CHAPTER NINE

THE DISTRIBUTION OF MULTIPLE-DEFENDANT (CONFLICT) CASES BETWEEN THE LEGAL AID SOCIETY AND THE 18-B PANEL AT ARRAIGNMENT

This chapter examines how co-defendants came to be represented by Legal Aid Society or 18-B Panel attorneys at Criminal Court arraignment. To determine whether the Panel was assigned to the more serious multiple-defendant cases, we examined the procedures by which co-defendants were allocated between the Society and the Panel. Thereafter we analyzed our observation sample of multiple-defendant cases in terms of each defendant's relative factual culpability, prior criminal record and bail status.[1051] Our observations revealed that the distribution process was not random. The Society chose the co-defendant it would represent and, in effect, referred the other, usually more seriously charged co-defendant(s) to Panel attorneys.[1052]

This power over case assignments had two important consequences. First, the proportionate share of Supreme Court cases handled by the 18-B Panel increased substantially. Second, the Panel was left with proportionately more demanding lawyering tasks, including cases carrying a greater likelihood of trial.[1053]

1051. In the Draft Report our analysis of case seriousness combined factual culpability, criminal record, and bail status. In eighty percent (n=32) of cases where one or more of these factors combined to create a substantial disparity (n=40), the *more* serious cases were assigned to the 18-B Panel. *See* M. McConville and C. Mirsky, Committee on Criminal Advocacy of the Ass'n of the Bar of the City of New York, Defense of the Poor in New York City: An Evaluation (1985) [hereinafter 1985 McConville & Mirsky Draft Report]. Our present discussion analyzes the case selection practiced by the Legal Aid Society from each of these perspectives.

1052. The Legal Aid Society has publicly stated that in Bronx County its attorneys take the first named co-defendant in each multiple-defendant case, regardless of factual culpability or prior criminal record. Joel Blumenthal, Attorney-In-Charge of the Legal Aid Society, Bronx County, Remarks at Fortunoff Criminal Justice Colloquium, New York University School of Law (October 21, 1986). Since our field sample was restricted to New York County we were unable to test the accuracy of this assertion. Even granting its accuracy, however, equally serious questions emerge from such a "blind selection" policy. The result is that the defense entity with greater resources to provide a meaningful defense in serious felony cases will often not represent the defendant with a more serious case.

1053. Research has established that the defendant with the more serious case (in terms of factual culpability and prior criminal record), has a greater likelihood of trial than the defendant with less evidence against her and a cleaner criminal record. In the latter case, the defendant may be offered a guilty plea to a reduced charge with limited sentencing consequences. *See* L. MATHER, PLEA BARGAINING OR TRIAL? 60-63 (1979); NATIONAL INSTITUTE OF JUSTICE, BASIC ISSUES IN PROSECUTION AND PUBLIC DEFENDER PERFORMANCE 45 (1982).

I.
THE ASSIGNMENT OF MULTIPLE-DEFENDANT CASES

New York City's criminal justice system operated without any standards regarding assignment of clients in multiple-defendant cases. In such cases there were no formal rules to determine whether the Legal Aid Society or the 18-B Panel received the defendant with the more serious case. When defendants were arrested and brought to court, the police and prosecutor prepared the charging papers and attached a print-out of the defendant's criminal record. These documents, along with the pre-trial service agency's release recommendation, were placed in the Society's in-basket.[1054]

At that point, we observed that one of three things happened. First, where all arraignments were handled by the Legal Aid Society (because of the absence of 18-B Panel attorneys or despite the presence of a rotationally assigned Panel attorney), the Society would inform the court, at the termination of a bail hearing, which defendant it would represent. The standard colloquy between the judge and the Society's attorney involved a simple question by the judge—"who are you staying with?"—and a simple answer by the attorney—"with defendant X." The remaining defendant(s) would be assigned to the Panel. In a second scenario, the Society attorney selected her client prior to formal arraignment. When a Panel attorney participated in the arraignment of co-defendants, the Society's attorney took all papers from the basket relating to the case. The Society attorney then took one of two steps. She went to the holding pens and chose one defendant to interview and, on completion of the interview, returned the remaining papers directly to the Panel attorney. Alternatively, she reviewed the papers, selected one defendant without an interview, and passed the remaining papers directly to the Panel attorney. Third, in other cases where a Panel attorney was present for arraignment, the Society's attorney took all papers relating to the case, selected one defendant and (before or after interviewing that defendant) returned the remaining papers to a court officer who, in turn, passed the papers to the Panel attorney.

In practice, therefore, the Legal Aid Society selected which defendant it represented.[1055] We did not observe a single case, over the entire six month period of our observational study, in which a judge sought to override the Society's determination as to which defendant it would represent. Not once did a Society staff attorney ask a judge to exercise judgment in the matter. In

1054. This procedure was followed in all cases, single and multiple-defendant alike.

1055. The Legal Aid Society has contended that no such selection was possible because the court controlled the distribution of conflict cases:

> The report characterizes the Society's efforts to live up to its contractual obligations as being those of a "strict game keeper," ever vigilant towards any "poachers" (presumably 18-B Panel attorneys). . . This characterization rests on the incorrect assumption that the Legal Aid Society controls the assignment of cases at arraignment. In reality we cannot assign cases to ourselves. The assignment of cases at arraignment is controlled by the court. The operation of the court system varies from county to county.

Legal Aid Society, Reply Memorandum to McConville & Mirsky Draft Report 14 (Oct. 1, 1985) [hereinafter 1985 Reply Memorandum]. Our observations belie this contention.

no case did a Society staff attorney tell a judge whom it would represent prior to the arraignment appearance. Once the Society staff attorney chose and interviewed her client,[1056] the judge without exception endorsed this decision.

