CONCLUSION

THE INTRACTABILITY OF REFORM

The deficiencies that persist in the quality of the indigent defense system in New York City, as in other major cities in the United States, mainly result from the system's primary goals, and not from bureaucratic process or the informal behavior of courtroom attorneys.[1242] These goals are alien to the needs of indigent criminal defendants. Thousands of defendants each year fail to receive effective assistance of counsel, and each year brings forth renewed calls for reform.[1243] Yet, defense of economically disadvantaged criminal defendants in New York has remained essentially unchanged since the turn of the century. That this system has persisted for over seventy years cannot be explained as a mere failure of method. The system must be understood as a success from the perspective of those who designed the system and now maintain it.

To understand the dichotomy between the institutional success of the system and its simultaneous failure to provide meaningful representation to defendants, we identified the policies and objectives this system services. Our research shows that the lawyering practices of indigent defense providers in the United States has been fashioned by deeply embedded structural goals, which evidence the relationship of each defense provider to powerful groups

---

1242. *See infra* notes 1275-78 and accompanying text.

1243. *See* N.Y. County Lawyers' Ass'n Comm. on Courts of Crim. Proc., A Report on The Public Defender Question, 9 BENCH AND B. 309 (1914-1915) [hereinafter 1914 Bar Association Report]; ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, WELFARE COUNCIL OF NEW YORK CITY, NEW YORK COUNTY LAWYERS' ASS'N, REPORT OF THE JOINT COMMITTEE FOR THE STUDY OF LEGAL AID (1928) [hereinafter 1928 REPORT]; SPECIAL COMMITTEE, ASS'N OF THE BAR OF THE CITY OF N.Y., EQUAL JUSTICE FOR THE ACCUSED (1959) [hereinafter EQUAL JUSTICE FOR THE ACCUSED]; 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 (June 17, 1971) [hereinafter 1971 Report]; 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 (Circulating Draft Aug. 1975) [hereinafter 1975 Report on the Legal Aid Society and the 18-B Panels]; Institute of Judicial Administration, Inc., Project on Court Improvement: Assigned Counsel Study (Final Report, July 1976) [hereinafter 1976 Assigned Counsel Study]; Harbridge House, Inc., Organization and System Evaluation of the Legal Aid Society (June 12, 1978) [hereinafter Harbridge House Preliminary Findings]; Spiegler, Ding & Mendelson, *Report to the Committee On Legal Representation of Indigents in the Criminal Process*, New York State Bar Ass'n (1980) [hereinafter 1980 Spiegler Report]; Association of the Bar of the City of New York, Committee on Criminal Advocacy, Resolution (June 9, 1982) [hereinafter 1982 Criminal Advocacy Resolution]; W. Mulligan, J. Gill & J. Keenan, Report and Recommendations to Mayor Edward I. Koch Concerning Representation of Indigent Criminal Defendants in New York City (Dec. 21, 1982) [hereinafter 1982 Report of the Keenan Commission]; Report of the Ass'n of the Bar of the City of New York, Committee on Criminal Advocacy, *A System in Crisis: The Assigned Counsel Plan in New York: An Evaluation and Recommendations for Change*, excerpts reprinted *infra* app. 4, at 943-63 (1986) [hereinafter *A System in Crisis*].

and to entrenched interests. These goals constitute a set of systemic constraints that define the role of the defense lawyer in the representation of poor defendants. The primary goals of the indigent defense system have been and remain to make the criminal law a more effective means for securing social control at minimal expense to the state and to the private bar.[1244] The method minimizes adversarial advocacy, and therefore the cost of criminal defense, by compelling guilty pleas and by other non-trial dispositions.

The non-adversarial, cost-efficient model of indigent defense emerged from the ashes of the assigned counsel system with the creation, in 1914, of the first public defender.[1245] Although assigned counsel provided defense services for the poor at no cost to the state, elite lawyers and reformers villified these lawyers as an obstacle to the rapid conviction and disposition of "guilty defendants".[1246] Court-assigned private attorneys, many of whom were of recent immigrant origin, constituted an underclass of the legal profession.[1247] They were stigmatized by elite lawyers and precluded from involvement in reputable lawyering endeavors.[1248] Stigmatization meant, however, that professional assigned counsel were not subject to the discipline of the organized bar.[1249] Reformers and elite lawyers alike claimed that indigent defendants' attorneys solicited fees from their clients and, in return, exploited the system's weak spots, obtained repeated adjournments, filed frivolous motions, and used fanci-

1244. *See* Ferrari, *The Public Defender: The Complement of the District Attorney*, 2 J. CRIM. L. & CRIMINOLOGY 704, 711, 714 (1911-1912); Goldman, *The Need for a Public Defender*, 8 J. CRIM. L. & CRIMINOLOGY 273-74 (1917-1918); R. SMITH, JUSTICE AND THE POOR 119 (1918); Rubin, *The Public Defender: An Aid to Criminal Justice*, 18 J. CRIM. L. & CRIMINOLOGY 346, 354 (1927-1928); R. SMITH & J. BRADWAY, GROWTH OF LEGAL AID WORK IN THE UNITED STATES 93 (1936); 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, at 6 (Nov. 1965) [hereinafter 1965 Report to Mayor on the Cost of Defense]; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 127-28 (1967) [hereinafter 1967 PRESIDENT'S COMMISSION REPORT]; 1971 Report, *supra* note 1247, at 10-12; NATIONAL LEGAL AID & DEFENDER ASS'N, THE OTHER FACE OF JUSTICE 30, Table 44, at 36, 44 (1973) [hereinafter THE OTHER FACE OF JUSTICE]; WILSON, CONTRACT BID PROGRAM A THREAT TO QUALITY INDIGENT DEFENSE SERVICES 19 (NLADA, 1982) [hereinafter WILSON CONTRACT BID PROGRAM]; Legal Aid Society, Budget Submission to the City of New York for Fiscal Year 1985, at 1, 5 (Feb 1, 1984) [hereinafter FY 1985 Legal Aid Budget]. *See also supra* notes 126-31, 138-43, 156-560, 382-86, 419-20, 428-29, 451-54, 497-99, 545-46, 678-80 and accompanying text.

1245. Wood, *The Office of Public Defender*, 124 THE ANNALS 69, 70 (1925); *see also* supra note 111 and accompanying text.

1246. *See* M. GOLDMAN, THE PUBLIC DEFENDER 49 (2d ed. 1919); *see also supra* notes 85-90 and accompanying text.

1247. *See* J. AUERBACH, UNEQUAL JUSTICE 50 (1976); *see supra* notes 94, 97, and accompanying text; *but see supra* note 777 and accompanying text.

1248. *See* Cockrill, *The Shyster Lawyer*, 21 YALE L.J. 383 (1911-1912); Pfeiffer, *Legal Aid Service in the Criminal Courts*, 145 THE ANNALS 50 (1929); J. AUERBACH, *supra* note 1247, at 50. *See also supra* notes 73-75, 96, 98-99 and accompanying test.

1249. *See* R. Pound, *Criminal Justice in the American City*, in R. POUND & F. FRANKFURTER, CRIMINAL JUSTICE IN CLEVELAND, A REPORT OF THE CLEVELAND FOUNDATION'S SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN CLEVELAND, OHIO 559, 602 (1922) [hereinafter Pound, *Criminal Justice in the American City]; see also supra* notes 94, 99 and accompanying text.

ful defenses at trial.[1250] In Los Angeles, Cleveland, and New York, such attorneys, in Roscoe Pound's words, gave "the actual sinful professional criminal his opportunity" and undermined confidence in the efficient administration of criminal justice.[1251]

Demographic developments in the United States magnified the problems created by assigned counsel. An increase in immigration coupled with migration to cities brought what reformers claimed was an avalanche of crime to urban areas and an increase in the numbers of foreign-born criminal defendants.[1252] Reformers sought to make the criminal justice system a more effective means of social control.[1253] The adversarial practices of private lawyers who made their livelihood representing criminal defendants were, according to reformers, undermining social control and breeding second offenders. These lawyering practices frustrated the would-be reformers, and persuaded them that institutional defenders should replace private practitioners for rich and poor alike.[1254] Institutional defenders would harmonize their function with that of the prosecution to bring about a more efficient administration of the criminal law.[1255]

Elite lawyers opposed reformers' efforts to replace private lawyers for those defendants who could pay an attorney's fee but accepted the institutional defense model for indigents only. This model began with the Los Angeles County public defenders and was later copied throughout the United States in cities with populations of over half a million.[1256] By 1973, institutional defenders served almost two-thirds of the nation's population.[1257] In some areas such as Boston and New York City, the idea took the form of a voluntary agency supported by philanthropic contributions and controlled by the

1250. *See* Ferrari, *supra* note 1244, at 711; *see also supra* notes 85-88.

1251. *See* Pound, *Criminal Justice in the American City*, *supra* note 1249, at 593.

1252. EQUAL JUSTICE FOR THE ACCUSED, *supra* note 1243, at 45; *see also* Norcross, *The Crime Problem*, 20 YALE L.J. 594, 600 (1911); *supra* notes 55-58 and accompanying text.

1253. *See* Untemeyer, *Evils and Remedies in the Administration of Criminal Law*, 36 THE ANNALS 145 (1910); Parmalee, *A New System of Criminal Procedure*, 4 J. CRIM. L. & CRIMINOLOGY 359 (1913-14); *see also supra* notes 54, 59-63, 103 and accompanying text.

1254. Embree, *The New York 'Public Defender'*, 8 J. CRIM. L. & CRIMINOLOGY 555 (1917-18); *see also* Ferrari, *An Argument for the Public Defender*, 5 J. CRIM. L. & CRIMINOLOGY 925 (1914-15); Adelman, *In Defense of the Public Defender*, 5 J. CRIM. L. & CRIMINOLOGY 494, 496 (1914-15); *supra* notes 89-90, 104-05 and accompanying text.

1255. Goldman, *supra* note 1244, at 273-74; Ferrari, *supra* note 1244, at 711; *supra* notes 137-39 and accompanying text. Non-adversarial advocacy enabled public and private defender agencies to secure a foothold in the criminal justice system, without eroding the private bar's monopoly over fee-paying clients. *See supra* notes 115-16, 267-79, 509, 674-75 and accompanying text. Thus, institutional defenders freed elite lawyers from what McDonald described as "*pro bonum* work in the polluting atmosphere of the criminal courts." McDonald, *In Defense of Inequality: The Legal Profession and Criminal Defense* in W. MCDONALD, THE DEFENSE COUNSEL 13, 36 (1983).

1256. THE OTHER FACE OF JUSTICE, *supra* note 1244, at 13, 44; *see also supra* notes 317, 417 and accompanying text.

1257. THE OTHER FACE OF JUSTICE, *supra* note 1244, at 13; *see also supra* note 417.

private bar.[1258] Whatever the form, whether public or private, the defender agencies sought to achieve a high rate of criminal dispositions in a cost-efficient manner.[1259] The dispute over whether the indigent defense providers should be publicly or privately controlled reflected not a concern about the quality of services but rather about whether the state or the private bar would ultimately control the institution.[1260]

A long-term consequence of the emphasis on cost-effective defense was a gradual but irrevocable erosion in adversarial advocacy and an inability to restrict the state in the arrest and prosecution of indigent defendants.[1261] Those who championed institutional defenders viewed the proper role of lawyers for the poor as giving legitimacy to the actions of the police and prosecution and assisting the courts in the rapid processing of defendants.[1262] They emphasized a cooperative relationship between defense and prosecution in which the defender principally relied on guilty pleas and prosecutorial dismissals rather than on adjudicative fact-finding to determine the outcome of criminal cases.[1263]

1258. E. BROWNELL, LEGAL AID IN THE UNITED STATES 134 (1951); *see also supra* note 113 and accompanying text.

1259. *See* Ferrari, *supra* note 1244, at 714-15; R. SMITH, *supra* note 1244, at 1191; R. SMITH & J. BRADWAY, *supra* note 1244, at 83; *see also* G. BARAK, IN DEFENSE OF WHOM? 65-66 (1980); *see also supra* notes 157-61 and accompanying text.

