CHAPTER TWO

STATE INVOLVEMENT IN THE FINANCING OF CRIMINAL DEFENSE

In this chapter we consider the nationwide growth in the proportion of the population served by institutional defenders, and also early legislation by which municipalities in New York were authorized to provide public funds to private defender agencies. We then consider the impact of *Gideon v. Wainwright*,[309] the landmark Supreme Court decision requiring the state to provide free legal services to all indigent defendants, on the nation's defense systems. Thereafter, we examine New York State's constitutional and legislative response to *Gideon* and analyze the principal features of New York City's implementation of the constitutional and legislative mandate to provide counsel: its contract with the Legal Aid Society, and the *Bar Association Plan* for involving court-assigned private 18-B Panel attorneys.

I.

THE EXPANSION OF INSTITUTIONAL DEFENSE SYSTEMS

Throughout the United States, the need for a cost-efficient system of indigent defense grew alongside the rise in the urban population, the crime rate, and the number of accelerated arrests. Between 1940 and 1967 the nation's population grew by more than 47 percent.[310] During the same period, the total number of reported offenses increased even more dramatically. The Uniform Crime Reports revealed that the number of property crimes increased sharply.[311] The incidence of larceny of $50 or more was up more than 550 percent from 1933, and the amount of burglary nearly doubled.[312] For the five-year period beginning in 1960, arrests for property crime increased by 25 percent, while arrests for crimes of violence increased by 16 percent.[313] The typical offender was "likely to be a member of the lowest social and economic groups in the country [and] poorly educated."[314] Accelerated arrests of poor people produced acute congestion in metropolitan criminal justice systems. This caused both "undue delay and unseemly haste" characteristic of "assembly-line" justice.[315]

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309. 372 U.S. 335 (1963).

310. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 23 (1967) [hereinafter 1967 PRESIDENT'S COMMISSION REPORT].

311. *Id.* at 23-24.

312. *Id.*

313. *Id.* at 24.

314. *Id.* at 44.

315. *Id.* at 128. There are at least three reports of assembly line justice in New York City. *See* Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15, 23 n.13 (1967). The Bronx Bar Association reported "mass

As crime control concerns became more pressing, a mechanism was needed to secure a high proportion of convictions and dispositions of indigents on a regular and predictable basis. The system of institutional defense once again came to fill this need. In 1949, public defenders or staff attorneys of a private contract agency served less than 14 percent of the nation's population.[316] By 1961, with the growth of institutional defenders in cities, the proportion of the population served by defender agencies nearly doubled.[317] Institutional defenders therefore came to serve a critical function in the administration of urban criminal justice nationwide.

II.
NEW YORK STATE'S LEGISLATION ESTABLISHING A "MIXED" SYSTEM OF INDIGENT DEFENSE

While the style of criminal defense representation adopted by the Legal Aid Society served the structural goals of cost-efficient, expeditious case-processing, as a system of providing defense services it was both incomplete and fiscally unreliable. The restraints of philanthropic contributions prevented the Society from providing services to all five counties in New York City and held the City subject to the vicissitudes of charity.[318] In the four counties outside of New York County, the City remained dependent upon the old assigned counsel system for all or a substantial portion of its court assignments.[319]

In 1951, New York State began to respond to the need for a more dependable method of processing indigent criminal defendants. In that year the legislature authorized counties to contract on a voluntary basis with private legal aid societies for the provision of free legal assistance to indigent criminal defendants.[320] This legislation was amended in 1961 to permit "the governing

assembly line justice" which "was rushing defendants into pleas of guilty and into convictions, in violation of their legal rights." *Id.*, *quoting* N.Y. Times, Mar. 10, 1965, at 51, col. 2. Similarly, judges in New York's Criminal Court reported that "pressure to set statistical records in disposing of cases had hurt the administration of justice." *Id.*, *quoting* N.Y. Times, Nov. 4, 1965, at 49, col. 1. Appellate judges reported that criminal justice had become "instant justice. . . converting our courthouses into counting houses. . . *Id.*, *quoting* N.Y. Times, Feb. 5, 1966, at 58, cols. 2-3.

316. E. BROWNELL, LEGAL AID IN THE UNITED STATES 137, Chart IV (1951).

317. Id. at 12-13, Chart II (Supp. 1961). The growth in institutional defense reflected a national trend toward greater use of staff attorney systems in large urban centers. Brownell reported in 1961 that while 59 percent of all counties nationally continued to rely upon court-assigned private attorneys, 2.9 percent had begun to employ a public or private institutional defender. Moreover, the proportion of the indigent-defendant population served by these defenders grew from 13.7 percent in 1951 to 24.8 percent in 1961. *Id.* at 13; *see also* NATIONAL LEGAL AID & DEFENDER ASS'N, THE OTHER FACE OF JUSTICE 13 (1973) [hereinafter THE OTHER FACE OF JUSTICE].

318. DuVivier, *The Use of Public Funds in Legal Aid Work*, 55(1) LEGAL AID REV. 3 (Spring 1957); *See supra* text accompanying notes 280, 288-91, 297-300.

319. H. TWEED, THE LEGAL AID SOCIETY, NEW YORK CITY, 1876-1951, at 98 (1954); *See supra* note 293.

320. N.Y. COUNTY LAW § 224(10) (McKinney 1972). Despite this legislation, most

body of a city in which any county is wholly contained" to appropriate funds for the maintenance of private legal assistance groups.[321] It was then that the Legal Aid Society began to receive money from the City of New York.[322]

Public funding allowed the Legal Aid Society to expand its criminal defense staff from twenty-eight attorneys in 1960 to forty-three in 1963.[323] By 1964, the Society represented 55,969 defendants in Criminal Court, and 6,931 in New York State Supreme Court.[324] Judges typically assigned Society attorneys to indigent defendants in felony and more serious misdemeanor cases.[325] To fulfill these assignments, the Society placed staff attorneys in all five counties, and appeared at all levels of criminal proceedings.[326] Although by 1963 there was still "some court assignment of private practitioners. . .this ordinarily occurr[ed] only when there [was] a conflict among two or more indigent defendants or where other unusual circumstances occurr[ed]."[327] Only homicide cases remained the special preserve of private attorneys.[328]

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counties outside of New York City continued to rely on uncompensated assigned counsel, in all but homicide cases, rather than on institutional defenders, for the provision of indigent defense services. Counsel was rarely assigned prior to indictment in a felony case and was almost never assigned to a defendant charged with a misdemeanor. *See* 1965 N.Y. STATE LEGIS. ANN. 32, 34 (legislative history of Article 18-B of the County Law). *See also infra* note 328.

New York's experience reflected what was taking place across the nation. A 1951 study of defense systems revealed that 38.2 percent of all counties provided either unpaid court-assigned private attorneys or no counsel at all. E. BROWNELL, *supra* note 316. In only 18.6 percent of all counties was compensation paid in capital offense cases. *Id.* Less than half of the counties paid assigned counsel in other cases. *Id.* Only 1.2 percent of all counties employed an institutional defender, although these systems serviced 13.7 percent of the eligible defendant population. *Id.*

321. N.Y. COUNTY LAW § 224(10) (McKinney 1972). The New York State movement for a "private public defender" was in part motivated by New York City's experience with the Legal Aid Society. L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 523, 531 (1965) [hereinafter L. SILVERSTEIN].