II.
CLIENT SELECTION IN TERMS OF CASE SERIOUSNESS

We identified sixty felony cases in our court sample in which the Legal Aid Society represented one defendant and the 18-B Panel the other defendant(s). We analyzed these cases to see whether Panel attorneys represented the more seriously charged defendants. Factual culpability, prior criminal record, and bail status were regarded as measures of case seriousness. In all sixty of these cases, the Society selected the defendant it would represent and, thereby, which other(s) would be referred to the Panel.[1057]

A. Factual Culpability

In the absence of discovery and the opportunity to interview witnesses, defense attorneys at Criminal Court arraignment gather only rudimentary information about the state's case. Nevertheless, at this stage of the process, substantial differences in the culpability of jointly-charged defendants are often apparent from a snapshot view of the facts. Judges, prosecutors, and defense attorneys share a common understanding of which co-defendant is more culpable. In a lawyer's parlance, this defendant is called "the heavy." In a robbery case, for example, "the heavy" is the defendant who wielded the gun or knife and actually took the money while the other defendant acted as lookout. In the absence of a disparity in available proof, characterizations of this kind often determine whether the case should be severed; that is, whether one defendant should be indicted and prosecuted in Supreme Court while the

1056. The discretion afforded the Legal Aid Society in choosing its defendant in multiple-defendant cases was not per se improper or undesirable. Such discretion could provide the Society with an opportunity to review the case to determine whether any of the co-defendants presents a potential conflict and thereby poses a barrier to full representation. *See* AMERICAN BAR ASS'N, STANDING COMMITTEE ON ASS'N STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION, Standard 4.35, at 4.38-4.39 (1980) [hereinafter 1980 ABA STANDARDS FOR THE DEFENSE FUNCTION]. Such a conflict might exist if the Society already represents a co-defendant or a defendant who is a potential witness in another pending case. *See Glasser v. United States*, 315 U.S. 60, 76 (1942); *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Cuyler v. Sullivan*, 446 U.S. 335 (1980). *But see People v. Wilkens*, 28 N.Y.2d 53, 320 N.Y.S.2d 8, 268 N.E.2d 756 (1971); *supra* note 504. In practice, however, the choice is most often a function of the "taking" practices of the Society's attorneys. *See, e.g., supra* pp. 800-01, TABLE 8-6, at 808; app. 3, at 938; TABLE 8-7, at 812.

1057. We excluded those cases over which the Legal Aid Society could not exercise a relatively unfettered power of selection. Such cases fell into three classes: (1) cases in which the co-defendants were arraigned at different times, making selectivity impossible; (2) cases in which the Society had already undertaken to represent one of the co-defendants in an unrelated pending matter, thus pre-determining its selection; and (3) cases in which the Society only represented co-defendant(s) for arraignment, including cases in which the Society was relieved for reasons of actual conflict, after which all co-defendants were reassigned to the 18-B Panel for the next adjourned date.

other has the charges reduced and remains in Criminal Court.[1058]

In over half the cases in our sample (n=34), we were able to identify substantial disparity in culpability between jointly-charged defendants. In most of these cases, as *Table 9-1* shows, the Legal Aid Society elected to represent the co-defendant who was alleged to be the *least* culpable.

TABLE 9-1: *Proportionate Representation Between Defense Entities According to Factual Culpability*

Case Disparity	Total Cases in Sample According to Factual Culpability	
	n	%
"Heavier" Co-defendant Represented by Legal Aid Society	11	32.4
"Heavier" Co-defendant Represented by 18-B Panel	23	67.6
Co-defendants of Equal Weight	26	—
	60	100.0

As *Table 9-1* illustrates, the 18-B Panel represented more than twice as many "heavy" defendants as the Legal Aid Society did. In more than a third of these cases (n=9) the disparity in culpability between the defendants was great enough to occasion a severance. Consequently, the defendant assigned to the Society had her case reduced to a misdemeanor in Criminal Court and/or had the charge against her dismissed, while the defendant assigned to the Panel was held for the grand jury and/or indicted. Even in non-severance cases (n=14), the substantial disparity in culpability strongly suggests that the lawyering tasks facing the Panel attorney would be more challenging than those confronting the Society's staff attorneys.

The following twenty-one case summaries present the facts bearing on which defendant was the "heavy", and also indicate which defendant the Legal Aid Society selected.[1059] We shall first describe seven severance cases

1058. While co-defendants are joined in the initial charging stage, they are frequently severed prior to final disposition. This may result from a difference in the severity of the charges (misdemeanor versus felony), a difference in the strength of the State's case as between co-defendants, and other factors related to the background and character of the defendants. Although one co-defendant may be prosecuted in Supreme Court, another at the margin of culpability may have her charges reduced in Criminal Court and dismissed or plea-bargained as a petty offense. *See* VERA INSTITUTE OF JUSTICE, FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS (1977).

1059. In two cases our notes did not reveal what acts were attributable to each of the co-defendants. We identified the "heavy" from events occurring subsequent to arraignment and resulting in a severance, events from which we could reasonably infer a substantial difference in factual culpability.

1) Co-defendants A, B and C were charged with criminal sale of a controlled substance.

and then describe the remaining fourteen non-severance cases.