1260. *See, e.g.*, 1914 Bar Association Report, *supra* note 1243, at 311, 319; Editorial, *The Knell of the Public Defender*, 9 BENCH & BAR 287 (1914-1915) [hereinafter *The Knell of the Public Defender*]; *see also supra* text accompanying notes 115, 185-92; *but see supra* note 114.

1261. *See, e.g.*, LEGAL AID SOCIETY 59TH ANNUAL REPORT, VOLUNTARY DEFENDERS' COMMITTEE 65 (1926) [hereinafter 1926 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT]; H. TWEED, THE LEGAL AID SOCIETY NEW YORK CITY 1876-1951, at 87 (1954); 1967 PRESIDENT'S COMMISSION REPORT, *supra* note 1244, at 128; THE OTHER FACE OF JUSTICE, *supra* note 1244, at 36; S. KRANTZ, D. ROSSMAN, P. FROYD & J. HOFFMAN, RIGHT TO COUNSEL IN CRIMINAL CASES 235 (1976) [hereinafter RIGHT TO COUNSEL IN CRIMINAL CASES]; N. LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR 2, 13-14 (1982); *supra* notes 140-43, 235-38, 240-43, 291, 417-36 and accompanying text.

Our empirical research of New York City's mixed system of indigent criminal defense shows that the Legal Aid Society and the 18-B Panel have survived because they engage in low cost, expeditious case processing. *See supra* TABLE 11-1, at 860; TABLE 11-8, at 872, TABLE 11-7, at 866. The lawyering practices that underlie cost efficiency include substitution of attorneys, *see supra* TABLE 6-1, at 752; TABLE 10-1, at 838; TABLE 10-2, at 843; the absence of interviewing and investigation, *see supra* TABLE 6-2, at 759; TABLE 6-3, at 763; TABLE 6-9, at 773; the failure to make pre-trial motions and to develop a coherent theory of defense, *see supra* TABLE 6-7, at 769; TABLE 6-8, at 769; and the infrequency of trials, *see supra* TABLE 9-6, at 833; TABLE 9-7, at 833.

1262. *See* Ferrari, *supra* note 1244, at 707; Embree, *supra* note 1254, at 556-57; Smith, *The Criminal Courts*, in R. POUND & F. FRANKFURTER, CRIMINAL JUSTICE IN CLEVELAND, A REPORT OF THE CLEVELAND FOUNDATION'S SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN CLEVELAND, OHIO 233-34, 238-47 (1922) [hereinafter Smith, *The Criminal Courts*]; Rubin, *supra* note 1244, at 346; FY 1985 Legal Aid Budget, *supra* note 1244, at 1, 5; *see also supra* notes 127-30, 233-34, 677-78 and accompanying text.

1263. *See* Wood, *Necessity for Public Defender Established by Statistics*, 7 J. CRIM. L. & CRIMINOLOGY 230 (1916-17); M. GOLDMAN, *supra* note 1246, at 45-46; Legal Aid Society 45th Annual Report, Voluntary Defenders' Committee 69 (1920) [hereinafter 1920 Voluntary Defenders' Committee Annual Report]; 1926 Voluntary Defenders' Committee Annual Report, *supra* note 1261, at 64-65; *see also supra* notes 143, 151, 160 TABLES A & B, 235-38, 244-50, 256

The ideology of non-adversarial representation rested on a set of commonly held assumptions defining the attitudes and behavior of lawyers for the poor. Those who sponsored institutional defense believed most indigent defendants were unworthy of adversarial advocacy; these defendants were guilty of *some* criminal offense, if not the particular offense charged.[1264] This presupposition of guilt attached upon arrest and charge; the reformers thus believed that criminal defense of the poor itself was a charitable act.[1265] In addition, there was the generally accepted belief among elite lawyers and reformers that the combined efforts of police, prosecution, and courts, if run efficiently, would secure the conviction of the guilty without compromising the rights of the innocent.[1266]

This ideology refocused the defense lawyer's attention from that of the defendant to that of the state. Institutional defenders sought to eliminate the contentious nature of court-room practices and became an unofficial cog in the efficient administration of criminal justice.[1267] In so doing, comity emerged between prosecution and defense regarding the proper disposition of *all* indigent defendants.[1268] The role of defense lawyers was recast in *prosecutorial* terms to insure that most defendants would be convicted and that only the manifestly innocent would go free.[1269]

This system of non-adversarial representation of poor people has per-

---

and accompanying text. In pursuit of this goal, institutional defenders devised inquisitorial methods to eliminate the defendant's resistance and compel confessions, *see supra* notes 143-44, 252 and accompanying text. For comparable methods observed during our court sample, see text accompanying notes 838 (Case S-75), 1124 (Case S-67), 1125 (Case S-66).

1264. *See* Ferrari, *On the Public Defender: A Symposium*, 6 J. CRIM. L. & CRIMINOLOGY 370, 372 (1915-16); Fabricant, *Voluntary Defender in Criminal Cases*, 124 THE ANNALS 74 (1925); *see also supra* notes 152, 240-241 and accompanying text.

1265. The function of the defense attorney would be to save guilty defendants from excess punishment not to provide technical, procedural defenses for a trial. M. GOLDMAN, *supra* note 1246, at 45-56.

1266. *See* 1914 Bar Association Report, *supra* note 1243, at 311-12; Adelman, *supra* note 1253, at 494; R. SMITH, *supra* note 1244, at 108; *see also supra* notes 119-20 and accompanying text.

1267. *See* J. MAGUIRE, THE LANCE OF JUSTICE 22-23 (1928); *see also supra* note 203-04 and accompanying text.

1268. *See, e.g.*, Ferrari, *supra* note 1244, at 707; Smith, *The Criminal Courts*, *supra* note 1261, at 233-34, 238-47; Rubin, *supra* note 1244, at 346, 354; *see also supra* notes 127-30 and accompanying text.

1269. Years later, Blumberg used the term "double-agent" or "agent-mediator," to describe the role of defense attorneys in the "convincing the accused to plead guilty, and ultimately to help in cooling-out the accused. . . ." Blumberg, *Practice of Law as a Confidence Game: Organizational Co-optation of a Profession*, 1 L. & SOC'Y REV. 15, 28 (1967); *see* A. BLUMBERG, CRIMINAL JUSTICE 96 (1967); *see also supra* note 903. Blumberg borrowed the term "agent-mediator" from Goffman's description of the staff ("attendant-mediator") at a mental institution. *See* E. GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATIONS OF MENTAL PATIENTS AND OTHER INMATES 8-9 (1961); *see also* Goffman, *On Cooling the Mark Out: Some Aspects of Adapatation to Failure*, in A. ROSE, HUMAN BEHAVIOR AND SOCIAL PROCESSES 482-502 (1962). Blumberg accepted Parson's view that while defense attorneys provide their clients some "support at critical times," they act primarily as "agent[s] of social control in counselling [the] client and . . . influencing . . . [her] course of conduct." Blumberg, *Practice of Law as a Confidence Game*, *supra*, at 17 n.17.

sisted over seventy years despite the adoption of national standards for adversarial representation in criminal cases and the Supreme Court's decisions in *Gideon v. Wainwright*[1270] and *Argersinger v. Hamlin*.[1271] The standards serve to legitimate indigent defense systems by providing them with acceptable codes of conduct.[1272] In retrospect, what the Supreme Court decisions meant, however, in contrast to the Court's rhetoric, was that increasing numbers of indigent criminal defendants would be subject to the non-adversarial practices of the pre-*Gideon* era.[1273]

Against this background, the creation of an indigent defense system whose object is the mass disposal of criminal cases through guilty pleas, lesser pleas, and other non-trial dispositions should not be viewed as a heroic response to the needs of poor people by public-spirited individuals.[1274] Nor

---

1270. 372 U.S. 335 (1963).

1271. 407 U.S. 25 (1972).

1272. The virtually unbroken history of indigent criminal defense in the United States, as confirmed by our empirical research in New York City, demonstrates that the standards of professional conduct serve to resolve the dilemmas created for the state and the private bar by the non-adversary practices of indigent defense providers. Given the alliances made between indigent defense providers, the city or state, and the organized bar, "those who proclaim the ideals know, or should know, that they [have] set impossible goals." Abel, *Why the ABA Promulgates Ethical Rules*, 59 TEX. L. REV. 639, 669 (1981). Under these circumstances, the myth by adversarial codes of conduct "is not noble but hypocritical." *Id.* A similar analysis was made by Abel of the ABA's Canons of Professional Ethics (1908), MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1971) and MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft, May 1981). Abel emphasizes that

> [a]n activity may plausibly be interpreted as an attempt at legitimation even if it does not succeed in that attempt .... [T]he justification may be persuasive and coherent as well as flimsy and illogical, and the person advancing it may be sincere as well as hypocritical; where a particular legitimation falls for these variables is an empirical question ....

Id.

1273. *See* 1967 PRESIDENT'S COMMISSION REPORT, *supra* note 1244, at 127-28; THE OTHER FACE OF JUSTICE, *supra* note 1243, at 13, 36, 58; RIGHT TO COUNSEL IN CRIMINAL CASES, *supra* note 1261, at 235-36; N. LEFSTEIN, *supra* note 1261, at 2, 13-14; *see also supra* note 1261 and accompanying text.

1274. The traditional apolitical rationale chroniclers offered for the rise of state supported indigent criminal defense was that it grew out of the work of a few visionaries, supported by public-spirited capitalists. *See generally* R. SMITH, *supra* note 1243; J. MAGUIRE, *supra* note 1267; H. TWEED, *supra* note 1260; *see also supra* note 40. These writers described the growth of the indigent defense system as an appropriate response to a previously unmet need. Others depicted the state's direct involvement as the sole result of private philanthropy's inability to sustain the mass defense of poor people. *See, e.g.*, DuVivier, *The Use of Public Funds in Legal Aid Work*, 55(1) LEGAL AID REV. 3, 4-5 (1957); EQUAL JUSTICE FOR THE ACCUSED, *supra* note 1243, at 45; *see also supra* note 303-06 and accompanying text. Still others maintained that the failure of the indigent defense system to provide effective adversarial advocacy following *Gideon* and the direct involvement of the state resulted from inadequate public financing and a political climate which placed a greater premium on the fear of crime than on the defense of the accused. *See* N. LEFSTEIN, *supra* note 1261, at 13-14; Remarks of A. Liman, *Legal Aid Society on the Defensive*, N.Y. Times, Aug. 4, 1985, at E7, col. 1; *see also infra* note 1375 and accompanying text. Accounts of the rise of civil legal aid similarly divorce law from politics. *See* Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474 (1985), arguing that, "[o]nce politics has been excluded from social analysis, it also is ignored in pre-

should it be viewed as a rational response to modern case pressure,[1275] as a product of the individual, or collective behavior of court-room actors,[1276] or as

---

scription." Under these circumstances, "[t]he decline in access to law is portrayed as the inevitable by-product of progress. . . ." *Id.* at 479.

1275. Social scientists have advanced two alternative analytical tools, to explain and evaluate the bureaucratic response to case pressure and the behavior of courtroom actors, the rational-goals model and the functional-systems approach. These perspectives are derived from research on organizational analysis. *See* A. Etzioni, *Two Approaches to Organizational Analysis: A Critique and Suggestion*, 5 ADMIN. SCI. Q. 257 (1960), and A. ETZIONI, A COMPARATIVE ANALYSIS OF COMPLEX ORGANIZATIONS (1961). Other influential theorists in this tradition are H. SIMON, ADMINISTRATIVE BEHAVIOR (1976).

