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Adversary Review: An Experiment in Performance Evaluation

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ADVERSARY REVIEW: AN EXPERIMENT IN PERFORMANCE EVALUATION

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I. INTRODUCTION

Chief Justice Burger and other observers of the legal profession have, in recent years, criticized the quality of "advocacy" in United States courts.[1] While such criticism is most often directed at trial representation,[2] focus on the performance of defense attorneys in plea negotiations is apposite to meaningful analysis of legal representation.

No studies have specifically dealt with policing the performance of counsel within the plea bargaining system. Moreover, one prominent critic of plea bargain justice, Professor Albert W. Alschuler, seems to dismiss the policing problem as being unresolvable.[3] While Professor Alschuler's conclusion is questionable, this article accepts his challenge that the burden "rest[s] with the advocates of plea bargaining to propose some mechanism that can achieve the asserted advantages of the guilty-plea process without, at the same time, yielding [to] the abuses . . . ."[4]

In a line of cases from *Powell v. Alabama*[5] to *Argersinger v. Hamlin*,[6] the Supreme Court has extended the sixth amendment right to counsel to various stages of criminal prosecutions.[7] As one observer has noted, the assistance of counsel is a defendant's most fundamental right, for it "affects his

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1. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973).

2. *Id. passim*. Similarly, most discussion of "effective assistance of counsel" has focused on the trial stage. Craig, *The Right to Adequate Representation in the Criminal Process: Some Observations*, 22 SW. L.J. 260, 275 (1968) [hereinafter cited as Craig]; Note, *The Emerging Right to Effective Assistance of Counsel*, 14 WASHBURN L.J. 541, 542 (1975) [hereinafter cited as *Emerging Right*]. *See generally* Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289 (1964) [hereinafter cited as Waltz].

3. "The problem of providing effective representation within the framework of the guilty-plea system is a problem that cannot be resolved satisfactorily." Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1313 (1975) [hereinafter cited as *Defense Attorney's Role*]. *See also* Alschuler, *The Trial Judge's Role In Plea Bargaining Part I*, 76 COLUM. L. REV. 1059 (1976); Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1 (1975); Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968) [hereinafter cited as *Prosecutor's Role*].

4. *Defense Attorney's Role*, *supra* note 3, at 1313.

5. 287 U.S. 45 (1932).

6. 407 U.S. 25 (1973).

7. *E.g.*, United States v. Wade, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963). *Contra*, Kirby v. Illinois, 406 U.S. 682 (1972).

ability to assert any other rights he may have."[8] In this vein, the Court stated in *McMann v. Richardson*[9] that the right to counsel contemplates the "effective assistance of competent counsel" and that "if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel."[10]

The central importance of the defense attorney in our criminal justice system is based on the assumption that "the process is an adversary one in which the initiative in invoking relevant rules rests primarily on the parties concerned . . . ."[11] Moreover, "[t]he defense lawyer is not only a principal conceptual element of . . . [the] adversary system; he is also a *sine qua non* of the system's implementation."[12] Thus, while the system is legitimized by the presumed presence and assistance of counsel,[13] it would seem that "[i]ncompetent counsel can thoroughly vitiate the right which his presence is meant to secure."[14] Some mechanism for quality control within the criminal justice system is imperative, but the traditional safeguards—appellate review and professional self-regulation—thus far have proven unable to provide that control.[15]

While the appellate courts differ with respect to the standard of review applicable in challenges based on counsel's effectiveness, use of either the "farce"[16] or the various "normal competency"[17] tests frequently amounts to little more than application of the anachronistic "fundamental fairness" doc-

8. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956).

9. 397 U.S. 759 (1970).

10. *Id.* at 771.

11. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 172 (1968).

12. Craig, *supra* note 2, at 261.

13. *See, e.g.*, United States v. Wade, 388 U.S. 218, 227, 233, 236, 238 (1967); Miranda v. Arizona, 384 U.S. 436, 466, 469-71, 480-81 (1966); Escobedo v. Illinois, 378 U.S. 478, 487, 490 (1964); Gideon v. Wainwright, 372 U.S. 329, 344-45 (1963); Powell v. Alabama, 287 U.S. 45, 68-69 (1932). *See also* AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 141 (Approved Draft 1971) [hereinafter cited as ABA STANDARDS]; REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 10-11 (1963).

14. Fitzhugh, *Providing Effective Assistance: The Duty of Defense Counsel*, 4 AM. J. CRIM. L. 123, 125 (1975-76).

15. *E.g.*, Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 17 (1973) [hereinafter cited as *Defective Assistance*]; Kavanaugh, *Performance Evaluation, Education, and Testing: Alternatives to Punishment in Professional Regulation*, 30 U. MIAMI L. REV. 953, 956 (1975) [hereinafter cited as Kavanaugh]; Marks & Cathcart, *Discipline Within the Legal Profession: Is it Self Regulation?*, 1974 LAW FORUM 193, 196, 228 [hereinafter cited as Marks & Cathcart]; Burbank & Duboff, *Ethics and the Legal Profession: A Survey of Boston Lawyers*, 9 SUFFOLK U.L. REV. 66, 69 (1974) [hereinafter cited as Burbank & Duboff]; Note, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review*, 13 COLUM. J.L. & SOC. PROB. 1, 2 (1977) [hereinafter cited as *Ineffective Representation*]. *But see* Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After* United States v. DeCoster, 93 HARV. L. REV. 752 (1980); Outcault & Peterson, *Lawyer Discipline and Professional Standards in California: Progress and Problems*, 24 *Hastings L.J.* 675, 683 (1973).

16. The "farce" tests are based on the view that the sixth amendment requires nothing more than the formal appointment of competent counsel. Subsequent analysis of counsel's performance under these tests is against the less stringent fifth amendment guarantee of due process. Thus, a petitioner may gain relief under the farce test "only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense." Gillihan v. Madrid Rodriguez, 551 F.2d 1182, 1187 (10th Cir.), *cert. denied*, 434 U.S. 845 (1977). *See also* United

trine.[18] This is apparent in the tendency of numerous courts to embrace, overtly or covertly, harmless error tests in effectiveness claims.[19] The continued reliance of appeals courts on such tests, as well as on other forms of disingenuous legal craftsmanship,[20] together with the Supreme Court's re-

States v. Ramirez, 535 F.2d 125 (1st Cir. 1976); Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

17. In McMann v. Richardson, 397 U.S. 759 (1970), the Supreme Court enunciated a standard of effective counsel within the context of plea bargaining. The Court sought to determine the point at which a defense lawyer's performance is so ineffective as to render his client's plea an unintelligent act, and held that counsel's performance had reached this stage when his advice to enter a guilty plea fell outside "the range of competence demanded of attorneys in criminal cases." *Id.* at 771. Nine of the federal circuit courts of appeal have rejected the farce test (discussed at note 16 *supra*) in favor of variations on the "normal competency" standard. *See* United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977) *cert. denied*, 435 U.S. 1011 (1978); Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979); Benson v. United States, 552 F.2d 223 (8th Cir.), *cert. denied*, 434 U.S. 851 (1977); United States v. Fessel, 531 F.2d 1275 (5th Cir. 1976); United States *ex rel.* Williams v. Twomey, 510 F.2d 634 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974); United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. July 10, 1973), *opinion after remand*, 20 CRIM. L. REP. (BNA) 2080 (D.C. Cir. Oct. 19, 1976), *opinion after remand vacated en banc*, March 17, 1977, *rev'd*, 25 CRIM. L. REP. (BNA) 2365 (D.C. Cir. July 12, 1979), *cert. denied*, 100 S. Ct. 302 (1979) (placing burden of proof on defendant); Moore v. United States, 432 F.2d 730 (3d Cir. 1970).