322. *See* L. Tolman, Annual Report of the Departmental Committee of the First Judicial Department, *in* 11th Annual Report of the Administrative Board of the Judicial Conference of the State of New York for the Judicial Year July 1, 1964 through June 30, 1965, N.Y. LEGIS. DOC. No. 90, at 83-84 (1966) [hereinafter 1966 L. Tolman Report]. *See also* Patterson, *A Brief History of the Legal Aid Society*, 65 LEGAL AID REV. 27, 30 (1968-1969). Silverstein reported that in 1963, the city contributed more than $256,000 to the Society's total income of over one million dollars. L. SILVERSTEIN, *supra* note 321, at 533.

323. L. SILVERSTEIN, *supra* note 321, at 533. There were an additional four attorneys who handled appeals, seventeen secretaries, and six investigators. *Id.*

324. 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]. The Report indicated that in 1965 the City had contributed $400,000 toward the Legal Aid Society's overall cost of $1,294,000, of which $780,000 represented work in criminal cases ($700,000 for trials and $80,000 for appeals). *Id.* at 1-2.

325. L. SILVERSTEIN, *supra* note 321, at 531.

326. In Queens County, the Society undertook representation only in Supreme Court once a defendant was named in an indictment. *Id.* at 533.

327. *Id.* at 532.

328. *See id.* at 523. The City compensated private attorneys in homicide cases pursuant to Section 308 of the former Code of Criminal Procedure. N.Y. CODE OF CRIM. PROC. § 308, repealed by 1965 N.Y. Laws 878, § 5, 1983 N.Y. Laws 521, § 1. *See also supra* note 166 and accompanying text.

III.
THE IMPACT OF *GIDEON V. WAINWRIGHT* ON INDIGENT CRIMINAL DEFENSE

The Supreme Court's 1963 decision in *Gideon v. Wainwright*[329] was the capstone of a movement which had achieved considerable momentum in the preceding twenty years. Despite the Court's adversarial rhetoric, *Gideon*, in effect, gave credence to a system of institutional defense for the poor that was already common in large cities throughout the United States.[330] The decision wove the sixth amendment right to counsel into the fabric of state criminal procedure by mandating the assignment of counsel to all defendants charged in felony indictments.[331] Justice Black, speaking for the Court, stressed the significance of an indigent felony defendant's right to free legal counsel:

> [I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.[332]

According to this new rhetoric, the assignment of a lawyer was no longer a "privilege," "dole" or "charity"; it did not depend upon "the pleasure of the court" or the responsiblity of "protecting the economic base of the private bar."[333]

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329. 372 U.S. 335 (1963).

330. For a discussion of the legitimating function of *Gideon* and its progeny on the non-adversarial practices of indigent defense providers, *see infra* note 421.

331. 372 U.S. 335 (1963)

332. *Id.* at 344.

333. LaFrance, *Criminal Defense Systems for the Poor*, 50 NOTRE DAME L. REV. 41, 104 (1974). LaFrance points out that "counsel is necessary because society has chosen the adversary process to seek truth. If this is true of counsel generally, it is compellingly true of counsel representing the poor." *Id.* at 48. For indigent defendants, therefore, who are "ill-equipped by education and status to represent themselves," *id.*, "the right to counsel [is] not simply a constitutional principle but . . . a form of entitlement to public assistance." *Id.* at 104. *See also* Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (the right to be heard would be of little avail if it did not comprehend the right to be heard while represented by counsel).

LaFrance's analogy to welfare rights is derived from Goldberg v. Kelly, 397 U.S. 254 (1970), which "recognized an important relationship between social policy, poverty and the right to be heard." LaFrance, *supra*, at 49. Justice Brennan wrote for the Court in *Goldberg*:

> We have come to recognize that forces not within the control of the poor contribute to their poverty. . . . Public assistance, then, is not mere charity, but a means to "pro-

The real significance of *Gideon* in New York City and other large cities throughout the United States was that it redefined indigent defense providers as adversarial representatives of the accused.[334] An indigent defendant was to be entitled to a lawyer who conducted an investigation into the law and facts, and considered all applicable defenses to the charges, including demurrers to the indictment and motions seeking to suppress evidence.[335] In effect, *Gideon*

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mote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."

397 U.S. at 265.

Thus, the assignment of counsel serves not only to protect the interests of the individual, but also to assure "the viability of the adversary system." O'Brien, Pheterson, Wright, & Hostica, *The Criminal Lawyer: A Defendant's Perspective*, 5 AM. J. CRIM. L. 283, 285 (1977) *citing* ATTORNEY GENERAL'S COMMITTEE, REPORT ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE (1963).

334. New York courts had begun to define conventional lawyering responsibilities in adversarial terms even before *Gideon*. However, this was always in the context of defendants who *retained* their own counsel. Birzon, Kasanof & Forma, *The Right to Counsel and the Indigent Accused in Courts of Criminal Jurisdiction in New York State*, 14 BUFFALO L. REV. 428, 429-30 (1965) [hereinafter Birzon, Kasanof & Forma]. *See, e.g.*, People v. Hull, 251 App. Div. 40, 296 N.Y.S. 216 (1937); People v. Kerber, 172 App. Div. 755, 159 N.Y.S. 215 (1916).

Subsequent to *Gideon*, New York courts began to define effective assistance of counsel in terms of what was needed for competent representation of all defendants.

> [A]t the very least, the right of a defendant to be represented by an attorney means more than just having a person with a law degree nominally represent him upon a trial and ask questions. Moreover, and this is well settled, the defendant's right to representation does entitle him to have counsel "conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial."

People v. Bennett, 29 N.Y.2d 462, 466, 280 N.E.2d 637, 639, 329 N.Y.S.2d 801, 804 (1972), *quoting* Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968), *cert. denied*, 393 U.S. 849 (1968) (finding ineffective assistance where assigned counsel failed adequately to prepare insanity defense). *See also* People v. Droz, 39 N.Y.2d 457, 348 N.E.2d 880, 384 N.Y.S.2d 404 (1976) (finding ineffective assistance by assigned counsel due to lack of preparation for trial and inadequate familiarity with basic criminal law); People v. Bell, 48 N.Y.2d 933, 401 N.E.2d 180, 425 N.Y.S.2d 57 (1979) (finding ineffective assistance of counsel where assigned counsel failed to request any pretrial hearings, conduct a *voir dire* of prospective jurors, make an opening statement and explain essence of defense).

335. In People v. Baldi, 54 N.Y.2d 137, 429 N.E.2d 400, 444 N.Y.S.2d 893 (1981), the Court of Appeals adopted a "meaningful representation" test. The court rejected the "farce and mockery" standard of People v. Brown, 7 N.Y.2d 359, 165 N.E.2d 557, 197 N.Y.S.2d 705 (1960), because it provided inadequate protection to the accused. Under the *Baldi* standard, the failure to undertake essential lawyering tasks is measured against the totality of the circumstances in the "particular case . . . as of the time of the representation." *Baldi*, 54 N.Y.2d at 147, 429 N.E.2d at 405, 444 N.Y.S.2d at 898. In this respect the meaningful representation test is similar to the "reasonable competence" standard later adopted by the U.S. Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984).