The rational goals model implies "an elaborate apparatus which processes arrests according to highly defined rules and procedures undertaken by 'experts' who perform the functions ascribed to them by highly developed formal rules, under a rigorous division of labor, and who are subject to scrutiny in a systematic and hierarchical pattern." Feeley, *Two Models of the Criminal Justice System: An Organizational Perspective*, 7 L. & SOC'Y REV. 407-10 (1973).

One of the seminal studies in this genre is A. BLUMBERG, CRIMINAL JUSTICE (1970). Blumberg describes the emergence of "bureaucratic due process," a non-adversarial system of negotiation as a response to modern case pressure. This system consists of "secret bargaining sessions, employing subtle, bureaucratically ordained modes of coercion and influence to dispose of onerously large case loads in an efficacious and 'rational' manner." *Id.* at 21. In this system, reliance on guilty pleas is considered a rational response to case pressure:

> The enforcement and adjudication process boils down to this: intolerably large caseloads of defendants in our criminal justice system, which must be disposed of in an organizational context of limited resources, encourages police, prosecution and court personnel to be concerned largely with strategies that lead to a guilty plea.

Blumberg, *Law and Order: The Counterfeit Crusade* in THE SCALES OF JUSTICE at 21 (A. Blumberg ed. 1973). The same causal links between guilty pleas and case pressure has been made by a variety of other commentators. *See, e.g.*, L. DOWNIE, JUSTICE DENIED (1971); H. JAMES, CRISIS IN THE COURTS (1968); A. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 51 (1968); Atkins, *Prisoners' Satisfaction With Defense Counsel*, 12 CRIM. L. BUL. 427, 442 (1976); *see also supra* note 902.

Recent attempts to subject the case pressure rationale for guilty pleas and other forms of non-trial dispositions to empirical and historical testing, including our analysis of lesser plea practices of the Voluntary Defenders' Committee in New York City, *see supra* notes 243-48 and accompanying text, cast doubt upon this alleged causal link, and suggests that other, more fundamental structural reasons account for this practice. For example, in a study of superior courts in Connecticut, Heumann found that the guilty plea "is, and has been, the best-travelled route to case disposition in high *and* low volume courts," and that rather than being simply an expedient dictated by excessive case pressure "plea bargaining is integrally and inextricably bound to the 'trial' court." M. HEUMANN, PLEA BARGAINING 31-32 (1978) (emphasis in original). This conclusion has been supported by Feeley who, using empirical and historical evidence relating to plea practices, concluded that "there has not been any particularly noticeable 'decline' in or 'twilight' of the adversary system. Rather, it seems that it has remained at a more or less constant level despite changes and variations in the magnitude of workload." M. FEELEY, THE PROCESS IS THE PUNISHMENT 266 (1979).

1276. The functional systems model acknowledges that while officially stated goals and rules of an organization or workgroup influence the behavior of its members, these are only one set of factors that shape decisions. Under this approach, "the rules the organization members are likely to follow are the 'folkways' or 'informal rules of the game' within the organization. The goals they pursue are likely to be personal or sub-group goals; and the roles they assume are likely to be defined by the functional adaptation of these two factors." Feeley, *Two Models of the Criminal Justice System*, *supra* note 1278, at 413. The most detailed exposition of courtroom workgroup analysis is that of J. EISENSTEIN & H. JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS (1977). *See also* J. SKOLNICK, JUSTICE WITHOUT TRIAL chs. 8-9 (1966); Blumberg, *supra* note 1269, at 15; L. CARTER, THE LIMITS OF ORDER

the logical result of procedural and evidential complexity attendant upon a trial.[1277] Instead, the routine processing of defendants is exactly what the indigent defense system was designed to accomplish.[1278] The development of

(1974); M. HEUMANN, *supra* note 1280; P. NARDULLI THE COURTROOM ELITE (1978); P. UTZ, SETTLING THE FACTS (1978); L. MATHER, PLEA BARGAINING OR TRIAL? (1979); P. Nardulli, *"Insider" Justice: Defense Attorneys and the Handling of Felony Cases*, 77 J. CRIM. L. & CRIMINOLOGY No. 2, at 379 (1986); *see also* supra note 893-94.

In an early exposition of this theory, Cole argued that lawyers develop close working arrangements with each other which lead to "exchange relationships" among the various courtroom actors. These exchange relationships minimize conflict and maximize co-operation and thus result in guilty pleas:

> In a legal system where bargaining is a primary method of decision-making, it is not surprising that criminal lawyers find it essential to maintain closed personal ties with the prosecutor and his staff. Respondents were quite open in revealing their dependence upon this close relationship to successfully pursue their careers. The nature of the criminal lawyer's work is such that his saleable product or service appears to be influence rather than technical proficiency in the law.

Cole, *The Decision to Prosecute*, 4 L. & SOC'Y REV. 331, 339 (1970).

In reviewing much of the organizational literature, Feeley concluded that, although it has made significant contributions to our understanding of guilty pleas and the criminal courts in general, an organizational approach does not and cannot easily explain, "why the practice of plea bargaining grew up in the first place, and what legal, theoretical and structural factors (as opposed to organizational functions) gave birth to and help sustain it." Feeley, *Plea Bargaining and the Structure of the Criminal Process*, 73 JUST. SYS. No. 3, at 338, 342 (1982) (emphasis in original).

1277. In a brief but incisive paper, Langbein demonstrated that the jury trial at common law, a judge-dominated lawyer-free procedure which was highly efficient in disposing of cases up to the middle of the eighteenth century, became extremely complex and unworkable for routinized case dispositions with the rise of adversarial advocacy and the law of evidence. He suggested that the tradition of private prosecution and prosecutorial discretion influenced nineteenth century common law procedure, causing courts to channel their caseload into non-trial dispositions. Langbein, *Understanding the Short History of Plea Bargaining* 13(2) L. & SOC'Y REV. 261 (1979). *See also* Feeley, *supra* note 1276, at 338. For an early analysis of the "vanishing jury" and its relationship to prosecutorial discretion ("nolle prosequis"), and guilty pleas, *see* Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97, 98-109 (1928).

1278. By contrast, our historical research confirmed that even before the advent of public and private defender agencies, assigned counsel disposed of a majority of indigent cases through guilty pleas. *See* R. SMITH, *supra* note 1243, at 123; *see also supra* note 1184 and accompanying text. Institutional defenders, by eliminating the financial and ideological incentives to take cases to trial, made the guilty plea process more attractive, and thus added an increased measure of predictability to the method of disposition of indigent defendants' cases. *See* Ferrari, *Analysis of New York and County Bar Reports on the Public Defender*, 6 J. CRIM. L. & CRIMINOLOGY 18, 18 (1915-16); M. GOLDMAN, *supra* note 1246, at 51-53; *see also supra* notes 140-43, 1253-54 and accompanying text. By institutionalizing non-adversarial advocacy, defender agencies reformed the indigent defense system to reliably assist the prosecution in achieving what Packer describes as the crime control goals of cost-efficient and expeditious case processing. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 158-63 (1968).

Other commentators have documented the early occurrence of non-trial dispositions in the American criminal justice system. *See* Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979); Langbein, *supra* note 1277, at 261; Friedman, *Plea Bargaining in Historical Perspective*, 13 L. & SOC'Y REV. 247 (1978); Haller, *Plea Bargaining: The Nineteenth Century Context*, 13 L. & SOC'Y REV. 273 (1979); *see also supra* note 249 and accompanying text. However, these studies have not related guilty pleas, lesser pleas, and prosecutorial dismissals to the political and economical alliances of institutional defender agencies. For the most part, commentators have treated the bureaucratization of the criminal justice system as independent from the class stratification of the legal profession and the institutionalization of the indigent criminal

this model of representation and the adherence to these structural goals is exemplified by New York City's indigent defense system.

I.
NEW YORK CITY'S SYSTEM OF INDIGENT CRIMINAL DEFENSE

New York City's indigent system is a product of the combined interests and goals of the organized bar and the City. Their policies led to an open-ended contract between the City and the Legal Aid Society[1279] that virtually guaranteed ineffective assistance and the survival of assigned counsel. The result of these policies is a system virtually impervious to reform.

In the subsequent two sections we will describe how the current policies of the organized bar and the City descend from a hundred years of interdependence between those two actors. We examine the organized bar's interest in controlling legal services and the City's interest in fast, inexpensive processing of indigent criminal defendants. In the final three sections, we will address the reasons why the Legal Aid Society has become bound to such a contract and why a core group of career 18-B Panel defenders has emerged as a major provider of indigent defense services. In addressing these issues, we analyze how the organized bar's interest and that of the City jointly structure incentives and constraints that mold New York City's dual system of indigent defense.

A. The Organized Bar

In New York City, the City Bar Association and the New York County Lawyers' Association have always opposed direct state control over the practice of criminal law.[1280] They have sought to protect private criminal practice by arguing for the exclusive control of legal services in the hands of those who charge fees for their work. To cede control to the state threatens the very interests the organized bar is most eager to defend.[1281]

---

bar. *See* J. BARAK, IN DEFENSE OF WHOM? 117 (1980). Sudnow's description of the public defender exemplifies this approach: "Whatever the reasons for its development, we now find in many urban places a public defender occupying a place alongside judge and prosecutor as a regular court employee." Sudnow, *Normal Crimes: Sociological Features of the Penal Code and Public Defenders Offices* 12(3) SOC. PROBS. 255 (1965).

1279. Agreement Between the City of New York and the Legal Aid Society (Aug. 6, 1966), reprinted *infra* app. 2(c), at 932 [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 922 [hereinafter Mayor's Executive Order]; *see also supra* notes 386-90 and accompanying text.

1280. *See* 1914 Bar Association Report, *supra* note 1243, at 309; *The Knell of the Public Defender*, *supra* note 1260, at 287; Ferrari, *supra* note 1278, at 18; Forster, *On the Public Defender: A Symposium*, 6 J. CRIM. L. AND CRIMINOLOGY 370, 378 (1914-15); H. TWEED, *supra* note 1261, at 27; DuVivier, *supra* note 1274, at 3-5; 1975 Report on the Legal Aid Society and the 18-B Panels, *supra* note 1243, app. 4 at 13; *A System in Crisis*, *supra* note 1243, at 947-48.

1281. Members of the organized bar, whose economic interests are not threatened by any reduction in court assignments to private attorneys, have historically favored replacing court-assigned private attorneys with staff attorneys from a bar-controlled private legal aid agency. *See* 1914 Bar Association Report, *supra* note 1243, at 319; 1928 REPORT, *supra* note 1243, at 54; EQUAL JUSTICE FOR THE ACCUSED, *supra* note 1243, at 1296-97. These elite lawyers supported private legal aid because it enhanced the private bar's image and eliminated disreputable

In the late 19th and early 20th centuries, the bar associations rejected proposals to establish a public defender for all criminal defendants.[1282] The organized bar viewed a public defender as a threat to private lawyers' monopoly over legal services. The bar claimed that a system of free legal services provided by a public defender would diminish private lawyers' opportunities to earn fees from defendants who could afford an attorney.[1283] Free legal serv-

---

lawyers. *See* H. TWEED, *supra* note 1261 at 29-30; Hughes, *Legal Aid Societies Their Function and Necessity*, 45 A.B.A. REP. 227, 235 (1920); *see also supra* notes 222-24 and accompanying text. By contrast, private attorneys whose livelihood depends on indigent cases have opposed efforts to institutionalize indigent representation. *See* 1975 Report on the Legal Aid Society and the 18-B Panel, *supra* note 1243, at 13; *see also supra* note 579 and accompanying text. For a similar analysis of the dichotomy in the private bar's response to civil legal aid in the United States, see Abel, *supra* note 1274, at 499; *see also* B. GARTH, NEIGHBORHOOD LAW FIRMS FOR THE POOR: A COMPARATIVE STUDY OF RECENT DEVELOPMENTS IN LEGAL AID AND IN THE LEGAL PROFESSION 33 (1980); Champagne, *Lawyers and Government Funded Legal Services*, 21 VILL. L. REV. 860, 867-70 (1976).

