CHAPTER THREE

THE DEVELOPING CRISIS IN PROVIDING REPRESENTATION TO INDIGENT CRIMINAL DEFENDANTS

Before examining the modern development of New York City's indigent defense system subsequent to the adoption of Article 18-B, we will trace the nationwide tension between the adversarial rhetoric of *Gideon v. Wainwright* and the cost-effective practices of indigent defense providers. Next, we will examine the responses made by defender agencies and the organized bar to increased case pressure following the Supreme Court's decision in *Argersinger v. Hamlin*.[416] We explain how institutional defenders, despite continued reliance on assembly-line practices, "shed" substantial numbers of cases to assigned counsel and private contract defenders. We then will describe the organized bar's efforts to legitimate indigent defense systems by promulgating professional standards which invest institutional defenders and assigned counsel with an acceptable adversarial veneer.

I.

THE NATIONWIDE PRACTICE OF ASSEMBLY-LINE JUSTICE AND CASE "SHEDDING"

The gap between the Supreme Court's adversarial expectations and the nonadversarial reality of indigent defense in state courts widened during the ten years following the *Gideon* decision. Most major cities throughout the United States came to rely on institutional defense systems which processed poor people without jury trials, principally through guilty pleas and non-trial dispositions.[417] The political survival and expansion of institutional defenders depended upon their capacity to provide cost-efficient dispositions of indigent defendants' cases.[418] Commentators soon exposed the gap between the adver-

416. 407 U.S. 25 (1972).

417. There was a dramatic growth in the proportion of the population served by institutional defenders: full-time public employees or staff attorneys of private contract agencies. In 1961, 3% of the nation's counties serving 28% of the nation's population provided institutional defense. *See supra* note 317 and accompanying text. By 1973, 28% of the nation's counties serving two thirds of the nation's population provided institutional defense. NATIONAL LEGAL AID & DEFENDER ASS'N, THE OTHER FACE OF JUSTICE 13 (1973)[hereinafter THE OTHER FACE OF JUSTICE]. Institutional defenders continued to pursue their original cost-efficient, crime control mission. *See supra* notes 157-61, 238-50; *see also supra* note 336 and accompanying text. A 1973 national survey of Defender agencies in 1973 reported that, overall, 70% of their cases were disposed of through non-trial dispositions (45% through guilty pleas and 25% through pre-trial dismissals). Of the 30% of institutional defender cases disposed of through trial, the vast majority were bench trials (26.9%) and a few were jury trials (3%). *Id.* at 30, TABLE 44.

418. The 1967 President's Commission used the term "assembly line justice" to describe the non-adversarial, mass processing of defendants in criminal courts. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT IN ADMINISTRATION OF JUSTICE, THE CHALLENGE OF

sarial rhetoric of *Gideon* and the day-to-day practices of courtroom actors.

A 1967 report prepared by the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, emphasized the failure of the criminal justice system to live up to *Gideon's* ideal.

> Wherever the visitor looks at the system, he finds great numbers of defendants being processed by harrassed and overworked officials. Police have more cases than they can investigate. Prosecutors walk into courtrooms to try simple cases after reviewing the files for the first time. Defense lawyers appear having had no more than time for hasty conversations with their clients. Judges face long calendars with the certain knowledge that their calendar tomorrow and the next day will be, if anything, longer. [Consequently], there is no choice: [because of the sheer magnitude of cases, the officials within the criminal justice system do not] regard the defendants as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way. The gap between the theory and the reality is enormous.[419]

This description of the criminal justice system mirrors the critiques that had been made earlier in the century.[420] When viewed in this context, *Gideon*

CRIME IN A FREE SOCIETY 128 (1967) [hereinafter 1967 PRESIDENT'S COMMISSION REPORT]. The Commission noted:

> [M]any courts have routinely adopted informal, invisible, administrative procedures for handling offenders. Prosecutors and magistrates dismiss cases; as many as half of those who are arrested are dismissed early in the process. Prosecutors negotiate charges with defense counsel in order to secure guilty pleas and thus avoid costly, time-consuming trials; in many courts 90 percent of all convictions result from the guilty pleas of defendants rather than from trial. Much negotiation occurs without any judicial consideration of the facts concerning an offender or his offense.

Id. at 127-28.

Blumberg's account of urban criminal justice emphasized the dichotomy between the ideology of constitutional due process and the rule of law versus the "bureaucratic due process," implemented in criminal courts. Blumberg argued that "bureaucratic due process consists of strategies and evasions calculated to induce pleas of guilty." A. BLUMBERG, CRIMINAL JUSTICE 4 (1970).

419. *Id.* at 128 (quoting Dean Edward Barrett).

420. *See, e.g.*, Roscoe Pound's description of urban criminal courts in the early twentieth century. 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 629 (1922).

> The scanty attention to cases which is so unfortunate a feature of the administration of criminal justice. . . belongs to the days when the police magistrate knew the town drunkard, as did all his neighbors, and could dispose of the case of Huck Finn's father offhand, with the assurance of one who knew. Today the method persists, but the personal knowledge on the part of the court and of the community which assured that justice would be done is no more. Without this check it results in opportunities for questionable influences of the case of real offenders, danger of irreparable injury to the occasional offender, who is not able to command such influences, and in consequence a general suspicion of the whole process which must affect the attitude of the public toward the administration of justice. . . .

had simply expanded the number of defendants subject to pre-existing non-adversarial practices.[421]

In 1972, in *Argersinger v. Hamlin*,[422] the Supreme Court again expanded the size of the population subject to existing indigent criminal defense systems. The Court noted that: "[T]he volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result.[423] . . . [T]herefore . . . the problems associated with misdemeanor and petty defenses often require the presence of counsel to insure the accused a fair trial."[424]

Despite *Argersinger's* call for an expansion of adversarial advocacy, a 1973 study undertaken by the National Legal Aid and Defender Association, *The Other Face of Justice*,[425] found that indigent defense systems regularly failed to provide such representation. Institutional defenders carried excessive caseloads and lacked adequate support personnel.[426] Assigned counsel, predominant in rural counties and in urban areas with populations under 500,000, were equally ineffective and lacked virtually any investigative assist-

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Id.

421. Although an analysis of the Court's sixth amendment jurisprudence is beyond the scope of this Article, *Gideon's* progeny, Morris v. Slappy, 461 U.S. 1, 13-14 (1983) and Strickland v. Washington, 466 U.S. 668 (1984), are significant in this context because these cases legitimate the non-adversarial practices of indigent defense providers. In *Slappy*, the Court found that indigent defendants are not entitled to "meaningful" relationships with their attorneys, a term the court described as "novel" to sixth amendment jurisprudence. Morris v. Slappy, 461 U.S. at 13-14. *See also supra* note 335. Instead, the Court found that it is perfectly lawful for one public defender to substitute for another on the eve of trial, over the defendant's vociferous objections, provided the defender has reviewed the case file and has asserted that she is ready for trial. *Slappy*, 461 U.S. at 13-14.

In *Strickland* the Court stated that the proper standard for attorney performance is that of "reasonably effective assistance." Strickland v. Washington, 466 U.S. at 687. *See also supra* note 335. The Court held, however, that as a matter of law, defense counsel are "presumed" to provide reasonably competent representation. *Strickland*, 466 U.S. at 689. When confronted by counsel's failure to undertake a basic investigation, a court must examine the facts of the particular case before determining that representation by counsel was inadequate. The counsel's decision not to undertake an investigation may lawfully result from a defendant's admission of guilt or systemic lack of resources. *Id.* at 681. Thus, the required amount of investigation, excusable by the above factors, becomes extraneous to the provision of adversarial advocacy. The amount of investigation required is based upon and depends on the information supplied by the defendant, rather than the sufficiency of the allegations made by the state. *Id.* Given the pre-*Gideon* history of the indigent defense system and its inquisitorial method of representation, *see supra* notes 148-51 and accompanying text, Blumberg's analysis of constitutional due process, including the right to counsel, seems particularly appropriate. "[T]he concern with better and more extensive rules has served as a facade of moral philosophy to divert our gaze from the more significant development of the emergence of bureaucratic due process, a non-adversary system of justice by negotiation." A. BLUMBERG, CRIMINAL JUSTICE 21 (1970).

422. *See supra* note 416.

423. *Id.* at 34.

424. *Id.* at 36.

425. *See* THE OTHER FACE OF JUSTICE, *supra* note 417, at 36.

426. *Id.* at 36. *The Other Face of Justice* reported that 60% of all institutional defenders surveyed did not have the assistance of full time staff investigators. Further, "[o]ver a quarter of those defenders not having staff investigators reported that investigatory expenses cannot be obtained in their jurisdiction." *Id.* at 21.

ance.[427] Further, assigned counsel, like their predecessors at the turn of the century, often were without adequate "training or experience in criminal defense skills."[428]

In 1976, a major study of indigent criminal defense undertaken for the Law Enforcement Assistance Administration ("LEAA") by the Boston University School of Law, *Right to Counsel in Criminal Cases, the Mandate of* Argersinger v. Hamlin,[429] argued against continued reliance on institutional defenders and assigned counsel as the exclusive means of representing poor people.[430] The report noted that underfunded indigent defense systems resulted in understaffed institutional defenders and the presence of "courthouse regulars" who depended upon court assignments for their livelihood.[431] The study concluded that "neglect from the politically powerful [organized] bar may result not only in overworked and ineffective public defender counsel but also in an even more extreme crisis in the criminal justice system."[432] In addition to calling for the organized bar's increased participation, the Boston University study advocated substantial modification of indigent defense systems to ensure adversarial representation.

The political attractiveness of a cost-efficient, non-adversarial model of representation served to perpetuate assembly-line justice and to limit the capacity of defender agencies to meet increased caseload demand. The very ideology which made institutional defenders attractive to the state disabled them from obtaining sufficient funding to satisfy *Argersinger's* mandate. By 1982, the amount spent nationally on representing poor defendants was less than 3 percent of all criminal justice expenditures.[433]

In 1982, a national study undertaken for the American Bar Association by Professor Norman Lefstein, *Criminal Defense Services for the Poor*,[434] emphasized the adverse consequences for poor people of the underlying structural goals of indigent defense providers. In an era of inflation, tax-cutting, and cost-efficiency, non-adversarial advocacy resulted in indigent defense systems with "grossly inadequate funding." Consequently, these systems did not have the capacity to provide adversarial representation in the face of increased caseload demands.[435] Lefstein concluded:

[M]illions of persons in the United States who have a constitutional

427. *See* THE OTHER FACE OF JUSTICE, *supra* note 417, at 44.

428. *Id.* at 44-45.

429. S. KRANTZ, D. ROSSMANN, P. FROYD & J. HOFFMAN, RIGHT TO COUNSEL IN CRIMINAL CASES (1976)[hereinafter RIGHT TO COUNSEL IN CRIMINAL CASES].

430. *Id.* at 235-36; *see also* Kittel, *Defense of the Poor: A Study in Public Parsimony and Private Poverty*, 45 IND. L.J. 90 (1969).

431. RIGHT TO COUNSEL IN CRIMINAL CASES, *supra* note 429, at 235.

432. *Id.*

433. R. SPANGENBERG, B. LEE, M. BATTAGLIA, P. SMITH & A. DAVIS, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY, FINAL REPORT 27 (1986) [hereinafter 1986 CRIMINAL DEFENSE SYSTEMS STUDY].

434. N. LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR (1982).

435. *Id.* at 13-14.

> right to counsel are denied effective legal representation. Sometimes defendants are inadequately represented; other times, particularly in misdemeanor cases, no lawyer is provided or a constitutionally defective waiver of counsel is accepted by the court. Defendants suffer quite directly, and the criminal justice system functions inefficiently, unaided by well trained and dedicated defense lawyers. There also are intangible costs, as our nation's goal of equal treatment for the accused, whether wealthy or poor, remains unattained.[436]

In 1986, the U.S. Department of Justice sponsored a national survey of indigent defense programs which disclosed that underfunded institutional defenders were no longer handling a growing number of cases, but were instead "shedding" cases to assigned counsel.[437] The survey discussed at least two factors contributing to the trend of case shedding. First, because institutional defenders applied an "increasingly strict standard of what constitutes a conflict of interest,"[438] defenders began making conflict declarations with greater frequency. Further, some declared conflict as a matter of policy in every codefendant case.[439] Court-assigned private attorneys, previously appointed only to cases involving actual ethical conflicts, became the beneficiaries of the new conflict policy.[440] Second, as case assignments increased, institutional defenders appeared to adopt maximum attorney caseloads recommended in 1976 by the *NLADA Guidelines for Legal Defense Systems in the United States*.[441] A maximum caseload policy permitted an overworked defender to "decline any additional cases" when additional assignments might have resulted in inadequate representation.[442] The *1986 Criminal Defense Systems Study* outlined some of the methods by which institutional defenders endeavored to deflect additional appointments, including negotiating fixed caseload levels with either local judges or with the program's funding source. Yet regardless of the method used, case shedding resulted in a significant increase in the number of indigent cases handled by the private bar.[443]

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436. *Id.* at 2.

437. 1986 CRIMINAL DEFENSE SYSTEMS STUDY, *supra* note 433, at 7. "Shedding" is the practice by institutional defenders of channeling cases to court-assigned private attorneys and private contract defenders. These cases fall within the mandate of the institutional defender, but are declined for reasons internal to the systemic operation of the defender agency. For a thorough discussion of the Legal Aid Society's case shedding practices in New York City, *see infra* chs. 8 & 10.

438. 1986 CRIMINAL DEFENSE SYSTEMS STUDY, *supra* note 433, at 7.

439. Approximately 25% of all adult felony cases involve codefendants. *Id.*

440. *Id.*

441. *See* NATIONAL LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS, FINAL REPORT, Guideline 5.1, at 516 & ch. 22 & Recommendations and Commentary at 424-26 (1976) [hereinafter 1976 NLADA GUIDELINES].

442. *Id.* at Guideline 5.3, at 517.

443. *See* 1986 CRIMINAL DEFENSE SYSTEMS STUDY, *supra* note 433, at 7. Codefendant case shedding occurs at the attorney's request in 50% of all counties surveyed nationally, at the defendant's request in 26% of all counties, and at the court's request in 38% of all counties. *Id.* at 35.

Los Angeles's experience demonstrates the concept and consequence of case shedding. In Los Angeles County, the Office of the Public Defender utilized the civil service law to place ceilings on the number of cases it would accept.[444] As the demand for indigent defense increased, public defenders began to decline assignments. Declarations of unavailability led to an increased reliance on court-assigned private attorneys to handle indigent defense cases and soon accounted for almost two-thirds of the cases referred to assigned counsel.[445]

Once it became evident that the cost per case for assigned counsel was considerably higher than that for the Public Defender, Los Angeles County developed alternative strategies for providing defense services.[446] These strategies included the establishment of contracts with groups of attorneys to handle a specified number of cases at a fixed hourly rate, development of a panel of approved private attorneys at pre-determined rates of compensation, and the creation of a new alternative private mid-range staff defense provider comprised of a designated number of attorneys who handle conflicts or unavailability cases.[447]

Increased reliance on private contract defenders, however, has resulted in the same systemic problems that *The Other Face of Justice* identified in 1973.[448] A 1982 report prepared by the NLADA, *Contract Bid Programs: A Threat to Quality Indigent Defense Services*,[449] found that these systems weighed cost over quality, placed arbitrary ceilings on representation which encouraged counsel to give short shrift to individual cases and failed to account for dramatically increased caseloads or individually difficult cases.[450] Contract systems discouraged the broad participation of the private bar rec-

444. *See* CAL. GOV'T CODE § 27706 (West Supp. 1986); SCIENCE APPLICATION, INC., A COMPARATIVE ANALYSIS OF INDIGENT DEFENSE SERVICES (1984) [hereinafter 1984 COMPARATIVE ANALYSIS].

445. *Id.* at 14. *See* CAL. PENAL CODE § 987.2 (West Supp. 1986); Ligda v. Superior Court, 5 Cal. App. 3d 811, 828, 85 Cal. Rptr. 744, 754 (1970).

446. 1984 COMPARATIVE ANALYSIS, *supra* note 444, at 17.

447. *Id.* The alternative mid-range defender has a contract with Los Angeles County to provide representation in the courts with the largest volume of cases. It has agreed to accept all cases that the public defender declines. *See also* 1986 CRIMINAL DEFENSE SYSTEMS STUDY, *supra* note 433, at 7, which documents the emergence of new mid-range defender services that accept the overflow from institutional defenders in 60% of public defender program counties nationally.

448. *See* THE OTHER FACE OF JUSTICE, *supra* note 417, at 36; *see also supra* notes 425-28 and accompanying text.

449. WILSON, CONTRACT BID PROGRAM: A THREAT TO QUALITY INDIGENT DEFENSE SERVICES (1982) [hereinafter WILSON, CONTRACT BID PROGRAM].