18. *See, e.g.*, Rochin v. California, 342 U.S. 165 (1952); Adamson v. California, 332 U.S. 46 (1947); Palko v. Connecticut, 302 U.S. 319 (1937). "Fundamental fairness" has been rejected as the applicable rule for other claims premised on the Bill of Rights. Johnson v. Louisiana, 406 U.S. 356, 384-86 (1972) (Douglas, J., dissenting). *But see* Ballew v. Georgia, 435 U.S. 223 (1978). The fundamental fairness standard, however, remains the prevalent test in claims of ineffective counsel. The "farce" tests evolved directly from the old doctrine. *See* Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443, 446-52 (1977) [hereinafter cited as Strazzella]; Waltz, *supra* note 2, at 305; Note, *Emerging Right, supra* note 2; Note, *Standards for Determining Effective Assistance of Counsel*, 37 OHIO ST. L.J. 927, 934-35 (1976). Though courts purport to apply a more objective test under the various "normal competency" standards, "the ultimate question [under either test] is whether the defendant received a 'fair trial.'" Comment, *Ineffectiveness Of Counsel—The Duty To Make A Reasonable Pretrial Investigation*, 40 MO. L. REV. 369, 371 (1975) (footnote omitted). *See* Ewing v. Williams, 596 F.2d 391, 396 (9th Cir. 1979); Fitzgerald v. Estelle, 505 F.2d 1334, 1336 (5th Cir. 1974), *cert. denied*, 422 U.S. 1011 (1975); Bazelon, *The Realities of* Gideon *&* Argersinger, 64 GEO. L.J. 811, 820-21 (1976) [hereinafter cited as *Realities*]; *Ineffective Representation*, note 15 *supra*, at 37-48.

19. Invoking the rationale of Chapman v. California, 386 U.S. 18, 24 (1967), ineffectiveness claims require a determination by the court as to whether the defendant was prejudiced by denial of effective assistance of counsel. Compare this with the formula enunciated in Palko v. Connecticut, 302 U.S. 319 (1937), in which the Court stated that some Bill of Rights guarantees "might be lost, and justice still be done." 302 U.S. at 325. Such an analysis shifts the focus of the sixth amendment claim to a fifth amendment due process issue of overall fairness and in the process conditions the sixth amendment right on the reviewing court's subjective interpretation of the defendant's culpability.

Citing the inapplicability of harmless error tests in counsel claims, the court in Beasley v. United States, 491 F.2d 687, 696-97 (6th Cir. 1974), rejected its use. *See also* Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970); Cooper v. Fitzharris, 551 F.2d 1162, 1164 (9th Cir. 1977) (ruling on prejudice issue *rev'd en banc* in 586 F.2d 1325, 1331 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979)); *but see* Judge Hufstedler concurring and dissenting, 586 F.2d at 1334-42. Still, numerous courts continue to sanction harmless error analysis in counsel claims. *See, e.g.*, Davis v. Alabama, 596 F.2d 1214, 1221-23 (5th Cir. 1979); United States v. Cooper, 580 F.2d 259, 263 n.8 (7th Cir. 1978); McQueen v. Swenson, 498 F.2d 207, 218 (8th Cir. 1974); United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973), *opinion after remand*, 20 CRIM. L. REP. (BNA) 2080 (D.C. Cir. Oct. 19, 1976), *opinion after remand vacated en banc*, March 17, 1977, *rev'd*, 25 CRIM. L. REP. (BNA) 2365 (D.C. Cir. July 10, 1979), *cert. denied*, 100 S. Ct. 302 (1979) (placing burden of proof on defendant); United States *ex rel.* Green v. Rundle, 434 F.2d 1112, 1115-16 (3d Cir. 1970). *See also* United States v. Bosch, 584 F.2d 1113, 1123 (1st Cir. 1978) (leaving issue open).

20. Courts have proven willing to indulge in questionable legal gymnastics in order to avoid the consequences of forthright analysis of counsel claims. Because Chapman v. Califor-

luctance to enunciate a standard for counsel effectiveness,[21] testifies to the inappropriateness of appellate review as a means of policing attorneys' day-to-day performance. Because of the closed nature of plea bargaining, courts are rarely in a position to observe counsel's performance except in the most superficial sense, usually at the plea-taking stage.[22] Moreover, the Supreme

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nia, 386 U.S. 18 (1967), distinguishes the *right* to counsel as a right the denial of which requires automatic reversal, *id.* at 23 n.8, those who urge use of harmless error tests for effectiveness challenges indulge in the proposition that the right to *effective assistance* of counsel does not inhere in the *right* to counsel. "Important as it may be, the right to effective representation is not as fundamental as the right to counsel. The right to effective representation is a gloss on the right to counsel, but it is only a gloss." *Ineffective Representation, supra* note 15, at 76. *See also* McQueen v. Swenson, 498 F.2d 207, 218 (8th Cir. 1974). *But see* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970); Cooper v. Fitzharris, 551 F.2d 1162, 1164 (9th Cir. 1977) *rev'd en banc* in 586 F.2d 1325 (9th Cir. 1978), *see* Judge Hufstedler concurring and dissenting, 586 F.2d at 1334-42. *See generally* Note, *Substantive and Procedural Aspects of the Right to Effective Assistance of Counsel*, 81 W. VA. L. REV. 525, 539-43 (1979).

While the above fiction has recently evolved as a device for insuring finality of convictions under the purported "more liberal" normal competency tests, courts have for years manipulated the "state action" doctrine to affirm convictions in private counsel cases. This approach, using a narrow view of the fourteenth amendment, finds necessary state action only in cases in which counsel was assigned by the court or when state officials failed "to accord justice" to defendants with retained counsel. Fitzgerald v. Estelle, 505 P.2d 1334, 1337 (5th Cir. 1974) (*en banc*), *cert. denied*, 422 U.S. 1011 (1975). *See* discussions of state action with respect to counsel claims in: Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1113-15 (1973); Fitzhugh, *supra* note 14, at 145-51; Waltz, *supra* note 2, at 296-301; *Ineffective Representation, supra* note 15, at 53-71. Though other circuits have recently failed to apply the state action approach, Greenfield v. Gunn, 556 F.2d 935 (9th Cir.), *cert. denied*, 434 U.S. 928 (1977); United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 640 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975), the Fifth Circuit continues to employ the state action formula, *see* Marino v. United States, 600 F.2d 462 (5th Cir. 1979); Perez v. Wainwright, 594 F.2d 159 (5th Cir. 1979). The Supreme Court declined to rule on the Fifth Circuit's double standard in Mansfield v. Estelle, 568 F.2d 1366 (5th Cir.) (unpublished opinion No. 77-2517 Feb. 9, 1978), *cert. denied*, 439 U.S. 881 (1978). Regarding the denial of certiorari in *Mansfield, see* Mr. Justice White dissenting in the denial of certiorari in Brown Transp. Corp. v. Atcon, Inc., 144 Ga. App. 301, 241 S.E.2d 15 (1977), *cert. denied*, 439 U.S. 1014, 1017-18 (1978).