An example of the dichotomy in the private bar's attitude toward legal aid can be seen in the divergent responses of elite lawyers and court-assigned private attorneys to our criticism of the Legal Aid Society's longstanding policy of declining homicide assignments in favor of private assigned attorneys, despite the overall poor quality of homicide representation provided by the 18-B Panel. *See supra* notes 276-78, 509, 674-75 and accompanying text; McConville & Mirsky, Defense of the Poor in New York City, A Response to the Reply Memorandum of the Legal Aid Society, 64-66 (Nov. 7, 1985) [hereinafter 1985 Response]; for earlier criticisms of this practice, see 1971 Report, *supra* note 1243, at 24, 26; *see also supra* note 527 and accompanying text. Following the filing of our Draft Report, 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 Draft Report], the City Bar Association's Criminal Advocacy Committee (comprised of successful private criminal defense attorneys, prosecutors, members of large corporate law firms, and past and present members of the Legal Aid Society's management) asked the Legal Aid Society to accept homicide assignments, in lieu of referral of these cases to 18-B Panel attorneys. The Society responded in the following manner:

> This Committee has asked whether the Society is prepared to undertake to defend homicide cases in significant numbers. We are willing, have been willing and will continue to be willing to do so. Indeed, we would be pleased to receive the Committee's endorsement with the [sic] respect to our initiative to undertake a major role in the representation of homicide cases. However, in order to agree to undertake these cases the Society will have to be provided with resources to support this representation. We are seeking the necessary funding from the City to begin this effort.

Legal Aid Society, Additional Reply Memorandum to McConville and Mirsky Draft Report at 25 (Jan. 3, 1986) [hereinafter 1986 Additional Reply Memorandum]. Subsequent to the Society's initiative, the 18-B Panel Administrator for the First Department, on behalf of court-assigned private attorneys, lodged a complaint with the administrative judges in New York and Bronx Counties and with the City of New York's Deputy Mayor for Criminal Justice. The administrator contended that Panel attorneys accepting homicide assignments were of "exceptionally high quality," and that they had "spent many years in honing [their] skills, and had to present [their] qualifications to the Screening Committee for rigorous review." He asserted that these attorneys "collectively" were the "cream of the criminal bar, public or private." *See* Letter from Geoffrey Q. Ralls, Administrator of the Supreme Court of the State of New York, Appellate Division, First Dep't to 18-B to Homicide Panel Members (Nov. 1986)[hereinafter 1986 Ralls Letter]. Subsequent to this complaint, the administrative judges for New York and Bronx Counties established policies precluding criminal court judges from assigning homicide cases to Society attorneys without prior approval. *Id.*

1282. J. MAGUIRE, *supra* note 1267, at 269; H. TWEED, *supra* note 1261, at 27.

1283. Forster, Secretary of the Reform Committee of the City Bar Association, argued

ices would also deprive private lawyers of an opportunity to represent defendants when statutory fees and publicity made court-assignments more attractive.[1284]

Leaders of the City Bar Association and the New York County Lawyer's Association therefore joined hands with prosecutors and with judges who denounced state-supported defense as an invidious attack on the integrity of the criminal justice system.[1285] The bar argued that a public defender would institutionalize adversarial advocacy and undermine confidence in the administration of criminal justice.[1286] Establishing a public defender office, the bar contended, would increase delays in the processing of cases and would serve only to set criminals free.[1287]

The organized bar originally promised that its members would provide free legal services for truly indigent defendants on a pro bono basis.[1288] Significant pro bono services never materialized. Those private attorneys who volunteered for court assignment did so for the money.[1289] Reformers decried the system's inefficiency, lack of concern for indigent defendants, and inability to generate pro bono representation.[1290] Furthermore, elite lawyers, who es-

---

that the public defender would ultimately "purge and socialize the bar" in both civil and criminal cases. Forster, 19 LAW NOTES 100 (1915). *See also* R. SMITH, *supra* note 1244, at 115; *supra* note 106 and accompanying text. Although early supporters of the public defender movement believed that if the right to counsel were "unfettered by custom", it would be free, *see*, Foltz, *Public Defenders*, 31 AM. L. REV. 393 (1897); *see also supra* notes 101-04 and accompanying text, by 1917, the public defender's most vocal champion, Mayer Goldman, contended that the movement was concerned primarily with "the necessity for extending adequate and proper legal assistance to 'indigent' accused persons." M. GOLDMAN, *supra* note 1246, at 14. Goldman conceded that "it is a moot . . . question as to whether or not *all* accused persons should not be defended by the state." *Id.* (emphasis in original).

1284. *See* R. SMITH, *supra* note 1249, at 112. *See also supra* notes 81-83 and accompanying text.

1285. *See, e.g.*, 1914 Bar Association Report, *supra* note 1243, at 315; Correspondence of Henry A. Forster Dated Oct. 9, 1916, in *The Public Defender: Duty to Furnish Technical Defense*, 7 J. CRIM. L. & CRIMINOLOGY 592, 594 (1916-17). *See also supra* notes 185, 191 and accompanying text.

1286. Who will assert that the tone of the Criminal Courts will be uplifted by the spectacle of daily forensic combat between these two public officials each asserting his efforts in opposite directions, each working with zeal and earnestness to secure a favorable result for his side of the controversy? Can there be any question that under these conditions popular respect for the administration of justice would be greatly diminished?

1914 Bar Association Report, *supra* note 1243, at 315.

1287. *Id* at 314; *see also* Forster, *supra* note 1285, at 594.

1288. *See* Curtis, *The Legal Aid Society, New York City, A Review*, 9 THE RECORD 224 (1954); *see also supra* note 170 and accompanying text.

1289. *See Prospectus, The Voluntary Defenders Committee*, NYLJ Mar. 19, 1917, at 1, col. 2, 4 [hereinafter *Prospectus*]; *Notes and Abstracts: The Voluntary Defenders Committee*, 8 J. CRIM. L. & CRIMINOLOGY 278, 279, 281-82 (1917-18) [hereinafter *The Voluntary Defenders Committee*].

1290. *See* Remarks of Rev. John A. Wade, Chaplain of the Tombs and the New York City Police Department, *reprinted* in J. MAGUIRE, *supra* note 1267, at 266. *See also supra* note 172-74. *See generally supra* notes 71-80, 85-90 and accompanying text.

chewed representation of state criminal defendants, particularly indigents,[1291] shared reformers' concern that the administration of criminal justice become an effective means of securing public order.

Thereafter, the organized bar's economic self-interest evolved into a *political* concern about state control of legal services.[1292] The City Bar Association and the New York County Lawyers' Association responded to the threat of socialized legal services by proposing a private charitable agency to replace assigned counsel.[1293] Thereafter, Directors and members of the Legal Aid Society joined with former prosecutors and philanthropic citizens to form the Voluntary Defenders' Committee, which later became part of the Society.[1294] The Defenders' Committee provided private lawyers, mostly former prosecutors, to indigent criminal defendants.[1295] The Committee sought to achieve four primary goals: insure that control over legal services remained in the hands of the private bar; maintain confidence in the administration of criminal justice by facilitating the efficient processing of indigent defendants; eliminate disreputable lawyers and thereby appease those formerly critical of assigned counsel; and reduce the potential for social unrest created by the adversarial practices of assigned counsel.[1296]

1291. *See* Letter of S. Untermeyer to W. Armstrong, Dec. 24, 1909 *quoted in* J. AUERBACH, UNEQUAL JUSTICE 26 (1976); Pfeiffer, *Legal Aid Service in the Criminal Courts*, 145 THE ANNALS 50 (1929); *see also* Pound, *Criminal Justice in the American City*, *supra* note 1254, at 602; *see also supra* note 96 and accompanying text. For the most part, as our empirical research confirms, state criminal practice continues to be dominated by an "underclass" of attorneys outside the mainstream of the profession. *See supra* TABLE 5-1, at 721; *supra* note 764, TABLES A & B; *see also supra* note 765. *See generally* J. CARLIN, LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO (1962); E. SMIGEL, THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN (1964); L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES (1965); A. L. WOOD, CRIMINAL LAWYER (1967); J. P. HEINZ & E. P. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 124 (1982); Riesman, *Toward an Anthropological Science of Law and the Legal Profession*, 57 AM. J. SOC. 121 (1951).

1292. *See e.g.*, 1914 Bar Association Report, *supra* note 1243, at 312; R. SMITH, *supra* note 1243, at 98; Stewart, *The Public Defender is Unsound in Principle*, 32 J. AM. JUDICATURE SOC'Y 115 (1948); Dimock, *The Public Defender: A Step Towards a Police State*, 42 A.B.A. J. 210, 220 (1956); *Mr. Justice Brennan Speaks on Legal Aid*, 55(1) LEGAL AID REV. 20 (1957); EQUAL JUSTICE FOR THE ACCUSED, *supra* note 1242, at 93-94; DuVivier, *supra* note 1273, at 3-5; *A System in Crisis*, *supra* note 1243, at 947-48; *see also supra* notes 100-01, 115-16, 191-92, 299-300, 303-306, 369-74 and accompanying text; *infra* note 1308 and accompanying text.

1293. 1914 Bar Association Report, *supra* note 1243, at 319; *see supra* note 192 and accompanying text.

1294. *See Prospectus*, *supra* note 1289, at 1, col. 2; *Voluntary Defenders Committee*, *supra* note 1288, at 278; LEGAL AID SOCIETY 48TH ANNUAL REPORT, VOLUNTARY DEFENDERS' COMMITTEE 79 (1923) [hereinafter 1923 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT]; H. TWEED, *supra* note 1261, at 26-27; *see also supra* note 226 and accompanying text.

1295. *See* H. TWEED, *supra* note 1261, at 26-27; J. MAGUIRE, *supra* note 1267, at 271-72; *see also supra* note 229 and accompanying text.

1296. *See* Embree, *supra* note 1258, at 556-57; Legal Aid Society, 52d ANNUAL REPORT, VOLUNTARY DEFENDERS' COMMITTEE 87 (1927) [hereinafter 1927 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT]; J. MAGUIRE, *supra* note 1272, at 271; LEGAL AID SOCIETY 57TH ANNUAL REPORT, VOLUNTARY DEFENDERS' COMMITTEE 39-40 (1932) [hereinafter 1932 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT]; Cobb, *Legal Aid Practice*, 35

Elite lawyers, through membership in the City Bar Association, have controlled the Legal Aid Society and thereby guaranteed private lawyers' control of New York City's institutional defender. Most of the city's major law firms contribute substantially to the funding of the Society's civil division,[1297] and elite lawyers from leading law firms continue to play a prominent role in the Society's Board of Directors.[1298] Members of the Society's senior management board serve as officers of the City Bar Association and as members of the Bar's Executive Committee.[1299]

The key element of the relationship between the City Bar Association and the Legal Aid Society was and is the Society's "independent" status. Independence, a rhetorical device in this context, legitimates the private control over indigent criminal defense and distinguishes the Society from a public defender.[1300] In the pre-*Gideon* era, independence meant that the Voluntary Defenders' Committee would forego technical defenses associated with adversarial advocacy, and assist in the prosecution of guilty defendants.[1301] In

---

LEGAL AID REV. 2, 4 (1937); LEGAL AID SOCIETY 51ST ANNUAL REPORT, VOLUNTARY DEFENDERS' COMMITTEE 64-65 (1926) [hereinafter 1926 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT]; H. TWEED, *supra* note 1261, at 83; *see also supra* pp. 617-24.

1297. *See, e.g.*, LEGAL AID SOCIETY 1981 ANNUAL REPORT, Report of the President, at 2-3, 5 (1981).

