own. The Court extended this rule to state prosecutions in 1963.[14] In holding that the sixth amendment is made obligatory on the states by the fourteenth amendment, the Court overruled Betts v. Brady[15] which up to that time had been the controlling case in right to counsel litigation involving state proceedings.

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11. Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

12. See The National Defender Project, The National Legal Aid and Defender Association, Report of the Proceedings of the National Defender Conference, Washington, D.C. May 14-16. 1969.

13. Johnson v. Zerbst, 304 U.S. 458, 467 (1938).

14. Gideon v. Wainwright, 372 U.S. 335 (1963).

15. 316 U.S. 455 (1942).

The Betts "special circumstances" test originated in a right to counsel inquiry under the Due Process Clause of the fourteenth amendment. The Court held that the sixth amendment applied only to trials in the federal courts,[16] but asserted that state defendants might enforce their right to counsel under the Due Process Clause of the fourteenth amendment.

The Betts Court said that "a denial by a State of the rights or privileges specifically embodied in [the sixth] and others of the first eight amendments may, in certain circumstances or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth."[17]

Since Gideon v. Wainwright,[18] the Court has adopted a "critical stage" test in dealing with the right to counsel in state criminal proceedings.[19] The "critical stage" test

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16. Id. at 461.

17. Id. at 462 (emphasis added). Examples of right to counsel cases, decided under the "special circumstances" test are: Crooker v. California, 357 U.S. 433 (1958); Moore v. Michigan, 355 U.S. 155 (1957); Townsend v. Burke, 334 U.S. 736 (1948). The difference between the sixth amendment and due process approaches is nowhere more clearly delineated than in the Betts opinion:

> Due process of law is secured against invasion by the Federal Government by the Fifth Amendment, and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of the facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in light of other considerations fall short of such a denial. 316 U.S. at 462.

18. 372 U.S. 335 (1963).

19. The phrase "critical stage" was used prior to Gideon in Hamilton v. Alabama, 368 U.S. 52 (1961).

can be viewed as a different form of the due process test[20] with the innovation that counsel is required by the Court at the "critical stage" in all states and at all times rather than being required only in the particular circumstances under consideration. Analysis of the purpose of the "critical stage" test discloses important implications concerning the Supreme Court's concept of the role of counsel in the criminal justice system.

The sixth amendment preserves the accused's right to counsel in "criminal prosecutions". Until recently, it was generally thought that the words "criminal prosecutions" referred only to those stages of the criminal process in which the defendant appeared in court, and, therefore, that those were the only stages in which the right to counsel was constitutionally protected.[21] The "critical stage" test has been utilized by the Court to eliminate this concept. The Court has stated[22] that the "critical stage" test adapts the sixth amendment concept of "criminal prosecutions" to fit the modern criminal justice system:

> When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witness against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings.[23]

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20. See Escobedo v. Illinois, 378 U.S. 478 (1964).

21. See Steele, The Doctrine of Right to Counsel: Its Impact on the Administration of Criminal Justice and the Legal Profession, 23 Sw. L.J. 488 (1969).

22. United States v. Wade, 388 U.S. 218 (1967).

23. Id. at 224. Cases which have extended the right to Counsel to non-trial stages are: Miranda v. Arizona, 384 U.S. 436 (1966) (Custodial interrogation); United States v. Wade, 388 U.S. 218 (1967) (Identification Line-ups); White v. Maryland, 373 U.S. 59 (1963) (Preliminary hearing - arraingment where waiver of rights or serious incrimination is possible); Doughty v. Maxwell, 376 U.S. 202 (1964), rev'g. mem. 175 Ohio St. 46, 191 N.E.2d 727 (1963) (Guilty Plea); Mempa v. Rhay, 389 U.S. 128 (1967) (State probation revocation hearing); Douglas v. California, 372 U.S. 353 (1963) and Anders v. California, 386 U.S. 738 (1967) (Appeal as of right).

While the purpose of the test is thus clear, its precise definition is not.

Though Wade does not expound an all-inclusive definition of what constitutes a "critical stage," the Court emphasized that the inherent "dangers" in a pre-trial line-up are what make it a critical stage.[24] More definite language can be found in the later case, Mempa v. Rhay.[25] Mempa held that the right to counsel is required in a state probation revocation proceeding, thus designating it a "critical stage." The Court in that case also set forth possibly its clearest definition of "critical stage" to date, stating that "appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected."[26] A "critical stage" is one at which there exist "dangers" to substantial rights of the accused.[27]

The Court, in these cases, is utilizing the "critical stage" test to protect the integrity of the adversary system itself. The determination that a particular stage is "critical" indicates that the accused has substantial rights which may be affected by the particular confrontation between the accused and the criminal justice apparatus.[28] The adversary system is in operation; the right to counsel is

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24. 388 U.S. at 228. ("A confrontation compelled by the state between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial.").

25. 389 U.S. 128 (1967).

26. Id. at 134.

27. An example of the kind of right of the accused deemed worthy of protection under the "critical stage" test can be seen in Miranda v. Arizona, 384 U.S. 436 (1966). The Court held that "custodial interrogation" by law enforcement personnel constituted a "critical stage" of a criminal proceeding, fearing the dangers to fifth amendment rights inherent in police interrogations.

28. United States v. Wade, 338 U.S. 218, 224 (1967). There are certain pretrial proceedings "where the results might well settle the accused's fate and reduce the trial itself to a mere formality."

necessary to insure that the prosecution gains no unfair advantage.[29] Counsel is, therefore, the insurer of fairness and genuine adversariness at various stages of criminal proceedings.[30] The implication is, necessarily, that there are acts which counsel can perform that ordinary laymen cannot. It is submitted that how well counsel performs those acts is the determinative factor in whether the Supreme Court's concern with preserving the integrity of the adversary system is to be vindicated. To determine how well counsel performs his role in the adversary system is to determine his effectiveness.

II. Effectiveness of Counsel

A. Origin and Development of the Right

With the mandate of Gideon v. Wainwright,[31] and the advent of various defender systems to handle the large numbers

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29. United States v. Wade, 388 U.S. 218, 226-27 (1967)

> [I]n addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial ... The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution.

30. Consistent with this approach, the Court, in Douglas v. California, 372 U.S. 353 (1963), extended the right to counsel by means of the equal protection clause of the fourteenth amendment. The Court held that the California rule, requiring an indigent appealing as of right to submit his appeal to a preliminary appellate court determination on the record whether counsel would be helpful before counsel could be appointed, drew an "unconstitutional line ... between rich and poor." (Id. at 357). At least part of the Court's concern, however, is with the possible derogation of the indigent's right to a full and fair hearing on appeal occasioned by the absence of counsel. The Court noted that on the preliminary determination, " only the barren record speaks for the indigent" (Id. at 356) and concluded that the preliminary determination on the merits thereby reduce the indigents appeal to a "meaningless ritual" (Id. at 358). It seems clear from the Court's language, that the real concern involved is the integrity of the adversary nature of the appeal proceeding.

31. 372 U.S. 335 (1963).

of indigent defendants,[32] has come a broadly based concern whether these defendants are in fact receiving effective representation.[33] Increasing numbers of claims of ineffective assistance of counsel are being made every year in petitions for post-conviction relief reflecting a belief by defendants that the quality of representation is below that to which they are entitled.[34]

The constitutional right to effective assistance of counsel, now "inextricably imbedded in the decisional law"[35] has its origin in Justice Sutherland's opinion in Powell v. Alabama.[36] In Powell, the Court held that where the trial court appointed the entire country bar to represent the defendants at arraignment, and where the defendants were tried and convicted of rape within seven days of their arrest, the Due Process Clause of the fourteenth amendment was violated. The failure of the trial court to give the defendants reasonable time and opportunity to secure counsel, and its failure to make an effective appointment of counsel each constituted a violation of due process.[37] More broadly, the Court held thqt in certain cases, there is a duty to assign counsel to a defendant, and "that duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."[38] Thus, the criminal defendant, where he is entitled to counsel, deserves not only counsel's bare presence at the proceeding, but also counsel's "effective aid" in his defense. Most courts have interpreted Powell to mean just that.[39]

Some appellate courts have viewed Powell narrowly and some confusion has resulted over whether the right to

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32. E. Brownell, supra note 4.

33. See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 59-64 (1967).

34. Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases, 59 Nw. U.L. Rev. 289-92 (1964).

35. Id. at 293.

36. 287 U.S. 45 (1932).

37. Id. at 71.

38. Id. at 71 (emphasis added).

39. Waltz, supra note 34, at 295, cites several cases as examples.

effective assistance of counsel is substantive or merely procedural.[40] Perhaps the leading opinion narrowly interpreting Powell is that of Judge Prettyman in Mitchell v. United States.[41] In considering the scope of the right to effective assistance, Judge Prettyman asserted that the right does not apply to the quality of service rendered by counsel but that all that is necessary is an effective appointment by the court.[42] Some commentators have suggested that this is a myopic view of Powell.[43] Not only does it ignore the plain meaning of the words "effective aid,"[44] it also ignores the numerous references of the Powell Court to the role of counsel in criminal defense and counsel's duties within that role. The Powell Court specifically noted that the defendants had not had the aid of counsel between arraignment and trial, a time when "consultation, thoroughgoing investigation and preparation were vitally important."[45] The Court also reasoned that the trial judge could not adequately safeguard the defendant's rights: "He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."[46] It is clear that the Court in Powell views counsel as having a specific set of functions in criminal defense, among them consultation with his client, investigation and preparation of a defense and advice as to its conduct. It is quite evident that counsel can be "effectively appointed" as a procedural formality and yet perform none of the functions described by the Court.

Additional reinforcement is given to the proposition that there is a right to "effective assistance," as distinguished from an "effective appointment" by several

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40. See Comment, Effective Representation - An Evasive Substantive Notion Masquerading as Procedure, 39 Wash. L. Rev. 819-23 (1964).

41. 259 F.2d 787 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958); accord, Miller v. Hudspeth, 176 F.2d 111 (10th Cir. 1949); State v. Bentley, 46 N.J. Super. 193, 134 A.2d 445 (1957).

42. 259 F.2d at 790.

43. See Waltz, supra note 34, at 293-95; Comment, supra note 40, at 822-23.

44. Powell v. Alabama, 287 U.S. 45, 71 (1932).

45. Id. at 57.

46. Id. at 61.

Supreme Court cases subsequent to Powell.[47] There is, therefore, definitely a constitutional right to the effective assistance of counsel which requires a certain quality of representation independent of the "mere formal appointment"[48] of counsel, and most courts have reached this conclusion.[49]

B. Judicial Standards for Determining Whether Effective Assistance of Counsel Has Been Rendered

1. Judicial Distaste for Claims of Ineffectiveness

It is profitable to note that ineffectiveness cases can be categorized into two main groups: those which involve incompetence, or other shortcomings on the part of

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47. Avery v. Alabama, 308 U.S. 444, 446 (1940). ("...denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that the accused be given the assistance of counsel."); Glasser v. United States, 315 U.S. 60, 76 (1942) (Possible conflict of interest occasioned by the appointment of the same counsel to represent two co-defendants having inconsistent defenses "denied Glasser his right to have the effective assistance of counsel guaranteed by the Sixth Amendment."); White v. Ragen, 324, U.S. 760, 764 (1945) (Where petitioner's appointed counsel refused to do anything for petitioner unless he had some money, refused to call witnesses in his behalf, and pleaded him guilty after the court denied petitioner a continuance, petitioner presented a prima facie case for denial of his right to "the effective aid and assistance of counsel."); Hawk v. Olson, 326 U.S. 271, 278 (1945) (If petitioner's allegations that he was arragined and immediately tried without the opportunity to consult with counsel are true, no "effective assistance of counsel was furnished ...."); Michel v. Louisiana, 350 U.S. 91 (1955) (Court searched the record upon petitioner's allegation that his counsel had been incompetent and found there no evidence of incompetence); Chambers v. Maroney, 399 U.S. 42 (1970) (Court deferred to a circuit court of appeals finding that petitioner had not been prejudiced by his counsel's lack of preparation).

48. Avery v. Alabama, 308 U.S. 444, 446 (1940).

49. Waltz, supra note 34, at 295.

counsel,[50] and those which involve some sort of outside action, extrinsic to counsel's competence which causes ineffective representation.[51] With regard to the former, courts have been very reluctant to grant relief sometimes to the point of requiring the presence of some kind of judicial intervention or other outside factor contributing to ineffectiveness.[52]

Generally judicial determination of whether or not effective representation has been rendered takes the form of a due process inquiry. The applicable rules formulated by the courts to test whether due process has been violated have been broad and numerous.[53] Their broadness and varied character makes it nearly impossible to synthesize and state them as a test without relating them to the facts of the cases to which they have been applied.

