

CRIMINAL DEFENSE OF THE POOR IN NEW YORK CITY

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We wish to express special indebtedness to Professor James B. Jacobs, Director of the Center for Research in Crime and Justice at New York University School of Law, under whose auspices this study was undertaken. Professor Jacobs served as a constant source of support and inspiration throughout the course of our research and played a major role in the editing and development of this Article. He gave generously of his time, and we came to rely upon his judgment and insight at every step of the research.

We also wish to thank the editors of the *New York University Review of Law & Social Change* for their diligent and patient assistance in the preparation of this Article.

Filomen D'Agostino and Max E. Greenberg Research Fund and the Center for Research in Crime and Justice of the New York University School of Law ("Center for Research") provided generous financial support for this study. The Association of the Bar of the City of New York ("City Bar Association") and the Bar Information Program of the American Bar Association ("American Bar Association") supplied additional funding. The views expressed in this Article, however, are the authors' and are not those of the City Bar Association or the American Bar Association.

Our research project grew out of the City Bar Association's attempts to restructure the assigned counsel system in New York City. The current structure of the 18-B Panel system was substantially created by the City Bar Association in 1966 following the Supreme Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1965). Twenty years later, critics charged that the representation of indigent criminal defendants received inadequate assistance from court-assigned private lawyers. See, e.g., Association of the Bar of the City of New York, Committee on Criminal Advocacy, Resolution (June 9, 1982) [hereinafter 1982 Criminal Advocacy Resolution]. See also *infra* note 609 and accompanying text. The City Bar Association believed the main problem to be their inability to control the quality of representation provided by court-assigned, private "18-B Panel attorneys." *The Study of Court-Appointed Lawyers*, N.Y. Times, July 22, 1984, at 28, col. 1.

The authors, affiliated with the Center for Research in Crime and Justice, agreed to plan, to implement, and to report a study of the assigned counsel system to the Criminal Advocacy Committee of the City Bar Association. At the time of the study, Chester Mirsky was a member of the Criminal Advocacy Committee. He later served as a Subcommittee consultant charged with reviewing this study's findings and with making policy recommendations to the City Bar Association. Court observations for this study occurred between September 1984 and April 1985.

The initial Draft Report was completed in June, 1985. M. McConville & C. Mirsky, Committee on Criminal Advocacy of the Ass'n of the Bar of the City of New York, *Defense of the Poor in New York City: An Evaluation* (1985) [hereinafter 1985 McConville & Mirsky Draft Report]. The Report, containing 376 pages, 81 tables and 8 figures, sought to provide an overview of New York City's indigent defense system, demographic data on the characteristics of 18-B Panel attorneys and Legal Aid Society staff attorneys, an analysis of the distribution of work and income within the Panel, the structure and patterns of the Panel attorneys' compensation claims, the quality of representation afforded indigent defendants by both defense entities, and the comparative costs of Panel and Society representation. The report included a proposal

INTRODUCTION

THE INTERDEPENDENCE AND PARALLEL GROWTH OF ASSIGNED COUNSEL AND INSTITUTIONAL DEFENDER SYSTEMS IN NEW YORK CITY

Indigent criminal defendants in state criminal cases in New York City ("City") receive ineffective assistance from lawyers who, for largely systemic reasons, fail to provide competent adversarial representation. These lawyers cannot fulfill their responsibility to their clients because those in control of indigent defense want low-cost, efficient processing of criminal defendants through guilty pleas and other non-trial dispositions. To achieve efficient processing of defendants (and to legitimate a system that fails constitutional and statutory mandates to provide effective assistance of counsel), defense

for a unified system of indigent criminal defense, for reform of the Society, and for reorganization of the Panel.

Between June and November 1985, the City Bar Association distributed our report to interested groups and to individuals, including the administrators of the assigned-counsel panels, the management of the Legal Aid Society, and the management of the Association of Legal Aid Attorneys (the Legal Aid Society staff attorneys' union). The Society's management and a representative from the Association of Legal Aid Attorneys appeared before the City Bar Association's Committee on Criminal Advocacy and submitted responses to our preliminary findings. In November 1985, we provided the Association with a response to the Society's submissions. McConville and Mirsky, *Defense of Poor in New York City: A Response to the Reply Memorandum of the Legal Aid Society*, (Nov. 7, 1985) [hereinafter 1985 Response]. It contained 93 pages and included an additional 23 tables based on the Society's responses to the Criminal Advocacy Committee of the City Bar Association and our audit of the Society's monthly Caseload Activity Reports, its case selection practices, the work responses of its attorneys at arraignment in Criminal Court, its post-arraignment appearance rate, and the 1984 'weighted' cost of a case for the Society and for the Panel.

