CHAPTER ONE

THE ORIGINS OF THE INDIGENT DEFENSE SYSTEM[40]

I.

THE MOVEMENT TO REFORM THE ADMINISTRATION OF CRIMINAL JUSTICE

Between 1870 and 1910, the population in the United States grew from forty million to ninety-two million.[41] Most of the growth was concentrated in cities, which experienced an initial massive influx of German immigrants, and a later wave of immigrants of predominantly Southern and Eastern European origin.[42] The new immigrant class became a dominant concern of those interested in maintaining the existing social order. Two approaches were envisioned to achieve this end: 1) Americanize the immigrant poor through existing social institutions[43] by promoting confidence in the "impartiality of

40. Information in this chapter is obtained, in part, from data provided by chroniclers of institutional defense. *See, e.g.*, R. SMITH, JUSTICE AND THE POOR (1919); J. MAGUIRE, THE LANCE OF JUSTICE (Legal Aid Society Publications) (1928); H. TWEED, THE LEGAL AID SOCIETY NEW YORK CITY, 1876-1951 (1954). The chroniclers advanced an apolitical view of the growth of organized legal aid. Reginald Heber Smith, for example, in a foreward to Tweed's book, contended that "the [movement's] pioneers were not philosophers. They were kindhearted and God-fearing people who could not tolerate gross injustice and proposed to *do something* about it." H. TWEED, *supra*, at v (emphasis in original). For a critique of the literature relating to the growth of legal aid in civil cases, *see* Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474 (1985). Abel is not generally concerned with legal aid in criminal cases, although he draws attention to important parallels. *Id.* at 514-15, 611-12.

Other information on the early years of the movement to reform indigent defense was obtained from THE LEGAL AID SOCIETY ANNUAL REPORTS, THE LEGAL AID REVIEW, THE JOURNAL OF THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY [hereinafter J. CRIM. L. & CRIMINOLQGY], THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE [hereinafter THE ANNALS] as well as publications of a more general nature. These writings contain frank and extensive discussion of the role of lawyers, their operative assumptions, and their ideologies toward law and social order. Such open discourse by those seeking to create political and economic alliance between defense providers, the state and the private bar, helped to secure particular forms of indigent defense. This self-revelatory style diminished gradually over the years, and declined markedly after 1945. The Warren Court era of individual rights, which *Gideon* heralded, eventually signaled its abandonment altogether.

Our purpose in examining this information and the data contained therein is to determine the structural goals of indigent criminal defense, and the alliances made with powerful political and economic interests. Through such analysis we hope to explain why indigent criminal defense systems came into being prior to *Gideon*, and survived thereafter in a substantially unchanged form.

41. *See* SPECIAL COMMITTEE, ASS'N OF THE BAR OF THE CITY OF NEW YORK, EQUAL JUSTICE FOR THE ACCUSED 45 (1959) [hereinafter EQUAL JUSTICE FOR THE ACCUSED].

42. J. AUERBACH, UNEQUAL JUSTICE 53, 58-59 (1976); *see also* Smith, *An Introduction to Legal Aid Work*, 124 THE ANNALS 1, 3 (1926).

43. The growth in legal aid organizations coincided with an unprecedented rise in immigration from 1905 to 1914. J. AUERBACH, *supra* note 42, at 58-59. This resulted in what

the administration of justice" and instilling loyalty to a government that "afforded to all classes the equal protection of the laws;"[44] and, 2) discipline and control the immigrant class through the administration of criminal justice.[45]

The professional elite had, for some time, "fretted over mounting evidence of public discontent with the legal system" and perceived "social disintegration."[46] The private bar was, "to a greater and greater extent, failing to meet its self-imposed obligation to the poor."[47] Their problems "engender[ed] a mass of litigation that strained the administration of justice beyond the breaking point."[48] The elite were concerned that the poor, clustered in populous and congested cities, would become convinced "that they were being denied redress, protection, and equality before the law . . . and were in consequence being oppressed and placed at an unfair disadvantage before our courts of justice."[49] Many thought that the failure of the legal system to secure impartial laws and an equal administration of justice would result in "a drift toward communism, revolution and anarchy."[50]

The fear of social unrest led the civic elite to support the creation of private legal aid agencies that would provide civil legal services to the immigrant and working class poor.[51] These agencies sought to ameliorate the living con-

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Auerbach describes as a "vast unassimilated mass concentrated in urban ghettos, generating concern about lawlessness and disorder." *Id.* Legal aid assumed new significance in the face of these changes. "Its defenders were galvanized into a renewed appreciation of the importance of their Americanizing mission." *Id.* at 60.

44. J. MAGUIRE, *supra* note 40, at viii.

45. Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 312 (1912-1913).

46. J. AUERBACH, *supra* note 42, at 59; *see, e.g.*, Norcross, *The Crime Problem*, 20 YALE L.J. 599, 599 (1911).

> [W]e are a cosmopolitan nation and our ports for many years have been open to all stratums of European society and not a little of the criminal element of Europe has found a permanent abiding place in the United States. One needs but glance at the records at our prisons to find that many foreign countries have had a measure of relief, at our expense, from the criminal class.

Id.; Potter, *Spectacular Aspects of Crime in Relation to the Crime Wave*, 125 THE ANNALS 1 (1926); and C. Kelsey, *Immigration and Crime*, 125 THE ANNALS 165 (1926).

47. Hamilton, *Legal Aid Work and the Bar*, 124 THE ANNALS 145, 146 (1926). In this Article, "organized bar" refers to the organized sector of the private legal profession (i.e. the City Bar Association), while "private bar" refers to the private practice of law in general.

48. Smith, *supra* note 42, at 3.

49. J. MAGUIRE, *supra* note 40, at viii.

50. *Id.* Similar concerns were expressed by Charles Evans Hughes who, in 1917, became the third president of the Legal Aid Society. Hughes wrote: "[t]here is no more serious menace than the discontent which is fostered by a belief that one cannot enforce his legal rights because of poverty. To spread that notion is to open a broad road to Bolshevism." Hughes, *Legal Aid Societies, Their Function and Necessity*, 45 A.B.A. REP. 227, 235 (1920).

51. Cornelius Kitchel, an attorney to the New York Legal Aid Society, observed,

> [t]he world owes no man a living, and to give him one has come to be recognized as unwise charity, but everyone is entitled to the preservation of his legal rights, and to enforce and protect these rights, through the courts when necessary, does not make our clients paupers, but rather contented men and good citizens, instead of discontented grumblers and possible recruits to the forces of social disorder.

C. Kitchel, 3(2) LEGAL AID REV. 1, 2 (1905). *See also* J. KATZ, POOR PEOPLE'S LAWYERS IN

ditions of the poor in a free market economy by assisting in the recovery of unpaid wages, and protecting individuals against loan sharks and unscrupulous landlords.[52] The proliferation of legal aid agencies dramatized the apparent fairness of the American legal system, curbed the threat of social unrest, and legitimated the existing social order.[53]

The fear of social disintegration found expression in the efforts of those who sought "to make criminal law effective to secure social interests."[54] Elite lawyers contended that the new immigrant class brought with it a criminogenic element.[55] This fear was translated into the actions of law enforcement; the consequence, reformers reported, was "[a]n avalanche of criminal matters"[56] that disproportionately affected those of foreign origin.[57] The "crime wave"[58] intensified a widespread feeling that the administration of

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TRANSITION 181 (1982). Responding to views such as these, legal aid societies tripled in number from five to fifteen between 1900 and 1910; by 1920 the number tripled again to 41. R. SMITH & J. BRADWAY, GROWTH OF LEGAL-AID WORK IN THE UNITED STATES 74 (1936); *see also* J. AUERBACH, *supra* note 42, at 58. The prototype legal aid agency was the New York Legal Aid Society, which was established in 1876. *See* LEGAL AID SOCIETY 47TH ANNUAL REPORT, VOLUNTARY DEFENDERS' COMMITTEE 16-17 (1922) [hereinafter 1922 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT]; *see also infra* pp. 612-15.

Private legal aid societies dependency on philanthropic contributions, however, resulted in low salaries, poor working conditions, lack of support services, and excessive caseloads. Legal aid work therefore was regarded as "essentially a young lawyer's work." R. SMITH, *supra* note 40, at 192-193. Smith reported that a survey of 28 legal aid organizations revealed that attorneys, on average, were "members of the bar only seven years . . . assistant attorneys on the staff are almost entirely young men." *Id. See also* 17(4) LEGAL AID REV. 16 (1919); McGee, *The National Development of Legal Aid Work*, 20(2) LEGAL AID REV. 1-2 (1922).

52. For an excellent analysis of the "structural thrust" of the Legal Aid movement of the late 19th and early 20th century, *See* J. KATZ, *supra* note 51, at 181-86, 35-50.

As to legal assistance in wage claims, see correspondence between W. Wood Public Defender of Los Angeles and A. C. Umbreit, Esq. of Milwaukee dated March 17, 1914. 5 J. CRIM. L. & CRIMINOLOGY 283, 288 (1914-1915); R. SMITH, *supra* note 40, at 153; Donnell, *St. Louis Municipal Legal Aid Bureau*, 124 THE ANNALS 48, 49 (1926). As to legal assistance against the extortionist policies of loan sharks, see 6(1) LEGAL AID REV. 7 (1908); 18(4) LEGAL AID REV. 12 (1920); 24(1) LEGAL AID REV. 7 (1926). *See also* Silverman, *Adapting Legal Aid to Social Change in Cincinnati*, 205 THE ANNALS 65, 67 (1939); Bachelder, *The Small Loan Business Unregulated*, 205 THE ANNALS 35 (1939). As to legal assistance against unscrupulous landlords, see 9(3) LEGAL AID REV. 12 (1911); 1922 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT, *supra* note 51, at 32-37.

53. Legal Aid, in helping to obtain justice for the poor, particularly those of foreign birth or parentage, who are unfamiliar with our laws and customs, goes far to eliminate one of the causes of unrest and is one of the factors helping to teach to the foreign born, the moral strength and justice of our institutions.

Wardell, *Bolshevism in the United States*, 17(2) LEGAL AID REV. 1, 2-3 (1919).

54. *See* Pound, *supra* note 45, at 312.

55. *See* Norcross, *supra* note 46, at 599.

56. EQUAL JUSTICE FOR THE ACCUSED, *supra* note 41, at 45.

57. Embree, *The New York 'Public Defender,'* 8 J. CRIM. L. & CRIMINOLOGY 554, 563 (1917-1918).

58. In a much quoted 1908 speech, William H. Taft expressed a common concern over the perceived rise in crime and the need for stricter enforcement of the criminal sanction.

And, now, what has been the result of the lax administration of criminal law in this country? Criminal statistics are exceedingly difficult to obtain. The number of homicides one can note from the daily newspapers, the number of lynchings and the

criminal justice "should do more *to* criminals and less *for* them."[59]

The rise in immigration and the use of the criminal sanction in relation to the foreign born focused reformers' interest on the criminal justice system's ability to efficiently process indigent criminal defendants.[60] Reformers argued that "technicalities in procedure . . . stimulate[d] the increase of crime" and enabled "guilty persons [to] escape punishment."[61] In response, they proposed the abolition of the grand jury, a restriction on defendants' assertions of the right to remain silent and the presumption of innocence, an increase in the judicial power to marshal evidence at trial and comment upon it to the jury, and the introduction of the majority verdict.[62] The elimination of court-assigned private attorneys in criminal cases, and their replacement by cost-efficient staff attorneys from public and private defender agencies, became an integral plank in the reform platform.[63]

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number of executions, but the number of indictments, convictions, acquittals and mistrials it is hard to find. Since 1885 in the United States there have been 131,951 murders and homicides, and there have been 2,286 executions. In 1885 the number of murders was 1,808. In 1904 it has increased to 8,482. The number of executions in 1885 was 108. In 1904 it was 116. This startling increase in the number of murders and homicides as compared with the number of executions tells the story. As murder is on the increase, so are all offenses of the felony class, and there can be no doubt that they will continue to increase unless the criminal laws are enforced with more certainty, more uniformity, more severity than they now are.

William H. Taft, Address Before the Civic Forum of New York City (April 28, 1908), *partially reprinted in* Forster, *On the Public Defender: A Symposium*, 6 J. CRIM. L. & CRIMINOLOGY 370, 378 (1915-1916) [hereinafter *The Public Defender Symposium*]. *See also* statistics reported by Forster related to the increase in crime. *Id.* at 378-79, 382-83; *see also* Remarks of President William H. Taft on the Administration of Civil and Criminal Law, *quoted in* Norcross, *supra* 46, at 599.

59. Smith, *Defender in Criminal Cases Recommended in Cleveland*, 12 J. CRIM. L. & CRIMINOLOGY 490, 491 (emphasis in original). "There is a widespread feeling . . . that we have been betrayed by a false sentimentality and have 'slopped over' in our treatment of criminals, and that it is high time to retrace our steps and to insist on crime being punished." *Id.* at 491.

60. Norcross, *supra* note 46, at 600.

61. Parmelee, *A New System of Criminal Procedure*, 4 J. CRIM. L. & CRIMINOLOGY 359 (1913-1914). *See also*, Untermeyer, *Evils and Remedies in the Administration of the Criminal Law*, 36 THE ANNALS, 145 (1910). Untermeyer argued that "the first and greatest existing evil in the administration of the criminal law, and one that should be corrected, is the undue protection still afforded to persons charged with crime." *Id.* at 150. Constitutional protection he argued, created "this disability to punish crime" that "lead to all sorts of dishonesty and expedience by the prosecuting officers . . . ." *Id.*

See also A. TRAIN, COURTS AND CRIMINALS (1924) 218-19: "We have unnecessarily fettered ourselves, have furnished a multitude of technical avenues of escape to wrong-doers, and have created a popular contempt for courts of justice, which shows itself in the sentimental and careless verdicts of juries, in a lack of public spirit, and in an indisposition to prosecute wrong-doers."

62. Parmelee, *supra* note 61 at 360-62. *See also* Untermeyer, *supra* note 61, at 151, 153, 159; Norcross, *supra* note 46, at 600-03; Hiscock, *Criminal Law and Procedure in New York*, 26 COLUM. L. REV. 253 (1926); Johnstone, *Suggestions for Reform in Criminal Procedure*, 125 THE ANNALS 94 (1926); Mikell, *Criminal Procedure Defects in its Administration*, 125 THE ANNALS 91 (1926); Miller, *The Problem of Criminal Procedure*, 125 THE ANNALS 96 (1926).

63. Parmelee, *Public Defense in Criminal Trials*, 1 J. CRIM. L. & CRIMINOLOGY 735 (1910-1911); Ferrari, *The Public Defender: The Complement of the District Attorney*, 2 J. CRIM.

