INDIGENT DEFENSE SYSTEMS ANALYSIS (IDSA)

A Study Funded by

The Law Enforcement Assistance Administration

National Institute of Justice

Conducted by

The National Legal Aid and Defender Association

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ACKNOWLEDGMENTS

In any undertaking of the magnitude of this study, the Project staff must have the assistance of others. We were particularly fortunate to have a good deal of support in our endeavor and we wish to acknowledge and especially express our gratitude to those who assisted us.

This study was made possible by a grant from the National Institute of the Law Enforcement Assistance Administration and we are grateful to that agency and their staff for their continuous advice and guidance.

We are particularly indebted to Marshall J. Hartman, former National Director of Defender Services of the National Legal Aid and Defender Association (NLADA), for his assistance throughout the life of this project. Indeed, it was his recognition of the essential role of research for future defender development, and his assistance in the conceptualization of the grant application that led to the funding of this project.

We also wish to acknowledge the assistance we received from another NLADA Project funded by LEAA. To the "Standards Grant" and its staff, Nancy E.Goldberg, Director and Ronald Hirsch and Virginia Riehl, professional staff, we express our thanks. We have made much use of that project's final report, Guidelines for Legal Defense Systems in the United States.

One of the important phases of the research for this project was the court docket study. To train the persons who gathered the docket data and supervised the collection of data, we were very fortunate to have Ms. Ina Marks, attorney-at-law, as a special

consultant. We wish to express our gratitude for and acknowledge her special efforts and dedication.

To assist us with the tabulation and computerization of our data we were fortunate to have Robert Pearson, a PH.D. student in Political Science at the University of Chicago.

The design and preparation of the numerous statistical tables in this report were done by Carol Metzger who has successfully presented the data in an artistic and informative manner. We are deeply grateful for her time and special talents.

Accounting and administrative details are an important part of any federal grant. We were indeed fortunate to have the assistance of Joseph Sullivan, NLADA staff accountant, and Jeanne McDonald, NLADA office manager for this important task and we are grateful to them for assisting us with this administrative burden.

Assisting us with our field visits were a number of criminal justice and defender experts who provided us with a variety of valuable insights and experiences that greatly enriched the observations of the staff. These consultants were: Professor Harvey Friedman of the University of Baltimore College of Law; Louis A. Frost, Public Defender of the 4th Judicial District of Florida; Morgan Harris, Public Defender, Clark County, Nevada; Professor Howard Chapman, Illinois Institute of Technolcgy, Chicago-Kent College of Law; Paul Ligda, Public Defender, Solano County, California; John Packel, Chief, Appellate Division, Public Defender Office of Philadelphia; Professor Bruce Levin, Illinois Institute of Technology, Chicago-Kent College of Law; Benjamin Lerner, Public Defender, Philadelphia, Pennsylvania; John Moran, Chief of the Appellate Division, Cook County, Illinois, Public Defender

Office; Myzell Sowell, Private Defender Service of Detroit, Michigan; and James Gramenos, Director of Training, Cook County, Illinois, Public Defender Office.

We also wish to express a special appreciation to the eight defender offices that we visited. The defender offices located in: Monterey, California; Santa Clara County, California; Jefferson County, Kentucky; Baltimore County, Maryland; Clark County, Nevada; Oneida County, New York; Franklin County, Ohio; and Philadelphia, Pennsylvania, made a special contribution to the project. We thank them for allowing us to interrupt their work and add a burden to an already overtaxed staff.

Finally, we are deeply appreciative of all of those who responded to our questionnaires received through the mail. These questionnaires were lengthy and took considerable time, thought and even some searching through records to answer. Nevertheless, because of our respondents, we were able to achieve a remarkably high return rate for this kind of research. This demonstrates that those in defender offices approach their position with sincerity and dedication and are deeply interested in improving services to their clients.

THE IDSA PROJECT STAFF

CHAPTER I

INTRODUCTION: IDSA--SCOPE OF THE PROJECT

In 1973, "The Other Face of Justice" was published by the National Legal Aid and Defender Association (hereinafter referred to as NLADA), as a result of a grant from the Law Enforcement Assistance Administration, United States Department of Justice. That study made available the most comprehensive description of the delivery of legal services to the poor. Before that study, there was very little data on the defense function in the criminal justice system.[1] This is not surprising since counsel was not required in most federal criminal trials until 1938[2] and in most state felony trials until 1963.[3] Hence, before the decade of the '60's there was no need for government to concern itself seriously with criminal legal services for poor people. Thereafter, in relatively quick succession, the United States Supreme Court held that people who could not retain counsel had a right to a lawyer without expense in appellate review,[4] in police stations during suspect interrogation,[5] and in misdemeanor cases where there is a danger that the accused will be sentenced to jail.[6] As a result of these decisions, the need to provide legal services for people who were criminally charged, but who could not afford to hire an attorney, was upon state and local governments. State and local governments reacted in a variety of ways to the abrupt change in the law; most went scurrying to find resources to finance the delivery of defense services to persons accused of crimes who could not afford counsel. Systems for the delivery of criminal legal services grew like topsy, on an ad-hoc basis.

Existing systems had to be quickly expanded to meet increasing case loads. Some communities ignored the need; indeed, in some localities it is very questionable as to whether even the form, much less the substance, of providing defense counsel when the law requires, has been met.

This is not to say that before 1963 no jurisdiction provided for the assistance of counsel in criminal matters. Los Angeles County, California, for example, had a defender office since 1913.[7] Memphis, Tennessee's, defender office dates back to 1918. The Cook County, Illinois, defender services began in 1930. In many other localities, private lawyers were appointed on a case-by-case basis for poor people. However, it was not until the middle 1960's and early 1970's that formalized defense delivery systems for the poor extensively expanded throughout the United States, as the need exploded upon the scene resulting from unequivocal court decisions requiring counsel for all criminally accused persons at all critical stages of the judicial proceeding.[8]

To fully appreciate the total impact upon our criminal justice system of this departure from the past, one must realize that in the majority of felony cases[9] and in almost half of the misdemeanor cases,[10] accused persons were unable to afford counsel. Accordingly, this gives some idea of the magnitude of the problem confronting state and local governments. Also, it is readily apparent that indigent defense service agencies represent a substantial proportion of criminal defendants in the criminal justice system. Hence, the lawyer representing clients who cannot pay legal fees* is as essential as the prosecutor, the judge and the police officer

* Hereinafter sometimes referred to as non-fee paying cases or clients.

to the fair operation of the system. If the justice system is to improve, and it is generally conceded that a good deal of improvement in the criminal justice system is a high priority in government, then the defense component will also have to improve. Indeed, one prominent federal appeals judge has observed that most defense systems for poor people are woefully inadequate today.[11]

In the 1973 publication The Other Face of Justice,[12] the National Legal Aid and Defender Association published the results of a Law Enforcement Assistance Administration funded survey of the state of the art of legal defense services for poor people as of 1972. The present study is an attempt to build on that original work and examine more intensively specific areas of defense services. This research effort resulted in an extensive social inventory of indigent defense systems with particularized attention to the plea bargaining process and case entry.

The collection of social inventory data from 300 defender agencies provides an update of The Other Face of Justice and an elaboration of several critical aspects of defense services. An extended description of early representation and the availability of support services in defender systems is presented to highlight the importance of each to the effective assistance of counsel. Descriptive comparisons of assigned counsel and defender costs are included to portray the relative costs of each component. The response rate of 70% for this study's mail questionnaire provides a substantial assurance that these descriptions of defender agencies are generally representative of indigent defense systems in areas of this country where an organized defender is an important component in the administration of criminal justice.

A major portion of the research project was devoted to the topic of plea bargaining. Plea negotiation which leads to a no-contest guilty plea of nolo contendere plea, or submission of the case on the probable cause hearing transcript* seems to be by far the primary procedure for disposing of criminal cases at the trial level.[13] Indeed, in the view of the present chief justice of the United States Supreme Court, the entire judicial system in the United States is dependent upon a high rate of guilty pleas, such that even a 10% drop in the percentage of guilty pleas would require twice as much judicial power and facilities than we presently have available.[14]

Still, the plea negotiation process that leads to the guilty or nolo contendere pleas is among the more controversial phenomena in the justice system,[15] since the result is usually a reduced charge and/or a substantially lighter sentence than that which is provided by law for the original charge.[16] On the other hand, some have suggested that where the bargain offered by the prosecution is substantially lower than the sentence that could be imposed after a contest, an innocent defendant may plead guilty to avoid the chance of the harsher result.[17] Its centrality to the criminal process and to the defender systems in that process required that it be treated as a separate topic. The analysis deals with plea bargaining as a phenomenon which is affected by certain "system" characteristics, and which influences many dispositional factors.

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* For purposes of this paper, all non-contested guilty results are considered to be the same. Although there may be significant legal differences between the various categories of non-contested case guilty results, such differences should not have any impact on this study.

A second issue considered extensively in the research was case entry by the defense attorney who represents criminally accused persons who cannot afford to pay a fee. While this is perhaps not as controversial as plea negotiations, the case entry process is a significant source of tension between the private bar and defender agencies. Indeed, in one location visited as part of this study, the case entry process was significantly altered by the defender agency because of agitation by the private bar. The defender agency had the decision-making power as to client eligibility for its legal services and as a result, entered cases before a formal court appearance. However, the private bar thought the defender agency too lenient and convinced the judiciary that they should assess eligibility.

FOOTNOTES

1. The only known comprehensive study was conducted by Lee Silverstein, Defense of the Poor in Criminal Cases in American State Courts, American Bar Foundation, Chicago (1959). (See also Bliss, Defense Investigation, 1956. See also, Special Committee of the Association of the Bar of the City of New York to Study the Defender System, Equal Justice for the Accused, Gardner City, New York, 1959.

2. Johnson v. Zerbst, 304 U.S. 458 (1938).

3. Gideon v. Wainwright, 372 U.S. 335 (1963). Prior to Gideon, the United States Supreme Court had held that the sixth amendment's right to counsel provision was not applicable to the states. Betts v. Brady, 316 U.S. 455 (1942). However, in special circumstance cases, the Due Process Clause of the fourteenth amendment required the Court to appoint counsel for a defendant who could not afford to retain counsel. Death as a penalty was such a special circumstance, Powell v. Alabama, 287 U.S. 45 (1932), or trial as a habitual offender, Chewning v. Cunningham, 368 U.S. 443 (1962).

4. Douglas v. California, 372 U.S. 353 (1963).

5. Escobedo v. Illinois, 378 U.S. 478 (1964).

6. Argersinger v. Hamlin, 407 U.S. 25 (1972). The Honorable David L. Bazelon, in a speech delivered to the 53rd Annual Conference of NLADA, October, 1975. See, "The Realities of Gideon and Argersinger," 3 Briefcase Vol. XXXIII, NLADA (January, 1976). See also, Bazelon, David, "Defective Assistance of Counsel," 47 U.Cin.L.Rev. 1 (1973); Finer, Joel, "Ineffective Assistance of Counsel," 58 Cornell L.Rev. 1077 (1973).

7. "Representation of Indigents," 13 Stanford L.Rev. 522, 531 (1961)

8. Lynch-Neary, B., Benner, L., The Other Face of Justice, National Legal Aid and Defender Association, Washington, D.C., 13-37 (1973).

9. Id. at n. 71.

10. Id.

11. Bazelon, D., "Defective Assistance of Counsel," 47 U.Cin.L.Rev. 1 (1973).

12. Supra note 8.

13. Santobello v. United States, 404 U.S. 257, 260 (1971).

14. Hall, Kamisar, Lefave, Israel, January, 1973, Supplement to Modern Criminal Procedure, West Publishing Co., St. Paul, Minn., (1973) at p. 315.

15. United States Supreme Court Chief Justice Burger states that plea bargaining is to be encouraged. Santobello v. United States, 404 U.S. 257, 260 (1971). However, the National Advisory Commission on Criminal Justice Standards and Goals urged the abolition of the process. Courts, "The Negotiated Plea," Standard 3.1, at 46-49. This is only one example of the controversy.

16. North California v. Alford, 400 U.S. 25 (1970); McMann v. Richardson, 397 U.S. 759 (1976). See also Dewey v. United States, 288 F.2d 124, 128 (8th Cir. 1959); Newman, Conviction: The Determination of Guilt or Innocence Without Trial 216 (1966) "The Influence of the Defendant's Plea on Judicial Determination Sentence," 66 Yale L.J. 204, 206-09 (1956); Ferguson, "The Role of the Judge in Plea Bargaining," 15 Crim.L.Rev. 25, 50-51 (1972); "Official Inducements to Plead Guilty: Suggested Morals for a Market Place," 32 U.C.L.Rev. 167 (1964).

17. Brady v. United States, 397 U.S. 742, 758 (1970). See also Lichtman, J., "Constitutional Requirements of Appointed Counsel in the Guilty Plea Process," Public Defender Source Book 76-78, Practicing Law Institute, New York City, 1976.

CHAPTER II

RESEARCH METHODOLOGY

The following is a brief summary of the research procedures utilized by the project. A more detailed explanation of the research methodology appears in Appendix I.

In summary, the project used mail questionnaires, field visits to eight localities and court docket studies in eight localities.

A. MAIL QUESTIONNAIRES.

Questionnaires were mailed to all organized state and local defender agencies in the United States for response by the chief defender, the operating head of the agency. In addition, in larger offices where the chief defender's role was primarily supervisory and without actual personal client representation, the chief defender was asked to deliver special questionnaires to staff attorneys who were providing the actual representation of clients. One questionnaire was designed for attorneys primarily engaged in misdemeanor representation and another questionnaire was designed for attorneys primarily involved in felony representation.*

B. FIELD VISITS.

Mail questionnaires can relatively quickly and efficiently survey practices across a broad geographic area. They cannot, however, effectively probe social processes and practices. Face-to-face interviewing and detailed observation are superior methods when the analysis requires in-depth information. The project,

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* It should be noted that the distinction between what is defined as a felony and what is defined as a misdemeanor will vary from state to state. However, it was felt that any such variation would be slight and not have any impact on the study.

therefore, made eight field visits in order to supplement, elaborate and intensify the data base provided by the mail questionnaire and docket studies.

Choosing sites for field visit is a difficult problem for any research project. Usually the number of field visits is so small that the sites cannot reliably "represent," in the statistical sense, all sites. When only eight counties out of all the counties in the United States are visited, it is readily observable that a representative sample of counties for field research is an impossible objective. Thus, probability sampling gave way to purposive sampling. The sites visited were chosen in order to maximize the goal of understanding the interaction among key variables in the research, especially the variables of staff size, time of entry practices and plea bargaining procedures. Particular emphasis was given to certain characteristics, such as variations in support services available to the attorneys and in assigned counsel's involvement in the delivery of defense services. A portion of the sites was selected along a continuum of support services available, ranging from offices in which defender systems were well-staffed and provided with ample support services, to offices in which the attorneys were heavily burdened and carried out their duties with insufficient support services.

Another portion was selected along a continuum of assigned counsel involvement, from areas in which assigned counsel provide representation in a high proportion of the indigent caseload (High involvement) to areas in which assigned counsel provide representation in a small proportion (Low Involvement). This criterion was used to provide an adequate data base for assessing the relative

"costs" of assigned counsel and public defenders. Lastly, selection was based on offices' entry practice, before a formal court appearance or later in the proceedings, and plea bargaining practices, under or over 60% of their caseload.

The actual sites visited and the criteria used in their selection are listed below. The eight criteria are designated numerically according to the following: (1) Relatively Full Support Staff; (2) Relative Little or No Support Staff; (3) Relatively Low Assigned Counsel Involvement; (4) Relatively High Assigned Counsel Involvement; (5) Case Entry Before Formal Court Appearance (Early Entry); (6) Case Entry At or After the First Court Appearance (Late Entry); (7) Guilty Plea Rate for Defender Office of Over 60% of its Cases; (8) Guilty Plea Rate of Less than 60% of its Cases.

SITE	CRITERIA
Columbus, Ohio	3, 6
Philadelphia, Pennsylvania	7
Louisville, Kentucky	5, 3
Utica, New York	8, 2
Baltimore County, Maryland	4
Monterey, California	6, 2
Las Vegas, Nevada	1
San Jose, California	8, 1

C. THE DOCKET STUDIES.

In addition to eight field visits, docket data were collected from eight jurisdictions.[1] Docket data usually consist of entries made by clerks of all motions, court orders, persons present, findings, verdicts, judgments and charges, as part of the permanent record of the proceedings. It was hoped that this data would relate known case dispositions to system characteristics, especiall

to prevailing plea bargaining practices and guilty plea impact, when compared to contested dispositions.

The docket data were collected under the supervision of the NLADA, IDSA staff, which used students from local law schools and colleges to do the actual retreiving of the data. This centralized supervision helped ensure some standardization across jurisdictions, for we knew that the nature of dockets would vary from one part of the country to another.[2]

(TABLE 1)

D. CONCLUSION.

The mail questionnaire data are national in scope and cover most research questions identified as key questions by the project. The data, therefore, became the core of the analysis. Additional data sets were used to elaborate findings from the questionnaire data and, in a few cases, to explore processes which were not probed in the questionnaires. All members of the research team took responsibility for questionnaire design and sampling strategies. However, the responsibility for data analysis was divided among staff members according to the three major data sources: one staff person was responsible for the mail questionnaire data, another for the docket data, and another for the field.

Throughout the analysis, the staff met regularly to compare and combine statistical findings which emerged from each of the data sources. In the end, the study reflects the collective efforts of the staff who, with the outside assistance of statistical consultants, have produced this final report.

TABLE 1

Sample of Felony Cases from the Dockets of 8 Jurisdictions

Docket	% Public Defender Cases	% Assigned Counsel Cases	% Retained Counsel Cases	Inappropriate Cases	Total Cases
Louisville, Kentucky	29%	0	71%	-	(191)
Baltimore, Maryland	4.5%	24%	67%	4.5%	(202)
Columbus, Ohio	27%	3%	43%	27%	(178)
Philadelphia, Penn.	49%	6%	29%	16%	(201)
Utica, New York	58%	-	34%	8%	(141)
Monterey, California	79%	7%	12%	2%	(176)
Las Vegas, Nevada	70%	2%	17%	11%	(216)
Oakland, California*	62%	17%	19%	2%	(156)
Total	47%	7%	37%	9%	1461

* San Jose, California was substituted for Oakland during the field research.

It is apparent in the following report that "plea bargaining" and case entry play a central role in the discussion. The research was not initially designed so that this would be the case. Rather, the actual centrality of plea bargaining in the criminal justice process left no choice but to make it central in the analysis. The study observed plea bargaining to be an institutionalized process, rooted in arrangements and practices going well beyond the specific behaviors and characteristics of defenders. This fact, more than any other, influenced the analysis and presentation of the data. It follows that the other data sets -- docket statistics and field materials -- were used to enrich and elaborate the plea bargaining process in defender agencies.

FOOTNOTES

1. The original intention had been to conduct docket studies in the same sites chosen for the field trips, all to be performed in advance of the visits. But because of the subsequent notification that we would not be able to include the Alameda County Public Defender Office in the field study, an untimely substitution had to be made. Hence, we have eight docket studies and eight field studies, but only seven of them coincide; there is a docket study, but no field trip, for Alameda County, and a field trip without a docket study for Santa Clara County.

2. Variation in the actual number of cases occurred, mainly due to variations in population size and crime rate. In two sites, there were so few criminal cases recorded that it would have been necessary to move into preceding record-keeping years in order to collect 200 completed cases. The decision was made not to sacrifice the uniformity of the sampling period in an effort to standardize the numbers of cases.

CHAPTER III

CHARACTERISTICS OF PUBLIC DEFENDER AGENCIES

This study received a total of 399 responses to mail questionnaires sent to all the defender agencies serving the state trial courts of this country. The 399 responding defender agencies represent 70% of all existing defender agencies (573) providing representation at the state trial court level, according to the records and other information of NLADA, the professional association of defender agencies. Included in the respondents are all defender agencies providing representation in areas with populations in excess of 1 million persons (24) and 90% of those serving populations of between 500,000 and 1 million (44). The non-respondents (174) are primarily located in areas with population below 50,000 persons. Defender agencies primarily serving federal trial courts on behalf of persons accused of federal crimes are not included in this study because of fundamental differences between the kinds of cases that such agencies become involved in and defender agencies providing services essentially in state courts. State and local defender offices become principally involved in the so-called street crimes, such as simple thefts, robbery, murder, and rape, while federal defender agencies are more heavily involved in the so-called white collar crimes in most localities. However, it should be noted that the defender agency for Washington, D.C., was included in the survey, because it has more of the characteristics of defender agencies providing services in state courts than of federal defenders serving clients in federal district courts.

Where meaningful comparisons can be made between the results of this 1975 survey and the 1972 defender survey reported in The Other Face of Justice, such comparisons will be made. However, in many instances, the information sought in the 1975 survey was different from that obtained in the 1972 survey.

A. CHARACTERISTICS AND SCOPE.

Defender agencies, as used herein, are defined as offices providing non-fee legal, primarily criminal, defense services under which an attorney or group of attorneys, through a contractual agreement or public employment, provide legal representation on a regular basis to persons who cannot afford to retain their own counsel. These defender agencies serve a particular political subdivision such as a municipality, a county, a circuit (which is really a judicial subdivision), or a group of political subdivisions that is a regional defender office other than a multi-county defender agency where all of the counties comprise one judicial circuit. They are distinguished from an assigned private counsel system which, for the present study, is defined as a method by which different attorneys principally in private practice are appointed by the court or some other body to represent non-fee defendants on a client-by-client basis. A few of these assigned counsel systems provide representation on a case-by-case basis through a central administration which often includes available support staff and training facilities. Examples of the coordinated assigned counsel systems are located in California and Louisiana. Most examples of these more structured assigned counsel systems, however, are found in the state of New York. Assigned counsel systems are

excluded from the primary data base but will be included in the comparison of the relative costs of assigned counsel and defenders.

This study has dichotomized the systems for providing non-fee legal services to criminally accused persons into two distinct categories -- defender and assigned counsel. While in most instances these two categories are easily distinguishable, some defense systems combine the attributes of both defender and assigned counsel systems. For example, the private law firm that has a contract with the surrounding county to provide representation to non-fee criminally accused persons consists of lawyers in private practice who are appointed on a case-by-case basis. As used here, however, they are a "defender agency," because they have a contractual arrangement under which the firm takes the bulk of the criminal cases.

On the other hand, a private practitioner may have a tacit understanding with a trial judge or judges in which he will receive almost all criminal defense appointments. While these practitioners may earn a substantial proportion or even their principal income from such appointments, they are included under the category of assigned counsel in this study, because they do not have a contract to provide defense services. Also included under the category of assigned counsel are the systems which use a coordinator or administrator to allocate appointed cases to a limited, pre-determined and select group of otherwise private practitioners or law firm. The key ingredients that distinguish a defender agency from an assigned counsel system are the public visibility of a regular cadre of defense attorneys who are known to provide non-

fee criminal legal defense services and the fact that they, because of public employment, undertake such representation on contract.

Even a highly structured and organized assigned counsel system does not have these two attributes. For example, the panel of attorneys serving Baltimore County, Maryland, is highly structured, organized and supervised. The panel is categorized as to experience and skills, appointed to cases in an organized manner, and the program is administered by a central office -- the defender agency. Yet, these appointed panel lawyers are principally engaged in private practice for fee-paying clients and do not hold themselves out as lawyers for those who cannot afford to hire a lawyer in criminal cases. Nor do any of the panel lawyers have a contractual right to any appointments. The panel attorneys may be excluded from the list at any time, or passed over or ignored in the distribution of appointed cases. Hence, lawyers on the panel are not defenders as the term is used here.

On the other hand, a defender agency which receives its cases on a case-by-case basis for a specific fee per case may hold itself out publicly to be the service for non-paying criminally accused persons, and has a written or oral agreement with the court or appropriate unit of government to provide indigent criminal defense representation, and thereby establish itself within a community as the agency for non-fee criminal defense services. That agency, though assigned to a case like a private lawyer, and compensated like a private lawyer, on a case-by-case basis, will fall into this study's definition of defender agency as used here.

In almost all areas served by a defender agency, an assigned

counsel system will co-exist with it, for some form of private bar involvement is usually necessary even in areas with the most comprehensive non-fee defense agency. Occasionally, there are conflict-of-interest situations which preclude the appointment of the defender agency. For example, in multiple defendant cases in which each defendant implicates the other, the defenses are conflicting, and if the two or more defendants require appointed counsel, the defender agency can represent only one defendant.[1] On the other hand, there are numerous areas, both rural and metropolitan, served exclusively by an assigned counsel system. These communities or geographical areas, even today, outnumber those areas served by a defender agency.[2]

The 399 defender systems in this study include only those systems which principally provide representation at the state trial court level. The Washington, D.C., defender is the exception; it serves the court system in the District of Columbia, which is a federal court. Excluded from the study are those defender systems which exclusively provide representation in juvenile matters, which are not, strictly speaking, criminal cases.[3] Although delinquency proceedings are criminally related, most juvenile offices have a large proportion of non-criminal matters, such as custody and supervision proceedings. Defender systems which exclusively provide appellate and post-conviction representation are also omitted from the data base, because the experiences of these offices are unique, and not comparable to offices heavily engaged in trial representation. Four state-wide systems which are exclusively appellate defender programs exist. They are located in Illinois, Michigan, Oregon and Wisconsin. Indiana has a state-wide office

providing exclusively collateral attack and post-conviction services at the trial and appellate levels.[4]

Sixteen states provide state-level funding for the operation of local defender programs. These states are: Alaska, Colorado, Connecticut, Delaware, Florida, Hawaii, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, Nevada,[5] New Mexico, New Jersey, Rhode Island and Vermont.* Where the local agency is autonomous, as in Florida, or partially autonomous, as in Kentucky and Missouri, each local office was treated as a separate agency. Where the local or regional office was merely a branch of the state office, with no autonomy other than that delegated to it by the head of the agency, the state was approached as one defender agency.

B. DEFENDER SYSTEM CLASSIFICATIONS.

For the purpose of analysis throughout this report, defender systems have been classified on the basis of the size of the population they serve and according to the percentage of that population's total criminal caseload in which the defender system provides representation.

It was thought that the largest defender agencies, those serving areas with populations of more than one million persons, should be distinguished from all other defender agencies serving areas with fewer than one million persons. These large defender agencies provide representation to a disproportionate number of non-fee paying criminally accused persons. They are 19 in number, representing 5% of the 399 responding defender agencies; yet they pro-

* Since this study, Ohio has become a partially unified state defender system -- with counties maintaining some degree of autonomy. Wisconsin has also become a statewide defender system, with a structurally strong state central office.

vided representation to over 57% of the cases, both felony and misdemeanor, reported as yearly caseloads for the combined 399 agencies. By distinguishing these 19 defender agencies from all others, the structure, organization and operation of defender agencies representing the majority of the non-fee criminally accused in this country will be described. In addition, defender agencies serving similar-sized population areas, are distinguishable according to the percentage of the total criminal caseload in that area in which they provide representation. The size of the defender agency depends not only upon the population size of the area being served, but also upon the volume of criminal cases assigned to the defender agency. For example, the mean staff size for defender agencies serving areas with more than one million persons is 27.1 staff persons, if the agencies provide representation to fewer than 50% of the area's total felony caseload. Yet, the mean staff size jumps to 130.1 if agencies serving the same population size provide representation to more than 50% of an area's total felony caseload. On the other hand, the staff size of defender agencies serving areas with populations of fewer than one million persons are not as dramatically affected by these caseload percentages: the mean staff size is 5.5 persons if the defender agency provides representation to fewer than 50% of an area's total felony caseload; it is 9 if more than 50% of an area's total felony caseload is assigned to the defender agency.

The classification of defender agencies according to population size and the percentage of an area's total felony caseload assigned to the defender results in four groups of defender agencies (see Table 2). They are: (1) 93 defender agencies serving

areas with fewer than one million persons and providing representation in 50% or fewer of the area's felony caseload ("small, non-central"); (2) 231 defender agencies serving areas with fewer than one million persons and providing representation in more than 50% of the felony caseload ("small, central"); (3) 6 defender agencies serving areas of over one million persons and providing representation in 50% or fewer of the area's felony caseload ("large, non-central"); and (4) 13 defender agencies serving areas of more than one million persons and providing representation in more than 50% of the caseload ("large, central"). At this time, the only large metropolitan area which is not served by a defender agency is Houston, Texas.

(TABLE 2)

C. AN OVERVIEW.

There are currently 573 defender agencies providing representation at the state trial court level. The 1972 defender survey[6] reported 650 state court level defender agencies in existence at that time. The 1972 study included branch offices of state defender agencies in the count. The present study did not consider the branch offices as separate agencies. Hence, this accounts for some of the drop from the 650 figure in 1972 to the 1975 figure of 573. Nevertheless, it is somewhat startling to observe that between 1972 and 1975 there has not been a sharp increase in the number of defender agencies in the United States, nor even any appreciable increase. Considering that in June, 1972, the United States Supreme Court for the first time held that the right to counsel for

TABLE 2
Classification of
Defender Agencies

	Number of Agencies
Small and Non-Central Agencies (those serving areas with populations of less than 1 million persons & handling less than 50% of the area's total felony caseload)	27% (93)
Small and Central Agencies (those serving areas with populations of less than 1 million pwesons & handling more than 50% of the area's total felony caseload)	67% (231)
Large and Non-Central Agencies (those serving areas with populations of more than 1 million persons & handling less than 50% of the area's total felony caseload)	2% (6)
Large and central agencies (those serving areas with populations of more than 1 million persons & handling more than 50% of the area's total felony caseload)	4% (13)
Total	100% (343)

indigent defendants extended to all misdemeanor cases when any sentence of incarceration might result.[7]

These 573 defender agencies employ 5,295* staff attorneys, both full and part time, to provide representation in geographical areas that account for approximately 66.4% of the total U.S. population.[7a] Representation was provided in felony and misdemeanor matters to approximately 1,041,246 indigent defendants during 1974 by these defender agencies. The 19 larger defender agencies, serving populations with more than one million persons, provided representation to 57% of those defendants.[8]

D. DEFENDER AGENCY CHARACTERISTICS.

The remainder of this chapter is based upon the responses from the head defender of 399 defender agencies and 825 staff attorneys employed by those agencies. Data and observations from the field research conducted in eight defender offices will be interwoven with the narrative.

1. Full and Part-Time Defender Agencies.

The majority of defender agencies are directed by a full-time chief defender. Fifty-four percent of the responding chief defenders engage in defender work as full-time employment, compared to forty-six percent who are part-time defender employees. In the 1972 defender survey, as reported in The Other Face of Justice,[9] of the reporting chief defenders at that time, 48.4% were full-time defender employees. Hence, in the three years between surveys, there has been a definite shift toward full-time

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* This figure includes an estimate of the staff size of non-responding systems. See Methodology, Appendix A.

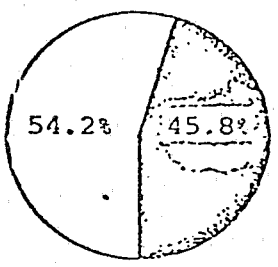
chief defenders. One-hundred and fifty defender agencies do not employ any full-time staff attorneys at all. One-hundred and fifty-six do not employ any part-time staff attorneys, and the remaining 93 agencies employ a combination of both full and part-time attorneys, as reflected in Table 3. Thus, 39% of the responding defender agencies are entirely operated by full-time staff attorneys, compared to 38% which are composed completely of part-time staff attorneys. There are 111 defender agencies which are comprised of only one part-time attorney, compared with 85 agencies which ocnsist of one full-time attorney. The 399 responding defender agencies are staffed with 4,737 staff attorneys, of which 19.2%, or 910, of them are part-time attorneys.

(TABLE 3)

In the 1972 survey, almost 3/4 of the staff attorneys in reporting defender agencies were part-time defender employees.[10] This represents a substantial change from part-time staff toward full-time staff, the same directional shift noted for chief defenders. A lawyer would be reluctant to entirely leave private practice, or entirely forego private practice, unless he were assured some degree of security in defender employment. Hence, this shift to full-time defender employment in such a short span of time, 1972 to 1975, would seem to indicate the increasing stability and institutionalization of defender agencies and increasing defender agency professionalism. Moreover, the shift from part-time defender agencies to full-time defender agencies by staff attorneys, as well as chief defenders, is entirely consistent with evolving pro-

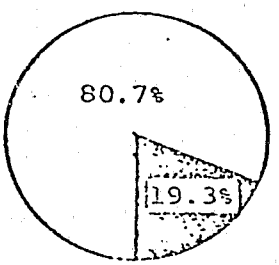
TABLE 3

Full-Time, Part-Time
Status of Defender Agencies



(389)

Chief



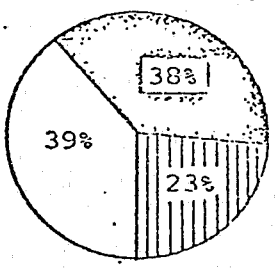
(4727)

Staff Attorneys

Full-Time

Part-Time

Agencies with:



(399)

No Part-Time Staff Attorneys

No Full-Time Staff Attorneys

A Combination of Full and Part-Time

fessional standards for defenders.[11]

2. Population Universe Served by Defender Agencies.

Most of the responding defender agencies are located in areas with a population of less than 250,000 persons, as shown in Table 7. Only 31% of the agencies are in areas of more than 250,000 persons. At the extremes, 6% of the defender agencies serve areas with more than one million persons, and 29% serve areas with less than 50,000 persons. Likewise, the majority of defender agencies (55%) consist of three or fewer attorneys, as shown in Table 5. The larger defender agencies, those with 20 or more attorneys, account for only 11% of the agencies across the country. Most defender agencies are relatively small operations designed to serve equally small areas.

(TABLES 4 and 5)

3. Organizational Structure of Defender Agencies.

Seventy-one percent of the reporting defender agencies are units of state or local government, with the chief defender either appointed or elected to office. See Table 6. The remaining defender agencies are: (1) private attorneys under contract with a governmental unit (15%); (2) private corporations providing exclusively criminal and quasi-criminal representation (9%); or (3) criminal divisions of legal aid societies which use a private, not-for-profit form of organization (5%). These criminal defense divisions of legal aid societies and the private corporations contract with the surrounding government to provide non-fee defense

TABLE 4
Population Size of the Areas
Served by Defender Agencies

Population Size	% of Defender Agencies
Under 50,000	29%
50,001 - 100,000	16%
100,001 - 250,000	24%
250,001 - 500,000	14%
500,001 - 1 million	11%
over 1 million	6%
	(N=399)

TABLE 5
Attorney Staff Size of
Reporting Defender Agencies

Attorney Staff Size	% of Defender Agencies
1 attorney	29%
2-3 attorneys	26%
4-5 attorneys	13%
6-10 attorneys	11%
11-20 attorneys	10%
21-30 attorneys	5%
31-40 attorneys	2%
41-50 attorneys	1%
over 50 attorneys	3%
	(N=398)

services for a determinate amount of money, or receive appointments and fees on a case-by-case basis under agreement with the court or other unit of local government. This represents a considerable shift from the 1972 survey, where only 59.6% reported that they were "public employees."[12] This shift from private defender services to public defender services is a further indication of a trend toward institutionalization and permanency in organized defender services. Usually, it is substantially less difficult to terminate a one-year contract with a private agency or law firm that provides non-fee criminal legal defense services than it is to terminate a public employee.

The public defender variety of agency is found in both large and small population areas; however, in population areas of over one million, the public defender type of system is most likely to exist if more than 50% of the area's total criminal caseload is assigned to the defender agency, as shown in Table 6. Nevertheless, some of the larger urban areas of this country are served by the private corporation type of defender system. For instance, New York City; Milwaukee, Wisconsin;[13] Philadelphia, Pennsylvania; Seattle, Washington; Clevelant, Ohio;[14] Cincinnati, Ohio; and Detroit, Michigan, are among the urban areas served by a private defender corporation, including the criminal defense divisions of a legal aid society. The same Table 6 illustrates that private attorneys who contract with a governmental unit to provide representation to non-fee criminal defendants are not located in any areas with more than one million persons. This method of organizing defense services for poor people charged with crimes seems to be largely confined to rural areas. However, San Diego, Cali-

fornia, has under consideration such a structure, as do three out of twelve Phoenix, Arizona, city courts with some misdemeanor jurisdiction.