450. *Id.* at 19. In response to these findings, the NLADA adopted GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES (1984) [hereinafter 1984 NLADA GUIDELINES]. These guidelines represent the standards for the "contracting process" which were to encourage the "zealous, effective and efficient representation of the indigent accused." 1984 NLADA GUIDELINES, at 1. The guidelines provided for secretarial and support staff, social workers, forensic experts, investigative services, supervision and evaluation, and training and refer to "allowable caseloads." *Id.* at Guideline III-6, at 12. The contract should specify "a maximum allowable caseload for each full-time

ommended in *Right to Counsel in Criminal Cases*,[451] tended to provide inadequate investigative and expert services, failed to monitor or evaluate representation and lacked internal training programs for new attorneys.[452]

II.
THE ADOPTION OF NATIONAL STANDARDS

The failure of institutional defenders and assigned counsel to provide adversarial advocacy in conformity with *Gideon's* mandate was addressed by the American Bar Association, the National Legal Aid and Defender Associations, the National Advisory Committee on Criminal Justice Standards and Goals, and the Law Enforcement Assistance Administration of the Department of Justice.[453] These groups sought to legitimate indigent defense through the adoption of professional standards regarding both the provision of indigent defense services and the role of the defense lawyer in an adversary system of criminal justice.[454] These standards were supplemented by publications and courses in trial advocacy.[455] Thereafter, these efforts offered a justification for the private bar's continued reliance on institutional defenders and assigned counsel to fulfill the profession's pro bono responsibility to the poor.[456] In 1968, the ABA adopted *Standards for Providing Defense Services* which contained recommendations for operation of indigent defense systems to insure that they provided "counsel skilled in the practice of criminal law

attorney or equivalent, who handles cases through the contract. Caseloads should allow each lawyer to give every client the time and effort necessary to provide effective representation." *Id.*

451. *See supra* notes 429-32.

452. *See* WILSON, CONTRACT BID PROGRAM, *supra* note 449, at 11.

453. *See, e.g.*, AMERICAN BAR ASS'N, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROVIDING OF DEFENSE SERVICES, APPROVED DRAFT (1968) [hereinafter 1968 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES]; AMERICAN BAR ASS'N, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION, APPROVED DRAFT (1971) [hereinafter 1971 ABA STANDARDS FOR THE DEFENSE FUNCTION]; 1976 NLADA GUIDELINES, *supra* note 441; NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS (1973) [hereinafter 1973 NAC STANDARDS AND GOALS].

454. *Id.* The legitimating function of the organized bar's standards is considered by Abel in his analysis of the function of the bar's ethical rules, *Why Does the ABA Promulgate Ethical Rules?* 59 TEX. L. REV. 639 (1981). Abel contends that codes of professional behavior serve to legitimate the practices of lawyers by suggesting that "ethical dilemmas" may be resolved without the need "for structural changes." *Id.* at 670. The purpose of such rules, then, is "not to describe reality or even to prescribe right behavior, but rather to create a myth about what lawyers might be in order to disguise what they are." *Id.* at 668 (footnote omitted). *See infra* chs. 5, 6, 8, & 10 for our empirical analysis of the differences between behavior proscribed by the profession's standards and everyday practice in New York City's indigent defense system.

455. *See, e.g.*, A. AMSTERDAM, B. SEGAL, & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES (3d ed. 1974) [hereinafter A. AMSTERDAM, TRIAL MANUAL].

456. In 1967, the American Law Institute-American Bar Association Joint Committee on Continuing Legal Education published the first edition of A. AMSTERDAM, TRIAL MANUAL, *supra* note 455. By 1971, 6,500 copies had been distributed and the organized bar announced that it had accomplished its objective of enhancing "the ability and capacity of the bar to defend in criminal cases." *See* Wolkin, *Forward* to A. AMSTERDAM, TRIAL MANUAL, *supra* note 455.

and subject to disciplinary control of the profession."[457] The author reasoned that:

> Because society—not the defendant—has selected the adversary as its choice of mechanism, our deliberate choice of that kind of system, rather than some notion of benevolence or gratuity to the poor, requires that both sides have professional spokesmen who know the rules, *i.e.*, that they both be trained lawyers.[458]

A second edition to the *ABA Standards for Providing Defense Services*[459] recommended that jurisdictions adopt "mixed" representational systems comprised of both full-time institutional defenders and private assigned counsel.[460] The *1976 NLADA Guidelines for Legal Defense Systems* provided that a coordinated system would either be centrally administered with authority over both institutional defenders and assigned counsel or separately administered by each defense entity with coordination on such matters as "training and support services" and allocations of caseload.[461] The administrator(s) would be charged with screening attorneys, monitoring the quality of representation, and distributing cases between each defense entity. "[T]he percentage of cases handled by each component . . . should depend on the relative sizes, expertise and availability of the staff defender and of the panel of private lawyers."[462] The administrator(s) would also assume responsibility for developing, promulgating and implementing this plan; it would presumably include such tasks as setting up a system of accounting and record-keeping, and establishing a unit of investigators, experts and secretarial support staff which would accommodate both defense entities.[463]

To guard against excessive caseloads, the *ABA Standards* recommended that institutional defenders and assigned counsel should not "accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations."[464]

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457. 1968 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, *supra* note 453, Introduction, at 2.

458. *Id.*

459. 1980 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, *supra* note 415.

460. *Id.*, Standard 5-1.2, at 5.8. & Commentary, at 5.9.

461. 1976 NLADA GUIDELINES, *supra* note 415, Guidelines 2.1-2.2, at 504. Details are contained in the guidelines adopted by the National Legal Aid and Defender Association, and the National Advisory Commission on Criminal Justice Standards and Goals, *see also* 1973 NAC STANDARDS AND GOALS, *supra* note 453, Standard 13.15, at 282, which recommended that the administrator of the institutional defender should also be charged with the responsibility for the assigned counsel system. *But see supra* note 396 and accompanying text.

462. 1976 NLADA GUIDELINES, *supra* note 415, Guideline 2.2, at 504; Recommendations and Commentary, at 135. *But see supra* text accompanying notes 391-93.

463. *See id.* at Guideline 2.1, at 504 & Recommendations and Commentary, at 133-35; Guideline 3.1, at 511; at 264-67. For a detailed analysis of the proper role of the administrator in a coordinated institutional defender-assigned counsel system, see Allison, *Relationship Between the Office of Public Defender and the Assigned Counsel System*, 10 VAL. U.L. REV. 399, 413-14 (1976). *But see* supra note 415 and accompanying text.

464. 1980 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, *supra* note 415, Stan-

The *NLADA Guidelines* further recommended that each defense system adopt maximum attorney caseloads that would reflect national standards.[465] Under this system, an individual staff attorney has the duty "not to accept more clients than he can effectively handle . . . . If such a situation arises, the staff attorney should inform the court and his client of his resulting inability to render effective assistance of counsel."[466]

The *NLADA Guidelines* provided for "continuous and uninterrupted representation" through all stages of the proceedings to permit the development of a close and confidential attorney-client relationship.[467] The commentaries to the *ABA Standards* rejected "stage" or "horizontal" representation, a cost-efficient method of case processing adopted by institutional defenders with limited staff in large cities,[468] in which different staff attorneys were deployed at each stage of the criminal process without any ongoing case responsibility.[469]

To develop a skilled and vigorous defense bar, rather than one which depended upon patronage or discrimination in the assignment system, the

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dard 5-4.3, at 5.47. The Commentary to the standard provided the following justification for workload limitations:

> One of the most significant impediments to the furnishing of quality defense services for the poor is the presence of excessive workloads. All too often in defender organizations attorneys are asked to provide representation in too many cases. Unfortunately, not even the most able and industrious lawyers can provide quality representation when their workloads are unmanageable. Excessive workloads, moreover, lead to attorney frustration, disillusionment by clients, and weakening of the adversary system.

Id., at 5.48.

465. 1976 NLADA GUIDELINES, *supra* note 415, Recommendations and Commentary, at 424. The report described the effect of excessive caseloads on the quality of representation provided by institutional defender agencies.

> Excessive caseloads in themselves often result in incompetent service in defender offices. Some of the byproducts of excessive caseloads are: a) the defender system is forced to resort to stage or "zone" representation, with all of the associated problems that depersonalized assembly-line justice entails; b) the guilty plea is the currency of such a system, but the defender is, for that very reason, deprived of stature at the bargaining table; c) fact investigation is not properly supervised or conducted, witnesses are not interviewed, and trials are lost that should have been won; d) adequate resources cannot be channeled into supervision and training, and the lack of competence problem is compounded; e) the defender office finds itself unable to recruit able attorneys, and unable to retain for long the attorneys it does manage to hire; and f) the result is a generalized stagnation, disaffection and atrophy of the defense function. The goal of every defender system should be to provide quality defense representation, and this requires that the Defender Director be able to assess and control maximum effective staff-case ratios.

Id. at 409 (footnotes omitted).

466. *Id.*, at Guideline 5.3, at 517.

467. *Id.*, Guideline 5.11, at 520. *See also* 1980 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, *supra* note 415, Standard 5-5.2, at 5.53; 1968 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, *supra* note 453, Standard 5.2, at 46.

468. 1980 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, *supra* note 459, Standard 5-5.2, at 5.53, Commentary at 5.54.

469. *Id.*

ABA Standards recommended that assignments should not be given to lawyers "merely because they happen to be present in the court at the time the assignment is made."[470] Instead, they "should be distributed as widely as possible among the qualified members of the bar" who are active in trial practice and familiar with criminal practice and procedure.[471] It was further recommended that assignments should be administered in an orderly way on a rotational basis from names which appear on a roster of qualified lawyers.[472] Finally, the *NLADA Guidelines* provided that institutional defenders should be compensated at the rate commensurate with their experience. Assigned counsel should be paid for time and services at a reasonable rate in accordance with prevailing standards.[473]

In 1971, the American Bar Association adopted *Standards for the Defense Function*, which contained instructions on how criminal defense attorneys should defend their clients.[474] The commentary to these *Standards* excoriated lawyers for not defending clients' rights by attempting to harmonize the defense function with that of the prosecution.[475] The commentary delineates the role of an accused's counsel, reminding defense attorneys of their "obligation of fidelity" to the defendant.[476] "Defense counsel should not be viewed as impeding the administration of justice simply because he challenged the prosecution, but as an indispensible part of its fulfillment and this view should underly the attitudes of the other participants and the Standards governing his own conduct."[477]

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470. *Id.* at Standard 5-2.1, at 5.23. The commentary to Standard 5-2.1 criticized the ad hoc appointment of courthouse regulars whose presence judges rely upon when institutional defenders are not present in the jurisdiction or unavailable:

> At its worst, the ad hoc system for assigning counsel is typified by the practice of appointing lawyers only because they happen to be present in the courtroom at the time a defendant is brought before the judge. This method of assignment obviously is unlikely to achieve an equitable distribution of assignments among the qualified members of the bar, and in some jurisdictions the practice has given rise to a cadre of mediocre lawyers who wait in the courtroom in hopes of receiving an appointment.

Id. at 5.25.

471. *Id.* at Standard 5-2.2, at 5.26, Commentary at 5.27. The commentary to Standard 5-2.2 recommended that:

> to assure the presence of sufficient numbers of private practitioners capable of providing competent legal services . . . some effort also should be devoted by the administrators of the program to monitoring the performance of assigned counsel . . . . At the very least, the staff of the program should investigate and keep track of any complaints made against assigned counsel by judges and clients. Where there is compelling evidence that an attorney consistently has ignored basic responsibilities. . . additional appointments to the panel member ought not be made by the assigned-counsel program.

Id. at 5.28.

472. *Id.* at Standard 5-2.3, at 5.28. The rationale for rotating case assignments is to achieve equality of distribution among qualified attorneys. *Id.*

473. 1976 NLADA GUIDELINES, *supra* note 441, at Guideline 3.1, at 511.

474. *See generally* 1971 ABA STANDARDS FOR THE DEFENSE FUNCTION, *supra* note 453.

475. *Id.* at 173.

476. *Id.*

477. *Id.* at Standard 3.2(a), at 204.

The *Standards for the Defense Function* provided detailed instructions to criminal defense attorneys for the conduct of each phase of a criminal case. When interviewing the defendant, attorneys "should probe all legally relevant information."[478] After accepting assignment, attorneys have a duty to conduct prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or a stated desire to plead guilty.[479] Counseling a defendant to plead guilty is only considered appropriate after the defense counsel has completed a "full investigation and study" and, in the attorney's opinion, conviction after trial is "probable."[480]

The *ABA Standards For Providing Defense Services*, the *NLADA Guidelines*, and the *NAC Standards and Goals* are non-mandatory recommendations for the operation of defense systems.[481] These national standards, however, have had little impact on the provision of adversarial advocacy because the underlying principles upon which indigent defense systems are organized reject lawyering that focuses upon the needs of the defendant.[482] Providing a mechanism for the swift disposition of indigent criminal cases is the system's objective and the political concern embraced by the organized bar and the state. The commonly accepted result is denying poor people adequate defense. Without displacing both the structural goals of indigent criminal defense and the alliance between indigent defense providers, the state and the organized bar, national standards function only at a rhetorical level. The justification is that these standards represent the aspirations of the entire profession, while further claiming that modification of the existing systems will fulfill *Gideon's*

478. *Id.* at Standard 4.1, at 225-26.

479. *Id.* at Standard 6.1(b), at 245.

480. *Id.* However, the requirement that defense counsel first determine whether conviction after trial is probable before engaging in plea negotiations was eliminated from the revised *1980 ABA Standards for the Defense Function*. AMERICAN BAR ASS'N, STANDING COMMITTEE ON ASS'N STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION, Standard 4-6.1(b), at 4.70 (1980) [hereinafter 1980 ABA STANDARDS FOR THE DEFENSE FUNCTION]. The language used in the discussion of the history of the standard is remarkably similar to that used by the Voluntary Defenders' Committee in 1926, when it sought to legitimate lesser plea practices:

> As revised, the standard does not require that defense counsel conclude that conviction is probable before engaging in plea negotiations. Indeed, even in instances where counsel believes that acquittal is likely, counsel may wish to ascertain whether, for example, there are lesser charges to which the prosecutor would accept a plea.

Id., History of Standard, at 4.70; *compare* LEGAL AID SOCIETY 51ST ANNUAL REPORT, VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT 65 (1926) [hereinafter 1926 VOLUNTARY DEFENDERS; COMMITTEE ANNUAL REPORT]; *supra* text accompanying note 249.

481. *See* 1976 NLADA GUIDELINES, *supra* note 441, at 8; 1980 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, *supra* note 459, Introduction at xix; NAC STANDARDS AND GOALS, supra note 452, Foreward at v. The ABA emphasized the discretionary nature of the standards: "[p]recisely how a jurisdiction may choose to implement these standards and to what degree is its choice alone." 1980 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, *supra* note 459, at xix.

482. *Cf.* Abel, *supra* note 454, at 667-68.

mandate.[483]

The resistance of institutional defenders and assigned counsel to any meaningful reform which would bring them into compliance with the national standards is illustrated by New York City's indigent defense system. The interdependence and parallel growth of the Legal Aid Society and the 18-B Panel violates virtually every standard for a "coordinated system of indigent defense." Nonetheless, the indigent defense system has survived and grown to the point where the Legal Aid Society and the 18-B Panel disposed of over 161,000 cases in 1984.[484]

III.
NEW YORK CITY'S INDIGENT DEFENSE SYSTEM'S RESPONSE TO INCREASED CASELOAD DEMAND AND RENEWED CALLS FOR ADVERSARIAL ADVOCACY

Neither the Legal Aid Society contract nor the *Bar Association Plan* provided a mechanism for dealing with expanding caseloads. The Society depended upon annual contract negotiations to ensure that its funding matched the demand for representation. When the negotiated funding proved inadequate to meet the demand, the Society informally reduced its share of the workload. Actions taken by the Society, in response to caseload pressures, visibly affected the number of defendants referred to the 18-B Panel. The Panel lacked both the inclination and the capacity to control its caseload. Panel attorneys therefore absorbed the cases that the Society did not handle. Though various observers, including committees of court administration, the City, and the organized bar, identified the shift of cases from the Society to the Panel, no effort to overhaul the system emerged. Over time, the Society redistributed a substantial portion of its caseload to Panel attorneys and the Panel became a major provider of indigent defense services.

In the following section we will trace the redistribution of the Legal Aid Society's caseload following the adoption of Article 18-B through six phases: 1) the first six years of the *Bar Association Plan*, 1966-1971, during which time the demand for representation increased, the Society responded by adopting a system of stage representation, and the number of cases referred to assigned counsel grew dramatically; 2) the reform era, 1971-1975, when changes altered the process of certifying and monitoring 18-B Panel attorneys and the Society adopted a system of "vertical" continuity; 3) the post-reform era, 1975-1982, when efforts at reforming the Panel were abandoned and the Society dealt with caseload pressure through an informal accommodation reached with its staff attorneys' union; 4) the events leading to the staff attorneys' 1982 strike; 5) the 1982 strike, its settlement, and the resulting increase in the number of Panel assignments; and 6) the condition of each defense entity at the start of our research in 1984.