A. Criticisms of the Assigned Counsel System

Commentators claimed that the treatment the poor received at the hands of the criminal justice system resulted, in part, from the failure of reputable private lawyers to undertake representation of indigent criminal defendants.[64]

In 1897, Clara Foltz, an advocate of the public defender idea, described the situation:

> Court appointees do not come from the successful ranks of the profession. Once in a while the court braves the resentment of a busy lawyer and appoints him. Sometimes a brilliant young lawyer, generally in novels, successfully defends. Now and then an able lawyer volunteers his services. But these are exceptional cases.[65]

Twenty-two years later, in 1919, Reginald Heber Smith, a partner in the Boston law firm of Hale and Dorr and general counsel to the Boston Legal Aid Society,[66] authored the influential Carnegie Foundation report, *Justice and the Poor*, on the state of indigent representation.[67] Smith reported that the assignment of lawyers to the poor "as a whole . . . proved a dismal failure, and that at times it . . . [had] been worse than a failure."[68] He noted that "[t]he more well-to-do attorneys . . . [were] entirely out of criminal practice," and their lack of experience in criminal cases made them "virtually exempt from assignment."[69] Smith further noted that "[c]ourts have made spasmodic efforts to whip the assignment system into shape by enlisting the leaders of the bar, but the attempts have not succeeded and have been short-lived."[70]

Reformers contended that the representation of indigent defendants fell, by default, into the hands of the inexperienced and the corrupt. Young attorneys were occasionally willing to serve in order to gain trial experience, but critics remarked that the inexperienced lawyers "hurt the cases they defend[ed] as often as they help[ed] them."[71] In general, they were no match for professional prosecutors.[72]

L. & CRIMINOLOGY 704 (1911-1912); Goldman, *The Necessity for a Public Defender*, 5 J. CRIM. L. & CRIMINOLOGY 660 (1914-1915).

64. *See* Foltz, *Public Defenders*, 31 AM. L. REV. 393 (1897); R. SMITH, *supra* note 40, at 113.

65. Foltz, *supra* note 64, at 399.

66. J. AUERBACH, *supra* note 42, at 60. In 1926, Smith became the chairman of the Legal Aid Committee of the American Bar Association. *See* Tweed, *Foreword* to E. BROWNELL, LEGAL AID IN THE UNITED STATES, at iii (1951).

67. R. SMITH, *supra* note 40.

68. *Id.* at 103.

69. *Id.* at 113.

70. *Id.*

71. Adelman, *In Defense of the Public Defender*, 5 J. CRIM. L. & CRIMINOLOGY 494, 496 (1914-1915).

72. Wood, *The Office of Public Defender*, 124 THE ANNALS 69, 70 (1926). Smith also commented on this problem: "However amusing to the bar the custom of assigning criminal defences to its most recent accessions may be, the proceeding on its face is unfair. With legal education as it is, the fledgling is little more qualified to defend than the prisoner is to conduct his own defense." R. SMITH, *supra* note 40, at 113.

The strongest criticism, however, was reserved for professional assigned counsel ("courthouse regulars"), many of whom were of recent immigrant origin. Elite lawyers referred to them as "shysters," "legal vermin," and "snitch lawyers."[73] These attorneys were accused of violating their pro bono obligations by procuring fees from their indigent clients and their families "in devious ways, ranging from compelling the mortgage . . . to forcing the prisoner's wife to sell herself on the streets."[74] When assigned counsel were unable to collect fees, reformers claimed that they often avoided preparation and failed to appear on required court dates.[75]

Reformers also decried the effects of assigned counsel representation on defendants themselves.[76] Some contended that attorneys who regularly took cases to trial in order to justify charging a fee were "cruel" to their clients because they did not advise their clients to plead guilty in appropriate circumstances, and thus risked harsher sentences after trial.[77] Others argued that indigent defendants came "to the bar of justice crushed in spirit, and if innocent, in mortal terror of the law and resigned to any fate."[78] A court-appointed lawyer, whose chief concern was retained clients, "easily convince[d] himself that he [had] done his duty to his pauper client if the prosecutor . . . [accepted] a plea of guilty to a lesser form of crime . . . or recommended a moderate sentence."[79] The result, reformers argued, was that "unjust convictions among the poor and helpless, and especially among our ignorant foreign population [were] far more frequent than we fortunates care to admit."[80]

The one exception to these reported failures in indigent representation was the appointment of private attorneys in homicide cases.[81] Commentators

73. J. AUERBACH, *supra* note 42, at 50; M. GOLDMAN, THE PUBLIC DEFENDER 19 (2d ed. 1919). Another author described a typical assigned counsel as "often shifty and shady by nature; even when inclined to square dealing, forced into crookedness by the conditions of his life; and, honest or dishonest, practically never able to give his clients first-class service." J. MAGUIRE, *supra* note 40, at 271.

74. R. SMITH, *supra* note 40, at 114.

75. H. TWEED, *supra* note 40, at 24.

76. *See, e.g.*, Parmelee, *supra* note 63, at 739. *See also*, Ferrari, *supra* note 63, at 711.

77. Ferrari, *supra* note 63, at 711. Judges were known to be lenient in sentencing self-confessed offenders because "they save the time of the court and the necessary expenses entailed in the production of evidence." *Id.* at 705. *See also* Wood, *supra* note 72, at 71, and M. GOLDMAN, *supra* note 73, at 40-41, 50-51.

78. Untermeyer, *supra* note 61, at 159. Untermeyer described the circumstances by which indigent defendants pleaded guilty when represented by assigned counsel:

> [B]efore the poor fellow knows what has happened to him he had consented on less notice and in less time than it requires to tell the story, to take the advice hurriedly given him as he stands quivering at the bar and he finds himself on the way to prison. There is hardly a day in the year when this scene is not enacted in the courts of our great cities.

Id.

79. *Id.*; *see also* Parmelee, *supra* note 63, at 738.

80. Untermeyer, *supra* note 61, at 158.

81. Even in these cases, however, the practices of assigned counsel were criticized. Maurice Parmelee, an early proponent of the Public Defender, argued that "Public Defense would, in all probability, prevent most of the exploitation of sensational cases caused by both prosecut-

observed that these attorneys worked with "great zeal," while generally earning a fee higher than the statutory compensation.[82] Smith reported that their real reward and incentive was the fee-generating publicity which usually surrounded a murder trial.

> [I]t is recognized that the newspaper publicity which attends a murder trial gives the lawyer the best advertising he can ever have and is just as valuable as a cash payment. The fact that the defendant's life is in his hands naturally spurs the lawyer on. In a word, the case appeals simultaneously to the lawyer's self interest and to the best traditions of his profession.[83]

Ultimately, however, the reported unethical behavior and poor quality of assigned counsel work proved less significant than other concerns. Indeed, it was private assigned attorneys' reported inefficiency, their failure to place a premium on speed and finality, and their willingness to employ adversarial advocacy to defeat the aims of the prosecution, that led to the demise of the private assigned counsel system. The obstruction of the process provided the rationale for strong pressure from reformers to eliminate private attorneys from the representation of indigent defendants. Although a majority of assigned counsels' cases were disposed of early by guilty pleas,[84] reformers contended that these attorneys often delayed a matter until a client's family or friends paid a fee.[85] Cases in which defendants had been freed on bail were delayed many months and sometimes even years after initial docketing.[86] Many defendants were incarcerated pending disposition from six to twelve weeks.[87] At trial, reformers reported that assigned counsel engaged in frivolous objections and various other delaying tactics to dupe the client into believing a fee was justified.[88] Reformers further argued that since private attorneys sought to profit from court assignments, their chief aim was "to get the defendant off at any price" by presenting a manufactured defense after receipt of some minimally adequate fee.[89] Thus, reformers believed that private attorneys were directly responsible for undermining the efficacy of the

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ing attorneys and counsel for the defense who are endeavoring to advertise themselves rather than to secure a speedy administration of justice." Parmelee, *supra* note 63, at 742.

82. R. SMITH, *supra* note 40, at 112.

83. *Id.* By contrast, Smith noted that in cases involving felonies other than murder, defense counsel often went without favorable publicity or adequate compensation.

> The prisoner arrested for burglary, rape or assault may arouse no sympathy, in fact the matter may be revolting. More important, the average lawyer, however honest and desirous of performing his professional obligations, cannot afford to give a thorough defence . . . . The situation forces on the conscientious lawyer the ugly dilemma of either spending largely of his own funds or of giving improper defence. Few lawyers are in a position to take the former course. *Id.* at 112-13.

84. Ferrari, *supra* note 63, at 711; *see also* R. SMITH, *supra* note 40, at 123.

85. *See* M. GOLDMAN, *supra* note 73, at 49.

86. Ferrari, *supra* note 63, at 705.

87. *Id.*

88. *Id.* at 711.

89. Embree, *supra* note 57, at 555.

criminal sanction and breeding "second offenders."[90]

Although the obstructive lawyering tactics and fee-gouging practices that reformers attributed to court-assigned private lawyers had brought "the entire profession of the law into disrepute,"[91] their existence was perpetuated by constitutional and statutory rights to criminal defense counsel[92] and the reluctance of reputable lawyers to volunteer for court assignments. The bar associations were even uncertain whether soliciting fees from indigent clients was unethical, so fee-gouging continued unchecked.[93] Even if the organized bar had reached a consensus on this issue, the bar associations would have found it difficult to discipline the court-assigned lawyers, because few of them belonged to the recognized professional organizations.[94]

B. The Crisis in Legitimacy

The disaffection of elite lawyers from the practice of criminal law had severe consequences. First, their absence contributed to the stratification of private practice. In New York City, for example, where the practice of law was divided along racial, ethnic, and class lines into "constitutional lawyers, corporation lawyers, and collection lawyers,"[95] it was considered a "reproach

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90. *Id.*

> [T]he number of second offenders, who are [sic] increasing with appalling rapidity, is suggestive and relevant to the need of a public defender in New York. In 1906 in New York County, out of 2,543 convictions under indictments, 648, or 21%, were second offenders. In 1915 out of 3,728 convicted, 1,328, or 35%, were second offenders.

Id. *See also* J. MAGUIRE, *supra* note 40, at 267: "From professional criminals the shysters reaped perennial harvests by keeping the crooks always in their debt and therefore on a vicious circle of recurrent crime to pay lawyer's bills [sic]."

91. Goldman, *supra* note 63, at 662.

92. W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 80-87 (1955). *See also infra* text accompanying notes 161-65.

93. The City Bar Association and New York County Lawyers' Association stated that "assignment of counsel is supposed to be for the benefit of the indigent or destitute and to carry no compensation. However, counsel is at liberty legally and, in these times, perhaps ethically, to get what fees the defendant may be able later to pay him." ASS'N OF THE BAR OF THE CITY OF NEW YORK, WELFARE COUNCIL OF NEW YORK CITY, NEW YORK COUNTY LAWYERS' ASSOCIATION, REPORT OF THE JOINT COMMITTEE FOR THE STUDY OF LEGAL AID 52 (1928) [hereinafter 1928 REPORT].

94. The state of urban law practice in the early 20th century was depicted by Roscoe Pound in his essay *Criminal Justice in the American City*, in R. POUND & F. FRANKFURTER, CRIMINAL JUSTICE IN CLEVELAND, A REPORT OF THE CLEVELAND FOUNDATION'S SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN CLEVELAND, OHIO 559, 602 (1922) [hereinafter Pound, *Criminal Justice in the American City*].

> [With] the rise of large urban bars . . . containing numbers [of attorneys] who are wholly unknown to their fellow practitioners, it ceased to be possible to keep up traditional standards . . . [G]radually . . . a differentiation took place and three well defined groups became set off from the main body of the bar, namely, a well-educated, well-trained stratum at the top, and uneducated, untrained, or ill-trained stratum at the bottom, and a small group of none too scrupulous politician-lawyers. The practice of criminal law came to be almost exclusively the domain of the two last.

Id. at 602.

95. J. AUERBACH, *supra* note 42, at 26.

. . . to be regarded as essentially a criminal lawyer."[96] Criminal practice was concentrated among solo practitioners, whose educational and cultural backgrounds were in marked contrast to those of elite lawyers. They engaged in assigned counsel work as a livelihood.[97] Second, elite lawyers sought to insulate themselves from the "contaminating influences" of assigned counsel by stigmatizing these lawyers.[98] This led to "sanctimonious resolutions against the evil-doing of the shyster lawyer."[99] Third, while elite lawyers knew little of the practice of criminal law, they were concerned about crime and desired to protect the private bar's monopoly over the provision of legal services. This led to an alliance of interests between themselves and reformers over the lawyering practices of assigned counsel.[100]

The interests of the professional elite and those of reformers conflicted, however, over the legitimacy of private practice in the administration of justice.[101] Reformers, whom elite lawyers branded as "zealots,"[102] sought to

96. Letter of S. Untermeyer to W. Armstrong (Dec. 24, 1909) *quoted in* J. AUERBACH, *supra* note 42, at 26; *see also* Pfeiffer, *Legal Aid Service in the Criminal Courts*, 145 THE ANNALS 50 (1929). "Since the rise of corporations, city lawyers have consciously avoided practice in the criminal courts." *Id.* In commenting upon the stratification of the legal profession, Barak has observed that for most of the nineteenth century, "competent" defense counsel existed for those with the money to retain an attorney. "With the rise of corporate law and business law . . . there was a gradual decline in the caliber of lawyers practicing criminal law." G. BARAK, IN DEFENSE OF WHOM? 29 (1980).

97. Pfeiffer, *supra* note 96, at 50. *See also* J. AUERBACH *supra* note 42, at 50, *citing* J. E. CARLIN, LAWYER'S ETHICS 6-7 (1966); *supra* note 73 and accompanying text.

98. J. AUERBACH, *supra* note 42, at 50, *citing* J. E. CARLIN, LAWYER'S ETHICS 177. *See* Cockrill, *The Shyster Lawyer*, 21 YALE L.J. 383 (1911-1912). There can be little doubt that some private court-assigned lawyers, in pursuit of financial gain, engaged in questionable lawyering practices. Nonetheless, as Auerbach explains, terms such as "shysters" and "ambulance chasers" were never clearly defined and were applied "by particular lawyers to enhance their own status and prestige," so that "[d]eviance was less an attribute of an act than a judgment by one group of lawyers about the inferiority of another." J. AUERBACH, *supra* note 42, at 50; *see also* G. BARAK, *supra* note 96, at 29, 68-72.

99. Pfeiffer, *supra* note 96, at 50. *See also* Haller, *Plea Bargaining in the Nineteenth Century Context*, 13 LAW & SOC'Y REV. 272, 276 (1979). Haller, explains that the actions of elite lawyers resulted in part from their efforts to insulate themselves from criminal lawyers.

> [T]he criminal bar seems to have attracted a disproportionate number of attorneys who had low social status because of their ethnic backgrounds and attendance at less prestigious law schools. The elite bar, then, looked down upon the criminal bar and criminal courts, only rarely represented clients in routine criminal cases, and knew little about the realities of criminal practice. This is highlighted by the studies of the criminal courts sponsored by that elite in the 1920's. The studies discovered the reality that in the early criminal justice system most arrests resulted in dismissals of the charges, while most cases brought to court were disposed of by pleas of guilty, often to lesser charges. Although this had been standard for at least a generation, the elite bar reacted with surprise and shock (citation omitted).

Id.

100. *See infra* notes 185-92 and accompanying text.

101. For an analysis of the different socio-economic and class backgrounds of reformers and elite lawyers, *see* G. BARAK, *supra* note 96, at 101-06.

