RESPONSE

HAROLD ROTHWAX*: My remarks deal with a different aspect of systemic development, that relating to New York and other large metropolitan areas where more than one agency delivers services to the indigent. In large metropolitan areas, there are more criminals and many more multiple defendant cases than Legal Aid or a public defender agency alone could represent. Therefore, such areas have had to search for additional ways to provide counsel to criminal defendants. After realizing that there needs to be more than one agency providing legal services, one must decide what form or forms those other agencies should take. In New York we have chosen a two-tier system consisting of a private Legal Aid Society which receives most of its money from government, and an assigned 18-B[1] panel made up of private attorneys.

The New York system does not work well.[2] That collection of the best and brightest—the Legal Aid Society—is now moribund and bureaucratic. Quite plainly, I attribute the Society's narrowness to the lack of significant institutional competition. Our other tier, consisting of assigned counsel, barely meets the needs of indigents' defense. The 18-B attorneys are inadequately compensated, their criminal cases often take a backseat to other matters in their practice and inevitably get delayed, and they often have limited resources, supervision and auxiliary services. From an administrative point of view, assigned counsel systems are about three times as expensive as Legal Aid or public defender systems.[3]

I propose the implementation of a four-tier system to provide indigents' counsel instead of the present system. The first two tiers consist of a legal aid society and a public defender system. Both are similar in organization, each having large numbers of attorneys who work on annual salary and who are recruited in the pattern of the present Legal Aid Society. Because Legal Aid goes on for generations without any effective yardstick by which its efficiency can be measured and because it operates without competition or challenge, the Society represents a false standard of excellence. More importantly, Legal Aid is now fixed in its ways. A public defender system in addition to Legal Aid would: 1) cost less than the 18-B system, and 2) create a climate spawning more innovation, more creativity, and more imagination in the conduct of indigents' defense.

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* Justice, New York State Supreme Court; former Director, MFY Legal Services.

1. *See* N.Y. COUNTY LAW § 722(3) (McKinney Supp. 1986).

2. *See* McConville & Mirsky, *Defense of the Poor in New York City: An Evaluation* (forthcoming).

3. *See, e.g.*, LOS ANGELES COUNTY, A COMPARATIVE ANALYSIS OF INDIGENT DEFENSE SERVICES 17 (1985). However, cost varies according to location and rate of compensation. *See, e.g.*, McConville & Mirsky, *supra* note 1 (institutional defender, who handled higher proportion of misdemeanor cases than assigned counsel, was more costly than assigned counsel).

When I became director of the Mobilization for Youth (MFY) Legal Services program in New York, Legal Aid Civil Division had a monopoly in providing civil services to the indigent. MFY innovated in ways that Legal Aid had not, and in response Legal Aid began to innovate in ways that MFY had not. Ricocheting off of each other was healthy, creative, and not unfriendly. If anything, lawyers at MFY and Legal Aid took pride in their special community. Competition provided the benchmark by which the efficiency and effectiveness of our services (not to mention our own self worth) could be measured.

Moreover, economies of scale favor institutional defender agencies over the assigned counsel system. Providing those services at one-third the cost of an assigned counsel system frees up resources that could go into training, supervision, and auxiliary services. Under the modern adversary system, Legal Aid and public defender agencies can mount a greater challenge to prosecutorial offices than individual 18-B lawyers can, simply because the defender organizations have greater resources. In addition, these added resources and structure mean that the agencies are more capable of developing uniform norms of operation and minimum standards.

A third tier would approximate the contract system which the State of Arizona found so wanting in *State v. Smith*.[4] Each year, a multitude of lawyers leave legal aid societies and district attorneys' offices to enter private practice. New York's appellate division could give firms with experienced criminal defense lawyers annual retainers to handle a fixed number of cases with exceptions for unusual cases. In the event that one of the members of the partnership could not handle a matter an associate or partner could take the case and delay would be minimized.

The fourth tier is the 18-B system as we now know it. In terms of systemic development, the assigned counsel panel in New York is as sophisticated as anywhere in the country. However, there are special problems in terms of selection, evaluation, and removal. While Legal Aid's hiring practice is sound (an excess of applicants over available positions would not exist if Legal Aid lacked credibility), the selection of 18-B lawyers is much more haphazard. Evaluation of attorneys is almost non-existent; neither the courts nor administrators of the appellate division panel undertake any systematic review. Furthermore, attorney removal is next to impossible. To my knowledge, no 18-B lawyers have been removed except in individual cases by individual judges. Lower court evaluation and disqualification is necessary because the appellate division does not want to devote the resources, manpower, and time to the due process hearings necessary to remove assigned counsel in particular instances.[5]

4. 104 Ariz. 355, 681 P.2d 1374 (1984).