1. Severance Cases

a) Defendants A, B, C, and D were charged with burglary. C allegedly drove all defendants to the scene of the crime, while D was a passenger in C's car. The Legal Aid Society chose D and referred A, B and C to the 18-B Panel arraignment attorney. An indictment was returned against A and B; the charges against C and D were dismissed in Criminal Court.[1060]

b) Defendants A and B were charged with attempted murder. A was alleged to have shot the complainant, while B was alleged to have driven the "get-away" car. The Legal Aid Society chose to represent B, and referred A to the 18-B Panel arraignment attorney. The Society's staff attorney made the following statement to the arraignment court judge regarding B's culpability: "The strength of the case against [my defendant] is tenuous at best. [She] stands in a very different position than [her 18-B Panel's co-defendant]." Only A was indicted.[1061]

c) Defendants A and B were charged with criminal possession of a weapon. A was driving a car in which the weapon was found. B was her passenger. A acknowledged that the weapon was hers. The Legal Aid Society chose B and referred A to the 18-B Panel arraignment attorney. Only A was indicted.[1062]

d) Defendant A was charged with criminal sale of a controlled substance, a felony, to defendant B. B was charged with criminal possession of a controlled substance, a misdemeanor. A was alleged to have handed drugs to B, who, in turn, passed money to A. It was also alleged that A possessed an additional quantity of a controlled substance. The Legal Aid Society chose to represent B, and referred A to the 18-B Panel arraignment attorney. Only A was held for the grand jury.[1063]

e) Defendants A, B, and C were charged with criminal sale of a controlled substance. A was alleged to have handed drugs to B, who gave the drugs to the undercover agent. All the "buy" money was seized from B. C was alleged to be the "steerer." The Legal Aid Society chose to represent C, and referred A and B to the 18-B Panel arraignment attorney. The charges against C were reduced to a misdemeanor in Criminal Court. A and B were

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The Legal Aid Society represented all co-defendants at arraignment. After arraignment, the Society chose to remain with B, while A and C were referred to the 18-B Panel. A was indicted, while the charges against B and C were dismissed in Criminal Court. (Case 031)

2) Defendants A and B were charged with criminal sale of a controlled substance. The Legal Aid Society arraigned both co-defendants and selected B, referring A to the 18-B Panel. The charges against both defendants were presented to the grand jury, but an indictment was returned only against A. (Case S-85)

1060. Case S-30.

1061. Case 023.

1062. Case 028.

1063. Case 062.

held for the grand jury.[1064]

f) Defendants A, B, and C were charged with criminal sale of a controlled substance. A was alleged to have handed drugs to an undercover agent while B was found in possession of "buy" money. C was alleged to have been the "steerer." The Legal Aid Society chose C, referring defendants A and B to the 18-B Panel arraignment attorney. C pleaded guilty to a misdemeanor in Criminal Court, and was sentenced to a fine. A and B were held for the grand jury.[1065]

g) A and B were charged with criminal sale of a controlled substance. A was alleged to have passed the cocaine to the undercover agent, in exchange for money. B was alleged to have been the "steerer." B was offered 60 days and a misdemeanor at arraignment. The Legal Aid Society chose B and referred A to the 18-B Panel arraignment attorney. B refused the misdemeanor offer at arraignment and was subsequently indicted along with A. The indictment against B was dismissed for insufficiency, after an in camera inspection of the grand jury minutes.[1066]

2. Non-Severance Cases

a) A and B were charged with criminal possession of a controlled substance in an automobile in which defendant A was driving and defendant B was a passenger. The controlled substance was found under B's seat and B admitted purchasing the drugs earlier. The Legal Aid Society chose defendant A and referred defendant B to the 18-B Panel arraignment attorney.[1067]

b) A and B were charged with criminal possession of a weapon found in an automobile in which both defendants were present. Defendant B was separately charged with possessing a second weapon and a quantity of controlled substance. The Legal Aid Society chose to represent defendant A and referred defendant B to the 18-B Panel arraignment attorney. During the arraignment appearance the Society's staff attorney made the following statement to the arraignment court judge regarding the relative culpability of both defendants: "Most of the problem is created by [the other defendant] and [my client's] involvement is incidental."[1068]

c) A, B, and C were charged with criminal possession of a controlled substance. A was driving a car in which B and C were passengers. The controlled substance was found in the back seat of the car approximate to where B was sitting. B made a statement admitting her drug use. The Legal Aid Society chose to represent defendant A and referred B and C to the 18-B Panel arraignment attorney.[1069]

1064. Case 013.
1065. Case 019.
1066. Case 002.
1067. Case 009.
1068. Case 012.
1069. Case 018.

d) Defendants A and B were charged with robbery. A allegedly struck the complainant and took her money. Thereafter A ran to a car driven by B. After a high speed chase A and B were arrested, along with C who was separately charged with misdemeanor possession of a controlled substance. The Legal Aid Society represented all the defendants at arraignment but chose to remain with C. A and B were referred following arraignment to the 18-B Panel.[1070]

e) Defendants A and B were charged with robbery. While it was alleged that both defendants struck the complainant, A was allegedly more active and tried to take the complainant's money. The Legal Aid Society represented both defendants at arraignment and chose to remain with defendant B. Defendant A was referred to the 18-B Panel.[1071]

f) Defendants A and B were charged with robbery. Defendant A allegedly punched the complaining witness and took her property, passing it to defendant B. The Legal Aid Society represented both defendants at arraignment, chose defendant B, and referred defendant A to the 18-B Panel.[1072]

g) Defendants A and B were charged with attempted grand larceny of an automobile and criminal possession of burglars' tools. While both were in the car, B allegedly had in her possession the burglars' tools and struck the arresting officer in an effort to prevent her arrest. The Legal Aid Society chose to represent defendant A and referred B to the 18-B Panel arraignment attorney.[1073]

h) Defendants A and B were charged with a knife-point robbery. When arrested, A was observed demanding money from the complainant and in possession of the knife. The Legal Aid Society chose defendant B and referred defendant A to the 18-B Panel arraignment attorney.[1074]

i) Defendants A and B were charged with armed robbery. Defendant A was alleged to have displayed a gun and to have taken the money while defendant B was the lookout. The gun was recovered from defendant A. The Legal Aid Society chose defendant B and referred defendant A to the 18-B Panel arraignment attorney.[1075]

j) Defendants A and B were charged with assault and robbery. Defendant A was alleged to have stabbed the complainant causing him to be hospitalized, while defendant B took his wallet. The Legal Aid Society represented both defendants at arraignment and referred defendant A to the 18-B Panel.[1076]

k) Defendants A, B, and C were charged with criminal possession of a weapon found in an automobile. Defendant A admitted that the weapon was