Petitions for post-conviction relief often assert that counsel was incompetent. Claims of this type have taken many forms. For example, the petitioner may point to trial counsel's general lack of qualifications,[54] counsel's illness and age,[55] counsel's inexperience,[56] failure to call witnesses,[57] or failure to object to prejudicial and incompetent evidence.[58] It may be said generally that courts take

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50. E.g., Michel v. Louisiana, 350 U.S. 91 (1955); Kilgore v. United States, 323 F.2d 369 (8th Cir. 1963), cert. denied, 376 U.S. 922 (1964); United States ex rel. Feeley v. Ragen, 166 F.2d 976 (7th Cir. 1948); United States ex rel. Hall v. Ragen, 60 F.Supp. 820 (N.D. Ill. 1945); Hill v. Balcom, 213 Ga. 58, 96 S.E.2d 589 (1957).

51. E.g., Hawk v. Olson, 326 U.S. 271 (1945); Glasser v. United States, 315 U.S. 76 (1942); Beckett v. Hudspeth, 131 F.2d 195 (10th Cir. 1942); United States v. Vasilick, 206 F.Supp. 195 (M.D. Pa. 1962); State v. Weigand, 204 Kan. 666, 466 P.2d 331 (1970).

52. E.g., People v. Tomaselli, 7. N.Y.2d 350, 165 N.E.2d 551, 197 N.Y.S.2d 697 (1960).

53. Waltz, supra note 34, at 301.

54. E.g., United States ex rel. Hall v. Ragen, 60 F.Supp. 820 (N.D. Ill. 1945).

55. Michel v. Louisiana, 350 U.S. 91 (1955).

56. E.g., Achtien v. Dowd, 117 F.2d 989 (7th Cir. 1941).

57. E.g., MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), aff'd en banc, 289 F.2d 928 (5th Cir. 1961), cert. denied, 368 U.S. 877 (1961).

58. E.g., People v. Winchester, 352 Ill. 237, 185 N.E. 580 (1933).

a dim view of such claims. Some have even termed them "distasteful."[59] This attitude exists, in part, because an examination of counsel's competence is considered a subjective issue and trial tactics a matter of opinion.[60] No doubt the courts feel that many of these claims are made in desperation or as a game and are without merit as a general rule.[61] Some courts deplore what they feel to be unjustified abuse of appointed counsel[62], and fear that allowing claims of ineffectiveness will deter counsel from accepting appointments.[63] Some courts have expressed fear that a liberal rule will cause an overflow of claims of ineffectiveness,[64] or might open the door to unethical counsel to deliberately commit errors in order to get a new trial.[65] Perhaps the most distasteful aspect of these claims, however, is what the courts regard as the calling to trial of the trial counsel.[66] Judges are members of the bar as well as trial attorneys and the judge-lawyer may often see himself in the place of the trial attorney when considering claims of ineffective assistance.

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59. Garton v. State, 454 S.W.2d 522, 529 (Mo. 1970).

60. E.g., Cofield v. United States, 263 F.2d 686 (9th Cir.), vacated, 360 U.S. 472 (1959).

61. Jones v. Huff, 152 F.2d 14, 15-16 (D.C. Cir. 1945) ("[I]t is well known that the drafting of petitions for habeas corpus has become a game in many penal institutions and the opportunity to try an unsuccessful former lawyer has undoubted attraction to an unsuccessful prisoner.").

62. Henderson v. Cardwell, 426 F.2d 150, 153 (6th Cir. 1970) ("It is a peculiar quirk of the law that lawyers have a responsibility to accept appointments, often without compensation, to defend indigent defendants and that they then must be subjected to the most scurrilous abuse and charge of incompetency if they do not succeed in getting an acquittal of their client by appointment.").

63. Gray v. United States, 299 F.2d 467, 468 (D.C. Cir. 1962) ("The charge of ineffective assistance is so often leveled at appointed counsel by convicted defendants that many lawyers dislike to accept assignments in behalf of indigents.").

64. E.g., Mitchell v. United States, 259 F.2d 787 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958).

65. Norman v. United States, 100 F.2d 905, 907 (6th Cir.), cert. denied, 306 U.S. 660 (1939).

66. State v. Benson, 247 Iowa 406, 72 N.W.2d 438 (1955).

From an examination of the cases, it is clear that whatever the cause, the reluctance of the courts to entertain these claims has led to rules formulated in the most extremely abstract terms, making subsequent application a near impossibility. On the question of counsel's incompetence, several general rubrics have arisen within the context of the "fair trial" inquiry. Generally, courts are unwilling to "second guess" the trial attorney on matters of trial strategy or tactics.[67] As a general rule, mistakes of trial strategy or tactics, or counsel's carelessness or inexperience do not amount to ineffective assistance unless the trial as a whole is reduced to a "mockery of justice."[68] Variations of this test are that the trial must have been reduced to a "farce,"[69] a "travesty,"[70] a "shock to the conscience of the court,"[71] or a "sham."[72] Some courts have even gone so far as to intimate that counsel will not be deemed ineffective unless his representation is of such low

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67. United States v. Hammonds, 425 F.2d 597, 600-603 (D.C. Cir. 1970); United States ex rel. Weber v. Ragen, 176 F.2d 579, 585 (7th Cir.), cert. denied, 338 U.S. 809 (1949); and see United States v. Stoecker, 216 F.2d 51, 52 (7th Cir. 1954); Tompsett v. State, 146 F.2d 95 (6th Cir. 1944), cert. denied, 324 U.S. 369 (1945); People v. Williams, 19 Mich. App. 291, 172 N.W.2d 515 (1969).

68. United States v. Hammonds, 425 F.2d 597 (D.C. Cir. 1970); Frand v. United States, 301 F.2d 102 (10th Cir. 1962); Cofield v. United States, 263 F.2d 686 (9th Cir.), vacated on other grounds, 360 U.S. 472 (1959); Edwards v. United States, 256 F.2d 707, 708 (D.C. Cir.), cert. denied, 358 U.S. 857 (1958); United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950); Duarte v. Field, 297 F.Supp. 41, 43 (C.D. Cal. 1969); Diggs v. Welch, 148 F.2d 667, 668 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945); see also Jones v. Huff, 152 F.2d 14 (D.C. Cir. 1945).

69. United States ex rel. Feeley v. Ragen, 166 F.2d 976, 981 (7th Cir. 1948); Hinton v. Henry, 311 F.Supp. 652, 654 (E.D. N.C. 1969).

70. State v. Keller, 57 N.D. 645, 648, 223 N.W. 698, 700 (1929).

71. Rice v. Davis, 366 S.W.2d 153, 157 (Ky. App. 1963).

72. Hendricksen v. Overlade, 131 F.Supp. 561, 563 (N.D. Ind. 1955).

caliber as to amount to no representation at all.[73] The lack of manageability of such nebulous standards is quite evident. What constitutes a "farce" or a "sham" lies in the minds of the judges as they consider the peculiar facts of each case.

Some courts, taking a somewhat different tack, have announced the requirement that counsel's incompetence or ineffectiveness must be so obvious that it becomes the duty of the judge and prosecution to intervene to protect the defendant,[74] or that the ineffectiveness must actually be a product of some action on their part.[75] These courts seem taken by the notion that the only violations of due process forbidden by the fifth and fourteenth amendments are those which are effected by state action.[76] This view is derived from early cases recognizing the right to effective assistance. Many of these cases involved some action on the part

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73. Galloway v. Burke, 297 F.Supp. 624, 628 (E.D. Wis. 1969); Johns v. Smyth, 176 F.Supp. 949, 953 (E.D. Va. 1959); and see Lunce v. Dowd, 261 F.2d 351 (7th Cir. 1958); People v. Ney, 349 Ill. 172, 181 N.E. 595 (1932); McGee v. Crouse, 190 Kan. 615, 376 P.2d 792 (1962).

74. United States ex rel. Darcy v. Handy, 203 F.2d 407 (3d Cir.), cert. denied, sub nom., Maroney v. United States ex rel. Darcy, 346 U.S. 865 (1953); State v. Keller, 57 N.D. 645, 223 N.W. 698 (1929).

75. People v. Tomaselli, 7 N.Y.2d 350, 165 N.E.2d 551, 197 N.Y.S.2d 697 (1960).

76. This supposed requirement has also led some courts to conclude that incompetence or ineffectiveness of retained counsel is not remediable because retained counsel is not an officer of the state but an agent of the defendant. See Hendricksen v. Overlade, 131 F.Supp. 561 (N.D. Ind. 1955); Sayre v. Commonwealth, 194 Ky. 338, 238 S.W. 737 (1922); Rice v. Davis, 366 S.W.2d 153 (Ky. App. 1963). Fortunately, many courts have now begun to recognize that the law of agency is misapplied in this situation and that the crucial factor is the prejudice resulting from ineffectiveness, not whether counsel is retained or appointed. See United States ex rel. Maselli v. Reincke, 383 F.2d 129 (2d Cir. 1967); Berry v. Gray, 155 F.Supp. 494 (W.D. Ky. 1957).

of the court which deprived counsel of the opportunity to represent the defendant adequately.[77] This view ignores the presence of the requisite state action in the fact that the state penal machinery both convicts the defendant and subsequently incarcerates him.[78] It is clear that most courts have rejected the state action requirement.[79]

2. The Emerging Rule

To many courts, it has become increasingly obvious that the confusing assortment of rules and rubrics common to many ineffectiveness cases means merely that the petitioner has the heavy burden of proving that he did not receive a fair trial.[80] One court in tracing the history of the right to effective representation observed that "[i]t is quite apparent that the cases do not turn on the formal language used by a particular court to state the applicable rule."[81] Unfortunately, the court then stated, in a less formal but tautological fashion that the real question was "whether one who may well be an admittedly able lawyer did or did not render effective assistance in the defense of an accused under all the facts and circumstances of the particular case."[82]

Paradoxically, while many courts are moving toward more specific standards, they continue to articulate the "mockery" rule. The courts warn that effective assistance does not

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77. E.g., Powell v. Alabama, 287 U.S. 45 (1932).

78. Waltz, supra note 34, at 299-300.

79. E.g., United States ex rel. Maselli v. Reincke, 383 F.2d 129, 133 (2d Cir. 1967) ("While it is clear that certain acts of incompetency may occur in the presence of and be obvious to the trial court ... it is equally clear that many forms of ineffective assistance of counsel will not, as here, be readily apparent to the trial court."). New York is a notable exception. See note 75 supra.

80. United States v. Hammonds, 425 F.2d 597, 601 (D.C. Cir. 1970).

81. Goodwin v. Swenson, 287 F.Supp. 166, 183 (W.D. Mo. 1968).

82. Id. at 182. See United States ex rel. Mathis v. Rundle, 394 F.2d 748, 750 (3d Cir. 1968) ("[T]he criteria for measuring adequate representation have in the past often been articulated on a highly abstract plane, in conclusory language; and the rulings have been made on a case-by-case basis.").

mean successful assistance,[83] and that effective representation does not require perfection.[84] These signs of judicial reluctance to find ineffectiveness have been counterbalanced by positive recognition that the right has some substance. For example, it has been said that defendants' constitutional rights cannot be satisfied by a pro forma or token appearance by counsel.[85] Counsel is required to give complete loyalty and service in good faith to the best of his ability.[86] Mere perfunctory appearance for a defendant is not enough.[87] These positive pronouncements are postulated alongside the negative warnings and the courts have almost invariably gone on from there to examine counsel's behavior to determine whether the defendant has been prejudiced thereby, and in many cases, reversals result. In Achtien v. Dowd,[88] the court held that counsel's stipulation of incriminating facts without the permission of the defendant, coupled with the fact that counsel presented no evidence at all, denied the defendant due process. In Banks v. United States,[89] the defendant admitted purchasing and selling heroin on his attorney's advice that he had a perfect defense of entrapment. When counsel submitted no instruction on entrapment, the jury had no choice but to find the defendant guilty and the court of appeals reversed the conviction. In People v. Blevins,[90] the court held that where an inexperienced defense attorney was obviously overmatched by the prosecutor and failed to object to incompetent and highly prejudicial evidence, it was the duty of the trial court to exclude the

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83. United States v. Hammonds, 425 F.2d 597 (D.C. Cir. 1970); People v. Higginbotham 21 Mich. App. 489, 775 N.W.2d 557 (1970).

84. United States v. Dilella, 354 F.2d 584 (7th Cir. 1965); United States ex rel. Weber v. Ragen, 176 F.2d 579 (7th Cir.), cert. denied, 338 U.S. 809 (1949).