In October 1986, the City Bar Association released an "action report" as a response to our research. This report called for a "mid-range" contract defender, run by the Bar Association, to replace the 18-B Panel. *See 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* (1986).

We wish to thank Lisa Greenman, Douglass Maynard and Elliot Peters for their dedicated work as research assistants during our court observations and Richard Marcantonio and Ilissa Rothschild for their special assistance in the preparation of early drafts of this manuscript. Other law students who committed themselves to help at various stages were: Deena Epstein, Gregory Ezring, Teresa Fedder, Carol Jones, Desseta Marcie-Hazen, Cedric Powell, Barbara Quackenbos. Dr. Jim Smith and Dr. William Philliber of the State University of New York at New Paltz were instrumental in providing computer assistance and valuable technical help. James Cohen, Fordham University School of Law, provided invaluable legal assistance in obtaining budgetary documents. We would like to make special mention of our secretaries, Carmen Carrero, Deborah Jaegers and Pauline R. Yeagans, without whose support and tireless work throughout the research, this Article would not have been possible.

We finally wish to thank Sonia McConville and Katherine Hudson who acted as partners in coding, analysis, and presentation of the data. They enabled us to undertake this research at great sacrifice to themselves and our families.

providers ally themselves with courts, prosecutors, local government, and the organized bar rather than with indigent defendants.

This Article explains this crisis in New York City's indigent criminal defense system as a product of the interdependence and parallel growth of assigned counsel (court-assigned private attorneys) and institutional defenders (staff attorneys with public and private defender agencies). Though this Article focuses on the growth of assigned counsel and institutional defenders in New York City, it also explains how the interaction of these defense entities typifies indigent defense systems in large cities throughout the United States.¹ The indigent defense system in present day New York City is a microcosm of the national criminal defense system.

For most of the first half of the twentieth century, assigned counsel and institutional defenders served separate interests.² Originally established as the sole means of providing representation to the poor in the United States, assigned counsel eventually fell into disfavor because of its adversarial defense techniques, which were linked to the solicitation of fees from indigent defendants and were thought to cause social unrest.³ Those who feared social unrest created the institutional defender to end adversarial advocacy for poor people with attorneys dedicated to a cost-efficient method of representation.⁴ After the enactment of legislation requiring cities and counties to provide compensation for appointed lawyers in criminal cases, both assigned counsel and institutional defenders began to serve the state's interest in maintaining public order through the mass processing of indigent defendants.⁵

The cost-efficient system of institutional defense in New York City evolved from a private charitable agency, the Voluntary Defenders' Committee ("Defenders' Committee") of the Legal Aid Society ("Society").⁶ In 1965 New York City confronted a state constitutional and statutory mandate to provide counsel to all defendants charged with an imprisonable offense; the cost-efficiency of the Legal Aid Society moved New York City to select the Society as its answer to this mandate.⁷ New York City's assigned counsel, the 18-B Panel ("Panel") of private attorneys, originally designed to take only conflict of interest cases, later became a co-equal provider of legal assistance in serious felony cases and a major provider in misdemeanor and other petty cases.⁸ The advent of mandatory compensation transformed the Panel into a

1. See R. SPANGENBERG, B. LEE, M. BATTAGLIA, P. SMITH & A. DAVIS, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY, FINAL REPORT 7 (1986) [hereinafter 1986 CRIMINAL DEFENSE SYSTEMS STUDY].

2. See *infra* pp. 596-99, 602-610.

3. See *infra* notes 84-90, 172-74 and accompanying text.

4. See *infra* notes 127-61.

5. See *infra* notes 417-51 and accompanying text.

6. See *infra* pp. 617-26.

7. See *infra* pp. 831-49, 861-70.

8. See *infra* TABLE 7-2, at 782; note 965, TABLES A, B; TABLE 7-4, at 788; note 982-83 and accompanying text; see also *infra* TABLE 11-8, at 872; notes 1236-37 and accompanying text.

more cost-efficient defense entity than the Society itself.⁹

These findings derive from historical research using both primary and secondary sources and from field research conducted in New York City's courts. The following overview of New York City's criminal justice system introduces the setting for our field research.

I.