102. H. TWEED, *supra* note 40, at 27. *See also* R. SMITH, *supra* note 40, at 115. One such "zealot" was Mayer Goldman of the New York City Bar. *See infra* text accompanying note 136. Tweed believed that Goldman's extreme views on this subject hurt the chances of public

eliminate the profit motive from trial practice in general and criminal courts in particular. The reformers asserted that lawyers who charged fees secured the acquittal of the guilty and exploited the public by using governmental facilities (i.e., the courts), to conduct maneuvers and "battle with the opposing side," in order to win their clients' cases.[103] To rid the courts of this "evil," reformers sought the imposition of a public defender for rich and poor alike.[104] Reformers contended that "[u]niform and severe enforcement of the law . . . will more likely occur from a public official who does not get fees from alleged lawbreakers for defending them, than at the hands of their privately paid counsel."[105]

Elite lawyers resisted any attempts to undermine the private bar's monopolistic control over the provision of legal services.[106] The elite characterized such notions as visionary, the "prelude to complete socialization of the bar, and as subversive of fundamental rights."[107] Elite lawyers recognized nonetheless that the criminal justice system was a principal contact between the poor and the existing social order.[108] Smith argued that criminal courts are "the people's courts, it is here that the great majority of persons have their

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defender legislation in the state legislature. H. TWEED, *supra* note 40, at 27. According to Smith, Goldman insisted "that every defendant in the criminal courts must be . . . represented [by a public defender]." R. SMITH, *supra* note 40, at 115; *but see* M. GOLDMAN, *supra* note 73, at 14; *see also infra* note 1283.

103. Adelman, *supra* note 71, at 496.

104. Ferrari, *An Argument for the Public Defender* 5 J. CRIM. L. & CRIMINOLOGY 925 (1914-1915). *See also* Adelman, *supra* note 71, at 496-97.

Articles supporting the public defender asserted that "the idea of public defense . . . includes the formation of an official trial bar to be paid solely by the State or Municipality, who are to have the exclusive privilege of trying all cases . . . ." Forster, *The Public Defender Symposium*, *supra* note 58, at 383. *See* Gray, *Reorganization of the Bar as a Necessary Means to Justice*, 4 J. CRIM. L. & CRIMINOLOGY 654 (1913-1914); Adelman, *An Offical Trial Bar*, 4 J. CRIM. L. & CRIMINOLOGY 663 (1913-1914); Hyde, *The Reorganization of the Legal Profession*, 8 ILL. L. REV. 239, 243 (1913-1914). Adelman, *supra* note 71, at 496-97.

105. Adelman, *The Public Defender Symposium*, *supra* note 58, at 380.

106. *Id.* at 370-81. There is no doubt, however, that public defense in criminal cases would ultimately pose a threat to the private bar's general monopoly of legal services. This point was explicitly acknowledged by Parmelee and others: "The logical sequel to public defense would, I believe, be free civil justice; that is to say, the employment of attorneys by the public for the pleading and defense of civil cases . . . . There will not be justice for all until both criminal and civil procedure is made free." Parmelee, *supra* note 63, at 746. *See also*, Correspondence Between J. H. Stolper, of the Tennessee and Oklahoma Bar, and Henry A. Forster of the New York Bar *reprinted in The Public Defender Symposium*, *supra* note 58, at 381-84.

107. R. SMITH, *supra* 40, at 115. *See also* Forster, 19 LAW NOTES 100 (1915); DuVivier, *The Use of Public Funds in Legal Aid Work*, 55(1) LEGAL AID REV. 1, 4-5 (1957). Forster, who served as Secretary of the Reform Committee of the City Bar Association, depicted the public defender movement as "an attempt to carry out the plank of a socialist platform for the 'free administration of justice'. . . in both civil and criminal cases." Forster, *supra*, at 100.

108. McDonald, *In Defense of Inequality: The Legal Profession and Criminal Defense*, in W. MCDONALD, THE DEFENSE COUNSEL 13, 33 (1983). According to McDonald,

> American leaders were worried and they identified the legal system . . . as the front line in the battle to save the American capitalist system. Those courts and those lawyers were the ones with whom the urban lower class had contact. Thus, they were the ones who would either legitimate the American social order and the privileged status of the legal profession or bring them both down.

Id.

only contact with the administration of justice, and that in accordance with the treatment they receive — particularly this is true of the immigrant population — will they judge our institutions."[109] Elite lawyers eventually came to accept the replacement of private lawyers in indigent cases, because they feared that assigned counsel gave the poor legitimate grievances that contributed to social unrest and presented an ongoing impediment to the efficient administration of criminal justice.

C. *The Establishment of Institutional Defense*

In 1896, bills to provide for a public defender in all criminal cases were introduced in a dozen states and defeated by the organized bar.[110] In 1914, the first indigents-only public defender office was established in Los Angeles, California.[111] Others soon followed,[112] although in some cities institutional defense was provided by private defender agencies.[113] Thus, criminal defense services for the poor were shifted from solo practitioners to a "definite office or organization . . . to whom all assignments may be made."[114] The shape the organization took, whether public or private, depended upon the influence of the organized bar in each jurisdiction.[115] Rather than eliminate the profit mo-

109. R. SMITH, *supra* note 40, at 116, 124-25.

110. Foltz, *supra* note 64, at 393; R. SMITH, *supra* note 40, at 116.

111. Wood, *supra* note 72, at 69. *See also* M. GOLDMAN, *supra* note 73, at 81-93; R. SMITH, *supra* note 40, at 117.

112. Public defenders were established in the municipal courts in Portland, Oregon and in Columbus, Ohio, and in the Superior Court in Omaha, Nebraska during 1915-16. In addition, in November 1915, the Office of Public Defender of Los Angeles expanded to create a police court defender. R. SMITH, *supra* note 40, at 117.

113. Brownell noted that "[T]he growth of privately supported offices providing counsel in criminal cases has been slow, due to the higher cost of this form of Legal Aid." E. BROWNELL, LEGAL AID IN THE UNITED STATES 134 (1951). He reported the development of two types of organizations: "1) — criminal law divisions of existing Legal Aid Societies and (2) — independent voluntary defender organizations." There were four of the first type located in Cincinnati, New Orleans, New York City, and Pittsburgh, and two of the second type located in Boston and Philadelphia. *Id.*

114. R. SMITH, *supra* note 40, at 116. This shift meant, in effect, that the poor were shunted into a corner and denied the opportunity for representation by reputable private attorneys. Katz's analysis is particularly apt:

> In the Legal Aid philosophy, equal justice was to be the distinctive mission of a specialized organization that would operate as an island of idealism in a profession governed by the ability to pay. But as long as privately compensated lawyers served their clients' substantive goals and did not limit their services to procedural, day-in-court standard, Legal Aid's dedication to equal access to the legal system could only be an exaggerated professionalism. By segregating the poor to separate facilities at which the dispensation of legal service would be governed by a unique commitment to equal justice, Legal Aid's services necessarily would be unequal to those available for a fee.

J. KATZ, *supra* note 51, at 43.

115. The chroniclers who described the shape and control of defender agencies did not account for the alliances defenders' made with powerful political and economic interests. *See e.g.*, Smith, *supra* note 59, at 490-91; CLARKE, Legal Aid by Privately Supported Organization, 124 THE ANNALS 54, 56-57 (1926); E. BROWNELL, *supra* note 113, at 134. A common explanation for the differences in control of institutional defense is related to the sinister influence

tive from the practice of criminal law, the organized bar sought to insure that those who could afford an attorney would be required to retain a private lawyer.[116] Meanwhile, those unable to pay a reasonable attorney's fee would be provided a staff attorney who would be compensated at "a reasonable sum for services and expenses."[117]

The lawyering practices of public and private defender agencies were fashioned from the relationship the agencies sought to establish with the prosecuting authorities. Both reformers and elite lawyers believed that an "independent" staff attorney system was needed to assist the prosecution in achieving impartial and efficient administration of criminal justice.[118] They believed, in theory at least, that the prosecution was the primary guarantor of the rights of the accused.[119] The prosecution was to "act as much for the accused as for the State."[120] Knowledgeable observers nonetheless conceded

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that local municipalities might bring to bear on the defender agencies. Smith, for example, maintained that, in the cities, the "public" element in the public defender generated "new vistas of graft, corruption, and incompetence." This required "an opportunist and experimental policy" that would vary from jurisdiction to jurisdiction:

> If in California the civil service system works well, then to have the public defender a civil service official may meet the difficulty; in Connecticut, where the judiciary is held in the highest respect, the method of having public defenders appointed by the judges is obviously an excellent system; in New York City where politics are troublesome the Voluntary Defenders' Committee, a private organization, is probably the wisest solution.

Smith, *supra* note 59, at 491.

116. *Prospectus, The Voluntary Defenders Committee*, N.Y.L.J. Mar. 19, 1917, at 1, col. 2, 4 [hereinafter *Prospectus*]; *Notes and Abstracts: The Voluntary Defenders Committee*, 8 J. CRIM. L. & CRIMINOLOGY 278, 279, 281-82 (1917-18) [hereinafter *The Voluntary Defenders Committee*].

117. R. SMITH, *supra* note 40, at 116.

118. "Independence" was a rhetorical device utilized by elite lawyers and reformers alike to legitimate the new defender class. *See, e.g.*, EQUAL JUSTICE FOR THE ACCUSED, *supra* note 41, at 50-51. In the context in which the term was originally used, it meant that the defender was *independent* of the defendant. *See* Ferrari, *Analysis of New York and County Bar Reports on the Public Defender*, 6 J. CRIM. L. & CRIMINOLOGY 18, 25 (1915) [hereinafter 1915 Ferrari Analysis].

119. R. SMITH, *supra* note 40, at 108; *see also* N.Y. County Lawyers Ass'n Comm. on Courts of Crim. Proc., *A Report on the Public Defender Question*, 9 BENCH & BAR 309, 311-12 (1914-1915) [hereinafter 1914 Bar Association Report]; Adelman, *supra* note 71, at 494. *But see* M. GOLDMAN, *supra* note 73, at 27-31, who contended that "it is humanly impossible for one official to adequately and fairly represent both sides of a controversy." District attorneys, he argued, were infected with intemperate zeal: "The average prosecutor scents guilt - not innocence. Accusation is often equivalent to proof." *Id.* at 31.

120. R. SMITH, *supra* note 40, at 110. Indeed, early attempts to introduce a public defender in Cleveland were held back by the City Prosecutor's intention in 1902 to espouse a dual function. Defining the duties of the prosecutor as being "to see that all the facts are made out on both sides of each controversy," assistant attorneys were instructed that they "should not be advocates to the state's side alone, but also advocates for the defendant's, having as their sole aim a just result in each case." Baker, *Police Court Prosecutions and a Public Defender*, 2 AM. CITY 266 (1910). A suggestion by the Legal Aid Society of Cleveland in 1910 that a public defender should be appointed by the city's lawyer (the public prosecutor) was rejected on the basis that this would require prosecutors "to abandon the theory upon which they had worked for 8 years, until they ultimately would come to regard themselves as partisans for conviction rather than partisans for just results." *Id.* at 267.

that "save in rare instances the modern prosecutor . . . [did] not stand between the people and the accused."[121] Some reformers attributed prosecutors' lack of impartiality to the lawyering practices of assigned counsel. They claimed that assigned counsels' practices included misstatement, misinterpretation of law, and accusations that prosecutors were either framing the defendant or were not justified in bringing a case to trial.[122] Smith contended that "professional" assigned counsel who, for money, "undertakes a defense that knows no bounds of honesty or propriety . . . forced prosecuting attorneys out of their impartial position into an attitude of hostility and distrust."[123] Others, including Roscoe Pound, maintained that prosecutors failed to secure the efficient administration of criminal justice because of "bad organization . . . bad conditions [political influence, lack of morale and motivation] in the prosecutor's offices and a tendency to perfunctory routine there and in the courts."[124] Inefficiency resulted in exaggerated numbers of nolles prosequi (prosecutorial dismissals) and acquittals.[125]

Pound believed that efficiency in the administration of criminal justice could be achieved through the establishment of a professional prosecutorial service, which itself would render a defense lawyer superfluous.[126] Most reformers argued that either a public or private defender agency, in cooperation with a professional prosecutorial service and a unified court system, was needed to restore confidence in the administration of criminal justice.[127] The combined effect of these new institutions would be to rid the criminal courts of "professional criminal lawyers."[128] The new defender class would be quasi-judicial officers like the public prosecutors, and they would owe a duty to the state as well as to their clients.[129] Thus the defender would be an aid to criminal justice, "the left hand of the court just as the [s]tate's [a]ttorney is the court's right hand . . . ."[130]

The notion that prosecution and defense were engaged in a common enterprise was given full expression by the experience of the Los Angeles Public Defender. The first Public Defender, Walton Wood, in answering those who objected to the defender on the basis that the office would be "a counterpart of

121. Untermeyer, *supra* note 61, at 160.

122. Ferrari, *supra* note 63, at 707.

123. R. SMITH, *supra* note 40, at 114.

124. Pound, *Criminal Justice and the American City*, *supra* note 94, at 634.

125. *Id.* at 631-32.

126. Pound, *Criminal Justice and the American City*, *supra* note 94, at 638. Some proponents of the public defender thought that the adversary system was necessary only so long as there were no better methods of case resolution. "If a better method of presenting evidence and of arriving at a decision . . . [were] discovered, it may be possible to abolish the partisan trial and with it prosecution and defense from criminal procedure." Parmelee, *supra* note 63, at 746.

127. *See, e.g.*, Smith, *The Criminal Courts*, in R. POUND & F. FRANKFURTER, *supra* note 94, at 233-34, 238, 247 [hereinafter Smith, *The Criminal Courts*]; Ferrari, *supra* note 63, at 707.

128. Smith, *The Criminal Courts*, *supra* note 127, at 233-34, 238, 247.

129. Ferrari, *supra* note 63, at 707.

130. Rubin, *The Public Defender: An Aid to Criminal Justice*, 18 J. CRIM. L. & CRIMINOLOGY, 346, 354 (1927-1928).

the district attorney and would naturally endeavor to undo the work of the prosecuting officer," stated frankly that, as Public Defender, he did not "undermine the work of the prosecutor nor . . . secure acquittals regardless of the merits of the case."[131]

> We have not felt that it was our duty to oppose the District Attorney, but rather to cooperate with him in setting all the facts before the court . . . . Our office has tried to keep uppermost the idea that justice should be done and even in criminal cases attorneys should not try to get the defendants "off" regardless of the merits. We have not asked for unnecessary delays and have not resorted to technicalities. No motion has been presented which was not necessary to protect the substantial rights of the accused. In cases where there is no question of the guilt of the accused, it is the established rule of the office that no trial should be held but that pleas of guilty be entered, thereby saving the county the expense and delay of trial.[132]

Institutional defenders sought to eliminate what Pound and others viewed as the failing of adversarial advocacy by redefining the role of the defense lawyer as an aid to the prosecutor.[133] Adversarial proceedings, Pound contended, had degenerated into the "sporting theory of justice," or in Wigmore's words, "the instinct of giving the game fair play."[134] Pound argued that such a contentious procedure, enabled "those who habitually represent accused persons to study the weak spots in the system and learn how to take advantage of that."[135] Mayer Goldman, the most aggressive champion of the public defender, and others who supported the idea,[136] maintained that the new defender would "harmonize" the defense function with that of the prosecution in order to "bring about a fair administration of the law."[137] They believed that "the whole idea of combat in the trial of a case . . . [was] fundamentally unsound."[138] Prosecution and defense would join in a common endeavor to insure that "no innocent man may suffer or a guilty man escape."[139]

Advocates of institutional defense believed that by depriving a defense lawyer of a personal financial interest in prolonging a case, the occurrence of

131. Letter of W. Wood to J. McManus, Secretary of the Committee on Criminal Procedure of the New York County's Lawyer Association, *reproduced in* 5 J. CRIM. L. & CRIMINOLOGY 441 (1914-1915) [hereinafter Letter of W. Wood].