(TABLE 6)

Four of the eight field visit locations of this study were governmental public defender offices, serving the counties in which the offices were located: Las Vegas (Clark County), Nevada; Monterey County, California; San Jose (Santa Clara County), California; and Utica (Oneida County, New York. Baltimore County, Maryland, is part of the publicly-funded statewide Public Defender of Maryland, but serves only one county. The other three sites were all private defender corporations. The Columbus (Franklin County), Ohio, defender had a contract with the city to provide representation in the Municipal Court, and received appointed counsel fees on a case-by-case basis at the upper felony trial court level. Louisville (Jefferson County), Kentucky,[15] is a private corporation receiving state, county, city and federal funding. Philadelphia, Pennsylvania, as a city, contracts with the defender office, which is a non-profit corporation.

4. Method of Selection of Chief Defender.

The method of selection of the Chief Defender is critical to the operation of the entire defender agency and to its relationship with clients and the remaining elements of the criminal justice system. The criminal justice system is founded upon the adversarial model. It is the defendant and his lawyer against the

TABLE 6
Type of Indigent Defender Agency

Defender Agencies	Public Defender	Private Attorneys	Defender Corporation	Criminal Divisions Legal Aid	
Small and Non-Central	62%	15%	10%	4%	(91)
Small and Central	71%	19%	9%	1%	(226)
Large and Non-Central	17%	-	50%	33%	(6)
Large and Central	62%	-	15%	23%	(13)
All Defender Agencies	71%	15%	9%	5%	(378)

Total Number of Responses= 336

system. Although the judiciary is supposed to be neutral while the defense takes a strong adversarial posture, the judiciary's role is considerably more arduous and professionally dangerous. A vigorous advocate will raise complex issues and motions, protract and often delay litigation, at times use legal devices that appear to police and prosecution as obstructive, and will continue the contest into the reviewing courts, alleging errors of the judge, police and prosecution. To continue that vigorous approach requires an independent defender.

At the core of independence is the question of Chief Defender selection and retention, for if the position of Chief Defender is insecure and tenuous, it will be difficult for the defender to provide the vigorous representation contemplated by the adversarial system. Hence, selection procedures and tenure rules are crucial to the quality of services provided by a defender agency.[16]

The chief defender of each responding defender agency is selected in a variety of ways. They include selection by the judiciary, the county board, a combination of the judiciary and county board, a special board, the governor, and both partisan and nonpartisan election. As Table 7 illustrates, most chief defenders are appointed by public officials. Public defenders are appointed by either the judiciary, the county board, or a combination of the two. Private attorneys who contract with a governmental unit are usually selected in a manner similar to the public defender, but with more of an emphasis on the combined selection of the judiciary and the county board. The chief of a private defender corporation is selected primarily by a board; the heads of legal aid societies with criminal divisions are always selected by a board. The chief

of the criminal division of a legal aid society is often hired by the head of the entire legal aid society. The private corporation defender, which includes the criminal divisions of legal aid societies, is required under corporate law to be governed by a board. Occasionally public offices are governed by an independent board which selects the head defender.

(TABLE 7)

The State of Ohio has recently passed legislation which calls for local boards to select the local defenders in counties wishing to establish an organized defender system. In the field studies, three of the eight agencies utilized the corporate form of organization. In each instance, a board selected the defender to serve at the pleasure of the board. Elected defenders are included herein as public defenders. Examples of elected defenders are found in San Francisco, California, in all the circuits of the State of Florida, and in Davidson County (Nashville), Tennessee, as well as in some places in Nebraska.

The method of selecting a defender results in different conditions of tenure. Most local defenders (67%) serve at the pleasure of the appointing body. Thirty-one percent of the reporting defenders serve for a specified term of years, and two percent have civil service status.

The 1972 survey of defenders reported in The Other Face of Justice found 15.1% of the reporting defenders appointed by the judicary.[17] In the present survey, judicially appointed defenders increased to 23%, which indicates some shift toward judicially-

TABLE 7
Method of Selecting the Head Defender

	Independent Board	Judiciary	Judiciary, County Board	County Board	Governor	Election	
Government Agency	16%	28%	5%	37%	4%	10%	(213)
Private Attorneys	15%	13%	35%	35%	2%	--	(46)
Private Corporation	88%	4%	8%	--	--	--	(25)
Criminal Div./Legal Aid	100%	--	--	--	--	--	(14)
All Defender Agencies	26%	23%	10%	31%	3%	7%	(310)

appointed defenders. To many, this is alarming, for judicial appointment of the defender makes the independence of the defender lawyer difficult, and is an obstacle to effective representation. When a lawyer must depend upon the judge before whom he practices for his job, he will be inhibited from urging the errors committed by that judge, from criticizing that judge in other tribunals. Will the lawyer vigorously contest matters before the judge who is his employer, compelling this judge/employer to work long hours and confront difficult, perplexing problems, rather than taking the easy route of pleading almost all clients guilty?[18]

The National Advisory Commission on Criminal Justice Standards and Goals,[19] the American Bar Association Standards Relating to the Defense Function,[20] and The National Study Commission on Defense Services[21] all recommend an independent board or commission to serve as the body responsible for chief defender selection. The three bodies are unanimous in their recommendation that the judiciary should take no part in the selection of defenders.[22]

At the positive end of the selection procedures continuum, the present survey indicates that 26% of the defenders were selected by a board, while 16% reported that they were selected by a board in the 1972 defender survey.[23]

5. Geographical Area Served.

The geographical area served by defender agencies ranges from a part of a municipality to an entire state. Service to part of a municipality has occurred in the past under the federal Model Cities Programs, which in some localities sponsored criminal defense services to target areas of a city. Most statewide defender programs provide services through a central office and branch offi-

ces located throughout the state; however, the statewide defender programs in Rhode Island and Delaware provide indigent defense services to the entire state through one location. Nationwide, most defender agencies provide representation to a surrounding county (49%); 31% of the agencies serve separate court systems of municipalities as well as the county court system in which they are located, as illustrated in Table 8. Seventeen percent of the defender agencies provide services to two or more counties. Only 10 systems, or 3%, serve a municipality, which is normally coterminous with the county in question.

(TABLE 8)

6. Classification of Litigation in which Defender Agencies Participate.

Most defender agencies (90%) provide representation in the indigent felony and misdemeanor cases originating in the area which they serve. Of these the vast majority also provide representation in some combination of juvenile, mental health and appellate matters, as shown in Table 9.

(TABLE 9)

In the 1972 defender survey, it was reported that 62% of the responding defender offices (233) provided representation to misdemeanor defendants at the trial level.[23] In the current survey of defender agencies, 92%, or 286, of the responding defender agencies reported that they provide representation to misdemeanor defendants, based on 1975 data. Comparing these data from 1972 and 1975, the impact of the 1972 Argersinger decision[24] is apparent Most defender agencies have expanded their scope of services to

TABLE 8
Geographical Area Served
by Defender Agencies

Part of a Municipality	.3%	(1)
Municipality	3%	(10)
County	48.7%	(184)
Joint Municipalities	31%	(117)
Combination of 2 or more counties	17%	(63)
Total	100%	(375)

TABLE 9

TYPES OF CASES HANDLED BY DEFENDER AGENCIES

	Felonies Only	Misdemeanors Only	Felonies, Misdemeanors Only	Felonies and other Offenses	Felonies, Misdemeanors and other Offenses	
Small and Non-Central	2%	1%	--	5%	92%	(89)
Small and Central	1%	--	1%	7%	92%	(223)
Large and Non-Central	--	--	16.5%	16.5%	67%	(6)
Large and Central	--	--	--	8%	92%	(13)
All Defender Agencies	1%	.5%	2%	6%	90%	(314)

Total Number of Responses = 331

include misdemeanor defendants who, according to the 1972 decision, are required to have the effective assistance of counsel if they are in danger of a penalty that includes any period of incarceration.

7. Proportionate Caseloads.

The proportion of defender agency representation to an area's total criminal caseload varies among systems, as illustrated in Table 10.

(TABLE 10)

In felony matters, most defender agencies provide representation in more than 50% of all the felony cases originating in an area.[25] Six percent of the defenders provide representation in less than 25% of an area's total felony caseload, and 9% in more than 90%. Misdemeanor representation vaires considerably. More than half of the defender agencies provide representation in less than 50% of an area's total misdemeanor caseload, with 8% handling less than 25%. These figures represent the percentage of an area's entire caseload, regardless of the indigency factor.

These percentages do not reflect indigency rates, for most defender agencies cannot represent all indigent defendants, because of conflict of interest situations. Moreover, in many jurisdictions, private practitioners provide representation, irrespective of conflict situations, in appointed cases, along with the defender agencies. For example, in Washington, D.C., a private attorney panel represents more eligible persons by assignment than the

TABLE 10

The Percent of an Area's Felony and Misdemeanor Caseload Handled by Defender Agencies

% of Total Felony Caseload	% Distribution of Defender Agencies
0-25%	6%
26-40%	11%
41-50%	12%
51-70%	29%
71-90%	33%
over 90%	9%
	(N=352)
%of Total Misdemeanor Caseload	
0-25%	18%
26-40%	20%
41-50%	16%
51-70%	18%
71-90%	19%
over 90%	9%
	(N=320)

defender agency does. In Cincinnati, Ohio, the defender agency provides representation to the bulk of eligible misdemeanor cases and private assigned counsel provide representation in almost all indigent felony cases. The Columbus, Ohio, defender agency provides representation in approximately 85% of the non-homicide felony assignments, and the Jefferson County (Louisville), Kentucky, defender provides representation for virtually all eligible criminally accused clients. In Baltimore County, Maryland, the defender agency provides representation in almost all indigent misdemeanor cases and private attorneys on an appointment panel provide representation in almost all indigent felony cases. Hence, it is usually impossible to determine indigency rates by comparing defender caseloads to the total caseloads in the area served by the defender agency.

8. Stages of Representation.

The scope of representation across the stages of a criminal proceeding varies among defender agencies, as shown in Table 11. This Table gives the percentage of agencies which provide representation at each stage in a criminal proceeding against felony and misdemeanor defendants.

(TABLE 11)

More defender agencies provide representation at each stage in a felony proceeding than in a misdemeanor proceeding. The most noticeable difference between felony and misdemeanor representation is representation at a bail hearing. Only 65% of the agencies provide representation at misdemeanor bail hearings, compared with

TABLE 11

The Stages of Felony and Misdemeanor Proceedings
In Which the Defender Agency Provides Representation

Stages	% of Agencies that Do Provide Representation at Each Stage	
	Felonies	Misdemeanors
Bail/Bond Hearing	72% (271)	65% (230)
Probable Cause Hearing	84% (318)	64% (209)
First Arraignment	71% (239)	N/A
Arraignment on Indictment	85% (324)	79% (279)
Total Number of Responses=	1152	718

72% which represent clients at felony bail hearings.

Bond hearings are often unnecessary in misdemeanor cases for various reasons, revealed through the field observations of eight defender offices. First, many misdemeanor cases are disposed of at the initial court appearance of the accused. For example, a person accused of a minor offense, such as drunk and disorderly conduct, can receive a sentence at the initial court appearance of time already served. Second, court-established bond schedules based upon the charge are more often available in misdemeanor cases, permitting accused persons to obtain release prior to an initial court appearance.[26] Third, in communities providing pre-trial release programs, the person accused of a misdemeanor is more likely to be released without money bond than in the case of a felony, even if the defendant does not have a lawyer. Nevertheless, effective representation at the initial bond setting hearing is often critical to the defense and disposition of the case,[27] and the fact that a substantial percentage of defendants is not represented at bond hearings is disquieting. For a more in-depth discussion of this matter, see Chapter IV, infra.

9. Method of Client Assignment to Attorneys

A. Staged vs. Continuous

There are several organizational methods employed by defender agencies for the assignment of their caseloads to individual staff attorneys: staged, continuous, and a combination of both.

Staged representation, variably referred to as zone or horizontal defense, is the method of assigning attorneys to individual courtrooms and/or specific stages in the criminal proceedings. One attorney is assigned to handle only the preliminary hearing,

another to the arraignment, and so on. As the defendant passes from courtroom to courtroom, he encounters a different defender attorney at each stage in the proceedings. Likewise, individual judges and prosecutors can be assigned to a specific stage and/or courtroom, and with the defender, form a triad in the processing of criminal cases. Inherent to staged representation is the possibility that a defendant may be represented by several attorneys before the disposition of his or her case.[28] This becomes a probability in felony matters, and in any case in which there is any change of courtroom during the pendency of the matter.

The most extreme example of lawyer change with each defendant court appearance was found in the Philadelphia Defender Office. There, weekly lawyer rotation of court assignments for staff attorneys makes it likely that the defendant will have a different attorney at each court appearance, even if there is no change in courtrooms for the case, with no one attorney providing representation at more than one court appearance for a defendant. Under this kind of system, a defendant facing a felony charge may have had many attorneys assigned to his case.

Continuous representation, known as one-to-one or vertical defense, is the method whereby each defender attorney is assigned to individual cases and retains those cases through to their disposition. One defender attorney provides representation throughout all the stages of a criminal proceeding. An example of this system of case assignment was observed in the Santa Clara Court Public Defender Office in murder cases. Here, a special task force of attorneys and all varieties of support services, all of which are highly experienced and skilled, exclusively represent

clients facing murder charges.

As described here, continuous and stage representation are extremes on a continuum of types of representation. In some agencies, variations of each type as well as combinations of the two types exist. Staged representation may exist up to a certain stage, after which a defendant is represented continuously by one attorney.

The decision to use one form of case assignment over another is usually based upon the belief that one form is much more expensive than another. Those who follow that line of thinking point to the attorney/courtroom assignment system as less expensive[29] than having one attorney provide representation from the beginning of the case to the end of trial. Those who favor the latter system argue that providing continuity of lawyer representation enhances the lawyer-client relationship and increases effectiveness of representation.[30]

While it may be conceded that stationing a lawyer in one courtroom eases court scheduling of cases for that lawyer and reduces travel time, it would also seem to encourage duplication of effort. Each attorney must conduct his own investigation, at least in part, if he is going to be properly prepared. It is true that in the idea system each lawyer will pass information on to the next lawyer, but this requires extensive report writing; also, investigation requires at least some personal effort on the part of the lawyer responsible for the case. Also to be considered is the time that should be spent by the lawyer with his client, both to familiarize himself with the case and with the client. On the other hand, lawyers working in a staged representation setting can become thoroughly familiar with the case by obtaining all transcripts of prior proceedings, carefully investigating the case, reviewing the file with previously-assigned lawyers, and spending considerable time with the defendant.

Most defender agencies (63%) assign their staff attorneys to individual felony and misdemeanor cases, permitting continuous representation until final disposition. Only 4% of the defender agencies assign their staff attorneys to an individual stage and/or courtroom in the proceedings. A sizeable number of defender agencies, the remaining 33%, utilize a mixed method of assigning cases to staff attorneys. Representation in these agencies is staged up to a certain point, such as arraignment, after which attorneys are continuously assigned to follow the case through to disposition. This is illustrated in Table 12.

(TABLE 12)

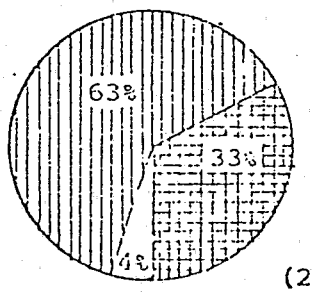
The type of method used by defender agencies varies according to the size of the office, the court structure served, and whether the charge is a misdemeanor or a felony. Most small urban and rural defender agencies assign their attorneys to continuously provide representation from first contact through to disposition. Many of these defender agencies consist of fewer than three staff attorneys. Where the defender office is very small, there is less likelihood of specialized assignment, such as to bond court, arraignment call, probable hearing court, trial court, and so forth. Moreover, where the court structure is relatively simplified and there is no proliferation of specialized courtrooms, cases are more likely to travel from the originating courtroom to a courtroom where the record is kept, making it easier for one attorney to stay with the case throughout the trial proceedings. Thus, travel time and court scheduling problems are minimal in those areas which

TABLE 12
Type of Representation
Provided by Defender Agencies
(Felonies Only)

Staged

Continuous

Mixed (staged and continuous)



(226)

do not have a high degree of courtroom specialization.*

Additionally, the caseloads are lighter, thus obviating the need for daily availability of non-fee defense lawyers at each stage in the proceedings. Since these defenders comprise the majority of the respondents, their sheer number overshadows the case assignment practices in the larger defender agencies, those serving areas with more than one million persons, where lawyers are typically assigned to courtrooms and provide staged representation. Hence, in terms of the defender clientele, most clients will have two or more attorneys assigned to their cases at various trials.

B. Assignment by Type of Charge

Another manner of looking at the assignment of cases to defender attorneys is by the nature of the charge against the accused. Some agencies assign attorneys to specifically provide representation in either felonies or misdemeanors; others assign cases to attorneys irrespective of the original charge in the case. Most agencies (57%) assign their attorneys to either felonies or misdemeanors; however, the larger defender agency, serving population areas in excess of one million persons, is more likely to do so. This is illustrated in Table 13.

(TABLE 13)

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* A common characteristic of court structure is that there is at least a division on the basis of court case assignment between the post-probable cause period and the period from arrest through the hearing into probable cause to believe there has been a crime when the accused is first involved criminally. Many courts have more highly specialized court structures. Even the most simple use the pre-/post-probable cause division.

TABLE 13
The Method by Which Cases Are
Assigned to Staff Attorneys

	% of Defenders that Assign Attorneys to either felonies or misdemeanors	% of Defenders that Assign Attorneys to both felonies and misdemeanors
Small Defender Agencies (i.e., serving areas with less that 1 million persons)	55% (102)	45% (83)
Large Defender Agencies (i.e., serving areas with more that 1 million persons)	95% (18)	5% (1)

Total Number of Responses= 204

Assignment of attorneys to specific types of cases appears to be an organizational method used primarily by the larger defender agencies. Ninety-five percent of the larger defender agencies assign their attorneys to specifically felonies or misdemeanors, compared with 55% of the smaller defender agencies.

The significance of the distinction between horizontal and vertical representation is in client satisfaction and economics. All of the defenders visited expressed the opinion that it was very uneconomical to assign one lawyer to a case from beginning to end at the trial level because of the distance to be travelled between courts. Moreover, for the convenience of case scheduling, it was thought to be more efficient to assign a lawyer to a courtroom than to a case. Then, when the lawyer was engaged in trial, so was the judge and the prosecutor, assuming, as is usually the case, that prosecutors are also assigned to courtrooms and not specific cases. In the vertical system, the courtroom, the judge and the prosecutor will all be at trial at the same time on the same case. If the vertical system is used, the case may be ready for trial, the judge and prosecutor ready for trial, and the courtroom open for trial, but the case will not be able to be tried if the attorney is engaged in a trial on another case elsewhere.[31]

10. Support Staff Availability.

As the complexity of the criminal justice system increases, the complexity of non-fee criminal defense services increases. To assist defender agencies in the provision of counsel to the indigent accused, a variety of lawyer support functions are now considered essential to perform certain legal, investigative,

social and administrative support functions.. Special categories of support services found in defender offices include: investigators, secretaries, clerks, office administrators, social workers, and an assortment of persons referred to as paralegals, including law students and law students with limited practice licenses. The term paralegal sometimes includes law students, law clerks and client interviewers. The term may also connote a person who has had particularized training as a paralegal as a career. The paralegals may perform a range of functions from the highly complex, such as the drafting of motions and briefs, to the utterly mundane, such as running errands.

Particularly in the larger defender agencies, support staff include non-legal professionals who perform managerial, administrative and social service functions. A full-time polygraph operator was found in the Clark County, Nevada, defender office. The Philadelphia Defender Agency employs a part-time board certified psychiatrist as well as a professional comptroller and a staff of professional social workers. In short, defender agency support staff are all those persons other than the attorneys who perform legal functions as their primary activity.

Support staff perform a variety of tasks related to an agency's performance. These tasks include investigation, interviewing, research, counselling, community work, general clerical, secretarial and administrative work, and a host of other activities based on immediate operational needs. No one function is limited to a specific type of support staff and all share in providing general back-up service to the defender attorneys. There was a general agreement among the attorneys interviewed in the field research

that support staff provide an invaluable service to the defender agency.

The availability of support staff varies among defender agencies, as shown in Table 14.

(TABLE 14)

Eight percent of the defender agencies do not employ any type of support staff, not even secretaries. Only 33% of the agencies employ both secretaries and investigators; 29% employ only secretaries. The 1972 NLADA National Defender Survey found that, of the respondents to the study (N = 233), 45% did not employ investigators; only 1% did not employ secretaries, and 93% did not employ social workers.[35] The present study, based on more current data and a higher response rate, found that approximately 35% of the defender systems do not employ investigators; 9% have no secretaries and 84% have no social worker staff. Today, 16% of the defender agencies employ a wide variety of support staff which includes secretaries, investigators and an array of more specialized persons, such as social workers, law students and paralegals.

The availability of support staff varies with the size of the defender agency. Every large defender agency, serving an area with a population of more than one million persons, employs some type of support staff, whereas 13% of the smaller defender agencies have no support staff whatsoever, as reflected in Table 15.

(TABLE 15)

TABLE 14

The Availability of Support Staff By
The Method of Case Assignment
(Felonies)

	% of Defenders Performing Jail Checks
No Support Staff	9% (2)
Secretary Only	16% (16)
Combination	9% (9)
Secretary and Investigator	27% (14)
Full Support Staff	16% (8)

Total Number Of Responses= 322

TABLE 15

Level of Support Staff Availability

	No Support Staff	Secretary Only	Combination*	Secretary and Investigator	Full Support Staff	
Small and Non-Central	5%	40%	31%	16%	8%	(93)
Small and Central	8%	28%	34%	16%	14%	(231)
Large and Non-Central	-	-	67%	-	33%	(6)
Large and Central	-	-	15%	-	85%	(13)
All Defender Agencies	8%	29%	30%	17%	16%	(398)

Total Number of Responses= 343

* Combinations - these are systems which employ either a combination of secretary and client contact persons (e.g. law students, para-legals, interviewers, social workers) or investigator and client contact person.. This category also includes the employment of only client contact persons. None of these systems employ both a secretary and an investigator.

A wide variety of support staff is available to only 8% of the defender agencies which represent less than 50% of the total felony caseload in an area of less than one million persons, and to only 14% of the agencies which represent more than 50% of the total felony caseload in an area of less than one million persons. Defender agencies serving areas of more than one million persons employ a wide variety of support staff 33% of the time if they represent fewer than 50% of the area's total felony caseload and an overwhelming 85% of the time if the agency represents more than 50% of an area's total felony caseload.

As would be expected, defender agencies serving the more highly populated areas of this country will usually employ the greatest number and variety of support staff persons. The complexity of the urban and metropolitan communities served by these defender agencies, together with the burgeoning caseloads, require the specialized services provided by support staff. Functions normally performed by defender attorneys in a small rural community are more arduous tasks to the defender attorney in a metropolitan area, who must delegate components of the legal defense function to more specialized support persons.

For example, a defender attorney in a rural community may find little difficulty in locating a job for a client who is seeking a probation sentence because of the defender's general acquaintance with the business community of the area. The defender attorney in a metropolitan area, on the other hand, may find it necessary to seek out the assistance of a professional job counsellor. Support staff are necessary to assist in the complex legal defense of accused persons and are more available in

areas in which the defender agency is responsible for representing vast numbers of clients each year. However, support staff, particularly investigators and secretaries and considered essential to defense services. While attorneys can and must perform some investigation on their own, it becomes expensive for an attorney to do the work that can be performed by an investigator, who is usually paid less than an attorney. Also, attorneys do not necessarily have the investigative skills necessary for effective and efficient investigation.[36] Finally, having the attorney perform all the investigative services, including interviewing prosecution witnesses and complainants may result in attorney embarrassment and conflicts, such as the defense attorney's testifying on behalf of the defendant to the prosecution witnesses' contradictory statements.[37]

11. Non-Fee Eligibility.

For the criminally accused to be represented by a defender agency, he must be determined eligible for non-fee public representation. Non-fee eligibility varies across jurisdictions. The 1972 National Defender Survey found that 65% of all felony defendants and 47% of all misdemeanor defendants are unable to hire private attorneys.[38] That same survey found that there is little uniformity in the criteria used to establish eligibility, and that the same person found eligible in one part of the country could be found ineligible for non-fee legal services in another area.[39] Field observations of eight defender agencies in this current study indicate that little, if any, change has occurred in regard to the variability in the criteria used to determine eligibility.

Eligibility is seldom explicitly defined; if defined, eligibility criteria are often ignored. Nevertheless, eligibility is often viewed as a critical issue for any defender agency and its relationship to the private bar and to governmental units concerned with taxing and budget. The defender agency of Monterey County, California, was compelled to relinquish its pre-court appearance contact with the client because of private bar pressure brought about by the fear of the private bar that the defenders were too lenient in determining client eligibility. As a result, at the time of the team visit to Monterey County, the trial judiciary had recently undertaken to elicit factual information and determine eligibility, and defender lawyers delayed their entry into the case until judicial appointment.[40]

In some areas, the determination of eligibility rests solely in the discretion of the court; but, in other areas, the defender agency participates in and even makes the final determination of an accused's eligibility for non-fee defense services. Seventy-seven percent of the responding defender agencies participate in some manner in the determination of eligibility, as illustrated in Table 16.

(TABLE 16)

Of those agencies that participate, 25% make the final decision; 39% make the initial determination, subject to final review by the court; and 35% play only a minimal role in the determination of indigency.

As Table 17 illustrates, the larger defender agencies, those

TABLE 16
Defender Agency's Participation
In The Determination of Indigency
(Felonies)

	% of Responses
Defender makes final decision	16%
Defender makes initial decision subject to review by the court	25%
Defender plays an informal role	23%
Defender does not participate	36%

Total Number of Responses= 378

serving areas with more than one million persons, are more likely than the smaller agencies to participate in the determination of eligibility. Most of the large defender agencies (80%) which provide representation in a smaller percentage of an area's total felony caseload also participate.

(TABLE 17)

Chief defender selecting authority appears to be related to whether or not the defender agency participates in the determination of eligibility. As Table 18 indicates, 72% of the defender agencies whose chief defender is selected by a board participate in eligibility determination, both formal and informal. This compares with 60% of the defenders selected by the judiciary or unit of government, and only 45% of those who are elected officials. Combining this data with that of the previous paragraphs, defender agencies which are governed by a board and who provide representation in less than 50% of the total felony caseload originating in areas with populations of more than one million persons will usually determine which accused persons are eligible for their non-fee defense services.

(TABLE 18)

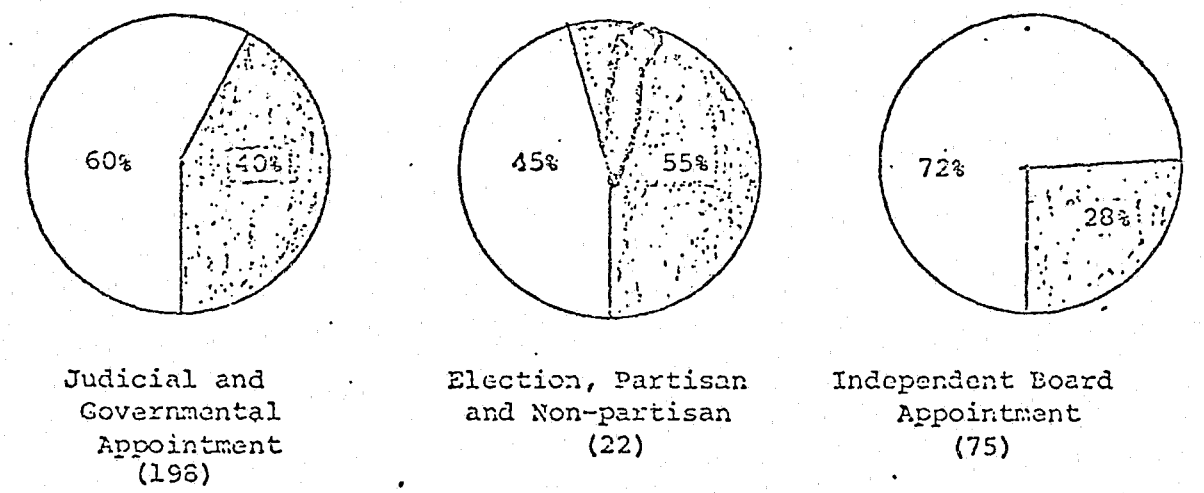
This result is not unexpected. Board control is most commonly found in private defender agencies, where agency attorneys are more likely to enter cases without waiting for court appointment (see Chapter IV). This necessarily will require the attorneys to determine client eligibility for non-fee services.

TABLE 17
Defender Agency's Participation
in Eligibility Determination
(Felonies)

	Defender Agency Participates	Defender Agency Does Not Participate	
Small and Non-Central	55%	45%	(89)
Small and Central	66%	34%	(224)
Large and Non-Central	80%	20%	(5)
Large and Central	73%	27%	(11)

Total Number of Responses= 329

TABLE 18
The Method of Selection of the Head of the
Defender Agency by Participation in
Eligibility Determination



The question of who has the responsibility for eliciting facts relative to financial resources and determination of eligibility for non-fee legal services is a critical factor to case entry and thus, effective representation. This is discussed more thoroughly in Chapter IV. If a defender does not play a principal role in assessing at lease preliminary eligibility for the agency's legal services, then attorney case entry must be delayed until at least the initial court appearance, or perhaps even later.

12. How Defenders Define Case.

The precise measurement of defender caseloads for comparative purposes is a difficult task because of the variability in how defenders define "case." If there is ever to be any reliable comparison between defender agencies, and if performance measures and comprehensive planning are to be meaningful, some uniformity in the definition of a "case" must be arrived at, for "case" is the principal unit of measure utilized universally by defender agencies. The need for more staff, funds, supportive services, and so on, hinges upon "case load." Hence, it would seem to follow that uniformity of the definition of "case" would be desirable; or at least, some way to accurately adjust the various definitions of "case" between localities so that accurate comparisons can be made.

The definition of a "case" is usually formulated by defender agencies for the purpose of keeping office statistics, thus measuring in an elementary way their own performance as compared to previous years and justifying budget increases. In the measure of performance, the most important criterion seems to be the num-

ber and kind of case disposition. Sometimes trial results are also given, but they seem to have no measurable impact. Where the case disposition for the previous budget year rises, this seems to justify a budget increase for the next year, as though it always follows that the current year's increase necessarily means a case increase for the next year. Presumably, this formula works fairly well, at least as long as crime continues to rise, and one can be fairly confident of that as long as social conditions do not appreciably change and state legislatures continue to identify more and more activity as criminal.

One half of all responding defender agencies define case as "all charges against a single defendant related to a single incident." This is illustrated in Table 19. "All charges or counts against a single defendant regardless of whether the charges arise out of a single incident" is used to define "case" by 16% of the defender agencies. The remaining 28% of the defender agencies use the "case" as each instance of representation arising out of a single incident.

(TABLE 19)

The definition of a "case" is less standard across the larger defender agencies which provide representation in 50% of the total felony caseload originating in areas with populations in excess of one million persons. For those defender agencies, no one definition of "case" predominates. Thirty-six percent of these agencies define case as "each separate charge, indictment or information"; another 36% as "all charges or counts against a single defendant related to a single incident"; and 28%, as "all charges

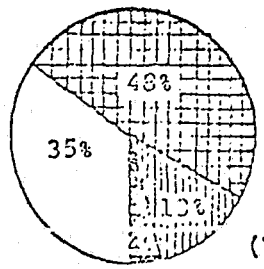
TABLE 19
How Defender Agencies Define "Case"

Each separate charge, indictment or information

All charges or counts against a single defendant relative to a single incident

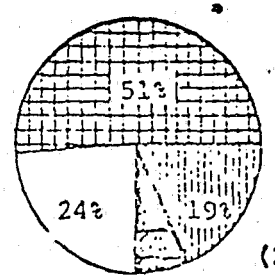
All charges against a single defendant regardless of whether the charges arise out of a single incident

Each instance of representation arising out of a single incident



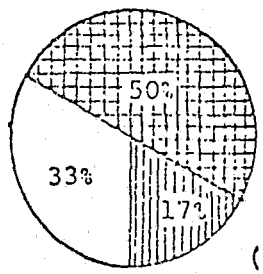
(75)

Small and Non-Central



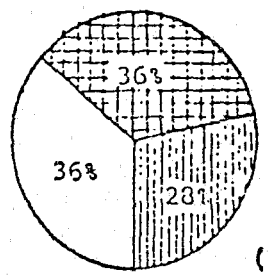
(216)

Small and Central



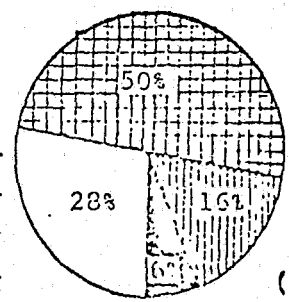
(6)

Large and Non-Central



((11)

Large and Central



(352)

All Defender Agencies

against a single defendant regardless of whether the charges arise out of a single incident."

13. Defender Office Caseloads.

As a result of the variety of ways of defining case for reporting purposes, the following discussion and comparison of caseload between defender agencies is not as precise as one would like. However, the project staff concluded from observation and discussion with defenders that the first three definitions of "case" measure relatively similar work effort, for in a great majority of situations, all charges against one defendant are disposed of at the same time, whether they arise out of one, or several, incidents. The remainder of the case definition variations, the staff concluded, are not so out of line as to make comparison totally unrealistic. The reader must be aware, however, that there is a lack of uniformity in the definition of "case" among the reporting defender agencies.

The total trial level felony and misdemeanor caseloads of defender agencies vary considerably. Agency caseloads per year range from 7 cases to 200,000 cases, with a median caseload of 430 cases. Table 20 presents the distribution of defender agency caseloads for the 1974 reporting year.

(TABLE 20)

Most defender agencies (72%) provided representation in fewer than 800 felonies during 1974, and 79% provided representation in fewer than 1500 misdemeanors. Only 6% of the defender agencies have annual felony caseloads in excess of 3500 per year, and 4%

TABLE 20
Size of Defender Office's
Felony and Misdemeanor Caseloads

Felony Caseload	% of Defender Agencies
1-60	20%
61-200	24%
201-400	13%
401-800	15%
801-1500	12%
1501-3500	10%
over 3500	6%
	(N=318)

Misdemeanor Caseload	
1-85	25%
86-300	26%
301-700	16%
701-1500	12%
1501-5000	12%
5001-10,000	5%
over 10,000	4%
	(N=297)

have misdemeanor caseloads in excess of 10,000 cases per year.

A. Average Attorney Caseloads

In considering caseload, the significant figure is that of the caseload per attorney. For when the attorney caseload becomes excessive, the quality of representation deteriorates.[41] Each chief defender respondent was asked to estimate the average number of felony cases that a typical attorney in his office would provide representation for each year. The estimates were given only for those full-time attorneys who are specifically assigned to provide representation in either felonies or misdemeanors, but not both.

The estimated attorney caseloads are presented for only full-time attorneys who specifically provide representation in only felony cases. Measures of average attorney caseloads for part-time attorneys were obtained and are reproduced in tabular form in the appendix to this chapter, but the part-time status is too imprecise to permit comparisons. As a result, part-time caseloads are not discussed. Part-time attorneys, by their very employment status, spend a certain percentage of their time on the defense of indigent cases. Part-time employment ranges from 10% of an attorney's time to over 2/3 of his time. Also, there is no way to closely estimate the volume of private cases that a part-time defender undertakes each year, nor the complexity of these fee-paying cases. The fee-paying cases may equal the number of indigent cases, or they may account for a disproportionate number of the total caseload of a part-time defender.

As to full-time defenders, the majority of chief defenders (56%) report that staff attorneys who represent only in felonies

provide representation in fewer than 125 felonies per year, as shown in Table 21.