5. Similarly, Legal Aid is unionized and thereby enjoys the distinction of being the one organization in the country that is less able to fire somebody than a teachers' union. Unionization has placed so many obstacles in the way of removing public defenders—particularly by heightening the expectation of indefinite job tenure—that it becomes almost impossible to do so.

In short, the entire personnel policy linked to the assigned counsel system must be re-examined.

With three examples, I hope to illustrate how some problems may be successfully resolved by a reworking of our indigent defense system.

First, as we approach the twentieth anniversary of *Miranda*, the Legal Aid Society in New York has yet to set up a system whereby counsel are available twenty-four hours a day. A defendant should be able to get a lawyer before thirty-six hours elapse after the arrest. Consider the consequences of the fact that public defender and 18-B lawyers do not enter a case until the arraignment. Often by that time the investigation is over. If the District Attorney's office can have DAs on call around the clock to go out on homicide call, I don't know why a public defender agency with the resources of the present Legal Aid Society—now somewhere between 450 and 500 lawyers—cannot provide a similar service.[6]

Second, public defenders rarely pay attention to the civil legal consequences of their criminal cases or to the causes of new problems that their clients face. If a person, because of financial problems, goes out, gets drunk, hits a police officer and as a result is going to be evicted by the housing authority or fired from his job, Legal Aid is satisfied if they get the fellow with no prior record out of jail with a discontinuance. Why haven't the public defender agencies—which have had a long experience with these situations—started treating the whole person and not just the criminal eruption that brings him to their attention? Lawyers should approach clients in the same way that doctors approach patients; we must remove the boil *and* detect the cause of the infection. In New York, there is astonishingly no formal or informal contact between the civil and criminal components of Legal Aid and very little in the way of referral. Efforts should be made to improve that aspect of Legal Aid's functioning.

Third, public defender agencies should be able to relate to their communities. Being located in the communities where they serve large groups of people, they can develop liaisons with police departments and education programs so that people know their rights and are able to assert them in advance of arrest. At MFY, we tried to address the communication problem by distributing cards printed in English and Spanish throughout the community which indicated what people's rights were upon arrest and what number to call in order to contact an attorney.

In short, Legal Aid, public defender agencies, and assigned counsel panels have no coherent structural or philosophical view. Neither the defenders nor the legal community has attempted to define its role. Conflicting allegiances, misallocated resources, and a stagnant environment sap imagination and breadth from the quality of indigent defense. Perhaps the four-tier system

6. The union, while portraying itself as an advocate for quality indigents' counsel, apparently has not thought of twenty-four hour on call rotation.

that I propose and some healthy competition may provide some longed-for relief.

RESPONSE

RICHARD MCGAHEY*: I grew up in the Presbyterian church, where the sermons often started out with a text for the congregation's reflection. I want to start my remarks here with two texts which I think are germane to the problem of indigent counsel. The first is from Samuel Butler: "The world will always be governed by self-interest. We should not try to stop this, we should try to make the self-interest of cads a little more coincident with that of decent people." The second is an anonymous English proverb: "The ass that is common property is always the worse saddled."

These two themes have been used during this conference, and apply to the papers by Wilson[1] and Mounts.[2] Knowing that public systems will always suffer from a lack of funds, how can we harness the self-interest of lawyers and the legal system to provide better counsel for the indigent? These issues were addressed by Malcolm Feeley[3] and Rick Abel,[4] when they suggested that we think about indigent counsel in terms of the way that the American welfare state provides services, and not just view it as a legal problem.

The papers by Wilson and Mounts call our attention to a serious problem: the establishment of a right to counsel for many types of legal actions, especially criminal ones, has not resulted in *effective* counsel. Although I trust that this proposition is not controversial, the problem is what can be done about it. The papers concentrate on a variety of litigation strategies to press for the goal of more effective counsel.