132. *The Annual Report of the Los Angeles County Public Defender*, 9 J. CRIM. L. & CRIMINOLOGY 441, 289-90 (1918).

133. Pound, *Criminal Justice in the American City*, *supra* note 94, at 593.

134. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ABA REP. 395, 404 (1906) (citing 1 WIGMORE EVIDENCE 127 (1904)).

135. Pound, *Criminal Justice in the American City*, *supra* note 94, at 631, 636.

136. *See* Wood, *supra* note 72, at 69.

137. Goldman, *The Need for a Public Defender*, 8 J. CRIM. L. & CRIMINOLOGY 273, 274 (1917-1918). *See also*, Wood, *supra* note 72, at 71-72; Rubin, *Criminal Justice and the Poor*, 22 J. CRIM. L. & CRIMINOLOGY 705, 715 (1931-1932).

138. Goldman, *supra* note 137, at 274.

139. *Id.*

adversarial advocacy would decline, as would the number of manufactured defenses and unnecessary trials.[140] The role of the defender was fashioned so that he would not "act so rabidly for the prisoner, as a private attorney usually . . . acts."[141] Lacking financial or institutional incentives to provide either over- or under-zealous representation, the new defender would seek dismissals and acquittals only for those defendants whom the lawyer believed to be innocent.[142] Most defendants would be encouraged to plead guilty, and thereby benefit by being "saved from over punishment."[143] Thus, judicial resources were more likely to be expended only in those cases where a real doubt as to the defendant's guilt existed. One commentator predicted that the increased fairness of such a system would "breed a higher respect for law."[144]

The transformation of indigent defendants' attorneys from adversaries to adjunct prosecutors effected a change in the way institutional lawyers viewed the attorney-client relationship. First, the lawyer, based upon her own investigation, would determine the "meritorious" nature of the defendant's case.[145] Upon completion of the investigation, the public defender then "advis[ed] the defendant as to his rights under the law, and further advis[ed] him as to what his plea should be — guilty or not guilty — whether it [was] better to have a jury trial or waiver thereof and [apply] for probation . . . ."[146] In those instances in which the defendant was persistent and refused to accept the lawyer's advice, the lawyer might seek to be relieved.[147]

The method of investigation employed by institutional defenders was heavily dependent on inquisitorial methods.[148] Techniques evolved to obtain

140. *See, e.g.*, M. GOLDMAN, *supra* note 73, at 51-53. Goldman was concerned with a reported increase in perjurious defenses. "The assumption that indigent defendants are given to the practice of manufacturing defenses is warranted by the experience of judges and lawyers. It may be said that such practice is not necessarily confined to 'indigent' defendants." *Id.* at 45.

141. 1915 Ferrari Analysis, *supra* note 118, at 18. Ferrari and other advocates of the public defender idea wished to avoid the acquittal of guilty defendants as in the case of those "defendants as represented by private lawyers" who "were certainly guilty." Ferrari contended: "any practicing lawyer knows how many scoundrels go scott free and our opponents are constantly telling us how many safeguards that choke the law there are, and how hard it is, under our benign system to convict." Ferrari contended, however, that those who supported the public defender were not soft on crime: "[w]e want these rogues to be put where they belong." *Id.* at 21.

142. *See* Letter of W. Wood, *supra* note 131, at 441; *see also* Goldman, *supra* note 137, at 274; Rubin, *supra* note 137, at 715.

143. M. GOLDMAN, *supra* note 73 at 45-46.

144. Ferrari, *supra* note 63, at 711.

145. *See* M. GOLDMAN, *supra* note 73, at 40-47; *see also* Embree, *supra* note 57, at 555-56; Fabricant, *The Voluntary Defender in Criminal Cases*, 124 THE ANNALS 74, 75, 79 (1925).

146. G. BARAK, *supra* note 96, at 77.

147. *The Voluntary Defenders Committee*, *supra* note 116, at 282; Waldo, *The Technique Involved in Making a Legal-Social Investigation*, 145 THE ANNALS 105, 107 (1929); Embree, *The Voluntary Defender*, 28(4) LEGAL AID REV. 1, 5 (1928).

148. Get a public defender, and (1) you can then abolish the Grand Jury . . . . (2) You can have the barbarous third degree abolished. The sweat-box sprang from the helplessness of the law in the face of its own involved and involving technicalities and safeguards for the individual. . . . The third degree you cannot abolish now. The public defender will make it unnecessary. For, with the equalization of the forces of the State

information to "lead [the defendant] to tell the the truth where he might have been concealing it."[149] Whatever was revealed would be laid before the court to aid in the disposition of the defendant's case, "emphasizing that which may be of advantage to the defendant without attempting to hide that which may be to his detriment."[150] Evidence that "indubitably established the verity of the defendant's claim" of innocence — at least to the defender's satisfaction — would be reported to the judge and laid before the prosecutor with the expectation that the matter would be dismissed.[151]

The operative assumption of the institutional defenders was that indigent defendants were probably guilty and therefore not entitled to "technical" procedural defenses or a trial.[152] The defender under this model would try only cases "where he ha[d] faith in the defendant."[153] To insure that only innocent defendants would be acquitted, defenders sought to have their clients take the witness stand at trial and testify on their own behalf.[154] Cases that were litigated would be resolved through determination on the merits rather than on technicalities.[155] Once convicted, defense counsel would not bring frequent and unmeritorious appeals, even if this meant that the right to appeal was taken away from the prisoner.[156]

Those who supported institutional defense, however, were most persuasive when describing the defenders' cost-effectiveness and efficiency:[157] the ca-

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> and the individual, during the progress of a man from his arrest to his conviction, or acquittal, the right to stand mute will be no longer necessary for the individual's protection. He may give it up. Society, at least, will demand that it be given up.

Ferrari, *supra* note 118, at 27.

149. Waldo, *supra* note 147, at 105.

150. Fabricant, *supra* note 145, at 74; *See also* Pfeiffer, *supra* note 96, at 53.

151. Fabricant, *supra* note 145, at 76.

152. Ferrari quotes one commentator as saying "[t]hat most people who are accused are guilty, and the guilty should be convicted" to which Ferrari adds "Amen! They should be." Ferrari, *The Public Defender Symposium*, *supra* note 58, at 370, 372. *See also*, Fabricant, *supra* note 145, at 74.

153. R. SMITH, *supra* note 40, at 119.

154. Embree, *supra* note 57, at 557.

155. Goldman, *Public Defenders in Criminal Cases*, 205 THE ANNALS 16, 17 (1939). According to Goldman:

> under the public defender system, the guilty get only what they are entitled to — a fair trial — and no more. Justice is the ultimate goal. All the technicalities, stratagems, delays, framed defenses, and crooked alibis of the average criminal trial are eliminated through having counsel with no axe to grind, but only the desire to see that justice is done.

Id. at 20.

156. Ferrari, *supra* note 63, at 709. Those who supported the public defender idea believed that "[t]he right of appeal is now being greatly abused in this country. A large percentage of criminal as well as civil cases are appealed and many of them are reversed upon purely technical grounds which do not affect the merits of the case." Parmelee, *supra* note 61, at 362. *See also*, Remarks of C. S. Tripler, Chairman of the Commonwealth Club of California before which the public defender question was under advisement: "Unmeritorious appeals would not be taken when Public Defenders represent most, or all persons . . . ." Ferrari, *The Public Defender Symposium*, *supra* note 58, at 370.

157. Ferrari, *supra* note 63, at 714; R. SMITH & J. BRADWAY, *supra* note 51, at 93 (1936); *see also* G. BARAK, *supra* note 96, at 65-66. Ferrari explained that the defender would "de-

pacity "to throw off at an early stage those cases in which it appears that the person apprehended is not an offender and then secure as expeditiously as possible the conviction of the rest."[158] Smith stated the point explicitly when referring to the Los Angeles Public Defender: "[t]he case for the defender rests *primarily* on the fact that such an office performs an essential function in the administration of justice more efficiently, more economically, and with better-all-around results than any other plan."[159] Reformers reported that in comparison with private attorneys, the Los Angeles office secured more guilty pleas, tried fewer cases, filed fewer demurrers and motions, took fewer cases on appeal, and completed trials more quickly.[160] The cost to local government was estimated to be almost half that of a system that relied on assigned

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crease the expense to the county, since the saving of time by pleas of guilty, in proper cases, and by shorter trials will be a savings of money. The amount saved would . . . be sufficient to overbalance the expense of the public defender's office." Ferrari, *supra* note 63, at 714-15.

158. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 160 (1968). For a discussion of the role of adversarial advocacy in a "due process" model of criminal justice, *see id.* at 163-73; *See also* Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 29 WIS. L. REV. 29, 60-61 (1978). *See also infra* notes 334-45 and accompanying text.

159. R. SMITH, *supra* note 40, at 119 (emphasis supplied). The Los Angeles experience had a profound effect upon the thinking of reformers. Although the Cleveland study conducted by Pound failed to produce any "sharp discrepancy unfavorable to the work of the assigned counsel" the efficiency and service of the Los Angeles Public Defender was seen as decisive in the argument over whether assigned counsel should be replaced in Cleveland. Smith, *supra* note 59, at 495, 498. Smith recommended that "for the time being at least, this work be entrusted to quasi-public, rather than public hands" because of the "generally upset conditions in Cleveland." Smith, *The Criminal Courts*, *supra* note 127, at 368-69.

Savings in money and time were also said to be the hallmarks of the public defender system of Columbus, Ohio. *See* Aumann, *The Public Defender in the Municipal Court of Columbus*, 21 J. CRIM. L. & CRIMINOLOGY 393, 398, 399 (1930-1931).

160. Goldman, *supra* note 63, at 665. "The office has been approved on the score of 'efficiency and economy.'" *Id.*

Smith supported the claim of efficiency with statistics from the Los Angeles Public Defender's Office in *Table A* below. *Table A* compares the method of disposition of the Public Defender with that of paid attorneys for the first year of operation, 1914.

TABLE A: *Comparison of Methods of Disposition in Los Angeles County, 1914*

	Paid Attorneys in 1914		Defender in 1914	
	n	%	n	%
Cases going to trial	147	28.6	58	22.3
Demurrers filed	40	7.8	2	0.8
Motions to quash filed	21	4.1	0	0.0
Motions for new trials	27	5.3	6	2.3
Appeals taken	27	5.3	3	1.2
Avg. time days per trial	—	1.6	—	1.0

R. SMITH, *supra* note 40, at 122 (percentages calculated by the authors).

Walton Wood, the Los Angeles Public Defender further strengthened the reformers' claim of efficiency with TABLE B, which he included in his article, *Necessity for Public Defender Established by Statistics*, 7 J. CRIM. L. & CRIMINOLOGY 230 (1916-1917).

counsel.[161]

Collectively this meant that institutional defenders would not engage in

TABLE B: *Comparison of Results of Cases Defended by Private and Public Defenders in Los Angeles County*

	Assigned Attorneys in 1913 Serving Without Pay	Attorneys in Private Practice, Paid by Defendants in 1914	Public Defender in 1914
Number of cases	115	514	260
Pleas of guilty	71	250	183
Percentage of cases in which pleas of guilty were entered	61.7%	48.6%	70%
Number of cases in which probation was granted	31	154	87
Percentage of cases in which probation was granted	27.8%	30%	33.4%
Number of trials	30	147	58
Percentage of cases that went to trial	26%	28.6%	22.3%
Verdicts of not guilty or disagreements	6	54	20
Percentage of trials in which verdict of not guilty rendered or jury disagreed	20%	36.7%	34.4%

TABLE C below, compiled by Reynolds, further demonstrates the efficiency and efficacy of the Los Angeles Public Defender.

TABLE C: *Criminal Dispositions by Attorney Type in Los Angeles County*

	Public Defender	Other Attorneys
Number of cases	303	472
Pleas guilty	202	186
Pleas not guilty	87	280
Trials	51	121
Verdicts guilty	29	67
Verdicts not guilty	19	30
Jury Disagreed	3	23

Reynolds, *The Public Defender* 12 J. CRIM. L. & CRIMINOLOGY 476, 478 (1921-1922).

161. R. SMITH, *supra* note 40, at 120. Similar comparisons were made in other jurisdictions that had adopted the public defender system. *See, e.g.*, Aumann, *supra* note 159, at 398-99 (Columbus, Ohio Defender). The Columbus Public Defender, whose cases included both civil and criminal matters, estimated "the average cost per case to be approximately $1.78." *Id.* at 397.

It should be noted that it is not possible to assess the accuracy of the claims for the Public Defender with respect to "efficiency," because the client population served may have been materially different from that served by assigned counsel. For example, our empirical research in New York City in 1984 showed the effects of the Legal Aid Society case selection practices on the proportion of cases tried by assigned counsel and the relative number of acquittals. *See infra* pp. 818-31; TABLE 9-6, at 833; TABLE 9-7, at 833; *infra* note 1096. Addressing early statistics from Los Angeles showing a higher plea rate under the Public Defender, one critic of the Public Defender remarked:

lawyering practices that impeded the rapid processing and inevitable conviction of indigent defendants. By curtailing adversarial advocacy, institutional defense rescued the prosecution from the attacks of professsional assigned counsel who, through the profit motive, rendered the prosecution inefficient and thereby challenged its legitimacy. The eventual replacement of assigned counsel and the partnership that emerged between the state, elite lawyers, and institutional defense providers is exemplified by the establishment of New York City's indigent defense system, to which we now turn.

II.
THE PROVISION OF FREE DEFENSE SERVICES IN NEW YORK CITY

The New York State Constitution has recognized a right to counsel in criminal cases since 1777.[162] New York courts long ago acknowledged a special responsibility to assign counsel to a defendant charged with a felony who is financially unable to retain an attorney. An 1881 amendment to the Criminal Procedure Law provided that a defendant who appeared without counsel in response to an indictment in the Court of General Sessions was to be asked whether she wanted an attorney.[163] If she did, the court would appoint counsel on a pro bono basis.[164] An 1893 amendment provided compensation for representation in capital (homicide) cases.[165] All other indigent defendants in the Court of Special Sessions and other lower criminal courts were to be advised of the right to retain counsel, but were not to be offered free legal assistance.[166]

New York's scheme for the assignment of counsel thus essentially relied upon the willingness of private attorneys to represent the poor *without compensation*.[167] Pro bono representation was said to be "an incident to the profession."[168] Judges consistently characterized the representation of the poor

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> The statistics relative to public defenders are interesting but not conclusive. Every accused person does not of necessity accept the assignment to him of counsel, nor is counsel generally assigned in misdemeanor cases. On the other hand, I take it that the public defender appears for every person accused of crime. If such is the case, the figures given throw no light whatever upon the question.

Dennett, Letter to the Editor, 20 LAW NOTES 140 (1916).

162. The state constitution provided that "in every trial on impeachment, or indictment for crimes or misdemeanor, the party impeached or indicted shall be allowed counsel, as in civil actions." N.Y. CONST. of 1777, art. XXXIV. The current form states that "[i]n any trial in any court . . . the party accused shall be allowed to appear and defend in person and with counsel . . . ." N.Y. CONST. art. I, § 6 (McKinney 1982).