(TABLE 21)

Another 11% of the chief defenders report that staff attorneys handle between 125 and 150 felonies each year. Of the remaining 33% who report average full-time attorney caseloads of over 150 felony cases per year,[42] 46% report an average attorney caseload of over 200 felony cases per year per full-time attorney. The number of 150 felony cases per year per full-time attorney is significant because that is the maximum recommended by the National Advisory Commission on Criminal Justice Standards and Goals.[43]

The National Advisory Commission Standards were not available for the 1972 defender survey. However, for purposes of arriving at some comparisons, the 1972 survey found that 32% of the reporting defender agencies stated that their full-time attorneys, who provided exclusively felony trial representation had a yearly caseload of 100 or less; 29% handled 101 to 200 cases per year; 22% handled 201-200 cases per year, and 7% handled in excess of 300 cases per year.[44] Thus, if the Advisory Commission caseload Standards are accurate, in 1972, more than 29% of the reporting defender agencies had clearly excessive caseloads, or in excess of 201 cases per attorney per year, with another 39% or portions thereof as suspected of having excessive caseloads. The present 1975 survey reports 33% of the responding agencies as having excessive caseloads, using the National Study Commission Standard criterion.

It should be further noted that the caseload standards promul-

TABLE 21

Average Attorney Caseloads for
Attorneys Assigned Specifically to Felonies
(Chief Defender Reports)

Average Felony Caseload Per Attorney	Full-Time Attorneys
0-50	22%
51-100	20%
101-125	14%
126-150	11%
151-175	9%
176-200	6%
over 200	18%

Total Number of Responses- 189

gated by the National Advisory Commission have been criticized as being too high.[45] Indeed, one is hard put to imagine carefully investigating every case, as is required by American Bar Association Standards Relating to the Defense Function, if the lawyers are handling 150 felony cases per year, or 400 misdemeanors per year.

The reported average attorney caseloads for full-time attorneys who represent only misdemeanor cases are substantially higher than in felony cases, as shown by Table 22. This is to be expected, since misdemeanors are often much less complex than felonies.

(TABLE 22)

Fifty percent of the chief defenders report that a full-time attorney provides representation in less than 200 misdemeanors per year exclusively, on the average, as is shown in Table 22. However, 29% of the reporting chief defenders state that their misdemeanor attorneys have a caseload in excess of 400 cases per year per attorney. And, 13% report that full-time attorneys handle in excess of 500 misdemeanors per year with a little less than half of these chiefs reporting that a full-time attorney handles more than 900 misdemeanors per year. The National Advisory Commission recommends a maximum misdemeanor caseload of 400 cases per attorney, per year.[46]

The actual picture may, in reality, be bleaker than the already bleak situation presented. The maximum caseload figure of the National Advisory Commission assumes adequate support services. Even the caseloads that are within the standard range may in reali-

TABLE 22

Average Attorney Caseload for
Attorneys Assigned Specifically to Misdemeanors
(Chief Defender Reports)

Average Misdemeanor Caseload Per Attorney	Full-Time Attorneys
0- 200	50%
201-400	21%
401-500	12%
501-600	4%
601-800	6%
801-900	1%
over 900	6%

Total Number of Responses= 182

ty be excessive because of shortages of support services. Moreover, when the 1972 survey asked the defenders themselves what they believed to be the maximum caseload per attorney, per year, the following was the response:[47]

MAXIMUM EFFECTIVE CASELOAD PER FULL-TIME ATTORNEY	
AVERAGE	
Felony caseload	140
Felony caseload without investigators	97
Misdemeanor caseload	295
MODE	
Felony caseload	100
Felony caseload without investigators	50
Misdemeanor caseload	200
MEDIAN	
Felony caseload	100
Felony caseload without investigators	75
Misdemeanor caseload	225

Thus, it is readily observable that the defenders themselves believe the National Advisory Commission figures to be excessive, particularly the misdemeanor caseload recommendations.

Finally, the National Study Commission on Defense Services criticized the utilization of total year case disposal figures as a measure of excessive caseloads. Instead, the Commission suggested the use of the number of active or open cases each attorney has at a given time, rather than the total year figures used by the National Advisory Commission.[48]

B. Average attorney caseloads in defender agencies serving areas with different population sizes

Using the same reports of chief defenders, Table 23 presents the average attorney caseload for defender agencies serving areas with different population sizes. For full-time attorneys, the reported average felony caseload varies according to the population size of the area being served by the defender agency: as population size increases, so does the reported average attorney

caseload for defender agencies.

(TABLE 23)

The percentage of chief defenders reporting that their full-time attorneys maintain average felony caseloads of less than 50 cases per year steadily decreases as the population size of the area being served increases from under 50,000 persons (52% of the chiefs) to between 250,000 and 500,000 persons (7% of the chiefs). In fact, no chief defender from an agency serving an area with a population of more than 500,000 persons reported an average full-time attorney felony caseload of less than 50 felony cases per year. The inverse trend occurs in the highest reported average attorney felony caseloads. The percentage of chief defenders reporting an average full-time attorney felony caseload in excess of 175 felony cases per year steadily increases as the population size of the area being served by the defender agency increases. Only 3% of the chief defenders from agencies serving areas with a population size of less than 50,000 persons report an average full-time attorney felony caseload of more than 200 felony cases per year, compared with 25% of the chief defenders from agencies serving areas with populations of more than one million persons.

It is in the highly populated areas that excessive attorney caseloads seem to be the most prevalent, using the National Study Commission guidelines to define "excessive." However, once again, the actual situation may be bleaker than presented by the statistics above. Rural defender agencies usually find that greater distances must be traveled between the various courts in which

TABLE 23

Average Felony Caseloads per Full-Time Attorneys
By Population Size of Area Served by the Defender Agency
(Chief Defender Reports)

Population	Average Full-Time Attorney Caseload							
	0-50	51-100	101-125	126-150	151-175	176-200	> 200	
< 50,000	52%	22%	8%	12%	3%	-	3%	(60)
50,001-100,000	19%	18.5%	18.5%	11%	7%	11%	15%	(27)
100,001-250,000	8%	23%	20%	8%	5%	8%	28%	(39)
250,001-500,000	7%	18%	7%	14%	14%	11%	29%	(28)
500,001-1 million	-	16%	16%	-	26%	16%	26%	(19)
over 1 million	-	19%	25%	19%	12%	-	25%	(16)

Total Number of Responses= 189

they appear. Urban courts are often centralized, or if not centralized, the volume in each courtroom is sufficiently great to require the assignment of one attorney to a courtroom on a full-time basis, and thus eliminating travel entirely. Moreover, as pointed out above, the rural defender is the least likely to have support services, and as a result, cannot efficiently handle his caseload by delegating some of the work.

In summary, it seems relatively safe to conclude that excessive caseloads for defender agencies are more likely to be the case than the reported attorney/caseload figures would indicate.

C. Average attorney caseloads for different classifications of defender agencies.

Since excessive caseload has an impact upon effective representation,[49] it was decided that caseloads should be compared with the characteristics of defender agencies to determine if there was a significant relationship between the type of defender agency and excessive caseload for the category of defender agency. Table 24 presents the reported average attorney caseloads for full-time attorneys assigned to only felonies in defender agencies of different varieties. As the data indicate, the governmental public defender agency is the least likely to maintain the lowest average attorney/felony caseloads.

(TABLE 24)

Thirty-one percent of the public defender agencies report average full-time attorney caseloads of less than 100 felonies per year, compared with 76% of the private attorneys under contract with the surrounding governmental unit; 41% of the private defender

TABLE 24
Average Felony Caseloads
For Full -Time Attorneys
In Different Defender Agencies

(Chief Defender Reports)

Type of Agency	Average Felony Caseload Per Full-Time Attorney							
	0-50	51-100	101-125	126-150	151-175	176-200	over 200	
Public Agency defender	14%	17%	15%	11%	11%	8%	24%	(123)
Private Attorneys Under Contract	43%	33%	5%	14%	0	0	5%	(21)
Defender Corporation	32%	9%	18%	18%	0	5%	18%	(22)
Criminal Divisions of Legal Aid Societies	0	33%	22%	0	33%	11%	0	(9)

Total Number of Responses= 175

corporations; and, 33% of the criminal divisions of legal aid societies. At the higher end of reported attorney caseloads, 32% of the public defender agencies report average full-time attorney/felony caseloads of more than 175 felony cases per year compared with only 5% of the private attorneys under contract, 23% of the private corporations and 11% of the criminal divisions of legal aid societies. Later in the report, suggestions are offered as to why the private defender appears better able to resist pressures to raise caseloads per attorney.

14. Defender System Budgets.

The funding procedures for defender agencies vary. Government agencies receive appropriations through the regular state or local legislative budgeting and appropriation processes. The private corporations and contracting law firms, are either reimbursed on a case-by-case or trial basis, as each client's file is closed, or on a contractual gross amount basis. Defender agencies can receive their funding through appropriations or reimbursement; from state, local and/or federal funding agencies; and, in some instances, from private sources or a combination of other sources.

The annual operating budgets for 1974 for the responding defender agencies are reported in Table 25. As shown in the Table, 50% of the defender agencies report annual budgets of less than $60,000; 32% report budgets of less than $30,000; and 18% report budgets of between $30,000 and $60,000 for 1974. In an ascending order, 14% of the defender agencies report annual budgets of between $60,000 and $120,000; 9% between $120,000 and $200,000; 13%, between $200,000 and $500,000; and 7% report annual budgets of between

$500,000 and one million dollars for 1974.

(TABLE 25)

Only 25% of the defender agencies which reported their yearly budgets indicated that the total budget includes expenses for salaries, rent, expert consultant fees, travel and court-related items. Six percent of the defenders indicated that their budgets only provide for personnel. The remaining defenders indicated that their budgets provided for all expenses except: rent(6%); expert consultant fees (10%); travel (1%); and a combination of the above three items, 45%. As to rent and utilities, defender agencies located in public buildings such as court houses, will usually not receive appropriations for such items since they are items in a public budget for all housed governmental agencies. Thus, the budget figures of many defender agencies do not reflect the total expenditure for indigent defense services in their areas of service, and should not be used as the sole indicator of defender activity. Moreover, the local or state contribution in excess of any state budget will vary from state to state and county to count.

In addition to a defender agency's regular operating budget, it is possible to supplement the budget with grant funds from a governmental or private agency, or with voluntary services or work-study programs. It is interesting to note that the awarding of grants to defender agencies occurs with the greatest frequency in areas of over one million persons, as indicated in Table 26.

(TABLE 26)

TABLE 25

Total Operating Budget of Defender Agencies*

	Under $30,000	30,000-60,000	60,000-120,000	120,000-200,000	200,000-500,000	500,000-1 million	Over $1 million	Number of Responses
Small and Non-Central	45%	17%	12%	10.5%	10.5%	1%	4%	(68)
Small and Central	32%	17%	16%	10%	15%	8%	2%	(196)
Large and Non-Central	-	-	-	-	33%	50%	17%	(6)
Large and Central	-	-	8%	-	8%	-	84%	(12)
All Defender Agencies	32%	18%	14%	9%	13%	7%	7%	(329)

Total Number of Responses= 283

* The budgets are for the most recent record keeping year including fiscal and calender year 1974.

TABLE 26

"Did the Defender Agency Receive Any Grants During the Last Record-Keeping Year?"

	Yes	No	
Small and Non-Central	28%	72%	(93)
Small and Central	29%	71%	(230)
Large and Non-Central	83%	17%	(6)
Large and Central	62%	38%	(13)

Total Number of Responses= 342

The likelihood of a smaller defender agency increasing its budget through grant funds in infrequent indeed. These small agencies may not have sufficient staff resources or expertise to develop and process grant applications.

Twenty-eight, or 110, of the responding defender agencies reported that their agencies utilize personnel that are not included in the defender agency payroll. These agencies have available, through other funding sources or agreements, a variety of personnel to assist in non-fee defense services, including: laywers (9%); law students (31%); investigators (8%); social workers (6%); office administrators (24%); and a combination of all types (22%).

15. Staff Attorney Preparation Time.

Each staff attorney respondent was asked to estimate the average number of work hours, excluding court time, that he spends on felony and misdemeanor cases. Table 27 presents the responses.

(TABLE 27)

In felony matters, most defender staff attorneys (51%) will reportedly spend more than 16 hours, on the average, in the preparation of a case. Twenty-one percent reportedly spend an average of 11-15 hours per felony case and 12% spend between 6-10 hours per case. Fourteen staff attorneys, or 6%, reported an average preparation of between 1-3 hours per felony case, and another 23 staff attorneys, or 10%, reportedly devote between 4-5 hours to the preparation of a felony case.

The average preparation time in misdemeanor cases is considerably lower than for felony cases. Most defender staff attorneys

CONTINUED

1 OF 3

TABLE 27

Average Preparation Time
of Staff Attorneys

Felonies	
1-3 hours	6% (14)
4-5 hours	10% (23)
6-10 hours	12% (27)
11-15 hours	21% (47)
16-25 hours	16% (36)
over 25 hours	35% (78)
Total	100% (225)

Misdemeanors	
1 hour	28% (98)
2 hours	31% (107)
3-4 hours	27% (91)
5-6 hours	7% (23)
7-9 hours	2% (8)
10-15 hours	4% (15)
over 15 hours	1% (2)
Total	100% (344)

(59%) report that they spend fewer than three hours in the preparation of a misdemeanor case. Another 27% of the staff attorneys reportedly devote between 3-4 hours to the preparation of a misdemeanor case. Only 14% of the staff attorneys report that they spend five or more hours per case; two staff attorneys (1%) indicated that they spend more than 15 hours in the preparation of a misdemeanor case.

E. RELATIVE COSTS OF PUBLIC DEFENDER AND ASSIGNED COUNSEL SYSTEMS.

It has been the custom of those who observe the differing types of counsel serving the indigent defendant to seek a definitive measure of the relative "costs" of appointed counsel and defender systems. Most often, a figure called "average cost per case" is used as the measure of which type of counsel or system is "less costly," "more economical," or "more cost-effective."

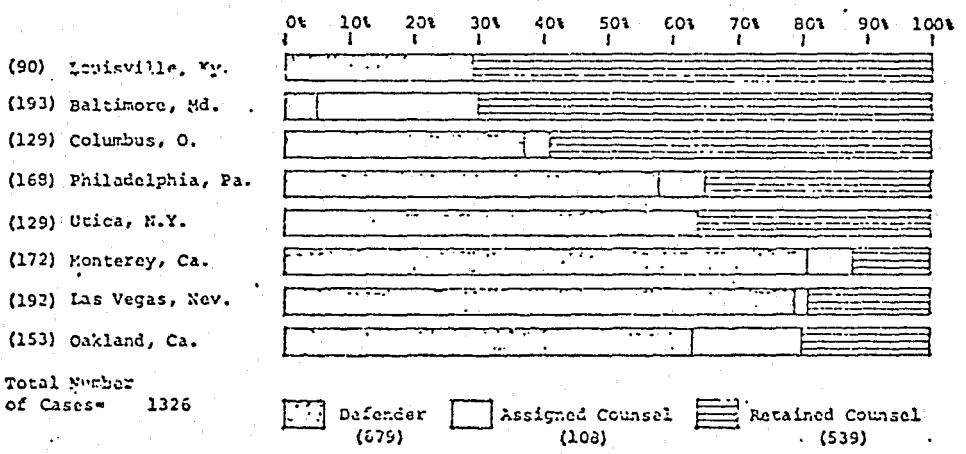
Eight defender agencies were selected for field research to provide on-site data collection for a comparison of the relative costs of assigned counsel and public defenders. In all but one site (Jefferson County, Louisville, Kentucky), private assigned counsel were appointed to represent a certain percentage of the non-fee criminal caseload. The level of assigned counsel involvement in each of the sites ranges from under 2% of the entire non-fee criminal caseload to about 31% of the caseload, as illustrated in Table 28.

(TABLE 28)

Three of the sites appoint private counsel only where multiple

Table 28

Distribution of Docket Sample of Cases
By Type of Counsel



defendants create a conflict of interest. Three other sites appoint private counsel to represent all homicide, rape and other sensational or publicity-laden cases in which the accused cannot afford to retain a lawyer. In only one site did the assigned private assigned counsel receive appointments to a thorough mixture of offenses and defendants; in that site, the defender agency provides representation in very few felonies of any type. The defender agency in question did provide administrative services to the panel of assigned counsel.

In all the sites, both classifications of counsel, defender and assigned counsel, receive their funding from the same source: a public agency. All of the assigned private counsel and three of the defender agencies receive their funding through reimbursement, while four of the defender agencies receive their funding through annual appropriations, as indicated in Table 29.

(TABLE 29)

At each site, intensive data-gathering was conducted to yield the most accurate information on the expenses and the caseloads of each type of counsel. Fiscal year 1974 was selected for the time period of comparison, and wehre offices reported on a calendar year basis, the calendar year 1974 was used. For the assigned counsel in each of the sites, the number of appointments and actual reimbursements for fiscal year 1974 were recorded from the appropriate data source, the auditor's office. For the defender agency in each site, the yearly caseload and operating expenses for fiscal year 1974 were collected from the agency itself. A comparison of

TABLE 29

Method of Funding of the Defender Agency and Assigned Counsel in Each of the 8 Field Sites

	Source of Funds		Method of Payment	
	Defender	Assigned Counsel	Defender	Assigned Counsel
Louisville, Kentucky	County	No Provision	Annual Appropriation	
Philadelphia, Pennsylvania	City and Federal	City	Annual Appropriation	Reimbursement for Actual Expenses
Monterey, California	County	County	Annual Appropriation	Reimbursement for Actual Expenses
Columbus, Ohio	City and County	City	Annual Appropriation by City; Reimbursement County	Reimbursement; Flat rates by Type of Disposition Maximum= $1500
Las Vegas, Nevada	County and Federal	County	Annual Appropriation	Reimbursement Maximum; Misdemeanor $ 200 Felony $1000 Murder $2500
San Jose, California	County	County	Annual Appropriation	Reimbursement for Actual Expenses
Utica, New York	County	County	Reimbursement	Reimbursement; Hourly Rates: $10/hr out of Court $15/hr in Court
Baltimore County Maryland	State	State	Reimbursement per case basis	Reimbursement Maximum: Non capital $ 500 Capital $1000

the agency itself. A comparison of the cost and caseload data collected in the eight field sites follows.

By combining data obtained in the field research, a cost per case figure for defenders and assigned counsel systems in each of the areas can be derived. Table 30 presents the data on the comparative costs of each type of counsel. As the table illustrates the relative costs of assigned counsel and defenders vary from site to site. The widest discrepancy in costs occurs in Philadelphia: the cost per case for defender is $29.07 and $562.65 for assigned private counsel. However, in Philadelphia, private counsel is assigned almost exclusively to homicide cases, while the defender agency does not receive any homicide case assignments.

The most similar costs per case are found in Baltimore County, Maryland: the cost per case for the defender is $83.14, and $99.33 for the panel of private assigned attorneys. In Baltimore, however, the defender agency incurs administrative costs for the assigned counsel. Caluclations for the other five sites show that the difference in the cost per case for defenders and assigned private counsel serving the same court systems is startling indeed. In Monterey County, California, the cost per case for the defender office is $62.65, and $640.58 for the assigned private counsel; in Columbus, Ohio, the cost per case to the defender agency is $36.20, and $372.37 for the assigned counsel. In Las Vegas, Nevada, the cost per case for the defender office is $80.91 and $657.19 for the assigned counsel; in Santa Clara County (San Jose), California, the cost per case to the defender office is $93.25 and $367.05 for assigned counsel. Finally, in Utica, New York, the cost per case to the defender office is $108.48 and $219.68 for the assigned

counsel.

(TABLE 30)

One would have to conclude from this cost per case data that the defender method of providing representation to the non-fee criminally accused in these seven sites is substantially more economical than the assigned private counsel system. The discrepancy in costs for the two types of counsel is more apparent when the data is merged from all seven of the sites. Then, the cost per case to the combined seven defender offices is $42.53 and $424.69 for the assigned private counsel appointed to non-fee cases in the same seven sites.[50]

A summary analysis of these cost per case figures reveals that a cost effectiveness assessment must take into account the scope of services provided by the defender agency and the assigned counsel, a comparison of the kinds of cases represented by each type of counsel, and the method of disposition for their respective caseloads. A cost effectiveness analysis which does not include a specification of these factors cannot determine that the cost per case for assigned counsel and defenders is for comparable services, caseloads and dispositions. For instance, the widest discrepancy in costs per case for the two types of counsel occurs in Philadelphia, an area in which the assigned private counsel are appointed primarily to murder cases and other sensational or publicity-laden cases. Furthermore, in Baltimore County, Maryland, where the costs per case for each type of counsel are the most similar, the panel of private assigned counsel is appointed to a thorough mixture of

TABLE 30
Comparative Cost Per Case for Defenders
and Assigned Counsel in 7 Field Sites
(1974 Reporting Year)

Site	Defender			Assigned Counsel		
	Budget	Caseload	Cost Per Case	Budget	Caseload	Cost Per Case
Philadelphia, Pa.	$2,826,600	97,218	$29.07	$1,145,561	2036	$562.65
Monterey, Ca.	365,498	5,742	63.65	84,556	132	640.58
Columbus, O.	233,648	6,454	36.20	45,429	122	372.37
Las Vegas, Nev.	399,218	4,934	80.91	126,180	192	657.19
San Jose, Ca.	1,632,876	17,510	93.25	185,358	505	367.05
Utica, N.Y.	103,704	956	108.48	4,174	19	219.68
Baltimore, Md.	180,091	2,166	83.14	96,061	967	99.33
All Sites	$5,741,635	134,980	$42.53	$1,687,319	3973	$424.69

all types of offenses and defendants. Moreover, the docket data obtained from these seven sites indicates that the assigned counsel go to trial in a higher proportion of their cases than the defenders, as will be discussed more fully in Chapter V. A higher trial rate (26% of the assigned counsel cases and 13% of the defender cases) coupled with the appointment of assigned counsel to different types of cases may explain the dissimilarity in costs between assigned counsel and defenders, and militate against any conclusions about which type of counsel is more economical. If trials take more attorney time and if the more serious offenses require a host of support functions to the defense, such as investigators or expert witnesses, it would seem to follow that the assigned counsel system, in which appointments to the more serious cases and trial dispositions are high, would be appreciably more expensive than the defender systems.

An alternate method of comparing the relative costs of defender systems and appointed counsel systems is to concentrate on total indigent defense system expenditures and the apportionment of them to the two classifications of counsel. Table 31 presents the comparative proportions of indigent defense caseloads and expenses for appointed counsel in seven of the field sites.

(TABLE 31)

When all appointed counsel expenses are merged, they represent 22.7% of the total expenses for indigent defense in the seven sites. But when all appointed counsel cases are merged, they account for only 2.9% of the total indigent defense caseload in the seven sites.

TABLE 3

Comparative Proportions of Indigent Defense Caseload and Expenses for Appointed Counsel in each Jurisdiction

From Annual Figures for 1974

Jurisdiction	% of Indigent Caseload	% of Indigent Expenses	Ratio of Cases to Expenses
Baltimore County	30.9% (967)	34.8%	1:1
Utica, New York	2.0% (19)	3.9%	1:2
Las Vegas, Nevada	3.7% (192)	24.0%	1:6
Columbus, Ohio	1.9% (122)	16.3%	1:9
Monterey, California	2.2% (132)	18.8%	1:9
Philadelphia, Pennsylvania	2.1% (2036)	28.8%	1:14
All Jurisdictions	2.9% (3,468)	22.7%	1:8

The average proportion of appointed counsel expenses exceeds the average proportion of cases by almost eight times. By examining the individual figures for each site, it does seem to cost a defense system more money to maintain an appointed counsel segment than to have the defender agency handle the majority of indigent criminal cases. The panel of assigned counsel in Baltimore County, who were appointed to 30.9% of the surrounding area's indigent caseload, received 34.8% of the area's total indigent defense budget; while the appointed counsel in Columbus, Ohio, accounted for only 1.9% of the indigent representation and received only 16.3% of the total indigent defense expenditures. The figures indicate that there is a substantial cost in supporting private bar involvement in indigent defense work.

F. SUMMARY.

The preceding section has presented a composite picture of defender agencies serving the state trial courts of this country. From the data, it is readily observable that there exists a variety of relatively complex structures identified as offices or agencies to provide defense services to persons charged with a crime who are unable to employ their own attorneys. Because of the recent development of the concept of legal representation for all persons charged with a crime, one may confidently predict that the full panoply of defender agencies has yet to be reached. As yet, there is no final agreement as to which variety of defender agency is best able to provide high quality criminal defense services at the lowest cost. However, the data available indicate that in terms of cost, the organized defender office provides the lowest cost

cost per case. Hopefully, however, this is not dispositive of the issue, for of paramount importance is the quality of service. Indeed, if the quality of service sinks to too low a level, a conviction cannot stand.[51]

It was somewhat startling to find that since the 1972 defender survey there had not been any increase in the number of organized defender offices. However, there was a definite shift from part-time defenders toward full-time defenders, and a shift from private agency systems to public agency systems, which seems to indicate a trend toward institutionalization and relative permanency for defender organizations.

However, it appears that a substantial number of offices is undertaking excessive caseloads and devoting inadequate time to the preparation of cases, according to accepted standards, as well as what the defenders themselves report as maximum effective caseloads and preparation time. Many offices are understaffed in support services, which also adds to the already burdensome caseload levels. Accordingly then, one must pause to ponder the quality of legal defense services for the poor in criminal cases. Much of the data regarding caseloads and inadequacy of support staff tend to indicate that the legal services provided for poor persons in many areas is of a low quality. Much of the remainder of this report addresses some aspects of this problem, for instance, the timing of case entry by non-fee criminal lawyers and the manner in which they dispose of cases.

APPENDIX 1

to

CHAPTER III

Average Caseloads for Part-Time Attorneys Who Handle Only Felonies (Chief Defender Reports)

Average Felony Caseload Per Attorney	% of Chief Defenders
0-50	41%
51-100	29%
101-125	10%
126-150	8%
151-175	6%
176-200	2%
over 200	4%
	100%

Total Number of Responses=153

Average Caseloads for Part-Time Attorneys Who Handle Only Misdemeanors (Chief Defender Reports)

Average Misdemeanor Caseload Per Attorney	% of Chief Defenders
0-200	81%
201-400	14%
401-500	3%
501-600	1%
601-800	0
over 800	1%
	100%

Total Number of Responses=147

Average Felony Caseloads for Part-Time Attorneys
in Different Types of Defender Agencies

Type of Agency	Average Felony Caseload Per Part-Time Attorney							
	0-50	51-100	101-125	126-150	151-175	176-200	over 200	
Defender	35%	28%	14%	8%	9%	1%	5%	(86)
Private Attorneys Under Contract	47%	30%	2%	9%	2%	5%	5%	(43)
Defender Corporation	46%	36%	18%	0	0	0	0	(11)
Criminal Divisions of Legal Aid Societies	0	0	0	50%	0	50%	0	(2)

Total Number of Responses= 142

Average Felony Caseloads for Part-Time Attorneys
in Agencies Serving Areas of Different Population Sizes

Population	Average Part-Time Attorney Caseload							
	0-50	51-100	101-125	126-150	151-175	176-200	> 200	
< 50,000	54%	24%	9%	6%	4%	1%	2%	(86)
50,001-100,000	23%	32%	15%	15%	3%	6%	6%	(34)
100,001-250,000	21%	38%	8%	4%	17%	4%	8%	(24)
250,001-500,000	14%	57%	-	14%	14%	-	-	(7)
500,001-1 million	100%	-	-	-	-	-	-	(2)
over 1 million	-	-	-	-	-	-	-	(0)

Total Number of Responses= 153

FOOTNOTES

1. See American Bar Association Standards Relating to The Defense Function, 3.5, p. 211; see also People v. Smith 27 Ill 2d. 632, 230 N.E. 2d (1974); Commonwealth v. Resinger 432 Pa. 2d 497, 48 A.2d 55 (1968), as examples of Conflict of Interest situations. The Maricopa County (Phoenix, Arizona) Public Defender presumes conflict in all multiple defendant cases and if two or more defendants in a single charge require appointed counsel, the defender represents one defendant and assigned counsel the other.

It is difficult to imagine a multiple defendant case where there is not some conflict. At the worst, a lawyer must consider the possibility of cooperation with the prosecution in exchange for immunity or leniency and presumably should advise his client of this in any multiple defendant case, even if the client initially states he is innocent. If a conviction occurs either through a plea of guilty or contest, it would seem that the comparative capability and background of the offenders would always be a consideration. Moreover, in considering trial strategy some conflicting tactics and defense almost always must be at least considered. Accordingly it is difficult to imagine any situation of multiple defendants where some conflict does not arise.

See also Bruton v. United States 391 U.S. 123 (1968).

2. See also Lynch-Neary, B. and Benner, L. The Other Face of Justice, National Legal Aid and Defender Association, Washington D.C. 1973, pp. 38-39. Argersinger v. Hamlin 407 U.S. 25 (1972).

3. For a brief description and characterization of the juvenile court, see In Re Gault 387 U.S. 1 (1967); Fox, S. "Juvenile Justice Reform: An Historical Perspective", 22 Stan. L. Rev. 1187 (1970); Paulsen, M. "Juvenile Courts, Family Courts, and the Poor Man", 54 Calif L. Rev. 694-698 (1966).

4. Collateral attack remedies, such as Habeas Corpus and post conviction action and the like, are remedies available to the accused in addition to the appellate remedies. They differ from appellate remedies in that matters not appearing in the original trial record may be raised as well as effective assistance of appellate counsel.

See also Stone v. Powell 428 U.S. 465 (1976).

5. Clark County (Las Vegas) and Reno, Nevada have defender offices independent of the state agency.

6. Lynch-Neary, Benner, supra note 2.

7. Argersinger v. Hamlin, 407 U.S. 25 (1972).

8. The 399 responding defender systems provide representation in geographical areas in which the total U.S. population is 141,019,000. The 1975 estimated U.S. population is 212,302,000, U.S. Bureau of the Census, Statistical Abstract of the United States 1975 (96th edition) Washington, D.C., 1975, p. 5.

9. Lynch-Neary and Benner, supra note 2, at 17.

10. Id. at 16.

11. National Advisory Commission on Criminal Justice Standards and Goals, Courts, 13.5, pp. 263-264, 13.7, 267. American Bar Association Standards Relating to Providing Defense Services, 3.2 pp. 36-37.

12. Lynch-Neary and Benner, supra note 2, at 16.

13. Wisconsin recently enacted a state defender bill that will result in the termination of the contractual arrangement between the City and the Legal Aid Society and the emergence of publicly employed defenders for the City.

14. Cleveland, Ohio, is also in the process of shifting from a private defender agency to a County defender agency as a result of recently enacted Ohio legislation.

15. The Columbus, Ohio, contract with the private legal aid society agency has also recently been terminated and a county defender agency is now in its place.

16. See American Bar Association Standards Relating to Providing Defense Service, 14, pp. 19-22; Standards Relating to The Defense Function, 1.1, pp. 171-178; National Advisory Commission on Criminal Justice Standards and Goals, "Courts," 13.8, pp. 268-9.

17. Supra note 2, at 17.

18. See Dimock. E. "The Public Defender: A Step Toward a Police State" 42 American Bar Association Journal 219-221 (1956).

19. Courts, 13.8, pp. 268-269.

20. 1.4, pp. 19-22.

21. Guidelines for Legal Defense Systems in the United States, National Legal Aid and Defender Association, Washington, D.C., 1976, pp. 506-507.

22. Courts, p. 268; Providing Defense Services, p. 21; Guidelines for Legal Defense Systems in the United States, p. 506-507.

23. Other Face of Justice, supra note 2, at 17.

24. Argersinger v. Hamlin, 407 U.S. 25 (1972).

25. This was approximately the same finding in the 1972 defender survey.

26. See Arkies v. Purdy, 322 F. Supp. 38 (S.D. Fla., 1970), where the court held that defendant had a right to a hearing on bond even though the county applied a bond schedule established by rule of court.

27. Singer, S., "Bond Motions From the Defense Perspective", Public Defender Sourcebook, Practicing Law Institute, New York City, p. 223 (1976).

28. For an example of the problems that kind of lawyer assignment system may encourage, see Williams v. Twomey, 510 F. 2d 634 (7th Cir., 1975); Moore v. United States, 432 F. 2d 730 (3rd Cir., 1970); Caplinger v. State, 271 So. 2d 780 (Fla. 1973); Commonwealth v. Webster, 320 A.2d 115 (Pa. 1921). See also Eisenstein and Jacob, Felony Justice, 1977, where the authors conclude that stability of court room assignment of prosecutors and defenders has significant impact upon case disposition procedure, i.e. produces a very high rate of guilty pleas.

29. Chicago Bar Association Bar Record, December 1977.

30. Guidelines for Legal Defense Systems in the United States, supra, note 21, pp. 462-466. See also People v. Martinez, 302 F.2d 643 (Cal. 1956); Moore v. United States, 432 F. 2d 730 (3rd Cir., 1970); U.S. ex rel Thomas v. Zelker, 320 F. Supp. 525 (S.D.N.Y. 1971).

31. Guidelines for Legal Defense Systems in the United States, supra, 5.11, 520.

32. Guidelines for Legal Defense Systems in the United States, supra, 5.11, 520, note 3, p. 21.

36. "Standards Relating to Providing Defense Services", supra, p. 22; "Courts", supra, 13.14, pp. 280-281.

37. "Standards Relating to the Defense Function", supra, 4.3 (d), p. 229; "Commentary" p. 231; "The Code of Professional Ethics", American Bar Association EC 5-9, 10, DR 5-102. See also Jackson v. United States, 297 F. 2d 195, 198 (D.C. Cir. 1961).

38. The Other Face of Justice, supra note 2, at 70-71.

39. Id. at 60.

40. See "Guidelines for Legal Defense Systems in the United States", supra note 19, at 72-104. See also Ligda, P., "Work Overload and Defender Burnout" 35 NLADA Briefcase 1, 5 (1977).

41. See Ligda v. Superior Court 5 Cal.App.3d 811, 827-828 (1970). See also "Standards Relating to the Defense Functions", 1.2(d), supra, pp. 178-179, 181; "Courts", supra, 13.12, pp. 276-277; see also "Guidelines for Legal Defense Systems in the United States", supra, pp. 406-412; LaFrance, "Criminal Defense Systems for the Poor", 50 Notre Dame Law 41, 92-97 (1974); "Courts", 13.2 pp. 276-277.

42. The Other Face of Justice , supra note 2, at 29.

43. "Courts", supra, 13.12, pp. 276-277.

44. Other Face of Justice , supra note 2, at 29.

45. Guidelines for Legal Defense Systems in the United States, supra note 19, at 406-412.

46. "Courts", supra, 13.12, pp. 276-277.

47. Other Face of Justice, supra note 2, at 29.

48. Guidelines for Legal Defense Systems in the United States, supra note 19, at 410-412.

49. Id. at 406-412.

50. See LaFrance, "Criminal Defense Systems for the Poor", 50 Notre D. Law 41, 60 (1974).

51. Powell v. Alabama, 287 U.S. 45 (1932); McMann v. Richardson, 397 U.S. 759, 770-771 (1970); Baxter v. Rose, 523 S.W. 2d 930 (Tenn. 1975); Risker v. State, 523 P.2d 421 (Alaska 1974); Harris v. State, 293 A2d 291 (Del. 1972); Taylor v. State, 282 So.2d 901 (Ala. 1973); United States v. DeCoster, 487 F. 2d 1197 (D.C. Cir. 1973).

See generally: Lichtman, J. "Constitutional Requirements of Appointed Counsel in Criminal Cases", Singer Ed., Public Defender Sourcebook, Practicing Law Institute, New York City, 1976.