85. Avery v. Alabama, 308 U.S. 444, 446 (1940); Turner v. State, 303 F.2d 507, 511 (4th Cir. 1962) ("Pro forma entry of an appearance without study or preparation for useful participation in the trial is not a satisfaction of the constitutional rights of the accused."); and see People v. Chesser, 29 Cal.2d 815, 178 P.2d 761 (1947).

86. Williams v. Beto, 354 F.2d 698 (5th Cir. 1965); Johns v. Smyth, 176 F.Supp. 949 (E.D. Va. 1959).

87. United States v. Wight, 176 F.2d 376, 378 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950).

88. 117 F.2d 989 (7th Cir. 1941).

89. 249 F.2d 672 (9th Cir. 1957).

90. 251 Ill. 381, 96 N.E. 214 (1911).

evidence on its own. The conviction was reversed. These are only a few examples of many cases[91] in which the courts have examined counsel's behavior, and, finding substantial prejudice, have granted relief to the defendant, even where the behavior complained of would ordinarily be considered to be in the realm of trial tactics.

In an attempt to formulate more workable rules, some courts have recognized verbally what they have been practicing for some time; if the defendant can prove that some dereliction on the part of counsel has resulted in substantial prejudice at trial, he has been denied his right to effective assistance in violation of due process.[92] While this rule may not seem terribly clear or susceptible to prospective application, it properly recognizes resulting prejudice as the central factor in the effectiveness of counsel inquiry. The switch in focus from the attorney's competence, and the state action requirement to resulting prejudice has opened the way for courts to begin an examination of the elements of ineffectiveness and for specific standards to emerge. As a result, affirmative obligations on the part of defense counsel have clearly emerged.

C. Affirmative Duties of Counsel

1. Duty to Prepare and Investigate

Most courts have recognized that there is a distinction between incompetence and ineffective representation in a very particular sense. Mistakes in strategy and

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91. See also, United States v. Hammonds, 425 F.2d 597 (D.C. Cir. 1970) (Totality of omissions reflected a pro forma defense); People v. De Simone, 9 Ill.2d 522, 138 N.E.2d 556 (1956) (Counsel made several errors including eliciting prejudicial evidence on cross examination and from his own witnesses and failing to object to incriminating statements by co-defendant.); People v. Winchester, 352 Ill. 237, 185 N.E. 580 (1933) (Failure to object to incompetent evidence by inexperienced attorney); People v. Jones, 30 App. Div. 1038, 294 N.Y.S.2d 827 (1968) (Defense counsel brought out a large amount of prejudicial hearsay on cross examination). It should be noted that where there appear several factors indicating ineffectiveness, there is a greater chance of relief. See MacKenna v. Ellis, 280 F.2d 592, 603 (5th Cir. 1960), aff'd en banc, 289 F.2d 928 (5th Cir. 1961), cert. denied, 368 U.S. 877 (1961).

92. See, e.g., People v. Ibarra, 60 Cal.2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963).

trial tactics may be due to the incompetence of an attorney. On the other hand, they may be due to an attorney's neglect of his duty to prepare the case, including consultation with the defendant and thorough investigation of the facts and law involved.[93] While reluctant to review trial strategy, the courts have been quick to recognize that without consultation, investigation and preparation there is no strategy at all.[94] As a result, some courts have begun to recognize that counsel's performance is dependent upon his preparation,[95] and that counsel has an affirmative duty to prepare adequately.[96]

(a) Origins in Cases Involving State Action

Judicial recognition of the affirmative duty of counsel to prepare adequately has evolved out of cases where attorneys were denied the opportunity to give adequate

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93. See ABA Canons of Professional Ethics No. 5, 8; ABA Special Committee on Evaluation of Ethical Standards, Code of Professional Responsibility (Final Draft July 1, 1969), Canon 4, EC 4-1, Canon 6, EC 6-4, DR 6-101; ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty (Approved draft 1968), Part III, § 3.2 (b).

94. See, e.g., Brubaker v. Dickson, 310 F.2d 30, 39 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963). ("Appellant does not complain that after investigation and research trial counsel made decisions of tactics and strategy injurious to appellant's cause; the allegation is rather that trial counsel failed to prepare, and that appellant's defense was withheld not through deliberate though faulty judgment, but in default of knowledge that reasonable inquiry would have produced, and hence in default of any judgment at all." The court held for the appellant.).

95. E.g., Gueldner v. Heyd, 311 F.Supp. 1168, 1171 (E.D. La. 1970) ("It is axiomatic that effective presentation of a case before a jury is premised on diligent and adequate trial preparation.").

96. E.g., Braxton v. Peyton, 365 F.2d 563, 564 (4th Cir.), cert. denied, 385 U.S. 939 (1966) ("Courts have a duty of vigilance to assure that appointed counsel shall give proper professional service to their indigent clients...[T]he assigned lawyer should confer with the client without undue delay and as often as necessary, advise him of his rights, ascertain what defenses he may have, make appropriate investigations, and allow himself enough time for reflection and preparation for trial."). See also People v. Crawford, 16 Mich. App. 92, 167 N.W.2d 814 (1969).

representation by some kind of judicial action. In Powell v. Alabama,[97] a case of this kind, no one attorney was responsible for the case. The defendants were held to have been denied effective representation in the "critical period" between arraignment and trial when "consultation, thoroughgoing investigation and preparation were vitally important."[98] In Avery v. Alabama,[99] the Court held that the late appointment of counsel could be a "denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, [and] could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement than an accused be given the assistance of counsel."[100]

Courts have recognized that late appointment of counsel and denial of continuances[101] are clear examples of improper judicial action which denies counsel the time to effectively prepare a defense.[102] The date of appointment, however, is

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97. 287 U.S. 45 (1932).

98. Id. at 57.

99. 308 U.S. 444 (1940).

100. Id. at 446.

101. Joseph v. United States, 321 F.2d 710 (9th Cir. 1963), cert. denied, 375 U.S. 977 (1964).

102. E.g., Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968); Fields v. Peyton, 375 F.2d 624 (4th Cir. 1967); Martin v. State, 365 F.2d 549 (4th Cir. 1966); Egderton v. State, 315 F.2d 676 (4th Cir. 1963); United States ex rel. Tillery v. Cavell, 294 F.2d 12 (3d Cir. 1961), cert. denied, 370 U.S. 945 (1962); Spaulding v. United States, 279 F.2d 65 (9th Cir.), cert. denied, 364 U.S. 887 (1960); Ray v. United States, 697 F.2d 268 (8th Cir. 1952); United States v. Wight, 176 F.2d 376 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950); United States v. Bergamo, 154 F.2d 31 (3d Cir. 1946); Beckett v. Hudspeth, 131 F.2d 195 (10th Cir. 1942); Gueldner v. Heyd, 311 F.Supp. 589 (N.D. Tex. 1967); United States . Vasilick, 206 F.Supp. 195 (M.D. Pa. 1962); State v. Weigand, 204 Kan. 666, 466 P.2d 331 (1970); Ray v. State, 202 Kan. 144, 446 P.2d 762 (1968); Ford v. Peyton, 209 Va. 203, 163 S.E.2d 314 (1968).

not the controlling factor.[103] Nor is the amount of time spent in preparation.[104] Whether the time allowed is sufficient depends upon the nature of the charge, the issues presented, counsel's familiarity with the applicable law and pertinent facts, and the availability of material witnesses.[105] The defendant generally must prove that he was prejudiced by the late appointment.[106] The Third and Fourth Circuits have, significantly, liberalized their rules in the late appointment situation. They hold that late appointment of counsel creates a presumption that counsel's representation was ineffective, and shifts the burden of proof that the defendant was not prejudiced thereby to the state.[107]

(b) The Affirmative Duty

From the cases where trial court action results in lack of preparation, it is but a small step to judicial realization that counsel's lack of preparation is just as prejudicial, whatever the cause. This realization has nowhere been more aptly stated than by the court in Goodwin v. Swenson:[108]

> Cases involving instances of arbitrary action on the part of a trial court that preclude investigation and consultation present only a factual variation from the cases in which counsel for any reason fails adequately to prepare for trial.[109]

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103. United States ex rel. Tillery v. Cavell, 294 F.2d 12 (3d Cir. 1961), cert. denied, 370 U.S. 945 (1962); Gueldner v. Heyd, 311 F.Supp. 1168 (E.D. La. 1970).

104. United States v. Wight, 176 F.2d 376 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950).

105. Ray v. United States, 197 F.2d 268, 271 (8th Cir. 1952); United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950); United States v. Vasilick, 206 F.Supp. 195, 199 (M.D. Pa. 1962).

106. Spaulding v. United States, 279 F.2d 65 (9th Cir.), cert. denied, 364 U.S. 887 (1960).

107. United States ex rel. Mathis v. Rundle, 392 F.2d 748 (3d Cir. 1968); Fields v. Peyton, 375 F.2d 624 (4th Cir. 1967); Twiford v. Peyton, 372 F.2d 670 (4th Cir. 1967); Martin v. Virginia, 365 F.2d 549 (4th Cir. 1966).

108. 287 F.Supp. 166 (W.D. Mo. 1968).

109. Id. at 176 (emphasis added).

Many courts, in accordance with this view, have evolved an affirmative requirement that counsel must prepare adequately for trial and have stated that counsel has an affirmative duty to do so.[110] The Supreme Court itself has suggested that there is such a duty in Von Moltke v. Gillies.[111] "Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved...."[112]

Complementing counsel's duty to prepare, some courts have formulated the rule that where lack of preparation causes the substantial weakening of the defense,[113] or where a "crucial defense" is withdrawn,[114] the defendant has been denied effective representation. The "substantial weakening" or "withdrawal of crucial defense" can take many forms at trial, such as a failure to object to crucial evidence,[115] counsel's demonstrable ignorance of a crucial rule of law,[116] failure to present crucial evidence,[117] and failure to call

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110. E.g., Caraway v. Beto, 421 F.2d 636, 637-38 (5th Cir. 1970) ("Our Adversary system is designed to serve the ends of justice; it cannot do that unless accused's counsel presents an intelligent and knowledgeable defense. Such a defense requires investigation and preparation."); King v. Beto, 305 F.Supp. 636 (S.D. Tex. 1969); State v. Lopez, 3 Ariz. App. 200, 412 P.2d 822 (1966); People v. Crawford, 16 Mich. App. 92, 167 N.W.2d 814 (1969).

111. 332 U.S. 708 (1948).

112. Id. at 721.

113. E.g., Brizendine v. Swenson, 302 F.Supp. 1011 (W.D. Mo. 1969); Poe v. United States, 233 F.Supp. 173 (D.D.C. 1964), aff'd, 352 F.2d 639 (1965); State v. Lopez, 3 Ariz. App. 200, 412 P.2d 822 (1966).

114. E.g., People v. Hill, 70 Cal.2d 678, 452 P.2d 329, 76 Cal. Rptr. 225 (1969); People v. McDowell, 69 Cal.2d 737, 447 P.2d 97, 73 Cal. Rptr. 1 (1968); People v. Ibarra, 60 Cal.2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963); People v. Crawford, 16 Mich. App. 92, 167 N.W.2d 814 (1969).

115. People v. Ibarra, 60 Cal.2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963); People v. Coffman, 2 Cal. App. 3d 681, 82 Cal. Rptr. 782 (1969); State v. Lopez, 3 Ariz. App. 200, 412 P.2d 822 (1966).

116. Poe v. United States, 233 F.Supp. 173 (D.D.C. 1964), aff'd, 352 F.2d 639 (1965).

117. People v. McDowell, 69 Cal.2d 737, 447 P.2d 97, 73 Cal. Rptr. 1 (1968).

witnesses.[118] It should be noted that under these rules, the inquiry remains one of due process and the burden of proof of prejudice rests with the defendant.[119]

2. Duty to Consult

The obligation of counsel to prepare, and especially to consult with the defendant assumes significance not only at trial, but also in the process of plea bargaining.[120] Plea bargaining has become, in recent years, an integral and increasingly important component of the criminal justice system. The clogging of the courts has produced increased pressure on both prosecutors and defendants to offer and accept plea bargains.[121] It has been estimated that in some jurisdictions, more than ninety per cent of criminal defendants plead guilty.[122] The advent of public and private defender systems in which the staffs are frequently inexperienced[123] and overworked,[124] coupled with the

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118. People v. Hill, 70 Cal.2d 678, 452 P.2d 329 76 Cal. Rptr. 225 (1969).