Although the Supreme Court has specifically disavowed the "meaningful" representation standard adopted in *Baldi, see* Morris v. Slappy, 461 U.S. 1, 13-14 (1983), it has continued to adhere to *Gideon's* rhetoric when describing the independent adversarial function which counsel for the indigent accused serves:

> . . . the primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his cli-

and its progeny altered the formal rhetoric of indigent criminal defense from that which described the defense function in terms of cost-efficiency to another which portrayed indigent representation as part of a "due process obstacle course."[336] The right to have an attorney conduct both factual and legal investigations, for example, with enough time to determine whether a defense can be developed,[337] presents a formidable impediment to the efficient processing of indigent defendants.[338] Making adversarial advocacy a constitutionally mandated standard, moreover, militates against continued reliance on police and prosecutorial determinations of probable guilt. The guilty plea no longer serves as a "focal device" through which "adjudicative fact finding is reduced to a minimum."[339]

The new emphasis on the defendant's right to adversarial representation was evident in Justice White's opinion in *United States v. Wade*.[340] Though he disagreed with the majority conclusion that the right to counsel applied at a

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ent. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.

Ferri v. Ackerman, 444 U.S. 193, 204 (1979). *See also* Kimmelman v. Morrison, 106 S.Ct. 2574, 2588-89 (1986) (counsel's failure to file timely motion to suppress evidence obtained in violation of fourth amendment constituted ineffective assistance and was sufficient to grant habeas relief despite the "technical" nature of the defense, and the Court's abstention doctrine in fourth amendment cases).

336. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 163 (1968). Packer attributes the differences in approach to the criminal process as examples of the Crime Control and Due Process Models of criminal justice. *Id.* The former was a model pioneered by institutional defenders, *see supra* text accompanying notes 156-60, as typified by the Voluntary Defenders' Committee, *see supra* text accompanying notes 238-49, in which "efficiency of operation" was a principal criterion of success. H. PACKER, *supra*, at 158.

337. People v. Bennett, 29 N.Y.2d at 466, 280 N.E.2d at 639, 321 N.Y.S.2d at 804.

338. H. PACKER, *supra* note 336, at 163.

Packer argues that a due process model which relies on adversarial advocacy, and not police and prosecution, to determine questions of guilt or innocence also seeks to control the adjudicatory process itself which those adhering to the model view as highly "coercive, restricting, and demeaning." *Id.* at 165-66. Thus, because of the "potency" of the state "subjecting the individual to . . .[its] coercive power. . . , the criminal process must, in this model, be subjected to controls that prevent it from operating with maximal efficiency." *Id.* at 166. This much was recognized by the 1967 President's Commission on Law Enforcement and the Administration of Justice:

> The provision of counsel entails costs beyond the expense of paying for their services. Counsel can be expected to require that the court deal deliberatively with his client; in many respects lawyers complicate the process. A court that has been adjudging men guilty and fixing their punishments in a matter of a few minutes is unlikely to be able to continue to do so when the accused persons before it are represented by lawyers. Defense counsel will demand compliance with the rules of evidence and make motions for discovery and suppression of evidence. Sometimes they will seek delay for tactical advantages, cast doubt on a truthful witness, or challenge legitimate proof.

See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 50 (1967) [hereinafter 1967 PRESIDENT'S COMMISSION REPORT].

339. H. PACKER, *supra* note 336, at 162.

340. 388 U.S. 218, 250 (1967) (White, J., dissenting in part and concurring in part).

police-arranged lineup,[341] Justice White shared the Court's understanding of the defense counsel's role in an adversarial system of criminal justice:

> Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be. *But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty.* The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can refuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. . . .[342]

Under this rhetoric, indigent defense lawyers would no longer harmonize the defense function with that of the prosecution to insure that "no guilty man. . . [may] escape."[343] Lawyers would no longer cooperate with the prosecution if this meant overlooking "routine violations of the clients' constitutional rights."[344] Rather, lawyers would be expected to undertake certain specific tasks which courts came to define as indicative of adversarial advocacy and "fundamental to competent representation."[345]

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341. *Id.* at 258.

342. *Id.* at 256-57 (emphasis added) (citations omitted).

343. Goldman, *The Need for a Public Defender*, 8 J. CRIM. L. CRIMINOLOGY 273, 274 (1917-1918). *See also* GOLDMAN, THE PUBLIC DEFENDER 8 (2d ed. 1919); *see also supra* text accompanying note 137.

344. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 492 (1982).

345. *Id.* The author cites Cooper v. Fitzharris, 551 F.2d 1162 (9th Cir. 1977), *modified en banc*, 586 F.2d 1325 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979), in which the court found ineffective assistance of counsel where the demands made upon an institutional defender resulted in her inability to engage in adversarial representation.

> At the evidentiary hearing, trial counsel testified that although she was aware of several issues regarding the admissibility of certain physical and testimonial evidence, she conducted no legal research and made no objection to its introduction. She further testified that within a few months after petitioner's conviction, she collapsed in court, her health "seriously threatened" by a caseload of approximately 2,000 cases per year. She then resigned from the Public Defenders Office, having come to the conclusion that she was "actually doing the defendants more harm by just presenting a live body than if they had no representation at all."

551 F.2d at 1163, n.1.

IV.

NEW YORK STATE'S CONSTITUTIONAL AND LEGISLATIVE RESPONSE TO *GIDEON*

Three years after *Gideon*, the New York Court of Appeals decided *People v. Witenski*.[346] The mandate of that case was that "in every criminal case, large or small, the court must 'make it clear' to the defendant that . . . [the right to counsel] exist[s] and that the opportunity to have the services of counsel must be real and reasonable, not a mere formalistic recital of law language.' "[347]

For the first time, New York courts imposed on judges the duty of informing persons charged with *misdemeanors* (and with petty offenses) not only that they enjoyed a right to counsel, but also that the court would assign counsel if necessary.[348] However, the failure of the private bar to volunteer in sufficient numbers for pro bono representation in state criminal courts[349] meant that *Witenski*'s mandate was "unworkable without extensive implementation . . . in the form of statutory enactment . . . accompanied by an appropriation of public money."[350]

In response to the court's decision, the state legislature required counties

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346. 15 N.Y.2d 392, 207 N.E.2d 358, 259 N.Y.S.2d 413 (1965).

347. *Id.* at 395, 207 N.E.2d at 360, 259 N.Y.S.2d at 415 (1965), *quoting* People v. Marincic, 2 N.Y.2d 181, 139 N.E.2d 529, 158 N.Y.S.2d 569 (1957). Previously, it was only upon a felony indictment, however, that a court was required to advise a defendant of his right to court-assigned counsel, in the event that the defendant was unable to retain counsel. *See* section 308 of the Code of Criminal Procedure. "[T]he governing procedural statute [N.Y. CODE OF CRIM. PROC. § 188 *repealed by* 1965 N.Y. Laws 878, § 2] [did] not compel a Criminal Court magistrate to inquire whether the defendant [had] the means to retain private counsel or whether the assistance of gratuitous legal services [was] desired, and no express authority for the assignment of counsel by the magistrate [was] found in the state's Code of Criminal Procedure." Birzon, Kasanof, & Forma, *supra* note 334, at 442-43 (1965).

348. *Witenski*, 15 N.Y.2d at 395, 207 N.E.2d at 362, 259 N.Y.S.2d at 415.

349. The New York State Bar Association acknowledged the futility of relying upon *pro bono* representation in its response to the proposed amendment to the County Law (adding new Article 18-B, *infra*, note 352):

> The increased burden of representing all indigents cannot, in fairness, be met by the uncompensated work of individually assigned lawyers. Lawyers who are assigned to represent indigents should be compensated sufficiently to permit them to devote the time, care and patience to the preparation and disposition of the case which are necessary to meaningful exercise of the right to counsel.

Report of Committee on Penal Law and Criminal Procedure, New York State Bar Association, at 2 (1965).