21. "[T]he Supreme Court . . . has never enunciated any clear standards for courts to follow in passing on claims of ineffective assistance of counsel. As a result, circuit courts, left without guidance, have groped for the correct prescription to apply." McQueen v. Swenson, 498 F.2d 207, 214 (8th Cir. 1974). The High Court has "eschewed its responsibility to the lower courts," preferring to "address the problem by persuasion and admonition." Tague, *The Attempt to Improve Criminal Defense Representation*, 15 AM. CRIM. L. REV. 109, 110-12 (1977) [hereinafter cited as Tague]. Recently dissenting in the denial of certiorari in Marzullo v. Maryland, 561 F.2d 540 (4th Cir.), *cert. denied*, 435 U.S. 1011 (1978), Mr. Justice White wrote that "[i]n refusing to review a case which so clearly frames an issue that has divided the Courts of Appeals, the Court shirks its central responsibility as the court of last resort." 345 U.S. at 1012-13. *See also* Mr. Justice White's dissent in the denial of certiorari in Brown Transp. Corp. v. Atcon, Inc., 144 Ga. App. 301, 241 S.E.2d 15 (1977), *cert. denied*, 439 U.S. 1014, 1017-18 (1978). In addition to *Marzullo*, the High Court has denied certiorari in leading effectiveness cases of the circuit courts. *E.g.*, the Court refused to rule on the farce test, Gillihan v. Rodriguez, 551 F.2d 1182 (10th Cir.), *cert. denied*, 434 U.S. 845 (1977); Rickenbacker v. Warden, 550 F.2d 62 (2d Cir. 1976), *cert. denied*, 434 U.S. 826 (1977); Dinker v. Vinzant, 505 F.2d 503 (1st Cir. 1974), *cert. denied*, 421 U.S. 1003 (1975); the confusing standard of United States *ex rel.* Williams v. Twomey, 510 F.2d 634 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975); and the normal competency test, United States *ex rel.* Davis v. Johnson, 495 F.2d 335 (3rd Cir.), *cert. denied*, 419 U.S. 878 (1974); Benson v. United States, 552 F.2d 223 (8th Cir.), *cert. denied*, 434 U.S. 851 (1977). Indeed, for petitioners seeking relief on ineffective counsel grounds, it is a long, long way to certiorari.

22. *See* United States v. DeCoster, 487 F.2d 1197, 1204 (D.C. Cir. 1973), *opinion after remand*, 20 CRIM. L. REP. (BNA) 2080 (D.C. Cir. Oct. 19, 1976), *opinion after remand vacated en banc*, March 17, 1977, *rev'd*, 25 CRIM. L. REP. (BNA) 2365 (D.C. Cir. July 10, 1979), *cert. denied*, 100 S. Ct. 302 (1979); Moore v. United States, 432 F.2d 730, 739 (3d Cir. 1970); *Defense Attorney's Role*, *supra* note 3, at 1198, 1270; *Defective Assistance*, *supra* note 15, at 34; Craig, *supra* note 2, at 276;

Court's "quest for finality"[23] of guilty pleas is in direct conflict with the long-standing assumption that positive reformation of defense performance can be induced through reversals of convictions.[24] Further exacerbating the situation are the Court's recent rulings constricting access to collateral review, resulting in almost complete insulation of guilty pleas and some trial convictions.[25]

The legal profession's efforts at self-regulation have proven equally unproductive as a means of monitoring criminal defense lawyers' performances. The organized bar traditionally has preferred to deal with the problem of unethical practices while ignoring the issue of professional competence.[26] Moreover, professional grievance procedures are geared to ascertaining the culpability of practitioners.[27] This preoccupation with fault can be said to limit, if not preclude, responsible criticism and corrective action by professional peers.[28] The result is that "the careless, ill-prepared, or ignorant at-

Note, *Post-Conviction Relief From Pleas of Guilty: A Diminishing Right*, 38 BROOKLYN L. REV. 182, 185-86 (1971); Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 579 (1977). Trial judges are expected to preside over entry of the plea and ensure the voluntariness of the bargain. Boykin v. Alabama, 395 U.S. 238 (1969). Judicial participation in plea negotiations is, however, officially condemned. *See* AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 4.1(2) (1974); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 136 (1967). Thus, the trial judge's ability to spot problems in defense counsel's preparation, especially in the plea bargaining context, is suspect; even when problems are obvious, the court may refuse to acknowledge them. *See* Katz, *Gideon's Trumpet: Mournful and Muffled*, 55 IOWA L. REV. 523, 557-58 (1970). Even when defense counsel's inadequacies are brought to the attention of the court or occur during trial, judges are reluctant to intervene. *See* United States *ex rel.* Spencer v. Warden, Pontiac Correction Center, 545 F.2d 21, 22-25 (7th Cir. 1976); United States v. De Coster, 487 F.2d 1197, 2000 (D.C. Cir. 1973), *opinion after remand*, 20 CRIM. L. REP. (BNA) 2080 (D.C. Cir. Oct. 19, 1976), *opinion after remand vacated en banc*, March 17, 1977, *rev'd*, 25 CRIM. L. REP. (BNA) 2365 (D.C. Cir. July 10, 1979), *cert. denied*, 100 S. Ct. 302 (1979); United States v. Katz, 425 F.2d 928, 931 (2d Cir. 1970). Nevertheless, the Supreme Court has stated that "the matter [of ensuring effective assistance of counsel] for the most part, should be left to the good sense and discretion of the trial courts." McMann v. Richardson, 397 U.S. 759, 771 (1970). *See also* Estelle v. Williams, 425 U.S. 501, 503 (1976); United States v. Bosch, 584 F.2d 1113, 1124 (1st Cir. 1978); Marzullo v. Maryland, 561 F.2d 540, 544 (4th Cir. 1977); Fitzgerald v. Estelle, 505 F.2d 1334, 1337 (5th Cir. 1974), *cert. denied*, 422 U.S. 1011 (1975).

23. *See* Blackledge v. Allison, 431 U.S. 63, 71 (1977); *id.* at 83-84 (Powell, J., concurring); McMann v. Richardson, 397 U.S. 759, 787 (1970) (Brennan, J., dissenting); Erickson, *The Finality of a Guilty Plea*, 48 NOTRE DAME LAW. 835, 835-37, 845, 846 n.80, 848-49 (1973).

24. The "reformation through reversal" view is espoused by *Realities*, *supra* note 18, at 822 n.51. The prophylactic effect of reversal is questioned by Tague, *supra* note 21, at 165.

25. *E.g.*, Wainwright v. Sykes, 433 U.S. 72 (1977); Stone v. Powell, 428 U.S. 465 (1976); Estelle v. Williams, 425 U.S. 501 (1976); Francis v. Henderson, 425 U.S. 536 (1976); Tollett v. Henderson, 411 U.S. 258, 267 (1973); McMann v. Richardson, 397 U.S. 759, 771-73 (1970). *See generally* Strazzella, *supra* note 18, at 472-84; Goodman & Sallet, Wainwright v. Sykes: *The Lower Federal Courts Respond*, 30 HASTINGS L.J. 1683 (1979).

26. Marks & Cathcart, *supra* note 15. *See* Kavanaugh, *supra* note 15; *Committee Report: The Disposition of Cases of Professional Incompetence in the Grievance System*, 32 THE RECORD 130 (1977) [hereinafter cited as *Committee Report*]. *See generally* J. CARLIN, LAWYER'S ETHICS: A STUDY OF THE NEW YORK CITY BAR (1970) [hereinafter cited as J. CARLIN]; ABA SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT (CLARK COMMITTEE) (1970) [hereinafter cited as CLARK COMMITTEE]; Arkin, *Self Regulation and Approaches to Maintaining Standards of Professional Integrity*, 30 U. MIAMI L. REV. 308 (1976) [hereinafter cited as Arkin]; Note, *Legal Ethics and Professionalism*, 79 YALE L.J. 1179 (1970).

27. Marks & Cathcart, *supra* note 15; Kavanaugh, *supra* note 15.

28. Although failure to inform the regulatory "authority" of "unprivileged knowledge or

torney who continually produces inadequate legal work is often beyond effective regulation."[29]

Despite current failings, professional self-regulation may have great potential, especially in the criminal justice system. The goal of this article is to articulate a concept of adversary review. No specific proposals are made; rather, a critical discussion of the efficacy and potential of one adversary review system is presented to offer a method and preliminary documentation for further study of the problem of implementing effective professional self-regulation.

