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LEGAL REPRESENTATION OF THE INDIGENT IN CRIMINAL CASES IN UTAH*

By SANFORD H. KADISH † and EDWARD L. KIMBALL ‡

A long standing difficulty with the common law system of attaining criminal justice through the adversary proceeding inheres in its presumption of a rough equality of legal representation of the state and the accused. This balance is unnecessary for systems of criminal administration otherwise oriented—where, for example, guilt and punishment are autocratically determined by direct agents of the ruler; or where, as in the inquisitorial system of continental Europe, other means are employed to maximize the reliability of the guilt-determining process. But if the common law process of pitting champions against each other in a legal arena is to work practically with a reasonable degree of fairness and reliability, the quality of legal representation of the accused must begin to approximate that of the state. However, in common law jurisdictions legal representation is traditionally viewed not as a state function, but rather as a professional service which must be acquired through private purchase. What happens, then, to the accusatorial system where large numbers of criminal defendants lack the resources to purchase adequate legal representation? Quite clearly, the fundamental rationalizing principle of our system of guilt determination can not operate. The system of trial by legal combat becomes an indefensible farce for the accused.1

Where the accused is totally unrepresented by legal counsel the trial becomes an empty formality. Justice Sutherland observed in an oft-quoted statement that:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted on incompetent evidence, or evidence irrelevant to the issues or otherwise inadmissible. He lacks both skill and knowledge adequately to prepare his defense although he have a perfect one. He requires the guiding hand of counsel at every

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1 "In our system of justice, which is the adversary system rather than the inquisitorial system, it is important that the position of the defendant be adequately presented to the court." Statement by Justice John J. Parker, Hearings before Committee on the Judiciary on H.R. 398 and H.R. 2091, 83d Cong., 2d Sess. 31 (1954). The concern of most writing on this subject, and of this article, is with the indigent who can afford to purchase no legal representation. Another, and very serious, problem is presented by persons who are able to pay a lawyer a small amount, but are unable to purchase adequate representation. "We all know that poor persons who get into a hospital sometimes get better treatment than the person of moderate means gets. That might happen in some cases in the courts. I know that there are some cases in which paid counsel appear and the paid counsel is very inexperienced. . . ." Id., at 109.
step in the proceedings against him. Without it though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true it is of the ignorant and illiterate, or those of feeble intellect.”

In such cases, then, the courtroom becomes a corridor to the penitentiary except to the extent that the judge and prosecutor drop the facade of the adversary proceeding and fill the roles of father-inquisitors making their own examination and determination of guilt and innocence. Similar difficulties are presented in those cases where the quality of representation of criminal defendants is significantly poorer than that of the state. For here also the substantial disadvantage of the accused in legal representation will, by its inconsistency with the basic premise of our accusatorial system, make unlikely the more or less consistent reaching of just results. In fact, the situation in one sense may be worse than where no counsel is present. Where some representation is afforded, the palliative of the judicial and prosecutive indulgence is not as likely to be present as where the assurance that a defendant receives just treatment is wholly the responsibility of those officials.

The lack of adequate representation in these cases represents even more than a breakdown in the functioning of our accusatorial system as a means of attaining justice. It is fundamentally irreconcilable with the basic values of a democratic society. If there is one unmistakable element of the concept of justice in the English-speaking tradition it is the principle of equality. The seminal document of American history commences its list of self-evident truths with the truth that “all men are created equal.” Above the portals of the Supreme Court of the United States are engraved the words Equal Justice Under Law. These are symbols, of course, but none the less significant for what they reflect of the community’s ultimate idealized conception of justice—a deus ex machina which grinds relentlessly in Jovian indifference to the wealth, position or personality of the human figure caught in its workings. Such democratic values are plainly incompatible with a situation where the quality of criminal justice to which a person may aspire is directly proportional to his ability to pay counsel.

In recognition of this institutional and moral crisis there have been movements in this country over the past fifty years looking toward some solution of this pervasive problem, varying from those calculated to sensitize the conscience of the Bar to plans for the assumption of direct responsibility by public agencies. However, a recent study of legal aid in criminal cases prepared for the Survey of the Legal Profession indicated that while some communities have made considerable progress, the crisis still exists. The

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conclusion of this study is that nationwide the indigent criminal defendant—
who may constitute between 60 and 80 per cent of the total number of
criminal defendants⁷—is not being provided with adequate legal representa-
tion.⁷ This conclusion, with its startling implications concerning the quality of
American criminal justice, suggests the desirability of careful stocktaking in
the individual communities ultimately responsible for this condition—the
cities, counties and states of the nation.