CHAPTER IV

DEFENDER CASE ENTRY

A. INTRODUCTORY NOTE.

The representation of indigent criminal defendants begins at various points in the proceedings against the accused. Although the trend in constitutional case law has been toward the requirement that public representation be provided poor people virtually from the time of arrest to release,[1] the reality strongly suggests otherwise. Indeed, rarely does one find a lawyer for an indigent client at the police station immediately after the arrest for police interrogation consultation.[2]

For purposes of this discussion, the undertaking of legal representation in a case by the lawyer is categorized as early and late entry. Of course, there is no such dichotomy in actual practice, and entry that is late cannot be defined in absolute terms nor with precision. However, for the purposes of this study, it would appear that a meaningful distinction can be drawn between degrees of early and late undertaking of client representation. For the purpose of this report, early undertaking of client representation is case entry at the police station interrogation and the witness-suspect confrontation, and sufficiently in advance of the initial court appearance to be prepared adequately for that court appearance. It is entry at least by the time a complaint is filed against an arrested person.[3]

Concededly, the term "adequately prepared" is itself imprecise. Where the initial court appearance is within 24 hours after the arrest and includes also a probable cause proceeding, it may be

impossible for the defense lawyer to be adequately prepared even if he undertook the client's case at the police station level and worked continuously to the hearing. The police may have developed the case over a period of time and spent weeks gathering evidence before making the arrest and the defense lawyer may find it impossible to meet that preparation, even at the probable cause hearing level, in 24 hours. But at least the defense lawyer can take an advocate's role in determining conditions of pre-trial release and, if tactically sound, present cogent arguments for a continuance of the probable cause proceeding.

On the other hand, this is not to say that late entry, entry at or after the initial court proceeding, is too late in a legal sense so that the trial is fatally tainted and a reversal likely, if the defendant is convicted.[4] But late entry, as defined here, often does have a detrimental impact upon the defense.

B. EARLY ENTRY IS NECESSARY FOR EFFECTIVE REPRESENTATION.

Consider the plight of one accused of a misdemeanor, the sort of minor misdemeanor where a conviction would result realistically in a jail sentence of a day or two, or even a week. That individual may appear in court within one to three days after arrest, or in some rural areas, several days after arrest. In most jurisdictions, counsel for the poor person does not enter the case on behalf of the defendant until at or after the court appearance, for entry must await judicial appointment. Where counsel and defendant meet in court for the first time, and the charge is a minor misdemeanor, the right to counsel enunciated in Argersinger v. Hamlin[5] is no more than an empty gesture. Consider the alternatives con-

fronting the defense. The accused person may plead guilty and perhaps receive a sentence of time already served. In that case, the misdemeanant, with a sigh of relief, scurries from the courtroom immediately. Or, the defendant may receive a sentence of additional time, 24 hours, two days, or whatever.

But what happens in the case of a defendant who is innocent, persists that he is innocent or has a viable defense? In many instances, time will be necessary for counsel to adequately prepare the case. Hence, a continuance will be necessary. In that event, the accused, if he cannot make bond, will remain in jail until the new court date, a week later, two weeks later, sometimes even a month later. Even if the defendant is acquitted at the next court appearance, his incarceration period during the continuance delay may exceed any sentence that might have been imposed upon an immediate plea of guilty; his victory, then, is in the very sense of the word, a pyrrhic one. The total incarceration time awaiting trial may easily exceed the post-sentence incarcerated time upon a conviction following a plea of guilty. To one confronted with such an alternative, and who cannot meet the conditions of pretrial release in a jurisdiction that does not provide counsel until the court appearance, the right to counsel is at best a meaningless gesture, and at worst, viewed as a cruel hoax that further alienates the accused person from society.

The defense lawyer cannot be the vigorous advocate for the accused, for he does not know the case; instead, the lawyer plays the role of the bargainer at the outset, and not a very effective one at that, because the impediment of his unfamiliarity with the case and the client precludes even effective plea bargaining. Iron-

ically, though it would seem obviously essential to have the accused represented well in advance of the initial court appearance in misdemeanor cases, this survey found that only 15% of the clients of the reporting defender agencies had their cases undertaken by the defender in advance of the initial court appearance.

Of course, these situations might be somewhat alleviated with the liberal use of alternatives to money bond, as a condition of pre-trial release. But relatively very few courts have very extensive alternatives to money bond practices. And even when there is a liberal use of alternatives to money bond, not all poor people charged with misdemeanors can obtain conditional release pending trial. In any event, even for the bonded defendant, delay of the case to another day works a hardship, and unnecessarily burdens courts, unduly delays case disposition, and discourages civilian witnesses and police officers. Thus, not only is the defendant harmed, but the entire system suffers because of the delayed entry of defense counsel for poor persons accused of crimes.

Concededly, pre-court appearance case entry by the defense lawyer does not assure that the case will be disposed of at that first appearance. But at least when the lawyer undertakes the representation early there will be an opportunity to be prepared at the initial court appearance and to dispose of the case satisfactorily. Courtroom entry destroys any possibility for proper preparation for that initial appearance.

The problems are similar for the poor person charged with a more serious crime in a jurisdiction that utilizes a probable cause hearing procedure similar to that employed in Coleman v. Alabama.[6] In many jurisdicitons the lawyer is not appointed until the day of

the hearing. The probable cause hearing must be delayed if counsel is to be properly prepared, or the hearing held with counsel unprepared. In many instances, however, the matter will in fact proceed with counsel appointed only moments earlier, or unprepared counsel, on the basis that the probable cause hearing is not dispositive of the issue of guilt or innocence. But unprepared defense counsel at the probable cause hearing can have an adverse impact on the trial, for valuable discovery opportunities are lost. Also lost is the possibility of permanent recordation of key witness' testimony at a chronological time much closer to the occurrence, when the memory is freshest and stories less likely to be irrevocably fixed that at trial, which is likely to be months later.

Moreover, another ramification of appointing counsel as late as the preliminary hearing occurs when a key prosecution witness testifies at the probable cause hearing, and later becomes unavailable for trial. In that event, state law may properly provide that preliminary hearing testimony of such a key witness can be introduced against the accused at trial providing the accused was represented at the probable cause hearing.[7] Because of this potentiality, ineffectual cross-examination by an unprepared defense counsel at the probable cause hearing may devastate the defense at trial.

Unpreparedness for the initial hearing to set bond for both and felony and misdemeanor charged client may also severely hamper the defense. In that situation, the defense attorney has no opportunity to contest any unfavorable conclusions of the bail bond investigator, if the court utilizes such a person, or the police statements and prosecutor's recommendation. Nor can defense coun-

sel effectively present convincing evidence that the terms of pre-trial release should be within the reach of the accused, or prepare viable alternatives to money bond as a condition of pre-trial release. Investigation of family and community ties, job situation, and so forth, must be done in advance of the hearing. Of course, defense counsel can move to lower bond at a later time when he is better prepared. But judges are often reluctant to overrule their brethren in the preliminary court , or to assume the risk of bonding out a previously incarcerated suspect.

But even if the bond terms are altered to facilitate release, often irreparable damage has been done by even a relatively short period of incarceration in the pre-trial stage. The accused may lose his job, the family is disrupted and the stigma of jail incarceration attaches. Perhaps the most devastating damage is the delay of investigatory activity where the cooperation of the accused is necessary. The assistance of the defendant is usually more critical in appointed cases than when counsel is retained, because of the lack of investigatory resources for appointed counsel, and because of the usual racial or ethnic and social differences between the lawyer and the indigent client and the client's friends and relatives. The lawyer needs the client to assist in moving about the community, to identify witnesses and to gain the confidence of potential witnesses. Possible loss of favorable witnesses and the dimming of the memories of other witnesses who are found, can obscure any possible defense.[8] Studies indicate that defendants incarcerated in the pre-trial stage are convicted more often than unincarcerated accused persons awaiting trial.[9] And when conviction occurs, the person who awaited trial in jail

will suffer a more serious penalty than his convicted counterpart who was free while awaiting trial.[10]

Finally, all of the advantages of police station representation are lost for the poor person who must rely upon court-appointed counsel, whether the client is charged with a misdemeanor or a felony. While Miranda v. Arizona[11] provides that an arrested person who is subject to police station questioning must be provided with counsel, the reality is that the suspect must await the initial court appearance for counsel to be provided. Very few localities have a system which makes available counsel on a regular basis for poor people at the police station. This despite the holding in United States ex rel. Williams v. Twomey,[12] in which the Court held that a police advisement that included the statement: "We have no way of furnishing you with an attorney, but one will be appointed to you, if you wish, if and when you go to court," was fatally defective. (For a contrary holding, see Wright v. North Carolina.[13])

In short, for poor people who are arrested, delaying entry of the lawyer until court appointment is simply inconsistent with the Miranda concept. Yet, in spite of the Miranda ruling, this present study presents convincing evidence that there has been little appreciable movement in this country by defender agencies to systematically provide lawyers at the interrogation stage of the prosecution or at any period prior to the initial court appearance that encourages meaningful advocacy at that appearance.

As critical as it is to provide counsel at the police station for the interrogation of a suspect, it is equally as important to have counsel at the police station for the witness-suspect identi-

fication confrontation. Of course, in Kirby v. Illinois,[14] the Court held that the right to counsel does not attach in the witness-suspect confrontation situation unless the suspect has been formally charged. However, the affluent person may have his lawyer at the lineup. The lawyerless suspect at the police station lineup is at a distinct disadvantage, and the entire truth-finding process of the trial is irreparably impaired. The witness-suspect confrontation may have a number of highly suggestive ingredients discernible only by experienced counsel, which can result in irrevocable mistaken identification. Without the presence of counsel, such suggestive procedures will remain forever lost and never presented to the jury.[15] By the time that the suspect stands before the bench and his counsel appointed, the guilty outcome is a foregone conclusion, for the identification will become more irreversible with each court appearance. Indeed, the presence of counsel for the suspect at the police station may in fact prevent use of suggestive techniques, for defense counsel can point out proper procedures and encourage police to conduct a fair lineup and can contribute immeasurably to the integrity of the entire judicial proceedings that follow. But that opportunity is never exploited according to the results of this study.

In summary, the right to counsel, the right to effective counsel, for poor people is often illusory, because by the time the court-appointed lawyer enteres the case, a whole host of problems may have arisen that defeat effective representation; ones that could have been avoided by timely entry into the case by the defense lawyer.

The affluent accused will have his attorney at the police sta-

tion immediately after arrest. Perhaps, the attorney has even begun representing the more affluent client even prior to the arrest. Then the attorney will be able to observe and monitor the witness-suspect confrontation and suggest changes in the confrontation procedure that will more nearly assure fairness. Counsel's advice will also be available for the police station questioning of the suspect. Investigation can begin immediately, and counsel has the opportunity to be fully prepared for the initial hearing on bond and even demand an early probable cause hearing.

The defense attorney who enters a case before the initial court appearance can even play a part in the charging process, pointing out weaknesses in the state's evidence, or producing evidence of the defendant's innocence. Perhaps the plea bargaining process can begin even before the charge is filed, with the suspect gaining immunity in exchange for his cooperations iwth the prosecution, which may also enormously benefit the prosecution as well as the defendant.

At stake also is the question of confidence in the system by the accused and the public. Can an accused person have assurance that his judicially-appointed attorney will be vigorous and as independent as retained counsel? Studies indicate that clients of defender agencies, and the community, believe that their court-appointed counsel is not as independent of the judiciary and the prosecutor as the privately-retained counsel, and does not vigorously represent the client. Appointed counsel, whether it be a public defender or a private-practice lawyer, does not often have the confidence of his client, to put it mildly.[16]

Perhaps a lack of confidence is inherent in any system where

the client does not freely choose his lawyer, but instead has a lawyer who is a government employee without charge. The appointed counsel who tries the patience of the judge, presents complex motions and issues, refuses to waive a jury and/or plead guilty, engages in protracted litigation, and substantially increases the risk of reversible error, may not be reappointed in other cases, or if a defender, is apt to lose his job. Of course that is not the case in most situations; but nevertheless, this is the image that many poor people have of court-appointed counsel; he simply cannot be as independent and as vigorous as retained counsel.

While this lack of confidence may be inherent in any situation where a person is provided with a free lawyer, the problem is heightened by reliance upon judicially appointed lawyers to the defense of people too poor to retain their own attorney, for the fact of judicial appointment itself may be a signal to the distrustful defendant that the appointed lawyer is too closely associated with the judge to act as an effective advocate against the state. That may well be another result of delayed entry into the case.

Besides protecting the interests of the accused and contributing to his confidence in the system, early representation is an important ingredient in the establishment of the attorney-client relationship. Where the lawyer is with the accused throughout, the accused can have more confidence that his lawyer is thoroughly familiar with the case. Furthermore, the lawyer and the defendant will have more time to become acquainted.

Lastly, and perhaps most importantly, early representation is an indicator of a high quality defense for the accused. Regardless of the disposition, early representation ensures that contested

matters and guilty pleas reflect the effective operation of a high quality defense for the accused. Regardless of the disposition, early representation ensures that contested matters and guilty pleas reflect the effective operation of a fair system of justice. In a system such as that found in the United States, where the affluent criminally charged person is generally represented by counsel immediately after arrest, the criminally accused who cannot afford to hire a private attorney should likewise have the early assistance of counsel if equality under the law is to be achieved.

C. SURVEY RESULTS.

Although early entry is often critical for the defense, only 21% of the defender agencies reported establishing initial contact with the accused in felony cases before a formal court appearance, including police station contact.

The situation in misdemeanors is even bleaker. There, only 15% of the defender agencies reported case entry prior to the initial court appearance. A slightly higher percentage of misdemeanors were reported to have been entered after the initial court appearance (22%) than in felony cases (19%). Yet, those relatively simple cases are the ones that can, and should be, disposed of quickly, at that initial appearance.

(TABLE 32)

As Table 33 illustrates, both small and large defender agencies which provide representation in less than 50% of the surrounding area's total felony caseload generally establish first contact with the accused more often before the first court appearance than

TABLE 32
Time of Entry for Felony and Misdemeanor Cases
(Reported by Chief Defenders)

	Felony Cases	Misdemeanor Cases
Before First Court Appearance	21%	15%
At First Court Appearance	60%	62%
Between First Court Appearance and Trial	19%	22.7%
At Trial	-	.3%
	100%	100%
Total Number of Responses=	341	317

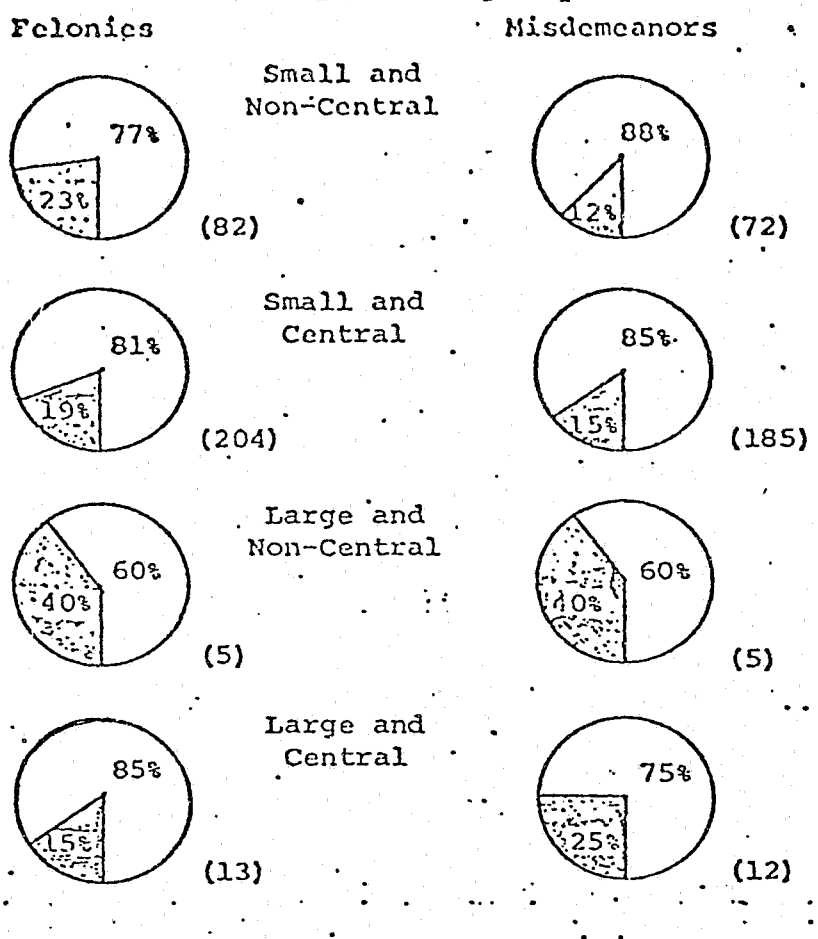
similar-sized defender agencies handling more than 50% of an area's total felony caseload. Thus, 40% of the large non-central defender systems, compared to 15% of the large central ones, and 23% of the small non-central defenders, compared to 19% of the small, central ones, generally make first contact before the first court appearance of the accused. Thus, the results would seem to indicate that higher caseload reduces the opportunity for early case entry. When the caseload pressures compel a reduction in services, the first services that are eliminated are police station representation and the opportunity for competent representation at the initial court appearance.

(TABLE 33)

D. HOW DEFENDERS AND CLIENTS MEET.

To anyone familiar with the defender scene nationally, it comes as no surprise that for poor people charged with an offense, the attorney-client relationship in most jurisdictions does not arise until at or after the initial court proceeding. Accordingly, the information on delay of entry merely confirms what the casual observer already knew. What is important to understand, however, is what accounts for this critical delay phenomenon, so that it may be corrected. To assist in uncovering an explanation, the chief defender's questionnaire asked the respondent to indicate in which of the following ways felony cases usually come to the office's attention: routine jail checks, courtroom detention cell checks, assignment of cases by a judge or judicial representative, or request for services by accused persons or their families and

Table 33
Defender Agency Entry
as to type of agency



friends.

In regular defender activities, "routine jail checks" are procedures by which the defender agency is able to examine arrest lists and/or to seek out eligible persons who are arrested and awaiting their first court appearance in police stations or central jail holding cells. Courtroom detention cell checks occur on the day of or at a court appearance of the accused, and take place at the courtroom holding cells used for the accused who are incarcerated furing the pre-trial stages of the proceedings. This procedure will usually be followed by a courtroom appointment by the presiding judge or some judicial representative.

Several defender agencies, notably those in California, may enter a case upon request of the relatives or friends of the accused or even at the request of the client himself before the arrest.

However, most, 71%, of the chief defenders, reported that their agency usually received cases through judicial assignment, or courtroom detention cell checks; of that group, only 15% entered cases before the first court appearance. On the other hand, 13% of the respondents said that jail checks and requests were the usual method of receiving cases; but of this group, 58% entered cases before the first court appearance. This is illustrated in Table 34.

(TABLE 34)

The data confirms what one might expect, that a defender agency which relies on judicial assignment for its receipt of cases is less likely to enter cases before a court appearance than is its counterpart which makes regular jail checks or receives requests

TABLE 34

Relationship Between How Defender Agencies Receive Cases and Entry Time (Felonies)

	% of Defender Agencies with Pre-Court Entry
Jail Checks and Family Requests	58% (15)
Judicial Assignment and Detention Cell Checks	15% (42)

Total Number of Responses= 297

from outside the justice system. But what factors might account for the fact that most defender offices rely upon judicial assignment and that only a few perform jail checks?

Many defenders interviewed who wait for judicial appointment believe that they have no authority to enter the case without appointment. Moreover, it is convenient to meet the client for the first time in the courtroom, for this reduces the amount of time the lawyer spends of the case, since all clients are initially contacted at a convenient, central location where the defender office is also located. Where judicial assignment is not required, it is possible that available support staff would facilitate the performance of jail checks, since these support persons can perform jail checks more readily that staff attorneys. And, as Table 35 indicates, it seems to be true that defender agencies with a wide variety of support staff are more likely to perform jail checks before a court appearance than are the defender agencies which have no such staff.

(TABLE 35)

The observations in the field phase of the research support this finding: the offices which performed regular jail checks employed non-lawyers whose principal task was to interview clients in the local jail. However, even though the performance of jail checks does result in earlier entry than court appointment, the indigent accused is still unrepresented in the critical police station setting immediately after arrest. No known defender agency provides police station representation on a regular basis. But

TABLE 35
The Availability of Support Staff
By the Method of Felony Case Assignment
To Defender Agencies

	% of Defenders Performing Jail Checks	% of Defenders Relying upon Appointment	
No Support Staff	9%	91%	(23)
Secretary Only	16%	84%	(97)
Combination	9%	91%	(102)
Secretary & Investigator	27%	73%	(51)
Wide Variety of Support Staff	16%	84%	(49)
	Total Number of Responses=		322

jail checks do significantly advance the time of defender case entry.

Drawing on the field research data, it appears that the structure of the court system served by the defender agency and the geographic relationship between court and jails is an important factor in the performance of regular jail checks by the defender staff. If the court system is decentralized, the temporary detention facilities may be decentralized as well. The implications of such decentralization are that when scattered police station holding cells are used for pre-court detention, and these jails are distant from a court and the defender agency office, regular checks of the jails become less feasible. On the other hand, in a centralized court/detention system, if the lock-up jail, where all detained persons are held awaiting a first court appearance, is located in or near the courts and/or defender agency, the defender staff should have an easier time in performing routine checks of the detention facility.

A field trip to Santa Clara County, California, provides an excellent example of a centralized jail for defendants awaiting their initial court appearance facilitating early entry. Here, there is one jail in the county, which is adjacent to the court, which detains all persons accused of a crime who cannot make bond. The defender offices are also only across the street from the jail. Since there is little or no travelling time involved, and only one central holding jail, stationing a staff person in the jail is feasible. Therefore, the defender agency serving that county easily perform regular jail checks and interviews potential clients before a court appearance. Another factor which may operate against

the defender agency conducting regular jail checks is the distance between the jail and the defender office. Part of this may result from the fact that the county compels the defender to use county facilities in the courthouse. But that was not the case of the Philadelphia defender, a private agency that rents its own space. Its offices were close to the courthouse in downtown Philadelphia, but relatively far from the holding jail.

The field research also pointed to the importance of considering the performance of jail checks in conjunction with the defender agency having responsibility in client-eligibility determination. The Santa Clara County defender not only performed jail checks, but it also determined which accused persons were eligible for their defense services; this was the only office visited during the field research which usually entered cases before the first court appearance of the accused. In Monterey County, when the defender determined eligibility, he also entered the case early. But when that responsibility was shifted to the court, early entry practices terminated and case entry was delayed until court appearance. In all other observed systems, judicial determination of eligibility as a characteristic was consistent with the characteristic of late entry.

This field observation confirmed the mail survey results. According to the data from the mail questionnaires, a defender agency's involvement in eligibility determination, either as sole participant or as principal participant, rather than the judiciary determining eligibility, is essential to the agency's making first contact with the accused before a first formal court apperarance. This fact, when joined to the relationship between entry at a pre-appearance point and jail checks, also makes sense in a logical way,

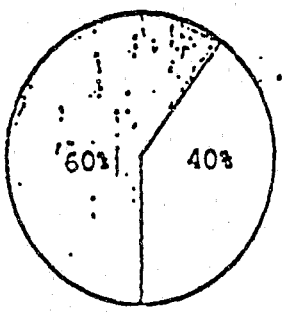
because those agencies which must rely upon judicial determination of eligibility and appointment cannot make first contact until at or after the first court appearance. Of course, if a defender agency has the authority to enter a case without the formalities of an actual judicial appointment, that agency is entirely free to undertake the case prior to a court apperarance, and then must determine eligibility without reliance upon the judge. The defender agency which has the authority to determine whether a given client is eligible for the office's service would seem to have an immense advantage over the agency which can make pre-court contact, but is still not officially appointed until some other agency makes the eligibility decision; for in the latter case, the defender may not be willing to commit scarce resources to a case to which, at a later time, he may not be appointed.

From Table 36, one can observe that the majority of defender agencies which both usually perform jail checks and determine client eligibility in fact enter cases before a formal court appearance by the accused. In this same Table, it is important to note that when a defender agency participates in the determination of eligibility but does not perform regular jail checks, entry before a court appearance is rare. Hence, participation in eligibility determination by a defender agency does not guarantee that pre-court entry will occur; it only increases the likelihood of pre-court entry when it is accompanied by regular jail checks. If jail checks are not performed, entry time is similar, whether an office participates in the determination of eligibility, or not.

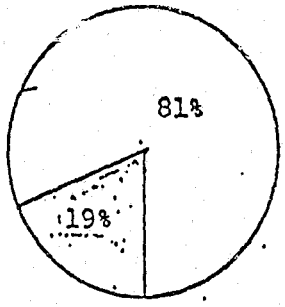
(TABLE 36)

Table 36

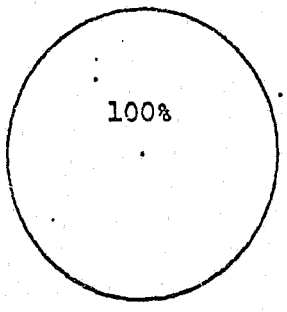
Percentage of Defender Agencies With Pre-Court Entry
By Method of Case Assignment and Participation in Eligibility Determination



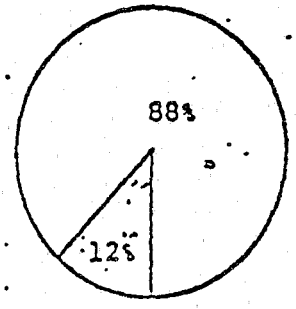
(25)
Defender Participates and Performs Jail Checks



(143)
Defender Participates and Cases Received Through Judicial Assignment



(1)
No Participation and Performs Jail Checks



(118)
No Participation and Cases Received Through Judicial Assignment

Total Number of Responses= 287

Percentage With Pre-Court Entry

Percentage With Later Entry

E. TIME OF FIRST CONTACT AND DEFENDER SYSTEM ORGANIZATION.

Pre-court representation is more prevalent in defender agencies which are characterized by specific organizational attributes For instance, defender agencies governed by a board are the most likely of all types of agencies to begin representation before the first court appearance of the accused. As Table 37 illustrates, 24% of the defenders selected by either an independent or county board usually provide representation before a court appearance. Fewer of the defender agencies, 19%, in which the chief defender is selected by the judiciary or unit of government, begin representation that early. Defender agencies whose chief defender is elected are the least likely to being representation before the first court apperarance of an accused. Only 14% of them do so.

There are a number of explanations for board-selected defenders to have a higher incidence of early case entry. The board insulates the defender from official criticism, and the defender is better able to withstand the complaints of the police and jail authorities and the prosecutor.[17] Also, the board-selected defender is more likely to be with a private agency and as a result is not compelled to use public office facilities which may be remote from the client community and police stations. The private agency is free to locate the offices where they choose.

(TABLE 37)

Finally, where the agency is private, which necessarily means it is governed by a board, the lawyer is usually freer to undertake the case without judicial appointment. Where the judiciary selects

TABLE 37

Entry Time for Defender Agencies Using Different Methods of Selection (Felonies)

	% of Defender Agencies with Pre-Court Entry	
Independent Board	24% (15)	=63
Judiciary	12% (8)	=66
Judiciary-County Board	18% (5)	=28
County Board	24% (20)	=82
Governor	12% (1)	=8
Election	14% (3)	=22

Total Number of Responses= 269

the defenders, or participates in selecting the defender, he may be reluctant to interfere with the judicial case appointment prerogative.

Defender agencies which organizationally assign their attorneys to specifically provide representation in either felonies or misdemeanors are not as likely to establish first contact before the initial court appearance, as illustrated in Table 38.

(TABLE 38)

This may result because the attorneys are assigned to courtrooms, such as felony jurisdiction courtrooms or misdemeanor jurisdiction courtrooms, rather than to clients or to cases. This is an obstacle to early entry because the lawyer is anchored to the courtroom. Also, organizing attorney assignments to either felonies or misdemeanors encourages the same result. Such specialization is a characteristic of the more urban areas where there are many judges and courtrooms. Hence, it is administratively impossible to know which courtroom a defendant will be assigned to, or which member of the defender staff will be assigned to the case. A felony trial call or a misdemeanor trial call is facilitated by lawyer assignment to the courtrooms specializing in misdemeanor or felony cases. Case entry at the police station or jail cell level does not easily lend itself to sorting out the felony from the misdemeanor suspects, because in the pre-trial stage neither the police station nor the jail personnel usually distinguish between the two categories of suspects. Thus, it is readily observable that the organizational structure of many defender agencies militates against

TABLE 38
Method of Assigning Attorneys
to Felonies By Entry Time

	% of Defenders with Pre-Court Entry
Attorneys Assigned to Felonies	14% (15)
Attorneys Not Assigned to Felonies	27% (20)

Total Number of Responses= 180

early case entry.

F. CONCLUSION.

Among the most significant factors observed in field visits and gleaned from questionnaire responses which delay defender entry into cases is reliance upon the court for appointment to cases If pre-court appearance case entry by the defense lawyer is an essential ingredient of effective representation, and there is impressive authority that is, then defenders must end their reliance upon judicial appointment and judicial determination of eligibility. For those two ingredients seem to be the principal obstacles in the path to early entry.

Appointment of counsel for indigent defendants by the trial judge has a long history, and was the general practice in many courts throughout the United States in serious cases long before Gideon v. Wainwright.[18] And, like many things with a long history, the system of court-appointed counsel has been accepted largely without critical analysis. As a result, today, in the majority of jurisdictions, even where an organized defender system is available, it is accepted without question that lawyer entry into indigent cases is delayed until the first court appearance or later.

In many states, legislation provides for appointment of counsel upon the first court appearance. But this should not prevent an attorney from entering a case earlier, where the accused is indigent. That is, a legislative provision that states:

> the judge shall:
> (2) advise the defendant of his right to counsel and if indigent shall appoint a public defender or licensed attorney at law ... [19]

merely addresses the situation of the defendant who has no attorney at the court proceeding. Nothing in such provisions should prevent an attorney from taking on the case before the first court appearance.[20] The lawyer, whether free or retained, should be able to take on a client as soon as the client wants the lawyer's services. Indeed, at least two states, California and Colorado, by statute specifically authorize entry upon the request of an eligible suspect even before an arrest has been made. Many other jurisdictions have utilized court rule-making power to authorize pre-court appearance entry into cases by appointed lawyers. Such rules also require the defender agency to make initial determinations of eligibility for state-provided legal services.[21]

Among the techniques used to bring potential non-fee paying clients into court rule-making power is to authorize pre-court appearance entry into cases by appointed lawyers. Such rules also require the defender agency to make initial determinations of eligibility for state-provided legal services.[22]

Among the techniques used to bring potential non-fee paying clients into contact with lawyers prior to the initial court appearance are the following:

1. Giving wide publicity to the availability of criminal defense service for poor people suspected or criminally charged, and its ability to provide representation without first obtaining court appointment.[23] This encourages relatives and friends to contact the defense service immediately upon arrest of the accused.
2. Daily review of inmates in jail awaiting the first court appearance.[24]

3. Maintaining defender staff around-the-clock in the central arrest receiving jail to screen and interview unrepresented arrestees.[25]

4. Requiring custodial authorities to contact defender counsel immediately after an unrepresented person is arrested.[26]

Even if state or local law were interpreted to mean that it was mandatory for a judge to determine eligibility and appoint counsel, counsel's determination of indigency early in the proceedings could be looked upon as a preliminary or investigative process, with the final decision to be made by the judge.

An experiment in early representation is now underway in Cook County, Illinois, in a project called the Criminal Defense Consortium of Cook County, Illinois. The Project operates six law offices in poor neighborhoods of the cities of Chicago, Evanston and Harvey, Illinois, all in the County of Cook. Each office has an advisory council consisting of persons who reside in the community. Through the advisory council and the neighborhood presence of the office, the availability of the project's legal services became generally known. Family or friends of an arrestee contact the office immediately after arrest, and, if the arrestee is eligible for free legal services, representation begins at the police station level and continues by the same lawyer throughout the trial stage.

Sometimes citizens contact the office even before arrest and the Consortium attorney participates in the surrender of the suspect to the police. The staff attorneys or investigators carefully assess indigency according to relatively strigent standards before the lawyers agree to take on the case. The Consortium has

all of the defender characteristics which appear to facilitate early entry into the case; it is a corporate entity with an independent board; it is decentralized with six neighborhood offices in poverty communities and in close proximity to community police stations; it has relatively substantial support services; Consortium lawyers make their own determination of client eligibility for free legal services, caseloads can be controlled so that lawyers are not burdened with an excessive number of cases, and client representation is undertaken without judicial appointment.

The Consortium has only been in operation since June, 1976, so it is still too early to assess its impact. But the Consortium, at the very least, has demonstrated that pre-court appearance lawyer case entry can be achieved on a regular basis.

FOOTNOTES

1. See, e.g., Coleman v. Alabama, 399 U.S. 1 (1970); McConnell v. Rhay, 393 U.S. 2 (1968); United States v. Wade, 388 U.S. 218 (1967); White v. Maryland, 373 U.S. 59 (1963); Douglas v. California, 372 U.S. 353 (1973); Hamilton v. Alabama, 368 U.S. 52 (1961); United States v. Ash, 413 U.S. 300 (1973); Kirby v. Illinois, 406 U.S. 682 (1973).

2. Miranda v. Arizona, 384 U.S. 436 (1966). See also Escobedo v. Illinois, 378 U.S. 478 (1964). For a discussion on the implementation of the Miranda principle, see Hartman, Singer, "The United States Supreme Court: A Change in Direction," Public Defender Source Book, Singer, S., Ed., Practicing Law Institute, 1976, p. 1, at 8-14. See Banks v. United States, 414 F.2d 1150 (D.C.Cir. 1969); Pelletier v. United States, 343 F.2d 322 (D.C. Cir. 1965); United States v. Bronson, 433 F.2d 537 (D.C.Cir. 1970).

3. See Moore v. Illinois, _____ U.S. _____ (Dec. 1977).

4. It should be noted that in Chambers v. Maroney, 390 U.S. 42 (1970), the Court concluded that attorney appointment on day of trial was not per se ineffective assistance of counsel. But see Powell v. Alabama, 287 U.S. 45 (1932); United States ex rel. Mathis v. Rundle, 394 F.2d 748 (3rd Cir. 1968), where the Court held that a late appointment of counsel raises a rebuttable presumption of ineffective assistance of counsel. See also, Walker v. Caldwell, 476 U.S. 213 (5th Cir. 1973).

5. 407 U.S. 25 (1972).

6. 399 U.S. 1 (1970).

7. California v. Green, 399 U.S. 149 (1970).

8. See Banks v. United States, 414 F.2d 1150 (D.C.Cir. 1969).

9.

10. McGinnis v. Royster, 410 U.S. 263 (1973); United States v. Gaines 449 F.2d 143 (2nd Cir. 1971).

11. 384 U.S. 436 (1966).

12. 467 F.2d 1248 (7th Cir. 1972).

13. 482 F.2d 405 (4th Cir. 1973), cert. denied, 415 U.S. 936 (1974).

14. 406 U.S. 682 (1972). See also

15. See United States v. Wade, 388 U.S. 281 (1967); Gilbert v. Cali-

fornia, 388 U.S. 263 (1967); Wall, P., Eyewitness Identification In Criminal Cases, (1967); Portman, S., "Eye Witness Suspect Confrontation," Public Defender Sourcebook,, supra note 2, at 237-88.

16. Casper, J., American Criminal Justice, 1972; Casper, J., "Improving Defendant Client Relations," 34 N.ADA Briefcase 114 (Aug. 1977). See also, Oaks, D., and Lehman, W., "The Criminal Process of Cook County and The Indigent Defendant," 1966 U.I.L.F. 584, 735; Blumberg, A., Criminal Justice, Quadrangle Books, at 95-115 (1970). Casper J., "Did You Have a Prayer When You Went to Court? No, I had a Public Defender," 1 Yale Rev. of L. & Soc.Act. 4 (1971).

17. See American Bar Association Standards Relating to Defense Services, Standard 1.4 and "Commentary" at 19-22.

18. Powell v. Alabama, 287 U.S. 45 (1932).

19. Ill.Rev.Stat., ch. 38, sec. 109-10, 1977. See Guidelines for Legal Defense Systems in the United States, Report by the National Study Commission on Defense Services, National Legal Aid and Defender Association, at 48-71 (1967).