It should be noted that the assumption that self-regulation by criminal justice system lawyers will be meaningful is based on the presumption that individual attorneys would subvert their own desires to win, thereby making the integrity of the system paramount. This presumption would result, for example, in a prosecutor telling his opponent that the defense attorney had performed poorly, even when the prosecutor knew such remarks would result in an ongoing adversary improving his performance, and possibly winning the next case. Some of the comments made by individual prosecutors participating in the study described below may indicate, however, that subverting the desire for convictions is, under the present system, extremely difficult for some assistant district attorneys.[30]

II. METHOD

The research for this study was performed in a California county, referred to in this article as California County.[31] The entire staff[32] of the county district attorney's office evaluated the performance of defense attorneys in criminal cases, with particular emphasis on performance in plea bargaining. The study did not attempt full peer review. While deputy prosecutors evaluated defense counsel, there was no review of the prosecutors

evidence concerning [the incompetency of] another lawyer or judge" is a disciplinable offense under the ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 1-102(A), -103(A), (B) (1975), the Code has been ineffective in coercing reports. *Committee Report*, *supra* note 26, at 130, 132 n.9, 133 (1977). *See* Brown, *A.B.A. Code of Professional Responsibility: In Defense of Mediocrity*, 16 CATH. LAW. 314 (1970); Note, *The Lawyer's Duty to Report Professional Misconduct*, 20 ARIZ. L. REV. 509 (1978). In an analysis of complaints filed against California attorneys between 1969-70 only 37, or about 0.1% of California's 30,672 attorneys, were disciplined or recommended to be disciplined. Marks & Cathcart, *supra* note 15, at 214-15. Study of the New York Bar disclosed that only 2% of *all violators* were processed through the bar's regulatory scheme, and that less than 0.2% of *all violators* were actually sanctioned by either disbarment, censure, or suspension. J. CARLIN, *supra* note 26, at 170. Nationwide, less than 0.1% of practicing attorneys face official sanction of any kind from the organized bar, according to the ABA Center for Professional Discipline located in Chicago, Illinois. Due to the bar's traditional disinclination to act without specific complaint, *see* CLARK COMMITTEE, *supra* note 26 at 60-66; Burbank & Duboff, *supra* note 15, at 100-01, this situation is not likely to change in the near future.

29. Kavanaugh, *supra* note 15, at 960.

30. *See* note 49 and accompanying text *infra*.

31. "California County" is a pseudonym. The author preferred not to identify the county studied. The county is a large rural county with an approximate population of 100,000 to 200,000. In the year of the survey, the county's District Attorney's office filed approximately 1,300 complaints.

32. The legal experience of the staff is set out in Appendix ii.

by defense attorneys. The method is, therefore, described as "one-sided adversary review."

A. *The Research Design*

A significant impediment to performance-oriented research is the bar's traditional disinclination to engage in critical evaluation at the level of particulars. While most practitioners are willing or even anxious to condemn incompetency generally, few are inclined to support such statements with specific criticism. This ubiquitous difficulty was stressed in the *Clark Report*:

> Although lawyers and judges have the necessary background to evaluate the conduct of attorneys and are far better equipped than laymen to recognize violations of professional standards, relatively few complaints are submitted to disciplinary agencies by members of the profession. This fact has been cited as a major problem by nearly every disciplinary agency in the United States surveyed by this Committee.[33]

The result, as noted by Judge David J. Bazelon of the United States Court of Appeals for the District of Columbia, is that "[t]here are no statistics to illustrate the scope of the problem [of ineffective assistance] because . . . the criminal justice system goes to considerable lengths to bury the problem."[34]

This project was designed to collect data to fill this void. The prosecutor's staff agreed to participate in a small-scale experiment in performance evaluation. For twelve weeks, the deputy district attorneys evaluated opposing counsel's performance in plea bargaining. To facilitate this evaluation, a one-page form was designed, in cooperation with the assistant district attorneys,[35] which enabled each deputy to evaluate the performance of defense counsel with minimal demands on prosecutor time.[36] The form is primarily a device for estimating counsel's *preparation*, and so is particularly appropriate for analyzing plea bargain results, since it focuses on the most identifiable aspect of defense counsel's work. Counsel's duty to investigate, regardless of the accused's stated desire to plead guilty is clearly mandated in the A.B.A. *Standards*.[37] Increasingly, appellate courts look to these standards as "a starting point for the court to develop, on a case-by-case basis, clearer guidelines for courts and lawyers as to the meaning of effective assistance."[38] Focus on the requirement of investigation is further emphasized by the ABA

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33. CLARK COMMITTEE, *supra* note 26, at 167.

34. *Defective Assistance*, *supra* note 15, at 2.

35. Regarding survey-form research, Cicourel has noted that:

> [t]he problem is not that organizational categories, questions, and answers are irrelevant, but that surveys and official records typically structure materials, so that the answer is decided by the form in which the question is posed or formal categories provided for classification. What is lacking is the actor's conception of the operative social structures.

A. CICOUREL, THE SOCIAL ORGANIZATION OF JUVENILE JUSTICE 107 (1968). Involvement of the deputies in construction of the survey form was an attempt to minimize this problem.

36. The deputies cited lack of time as the major technical problem of the survey.

37. A.B.A. STANDARDS, *supra* note 13, § 4.1.

38. United States v. DeCoster, 487 F.2d 1197, 1203 n.23, 1204 (D.C. Cir. 1973), *opinion after remand*, 20 CRIM. L. REP. (BNA) 2080 (D.C. Cir. Oct. 19, 1976), *opinion after remand vacated en banc*, March 17, 1977, *rev'd*, 25 CRIM. L. REP. (BNA) 2365 (D.C. Cir. July 10, 1979), *cert. denied*, 100 S. Ct. 302 (1979); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968); Tague, *supra* note 21, at 127 n.104.

CODE OF PROFESSIONAL RESPONSIBILITY which provides that the "[h]andl[ing of a] legal matter without preparation adequate in the circumstances" is a disciplinable offense.[39] The idea that preparation can be defined and measured is asserted in the Third Circuit's observation that "[t]he advocate's work . . . is not readily capable of later audit like a bookkeeper's. Of course, not all the activity of the advocate has this highly subjective quality. It is possible to examine the sufficiency of his preparation and the adequacy of his knowledge of the relevant law."[40]

B. *The Survey Form*

On the survey form,[41] the deputies could indicate five control characteristics of each case, and, where applicable, evaluate defense counsel's performance with respect to final disposition. In order to make comparisons without risking participants' anonymity, a coding system to identify deputies and defense counsel was developed. Identification numbers were randomly assigned to the seven deputies and approximately seventy-five defense lawyers. Using the code, each deputy answered questions number one and two by indicating the proper code numbers for himself and opposing counsel.

The third question indicated defense counsel status: public defender, appointed, or privately retained. Next, the main charge was indicated. In an effort to minimize the reporting burden, four classifications of charges were chosen:[42] (1) selected misdemeanors (drunk driving cases), (2) serious misdemeanors (alternate felony/misdemeanor cases), (3) felonies (all felonies except those categorized as serious felonies), and (4) serious felonies (various violent offenses). Finally, the case status was indicated: in negotiation, charges dropped, and agreement on a guilty plea. Since the deputies were instructed to fill out forms whenever a "meaningful attempt at negotiation" occurred, almost half of the returns were reported as "still in negotiation." While these particular reports are of limited value for this analysis, the "in negotiation" category encouraged the deputies to examine the preparation of counsel on a daily basis.

The five control questions were followed by three judgmental questions. First, the deputies were asked to give a general qualitative rating of defense counsel's preparation; and, in instances where preparation was judged to be inadequate, the deputies were asked to indicate whether defense counsel was informed of the problem. Next, the deputies indicated specific problem areas for cases in which inadequate preparation had been found. Finally, the influence of counsel's preparation on the disposition of the case was reported. As an optional step deputies were asked to comment.