Having done a fair amount of work on legal issues, and having worked very closely with lawyers, I nevertheless continue to be struck by the distinctive approach lawyers take to the issues of public policy. The Wilson and Mounts papers are no exception. A variety of cases are described, a detailed rendering of legal theories for optional litigation strategies are provided, and some other remedies are hinted at. Yet there is relatively little institutional analysis: If we have such a bad system, how did it get that way, and what features of that system perpetuate and perhaps cause these deficiencies? Nor is there much attention to costs—how much would some alternative system cost, even in very rough terms? And finally, there is little discussion of how the political support for such a new system might be developed, especially if it looks like it might be very expensive.

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* Economist, New York University Urban Research Center.

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

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

3. Feeley, *Bench Trials, Adversariness, and Plea Bargaining: A Comment on Schulhofer's Plan*, 14 N.Y.U. REV. L. & SOC. CHANGE 173, 174-75 (1986).

4. Abel, *What is the Assistance of Counsel Effective For?*, 14 N.Y.U. REV. L. & SOC. CHANGE 165, 169-70 (1986).

Let me emphasize that this is not a particular criticism or attack on the authors; it is an observation about the two cultures of law and social research. Lawyers argue from cases (often extreme ones), whereas social researchers look for regularities. Sociological research may reveal, for example, that judges make routine and predictable sentencing decisions in ninety-five percent of their cases, but lawyers look at the five percent at the far ends of the continuum, and argue whether the results are fair, just, or what have you.

This problem colors my reactions to these papers, and much of the debate at this conference. I am not a lawyer, so I will not comment at length on the general legal arguments of the papers. But outside the realm of legal argument, there are several aspects of the papers, and the Colloquium, which I find troubling or incomplete.

The first problem is the lack of attention to why the system seems to work so poorly. The English proverb about the poorly saddled ass tells us some of the reason; it is also expressed in the observation that systems for the poor are poor systems. Public provision of virtually all basic social services is much worse in the United States than in other advanced capitalist societies, partly because we approach social policy through a means-tested approach rather than a universal right to services. Means-tested approaches are cheaper, but they are also more discretionary and easier to cut back. Recent American experience with anti-poverty spending illustrates this quite well.

The sheer lack of financial resources is also implicated in the poor operation of the system, but it is hard to see how substantial new money will be found to address the problem. I think it is this frustration that drives people to a litigation strategy. It is an American style to attack social problems via the courts, and establish new rights without regard to resource constraints, rather than building political coalitions for more resources or offering alternative policies that would make more effective use of existing resources. After all, the essence of a right is that it is a non-negotiable claim that must be enforced.

But do problems exist only because of the lack of dollars? I suspect not, and that leads me to a second problem, a perhaps latent assumption, that more money is a critical part of the solution to the problem. There is ample testimony from participants that there are very limited resources in these systems. But you would get the same story if you talked to police, district attorneys, judges, corrections personnel, and probation and parole officers. One simply cannot assume that more resources will solve the problems. Money cannot be obtained with much ease from legislatures, and institutional pressures lead to proportionality in the system; if the police get more money, everyone else wants an equal share. Although I don't know where counsel for the indigent ranks in the criminal justice spending hierarchy, it's probably very near the bottom. Perhaps rehabilitative services for prison inmates is lower, but not much else will be. Moreover, this ordering is not likely to shift much.

To economists, there are basically two ways to get more output from a

system: you spend more money, leaving the arrangements unchanged, or you make the existing arrangements more productive. This is supposed to be the virtue of competitive markets, where cost pressures will force competitors to provide equal quality services at lower prices. Hence the calls are made for making public systems more responsive to cost pressures, even to the point of having private contractors operate them; in short, introduce competition, and services will improve.

However, I don't think that private competition will help us much with the problem of counsel for the indigent. It may be odd to hear an economist express skepticism about the salutary effects of competition, but the competitive approach to obtaining greater productivity, which has enough problems when applied to private markets, is even more problematic for understanding public systems. Public systems which are not threatened with going out of business have no incentives to improve; in fact, private competition with public services can easily result in a deterioration of the public service.[5] The most vocal and mobile consumers leave the public system, and the remaining consumers (or clients) are even less able to bring pressure to bear on the inefficient public system. For example, consider that the increased use of urban private schools has failed to improve the quality of public education. This paradox helps explain a problem noted by Mounts and Wilson—why the contract bidding system for public defense simply results in progressively lower cost bids with no regard for the quality of the defense.[6] There are no consumers who can enforce higher quality services.