483. *See supra* text accompanying notes 332-39.
484. *See* TABLE 11-8, at 872.

A. *The First Years of the* Plan, *1966-1971*

In the period immediately following the effective date of Article 18-B,[485] the volume of cases going to 18-B Panel attorneys, though greater than anticipated, fell well within the administrator's capacity to adhere to the *1966 Plan*. During the first year of the *Plan's* operation, in the Appellate Division, First Department (New York and Bronx Counties), the Panel administrator assigned approximately 500 cases to Panel attorneys.[486] The Panel administrator's first report indicated that, while some modification in the *Plan* might be required in the future, "experience to date has been satisfactory and the plan is working smoothly."[487]

Between 1965 and 1970, however, the number of Supreme Court indictments doubled.[488] Moreover, as the actual number of indigent defendants increased, the Panel's caseload and expenditures also increased.[489]

This growing caseload revealed a fundamental tension in New York City's system of indigent criminal defense; no mechanism existed for insuring that the expectation of the 1966 *Plan* would be met. The *Plan* contemplated a division of cases between the Legal Aid Society, which would get the vast majority, and 18-B Panel attorneys, who would be allocated a small, residual portion.[490] But in the absence of a fixed caseload allocation system, the two defense entities functioned without regard either to the contemplated distribution of cases under the *Plan* or to the effect that a departure from this contemplated distribution would have on the quality of indigent defense services in general.[491]

485. Article 18-B took effect on December 1, 1965. N.Y. COUNTY LAW § 722 (McKinney 1972).

486. L. Tolman, Annual Report of the Departmental Committee of the First Judicial Department, in 17th Annual Report of the Administrative Board of the Judicial Conference of the State of New York for the Judicial Year July 1, 1970 through June 30, 1971, N.Y. LEGISLATIVE DOC. No. 90, at 129 (1972) [hereinafter 1972 L. Tolman Report]. We have no comparable information on the number of assignments made by the administrator for the Second Department (Kings, Queens, and Richmond Counties).

487. L. Tolman, Annual Report of the Departmental Committee of the First Judicial Department, in 12th Annual Report of the Administrative Board of the Judicial Conference of the State of New York for the Judicial Year July 1, 1965 through June 30, 1966, N.Y. LEGISLATIVE DOC. No. 90, at 62 (1967) [hereinafter 1967 L. Tolman Report].

488. From 12,159 in FY 1965, the number of indictments rose to 23,561 by FY 1968. Administrative Board of the Judicial Conference of the State of New York, 15th Annual Report for the Judicial Year July 1, 1968 through June 30, 1969, N.Y. LEGISLATIVE DOC. No. 90, at A143 (1970) [hereinafter 1970 Judicial Conference Report]; Administrative Board of the Judicial Conference of the State of New York, 10th Annual Report for the Judicial Year July 1, 1964 through June 30, 1965, N.Y. LEGISLATIVE DOC. No. 90, at 431 (1966) [hereinafter 1966 Judicial Conference Report].

489. *See infra* TABLE 3-1, at 665.

490. *See supra* text accompanying notes 391-93.

491. The shift of cases from the Legal Aid Society to the 18-B Panels occurred without regard to pre-existing caseloads, available resources, or charge severity. *See infra* text accompanying notes 496-510. By contrast, some jurisdictions adopted a fixed system of caseload allocation through the setting of pre-existing caseload limits. In San Diego, for example, cases are distributed between the private bar and the institutional defender according to charge severity.

Table 3-1 illustrates the absolute growth in the First Department 18-B Panel's caseload and that growth's fiscal impact.

TABLE 3-1: *Growth in Workload and Expenditures of the 18-B Panel, First Department, 1966-1972*[492]

	FY1966	FY1970	FY1971	FY1972
Requests for counsel	746	3,975	5,165	5,845
Felony referrals	611	3,360	4,425	5,030
Misdemeanor referrals	135	615	740	815
Total dispositions	316	2,622	2,986	3,076
Vouchers for fees	n/a	2,961	4,450	4,715
Total fees and disbursements to attorneys and experts	$99,781	$803,000	$1,144,000	$1,325,217

A REPORT OF THE BLUE RIBBON COMMISSION ON INDIGENT DEFENSE SERVICES TO THE SAN DIEGO COUNTY BOARD OF SUPERVISORS, TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL 19-20 (1985) [hereinafter 1985 BLUE RIBBON COMMISSION REPORT].

In other jurisdicitions litigation spawned caseload limits. In *State v. Smith*, for example, the Arizona Supreme Court declared unconstitutional a contract system which placed no limit on the number of cases an attorney could be assigned. State v. Smith, 140 Ariz. 355, 362, 681 P.2d 1374, 1381 (1984). The Court declared that before an assignment is made, each judge must consider the complexity of the case, the attorney's qualifications and experience, and the anticipated time to completion. *Id.* at 361, 681 P.2d at 1380. *See also* Comment, *State v. Smith: Placing a Limit on Lawyer's Caseloads*, 27 ARIZ. L. REV. 759 (1985). Other public defender systems have employed a variety of litigative strategies to control caseloads. *Id.* at 24-30. For example, in Oregon, judges refused to allow public defenders with massive caseloads to decline appointments. Consequently, the State Appellate Defender filed a writ of mandamus against one of the presiding judges. The Oregon Supreme Court held that the trial court had a nondiscretionary duty to honor the finding of the public defender committee, as set forth in an Oregon statute, that the public defender office was unable to accept any additional cases. The court granted the writ of mandamus and directed the judge to appoint private counsel to handle the overflow. State *ex rel* Acocella v. Allen, 288 Or. 175, 178-82, 604 P.2d 391, 393-96 (1979); *see also* N. GOLDBERG, M. HARTMAN, R. BRANDT. S. SINGER & W. O'BRIEN, PERSPECTIVES RELATING TO CASE OVERLOAD IN DEFENDER OFFICES: DEVELOPING STRATEGIES FOR RESOLVING WORKLOAD PROBLEMS AND CONTROLLING CASELOADS 24-25 (1985) [hereinafter CONTROLLING CASELOADS].

In Solano County, California, the Public Defender Director successfully pressured the county administrator into hiring additional full-time attorneys by threatening to file writs of mandamus in every case as long as the defender's office was overloaded. CONTROLLING CASELOADS at 26-27.

Although the Colorado Public Defender filed suit when the legislature cut the staff of its already overburdened office, political action on the part of the state's counties obtained favorable results. Because there was a lack of public defenders, judges began appointing private counsel at county expense. Political pressure from the counties forced the legislature to increase the staff of the public defender's office beyond the pre-cut level. *Id.* at 28. *See generally* Wilson, *Litigative Approaches to Enforcing the Right to Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. SOC. CHANGE 203 (1986).

492. The *Table* is extracted from the Annual Report of the Departmental Committee for The Judicial Year, 1971-1972. *See* G. Stern, Annual Report of the Departmental Committee of the First Judicial Department, in 19th Annual Report of the Administrative Board of the Judicial Conference of the State of New York for the Judicial Year July 1, 1972 through June

As *Table 3-1* shows, within six years of the adoption of the *Bar Association Plan*, the number of felony referrals in the First Department had increased more than eightfold, from 611 to 5,030, and the 18-B Panel disposed of about ten times as many cases as it did in the first year of its operation.

The shift of cases from the Legal Aid Society to the 18-B Panel is even more striking. While the First Department Panel experienced a tenfold growth in dispositions from 1966, the Society's dispositions less than tripled.[493] Thus, despite the nationwide trend toward reliance on institutional defense,[494] private attorneys had once again assumed a major role in representing poor defendants in New York City.

Three policy decisions within the Legal Aid Society help account for this shift. The first stems from the Society's efforts to meet sharply increased caseload demands in the face of a contract which required the Society to accept an unlimited number of cases on a fixed budget.[495] The Society utilized a system of stage (horizontal) representation,[496] which assigned staff attorneys

30, 1973, N.Y. LEGISLATIVE DOC. No. 90, at 105 (1974) [hereinafter 1974 G. Stern Report]; *see also* 1972 L. Tolman Report, *supra* note 486.

493. In fiscal year 1964, the Legal Aid Society disposed of 6,931 cases in Supreme Court and 55,969 in Criminal Court for a total of 62,900 dispositions. Institute of Judicial Administration, Report to the Mayor of the City of New York on the Cost of Providing Defense Services for Indigents in Criminal Cases 6 (Nov. 1965) [hereinafter 1965 Report to Mayor on the Cost of Defense]. By fiscal year 1972, the Society's total number of dispositions increased threefold, to 151,955. Its Criminal Court dispositions increased to 137,272 and its felony dispositions rose to 14,683. Report to the Judicial Conference for the Judicial Year July 1972 to June 1973 [hereinafter Report UCS-195 (1973) Legal Aid Society].

494. In 1961, 75% of all indigent defendants nationwide were represented by court-assigned counsel and 25% by institutional defenders. *See* E. BROWNELL, LEGAL AID IN THE UNITED STATES 12 (Supp.1961). By 1973, however, the proportion of institutional defenders to court-assigned counsel had reversed. Nationally court-assigned private attorneys represented 36% of the indigent defendants in 1973 while institutional defenders represented 64%. *See* THE OTHER FACE OF JUSTICE, *supra* note 417, at 13.

495. *See* Agreement Between the City of New York and the Legal Aid Society (Aug. 6, 1966), reprinted *infra* app. 2(c), para. First, at 933 [hereinafter 1966 Agreement]. By contrast, the 1984 NLADA GUIDELINES state that "[t]he contract should specify a maximum allowable caseload for each full-time attorney, or equivalent, who handles cases through the contract. Caseloads should allow each lawyer to give every client the time and effort necessary to provide effective representation." 1984 NLADA GUIDELINES, *supra* note 450, Guideline III—6, at 12. The comment warns: "Under no circumstances should maximum allowable caseloads for each full-time attorney exceed the following: (a) 150 felonies per attorney per year; or (b) 300 misdemeanors per attorney per year; or (c) 200 juvenile cases per attorney per year; (d) 200 mental commitment cases per attorney per year; (e) 25 appeals to appellate court hearing a case on the record and briefs per attorney per year." *Id.*

Even older standards, which do not define a maximum caseload number, specify that there must be one. For example, NLADA *Guideline* 5.1 provides that "[i]n order to achieve the prime objective of effective assistance of counsel to all defender clients, which cannot be accomplished by even the ablest, most industrious attorneys in the face of excessive workloads, every defender system should establish maximum caseloads for individual attorneys in the system." 1976 NLADA GUIDELINES, *supra* note 441, at 516.

496. *See* Supreme Court of the State of New York, Appellate Division, First and Second Departments, Subcommittee on Legal Representation of Indigents, Report on the Legal Representation of the Indigent in Criminal Cases, 10-12 (June 17, 1971) [hereinafter 1971 Report].

to courtrooms rather than to cases.[497] Under this system, a criminal defendant was represented by a different Society staff attorney as the case moved from one courtroom to another. Theoretically, stage representation was supposed to enable the Society to process more defendants with the same number of staff attorneys and thereby continue to service the indigent in an "efficient" and "cost effective" manner. In reality, however, this method of representation reinforced the commitment of attorneys to case movement rather than representation of individual clients.[498] Judges came to associate attorneys

497. All the national standards for indigent defense services have criticized the practice of stage representation. For example, *NLADA Guideline* 5.11 provides that "[d]efender offices should provide for continuous and uninterrupted representation of eligible clients from initial appearance through sentencing up to, but not including, the appellate and post-conviction stages by the same individual attorney." 1976 NLADA GUIDELINES, *supra* note 441, at 520; *see also* 1980 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, *supra* note 459, Standard 5-5.2, at 5.53; *see also supra* note 467 and accompanying text.

Stage representation also appears to violate the ethical rules of the legal profession. The ABA Code of Professional Responsibility states that a lawyer may not withdraw from representation of a client in a pending matter except under certain specified circumstances, such as improper conduct by the client, the development of a conflict of interest or other ethical impediment to continued representation, or the lawyer's own incapacity. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(C) (1981). The ethical considerations accompanying the code provide that: "A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances . . . . A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-32 (1981).

Nevertheless, institutional defense systems in large urban centers widely adopted the practice of stage representation. A 1976 report to the National Institute of Justice indicated that 63% of all institutitonal defenders utilized stage representation in an attempt to meet unlimited caseload demands. Of those institutional defenders which relied upon stage representation, 82% were located in areas with populations of one million or more. *See* S. SINGER, B. LYNCH & K. SMITH, NLADA FINAL REPORT OF THE INDIGENT DEFENSE SYSTEMS ANALYSIS PROJECT 51 (1976) [hereinafter 1976 INDIGENT DEFENSE SYSTEMS ANALYSIS PROJECT]. For examples of other cities which have utilized the system of stage representation, see J. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 103 (1972); Graham & Letwin, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal Policy Observations*, 18 UCLA L. REV. 636, 649 (1971).

The pragmatic argument made in favor of stage representation is that it is a cost-effective method of defending "a maximum number of indigents with the limited resources available." Wice & Suwak, *Current Realities of Public Defender Programs, A National Survey and Analysis*, 10 CRIM. L. BULL. 161, 172 (1974). Thus, institutional defenders, in cities where the representation of the poor is not a top budget priority, are satisfied with the "assembly-line scheme as a necessary balance between the ideals of justice for all and the realities of current backlogs." *Id.* at 173; *see also* Wice & Pilgrim, *Meeting the Gideon Mandate: A Survey of Public Defender Programs*, 58 JUDICATURE 400, 406-07 (1975).

498. *See, e.g.*, U.S. *ex rel.* Thomas v. Zelker, 332 F. Supp. 595 (S.D.N.Y. 1971), where a federal court found on a habeas corpus motion that a defendant who was represented by at least four Legal Aid Society attorneys during his pretrial confinement was denied effective assistance of counsel. The court held that:

> [F]or whatever reasons of calendar pressure and Legal Aid counsel left petitioner to the most brutal and horrifying kind of isolation, effectively walled off for many months from any genuine assistance by a facade of "representation." Those supposedly aiding him failed even to see him. He did not know who his lawyer, as a live human being, was supposed to be.... To put the matter more precisely, he was never

with courtrooms rather than with clients or particular cases. As the relationship between the Society's attorneys and their clients weakened, the proportion of cases referred to the 18-B Panel increased. Judges replaced Society staff attorneys with Panel attorneys when, "for any reason," the Society's staff attorneys were "not available" to undertake case responsibility,[499] instead of requiring a compelling and "appropriate" reason, as the Society contract envisioned.[500]

The second cause of the shift of cases from the Legal Aid Society to 18-B Panel attorneys was a change in the Society's policy with regard to multiple-defendant cases, cases in which two or more defendants are joined on the same accusatory instrument and charged with the same or related offenses.[501] By 1971-1972, the Society had adopted a policy of representing only one co-defendant in a multiple-defendant case[502] on the ground that joint representation

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told that nothing was being done to pursue the elementary and obvious things required for even a rudimentary defense.

Id. at 599. Although the Legal Aid Society formally eliminated stage representation by 1974, *see infra* text accompanying notes 563-64, our field observations in New York County during 1984-1985 revealed continued Society reliance on horizontal representation. *See* the discussion of the role of the Society's "catcher," *infra* pp. 844-47.

The effects of stage representation in other jurisdictions are well documented in the literature. *See* Gilboy & Schmidt, *Replacing Lawyers: A Case Study of the Sequential Representation of Criminal Defendants*, 70 J. CRIM. L. & CRIMINOLOGY 1, 3 (1979); Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 486.

499. Office of Court Administration of the State of New York, Advisory Committees on Court Administration, Subcommittee on Legal Representation of the Indigent and Limited Income Groups, Report on the Legal Aid Society and the 18-B Panels, at 3 (Circulating Draft, Aug. 1975) [hereinafter 1975 Report on the Legal Aid Society and the 18-B Panels]. The willingness of judges to substitute Panel attorneys for the Society's staff attorneys was evident throughout our field research in New York County. For a discussion of the effects that this practice had on the proportionate share of the Panel's workload in Supreme Court, *see infra* chs. 8, 10.

500. 1966 Agreement, *supra* note 495, at 929; *see also supra* note 395 and accompanying text.

501. *See* 1975 Report on the Legal Aid Society and the 18-B Panels, *supra* note 499, at 9. The 1975 Report indicated that the Society's multiple-defendant policy was one of a "combination of factors" which had caused the dramatic increase in 18-B referrals from 1970 to 1973. *Id.* *See also infra* note 568.