119. Id.

120. See D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 206-207 (1966).

121. See President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 127-129 (1967).

122. L. Silverstein, supra note 6, at 9.

123. Though the bare allegation that counsel was inexperienced and incompetent is not enough to establish ineffective representation, Spaulding v. United States, 279 F.2d 65 (9th Cir.), cert. denied, 364 U.S. 887 (1960); United States v. Stoecker, 216 F.2d 51 (7th Cir. 1954), some courts seem more ready to find that counsel's errors during trial are prejudicial and even to impute a duty to the trial court to be especially careful to help counsel avoid errors. E.g., McKenna v. Ellis, 280 F.2d 592, 600 (5th Cir. 1960), aff'd en banc, 289 F.2d 928 (5th Cir. 1961), cert. denied, 368 U.S. 877 (1961) ("A trial judge who appoints fledgling attorneys as defense counsel ... cannot wash his hands of their mistakes."); and see People v. Winchester, 352 Ill. 237, 185 N.E. 580 (1933); People v. Blevins 251 Ill. 381, 96 N.E. 214 (1911) (Duty of trial court to reject prejudicial evidence on its own initiative.).

124. Equal Justice at 71-2.

high incidence of pleas of guilty has led to the fear that many of these pleas may be entered into without adequate advice and consultation.

a) Origins in Cases Involving State Action

As with the cases involving the general duty to prepare, counsel's duty to consult has evolved from earlier cases in which judicial action impaired the opportunity to consult to the detriment of the defendant. In Hawk v. Olson,[125] the petitioner alleged that after his arraignment he was held incommunicado in jail except for one fifteen minute interview in which the public defender "tried to intimidate" him to plead guilty. He also alleged that he was denied a continuance and brought to trial without further consultation. Assuming the allegations to be true, the Court held that the "denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment."[126]

Denial of a continuance and the recalcitrance of jail authorities are not the only kinds of official action which can impair consultation. Violation of the privacy of the defendant and his counsel also impairs consultation and can take several forms. In Coplon v. United States,[127] because the prosecution had intercepted telephone conversations between the defendant and defense counsel, the conviction was reversed without a showing of prejudice. Similarly, the prosecution may not eavesdrop by means of a hidden microphone,[128] or censor prison mail.[129] Where the only place provided for petitioner to consult with his attorney was a large room used by many attorneys and clients for such purpose, it was held that the right of defendants to "private consultations with their counsel is a corollary of the constitutional right to be represented by counsel in their defense."[130] The court reversed, noting that it is the

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125. 326 U.S. 271 (1945).

126. Id. at 278. See also McKenzie v. State, 233 Miss. 216, 101 So.2d 651 (1958). (Trial court's denial of a continuance after appellant's attorneys alleged that they had been denied free access to him in jail was a denial of due process.).

127. 191 F.2d 749 (D.C. Cir. 1951), cert. denied, 342 U.S. 962 (1952).

128. State v. Cory, 162 Wash.2d 365, 382 P.2d 1019 (1963).

120. United States ex rel. Ormento v. Warden, 216 F.Supp. 609 (D. Kan. 1963).

130. Ex Parte Qualls, 58 Cal. App.2d 330, 331, 136 P.2d 341, 342 (1943).

"duty of the authorities to make reasonable provision"[131] for private consultation facilities, though reasonable security provisions are allowable, and ordered the authorities to make such facilities available.

b) The Affirmative Duty

Recognizing that the defendant may be prejudiced even though lack of consultation did not result from official action, many courts have defined an affirmative duty of defense counsel to consult with the accused.[132] As with lack of preparation, mere allegation that consultation was short,[133] or even nonexistent[134] is insufficient to establish ineffectiveness of counsel; generally there must be some prejudicial result.[135]

Where a guilty plea is involved however, many courts seem to be more zealous in guarding the defendant's rights when a short or nonexistent consultation is alleged. In Bryant v. Peyton,[136] the court said that "[w]hen a guilty plea is entered on the same day that a lawyer initially consults with his client, there may be a suspicion of neglect

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131. Id. at 332, 136 P.2d at 343. See also Flaherty v. Warden, 155 Conn. 36, 39, 299 A.2d 362, 363 (1967) ("[C]onsultation is obviously necessary to enable the attorney to gain information so that he can properly advise his client. The right to consult with one's counsel includes the right to consult without being overheard although under proper security safeguards.").

132. E.g., Braxton v. Peyton, 365 F.2d 563, 564 (4th Cir.), cert. denied, 385 U.S. 939 (1966) ("[T]he assigned lawyer should confer with the client without undue delay and as often as necessary [to] inform him of his rights ...."); State ex rel. Dehning v. Rigg, 251 Minn. 120, 122, 86 N.W. 2d 723, 726 (1957) ("The right to assistance of counsel obviously carries with it the requirement that consultations with counsel be sufficiently adequate to at least inform the accused of his legal rights.").

133. United States v. Tribote, 297 F.2d 598 (2d Cir. 1961).

134. Simpson v. State, 164 So.2d 224 (Fla. App.), appeal dismissed, 169 So.2d 383 (Fla. 1964).

135. E.g., United States ex rel. De Mary v. Pate, 277 F. Supp. 48 (W.D. Ill. 1967) (Failure to contact alibi witness because of absence of meaningful consultation).

136. 270 F.Supp. 353 (W.D. Va. 1967).

or laziness on the part of the attorney or that the guilty plea was prompted by the pressure of time preventing full preparation of a defense.... Actually, there may be a presumption rather than mere suspicion of such inadequacy under these circumstances."[137] This presumption would shift the burden of proving lack of prejudice to the state. The Bryant court, however, circumspectly went on to list several defenses available to defendant which were lost through lack of investigation and did not rely upon the presumption of inadequacy.[138]

3. Duty to Inform the Defendant of His Rights

Many courts are now recognizing that a lack of adequate consultation may induce the defendant to plead guilty without knowing his rights. For example, Windom v. Cook[139] involved a fifteen to thirty minute consultation just before arraignment where the defendant tendered a plea of guilty. The record showed that counsel did not discuss the elements of the crime with the defendant and made no effort to find out the facts of the case from him. The court held that on this basis alone, the record reflected the ineffectiveness of counsel.[140] Significantly, the court noted that "[c]ounsel was not in a position to advise Windom prior to allowing him to plead guilty because he was unfamiliar with the case. Furthermore, counsel allowed Windom to plead guilty without advising him of the fact that he could attack the composition of the grand jury which indicted him."[141] Similarly, in Bush v. State,[142] the appellant alleged that his consultation with counsel, a public defender, consisted of a few minutes conversation between the bars of the "bullpen" at the back of the courtroom with several other defendants present, and that all the defender did was ask appellant if he wanted to plead guilty. The appellant also alleged that the defender told him that he was too busy to

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137. Id. at 358 (The court seems to assume that the lack of consultation resulted from a late appointment).

138. See also Fields v. Peyton, 375 F.2d 624 (4th Cir. 1967); Ford v. Peyton, 209 Va. 403, 163 S.E.2d 314 (1968).

139. 423 F.2d 721 (5th Cir. 1970).

140. Id. at 721.

141. Id. at 721-22.

142. 209 So.2d 696 (Fla. App. 1968).

do anything further. The court vacated the conviction saying:

> It is well known that public defenders ... are heavily burdened with the responsibilities of their offices. Nevertheless, one charged with a crime cannot be properly represented unless given fair opportunity to talk in private with his counsel. If in such a case the public defender, for any reason, finds himself unable to afford an interview with his client for a complete review of the case, this fact should be reported promptly to the trial court for appropriate disposition.[143]

These and similar cases indicate that an attorney is obliged not only to investigate the facts and law in order to prepare for trial but also in order to prepare to advise his client whether or not to plead guilty.[144] Further, the defendant is "entitled to be advised as to all his legal rights under the law and the facts."[145] If counsel fails to so advise the defendant, either because he is not adequately prepared to,[146] or because he does not confer adequately with his client,[147] the defendant cannot reach an informed decision and his right to effective assistance is violated.[148]

SUMMARY

It must be said in summary that the general standard of effective representation remains that of the "fair trial,"[149] though it has been verbally rendered in variant forms by different courts, based on the Due Process clauses of the fifth

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143. Id. at 697-98.

144. In Re Williams, 1 Cal.2d 168, 460 P.2d 984, 81 Cal. Rptr. 784 (1969).

145. Abraham v. State, 228 Ind. 179, 184, 91 N.E.2d 358, 360 (1950).

146. Id.

147. Bush v. State, 209 So.2d 696 (Fla. App. 1968).

148. Kercheval v. United States, 274 U.S. 220, 223 (1927) ("[A] plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences....").

149. See United States v. Hammonds, 425 F.2d 597 (D.C. Cir. 1970).

and fourteenth amendments.[150] Each case continues to be considered on its own facts and the totality of the circumstances.[151] There must be substantial prejudice shown[152] to justify reversal of the conviction or issuance of a writ of habeas corpus,[153] and the defendant has the burden of

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150. E.g., a) whether counsel did or did not render effective representation under all the facts and circumstances of the case, Goodwin v. Swenson, 287 F.Supp. 166. (W.D. Mo. 1968); Smotherman v. Beto, 276 F.Supp. 589 (N.D. Tex. 1967); Green v. Warden, 2 Md. App. 266, 238 A.2d 920 (1968). b) whether on the whole course of the proceedings there is a denial of fundamental fairness or fair trial, Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963); People v. McDowell 69 Cal.2d 737, 447 P.2d 97, 73 Cal. Rptr. 1 (1968); State v. Roberts, 69 Wash.2d 921, 421 P.2d 1014 (1966).

151. Kott v. Green, 303 F.Supp. 821 (N.D. Ohio 1968); State v. Roberts, 69 Wash.2d 921, 421 P.2d 1014 (1966).

152. This rule may not apply in the Third and Fourth Circuits. See text accompanying note 106 supra.

153. The defendant can raise the issue of ineffective representation in a number of ways. On the state level, he may appeal from the denial of a motion for a new trial or may press the issue on direct appeal where the issue has been properly preserved. He may also raise the issue in a collateral attack on his conviction through a writ of coram nobis, where available, or through a writ of habeas corpus. In addition, federal habeas corpus is available to state prisoners raising the issue. Stickney v. Ellis, 286 F.2d 755 (5th Cir.), cert. denied, 365 U.S. 888 (1961). The federal prisoner may raise the issue in substantially the same ways except that he may, in addition, attack his conviction in the court of sentence under 28 U.S.C. § 2255 (1958). When the issue is raised on appeal, the usual rules of limitations on review obtain and the court will do no more than search the record. In habeas corpus proceedings, e.g., Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963), and in § 2255 proceedings, e.g., United States v. Edwards, 152 F.Supp. 179 (D.D.C.1957), aff'd, 256 F.2d 707 (D.C. Cir. 1958), cert. denied, 358 U.S. 847 (1958), where matters extrinsic to the record may be relied upon, they must be presented in detailed form. United States v. Edwards, supra. General or conclusory allegations that counsel was ineffective are insufficient. Id. The petitioner must descend to particulars. Gilpin v. United States, 252 F.2d 685 (6th Cir. 1958).

proof.[154] Though it might seem that Gideon v. Wainwright's[155] overruling of the Betts v. Brady[156] "special circumstances" test[157] might make necessary a rule that a prima facie showing of ineffectiveness per se requires reversal, the Supreme Court recently showed in Chambers v. Maroney[158] no inclination to change the general rule that prejudice must be shown.

In any event, examination of the case law has yielded a number of specific standards by which effectiveness of counsel may be measured. To summarize, a defendant's right to effective assistance gives rise to duties on the part of the court and of counsel. The court must appoint counsel promptly and afford him reasonable time to prepare the case. If counsel is inexperienced, the court must exercise added vigilance to see that counsel does not commit prejudicial errors. Counsel, for his part, must adequately prepare the case for trial. This includes consultation with the client and appropriate investigations of both fact and law to determine what matters of defense can be developed. Counsel must confer with his client without undue delay and as often as necessary and must, at these conferences, advise his client of all his rights under the facts and law so that

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154. People v. Hill, 70 Cal.2d 678, 452 P.2d 329, 76 Cal. Rptr. 225 (1969); Ex Parte Kramer, 61 Nev. 174, 122 P.2d 862 (1942), appeal dismissed, 316 U.S. 646 (1942).

155. 372 U.S. 335 (1963).

156. 316 U.S. 445 (1942).

157. See text accompanying note 17 supra.

158. 399 U.S. 42 (1970). In Chambers, the petitioner, at his second trial, was represented by appointed counsel who had never seen petitioner until a few minutes before the trial began. The petitioner claimed that his attorney could not possibly have rendered effective assistance because of the belated appointment. The district court rejected the claim without an evidentiary hearing. The court of appeals, after thoroughly searching the record, held that no prejudice to the petitioner had resulted. The Supreme Court held that the "claim of prejudice... was without substantial basis", and declined to "fashion a per se rule requiring reversal of every conviction following tardy appointment of counsel." Id. at 54.

he can make an informed decision on how to plead. Finally, counsel must assert all available defenses.