Over the twelve-week survey period, 618 completed forms were returned, 348 of which reported dispositions. The prosecutors filled out forms in 90 to 95% of the applicable cases. After the survey, the prosecutors were

39. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 6-101(A)(2) (1975).
40. Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970).
41. *See* Appendix i.
42. *See* Appendix iii. The deputies participated in these selections. *See* note 35 *supra*.

asked to complete an open-ended self-evaluation designed to shed light on the credibility and objectivity of their evaluations.[43]

C. *Characteristics of California County*

The issue of effective assistance of counsel is especially germane to California County, because of the heavy use of charge-reduction plea bargaining by the office of the district attorney. This tactic is pursued by initially overcharging defendants. As one prosecutor stated in an interview:

> I'll charge everything within reason. There are other charges we could still dream up, but . . . we still employ a "shotgun" charging system. We do this for two reasons: One, if we're pressed to go to trial, we want to go in with all the possible charges, because you never know what a jury will find on. Two, [shotgun charging] facilitates the negotiation process. It gives you something to move on.[44]

Overcharging is facilitated by CAL. PENAL CODE § 17(b)(4).[45] One prosecutor stated in an interview that section 17(b)(4) "almost encourages charge reduction bargaining" by specifically allowing some charges to be filed as either felonies or misdemeanors. If the same crime can be considered either a felony or a misdemeanor, with jail or prison alternate sentences, the charge is considered a "wobbler" under section 17(b)(4). The case can be filed at either level in the deputy district attorney's discretion. The practice is to charge at the felony level and drop to a misdemeanor to facilitate bargaining.

Another means of expediting the bargaining process is provided in the liberal definition of "reasonably related" enunciated in *People v. West*.[46] Under *West*, defendants are allowed to enter guilty pleas to a "reasonably related" offense carrying a mutually acceptable sentence or sanction.

The extensive use of charge-reduction bargaining in California County becomes statistically evident when the county's felony arrest attrition rate is compared with that of other counties in California. In the year in which this study took place, only 22% of felony arrests in California County received a felony disposition. This is comparable to a state-wide felony arrest/felony disposition rate of 23%. But, in California County, 73% of felony arrestees received dispositions at the misdemeanor level, in comparison to 57% statewide. At the screening stages, California County law enforcement agencies showed a low release rate of .55% compared to 6.7% statewide. Also, for the same period, the California County District Attorney's Office denied only 5.1% of all felony complaints, as opposed to 13.6% statewide. Despite apparent low levels of screening, the county maintained a conviction rate of 64% for all felony arrests, compared to a statewide figure of 56%.[47]

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43. *See* Appendix ii.

44. Quoted written comments of California County prosecutors were made on the survey forms. As indicated in the text, some comments were made during interviews.

45. CAL. PENAL CODE § 17(b)(4) (West 1979).

46. 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970).

47. These figures are derived from data reported in the CALIFORNIA DEPARTMENT OF JUSTICE, CRIMINAL JUSTICE PROFILE.

While it is possible that California County's low screening percentage is the result of better quality arrests, this is not likely to be the case. Instead, it appears that some defendants are deliberately charged as a result of infirm arrests, with the intention of pushing them into the criminal justice system. One sheriff candidly stated during an interview:

> A lot of times cases are dumped because the case isn't that hot on the officer's part . . . and they're not going to get a good conviction out of it so they bargain it out to the best they can get . . . . If I've got a shaky case, I'll go down to the D.A.'s and say, "Hey, let's try and work it out" . . . If I don't feel good about a case, I'll go down to the D.A.'s and say, "Hey, if you ever use plea bargaining, let's use it now." I mean, I don't like the plea bargaining system . . . but there are times and places for it on weak cases.

Similarly, a police officer who was interviewed stated:

> I have no problem with [the exclusionary rule] being used as a tool [in bargaining]. A U.S. Supreme Court decision that came down about a year ago stated that the safety of the community has to be looked at as well as the individual's rights [with respect to] search and seizure, and sometimes those rights should be overlooked, or very minimal weight should be given . . . for the safety and security of the community.[48]

Guilty pleas, most of which are achieved through plea bargaining, are the primary method of obtaining convictions in California County.[49] To the extent that such pleas result from manipulation by law enforcement officials and from the district attorney's overcharging policy, outcomes depend heavily on defense counsel's role as a countervailing agent able to overcome the influence of infirm arrests and inflated charges. The reality behind this dependence will now be examined.

III. ANALYSIS OF DEFENSE PERFORMANCE IN CALIFORNIA COUNTY

A. *Correlation of Charges to Dispositions*

Table 1, below, shows a breakdown of both the main charges and the dispositions which occurred during the twelve-week period. As might be expected, the percentage of interactions[50] resulting in dispositions decreases with severity of the charge; an apparent exception in regard to serious misdemeanors can be explained by the influence of charge-reduction bargaining under CALIFORNIA PENAL CODE § 17(b)(4).[51]

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48. The officer was alluding to Stone v. Powell, 428 U.S. 465 (1976). *But see* Lefkowitz v. Newsome, 420 U.S. 283, 296 n.3 (1975) (White, J., dissenting); Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 573 (1977). *See generally Prosecutor's Role*, *supra* note 3.

49. Guilty pleas account for approximately 95% of the criminal convictions in California County, *supra* note 47.

50. "Interactions" include cases reported as "still in negotiation" and cases reported as "disposition reached."

51. *See* note 45 and accompanying text *supra*.

Table 1

Status of Case by Main Charge Classification

Status of Case	Main Charge Classification*			
	Selected Misdemeanors	Serious Misdemeanors	Felonies	Serious Felonies
"In Negotiation"	41.6%	35.6%	60.3%	63.6%
"Final Disposition Reached"	58.4	64.4	39.7	36.4
	100.0%	100.0%	100.0%	100.0%
	n=380	n=129	n=78	n=22

9 observations = missing

*See classifications in Appendix iii

618 total cases in survey

B. *Performance Evaluations*

In response to the first of three judgmental questions of the survey form, the deputies evaluated the overall performance of defense counsel. Table 2, below, shows a breakdown of the deputies' assessments of the quality of this performance.

Table 2

Performance Evaluations by Reporting Deputy, Disposed Cases

Performance Evaluations	Deputy Nos.				
	No. 1	No. 2	No. 3	Nos. 4-7*	ALL
"Excellent"	28.8%	10.0%	57.3%	10.3%	33.1%
"Acceptable"	60.6	60.0	30.8	67.9	49.9
"Inadequate"	10.6	30.0	11.9	21.8	17.0
	100.0%	100.0%	100.0%	100.0%	100.0%
	n=66	n=60	n=143	n=78	n=347

1 observation = missing

*While seven deputies were involved in the survey, three handled the bulk of the plea negotiations and dispositions. Deputies 4-7 include: one administrator, two veteran trial attorneys, and one deputy involved in work mostly outside the scope of the survey.

Analysis of Table 2 suggests that the ratings of performance vary from deputy to deputy. Because of the distribution of the various courts in California County, a team of two prosecutors frequently deals with a corresponding team of public defenders and a handful of private counsel. Thus, the sample from which the evaluations of performance were drawn probably reflected differences in levels of competence of lawyers in different areas of the county. For this reason, evaluations that deviate from the norm do not necessarily indicate unreliability of the deputies' judgments; moreover, such evaluations are likely to reflect the peculiar characteristics of the county.