20. ABA Providing Defense Services, Standard 1.2.

21. See Guidelines for Legal Defense Systems in the United States, supra note 19, at 23.

22. National Advisory Commission on Criminal Justice Standards and Goals, 13.1, "Commentary." This system is utilized by the Santa Clara County, California, Public Defender.

23.

24. See North Carolina Gen. Stat., Sec. 7A-453, as amended, Supp. 1974; Florida Rules of Criminal Procedure, Rule 3.111; NSC Standard No. 3.

25.

26.

CHAPTER V

GUILTY PLEA RATES AND DEFENDER AGENCY CHARACTERISTICS

A. INTRODUCTION.

1. Definition.

For the purposes of this study, plea bargaining is used interchangeably with plea negotiations. Plea bargaining is that process by which a defendant and his attorney barter with a prosecutor with or without the judge as well, whereby the accused pleads guilty or nolo contendere (no contest), or submits the matter for trial on the probable cause hearing transcript, in exchange for some concession from the state, such as a charge reduction, a dismissal of some of the charges, or an agreement by the prosecutor to recommend a lighter sentence if the judge has sentencing discretion. When the judiciary is involved in the negotiation process, the judge may also make a setnence promise as a condition to the entry of a plea. In short, the defendant agrees to surrender his right to contest his guilt in exchange for a lesser sentence. All forms of non-contested disposition which result in a guilty judgment on one or more of the charges will simply be referred to as a guilty plea, or a non-contested disposition of the case.

The bargain agreement today is much like a contract in commercial terms. A failure by the prosecutor, or the judge, to perform as agreed, becomes a failure of performance, and gives the defendant the authority to withdraw the guilty plea.[1] However, unlike a commercial contract, extraordinary steps must be taken to assure that the defendant understands the substance of the agreement. The accused person must be made aware of the possible consequences of

the plea of guilty and the rights he is waiving when he pleads guilty, and the record must demonstrate this awareness.[2]

It is generally accepted that except in a few isolated localities, plea bargaining precedes the entry of a guilty or nolo contendere plea. Indeed, in none of the jurisdictions visited was there found a plea of guilty that was not preceded by negotiations for the plea.[3]

2. Extent of the Plea Bargaining Process.

The negotiation of guilty plea dispositions in criminal cases, commonly referred to as plea bargaining, is a central feature of the criminal justice system. It is by far the principal method of case disposition in almost all state courts of this country.[4] When one considers that many defender agencies provide representation in excess of 50% of the total criminal caseload in the areas they serve, it becomes apparent that the plea bargaining process is central to the operation of defender agencies. In any discussions of guilty plea dispositions in defender agencies, it is likely that the dispositions of the bulk of criminal defendants in this country are being described.

Perhaps no practice in the criminal justice system is as controversial as the plea bargaining process. The opponents of the practice contend that it presents the danger of coercing innocent people to plead guilty; permits guilty people to avoid deserved punishment and results in inadequate protection of society; encourages police and prosecutors to overcharge; and evokes a widely-based distrust of the justice system. The proponents of plea bargaining, on the other hand, argue that it is a procedure for

defendants to mitigate the uniform harshness of the criminal justice system and is a cost and time saving device essential to the criminal process. Some tend to a middle course; they may deplore the process, but, believing that it is a necessary process, urge procedural reforms to make the process less subject to abuses.[5]

Plea negotiations need not always result in guilty plea disposition. They occur regularly in the processing of criminal cases as discovery devices or in ordinary exploration discussions of dispositional alternatives. Nor need a guilty plea disposition always be the result of plea negotiations. However, the data obtained on the field visits of this research project tend to confirm that virtually all guilty plea dispositions are the result of concessions between the defense and the prosecution. Legislative efforts to limit the availability of concessions for defendants pleading guilty are rare and are usually geared toward specific crimes.

In one jurisdiction visited during the field research, New York, limits were legislatively imposed to restrict the concessions that the prosecutors and judge could agree to in exchange for a guilty plea. However, the prosecution and the defense were able to avoid the legislative limitations by agreeing to proceed by way of a speedy non-jury trial during which the prosecution would present uncontested evidence and the judge would find the defendant guilty of a lesser offense than that permitted by law, as a concession.

The defense attorney has no choice in the matter when the prosecutor wants to negotiate. All offers by the prosecutor to the defense lawyer must be conveyed to the client,[6] although in many instances, the negotiation process will be instituted by the de-

fense counsel. But what is more likely is that both prosecutor and defense counsel begin the process automatically, and it does not make any difference who initiates the procedure.

It is the purpose of this section to describe the settings in which defender agencies are likely to negotiate guilty plea dispositions and to determine if a pattern of certain defender characteristics contributes to higher or lower guilty plea rates. The rate of negotiated guilty plea dispositions for defender agencies refers to the percentage of their total caseload which is disposed of through a negotiated guilty plea. In many of the discussions, reference will be made to rates of under 60% and rates of over 60%. This dichotomization into under and over rates of 60% was made at the median value of the combined rates of all reporting defender agencies. It is to be considered only as a methodological device for comparing guilty plea rates of defender agencies and is not intended to evaluate the relative rates of defender agencies.

B. THE GUILTY PLEA: CHARACTERISTICS OF THE DEFENDER AGENCY PROCESS.

1. Introduction.

The negotiation of guilty or nolo contendere plea dispositions is practiced by all the defender agencies that responded to the mail questionnaire and those observed in the field research. No defender responding or observed relies entirely upon trial dispositions for the processing of the criminal cases in the area served by the defender. Nor do defender clients plead guilty without some agreement with the prosecutor and/or trial judge. The frequency with which defenders use the negotiated guilty plea varies; nevertheless, more than 60% of defender agencies report that over

one-half of their total felony and misdemeanor caseload is disposed of through the negotiated guilty plea. Table 39 presents the percentage of the felony and misdemeanor caseloads of defender agencies that are disposed of through guilty pleas.

(TABLE 39)

Reported guilty plea rates in felony cases of under 60% occur in 33% of the defender agencies and in misdemeanor cases, in 39% of the agencies. Rates of over 60% occur in 67% of the defender agencies for felony cases and in 61% of the defender agencies for misdemeanor cases. There is enough variation in guilty plea rates to permit a comparison between defender agencies which use the guilty plea disposition at varying rates. Why some defender agencies rely more frequently on the negotiated guilty plea disposition is the topic addressed in this chapter. The discussion will specify conditions under which the guilty plea is used and distinguish defender agencies according to different guilty plea rates.

The varieties and characteristics of defender systems will be matched with their corresponding guilty plea rates to determine if guilty plea rates increase according to certain characteristics of defender agencies. The major defender characteristics which will be related to guilty plea rates include: size of agency (attorney staff size and population size of the area served); type of agency; method of selecting the chief defender; caseload size; and staff resources, particularly support staff. Since it is assumed by many that the criminal justice system must dispose of most of its cases by guilty plea rather than trial because of the volume

TABLE 39

Percentage of Felony and Misdemeanor Cases
Disposed of through Negotiated Guilty Pleas

(Percent of Reporting Chief Defenders)

Guilty Plea Negotiation Rate	Felonies		Misdemeanors	
	% Distribution	Cumulative %	% Distribution	Cumulative %
0-20%	7%	7%	10%	1%
21-40%	10%	17%	14%	24%
41-60%	20%	37%	15%	39%
61-80%	30%	67%	28%	67%
81-100%	33%	100%	33%	100%
Total Number of Responses=	340		326	

of criminal cases,[7] several of the characteristics examined deal with size and caseload; such as population served, size of defender agency, case load and staff resources. These are examined to determine what impact those characteristics have on guilty plea rates. Kind of agency, such as public office, private defender, and so on, and manner of selection of the chief defender are also compared with guilty plea rates to determine their impact upon guilty plea rates.

It would seem to follow that the independent defender will have less pressure to plead clients guilty than the non-independent defender. Police, prosecutors and judges who feel caseload pressure will tend to exert pressure upon the defender to convince the defender client to plead guilty, for the defender is the direct link to the client. Also, a high volume of guilty pleas assists the prosecutor in maintaining a high rate of convictions, usually a political asset, and insulates the judiciary from risks of being reversed. Hence, it would follow that defenders who are not relatively insulated from these pressures would have a high guilty plea rate.[8]

This chapter will rely primarily upon the responses of chief defenders and staff attorneys to the mail questionnaires. Examples from the field research will be used to describe more completely the relationships derived form the mail questionnaire. Guilty plea rates are measured through the reports of both the chief defender and the staff attorneys. The chief defender reports of guilty plea rates provide an agency-wide account of the percentage of the office's total caseload which is disposed of by guilty pleas. The staff attorney reports yield individual attorney rates of the

frequency with which they use the guilty plea disposition.

An initial comparison of staff attorney guilty plea rates is presented in Table 40. With the overall rates reported by the chief defender, the indication is that individual attorney rates are similar to the overall rates of the agencies that employ them. In felonies, 69% of the staff attorneys report that they dispose of more than 60% of their caseload through a guilty plea; 63% of the chief defenders report the same guilty plea rate. In misdemeanors, 65% of the staff attorneys report that they dispose of more than 60% of their caseload through a guilty plea; 61% of the chief defenders report the same guilty plea rate. Since there is little disparity in the reported guilty plea rates of chief defenders and staff attorneys, the rates of the chief defender will be used hereafter unless otherwise indicated.

(TABLE 40)

2. Rural Defenders vis-a-vis Urban Defenders: The Population Variable.

The size of a defender agency, indexed by the number of attorneys and the population size of the area being served by the agency, is a critical factor in the overall administration of the office. Major differences in structure, organization and operations will exist between the one-person defender agency serving an area of under 50,000 persons and the larger defender agency serving an area with a population of over one million persons. One might expect guilty plea rates to vary among defender agencies of different sizes particularly, since backlog and delay are usually attri-

TABLE 40

Percentage of Felony and Misdemeanor Cases
Disposed of through Negotiated Guilty Pleas

(Percent of Reporting Staff Attorneys)

Guilty Plea Negotiation Rate	Felonies		Misdemeanors	
	% Distribution	Cumulative %	% Distribution	Cumulative %
0-20%	5%	5%	8%	8%
21-40%	10%	15%	11%	19%
41-60%	16%	31%	16%	35%
61-80%	33%	64%	32%	67%
81-100%	36%	100%	33%	100%
Total Number of Responses=	382		353	

buted to the larger urban areas. The 1972 NLADA National Defender Survey found that rural defender agencies serving populations of less than 50,000 persons disposed of only 17.2% of their misdemeanor caseload through guilty pleas, compared to urban defender agencies which disposed of 61.6% of their misdemeanor caseload through guilty pleas.[9]

The present study, based on more current data and a higher response rate, found no such startling difference among the guilty plea rates of defender agencies serving areas of varying population sizes. Table 41 presents the guilty plea rates for defender agencies serving areas of varying population sizes. In felony cases, more than one-half of all defender agencies dispose of more than 60% of their caseload through guilty pleas. These rates occur regardless of the size of the population being served. Differences in guilty plea rates, however, are found in the proportion of differently-sized agencies which dispose of more than 80% of their caseload through guilty pleas.

(TABLE 41)

Thirty percent of the rural defender agencies, serving areas with less than one million persons, compared to 41% of the larger defender agencies, those serving areas of more than one million persons, dispose of more than 80% of their felony caseload through guilty pleas. The same pattern occurs with respect to misdemeanors. More than one-half of the defender agencies dispose of over 60% of their misdemeanor caseload through guilty pleas, but in the guilty plea rate range of 81-100%, fewer of the rural defenders

TABLE 41
Guilty Plea Rates of Defender Agencies Serving Areas with Different Population Sizes

Population	Felony Guilty Plea Rates 0-20%	21-40%	41-60%	61-80%	81-100%	
Under 50,000	11%	11%	20%	28%	30%	(98)
50,001-100,000	2%	9%	21%	30%	38%	(56)
100,001-250,000	5%	12%	16%	35%	32%	(82)
250,001-500,000	4%	9%	23%	30%	34%	(47)
500,001-1 million	9%	15%	15%	32%	29%	(34)
over 1 million	9%	0	23%	27%	41%	(22)
Total Number of Responses=						339
Population	Misdemeanor Guilty Plea Rates 0-20%	21-40%	41-60%	61-80%	81-100%	
Under 50,000	11%	12%	17%	34%	26%	(99)
50,001-100,000	9%	22%	20%	16%	33%	(55)
100,001-250,000	11%	16%	13%	27%	33%	(70)
250,001-500,000	6%	13%	13%	31%	37%	(48)
500,001-1 million	10%	13%	19%	19%	39%	(31)
over 1 million	18%	4.5%	4.5%	32%	41%	(22)
Total Number of Responses=						325

(25%) do so. The differences noted are not substantial; hence it appears that the population size of the area being served by a defender agency has no noticeable impact on guilty plea rates.

This result is consistent with the finding that attorney staff sizes of defender agencies are highly related to the population size of the area being served. Thus, the urban/rural characteristic would be expected to have little visible impact on guilty plea rates, so long as the per-attorney workload remained constant across the urban/rural distinction.

Table 42 presents the relevant data. Regardless of the number of attorneys employed by a defender agency, more than one-half of varying sized defender agencies dispose of over 60% of their felony and misdemeanor caseload through guilty pleas. Again, slightly more of the defender agencies (44%) with more than ten staff attorneys will dispose of more than 80% of their caseload through guilty pleas than the defender agencies characterized as one-person operations (31%). But again, as far as this study could determine, the guilty plea remains as the principal method of case disposition by defender agencies without regard to demographic characteristics.

(TABLE 42)

3. Varieties of Defender Agencies.

The present study identified fourt distinct types of defender systems. They are: (1) the governmental agency (public defenders); (2) attorneys in private practice who contract with a governmental unit; (3) private defender corporations engaged exclusively in indigent defense work; and (4) criminal divisions of legal aid socie-

TABLE 42

Guilty Plea Rates
In Defender Agencies of Different Sizes

Staff Size	Felony Guilty Plea Rates 0-20%	21-40%	41-60%	61-80%	81-100%	
1 attorney	8%	11%	20%	30%	31%	(99)
2-3 attorneys	6%	13%	21%	25%	36%	(87)
4-5 attorneys	10%	7.5%	15%	47.5%	20%	(40)
5-10 attorneys	6%	11%	26%	37%	20%	(35)
over 10 attorneys	5%	7%	17%	27%	44%	(78)
Total Number of Responses=						339
Staff Size	Misdemeanor Guilty Plea Rates 0-20%	21-40%	41-60%	61-80%	81-100%	
1 attorney	9%	14%	17%	28%	32%	(97)
2-3 attorneys	15%	20%	21%	18%	26%	(81)
4-5 attorneys	8%	14%	8%	42%	28%	(36)
5-10 attorneys	3%	19%	19%	31%	28%	(36)
over 10 attorneys	12%	5%	9%	28%	46%	(75)
Total Number of Responses=						325

ties which are incorporated. See p. for a more complete description of these varieties.

One might speculate that differences in the guilty plea rates for each kind of defender system may arise form the nature of each agency's organizational structure. The governmental agency, public defender type, is part of the local government and very similar in organization and structure to all other governmental agencies. Because these public defenders are directly connected to the government as is the prosecutor, judge and police, they may be expected to respond to the need to dispose of their caseloads within a minimum amount of time and for a minimum expense.[10] They thus may dispose of their caseloads in a manner different from the private defender corporations which are incorporated agencies separate from the surrounding governmental structure. Likewise, elected officials, who are responsive to the electorate, may dispose of their caseloads quite differently from all other types of defender agencies.

Table 43 presents the felony guilty plea rates for the four categories of defender agencies defined in this study.

(TABLE 43)

Very few dispose of less than 40% of their caseload through guilty pleas: 16% of the governmental public defenders; 22% of the attorneys in private practice under contract with the local government; 18% of the private defender corporations; and 25% of the criminal divisions of legal aid societies do so. In the highest category of guilty plea rates, 80-100%, the governmental agency public de-

TABLE 43
Type of Defender Agency
By Guilty Plea Rate

	Felony Guilty Plea Rate					
	0-20%	21-40%	41-60%	61-80%	81-100%	
Public Defender	6%	10%	18%	30%	36%	(230)
Private Attorneys Under Contract	12%	10%	20%	39%	19%	(49)
Defender Corporation	9%	9%	22%	35%	25%	(32)
Criminal Divisions of Legal Aid Societies	0	25%	17%	25%	33%	(12)
Total Number of Responses=						(323)

fender variety predominates. Thirty-six percent of the public defender agencies report a guilty plea rate of over 80% compared with: 19% of the attorneys in private practice under contract with the local government; 25% of the private defender corporations; and 33% of the criminal divisions of legal aid societies.

But utilizing 60% as the distinguishing percentage between high and low guilty plea rates, only 34% of the public defender agencies plead clients guilty in 60% or less of the cases, while the percentage is, respectively, 42%, 40%, and 42%, for private counsel under contract, defender corporations and criminal divisions of legal aid societies.

Moreover, fewer of the non-governmental types of defender system maintain guilty plea rates in excess of 80%. While the difference can hardly be called startling, there is a decided tendency for public defenders to plead a greater percentage of their clients guilty than the other three organizational structures. It would seem to follow that a reasonable explanation for the disparity lies in the nature of the defender as a governmental agency, while the other forms of defender are private.

The non-governmental agency, which includes the corporate form and private law firms under contract with a governmental agency, is in the unique position of exerting control over its caseload, either through a refusal to accept cases above an optimum number or through contractual arrangements with the political subdivisions they serve. Three private corporation forms of defender agencies were examined in the field research. Two of these agencies accepted all of the cases assigned to them; however, the governing boards of these two agencies exerted a particular pressure for the main-

tenance of funding levels proportionate to case assignment. The other corporate defender agency received funding on the basis of its caseload and by fees charged on a case-by-case basis. There, when caseload assignments increased substantially, additional staff could be immediately acquired.

The governmental type of defender, such as the public defender, is usually expected to provide representation in all criminal cases, except in conflict of interest situations, in which eligibility has been determined and an appointment.[11] The governmental agency usually has no board structure to promote its interests; not does it have the flexibility to expand or reduce staff quickly as caseload levels change. However, it is the theory of some that a governmental agency defender office can refuse to accept appointments. Indeed, some urge that a defender has the duty to refuse cases when the agency's caseload is out of proportion to staff attorney resources.[12] Observations in the field research suggest otherwise: there is a general reluctance on the part of governmental defender agencies to attempt caseload control by refusing excessive appointments. As a matter of fact, the public defender agencies observed proceeded on the assumption that when appointed they must accept the case, unless a conflict occurred.

Of course, one may ask why the disparity between the public defender agencies and the private defender agencies' guilty plea is not greater. At the outset one should recognize that many defendants are guilty and want to plead guilty. In Philadelphia during the time that the prosecutor refused to plea bargain, 32% of the defendants still pleaded guilty.[13] Also, many judges will be

considerably lenient in sentencing, and a lawyer must advise his client of this and many times the client will seek the more lenient sentence, even though there is no pre-plea bargaining binding anyone to any leniency.[14] Also, even the non-public defender agencies are not totally immune from official pressure and dispose of a significant portion of their cases by plea of guilty, for not to do so will substantially increase the cost and time as a result of litigation.

In that light, the statistical disparity in guilty plea rates between public defenders and private defenders appears to be significant. That is, all criminal defense lawyers and their clients have some of the same pressures to have clients plead guilty. These pressures include more lenient sentencing, saving time and money, and the desire of a guilty client to admit his guilt. Yet, the public defender clients plead guilty approximately 10% more frequently than private defender clients. The difference in the rate may be attributable to the public defender's greater exposure to other governmental agency pressures, such as the judge and prosecutor and the inability or refusal of the public defender to limit his caseloads. The ability of defender agencies to control caseload levels may be a characteristic which affects the volume of cases disposed of through guilty pleas, since it implies that optimum levels will be maintained so as to remove caseload pressures from individual attorneys.

4. Caseload Sizes.

Defender agencies provide representation to varying numbers of persons accused of crimes. The size of a defender agency's case-

load is dependent upon the population size of the area being served, the crimes charged, the standards of eligibility for the services of the defender agency, and the degree of involvement by the private in indigent representation. Defender agencies serving rural areas are more likely to be responsible for the representation of fewer persons than the defender agencies serving highly populated metropolitan areas.

Crime rates, which are known to vary inter- and intra-jurisdictionally, contribute toward the volume of cases requiring public representation. The nature of, and implementation of, standards of eligibility determines the number of accused persons eligible for the services of the defender agency and can increase or decrease, as the case may be, the volume of cases assigned to the defender agency.

Along with population, the involvement of the private bar in public representation may be the most critical factor influencing caseload volumes of defender agencies. If the private bar is heavily involved in public representation, in both large and small population areas, there will be less of a caseload pressure on the defender agency. For example, the defender agency in Washington, D.C., is appointed to less than one-half of the indigent cases; the remaining indigent cases are assigned to private practitioners. On the other hand, the defender agency in Jefferson County (Louisville), Kentucky, is assigned to virtually all of the criminal cases involving indigent persons. In other localities, such as Portland, Oregon, the defender agency contracts with the government to provide representation to a certain number of indigent accused persons. Yet, despite these factors which affect the caseload levels of

defender agencies, this study found a very strong relationship between the population size of the area served by the defender agency and the corresponding volume of cases assigned to the agency. Table 44 presents the mean caseloads, felony and misdemeanor only, for defender agencies serving differently sized populations.

(TABLE 44)

A. Agency Caseloads

The total number of trial level felony and misdemeanor cases assigned to a defender agency on an annual basis depicts the volume of cases handled by a given agency and indirectly measures the size of the defender operation and of the population being served. Annual caseloads range from under seven cases to over 50,000; each may reflect either a large percentage of an area's total criminal caseload or only a portion of the total number of criminal cases arising in an area.

Table 45 presents the guilty plea rates for defender agencies which provide representation to varying percentages of an area's total criminal caseload.

(TABLE 45)

Seventeen defender agencies provide representation in less than 25% of an area's total felony cases, compared to 31 agencies which provide representation in excess of 90% of an area's total felony caseload. Guilty plea rates among these contrasting defender agencies do vary: 41% of the defender agencies which provide represen-

Table 44

Annual Defender Office Caseloads
In Areas of Varying Population Sizes
(Mean Caseload Levels
for Trial level Felonies and Misdemeanors)

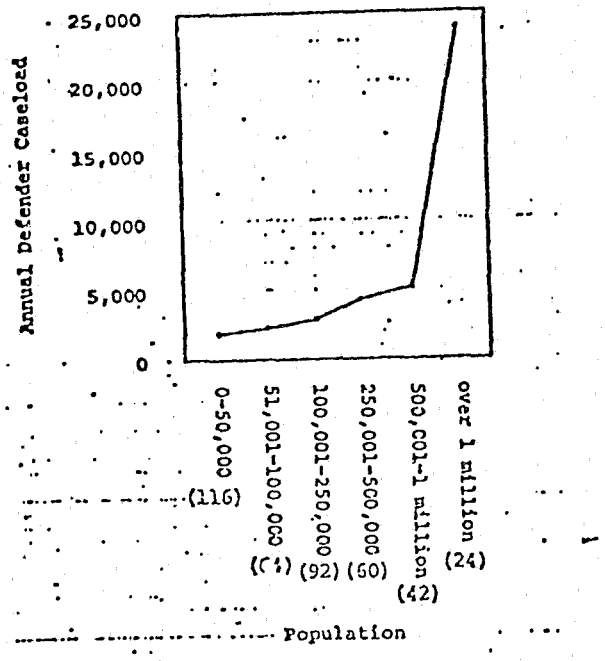


TABLE 45

The Percentage of an Area's Total Felony Caseload
Assigned to the Defender Agency by Guilty Plea Rates

% of Caseload Handled	Felony Guilty Plea Rates 0-20%	21-40%	41-60%	61-80%	81-100%	
0-25%	12%	29%	18%	12%	29%	(17)
26-40%	17%	11%	11%	17%	44%	(36)
41-50%	3%	5%	13%	38%	41%	(37)
51-70%	8%	8%	23%	30%	31%	(92)
71-90%	5%	13.5%	16%	37.5%	28%	(104)
over 90%	7%	3%	19%	35.5%	35.5%	(31)
Total Number of Responses=						(317)

tation in less than 25% of an area's total felony cases dispose of more than 60% of those cases through guilty pleas, compared to 71% for the defender agencies which undertake more than 90% of an area's total felony caseload.

Providing representation to fewer of an area's total felony caseload results in lower guilty plea rates (under 40%) more often than providing representation to virutally all felony cases arising in an area. The highest guilty plea rates in Table 45 are found among defender agencies which provide representation in between 40-50% of an area's total felony caseload. There 79% of the defender agencies dispose of more than 60% of their caseload through builty pleas; and only 8% of them maintain guilty plea rates of less than 40%. Caseload pressures arising from involvement in a large percentage of an area's total felony caseload do have an impact upon the resultant guilty plea rates of defender agencies. While the impact may not appear to be overwhelming, it must be revealed again that there are other factors which contribute to the defendant's deciding to plead guilty, as discussed in previous sections. Hence, the fact that there is any noticeable variance according to agency caseloads, in the view of the project, is significant. Defender agencies, which can maintain some control over their caseload levels, concomitantly appear to maintain a control over the volume of cases that is disposed of through guilty pleas.

B. Attorney Caseloads

Each chief defender was asked to report the average attorney caseload for those attorneys who provide trial court representation in only felony matters. One might expect these average attorney

caseloads to be related to guilty plea rates if the pressures of attorney caseloads result in the frequent use of guilty plea dispositions. If guilty plea disposition rate increase is a reaction to rather unwieldy attorney caseloads, attorneys with excessive caseloads are bound to use the guilty plea disposition more often than attorneys with more manageable caseloads. Of course, in the hearing it is the defendant who must plead guilty, not the lawyer, and the judge who accepts a guilty plea must take precautions that the plea be voluntary, and that the accused understand the nature of the plea.[15]

Nevertheless, the defense attorney may exert little or no pressure upon the accused to accept a plea bargain, or exert enormous pressure upon the accused to accept a plea bargain agreement. Also, the defendant himself knows or at least can sense when the lawyer is prepared to proceed with a contest and when he is not, which must also be considered by the defendant in deciding whether or not to plead guilty, although such considerations are hardly likely to be thoroughly explored by the trial judge.[16]

For attorneys, both full-time and part-time, who represent only clients charged with felonies, their reported average caseloads do have an impact on guilty plea rates. As Table 46 indicates, as average attorney caseloads increase, so do the reported guilty plea rates for the agencies that employ them. Defender agencies whose full-time attorneys reportedly provide representation in an excess of 150 felony cases per year* maintain higher guilty plea rates than agencies whose reported average full-time attorney caseloads

* The 150 caseload distinction is used here because that is the maximum recommended by the National Advisory Commission on Criminal Justice Standards and Goals, "Courts," 13.12, at p. 276.

are less than 150 felony cases. Felony guilty plea rates of over 80% occur in 37% of the defender agencies whose full-time attorneys represent in fewer than 50 felony cases per year; in 29%, with average attorney caseloads between 51-100 cases; in 34% with average attorney caseloads between 101-125 cases; in 53% with average attorney caseloads between 126-150 cases; in 50% with average attorney caseloads between 151-200 cases; and in 42% of the defender agencies whose full-time attorneys represent in excess of 200 felony cases per year. The lowest felony guilty plea rates, less than 20% of the agency's felony caseload, are reported by 11% of the agencies with average full-time attorney caseloads of less than 50 felony cases per year, and 14% of the agencies with average full-time attorneys' caseloads of between 51-100 felony cases per year.

(TABLE 46)

That low guilty plea rate, under 20% is not reported by any defender agencies whose full-time attorneys represent between 101 and 200 felony-charged clients per year. Two defender agencies, or 6.5% of the agencies with reported average full-time attorney caseloads in excess of 200 felonies per year, maintain felony guilty plea rates of less than 20%, as shown in Table 46.

The reported average caseload for part-time attorneys who represent only represent felony-charged clients equally affects guilty plea rates, as illustrated in Table 47. Many more defender agencies whose part-time attorneys represent in excess of 125 felony charged clients per year report a felony guilty plea rate of over

TABLE 46

Average Felony Caseload Per Full ~~and Part-Time~~ Attorney By
Guilty Plea Rate - Felonies Only
(Chief Defender Reports)

Average Felony Caseload Per Full-Time Attorney	Guilty Plea Rates 0-20%	21-40%	41-60%	61-80%	81-100%	
0-50	11%	12%	23%	17%	37%	(35)
51-100	14%	15%	11%	31%	29%	(35)
101-125	-	19%	33%	14%	34%	(21)
126-150	-	-	26%	21%	53%	(19)
151-175	-	-	19%	31%	50%	(16)
176-200	-	10%	10%	30%	50%	(10)
over 200	6.5%	6.5%	19%	26%	42%	(31)

Total Number of Responses= 167

80%. No defender agency whose part-time attorneys represent more than 175 felony-charged clients per year is able to maintain a felony guilty plea rate of less than 60%.

(TABLE 47)

The chief defenders were also asked to estimate the average number of felony cases that would be pending per attorney at any given time for those attorneys who provide representation in only felonies. The pending caseloads of individual defender attorneys are probably a more precise measure of the pressures of attorney caseloads on a daily basis and should therefore be more strongly related to corresponding guilty plea rates. Table 48 presents the guilty plea rates of defender agencies with different reported pending caseloads for both full-time and part-time attorneys who provide representation in only felonies.

(TABLE 48)

Consistent with the hypothesis that high caseload pressures will tend to cause an increase in guilty plea rates, it is seen that as pending attorney caseloads increase, the reported guilty plea rates increase.

C. IMPACT OF CASELOADS AND GUILTY PLEA RATES.

There appears to be a positive relationship between both the total caseload of a defender agency and average attorney caseloads and the increasing frequency with which a defender agency will dis-

Table 47

Average Felony Caseload Per Part-Time Attorney	Guilty Plea Rates 0-20%	21-40%	41-60%	61-80%	81-100%	
0-50	7%	18%	32%	18%	25%	(56)
51-100	12%	7%	17%	34%	30%	(41)
101-125	8%	23%	15%	31%	23%	(13)
126-150	-	-	33.3%	33.3%	33.3%	(12)
151-175	-	22%	11%	56%	11%	(9)
176-200	-	-	-	100%	-	(4)
over 200	-	-	-	20%	80%	(5)

Total Number of Responses= 140

TABLE 48

The Guilty Plea Rates for Average Pending Caseloads of Full and Part-Time Attorneys Assigned to Felonies

(Chief Defender Reports)

-Full-Time Attorneys-

Pending Felony Caseloads for Full-Time Attorneys	Guilty Plea Rates 0-20%	21-40%	41-60%	61-80%	81-100%	
0-50	7%	10%	22%	28%	33%	(123)
51-100	3%	9%	15%	21%	52%	(33)
101-125	-	11%	11%	33%	45%	(9)
126-150	33.3%	-	33.3%	-	33.3%	(3)
over 150	-	-	-	-	100%	(3)

Total Number of Responses= 171

-Part-Time Attorney-

Pending Felony Caseloads for Part-Time Attorneys	Guilty Plea Rates 0-20	21-40%	41-60%	61-80%	81-100%	
0-50	8%	14%	23%	29%	26%	(122)
51-100	-	6%	18%	47%	29%	(17)
101-125	-	-	50%	50%	-	(2)
126-150	-	-	-	33%	67%	(3)
over 150	-	-	-	-	100%	(1)

Total Number of Responses= 145

pose of its caseload through guilty pleas. As caseload levels, both office and attorney, increase, so does the corresponding guilty plea rate of the defender agency. But caseload levels are reflective of a larger process, the intricate working of the police, the prosecution, the courts and the population being served. Instead of narrowly focussing on defender attorney caseload pressures as the primary explanations of the occurrence of the guilty plea disposition, perhaps extend the burden of the guilty plea's prevalence to include the justice system in its entirety. The entire justice system with its many components and actors contributes toward the prevalence, acceptability and legitimization of the guilty plea as the principal method of disposing of criminal cases.

Lowering the caseload levels of individual defender attorneys may not necessarily guarantee that a decrease in guilty plea dispositions will occur. Police, prosecution and the judiciary also impose pressures upon defenders and their clients to plead guilty. As a result, if the other elements in the criminal justice system have excessive caseloads, they will use their often powerful influence to increase the proportion of guilty plea dispositions. Without concomitant adjustments of their caseloads, guilty plea rates will remain higher than otherwise. Defender attorneys may be reacting to a system that is geared toward the disposition of a certain percentage of cases through guilty pleas, and it may be virtually impossible to alter that rate merely by distributing fewer cases to more attorneys.

One recent study of guilty pleas in Detroit, Michigan; Baltimore, Maryland; and Chicago, Illinois concluded that the factor most influential in high guilty plea rates is stability of court-

room work groups. That is, the situation in which the prosecutor, judge and defender are all assigned to a particular courtroom over an extended period of time and each works on cases only assigned to that courtroom. In such a situation, guilty plea rates will be higher than when defense attorneys move from courtroom to courtroom, depending on the case.[17] Courtroom assignment, rather than case assignment, for defender lawyers is a product of heavy case loads. The observation of this study is that urban defenders with heavy case loads believe that the most efficient way to process a huge volume of cases is to assign lawyers to a courtroom and the defender lawyers represent all defender cases in that particular courtroom. Hence, underlying the factor found critical to high guilty plea rates by Eisenstein and Jacob are caseload pressures.

An example of systemic pressures to plead guilty was observed in Santa Clara County, California. There, court procedure has legitimized the negotiation process by setting specific court dates for plea bargaining conferences during which the judge, the prosecutor and the defense attorney, and often the police officer, discuss the guilty plea dispositions and negotiate dispositions where possible.

This formalized process is quite different from other field observations of informal "hallway" or telephone conferences during which bargains are made. The Santa Clara County defender regularly disposes of approximately 95% of its criminal cases through guilty pleas, a substantially higher rate than the other offices observed in the field research. While there are other factors which no doubt contribute to this high guilty plea rate, the plea bargaining conferences were observed to be a moving force. The mere fact that

the process was so formalized legitimized it. Moreover, the process formally brought to bear upon the defendant most of the elements of the criminal justice system, and pointed toward a unified objective, disposal of the case through a guilty plea. What defendant could resist that enormous pressure! Santa Clara County is also a county in which individual caseloads for defenders are extraordinarily high, approximately 200 felony cases per attorney assigned to a felony trial call.

Another consideration is the caseload pressure upon individual trial court judges. They are not immune to the pressures of caseflow and clear dockets. From the judge's perspective, influence on the guilty plea rates occurs through either the control he exerts over the defender agency or through the use of varying sentencing patterns. Except for California, where sentences are set by law, the practice of harsher sentences for contested matters was found to exist in all of the field sites. Even in the California communities observed in this study, where judges do not control sentencing, but have the discretion whether or not to place a defendant on probation, most judges will not exercise that discretion in favor of probation in contested cases. Moreover, in jurisdictions that have developed alternative programs to incarceration, it is generally understood, and sometimes even expressed, that if the charge is contested, the accused will not be considered eligible for the alternative program that will keep him out of the penitentiary.

The attitude of the prosecutor may also influence guilty plea rates more than any action by the defender attorney or his employ-

ing agency. The entire charging process by the state is an added encouragement to the prevalence of negotiating guilty pleas. Even in California, where specific sentences are controlled by law and are not negotiable, except for probation, the prosecution has the authority to dismiss other charges or reduce charges to lesser included crimes so as to reduce ultimately the specific sentence. The control of the charging process, together with the ability to bring additional charges or reduce charges against an accused gives the prosecutor a tremendous amount of power in influencing the method of case disposition.

In California the bargaining is as to charge rather than as to outcome, for as has been said, the charge controls the sentence. In New York State, the discretion of the prosecutor to reduce charges in some narcotics offenses is limited by statute. However, in an examination of Oneida County, New York, it was observed that practices had been devised to avoid these statutory limitations: the judge, prosecutor and defense attorney would agree upon a summary non-jury trial, upon the presentation by the state of uncontested evidence. In exchange for not contesting the evidence, the court would find the defendant guilty of a lesser included offense. Thus, despite the statutory limitations, neither the prosecutor or the judge lost his power to offer sentence reduction inducements to the defendant.