163. Act of June 1, 1881, ch. 442, 1881 N.Y. Laws 601, § 8.

164. N.Y. CRIM. PROC. LAW § 308 (repealed 1965).

165. *Id.*

166. Act of May 2, 1893, ch. 521, 1893 N.Y. Laws 1118.

167. In 1933, responding to a challenge regarding the absence of compensation, the Court of Appeals interpreted article I, section 6 of the 1894 New York Constitution as granting state courts the authority to assign counsel in all indigent cases, even though compensation was still limited to capital cases. People v. Price, 262 N.Y. 410, 412, 187 N.E. 298, 299 (1933).

168. Foltz, *supra* note 64, at 400.

as an obligation lawyers assumed upon admission to the practice of law.[169] The organized bar stressed the professional obligation to volunteer, and contended that sufficient numbers of attorneys would respond.[170]

But elite lawyers did not come forward. Few of the City's leading practitioners were involved in criminal defense and the organized bar displayed little interest in enlisting the support of the profession.[171] Court appointments fell to the underclass of the bar: a core group of private attorneys whom reformers contended "could be sent to jail themselves without any substantial injustice."[172] Commentators observed that these lawyers were turning the practice of handling assigned cases into a business. They stationed themselves "in a conspicuous place . . . in the Court of General Sessions" to maximize the opportunity for court appointments.[173] Court-assigned lawyers had "no facilities to do the work . . . no assistants or investigators; sometimes not even an office."[174]

A. New York State's Response to the Movement for Institutional Defense

Despite its early acceptance in Los Angeles and elsewhere, the public defender idea was rejected in New York. In 1912, a bill to establish a public defender was introduced in the state legislature and defeated.[175] In 1914, Judge Edward Swann of the Court of General Sessions published a highly influential editorial in the Sunday edition of the *New York World* opposing the public defender.[176] Contradicting the claims of the defender's supporters, Swann, who later became the District Attorney of New York County in 1915, contended that the adversarial nature of the criminal justice system would necessarily lead a public defender to seek acquittals, and that this consequence would undermine public confidence in the courts.[177] In Swann's view, the fact

169. *See, e.g.*, People ex rel. Acritelli v. Grout, 87 A.D. 193, 196, 84 N.Y.S. 97, 99 (N.Y. App. Div. 1903), *aff'd* 177 N.Y. 587, 70 N.E. 1105 (1904).

170. *See* Curtis, *The Legal Aid Society, New York City — A Review*, 9 THE RECORD 224 (1954). *See also* Kaumheimer, *Assigned Counsel in Criminal Cases*, 124 THE ANNALS 81, 83 (1925).

171. After reviewing the early history of the New York bar's resistance to organized legal aid, one commentator concluded that while "the bar took the attitude that the generosity and public spirit of the individual practitioner were sufficient to take care of the poor . . . [i]t is all too plain that this attitude was due either to ignorance or to self-interest." Curtis, *supra* note 170, at 224.

172. *See* Statement of Rev. John A. Wade, who served at different times as chaplain of the Tombs and the New York City Police Department, in J. MAGUIRE, *supra* note 40, at 266.

173. *Prospectus*, *supra* note 116, at 279.

174. *Id.*

175. J. MAGUIRE, *supra* note 40, at 269.

176. Swann, *Does New York Need a Public Defender?*, N.Y. World, Oct. 25, 1914, at E1, col. 1.

177. Swann's repudiation of adversarial advocacy was, to this extent, in accord with the instrumentalist views of Mayer Goldman and Roscoe Pound. *See* Pound, *supra* note 134, at 404; Pound, *Criminal Justice in the American City*, *supra* note 94, at 636. *See also supra* text accompanying notes 133-35. *See*, Goldman, *supra* note 137, at 274. *See also supra* text accompanying notes 137-39.

that guilty defendants occasionally won acquittals was an inherent weakness of the adversarial model. "If we had a public defender, he would necessarily be a lawyer of skill and he would not be performing his duty to his client unless he seized upon every technical advantage and invoked every rule of the game that would prevent the facts from getting into evidence."[178] Swann urged that a private, non-profit organization be given the task of defending poor people charged with crime.[179] The adversarial nature of proceedings would be diminished because "the absence of an attorney-client relationship would encourage the attorney not to invoke rules of evidence and procedure" unless he were personally convinced of the intrinsic merits of the case.[180] A crucial element of Swann's attack on the idea of a public defender was his view that judges, prosecutors, and the rules of criminal procedure provided adequate protection for the factually innocent.[181] According to this view, every defendant's case received the benefit of scrutiny by a city magistrate, the grand jury, and the district attorney. The restraints built into the system rendered the presence of a public defender unnecessary.[182]

Despite the fact that Mayer Goldman served as chairman of the New York County Lawyers' Association Committee charged with reviewing the public defender question, and championed the idea,[183] the organized bar adopted Swann's view of the public defender.[184] In a joint report of 1914, both the New York Lawyers' Association and the City Bar Association came out against establishing a public defender's office.[185] The bar denied the existence of any substantial defects in the assigned counsel system.[186] The associa-

178. Swann, *supra* note 176, at E1, col.1.

179. *Id.*

180. *Id.* at col. 2.

181. Swann's reliance on courts and prosecution to adequately protect the rights of innocent individuals reduces the role of defense counsel to a superfluous functionary. A similar notion of the unimportance of the role of counsel for the defense is found in the writings of Roscoe Pound. *See* Pound, *Criminal Justice in the American City*, *supra* note 94, at 634. *See also supra* text accompanying note 126.

182. Swann, *supra* note 176, at E1, col. 2. Another critic of the public defender, Judge Charles C. Nott, Jr., emphasized the waste that would result from the establishment of an Office of Public Defender: "If, under the present system, the District Attorney and Grand Jury are acting in a quasi-judicial attitude in protecting the rights of the innocent, the need of another great political office to perform the same task is not apparent." Nott, *Do We Need a Public Defender?*, N.Y. Evening Sun, Mar. 26, 1917, at 10, col. 5.

183. Goldman, *supra* note 63, at 665.

184. *See The Knell of the Public Defender*, 9 BENCH & BAR 287 (1914-1915). *See also* Forster, *The Public Defender Symposium*, *supra* note 104, at 378; Correspondence of Henry A. Forster, Secretary of the Reform Committee of the City Bar Association, dated Oct. 9, 1916, in *The Public Defender: Duty to Furnish Technical Defense*, 7 J. CRIM. L. & CRIMINOLOGY, 592, 594 (1916-1917).

185. The Association of the Bar of the City of New York and the New York County Lawyer's Association formed two committees to review the proposal to establish a public defender office in New York City. *See* 1915 Ferrari Analysis, *supra* note 118, at 18. The committees joined together and produced "almost identical reports," the substance of which appears in BENCH & BAR, November 1914. *See* 1914 Bar Association Report, *supra* note 119, at 311.

186. The bar associations identified "9 different operations" within the criminal process that protected innocent individuals from groundless prosecutions and eliminated the need for a

tions asserted that the responsibility of the District Attorney to prosecute only guilty defendants, and the several agencies employed in the ordinary felony prosecution assured that it was "practically impossible for an indigent defendant to be sent to prison for a crime he did not commit."[187] Thus, no advantage was to be gained by the employment of a public defender at a large expense to do what the District Attorney is obligated to do under the law.[188]

The bar associations conceded "the failure on the part of [private] counsel to perform the duty assigned him by the court."[189] However, the bar argued that this shortcoming was only a temporary inconvenience to the defendant and not a failure of justice, because "the Court has been quick to provide other [substitute] counsel for the defendant" so his interests might properly be protected.[190] The report contended that the problem could easily be overcome "without the employment of a remedy so drastic and revolutionary as the office of a public defender."[191] Should the continued substitution of uncompensated private counsel prove to be inadequate, the associations suggested three alternatives, each of which would have retained control of indigent defense services in the hands of the private bar:

> 1. The organization of a bureau under the auspices of the New York County Lawyers' Association and the [City] Bar Association with a corps of attorneys attached thereto who would volunteer their services as counsel for these unfortunates.
> 2. The organization of a bureau upon the lines of the Legal Aid Society to be supported by private subscriptions with a staff of paid attorneys to act under assignment by the Court.
> 3. The amendment of Section 308 of the Code of Criminal Procedure which regulates the assignment of counsel in criminal cases to the end that the Trial Court might, in its discretion, award compensation to assigned counsel in felony cases, other than murder in the first degree, in an amount not to exceed Twenty-Five ($25) Dollars in each case.[192]

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public defender. These included: factual reviews by the assistant district attorney, by the arraigning magistrate, by the Grand Jury, and ultimately by the trial court and petit jury. 1914 Bar Association Report, *supra* note 119, at 311.

187. *Id.*

188. *Id.* at 315. The bar associations contended that a public defender, far from being cost-efficient, would require an outlay of almost $500,000 each year. Moreover, this expenditure would be made for the benefit of those convicted after trial, "none of whom [sic] are legally or morally entitled to it." *Id.* at 316.

189. *Id.* at 319.

190. *Id.* at 312.

191. *Id.*

192. *Id.* at 319.

B. Institutional Representation in New York City

1. The Legal Aid Society

In 1876, the Deutscher Rechts-Schutz Verein ("Verein") was founded by a group of merchants and lawyers to provide charitable aid in civil cases to poor German immigrants residing in New York County.[193] At the outset, the Verein was subject to the "distrust and jealousy" of the City's private bar.[194] Because the Verein charged, at most, the nominal fee of one dollar for litigation representation,[195] it was perceived as a source of dangerous competition.[196] The idea of almost-free representation was virtually unknown to the New York City bar, except as the occasional obligation of private lawyers.[197] The organized bar feared that the institutionalization of one sector of the profession would lead to the socialization of all legal services.[198] Despite the bar's objections, the Verein's activities expanded. Those restrictions relating to clients of "German birth" were dropped in 1890.[199] In 1896, the Verein staff became full-time and it changed its name to the Legal Aid Society.[200]

In its early days, the Legal Aid Society added some criminal disputes to its roster of civil cases. This diversification in the criminal field was, however, abandoned shortly after it was instituted, partly due to a lack of funds.[201] In addition, the Society thought that representation of accused criminals was practically obviated by a plan of the New York County District Attorney that placed assistant prosecutors in the City's police courts.[202] Through experience, the Society decided that it could do most good by becoming an essential, though informal, part of the civil court system.[203] John Arthur Maguire, whose book *The Lance of Justice* extolled the virtues of the Society in its early years, voiced the Society's objectives:

In order fully to discharge its chosen duty, it had to become and be

193. *See* 1922 Voluntary Defenders' Committee Annual Report, at 16-17. The early years of the Society's representation of indigents in civil cases are described by J. MAGUIRE, *supra* note 40, at 18-75, and H. TWEED, *supra* note 40, at 5-24, and to a lesser extent by R. SMITH, *supra* note 40, at 135-36.

194. R. SMITH, *supra* note 40, at 135.

195. J. MAGUIRE, *supra* note 40, at 63-64. The purpose of the $1.00 fee was "to weed out futile claims and those stained with bad faith" to avoid unnecessary litigation. *Id.* at 63. Nominal fees were eliminated for all purposes in 1969, although the Criminal and Family branches of the Society never charged fees of any kind. Patterson, *An Interview with the President of the Legal Aid Society*, 65 LEGAL AID REV. 5, 7 (1968-1969).

196. J. MAGUIRE, *supra* note 40, at 71.

197. Curtis, *supra* note 170, at 224.

198. Hollis, *The Legal Aid Society*, 3 CHARITIES REV. 15, 17 (1898).

199. J. MAGUIRE, *supra* note 40, at 58.

200. H. TWEED, *supra* note 40, at 7; J. MAGUIRE, *supra* note 40, at 59.

201. H. TWEED, *supra* note 40, at 25; J. MAGUIRE, *supra* note 40, at 265.

202. *Legal Aid for Accused Persons*, 7(2) LEGAL AID REV. 9, 9-10 (1909); and 8(3) LEGAL AID REV. 2 (1910). *See also* J. MAGUIRE, *supra* note 40, at 266-69. For a similar response by the public prosecutor to a suggestion that lawyers be appointed for indigent defendants in Cleveland, see Baker, *supra* note 120, at 266-67.

203. J. MAGUIRE, *supra* note 40, at 22-23.

> recognized as an unofficial cog of the machine of justice — a voluntary partner to the sheriffs, the judges, and the other public servants required for the proper operation of our legal system. This recognition could not be hoped for without the complete confidence and approval of at least the leading public officials working for the same end.[204]

The Legal Aid Society sought to provide representation without litigation. It used the threat of court action to secure settlements and at the same time tried to discourage claimants from resorting to the courts.[205] The Society believed that a legal aid society best served justice through conciliation, not litigation.[206] Indeed, the Society established a front desk department, the function of which was in part to dissuade would-be litigants from legal proceedings.[207] Front desk attorneys persuaded clients that damages to which they were theoretically entitled were too small to merit litigation.[208] Alternatively, Society attorneys defined clients' expectations of collecting damages as too quixotic to justify a court proceeding.[209]

One of the Legal Aid Society's principal rules was that legal assistance was given only to those who appeared "worthy."[210] The Society's rule of worthiness sought not only to protect the underprivileged from those more fortunate, but also the privileged from the poor.[211] To be accepted as a client by the Society, an applicant had to have a "righteous cause:"[212] a claim "sound not merely in the technical sense but also in the moral sense."[213] The worthi-

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204. *Id.*

205. *See* Hughes, *supra* note 50, at 227.

206. Parties are brought together, the facts analyzed, and wherever possible the controversy is adjusted by attorneys who, while solicitous for the particular interests of their clients and able to safeguard them, still hold paramount the demands of justice to both sides. Thus, the purpose is not to stir up strife, but to allay it, and the poorest is served in a manner compatible with the noblest aim of our profession.

Id. at 233.

207. J. MAGUIRE, *supra* note 40, at 63.

208. *Id.*

209. *Id.*

210. McGee, *The New York Legal Aid Society* (1876-1925), 124 THE ANNALS 27, 27-28 (1926). *See also* J. MAGUIRE *supra* note 40, at 22.

211. J. MAGUIRE, *supra* note 40, at 63.

212. *Id. See also* Dowling, *Introduction and Historical Sketch*, 11(2) LEGAL AID REV. 1, 3 (1913).

213. J. MAGUIRE, *supra* note 40, at 83-84. *See also* statement of Philip J. McCook, Director of the Society: "We do not accept a case where we believe that the applicant to have a legal right if we decide he is morally wrong." McCook, *Our New President*, 15(1) LEGAL AID REV. 1, 5 (1917).

Beginning in October 1915, the Society began reporting details of "clients refused" in three categories: "Can afford Private Attorney;" "Left without notice;" and "Unworthy Clients." *See* 13(4) LEGAL AID REV. 16 (1915). In 1916, the first full year for which these statistics were reported, the Society declined representation for 989 applicants considered "unworthy." *See* 14(2) LEGAL AID REV. 16 (1916); 14(3) LEGAL AID REV. 16 (1916); 14(4) LEGAL AID REV. 16 (1916); 15(1) LEGAL AID REV. 16 (1917).