1070. Case 042.
1071. Case 065.
1072. Case 056.
1073. Case 060.
1074. Case S-3.
1075. Case S-25.
1076. Case S-53.

hers. The Legal Aid Society chose defendant B and referred defendants A and C to the 18-B Panel arraignment attorney.[1077]

l) Defendants A and B were charged with forgery. Defendant A was observed altering the instrument and found in possession of three additional instruments. Defendant B was observed removing a photo from one instrument. Defendant A admitted that she was altering the instruments to sell them to defendant B. Defendant B admitted to purchasing the instruments from defendant A. The Legal Aid Society chose defendant B and referred defendant A to the 18-B Panel arraignment attorney.[1078]

m) Defendants A and B were charged with criminal sale of a controlled substance. Defendant A allegedly passed the drugs to an undercover agent, received money in return, and negotiated the sale. When arrested, defendant A was found in possession of a controlled substance. The Legal Aid Society represented both defendants at arraignment, chose defendant B, and referred defendant A to the 18-B Panel.[1079]

n) Defendants A and B were charged with criminal sale of a controlled substance. Defendant A was separately charged with possession of a loaded firearm. The Legal Aid Society chose defendant B and referred defendant A to the 18-B Panel arraignment attorney.[1080]

As these summaries demonstrate, it is readily apparent from the facts of many multiple-defendant cases that the Legal Aid Society chose to assign the "heavier" co-defendant to the 18-B Panel.

B. Criminal Record

To research further whether the Legal Aid Society used its assignment power to represent the less culpable defendant, we compared the criminal records and predicate felonies of jointly-charged defendants. Since defendants with more extensive criminal records are vulnerable to more severe sentences,[1081] criminal record is a useful measure of case seriousness. Likewise, predicate felons are likely to receive harsher sentences than defendants with less serious or with no predicate felonies.[1082]

The prior criminal records of the jointly-charged defendants differed in 73 percent (n=44) of our sample of cases. In seven out of ten of these cases, the Legal Aid Society chose to represent the defendant with the *less severe* record. Similarly, of the twenty-nine defendants alleged to be predicate felons, eighty percent were referred to the 18-B Panel.[1083] *Table 9-2* sets out the dis-

1077. Case S-60.

1078. Case S-81.

1079. Case S-88.

1080. Case S-89.

1081. *See* Brereton and Casper, *Does It Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 LAW AND SOC'Y REV. 45 (1981-82).

1082. N.Y. PENAL LAW §§ 70.06, 70.08, 70.10 (McKinney 1987).

1083. This conclusion was reached by counting the number of predicate felons in the sam-

tribution of multiple-defendant cases according to differences in criminal record.

TABLE 9-2: *Proportionate Representation Between Defense Entities According to Criminal Record*

Disparity of Criminal Record	Number of Cases n	Percentage of Cases Where Co-Defendants Have Differing Criminal Records (n=44) %
Co-Defendant With the More Severe Criminal Record Represented by the Legal Aid Society	13	29.5
Co-Defendant With the More Severe Criminal Record Represented by the 18-B Panel	31	70.5
Co-Defendants with Prior Criminal Records of Equal Severity	16	—
	60	100.0

C. Bail Status

Bail status is also a measure of case seriousness. While its constitutional justification is to insure against flight, bail is widely used as a form of pre-trial detention for those defendants who face the likelihood of indictment.[1084] Thus, a defendant held on $10,000 bail is likely to face a more serious charge or more serious consequences than a co-defendant held on low bail or released on her own recognizance ("ROR'd"). Our bail analysis reveals that 47 percent (n=28) of the cases in the sample involved a disparity in bail between jointly-charged defendants.[1085] As *Table 9-3* shows, the Legal Aid Society

ple of 60 multiple-defendant cases in which the Legal Aid Society had the power of case selection. The 18-B Panel represented 23 defendants while the Society represented 6.

1084. This use of bail was established in the first important empirical study of bail administration in the United States. *See* A. BEELEY, THE BAIL SYSTEM IN CHICAGO (1927). *See also* M. FEELEY, THE PROCESS IS THE PUNISHMENT (1979); W. THOMAS, BAIL REFORM IN AMERICA (1976); M. FEELEY, COURT REFORM ON TRIAL, ch. 2 (1983); Dershowitz, *Imprisonment by Judicial Hunch: The Case Against Pretrial Preventive Detention*, 1970 THE PRISON JOURNAL No. 2 (1970); R. GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICANBAIL SYSTEM (1965); Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959 (1965), Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PENN. L. REV. 1031 (1954).

1085. At the November 4, 1985 meeting of the Committee of Criminal Advocacy, *see supra* note 718, Russell Neufeld, spokesperson for the Association of Legal Aid Attorneys (the staff attorneys' union) acknowledged that staff attorneys *did* select co-defendants after the set-

took the co-defendant with the less serious bail pre-trial release status in 86 percent of the cases.