A third problem involves lawyers' conception of the nature and virtues of the adversary system of legal defense. The authors find most non-experts to be uninformed about the essence of the adversary system,[7] but the essence seems to boil down to the assertion that more resources means a better defense. I think this notion should be reexamined. At some lower limit (no defense) this is probably true, although one can imagine situations where no defense is preferable to a poor defense. But there is an implicit assumption that more resources and private counsel will insure a better defense.

Private counsel is certainly more expensive, which is why the poor don't use it. To the extent that price reflects the quality and quantity of resources, and those resources have some bearing on the quality of the defense, private counsel is probably better. But the assumption that adversary proceedings are better recalls Rick Abel's question:[8] What is effective counsel? Is it a process where you get as many people out of the system as possible? A higher acquittal rate? More resources per case, regardless of outcome? Standards may need to be established, but Wilson's suggestion that the current structure of

5. A. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970).

6. Mounts & Wilson, *Systems For Providing Indigent Defense: An Introduction*, 14 N.Y.U. REV. L. & SOC. CHANGE 193, 199-200 & n.35(1986).

7. *Id.* at 200-01.

8. Abel, *supra* note 4.

private fees and practice be used as a guide for public cases[9] seems to me unworkable. Mounts calls for "measurable standards" for a defense, drawn from some assessment of resources required, experience of other lawyers, and the workload from other comparable cases.[10] There is a suggestion of using precase hearings[11] to set the bounds of these expenses—rather like an estimate by an auto repair shop.

The problem is: Who is empowered to set the "measurable standards"? Presumably, as most non-lawyers are "ignorant" about the needs of the adversary system, panels of lawyers would set the standards. But who would enforce the guidelines? Who will audit the lawyers' submission of claims? Do lawyers in this audience want to submit what their overall caseload is, and have that audited by someone? We can create these new layers of regulation endlessly, but there is no guarantee that such regulation will result in the goal we all share—better counsel for the indigent.

The implicit model for standards in the Mounts and Wilson papers seems to be that of medicine, where doctors have been given a major role in establishing "reasonable and customary" fees for different procedures. I trust everyone is familiar with the trends in medical costs resulting from this approach; it allows a specific professional group to pass along rising costs to a broad body of consumers (in this case, taxpayers) with little incentive to hold down expenses. As I am not convinced that increases in expenditure *per se* would significantly raise the quality of legal defense, this option seems to me undesirable.

It is also politically improbable. Most trends are in the other direction, as shown by new mechanisms for medical cost containment. And the political consensus for providing medical care in the U.S., while weak, is a lot stronger than the public consensus for providing counsel to indigent criminal defendants. We are in a period when the national administration, because of budget pressures, is successfully reducing nutritional aid to mothers and newborn infants. If these expenses can be reduced, the prospects for increased public dollars for the criminal defense of the indigent seem remote indeed.

It may be just this sense of pessimism about obtaining new funds that leads attorneys to litigation. But establishing a legal right, while not to be dismissed as unimportant, means little if the resources for implementation cannot be provided. And even if the resources are provided, the resulting system of defense may be very far from the goal that we desire.

So what are the options for the system? I have a short list of possibilities, none of which seems very probable to me, including one which I introduce mostly to try and shake up our thinking about this problem.

1) Tighter, more effective control and regulation of existing expenditures, and standardization of basic procedures. This seems a weak reed. The system

9. Wilson, *supra* note 1, at 218.
10. Mounts, *supra* note 2, at 241.
11. *Id.* at 236-37.

is overwhelmed, and fighting waste and inefficiency might not get us very far. Some better policing of assigned counsel expenditures might be in order, although we should question the implicit claim that a particular attorney must pursue a single case to provide effective defense. This is what doctors always said about medical care, but group medical care through health insurance plans has provided effective medical care in many instances of standardized treatment. An analogy to standard criminal and other actions may not be far-fetched. Better training for lawyers could be joined with this notion of standardizing certain types of cases or procedures.

2) Harder thinking about what an effective defense is. How do you measure effective assistance of counsel? For an appeals court, it may be sufficient in particular cases to adopt Justice Stewart's standard on pornography—"I don't know what it is, but I know it when I see it." As Mounts and Wilson ably point out, this is not sufficient for a systematic theoretical critique. Nevertheless, it may not be so bad for particular cases. I am not as disturbed as the authors by the *Cronic*[12] and *Strickland*[13] cases, where the Supreme Court focused on the fairness of the result, not the process. Appellate courts, and court procedures generally, are better at deciding specific cases than they are at establishing general rules. It would seem possible under the authors' critiques to imagine a case where a fair result was obtained, and the lawyers did an adequate job, and yet the process was somehow deemed wrong or unfair. I must confess that I fail to fully grasp the problem here—what would the harm or the remedy be where the result was fair and the defense adequate?