350. *Witenski*, 15 N.Y.2d at 398, 207 N.E.2d at 362, 259 N.Y.S.2d at 418 (Bergan, J., dissenting).

In guaranteeing counsel to misdemeanor defendants, the court's decision required New York's indigent defense system to expand its role tremendously. Statistics of the Federal Bureau of Investigation for 1969 indicated that misdemeanors constituted approximately 82 percent of all non-traffic arrests. *See* Wice & Suwak, *Current Realities of Public Defender Programs: A National Survey and Analysis*, 10 CRIM. L. BULL. 161, 162 (1974). Thus, the decision in *Witenski* potentially increased the number of indigent defendants referred to court-assigned counsel fivefold — from 18 percent (felony cases) to nearly 100 percent. *Id.*

to assume fiscal responsibility[351] for providing counsel to every defendant charged with an offense for which "a sentence to a term of imprisonment is authorized . . . ."[352] This right to counsel was more expansive than that enjoyed under the federal Constitution. *Argersinger v. Hamlin*[353] only extended the right to counsel to federal offenses for which a term of imprisonment is *actually* imposed.[354]

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351. The Budget Report to the State Legislature on Article 18-B noted that, while Section 224(10) of the County Law, *see supra* note 320 and accompanying text, had enabled cities to establish plans for private or public defender systems, "[o]nly a few counties accepted their responsibility and established a legal aid program." Richard I. Nunez, Examiner, Budget Report on Bills: Assembly Print 7273, Assembly Intro. 4786 (July 14, 1965).

352. N.Y. COUNTY LAW § 722(a) (McKinney 1972). Chapter 878 of the Laws of 1965, of which Article 18-B was a part, required courts to inform indigent defendants charged with a crime (including defendants charged with misdemeanors and petty offenses) of the right to the assignment of counsel at the first court appearance, whether arraignment upon a complaint in Criminal Court, N.Y. CRIM. PROC. LAW § 170.10(3) (McKinney 1982), or upon an indictment in Supreme Court. N.Y. CRIM. PROC. LAW § 210.15 (McKinney 1982).

Article 18-B received wide support from judges and prosecutors. Among its supporters was the Legal Aid Society, which stated that "[i]n the flexibility of its requirements this bill follows the admirable precedent given by the 1964 Federal Criminal Justice Act, making similar provisions for criminal cases in the U.S. District Courts." Letter from Edward C. Carr, Jr., Attorney-in-Chief of the Legal Aid Society, to Hon. Sol Neil Corbin (June 9, 1965) [hereinafter 1965 Carr Letter]. While New York City supported the legislation, it expressed reservations about the anticipated cost which the city would incur should it have to rely upon the assignment of private attorneys:

> [I]t should be noted that this bill goes one step further than recent court decisions in that in addition to counsel services, it requires the furnishing of other necessary services to defendants. Thus, the total potential costs of both counsel and other services cannot be precisely ascertained at this time. Of course, there can be no question that such costs will be of great magnitude.
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> Inasmuch as the administration of criminal justice is completely a matter of State concern, the costs of this new program should be borne in large measure by the State. Therefore, it is recommended that legislation providing State aid for such costs be introduced at the next session of the Legislature.

Letter from Robert F. Wagner, Mayor of the City of New York, to Nelson A. Rockefeller, Governor of the State of New York, at 2 (July 8, 1965) [hereinafter 1965 Wagner Letter], *quoting*, The Budget Director of the City of New York. *See generally* 1965 Report to Mayor on the Cost of Defense, *supra* note 324 (illustrating the degree to which the City's concerns over cost dictated the plan it adopted pursuant to Article 18-B).

353. 407 U.S. 25 (1972).

354. *Id.* at 30-31. In the State of New York, the attachment of the right to counsel has also proceeded independently of its federal counterpart. The federal constitutional right to counsel attaches at the commencement of adversarial proceedings, arraignment, preliminary hearing, or indictment. Michigan v. Jackson, 475 U.S. 625 (1986); U.S. v. Gouveia, 467 U.S. 180 (1984); Kirby v. Illinois, 406 U.S. 682 (1972). The New York Court of Appeals, by contrast, held in People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963), that, under New York's constitution, in certain circumstances the right to counsel will attach at the time of arrest. *See also* People v. Arthur, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968). Thus, regardless of whether judicial proceedings have commenced, the police may be prohibited from questioning a suspect. *See, e.g.*, People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976) (right to counsel attached when represented defendant requested counsel); People v. Pinzon, 44 N.Y.2d 458, 377 N.E.2d 721, 406 N.Y.S.2d 268 (1978) (right to counsel attached when lawyer phoned police and indicated that he wished to speak with his client and did not want him questioned); *but cf.* Moran v. Burbine, 475 U.S. 412 (1986) (where the Supreme Court held that an attorney's act of contacting the police to speak with his client

Under Article 18-B of the County Law,[355] New York City had its choice among four methods of providing defense services. The four options were:[356]

A) a public defender system which would hire defense lawyers as City employees;

B) a private agency, such as the Legal Aid Society, under contract with the City;

C) a panel of private attorneys coordinated by an administrator pursuant to a bar association plan; or

D) a combination of any of the above methods.[357]

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does not cause the sixth amendment right to counsel to attach, and has no consequences under the fifth amendment of the U.S. Constitution); People v. Rogers, 48 N.Y.2d 167, 422 N.Y.S.2d 18, 397 N.E. 2d 709 (1979) (right to counsel attached when defendant was represented on an unrelated pending proceeding); People v. Cunningham, 49 N.Y.2d 203, 400 N.E.2d 360, 424 N.Y.S.2d 421 (1980) (right to counsel attached when unrepresented defendant requested counsel).

The statutory law of the state, however, has not kept pace with the constitutional pronouncements of the courts. New York County Law § 722 (McKinney 1972) is silent as to the timing of the attachment of the right. The New York Criminal Procedure Law §§ 170.10 and 210.15 (McKinney 1971), *supra* note 354, provide for the appointment of counsel at arraignment, on a Criminal Court complaint or on a Supreme Court indictment. No provision is made for the assignment of counsel at the precinct and neither the Legal Aid Society nor the 18-B Panel systematically provides representation prior to Criminal Court arraignment. *See infra* text accompanying note 1058. This gap in the applicable statutory provisions has left the courts with the task of engaging in *ad hoc* determinations on whether or not to assign counsel prior to the defendant's initial court appearance. Thus, for the most part, indigent defendants are unrepresented prior to the initial court appearance.

355. N.Y. COUNTY LAW § 722 (McKinney 1972). Article 18-B was patterned after the 1964 Federal Criminal Justice Act ("CJA"). *Compare* N.Y. COUNTY LAW §§ 722, 722(b), 722(c) (McKinney 1972), *with* Federal Criminal Justice Act of 1964, 18 U.S.C. §§ 3006A(a)(2) & (3) (1964). The CJA provided for the adoption of indigent defense plans in federal criminal cases in the United States District Courts. It permitted representation by a legal aid society, a public defender, or court-assigned private attorneys. The fee structure, including different pay scales for time expended in court and out of court, was identical under both the Criminal Justice Act and Article 18-B. *See* Memorandum from Nathan R. Sobel, County Judges Association, to Counsel for Gov. Nelson A. Rockefeller 4-5 (1964) [hereinafter 1964 Sobel Memorandum]; *See also* Note, *Providing Counsel for the Indigent Accused: The Criminal Justice Act*, 12 AM. CRIM. L. REV. 789, 801-3 (1975).