III. OPERATIONS OF THE LEGAL AID SOCIETY IN THE CRIMINAL COURTS OF THE CITY OF NEW YORK[159]

A. Introduction

The Legal Aid Society was established in New York City in 1876[160] but did not adopt its present name until 1896.[161] In 1917, the Society began to provide criminal defense for indigents in a limited number of cases.[162] In 1965, after a long period of consistently expanding services, the Society was designated to represent virtually all indigents in New York City in exchange for a substantial amount of public funding.[163] Because Legal Aid is substantially publicly funded it is classified as a mixed private-public defender system.[164] As the sole organization representing indigents in New York City, the Society, in its operations, determines whether indigents in New York City will receive effective representation.

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159. Information on the actual operations of the Legal Aid Society has been gleaned from several sources: 1) Record, Lefcourt v. Legal Aid Society, 312 F.Supp. 1105 (S.D. N.Y. 1970) [Hereinafter Record]. 2) Interview with Hon. Harold Rothwax, Judge, Manhattan Criminal Court [Hereinafter Rothwax interview]. 3) Interview with Samuel Dawson, Legal Aid Staff Attorney, Kings County Supreme Court [Hereinafter Dawson interview]. 4) Interview with Carol Halpern, Legal Aid Staff Attorney, Youth Division [Hereinafter Halpern interview]. 5) Interview with Harry I. Subin, Professor of Law, New York University School of Law [Hereinafter Subin interview]. 6) Several confidential interviews with present and former Legal Aid Staff Attorneys. In addition, much invaluable background information was made available to the writer in several unpublished reports done by New York University law students based on their clinical experience with Legal Aid. These students are: Bonnie Brower, Ivan Gold, Juan U. Ortiz, and David Rosenberg.

160. H. Tweed, supra note 4, at 6.

161. Id. at 7.

162. N. Fabricant, supra note 6, at 3.

163. R. Patterson, supra note 6, at 31; Halpern interview. The City of New York has estimated that it will be funding Legal Aid in the amount of $4,000,000 in 1971. New York Times, Oct. 11, 1970, at 80, col. 3.

164. See Equal Justice.

To a large extent Legal Aid's manner of operation in the criminal courts is shaped by the huge caseload. In 1968, 127 Legal Aid attorneys disposed of over 135,000 cases of which all but 14,500 were handled in criminal court.[165] In order to be able to process this vast number of cases, Legal Aid has adopted a system known as "fragmented representation." Under this system a team of Legal Aid attorneys is assigned to man each of the various "parts" of the criminal court.[166] No one attorney is assigned specific responsibility for a case. The defendant in a criminal prosecution will see a different Legal Aid attorney each time his case proceeds from one "part" of the court to another on its way to final disposition. For example, the defendant will see one attorney in the arraignment part, another in the hearing and motions part and, if the case has not been disposed of by plea yet, still another in the trial part.[167]

It has long been recognized that the effectiveness of representation of Legal Aid in New York is severely impaired by its staggering caseload. The Judiciary Committee of the New York State Assembly has said:

> In our judgment, the Legal Aid Society, Criminal Branch, is severely overtaxed. As a result, the indigent Criminal Court defendant is not assured of adequate representation. We believe that this fact is virtually mathematically demonstrable. Bearing in mind the limited number of attorneys, the large number of cases, the widespread courtroom locations and the variety of charges that must be defended, it is inconceivable to us that even the most dedicated efforts can assure the average defendant a performance in the usual case on a parity with that of the average privately retained lawyer.[168]

The system of fragmented representation which is, in the opinion of some, the only way Legal Aid can handle the huge caseload,[169] also has been criticized for its impairment of effective representation by the Judiciary Committee.

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165. New York Times, Sept. 3, 1969, at 49, col. 7.

166. Halpern interview.

167. Id.;Record at 164-65.

168. Report of the Judiciary Committee of the New York State Assembly on the Practices and Procedures in the Criminal Court of the City of New York, Leg. Doc. 37, 186th Session 17 (1963) [Hereinafter Report].

169. Halpern interview.

> This procedure contrasts sharply with the personalized representation which is given by an individual practitioner. The privately retained lawyer necessarily deals with all aspects of the case, and brings to it a continuing familiarity with the accused and the circumstances of the alleged crime. He must ... develop a sense of involvement in the case, and conversely his client can develop a relationship of confidence.
>
> The dialogue between attorney and client is frustrated by the very manner in which Legal Aid operates.[170]

These general criticisms give a preliminary view of the inherent dangers to effective representation present in Legal Aid's manner of operation. The discussion will now proceed to a consideration of how Legal Aid's operation compares to judicial standards of effectiveness.

B. HOW LEGAL AID STANDS ON JUDICIALLY RECOGNIZED STANDARDS OF DEFENSE REPRESENTATION[171]

1. Arrest

Both felony and misdemeanor cases usually begin with an arrest. Recent Supreme Court decisions,[172] indicate that the presence of counsel during critical stages between arrest and arraignment is often necessary to insure the preservation of the defendant's rights. Despite these indications, Legal Aid is not organized to provide counsel until the defendant is arraigned.

2. The "In Court" Stages

a) The Structure of the New York City Criminal Courts

The New York City Criminal Courts are, in a word, highly fragmented. The courts are split up into several "parts" which perform various functions. Recently, a number of "all purpose parts" have been instituted in an effort to consolidate these various functions.[173] By and large, however, the process remains fragmented since neither

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170. Report at 17.

171. We have limited this discussion to adult felony and misdemeanor cases.

172. E.g., Miranda v. Arizona, 384 U.S. 436 (1966); United States v. Wade, 388 U.S. 218 (1967).

173. The significance of all purpose parts in relation to the adequacy of Legal Aid's representation is discussed infra. See text accompanying notes 243-55.

arraignments nor jury or three judge trials, now available to misdemeanor defendants,[174] are conducted in the all purpose parts.[175]

As noted earlier, the organization of Legal Aid in the criminal courts also is fragmented. The fragmentation of Legal Aid follows directly the fragmented part system of the courts. A team of Legal Aid attorneys is assigned to each part of the court.[176]

Both felonies and misdemeanors enter the system at the criminal court level. The misdemeanor will remain until final disposition. The felony, after arraignment, remains in the criminal court for preliminary hearing. At that stage it may be dismissed or reduced to a misdemeanor. If neither of these eventualities occur, the case will go to the Grand Jury for indictment. After indictment the case leaves the jurisdiction of the criminal court and is disposed of in some way in the supreme court of the particular county.[177] During its stay in the criminal court, the felony is handled entirely by the criminal court staff of Legal Aid. Responsibility for the case is not assumed by the entirely separate supreme court staff until indictment.

b) Arraignment

Arraignment is the first court proceeding for all defendants. There the defendant is informed of the charges against him and his bail is set. At arraignment, the defendant has his first contact with Legal Aid. He is interviewed just before his appearance by a Legal Aid attorney who makes a record of the interview. This record is part of the Legal Aid "face sheet" which is atached to the folder which will contain the court papers and other records pertaining to the defendant's case.

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174. Baldwin v. New York, 399 U.S. 66 (1970) held that the right to jury trial must be given to Class A misdemeanants in New York. A Class A misdemeanor is one which is punishable by up to one year of imprisonment. N.Y. Penal Law § 70.15 (McKinney 1967).

175. Halpern interview.

176. This does not mean that the individual attorneys are permanently assigned. There is a good deal of random shifting of individuals between the various parts and from county to ocunty. Dawson interview.

177. The percentage of felonies which survive the criminal courts as felonies is very low. See text accompanying notes 225-28 infra.

1) The Initial Interview

A Legal Aid attorney describes the interview as follows:

> The interviews are done back in the pen, standing up in the pen, with a jail cell full of prisoners, and they are not private interviews because prisoners are present. ...[T]here will always be a corrections officer present in that room, in the cell, and there will be often a number of Legal Aid lawyers interviewing clients in that cell.[178]

Clearly, the lack of privacy involved in the kind of interview described itself infringes upon the rights of the defendant.[179] Not only does it inhibit the defendant from being truthful with his attorney concerning the details of the alleged crime, but in many cases puts positive pressure on him to lie or be deliberately uncommunicative in order to appear a "big man" to the other prisoners present.[180]

Physical conditions, however, are not the only factors impairing the quality of the first interview. When a team of three to six attorneys is obliged to handle as many as one to two hundred arraignments per day,[181] there obviously is not enough time spent with each interview.[182] The Legal Aid attorney may thus be forced to handle the arraignment without sufficient knowledge of the facts of the case. As we shall see, the inadequacy of the initial interview is reflected throughout the progression of the case through the courts.

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178. Record at 160-61.

179. See text accompanying notes 130-31 supra.

180. Halpern interview.

181. The load per day, in the arraignment part, at times has been close to three hundred cases. Halpern interview.

182. Legal Aid attorney Ralph S. Naden, commenting upon this factor, said: "[We] do not have enough opportunity to consult with our clients... and enough time to go into the facts and details of the case." Record at 162. Mr. Naden also noted that other Legal Aid attorneys have made the same complaint "almost to a man." Id.

2) Bail Setting

Legal Aid generally provides inadequate representation at arraignment where bail is set.[183] The function of counsel at the bail hearing has been described as the presentation "to the court [of] facts about the accused's family status, employment history, and ties in the community to prove that he should be free pending trial."[184] The Legal Aid attorney generally makes no effort to gather any of this information beyond the "interview" he conducts with each client at arraignment. Indeed under the present system of organization it is impossible for him to gather information beyond the interview because he does not meet the client until arraignment. If Legal Aid defense entered cases at an earlier time, perhaps just subsequent to arrest, additional information gathering could be done.[185] Without information, the Legal Aid attorney is hampered as he conducts his arguments for pretrial release. Legal Aid does not, as a consistent policy, carry out bail investigations after arraignment leading to bail reduction applications to the supreme court.[186] Investigations and bail reduction applications take place only upon the order of the individual attorney who handles the case at arraignment. Unfortunately, the individual attorney often may not order a needed investigation or bail reduction application because "somebody else will catch it later on."[187]

By not providing adequate representation when bail is set, Legal Aid compounds its problems of representation later on. There is "mounting evidence" for the proposition that defendants who are detained for want of bail are "less likely to get equal treatment in court."[188] In New York City, a study in 1960 showed that in misdemeanor cases,

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183. Subin interview.

184. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 53 (1967) [Hereinafter Courts].

185. See Id. This type of informational search need not require the expertise of counsel in all its phases. An avenue of improvement might therefore be the utilization of para-professionals.

186. Subin interview.

187. Dawson interview.

188. D. Freed and P. Wald, Bail in the United States: 1964 (Report to the National Conference on Bail and Criminal Justice, Washington, D.C.) 48 (May 27-29, 1964).

prison terms were given to 87 per cent of jailed defendants but to only 32 per cent of those out on bail.[189] This difference in treatment may be due to the fact that the defendant while in jail is unavailable to assist in investigation and to otherwise participate in defense work.[190] The unavoidable result seems to be the impairment of indigent clients' chances of receiving favorable treatment.

c) Between Court Appearances

If there is no dismissal or guilty plea, the defendant is either incarcerated pending release on bail or is released on his own recognizance and the case is adjourned to a hearing or trial part. In the case of a felony, the adjournment is to a preliminary hearing unless the hearing is waived. If there is a waiver, the case will do directly to the Grand Jury.[191]

After a case is adjourned the Legal Aid attorney places the folder for that case in a pile of case completed for the day. The face sheet of the folder is marked with the adjourned date and the part of the court in which the case will next appear. Also marked will be whether the attorney thinks a bail reduction application in the supreme court or an investigation by the Legal Aid investigations office is desirable.

Once the folder is placed in the completed pile, the attorney who conducted the interview and made judgments concerning investigations has no further connection with the case. That attorney will not see the defendant again. He will not know whether the investigation he requested was made or whether it produced useful results. He will not know whether a bail reduction application was made or was successful. The case is filed along with all other completed cases for the day, until the next step of the proceeding in which the defendant is required to appear. At the next

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189. Id. at 47.

190. See Id. at 46. Professor Subin suggests that the system may simply be more "stacked" against jailed defendants because of such factors as unconscious prejudice of judges and jurors against them.

191. It should be noted here that all felonies are handled in criminal court by the Legal Aid criminal court staff until they are sent to the Grand Jury for indictment. From then on, felony cases are taken over by the supreme court staff of Legal Aid until final disposition.

proceeding, the file on the case will be sent to the appropriate court part and given to the attorneys assigned to that part.

Between arraignment and the next scheduled proceeding, the case is completely out of the hands of the individual Legal Aid attorney. Any investigation requested will be done by the separate Investigations Office. There is as a general rule, no contact with the defendant and his family.