THE RESEARCH SITE

When we began our field research in 1984, 259,000 cases were filed in New York City's Criminal Court (lower court), including 82,732 felony complaints and 153,235 misdemeanors.¹⁰ In Supreme Court (the court of general jurisdiction), over 29,000 indictments were filed.¹¹ The defendants predominantly were minorities: 54.5 percent of detained males were black, 34.2 percent were hispanic, and 10.8 percent were white; 61.7 percent of detained females were black, 22.2 percent were hispanic, and 15.8 percent were white.¹² Guilty pleas accounted for approximately 63 percent of all Criminal Court dispositions, dismissals for 36 percent, and trials for 0.6 percent.¹³ In Supreme Court guilty pleas were 76 percent of all dispositions, dismissals were 12 percent, and trials were 10 percent.¹⁴ Legal Aid Society staff attorneys and 18-B Panel attorneys completed over 161,000 cases.¹⁵ Of these, approximately 143,000 occurred in Criminal Court (651 by trial) and 18,000 in Supreme Court (2,165 by trial).¹⁶ New York City and New York State spent approximately \$55 million on indigent criminal defense in New York City in 1984.¹⁷ The total criminal justice expenditures for New York City exceeded \$2 billion (including police, courts, prosecution, and indigent defense).¹⁸

9. See *infra* TABLE 11-9, at 873.

10. See Criminal Court of the City of New York, Caseload Activity Report — Arrest Cases (1984) [hereinafter 1984 Caseload Activity Report — Arrest Cases]. This figure represents the number of "defendant-dockets." See *infra* note 985. As with "defendant-indictments," see *infra* note 11, this figure is greater than the actual number of arrested defendants.

11. See Office of Court Administration of the State of New York Supreme Court — Caseload Activity Reports (1984) [hereinafter 1984 Supreme Court Caseload Activity Reports]. These figures represent the number of "defendant-indictments," see *infra* note 965. As with "defendant-dockets," see *supra* note 10, this figure is greater than the actual number of indicted defendants.

12. See New York City Department of Correction, 1984 Admission—Second Quarter (1984).

13. See *supra* note 10.

14. See *supra* note 11.

15. See *infra* TABLE 11-8, at 872.

16. *Id.* These figures refer to case assignments, *infra* notes 992, 1235, rather than to defendant-dockets, *supra* note 10, or to defendant-indictments, *supra* note 11. Assignments more closely approximate the number of individual defendants represented than the number of accusatory instruments filed because several instruments may be filed against an individual defendant. See *infra* note 985.

17. See *infra* pp. 863-66.

18. SETTING MUNICIPAL PRIORITIES 368 (C. Brecher and R. Horton eds. 1986). The cost of defending poor people must be considered in the context of national criminal justice expenditures. Although poor people account for a substantial majority of all arrest cases and filed

The plan for New York City's current system of indigent defense originated in 1965 when the City designated the Legal Aid Society as primary defense provider.¹⁹ As primary provider, the Society staffed all state courts that took original jurisdiction in criminal cases. The Society, similar to other institutional defenders throughout the United States, has a managerial and supervisory staff and provides staff attorneys with investigators and support services. Originally, an individual represented by the Society would be assigned to different staff attorneys at different stages in the process. The Society now uses vertical representation: one defendant is assigned to a single designated attorney throughout the process.²⁰

In theory, a court's determination that the Legal Aid Society faced an actual conflict of interest in cases with several defendants triggered formation of the 18-B Panel.²¹ Practice and theory diverged. Though designed to represent defendants in 500 cases, the Panel received over 36,000 cases in 1984.²²

The 18-B Panel is typical of "coordinated" assigned counsel systems throughout the United States.²³ The Panel has administrators whose principal

indictments, indigent defense entities do not receive funding comparable to the funding received by prosecutors. In 1982, the amount spent representing indigents represented less than three percent of all criminal justice expenditures. See 1986 CRIMINAL DEFENSE SYSTEMS STUDY, *supra* note 1, at 77, which computed these expenditures based on 1979 data reported by the Bureau of Justice Statistics. Lefstein's analysis, based on the Bureau of Justice Statistics for 1980 notes, "[a]ccording to the most recent federal government report, public defense is said to receive 1.5 percent of state and local government criminal justice funds, whereas prosecution services receive 5.9 percent; the judiciary, 13.1 percent; corrections 24.7 percent; and police protection 53.2 percent." N. LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR 10 (1982). Even these figures understate the disparities involved because nonprosecution budgets include money that should be attributed to prosecutors. For example, police budgets include some prosecutorial investigation costs. See J. Gradess, Executive Director, Testimony Before the ABA Standing Committee on Legal Aid and Indigent Defendants (Nov. 10, 1982) (discussing crisis in indigent funding) [hereinafter Gradess Testimony].