356. With the exception of the public defender system, the other three options had been recommended by the organized bar in 1914, when the bar had rejected adversarial representation in favor of a charitable service. *See* N.Y. County Lawyers' Ass'n Comm. on Courts of Crim. Proc., *A Report on the Public Defender Question*, 9 BENCH & BAR (1914-1915) 309, 319 [hereinafter 1915 N.Y. County Lawyers' Ass'n Report]; *see also supra* text accompanying note 192.

357. The American Bar Association ("ABA") has since recommended "that in each jurisdiction there should be both organized defense services and assignments to private attorneys." AMERICAN BAR ASS'N, STANDING COMMITTEE ON ASS'N STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROVIDING OF DEFENSE SERVICES, Standard 5-1.2, at 5.8 (1980) [hereinafter 1980 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES]. To attain this goal, the ABA recommended that jurisdictions adopt a "mixed system" of indigent defense whereby institutional defenders and assigned counsel shared in the provision of defense services. *Id.* at 5.11.

The commentary to the ABA standards emphasized the fact that institutional defenders had developed "unusual expertise in handling various kinds of criminal cases" and were "frequently . . . in the best position to supply counsel soon after an accused is arrested." *Id.* at 5.9-

Under options A and B, the salaries of full-time staff attorneys employed by a public defender or a private legal aid society would be set by either the City or the private contracting agency. Under option C, however, the compensation for private attorneys was fixed by statute at an hourly rate of $15 for time expended in court, and $10 per hour for time "reasonably expended" out of court.[358] The maximum compensation for a single attorney in a capital case was $1,500, and $2,000 for more than one attorney.[359] The maximum compensation for representing a felony defendant in a non-capital case was $500, while for one or more "other crimes," it was not to exceed $300.[360] These caps could only be adjusted upward by the trial judge upon a finding of "extraordinary circumstances."[361]

Implicit in this scheme of compensation, under option C, was the legislature's intent to rely upon the willingness of public-minded *pro bono* lawyers, operating in "the highest tradition of the profession,"[362] to represent those indigent defendants not represented by an institutional defender.[363] Attorneys

5.10. The private bar, by virtue of its "training and experience," could "contribute substantially to the knowledge of defenders." *Id.* at 5.10. A mixed system of indigent defense offered a "safety valve" to reduce pressure on institutional defender systems in which "[c]aseloads have increased faster than the size of staffs and necessary revenues, making quality legal representation exceedingly difficult." *Id.* "Furthermore, the involvement of [court-assigned] private attorneys in defense services assures the continued interest of the bar in the welfare of the criminal justice system" without which "improvements in the nation's justice system are rendered less likely." *Id.*

358. N.Y. COUNTY LAW § 722(b) (McKinney 1972). By 1963, only six states did not compensate assigned counsel. L. SILVERSTEIN, *supra* note 321, at 253-67. The great majority of states, however, provided for "reasonable compensation" dependent upon disposition and/or case seriousness in the discretion of the courts. In those states where fees were set by statute, the compensation paid for a felony trial ranged between $50 and $500 while compensation paid for trial in a capital offense ranged between $100 and $750. *Id.*

359. N.Y. COUNTY LAW § 722(b) (McKinney 1972).

360. *Id.*

361. *Id. See also* N.Y. RULES OF COURT § 606.2 (McKinney 1987). The Appellate Divisions (charged with administering the 18-B Panels in New York City) interpreted the term "extraordinary circumstances" by reference to the Federal Criminal Justice Act, 18 U.S.C. § 3006A(d) (1964). The courts concluded that "[t]he payment of compensation to counsel . . . will, in most cases, be something less than compensatory." People v. Perry, 27 A.D.2d 154, 158, 278 N.Y.S.2d 323, 326 (1967). *See* Report of the Committee to Implement the Criminal Justice Act of 1964, *in* Report of the Judicial Conference of the United States, 36 F.R.D. 277, 294 (1965).

Upon application to the judge, Article 18-B enabled Panel attorneys to obtain expert and investigative services on an ad hoc basis, with a compensation cap of $300. *See* N.Y. COUNTY LAW § 722(c) (McKinney 1972); N.Y. RULES OF COURT § 606.2 (McKinney 1987).

362. Werfel v. Agresta, 36 N.Y.2d 624, 627, 370 N.Y.S.2d 881, 882 (1975).

363. Following the enactment of Article 18-B, the Court of Appeals emphasized the essentially pro bono nature of the work:

> [P]lans under Section 722 . . . are designed to ease the burden of lawyers who serve in assigned capacities in the representation of indigent criminal defendants. The lawyers who participate do so willingly . . . knowing that the limited fees provided fall short of full, or even fair compensation for their services. [citation omitted] In so participating, the lawyers undertake an important public service which before the statute was enacted they performed without any compensation at all. [citation omitted]

Id. at 626-27. The pro bono notion under which Article 18-B was designed was consistent with

were not expected to earn a livelihood by such representation, for which they were compensated at below private rates.[364] Rather, Article 18-B aimed only to reduce the costs that assigned counsel incurred in representing indigents.

V.
NEW YORK CITY'S RESPONSE

A. Consideration of the Available Options

As we have seen, by 1965, New York City had designated the Legal Aid Society as its principal provider of indigent criminal defense services.[365] The Society, the City's institutional provider of indigent defense services since 1917,[366] enjoyed the confidence of judges and district attorneys.[367] The City anticipated that it would be well-served by a cooperative system of indigent representation by which defendants could be processed in large numbers at minimum cost.[368]

Moreover, the organized bar was generally opposed to the idea of a public defender.[369] Many of those who feared reliance on a public defender did so because of an apprehension that it would lead to the "total abolition of the right to independent counsel;"[370] they further maintained that only private

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the view held in federal courts regarding the responsibility of lawyers. The Ninth Circuit declared that:

> [a]n applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that there is a "taking of his services."

U.S. v. Dillon, 246 F.2d 633, 638 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

364. Reliance on below-market rates of compensation, however, later came to violate national standards. *See* NATIONAL LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS, FINAL REPORT, Guideline 3.1, at 511 & 271-72 (1976) [hereinafter 1976 NLADA GUIDELINES].

365. *See supra* text accompanying notes 322-28.

366. *See supra* text accompanying notes 226-30 (discussion of the establishment of the Voluntary Defenders' Committee).

367. *See supra* pp. 143-44, *see infra* text accompanying notes 377-79.

368. *See infra* text accompanying notes 380-84.

369. *See* SPECIAL COMMITTEE, ASS'N OF THE BAR OF THE CITY OF NEW YORK, EQUAL JUSTICE FOR THE ACCUSED 93-94 (1959) [hereinafter EQUAL JUSTICE FOR THE ACCUSED]; *see also supra* text accompanying notes 176-78. By 1957, several attempts at legislation that would establish an Office of the Public Defender in New York City had been made. DuVivier, *supra* note 318, at 4. Every bill, however, was disapproved by the City Bar Association and the New York City Lawyers Association and failed passage. *Id.* The organized bar considered these proposals to be attempts at "socialization" of the legal profession. *Id.* at 5.