TABLE 9-3: *Proportionate Representation Between Defense Entities According To Bail Status*

Disparity in Bail Status	Number of Cases n	Percentage of Cases Where Co-Defendants Have Different Bail Status (n=28) %
Co-Defendant with Higher Bail Represented by the Legal Aid Society	4	14.3
Co-Defendant with Higher Bail Represented by the 18-B Panel	24	85.7
Co-Defendants with Equal Bail	32	—
	60	100.0

The 18-B Panel overwhelmingly was assigned defendants facing the greatest likelihood of detention, indictment and imprisonment.[1036] The Legal Aid Society assigned itself defendants who were released or most likely to be released, or for whom a misdemeanor plea or non-incarcerative sentence was more likely. In the cases in which one of the defendants was released without bail (ROR'd) and the other defendant had bail set, the Panel was assigned the bailed defendant 86 percent of the time.[1087]

Next, we identified the amount of bail set for the "heavy" defendant (i.e.,

ting of bail. He hypothesized that this was done so that the attorney could choose the co-defendant with the greatest likelihood of indictment and pre-trial detention. The Society's management adopted this statement as an amendment to its earlier (and contradictory) position. *See supra* note 1055.

1086. Our findings were at variance with an earlier national study undertaken by the National Legal Aid and Defender Association comparing the pre-trial status of clients in seven defender agencies with that of clients assigned private counsel. *See* S. Singer, B. Lynch & K. Smith, NLADA Final Report of the Indigent Defense Systems Analysis Project (1976) [hereinafter 1976 Indigent Defense Systems Analysis Project]. That study found that fifty percent of the clients of institutional defenders were detained (remanded or bailed) pending disposition compared to forty-six percent of the clients of court-assigned private Legal Aid attorneys. *Id.* In addition, our data demonstrate the difference in the seriousness of the Legal Aid Society's caseload in 1984 from that of the Voluntary Defenders' Committee in its early years when the Committee caseload was almost entirely comprised of superior court indictments. *See supra* note 280 and accompanying text.

1087. Of fourteen multiple-defendant cases where one defendant was released on his own recognizance while the other co-defendant(s) had bail set, the 18-B Panel represented the detained co-defendant in twelve cases. In two cases (cases 23 and 28), the Legal Aid Society represented the co-defendant with bail set while the Panel represented the co-defendant released on her own recognizance.

the one with the highest bail). Second, we identified which entity represented this defendant. Finally, we identified the defendant(s) represented by the other entity and selected from among that group the defendant with the highest bail.[1088] The following tables show that the 18-B Panel was consistently assigned the defendant with the higher bail.

TABLE 9-4:[1089] *Number of Multiple Defendant Cases Assigned to the Legal Aid Society and the 18-B Panel Where There Was a Disparity in Bail*[1090]

Degree of Bail Disparity in Dollar Figures	Legal Aid Society Had Defendant with Higher Bail	18-B Panel Had Defendant with Higher Bail
500- 999	1	2
1,000-1,999	1	10
2,000-2,999	1	4
3,000-4,999	0	4
5,000 or above	0	4

The pattern of client assignments is more striking when co-defendants are compared in the intervals set forth in *Table 9-5*. Where there was a disparity of over $5,000 in bail for co-defendants, the bail set on the 18-B Panel client was at least five times higher than that set for the Legal Aid Society's client. In two cases, the Panel defendant was detained in lieu of $5,000, while the Society's defendant was ROR'd.

1088. For comparative purposes we have included only the 18-B Panel co-defendant with the highest bail status and eliminated reference to other co-defendant(s) represented by the Panel.

1089. *Table 9-4* excludes one case (Case 28) where the disparity was not quantifiable in a dollar amount. In that case, the defendant represented by the Legal Aid Society was remanded on $1 bail (as a result of a pending parole warrant), while the 18-B Panel represented the defendant released on her own recognizance.

1090. To maintain anonymity and confidentiality, in two instances the actual dollar amount of bail is altered in *Table 9-4* to avoid case identification. However, the exact bail disparity remains static.

TABLE 9-5: *Disparity In Bail Between Co-Defendants Represented By The Legal Aid Society And The 18-B Panel*

(a) *Disparity of $5,000 or over*

Case	Defendant	Bail Status	Representation
1	Defendant A	$25,000	(18-B Panel)
	Defendant B	$ 5,000	(Legal Aid Society)
2	Defendant A	$ 7,500	(18-B Panel)
	Defendant B	$ 1,000	(Legal Aid Society)
3	Defendant A	$ 5,000	(18-B Panel)
	Defendant B	ROR	(Legal Aid Society)
4	Defendant A	$ 5,000	(18-B Panel)
	Defendant B	ROR	(Legal Aid Society)

In those instances where there was a disparity of between $3,000 and $4,999, the bail set on the 18-B Panel's client was between 2.5 to 10 times higher than that for the Legal Aid Society's client. In one case, the Panel defendant was detained in lieu of $3,500, while the Society's defendant was ROR'd.

(b) *Disparity of $3,000 - $4,999*

Case	Defendant	Bail Status	Representation
5	Defendant A	$ 5,000	(18-B Panel)
	Defendant B	$ 500	(Legal Aid Society)
6	Defendant A	$ 3,500	(18-B Panel)
	Defendant B	ROR	(Legal Aid Society)
7	Defendant A	$ 5,000	(18-B Panel)
	Defendant B	$ 2,000	(Legal Aid Society)
8	Defendant A	$ 5,000	(18-B Panel)
	Defendant B	$ 2,000	(Legal Aid Society)

In cases with a disparity of between $2,000 and $2,999, the 18-B Panel client's bail was 1.4 to 6 times higher than that for the Legal Aid Society's client, without exception. Similarly, in cases with a disparity of between $1,000 and $1,999, the Panel client's bail was, with a lone exception, 1.7 to 3 times higher than that set for the Society's client. In three cases the Panel defendant was detained in lieu of $1,500 and the Society's defendant was released, while in five cases the Panel defendant was detained in lieu of $1,000 and the Society's client was ROR'd.