19. See Exec. Order No. 178, City of New York, Office of the Mayor (Nov. 27, 1965), reprinted *infra* app. 2(a), at 922; Agreement Between the City of New York and the Legal Aid Society (Aug. 6, 1966), reprinted *infra* app. 2(c), para. First, at 933 [hereinafter 1966 Agreement]; 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]; see *infra* notes 386-97 and accompanying text.

20. See *infra* notes 496-500, 541-51, 562-63 and accompanying text. But see *infra* TABLE 10-1, at 838; TABLE 10-2, at 843; TABLE 10-3 at 844.

21. See 1966 Agreement, *supra* note 19, para. Second, at 933; see also *infra* note 391 and accompanying text. In addition, the contract provided that an 18-B Panel attorney could be appointed in a homicide case if a judge concluded that a more experienced private attorney would be better suited for the assignment. See *infra* notes 391-93 and accompanying text; see 1966 Bar Association Plan, *supra* note 19, art. I, at 925.

22. See *infra* notes 397, 662-63 and accompanying text.

23. See 1986 CRIMINAL DEFENSE SYSTEM STUDY, *supra* note 1, at 18; see also N. ALBERT-GOLDBERG, M. HARTMAN, W. O'BRIEN, P. HOULDEN, & S. BALKIN, NATIONAL DEFENDER INSTITUTE, THE PLIGHT OF THE INDIGENT ACCUSED IN AMERICA 9-11 (Executive Summary 1985) [hereinafter THE PLIGHT OF THE INDIGENT ACCUSED IN AMERICA].

responsibilities are to distribute cases to attorneys and to process compensation vouchers. The administrators lack the managerial structure to supervise, to monitor, and to support their lawyers. As a result, court clerks unfamiliar with the practice of criminal law undertake the assignment of cases and the processing of vouchers.²⁴ The Panel administrators handle assignments without examining the facts of individual cases or the skills of particular attorneys.²⁵ The attorneys on the Panel come from lists of volunteer attorneys certified by local bar associations as competent to handle misdemeanor or felony cases.²⁶ Under the Panel system, clerks assign cases to attorneys on a rotation basis to insure that no attorney receives undue favor and that all lawyers listed have an equal opportunity to share in the representing of poor people.²⁷

The Legal Aid Society, like other private institutional defenders, operates under a contract setting its budget each year.²⁸ The 18-B Panel, typical of assigned counsel, has no fixed budget and is paid by vouchers submitted as cases are disposed.²⁹ The Society operates under limited resources without any formal capacity to control demand, but the Panel has *no* capacity to control demand and no formal constraint on the resources available. At the termination of a case, the Panel attorney may submit a claim for compensation, and the sum awarded is fixed by the court before whom the lawyer appeared for final disposition. Statutory rates per hour, waived only in extraordinary cases, are set for each class of case.³⁰

Before and during 1984-1985, cases filed with New York City criminal courts funnelled through a master calendar system.³¹ In this system, cases went to successive courtrooms (calendar parts), changing courtrooms as the case moved through its procedural stages: an arraignment part, a Criminal

24. See *infra* note 510, 600-06 and accompanying text; pp. 234-36.

25. See *supra* note 24.

26. 1966 Bar Association Plan, *supra* note 19, arts. II-IV, at 925-30; see also *supra* text accompanying notes 398-401; *supra* note 593.

27. *Id.* art. III, at 927; but see *infra* pp. 236-39.

28. 1986 CRIMINAL DEFENSE SYSTEMS STUDY, *supra* note 1, at 19-20; 1966 Agreement *supra* note 19, art. VI, at 930; *infra* note 386 and accompanying text.

29. 1986 CRIMINAL DEFENSE SYSTEM STUDY, *supra* note 19, at 18-19; 1966 Bar Association Plan, *supra* note 19 at art. VI, at 930 see also *infra* notes 413-15 and accompanying text.