1298. *See* LEGAL AID SOCIETY 1976-1985 ANNUAL REPORTS, Reports of the Board of Directors (1976-1985).

1299. During 1984-1985, the President of the City Bar Association and a member of the Bar's executive committee were both members of the Legal Aid Society's Board of Directors, while another member of the Bar's Executive Committee was a member of the Society's senior management. *See* Ass'n of the Bar of the City of N.Y. 1984-1985 Officers and Elected Committees (1984).

1300. *See* EQUAL JUSTICE FOR THE ACCUSED, *supra* note 1243, at 50-52; *see also supra* notes 118, 304-06, 308 and accompanying text. In different ways, however, the Legal Aid Society and the 18-B Panel are dependent entities. The Society's Criminal Defense Division relies on New York City and New York State for its entire budget, and the City and judges for most of its caseload. *See* N.Y. COUNTY LAW § 722 (McKinney 1982); 1966 Agreement, *supra* note 1279, at 932; Mayor's Executive Order, *supra* note 1279, at 922; *see also supra* notes 386-90 and accompanying text. Panel attorneys rely on judges and the Society for their assigned cases and on the City for their compensation for indigent representation. *See* N.Y. COUNTY LAW §§ 722, 722(b) (McKinney 1982); Mayor's Executive Order, *supra* note 1279, at 922; 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. I, at 925 [hereinafter 1966 Bar Association Plan]; *supra* notes 358-60, 392-95 and accompanying text.

In this context, assertions that one of the entities lacks independence is merely an attempt by the other to claim control over the provision of indigent defendant services. *See* Abel, *supra* 1274, at 509-10. Lawyers providing legal aid "[in] both the United States and Britain . . . [have] sought control [of legal services] by arguing that they had to be 'independent,' especially of those who might be their client's adversaries. Since government at all levels was the most frequent adversary of the poor . . . [i]n the end, there was no one left to administer the scheme except the lawyers themselves." *Id.* citing B. GARTH, *supra* note 1281, at 26-28, 36.

1301. *See* Fabricant, *supra* note 1264, at 74; Embree, *The Voluntary Defender*, 28(4) Legal Aid Rev. 3, 3-5 (1928); 1920 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT, *supra* note 1263, at 69; 1923 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT, *supra* note

the post-*Gideon* era, independence meant that only a private legal aid society, even after the shift to full public funding, could provide adversarial advocacy and thereby guarantee that the constitutional rights of all indigent defendants were vigorously asserted.[1302]

Our Draft Report, presented to the City Bar Association in 1985, documented the large number of cases handled by the 18-B Panel of private attorneys and the overall poor quality of indigent representation.[1303] Our court observations and record analysis demonstrated that the Panel had become a co-principal provider with the Legal Aid Society of indigent criminal defense in the Supreme Court. The Panel's dominant role, and the fact that we identified poor quality representation with *both* Society staff attorneys and Panel lawyers, surprised and embarrassed the Bar.[1304] The presence of Panel regulars proved that very few private attorneys took pro bono criminal cases.[1305] Our research demonstrated that Panel regulars routinely compromised defendants' rights when they substituted for Society lawyers and assumed per diem representation.[1306] Because they lacked a professional management structure, these private attorneys were unable to claim that they provided adversarial representation sufficient to legitimate their activities.[1307] Faced with this state of affairs, the Bar attempted to re-establish its control over the as-

1294, at 73; 1926 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT, *supra* note 1263, at 64-65; J. MAGUIRE, *supra* note 1267, at 273; Campbell, *Attitudes of Defendants Pleading Guilty*, 30(1) LEGAL AID REV. 7, 8 (1932); *see also supra* notes 235-58 and accompanying text.

1302. *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. LEGISLATIVE DOC. No. 90, at 85-86 (1966) [hereinafter 1966 L. Tolman Report]; *A System in Crisis*, *supra* note 1243, at 947-48; *see also supra* note 374 and accompanying text.

1303. 1985 Draft Report, *supra* note 1281, at 218-71, 294-334; McConville and Mirsky, Defense of the Poor in New York City: A Response to the Reply Memorandum of the Legal Aid Society, at v, TABLE A (Nov. 7, 1985) [hereinafter 1985 Response].

1304. *See A System in Crisis*, *supra* note 1243, at 943, 954.

1305. For evidence of the extent to which 18-B Panel assignments were a means of livelihood, and not pro bono public service, see *supra* note 763, TABLE; *supra* note 764, TABLES A & B.

1306. For a description of 18-B Panel per diem ("for arraignment only") representation, see 1986 Ralls Letter, *supra* note 1281, at 2; *see also supra* notes 603-04 and accompanying text. For our analysis of the effects of per diem practices on continuity of representation, and of the overall quality of Panel practice, see *supra* note 825, TABLE; TABLE 6-1, at 752; *supra* pp. 754-58. For similar research on discontinuous representation in other jurisdictions, *see supra* note 825; *see also supra* note 497.

1307. By contrast, the Legal Aid Society has traditionally sought to legitimate its role as defense counsel by pointing to its acquittal rate in the cases it takes to trial. *See* LEGAL AID SOCIETY 47TH ANNUAL REPORT, VOLUNTARY DEFENDERS' COMMITTEE 3 (1922) [hereinafter 1922 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT]; 1923 VOLUNTARY DEFENDERS' COMMITTEE ANNUAL REPORT, *supra* note 1294, at 73; LEGAL AID SOCIETY 1984 ANNUAL REPORT at 34 (1984); Legal Aid Society, Reply Memorandum to McConville and Mirsky Draft Report 37-42 (Oct. 1, 1985) [hereinafter 1985 Reply Memorandum]. In 1984, the Society contended that its acquittal rate in Supreme Court (40.9 percent) was "far superior to that obtained by the remainder of the bar (18-b and private collectively)." *Id.* at 39-40; *see also supra* note 1096, TABLES A & B. *But see* our analysis of the Society's trial rate as compared to the 18-B Panel, *supra* TABLE 9-6, at 833; TABLE 9-7, at 833.

signed counsel system rather than risk renewed demands to replace court assigned private attorneys with a new public defender.

In 1986, the City Bar Association, still fearful of a public defender, proposed yet another private defender agency to co-exist with the Legal Aid Society and to reduce substantially the size and prominence of the 18-B Panel.[1308] The new entity, a "mid-range" institutional defender under fiscal contract with the City, would be assigned most of the cases presently referred to the Panel.[1309] Like the Society, the new defense entity would be an "independent" private organization with direct ties to the organized bar and not a "creature of the state, directly subservient to state officials."[1310] The City Bar Association claimed that its preferred choice was a revitalized Panel of private attorneys, but it rejected reform or expansion of the Panel on practical political grounds.[1311] Increased rates of compensation and the costs of necessary reforms would make the existing Panel fiscally unattractive to the City.[1312] Thus independence and cost-efficiency, the same rationales that the organized bar advanced on behalf of the Voluntary Defenders' Committee half a century before, were marshalled in support of this new defender agency.

The City Bar Association's 1986 proposal failed to address a principal reason why 18-B Panel attorneys became a major liability to the organized bar. The Legal Aid Society's failure to provide representation to all eligible defendants and its case selection and shedding practices made the Panel a co-equal provider in Supreme Court and a major provider in Criminal Court.[1313] The growth of the Panel measured the extent to which the Society did not

1308. *See A System in Crisis, supra* note 1243, at 946-50. The Bar concluded that competition for cases between the Legal Aid Society and the new "mid-range defender", *see infra* note 1309 and accompanying text, would only occur if the new defender were "set up as a public defender." *Id.* at 949.

1309. *See id.* at 946, 949-50.

1310. *Id.* at 947-48. The Bar, in recommending the replacement of the 18-B Panel by a new institutional defender, argued that "a non-profit corporation has a much greater degree of political independence than an appointed public defender, whether the mayor, the city council, or even the presiding justices of the Appellate Division make the appointment." *Id.* at 958.

1311. *Id.* at 948.

1312. *Id.* at 944-45. "The major disadvantage to the plan . . . is financial. Nothing short of the recommendations we make, and the financial committment it entails, will make the 18-B panels work effectively. Yet the supplemental cost of our revitalization plan runs in the neighborhood of five million dollars." *Id.* at 958. The Bar declined to mention that its projected cost of revitalization would not exceed one fourth of one percent of the City's criminal justice budget. *See* SETTING MUNICIPAL PRIORITIES 368 (C. Brecher & R. Horton eds. 1986); *see generally supra* note 18.

1313. *See supra* TABLE 7-1, at 779 (number of Legal Aid Society relieved cases); TABLE 7-2, at 782 (proportion of Society and 18-B Panel Supreme Court cases); TABLE 7-4, at 788 (proportion of Society and Panel Criminal Court cases); TABLE 8-1, at 795 (proportion of expected Society representation shed to Panel attorneys at arraignment); TABLE 8-6, at 808, *supra* pp. 813-15, and *infra* app. 3, at 938 (relationship between Society attorney practices at arraignment and the loss of cases to Panel attorneys); TABLE 9-1, at 821 (case selection according to factual culpability); TABLE 10-1, at 838 (proportion of expected Society representation shed to Panel attorneys after arraignment). For a description and analysis of Society practices which account for post-arraignment shedding, see *supra* pp. 837-42, 844-47.

fulfill its contractual obligations. Thus, the continued referral of a large number of cases to the Panel threatened the Society's very existence. Increasing case referrals to a more expensive panel of attorneys could inspire the City to replace the Society with a public defender that provides representation to most indigent defendants.

Although the City Bar Association hoped to deflect criticism of the Legal Aid Society by focusing on the 18-B Panel, it also made a gesture toward reforming the Society in order to defuse any efforts to replace it. The Bar acknowledged that the representation provided by the Society needed improvement,[1314] but contended that improvement would follow from the competitive presence of the new mid-range defender.[1315] Market forces would, in this view, improve the quality of the Society's services and reduce case shedding.

The City Bar Association's market force theory rested on two assumptions. First, the Bar contended that professionalism, stimulated by "healthy" competition, would motivate the Legal Aid Society to improve its performance.[1316] The Society would overcome past inertia when confronted by a new institutional defender equipped with caseload caps, modern management systems and non-union attorneys.[1317] Second, the City would reward higher quality representation which at the same time would reduce case shedding.[1318] Although the Bar publicly disavowed any adverse consequence of healthy competition, such a defense entity could eventually threaten the Society's position as the City's principal provider of indigent defense should it fail to reform. The new mid-range defender could successfully compete for cases and would replace the Society as the City's first line of defense.[1319]

The market force, self-reform theory, however, is inconsistent with the substance of the City Bar Association's own proposal and the history of New York City's indigent defense system. The Bar rejected reliance on a revitalized 18-B Panel because Panel representation may no longer be cost-efficient.[1320] The Bar proposed a mid-range defender with a fiscal contract, like that of the Legal Aid Society, which would require it to provide unlimited representation (up to eighty percent of the existing Panel multiple-defendant caseload) under a fixed annual budget.[1321] This financial arrangement would

1314. *See A System in Crisis, supra* note 1243, at 954, 954 n.52.

1315. *Id.* at 948, 955.

1316. *Id.* at 948.

1317. *Id.* at 949-50.

1318. *Id.* at 948, 963.

1319. The Bar, however, contended that such "unhealthy" competition would only arise if the new mid-range defender were constituted as a public defender, rather than as an independent organization with direct ties to the organized bar. *Id.* at 949.

1320. *See supra* notes 1311-12 and accompanying text.