(c) *Disparity of $2,000 - $2,999*

Case	Defendant	Bail Status	Representation
9	Defendant A	$ 3,000	(18-B Panel)
	Defendant B	$ 500	(Legal Aid Society)
10	Defendant A	$ 5,000	(18-B Panel)
	Defendant B	$ 2,500	(Legal Aid Society)
11	Defendant A	$10,000	(18-B Panel)
	Defendant B	$ 7,500	(Legal Aid Society)
12	Defendant A	$ 2,500	(18-B Panel)
	Defendant B	$ 500	(Legal Aid Society)
13	Defendant A	$ 2,500	(Legal Aid Society)
	Defendant B	$ 500	(18-B Panel)

(d) *Disparity of $1,000 - $1,999*

Case	Defendant	Bail Status	Representation
14	Defendant A	$ 1,500	(18-B Panel)
	Defendant B	ROR	(Legal Aid Society)
15	Defendant A	$ 1,500	(18-B Panel)
	Defendant B	ROR	(Legal Aid Society)
16	Defendant A	$ 1,500	(18-B Panel)
	Defendant B	ROR	(Legal Aid Society)
17	Defendant A	$ 2,500	(18-B Panel)
	Defendant B	$ 1,000	(Legal Aid Society)
18	Defendant A	$ 1,000	(18-B Panel)
	Defendant B	ROR	(Legal Aid Society)
19	Defendant A	$ 1,000	(18-B Panel)
	Defendant B	ROR	(Legal Aid Society)
20	Defendant A	$ 1,000	(18-B Panel)
	Defendant B	ROR	(Legal Aid Society)
21	Defendant A	$ 1,000	(18-B Panel)
	Defendant B	ROR	(Legal Aid Society)
22	Defendant A	$ 1,000	(18-B Panel)
	Defendant B	ROR	(Legal Aid Society)
23	Defendant A	$ 1,000	(Legal Aid Society)
	Defendant B	ROR	(18-B Panel)
24	Defendant A	$ 2,500	(18-B Panel)
	Defendant B	$ 1,500	(Legal Aid Society)

In two of three cases with a disparity of between $500 and $999, an 18-B Panel attorney represented the defendant with the higher bail.

(e) *Disparity of $500 - $999*

Case	Defendant	Bail Status	Representation
25	Defendant A	$ 500	(18-B Panel)
	Defendant B	ROR	(Legal Aid Society)
26	Defendant A	$ 1,000	(18-B Panel)
	Defendant B	$ 500	(Legal Aid Society)
27	Defendant A	$ 1,500	(Legal Aid Society)
	Defendant B	$ 1,000	(18-B Panel)

III.
THE SYSTEMIC CONSEQUENCES OF THE LEGAL AID SOCIETY'S POWER OVER ASSIGNMENTS: THE DISTRIBUTION OF SUPREME COURT CASES AND COMPARATIVE TRIAL RATES

The data relating to factual culpability, prior criminal record, predicate felony status, and bail status demonstrate that, in New York County, the Legal Aid Society consistently represented the less serious co-defendant, despite assertions to the contrary.[1091] The Society's selection practices had two systemic effects upon New York City's criminal defense system. First, they increased the proportionate number of cases handled by 18-B Panel attorneys in Supreme Court.[1092] Second, in combination with the shedding of single-defendant cases[1093] and the refusal to accept all but a few homicides,[1094] case selection was a major reason why Panel attorneys had a much higher trial rate than Society staff attorneys,[1095] despite the fact that the Society completed

1091. A Legal Aid Society supervisor explained the process of case selection to us in the following terms:

> There are no hard rules, no fixed rules. It depends on a lot of things. If I have only a misdemeanor lawyer here, I'll tell him to keep the misdemeanor if there is one and drop the felony. If I have a felony lawyer who is heavy on felonies already, is backed up with a big caseload, I'll say keep the case that you'll get rid of quickly. There are lots of factors like that. If we want it we'll keep it, if not we will drop it.

Extract from field notes, January, 1985.

1092. *See supra* TABLE 7-2, at 782. Of those cases in our sample in which the 18-B Panel was assigned the "heavier" co-defendant, eighty-eight percent were held for the Grand Jury or indicted. By contrast, in those cases in which the Legal Aid Society chose the "heavier" co-defendant, sixty-four percent were held for the Grand Jury. The Society's remaining cases were either resolved in Criminal Court or not indicted by the Grand Jury. As we indicated *supra* text accompanying notes 930, 949, our audit of the Society's internal records revealed that while the Society handled approximately 67,000 felony complaints in Criminal Court in 1984 (including relieved, reassigned and absconded), only some 9,400 were disposed of in the Supreme Court, compared with aproximately 8,600 Supreme Court dispositions for the 18-B Panel, *see supra* text accompanying note 948.

1093. *See supra* TABLE 8-1, at 795; *infra* TABLE 10-1, at 838.

1094. *See supra* notes 275, 509, 674 and accompanying text.

1095. Similar results have been reported in the 1976 Indigent Defense Systems Analysis Project, *supra* note 1086, at 166, which found that assigned counsel tried cases at a rate of twenty-six percent as compared to thirteen percent for institutional defenders. In each of the jurisdictions studied, assigned counsel provided representation in a significantly higher percent-

over three times as many cases (n=126,829) as Panel attorneys (n=34,841) in 1984. *Table 9-6* shows that the Panel went to trial more than twice as frequently in Supreme Court that year. Similarly, *Table 9-7* shows that in Criminal Court, while the absolute number of trials was virtually equal between the Panel and the Society, the rate at which the Panel went to trial was nearly four times that of the Society.[1096]

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age of violent felony offenses (homicide, rape, etc.) than did their institutional counterparts. *Id.* at 171.