3) Remove cases, to the extent possible, from the full-blown, adversarial system. This might involve mediation, arbitration, the decriminalization of certain offenses, or handling them through administrative tribunals and fines. Adversarial defense can be quite costly, and monetary costs matter. I know that economists can sound disturbingly like pennypinchers, discussing cost constraints during debates over the legitimacy of expanded rights, but there are resource constraints. We don't have the option to ignore them; if they are not explicitly understood and accounted for, they will exercise their influence in subtle and unforeseen ways. To use an example drawn from a different area, some states that have moved to mandatory criminal sentencing did not incorporate explicit prison population constraints in their policies. The results were quite predictable; many legislators and others wanted to raise the penalties for all offenses. Without explicit and binding resource constraints, it's easy to advocate doing more of everything, as it all seems costless. But since the money constraints will come into play anyway, this approach ignores reality and the sometimes subterranean influences that resource constraints have on public policy.

4) Establish a tax on lawyers' incomes. Here's an idea that I want to use to try and stir up our thinking. Although I indicated that letting lawyers set

12. United States v. Cronic, 466 U.S. 648 (1984).
13. Strickland v. Washington, 466 U.S. 668 (1984).

up the fee structure for an adequate defense might reproduce the problems that we have seen in health care costs, there is one case where it might be allowed. Building on the *pro bono* obligation, we might fund indigent defense through a dedicated, progressive tax on lawyers' incomes. The license to practice law provides access to income that is not available to non-lawyers, and we might tax some of that income to fund the necessary defense of the indigent, which the private market fails to provide.

The tax could be proportional to lawyers' incomes. It could also be paid in two ways: money, or in-kind services. If lawyers don't want to pay with actual hours of service, because they feel incompetent to provide criminal defense, or want to spend their time elsewhere, they could pay to remove the obligation. The funds could go into a pool to hire attorneys, or pay for contract systems, public defenders, legal aid, or what have you.

A lawyers' committee could set the standard for an average cost per indigent case, and estimate what the total volume of cases per year would be, in the same way that insurance companies estimate total risks and financial requirements. Based on these estimates of necessary revenue, the committee could calculate the total income of lawyers in a state, and figure how best to raise the necessary revenue—some progressive tax based on a baseline hourly contribution might make sense. If the average costs for an adequate defense were 100 hours at $50 per hour, then a progressive tax could easily be instituted based on lawyers' income to cover the total dollars and/or hours of service required. In short, lawyers could be permitted to set the fee schedule if they taxed themselves to provide the services. This might cause some inflation in overall legal expenses, but as the competitive market for all legal services works somewhat better than it does in the case of indigent counsel, there probably would not be a substantial inflationary impact.[14]

I trust that most people are dismissing the idea of taxing lawyers' incomes to provide for indigent counsel. I introduce it partly to make a rhetorical point—is it really more problematic than what we have now? Obviously, I do not think that it has much of a chance to become policy, as *pro bono* sounds noble until it becomes an obligation and a tax; lawyers won't be any more eager to be taxed than anyone else. But any system to expand resources for indigent counsel either has to tax everyone, or raise the productivity of the existing system. I am well aware that a *pro bono* tax would be an odd and perhaps unworkable system. The challenge to all of us at this conference is to think of something better. The only virtue of the existing system over any of these alternative schemes may be that it exists.

14. Variations of this scheme have been proposed. For example, Bob Levinson, a research assistant at the Urban Research Center, suggested allotting a certain number of hours in court for all cases to each lawyer, and allowing them to purchase more hours and access by paying money to a fund for indigent defendants.

RESPONSE

CHESTER L. MIRSKY: Allow me to recreate indigent criminal defense work as it existed twenty years ago at MFY. We didn't have a very large budget. We had an office on Third Street about a quarter of a block off Avenue D. Our office was burglarized on a fairly regular basis. It was dangerous to work there. The facilities were rat infested and you had to work your way through people who were sitting in the waiting room on the ground floor of a very old brownstone. After you picked up your mail and papers you would wind your way up to a very small office which usually did not have adequate heat and lighting. Nonetheless, the quality of lawyering that went on there was first rate, and the questions we ask ourselves today are: What happened there that made the quality of lawyering so good? On the other hand, what has happened today when extraordinary sums are expended on criminal defense? Is the quality of people delivering defense services today a lot different from twenty years ago?