1321. *See A System in Crisis, supra* note 1243, at 949-50; *see also infra* note 1349 and accompanying text. The City Bar Association maintained that under the 1986 compensation rates, *see* Act of 1985, c. 315, *supra* note 1233, the 18-B Panel's per-case cost would exceed that of the Legal Aid Society. *See A System in Crisis, supra* note 1243, at 945; *see also supra* note 1311 and accompanying text. In arriving at this conclusion, the Bar increased the cost of the

be more cost-efficient than the present Panel, because the Panel works essentially on open demand without any formal constraint on resources. However, historical research and our own courtroom observations have shown that, contrary to the Bar's proposal, effective adversarial advocacy is virtually impossible in a system in which the financial and staffing structure is linked to the unstated but principal goal of expeditious, cost-efficient processing of defendants.

B. The City

The Office of Management and Budget ("OMB")[1322] and the Mayor's Criminal Justice Coordinator[1323] are the New York City agencies most involved in setting policies over criminal defense services. OMB negotiates the City's annual contract with the Society and gives effect to the City administration's concern for low cost.[1324] The Mayor's Coordinator makes sure the indigent defense system functions efficiently with due regard for the interests of police, prosecution, and corrections.[1325] No agency exists whose function it is to oversee the quality of representation provided to poor people.

The City of New York has consistently sought to meet the constitutional and statutory requirements to assign counsel by providing low-cost defense to poor people. Two reports that the City commissioned in the twenty years following the adoption of Article 18-B recommended that the City continue to designate the Legal Aid Society as its principal provider of indigent criminal defense because of the Society's comparative cost-efficiency.[1326] Assigned counsel was thought to be substantially more expensive and less reliable than the Society.[1327] A public defender was said to entail considerable start-up costs.[1328]

Panel by a factor of 1.63, (equivalent to the proportionate increase in rates of 18-B compensation), without accounting for over five million dollars of additional government funds which the Society received in FY 1985. *See A System in Crisis*, *supra* note 1243, at 945. *Compare* LEGAL AID SOCIETY 1984 ANNUAL REPORT 57 (1984) ($40,860,377 awarded by governmental agencies) *with* LEGAL AID SOCIETY ANNUAL REPORT 43 (1985) ($46,144,363 awarded by governmental agencies).

1322. New York City, N.Y. Charter, ch. 6, § 111 (amended by local law 1975, no. 5).

1323. New York City, N.Y. Charter, ch. 1, § 13 (1975).

1324. *See supra* note 1322; 1965 Report to the Mayor on the Cost of Defense, *supra* note 1244, at 2-7; 1966 L. Tolman Report, *supra* note 1302, at 85-86; *see also supra* notes 379-86 and accompanying text.

1325. *See supra* note 1323; 1982 Report on the Keenan Commission, *supra* note 1242, at 7, 8 (at the time John Keenan was the Mayor's Coordinator); Letter from Kenneth Conboy, New York City's Coordinator of Criminal Justice, to Governor Cuomo at 1-2 (July 9, 1985) [hereinafter 1985 Conboy Letter]; *see also supra* notes 637-49, 1235-39 and accompanying text.

1326. *See* 1965 Report to Mayor on the Cost of Defense, *supra* note 1244, at 6; *see also supra* note 380; 1982 Report of the Keenan Commission, *supra* note 1243, at 14; *see also supra* note 643.

1327. 1965 Report to Mayor on the Cost of Defense, *supra* note 1244, at 2, 4-5; *see supra* notes 380-85 and accompanying text; 1982 Report of the Keenan Commission, *supra* note 1243, at 12; *see also supra* note 640-41 and accompanying text.

1328. 1982 Report of the Keenan Commission, *supra* note 1243, at 10; *see also supra* note 636 and accompanying text.

Despite these start-up costs, the City threatened to replace the Legal Aid Society with a public defender during the 1982 staff attorney strike.[1329] The City raised the spectre of a public defender to dissuade Society staff attorneys from striking and to prevent the 18-B Panel from becoming the City's first line of defense. Following the strike, the City forced a blanket no-strike agreement on the Society's union.[1330] The clause eliminated the threat of future strikes by subjecting all disputes between the Society's management and its union to binding arbitration.[1331] Because the City is not a party to the agreement, it does not have to increase wages, benefits, or the number of staff attorneys if a grievance is sustained.[1332] In fact, the City steadfastly refused to address the staff attorneys' caseload demands instead, it unsuccessfully suggested that financial eligibility for assignment of counsel be made more stringent.[1333]

Although cost is an important factor, it is not the City's only concern. The entire indigent defense budget in 1984, for example, only consumed approximately fifty-five million dollars of a total criminal justice budget of over two billion dollars.[1334] The City is equally concerned with the rapid processing of, for example, over 280,000 cases in 1984.[1335] The City must dispose of these cases quickly in order to permit this rate of arrests to continue without exceeding the capacity of pre-trial detention facilities. The rapid processing of defendants can only be accomplished through a cooperative indigent defense system because approximately seventy-five percent of all Supreme Court and Criminal Court cases involve poor people.[1336] Without a defense entity willing to expedite cases, the City's detention facilities would become even more overcrowded, court calendars would become more unmanageable, and delay from arrest to arraignment would be further prolonged.[1337]

For the past twenty years, the City has known of the 18-B Panel's un-

1329. 1982 Report of the Keenan Commission, *supra* note 1243, at 14; *see also supra* notes 642-43 and accompanying text.

1330. *See* Collective Bargaining Agreement Between the Legal Aid Society and the Association of Legal Aid Attorneys of the City of New York 1984-1986, Arts. XIII, XVII (Jan. 4, 1985); *see also supra* text accompanying note 647.

1331. *Id.*

1332. N. ALBERT-GOLDMAN, 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 (1985); *see also supra* note 586 and accompanying text.

1333. *See* 1982 Report of the Keenan Commission, *supra* note 1243, at 28; *see also supra* notes 644-46 and accompanying text.

1334. *See supra* pp. 863-66; SETTING MUNICIPAL PRIORITIES 368, TABLE 11.5 (C. Brecher and R. Horton eds. 1986).

1335. *See* Criminal Court of the City of New York, Caseload Activity Report — Arrest Cases (1984) [hereinafter 1984 Caseload Activity Report — Arrest Cases]; Office of Court Administration of the State of New York Supreme Court — Caseload Activity Reports (1984) [hereinafter 1984 Supreme Court Caseload Activity Reports]; *see also supra* notes 10-11 and accompanying text.

1336. *See supra* TABLE 7-2, at 782; TABLE 7-4, at 788.

1337. For a statement of these concerns illuminated by the absence of Legal Aid Society representation during the 1982 staff attorney's strike, see 1982 REPORT OF THE KEENAN COMMISSION, *supra* note 1243, at 7-8; *see also supra* note 639.

planned growth, but it has not objected because the Panel was providing cheap, fast representation.[1338] The City failed to design standards for case selection and for shedding that would police the system and would insure compliance with the *1966 Plan*.[1339] Instead, the presence of Panel regulars, who avidly acquired whatever cases the Legal Aid Society staff attorneys chose not to handle, including a substantial portion of the Society's felony caseload,[1340] reduced pressure on courts, prosecution, and corrections. Finally, Panel attorneys enabled police to continue to funnel cases through the system without regard to the system's capacity to insure competent vigorous representation for all defendants.

C. *The Institutional Defender*

The Legal Aid Society's structure, the quality of attorneys it sustains, and the degree to which it complies with *Gideon's* adversarial mandate can be understood in terms of the interests and ideologies of the organized bar and of the City. Our historical research revealed that the Society pioneered a prosecutorial method of extracting guilty pleas.[1341] This non-adversarial style of lawyering united the Society with the organized bar, which shared the view that the prosecution adequately protected the rights of defendants,[1342] and satisfied the City's concern for low-cost and expeditious case processing.[1343]

By 1965 the Legal Aid Society could no longer explicitly support this non-adversarial model of criminal defense; *Gideon* had made adversarial advocacy a constitutional requirement.[1344] As the Society's caseload grew and its

1338. *See, e.g.*, 1985 Conboy Letter, *supra* note 1325, at 1; *see also supra* notes 1165, 1236-37 and accompanying text.

1339. *See* 1985 Conboy Letter, *supra* note 1325, at 2; *see also supra* note 1238 and accompanying text. For our analysis of the difference between expected and actual representation under the 1966 *Plan*, see TABLE 7-3, at 787; TABLE 7-4, at 788; *see also supra* notes 993-96 and accompanying text.

1340. For our analysis of the proportionate share of citywide Supreme Court dispositions completed by Legal Aid Society staff attorneys and 18-B Panel attorneys, *see* TABLE 7-2, at 782. For our analysis of the proportionate number of Society cases we observed handled by Panel attorneys in New York County, *see* TABLE 8-1, at 795; TABLE 10-1, at 838. For our analysis of the work and income patterns of "active" Panel attorneys, *see supra* TABLE 5-17, at 739; TABLE 5-18, at 740, and the frequency with which judges appoint Panel regulars at arraignment, *see* TABLE 8-3, at 800.

1341. *See* Campbell, *Attitude of Defendants Toward Pleading Guilty*, 30(1) LEGAL AID REV. 7, 8 (1932); *The Voluntary Defenders Committee, supra* note 1288, at 282; Embree, *supra* note 1254, at 557; Waldo, *The Technique Involved in Making a Legal Social Investigation*, 145 THE ANNALS 105, 107 (1929). *See also supra* notes 251-54 and accompanying text.

1342. *See* 1914 Bar Association Report, *supra* note 1243, at 311; *supra* note 187-88 and accompanying text; *see also* H. TWEED, *supra* note 1261, at 29-30; *supra* note 187-88 and accompanying text.

1343. *See* Legal Aid Society 51st Annual Report, Voluntary Defenders' Committee at 64 (1926) [hereinafter 1926 Voluntary Defenders' Committee Annual Report]; 1965 Report to the Mayor on the Cost of Defense, *supra* note 1244, at 2-7; 1966 L. Tolman Report, *supra* note 1302, at 85-86; *supra* note 238, 378, 380-84 and accompanying text.

1344. Gideon v. Wainwright, 372 U.S. 335, 344 (1963). *See* U.S. v. Wade, 388 U.S. 218, 250 (1967) (White, J., dissenting in part and concurring in part); Ferri v. Ackerman, 444 U.S.

operations expanded beyond New York County, its need for staff attorneys correspondingly increased.[1345] This expansion brought the Society an activist core of attorneys committed to *Gideon's* adversarial mandate.[1346] They wanted to defend the rights of the accused rather than to harmonize their representation with the objectives of the prosecution.[1347]

Nevertheless, the Legal Aid Society's contract with the City adhered to the City's policy of achieving inexpensive, speedy dispositions.[1348] The contract embodied the indigent defense system's original structural goals by requiring the Society to satisfy an expanding and unlimited demand for representation within a fixed annual budget.[1349] The contract does not include caseload caps or case selection standards, which would allow the Society to decline cases to assure adversarial advocacy in the cases it does accept.[1350]

The conflicting interests of the Legal Aid Society's staff attorneys and the Society's management and the City have created untenable tensions. Management refused to impose caseload caps or to permit staff attorneys to publicly decline assignments.[1351] Staff attorneys struck four times between 1974 and 1982 to protest excessive caseloads, inadequate resources, and an inability to provide meaningful representation.[1352]

The response of the Legal Aid Society's management and the City Bar Association to the 1982 staff attorneys' strike illuminates the tensions and contradictions that confront the Society as a modern indigent defense provider. The Society could not disavow *Gideon's* adversarial mandate or its contract with the City. To resolve the conflict, the Society's management decided to depict its own attorneys as unworthy to defend the poor.[1353] The Society had

193, 204 (1979). *See also* La France, *Criminal Defense Systems for the Poor*, 50 NOTRE DAME L. REV. 41, 104 (1974); 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); Mounts, *Public Defender Programs, Professional Responsibility and Competent Representation*, 1982 WIS. L. REV. 473, 492; *supra* notes 334-39, 344-45 and accompanying text.