370. Dimock, *The Public Defender: A Step Towards a Police State?*, 42 A.B.A. J. 219, 220 (1956). In the context of the rhetoric of the times, this type of statement meant that the public defender represented a step on the road to communism: "The Communists honestly believe in the doctrine that the highest welfare of the human race is to be attained only by complete subservience to an all-providing state." *Id.* at 219. *See also* Stewart, *The Public Defender System Is Unsound in Principle*, 32 J. AM. JUDICATURE SOC'Y 115 (1948). Dimock, along with his predecessors, concluded that the advantages of the public defender system "unaccompanied by

attorneys or a private contract agency[371] could be sufficiently uncompromised in their loyalties to insure the vigorous protection of clients' rights.[372]

The organized bar continued to favor a "mixed system"[373] in which a private legal aid society with an independent board of directors would receive public funds. Such a system would have a greater capacity to maintain the "delicate balance between the traditional independent professional services of the lawyer and the overall problems of the organization's responsibility."[374]

In October 1965, the City commissioned a study by the Institute of Judicial Administration to evaluate the respective costs of its options under Article 18-B (with the exception of the public-defender alternative).[375] The study sought to determine whether the Legal Aid Society should remain the principal provider of defense services or be replaced, in whole or in part, with a panel of court-assigned private attorneys.[376]

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its dangers" could be obtained by making public funds available to a private voluntary defender organization.

371. By contrast, in 1917, the private bar argued that independent private attorneys (the Voluntary Defenders' Committee) would maintain confidence in the administration of criminal justice by being independant of the defendant, *see supra* text accompanying note 118, eschewing an adversarial posture, *see supra* text accompanying note 240, and harmonizing, *see supra* text accompanying notes 241, 244-49, 251-56, their function with that of the prosecution.

372. The most important reason [for the assignment of private counsel] is that counsel thus specially assigned do not rely upon the government for their livelihood. If one of them displeases the court in the handling of the case, the worst that can happen is that that particular specially assigned counsel will never get another special assignment—unpleasant, perhaps, but nothing like losing a full-time job.

Dimock, *supra* note 370, at 221. *See also* Oaks & Lehman, *Lawyers for the Poor, reprinted in* A. BLUMBERG, THE SCALES OF JUSTICE 159, 171 (1971) [hereinafter *Lawyers for the Poor*], where the authors argued that the defendant should be permitted to choose either a public defender or a private court-assigned attorney:

> [T]he quality of public defense is maintained by the opportunity of the accused to reject the defender and demand a private lawyer. The private appointed lawyer can set a very high standard of indigent defense, operating without the pressures of volume that continually impinge upon the defender. And they can and do take causes, devoting amounts of time, energy and money that could not be asked of a public servant.

Id. at 171.

373. *See* EQUAL JUSTICE FOR THE ACCUSED, *supra* note 369, at 93.

374. 1966 L. Tolman Report, *supra* note 322, at 85-86. The notion that the cooperative style of lawyering, which the Legal Aid Society had pioneered, would now have to be replaced with the adversarial model envisioned in *Gideon* was not considered an impediment to the Society's continued survival under the regimen of Article 18-B. Perhaps this resulted from the bar's recognition of the influence that the court's structure and the Society's ideology of cost-effectiveness exerted on the role played by defense counsel. In Blumberg's words, even in the adversarial model:

> [d]efense attorneys . . . whether of the Legal Aid, the Public Defender variety or privately retained, although operating in terms pressure specific to their respective roles and organizational obligations, ultimately are concerned with strategies which tend to lead to a plea. It is the rational, impersonal elements involving economy of time, labor, expense and a superior commitment of the defense counsel to these rationalistic values of maximum production (footnote ommited) of court organization that prevail, in his relationship with a client.

Blumberg, *supra* note 315, at 23.

375. 1965 Report to the Mayor on the Cost of Defense, *supra* note 326.

376. *Id.* at 2.

Prior to the commencement of the Institute's study (and consistent with the close relationship the Legal Aid Society had historically enjoyed with the courts) the presiding justices of the Appellate Division argued that the City should deepen its relationship with the Society.[377] The judges argued that only an institutional defender could provide the "most efficient and economical method of implementing the new statute."[378] Private attorneys, in their view, would cause unnecessary delay, particularly at Criminal Court arraignment. The presiding justice of the First Department stated that:

> . . . because the Society employed full-time attorneys stationed regularly in the court houses, it was able to provide representation at a most critical juncture — the moment of first arraignment; and that it would be extremely difficult, if not impossible, to have on hand at the time of arraignment a sufficient number of private lawyers supplied from a rotating panel to provide immediate representation on the scale needed. Whoever administered a panel would have to communicate with and locate the lawyers to be assigned before they could go into action. They might be engaged elsewhere, and the likelihood is that most cases would have to be adjourned to dates when they would be available.[379]

The Institute concluded that the Legal Aid Society was the most cost-efficient system of indigent representation.[380] The Institute operated under three assumptions that led to their conclusion. They first assumed that due to their outside commitments to fee-paying clients, private attorneys would not be available to staff the arraignment courts.[381] The unavailability of private attorneys would result in inefficiency and delay in the criminal justice system. Second, the Institute assumed that the Society provided unique economies of scale. It assumed that a staff attorney who handled twenty cases in any given working day would have to be replaced, under an assigned counsel system, by twenty *different* private attorneys.[382] (The report did not discuss the possibility of a single assigned attorney handling twenty cases).

Lastly, the Institute assumed that a court-assigned lawyer would need to be in court for the same number of hours as a Legal Aid Society staff attorney.[383] According to the report, this meant that they would spend most of the day in court at Article 18-B's hourly rate of compensation. Since the Society's cases were not called until after the completion of cases of privately retained

377. *Id.* Justice Botein, the Presiding Justice of the Appellate Division, First Department, had earlier declared himself a strong proponent of the Legal Aid Society which, he argued, "richly deserves the support of the entire community." Botein, *The Defense of Persons Accused of a Crime*, 56 (1) LEGAL AID REV. 3, 5 (Spring 1958).

378. *Id. See also* 1966 L. Tolman Report, *supra* note 322.

379. 1965 Report to the Mayor on the Cost of Defense, *supra* note 324, at 2.

380. *Id.* at 6.

381. *Id.*

382. *Id.* at 4.

383. *Id.*

attorneys, the report assumed that assigned counsel's cases would also be delayed.[384]

These assumptions were all questionable, particularly in view of New York City's earlier reliance on court-assigned private attorneys when the Voluntary Defenders Committee of the Legal Aid Society was unable to provide complete coverage.[385] Despite the obvious parallels, the Institute's study concluded that the Society would provide indigent defense services in a more cost-effective manner than the private bar.

B. The Legal Aid Society Contract

In September 1966, the City and the Legal Aid Society entered into a contract in which the Society agreed to represent virtually all indigent defendants in exchange for a fixed annual appropriation.[386] The Society agreed to provide representation at every stage of the case, from initial appearance through trial, appeal, and post-conviction proceedings.[387] The Society retained complete control over hiring, salary scale, and the terms and conditions of employment.[388] For its part, the City agreed to appropriate a sum of money each year which the Society was authorized to expend on a staff of full-time attorneys, experts, investigators, social workers, paralegals, and clerical and support personnel.[389] The City retained the right to cancel the contract on ninety days notice.[390]

The Legal Aid Society agreement memorialized the division of responsibility between institutional defense and assigned counsel which had existed prior to the enactment of Article 18-B.[391] It provided that private 18-B Panel

384. *Id.* at 7. For cases which were already on the court calendar (74% of all Legal Aid Society cases were calendared) time ran from the start of the court day until disposition. *Id.* at 5. Judges called the Society's cases last under a policy of deference to retained counsel, and because the Society's attorneys were often not ready to handle a particular case until later in the day due to their heavy caseloads. *Id.* at 9.