The principle of worthiness was adopted by other legal aid societies for whom the New York City Society became a role model. Thus, for example, the Boston Legal Aid Society,

ness rule, for example, resulted in the Society's refusing to represent some servants in meritorious claims against their employers for back wages. When a servant left her employ on short notice, and thereby disrupted the social life of her employer, she was considered "unworthy" of the Society's representation.[214]

The Legal Aid Society utilized the interview process to weed out unworthy applicants. When the applicant's responses were "such to immediately place the attorney on his guard . . . the prospective client [was] put through an examination which . . . closely resemble[d] the cross-examination at a trial."[215] A decision was made whether to accept the applicant as a client based upon the applicant's reactions to the interrogation process.

An important measure of "worthiness" was whether a prospective client had been a productive member of society. Arthur Von Briesen, the Legal Aid Society's first President, wrote that before a person was accepted as a client, that person "must show that he *has* rendered some service, that he has done some work and that he is entitled to a corresponding consideration, which, being denied . . . [the Society will] enforce on his behalf."[216] The Society did not represent those persons "who are always poor but only people who are made poor for the time being by the wrongful acts of others."[217]

The Legal Aid Society was committed to the Americanization of the immigrant class. Von Briesen spoke of the collateral benefit of the Society's work: it "arouses a sentiment of respect for the laws, and also . . . a sentiment of patriotism."[218] According to Von Briesen, persons who have been wronged become bitter against society, and thus pose a danger "to the security of law and order."[219] He feared that such persons were "ripe to listen to . . . social agitators and disturbers."[220] The Society's expectation was that those benefitting from its assistance would be changed from "dissatisfied grumblers into self-satisfied citizens" and would "promptly join the ranks of those who are

which was incorporated in 1900, was set up to provide "legal aid and assistance, gratuitously, if necessary, to all persons who may be worthy thereof and who from poverty are unable to procure it." *See* Hill, *The Boston Legal Aid Society*, 3(4) LEGAL AID REV. 1 (1905). Of similar note was the applicant screening process of the Legal Aid Society of Chicago: "We must refuse our support to unjust claims, and must not be asked to take a position regarding claims of other people, which, after looking at the matters fairly, we would not be disposed to take in matters of our own." Matz, *Right Before Might: Legal Aid Work in Chicago*, 11(3) LEGAL AID REV. 1, 3 (1913).

214. McGee, *supra* note 210, at 28; J. MAGUIRE, *supra* note 40, at 84.

215. *Is Legal Aid Society Always to Blame?*, 14(3) LEGAL AID REV. 13, 14 (1916).

216. *See* J. AUERBACH, *supra* note 42, at 56 (citing correspondence of A. Von Briesen) (emphasis in original).

217. *Id.*

218. Von Briesen, *Legal Aid for the Poor*, 17 THE ANNALS 164, 65 (1901).

219. *Id.*

220. *Id.* A similar rationale for the work of the Society was advanced in 1926, by Leonard McGee, the Society's Attorney-in-Chief. McGee, *The New York Legal Aid Society*, 124 THE ANNALS 29 (1926).

the most ardent supporters of our institutions."[221]

The Legal Aid Society's private status, its reliance upon conciliation rather than adversarial advocacy, its efforts to combat social disintegration, and its rejection of state funding,[222] eventually attracted the interest of the organized bar. Harrison Tweed, a prominent member of the New York Bar, served for three terms as President of the City Bar Association following nine years as President of the Society.[223] He pointed out the underlying motivations for this change in attitude by the organized bar toward the Society:

> The Bar has come to recognize that legal aid wins more friends and influences people more favourably towards lawyers than anything else that has been said or done by or on behalf of the profession. It constitutes the most tangible and the most conspicuous evidence that lawyers recognize their responsibility to serve the public and to assure the success of the administration of justice through democratic procedures.[224]

The Legal Aid Society joined the organized bar in opposition to the establishment of a public defender. As early as 1897, the Society's Attorney-in-Chief criticized the idea of a public defender, and contended that the failings of the assigned counsel system suggested a role for a private institutional defender in criminal defense:

> As a rule these [assigned] attorneys try to get from the prisoner or his friends a fee. If unsuccessful in this attempt they pay little attention to the case, make little, if any preparation, often not appearing in Court at the trial. If this Society had counsel who could look after these assigned cases, justice would be done, prisoners properly defended, and there would be no necessity for such an office as Public Defender . . . .[225]

In opposing the public defender, therefore, the Society offered to replace private attorneys who tarnished the bar's pro bono image, with staff attorneys employed by a private charitable agency.

2. *The Voluntary Defenders' Committee*

The unwillingness of the organized bar, courts, and prosecutors to support a public defender created a political stalemate that allowed the assignment system to continue unchecked. The stalemate was broken in 1917, when James Bronson Reynolds, who had been an active member of the Legal Aid

221. J. AUERBACH, *supra* note 42, at 56, *quoting* N.Y. Times, June 26, 1911, Box 4 (letter to editor written by Von Briesen).

222. The Board of Directors threatened to resign in 1912 over the issue of state funding. J. MAGUIRE, *supra* note 40, at 257. Hughes also rejected government support because of the fear that local politics would ruin the legal aid service. Hughes, *supra* note 50, at 232-33.

223. Marden, *Introduction* to H. TWEED, THE CHANGING PRACTICE OF LAW 6 (1955).

224. H. TWEED, *supra* note 40, at 29-30.

225. J. MAGUIRE, *supra* note 40, at 261-62.

Society, joined Charles Evans Hughes (the President of the Society), other present and former members of the Society, and former prosecutors and philanthropic citizens to form another charitable agency, the Voluntary Defenders' Committee[226]. The Defenders' Committee sought to provide representation to indigent defendants in the New York County (Manhattan) Court of General Sessions. The coverage it provided was incomplete. Assigned counsel would continue to represent a proportion of indicted defendants in New York County and would be the sole source of representation for poor people in all other New York City courts.[227] The City offered rent-free accommodations, and philanthropic donors, including John D. Rockefeller, Jr., provided operating funds.[228] In congruence with the aims of the organized bar, the Defenders' Committee was staffed by former prosecutors.[229] In 1921, the Defenders' Committee formally became a committee of the Society, supported by Society funds.[230]

The Defenders' Committee adopted the tenets of the Legal Aid Society regarding the role of the lawyer in the representation of poor people, and applied them to criminal cases. The Defenders' Committee's *Prospectus* stated that while the chief source of its work would be court-assignments, it would not take cases "upon the application of the person accused."[231] Rather, the Defenders' Committee would only accept out-of-court referrals from other sources (e.g., institutions and "volunteer workers") who would vouch for the worthiness of the case.[232] The Defenders' Committee viewed its attorneys as

226. *The Voluntary Defenders Committee, supra* note 116, at 282. *See* McCook, *supra* note 214, at 1; H. TWEED, *supra* note 40, at 26-27. At the time, Charles Evans Hughes was both a member of the Defenders' Committee and President of the Legal Aid Society. James Bronson Reynolds, who had been an active member of the Society's Publication Committee and a former prosecutor, was, however, credited with "the creation of the Voluntary Defenders' Committee." *See* LEGAL AID SOCIETY, 48TH ANNUAL REPORT, VOLUNTARY DEFENDERS' COMMITTEE 79 (1923) [hereinafter 1923 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT].

227. *See infra* text accompanying notes 288-91.

228. John D. Rockefeller, Jr., the Carnegie Foundation, and the Commonwealth Fund were major funders of the Defenders' Committee. At the outset, the Committee's attorneys were known as "Rockefeller Lawyers." *See* H. TWEED, *supra* note 40, at 26, 28.

229. When the Defenders' Committee was formed, its Chief Counsel, William Embree, and staff attorney, Timothy Pfeiffer, were both former assistant district attorneys. Pfeiffer left soon after the office was opened and was succeeded by Louis Fabricant, "another veteran of the District Attorney's office." H. TWEED, *supra* note 40, at 26-27, and J. MAGUIRE, *supra* note 40, at 271-72.

In its early years there was considerable mobility between the staff and members of the Committee and the Committee's Directors. For example, when Embree and Pfeiffer resigned as staff attorneys, they became Members of the Committee; in 1925, upon the death of Reynolds, Pfeiffer became Chairman of the Committee. *See* 1923 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT, *supra* note 226 at 7; LEGAL AID SOCIETY 51ST ANNUAL REPORT, VOLUNTARY DEFENDERS' COMMITTEE 67-68 (1926) [hereinafter 1926 VOLUNTARY DEFENDERS' ANNUAL REPORT].

230. H. TWEED, *supra* note 40, at 82; J. MAGUIRE *supra* note 40, at 276.

231. *The Voluntary Defenders Committee, supra* note 116, at 281. Embree, *supra* note 57, at 556. Embree, *New York's Substitute for the Public Defender*, 5(3) LEGAL AID REV. 1, 5 (1917).

232. *The Voluntary Defenders Committee, supra* note 116, at 281. By 1922, however, 20%

occupying a "*sui generis* position . . . in relation to their client's real welfare on the one hand, and the public interest on the other."[233] The Defenders' Committee thus mitigated fears of elite lawyers and reformers that the court-assignment system, by defrauding and manipulating indigent defendants, helped to "sow the seeds of social unrest" and undermined the effective administration of criminal justice.[234]

From its inception, the Defenders' Committee adopted a non-adversarial, cost-efficient view of criminal defense. Staff attorneys actively discouraged defendants from going to trial. In its first report, issued three months after it was founded in April 1917, the Defenders' Committee boasted that it had handled 182 cases, only 12 of which went to trial.[235] Such a low trial rate was heralded as a significant improvement in the administration of justice. Maguire described such results as satisfactory, adding that "[t]his did not mean that the Voluntary Defenders [sic] got most of their clients off. They were out for the truth, not for a record of acquittals at any price."[236]

The workload of the Defenders' Committee in the early years of its existence was generally between 500-600 cases per annum and the trial rate remained low.[237] The Defenders' Committee measured its success in terms of costs saved for the City.

> [T]he bulk of the work has been in disposing of cases in ways other than by trial, and, it is hoped, this was accomplished without the surrender of a single right of any defendant. If the [Defenders'] Committee had not been so successful in arriving at dispositions without trials, it might have been necessary to try several hundred cases, at an enormous expense to the community. It is estimated

(121 of 579) of the Committee's clients were accepted upon their own application. *See* 1922 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT, *supra* note 51, at 87. Nonetheless, institutional referrals continued to account for a considerable portion of the Legal Aid Society's caseload. And, by 1934, institutional referrals amounted to over 36% (566 of 1586) of the Committee's assignments while direct assignments from the court amounted to 26% (420 of 1586). *See* LEGAL AID SOCIETY 59TH ANNUAL REPORT, VOLUNTARY DEFENDERS' COMMITTEE 40 (1934) [hereinafter 1934 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT].

233. Embree, *supra* note 57, at 556-57.

234. *Id.*

235. H. TWEED, *supra* note 40, at 28.

236. J. MAGUIRE, *supra* note 40, at 273.

237. LEGAL AID SOCIETY, 49TH ANNUAL REPORT, VOLUNTARY DEFENDERS' COMMITTEE (1924) [hereinafter 1924 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT]; *see also* H. TWEED, *supra* note 40, at 83. Thus, of the 484 cases handled in 1917 by the staff of the Defenders' Committee, only 46 (9.5 percent) resulted in trials. The figures for the three following years were as follows:

TABLE: *Comparison of the Number of Cases Handled by the Voluntary Defenders' Committee and Cases that Resulted in Trials, 1918-20*

Year	Number of Cases	Number of Trials	Trial %
1918	533	58	10.9
1919	697	62	8.9
1920	463	65	14.0

Reynolds, *supra* note 160, at 480.

> that the operation of a single part of the Court of General Sessions of the County of New York costs approximately $800 a day. The saving accomplished heretofore has been not the least of the advantages offered by the presence of the [Defenders'] Committee.[238]

The cost-efficient strategy of the Defenders' Committee was based on an ideology[239] that served to legitimate its role as an aid in the administration of criminal justice. This ideology assumed first that adversarial defense was not usually necessary, since most court-assigned indigent defendants were believed guilty and unworthy of a legal defense.[240] The Defenders' Committee's Chief Counsel stated frankly that "[d]efense in its general acceptance is not always required as statistics show beyond question that most of the indigent accused are in fact guilty."[241] A corollary to this assumption was the Defenders' Committee's belief that the prosecution provided adequate protection against unjust conviction.[242] A second assumption was that indigent defendants were not entitled to the benefit of technical defenses or to the services of the most able lawyers.[243]

The ideology of the Defenders' Committee shaped the lawyering practices of its staff. The Defenders' Committee would not proceed to trial with a defendant who admitted her guilt to the Defenders' Committee's attorneys.[244] Instead, such defendants were counselled to admit their guilt "at the bar," rather than to stand trial.[245] The Defenders' Committee felt that "counsel's

238. LEGAL AID SOCIETY, 51ST ANNUAL REPORT, VOLUNTARY DEFENDERS' COMMITTEE 64 (1926) [hereinafter 1926 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT]; *see also* H. TWEED, *supra* note 40, at 83.

239. By "ideology" we refer to the set of commonly held assumptions defining institutional attitudes and behavior. The Defenders' Committee's ideology is found in *The Voluntary Defenders Committee*, *supra* note 116, at 278; in the writings of its attorneys-in-chief, *see* Embree, *supra* note 57, at 554; Fabricant, *supra* note 145, at 74; and its ANNUAL REPORTS.

240. *See* Fabricant, *supra* note 145, at 74. This paternalistic and negative attitude towards poor people is, as Barak points out, consistent with the "amelioristic" origin of institutional defense. G. BARAK, *supra* note 96, at 74.

241. Fabricant, *supra* note 145, at 74.

242. Embree, *supra* note 57, at 557; *see* Embree, *supra* note 147, at 3-5.

243. Fabricant declared that an organization such as the Defenders' Committee should not be expected to provide "the utmost in legal skill" but only that which was "as high as the average ability purchaseable generally." Fabricant, *supra* note 145, at 78-79.

244. LEGAL AID SOCIETY, 45TH ANNUAL REPORT, VOLUNTARY DEFENDERS' COMMITTEE 69 (1920) [hereinafter 1920 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT]. The 1923 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT stated frankly: "[t]he notable feature of our work is the large number of persons who plead guilty . . . . These pleas are not always the immediate and open confession of guilt which the figures might imply. We have often been compelled to make extensive investigations into facts, which when revealed to our clients, have resulted in their admissions of guilt." 1923 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT, *supra* note 226, at 73.