502. 1975 Report on the Legal Aid Society and the 18-B Panels, *supra* note 499, at 9. By late 1972, the Legal Aid Society automatically declined representation of more than one defendant in multiple-defendant cases. In its 1975 report, the Subcommittee on Legal Representation of the Indigent noted that 18-B Panel attorneys handled cases involving more than one defendant "because LAS feels that representing more than one defendant in the same case involves an inherent conflict of interest." 1975 Report on The Legal Aid Society and the 18-B Panels, *supra* note 499, at 3. The Subcommittee described the Society's policy in multiple-defendant cases as "neither universal nor unique." *Id.* The Subcommittee reported that public defenders in Washington, D.C. and New Jersey also refused to represent more than one defendant in multiple-defendant cases. Other defender services, including the Philadelphia public defender, declined representation in multiple-defendant cases only when a true conflict of interest arises. The Cook County defender routinely represented more than one defendant in multiple-defendant cases. *Id.*

posed an "inherent" conflict of interest.[503] The Society's policy of automatically declining representation of more than a single defendant in a multiple-defendant case — while providing routinized protection against claims of ineffectiveness — is not mandated by constitutional constraints[504] or the *ABA Standards for Criminal Justice*.[505] The Society's contract with the City and

503. *Id.* at 3.

504. *See* Cuyler v. Sullivan, 446 U.S. 335 (1980); Halloway v. Arkansas, 435 U.S. 475 (1978); U.S. v. Glasser, 315 U.S. 60 (1942).

The Legal Aid Society's policy, however, is consistent with national trends for institutional defenders. *See* R. SPANGENBERG, B. LEE, M. BATTAGLIA, P. SMITH & A. DAVIS, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY, FINAL REPORT at 7, 35 (1984) [hereinafter 1984 CRIMINAL DEFENSE SYSTEMS STUDY]. The implications of such a policy are significant when one considers that nationally, there are co-defendants in approximately 25 percent of all adult felony cases. *Id.* at 7. By contrast the Supreme Court has held that a "presumption [of conflict] would preclude multiple representation in cases where '[a] common defense . . . gives strength against a common attack.' " *Cuyler*, 446 U.S. at 348 (1980). Indeed, even in a case of *actual* conflict, involving two separate divisions of the Legal Aid Society, the New York Court of Appeals found that the defendant was not denied effective assistance of counsel without a showing of actual prejudice. People v. Wilkins, 28 N.Y.2d 53, 268 N.E.2d 756, 320 N.Y.S.2d 8 (1971). *See* People v. Lloyd, 51 N.Y.2d 107, 412 N.E.2d 371, 432 N.Y.S.2d 685 (1980); People v. Gomberg, 38 N.Y.2d 307, 312-14, 342 N.E.2d 550, 554, 379 N.Y.S.2d 769, 773-75 (1975); *see also supra* note 392; *A System in Crisis: The Assigned Counsel Plan in New York:* A Report of the Association of the Bar of the City of New York, Committee on Criminal Advocacy, *reprinted infra* app. 4, at 950-54 (1986) [hereinafter *A System in Crisis*].

505. *See supra* note 392. ABA Standard 4-3.5(b) recognizes that the *potential* for conflict exists in all multiple-defendant cases and that an attorney should usually decline such representation. Nevertheless, if after "careful investigation," it is clear that no actual conflict is likely to develop and the defendants agree to joint representation by a single attorney, such representation is permitted. AMERICAN BAR ASS'N, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION, Standard 4-3.5(b), at 4.39 (1980).

Some commentators have suggested that institutional defenders can avoid disqualification even in cases of actual conflict by isolating the attorney handling the conflict from the other attorneys in the office. *See* R. Wilson, Responses by Public Defender Office to Conflicts of Interest Arising From Representation of Multiple Defendants at Trial 15 (Dec. 6, 1984) [hereinafter 1984 Wilson Responses]. Geer, *Representation of Multiple Defendants*, 62 MINN. L. REV. 119, 161 n.170 (1978); *see also A System in Crisis, supra* note 504, at 953. Moreover, recent case law in Illinois seems to support the proposition that a public defender may establish a conflicts unit which insulates its attorneys from disqualification. *See* People v. Robinson, 402 N.E.2d 157 (Ill. 1980), where the court concluded that:

> The avoidance of conflicts of interest which result in failure to provide effective assistance of counsel does not require us to hold that the individual attorneys who comprise the staff of a public defender are members of an entity which should be subject to the rule that if one attorney is disqualified by reason of conflict of interest then no other member of the entity may continue with the representation.

Id. at 162. While a policy of disqualification is administratively convenient in every case involving co-defendants, some public defenders have formulated written policies that seek to restrict the application of this rule and guard against the assignment of cases to unqualified, poorly supported court-assigned private attorneys. For example, the policy of the public defender in Denver, Colorado is that "the decision to conflict-off a case must only be done after serious consideration of all the factors involved, and should not be requested on frivolous grounds or to avoid an unpleasant case or defendant." 1984 Wilson Responses, *supra*, at 11, app. at 2. In cases involving multiple defendants, the Denver Public Defender has staff attorneys conduct a preliminary review of the appropriateness of disqualification. Staff attorneys protect the rights of all co-defendants by not interviewing them concerning "the facts of the case" prior to a disqualification decision and are directed "as soon as it is humanly possible . . . [to obtain]

the *Bar Association Plan* contemplated that the Society would decline representation only in cases involving an *actual* conflict of interest.[506] Nonetheless, judges accepted the Society's position and routinely assigned Panel attorneys in multiple-defendant cases. Given the general increase in multiple-defendant cases since 1964,[507] the Society's policy change caused additional growth in the Panel's proportionate share of the indigent criminal caseload.[508]

Third, the Legal Aid Society steadfastly refused assignments in homicide cases. This refusal contributed to the 18-B Panel's disproportionately large number of felony referrals. The *1966 Bar Association Plan* authorized judges, but did not require them, to substitute Panel attorneys for the Society attorneys in homicide cases.[509]

Thus, the effect of the Legal Aid Society's actions was to expand the group of defendants represented by 18-B Panel counsel beyond that originally envisaged. The intent of the 1966 *Plan* was that only a small number of defendants should be assigned to Panel attorneys. Yet the Panel administrators lacked control of the referral system and were ill equipped to accommodate the rise in Panel assignments. Individual judges, rather than Panel administrators or assignment clerks, decided how many cases would be referred to the Panel. The role of the administrators was limited to designating an attorney from the appropriate Panel (felony or misdemeanor), in rotational order, from a list drawn by lot from those attorneys certified by the organized bar.[510]

In addition to the deviations caused by the Legal Aid Society's policies,

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discovery . . . to determine if an actual conflict exists . . . ." If a conflict is real, a motion to withdraw as to one of the defendants must be filed immediately. *Id.* Once such a determination is made, it is the Denver Public Defender's policy to represent that co-defendant who "appears to be the most culpable or [who] appears to be in the most amount of trouble." *Id.* at 12.

By contrast, our research revealed that in New York County, Legal Aid Society staff attorneys used virtually every conceivable reason to "conflict-off" cases. For actual case examples of this practice, *see infra* note 1009 (case 044) and *infra* note 1136 (case S-69) and accompanying text. Further, when selecting which co-defendant to represent, Society attorneys regularly chose the least culpable defendant to represent. *See infra* pp. 818-54; TABLE 9-1, at 821; TABLE 9-2, at 826; TABLE 9-4, at 828; TABLE 9-5, at 829.

506. 1966 Agreement, *supra* note 495, para. Second, at 933; Plan of the Association of the Bar of the City of New York, Bronx County Bar Association, Brooklyn Bar Association, New York County Lawyer's Association, Queens County Bar Association and Richmond County Bar Association, (approved by the Judicial Conference of the State of New York, Apr. 28, 1966) (adopted pursuant to Article 18-B of the County Law) reprinted *infra* app. 2(b), art. I(1), at 925 [hereinafter 1966 Bar Association Plan].

507. 1975 Report on the Legal Aid Society and the 18-B Panels, *supra* note 499, at 9.

508. *Id.*

509. *See* 1966 Bar Association Plan, *supra* note 506, art. I(2), at 925. The consequences of the Legal Aid Society's historical policy to abstain from homicide representation, *see supra* notes 227-330 and accompanying text, went beyond its effect on the number of cases referred to 18-B Panel attorneys. Judges, in disregard of the rotational system, distributed these cases to a small number of Panel attorneys they knew. Both prosecutors assigned to the homicide bureau and Society attorneys complained that the quality of representation provided by homicide attorneys often fell below a minimum level of competence. *See* 1971 Report, *supra* note 496, at 24.

510. 1966 Bar Association Plan, *supra* note 506, art. III at 927, art. IV, at 928. In addition, the administrator played no role in overseeing attorney performance and was unfamiliar with the capabilities of individual attorneys. *See supra* notes 411-12 and accompanying text.

the 18-B Panel's operation departed from the 1966 *Plan* because of the absence of pro bono volunteers.[511] According to the Subcommittee on Legal Representation of the Indigent, there was a "lack of any real concern among the greater portion of the Bar about participating in representation of the indigent . . . ."[512] Few experienced attorneys with financial means or criminal defense backgrounds came forward to accept 18-B Panel assignments. The bar associations themselves were criticized in the Subcommittee's report for failing to tackle the problems raised by the increase in arrests and the disproportionate share of cases handled by Panel attorneys.

> By statute . . ., the [organized b]ar has been afforded the opportunity to perform a public service and create a system of defending the indigent through the [organized b]ar [a]ssociations with virtually unlimited authority. The fact remains, however, that all that has been contributed by the private [b]ar is the limited screening of attorneys applying for inclusion on the panels. It is most distressing that this is the situation in New York City where the [b]ar [a]ssociations are among the largest and most influential in the United States.[513]

As the demand for representation increased, quality of representation suffered. Both prosecutors and Legal Aid Society attorneys voiced doubts — particularly in homicide cases — about the competence of 18-B Panel attorneys.[514] Defendants and their families alleged "general incompetence, failure to visit the defendant, lack of knowledge about the case, failure to appear at court, and requests for additional fees."[515] Judges complained about padded compensation vouchers.[516] Yet there was no administrative mechanism for processing complaints or for supervising or removing incompetent attorneys.[517]

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511. 1971 Report, *supra* note 496, at 24. A similar failure of the organized bar to undertake the representation of poor people is well-documented nationally. *See supra* text accompanying notes 429-32. The absence of adequate compensation is the most commonly advanced reason for private attorneys' disinterest. *See, e.g.*, N. LEFSTEIN, *supra* note 434, at 19.

512. 1971 Report, *supra* note 496, at 24.

513. *Id.* at 24-25.

514. 1975 Report on the Legal Aid Society and on the 18-B Panels, *supra* note 499, at 16, 19.

515. *Id.* at 16; *see supra* note 509.

516. *Id.* at 19.

517. Such a mechanism was first introduced in 1974, with the establishment of the Office of Projects Development, *see infra* text accompanying notes 529-32, and the issuance of Draft Standards by the NLADA. NLADA Proposed Standard I-2(b) states that "[i]f a panel of attorneys provides defense representation . . . a full-time administrator [should be] responsible for the selection, rotation and removal of attorneys, the continuing education of attorneys in criminal law, the preparation of interested attorneys for the panel, the selection of counsel for specific cases, and the delivery of quality representation by panel attorneys." NATIONAL LEGAL AID AND DEFENDER ASS'N PROPOSED STANDARDS FOR DEFENDER SERVICES, Standard I-2(b) (1974) [hereinafter 1974 NLADA PROPOSED STANDARDS]. Similar language was incorporated in the 1976 NLADA GUIDELINES, *see* 1976 NLADA GUIDLINES, *supra* note 441, Guideline 2.14, at 507-08; *see also* 1973 NAC STANDARDS AND GOALS, *supra* note 453, Standard 13.15, at 282; *supra* note 471. The National Advisory Commission on Criminal Justice Stan-

For their part, the 18-B Panel attorneys complained that failure to assign them until after Criminal Court arraignment meant the loss of essential information which Legal Aid Society attorneys or privately-retained counsel would normally obtain during review of the complaint at the initial court appearance.[518] Communication difficulties between court personnel and assignment clerks meant that the assignment of a Panel attorney was delayed while defendants remained unrepresented.[519]

B. The Reform Era, 1971-1975

In 1971, the Appellate Division's Subcommittee on the Legal Representation of the Indigent reviewed the representation of indigent criminal defendants in New York City.[520] Composed of a blue ribbon panel of judges, practitioners, and academics, the Subcommittee studied the effectiveness and efficiency of the representation provided by the Legal Aid Society and the 18-B Panel. The Subcommittee concluded that the key challenge for both defense entities was coping with large caseloads while providing adversarial representation for indigent defendants.[521] With the City and State in the midst of a fiscal crisis, the report limited its recommendations to managerial and structural changes rather than budgetary solutions.[522]

The report expressed dissatisfaction with the operation of the 18-B Panels in three respects. First, no discernible standards or requirements for the inclusion of attorneys on Panels existed.[523] Consequently, the appointment of Panel members rested not on their qualifications as defense counsel but on the subjective judgment of the appointing committee.[524] The report therefore urged Panel administrators to adopt mechanisms for regular and formalized evaluation of attorney performance and for the implementation of removal

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dards and Goals recommended that when the administrator is unable to monitor the performance of appointed attorneys, the public defender's office should undertake the task. 1973 NAC STANDARDS AND GOALS, *supra* note 453, Standard 13.12, at 276.

518. Office of Projects Development, Interim Report Number Four, at 2 (1975) [hereinafter 1975 Interim Report Four]. In response to a poll conducted by the Office of Projects Development in 1975, 83 percent of First Department 18-B Panel attorneys who responded stated that they believed co-defendants would be "more effectively represented on the issue of bail" if the designated panel attorney was present at arraignment. Presence at arraignment also permitted "an opportunity to interview the arresting officer" (28%), "an opportunity to interview the complainant" (45%), and "an opportunity to interview other witnesses" (51%). Fifty-nine percent stated that "presence at arraignment allowed them to gather information that might have been lost to the defense or become very difficult to obtain at a later stage." *Id.*

519. *See* 1975 Report on the Legal Aid Society and the 18-B Panels, *supra* note 499, at 17-18.

520. The Subcommittee on Legal Representation of the Indigent was one of the departmental committees for court administration. These departmental committees were appointed by the Presiding Justices of the First and Second Departments of the Appellate Division in 1970. *See* 1971 Report, *supra* note 496, at i-iii.

521. *Id.* at 2-3.

522. *Id.* at 2.

523. *Id.* at 25.

524. *Id.* at 22.

procedures.[525] Second, the report strongly criticized the practice of court patronage, the power of judges to assign homicide cases to select Panel attorneys.[526] It recommended that Panel administrators establish a homicide Panel and make assignments on a rotational basis.[527] Third, the Subcommittee perceived the need for recruiting new attorneys and for improving the quality of those attorneys already serving on the Panels. The report suggested that the administrators develop a program of continuing legal education for Panel attorneys and a training program designed to attract new attorneys without previous criminal law experience.[528]

In response to this report, the First Department's 18-B Panel administrator in 1973 obtained a grant from the federal Law Enforcement Assistance Administration to establish the Office of Projects Development ("OPD").[529] OPD's mandate was to oversee the Panels and remedy the deficiencies the Subcommittee's report had identified.[530] During its three-year life span, OPD devised computerized voucher forms to facilitate the monitoring and analysis of attorney claims,[531] instituted a system for recording and investigating com-

525. *Id.* at 25; *see also supra* note 517 and accompanying text.

526. *Id.* at 24, 26; *see also supra* note 509. This criticism is consistent with ABA standards which require rotation "to avoid patronage and its appearance . . . ." 1980 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, *supra* note 459, Standard 5-2.3, at 5.28; *see also* 1976 NLADA GUIDELINES, *supra* note 441, Guideline 2.2, at 504, and Recommendations and Commentary at 135-36; Guideline 2.3, at 504, and Recommendations and Commentary at 142. Nonetheless, the judicial appointment of court-assigned private attorneys in homicide cases is a practice adopted in other jurisdictions by institutional defenders. 1976 INDIGENT DEFENSE SYSTEMS ANALYSIS PROJECT, *supra* note 497, at 97; Allison, *Relationships Between the Office of Public Defender and the Assigned Counsel System*, 10 VAL. U.L. REV. 399, 417 (1976). In some jurisdictions, court patronage affected assignments other than homicide despite the existence of a rotational panel. A study done in Los Angeles showed that, despite the existence of a system of rotation for the appointment of counsel, judges were prone to keep their own lists of available counsel "who regularly sit in court or have offices nearby." Most responding judges reported that they "personally knew" or "are friends of" the attorneys on their own appointment lists. *See* R. HERMANN, E. SINGLE & J. BOSTON, COUNSEL FOR THE POOR 35-36 (1977) [hereinafter COUNSEL FOR THE POOR]. For our analysis of the continued reliance on the practice of appointing 18-B Panel regulars at arraignment in 1983-84, see TABLE 8-3, at 798-99.

527. 1971 Report, *supra* note 496, at 25. In 1972, the City's Coordinator for Criminal Justice recommended that the Legal Aid Society undertake the representation of defendants charged with homicide and form a special bureau for this purpose. 48 LEGAL AID REV. 33 (1972). Notwithstanding this recommendation, the Society continued to decline homicide assignments which remained the province of the 18-B Panel, *see infra* note 674 and accompanying text.

528. *Id.*

529. 1974 G. Stern Report, *supra* note 492, at 115.