1345. *See supra* text accompanying notes 288-92, 297-98.

1346. Harbridge House Preliminary Findings, *supra* note 1243, at v, 31; *see also supra* notes 626-28 and accompanying text.

1347. *See Legal Aid Lawyers' Strike Enters Third Week With No Talks Planned*, N.Y. Times, Nov. 7, 1982, at 38, col. 1; *supra* note 634 and accompanying text.

1348. 1966 Agreement, *supra* note 1279, at 929.

1349. *Id.*, para. First, at 930, para. Sixth, at 931. *See also supra* notes 389-90 and accompanying text.

1350. 1966 Agreement, *supra* note 1279, at 929.

1351. *See supra* notes 612-15 and accompanying text.

1352. *See* 1982 Report of the Keenan Commission, *supra* note 1243, at 7; *supra* notes 552, 633-34 and accompanying text.

1353. *See Legal Aid Lawyers' Strike Enters Third Week With No Talks Planned*, N.Y. Times, Nov. 7, 1982, at 38, col. 1.

The Legal Aid Society's management and the Mayor's Commission charged with reviewing the strike both condemned staff attorneys' actions and their "disrupt[ive]" effects on the criminal justice system, while refusing to acknowledge the fundamental systemic contradiction presented by the Society's contract requiring it to respond to an unlimited demand with fixed resources. By contrast, the Mayor's Commission praised the Society's management and Board

always extolled its staff attorneys for making heroic efforts in difficult circumstances.[1354] Now, it set out to publicly stigmatize these lawyers.[1355] At the same time, a City Bar Association's Ethics Opinion depicted staff attorneys as unethical lawyers who refused to provide services to existing clients.[1356] The City Bar Association decided that "neglect" of an existing client's pending case, which violated the Code of Professional Responsibility, took precedence over systemic "neglect," which caused excessive caseloads and poor working conditions.[1357]

The Legal Aid Society's management and the City Bar Association, however, could not continue to discredit staff attorneys; they depended on these attorneys to maintain the private bar's control over criminal defense services. To continue to brand them as unethical might cause the Society to be replaced by a public defender or by an expanded assigned counsel system. Moreover, since the staff continued to invoke *Gideon* in its struggle with the Society's management over caseloads, this presented a threat to the Society's carefully cultivated reputation as a defender of the poor.[1358] The Society needed a long term strategy to prevent any future challenge to the integrity of the organization.

When the City threatened to replace the Legal Aid Society with a public defender, management accepted the City's demand that a no-strike clause be incorporated in the collective bargaining agreement with the staff attorneys' union.[1359] Management gave the union the City's ultimatum: the City would replace the Society with a public defender unless the contract contained a blanket no-strike clause. The union had two choices: it could either accept

---

of Directors for their role in mitigating the disruptive effects of the strike on the criminal justice system, and in mediating the staff attorneys' demands regarding excessive case loads and their adverse effect on the quality of representation. 1982 Keenan Commission Report, *supra* note 1243, at 10-11; *see supra* note 638 and accompanying text; *see also* Interim Report of the Joint Union-Management Committee on Working Conditions 1 (Dec. 9, 1983); *supra* note 648 and accompanying text.

1354. *See* R. Smith, *Foreword* to H. TWEED, *supra* note 1261, at v; *supra* note 39 and accompanying text; *see generally* J. MAGUIRE, *supra* note 1267; Harbridge House Preliminary Findings, *supra* note 1243, at iv; *supra* note 620 and accompanying text.

1355. *See Dispute Over a Dismissal Causes Legal Aid Strike*, N.Y. Times, Oct. 23, 1982 at 29, col. 3. The Executive Director of the Society argued that the strike was "an illegal strike, which penalizes clients" and therefore was "all the more unforgiveable." *Id.*

1356. Ass'n of the Bar of the City of N.Y., Committee on Professional and Judicial Ethics, *Opinion No. 82-75*, Section IV:

> We believe that the attorney who has assumed responsibility for the representation of an individual client may not ethically refuse, for the indefinite duration of a strike, to provide continued legal services without leave of court to withdraw as required by rules of court. We believe that such a deliberate refusal to provide services to such existing clients constitutes neglect of a legal matter entrusted to an attorney, in violation of DR 6-101(3).

Id.

1357. *Id.*

1358. *See Is There a Better Way Than Legal Aid?* N.Y. Times, Dec. 26, 1982 at E7, col. 1.

1359. *See* Collective Bargaining Agreement, *supra* note 1331, at arts. XIII, XVII; *see also supra* note 647 and accompanying text.

the expanded no-strike clause and binding arbitration or refuse the no-strike provision and thereby jeopardize the employment of all its members. The strike ended when the union accepted management's conditions, but the underlying schism between management and staff over caseload and adversarial advocacy remained.[1360]

To minimize discord with the union, management sought staff attorneys who were willing to conform to the indigent defense system's original structural goals, and to accomodate lawyers willing to pursue these goals. Management permitted staff attorneys to engage in "easing behavior": informal practices designed to relieve the stress of excessive caseloads and of poor working conditions.[1361] Management tolerated case-shedding,[1362] low appearance rates,[1363] the failure to accept new assignments,[1364] the referral of the heaviest cases to 18-B Panel attorneys,[1365] and the disposal of cases without determination of whether triable issues exist.[1366]

As staff attorneys informally shed cases to 18-B Panel attorneys, the Legal Aid Society's management publicly declared that it complied with its contractual obligations at a cost per-case of less than $200.[1367] To support its claim, the Society's Annual Reports to OCA overstated assignments and dis-

---

1360. *See supra* text accompanying notes 649-50.

1361. The Legal Aid Society could not plausibly embrace a rhetoric that legitimates adversarial advocacy because it continued to process defendants in a non-adversarial, cost-efficient manner, through guilty pleas and other non-trial dispositions. Thus, the Society retreated into silence, engaged in "easing" behavior, and justified itself on the basis that the staff attorneys are doing the best that can be done, given the constraints under which they operate. *See infra* notes 1374-75 and accompanying text. *See also* Harbridge House Preliminary Findings, *supra* note 1243, at iii-iv. The term "easing" is derived from police research on permitted, but "non-prescribed," behavior of police officers. *See* M. CAIN, SOCIETY AND THE POLICEMAN'S ROLE 37 (1973). Cain has defined easing as "behavior designed to make . . . work or [work] conditions more congenial. It can be licit or illicit from the point of view of the senior members of the work organisation." *Id.* Official easing has the additional characteristic that "opportunities for the behavior are formally provided" by the organization. *Id.* As applied to the Legal Aid Society's staff attorneys, easing does not take the form of a formal organizational policy. Instead, easing represents an accommodation to the conflicting and contradictory demands made upon attorneys. Under these circumstances, as one Society supervisor said, there are "[n]o hard rules, no fixed rules." *See supra* note 1091.

In the absence of a formal organizational policy regarding caseload, the lawyering practices of Society staff attorneys become "obscure"; this obscurity is a "tool to manage conflict" and "protect[s] against threats from outsiders." *See* L. MCINTYRE, THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE 72 (1987). McIntyre, however, accepts the legitimacy of institutional defenders who, she hypothesizes, live in the "shadows of repute" because they "zealously defend even the most guilty and abhorrent criminal defendant." L. MCINTYRE, *supra*, at 72. McIntyre contends that in providing meaningful adversarial advocacy institutional staff attorneys threaten "the very legitimacy of any criminal justice system that is less than infallible," thus necessitating their obscurity rather than their prominency. *Id.* at 174.

1362. *See supra* note 1313.

1363. *See supra* TABLE 10-2, at 843; TABLE 10-3, at 844.

1364. *See supra* notes pp. 848-49.

1365. *See supra* note 1313.

1366. *See supra* note 1120 (Case 056), note 1121 (Case S-67); pp. 843-44.

1367. Legal Aid Society, Budget Submission to the City of New York for Fiscal Year

positions,[1368] concealed massive case shedding,[1369] and excluded 23 percent of the Society's annual budget.[1370] Management also tried to prevent analysis of its assignments by denying us access to its original books and records.[1371] As proof that the Society provided adversarial advocacy and vigorously protected defendant's constitutional rights, the Society highlighted its acquittal rate in the occasional trial[1372] and pointed to class action law suits brought by its law reform unit.[1373] When confronted with proof of massive case shedding, of the poor attendance rates of its attorneys, of the infrequency of trials, and of its reliance on "catchers," the Society claimed that any failure to provide adversarial advocacy arose from an inability to implement the Society's purported mission rather than from success in achieving it.[1374] As the President of the Legal Aid Society stated:

1986, at 7 (Jan. 28, 1985) [hereinafter FY 1986 Legal Aid Society Budget]; *see supra* note 1163 and accompanying text.

1368. *See supra* pp. 777-81. In fact, it was necessary to exclude one-third of the Legal Aid Society's case count to arrive at its completed (net) dispositions (from 192,576 to 126,829 total dispositions). *See supra* notes 940, 944, 985-86 and accompanying text.

1369. *See supra* TABLE 7-1, at 779; pp. 779-80.

1370. *See supra* pp. 867-68; TABLE 11-4, at 867; TABLE 11-5, at 867.

1371. *See* Letter from Archibald R. Murray, Executive Director of the Legal Aid Society, to Chester L. Mirsky (Nov. 9, 1984) [hereinafter Nov. 1984 Murray Letter]; Harold S. Jacobson, Assistant Attorney for Planning and Management of the Legal Aid Society, Internal Memorandum (Feb. 14, 1985) [hereinafter 1985 Jacobson Memorandum]; *supra* notes 702-03 and accompanying text.

1372. *See supra* note 1307.

1373. *See* LEGAL AID SOCIETY, 1984 ANNUAL REPORT, at 40-41 (1984); *see also* 1985 Reply Memorandum, *supra* note 1307, at 37-42. For a discussion of similar efforts to legitimate civil legal services, *see* Abel, *supra* note 1274, at 607. However, Abel cautions against the use of law reform cases in assessing the work of legal aid. The tendency, he contends, is to "focus on the periphery rather than the core – on law reform litigation and community organization rather than routine servicing of individual cases. . . .[It] is as though the significance of multinational corporations. . .[is] assessed by the number of operas they sponsor." Abel, *supra* note 1274, at 607-08. Legal aid, he concludes, "must be judged by what most lawyers do most of the time, not by what only a few do occasionally." *Id.* at 607-08; *see also* J. KATZ, POOR PEOPLE'S LAWYERS IN TRANSITION 180 (1982).

1374. The Legal Aid Society's management contends that "throughout its history. . .[it] has remained an innovative and effective advocate on behalf of its clients." 1985 Reply Memorandum, *supra* note 1307, at 3. Whatever the shortcomings of New York City's indigent defense system, the Society's management argues that the responsibility lies with others. The Society's management maintains, for example, that the "particulars of case assignments and the availability of 18-B attorneys at arraignment are not within . . . [its] control, . . . but instead are within the control of the court." *Id.* at 16. Similarly, the Society's management disclaims any responsibility for the failings of the catcher system: it contends that "[n]one of this was of. . .[its] making" and stated that it "strenuously oppos[ed]" the practice. 1985 Reply Memorandum, *supra* note 1307, at 34. Management claims that the Society's reliance on the catcher system was an appropriate response to case pressure. *Id.* at 31-32; *see also supra* note 1126. Whatever negative aspects resulted because, "judges all too often apply pressure to the catchers to provide primary representation and thereby disregard the continuity of representation. . . ." 1985 Reply Memorandum, *supra* note 1307, at 34. Similar explanations were advanced for the low appearance rate of the Society's staff attorneys, *see supra* note 1124, and the failure to volunteer for homicide assignments ("the court rarely assigns the Society to these cases"). 1985 Reply Memorandum, *supra* note 1307, at 37.