Analysis of data not shown indicates that while defense performances were inadequate in 17% of dispositions, the deputies showed a marked reluctance to inform opposing counsel of perceived inadequacies, doing so in only 29% of the applicable cases.[52]

Table 3

Performance Evaluations by Defense Counsel Status, Disposed Cases

	Defense Counsel Status*			
Performance Evaluations	Public Defender	Appointed	Retained	All Defense Attorneys
"Excellent"	30.1%	33.3%	37.2%	33.2%
"Acceptable"	55.4	33.3	43.9	49.7
"Inadequate"	14.5	33.3	19.0	17.0
	100.0%	99.9%	100.1%	99.9%
	n=186	n=12	n=148	n=346

2 observations = missing

*Further analysis of data not shown reveals that "charge breakdowns" for each defense counsel status are quite similar. For example, 67.2% of the public defenders' cases were "selected misdemeanors," compared to 67.6% for retained counsel. Additionally, 2.2% of the public defenders' cases were "serious felonies," compared with 1.4% for retained counsel.

Table 3 indicates that public defenders were rated favorably more often than retained counsel. Further, analysis of data not shown reveals that public defenders were more frequently informed of the perceived inadequacy when their performance fell below the accepted minimum.[53]

C. *Inadequate Preparation*

In cases in which defense counsel's performance was found to be inadequate, the deputies specified the problem areas of inadequacy. The most frequent problem was defense counsel's ignorance of case facts. Indeed, this might have proven to be an even more pervasive problem if the "combination or all" category were broken down.

52. Analysis of data not shown reveals that this trend holds for all deputies.

53. Public defenders were informed of their inadequacies in 37% of the applicable cases, as opposed to 27.3% for retained counsel. Further analysis of data not shown indicates that the deputies' propensities to inform opposing counsel of inadequacies did not increase with the severity of the charge.

Table 4

Areas of Inadequate Preparation by Defense Counsel Status, Disposed Cases

	Defense Counsel Status		
	Public Defender	Appointed	Retained
Problem Area			
Facts of Cases	41.4%	50.0%	26.7%
Witnesses	10.3	0.0	13.3
Statutes	3.4	25.0	0.0
Case Law	10.3	0.0	0.0
Combo/All	34.5	25.0	60.0
	99.9%	100.0%	100.0%
	n=29	n=4	n=30

Table 4 indicates that retained attorneys were cited as having problems relating to witnesses and case facts in 40% of their cases, as opposed to 51% for public defenders. While this distinction may be explained by the heavy caseloads that public defenders carry the frequent reporting of "combination or all" problems for retained counsel may suggest that the actual extent of failure to fully investigate facts is greater than indicated by the percentages in specific categories.

D. *Effect of Counsel's Performance on Case Disposition*

The last question of the form solicited from the deputies a categorization of the quality of the case disposition by applying the following seven descriptive synopses:

1. The case was deemed "routine" by the assistant district attorney and defense counsel; there was no discussion of case particulars, but a plea agreement was reached.
2. Defense counsel's preparation was adequate/very good, and the defendant benefited by such representation.
3. Defense preparation was adequate, but for other reasons (such as a personality conflict between attorneys) the disposition was not as favorable as it might have been had the defendant been represented by other counsel.
4. Defense counsel's preparation was inadequate, but the case was strong and (for this or other reasons unrelated to counsel's lack of preparation) adequate preparation would have rendered the same result.
5. Defense counsel's preparation was inadequate and would have resulted in a less favorable disposition for the defendant, but the D.A. compensated and granted an equitable bargain.
6. Defense counsel's preparation was inadequate and resulted in a less than favorable disposition for the defendant.
7. Both inadequate preparation and personality conflicts (between the assistant district attorney and defense counsel) were key factors detrimental to the defendant's disposition.

Analysis of the data shows that defense attorneys were rated inadequately prepared in 18.6% of all dispositions.[54] Either because the state's case was strong or the deputies compensated, counsel's inadequacies were judged not to have affected the dispositions in 60% of these cases. *But in 40% of the cases in which counsel's preparation was judged inadequate, the assistant district attorney indicated that the disposition was detrimental for the defendant.* Thus, the deputies reported that in 7.4% of the cases there was a result that Judge Bazelon has characterized as "shocking": "the prosecutor was perfectly willing to let the defendant be victimized by his lawyer's inadequacy."[55] Further, analysis of data not shown indicates that, in 17.6% of the cases in which defense counsel was told of his perceived inadequacy, the defendant still received a detrimental disposition. Conversely, in 45.2% of the cases in which defense lawyers were not informed of perceived inadequacies, deputies either compensated for counsel's performance or otherwise rationalized the disposition in such a way that counsel's failings did not penalize the defendant.

Analysis of the quality of dispositions by defense attorney status[56] shows, that for the three classifications, there is marked deviation in the incidences of routine dispositions. As might be predicted, 42% of the public defender's cases were labeled routine, as opposed to 8 and 26.4% for appointed and retained counsel, respectively. Removing these routine cases from the performance oriented disposition options permits closer analysis of defense counsel performance.

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54. The slight increase in "inadequate" evaluations from the 17% figure reported in Tables 2 and 3 occurred because six cases originally labeled as "acceptable" were deemed "inadequate" at the disposition stage. *See* Table 5, *infra*.

55. *Defective Assistance*, *supra* note 15, at 15. Judge Bazelon adds that prosecutors have little incentive to do otherwise, as there is no serious threat of reversal on ineffective counsel grounds.

With respect to the prosecutor's willingness to "let the defendant be victimized," one deputy maintained that "fatal flaws," (i.e., violations of exclusionary rules) are "screened out," and do not contribute significantly to dispositions. On the other hand, the same deputy stated that he "feel[s] no duty to tell [counsel] about . . . legal and evidentiary problems . . . [and] flaws in the case which don't justify a dismissal or rejection of the charge at the outset." The deputy related two cases to illustrate the point:

> I had a "wobbler." [*See* note 45 *supra*]. [Defense attorney] called up and said his client was ready to plead. When he arrived, he had the plea forms all filled out and signed by his client. He had his man pleading to a felony! Of course, I was expecting to settle a misdemeanor, but I didn't say anything. I just signed . . . .
>
> [A highly respected defense attorney] failed to notice a fantastic flaw in our evidence. He just didn't see it. His client is in prison now. Even the best make mistakes.

A second deputy recalled a similar case:

> There were three people being arraigned. One of them was represented by [a public defender]. The charges against his client were really weak; they were felony bad checks, but we couldn't have proven it. The checks were three years old, and we didn't have the key witness. The defendant wanted to plead guilty, but the judge had assigned her [a public defender]. When she told [the public defender] she wanted to plead as charged, he said "OK" and filled out the forms. He didn't even attempt to negotiate. That's incompetence. It's also unethical . . . but, if I have a car worth $375, and somebody offers me $500, I'll take it. And I took the felony . . . .

Another incident related by the second deputy involved an inexperienced attorney:

> I was sitting there with the defense, waiting for the judge. [Counsel] leaned over to me and asked, "Hey, what should I do? Plead guilty now, or ask for a continuance?" I told him it was his decision. He then asked "what should I plead this guy guilty to?" I told him to P.A.C. [plead as charged] and he did.

56. *See* note at Table 3, *supra*.