1) Investigation

Inadequate initial consultation has a profound effect upon investigations. Inadequate communication of the client's version of the facts means that necessary investigation may go undone. As a result, Legal Aid attorneys who work the latter stages of cases often interview the client, look at the record and find that needed investigation remains to be done even after the case has been to court several times.[192]

Inadequate consultation is not the only cause of poor or nonexistent investigation. As noted earlier, Legal Aid attorneys, as a rule, do not do their own investigation.[193] Unfortunately, Legal Aid's fragmented organization often leads to impairment of communication between the separate investigative staff and defense counsel. Since an attorney's responsibility for a case ends after a specific stage, he will never know whether any investigation proves to be productive. This situation leads to unconscious neglect. As one Legal Aid attorney put it:

> One of the worse things about fragmentation is the terrible temptation, which very few people are able to resist, to pass the buck.... The press of cases and the fragmentation make it fairly easy to unconsciously let it slide, because you know that the next guy who actually does the trial - if he thinks it's necessary - then he'll send out the investigators - without even articulating it to yourself.[194]

As a result, "not enough investigation is generally done."[195]

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192. Halpern interview.

193. Dawson and Halpern interviews.

194. Halpern interview.

195. Id.; see also Report at 18-19.

The situation of Legal Aid in this respect is closely analogous to the situation faced by the Supreme Court in Powell v. Alabama.[196] In that case, the Court considered the appointment of the entire county bar an ineffective one, and held that the defendants had been deprived of the effective assistance of counsel between arraignment and trial. It seems clear that at least one of the factors prompting this holding was the fact that with the entire county bar responsible for the defense, no one attorney could be held, or indeed could feel, responsible for the case. As a result, no investigation was done. The indefiniteness of responsibility occasioned by Legal Aid's fragmented system of representation leads to the same result.

The problem of inadequate investigation is reduced drastically when a felony case reaches the supreme court staff of Legal Aid.

> In the criminal court, it's a rare case [in which] you know the whole story, particularly the defendant's story. In the supreme court, it's a rare case [in which] you don't know just about everything that happened.[197]

The reason for the contrast is simple. It is "because [the attorneys] have more time."[198] In the supreme court, because of the greatly reduced caseload and because representation is not so fragmented, that is, the case does not jump from part to part so often, more individual attorney responsibility is allowed for than in the criminal court.

However, since felonies are handled in the criminal courts until they are sent to the Grand Jury, poor investigation while the case is below can cause problems in certain cases for the Legal Aid supreme court staff. By the time the case gets to the supreme court, which may be as much as six months after arrest, witnesses may not be as accessible or evidence as fresh.[199]

2) Research

Of course, the crucial points in many criminal cases are questions of fact which do not require

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196. 287 U.S. 45 (1932).

197. Dawson interview.

198. Id.

199. Id.

legal research by counsel. Even when there are disputed legal issues, an experienced attorney often knows the substantive law without needing to research it. In cases where legal research is appropriate however, the Legal Aid attorney may have difficulty fulfilling his obligation. As a Legal Aid attorney,

> ...you don't have the time, particularly in the criminal courts. Your primary responsibility is to be in court with those clients who are there for the day. You don't have the time to go and take four or five hours off in the library.[200]

The Legal Aid attorney does not have the time because of the crushing caseload. His primary responsibility is to be in court because under Legal Aid's fragmented system he is assigned to "man the part" rather than to handle a specific case or cases from beginning to end.

In sum, there is substantial inadequacy with regard to Legal Aid's performance of the research aspect of the defense function. This failure to research is especially prevalent in the criminal courts where the Legal Aid attorney is likely to be inexperienced[201] and will probably have a greater need for research than more experienced counsel. In supreme court, the Legal Aid staff has much more time to perform in depth research because there is a lighter caseload than in the criminal courts.

d) The Next Appearance

The next appearance will be for the purpose of preliminary hearing and motions, such as motions to suppress evidence or for an identification hearing; or if the hearing is waived, for trial before a judge. This appearance will take place in one of a number of hearing and motion parts, trial parts or all purpose parts, and the defendant will there be represented by the Legal Aid team assigned to the part.

The files will be put in order by the Legal Aid team and the calendar will be called to determine which cases the prosecution is ready to proceed upon. The Legal Aid

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200. Id.

201. Rothwax and Dawson interviews. The prevalent inexperience of Legal Aid attorneys in criminal court is discussed infra. See text accompanying notes 281-90 infra.

team makes no attempt to interview any defendants before the calendar call. If the case is marked ready, the individual attorney to whom the case is assigned will attempt to interview the defendant and prepare the case for hearing or trial.

1) The Interview and "Face Sheet" Problems

We have noted that initial interviews conducted by Legal Aid take place under very poor conditions and are generally inadequate. Though the next attorney will probably conduct an interview himself, the conditions will be the same.[202] The problems of the poor conditions under which initial interviews must be conducted, and the frequent result of inadequate information often is compounded by two additional factors. The first is that the Legal Aid attorney handling the case in a proceeding subsequent to arraignment on occasion does not receive the defendant's Legal Aid file.[203] The previous attorney, pressed for time, may have written the wrong adjourned date or part on the face sheet, or the folder may simply have been misfiled in the Legal Aid office. Whatever the reason, when the file and court papers are not sent to the correct part on the correct date, the Legal Aid attorney must, in addition to his usual duties, attempt to reconstruct the history of the case from the court's copy of the court papers and from discussion with the defendant. Also, he must attempt to manufacture a new file so that the same problem will not be faced by a new attorney later.[204]

The second factor is that the attorney at a proceeding subsequent to a arraignment may not, and indeed often does not, have a chance to conduct any interview at all until the defendant is brought before the court.[205] The typical

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202. Halpern interview.

203. Attorney Sam Dawson, a member of Legal Aid's Kings County Supreme Court staff expressed his view of this problem: "Many times, you wouldn't have the papers, you wouldn't even have the [Legal Aid] file. You'd have to handle a case off the cuff...a significant enough portion of the time so that you'd feel like a damn fool."

204. Dawson interview.

205. "As a general rule ... a lawyer in any part would be seeing the client for the first time that day, as he's brought before the court, not meeting him earlier in the detention facility or at home or talking to him over the phone." Dawson interview. This rule may not apply to the Legal Aid youth and supreme court staffs which have a much lighter caseload.

situation faced by counsel in a proceeding subsequent to arraignment is one in which he may have as little as "about a half hour" between calendar calls to prepare all the cases assigned to him for the day.[206] Even if the attorney is assigned as few as ten cases, the preparation time allotted must be viewed as grossly inadequate by any standard.

In sum, it has been admitted by Legal Aid attorneys that they "just don't have time to consult,"[207] and "don't have time to inform the client." Neither is this situation remedied by the client's interview with the next attorney he sees. In many instances the client is still not adequately advised of his options because the next attorney is not only in a hurry, but may assume that the client has already been told, in previous consultations, things which he actually has not.[209]

At no time, therefore, can Legal Aid conduct generally productive consultations with its clients, because of the physical conditions of the facilities in which it operates, because of the press of time due to the caseload, and because of the lack of co-ordination between the attorneys themselves. As a result, not only does information which could necessitate investigation remain ungathered, but the client is not, generally, adequately informed of his rights.

2) Conduct of Court Appearances by Legal Aid

a) Generally

Some observers are of the opinion that Legal Aid attorneys are reasonably competent and dedicated,[210] and as far as competency and dedication can enable an individual attorney to conduct a court proceeding well, it may be assumed that Legal Aid provides adequate service. We have observed, however, that Legal Aid's preparation for defense at the criminal court level is woefully inadequate. Poor preparation must necessarily impair the individual attorney's ability to conduct a competent proceeding. For example, he cannot present crucial defense witnesses who have never been found. To the extent, therefore, that Legal Aid's preparation is inadequate, its attorneys are proportionately disabled in the conduct of court proceedings.

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206. Dawson interview.

207. Record at 167.

208. Id. at 167.

209. Halpern interview.

210. Report at 17.

The caseload itself hampers the typical Legal Aid attorney in his efforts to protect his client's rights at a specific proceeding.[211]

> The pace of the court is so rapid and the crush of defendants is so great ... [that] you have to handle the cases very quickly. A Legal Aid lawyer in a given part might come into court in the morning with a hundred cases to stand up for, and I don't have to tell you in the course of the day that you just can't prepare a hundred cases properly and speak to your client, whom you more than likely have never seen before.[212]

The fragmented system of representation is also not without an effect on the conduct of cases. Some Legal Aid attorneys have expressed the opinion that because of the fragmentation, things tend to get lost "in the shuffle" between court appearances.[213] Examples of this effect are that often, "motions that should be made are never made, or... one attorney does something with a certain strategy in mind and the next attorney doesn't understand what that strategy was and does something completely contrary to it which ends up costing the guy ... more time in jail."[214] These are only the natural results of the lack of specific responsibility for cases and the lack of unified strategy for individual cases inherent in the fragmented system of representation.

Perhaps the most distrubing effect of fragmentation upon the conduct of court proceedings by Legal Aid is its vitiation of the adversary positions of the parties themselves. The Legal Aid attorney assigned to a specific part of the criminal court must work with the same judge and prosecutor day in and day out. Lacking the proper tools of defense advocacy, consultation and investigation, he may be forced to rely to an improper degree upon the sentiments of the judge and prosecutor. The Judiciary Committee of the New York State Assembly has observed:

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211. See Report at 19. ("The very frequency of assignment at times becomes so great that the Legal Aid lawyer can do no more than make a cursory examination of the case papers, without any hope of familiarizing himself sufficiently with the facts to determine whether a preliminary hearing, motion to suppress evidence, or some other preliminary relief, is indicated.").

212. Record at 166-67.

213. Halpern interview.

214. Id.

> We fear that, consciously or not, the Legal Aid lawyer is so hampered by the case burden he must carry in the Criminal Court that he will seek shortcuts to the detriment of defendants. At times stalwart representation of a defendant requires counsel to do battle with the Assistant District Attorney or the judge. Where the penalty may be damage to the rapport between court and counsel, and defense counsel has 25 more defendants to represent the same day, he will be reluctant, perhaps, to seek a preliminary hearing or to challenge a bail figure.[215]

What the committee describes here is a breakdown in Legal Aid counsel's advocacy going to the very adversariness of the criminal proceeding. This abhorrent aspect of fragmented representation cannot but cast Legal Aid in the role of a mere adjunct of the court.

b) Guilty Pleas

Inadequate consultation and investigation almost necessarily have a deleterious effect upon the capacity of the Legal Aid attorney to help the defendant make an informed decision concerning a plea bargain.[216] Inadequate knowledge of the facts of the case, and inadequate investigation preclude the attorney from providing informed advice to the defendant concerning the likelihood of conviction. It should be remembered that pleas of guilty may be made

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215. Report at 18.

216. See ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty (Approved Draft 1968) Part III § 3.2.

> Relationship between defense counsel and client.
> (a) Defense counsel should conclude a plea agreement only with the consent of the defendant, and should ensure that the decision whether to enter a plea of guilty or nolo contendere is ultimately made by the defendant.
>
> (b) To aid the defendant in reaching a decision, defense counsel after appropriate investigation, should advise the defendant of the alternatives available and of considerations deemed important by him or the defendant in reaching a decision.

at any court appearance between arraignment and trial, and at arraignment in misdemeanor cases.[217] The Legal Aid attorney may or may not have adequate information to advise the client. Even if he has such information, however, it is not likely to get across to the client because of the pressure of the caseload.

> Because of the press of the caseload - [you have an offer and] very often you'll be in the situation where the case is going to be called on a calendar call. If you want to, you can say you want a second call on it, but after all there are 150 cases on the calendar and you can't have a second call on every one of them or nothing will happen. And the guy is coming out in five minutes, and you want to know basically if he wants to plead or if he doesn't.[218]

In view of the above conditions, it seems clear that the average Legal Aid attorney experiences difficulty in disposing of cases by plea based on an informed judgment of the likelihood of conviction. There are, however, several complicating factors which may mitigate this general conclusion or even eliminate its relevance to the question of adequacy of representation.

One such factor is the opinion of some that a capable and experienced trial attorney can "size up" a case quickly without need of the traditional factual investigation.[219] A Legal Aid attorney with six years' experience, described this ability as a "sixth sense" developed from long practice in "going over these things quickly."[220]

Admitting however that some attorneys have this ability, it is nonetheless clear that most Legal Aid attorneys in the criminal courts probably do not. They do not because they are for the most part inexperienced and untrained and must learn "on the job."[221] The "sixth sense" factor, therefore, does not cut in favor of the quality of Legal Aid's

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217. Estimates exist that nearly 90% of the cases are in fact disposed of by plea. See L. Silverstein, supra, note 6, at 9.