385. *See supra* text accompanying notes 280-82, 288-91, 297-98; *see also supra* note 318 and accompanying text.

386. Agreement Between the City of New York and the Legal Aid Society (Aug. 6, 1966), reprinted *infra* app. 2(c), para. First at 933, para. Sixth, at 934 [hereinafter 1966 Agreement]. *See* Exec. Order No. 178, City of New York, Office of the Mayor (Nov. 27, 1965), reprinted *infra* app. 2(a), at 919.

387. 1966 Agreement, *supra* note 386, para. Fourth, at 933.

388. *Id.* at para. Second, at 933.

389. *Id.* at para. Sixth, at 934.

390. *Id.* at para. Eleventh, at 935.

391. *Id.* at para. Second, at 933; *see also supra* text accompanying notes 327-28. The Executive Order issued by the Mayor of the City of New York specified the division of responsibility contemplated under the Legal Aid Society contract and Bar Association Plan, *see infra* note 398:

> Pursuant to the provisions of Article 18-B of the County Law [citation omitted] I hereby designate the Legal Aid Society of the City of New York to furnish counsel to persons within the City of New York charged with a crime [citation omitted] who are financially unable to obtain counsel within the meaning of County Law Section 722. . .
>
> In those cases where by reason of a conflict of interest or other appropriate reason provided in the above-mentioned agreement, the Legal Aid Society declines to repre-

attorneys would replace Society attorneys only in cases of actual conflict of interest,[392] in homicide cases (at the judge's discretion)[393] or when the Society could not for some "other appropriate reasons"[394] represent a particular defendant.[395] This was necessarily based on an implicit assumption that public-spirited attorneys would volunteer their services on occasion. Under the contract, the Society would not be held responsible for the screening, training, supervising or monitoring of Panel attorneys, nor would the Society have to

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sent any such defendant, such defendant shall be represented by counsel furnished pursuant to the joint plan of the Association of the Bar of the City of New York and the New York County Lawyers' Association . . . .

Exec. Order No. 178, City of New York, Office of the Mayor (Nov. 1965), *supra* note 386, at 919.

392. 1966 Agreement, *supra* note 386, para. Second, at 933. The rule against representing defendants with actual conflicts of interest was first articulated by the Supreme Court in Glasser v. United States, 315 U.S. 60, 70 (1942). The Court held that to require defense counsel to represent defendants whose interests are actually in conflict with one another would deny them effective assistance under the sixth amendment. This rule has remained limited, however, to situations involving *actual* conflicts. It does not apply to instances in which defense counsel is simply asked to represent more than one defendant in a multiple-defendant case. *See* Cuyler v. Sullivan, 446 U.S. 335 (1980) ("reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel" in every case involving multiple representation. *Id.* at 348, *paraphrasing* Holloway v. Arkansas 435 U.S. 475, 482-83 (1978).

The ABA suggests, however, that ordinarily multiple representation should be declined unless "it is *clear* that no conflict is likely to develop . . . ." (emphasis added). AMERICAN BAR ASS'N, STANDING COMMITTEE ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION, Standard 4-3.5(b), at 4-3.5 (1980) [hereinafter 1980 ABA STANDARDS FOR THE DEFENSE FUNCTION]. *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-101a, 5-105, 5-107 (1983).

The approach taken by the New York courts is consistent with the Supreme Court's decisions in *Cuyler* and *Holloway*. The New York Court of Appeals has applied a prophylactic rule that requires a judge to inquire of co-defendants to ensure that they consent to representation by a single attorney and waive potential claims of conflict of interest. *See* People v. Gomberg, 38 N.Y.2d 307, 314, 342 N.E.2d 550, 554, 379 N.Y.S.2d 769, 775 (1975). *See generally* Geer, *Representation of Multiple Defendants*, 62 MINN. L. REV. 119, 140-43 (1977); Hyman, *Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache*, 5 HOFSTRA L. REV. 315, 320-24 (1977); Lowenthal, *Joint Representation in Criminal Cases: A Critical Approach*, 64 VA. L. REV. 939, 980-83 (1978); Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 GEO. L.J. 1075, 1088-91 (1979).

393. 1966 Agreement, *supra* note 386, para. Second, at 933. The contract permitted courts presented with "a crime punishable by death or life imprisonment" to "determine," *id.*, whether or not to assign private attorneys furnished pursuant to the Bar Association Plan, *infra* note 400. While this provision served to perpetuate the patronage system that had evolved in the early part of the twentieth century with respect to homicide cases, *see supra* text accompanying notes 81-83, 276-77, it did not preclude the Legal Aid Society from volunteering to represent defendants in those cases where there was potential for life imprisonment. The Society, however, came to interpret this provision as permitting it to decline all homicide offenses while accepting other life offenses with a lower trial rate (*e.g.*, narcotics offenses and persistent felony offenders). *See infra* notes 509, 674-75 and accompanying text.

394. 1966 Agreement, *supra* note 386, at 929.

395. As the Society's contract did not define the circumstances under which it would be "appropriate," *see supra* note 394, for the Legal Aid Society to decline representation, the implementation of this provision was left to the discretion of the courts, upon the Society's application to decline or withdraw. The contract was silent on the question of whether an excessive caseload would provide an "appropriate reason" for the Society to decline representation.

provide them with supportive services.[396] While the contract did not set a limit on the number of cases which might be referred to the private bar, Panel administrators estimated that attorneys would not need to accept more than 500 assignments per year in the five counties.[397]

C. *The Bar Association Plan*

The City Bar Association and the five county bar associations drew up a plan for the organization and operation of a rotational Panel of private attorneys.[398] The *Bar Association Plan* called for the establishment of a misdemeanor and a felony 18-B Panel, which would include lawyers with varying degrees of experience in criminal practice.[399] The local bar associations would be responsible for certifying attorney's qualifications for participation on either Panel.[400] The *Plan* did not specify any standards for attorney certification except that attorneys certified to accept felony assignments must have been admitted to practice for seven years.[401] Aside from this one standard, the bar associations were free to adopt their own certification criteria.[402]

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396. By contrast, in a "coordinated" assigned counsel system the institutional defender should assume overall responsibility for training, supervision, and monitoring of court-assigned private attorneys to whom it refers cases. *See* 1973 NAC STANDARDS AND GOALS, *supra* note 364, Standard 13.15, at 282 and Commentary at 282-83. The design of the 18-B Panel is typical of assigned counsel systems that label themselves "coordinated." *See* R. SPANGENBERG, B. LEE, M. BATTAGLIA, P. SMITH & A. DAVIS, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY, FINAL REPORT 50 (1984) [hereinafter 1984 CRIMINAL DEFENSE SYSTEMS STUDY]. Nationwide, only 25 percent of assigned-counsel systems were "coordinated" by an administrator. *Id.* Sixty-three percent of these programs are located in the Northeast. *Id.* at 53. Recently, the National Legal Aid and Defender Association has reported that institutional defenders have "developed, organized and administered panels for the assignment of cases to the private bar." R. Wilson, Responses by Public Defender Office to Conflicts of Interest Arising from Representation of Multiple Defendants at Trial 3 (Dec. 6, 1984) [hereinafter 1984 Wilson Responses].

397. *See* 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 128 (1972) [hereinafter 1972 L. Tolman Report].