In summary, it may be too simplistic to contend that individual defender attorney caseload levels are the exclusive or even the primary reason for high or low guilty plea rates. However, it does appear that defender attorney caseload levels do have a substantial impact upon guilty plea rates. Moreover, if the case-

load level of a defender agency is excessive, it is likely that the prosecution and judiciary are experiencing similar caseload pressures. The caseload burden upon the defender agency reflects the burden upon the entire criminal justice system.

Guilty plea rates may also be affected by arrest policies of the local police and the quality of prosecutorial screening. If the police exercise their arrest discretion excessively, this will add caseload pressures to the entire system. When the prosecutor has no, or very poor case intake screening procedures, this will also add to the caseload pressures. Moreover, when the investigatory preparation is inadequate, the prosecutor's fear of a not guilty verdict will pressure the prosecutor to exert more pressure for guilty pleas by granting enormous concessions to defendants, or overcharging and giving the appearance of granting substantial concessions, while exposing a defendant to an unwarranted verdict verdict if rendered in a contest.[18] Pre-trial release practices also may have an impact upon guilty plea rates. Studies have indicated that defendants incarcerated in the pre-trial stage are more likely to plead guilty than those free on bond pending trial.[19]

D. ATTORNEY PREPARATION TIME.

Factors that play a part in the amount of time a defender attorney spends in the preparation of a criminal case are the complexity of the case, the thoroughness of the defense, preparation, experience of the attorney, as well as caseload pressures. One may also hypothesize that preparation time for a guilty plea is considerably less than preparation for a contested disposition. Trial involves technical rules of evidence and other law which differs from trial to trial and which requires more preparation time if

counsel is to be fully prepared. In addition to legal preparation that is necessary for trial, one might expect that a more thorough factual investigation would precede a contested matter than a non-contested matter. On the other hand, field visit observations confirmed that attorneys often do not know until the day scheduled for trial whether or not the matter will be disposed of by contest or by guilty plea.

Even in the Santa Clara County, California, situation, where there was a judicially scheduled plea negotiation day, if negotiations failed to result in a guilty plea immediately, the matter was still, more likely than not, disposed on a guilty plea on the date of trial. Hence, in many guilty plea situations the defense attorney may have to approach the case as though it were going to be a contest. Also, extensive preparation may be required with the increased complexity of the various alternatives to penitentiary sentences, and for effective sentence advocacy As a result, extensive preparation time may be necessary even for a guilty plea case. Indeed, one may argue that extensive preparation enhances the effectiveness of plea bargaining and it should make no difference if the case is disposed of as a contested matter or on a guilty plea.

To test the validity of the hypothesis that guilty plea cases generally take less preparation time than contested matters, staff attorney respondents to this study were asked to compare, based on their own experience, the preparation time involved in guilty plea dispositions with the preparation for contested matters. Sixty-nine percent, or 276 of the staff attorney respondents, indicated that guilty plea dispositions in felony cases demand less preparation time than trials; 30% of 122, lawyers said that the preparation

time involved in guilty pleas and trials is about the same, and 1% responded that less time is spent in preparing cases for trial than for guilty pleas. Slightly more than 2% reported that guilty plea dispositions in misdemeanor cases demand more preparation time than misdemeanor trials do; 66% said that guilty pleas take less preparation time; and 32% said that guilty pleas and trials take about the same amount of preparation time in misdemeanor cases.

Table 49 indicates that 51% of the attorneys who spend more than six hours, on the average, in the preparation of a felony case dispose of more than 60% of their caseload through guilty pleas compared with 73% of the attorneys who spend less time in the preparation of felony cases. Thus, lower reported attorney preparation times are characteristically associated with guilty plea rates of over 60% and higher preparation times are associated with guilty plea rates of under 60%.

(TABLE 49)

However, it cannot be concluded that the cases for which attorneys spend less time preparing will eventuate in negotiated guilty pleas, for the statistics do not directly link preparation time to specific types of dispositions; rather, they measure preparation time/guilty plea relationship in reverse. For instance, in defender agencies with relatively high guilty plea rates, staff attorneys will spend, on the average, less time in the preparation of cases than their counterparts do in systems where the guilty plea rate is lower. Because a higher percentage of cases are being pled guilty than are tried, this relatively low trial rate would tend

TABLE 49
Staff Attorney Preparation Time
and their Guilty Plea Rates

	Guilty Plea Rates					
Felonies, on the average took:	0-20%	21-40%	41-60%	61-80%	81--100%	
Less than 6 hours preparation time	4%	9.5%	14%	32.5%	40%	(169)
More than 6 hours preparation time	7%	10%	18%	34%	31%	(175) (344)
Misdemeanors, on the average took:						
Less than 2 hours preparation time	7%	9%	11%	35%	38%	(191)
More than 2 hours preparation time	8%	12%	23%	31%	26%	(134) (325)

to decrease the overall amount of attorney preparation time. Viewed in this context, the amount of attorney preparation time becomes a characteristic of defender agencies with varying guilty plea rates, rather than a cause of specific types of dispositions.

E. SUPPORT STAFF.

Support staff as used here includes all non-lawyer personnel, including professionals such as certified social workers to filing clerks. The field investigation of eight defender agencies suggests that as defender agencies increase the scope of their legal services to the client community, more non-trial dispositions are sought to ensure sentences with little or no incarceration. These alternatives to incarceration are frequently more accessible to those who plead guilty and are more frequently the result for the defender agency which employs support staff to arrange the alternative programs. Defender agencies which employ a variety of different kinds of support staff are probably serving communities which offer a host of alternative programs. No social worker capability was observed in the field unless the community provided for comparable resources in the other components of the justice system. As a community's supply of dispositional alternatives increases, the rate of guilty pleas increases, particularly if the alternatives are conditioned upon an uncontested disposition.

Support staff can play a direct role in the frequency with which guilty plea dispositions are sought and in the quality of the bargain made. It was generally observed in the field research that support staff of the social worker variety were usually delegated the responsibility of developing alternative programs for

the clients of the defender agency. The Santa Clara defender office was particularly well staffed with this variety of support staff. These support staff members were very active in arranging alternative programs for the office's clients. In Philadelphia, the defender agency has a special worker section, whose principal task is the development of the appropriate conditions and evidence for a probation sentence. Since most of these alternative programs and probation sentences were observed to be available primarily to clients who plead guilty, the availability of social workers and other para-professionals to coordinate and arrange these programs increased the incidence of negotiated guilty pleas.

Other varieties of support staff, besides the alternative program workers, were observed as actors in the guilty plea process. The polygraph operator in the Clark County, Nevada, defender office was particularly important in the decision-making process as to whether to contest a charge or to plead guilty. Clients who said they were innocent of the charges against them were administered a lie detector test. Negative results were used to influence the clients to agree to plead guilty. Conversely, positive results were used to convince the prosecutor to re-examine his case with a view toward a dismissal of the charge(s) or an alteration of the charge(s) to something more consistent with the clients' perception of the incident. The polygraph operator in the Clark County defender office had a dramatic, almost decisive impact upon the decision of numerous clients to plead guilty.

In a smaller defender office, located in Oneida County, New York, the chief investigator was extremely active in the plea negotiation process and very influential with the clients of the office.

In reality, this investigator arranged the entire agreement between the prosecution and the defense, and ultimately obtained the concurrence of the judge in most cases disposed of by guilty pleas. According to the docket data, the guilty plea rate for this office was 90% in felony cases, and among the highest rates of the defender offices visited in the field research.

Hence, the field observations indicate that there may well be a strong relationship between the variety of support staff in a defender office and a relatively high guilty plea rate. But the mere availability of support staff has no discernible impact on the defender agency's guilty plea rate. They must be involved in activities which directly or indirectly have an impact upon the manner of disposition in both contested and non-contested cases. For example, in Jefferson County, Kentucky, the defender office was relatively well-staffed with intake interviewers, a specially-trained non-lawyer support staff component. But, the office did not employ any social workers. The intake interviewers play no observable role in plea negotiation. In those instances where support staff are available and delegated the primary responsibility of arranging alternatives to incarceration, or in arranging the actual guilty plea agreement, the volume of guilty plea dispositions is expected to increase. When the conditions of an alternative program include the entry of a guilty plea, and that is generally the case, the incidence of guilty plea dispositions must necessarily increase as more and more clients seek non-incarceration sentences.

The data from the mail questionnaire support these observations from the field. Table 50 presents the guilty plea rates for defender agencies that employ varying kinds of support staff.

(TABLE 50)

TABLE 50

Type of Support Staff Available to Defender Agencies
By Corresponding Guilty Plea Rates

(Felonies)

Type of Support	Guilty Plea Rates					
	0-20%	21-40%	41-60%	61-80%	81-100%	
No Support Staff	4%	9%	26%	39%	22%	(23)
Secretary Only	9%	9%	20%	26%	36%	(186)
Investigator Only	-	29%	29%	29%	13%	(7)
Law Students Only	-	-	50%	50%	-	(1)
Secretary and Law Students	7%	10%	19%	25%	39%	(88)
Secretary and Investigator	4%	17%	15%	37%	27%	(52)
All Varieties	6%	7%	15%	38%	34%	(53)

Total Number of Responses= 338

Defender agencies which employ a wide variety of support staff, such as secretaries, investigators, social workers, paralegals, and so on, are more apt to report higher guilty plea rates. Seventy-two percent of the defenders with a wide variety of support staff dispose of more than 60% of their felony caseload through guilty pleas, compared to 61% of the defender agencies that do not employ any support staff whatsoever. The same pattern, although more noticeably, exists in the guilty plea rates for misdemeanor cases. Forty-four percent of the defender agencies which do not employ any support staff dispose of voer 60% of their misdemeanor cases through guilty pleas, compared to 64% of the defender agencies that employ a wide variety of support staff.

In sum, the field research and the questionnaire date together point to the primacy of the guilty plea in those jurisdictions which offer alternatives to incarceration and other diversionary programs. Defender agencies that serve these jurisdictions are likely to hire a support staff to assist the defender's clients in obtaining alternative dispositions. In doing so, the defender agency will naturally increase its overall guilty plea rate as the requirements for alternative programs include a non-contested disposition.

F. A SAMPLE OF DEFENDER ATTORNEY NEGOTIATED GUILTY PLEA DISPOSITIONS

A sample of felony and misdemeanor cases which eventuated in negotiated guilty plea dispositions was drawn from 825 responding defender staff attorneys. Each attorney responding was asked to focus on his or her most recent case which resulted in a negotiated guilty plea disposition. Once their attention was so focussed, a

CONTINUED

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series of questions was asked to elicit information on the typical negotiated guilty plea disposition.

1. Nature of the Charge.

The most frequently occurring felony charge in the sample of negotiated guilty plea dispositions is burglary, while theft was the most frequent charge in misdemeanor dispositions. All major categories of offenses are included in the sample of negotiated dispositions; however, the more serious charges of homicide and rape occurred less frequently. Table 51 indicates the percentage distribution of the offenses (the original charges) which resulted in negotiated dispositions.

(TABLE 51)

2. Point of First Contact in Recent Case.

The point of first contact with the accused whose case resulted in a negotiated guilty plea disposition varied in the sample of cases, as indicated in Table 52. Most attorneys established first contact at or prior to the first court appearance of the accused: in felony cases, 5% at the police station immediately following arrest; 32% before the first court appearance; and 32% at the first court appearance of the accused. Another 31% established first contact between the accused's first court appearance and the trial and less than 1% after the trial.

(TABLE 52)

The same pattern exists in misdemeanor cases: first contact occurred at the police station in 2% of the cases; before the first court appearance in 38% of the cases; between the accused's first

TABLE 51
The Original Charge In
Recent Sample of Cases

Felonies	
Homicide	15%
Rape	9%
Theft	8%
Robbery	22%
Burglary	30%
Other	16%
Total	100%

Total Number
of Cases= 405

Misdemeanors	
Theft	39%
Assault	17%
Drugs	20%
Vice	2%
Other	22%
Total	100%

Total Number
of Cases= 381

TABLE 52
Point of First Contact in Recent Cases
of Staff Attorney Respondents

	Felonies	Misdemeanors
At the Police Station	5%	2%
Before 1st Court Appearance	32%	28%
At 1st Court Appearance	32%	38%
Between 1st Court Appearance and Trial	31%	31%
At the Trial	.2%	1%
After the Trial	-	-
Total	100%	100%
Total Number of Cases=	407	380

court appearance and the trial in 31% of the cases; and at the trial in 1% of the cases.

3. The Stage in the Proceedings when Negotiations Take Place.

The usual point in the proceedings during which a defender attorney will enter into major negotiations for a plea of guilty with the state is between the accused's first court appearance and his trial. In felony cases, 83% of the attorneys said that major negotiations occurred at that point and 73% indicated the same for misdemeanor cases, as illustrated in Table 53.

(TABLE 53)

Very few negotiations take place before the first court appearance of the accused (5% of the time in felonies and 7% in misdemeanors). This would be expected, since very few defenders have undertaken the representation prior to the initial court appearance. Thus, very few defenders can have any influence on the charging process, or the opportunity to work out agreements to cooperate with the prosecutor in exchange for the prosecutor's not filing a charge in the appropriate case.

Very little negotiation takes place after the trial of the accused (2% in felonies and 0.8% in misdemeanors). One might ask what is left to negotiate after a verdict and judgment of guilty. The response is that in many jurisdictions, the defendant can still withdraw his not guilty plea, plead guilty and waive an appeal. Waiving an appeal saves considerable prosecutorial time and expense, and reduces the trial judge's exposure to a reversal. Hence, the

TABLE 53
Stages(s) in the Proceeding When Major Negotiations Occurred

	% of Attorneys Reporting "Yes"	
	Felonies	Misdemeanors
Before 1st Court Appearance	5% (20)	7% (26)
At 1st Court Appearance	12% (48)	21% (81)
Between 1st Court Appearance and Trial	83% (338)	73% (277)
At the Trial	20% (81)	21% (79)
After Trial	2% (7)	.8% (3)

prosecutor and the trial judge may well offer a concession even after a guilty judgment, if that will waive an appeal.

A higher percentage of attorneys enter into negotiations at the first court appearance of the accused in misdemeanor matters (21%) than do in felony matters (12%). Negotiations occur with equal frequency in felony and misdemeanor matters at the trial of the accused, namely, 20% and 21% of the time, respectively.

Negotiations for a guilty plea cannot occur until the defender attorney has at least entered the case of the accused. Since most defender agencies usually enter cases at the first court appearance of the accused, it is unlikely that negotiations would occur prior to or at that time. Thus, as would be expected, the vast majority (83%) of the responding staff attorneys will usually negotiate a guilty plea disposition after the accused's first court appearance but before trial. However, since it appears that plea negotiations may take place at any time in the process, it would seem to follow that the earlier the defense attorney is on the case, the earlier that the case has the opportunity of diversion from the court system.

In any event, plea negotiations can and to take place all along the court process. However, in most situations, serious plea negotiations take place only after the initial court appearance and not before. This may be another attribute of late entry into cases by defenders generally, as is discussed in Chapter IV. Hence, the defender characteristic of late entry eliminates the possibility of early case disposition.

4. The Influences to Negotiate for a Non-Contested Disposition in One Case and not Another.

As indicated above, it is the defendant, not the attorney, who pleads guilty, and in the final analysis it is the defendant's decision, not the attorney's, that leads to a guilty plea, even though there are coercive tactics used upon the defendant.[20] Yet, it is clear that the defense attorney is a significant influence in the defendant's decision to plead guilty, and that it is usually the defense attorney who presents the guilty plea alternative to the defendant.[21]

In the preceding section of this chapter, systematic pressures to plead guilty were examined. However, no matter how intense and oppressive the systematic pressures to plead guilty, some cases are contested and the guilty plea rate is not 100%. In this section the focus turns to case or client characteristics that are related to guilty plea dispositions.

Each attorney was asked to indicate what substantially or significantly affected his decision to enter into negotiations on the sample case, rather than proceeding all the way through a trial. The available factors included: the nature of the offense; the attitude of the defendant; the characteristics of the defendant; pressure from the prosecutor; pressure from the judge; the strength of the defense; and the strength of the prosecution.[22] Each respondent was directed to check each factor which substantially influenced the decision to negotiate a guilty plea disposition.

The results are presented in Table 54, and point to the strengt of the prosecution's case as the single most important reason why

defender attorneys entered into plea negotiations in both felony and misdemeanor cases.

(TABLE 54)

Seventy-eight percent of the staff attorneys responded that the strength of the prosecution's case was a substantial influence on arranging a negotiated plea in felony cases, and 74% of the attorneys reported the same for misdemeanor cases. Of comparable importance is the nature of the offense in the sample case; the majority of the responding attorneys (56%) stated that hte nature of the charge against the accused, in terms of its seriousness and/or relation to the alleged act, served as an impetus to negotiate. The strength of the defender attorney's case was considered important in about 44% of the felony and 45% of the misdemeanor cases. The attitude and characteristics of the defendant were important factors in deciding to plea-negotiate in 42% of the felony cases and in 39% of the misdemeanor cases. Accordingly, it would follow that careful police and prosecution preparation coupled with knowledgable screening of charges, with the objective of not charging in cases in which the evidence is questionable, would contribute substnatially to an increase in non-contested guilty plea dispositions.

Although not reported in Table 54, a category of "other" was included in the question. Twenty-three percent of the defender attorneys checked "other", and nine times out of ten the "other" was specified as being a good sentence offer and/or assurance that the client would avoid incarceration. Often considered the essence

TABLE 54

Designation of Factors Which Significantly Influenced The Attorneys' Decision to Negotiate a Plea

	% of Attorneys Indicating That Factor Was Significant	
	Felonies	Misdemeanors
Nature of the Offense	58% (239)	56% (214)
Attitude of the Defendant	42% (172)	39% (148)
Characteristics of the Defendant	37% (152)	36% (139)
Pressure from the Prosecutor	2% (10)	3% (10)
Pressure from the Judge	3% (14)	3% (13)
Strength of the Defense	44% (179)	45% (173)
Strength of the Prosecution	78% (319)	74% (284)

of plea bargaining, a lighter sentence than one following a trial conviction, the sentence offer is not considered critical until the strength of the prosecution's case can be assessed. The sentence offer only gains in importance as the likelihood of conviction after trial becomes clear. Perhaps, the reason the defender's clients plead guilty at all is to obtain a lighter sentence when the prosecution's case is very strong -- the probability of a harsher sentence is higher.

5. The Typical Negotiated Guilty Plea.

Combining all of this data on the sample of defender attorney cases, a portrait of a typical negotiated guilty plea emerges. The original charge in the case is usually one of a non-violent type of felony. The defender attorney will establish first contact with the accused at the first court appearance and will usually begin negotiations soon after that appearance. However, those negotiations will not become serious until the defender attorney can assess the strength of the prosecution's case. If the case against his client is relatively strong, the defender attorney will most likely present the "offer" to the client and a guilty plea will be entered before the trial stage. The entire process takes on the average, from arrest to disposition, 85 days for felony guilty pleas and 32 days for misdemeanor guilty pleas, as shown in Table 55 below.

(TABLE 55)

TABLE 55

The Elapsed Time of Recent Cases
(From Arrest to Final Disposition)

Felonies	
1-20 days	14%
21-30 days	12%
31-60 days	28%
61-100 days	17%
101-150 days	12%
151-300 days	14%
301-651 days	3%
Total Number of Cases=	405

Misdemeanors	
1-5 days	15%
6-13 days	14%
14-20 days	16%
21-30 days	20%
31-50 days	12%
51-100 days	17%
101-200 days	5%
201-270 days	1%
Total Number of of Cases=	377

G. CONCLUSION.

The preceding section sought explanations for the variance in guilty plea rates among defender agencies and in the characteristics of agencies with relatively high and low guilty plea rates. These characteristics are associated with guilty plea rates to the extent that they are combined as descriptive dimensions of a defender agency.

No one characteristic accounts for an agency's guilty plea rate. Rather, as aggregate descriptions of defender agencies, they provide a picture of those agencies which sue the guilty plea most frequently. These characteristics, staff size, caseload size and staff resources, are not the causes of an agency's guilty plea rate, but rather, are contextual settings in which other phenomena originate and interact to produce prevailing guilty plea rates. In this section, the study has attempted to describe that context. The data continually indicate that the context consists of the larger defender agencies whose caseloads reflect the voluminous processing of criminal cases whose budgets provide for the funding of both staff attorneys and a wide variety of support staff. Within these agencies, there is a relatively high guilty plea rate.

Moreover, the plea negotiation process which precedes most guilty pleas has been among the more severely criticized procedures in the criminal justice system. Indeed, some would entirely abolish the process. Even those who support such procedures have recommended substantial reform.

In any event, the role of the defense lawyer is critical to the plea negotiation process and the defendant's decision to plead guilty. In this section, this study has attempted to illuminate

some of the characteristics that appear in defender agencies with relatively high guilty plea rates, as compared to defender agencies with relatively low plea bargaining rates, in order to better assess the process, and some of the reasons for it.

In terms of trends, this study indicates the following:

1. The governmental form of defender agency, the public defender, has its clients plead guilty in a higher percentage of cases than the private defender agencies, such as private corporations;

2. Case load pressures have an impact upon guilty plea rates. That is, the greater the case load, the higher the guilty plea rate.

3. From the defender-defense attorney view, the strength of the prosecution's case is the most impotant factor in the attorney's decision to advise his client to plead guilty.[23]

4. Rural defender agencies have about the same guilty plea rate as urban defender agencies.

FOOTNOTES

1. Santobello v. New York, 404 U.S. 257 (19); People v. Rhiebe, 40 Ill.2d 565 (19).

2. Boykin v. Alabama, 395 U.S. 238 (1969). The prosecutor of Philadelphia at one time generally refused to plea bargain. People still plead guilty, but the guilty plea rate was approximately 32%. The National Advisory Commission on Criminal Justice Standards and Goals, "Courts," at 47. However, at the time of the team's visit to Philadelphia, the prosecutor's office had changed hands and plea negotiations assumed the importance usually found in state courts. The prosecutor of Blackhawk County, Iowa, has also recently ended plea bargaining.

3. The Other Face of Justice, National Legal Aid and Defender Association (1973), reported that the 1972 defender survey had 68.5% of all felony cases and 74.5% of all misdemeanors disposed of by guilty pleas.

4. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts, at 9 (1967), sets the guilty plea rate at "roughly 90%." See also"Guilty Plea Bargaining: Compromises by Prosecutor to Secure Guilty Pleas," 112 U.Pa.L.Rev. 865 (1964).

5. Examples of written materials which espouse the different views include: Wheatly, "Plea Bargaining: A Case for Its Continuance," 59 Mass.L.Q. 31 (1974) (proponent); Alschuler, "The Defense Attorney's Role in Plea Bargaining," 84 Yale L.J. 1179 (1975) (opponent); National Advisory Commission on Criminal Justice Standards and Goals, Courts (1973) (opponent); Gallagher, "Judicial Participation in Plea Bargaining: A Search for New Standards," 9 H.Civ.Rts./Civ.Libs.L.Rev. 29 (1974) (reformer); Note, "Restructuring the Plea Bargain," 82 Yale L.J. 286 (1972) (reformer); "The Unconstitutionability of Plea Bargaining," 83 Harv.L.Rev. 1387 (1970) (opponent). See Santobello v. New York, 404 U.S. 257 (1971), where the present United States Supreme Court Justice finds the process of plea bargaining essential. See also New York State Commission on Attica, at 30-31 (1972).

   Most reformers of the plea bargaining process suggest that it be made into a more formalized part of the normal course of the proceedings, with the bargaining stenographically transcribed, and if not the entire bargaining process transcribed, then at least the agreement transcribed. See Ill.Rev.Stat., 1977, ch. 110A, sec. 402, "Commentary;" and National Advisory Commission on Criminal Justice Standards and Goals, Courts, 3.3, and "Commentary," at 52-53. American Bar Association Standards Relating to Pleas of Guilty, 1968.

6. People v. Whitfield, 239 N.E.2d 850 (Ill. 19).

7. Santobello v. New York, 404 U.S. 257 (19). See also Kittel,

"Defense of the Power: A Study in Public Parsimony and Private Poverty," 45 Ind.L.J. 90, 110-112 (1970); "The Influence of the Defendant's Plea on Judicial Determination of Sentence," 66 Yale L.J. 204, 205-20 (1956); Alschuler, A., "The Defense Attorney Role in Plea Bargaining," 84 Yale L.J. 1179, 1248-56 (1975).

8. Kittel, supra note 7, at 144-212. See also, Scott v. United States, 419 F.2d 264, 772 (Cir. 1969).

9. The Other Face of Justice, supra note 3, at 30. The percentages of guilty plea dispositions are based on the reported caseload dispositions of 233 defender agencies. For rural defender agencies, a total of 1012 misdemeanor cases were included in the calculation of guilty plea dispositions, and a total of 4748 felony case dispositions were included.

10. See Oaks, D., Lehman, W., "The Criminal Process of Cook County and the Indigent Defendant," 1966 U.I.L.F. 584, 614-57, for an attempted explanation of why clients of the Public Defender of Cook County, Illinois, plead guilty. However, in the view of one of the authors of this report, an attorney on the staff of the defender agency examined during part of the time period discussed, the authors ignored structural changes occurring in the defender office at the time and the enormous pressures placed upon defender lawyers by the judiciary, who hire and can discharge the chief defender, to convince the defender's clients to plead guilty. See also Alschuler, supra note 7, at 1206-70.

11. However, the definition of a conflict case may vary minimally from locality to locality.

12. See, Wallace v. Kern, 371 F.Supp. 1384 [E.D. N.Y. 1974] , in which the U.S. District Court limited Legal Aid Society lawyers to 40 (pending) felony cases; reversed on jurisdictional grounds 481 F.2d 621 (2nd Cir., 1974), American Bar Association Standards Relating to the Defense Function 1.2(d), p. 178-179; and Ligda v. Superior Court, 5 Cal. App. 3d 811 1970), in which it was stated that the defender must have the legal authority to refuse additional cases at any point at which, in his opinion, adequacy of representation of accused persons would be threatened by additional caseload. Also see, ABA Standards (The Defense Function) Sandard 1.2 (d), pp. 178-179; and NLADA Proposed Standards for Defender Services, pp. 45-48.

13. National Advisory Commission on Criminal Justice Standards and Goals, "Courts," p. 47. Prosecutors in Alaska have claimed that Alaska has ended plea bargaining. Black Hawk County, Iowa has also experimented with a no plea bargaining process. In both Black Hawk County and Alaska criminal defendants still plead guilty.

14. Oaks, D. and Lehman, U. supra note 10, at 723-728. "Remedies for Renegade Plea Bargains in California," 16 Santa Clara L.Rev. 103 (1975), nn 5 and 10. See also Alschuler, A. "The Trial Judges Role in Plea Bargaining, Part I," 76 Cal. L.R. No. 7, pp. 1059-1154 (1960).

15. Boykin v. Alabama, 395 U.S. 238 (1969); North Carolina v. Alfred, 400 U.S. 25 (1970); McMann v. Richardson, 397 U.S. 259 (1970).

16. See Lichtman, J., "Constitutional Requirements of Appointed Counsel in the Guilty Plea Process," supra. Alschuler, "The Defense Attorney's Role in Plea Bargaining" 84 Yale L.J. 1179 (1975).

17. Eisenstein and Jacob, Felony Justice, 1977.

18. Alschuler, A., "The Prosecutor's Role in Plea Bargaining" 36 U. of Chicago L.R. 50.

19. LaFrance, A. "Criminal Defense Systems for the Poor" 50 Notre D.L. 41, 51 (1975); Wallace v. Kern, 371 F.Supp. 1384, 1388 (E.D. N.Y., 1974), reversed on jurisdictional grounds 499 F.2d 1345 (E.D. N.Y., 1974).

20. Brady v. United States, 397 U.S. 742 (1970); People v. Whitfield, 239 N.E.2d 850 (Ill. 19). One would be hardpressed to find a more coercive setting than that presented by People v. Heirens, 4 Ill2D 131 (19), yet the plea has withstood subsequent defense counsel attacks.

21. Lichtman, J. supra, at 80-90; Alschuler, "The Defense Attorneys Role in Plea Bargaining," supra note 5, at .

22. Alschuler in "The Defense Attorney's Role in Plea Bargaining," supra note 5, at 1206-1255, considers systematic pressures along with more individualistic, i.e. client and case pressure, in his work. The factors utilized here are those which the team conceptualized based upon experience as being among the most important.

23. Finkelstein, "A Statistical Analysis of Guilty Plea Practice in the Federal Court" 89 Harvard L.R. 293 (1973) argues that a significant number of defendants pleading guilty or nolo contendre in federal court would have been acquitted if they had gone to trial. One may also make the continuing point that prosecutors will reduce the sentence offer to one that cannot be refused where their case is weak, hence it is weakness of the case for the prosecution that caused guilty pleas. However, that was not the response from the defenders.

APPENDIX TO CHAPTER V

SUMMARY OF DOCKET DATA IN THE EIGHT DEFENDER OFFICES

The docket data from each of the 8 defender offices reveals different guilty plea rates for each office. Table 56 presents the guilty plea rates for the felony cases assigned to each of the 8 defender offices. The rates range from 13% in Baltimore County (note, the % is to be questioned because of the smallness of the N) to 90% in Oneida County, New York. A summary of the judgments and sentences for the guilty plea dispositions in these 8 offices follows. Table 57 summarizes the data.

1. Baltimore County

The one felony case that eventuated in a guilty plea disposition was a guilty on some counts but not guilty on other counts. The defender client received probation in exchange for the guilty plea.

2. Lousiville, Kentucky

The Public Defender Office in Jefferson County (Louisville), Kentucky disposed of 29 cases, or 53%, of its felony caseload through guilty pleas in the docket sample of cases. An overwhelming 97% of these guilty pleas were to the original offense charged against the accused. One defendant, or 3%, pled guilty to a lesser

TABLE 56
Guilty Plea Rates for
8 Defender Offices

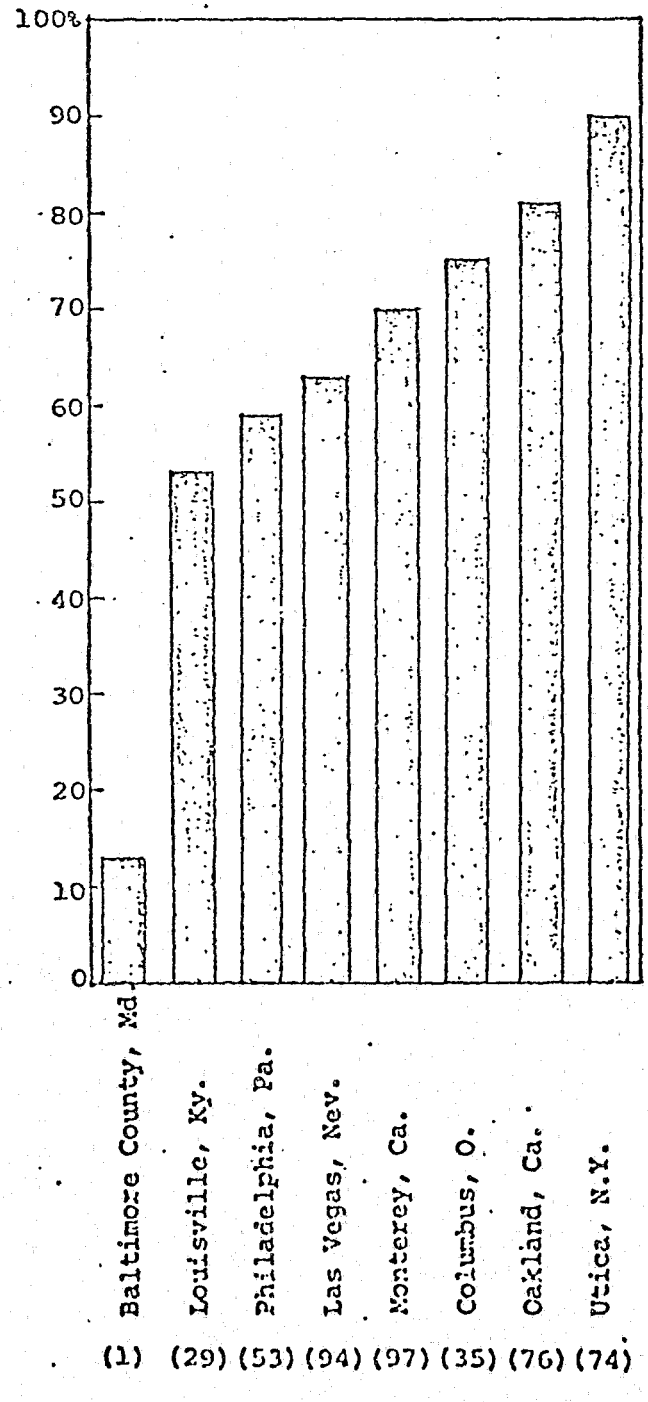

TABLE 57
Final Charge and Sentence for Guilty Plea Dispositions
for each Docket Sample

	Final Charge					Sentence		
	Guilty as Charged	Dropped Counts	Dismissed Charges	Lessor Offense		Pro-bation	Incar-ceration	
Baltimore, Md.	-	50%	50%	-	100% (2)	100%	-	100% (1)
Louisville, Ky.	97%	-	-	3%	100% (29)	15%	85%	100% (27)
Philadelphia, Pa.	12%	42%	39%	7%	100% (91)	60%	40%	100% (52)
Las Vegas, Nev.	45%	12%	21%	22%	100% (117)	62%	38%	100% (91)
Monterey, Ca.	15%	26%	26%	33%	100% (130)	62%	38%	100% (95)
Columbus, O.	12%	31%	31%	26%	100% (51)	53%	47%	100% (34)
Oakland, Ca.	17%	36%	34%	13%	100% (114)	70%	30%	100% (74)
Utica, N.Y.	25%	9%	9%	57%	100% (82)	58%	42%	100% (73)
Total Cases=	157	112	158	143	616	263	164	447

included offense. Eighty-five percent of the clients who pled guilty received incarceration as a sentence; the remaining 15% received a probation sentence.

3. Philadelphia, Pennsylvania

In the docket sample of felony cases assigned to the Philadelphia Defender Association, 53 cases, or 59%, of them were disposed of through guilty pleas. Only 12% were guilty pleas to the original charge; the remaining were guilty pleas to lesser included offenses (7%) and guilty pleas to some counts, others dropped (81%). Most of the clients who pled guilty received probation as a sentence (60%) compared with 40% who received a sentence of incarceration.

4. Las Vegas, Nevada

Ninety-four clients, or 63%, pleaded guilty in the sample of felony cases taken from the public defender office in Las Vegas. Forty-five percent of the pleas were to the original charge whereas 55% resulted in an alteration of the original charge: 22% were pleas to a lesser included offense and 33% involved the dropping of some counts. The majority of clients who plead guilty received probation as a sentence (62%).

5. Monterey, California

The public defender office in Monterey County disposed of 70% of its felony cases in the docket sample through guilty pleas. Fifteen percent were pleas to the original charge; 52% involve the dropping of some counts; and, 33% were pleas to a lesser included offense. The majority of the guilty plea dispositions (62%) received a probation sentence, the others (38%), incarceration. It should be noted that in California, sentences are set by law.

As a result, there is no direct sentencing bargaining, except for probation. Bargaining for a reduction of charges is, of course, undertaken, indirectly. This is a form of sentencing bargaining.

6. Columbus, Ohio

The Columbus public defender office disposed of 35 felony cases, or 75%, of its total felony caseload in the sample through guilty pleas. Only 12% of the guilty pleas were to the original charge; the majority, 62%, involved the dropping of some counts; and 26% were to lesser included offenses. The majority, or 53%, received a probation sentence.