218. Halpern interview.

219. Subin interview.

220. Dawson interview.

221. Dawson and Subin interviews.

representation in criminal court.[222]

A second complicating factor is the effect that the caseload has had not only on defense counsel, but on the criminal justice system itself in New York City. This subject is certainly much too broad for comprehensive treatment in an article of this scope; yet a few observations can be made. The President's Commission on Law Enforcement and the Administration of Justice has noted what appears to be a common effect on lower criminal courts in many urban areas resulting from "volume problems."

> In the lower courts the agencies administering criminal justice sometimes become preoccupied simply with moving the cases. Clearing the dockets becomes a primary objective of all concerned, and cases are dismissed, guilty pleas are entered, and bargains are struck with that end as the dominant consideration. Inadequate attention tends to be given to the individual defendant, whether in protecting his rights, ... or in determining the social risk he presents and how he should be dealt with after conviction.[223]

The New York City Criminal Courts present a paradigm example of the effect described above. The criminal courts have been described as a "meat market", which "dehumanizes" all who have prolonged contact with it including judges and prosecutors as well as defense counsel.[224]

A significant result of this problem is tremendous pressure to dispose of cases by plea. It has been suggested that the system "abhors trials" and that defendants who insist on going to trial are likely to be sentenced much more

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222. "In my five years as attorney in charge of Brooklyn Criminal Court, I have seen too many cases of unsupervised lawyers pleading defendants guilty to nonexistent crimes, or overlooking obvious defenses, or disregarding the wishes of his clients...." Joseph A. Kaplan, Legal Aid Senior Trial Attorney, in the New York University Law School newspaper, The Commentator, Feb. 2, 1971, at 5, col.3.

223. Courts at 31.

224. Subin interview. For an interesting illustration of cynicism among New York City Legal Aid attorneys, see J. Mills, "I have nothing to do with Justice", Life, March 12, 1971, at 57.

severely than if they tender a guilty plea.[225] This pressure to plead seems to be felt equally by both felony and misdemeanor defendants and is reflected in the numbers of defendants pleading guilty as opposed to those choosing to risk trial. Of 116,175 misdemeanors arraigned in the criminal courts in 1967, 68,112 tendered guilty pleas while only 12,756 went to trial.[226] Of the 56,779 felonies arraigned in 1967, 22,126 were reduced to misdemeanors or violations before the felony preliminary examination was reached and ultimately only 13,173 survived the criminal courts as felonies to go to the Grand Jury.[227] Certainly, many of the felonies which did not survive were dismissed or discharged, but the number of felony defendants who accepted reduction of the charge in exchange for a guilty plea, implicit in the figures above, certainly bears out the assumption that pressure to plead is great. Of course most defendants plead guilty because they are guilty. Nevertheless, it has been recognized that in a system which exerts great pressure to plead guilty, there always exists "the possibility that an innocent defendant may plead guilty because of the fear that he will be sentenced more harshly if he is convicted after trial."[228]

The tremendous number of guilty pleas certainly does not prove that Legal Aid renders ineffective representation at the plea bargaining stage. It does, however, suggest the extent to which the criminal justice system in New York City has ceased to be a fact finding system and has instead adopted the unstated primary purpose of moving cases. This fundamental change in the thrust of the criminal justice system has had significant effects upon the attitudes and obligations of defense counsel. In particular, counsel's attitude toward his obligation to prepare is detrimentally affected. Preparation of the case, instead of a step in arriving at a judgment concerning the merits of the defendant's case, becomes merely a tool with which to elicit a more favorable plea offer from the prosecution.[229] Preparation of the case is no longer preparation for trial because the odds against the case ever getting to trial are so great. This change in the function of preparation, coupled with the huge caseload, must certainly have a deleterious effect on how much incentive there is for defense counsel to prepare in the traditional manner. Since he is not certain which of

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225. Id.

226. J.B. Jennings, The Flow of Defendants Through the Criminal Court of the City of New York 3 (RAND Institute Study, Dec., 1969) (unpublished draft).

227. Id.

228. Courts at 11.

229. Subin interview.

the vast number of cases he must handle will ever go to trial, he is inclined not to prepare any of them. This effect, termed the "bureaucratic problem",[230] is a condition in which the Legal Aid defenders fall into a "malaise" characterized by an "attitude of cynicism" and the feeling that "it doesn't make any difference if you do or don't do something."[231] As a result, Legal Aid attorneys sometimes come to have "a tendency to slough off."[232]

Ironically enough, the system described above, whose business it seems has become chiefly the moving of cases, often works to the advantage of defendants who are guilty.[233] Defendants are actually able to get "great deals" because of the pressure which the system puts upon the prosecutor.[234]

The criminal justice system in New York City today compares poorly with that contemplated by Justice Sutherland when he wrote his opinion in Powell v. Alabama.[235] Indeed, the defense function in a system which has lost its fact-finding purpose and which has in fact become a market in which time in jail is auctioned off may bear no relation at all to the role of counsel envisioned in Powell. For this reason, only equivocal conclusions at best can be drawn regarding Legal Aid's performance at the plea bargaining stage. Surely it must be said that Legal Aid does not prepare its cases adequately. On the other hand, it is not clear that better preparation or more vigorous investigation would mitigate the obstacles to due process existing in the New York City criminal justice system itself.

d) Sentencing

If there is a guilty plea or a conviction by other means, sentencing is the next step in the process and will in most cases take place in the same part in which the conviction occurred. Sentencing may take place immediately upon conviction or it may be adjourned to a later date. In either case, the defendant will be represented by the same Legal Aid team which represented him at the time of the conviction.

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230. Dawson interview.

231. Id.

232. Id.

233. Id.; see Courts at 11.

234. Subin interview.

235. 287 U.S. 45 (1932).

The role of counsel at the time of sentencing "extends to the gathering and evaluation of facts relevant to sentencing and most important, to their presentation in court."[236] In the New York City Criminal Courts, most misdemeanor defendants are sentenced on an ad hoc determination by the judge based on the defendant's record, a copy of the complaint, and whatever relevant information the judge can get from the defendant before the bench.[237] It has been estimated that in more than half of misdemeanor sentencing proceedings, the judge does not even have the benefit of a report on the defendant from the probation department.[238] This lack of information is simply not remedied by Legal Aid. As one attorney put it: "We say very very little on behalf of a man when he is sentenced."[239]

In addition to not providing information about the defendant, Legal Aid makes no systematic effort to suggest positive programs of rehabilitation for the defendant. There is no systematic effort to explore possibilities of employment, family services, educational improvement, drug rehabilitation, or mental health services.[240] To undertake an effort of this kind would not require the diversion of Legal Aid attorneys from their normal functions. The Legal Aid Agency of the District of Columbia employs a nonprofessional staff to conduct factual investigations and to provide presentence reports.[241] Similar personnel could perform the same function in New York. Also, they could investigate possibilities for rehabilitative alternatives to imprisonment. Perhaps Legal Aid could seek to work with law and social work school students on projects of this type.

D. Causes and Cures

The representation which the Legal Aid Society provides in New York City's Criminal Courts clearly does not comport with the standards of effective assistance developed in case law. The representation provided in supreme court, where the caseload is much diminished appears somewhat better, but even this cautious conclusion is open

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236. Courts at 19.

237. Dawson interview.

238. Subin interview. On the other hand, probation reports are required in all cases prior to felony sentencing in the supreme court. Dawson interview.

239. Dawson interview.

240. Id.; Subin interview; and see also Courts at 19-20.

241. Courts at 19.

to dispute.[242] As a general rule, Legal Aid does not conduct proper consultations with clients or adequately inform them of their rights. Legal Aid does not conduct proper investigation of facts and law. Legal Aid does not conduct bail and sentencing hearings in an informed and consistent manner.

However, not all responsibility for these failures rests with Legal Aid. Insights into the causes of Legal Aid's manifold problems may give direction to the search for solutions.

1. The Structure of the Courts

We have already noted the inequities caused in part by Legal Aid's "fragmented" system of "manning the parts." A substantial causative factor of Legal Aid's "fragmentation" is the structure of the criminal courts themselves which are divided into "parts," each of which handles a particular phase of a criminal proceeding.[243] Given Legal Aid's present manpower resources, it is all but impossible to assign individual attorneys to individual cases. The attorneys, with the same caseload as at present, would be forced to spend most of their time running from part to part to keep up with their assignments.[244]

Restructuring of the criminal courts into "all purpose parts" has been a suggested solution to fragmentation. Legal Aid has been one of the foremost lobbyists for such a restructuring. In 1969, an experimental all purpose part was instituted in Queens County,[245] and this new structure has recently been extended to Bronx and Kings Counties.[246] Though this development has elicited praise in various quarters,[247] it is submitted that all purpose parts fall far

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242. "At the Supreme Court level of the Criminal branch of the society ... fragmentation takes a heavy toll in client confidence and rapport and in preparation for trial...." Kaplan, supra note 222, at 5, col. 3.

243. See Statement by Robert P. Patterson, Jr. at the State Senate Committee hearings investigating conditions at the Tombs, 67 Legal Aid Review 35 (1970).

244. Dawson interview.

245. R. Patterson, supra note 243, at 36.

246. Edward Q. Carr, Legal Aid Attorney-in-Chief, The Commentator, Feb. 2, 1971, at 6, col. 3.

247. Id.

short of solving the defense problems of Legal Aid. First, all purpose parts, as they are now constituted, do not really eliminate fragmentation. They handle only hearings, motions and trials by single judges for misdemeanants. They do not handle arraignments, jury trials or three judge trials each of which are conducted in separate parts.[248] A misdemeanant, therefore, may still see as many as three or more Legal Aid attorneys as his case progresses. Additionally, all purpose parts in no way affect the fragmented representation an accused felon faces since he must still go through arraignment and preliminary hearing in the criminal courts before indictment.[249]

Theoretically, all purpose parts will allow a set team of Legal Aid attorneys to handle all phases of a case subsequent to arraignment except jury trials and will allow for greater familiarity with cases and defendants and for greater individual responsibility for each case.[250] In practice, the personnel of the Legal Aid team assigned to the all purpose part do not remain static. Many leave the Society, or are on vacations, or are rotated to other parts.[251] There may not be immediate replacements for these people due to the tremendous manpower demands that all courts exert on Legal Aid. Even if replacements are available they may be only temporary and thus may see only a small segment of each case they handle.[252] The continuity and enhanced individual responsibility associated with all purpose parts in theory are therefore, vitiated in practice.

In practice, fragmentation may develop within the all-purpose part itself. Typically, one attorney on the all-purpose part team will answer the calendar call on all cases. The others divide up the remaining ready cases and handle the actual proceeding involved.[253] This procedure dilutes individual responsibility for cases.

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248. Halpern interview.

249. He may, however, waive hearing and go directly to the Grand Jury.

250. See Carr, supra note 246, at 6, col. 3.

251. Dawson interview.

252. Id.

253. Id.

Finally, the existence of all purpose parts has not changed the fact that the main object of the criminal justice system in New York City has become the moving of the caseload in any way possible. All purpose parts have become "massive calendar part[s] where you're just calling the calendar again to see how many cases you can dispose of and how many are left."[254]

Clearly, all purpose parts are no panacea. They accomplish very little by way of mitigating the effects of fragmented representation and do not even approach other inherent problems with the criminal justice system itself.[255] As long as Legal Aid's defense structure remains captivated by the case moving demands of the system, fragmentation will intrude. The real need is for individual attorneys to be assigned to individual cases. Of course, such a recommendation is quixotic unless either a drastic reduction in the caseload or a massive multiplication of the Legal Aid staff occurs. The latter prospect at least, constitutes a matter beyond the discretion of Legal Aid. It is, rather, in the realm of municipal finance.

2. Facilities and Location of Legal Aid Offices

We have already observed the deplorable facilities in which Legal Aid attorneys in the criminal courts are forced to conduct initial interviews with clients. The inadequacy of the available facilities is merely a corollary of the inadequacy of the court buildings in which Legal Aid staff offices are located throughout the city.[256] The location of the Legal Aid staff offices in the court buildings themselves does not help in the conduct of the defense function. Not only does it relegate counsel to inferior facilities in which to perform their duties, but prevents Legal Aid from having even minimal contact with the communities which it serves.

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254. Id.

255. Another problem not approached by all purpose parts is called to our attention by Senior Trial Attorney Joseph A. Kaplan: "The all purpose part panacea may permit the lawyer to handle a matter from arraignment through trial but if that lawyer is poorly trained, inexperienced or otherwise inadequate, his clients are being cheated and there is little likelihood that his incompetence will be discovered." Kaplan, supra note 222, at 5, col. 3.

