DISCUSSION

MICHAEL SMITH, MODERATOR*

RICHARD WILSON: Hopefully, illustrations of funding inequities will get people started on a fuller examination of the problems of indigents' defense.[1] In response to Professor Mirsky's suggestion that there is no empirical data in these kinds of suits to support our hypothesis, these suits are rare. There are very few of them and we've suggested reasons why there are all kinds of systemic disincentives to pursue them.[2] There is some necessity for lawyers to recognize that it isn't their responsibility alone to bear the burdens of the system—the judiciary, other branches of government, and the public bear that responsibility as well. The one suit which I drew on heavily in the article was *Wallace v. Kern*.[3] The New York district court decision was incredibly broad and very far reaching in terms of what it attempted to resolve through a class action section 1983 civil rights claim. It imposed for the first time a number of cases over which it is inappropriate for lawyers to handle felonies. That case was overturned on appeal but only on grounds that the Legal Aid Society is a private entity which does not act under color of state law. I suggest that most public defender offices do act under color of state law and similar suits with judges who are equally visionary could do an awful lot for the quality of defense services by imposing realistic limitations.[4]

AUDIENCE COMMENT: My name is Vince Aprile. With all due respect, Professor Mirsky, why do you feel that the law schools are the place to make this change in the standard in level of competence of criminal defense attorneys?

CHESTER MIRSKY: I think the law schools are a good place to formulate different models because they are less subject to the pressures of the private bar and large institutional defenders. The Legal Aid Society in New York City is either constantly in fear of a loss of city funding or replacement by an alternative public defender system. It's hard, then, for the existing defense entities to engage in self-scrutiny. The private lawyers (with their own self-interest) who operate in the assigned panel system find it very difficult to criticize their own work. It seems to me that law schools have a certain amount of independence and are better places to engage in some of those tasks.

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1. Mounts & Wilson, *Systems For Providing Indigent Defense: An Introduction*, 14 N.Y.U. REV. L. & SOC. CHANGE 193, 193-95, 197-201 (1986).

2. *Id.* at 200 & n.36; Mounts, *The Right to Counsel and the Indigent Defense System*, 14 N.Y.U. REV. L. & SOC. CHANGE 221, 234-36 (1986); Wilson, *Litigative Approaches to Enforcing the Right of Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 203, 209-10 (1986).

3. 392 F. Supp. 834 (E.D.N.Y. 1973).

4. *But see* Polk County v. Dodson, 454 U.S. 312 (1981).

Mounts and Wilson deal with the competency problem through litigation. In the Warren Court era, a receptive federal or state court may have imposed rules on appropriate caseload. I do not believe that the litigation approach is likely to succeed today. Perhaps, then, continuing legal education and certification will improve the quality of indigent criminal defense. My belief is that law schools have the independence and creativity to meet the challenge.