7. Oakland, California

The public defender office in Oakland disposed of 114 felony cases, or 81%, of its felony caseload in the docket sample through guilty pleas. The majority of these guilty pleas, 70%, involved the dropping of some counts, whereas 17% were pleas to the original charge and 13% were to lesser included offenses. The vast majority, 70%, of these clients who pled guilty received probation; the others, 30%, received incarceration.

8. Utica, New York

The public defender office in Utica had the highest guilty plea rate for felony cases in the docket sample. Seventy-four cases, or 90%, of the office's total felony caseload was disposed of by guilty pleas. One-fourth of them did so to the original charge, but the majority, 57%, pled guilty to a lesser included offense. Only 18% of the guilty pleas involved the dropping of some counts. The majority of the guilty pleas, 58%, resulted in a probation sentence.

CHAPTER VI

THE GUILTY PLEA: ACTUAL CASE DISPOSITIONS

A. DESCRIPTION OF THE DOCKET STUDY.

In Chapter V, the various characteristics of defender agencies with varying guilty plea rates were described. That chapter discussed, through mail questionnaire data and field research observations, the different settings in which guilty plea rates increase or decrease. In this section, the perspective shifts to a description of actual guilty plea dispositions in eight localities in the country. Data gathered in eight docket studies are used to extend findings disclosed by the mail survey, and to provide additional information not elicited in the mail questionnaire.

Data were collected from the court dockets of eight jurisdictions which utilize a defender office to provide defense services to poor people accused of crime. The defender offices are located in and serve the following areas: Columbus, Ohio; Jefferson County (Louisville), Kentucky; Oneida County (Utica), New York; Baltimore County, Maryland; Philadelphia, Pennsylvania; Clark County (Las Vegas), Nevada; Monterey County (Monterey), California; and Santa Clara County (San Jose), California.

The original objective was to conduct docket studies in the sam sites chosen for the field research, all to be performed in advance of the field visits. However, docket studies were completed in advance of field visits. After the docket study in Alameda County (Oakland), California, a study team field visit to Alameda County became impossible for reasons unrelated to this project. Santa Clara County (San Jose), California, was selected as a substitute,

but budget and time constraints did not permit a Santa Clara County docket study. Hence, there are eight docket studies and eight field trips, but only seven of them coincide; there is a docket study, but no field trip, for Alameda County, and a field trip without a docket study for Santa Clara County.

All of the court systems from which the docket data was collected serve areas with populations of over 250,000 persons (See Methodology Appendix A and Appendix to Chapter V). The sites were chosen with the objective of providing variability as to guilty plea rates, as well as the degree of private bar involvment in providing non-fee defense services. Also, it was necessary for the court records to be in relatively good order, the information to be relatively easily retrievable, and that there exist a spirit of cooperation from court and other personnel. The "sample" of locations was not intended to be representative of the universe of areas which employ the organized defender method of non-fee criminal defense delivery, but enough variation exists for the study to suggest a number of significant facts about the more urban defender agencies and the guilty plea impact and process.

The data were gathered variously by law students, court employees and attorneys, who recorded the pertinent data from a random sample of felony cases which were completed at the trial court level in or around March of 1974.* The first 150-200 felony cases which were completed, were examined to determine the following information: pre-trial (jail or release) status and bail amount;

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* Completion here is defined as dispositions by either a guilty judgment and sentence, dismissals for any reason, or a not guilty judgment. The appellate or collateral attack process was not included, nor were trial court proceedings pursuant to a remand of the matter.

type of counsel (defender, appointed private counsel or retained counsel); elapsed times from arrest to sentencing; amount of time spent in jail awaiting trial court disposition; method of disposition; original and final charges; judgment; and sentence.

Pre-trial release status and amount of time in jail in the pre-trial stage are considered factors which have significant impact upon guilty plea rates,[1] and are facts relatively easily retrievable from most docket records. Type of counsel was examined to determine whether there was any correlation between type of counsel and plea bargaining rates.[2] Patterns in charge reduction, sentence reduction, or charges dismissed were examined to identify any differing conviction or sentencing patterns between contested and non-contested dispositions.[3]

A total of 1326 felony cases emerged from the docket studies. What follows is a comparative analysis of methods of disposition (contested vs. non-contested), the pre-trial status of the accused, and the judgments and sentences for this sample of actual felony cases. But first, the cases represented by the eight defender offices are compared with those in which assigned private counsel provided representation. That is followed by summary description of the 679 felony cases assigned to and disposed of by the eight defender offices. And, finally, the impact of the guilty plea disposition on the clients of the defender offices is examined in light of charge alteration and ultimate sentencing.

Neither the sample of cases nor the data obtained on each case are intended to be exhaustive; the results apply to only those eight court systems from which the data was gathered. Generalizations to other court systems are necessarily suspect because of the varieties

of existing criminal justice systems, their practices and procedures throughout the United States. Also, comparisons which include retained counsel are not included because retained clients have substantially different characteristics than appointed counsel and defender clients, since it was impossible to weigh those differences in characteristics for a meaningful comparison of attorneys rather than of cases and clients.

B. ASSIGNED COUNSEL VERSUS PUBLIC DEFENDER.

In all but one of the sites used for the collection of the docket data, provisions existed for the appointment of private assigned counsel to non-fee criminal cases. The defender office serving Jefferson County (louisville), Kentucky, is appointed to represent all non-fee criminally accused persons. In the event of conflict-of-interest situations, a different public defender attorney was assigned to each co-defendant.[4] In extraordinary cases, the Jefferson County Public Defender would also call upon private attorneys who were personal friends and induce them to represent a conflict client for little or no fee, but on a non-appointive basis. That situation would not be disclosed by docket entries. In any event, because there were no identifiable appointed private counsel cases in Jefferson County, Kentucky, this section's comparison of defender and assigned counsel cases will therefore utilize only the dockets of the other seven sites.

1. Distribution of Case Sample Across Types of Counsel.

Defense counsel was present for each of 1326 felony cases in the docket sample of cases. The defender offices (8) provided representation in 51% of these felony cases; assigned private coun-

sel were appointed to 8% of the felony cases; and 41% of the felony cases were ones in which the accused hired a private attorney. Assuming that these 1326 felony cases are representative of the usual felony caseload in the eight sites, an indigency/eligibility rate can be developed by combining the defender and assigned private counsel cases into the total felony cases requiring non-fee criminal defense services. Thus, in the eight sites studied, 59% of the total felony caseload in those areas was provided with non-fee criminal defense services.

However, the rate of eligibility for non-fee defense services fluctuated considerably among the eight sites, as illustrated in Table 58.

(TABLE 58)

In felony matters, only 29% of the cases arising in Louisville, Kentucky, required the appointment of the public defender office[5] (there are no provisions for the appointment of assigned private counsel), whereas 88% of the felony cases in Monterey County, California,* required the appointment of the public defender office (81%) or assigned private counsel(7%). Combining the appointments of defender office and assigned private counsel, the eligibility rate for non-fee defense services for the remaining six areas is as follows: Baltimore County, Maryland -- 30%; Columbus, Ohio -- 41%; Utica, New York -- 64% (there were no appointments of private

* Observations and interviews led the study team to the opinion that the appointed variations between Jefferson County and Monterey County were the result of extraordinary reluctance of Jefferson County judges to find accused persons without counsel eligible for appointed counsel.

TABLE 58
Rate of Eligibility for
Non-Fee Criminal Defense
Services in the 8 Field Sites

Site	Defender	Assigned Counsel	Retained Counsel	Total
Louisville, Ky.	29%	--	71%	190
Baltimore County, Md.	5%	25%	70%	193
Columbus, Ohio	37%	4%	59%	129
Philadelphia, Pa.	58%	7%	35%	168
Utica, N.Y.	64%	--	36%	129
Monterey, Cal.	81%	7%	12%	172
Las Vegas, Nev.	79%	2%	19%	192
Oakland, Cal.	63%	17%	20%	153
	51%	8%	41%	1326

assigned counsel in the sample of felony cases for this area); Philadelphia, Pennsylvania -- 65%; Oakland, California -- 80%; and Las Vegas, Nevada -- 81%.

2. Comparative Pre-Trial Status.

The clients of the seven defender agencies are more likely to begin their movement through the criminal process in jail than are the clients of assigned private counsel and retained counsel. Fifty-three percent of the defender clients were detained while awaiting disposition compared to 46% of the clients of assigned counsel and only 14% of the clients of retained counsel, shown in Table 59.
If incarceration in the pre-trial stage does influence the accused person to plead guilty, it would seem to follow that in the sample, retained counsel would have a much lower guilty plea disposition rate than defender or appointed counsel.

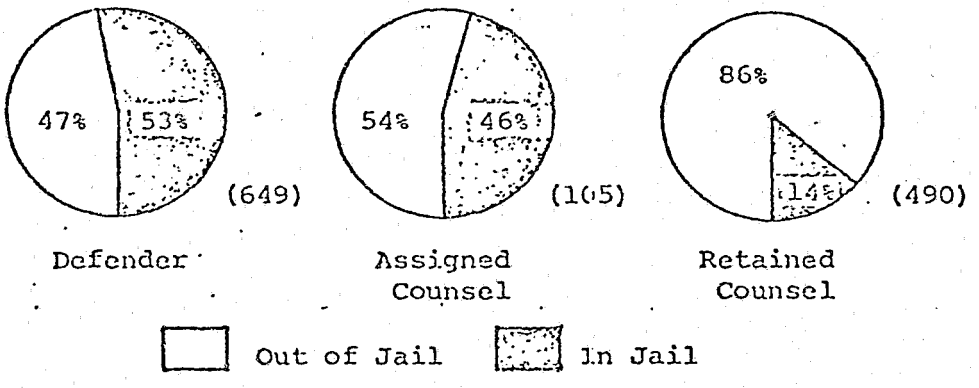
(TABLE 59)

A related finding is that while bail amounts in the sample ranged from less than $500 to more than $5,000, some 66% of the defender cases had bail set in amounts exceeding $1,000. It is not difficult to put this fact together with the inability of poor people to raise large sums of money, and come up with a high rate of pre-trial detention for defender clients. It is clear that the defender offices' clientele is more likely to be detained before disposition. However, it is not at all clear that this should be the case as a matter of law.

Principles of equal protection would seem to require that money bond should not stand as an unconquerable obstacle to poor people, since affluent persons find money bond to be no obstacle at all.[6] Of course, judges may impose conditions for pre-trial re-

TABLE 59

Type of Counsel by
Pre-Trial Status of Accused



lease to assist in assuring the appearance of the accused and his submission to court orders. But if the accused is too poor to deposit a money bond, then alternatives to money bond should be utilized.[7]

This, however, does not appear to be the case in the sample of situations examined here. In fact, the clients of the seven defender offices comprise 75% of the jail population in the sample of cases; 10% are assigned-counsel clients and the remaining 15% are the clients of retained private counsel. This is illustrated in Table 60.

(TABLE 60)

3. Comparative Methods of Disposition.

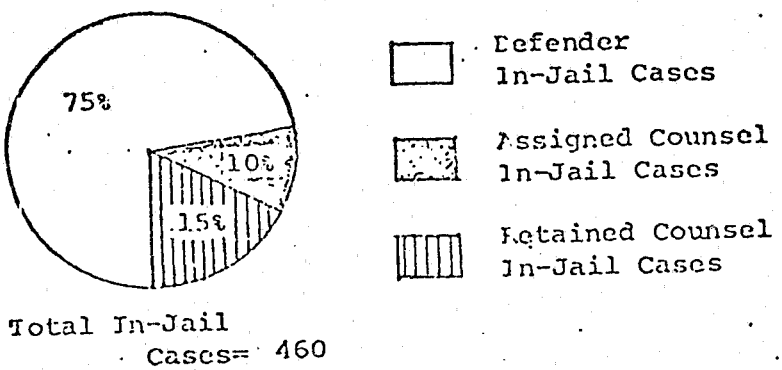
As Table 61 illustrates, the assigned private counsel in the seven jurisdictions exhibit a lower rate of guilty pleas than the defender group; thus, while the defenders disposed of about 2/3 of their cases through guilty pleas, the assigned counsel disposed of about half of their cases this way. Trial rates are very different: 26% for assigned counsel, and only 13% for defenders. Dismissal rates for the two types of counsel are roughly equivalent (18% for assigned counsel, 17% for defender).

(TABLE 61)

Why would assigned counsel take cases to trial twice as often as their defender counterparts? Some observers have offered reasonable suggestions: Oaks and Lehman, for example, hypothesize

TABLE 60

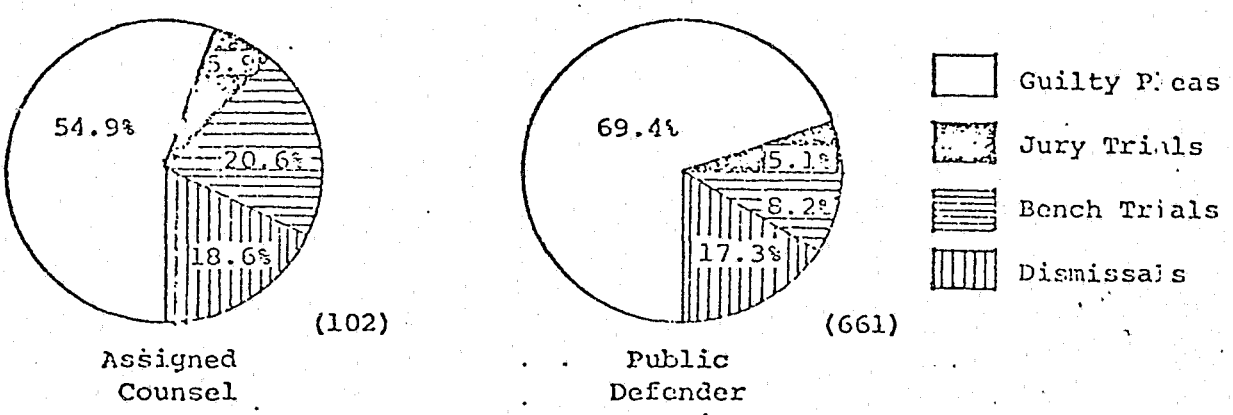
Defender Cases, as Proportion of All In-Jail Cases



Total In-Jail Cases= 460

TABLE 61

Comparative Methods of Disposition for Assigned Counsel and Defender Cases



that defenders have a higher guilty plea rate because they have a more thorough screening procedure than the typical appointed lawyer who must rely on much less experience with the kinds of cases and clients that the defender sees every day.[8] Hence, defenders would try only those few cases in which there was a genuine factual issue, because of their ability to realistically assess the defensibility of a case. The defender lawyer, according to that theory, is then able to alternately take advantage of the concessions available to his/her client through the plea bargaining process. Moreover, as the docket data indicate as illustrated in Table 62, the assigned counsel in the sample are appointed to a larger proportion of the more serious offenses of homicide and rape. These more serious offenses are more apt to eventuate in a trial disposition, as illustrated in Table 63. This tends to indicate that the assigned counsel may be appointed to the cases that are more likely to go to trial because the sentence, even in a plea bargain situation, will be so long as to cause the defendant to take his chances at trial.

(TABLE 62)

(TABLE 63)

Oaks and Lehman also indicated, in their study of one system, that this screening differential would make one expect a higher acquittal rate for the more cautious defenders than for the assigned counsel. Such was apparently the case in the site they studied, Cook County, Illinois,[9] and it is also confirmed in the present study. On the occasions when defenders went to trial, 31% of

TABLE 62

Comparative Percentages of Caseloads Represented by Each Offense

	% of Defender Cases	% of Assigned Counsel Cases
Homicide	1.8% (12)	6.5% (7)
Rape	2.7% (18)	4.6% (5)
Robbery	15.2% (103)	21.3% (23)
Aggravated Assault	8.2% (56)	8.3% (9)
Burglary	22.4 (152)	33.3% (36)
Theft	23.4% (159)	4.6% (5)
Narcotics	13.5% (92)	15.7% (17)
All Others	12.8% (87)	5.7% (6)
Total	100% (679)	100% (108)

TABLE 63

Comparative Guilty Plea Rates for Assigned Counsel and Defender "More" and "Less" Serious Cases*

	More Serious Charges	Less Serious Charges
Assigned Counsel		
Pleas	65.6%	68.5%
Trials	34.4%	31.5%
Total	100% (29)	100% (54)
Defender		
Pleas	74.8%	86.4%
Trials	25.2%	13.6%
Total	100% (119)	100% (428)

UNWEIGHTED

* More serious includes homicide, rape, robbery. Less serious includes aggravated assault, burglary, theft, narcotics, and other.

their clients were found not guilty, while assigned counsel obtained not guilty judgments in 26% of their trial cases, as shown in Table 64. While this difference is not substantial, it is suggestive of some phenomena at work in the system, one of which could well relate to differing degrees of accuracy in screening cases and better judgment on which cases should be contested and which cases should not.[10]

(TABLE 64)

Another study attributes stability of courtroom personnel to high guilty rates, that situation in which the prosecutor and defender are regularly assigned to the same courtroom over a period of time.[11] That was the method of defender assignment in Jefferson County and Monterey County.

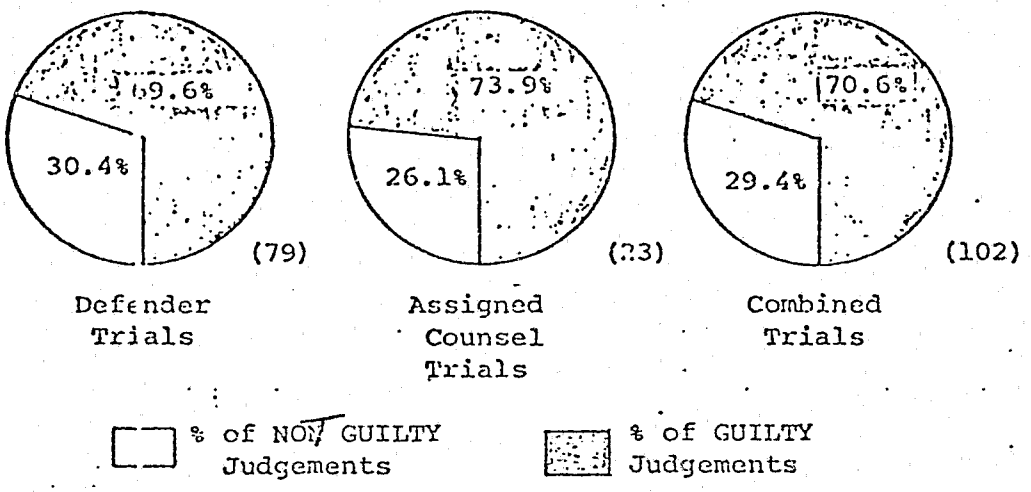
The reader should be reminded that in the final analysis, it is the defendant who pleads guilty. The lawyer, at best, can influence that decision. The influence may range from little to great The weight of the lawyer's influence will depend on a variety of factors including, but not limited to, the confidence of the client in the lawyer, the strength of will of the defendant, his independent perception of his guilt or innocence, the client's opinion of his chances in a contest, and his conceptualization of a good sentence arrangement.

Moreover, in Part 2 above, it was noted that the clients of defenders were more likely to be incarcerated in the pre-trial stage than the clients of appointed counsel. According to some observers, detained clients are more likely to plead guilty.[12] The

TABLE 64

Comparative Acquittal Rates

For Defender and Assigned Counsel Trials



apread between incarcerated defender clients and appointed-counsel clients is 7%, shown in Table 59, while the contest/guilty plea spread between defender clients and assigned counsel clients is over 14%, shown in Table 61. The greater percentage of incarcerated defender clients may account for some of the difference in the guilty plea rate between defender clients and assigned private counsel clients.

4. Comparative Caseloads: Different Counsel for Different Offenses.

In the seven docket samples of felony cases, assigned counsel provided representation in a higher percentage of the three "more violent felonies" (homicide, rape, robbery), as opposed to felonies that involve crimes against property (burglary, theft), that did the defenders. Table 62 indicates that violent felonies constitute nearly 7% of the total assigned private counsel caseload, while they represent only 2% of the defender cases. This tendency continues through all the crimes involving some form of violence.

The difference is more dramatic when homicide and rape are set apart from other crimes: some 11% of assigned private counsel cases are in this category, whereas only 4.5% of defender cases are of this type. In relative terms, the assigned private counsel in this sample undertook 2 1/2 times as many of the two most violent crimes as the defenders.

5. Who Tries More Cases?

Table 63 illustrates that defenders show a marked tendency to take more of their very serious cases to trial (trial rate of 25%, excluding dismissals) and to settle more of their less serious

cases through guilty pleas (trial rate of only 14%, excluding dismissals). But the assigned private counsel do not behave similarly; irrespective of the seriousness of the charge, assigned counsel will contest about 1/3 of their cases (excluding dismissals)

However, overall data accumulated here tend to confirm that assigned private counsel represent clients who contest a higher percentage of cases than defender clients. The data suggest at least two reasons for this phenomenon: (1) a higher percentage of defender clients are incarcerated in the pre-trial stage than assigned counsel clients; (2) a higher percentage of assigned counsel cases involve the more serious crimes than defender cases.

Incarceration leads to guilty pleas because the incarcerated client has become acclimated to the loss of his freedom. The incarcerated client has lost his job, been separated from family, friends and neighborhood. The conviction that follows a guilty plea results in much less of an abrupt, traumatic change in status than for the free defendant awaiting trial. Moreover, the time spent in jail awaiting trial is frequently credited toward the sentence either as a matter of law or taken into consideration by the judge when imposing final sentence, so that a substantial portion of the sentence may have been served by the time final sentencing occurs. Indeed, the sentencing proceeding may result in the end of incarceration for the jailed defendant awaiting trial, but the beginning of incarceration for the free defendant awaiting trial. Also, there is the hopelessness and depression common among jailed defendants that destroys any combative spirit he may have had before incarceration. Hence, the pre-trial status of the accuse may be a critical factor as to whether or not he pleads guilty or

contests the case.

The seriousness of the charge may also have an impact upon whether a defendant contests a case or not. A less serious case is more likely subject to probation, or is amenable to a time-considered-served type of sentence than a more serious charge. A serious charge may require a substantial sentence of incarceration, even with a relatively good plea bargain arrangement. Hence, it may follow that the accused will feel he has little to lose by risking a still harsher sentence after a guilty judgment in a contested matter. The better part of his life will be wasted in prison in any event, and he may as well take his chances on a not guilty verdict.

The point is that variations between assigned-private-counsel client guilty plea rates and defender client guilty plea rates may be a result of differences in key characteristics of clients and cases assigned to defender and assigned private counsel, rather than in differences between the way lawyers from each system approach their cases. It may not be, as Lehman and Oaks suggest, that a defender's experience enables the defender to more selectively choose whether to contest a case, for the final decision to plead guilty or contest a case is the client's, not the lawyer's. Moreover, there is no reason to believe from the cities visited that defender lawyers are more experienced criminal practitioners than assigned private counsel. Hence, it should follow that the characteristics of the client and his case are more important than whether assigned private counsel or a defender is the lawyer.

C. COMPARATIVE SENTENCING -- ASSIGNED PRIVATE COUNSEL/DEFENDER.

The docket study has provided data as to the relative frequencies of probation and incarceration, for both trials and guilty pleas. For both types of counsel and for all manners of disposition, probation occurs more frequently than incarceration, as shown by Table 65.

Observing guilty pleas only, the result for defender clients and assigned private counsel clients is ab4ut the same: both the defender and assigned private counsel obtain probation in over half of their guilty plea cases. However, the clients of assigned private counsel and defenders are not receiving similar probation sentences for guilty judgments after trial. The clients of defenders are more likely to be sentenced to a period of incarceration after a contested trial than are the clients of assigned counsel. Or, to put it the other way, assigned private counsel are equally successful at obtaining probation for their clients, regardless of whether they contest or plead guilty, and they are more successful at obtaining probation after a contested trial than the clients of defenders. This result is even more noteworthy when one considers that assigned private counsel receive a higher percentage of serious cases than do the defenders.

(TABLE 65)

An obvious explanation for this finding was not detected by the study. However, case screening may play a role. When the defender loses at trial, it may be that the client (as well as the charge) is not suited for probation at all, and this unsuitability

TABLE 65

Comparative Rates of Probation and Incarceration
For Assigned Counsel and Defender

	% of Cases Receiving Probation	% of Cases Receiving Incarceration	Total
Pleas			
Appointed Counsel	52.8% (28)	47.2% (25)	100% (53)
Defender	56.9% (244)	43.1% (185)	100% (429)
Trials			
Appointed Counsel	52.9% (9)	47.1% (8)	100% (17)
Defender	37.5% (18)	62.5% (30)	100% (48)

was the reason for not pleading guilty in exchange for a probation sentence in the first place. It was noted above that a higher proportion of assigned-counsel clients are free on bond than defender clients. The free status may result in the defendant being probationable where he would not have been probationable had he been incarcerated.

A defendant free in the pre-trial stage may have a job and be able to support his family; he may have undertaken a community-based rehabilitation program, such as alcoholics anonymous, drug therapy or counseling; and given signs of affirmative response.[13] However, the percent difference between probation sentences for private assigned-counsel clients over defender clients is much greater than the percent difference of defender incarcerated clients in the pre-trial stage over assigned private counsel clients. Thus, factors other than pre-trial incarceration status must be at work.

Other explanations concern the possible differential treatment afforded assigned private counsel on the basis of several factors. Because assigned counsel are appointed to a much lower proportion of the indigent cases (except in Baltimore County), their appearance in court is rare. Also, since indigent cases are usually not randomly distributed among defenders and assigned counsel, the nature of each group's caseload is quite different. Another significant ingredient may be the fact that assigned counsel are private practitioners, professionally and logistically separate from the day-to-day operation of the justice system. Because assigned counsel are exceptional in the sample of cases, the justice system may react differently to them by showing a lesser reluctance to grant probation after a trial. Finally, defenders usually have

a higher percentage of the court's assigned clients than assigned private counsel. Also, a defender will usually have a very large number of cases, while an assigned private attorney will have relatively few cases, though in the aggregate, the assigned counsel system may have as many cases as the defender agency.

Many in the criminal justice system believe that it is essential to terminate a very high percentage of criminal cases through guilty pleas because resources are limited,[14] and since the individual defenders are the ones who are in court every day with indigent clients, the individual defender must have his clients plead guilty in a high proportion of his cases. Hence, it becomes necessary to harshly punish a defender client who is found guilty after a contested trial to discourage too many contested matters by the defender who is constantly before the court on behalf of indigent clients. On the other hand, the assigned private counsel has only an occasional indigent case. Punishing his client for contesting a case will be relatively useless, since the next assignment of another case will be weeks or even months away.

FOOTNOTES

1. Wallace v. Kern, 321 F.Supp. 1384 (E.D.N.Y. 1974), reversal on jurisdictional grounds. American Bar Association Standards Relating to Pre-Trial Release, pp. 23-25. "The Effect of Pre-Trial Detention," 39 N.Y.U.L.Rev. 641 (1964).

2. Oaks, D., and Lehman, W., "The Criminal Process of Cook County and the Indigent Defendant," 1966 U.I.L.F. 584, 719-35. See also, Alschuler, A., "The Defense Attorney's Role in Plea Bargaining," 84 Yale L.J. 1179 (1975). See also Lehtinen, M., and Smith, G., "The Relative Effectiveness of Public Defenders and Private Attorneys," 22 NLADA Briefcase 1, 13 (1974), for an example of an effort to compare case results of private attorneys with those of defenders. The study is limited to Los Angeles County, California, and does not distinguish private retained counsel from private appointed counsel. See also, Smith, G., and Wendall M., "Public Defender and Private Attorney: A Comparison of Cases," 27 NLADA Briefcase 2 (1968).

3. "Remedies for Renegade Plea Bargaining in California," 16 Santa Clara L.Rev. 103 (1975). This is a work that focuses upon the remedies available when there has been a breach of the agreement. The approach of the work is almost that of a civil contractual la See also Lambras, "Plea Bargaining and the Sentencing Process," 53 F.R.D. 509 (1971); "Plea Bargaining: The Case for Reform," 6 U.Rich.L.Rev. 325, 326 (1972).

4. The Illinois Supreme Court has held that the Jefferson County, Kentucky, procedure does not cure the conflict. People v. Smith, 37 Ill.2d 622, 230 N.E.2d 169 (1967). However, New York courts have held that a defender agency may assign different defender lawyers to conflict clients. People v. Wilkins, 320 N.Y.2d 53 (1971). See also State v. Gallagher, 509 P.2d 852 (Mont. 1973); Williams v. State, 214 So.2d 29 (Fla. 1968); Kaczmarek v. State, 155 N.W.2d 813 (Wisc. 1968).

5. The study team does not intend to indicate that this was the true indigency rate. In this regard, particularly noteworthy are Louisville, Kentucky, and Baltimore County, Maryland. In Louisville, the judges put enormous pressures upon the accused to retain their own attorneys and some private attorneys did provide minimal defense services for very modest fees. In the judgment of the team, if appropriate measures for indigency had been utilized, the appointed counsel rate would have been substantially higher. See National Advisory Commission on Criminal Justice Standards and Goals, "Courts," 13.2, pp. 257-58; American Bar Association Standards Relating to Providing Defense Services, 6.1, pp. 53-55. See also discussion and cases therein, "Guidelines for Legal Defense Systems in the United States," Report of the National Study Commission on Defense Services, National Legal Aid and Defender Association, 1976, pp. 72-97. Baltimore County, Maryland, consisted of many of the suburbs surrounding Baltimore City, and as a result, was a more affluent

area than is typical, which may account for the low rate of indigency. However, certain practices of the defender also reduced the number of appointed counsel cases. The defender, among his other responsibilities, assigned non-fee cases to members of the private bar. In many cases, he would not make the arraignment until approximately ten days after the arrest, all of which time the defendant was languishing in jail, in the hopes that the delay would cause the defendant to pressure his family into hiring a lawyer for him.

6. United States v. Gaines, 449 F.2d 143 (2d Cir. 1971); Bandy v. United States, 81 S.Ct. 197 and 82 S.Ct. 11 (1961). See also Tate v. Short, 401 U.S. 395 (1970), and Williams v. Illinois, 399 U.S. 242 (1969).

7. Pelletier v. United States, 343 F.2d 322 (D.C.Cir. 1965); United States v. Bronson, 433 F.2d 532 (D.C.Cir. 1970). For a general discussion on the topic, see also Singer, S., "Bond Motions from the Defense Perspective," Public Defender Source Book, Singer, ed., Practicing Law Institute, New York, N.Y., 1976.

8. Oaks, D., Lehman, W., A Criminal Justice System and the Indigent, University of Chicago Press, Chicago, 1968.

9. Oaks, D., Lehman, W., supra note 2, at 719-30.

10. See Lehtinen, M., Smith, G., supra note 2. See also LaFrance, A., "Criminal Defense Systems for the Poor," 50 N.D.L.Rev. 411, 465-70; Alschuler, A., supra note 2, for further discussion on the differences between retained counsel, appointed counsel in criminal cases and defenders.

11. Eisenstein and Jacob, Felony Justice, 1977.

12. See note 1, supra.

13. Singer, S., supra note 7.

14. Santobello v. New York, 404 U.S. 257 (1971).

CHAPTER VII

THE DEFENDER CASE PORTRAIT

In this Chapter, the sample of 679 felony cases taken from docket entries in which the eight defender offices provided representation will be described. The retrievable data from the docket entries of these felony cases includes the original charge; the elapsed time between the arrest of the accused and his first court appearance; the method of disposition (contested vs. non-contested cases) judgments and sentences; and the total amount of time that cases remained in the system.

The purpose of examining these factors is to arrive at some assessment of the quality of defender services from a relatively quantified measure. Time of entry into a case by a defense lawyer is considered to be of importance in assessing the quality of the legal defense.[1] Other indicators of quality of legal service surface in such factors as sentences, probation rates and acquittals. While these factors are not definitive of the question of quality of service, hopefully some pattern will emerge that will permit analysis.

A. ORIGINAL CHARGE.

The most frequently occurring original felony charge for defender cases in the docket sample is theft (23.4%), which is followed closely by burglary (22.4%); then, robbery (15.2); narcotics offenses (13.5%); aggravated assault (8.2%); rape (2.7%); homicide (1.8%); and all other offenses (12.8%). The more violent crimes against a person (rape, homicide) constitute only 4.5% of the total defender caseload.

B. ELAPSED TIME BETWEEN ARREST AND FIRST COURT APPEARANCE.

According to Table 66, 72% of all defender clients wait up to three days from their arrest to their first court appearance. Since a majority of defender clients spend that waiting period in jail, one might be tempted to assume that the jailed clients would have a shorter wait between arrest and their first court appearance than bonded ones. But such is not the case, for when pre-trial status and elapsed time between arrest and first court appearance are compared in Table 67, the relationship is reversed: bonded cases are the ones most likely to have the shortest waiting period from arrest to first court appearance. Thus, while only 24% of the jailed clients are brought before a judge within one day after arrest, 45% of the bonded clients have their first court appearance within one day after arrest. It appears to be an example of those in a more fortunate position having better treatment from the system than the less fortunate, even among the defender agency clientele.

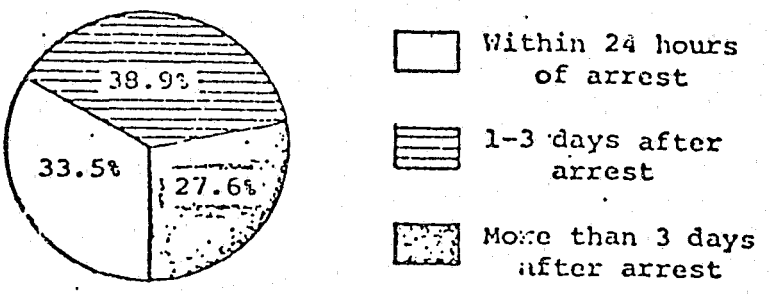
(TABLE 66)

(TABLE 67)

Because the sample merges data from eight localities, it contains a mixture of different statutory and case law on matters like bond, speedy hearings and attorney appointment procedure. This legalistic heterogeneity may be a factor among others contributing to these results. For the present, the sample of cases shows that defender clients are usually in jail awaiting disposition and are spending a longer time between arrest and first court appearance than other defender clients who are out of jail while awaiting disposition.

TABLE 66

Elapsed Time Between Arrest and First Appearance, for Defender Cases



Total Number of cases= 650

TABLE 67

Pre-Trial Status as a Factor in Elapsed Time from Arrest to First Apeearance for Defender Cases

Length of Time from Arrest to First Appearance	% In Jail	% Out of Jail
Within 24 hours of Arrest	24%	45%
1-3 days after Arrest	44%	33%
More than 3 days after Arrest	32% (329)	22% (294)

C. METHOD OF DISPOSITION.

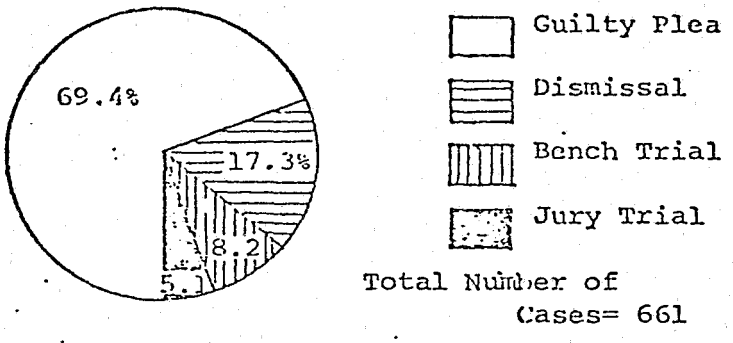
Table 68 illustrates that 69% of all defender cases in the docket sample are disposed of through guilty pleas, and that dismissals are the second most frequent disposition (17%). On the other hand, 13% of all the defender cases in the docket sample are contested dispositions. Eight percent of them are tried before a judge and 5% are tried before a jury. Accordingly, the data illustrate that the non-contested disposition is the primary procedure used by the eight defender offices to dispose of their caseloads. Both of the non-contested dispositions, guilty pleas and dismissals, almost always arise out of the plea negotiation process. The less familiar dismissal can result from plea agreements in a variety of ways.