Table 5

Quality of Performance and Outcome of Non-Routine Dispositions by Defense Counsel Status

	Defense Counsel Status		
	Public Defender	Appointed	Retained
Quality of Performance/Outcome			
Adequate, Very Good/ Favorable	71.3%	63.6%	70.7%
Adequate/But Detrimental	1.9	0.0	0.0
Inadequate/But Favorable; Case Was Strong	12.0	18.2	9.2
Inadequate/But Favorable; Deputy Compensated	5.5	0.0	7.3
Inadequate/Detrimental Outcome	9.3	18.2	12.8
	100.0%	100.0%	100.0%
	n=108	n=11	n=109

In cases in which counsel's performance was indicated as instrumental to the disposition, the deputies rated preparation as inadequate in 28% of the cases. Public defenders were found to be inadequately prepared in 27% of their cases, but contributed to detrimental dispositions in only 26% of those cases. Retained attorneys were rated as inadequately prepared in 29% of their cases, and their inadequate preparation was indicated to have adversely affected dispositions in 41% of those cases.[57]

Though these categorical analyses are interesting,[58] such generalized analysis is of limited use for the purpose of singling out *individual* attorneys for closer study. Using other survey data, however, it is possible to analyze individual counsel's performance while controlling for key variables. For example, one defense lawyer, a deputy public defender, handled thirty-eight dispositions over the twelve-week period. Of these, thirty were selected misdemeanors, five were serious misdemeanors, two were felonies, and one was a serious felony. The deputy public defender was rated inadequate in 31.6% of the cases, and was informed of the perceived inadequacies only 25% of the time. No single problem area stands out; the assistant district attorneys cited "combination or all" to describe 75% of the deputy public defender's problem cases. Of his thirty-eight dispositions, 52% were labeled routine. In his

57. Analysis of data not shown reveals that "personality conflicts" contributed to five of retained counsel's "detrimental outcomes." No such conflicts were reported for public defenders or appointed counsel.

58. Superficially, these findings challenge the prevailing assumption that public defenders render inferior service in comparison to retained counsel. While Table 5 can be interpreted in this way, such a conclusion is unfounded. Analysis of data not shown reveals little deviation within quality ratings of public defenders; retained counsel, however, are shown to perform at highly variant levels of competence. As one deputy prosecutor explained, "public defenders are mediocre most of the time. On the other hand, some retained counsel are excellent and others are horrible . . . ."

nonroutine dispositions, assistant district attorneys indicated that the deputy defender rendered acceptable performance and contributed to favorable dispositions in 22%. He was rated inadequately prepared in the remaining 78% of nonroutine dispositions, yielding detrimental dispositions in 35% of these cases. One deputy who regularly dealt with this attorney wrote:

> Defense counsel attempted to enter [a] written guilty plea but after two attempts had to be instructed by judge on proper method . . . . Defendant in custody, and lack of preparation prevented timely hearing of the case . . . . Total lack of familiarity with the facts of [the] case or applicable legal expectations . . . . Defense counsel was unaware of effect of plea on defendant's other cases . . . . The only witness is dead but defense counsel had defendant plead guilty anyway . . . . Lack of client control . . . . No client contact . . . . Poor client control . . . . Lack of preparation . . . . Lack of familiarity with the case . . . .

In contrast, another attorney handled ten dispositions during the survey period, appearing as retained counsel in nine, and as court-appointed in the other. Five of his cases were selected misdemeanors, two were serious misdemeanors, and three were felonies. His performance was rated excellent in nine cases and acceptable in one; no problems were reported. Of his ten dispositions, one was labeled routine, and nine were categorized as adequate/very good, the highest rating listed.[59]

IV. INTERPRETATION OF FINDINGS

The findings indicate that a defense lawyer's personality and performance history affect his interaction with the deputy prosecutor and are, thus, a major factor in the ultimate quality of the criminal case disposition.[60] In plea bargaining, prosecutors weigh the strengths, weaknesses, and inadequacies of defense lawyers in their decisions to grant reductions in charge or sentence. This is borne out by the comments made during interviews with several deputy district attorneys:

> You try to divorce yourself from what personal feelings you might have about an attorney. But we're human. When he comes around here, I listen to him, but maybe not as long as I would listen to other attorneys. I don't want to say it hurts his clients, but it doesn't help them.[61]

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59. These two examples reflect extremes; *see* note 58 *supra*.

60. Previous quantitative research on plea bargaining has not penetrated the bargaining process and has tended to present an incomplete picture of outcome factors. *I.e.*, in J. EISENSTEIN & H. JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS (1977), the authors offer a sophisticated analysis of the relation of length of sentence to selected characteristics, but were unable to control for the identity of individual defense counsels. Summarizing their data, the authors concluded that "all of the variables commonly thought to be significant in affecting the length of sentence account for only one-half to two-thirds of the variance. The effects of the queuing, measurement error, and random or unidentified factors account for the rest." *Id.* at 285. Such a conclusion seems ill considered. The exisiting plethora of quantitative research relating to plea bargaining and the defense attorney's role in that process hardly merit defense counsel's designation as an "unidentified factor" affecting the length of sentence. Indeed, it can be argued that defense counsel is *the* major determining factor in case outcomes.

61. Regarding the same attorney, other deputies revealed:

> When [defense counsel] comes in here and threatens to go to trial, I laugh inside. He'll *never* let it go to trial. I know it, he knows it, everybody knows it. It's an empty threat. Now, if [another defense counsel] comes in here and says "we'll go," *then* it means something. I respect his trial ability. Empty threats do nothing to me . . . .
>
> Last week, [a private attorney] went up against [a deputy] in trial, and lost really bad. This week, he went back to [the same deputy] on a new case and pleaded right away. Then he came to me on another case. I told him, "well, I've got an open calendar next week, I'll just take it to trial . . . ." He pled out right here.

Counsel's actual performance in a particular case also determines the nature of the ultimate disposition of that case, to either the advantage or detriment of the defendant. Commenting on specific cases, the deputies' written observations illustrate the influence of counsel:

> Investigation into facts by defense counsel resulted in misdemeanor disposition on felony charge.
>
> Counsel proposed use of a little known statute for guilty plea and it was to defendant's advantage.
>
> Defense counsel was on top of all of the defendant's pending cases and was able to work out a disposition covering all cases.
>
> Defense counsel made a point of examining the physical evidence prior to pre-trial.
>
> Counsel arrived late, did not pre-try, set case for trial that should have been negotiated, and did not check into reliability of witnesses.
>
> Counsel failed to negotiate the case . . . [and] her client pleaded as charged when I was willing to negotiate to a lesser charge.
>
> Counsel would not talk to me . . . result: one year in jail rather than in alcohol program.
>
> Counsel didn't take time to deal with the case.
>
> Counsel didn't do anything.
>
> Counsel is continually unprepared factually and legally.
>
> Defendant could gain [the] benefit of dismissal under applicable law but counsel refused to use that avenue, insisting on a motion to withdraw a guilty plea which was denied, leaving conviction on record.

V. IMPLICATIONS FOR REFORM

Peer review, though a seemingly radical challenge to the prevailing concept of self-regulation, is not as alien as it first might appear. An informal system of assessment clearly operates on a daily basis in attorney interactions.[62] Furthermore, intra-professional evaluation is presently utilized in

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> When [a lawyer in private practice who was retained] has a case, you never hear the end of it. He'll rant and rave and cry and whine and just make you sick. Maybe he thinks he gets good deals with his clients, but not from me . . . .
>
> When he calls, I just turn him off. He'll go through this b.s. story and cry all over me. His tactic is "bug you till you crack." I'm immune to it.

62. Marks & Cathcart, *supra* note 15, at 204-05.

both large law firms and in non-legal professions.[63] If employed constructively, absent the fault and sanction-dominated machinery of grievance boards, a peer review system could be a step toward actualizing the legal profession's claim that it regulates itself.[64]

Such a move is both desirable and practical. The need for some peer review is mandated by the current system's failure to effectively come to grips with the problem of inadequate performance.[65] Clearly, the possibility of meaningful peer review, especially in the context of plea bargaining in which attorneys operate almost exclusively in seclusion, is real. The major obstacle lies in convincing the bar that peer review need not take on the customary negative trappings of grievance procedures, but can be performed in a *closed* professional atmosphere emphasizing constructive criticism to facilitate attorneys' improvement.[66]

Whether a survey similar to the one that is the topic of this article would be feasible without initial "grassroots" support of lawyers is doubtful; indeed, monitoring and prodding the flow of reports in this small-scale survey proved to be its most difficult feature, calling for both a high level of diplomacy and continuing management. Still, a large-scale survey is required to fully test the method of adversary review outlined in this article. To this end, improvements and modifications of the method must be made. For example, a large-scale survey should be open, instead of secretive. Moreover, an overt program could utilize administrative procedures to insure consistent reporting.[67]

VI. CONCLUSION

Given the continued reliance on plea bargaining in the criminal justice system, its low visibility, and the crucial importance of the defense attorney's role, some means of performance review is mandatory if justice is to be approximated. This could be accomplished by (a) a redefinition or liberalization of appellate policy, (b) incremental procedural adjustments of the plea bargaining system, or (c) a system of adversary review applied in a constructive, professional fashion. This article proposes[68] that adversary review is feasible and may serve as a means of effective quality control in the criminal justice system.