30. N.Y. COUNTY LAW § 722(b) (McKinney 1972); see also text accompanying notes 357-60.

31. For a discussion of the master calendar system, its history and problems, see *The Individual Calendar System — A Needed Reform for New York City Criminal Court*, 37 THE REC. 302 (1982) (published by the Committee on Criminal Advocacy of the Bar Association of the City of New York). Beginning in January, 1986, New York City adopted the Individual Assignment System proposed in the 1982 City Bar Association Report. See *Text of Review Panel's Report on IAS*, N.Y.L.J., Feb. 24, 1987, at 5, col.1. The change in calendar systems reduced the number of cases disposed of before calendar judges without ongoing case responsibility and required attorneys to appear in many more court parts before judges who previously presided only over hearings and trials. The effect of this managerial change on the quality of representation provided by the 18-B Panel attorneys and by Legal Aid Society staff attorneys is beyond the scope of this article.

Court "all-purpose" calendar part, and a Supreme Court calendar part. These courts arraigned defendants, set bail, and determined all pre-trial motions that needed no hearing. Calendar parts typically handled over a hundred cases on any given day, accounting for over 56 percent of all Supreme Court dispositions³² and for virtually all Criminal Court dispositions.³³

Once a case was assigned to a calendar part, every effort was made to dispose of the case without referring the case to a hearing part or a trial part.³⁴ A typical calendar part was staffed by a judge, a clerk, court officers, one or two representatives of the District Attorney's office, and a specially designated Legal Aid Society staff attorney ("catcher").³⁵ 18-B Panel attorneys and Society staff attorneys designated to provide continuous representation in individual cases nevertheless had to appear in calendar parts on specified dates.

Figure 1 sets forth the calendar parts in 1984-1985 in New York County (Manhattan), where we conducted our field research.

Two calendar parts in Supreme Court linked to two all-purpose parts in Criminal Court formed a court complex. In theory, cases were tracked³⁶ to a pre-designated complex, permitting assistant District Attorneys, Legal Aid Society staff attorneys, and 18-B Panel attorneys to reduce the number of courtrooms in which they had to appear. For example, after arraignment in Criminal Court, a felony case was adjourned to a designated all-purpose part to await the determination of the grand jury.³⁷ Once an indictment was filed, the all-purpose part scheduled a date for the defendant to be arraigned in a linked Supreme Court calendar part.

Within this system of connected court parts, we conducted our field research.

II.

STRUCTURE OF THE ARTICLE

The current practices of lawyers for the poor in New York City, upon which much of our empirical research focuses, derives from early efforts of elite lawyers and reformers in large cities to make the administration of criminal justice more cost-efficient. These efforts resulted in alliances between indigent defense providers and powerful political and economic interests. Indigent defense providers in the first half of the century adopted a non-adver-

32. See Office of Court Administration of the State of New York, Supreme Court Criminal Term Disposition Report (1984) [hereinafter 1984 OCA Criminal Term Disposition Report].

33. See 1984 Caseload Activity Report — Arrest Cases, *supra* note 10.

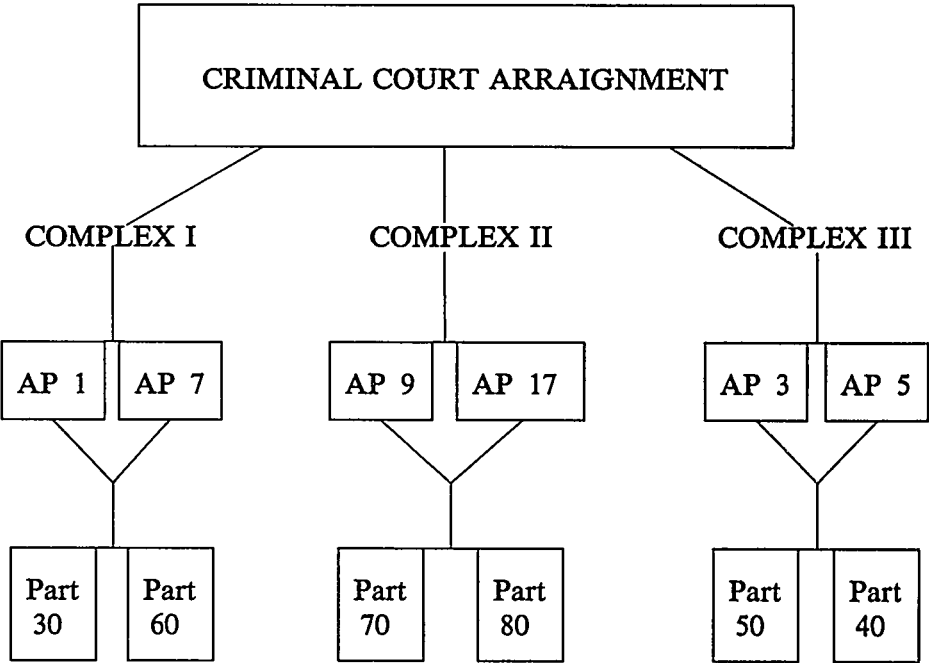
34. See *infra* notes 900-01 and accompanying text.