Someone predicted that the people providing criminal defense services today would view their responsibilities in the same way a civil servant regards her job. That is, operating on a nine-to-five basis. That wasn't what indigent criminal defense lawyers thought of the job twenty years ago. Rarely if ever was a day so regular, and we certainly would never have compared ourselves to civil service employees. MFY lawyers were carefully selected, closely supervised and trained, and responsible to one another. We, of course, were not organized in a union (although the support staff was), though I'm not really sure the extent to which unionization of lawyers has contributed to the current state of affairs.

I harken back to the question of who we were and why we are different today. Allow me to interpret Justice O'Connor's message in *Strickland*:[1] "Listen, you graduated law school, you got a degree. When you left law school you passed the bar exam, you are presumptively competent." When people were hired to work at MFY we recognized that clearly everyone was not competent to practice criminal defense work and that O'Connor's assumption is dead wrong. What I think has occurred today is that there are too many uncommitted lawyers practicing criminal defense, and the selection process which we engaged in at MFY and which developed a small cadre of devoted lawyers who provided effective assistance on a regular basis does not now occur.

I think the law schools have, after *Strickland*, a responsibility in training and educating students to determine whether they can be suitable criminal defense lawyers. How could that be accomplished and what should be the systemic development that should occur? At the outset, there must be a certi-

1. Strickland v. Washington, 466 U.S. 668 (1984).

fication process for both criminal defense lawyers and prosecutors. Law schools have to seriously consider continuing legal education in an organized way. This process can interrelate with the bar and serve, in part, as a screening mechanism for the lawyers beginning to practice criminal defense. The incompetent attorneys include both private court-appointed lawyers and institutional defenders. The problem is extensive; there are lawyers practicing who actually espouse racist views about their clients. These attorneys continue to practice without regard to how personal bias affects the quality of representation.

What has happened that permits such a state of affairs to exist? It seems to me that law schools have chosen not to concern themselves with the implementation of the sixth amendment right to counsel. What law schools have said is that a student who has taken criminal procedure, evidence, and maybe a short clinical program is ready to practice. They haven't exerted any pressure by way of certification to see to it that people who wind up representing criminal defendants are qualified. If law schools wish to satisfy the clinical accreditation standard, they should maintain a viable continuing legal education program tied into the certification process for criminal defense attorneys.

When I read the Mounts and Wilson articles I see the typical organized institutional defender's response to innovative defender models. In a worst case scenario, a lawyer signs a contract with an agency of the city government for *X* amount of dollars, and hires a young lawyer without any training or screening who is assigned to take all the indigent defense cases. Suddenly this otherwise uninitiated person is resolving cases by plea, having never investigated or considered the facts and therefore taking nothing to trial. The result is a record ten times worse than that of the institutional defender.

That worst case scenario does not necessarily have to apply. There are many lawyers leaving law school who would like to have an option other than a large institutional defender or a rotational assignment system. Having gone through an appropriate certification process run by law schools and having participated in models similar to the one we developed at MFY, the new attorney would then possess the minimum level of reasonable competence. Consider small firms which are funded and in which clear definitions of responsibility exist. There is no need to think of the contract model as the worst case scenario. It surely should be considered as one of the options.

Why is this an applicable place to reflect upon some of these issues? It's hard to throw reform proposals into the marketplace and hope that they will survive. The Legal Aid Society is a large and well-defined institution. It is prepared to defend itself, and it seems to do so at a cost to all of us in that it precludes the kind of scrutiny that we need. The private bar is also organized to defend itself against close scrutiny of the same sort. When you suggest a new model, many 18-B[2] lawyers think of socialized medicine or unnecessary

2. *See* N.Y. COUNTY LAW § 722(3) (McKinney Supp. 1986).

control, an abridgement of their autonomy. If these models are going to be proposed and brought forward they have to be tested and empirically verified. The law school has the obligation to undertake this process.

I don't believe there is any empirical data to support Rick Wilson's contention that affirmative suits which are in the nature of a condition suit will have any effect whatsoever on minimum standards.[3] You can just do so much in terms of a rule-embedded system. You can decide new cases which will stack up new rules. The ultimate questions are who is going to be employed in these defender agencies and what is their commitment to the individuals and the necessary lawyering tasks.

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