Some researchers postulate that trial rate disparity between institutional defenders and court-assigned private attorneys results from the screening practices of institutional defenders, who are more familiar with "acceptable" guilty pleas than private attorneys. *See, e.g.*, D. OAKS & W. LEHMAN, A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT 158-59 (1968). In our sample, *see* case summaries *supra* notes 1060-66 (Cases S-30, 023, 028, 062, 013, 019, 002), the proportionate number of severance cases refutes this explanation. Another explanation may be that private attorneys, whether court-assigned or retained, have a financial incentive to take cases to trial. D. OAKS & W. LEHMAN, *supra*, at 158. Our court observations and analysis of the Panel's citywide dispositions and of 14,000 of the 18-B Panel compensation vouchers refute this view. The vast majority of Panel cases appear to result from non-trial dispositions which fall well below the minimum compensation allowable by statute. *See* supra note 820, TABLE B; *see infra* TABLE 9-6, at 833; TABLE 9-7, at 833; TABLE 11-1, at 860. The comparatively high Panel trial rate is thus explainable only in terms of the cases referred to the Panel, not the financial motivation of Panel attorneys.

1096. The Legal Aid Society's acquittal rate, however, may be higher than that of the 18-B Panel. In the 0.3% of the Society's final dispositions in Criminal Court which proceeded to trial, the Society reports a sixty-five percent acquittal rate. By contrast, in the one percent of the First Department Panel cases which proceeded to trial in Criminal Court, the administrator reports an acquittal rate of 36.2%. These figures are computed from the Society's Monthly Caseload Activity Reports, *see supra* pp. 704, 800-01, and internal records maintained by the Panel administrator for the First Department. *See also* 1985 Reply Memorandum, *supra* note 1055, at 37. The Society's acquittal rate in Supreme Court (40.8%) is also derived from the Monthly Caseload Activity Reports. The Reports do not differentiate between acquittals on all charges and acquittals on all felony charges. In contrast, the Panel's First Department Supreme Court acquittal rate of 33.9% in felony cases refers to defendants acquitted on all charges; its acquittal rate on all felony charges is 41.9%. *See* TABLE A and TABLE B below.

TABLE A: *Legal Aid Society Trial Disposition Outcomes Citywide, 1984*

	Trials	Acquittals	Acquittal Rate
Criminal Court	348	228	65.5%
Supreme Court	688	281	40.8%
Overall	1036	509	49.1%

Note: The Society's 1984 annual report to OCA (Report UCS-195 (1984)(Legal Aid Society)) reports an additional seven misdemeanor trials and an additional 48 felony trials from those included in its internal monthly caseload activity reports. These additional trials, however, do not alter the proportion of acquittals or the acquittal rate. In its 1985 Reply Memorandum, *supra* note 1055, at 39, the Society itself claims an acquittal rate of 40.9%.

TABLE B: *18-B Panel, Trial Disposition Outcomes, First Department, 1984*

	Trials	Acquittals	Acquittal Rate
Criminal Court	177	64	36.2%
Supreme Court	899	305	33.9%
Overall	1,076	369	34.3%

Note: Altogether, of the 1,076 dispositions, 464 (43.1%) were convicted as charged, and the 243 (22.5%) remaining convictions were on a lesser charge. Of 899 felony trials, 142 (15.8%) resulted in conviction of a lesser felony, 51 (5.7%) in conviction of a misdemeanor, and 21 (2.3%) in conviction of a violation.

TABLE 9-6: *Comparative Trial Rates, Final Dispositions, Supreme Court, Citywide, 1984*[1097]

	Legal Aid Society	18-B Panel 2nd	18-B Panel 1st	18-B Panel Overall
Total Felonies to Final Disposition (Plea, Verdict, Dismissal, Trial)	9,419	3,889	4,712	8,601
Total Felonies to Trial	688	578	899	1,477
Trial Rate (%)	7.3	14.9	19.1	17.2

TABLE 9-7: *Comparative Trial Rates, Final Dispositions, Criminal Court, Citywide, 1984*

	Legal Aid Society	18-B Panel 2nd	18-B Panel 1st	18-B Panel Overall
Total Criminal Court Final Dispositions	117,410	9,102	17,138	26,240
Total Criminal Court Post-arraignment Final Dispositions	45,574	4,602	12,638	17,240
Total Trials	348	125	177	302
Trial Rate as % of All Final Dispositions	0.3	1.4	1.0	1.2
Trial Rate as % of Post-arraignment Final Dispositions	0.8	2.7	1.4	1.8

These tables starkly reveal the effects of the Legal Aid Society's selection practices and case shedding. In Supreme Court, Panel attorneys tried cases at a rate more than twice that of the Society's attorneys. In Criminal Court, the Panel's trial rate was, as a percentage of all final dispositions, nearly four times the Society's.