245. *Id.* 1920 VOLUNTARY DEFENDERS' COMMITTEE, at 69. The principal service to defendants was, therefore, to counsel a guilty plea. Campbell, *Attitude of Defendants Pleading Guilty*, 30(1) LEGAL AID REV. 7, 8 (1932). Our analysis of the total guilty pleas and trials of the Defenders' Committee and its successor the Criminal Courts Branch of the Legal Aid Society, for indicted defendants in the Court of General Sessions in New York County, shows that trials decreased from 21% (65 of 313) in 1920, to 15.6% (128 of 818) in 1940, to 3.9% (62 of

duty does not require that the state be compelled to prove the guilt of a defendant confessedly guilty."[246]

Furthering the Defenders' Committee's pursuit of justice with a "minimum of litigation," "the attorneys counselled defendants to accept lesser pleas,"[247] guilty pleas to lesser offenses than those charged in the top counts of indictments. The Defenders' Committee legitimated this practice as an effective response to defendants' tendency to plead not guilty, and to the problems which the resultant increase in trials engendered for the administration of criminal justice.[248]

> Defendants in greater numbers are deciding to take their chances in trials . . . As in civil cases not every complaint which finds its way to court can be fully sustained by proof, so in criminal cases not every indictment can be established before a jury. And the practice has been to find the middle ground which will result in a proper disposition of the cause and, in proper cases, adequate punishment of the offender. Lesser pleas are, therefore offered and accepted . . . It has been the practice of counsel to assess fairly the nature of the case against clients and frankly present the counter proof to the District Attorney for his judgment. Between the two, the arrival at a conclusion that a smaller plea could be accepted has rarely resulted in anything but the most proper disposition of the case. It is hoped that this practice will not be abandoned.[249]

1587) in 1954. LEGAL AID SOCIETY ANNUAL REPORTS (1920-1954) (Excluded are mental commitments, substitutions, and other miscellaneous dispositions).

246. 1920 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT *supra* note 244, at 69.

247. 1926 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT, *supra* note 229, at 64-65.

248. *Id.* at 65. The Committee claimed that defendants began to elect trials rather than guilty pleas as a result of the enactment of mandatory sentencing laws limiting courts' sentencing discretion in guilty pleas.

249. *Id.* A subsequent study of the frequency of guilty pleas by the New York State Crime Commission, however, disputed the explanation advanced by the Defenders' Committee for accepting pleas to lesser offenses. *See* Report of the Crime Commission of the State of New York, Sub-Commission on Statistics, N.Y. LEGISLATIVE DOC. NO. 23, at 49-50 (1928). The report stated:

> In reply to this statement [of the Defenders' Committee] it should be noted that the first sentence quoted does not seem to be justified in the light of the statistics collected by our Sub-Commission. In our report of last year it was shown that in 1925 among the 8,296 cases arraigned after indictment in all of the jurisdictions studied, 32.3 per cent pleaded not guilty while in 1926 the percentage was 29.7. But in New York City in 1925 a total of 35.1 per cent pleaded not guilty and in 1926 32.2 per cent did so. Thus the argument for more pleas to a lesser offense cannot be sustained on the basis of a greater tendency to plead not guilty. The opposite is true and yet the pleas to a lesser offense have increased.

Id. at 50.

In 1927, the year following the announcement of its policy to counsel "lesser pleas," the Annual Report of the Defenders' Committee contained the following statement:

> During the year the defendants in 283 cases pleaded guilty, all, except 24, to lesser offenses. By so doing they secured material advantages to themselves, and the com-

The result was that by 1926, the vast majority of the Defenders' Committee's clients pleaded guilty to lesser offenses.[250] Thus, the Defenders' Committee rescued the prosecution from the almost certain fate of having to try cases in which defendants would have been acquitted of some, if not all, charges.

The *Prospectus* of the Defenders' Committee explains the counselling approaches attorneys should take when confronted with defendants who had not confessed, but whom the attorneys believed were, in fact, guilty: "When a voluntary defender finds he has a guilty man on his hands he will not set out to acquit him. He will boldly face the problem of the defendant's future career. The first essential step towards improvement is a confession of guilt."[251] When this counselling strategy failed, the Defenders' Committee's attorneys resorted to other methods, including "laughing at the defense advanced, pouring scorn on the story of the defendant and treating whatever was said with the utmost suspicion."[252] As a result of these techniques, "defendants who had first asserted their innocence, . . . admitted their guilt.[253] If the defendant

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munity was saved enormous expense. These pleas were arrived at between the District Attorney and counsel, with the approval of the judges after a full and frank appraisal of all available evidence on both sides . . . .

LEGAL AID SOCIETY, 52D ANNUAL REPORT, VOLUNTARY DEFENDERS' COMMITTEE, 70 (1927) [hereinafter 1927 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT].

Similar sentiments regarding the cost savings and legitimacy of pleading guilty to lesser offenses appeared in several reports of the Defenders' Committee. *See* LEGAL AID SOCIETY, 53RD ANNUAL REPORT, VOLUNTARY DEFENDERS' COMMITTEE 83 (1928); LEGAL AID SOCIETY, 55TH ANNUAL REPORT, VOLUNTARY DEFENDERS' COMMITTEE 66 (1930).

While a detailed analysis of the early history of plea bargaining in New York City's criminal courts is beyond the scope of this Article, our data on institutionalized "lesser pleas" practices of the Defenders' Committee add to the growing body of research that demonstrates that plea bargaining is not properly understood as a historical aberration resulting from corruption in the prosecutor's office, devious criminal defense lawyers, or as a rational response to modern case pressure. *See* L. FRIEDMAN & R. PERCIVAL, THE ROOTS OF JUSTICE 175-82 (1982); Friedman, *Plea Bargaining in Historical Perspective*, 13 LAW & SOC'Y REV. 247 (1979); Haller, *supra* note 99, at 274-77; Heumann, *A Note on Plea Bargaining and Case Pressure*, 9 LAW & SOC'Y REV. 515 (1975).

250. This practice was announced in the 1926 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT, *supra* note 229, at 65; *see supra* text accompanying note 249, and included in the Defenders' Committee's statistical data thereafter. We analyzed the total guilty pleas entered to the indictment and guilty pleas to lesser offenses as reported in the Defenders' Committee's statistics from 1926 to 1954. In 1926, "lesser pleas" amounted to 92.1% (315 of 342) of total guilty pleas, in 1946 "lesser pleas" amounted to 86.1% (597 of 693) of total guilty pleas, while in 1954, "lesser pleas" amounted to 99.6% (1516 of 1525) of total guilty pleas. LEGAL AID SOCIETY ANNUAL REPORTS (1920-1954) (excluded are guilty pleas "during trial").

The practice of counselling defendants to accept "lesser pleas," however, did not originate in 1926. Examples of this practice appear in the Defenders' Committee Annual Report in 1923, where the New York County District Attorney stated that the Committee can "secure for [the defendant] the most advantageous plea that the indictment will permit." 1923 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT, *supra* note 226, at 74.

251. *The Voluntary Defenders Committee*, *supra* note 116, at 282.

252. Campbell, *supra* note 245, at 8. Despite these techniques, "some defendants, particularly stupid ones, unfortunately refuse to heed the urgent advice of counsel; and often they must dearly pay for their obstinacy." *Id.* at 9.

253. Embree, *supra* note 57, at 557. The reaction of defendants to the Defenders' Committee accusatorial approach is captured in the following account:

continued to refuse the advice, the voluntary defender might ask to be relieved from the assignment.[254]

The Defenders' Committee's attorneys also counselled defendants who were palpably innocent not to stand trial. For those defendants, the staff attorneys attempted to "gather proof of the innocence of the accused."[255] Those findings were "laid before the District Attorney . . . [who would] recommend to the court the immediate dismissal of the charge."[256]

In cases that went to trial, those in which the defendant had an arguable claim of innocence but the prosecutor would not dismiss, the Defenders' Committee's attorneys counselled the defendants to "take the witness stand and testify in their own behalf unless they decline to do so."[257] The Defenders' Committee thus sought to acquit only those defendants who had the capacity to demonstrate their innocence.[258]

a. The Attitudes of Judges and Prosecutors

The Defenders' Committee quickly became an unofficial and indispensible factor in the administration of criminal justice in New York County.[259] The non-adversarial style of lawyering adopted by the Defenders' Committee reduced trial calendars and the total pre-trial detention time incurred by defendants in city jails.[260] Judges "warmly approve[d]" of the Defenders' Committee's effort and readily assigned cases to it thereby enabling the Defenders'

> Many defendants are bitterly opposed to any plea of guilty and are almost unbelievably evasive as to the facts in their cases. Often they strongly resent close questioning, particularly as to their guilt. Sometimes they will exclaim: "You talk like the District Attorney! Are you trying to get me convicted? Do you expect me to plead guilty when I am innocent?"

Campbell, *supra* note 245, at 9.

254. *The Voluntary Defenders Committee*, *supra* note 116, at 282. *See also* Waldo, *supra* note 147, at 107.

255. Embree, *supra* note 147, at 4.

256. *Id.*

257. Embree, *supra* note 57, at 557.

258. *Id.* Fabricant, the Defenders' Committee's Attorney-in-Chief conceded his prosecutorial bias in such cases:

> On analyzing that situation, I discovered in myself a trend to minimize the value of defenses that had been offered by those innocent men, and because of my experience as a prosecutor that I had been minimizing wholly decent, truthful defenses and regarding them as perhaps untrue, because I had been in a position where it had been my learning to regard such things as fabrications.

L. Fabricant, Remarks at the Thirteenth Annual Meeting of the Institute, in Cincinatti, Ohio, Nov. 19, 1921, *quoted in* Reynolds, *supra* note 160, at 483.

259. Fabricant described the relationship between the Defenders' Committee and the administration of criminal justice in these terms:

> The reliability of our work is attested by the public officials with whom our work throws us in daily contact. In the scheme of administration of the criminal law and felony cases in New York County (the rather small sphere in which we have been compelled by limited staff) the Voluntary Defenders' Committee is practically an integral part of the legal machinery of the court.

Fabricant, *supra* note 145, at 77.

260. Embree, *supra* note 57, at 557.

Committee to secure its foothold in the system.[261]

Prosecutors also approved of the Defenders' Committee's approach,[262] because the Defenders' Committee's lawyers engaged in *facilitative* lawyering and did not delay, obstruct, or employ surprise tactics.[263] Facts were not withheld, frank discussion of the evidence took place, and a cooperative attitude prevailed.[264] When the investigation of the Defenders' Committee led to evidence of crimes committed by other persons, "[t]his evidence . . . [was] collected and placed in the hands of the District Attorney or the police authorities."[265] Such facilitative, non-adversarial practices led the New York prosecutor to proclaim that the Defenders' Committee did "more [than any other organization] to maintain the ideal of the District Attorney, that no guilty person should escape prosecution and yet that no innocent person should be unjustly accused . . . ."[266]

b. The Response of the Organized Bar

The existence of the Defenders' Committee helped to alleviate the organized bar's fear that a public defender would replace assigned counsel and lead to the socialization of legal services. Because they shared the Legal Aid Society's goals of non-adversarial and cost-efficient defense, the organized bar and the Defenders' Committee formed a lasting alliance. The Defenders' Committee cemented these ties in several ways. First, the Defenders' Committee constantly stressed the deficiencies of the assignment system, particularly the need to remove disreputable lawyers from the City's courts.[267] Given the organized

261. J. MAGUIRE, *supra* note 40, at 279; *see also* Embree, *supra* note 57, at 557. The Defenders' Committee reported that its policy of refusing to take cases to trial of defendants who admitted their guilt "had the approval of judges in the Court of General Sessions." 1920 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT, *supra* note 244, at 69. *See also* Fabricant, *supra* note 145, at 77. "We never try to dodge the facts of the case. Pleas of guilty are not withheld where the facts given us by our clients warrant such a plea. Confidence is thus inspired both in the court and in the prosecutor." *Id.*

262. Reynolds' review of institutional defense in New York City, Connecticut and Los Angeles discovered that district attorneys and other courtroom personnel were favorably impressed by the new style of defense: "District attorneys from their position might be expected to be hostile, but in fact have been the warmest endorsers of the work. [I know] of no prosecuting attorney who has dealt with a Public Defender who does not approve the work." Reynolds, *supra* note 160, at 477.

263. *See* statement of New York County District Attorney in 1923 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT, *supra* note 226, at 74.

264. J. MAGUIRE, *supra* note 40, at 277. Relations "with the District Attorney's Office were cordial and cooperative from the beginning and have remained so to the present day." H. TWEED, *supra* note 40, at 27.

265. Embree, *New York's Substitute for the Public Defender*, 15(3) LEGAL AID REV. 1, 4 (1917).

266. *See* Statement of New York County District Attorney in 1923 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT, *supra* note 226, at 74.

267. *See* 1926 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT, *supra* note 250, at 87; LEGAL AID SOCIETY, 57TH ANNUAL REPORT, VOLUNTARY DEFENDERS' COMMITTEE 39-40 (1932) [hereinafter 1932 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT]. *See also* J. MAGUIRE, *supra* note 40, at 271; H. TWEED, *supra* note 40, at 26.

bar's reluctance to replace assigned counsel with a public defender,[268] an organized private defender, committed to the existing social order and eager to remove court-appointed regulars, had irresistible attraction.

The Defenders' Committee also gained the organized bar's favor by seeking to help the legal profession live up to its pro bono rhetoric.[269] The Defenders' Committee initially justified its "voluntary" status by claiming that it would support public-spirited private attorneys who would take the bulk of the Defenders' Committee's work. To attract the members of the private bar, the Defenders' Committee offered reputable lawyers potentially triable cases, and assistance from the Defenders' Committee's staff attorneys in completing the more mundane tasks involved in trial preparation.[270] Despite this offer of added assistance, reputable attorneys were still unwilling to come forward.[271] They were excused from their public duty largely by virtue of their privileged status.[272] Monetary contributions to the Legal Aid Society became acceptable substitutes for pro bono service. The Attorney-in-Chief of the Society emphasized the Society's surrogate status with respect to the private bar: "[I]n this country, whenever a legal aid society exists lawyers feel that by contributing to the local society they have vicariously performed their duty and relieved their practice from the burden and the interruption of poor clients who . . . are frequently difficult ones."[273]

In addition, the Defenders' Committee strengthened the private bar's monopoly over fee-paying cases by confining its activities to non-compensable indigent cases.[274] This included, for example, "refraining from conducting the

268. *See supra* notes 185-88, 191 and accompanying text.

269. *See supra* note 170 and accompanying text.

270. The Defenders' Committee allowed pro bono lawyers from reputable firms to undertake the "more complex and difficult cases" and promised that the regular office staff "would do every stroke of the tedious pick-and-shovel work prior to trial . . . ." J. MAGUIRE, *supra* note 40, at 273.

271. By 1925 the Society's attorney-in-chief reported that "[t]he feature which was contemplated as making the name 'voluntary' an apt one has disappeared, and instead all the work is now done by a regularly employed staff." Fabricant, *supra* note 145, at 74. *See also* J. MAGUIRE, *supra* note 40, at 276. While some firms occasionally lent young attorneys to assist the Defenders' Committee, experienced private lawyers and the professional elite did not volunteer their services.

272. Hughes wrote that while the country lawyer could distinguish "the deserving from the undeserving, the man with the just grievance from the crank," the urban lawyer could not because "the poor are comparatively more numerous" and are not "neighbors of those who would aid them." Hughes, *Meeting the Need for Legal Aid to the Poor*, 35(4) LEGAL AID REV. 6 (1937). Hughes thus contended that the conscientious urban lawyer "discharges his part of the obligation to bring legal aid to the poor . . . largely by contributing generously to a legal aid society." *Id.* at 6.