(TABLE 68)

First, when there are multiple charges arising from different and unrelated transactions against one defendant, the agreement to plead guilty to one or more charges will almost always include the promise by the prosecutor to dismiss the other charges. Second, during the plea negotiation process, the defense lawyer may point out the weakness of the prosecutor's case, which if realized by the prosecutor, may result in dismissal. Third, a dismissal may reflect a plea agreement between the accused and the prosecutor in which the accused agrees to cooperate with the prosecutor in testifying against co-defendants in exchange for a dismissal.

The data illustrate the important role played by the plea negotiation process in the criminal justice system, at least among

TABLE 68
Methods of Disposition
in Defender Cases



Total Number of
Cases= 661

defender clients.

D. JUDGMENTS AND SENTENCES.

In the end, every defendant's principal concern is the judgment and the sentence if the accused is found guilty. The single most frequently occurring judgment in the sample of all defender cases is "guilty as charged" (28%), and the most frequently occurring sentence is "probation" (51%). As Table 69 demonstrates, the other kinds of judgments in the sample of defender cases are: "guilty on some counts" (26%); "guilty of a lesser offense" (24%);[2] "dismissal" (19%); and "not guilty" (4%). Other than probation sentences (51%), 41% of the defender clients received a sentence of imprisonment for a term of years; 4% were referred to an alternative-to-incarceration program; and 4% received some other unspecified sentence.

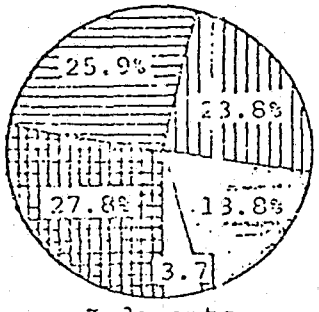
(TABLE 69)

The pattern changes in some informative ways when the judgments and sentences of guilty pleas and convictions following contested cases are compared. Convictions after trial resulted in guilty as charged 46% of the time, but for guilty pleas this judgment occurred only 35% of the time, as shown in Table 70. A guilty plea disposition frequently results in some alteration* in the original charge against the defendant. Conversely, the rate of probation rises when defender cases result in a guilty plea, but drops drama-

* Charge "alteration" includes a finding that the defendant was not guilty as charged -- the defendant was either guilty of a lesser offense, or guilty on some counts, but not guilty on some counts (some counts having been dropped).

TABLE 69

Judgments and Sentences in Defender Cases



Judgments
(673)

Guilty as Charged

Guilty on Some Counts

Guilty of Lessor Offense

Dismissed

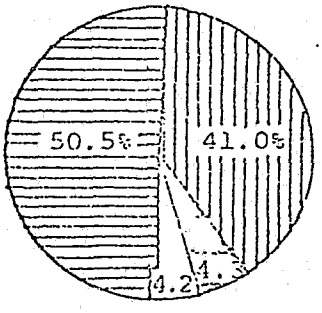
Not Guilty

Probation

Incarceration

Alternative to Incarceration

Other



Sentences
(531)

tically when defender cases are tried. Probation is granted in 57% of the defender guilty plea dispositions, but in only 36% of the contested cases, as shown in Table 71.

(TABLE 70)

(TABLE 71)

E. AMOUNT OF TIME IN THE SYSTEM.

Most defender cases in the sample were disposed of, from arrest to disposition, in less than 120 days. Twenty-seven percent of the defender cases were disposed of in less than three months; 25% were disposed of in between 90-120 days, and, 48% remained in the system for more than 120 days, as illustrated in Table 72.

(TABLE 72)

Felony cases which resulted in guilty pleas were disposed of more quickly than those which went to trial. As Table 73 shows, 53% of the guilty plea dispositions in the docket sample were disposed of in less than 120 days, compared to only 39% of the trial dispositions.

(TABLE 73)

Thus, the docket data rather dramatically illustrate that in the localities examined, those who plead guilty receive considerably more lenient treatment than those adjudged guilty after a trial. Criminally accused persons in the United States have a fundamental constitutional right to a trial. But they pay dearly when they exercise that right and lose.

TABLE 70
Comparative Rates of Charge Alteration
For Pled and Tried Defender Cases

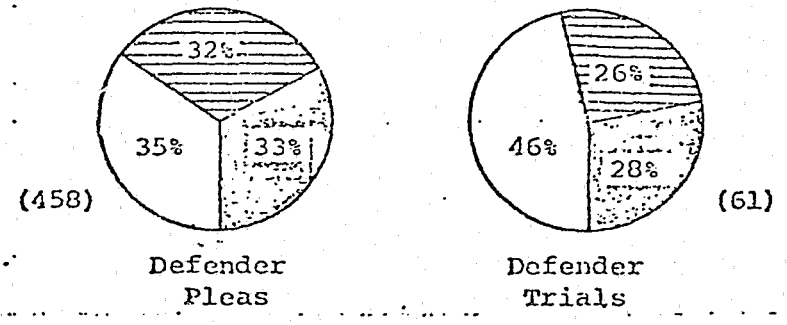


TABLE 7/
Probation Rates in
Defender Pled and Tried Cases

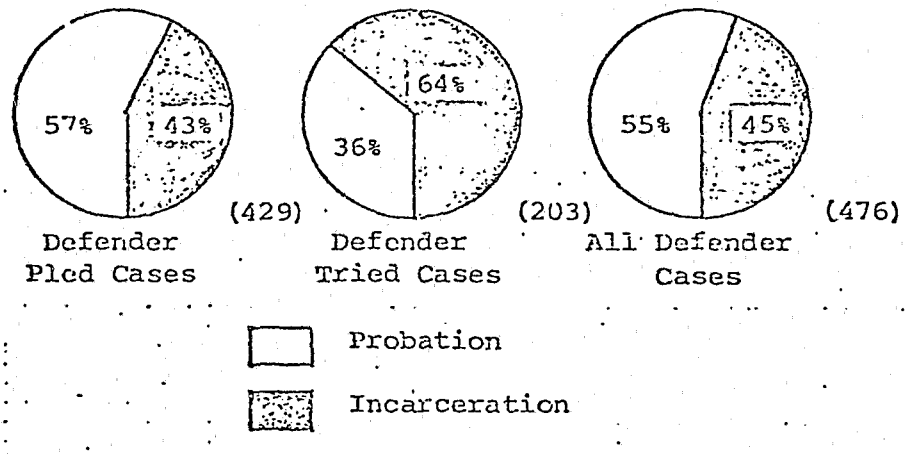
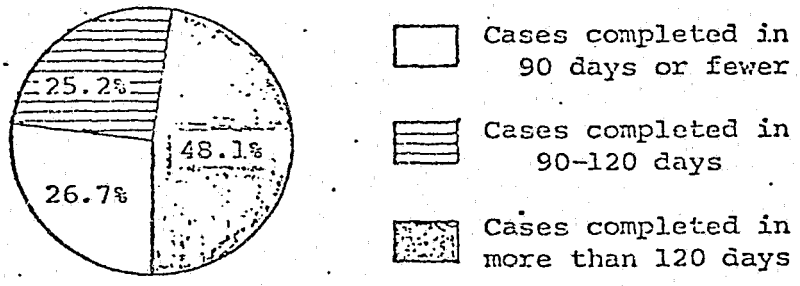


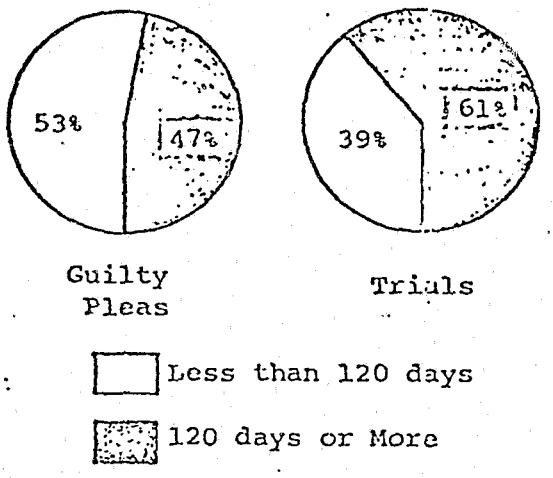
TABLE 72

Elapsed Time in Defender Cases



Total Number of Cases= 652

TABLE 73
Comparative Elapsed Times
for Pled and Tried Cases



FOOTNOTES

1. See Chapter VIII, infra. See also Chapter IV, supra.

2. Guilty of a lesser offense may result because a charge includes all of the lesser offenses of that charge. For example, a single charge of murder includes such offenses as manslaughter. A charge of armed robbery will authorize a conviction for simple robbery or theft, and so on.

CHAPTER VIII

THE PUBLIC DEFENDER GUILTY PLEA DISPOSITION: CHARACTERISTICS

In the preceding section, the purpose was to describe the total sample of defender cases, in fundamental terms of frequency distribution. But in the section which follows, the scope narrows to examine the visible effects which the guilty plea disposition has had on these cases. In doing this, an effort is made to discover the results of pleading guilty, in terms of both charge alteration and sentencing.

A. TYPES OF CASES BEING PLED OUT.

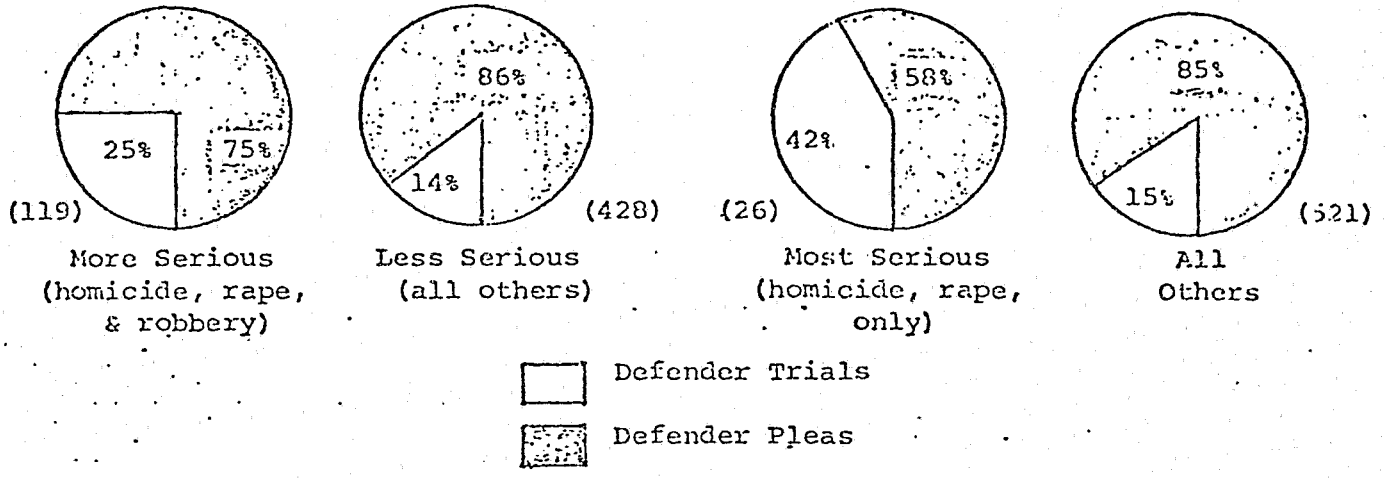
Defender guilty plea dispositions occur with greater frequency among the less serious original charges (theft, narcotics, etc.) than among the more serious original charges of homicide, rape, or robbery. This is illustrated in Table 74. For homicide and rape cases only, guilty pleas occur 38% of the time compared to all other felonies, which resulted in guilty pleas 85% of the time. Thus, defenders are taking more of their homicide and rape cases to trial (42%) than they are all other felony cases (15%).

(TABLE 74)

There are several possible explanations for what appears to be a greater willingness (or more accurately, lesser reluctance) of defenders to take their most serious cases to trial. One possibility has to do with the sheer number of cases involved; it is obvious that homicides and rapes are relatively rare in the sample

TABLE 74

Defender Guilty Plea and Trial Rates for "More Serious" and "Less Serious" Charges



of defender cases. Together, they make up less than 5% of the charges. To the extent that the sample is representative, it suggests that cases of this type are exceptional in the defender's caseload. Perhaps defender attorneys treat exceptional cases in exceptional ways, by not negotiating them, but by contesting them.

Another possibility is that the more serious offenses of homicide and rape simply are not probationable. As a matter of law and/or as a practical matter of fact, the state is precluded from offering a probation sentence to those charged with more serious felonies. Since the restricted concessions available to the state for serious felonies are not as appealing to the accused, a trial disposition may be more likely to occur.

Also, from the tactical point of view, homicide and rape may be substantively more suitable for trials than are other crimes, because they are more defensible.* It would seem reasonable, then, to contest a larger proportion of the "more defensible" cases, especially given the higher penalties for conviction on such charges which often have mandatory minimum sentences. One former public defender has put it succinctly: "When the stakes are that high, you might as well roll the dice."

B. JAIL TIME FOR GUILTY PLEA DISPOSITIONS.

The defender clients who are detained prior to the disposition of their cases are more apt to plead guilty than are clients who are not detained. Table 75 indicates that of the defender clients

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* With respect to homicide, the emerging availability of the death penalty may create in the future a greater reluctance to proceed to trial.

who plead guilty, 81% were detained prior to disposition, but of the defender clients who went to trial, only 67% were so detained. The detained clients who pled guilty spent less time in jail before disposition than those detained clients who go to trial.

(TABLE 75)

As Table 76 indicates, 65% of the detained clients who pled guilty spent less than 120 days in jail, compared to 49% of detained clients who went to trial.

(TABLE 76)

It is likely that the detained clients who pled guilty did so early in the proceedings in order to get out of jail sooner. If so, a system which detains its defendants prior to adjudication is probably promoting guilty plea disposition.

C. ALTERED CHARGES IN PLED CASES.

The alteration of charges against an accused, in the form of guilty of a lesser offense or guilty on some counts but not guilty on other counts, occurs with greater frequency among defender clients who pled guilty. Sixty-five percent of all defender clients who pled guilty received the benefits of charge alteration, compared with 54% of all defender contested cases. This is shown in Table 77. Not all guilty plea dispositions result in an alteration of the original charge, for in the sample of defender cases, 35% of the clients who pled guilty did so to the original charge.

(TABLE 77)

TABLE 75

Jail Time As A Factor In Pleading Guilty

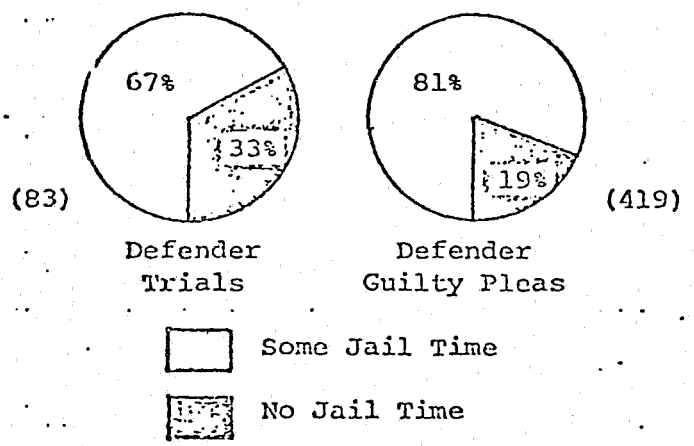


TABLE 76

Comparative Amounts of Jail Time
As A Factor In Pleading Guilty

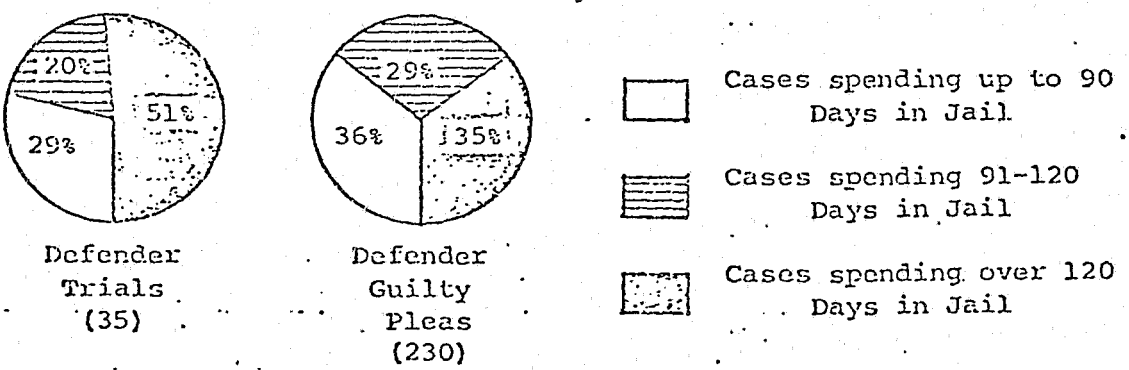
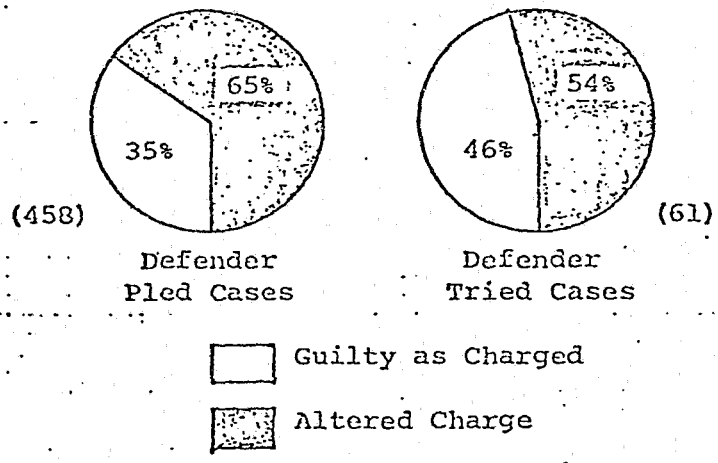


TABLE 77

Charge Alteration Rates in
Defender Pled and Tried Cases



It may be that those guilty pleas where charges were not altered did not carry severe enough penalties to require a reduction of the charge in order to secure a less harsh sentence, such as probation. Or, as in some jurisdictions, the alteration of charges is not necessary, since sentencing bargaining can result in reduced sentences.

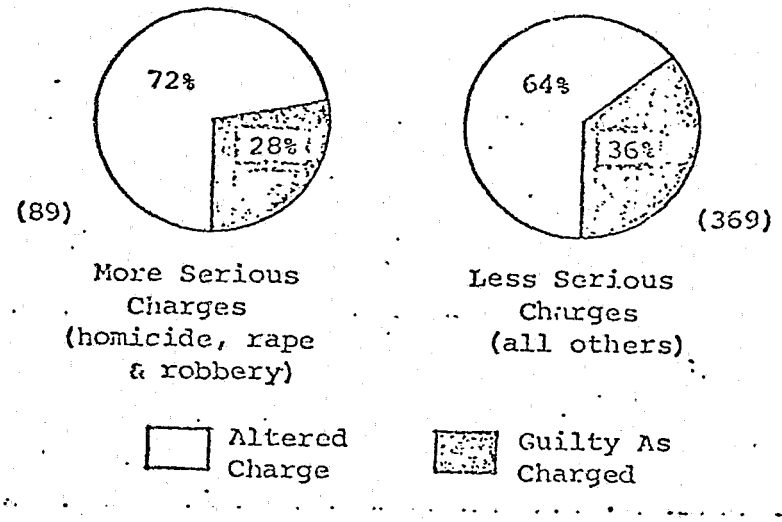
In California, for example, at the time of the study, the judge had no sentence discretion, other than as to probation or incarceration for the time provided by law for the crime for which the defendant was convicted. Hence, if the sentence was not to be probation, sentence bargaining would necessarily have to be charge bargaining, for only by reducing the charge could the sentence be reduced. However, when reduction is controlled by the seriousness of the original charge, a high proportion of the more serious original charges resulted in a reduction of the charge or the dropping of some counts. as indicated in Table 78. Alteration of the original charge occurred in 72% of the homicide, rape and robbery charges, compared with 64% of the other less serious charges.

(TABLE 78)

One may infer from this that part of the concession in exchange for a guilty plea was an alteration of the original charge by the prosecutor, and that the more serious the offense charged, the more likely such a concession would be made. And, it may be that prosecutorial overcharging made it possible to alter the original charge (reduction or dropping of counts) in exchange for a guilty plea, or to alter it in a trial that finds the defendant guilty of the charge that was actually committed. Overcharging is frequently used to encourage guilty pleas, since it increases the risk of a harsher sentence for the defendant who contests the case.[1]

TABLE 78

Seriousness of Offense as a Factor in Charge Alteration



D. SENTENCING IN GUILTY PLEA DISPOSITIONS.

As might be expected, probation is the most likely sentence following a guilty plea disposition that results in some sort of original charge alteration, as shown in Table 79. A probation sentence was given to 72% of the defender clients who pled guilty to a lesser included offense; to 57% who pled guilty after some counts were dropped; and to 49% who pled guilty to the original charge. A guilty plea to a lesser included offense increases the likelihood of a probation sentence. Yet, there is also a high rate of probation (49%) for defendants who plead guilty to the original charge.

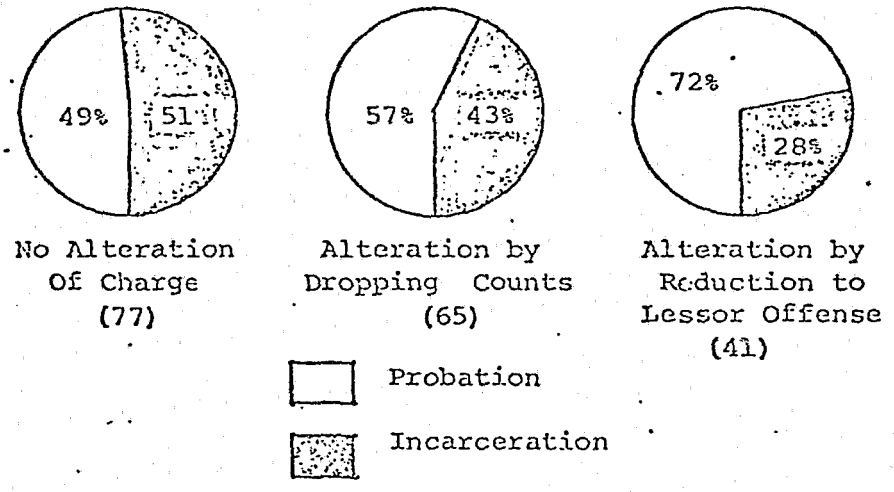
(TABLE 79)

Part of the explanation may be in the nature of prosecutorial overcharging. Probation, as a matter of law or as a practical matter of fact, is only available for certain offenses and/or defendants. If the original charge is probationable, the defendant need only plead to the original charge in order to obtain a probation sentence. The granting of probation may be viewed as enough of a concession by the judge and/or prosecutor, of course, when the charge is not reduced. A harsher sentence may be imposed if the terms of probation are violated.

The defendant, on the other hand, when offered probation will usually not concern himself with the charge, and that offer alone will deter him from contesting the case, since it is likely that a conviction after trial would eliminate probation as a possible sentence. On the other hand, if the original charge is of a more serious nature, and incarceration is the certain sentence after a

TABLE 79

Charge Alteration As A Factor In
Sentencing - Defender Guilty Pleas



conviction at trial, the defendant must plead guilty to a lesser included offense to obtain a less harsh sentence, such as probation.

Even though a defender client receives an alteration of the original charge in exchange for a guilty plea, a sentence of incarceration is still possible. Thirty-six percent of the defender clients who pled guilty to an altered original charge (lesser included offense or the dropping of some counts) were sentenced to a period of incarceration. In the sample of defender cases, the more serious original charges are the most likely to result in an alteration of the original charge -- and are the most likely to receive a period of incarceration as a sentence. Even though a murder charge, for example, is reduced to manslaughter in exchange for a guilty plea, incarceration is still the most probable sentence. However, the reduced charges in these instances are likely to result in shorter terms of imprisonment than those available for the original charge and perhaps mroe favorable treatment from the parole board.

In the defender offices visited furing the field research, it was observed that probation was frequently used as an inducement to convince the defendant to plead guilty and that a probation sentence after a contest was usually not considered. Although contested cases are usually of the more serious type, as shown in Table 74, it remains that both serious and less serious cases are unlikely to receive probation following a trial conviction. Accused persons who are not probationable, either because probation is not a lawful sentence for the offense charged, or because of the nature of the case and/or the personal history of the accused, will tend to contest their cases more frequently than accused per-

sons who are likely candidates for probation.

E. PRE-TRIAL STATUS AND SENTENCING.

Defender clients who begin the criminal process in jail pending adjudication will probably receive a sentence of incarceration if they plead guilty. Table 80 indicates that 60% of the defender clients who plead guilty while detained in jail received incarceration as a sentence compared with only 21% of the clients who pled guilty and were released pending adjudication. Examined from another perspective, 78% of the coients who received a sentence of incarceration after a guilty plea had been in jail awaiting disposition; and only 38% of the clients who received probation after a guilty plea had been so detained. This is illustrated in Table 81.

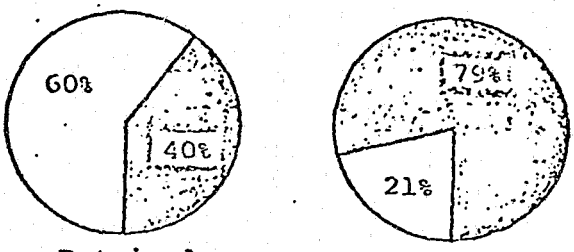
(TABLE 80)

(TABLE 81)

The trend seems to be that the more serious cases of the defender are the most likely to be detained prior to disposition, as shown in Table 82. These detained clients are the most likely to plead guilty, and guilty pleas by detained clients will in all probability result in sentences of incarceration. By combining this with the fact that defender clients who are charged with less serious offenses and are detained prior to adjudication are also likely to receive a sentence of incarceration if they plead guilty, the pre-trial status of defender clients emerges as one of the most important factors in sentencing.

(TABLE 82)

TABLE 80
Pre-Trial Status and Sentencing



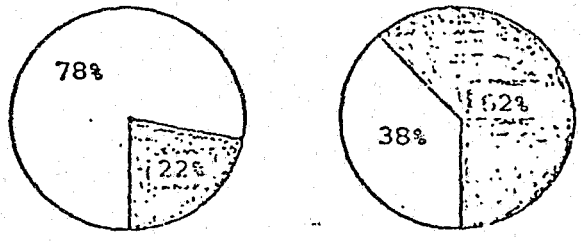
(225) Detained Cases

((183) Released Cases

Incarcerations

Probations

TABLE 81
Pre-Trial Status as a Factor in Sentencing Defender Guilty Pleas



(174) Total Incarcerations

Total Probations (234)

% which began with Detention

% which began with Release

TABLE 52

Seriousness of Charge as
A Factor in Pre-Trial Status

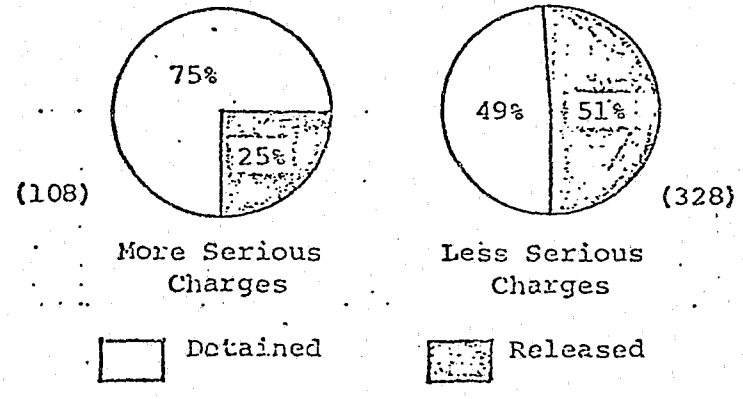


Table 83 summarizes the elements of a case which seem to affect the probability of a probation or incarceration sentence, and highlights the importance of the pre-trial status of defender clients over and above the seriousness of or alteration of the original charge.

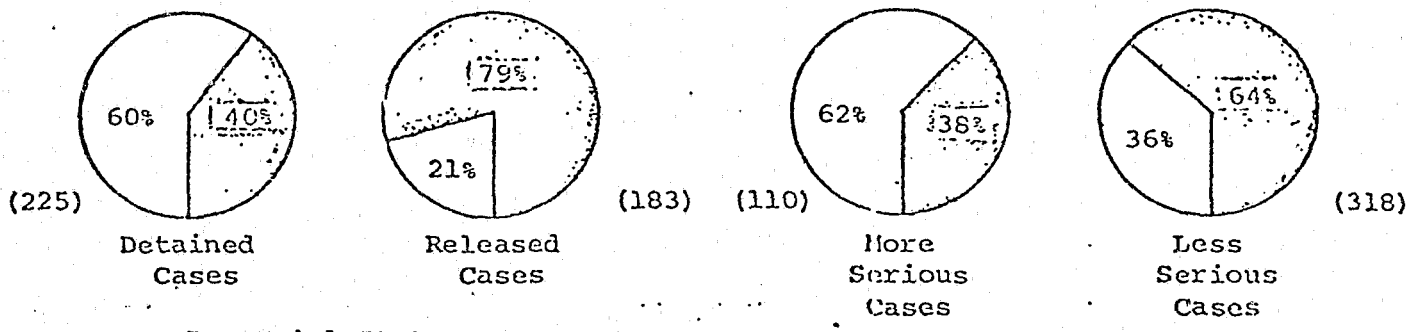
(TABLE 83)

One can infer from this that those accused persons who are suitable for pre-trial release are good candidates for probation -- they appear to be "reliable" persons. Essentially, the same group of defendants is being imprisoned before and after conviction; it cannot be said with any certainty that a presumption of guilty always attaches to a person who starts out in jail, but the relationship is too strong to ignore. The pragmatic defendant and defender attorney might put their best efforts into securing pre-trial release as a means to probation for those clients who want to plead guilty.

F. CONCLUSIONS.

The preceding chapter's review of data sheds some light on the guilty plea disposition process and the consequence of the guilty plea, or rather, the refusal to plead guilty. Most defender clients will choose a guilty plea disposition over a trial. First, of all, they are likely to be in jail and it is to their advantage to plead guilty so as to shorten jail time. Secondly, being in jail greatly increases the probability of a conviction and an eventual prison term, so that negotiating for reduced charges and pos-

TABLE 83
Summary of Factors which Affect
Sentences - Defender Guilty Pleas



sible probation or a shorter prison term is an effective way for the jailed clients to improve their bad position. Third, defender clients are less likely to receive a sentence of incarceration if they plead guilty than if they contest the case. Finally, it appears that charge reduction is more likely if a client pleads guilty.

Clearly, a defendant who contests a charge incurs a substantial risk of a harsher sentence if convicted. The data leaves one with the impression that the criminal justice systems examined are more adept at processing cases than at adjudicating facts and guilt or innocence. Of course, one may argue that the disposition of a case with a guilty plea is conclusive of guilt, while one canno be so certain from a trial result because of the frailties of evidentiary, trial procedures and tactics. Yet, one sees that such matters as pre-trial status, kind of counsel and the seriousness of the crime charged are important factors in which cases are contested and which are not. It would seem that such considerations would be irrelevant on the issue of the truth or falsity of the charge.

In the entire foregoing discussion, no consideration was given to the guilt or innocence of the charged person. That, too, may be irrelevant, for if the defendant is convicted, his guilt becomes the operative truth, even though the accused person did not commit the crime charged.

Consider the irrelevancy of actual guilt or innocence to the judgment of guilt in a fairly typical example: James Whitfield,[2] charged with and convicted of murder. Prior to trial, the prosecutor offered to reduce the charge to manslaughter with a sentence

of probation. The minimum sentence at that time for murder was 14 years, without chance of probation.[3] James Whitfield was 19 years old at the time. What choice did he really have? Was not his guilt or innocence operatively irrelevant? The official reports are replete with similar examples, many of which have been approved by the United States Supreme Court.[4]

Yet the United States Supreme Court has also held that a criminal defendant cannot be punished for exercising his constitutional right to trial[5] or to appeal a defective conviction.[6] The Court, in approving substantial reductions of charges[7] or sentences[8] appears to take the position that the greater sentence that could have conceivably been imposed had the accused been adjudged guilty after a contest would have been sentence warranted by the nature of the crime and the characteristics of the offender.

But, we have examples of prosecutorial overcharging, and sentencing discretion in the judiciary in many jurisdictions is extraordinarily broad. In the real world it is virtually impossible to distinguish the exercise of sentence discretion from the infliction of punishment for contesting guilt. The distinction can adroitly be drawn in the context of appellate review. However, in the context of representing criminally-accused clients on a day-to-day basis, it is a distinction utterly without meaning. Rewards for pleading guilty, punishment for being adjudged guilty after a contest, seem to be the core of criminal case disposition in the United States.

FOOTNOTES

1. Alschuler, A., "The Prosecutor's Role in Plea Bargaining," 36 U.C.L.Rev. 50, 85-105 (1968).

2. People v. Whitfield, 239 N.E.2d 850 (Ill. 1968).

3. Ill.Rev.Stat., 1969, ch. 38, sec. 9-1.

4. See Lichtman, J., "Constitutional Requirements of Appointed Counsel in the Guilty Plea Process," Public Defender Sourcebook, Singer, S., Ed., Practicing Law Institute, at 53-133 (1976). See also note , Chapter .

5. United States v. Jackson, 390 U.S. 570 (1968).

   See also Scott v. United States, 419 F.2d 264 (D.C.Cir. 1969); Thomas v. United States, 368 F.2d 453 (7th Cir. 1959).

6. North Carolina v. Pierce, 395 U.S. 711 (19); Blackledge v. Perry, 417 U.S. 21 (1974).

7. North Carolina v. Alford, 400 U.S. 25 (1970).

8. Brady v. United States, 397 U.S. 242 (1970); Parker v. North Carolina, 397 U.S. 790 (1970); McMann v. Richardson, 397 U.S. 759 (1970).

CHAPTER IX

CONCLUSION

In the years since the 1963 United States Supreme Court decision in Gideon v. Wainwright,[1] requiring counsel for almost all defendants in criminal cases, without regard to the defendant's ability to pay attorney fees, scant attention, at best, has been paid to the quality of counsel. While this study does not, by far, provide the definitive answer to the question, it does reveal some facts which tend to indicate that the quality of representation, at least for poor people, is not at a very high level.

The inventory portion of this study, reported in Chapter III, indicates that many defender agencies have too heavy a caseload and too little support staff. There is a further indication that standards that set a specific number of cases, such as 150 felonies per full-time attorney and 400 misdemeanors per full-time attorney each year, are too high. There is further indication that a significant number of defender agencies are not as able to provide the type of independent and vigorous representation which is required by existing standards of the legal profession.[2]

Chapter IV reveals that most defender lawyers undertake the representation of a client at a relatively late stage in the proceedings. This factor will tend to have an adverse impact upon the quality of the defender agency's legal service.

Finally, the study confirms that guilty plea rates are very high, and that defender clients who are adjudged guilty after a contest are generally sentenced substantially more harshly than defender clients who plead guilty. Also, for defender office cli-

ents, the sentence of probation is almost always dependent upon a guilty plea. The study also tends to confirm that the pre-trial status of incarceration as compared to freedom correlates significantly with sentencing results and conviction rates, whether or not the case is contested. That is, pre-trial incarcerated defendants are convicted more frequently and sentenced more harshly than defendants free on bond awaiting trial.

The study also indicates that clients assigned to private appointed counsel have a tendency to contest a higher proportion of cases than do defender office clients, and that assigned counsel clients are not nearly as dependent upon the guilty plea for a sentence.

The study raises many more questions than it answers, and it is readily apparent that more extensive study needs to be undertaken to arrive at more definitive answers. Accordingly, it is hoped that the report stimulates further examination of the defense function in the criminal process.

FOOTNOTES

1. 372 U.S. 335 (1963).

2. American Bar Association Standards Relating to the Defense Function, 1.1, 1.6, 3.6; Standards Relating to Providing Defense Services, 1.4; National Advisory Commission on Criminal Justice Standards and Goals, "Courts," 13.8.

END