The Legal Aid Society has challenged the appropriateness of this trial rate comparison on two grounds. First, it has stated that "[In] our view, the more appropriate method for developing a comparative trial rate would have been to compare the felony trial rate of the Society with that of 18-B attorneys, excluding the homicide trials because the court rarely assigns the Society to

1097. Final dispositions may occur by plea and sentencing, dismissal, adjournment in contemplation of dismissal, and trial (acquittal or conviction and sentencing). We exclude bench warrants, mental commitments, cases in which the attorney is relieved, and transfers. In the case of the Legal Aid Society, for Criminal Court we also omit "carry-overs" to Supreme Court which, though included in Society statistics, did not involve final dispositions. *See supra* note 986, and *infra* TABLE 11-8, at 872, for the breakdown of final dispositions for both defense entities.

these cases. (In 1984 the homicide trial rate was more than three times the regular felony trial rate: 37.1 percent versus 10.8 percent)."[1098] However, we saw no good reason to exclude homicide cases since it was the Society's own decision to decline all but a few such assignments.[1099] Nevertheless, it was possible to make an alternative comparison between the Society's and Panel's trial rates, with homicides excluded, by using data collected by the Second Department's Panel administrator.[1100] In 1984, the Second Department administrator reported 320 homicide assignments. Of these, approximately 119 went to trial (37.1 percent of 320).[1101] When homicide assignments are excluded from the total felonies disposed of by the 18-B Panel in the Supreme Court, Second Department (n=3,889−320=3,569), and when homicide trials are excluded from the total number of trials handled by the Panel in that same forum (n=578−119=459), the Panel trial rate, *excluding homicides*, was 12.9 percent (459 out of 3,569).

In 1984, Legal Aid Society attorneys handled 28 trials[1102] which arose under Article 125 of the New York Penal Law (attempted and completed homicides).[1103] Assuming a trial rate of 37.1 percent,[1104] the Society represented an estimated seventy-five Article 125 defendants. Deducting these cases from the Society's total trials and dispositions, its trial rate in Supreme Court, *excluding homicides*, was 7.1 percent (660 trials out of 9,344 cases). Thus, the 18-B Panel's Second Department trial rate (12.9 percent) was almost double that of the Society even when homicides are excluded.

The Legal Aid Society's second challenge to the trial rate comparison has been as follows:

> Inasmuch as every three defendant trial with one Criminal Defense Division attorney and two 18-B Panel attorneys overstates significantly the trial rate for the 18-B Panel doubling the rate, additional refinement of the data should have been undertaken by the researchers in comparing felony trial rates for the Society (688) and 18-B Panel attorneys (899). By confusing the counting of assignments with the counting of cases the authors inflated 18-B Panel trial rates. The researchers should have attempted to sort the multiple-defend-

1098. 1985 Reply Memorandum, *supra* note 1055, at 37.

1099. The Society's description of its "taking" practices in relation to homicides is found in *supra* note 674, and accompanying text.

1100. Since homicide trials are not segregated in the Annual Report of the Administrator for the First Department, *see* Report UCS-195 (1984) (18-B Panel 1st Dep't), and the Administrator did not maintain a worksheet which segregates trials according to offense severity, no comparison of the First Department Panel with the Legal Aid Society is possible.

1101. The proportionate number of homicide trials were reported by the Division of Criminal Justice Services of the State of New York, Felony Processing Preliminary Annual Report, Indictment through Disposition (1984) [hereinafter 1984 Felony Report], at 28.

1102. 1985 Reply Memorandum, *supra* note 1055, at 40. Of these cases, sixteen defendants were charged with attempted murder.

1103. N.Y. PENAL LAW Article 125 (McKinney's 1975).

1104. *See* 1984 Felony Report supra note 1101, at 28; 1985 Reply Memorandum, *supra* note 1055, at 37.

ant cases into categories of two, three, four co-defendants.[1105]

This objection rests on two basic fallacies. First, the overwhelming majority of multiple-defendant cases involved two defendants, not three or more.[1106] Second, the Society's response assumed that when one defendant plead not guilty and went to trial, all co-defendants necessarily did the same. An examination of our multiple-defendant sample of seventy-five cases shows that this was plainly untrue. At the end of our observation period, thirty-nine cases (52 percent) had already been split (because, for example, one defendant plead guilty; another defendant, with marginal culpability, had the charges reduced in Criminal Court and was severed; and another had absconded). A further nine cases (12 percent) involved co-defendants who had already been sentenced or had obtained a dismissal before trial. In other words, at least 64 percent of the cases did not proceed jointly to trial. The actual percentage is almost certainly higher, since many of the remaining cases were put on the calendar only a short time before the end of our observation period — too soon to record subsequent split outcomes and non-trial dispositions.

IV.
CHAPTER SUMMARY

The Legal Aid Society had virtually unfettered discretion in choosing which co-defendant to represent in multiple-defendant cases in New York County. While the Society did not exercise this discretion according to formal guidelines, it also did not select defendants at random. With the knowledge of its management and without any oversight by Criminal Court judges, OCA, or the City, the Society's attorneys systematically chose to represent the defendants with the least serious case, whose defense required the least challenging lawyering tasks. In consequence, 18-B Panel attorneys were regularly assigned to represent co-defendants whose cases were, by any measure, more serious, and whose defense required greater degrees of skill, effort and resources. This practice of discretionary selection accounted in large measure for the disproportionate number of Panel assignments in Supreme Court and for the Panel's comparatively greater trial rate.

The case selection practices of Legal Aid Society attorneys are consistent with the history of New York City's institutional defender. When the Voluntary Defenders' Committee was formed in 1917, it adopted a non-adversarial role, discouraged defendants from going to trial, and refused to handle homicides, the most serious cases. This policy was defended on the basis of cost efficiency; its supporters further contended that in homicide cases with the greatest likelihood of trial specially skilled private lawyers constituting an elite sub-set of the private bar would zealously represent those defendants.[1107]

1105. 1985 Reply Memorandum, *supra* note 1055, at 39.

1106. *See supra* note 968, TABLE A.

1107. *See* R. SMITH, JUSTICE AND THE POOR 112 (1919); *see also supra* text accompanying notes 82-83.

Whatever merit this contention once had, it was clear that 18-B Panel attorneys in our observation sample did not constitute a professional elite; further, both homicide-certified and felony-certified 18-B Panel attorneys lacked the institutional resources available to Legal Aid Society attorneys to provide meaningful representation for indigent criminal defendants.