398. Plan of the Association of the Bar of the City of New York, Bronx County Bar Association, Brooklyn Bar Association, New York County Lawyers' 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. III(3), at 927 [hereinafter 1966 Bar Association Plan].

399. *Id.*, at art. II(1), at 926.

400. *Id.*, at art. II, at 925.

401. *Id.*, at art. II(4), at 926.

402. Article 18-B did not limit the authority of local bar associations in the implementation and oversight of the assigned counsel system. N.Y. COUNTY LAW § 722 (McKinney 1972). The *1966 Bar Association Plan*, *see supra* note 398, allowed only those attorneys with experience in criminal practice who were competent to give adequate representation to defendants to be certified to the 18-B Panel. *Id.*, at art. II, at 925. Although the Plan is consistent with national standards in that it requires certification of attorneys, *see* 1980 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, *supra* note 357, Standard 5-2.2, at 5.26; *see also* 1976 NLADA GUIDELINES, *supra* note 364, Guideline 2.15, at 509, it does not establish the means to evaluate qualifications of lawyers competent to render effective assistance. *See* Burger, *Special Skills of Advocacy*, 42 FORDHAM L. REV. 227, 241 (1971). Nor does it require recertification

Pending ratification of the plan, the Appellate Division implemented a hastily-conceived interim procedure.[403] Under the provisional plan, local bar associations produced lists of attorneys for Panel service,[404] but gave little consideration to each attorney's qualifications.[405] The Appellate Division contemplated that, after the formal plan was adopted, bar associations would draw up new lists of available attorneys using stricter eligibility requirements.[406] Yet in April 1966, when the plan received the approval of the Judicial Conference,[407] the promised "full inquiry" into the qualifications of those "interim" attorneys did not take place.[408] Neither did the local bar associations adopt "discernible standards or requisites" for new Panel membership.[409] If any member of the screening committee knew a Panel applicant, that member had de facto authority to approve the application. The committee only interviewed applicants unknown to all screening committee members.[410] Such a system allowed the possibility of cronyism, whereby attorneys known to committee members could be certified even though incapable of providing competent representation.

The Appellate Division's administrators assembled felony and misdemeanor 18-B Panels out of the final lists provided by the bar committees. The names were transmitted to the administrators with copies of the applications those attorneys submitted to the committees, but without comment, without documentation of the attorneys' qualifications, and without the committee's reasons for approval.[411] The administrators, therefore, had no basis for an independent review of any attorney's qualifications. Nonetheless, the administrator of the First Department 18-B Panel went ahead and assembled an official rotational list of 500 attorneys by July 1, 1966.[412]

Under the *Plan*, the 18-B Panel administrator was to assign attorneys for service in rotational order unless a case involved a possible sentence of death or life imprisonment, in which case the court would designate the Panel attor-

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on a "periodic basis" as a condition of the continued assignment of cases. *See* Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 18 (1973).

403. 1972 L. Tolman Report, *supra* note 397, at 128.

404. *Id.*

405. Supreme Court of the State of New York, Appellate Division, First and Second Departments, Subcomm. on Legal Representation of Indigents, Report on the Legal Representation of the Indigent in Criminal Cases 22 (June 17, 1971) [hereinafter 1971 Report].

406. *Id.*

407. This approval was required by § 722(3) of County Law. *See* N.Y. COUNTY LAW § 722(3) (McKinney's 1972).

408. 1971 Report, *supra* note 405, at 22.

409. *Id.*

410. *Id.*

411. 1972 L. Tolman Report, *supra* note 397, at 131. *See* 1971 Report, *supra* note 405 at 23. *But see* 1976 NLADA GUIDELINE, *supra* note 364, Guideline 2.14, at 508-09 (recommending that the administrator be a "qualified attorney" with "extensive experience in the field of criminal defense" who would "select the attorneys who will comprise the assigned counsel panel," "suspend or dismiss panel members for cause," "monitor the quality of services being rendered and . . . take appropriate measures to maintain a competent level of services").

412. 1972 L. Tolman Report, *supra* note 397, at 129.

ney.[413] An attorney accepting a Panel assignment would assume responsibility to represent the defendant throughout all proceedings, including the trial.[414] Claims for compensation which specified the activities involved in representation were to be submitted in writing to the court. While small out-of-pocket expenses would be reimbursed, the costs of general office overhead (rent, electricity, etc.), telephone services, secretarial assistance, and other support services were to be absorbed by the Panel attorneys themselves.[415]

VI.
CHAPTER SUMMARY

Gideon required all states to provide free legal assistance to defendants charged with a felony. More importantly, for our analysis, it created a set of adversarial expectations for the provision of indigent defense services. Criminal defense lawyers were expected to test the state's case through challenges made to the propriety of the prosecution, as well as to the admissibility and sufficiency of evidence.

The scheme adopted by cities throughout the United States called for the expansion of institutional defenders, either public or private, to assume the role of principal providers of indigent defense services. This occurred despite the fact that the structural goals of these organizations rendered them unsuitable to provide the type of defense required by *Gideon*.

The strategy adopted by New York City called for the Legal Aid Society to continue in its role as the principal provider of indigent services. The Society had over the years developed a paternalistic, non-adversarial style of defense that offered speed and cost-efficiency through a reduction in trials and an increase in guilty pleas. Indeed, after *Gideon*, the Society was chosen precisely because the City believed it was more cost-efficient than assigned counsel and would present fewer obstacles to the mass processing of indigent defendants.

The limited role defined for the private bar depicted the 18-B Panel as pro bono attorneys who would supplement the work of Legal Aid Society staff

413. 1966 Bar Association Plan, *supra* note 398, art. IV(A)(1), at 928.

414. *Id.* at art. IV(C)(1), at 929. Appellate representation was required only of those attorneys who were members of a separately constituted appeals panel. *Id.*

415. *Id.* at art. VI(1), at 930. *See also* N.Y. RULES OF COURT § 606.3 (McKinney 1986). The requirement that court-assigned attorneys absorb the costs of support services is inconsistent with national standards. *See* ABA Standard 5-1.4, "Supporting Services and Training," which requires that "other services necessary to an adequate defense" in addition to investigative and expert services be provided. "These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process." 1980 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, *supra* note 359, Standard 5-1.4, at 5.18-5.19. *See* 1976 NLADA GUIDELINES, *supra* note 364, Guideline 3.1, at 511; S. KRANTZ, C. SMITH, D. ROSSMAN, P. FROYD & J. HOFFMAN, RIGHT TO COUNSEL IN CRIMINAL CASES 248-51 (1976) [hereinafter RIGHT TO COUNSEL IN CRIMINAL CASES] (recommending that assigned-counsel system have adequate library facilities, secretaries, investigators, and expert witnesses). The authors contended that "[w]ithout these resources, the program would have to rely on the materials and ingenuity of the individual practitioner. That is not appropriate for a plan of this nature." *Id.* at 247.

attorneys when, for reasons of actual conflict or other good cause, the Society was precluded from providing representation. Courts and the organized bar together extolled the virtues of involvement of public spirited private attorneys. These attorneys, they said, would be capable of guarding against the total institutionalization of the criminal bar and preventing the subjugation of the defendant's rights to the interests of the states.

In practice, 18-B Panel attorneys were quickly chosen without regard to qualification. The process of Panel certification was at best pro forma. Panel administrators accepted the names of applicants presented without question. They had no independent basis for judging the capacity of the private attorneys certified by the bar associations. Each attorney, regardless of ability, enjoyed the same opportunity for rotational assignment of cases.