530. *See supra* note 517. The Office of Projects Development employed a staff of experienced attorneys with specially designated responsibilities. OPD's director was a former Assistant District Attorney in New York County who had considerable experience in the practice of criminal law; its Supreme Court and Criminal Court 18-B Panels' coordinator was a former senior trial attorney with the Legal Aid Society; one of its administrative assistants had experience in legal and social science research and in policy analysis; and its three-person support staff had the capacity to keypunch and computerize the voucher claim process. Interview with C.A.L.J. Richard C. Failla, Former Director of OPD (Apr. 12, 1985).

531. *See supra* note 462 and accompanying text. A copy of the computerized form appears in Office of Projects Development, Appellate Division, First Department Interim Report

plaints,[532] and developed a separate homicide Panel and a process for certifying attorneys for homicide Panel membership.[533] Under OPD's management, the Panel administrator's rotation system replaced judicial appointment in homicide cases.[534] In addition, OPD designed an optional rotational arraignment system in Bronx County which enabled Panel attorneys to represent defendants from initial court appearance until disposition.[535] OPD also sought to recruit new attorneys to the Panel through a continuing legal education course[536] and a co-counsel training program.[537] Finally, OPD urged that support services "such as investigators, psychiatrists, photographers, ballistics and other experts" be made available to aid Panel attorneys.[538]

The Subcommittee identified different structural problems in its 1971 analysis of the Legal Aid Society. The City's contractual negotiations with the Society had focused on providing enough attorneys at each point of the criminal process to handle all arrests and indictments.[539] The Subcommittee, however, focused on the representation of individual criminal defendants. It did not believe that merely increasing the number of attorneys available at each stage of the process would resolve the deeper crisis in indigent representation: the failure to provide meaningful representation.[540]

From this perspective, the Subcommittee condemned the Legal Aid Society's stage representation. It concluded that the system of stage representation was inconsistent with the goal of establishing an attorney-client relation-

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Number Two, at 20 (Oct. 31, 1974), reprinted *infra* app. 1(d), at 918 [hereinafter 1974 Interim Report Two].

By this time, modern management information systems had been designed to enable administrators to monitor caseload and integrate the study of attorneys' work with other elements of the criminal justice system. *See* Blumstein, *Management Science to Aid the Manager: An Example From the Criminal Justice System*, 15 SLOAN MGMT. REV. 35, 35-48 (Fall 1973). Of course, in the absence of such a system, there is little awareness of Panel attorneys' proportionate share of the work, the quality of their representation, or the cost of their representation per case. *See also infra* note 622. We undertook to compute these data *infra* chs. 5, 6, & 11, through a computerized analysis of the OPD designed vouchers.

532. 1975 Interim Report Four, *supra* note 518, at 45-46.

533. 1974 Interim Report Two, *supra* note 531, at 21-24.

534. 1975 Interim Report Four, *supra* note 518, at 16-18.

535. *Id.* at 1-5.

536. *Id.* at 50-55.

537. *Id.* at 56-58. The implementation of training programs for both current and future assigned defense counsel is consistent with ABA and NLADA standards. *See* 1980 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, *supra* note 461, Standards 5-1.4, at 5.18, Standard 5-2.2, at 5.26; 1976 NLADA GUIDELINES, *supra* note 441, Guideline 2.1, at 504, Guideline 3.1, at 511, & 264-67; *see also supra* note 462 and accompanying text.

538. 1974 Interim Report Two, *supra* note 531, at 79-80; *see also supra* note 463 and accompanying text.

539. "The Society shall employ and provide for the services of attorneys . . . *in sufficient numbers* to undertake . . . the defense of all persons [with certain exceptions] charged with a crime . . . who are financially unable to obtain counsel." 1966 Agreement, *supra* note 500, at ¶ 2 (emphasis added).

540. 1971 Report, *supra* note 496, at 10; *see supra* note 335.

ship.[541] The report noted that "[t]he heart of effective representation lies in establishing the attorney-client relationship in which the *total* responsibility for the outcome of the case lies with one attorney."[542] The report found that under the stage system, Society attorneys failed to "conduct in-depth interviews with clients[,] apprise defendants of case status and generally maintain communication with each client in a true lawyer-client relationship."[543]

The Subcommittee recognized that there was a close link between stage representation and caseload.[544] The Subcommittee realized that under a system of individual and continuous representation, caseload demands would quickly overburden the Legal Aid Society's staff attorneys and require the Society "to decline to accept assignments over the number which it could treat in [a] comprehensive way . . . ."[545] The Subcommittee believed, however, that refusing new assignments would be preferable to the continuation of the stage representation system. It contended that a policy of refusing assignments could alter the balance in the criminal defense system, affecting both the policing practices that had led to the staggering growth in arrests and the lack of participation by the private bar.[546] It therefore recommended that "[t]he Appellate Division . . . require the Legal Aid Society to determine a maximum lawyer-client ratio beyond which it [could not] provide effective

541. 1971 Report, *supra* note 496, at 11. *See supra* notes 468-69, 497-98 and accompanying text.

The overriding problem with stage representation, in addition to the loss of the attorney-client relationship, is that the replacement of attorneys fragments work and causes uncoordinated representation. *See* Gilboy & Schmidt, *supra* note 498, at 1-2; *see also* Note, *Client Service in a Defense Organization: The Philadelphia Experience*, 117 U. PA. L. REV. 448, 468 (1969).

> [T]he lack of coordination of a succession of lawyers' work may result in no lawyer taking responsibility for pursuing preparation of portions of a case . . . . Gaps in legal representation may occur between the time of the withdrawal of one lawyer and the appointment of his successor, leaving a defendant without effective assistance of counsel at initial stages of his case.

Gilboy & Schmidt, *supra* note 498, at 2. Useful information may be lost, especially information of the type that is neither part of the case record nor easily related by offhand notetaking, like witness' demeanor at pretrial proceedings, and off-the-record conversations with prosecutors, arresting officers, and judges. *Id.* at 1; *see also* Note, *supra*, at 466; *see also supra* note 518 and accompanying text.

"[T]he bureaucratic shuffling of cases from stage to stage and from attorney to attorney may [also] result in 'lost' cases." 1976 NLADA GUIDELINES, *supra* note 441, at 469. Not only can whole cases become 'lost,' but "an initial lawyer, who does not expect to be a defendant's trial counsel, may fail to assume necessary case preparation responsibilities at the pretrial stages." Gilboy & Schmidt, *supra* note 498, at 2. Practices such as waiving a preliminary hearing may, in part, be a function of this phenomena. *See* Katz, *Gideon's Trumpet: Mournful and Muffled*, 55 IOWA L. REV. 523, 549 (1970). As a result, subsequent counsel must duplicate the work. If she cannot, the information may be lost forever. For the effects of delayed information gathering, *see* Gilboy & Schmidt, *supra* note 498, at 1 n.5.

542. 1971 Report, *supra* note 496, at 11 (emphasis in original).

543. *Id.* at 12.

544. *Id.* at 12-13.

545. *Id.* at 12.

546. *Id.* at 13.

representation."[547]

The report also recognized that abolishing stage representation and establishing caseload caps would increase the 18-B Panels' workload.[548] Thus, it recommended enlarging the pool of Panel attorneys.[549] It suggested that associates from the city's private law firms should be recruited to pro bono service through the creation of a "public interest criminal law office."[550] The Subcommittee concluded that such efforts would be necessary to overcome court practices which made the representation of the indigent defendant "unappealing."[551]

The Committee was not alone in advocating an end to stage representation. The Association of Legal Aid Attorneys also called for its abolition and demanded a system of "vertical" representation in the three strikes it initiated in the early 1970s.[552] The union was supported by the Criminal Justice Coordinating Council, an arm of the Office of the Mayor of the City of New York. The Council noted that by April 1973, "[a]n acceptable one-to-one relationship between client and attorney [had not] yet . . . [been] developed."[553]

In 1972, a civil rights action, *Wallace v. Kern*,[554] was brought on behalf of

547. *Id.*; *See also supra* notes 464-66. *See generally* J. Kettleson, *Caseload Control*, in 34 NATIONAL LEGAL AID AND DEFENDER ASS'N BRIEFCASE 111, 111-12 (1977).

Several defender offices have established maximum caseloads standards. For example, the Washington, D.C. Public Defender's Office permits attorneys to carry a felony trial caseload of 30 cases, twenty of which can be active. Attorneys in the family division are allowed a caseload of 38 cases, 15 of which can be active and likely to go to trial. Thus, maximum annual caseloads are 110-20 per attorney in the criminal division and 180 per attorney in the family division. In periodically reassessing these standards, the Office considers the following factors: 1) quality of representation; 2) speed of turnover of cases (the faster the rate at which cases are closed, the smaller an attorney's caseload must be); 3) percentage of cases tried (the higher the percentage of cases reaching trial, the lower the caseload must be); 4) extent of support services available to staff attorneys; and 5) court procedures (to the extent that attorneys spend time in court awaiting action on their cases, their ability to provide representation is diminished). *See* U.S. DEP'T OF JUSTICE, AN EXEMPLARY PROJECT: THE D.C. PUBLIC DEFENDER SERVICE 12-15 (1975). For the maximum caseload standards employed by the Public Defender of Sacramento County, California, see 1976 NLADA GUIDELINES, *supra* note 441, at 411.

548. 1971 Report, *supra* note 496, at 13.

549. *Id.* at 13.

550. *Id.* at 26.

551. *Id.* The report also proposed studying whether each member of the bar should be required to register with the administrator's office in the event that conscription became necessary. *Id.*

552. The union, formed in 1970, went out on strike for three days in May of 1970, for seven days in July of 1973, and for 19 days in September of 1974. W. Mulligan, J. Gill & J. Keenan, Report and Recommendations to Mayor Edward I. Koch Concerning Future Representation of Indigent Criminal Defendants in New York City at 7 (Dec. 21, 1982) [hereinafter 1982 Report of the Keenan Commission]. In addition to a system of vertical representation, the union demanded and won pay parity with prosecuting attorneys. *See* Harbridge House, Inc., Organization and System Evaluation of the Legal Aid Society at 31 (June 12, 1978) [hereinafter Harbridge House Preliminary Findings].

553. The court referred to the Council's positions in Wallace v. Kern, 392 F. Supp. 834, 843 (E.D.N.Y. 1973), *rev'd on jurisdictional grounds*, 481 F.2d 621 (2d Cir. 1973).

554. 392 F. Supp. 834 (E.D.N.Y. 1973), *rev'd on jurisdictional grounds*, 481 F.2d 621 (2d Cir. 1973).

all felony defendants awaiting trial in the Brooklyn House of Detention. The suit sought to enjoin the Legal Aid Society from accepting additional assignments.[555] The felony defendants claimed that the large number of cases handled by the Society under stage representation deprived them of the opportunity to be represented by an attorney familiar with the facts and circumstances of their case.[556] They cited the absence of client interviews and factual and legal investigations as evidence of the Society's failure to participate effectively in an adversarial system of criminal justice.[557]

The federal court found that the caseload of Legal Aid Society staff attorneys substantially exceeded the number of cases that could be competently managed.[558] The court enjoined the Society from accepting additional assignments until it significantly reduced caseloads and the "attorney-in-charge" of the Brooklyn office certified that "the attorneys on his staff are able to give effective representation."[559] The court declared that "[c]omparing the level of representation now provided by the Legal Aid Society with the American Bar Association standards, it becomes evident that the overburdened, fragmented system used by Legal Aid does not measure up to the constitutionally required level."[560]

Wallace was later reversed because the Second Circuit found that, as a private organization, the Legal Aid Society had not acted under color of state law.[561] The Society, however, did eliminate stage representation in the two years following the court's decision.[562] Thereafter, the Society formally adopted a system of vertical representation.[563] But the Society did not adopt the maximum caseload standards that the Subcommittee or the federal court viewed as a necessary accompaniment to vertical representation. Instead, it attempted to deal with the issue internally.

A provision of the collective bargaining agreement reached in settling the 1974 strike between the Legal Aid Society and its staff attorneys provided for the arbitration of caseload grievances.[564] The agreement specified that: a) the

555. *Id.* at 849.

556. *Id.* at 835.

557. *Id.* at 837.

558. *Id.* at 849.

559. *Id.* The court considered 1) length of pre-trial detention; 2) quality of interview facilities; 3) quality of supporting services; and 4) control of calendar in determining maximum caseloads for Legal Aid Society attorneys. Based on its assessment of these factors, the court found that "an average caseload of 40 felony indictments pending in a trial part strains the utmost quality of a Legal Aid attorney under existing conditions, . . . and that acceptance of any additional felony indictments by Legal Aid would prevent it from affording its existing clients their constitutional right to counsel." *Id.* at 848-49.

560. *Id.* at 847.

561. 481 F.2d 621, 622 (2d Cir. 1973).

562. 1975 Report on The Legal Aid Society and the 18-B Panels, *supra* note 499, at 4.

563. *Id.*

564. 1984-1986 Collective Bargaining Agreement Between the Legal Aid Society and the Ass'n of Legal Aid Attorneys of the City of New York, art. XVII (Jan. 4, 1985) [hereinafter 1984-1986 Collective Bargaining Agreement].

responsibility for setting caseload limitations fell upon the Society's staff attorneys; b) although required to respond to legitimate grievances raised by its staff attorneys, the Society's management was not required to initiate a policy of maximum attorney caseloads; and c) New York City would not be bound by the agreement and would not be affected by the arbitrators' caseload grievance decisions.[565] Thus, a successful caseload grievance could only shift burdens from one staff attorney to another. Even a successful grievance could not require the city to give the Society money to hire additional staff attorneys.[566] In practice, given the number of cases handled by the Society's staff attorneys, the Society's policy of redistributing cases among staff attorneys rarely offered a realistic opportunity for caseload reduction.[567]

Panel assignments grew dramatically from 1972 to 1974 when the Legal Aid Society instituted its new policy of vertical representation and continued to decline representation of more than a single defendant in a multiple defendant case.[568] *Table 3-2* documents the increase in assignments to 18-B Panel attorneys in the First and Second Departments between 1972 and 1974.

TABLE 3-2:[569] *Number of Defendants Referred to 18-B Panel Attorneys Citywide, 1972-1974*

	18-B First Dep't		18-B Second Dep't	
Year	Felonies	Misdemeanors	Felonies	Misdemeanors
1972	5,030	815	2,351	339
1973	7,562	1,217	4,566	886
1974	10,557	3,332	5,603	1,320

From 1972 to 1974, the 18-B Panels' felony assignments doubled. This increase in Panel assignments occurred despite a dramatic increase in the Legal Aid Society's staff, (from 200 staff attorneys in June 1971 to 535 in

565. *Id.* The Legal Aid Society's caseload grievance policy is described in H. Jacobson & W. Gallagher, *Case Cut-Off Mechanism, Documentation Required*, in NATIONAL CRIMINAL JUSTICE EXECUTIVE TRAINING PROGRAM: OPERATING A DEFENDER OFFICE 5 (undated). Under this policy, the Society theoretically considered the following factors in determining whether an attorney has an excessive caseload: attorney experience; total caseload; proportion of caseload that is for sentencing only; proportion of caseload with bailed defendants and detained defendants; aging of caseload and assignment dates (to estimate disposition time); complexity of fact patterns and legal issues; likelihood that disposition will occur by trial; number of previous trials conducted by the petitioning attorney in the last 60 days (trials create backlog); the attorney's caseload compared with the caseload of other attorneys in the office; and a statement by the attorney of the relative burden of preparation completed and further preparation needed on a case-by-case basis. *Id.* at 5, 6.

566. *See* CONTROLLING CASELOADS, *supra* note 490, at 24.

567. Remarks of Russel Neufeld, Representative of the Association of Legal Aid Attorneys, Meeting with Legal Aid Society (Nov. 4, 1985).

568. *See supra* notes 502-04 and accompanying text.

569. These data were obtained from the Panel administrators' Annual Reports for fiscal years 1972-74. *See infra* pp. 706-07. *See* Reports UCS-195 (1972) (18-B 1st Dep't); UCS-195 (1972) (18-B 2d Dep't); UCS-195 (1973) (18-B 1st Dep't) UCS-195 (1973) (18-B 2d Dep't); UCS-195 (1974) (18-B 1st Dep't); UCS-195 (1974) (18-B 2d Dep't).

1973). Although the number of the Society's staff attorneys more than doubled, there was a 24 percent *decrease* in the number of filed indictments in that two-year span (from 27,185 in FY 1971 to 20,625 in FY 1973).[570]

Out of continuing concern with the quality of legal representation of indigent defendants, the Subcommittee on the Legal Representation of the Indigent filed its second report in 1975.[571] The report concluded that the "economic and professional problems" of the indigent defense system required immediate solution if the City was to provide "the highest quality of legal assistance at the lowest price commensurate with such quality."[572]

A task force of the Subcommittee[573] recommended that the number of

570. Administrative Board of the Judicial Conference of the State of New York, 19th Annual Report for the Judicial Year July 1, 1972 through June 30, 1973, N.Y. LEGISLATIVE DOC. No. 90, at A97 (1974) [hereinafter 1974 Judicial Conference Report]; Administrative Board of the Judicial Conference of the State of New York, 17th Annual Report for the Judicial Year July 1, 1971 through June 30, 1972, N.Y. LEGISLATIVE DOC. No. 90, at A77 (1972) [hereinafter 1972 Judicial Conference Report].