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63. *See* Wolkin, *More on a Better Way to Keep Lawyers Competent*, 61 A.B.A.J. 1064, 1065 (1975) [hereinafter cited as *More on a Better Way*]; Kavanaugh, *supra* note 15, at 977.

64. *See* Wolkin, *A Better Way to Keep Lawyers Competent*, 61 A.B.A.J. 574 (1975); *More on a Better Way*, *supra* note 63; Marks & Cathcart, *supra* note 15, at 203; Kavanaugh, *supra* note 15, at 978; Arkin, *supra* note 26.

65. *See* notes 15-28 and accompanying text *supra*.

66. It is suggested that grievance committees should be involved in matters of alleged professional incompetence only after the attorney in question displays a chronic inability or reluctance to respond to constructive suggestions of a *closed* peer review organization. *See More on a Better Way*, *supra* note 63, at 1064-65.

67. As many deputies suggested, placing an evaluation form in each case file would facilitate reporting.

68. Here, the wisdom of Judge Bazelon is appropriate: "[B]randing a problem insoluble to avoid facing it, or a solution utopian to avoid trying it, turns doubts into self-fulfilling prophecies." *Defective Assistance*, *supra* note 15, at 23.

Appendix i

Defense Counsel Preparation Survey

(1) Deputy DA Id. ____

(2) Defense Counsel Id. ____

(3) Defense Counsel Status: "1" = Public Defender, "2" = Appointed, "3" = Retained. ____

(4) Main Charge: "1" = selected misdemeanors, "2" = "serious" misdemeanors, "3" = felonies, "4" = "serious" felonies. ____

(5) Case Status: "1" = in negotiation, "2" = continuing negotiation—this case was reported previously, "3" = disposition reached, charges dropped or suspended, "4" = disposition reached, agreement on guilty plea, "5" = (other) ____

(6) Deputy Analysis of Defense Preparation: "1" = excellent, "2" = acceptable, "3" = inadequate, and the "problem" was brought to the attention of defense counsel, "4" = inadequate, and defense counsel was not informed. ____

(7) Problem Area: (BLANK = no problem), "1" = inadequate investigation of the facts, "2" = inadequate researching of witnesses, testimony, etc., "3" = inadequate researching of statutes, "4" = inadequate researching of case law, "5" = combination or all of the above. ____

(8) Resulting Disposition: (BLANK = no disposition) IF A DISPOSITION WAS REACHED, OR IS ALMOST ASSURED, WHICH SYNOPSIS BEST DESCRIBES THE END?

I. Routine:

"1" = The case was deemed "routine" by DA and defense counsel; there was no discussion of case particulars, but a plea agreement was reached.

II. Adequate Preparation Found:

"2" = Defense counsel's preparation was adequate/very good, and the defendant benefited by such representation.

"3" = Defense preparation was adequate, but for other reasons (such as a personality conflict between attorneys) the disposition was not as favorable as it might have been had the defendant been represented by other counsel.

III. Inadequate Preparation Found:

"4" = Defense counsel's preparation was inadequate, but the case was strong and (for this or other reasons unrelated to counsel's lack of preparation) adequate preparation would have rendered the same result.

"5" = Defense counsel's preparation was inadequate and would have resulted in a less favorable disposition for the defendant, but the DA compensated and granted an equitable bargain.

"6" = Defense counsel's preparation was inadequate; this resulted in a less than favorable disposition for the defendant.

"7" = Both inadequate preparation and personality conflicts (between DA and Defense counsel) were key factors detrimental to the defendant's disposition. ____

(9) Comment if desired: The thing that struck me most about defense counsel's performance was ____

Appendix ii

Deputy Responses, Self-evaluation by Deputy Id.

Question	"7"	"4"	"5"	"6"	"2"	"1"	"3"
	(9 dispos)	(11 dispos)	(25 dispos)	(33 dispos)	(60 dispos)	(66 dispos)	(144 dispos)
1) What % of applicable dispos. did you report?	90%	85%		85%	60%	90%	90%
2) When you failed to report a case, what was the reason?	case was in continuing negotiation	forgot	no time			forgot, and it was too late to reconstruct	no time/missed work
3) Were you too "hard" or too "soft" in your evaluations?	"appropriate"	soft	hard	neither	as objective as possible	soft	neither
4) Were you biased for or against some counsel?	no	not purposely	probably, on both counts	tried not to	no	no	no; was purposely objective
5) By what standards did you judge counsel?*	own stds.	own stds.	all three	own; by what I would do	own; and local norms	own	all three; no ABA std. was violated
6) Did you have personal reservations about participating in this survey?	no	no	very much so	no	some, but the survey is necessary	no	yes, I don't like secret judgments
7) How well did the form treat the relevant issues?	fairly well	it didn't treat jury trials	?		well constructed, but there are always problems with categorization	no problem	needs more variables/options
8) What was the major problem with the survey?	time to complete forms	multiple reporting	time	time	categorization creates artificial classifications	too narrowly categorized	time; memory problems re: prior reports
9) How can this be solved?		report dispos. only	have secretaries put forms in case file with other paperwork	can't avoid it	scope of survey should be narrowed	adequate/excel. option should be separate	somehow record for previously negotiated cases
10) Would you participate in a similar, longer survey?	(implied, yes)	yes	no	yes	depends on the results of this one	yes	no, if it's a secret survey

* *Question 5 read:* "When evaluating the performance of counsel, what standards did you use? For example, did you judge counsel against accepted community "norms," your own standards or conceptions of what counsel should have done, or professional standards, such as the *A.B.A. Standards for the Defense Function*?"

** The prosecutors' legal experience at the time of the survey, by identification number, was as follows:

"7" defense counsel 4 years; prosecutor 1 year.
"4" prosecutor 8 years.
"5" defense counsel 4 years; prosecutor 3 years.
"6" prosecutor 7 years.
"2" prosecutor 4 years.
"1" defense counsel 2 years; prosecutor 4 years.
"3" prosecutor 4 years.

Appendix iii

Charge Categories

1. Selected misdemeanors (drunk driving charges)
2. Serious misdemeanors

a) Alternative felony/misdemeanors (wobblers) filed as misdemeanors pursuant to CAL. PENAL CODE § 17(b)(4) (West 1979) and disposed of as such

b) Cases filed as felonies but disposed as misdemeanors pursuant to CAL. PENAL CODE § 17(b)(5) (West 1979).

3. Felonies

All cases disposed of on a felony basis except those falling in the category of serious felonies

4. Serious felonies

a) Murder and included offenses
b) Robbery
c) Rape
d) Forcible sodomy and oral copulation
e) First degree burglary
f) Any felony in which use of a firearm is alleged and proved as an enhancement
g) Any felony in which infliction of great bodily injury is alleged and proved as an enhancement
h) Any felony in which excessive taking is alleged and proved as an enhancement
i) Any felony which in addition to admitting or being found guilty of, the defendant admits or is found to have suffered a previous conviction
j) Any felony punishable by life imprisonment
k) Assault with a deadly weapon, attempted murder, assault with intent to kill
l) Child molestation