273. Cobb, *Legal Aid Practice*, 35(2) LEGAL AID REV. 4 (1937).

274. *Prospectus*, *supra* note 116, at 1, col. 4; *The Voluntary Defenders Committee*, *supra* note 116, at 281-82. From the outset, the policy of the Voluntary Defenders' Committee and the Legal Aid Society was to cooperate with the organized bar by avoiding cases in which a private lawyer could earn a fee. The bar was allowed exclusive access to such cases. In some civil matters, however, the Society charged a small retainer or levied a small commission on recovered sums. It stressed that these were token payments: "Naturally such fees are far below

defense of prisoners who were able to obtain bail,"[275] and refusing to take on homicide cases, which were compensable under the Code of Criminal Procedure.[276] Although homicide cases could have provided increased income for the Legal Aid Society, thereby permitting it to extend its services to courts outside New York County, the possibility of obtaining such income was subordinate to the maintenance of the Society's symbiotic relationship with the private bar.[277] The Society's Attorney-in-Chief, W. Bruce Cobb, emphasized the nature of that relationship: "A legal aid organization cannot thrive on competition with the [private] bar, but only in co-operation with it. A selfish policy of competition would ultimately be fatal to it."[278]

The organized bar came to view the Defenders' Committee not merely as non-threatening, but also as an asset to its own interests. By allying with an organization dedicated to providing for the public welfare through cost-efficient criminal defense services for the poor that did not require the elite of the profession to undertake court assignments, the bar stood only to improve its reputation.[279] Such an alliance distanced the organized bar from the underclass of assigned counsel whose lawyering practices were often criticized by legal reformers. Further, the alliance demonstrated the legal profession's concern with keeping its own house in order by replacing disreputable attorneys and providing "acceptable" representation to the truly indigent.

III.
THE GROWTH OF THE VOLUNTARY DEFENDERS' COMMITTEE

The Defenders' Committee began as a small private agency, with operations confined to the New York County Court of General Sessions.[280] As its

what a private attorney would charge, so that there may not be the slightest basis for the criticism of competition with the bar." Cobb, *supra* note 273, at 6.

Katz explains that "Legal Aids nationally shaped their commitment to [equal justice] in quiescent deference both to the economic interests represented by the organized bar and to the conservative moral and social values of those who supplied their funds. (citation omitted) . . . Income eligibility scales and restrictive policies on accepting fee-generating cases were periodically submitted for bar approval." J. KATZ, *supra* note 51, at 40.

275. 1923 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT, *supra* note 226, at 72. In 1934, the Defenders' Committee acknowledged representing defendants in 42 bail cases. The Committee explained, however, that the "amount . . . was minimum bail and these cases . . . did not present opportunities for private counsel to earn a fee." 1934 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT *supra* note 232, at 38.

276. *See* L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 523 (1965) [hereinafter L. SILVERSTEIN]; *see also infra* note 674 and accompanying text; N.Y. CRIM. PROC. LAW § 308 (McKinney 1982); *supra* note 166.

277. *See* J. KATZ, *supra* note 51, at 40-41.

278. Cobb, *When Does a Legal Aid Society Compete with the Bar?*, 35(3) LEGAL AID REV. 3 (1937).

279. The marginal nature of private criminal practice is described by Pound, *Criminal Justice in the American City*, *supra* note 94, at 602; *see also supra* notes 94-96 and accompanying text.

280. J. MAGUIRE, *supra* note 40, at 270-71. Maguire (citing an internal 1924 Voluntary Defenders' Committee Report) reveals that in 1927 the Society represented 558 defendants in

relationship with the bench and bar improved, the size and influence of the Defenders' Committee increased. In 1928, a report prepared by the City Bar Association — New York County Lawyers' Association Joint Committee for the Study of Legal Aid ("Joint Committee") recommended that *all* defendants in the Court of General Sessions in New York County "who request assignment of counsel on the ground that they are not able to pay counsel should have the attorneys of the Voluntary Defenders [sic] Committee assigned to them . . . ."[281] The report noted that while the Defenders' Committee already processed 500 to 600 cases a year, it was able to handle about 750.[282] Therefore, the Joint Committee recommended that the judges of the General Sessions Court take some action as a body to see that the full capacity of the Defenders' Committee was utilized.[283] Finally, the report proposed that "a like course of action be adopted in other counties when an efficient and properly sponsored voluntary defender service shall be established therein."[284]

The first forty years of the existence of the Defenders' Committee were marked by moderate increases in staff size and a great expansion of its caseload. This ratio of staff size to caseload became a model for institutional defense which guaranteed the continued cost-efficient processing of poor people. It did this by limiting the capacity of staff attorneys to test the state's case and adequately protect individual rights. In its first ten years, the number of full-time staff attorneys grew from two to four; in the next two decades, it increased to over twenty.[285] In 1939, the Defenders' Committee became known as the Criminal Courts Branch of the Legal Aid Society,[286] the predecessor of the Society's current Criminal Defense Division. The Defenders' Committee represented 500 criminal cases in 1917, some 1,600 in 1936, and, as the Criminal Courts Branch of the Society, 18,158 in 1951, and 35,506 by 1959.[287]

The Legal Aid Society's share of the total indigent defense caseload also increased. In 1927, the Society represented defendants in slightly more than one-third of all assigned cases in the Court of General Sessions in New York County.[288] By 1930, this proportion had increased to about one-half of all

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the Court of General Sessions of New York County, where "approximately 1500 defendants each year are without means to retain counsel." *Id.* at 280; *see supra* note 259.

281. 1928 REPORT, *supra* note 93, at 148.

282. *Id.* at 54.

283. *Id.* The Bar's recommendations mirrored the official position of the Defenders' Committee. *See* LEGAL AID SOCIETY 49TH ANNUAL REPORT, VOLUNTARY DEFENDERS' COMMITTEE 74 (1924) [hereinafter 1924 VOLUNTARY DEFENDERS' COMMITTEES' ANNUAL REPORT].

284. 1928 REPORT, *supra* note 93, at 148.

285. H. TWEED, *supra* note 40, at 82-83; *The Legal Aid Society's Summary of Statistics*, 35 LEGAL AID REV. 8 (Jan. 1937); EQUAL JUSTICE FOR THE ACCUSED, *supra* note 41, at 121 n.16.

286. H. TWEED, *supra* note 40, at 82.

287. Embree, *supra* note 147, at 2; *The Legal Aid Society's Summary of Statistics*, *supra* note 285, at 8; E. BROWNELL, LEGAL AID IN THE UNITED STATES 94 (Supp. 1961).

288. J. MAGUIRE, *supra* note 40, at 280.

assigned cases.[289] By 1955, the Society represented 45 percent of all defendants named in indictments pending in the Court of General Sessions.[290] Tweed explained that "during this period the total number of cases tried in General Sessions by all lawyers considerably diminished, which means, of course, that the percentage assigned to the Society had increased enormously."[291]

In the early 1950s, judges and district attorneys fostered the extension of the Defenders' Committee beyond New York County.[292] Tweed attributed the growth in the Defenders' Committee's work to the determined and distinctly vocal desire of the bench. In 1954, Tweed wrote that "[t]he judges, seeing the need and having confidence in the ability of the Society to meet it, have demanded and obtained action by the Society."[293]

The legal profession, however, was not initially as enthusiastic in showing its financial support. Although the Defenders' Committee's survival depended on private charitable contributions, and despite the commonality of interests between the organized bar and the Legal Aid Society, lay persons contributed almost three times as much money to the Society as lawyers in the early years.[294] It was not until 1926 that lawyers' contributions exceeded those of lay persons.[295] This trend continued until 1951, when contributions from each source became equal.[296]

Throughout this period, the Defenders' Committee was unable to eliminate assigned counsel from the system.[297] As the number of city-wide arrests and indictments grew, the Legal Aid Society's staff size limited its ability to

289. *See* LEGAL AID SOCIETY, 56TH ANNUAL REPORT, VOLUNTARY DEFENDERS' COMMITTEE 39 (1931) [hereinafter 1931 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT], which reported that of two thousand defendants "without means to retain counsel" 1,174 were represented by the Defenders' Committee. *See also* 1932 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT, *supra* note 267, at 39, which reported that of two thousand defendants "without means to retain counsel" the Defenders' Committee represented 1,057. *See also* Embree, *supra* note 147, at 5.

290. EQUAL JUSTICE FOR THE ACCUSED *supra* note 41, at 135 n.4.

291. H. TWEED, *supra* note 40, at 87.

292. Tweed reported that in the early 1950s, "in Richmond, Queens, some parts of Kings and the Bronx there [was] nothing but the old assignment system — and by no means at its best." *Id.* The expansion of the Society's representation outside New York County began during this time, first in Brooklyn, then in the Bronx. *Id.*

293. *Id.*

294. *Id.* at 22, 23.

295. *Id.*

> The increase in lawyers' contributions was largely due to the institution of the so-called law firm plan, whereby there were certain classifications of law firms, the top one of which required payment of fifty dollars a year for each partner and ten dollars for each associate lawyer. There were thirteen law firms in this class in 1926. The other classification consisted of law firms paying $50 a year for each partner and nothing more. There were seven firms in this category. Firms which contributed lesser amounts numbered about a hundred.

Id. at 23.

296. *Id.* at 102-03.

297. *Id.* at 98. Embree, *supra* note 147, at 2.

cover all assignable cases and forced the courts to rely on court-assigned private attorneys, whose conduct, the bench and bar claimed, perpetuated inefficiency in the criminal justice system. This threatened the Society's status as the City's institutional defense provider. Leaders of the organized bar voiced concern that such a state of affairs might rekindle support for the establishment of a public defender system to replace the Society. According to Tweed:

> The chances that the Government may take over [indigent criminal defense] are much greater on the criminal than on the civil side. The public defender system has worked well almost everywhere that it has been tried whereas the municipal and county bureaus giving civil advice and representation have not as a whole been successful. The Bar simply must produce promptly a plan which offers a permanent solution and is not merely a stopgap or stalling device. Otherwise, there will be political pressure and the Bar may lose control.[298]

The Legal Aid Society used the perceived threat of a public defender as a form of socialized law practice to publicize and justify its own need for more reliable and extensive funding.[299] In 1957, the Society's Attorney-in-Chief contended that the Society could use public funds to meet the growing demand for institutional defense and still avoid the perceived drawbacks of a public defender:

> If public funds are ever made available in New York City for the defense of the indigent accused of crime, it is our belief that such funds will be far better and far more effectively spent under a contract entered into between the governing body of this city and the Legal Aid Society than by allowing them to be used as an indirect form of patronage by some newly appointed or elected public official.[300]

In 1959, a Special Committee of the City Bar Association and the National Legal Aid and Defender Association ("Special Committee") published *Equal Justice for the Accused*,[301] which criticized the continued reliance on the

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298. H. TWEED, *supra* note 40, at 98.

299. DuVivier, *supra* note 107, at 4, 6. A statement of Supreme Court Justice William Brennan, who opposed the use of state funds for Legal Aid, was included within the Society's publication, THE LEGAL AID REVIEW. Justice Brennan contended that "a government agency of lawyers paid with tax money, may be followed by government control of the profession." *Mr. Justice Brennan Speaks on Legal Aid*, 55(1) LEGAL AID REV. 20 (1957). Justice Brennan contended:

> it is not mere coincidence that the masters of Hitler, Germany and of modern Russia first destroyed the independence of the Bar before they destroyed the democracy that they replaced. If a citizen opposes his government, and the lawyers for both parties are paid by the government, will the citizen get that fearless and resolute representation by his counsel which history proves is essential to the proper administration of justice?

Id.

300. DuVivier, *supra* note 107, at 6.

301. EQUAL JUSTICE FOR THE ACCUSED, *supra* note 41.

assigned counsel system in cities that did not have an institutional defender.[302] Instead, the Special Committee strongly recommended a "mixed system" in which it was possible "to support a voluntary-defender system wholly or partly by public funds."[303] The Special Committee proclaimed that such a system would afford a "unique opportunity" and deserved "careful consideration as one of the best solutions to the problem of representing the indigent defendant."[304] Included within the Special Committee's definition of a "mixed system" was a defender system financed entirely by public funds but "controlled by a private board of representative leaders of the Bar and the community . . . ."[305] Thus, the report's conclusion was congruent with the Legal Aid Society's proposal. The Special Committee recommended the provision of public funds to supplement the income of a private defender agency, thereby enabling such an organization to expand its coverage to meet the growing demand for representation: "[W]here an existing voluntary defender system is faced with financial difficulties or cannot expand its coverage because of lack of funds the community might well consider supplementing voluntary contributions to the system by public funds."[306]

In the ensuing contest over public money between the Legal Aid Society and a potential public defender, the Society's emphasis on its private character and cost-efficiency reaped benefits. The Society's operational limitations were due to the uncertainty and inadequacy of charitable contributions,[307] and could be overcome by access to public funds; in contrast, the deficiencies attributed to a public defender could not. In the debate over whether a public defender should undertake to represent indigent defendants, the Society would have the support of the organized bar. The organized bar depicted the Society as an "independent," "privately controlled," "non-governmental agency" with a Board of Directors to which the staff of the agency was ultimately responsible.[308]

IV.
CHAPTER SUMMARY

The assigned counsel system that operated in the United States at the end of the nineteenth century and in the early years of the twentieth century possessed both real and apparent contradictions. First, there was a basic contradiction between the rhetoric of the system and the practice of the practice bar.

302. The Special Committee found that the assigned-counsel system failed to afford experienced and competent representation in criminal cases. Surveys revealed, for example, that "in Essex County (New Jersey) 43.4 percent and in Tompkins County [New York] 32.3 percent of the assigned counsel had no criminal law experience before their first assignment." *Id.* at 65.

303. *Id.* at 93.

304. *Id.* at 93, 94.

305. *Id.* at 93.

306. *Id.* at 94.

307. *Id.* at 69.

308. *Id.* at 50, 51.

In a system based upon the notion of pro bono representation derived from the obligations of the professional lawyer, those who were supposedly most responsible were least willing to volunteer their services. Second, there was a conflict between the cost-free theory of the assignment system and the financial and social burdens it was said to impose. The problems underlying these contradictions rendered the system inefficient.

The response of elite lawyers and reformers to the assignment system was to establish a system of institutional defense that provided non-adversarial, cost-efficient staff attorneys to indigent felony defendants. The organized bar's interest, and that of the reformers, was to reduce the potential for social unrest which the rise in immigration heralded, to Americanize the poor into accepting the legitimacy of the existing social order, and to rescue the prosecution from the adversarial practices of court-assigned private attorneys.

In New York City, the organized bar's response took the form of a private, charitable agency that accepted the legitimacy of the prosecution and preempted public control of criminal defense services. In order to do this, the Defenders' Committee had to manage certain contradictions: maintaining the support of judges, district attorneys, and other state officials while continuing to enjoy the private bar's support; becoming a part of the private bar while offering legal services without compensation; reconciling the pro bono responsibilities of all lawyers with the Society's assumption of them; resisting the notion of a public defender and at the same time engaging in lawyering identical to that which a public defender would provide.

Essentially, the Defenders' Committee was a creature of the criminal justice administration and the organized bar. Initially staffed by former district attorneys and avidly supported by judges and prosecutors, it developed and refined a paternalistic, non-adversarial style of defense geared toward guilty pleas. It offered judges efficiency and fewer trials. It offered district attorneys cooperation, eliminating surprise and maximizing predictability. It allayed the fears of reputable private attorneys of competition for the most remunerative cases and permitted the vicarious discharge of lawyers' pro bono responsibilities, while still leaving the control of legal services in the hands of the profession's elite.