Similarly, the number of misdemeanors referred to the 18-B Panels quadrupled between 1972 and 1975. At the same time, the number of arrest cases filed in Criminal Court dropped from 216,000 to 206,000, a decrease of 4.6%. Criminal Court of the City of New York, Caseload Activity Report — Arrest Cases (1974) [hereinafter 1974 Caseload Activity Report — Arrest Cases]; Criminal Court of the City of New York, Caseload Activity Report — Arrest Cases (1972) [hereinafter 1972 Caseload Activity Report — Arrest Cases].

That the Legal Aid Society's policy changes account for the sustained increase in the number of cases referred to the 18-B Panels is also suggested by the fact that between 1975 and 1979 arrests decreased from 205,725 to 203,367 and filed indictments dropped from 19,720 to 16,454, while Panel caseloads remained relatively constant. Criminal Court of the City of New York, Caseload Activity Report — Arrest Cases (1975) [hereinafter 1975 Caseload Activity Report — Arrest Cases]; Criminal Court of the City of New York, Caseload Activity Report - Arrest Cases (1979) [hereinafter 1979 Caseload Activity Report — Arrest Cases].

TABLE: 18-B Panel Caseload, Citywide, 1975-1979

	First Department Panel		Second Department Panel	
Year*	Felonies	Misdemeanors	Felonies	Misdemeanors
1975	9,299	n/a	5,097	1,083
1977	9,960	2,274	n/a	974
1978	8,982	1,581	5,377	927
1979	9,893	2,574	5,824	1,788

*These data are for fiscal year 1975 and calendar years 1977-79. *See* Reports UCS-195 (1975) (18-B 1st Dep't); UCS-195 (1975) (18-B 2d Dep't); UCS-195 (1977) (18-B 1st Dep't); UCS-195 (1977) (18-B 2d Dep't); UCS-195 (1978) (18-B 1st Dep't); UCS-195 (1978) (18-B 2d Dep't); UCS 195 (1979) (18-B 1st Dep't); UCS 195 (1979) (18-B 2d Dep't).

571. 1975 Report on The Legal Aid Society and the 18-B Panels, *supra* note 499, at 1, 2.

572. *Id.* at 1.

573. The Subcommittee appointed some of its members to a task force to study the question of whether the 18-B Panels, upon which the City was increasingly dependent for indigent defense, were capable of meeting the ever-growing demands that were placed on them. In concluding that they were not, the task force identified seven problems with the assigned counsel system: 1) the quality of service of some of the 18-B Panel attorneys; 2) Panel attorneys' dissatisfaction with the conditions of their service; 3) non-appearance or lateness of Panel attorneys; 4) Panel attorneys' dissatisfaction with their reimbursement rates; 5) judicial discontent with the voucher method of payment; 6) dissatisfaction of Panel attorneys whose voucher amounts were reduced by judges; and 7) Panel attorneys' inadequate access to experts and social support services. *Id.* at 7. In addition, according to the task force's calculations, Panel representation

assignments made to 18-B Panel attorneys be substantially reduced.[574] To reduce the number of Panel assignments, the task force suggested a four-tier remodelling of the indigent defense system: 1) institution of a public defender system on a county by county basis, to replace existing Panel representation; 2) continuation of the Legal Aid Society as presently constituted; 3) on the basis of carefully defined criteria, selection of a number of partnership teams from existing law firms to take on a fixed assignment caseload for a fixed annual retainer; and 4) where necessary, in cases which present a conflict for the other three defense entities, use of the assigned counsel Panels in a manner similar to the present system.[575]

The full Subcommittee debated the task force's recommendations but was unable to reach a consensus.[576] Those subcommittee members who opposed all of the task force's recommendations contended that "no basis exists for assuming that the Legal Aid Society or legal services agencies generally offer a quality of representation intrinsically superior to that of 18-B."[577] In addition, they challenged the task force's finding that 18-B Panel representation was substantially more expensive than representation by a legal services agency.[578]

Those opposed to reducing the proportionate number of indigent cases assigned to private attorneys argued that the participation of the private bar in the representation of the poor was desirable and that institutional defenders should not assume total responsibility for this work. They argued, however, that partnership teams operating on a fixed annual retainer would enable private attorneys to continue this role with better supportive services and in a more cost efficient manner than previously.[579]

Finally, those opposed to the establishment of a public defender office questioned the feasibility of the task force's recommendations in light of the start-up costs the City would incur in implementing them. They reasoned that the savings offered by the Legal Aid Society would dissipate if the City were to adopt the proposed borough-wide public defender system. They argued that the savings which resulted from the Society's centralized administration would be lost in a system where the institutional defender would be required to establish five separate administrative structures.[580]

Because of the Subcommittee's deadlock, it took no action on the task force's recommendations.[581]

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cost the city three times as much per case as the Legal Aid Society's representation and, in its opinion, the additional expenditures that would be needed to cure the Panels' problems would be good money thrown after bad. *Id.* at 8-10; *see infra* notes 1157-59 and accompanying text.

574. *Id.* at 10.

575. *Id.*

576. *Id.* at 12.

577. *Id.* at 13.

578. *Id.*

579. *Id.* at 31-32.

580. *Id.* at 30.

581. *Id.* at 2.

C. The Post-Reform Era, 1975-1982

From 1975 to 1982, no efforts were made to monitor the quality of representation, to establish a public interest law office or to substantially expand the participation of the private bar in the representation of indigent defendants. The only affirmative response to the continuing crisis in criminal representation of the indigent in New York City was an increase in the rate of compensation for 18-B Panel attorneys.[582] While this step may have had the short-term effect of maintaining or increasing the number of available attorneys, it in no way addressed the issue of quality representation. OPD reforms which might have enabled administrators to guarantee the quality of representation succumbed to bureaucratic pressures.[583] Panel administrators and assignment clerks did not comprehend the desperate need for reform and were more concerned with providing a sufficient number of attorneys to reduce case backlog and avoid delays.[584]

Without question, the compensation scheme under which the 18-B Panels functioned for over a decade badly needed revision. In 1976, New York was among four states with the lowest rates of hourly compensation for assigned private counsel.[585] In 1978, the legislature finally acted.[586] It raised assigned counsel's hourly rates from $15 to $25 for in-court time and from $10 to $15 for out-of-court time.[587] Yet even these increases seemed woefully inadequate. The only effect the increase in compensation had on indigent representation was an increase in the number of attorneys serving on the Panels. Between 1979 and 1984, the number of certified Panel attorneys increased from 750 to 955 in the First Department[588] and from 676 to 1006 in the Second Department.[589]

In 1979, the First Department's Appellate Division appointed a Central Screening Committee to design a plan to improve the quality of 18-B Panel

582. Act of 1978, c. 700, 978 N.Y. Laws 700.

583. *See infra* notes 600-06 and accompanying text.

584. *Id.* For our observations of the operation of the administrator's assignment system in the First Department, see *infra* pp. 716-19.

585. INSTITUTE OF JUDICIAL ADMINISTRATION, PROJECT ON COURT IMPROVEMENT: ASSIGNED COUNSEL STUDY 24 (Final Report, July 1976) [hereinafter 1976 IJA Assigned Counsel Study].

586. *See supra* note 582.

587. N.Y. COUNTY LAW § 722(b) (McKinney 1982). The legislature also fixed caps on the total amount to be received at $1500 for capital offenses, $750 for felonies, and $500 for misdemeanors. *Id.* The new fees continued to be lower than those afforded private attorneys assigned to indigent criminal defendants in federal court pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1984) (amended 1970).

588. Reports UCS-195 (1979) (18-B 1st Dep't); UCS-195 (1984) (18-B 1st Dep't).

589. Reports UCS-195 (1979) (18-B 2d Dep't); UCS-195 (1984) (18-B 2d Dep't). Other factors such as the elimination of auto accident cases through the adoption of "no-fault" insurance may also account for this increase. *See* Statement of attorney 77, *infra* note 784. The figures themselves represent the sum of the number of attorneys serving on the homicide panel and the number of those serving on the felony and misdemeanor panels. Thus, an attorney certified to serve on all three panels is counted three times. For our analysis of the number of "active" panel attorneys in the First Department, see *infra* TABLE 5-14, at 735.

representation.[590] The Committee was to develop and implement feasible standards for screening Panel attorneys.[591] The screening process had previously functioned with an unbridled discretion that sometimes amounted to cronyism.[592] As a result of the Committee's recommendations, after July, 1979, applicants for Panel service were required to state their in-court experience, including numbers of cases tried, hearings conducted, and pleas negotiated.[593] The Committee was responsible for reporting annually on "the

590. N.Y. COMP. CODES R. & REGS. tit. 22, § 612 (1980) (Rules to Implement a Criminal Courts Panel Plan, 1st Dep't, App. Div., promulgated under New York County Law, Article 18-B). In the Second Department, screening continued to be solely a function of local bar associations.

591. *Id.*

592. 1971 Report, *supra* note 496, at 21-22.

593. Presiding Justice of the Supreme Court of the State of New York, Appellate Division, First Department, General Requirements for Certification to the Indigent Defendants' Legal Panels in the Appellate Division, First Department (undated) (promulgated pursuant to N.Y. COMP. CODES R. & REGS. tit. 22, § 612.6 (1980).

There are five methods of certification to the Criminal Court Panel. Each method depends upon quantitative experience only. Attorneys are not asked to produce a written product or engage in simulated interviewing, counseling, trial preparation, witness examination, oral argument, or complete any other sort of exercise designed to evaluate competence or to determine the attorney's fitness to represent the poor in criminal cases. Method A permits certification of attorneys with experience in at least 10 criminal proceedings within three years of the date of application. Method B permits certification of attorneys with three years of the date of application. Method C permits a law school professor or instructor, or panelist in an approved seminar, to be certified, provided the applicant has had experience in criminal proceedings within three years of the date of application. Method D permits certification of an attorney with no experience in criminal law, if she has proved exceptional in the handling of five jury trials in other areas within three yuears of the date of application. Methods E permits certification of a former judge of the Criminal Court or Supreme Court. *See id.* at 2-3. The methods for certification to the Supreme Court Panel and Homicide Panel are similar in most respects to those for the Criminal Court Panel, except that the quantitiative experience required of the applicants is greater. For certification to the Supreme Court Panel, the applicant must have been involved in the practice of criminal law within the past five years of the date of application, either as sole counsel or in a co-counsel program. For certification to the Homicide Panel, the quantitative experience required includes at least 60 criminal matters within five years of the date of application. *Id.* at 4-5.

A 1984 nationwide study of indigent defense systems found that only one-third screen assigned counsel to determine their eligibility for court assignment. Furthermore, only 19 percent of assigned counsel counties screen attorneys according to the seriousness of cases. Of those counties, 43 percent are located in the West and 29 percent in the Northeast. 1984 CRIMINAL DEFENSE SYSTEMS STUDY, *supra* note 505, at 51-53; *see also infra* note 784. The most recent New York State survey reports that only the Central Screening Committee in the First Department and the Onondonga County Panel have screening that regularly applies quantitative criteria for both misdemeanor and felony panels. Memorandum from Donna Hall, New York State Defenders Ass'n, to Hon. Joseph Bellacosa, at c-1 (1986) (discussing OCA's role in improving public defense services) [hereinafter in 1986 Hall Memorandum] Nassau County has quantitative criteria for felony panels only. *Id.* at c-2. In Erie County:

> attorneys who accept 18-B misdemeanor cases and have been admitted to the bar for two years or more will be required to accept one indicted felony assignment per year regardless of their qualifications to handle felony cases. The remaining jurisdictions have not promulgated guidelines (other than the requirment [sic] of being a licensed attorney and living or practicing within the jurisdiction).

Id.

efficiency of the Panel plan"[594] and on "procedures which have been followed or will be followed to improve the quality of representation in the criminal courts."[595]

Despite the adoption of screening criteria, the problems created by discretionary decision-making persisted. Although the Screening Committee was interviewing more applicants for 18-B Panel service, it continued to rely heavily on the judgment of those committee members who knew the applicant.[596] In fact, until 1985, the Committee operated without the benefit of bylaws.[597] Furthermore, the Committee made no effort to review the qualifications of Panel attorneys who were certified *before* July, 1979[598] and, not surprising in view of its voluntary composition, it failed to file any reports evaluating the quality of Panel practice.[599]

OPD's reforms fell victim to the administrative emphasis on servicing the system rather than serving defendants.[600] OPD had created a framework for arraignment assignments in order to permit counsel's involvement to begin as early as possible and to ensure continuity of representation.[601] The emphasis

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594. N.Y. COMP. CODES R. & REGS. tit. 22, § 612.7 (1980).

595. *Id.*

596. Interview with Frank Bress, Chairman of the Central Screening Committee, Appellate Division First Department (Sept. 13, 1984) [hereinafter Interview with Bress]. Although the Central Screening Committee adopted certification of 18-B Panel attorneys, the standards may be waived at the discretion of the Screening Committee.

597. Bylaws were revised in July of 1984 and were adopted in 1985, pursuant to N.Y. COMP. CODES R. & REGS. tit. 22, § 612.5 (1980), to govern the processing of applications for 18-B Panel membership, and of complaints made regarding existing 18-B Panel attorneys' work. For the first time, bylaws required that applicants be interviewed by individual committee members and abolished the practice of delegating that task to a member of the committee known to the applicant. Bylaws of the Central Screening Committee § 2.4 (1985). Committee members charged with reviewing an applicant's qualifications were required to contact judges and other attorneys who had participated in proceedings in which the applicant had served as counsel or co-counsel. Bylaws of the Central Screening Committee § 2.5 (1985).

598. Interview with Bress, *supra* note 596. The Screening Committee had not reviewed the qualifications of those 18-B Panel attorneys certified prior to this date, nor had it devised means to test the "effectiveness" of the representation provided by these attorneys. Assigned counsel systems in other jurisdictions also failed to recertify and to remove court-assigned private attorneys. As of 1984, "[t]here [were] no formal procedures by which attorneys are removed from assigned-counsel lists" in 85 percent of assigned counsel counties nationwide. 1984 CRIMINAL DEFENSE SYSTEMS STUDY, *supra* note 504, at 53. "[N]one of the assigned counsel counties in the Northeast reported removal procedures." *Id.*

599. Interviews with Nancy Rucker, Administrator of Indigent Defendants Panel, First Department (Fall, 1984 to Spring, 1985) [hereinafter Interviews with Rucker]. The problems of volunteer screening committees are not unique to New York City. Similar problems occurred in San Diego County, California. *See* 1985 BLUE RIBBON COMMISSION REPORT, *supra* note 490, at 42. There, a blue-ribbon panel found that, in one of the two districts studied, "although well-intentioned, the screening committees have not adequately performed their function in part because of inadequate time and resources and in part because the Office of Defender Services (ODS) has refused to adhere to their recommendations." *Id.*

600. The LEAA grant which OPD received ended in 1976, at which time the Appellate Division, First Department, and the Panel administrator absorbed certain of OPD's functions served under the grant while they eliminated others. *See supra* note 531.

601. *See supra* note 535 and accompanying text. By 1984, the OPD arraignment project had been implemented citywide.

changed dramatically under the aegis of the 18-B Panel administrators' office. The administrators viewed the presence of Panel attorneys at arraignment as a means of assisting judges to process defendants expeditiously.[602] Given this focus, the administrators gave Panel attorneys the option of representing defendants "for arraignment only."[603] Panel administrators permitted Panel attorneys "per diems" — to work eight-hour assignment shifts and claim $25 per hour for in-court time regardless of whether the attorneys represented anyone at all. "For arraignment only" service meant that there was no commitment to represent the indigent client after arraignment.[604] The arraignment rotation, while originally aimed at improving quality and ensuring continuity, became a mechanism for adapting indigent representation to the demands of assembly-line justice. The 18-B Panel system was now being formally structured to serve the cost-efficient demands of the criminal justice system.

The computerization of attorney fee vouchers was abandoned altogether. The OPD voucher had been designed to permit monitoring and review of attorneys' performance.[605] The 18-B Panel administrator, however, used the

602. Interviews with Rucker, *supra* note 599. What remained of earlier efforts to provide supportive services to 18-B Panel attorneys, *see supra* note 538 and accompanying text, was a list maintained by the administrators of investigators, experts and others willing to accept cases within the statutory maximum of $300. No evaluation was made of competence of those persons whose names appeared on the list. Legal research assistance to Panel attorneys was discontinued, as were all efforts to provide supportive services. Although the co-counsel program for inexperienced attorneys continued to exist, *see supra* note 537 and accompanying text, it functioned without supervision or standards. No general policy existed regarding compensation of interns. In the First Department, compensation was not provided, while in the Second Department, the intern was paid two-thirds of the compensation authorized for the participating Panel attorney.