> If *Gideon* meant that someone should have a lawyer who can devote all the time required for a case, we fall somewhat short, but the system is working rather well considering our funding. . . . *Gideon* is a great decision, part of what makes us a civilized society, but it's not a decision that would win a referendum.[1375]

D. Assigned Counsel

The assigned counsel system has rarely attracted any lawyers other than solo practitioners who depend on court assignments for a living.[1376] A significant number of elite and mainstream lawyers have never volunteered their services despite the profession's exhortations about pro bono service to the poor.[1377] Lawyers who have sought criminal court assignments have consistently been criticized, either because they *provided* adversarial advocacy or because they *lacked* the necessary training, resources, and supervision to provide an adversarial criminal defense.[1378]

Assigned counsel has survived despite constant criticism and the establishment of the Legal Aid Society. Their continued presence reflects their importance to the organized bar and to the City. At first, the organized bar depended on assigned counsel to maintain control of all indigent criminal defense services.[1379] The Voluntary Defenders' Committee was a symbolic response designed to solve a political problem of the organized bar by responding to reformers' criticisms about the legal profession rather than to fulfill the need for effective indigent defense.[1380] Over the next 40 years the organized bar continued to distance itself from assigned counsel by criticizing their lawyering practices, yet it continued to depend on assigned counsel to provide representation to all remaining indigent defendants.[1381]

By 1975 court-assigned private 18-B Panel attorneys expeditiously and cheaply provided full representation, regardless of conflict, whenever the

---

1375. Remarks of A. Liman, President, Legal Aid Society, in *The Legal Aid Society on the Defensive*, N.Y. Times, Aug. 4, 1985, at E7, col. 1.

1376. *See The Voluntary Defenders Committee*, *supra* note 1289, at 279; 1971 Report, *supra* note 1243, at 24-25; *supra* notes 1291, 1305 and accompanying text; *see also* supra notes 171-74 and accompanying text.

1377. *See* 1971 Report, *supra* note 1243, at 24-25; *supra* notes 511-13, 1289-90 and accompanying text.

1378. *See The Voluntary Defenders Committee*, *supra* note 1289, at 279; 1975 Report on the Legal Aid Society and the 18-B Panels, *supra* note 1243, at 16-19; 1982 Report of the Keenan Commission, *supra* note 1243, at 13; *supra* TABLE 5-7, at 728; TABLE 5-8, at 729; TABLE 5-9, at 732; TABLE 5-10, at 733; *see also supra* notes 85-90, 514-15, 640, 784, 787 and accompanying text.

1379. *See* Curtis, *supra* note 1288, at 224; J. MAGUIRE, *supra* note 1267, at 266; *see also supra* notes 170-72 and accompanying text.

1380. *See* J. MAGUIRE, *supra* note 1267, at 270-71; *see supra* text accompanying note 227; *see also supra* note 280 and accompanying text.

1381. 1928 REPORT, *supra* note 1243, at 54, 148; EQUAL JUSTICE FOR THE ACCUSED, *supra* note 1243, at 65; 1982 Criminal Advocacy Resolution, *supra* note 1243, at 2; *see also supra* notes 281-84; *supra* notes 297-98, 662 and accompanying text.

Legal Aid Society was unable to provide representation.[1382] Thus, within the ten years following the adoption of the *Bar Association Plan*, assigned counsel re-emerged in its original historical role.[1383] Judges called on a core group of Panel attorneys at arraignment in Criminal Court and in Supreme Court to "stand-in" and dispose of cases when the designated attorney (Legal Aid or 18-B) was unavailable or unwilling to conform to the court's expectations.[1384] By 1984, the Panel represented proportionately as many indigent defendants in Supreme Court as the Legal Aid Society[1385] at half the "weighted" cost per case of Society counsel.[1386] As bar certified practitioners, Panel attorneys went unsupervised, and no systematic effort was made to monitor the quality of Panel representation.[1387]

Panel practice is cost-efficient because court-assigned private attorneys now have a financial interest in processing many cases and often lack the resources to provide a competent defense. In 1900, assigned counsel was said to solicit fees from defendants and to earn money from lawyering practices that elite lawyers and reformers considered obstructive.[1388] When they were reconstituted as 18-B Panel attorneys after *Gideon*, assigned counsel's financial reward depended not on the defendant's satisfaction, but on the court's appointment.[1389] This switch in financial arrangements made assigned counsel's lawyering practices cost-efficient. By 1984 career Panel attorneys had become the most efficient case processors at arraignment and in the calendar parts of the Supreme Court. They disposed of cases without having been introduced to the defendant and, upon a court's request, substituted for each other and for

1382. 1975 Report on the Legal Aid Society and the 18-B Panels, *supra* note 1243, at 3; *see also supra* note 499 and accompanying text.

1383. *See supra* notes 1379, 1380 and accompanying text. By adopting a rotational assignment system in 1966, the Bar provided an opportunity for reputable criminal defense attorneys to represent the poor with expenses deferred through statutory compensation. *See* 1966 Bar Association Plan, *supra* note 1300, art. II, at 925-27; N.Y. COUNTY LAW § 722, 722(b) (McKinney 1965); *see also supra* notes 357-64, 400-02 and accompanying text. The failure of elite and mainstream lawyers to volunteer for court assignments, *see supra* note 1377 and accompanying text, has meant that the rotational system created business for private practitioners who were dependent upon court assignments for a livelihood. In practice, the operation of the rotational system resulted in the dominance of a core group of professional assigned counsel, who serve as court functionaries. *See supra* pp. 717-19; 738-40; TABLE 5-17, at 739; TABLE 5-18, at 740; FIGURE 3, at 742. The result has been "the growth of a differentiated professional stratum . . . first through functional specialisation [sic], but ultimately along lines of ideology, economics, and socializing (citations omitted)" *See* Abel, *The Politics of the Market for Legal Services*, in P.A. THOMAS, LAW IN THE BALANCE: LEGAL SERVICES IN THE EIGHTIES 19 (1982).

1384. *See supra* TABLE 8-2, at 798; TABLE 8-3, at 800; pp. 797-98; TABLE 10-1, at 838; pp. 840-49.

1385. *See supra* TABLE 7-2, at 782.

1386. *See supra* TABLE 11-9, at 873.

1387. *See supra* notes 396, 525, 598-99 and accompanying text.

1388. *See* R. SMITH, *supra* note 1244, at 114; H. TWEED, *supra* note 1261, at 24; M. GOLDMAN, *supra* note 1246, at 49; Ferrari, *supra* note 1244, at 705, 711; Embree, *supra* note 1254, at 555; *supra* notes 85-90 and accompanying text.

1389. N.Y. CRIM. PROC. LAW § 170.10(3) (McKinney 1982); N.Y. CRIM. PROC. LAW § 210.15 (McKinney 1982); N.Y. COUNTY LAW, § 722(a) (McKinney 1982); *see, e.g., supra* note 1384.

the Legal Aid Society's staff attorneys, all at an average cost less than that allowed by statute.[1390] The Panel's low cost operation is not surprising. These attorneys engaged in little if any out-of-court preparation and lack a supervisory structure, full–time investigators, experts, secretaries, social workers, and paralegals.[1391]

Our in-court observations and our analysis of 18-B Panel attorneys' compensation vouchers revealed that Panel attorneys were court functionaries, rather than adversarial representatives of the poor.[1392] Judges and Appellate Division clerks assigned as many cases as possible to Panel regulars willing to accept assignments on a moment's notice.[1393] The clerk routinely assigned one attorney to more than one co-defendant in Criminal Court despite a potential conflict of interest.[1394] Most of the time spent by Panel attorneys in court, and for which they requested compensation, consisted of waiting for new assignments or for a defendant to plead guilty in an existing assignment.[1395]

II.
THE FAILURE OF THE INDIGENT DEFENSE SYSTEM

In New York City, lawyers for the poor in criminal cases infrequently test the state's case and insufficiently protect defendants' rights. Investigation and adjudicative fact-finding is generally absent. Attorneys conduct these day to day activities without client interviews and with little regard for their clients' concerns. The rights of poor people charged with crime have a life only in the rhetoric of the system. The state, through the assignment of counsel, controls not only the form the prosecution takes but also the defense available to a poor person charged with a crime.

The poor in criminal cases lack a collective voice that might be a force for change. Indigent defendants are virtually all members of minority groups from disadvantaged backgrounds.[1396] They lack influence with the organized bar and while they attract the professional interest of police and prosecution, they are without any effective voice in city government. They cannot direct the behavior of their attorneys, who do not, after all, depend on their approval

1390. *See supra* TABLE 6-1, at 752; *supra* note 831 (Case 006), note 836 (Case S-75) and accompanying text; *supra* pp. 339-41; 845-47; *supra* TABLE 11-1, at 860.

1391. *See supra* TABLE 11-2, at 860; 1966 Bar Association Plan, *supra* note 1300, art. VI(1), at 930; *supra* note 396 and accompanying text; *see, e.g.*, TABLE 5-1, at 721; TABLE 6-2, at 759; TABLE 6-3, at 763; TABLE 6-6, at 767; TABLE 6-9, at 773; *see also* N.Y. RULES OF CT. § 606.3 (McKinney 1986)); *supra* notes 415, 765 and accompanying text.

1392. *See, e.g.*, *supra* pp. 774-75, 803; *supra* note 831 (Case 006), note 833 (Case 044) and accompanying text.

1393. *See, e.g.*, *supra* TABLE 5-17, at 739; TABLE 8-2, at 798; TABLE 8-3, at 800 *supra* pp. 797-98.

1394. *See supra* note 761 and accompanying text.

1395. *See supra* note 820, TABLE B; TABLE 11-2, at 860; note 1175; *supra* pp. 773-74.

1396. *See supra* note 12 and accompanying text; *see, e.g.*, Wilson, *The Urban Underclass* in L.W. DUNBAR, MINORITY REPORT: WHAT HAS HAPPENED TO BLACKS, HISPANICS, AMERICAN INDIANS, AND OTHER MINORITIES IN THE EIGHTIES 75-117 (1984).

for continued employment as criminal defense lawyers.[1397]

To conclude that the adversarial system has failed is to misunderstand New York City's system of indigent criminal defense. The structural goals of the City and of the organized bar discourage lawyers assigned to the poor from undertaking adversarial advocacy. The system sustains only those lawyers who comply with its goals by providing cost-efficient, expeditious dispositions, and alienates those who view the defense function in adversarial terms. The system has consistently set out to speed up the processing of defendants and to avoid trials.

The 18-B Panel and the Legal Aid Society flourish within this structure because they are willing to take on more cases than they can handle effectively and to dispose of them cheaply. If either entity accepted only manageable caseloads and demanded adequate resources, which in turn would permit them to regularly challenge the state's case and aggressively defend the rights of poor people, they would be replaced. Routinized case-processing in New York City's criminal courts, exaggerated claims of cost-efficiency, and the shedding of cases are not aberrational practices. They are the logical product of a criminal defense system which has been fashioned by the City and the organized bar to operate *against* poor people rather than on their behalf.

1397. In the absence of an exchange relationship, indigent defendants are powerless to select an attorney based upon the attorney's reputation and competence. Defendants have no choice in the selection of an attorney in the existing indigent defense system; they are simply assigned the first available attorney pursuant to Article 18-B: either a Legal Aid Society staff attorney or an 18-B Panel attorney. *See supra* note 1389; *see also supra* p. 803; *supra* note 1118 and accompanying text. Attorneys, moreover, are legally protected from defendants' claims of ineffectiveness, because of the presumption of reasonable competence afforded attorneys under Strickland v. Washington, 466 U.S. 668, 689 (1984); *see also supra* note 421. Thus, indigent defendants' attorneys are insulated from virtually all scrutiny and approval of their clients, because defendants are placed in the untenable position of having to prove prejudice to the outcome of a case before reversal for ineffectiveness is warranted. *Strickland*, 466 U.S. at 691-96.