35. See *infra* note 1133 and accompanying text.

36. See Legal Aid Society, Reply Memorandum to McConville and Mirsky Draft Report 25-27 (Oct. 1, 1985) [hereinafter 1985 Reply Memorandum].

37. Felony cases adjourn to an all-purpose part in Criminal Court to satisfy New York's Criminal Procedure Law, which requires defendants charged with a felony to be indicted or released within 120 hours of their arrest or custody. N.Y. CRIM. PROC. LAW § 180.80 (McKinney 1982).

FIGURE 1: *The “Complex” or Calendar Part System in New York County*



Key
AP = All Purpose Part
Part = Calendar Part, Supreme Court

sarial ideology from reformers concerned with crime control and efficiency in government. This ideology became embedded in the practices of defenders toward their clients, the prosecution, and the judicial system. Thus, the mass disposition of poor people's criminal cases by guilty pleas and by other non-trial dispositions can best be understood through the history of indigent criminal defense.

This Article therefore consists of two parts. Part One presents a comprehensive history of indigent criminal defense from 1914 to 1984. Part Two presents the findings of our empirical research on the practices and operational structure of the 18-B Panel and the Legal Aid Society in New York City.

Part One presents the attitude of elite lawyers and reformers toward the poor, the use of the criminal sanction, and the history of adversarial legal advocacy. It describes the ideologies of elite lawyers and reformers and explains how their beliefs shaped the structure, policies and practices of the first public and private defender agencies.

Part One also analyzes the organized bar's response to the public defender movement in New York City and the reasons why, by 1963, a private institutional defender replaced court-assigned private attorneys in all but conflict and homicide cases. Part One then describes New York State's enabling legislation, Article 18-B of the County Law, and analyzes the *1966 Plan* of the City of New York and the organized bar for providing criminal defense to the indigent. Part One concludes by describing how, even after 1966, institutional defenders continued to rely on rapid processing of defendants and how assigned counsel in New York City became a major provider of defense services.

Part Two begins with a description of the goals and methods of our empirical research in New York City. It then presents our data on the structure and composition of the 18-B Panel and compares these with data on the Legal Aid Society. It also presents our data and analysis of the lawyering practices of Panel attorneys in the representation of indigent defendants. In addition, Part Two analyzes how accurately the Society and the Panel reported case assignments and dispositions, and compares each defense entity's proportionate share of the indigent defendant caseload. It examines the allocation of cases between the two defense entities and explains how and why the Society "shed" cases to the Panel. Part Two concludes by analyzing the per-case costs of Panel representation, comparing the case costs of both defense entities and these costs' effect on the proportionate number of cases referred to the Panel.

The Conclusion reflects on the indigent defense system's structural contradictions and the continuing influence of the organized bar and the City on the system's goals, policies and practices. The Conclusion analyzes the Association of the Bar of the City of New York's ("City Bar Association") 1986 reform proposals, which were a response to our own empirical research, and the explanation the City Bar Association gave for replacing the Panel with a

“mid-range” institutional defender.³⁸ It ends with a discussion of the intractability of reform.

Appendix One contains our research questionnaires, the Appellate Division control card that enabled us to analyze the distribution of cases and income among 18-B Panel attorneys, and the 18-B voucher claim used in our analysis of the lawyering provided in over 14,000 cases. Appendix Two reproduces the executive order establishing the current system of indigent criminal defense, the original contract between the City and the Legal Aid Society, and the *Bar Association Plan* for establishment of the Panel. Appendix Three further expands *Table 8-6*, which details the arraignment caseloads of Society felony-certified staff attorneys. Appendix Four reproduces an abstract of the 1986 “Action Report” of the City Bar Association prepared by its Committee on Criminal Advocacy.

38. See 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* (1986), excerpts reprinted *infra* app. 4, at 943-64 [hereinafter *A System in Crisis*].