603. Letter from Geoffrey Q. Ralls, Administrator of the Supreme Court of the City of New York, Appellate Division, First Dep't to 18-B Homicide Panel Members (Nov. 1986) [hereinafter 1986 Ralls letter]. *Id.* In November, 1986, as a result of a substantial increase in the number of arrest cases and the Legal Aid Society's failure to provide complete arraignment coverage, the 18-B Panel administrator initiated a special certification process whereby attorneys without any criminal law experience would be trained and certified for "arraignment purposes only." Under this policy, these attorneys would be appointed for the arraignment shift and would *not* be permitted to provide continuous representation thereafter. *Id.*

604. *Id.* Criminal Procedure Law sections 170.10(3) and 210.15(2) authorize courts to assign counsel to indigent defendants at arraignment upon a complaint in Criminal Court or an indictment in Supreme Court. N.Y. CRIM. PROC. LAW §§ 170.10(3), 210.15(2) (McKinney 1982). The statutory provision authorizing hourly rates for indigent client representation does not specifically authorize the assignment of 18-B Panel attorneys to arraignment shifts. N.Y. COUNTY LAW § 722(b) (McKinney Supp. 1987). By rotationally assigning Panel attorneys to arraignment, rather than to individual defendants, the administrator altered the function of the Panels from that of a residual provider to full-time court staff indistinguishable in this regard from Legal Aid Society attorneys.

605. 1974 Interim Report Two, *supra* note 531, at 20. The 18-B Panel administrators abandoned use of these forms after only three years—when OPD closed its doors. Although the OPD voucher system had been designed to permit monitoring and review of attorney performance, the Panel administrators utilized the vouchers only for billing, that is, to manually document claims for compensation. Data-processing machines, which had been acquired to implement the more ambitious OPD monitoring plan, were placed in storage. Interviews with Rucker, *supra* note 599.

voucher only for billing, *i.e.*, to document claims for compensation. Data-processing machines that had been acquired to implement the more ambitious OPD voucher plan were placed in storage.[606]

Reformers continued to express concern about the quality of 18-B Panel representation. In 1982, the Committee on Criminal Advocacy of the City Bar Association recommended that the Central Screening Committee periodically review the qualifications of each Panel attorney.[607] The Committee on Criminal Advocacy shared the concerns "of those who have expressed serious dissatisfaction with the quality and caliber of advocacy of some of the members of the 18-B panel."[608] In those instances where an attorney's qualifications were "found wanting," the Committee recommended denial of reappointment.[609] The Committee's recommendations, however, like the subcommittees' before it, went unimplemented.

D. The Events Leading to the Legal Aid Society Staff Attorneys' 1982 Strike

The Legal Aid Society's management responded to the caseload pressures generated by vertical representation[610] by requesting increases in annual appropriations from the City to hire more staff attorneys and reduce case backlog and delay in the criminal courts.[611] Senior officials in the Society argued that a maximum caseload policy would exacerbate case pressures even further because the City would treat any maximum that the Society imposed as "a minimum in fixing appropriations."[612] Because "cases are not all alike and attorneys differ in ability," these Society officials implied that they would be unable to meet the City's projected minimum.[613] This, the Society believed, would result in a decrease in the City's appropriations relative to the increase in caseload, which would in turn result in a proportionate reduction in the size of the Society's staff. Nonetheless, despite the Legal Aid Society's refusal to adopt caseload caps, the number of Society's staff attorneys actually decreased

606. Interviews with Rucker, *supra* note 599.

607. Association of the Bar of the City of New York, Committee on Criminal Advocacy, Resolution (June 9, 1982) [hereinafter 1982 Criminal Advocacy Resolution]. The Resolution stated:

BE IT RESOLVED THAT:

(1) The qualifications of the members of the First Department's 18-B panels should be periodically reviewed by the 18-B Central Screening Committee, with one-third of the panel members to be reviewed each year; and

(2) Such funding as may be necessary for the Central Screening Committee's implementation of such periodic review should be provided by the appropriate governmental bodies.

608. *Id.* at 2.

609. *Id.*

610. *See supra* text accompanying notes 545-63.

611. *See* Wallace v. Kern, 392 F. Supp. 834, 836-37 (E.D.N.Y. 1973) (testimony of Robert Patterson, then-president of the Legal Aid Society), *rev'd on jurisdictional grounds*, 481 F.2d 621 (2d Cir. 1973).

612. *Id.* at 838.

613. *Id.*

as arrests grew.[614] Excessive caseloads continued to impede the Society's capacity to reduce case backlog and resulted in increased arrest to disposition delays.[615]

The failure of the Legal Aid Society's caseload stategy led its management, in 1978, to commission an internal study "to address the organizational structure, operating systems and management training requirements" of the Society.[616] The study was funded by a grant from the Criminal Justice Coordinating Council of New York City,[617] which was concerned with "the management pressures and problems arising out of vertical" representation.[618]

The study revealed that the Legal Aid Society's management lacked "visible . . . policy planning,"[619] and spent a "disproportionate amount of public

614. The Legal Aid Society's staff decreased from 535 attorneys in 1973 to 468 in 1983. *See* Reports UCS-195 (1973-74) (Legal Aid Society); UCS-195 (1983) (Legal Aid Society). Of the 468 staff attorneys in 1983, 368 carried full caseloads. *See* The Legal Aid Society, Budget Submission to the City of New York for Fiscal Year 1987, at 9 (rev'd Mar. 17, 1986) [hereinafter FY 1987 Legal Aid Society Budget]. The remaining attorneys were supervisory staff who carried limited caseloads primarily for instructional purposes. *Id.*

Between 1980 and 1982, filed indictments grew by 47%, from over 19,000 in 1980 to 28,000 in 1982. Arrest cases increased by 22%, from over 182,000 in 1980 to 222,000 in 1982. Criminal Court of the City of New York, Caseload Activity Report — Arrest Cases (1980); Criminal Court of the City of New York—Arrest Cases (1980); Chief Administrator of the Courts, 3rd Annual Report (1981); Office of Court Administration of the State of New York, Supreme Court—Caseload Activity Reports (1982); Criminal Court of the City of New York, Caseload Activity Report — Arrest Cases (1982). Arrest cases statistics and reports on filed indictments after 1981 are unpublished but are available through the Office of Court Administration.

615. *See Wallace v. Kern*, 392 F. Supp. at 839.

616. *See* Harbridge House Preliminary Findings, *supra* note 552, at ii.

617. *Id.* at 11.

618. *Id.*

619. *Id.* at iii. Additional findings which related to the managerial structure of the Legal Aid Society and its Criminal Defense Division were as follows:

> The organization is extremely fragmented both operationally and in terms of staff attitude. . . .
>
> With a few outstanding exceptions, managers display little professional pride or self-esteem as Legal Aid attorneys. . . .
>
> The value structure of the managerial staff is much closer to that of civil service than to a private law firm. . . .
>
> The present structure of Society membership, its Board of Directors and bylaws officers are more appropriate to eleemosynary activity than to policy formulation. . . .
>
> A centralization of functions without an operational chain of command has created a paradox of authority without control. . . .
>
> The authority of the Attorney-in-Chief to implement policy is undefined. . . .
>
> The office of the Attorney-in-Chief appears isolated and somewhat nebulous to personnel outside of Central Administration and below the rank of attorney-in-charge. . .
>
> The Criminal Defense Division management structure supplements and duplicates many of the functions of Central Administration. Often the duplication is positive and reinforcing, as in professional training programs; sometimes it is questionable, as in personnel administration. . . .
>
> There is little guidance and no training to prepare new managers for their positions. . . .

Id. at iii-iv.

relations effort" legitimating the Society through "fire-fighting."[620] The Society's management, the study found, simply reacted to the actions of the Association of Legal Aid Attorneys.[621] Second, the Society collected data solely for "accounting and bookkeeping" rather than for "policy formulation."[622] The Society did not require individual staff attorneys to report their caseloads and time allocation per case. As a result, no useful information system existed which would allow oversight and monitoring.[623] Finally, unclear standards for appointments and promotions produced "inconsistent" decisions.[624] Staff attorneys received job security after a six-month probationary period without a performance review and advancement resulted from "*who* one knows rather than *what* one knows."[625]

The study described the Association of Legal Aid Attorneys as an entity which exerted influence disproportionate to its numbers. Although its rank and file members were largely "apathetic," a small group of young, inexperienced, "activist" attorneys dominated the union.[626] The study identified the union as an "agent of change,"[627] and indicated that the Legal Aid Society's supervisors had come to depend on the union to initiate operational reforms instead of implementing reforms themselves.[628]

The study also disclosed that the Legal Aid Society's management had reached an informal accommodation with its staff attorneys.[629] Reacting to increased workload and proportionately diminished staff, the management and staff agreed to place greater emphasis on disposing cases through guilty pleas,[630] clearing court calendars, and reducing backlog.[631] In sum, the Society's institutional concerns with meeting its contractual obligations triumphed over the need for systemic reform. The Society, consistent with its history, subordinated adversarial advocacy — "diligent," "vigorous," and "individual-

620. *Id.* at iv.

621. *Id.* at iii, v, 31.

622. *Id.* at iii. The guidelines of the American Bar Association and the National Legal Aid and Defender Association require defenders' offices to maintain a case reporting and management information system to enable policymakers to make informed decisions on budget, caseload, and performance issues. *See* 1984 NLADA GUIDELINES, *supra* note 452, Guideline III-22, at 21; 1976 NLADA GUIDELINES, *supra* note 441, at 412-18, Guideline 5.2, at 516-17.

> [T]hese activities are essential to the successful operation of a defender office. They permit the defender office to advise clients and courts of the exact status of cases, and enable defenders to ascertain and project manpower and budgetary needs. Without maintaining complete records a defender is unable to determine case overload and take timely corrective action.

1976 NLADA GUIDELINES, *supra* note 441, at 412; *see also* CONTROLLING CASELOADS, *supra* note 490, at 16, 42; 1984 COMPARATIVE ANALYSIS, *supra* note 444, at 57.

623. Harbridge House Preliminary Findings, *supra* note 552, at v.

624. *Id.* at iv.

625. *Id.* (emphasis in original).

626. *Id.* at v.

627. *Id.* at 31.

628. *Id.*

629. *Id.*

630. *Id.*

631. *Id.*

ized" defense[632] — to the need for productivity and efficiency.

E. The 1982 Legal Aid Society Staff Attorneys' Strike and Settlement

The Legal Aid Society's failure to adopt caseload caps and the consequent excessive staff attorney workloads precipitated the longest strike in the Society's history.[633] The president of the Association of Legal Aid Attorneys characterized the strike, which lasted from October 1982 to January 1983, as a "last-ditch effort to defend the rights of our clients."[634]

During the 1982 strike, Mayor Edward Koch appointed a commission to determine whether the City should replace the Legal Aid Society with complete reliance on 18-B Panel attorneys or a public defender.[635] The Commission concluded that the start-up cost and ongoing expenses of a public defender doomed that proposal.[636] The Commission opposed continuation of the Society in its existing form, that is, without inclusion of a blanket no-strike clause in the Society's collective bargaining agreement.[637] The Commission noted that while "the directorship and management of Legal Aid have been most helpful,"[638] the Society system failed "because of the ability of their attorneys to seriously disrupt the criminal justice process."[639] The Commission also opposed exclusive reliance on the Panel because the low rate of compensa-

632. 1971 Report, *supra* note 496, at 10; *see supra* pp. 617-23. Wice and Suwak, consistent with those who advance the "case pressure" explanation for the character of indigent criminal defense, *see infra* note 1275, argue that the "disparity between the adversarial theory as posited by the criminal justice system and the actual behavior of prosecutors and defense attorneys" is caused by "the monstrous and chaotic backlog facing both offices." Wice & Suwak, *supra* note 497, at 175-76. Under these circumstances, they argue, "[c]ooperation is the only feasible mechanism which can unravel the dilemma facing all agents of the urban criminal court system." *Id.* at 176. The history of New York City's institutional defense movement, however, reveals that indigent representation was never intended to be adversarial but was, instead, always perceived as a cooperative endeavor for processing large numbers of poor criminal defendants. *See supra* text accompanying notes 238-56.

633. 1982 Report of the Keenan Commission, *supra* note 552, at 7. The strike's issues related to working conditions. These issues could not be resolved by the "re-opener" clause in the 1982 collective bargaining agreement, which only addressed wages and benefits. Interim Report of the Joint Union-Management Committee on Working Conditions 1 (Dec. 19, 1983). The working condition issues in dispute included caseloads, all-night arraignments ("lobster shifts"), weekend arraignments, institutional assignments, and office days. *Id.*; *see also Legal Aid Lawyers' Strike Enters Third Week With No Talks Planned*, N.Y. Times, Nov. 7, 1982, at 38, col. 1 [hereinafter after *Legal Aid Lawyers' Strike*].

634. *Legal Aid Lawyers' Strike*, *supra* note 633, at 38, col. 2 (quoting statement of Carol Gerstl, then-President of the Association of Legal Aid Attorneys).

635. The mandate of the Commission was "to review the City's program for the future representation of indigents in criminal cases." Report of the Keenan Commission, *supra* note 552, at 2. The Commission's chair, John F. Keenan, was the City's Coordinator for Criminal Justice.

636. *Id.* at 10.

637. *Id.* Although the previous collective bargaining contained a no-strike provision and binding arbitration, it also contained a provision permitting suspension of these clauses during negotiations over wages and benefits. *See supra* note 633.

638. *Id.* at 10-11.

639. *Id.* at 11.

tion made it "difficult to attract qualified private attorneys to handle assigned counsel cases."[640] The Commission's review of case costs in other jurisdictions revealed that institutional defenders, whether public or private nonprofit, were approximately "one-third the cost per case of assigned counsel programs."[641]

The Commission recommended that the City establish a public defender[642] only in the event that the collective bargaining agreement containing a no-strike clause proved "ineffectual."[643] It attributed the problem of case overload to the lack of standards for determining a defendant's indigency status.[644] The Commission indicated that to determine indigency status both Legal Aid Society and 18-B Panel attorneys relied principally upon statements made by defendants.[645] Thus, it recommended that a pilot project be established to develop indigency standards and a more reliable method of screening defendants.[646]

After the strike, more comprehensive binding arbitration and no-strike clauses were added to the collective bargaining agreement. Previous provisions permitting suspension of the no-strike clause during a reopener over wages and benefits were eliminated, effectively eliminating the staff attorneys' union's right to strike while the contract was enforced.[647]

Though the Legal Aid Society agreed to form a joint labor-management committee in recognition of the "increasingly difficult working conditions that had contributed to the strike,"[648] its strategy for dealing with caseloads remained unchanged. The Society continued to seek increased funding from the City by appealing to the City's desire for a more "expeditious time table" in

640. *Id.* at 13.

641. *Id.* at 12; *see infra* note 1160 and accompanying text.

642. *Id.* at 14. When comparing the cost-efficiency of the Legal Aid Society and the Panels, the Commission echoed the views held by others that "for the most part[,] institutional systems of indigent defense . . . are less costly than assigned private counsel programs." *Id.* at 12. Comparing the gross dispositions reported by the panels to the Office of Court Administration with the dispositions reported by the Society, the Commission found that the average cost per case for the Panels was approximately 1.7 times higher than that incurred by the Society. *Id.* In reaching this conclusion, however, the Commission failed to take into account differing methods of disposition, times to disposition, charge severity, and whether continuous representation was provided. *Id.* at 10.

When addressing the feasibility of establishing a public defender, the Commission concluded that there seemed to be little point in undertaking the expense when the Legal Aid Society appeared to be well qualified to continue to perform the desired function. *Id.* Yet the Commission noted that a public defender had one distinct advantage because of the "no strike provisions of the state's civil service laws . . . ." *Id.* at 9-10. *See* N.Y. CIV. SERV. LAW § 200 (McKinney 1983).

643. 1982 Report of the Keenan Commission, *supra* note 552, at 14.

644. *Id.* at 25.

645. *Id.*

646. *Id.* at 28.

647. *See* 1984-1986 Collective Bargaining Agreement, *supra* note 564, at arts. XIII, XVII.

648. Interim Report of the Joint Union-Management Committee on Working Conditions, *supra* note 633, at 1.

criminal cases.[649] In its budget submissions, the Society continued to assert its cost-efficient ideology: the reduction of systemic "impediments and inefficiencies" depended on increasing defender funding in proportion to the increased funding for police and prosecution.[650]

The 18-B Panel became the principal provider of defense services during the strike. Apart from a small number of cases which Legal Aid Society supervisors accepted, Panel attorneys handled all arraignments for ten weeks. Following the strike, however, the flow of cases to the Panels continued unabated.[651]

TABLE 3-3: *Number of Defendants Referred to 18-B Panel Attorneys, Citywide, 1981-1984*[652]

	18-B First Dep't		18-B Second Dep't	
Year	Felonies	Misdemeanors	Felonies	Misdemeanors
1981	11,413	3,871	6,610	2,196
1982	16,717	7,692	6,072	1,352
1983	15,371	7,494	8,781	N/A[653]
1984	16,315	7,818	7,623	4,110[654]

As *Table 3-3* demonstrates, the Legal Aid Society strike permanently affected the caseload of the 18-B Panel in the First Department. Despite the Society's contention that the cases assigned to the Panel during the strike were "for the limited purpose of arraignment,"[655] the number of felony cases referred to and retained by First Department Panel attorneys following the strike was nearly 1.5 times higher than pre-strike referrals while the number of misdemeanor assignments nearly doubled. Conversely, the Society's Criminal Court caseload fell from more than 160,000 assignments in 1980 to slightly more than 150,000 assignments in 1983.[656]

649. Legal Aid Society, Budget Submission to the City of New York for Fiscal Year 1985, at 5-6 (Feb. 1, 1984) [hereinafter FY 1985 Legal Aid Budget].