256. See Hon. Harold A. Stevens, Presiding Justice of the Appellate Division, First Department, Remarks to the 94th Annual Meeting of the Legal Aid Society, March 12, 1970, 67 Legal Aid Rev. 20 (1970).

If Legal Aid staff offices were moved out of the court buildings and into the communities that the Society serves, a number of problems might be ameliorated. First of all, if the offices were areally decentralized in the same manner as police stations are, prearraignment contact with defendants might be facilitated. Furthermore, Legal Aid's presence in the community would probably enhance the chances of contact with the families of defendants, thus promoting efforts to gather information on the status of defendants for bail reduction and other purposes. Most important however, location in the community could make possible vast improvement in community attitudes. As the situation stands now, Legal Aid is "literally in the woodwork"[257] of what indigents view as an oppressive court structure. Legal Aid is often thought of by indigent defendants as part of "the system" and not as an organization whose purpose it is to render vigorous advocacy in their interest.[258] Location in the communities in which these defendants live could make Legal Aid more accessible to and accepted by the ghetto community.

Improvement in attitude on the part of Legal Aid attorneys themselves might be helped by such a move. Facilitated contact with the communities in which indigent defendants live might enable attorneys to avoid the "bureaucratic problem", that is, the tendency to take a cynical attitude toward their work and to view the individual defendant as merely another number to be processed.[259]

Again, this kind of improvement would require substantial funding and is beyond the discretion of Legal Aid given present resources.

3. Caseload

We have noted the enormity of the problems caused by the tremendous caseload in New York's Criminal Courts not only for Legal Aid defense but for the court system as a whole. We have seen that even with the institution of all purpose parts, a considerable accomplishment, the caseload causes the most serious deficiencies of Legal Aid defense to remain unremedied. Without a caseload reduction per attorney there is still not sufficient time for pre-arraignment or in-jail consultation, for preparation, research or

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257. Subin interview.

258. See the grievance list of prisoners during the recent jail riots in New York City in New York Times, Aug. 11, 1970, at 34, col. 3.

259. Dawson interview.

investigation. Without caseload reduction, the goal of the strained court system will surely remain the shuffling through of cases under the guise of due process.

Administrative improvements such as comprehensive calendar control could help reduce the caseload pressure for both the courts and Legal Aid.[260] Statistics show that in Manhattan Criminal Court in 1969 the average felony appeared in court 4.29 times and that the average waiting time between appearances was 3.9 weeks.[261] The average duration of each felony in the criminal courts only was 13.1 weeks.[262] Misdemeanors appeared an average of 3.46 times with an average inter-appearance time of 5.1 weeks and an average duration of 12.8 weeks.[263] Because cases average nearly four adjournments and remain in the court system for nearly 13 weeks, there is no equivalent outlet for the rapidly increasing intake of cases. Between 1968 and 1969 arrests increased 21.6 per cent and summonses issued increased 34.8 per cent.[264] Unnecessary adjournments, while they do not

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260. A related method of reducing the caseload for both the courts and Legal Aid is a much needed revision of the substantive law. Administrative violations such as housing offenses, and victimless crimes such as gambling, alcoholism and prostitution contribute heavily to the case burden. Statement of Mayor John V. Lindsay to the Administrative Board of the Judicial Conference, New York Times, Oct. 11, 1970, at 80, col. 4-5; see also R. Patterson, supra note 222, at 39. In addition, drug addiction should be fully recogniæed as a medical and social rather than a criminal problem. Facilities for treatment should be imporved and expanded and cases should be handled without the criminal courts. Since nearly 60% of the inmates of New York City's detention facilities are suspected addicts (Lindsay, supre, at 80, col. 2.), removing these cases from the court dockets would greatly alleviate caseload pressure.

261. J.B. Jennings, The Flow of Arrested Adult Defendants Through the Manhattan Criminal Court in 1968 and 1969 9 (RAND Institute Study, Jan. 1971).

262. Id.

263. Id.

264. Hon. Harold A. Stevens, supra note 256, at 19.

increase the number of cases which the courts must handle, bottle up the cases which have already been taken in, thereby artifically inflating the caseload burden. In addition, the defendant is kept waiting longer in jail, and the more appearances he is forced to make, the greater the fragmentation of his defense by Legal Aid.[265]

It has been suggested that inefficient and haphazard calendar control by the district attorney's offices and the courts themselves is a major cause of unnecessary adjournments.[266] In the words of Justice Harold Stevens:

> The daily court calendars are far too large for efficient handling. In a typical calendar part for either misdemeanors or felony hearings, 150 to 300 cases are processed on an average day, although the part has a capability, assuming a back-up, of holding only 10 or 15 hearings a day. The inevitable result is adjournment of many cases which, with adequate courtroom space and manpower, could be readily disposed of rather than adjourned.[267]

Justice Stevens suggests increased manpower and facilities as a solution. A possible remedy with potentially comparable effect and infinitely lighter financial burden is a system of master calendar control. Such a system could insure rational distribution of the caseload throughout the courts at a rate at which dispositions could be made both efficiently and with adequate attention to individual defendants. The short wait which would be required of defendants subsequent to arraignment is certainly better than the months they must sometimes now endure in waiting for disposition.[268]

Another remedy which offers possible amelioration of the caseload is extra-legal disposition of cases. On this point Legal Aid could have much to say on behalf of defendants. Legal Aid does very little to explore the possibilities of alternatives to imprisonment for its clients. As a corollary, Legal Aid does very little in the direction of diverting cases from the criminal process.[269] It has been suggested

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265. Kaplan, supra note 222, at 5, col. 3.

266. Id.; Subin interview.

267. Hon. Harold A. Stevens, supra note 256, at 20.

268. 5% of all adult arrest cases required more than 10 months for disposition in 1969, J.B. Jennings, supra note 261, at V.

269. Dawson interview.

that defense counsel can often obtain a dismissal or at least a conditional discharge for the defendant if he can document a coherent noncriminal program of rehabilitation.[270] There is little or no resistance from the prosecutor since his calendar would also be lightened.[271]

One Legal Aid attorney stated that there is "very little time [individual attorneys] can devote to that type of planning."[272] It is obvious that caseload demands must necessarily limit the participation of Legal Aid attorneys in such activity. It is nonetheless true that the Society has never made a creative effort to implement extra-legal disposition of cases on a large scale.[273] Legal Aid attorneys in fact, need not be used. A para-professional staff perhaps aided by volunteer law and social work students could perform the tasks involved.

It might in fact be argued that Legal Aid is obligated to provide such services, not only because it would thereby improve its performance of the traditional defense function, but also becuase the indigent population which Legal Aid serves is almost universally in need of them. In effect, the problem of crime for the ghetto resident is not a legal, but a social problem. A criminal act is not a momentary lapse in an otherwise "normal" lifestyle for a ghetto resident as it usually is for a member of the more affluent social strata. The indigent defendant, in general, is the victim of the criminal environment in which he subsists.[274] In this setting, Legal Aid has an institutional obligation to recognize that it defends a specific segment of the population which has problems common to no other segment.[275] The way to fulfill this obligation is to seek resources to make a "broader argument" for the defendant, to divert his case from the criminal justice system.

There is yet another option open to Legal Aid to ameliorate the caseload problem. The significant fact to be considered here is that Legal Aid is under contract with the City of New York to defend all indigents assigned to it.[276]

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270. Dawson interview.

271. Id.

272. Id.

273. Subin interview.

274. Id.

275. Id.

276. Halpern interview.

Logically, if Legal Aid as an institution ceased to accept all cases assigned, the caseload could be reduced to a point at which individual attorneys could be assigned specific responsibility for individual cases from arrest to final disposition.[277]

The same result could be effected by the individual Legal Aid attorneys themselves. According to Senior Trial Attorney Joseph Kaplan, the Bronx Supreme Court staff of Legal Aid recently protested their oppressive caseload and it was promptly reduced.[278] Mr. Kaplan expressed the opinion that it was not only a right but a duty of defense counsel to reject an assignment if he feels he cannot give adequate representation.[279]

However it is done, the effect of the caseload must be ameliorated if Legal Aid is to provide adequate defense services. Several courses of action toward this end are now within the Society's means. Given its present resources, Legal Aid could establish a systematic policy of seeking extra-legal disposition of cases by utilizing volunteer and para-professional personnel. Alternatively, it could accept only those defendants it can represent effectively, thereby forcing the city to appoint private counsel for remaining indigents under Article 18-B of the County Law.[280] Legal Aid is in a unique position as defender of all indigents, and therefore, the mainstay of the case-moving apparatus. If refusal of assignments seems too drastic a measure, Legal Aid can at least use its position as a bargaining lever to help effectuate other needed reforms in substantive law and calendar control.

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277. See Equal Justice at 91.

> One of the dilemmas which often faces a voluntary defender system is whether coverage should be extended so that all indigents appearing in the criminal courts are afforded counsel or whether coverage should be restricted so that the quality of representation can be maintained... However, if a choice is necessary, this committee believes that the quality of representation should be maintained even if as a consequence the coverage of the voluntary defender system must be restricted.

278. Kaplan, supra note 222, at 5, col. 2.

279. Id.

280. N.Y. County Law §§ 716-21, 943 (McKinney Supp. 1970).

4. Experience and Training of Legal Aid Attorneys

It has been suggested that the heart of Legal Aid's problems is not the caseload or fragmentation but the inexperience of much of its criminal court staff.[281] The high turnover rate of the Legal Aid staff[282] when coupled with the Society's policy of promoting experienced counsel to the supreme court,[283] results in the constant manning of the criminal courts by relatively inexperienced people.[284] Legal Aid relies heavily on recent law school graduates to man the criminal courts.[285] Moreover, the Society conducts no systematic program of training or even of on-the-job supervision for these inexperienced people.[286]

Clearly, Legal Aid can remedy this problem with little more than its present resources. Instead of inexperienced attorneys being forced to learn "literally over the bodies and backs" of their clients,[287] a comprehensive and continuing training program should be immediately initiated. To supplement this, Legal Aid should periodically rotate its experienced supreme court staff to act as participating supervisors in criminal court.[288]

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281. Kaplan, supra note 222, at 5, col. 3.

282. Attorney Carol Halpern gave a rough estimate of 25% per year.

283. Dawson interview.

284. "Unless a defender system gives the indigent defendant competent representation, it is nothing more than a pro forma discharge of society's obligation to defend the indigent. Representation by inexperienced, incompetent or unconcerned counsel cannot be considered to be adequate representation.... This committee believes that any defender system which relies primarily on inexperienced members of the Bar is not providing the quality of defense which should be given. Equal Justice at 58.

285. Rothwax interview.

286. Dawson and Roghwax interviews. Attorney Dawson's experience may be typical. When he began working for Legal Aid, the sum total of training he received consisted of two lectures on substantive law and procedural problems, and one or two days of watching arraignments in part 1-A (now part AR-1 in Manhattan).

287. Dawson interview.

288. Rothwax interview.

With regard to the high turnover rate, there are certain inherent problems in any kind of criminal work. district attorneys' offices, as well as Legal Aid, have a constant influx of new attorneys looking for a short period of in-court experience with which to procure a better paying job.[289] Additionally, many who come with great enthusiasm find after a time that they are just not suited for the challenge of prosecution or criminal defense work.[290] Young, idealistic attorneys can quickly become disillusioned by the burden of the caseload and by the fact that they are part of an organization which many defendants see not as a friend in time of need, but as part of an oppressive court structure. To counteract this disillusionment Legal Aid should become a more aggressive and innovative defense organization, by establishing community relations and by exerting public pressure to effect reforms which it cannot effect on its own.

CONCLUSION

It seems firmly established that Legal Aid does not render effective assistance of counsel, in the constitutional sense, to the indigents of New York City. Not all of the problems can be remedied by Legal Aid alone. The addition of financial and manpower resources to both the court system and Legal Aid would go far toward remedying the burdensome caseload, fragmented representation and deplorable facilities. Short of these measures, Legal Aid should use its position as mainstay of the New York City criminal justice system to pressure for helpful reforms such as calendar control and substantive law reforms.

Legal Aid clearly can do much more to divert cases from the criminal process and to insure the competence of its attorneys. In addition, Legal Aid must begin to establish contact with the communities it serves. It must become more accessible and more responsive to the ghetto resident. The attitude of "moving the caseload" which constitutes a posture of responsibility to the system rather than to defendants must be expunged.

Whatever is done, the situation clearly cannot be allowed to remain as it is at the present time. The situation that has been described above is not only intolerable, it is antithetical to the very assumptions upon which the

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289. Dawson interview.

290. Id.

adversary system of justice rests.[291] As the Supreme Court has stated in Coppedge v. United States:[292]

> When society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged.[293]

D.R.A.

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291. See text accompanying notes 29-31 supra.

292. 369 U.S. 438 (1962).

293. Id. at 449.