650. *Id.* at 6.

651. *See infra* notes 652-56 and accompanying text.

652. These data are for calendar years 1981-84. Report UCS-195 (1981) (18-B 1st Dep't), UCS-195 (1981) (18-B 2d Dep't); UCS-195 (1982) (18-B 1st Dep't); UCS-195 (1982) (18-B 2d Dep't); UCS-195 (1983) (18-B 1st Dep't); UCS-195 (1983) (18-B 2d Dep't); UCS-195 (1984) (18-B 1st Dep't); UCS-195 (1984) (18-B 2d Dep't).

653. Report UCS-195 (1983) (18-B 2d Dep't) recorded 7,849 misdemeanor assignments. Since that number would represent a sevenfold jump from calendar year 1982 (n=1352) and twice the number assigned in 1984, we considered the number of misdemeanor assignments for 18-B Second Department Panel in 1983 as "not available."

654. Report UCS-195 (1984) (18-B 2d Dep't) recorded 7,124 misdemeanor assignments for 1984. Our analysis of the administrator's worksheet, however, revealed that the actual number of assignments for that year was 4,110.

655. Legal Aid Society, Budget Submission to the City of New York for Fiscal Year 1984, at 1 (Jan. 11, 1983).

656. Report UCS-195 (1980) (Legal Aid Society); UCS-195 (1983) (Legal Aid Society).

F. The Defense Entities at the Beginning of our Empirical Research

In 1984, the 18-B Panels bore little resemblance to the original *Bar Association Plan*. The *Plan* anticipated a minor role for the 18-B Panel. According to the original *Plan*, the Panel was to be comprised of competent, experienced pro bono attorneys who could be relied upon to represent a few indigent defendants per year without close supervision.[657]

Some twenty years after the implementation of the *1966 Plan*, hourly rates for assigned counsel in New York were lower than all but five states in the United States.[658] Two thousand attorneys were certified to accept felony, homicide, and misdemeanor 18-B Panel assignments.[659] Yet, in a system littered with the debris of public service rhetoric, the elite of the profession did not join the ranks of assigned counsel.[660] Those attorneys who did come forward were persistently criticized for their lawyering shortcomings.[661] By 1984, the number of Panel assignments had grown to over 36,000 (excluding Criminal Court arraignments and appeals).[662] In the First Department, the Panel's workload consisted of 15,593 felony assignments, of which 3,888 originated as indictments in Supreme Court.[663] In the Second Department, the Panel's workload consisted of 7,623 felonies, of which approximately 1,525 originated in Supreme Court.[664] Between 1973 and 1984, the Panels' overall felony assignments (in both Criminal Court and Supreme Court) *increased* by 200 percent.[665]

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657. *See supra* text accompanying notes 396-97.

658. The compensation rates implemented in 1978 continued in effect until they were increased in January 1986. Act of July 11, 1985, ch. 315, § 4, 1985 N.Y. COUNTY LAW § 722(b) (McKinney Supp. 1987); *see supra* notes 582, 586 and accompanying text. However, in 1984, only five states had reimbursement rates as low as or lower than those provided to 18-B Panel attorneys in New York. *See* NEW YORK STATE DEFENDERS ASS'N, ASSIGNED COUNSEL FEES IN NEW YORK STATE: TIME FOR A CHANGE 4 (Mar. 1985). Between 1978 and 1984, the consumer price index increased by 61 percent from 195.4 to 315.3. Thus, had the legislature kept real compensation constant, by 1984 the out-of-court fees would have been $24 and in-court fees $40. *Id.*

Nationally, hourly rates for out-of-court work in both felony and misdemeanor cases ranged from $10 to $50, with $20 to $30 being the most common. The maximum hourly fee for in-court misdemeanor work was $50, whereas for felonies it was $65. In both types of cases, the typical fee was $30 to $40. 1984 CRIMINAL DEFENSE SYSTEMS STUDY, *supra* note 504, at 56-57 (1984). The maximum fee for felony (noncapital) cases ranged from $220 to $2500, with $500 to $1000 being the most common. And for misdemeanors, the maximum fee ranged from $100 to $2500 with $200 to $500 being the most common. *Id.* at 57.

659. *See* Reports UCS-195 (1984) (18-B 1st Dep't); Report UCS-195 (1984) (18-B 2d Dep't).

660. *See supra* text accompanying note 640.

661. *See* 1982 Criminal Advocacy Resolution, *supra* note 607, at 2; *see also* 1975 Report on the Legal Aid Society and the 18-B Panels, *supra* note 499, at 15-19; 1971 Report, *supra* note 496, at 22-23; *supra* note 573; *supra* text accompanying notes 514-15.

662. *See* Reports UCS-195 (1984) (18-B 1st Dep't); UCS-195 (1984) (18-B 2d Dep't).

663. *Id.*

664. *Id.*

665. *Id.*; *see* Reports UCS-195 (1972-73) (18-B 1st Dep't); UCS-195 (1972-73) (18-B 2d Dep't).

In contrast with the growing number of 18-B Panel attorneys, the Legal Aid Society's 1984 staff of 502 attorneys (395 full-time casehandlers) was smaller than it had been in 1973.[666] This decrease occurred despite a 27% increase in the *overall* number of Society assignments,[667] which had resulted from a substantial (34%) increase in the Society's Criminal Court caseload.[668] But while the Society's Ciminal Court caseload grew, the number of felonies assigned to the Society in Supreme Court *decreased* by 32%.[669] In fact, the focus of the Society's representation had dramatically shifted in the sixty years following the establishment of the Voluntary Defenders Committee. From nearly 100% indicted felony cases in 1926,[670] only 7% of the Society's caseload consisted of indicted felony cases in 1984.[671]

In 1984, the Legal Aid Society received more staff attorneys' caseload grievances than in any previous year.[672] Yet despite staff pressure, the Society refused to decline assignments or establish fixed caseload limits in its contract with the City.[673] The Society also continued to decline homicide assignments.[674] The Society took the position that under its contract with the City it

666. Reports UCS-195 (1973-74) (Legal Aid Society); UCS-195 (1984) (Legal Aid Society). Although the Legal Aid Society's staff was reduced from its 1973 level, the Society continued to be one of only sixteen institutional defender programs in the nation which employed more than fifty full-time staff attorneys. Of these defender programs, those with the highest number of full-time staff attorneys (twenty or more) were located in the Northeast (10%) and in the West (12%). 1984 CRIMINAL DEFENSE SYSTEMS STUDY, *supra* note 504, at 47-49.

667. Reports UCS-195 (1972-73) (Legal Aid Society); UCS-195 (1984) (Legal Aid Society).

668. Criminal Court assignments grew from 138,372 in 1972-1973 to 184,788 in 1984. Report UCS-195 (1984) (Legal Aid Society); Report UCS-195 (1972-1973) (Legal Aid Society).

669. Reports UCS-195 (1972-1973) (Legal Aid Society).

670. H. TWEED, THE LEGAL AID SOCIETY, NEW YORK CITY, 1876-1951, at 83 (1954).

671. Report UCS-195 (1984) (Legal Aid Society).

672. FY 1985 Legal Aid Budget, *supra* note 649, at 2.

673. The Legal Aid Society contended that it fulfilled its contractual obligations. Legal Aid Society, Reply Memorandum to McConville and Mirsky Draft Report, 2-3, 9-19 (Oct. 1, 1985) [hereinafter 1985 Reply Memorandum]. In April, 1986, however, subsequent to the filing of our Draft Report, *see* M. McConville & C. Mirsky, Committee on Criminal Advocacy of the Ass'n of the Bar of the City of New York, Defense of the Poor in New York City: An Evaluation (1985) [hereinafter 1985 McConville & Mirsky Draft Report], the Legal Aid Society began to withdraw from certain arraignment sessions. This decision followed caseload increases and a court administrative decision to replace reliance on the master calendar systems, *see supra* FIGURE 1, at 588 and accompanying text at 586-87, with an individual assignment system that required the appearance of staff attorneys at many additional court parts. *See* Legal Aid Society, Briefing Memorandum (May 14, 1986); *see also supra* note 31.

At the time of the Legal Aid Society's decision to withdraw from certain arraignment sessions, the administrator of an 18-B Panel reported that Panel attorneys had been asked to cover arraignment parts in "unprecedented numbers, with exhausting frequency. Everyone's workload . . . expanded to the maximum and . . . [the administrator's] office [was] no longer able to schedule sufficient numbers of attorneys to adequately staff the courts." 1986 Ralls Letter, *supra* note 603.

674. In a letter of October 22, 1985, the Executive Director of the Society wrote to the Committee on Criminal Advocacy and described the Legal Aid Society's practice in relation to homicides:

> [A]bsent the presence of other appointed or retained counsel, the Society does represent defendants charged with homicide offenses at arraignment. Although under its

was not obliged to accept these assignments and could not be "compelled."[675]

In budget submissions to the City, the Legal Aid Society began to acknowledge that its capacity to handle all assignments was limited. In fiscal year 1984, it said: "Increases in caseload and in resultant workload cannot be addressed both competently and timely without appropriate staff increases."[676] In order to continue to be cost-efficient, the Society emphasized the "necessity for joint criminal justice planning" with courts, police and pros-

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contract the Society is not obligated to accept homicide appointments, the Society does accept such assignment [from] the court . . . 1) when a defendant has contacted the Society in advance of his arrest; 2) where a defendant is currently being represented by the Society on a pending charge; or 3) where a substantial representational effort has been undertaken prior to any possible substitution of a homicide Panel attorney and the defendant's Sixth Amendment rights might be jeopardized if the Society did not continue to provide representation. Supervisory approval is always required to accept or decline homicide representation.

Letter from Archibald R. Murray, Executive Director of The Legal Aid Society, to the Committee on Criminal Advocacy of the Association of the Bar of the City of New York (Oct.22, 1985) [hereinafter Oct. 1985 Murray Letter]. The Legal Aid Society refuses homicide assignments by interpreting its contractual responsibilities as not requiring it to accept cases punishable by life imprisonment. *See supra* text accompanying notes 275-76, 509; *supra* note 593 and accompanying text. Meanwhile, the Society does accept assignments in narcotics offenses, which, while punishable by life imprisonment, result in higher incidence of guilty pleas and a trial rate which is over 10 times less. *See* DIVISION OF CRIMINAL JUSTICE SERVICES OF THE STATE OF NEW YORK, FELONY PROCESSING PRELIMINARY REPORT INDICTMENT THROUGH DISPOSITION 6 Preliminary Report, 28 (Jan.-Dec. 31,1984). The trial rate for homicides is 37.1%, the overall trial rate for felonies is 10.7%, and the trial rate for narcotics offenses is 3.7%. *Id.*

In response to the preliminary findings of the Draft Report, *see* 1985 McConville & Mirsky Draft Report, *supra* note 673, the Executive Director of the Legal Aid Society stated that the Society would be eager to provide the major portion of homicide representation "if appropriate resources [were] made available to support this new undertaking. The steps are now being reviewed internally by Society management and by its Board of Directors. Once our internal needs assessment is completed we shall be seeking funds from the city to begin this new endeavor." Legal Aid Society, Additional Reply Memorandum to McConville and Mirsky Draft Report (Jan. 3, 1986) [hereinafter 1986 Additional Reply Memorandum]; *but see infra* note 1281.

675. Letter from Archibald R. Murray, Executive Director of Legal Aid Society, to Stephen L. Weiner and Gerald B. Lefcourt, Committee on Criminal Advocacy 2 (Jan. 3, 1986) [hereinafter Jan. 1986 Murray Letter].

676. FY 1985 Legal Aid Budget, *supra* note 649, at 1. After the Draft Report *see* 1985 McConville & Mirsky Draft Report, *supra* note 673, was filed, in its fiscal year 1987 budget submission to New York City the Legal Aid Society stated that "the average caseload of a [case handling] staff attorney was 68.3 in December of 1984 and 71.9 in July 1985; the average was 74.0 in December of 1985 and 75.4 in January 1986." FY 1987 Legal Aid Budget, *supra* note 616, at 4. Although this per attorney average did not differentiate between misdemeanor and felony-certified attorneys and simply divided all pending cases by the available number of case handling staff attorneys, the Legal Aid Society maintained that its experience had been "that a caseload of 60 pending cases (if they contain a fair mixture of misdemeanor and felonies) is reasonable and manageable." *Id.* The Legal Aid Society contended "[t]he choices facing us [the Legal Aid Society and the City of New York] are thus to increase staff, to reduce intake or to face an arbitration on workload grievances that would lead to mandated intake restrictions. There really is one reasonable course for us and for the City: increasing the staff." *Id. See also supra* text accompanying notes 565-67, 610-13.

ecution.[677] It noted that "neither court nor defender funding has kept pace with those initiating parties [police and prosecution] and the resulting disparities have limited the *productive* results of that increased funding."[678] Thus, the Society argued that inadequate defense funding had impacted negatively upon the operational effectiveness of the courts and the prosecution.

In its public statements, the Legal Aid Society management claimed it provided adversarial advocacy with a very high success rate.[679] The management emphasized its acquittal rate in both Criminal and Supreme Courts and maintained that this was better than that of assigned counsel and equivalent to that achieved by retained lawyers.[680] Moreover, the Society pointed to its law reform cases as evidence that its private status permitted it to be independent of the City against whom it initiated lawsuits.[681] Through this rhetoric, the Legal Aid Society sought to legitimate its position by claiming conformity to *Gideon*'s adversarial mandate while remaining the City's principal provider.

IV.
CHAPTER SUMMARY

Gideon's significance in the structure of indigent defense systems nationwide was to dramatically increase the proportion of the population served by institutional defenders. Once *Argersinger* required courts to provide representation for all defendants if a term of imprisonment were to be imposed, unmanageable caseload demands routinely confronted institutional defenders. These demands could not be met by cost-efficient defense providers despite their continued reliance on non-trial dispositions and general repudiation of adversarial advocacy. Millions of persons were denied effective legal representation because of the quality of lawyering provided by institutional defenders, assigned counsel and private contract agencies.

The organized bar's promulgation of standards and its endorsement of adversarial practices did nothing to change the quality of lawyering provided by indigent defense entities. These entities remained chronically underfunded, and their underlying purpose, to assist the state in processing defendants through non-adversarial means, remained unchanged. Standards thus were little more than symbolic responses which legitimated defense of the poor by suggesting that the system's difficulties were solvable by the adoption of officially sanctioned codes of practice.

In New York City, after 1965, the Legal Aid Society's criminal defense division became entirely dependent upon city and state funds. The Society became captive to public funding in the same way that it had been dependent,

677. FY 1985 Legal Aid Budget, *supra* note 649, at 5.
678. *Id.* (emphasis added).
679. LEGAL AID SOCIETY, 1984 ANNUAL REPORT 57 (1984).
680. *Id.* at 34; 1985 Reply Memorandum, *supra* note 673, at 37-42.
681. LEGAL AID SOCIETY, 1984 ANNUAL REPORT 40-41; 1985 Reply Memorandum, *supra* note 673, at app. A, at ii-vii.

until 1965, upon charitable donations. It responded to revenue shortfalls in the same way: by limiting its coverage and relying upon court-assigned private attorneys to provide full representation. Although it was nominally a private corporation that espoused adversarial principles, the Society continued to service the City and to remain committed to the cost-efficient processing of defendants. Its staff attorneys, unable to publicly refuse assignments or to strike when caseloads became unbearable, were increasingly dependent on guilty pleas. The opportunity for these attorneys to provide adversarial advocacy was virtually eliminated by institutional process.

The 18-B Panel, designed in 1965 as a residual provider in five hundred conflict cases and in selected homicide cases, became a major provider of indigent defense services in over 36,000 assignments. The growth of the Panel occurred despite the failure to systematically screen the private attorneys who volunteered for Panel service, the lack of administrative, investigative and support staff capable of monitoring, evaluating and improving the quality of Panel representation, and the absence of standards for the equitable distribution of cases between Legal Aid Society staff attorneys and 18-B Panel attorneys. In short, the interactive relationship between the Panel and the Society resulted in the Panel's fulfilling the same mission that assigned counsel had fulfilled prior to the adoption of Article 18-B: to provide counsel in all cases in which the Legal Aid Society, for whatever reason, was unable to provide representation.