Such stocktaking for the state of Utah is the purpose of this article. An
attempt will be made in the following pages to report on the manner in
which indigent criminal defendants now secure legal representation in Utah;
to evaluate whether the system of legal representation as it operates is ade-
quate; to consider various proposals for improving legal representation of the
poor; and to recommend such changes in the Utah system as appear most
likely, in light of the needs and special characteristics of the community, to
result in remedying any defects observed.

I. THE CONSTITUTIONAL AND STATUTORY RIGHT TO COUNSEL IN UTAH

The constitutional and statutory law governing legal representation of
criminal defendants in Utah is wholly confined to marking out the situations
in which a criminal defendant has a "right" to counsel; that is to say, to
defining the cases wherein failure to permit or furnish representation serves
to void the conviction.

A. The Federal Constitution

The due process clause of the Fourteenth Amendment of the United
States Constitution is foremost in the hierarchy of positive laws governing
the right to legal representation in Utah. The scope and nature of the
obligation it imposes upon the states to furnish counsel to the indigent accused
have been widely and thoroughly treated elsewhere.⁸ What is most significant
for our purposes is to observe the wide gap between what it compels as a
matter of constitutional duty and what is demanded in the interests of an
enlightened legislative policy.

The provision of the Sixth Amendment of the U.S. Constitution that
"In all criminal prosecutions, the accused shall enjoy the right to . . . the
assistance of counsel for his defense" has been interpreted by the Supreme
Court to require that in the absence of effective waiver the accused in all
criminal cases is entitled to have counsel furnished by the government when
he can not afford to employ his own counsel; failure to comply with these
requirements renders a conviction void.⁹ But a steady majority of the Court
in a substantial number of cases has held that this provision is not applicable

⁶ BROWNELL, LEGAL AID IN THE UNITED STATES 83 (1951).
⁷ Callagy, supra note 5, at 594. See VIRTUE, SURVEY OF METROPOLITAN COURTS, DETROIT
AREA 108 et seq. (1950).
⁸ Fellman, The Constitutional Right to Counsel in Federal Courts, 30 Neb. L. Rev. 559
(1951); Fellman, The Constitutional Right to Counsel in State Courts, 31 Neb. L. Rev. 15
(1951); KELLER, THE SIXTH AMENDMENT 91 (1951); Wood, Due Process of Law 192-218
(1951); Comment, 17 U. of Chi. L. Rev. 718 (1950).
⁹ Glasser v. U.S., 315 U.S. 60 (1942); Walker v. Johnson, 312 U.S. 275 (1941); Johnson
to the states through the due process clause of the Fourteenth Amendment,\textsuperscript{10} and that a less rigorous standard is demanded by that clause. The Supreme Court appears to have taken the position that in capital trials due process exacts the same standard in respect to representation in the state courts as does the Sixth Amendment for all criminal trials in the federal courts.\textsuperscript{11} But for all other criminal offenses in the state courts the failure to advise an indigent defendant of his right to the assistance of counsel and to appoint counsel for him if necessary is not in itself grounds for voiding a conviction. The conviction is void only when the failure to appoint counsel, considered in light of the total circumstances of the case, has worked a shocking, demonstrable and substantial injustice to the defendant.\textsuperscript{12} In the words of the Supreme Court, due process is violated "where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair."\textsuperscript{13} Precisely how much prejudice must be demonstrated before the proceedings become "fundamentally unfair" presents an elusive factual inquiry, but it is at least clear that the burden rests upon the defendant to demonstrate substantial impairment of the right to a fair trial. Quite plainly due process requires the appointment of counsel in state cases only in those extremely shocking cases where failure to do so is unconscionable. In the vast majority of situations where the appointment of counsel is demanded simply in the interests of a democratic polity and the effective functioning of the accusatorial system, the federal Constitution offers no guarantee.

It is clear that representation by counsel is an empty formality unless counsel is competent. However, for understandable reasons the courts have been extremely reluctant to find denial of due process in the incompetency of counsel even in cases where the appointment of counsel was constitutionally required.\textsuperscript{14} In general only where "appointed attorneys are so ignorant, negligent, or unfaithful that the accused was virtually unrepresented, or did not in any real or substantial sense have the aid of counsel" have courts intervened.\textsuperscript{15} That the attorney is young and inexperienced is not sufficient; the fact that he is admitted to practice law creates a prima facie presumption


\textsuperscript{13} Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948).


\textsuperscript{15} Williams v. State, 192 Ga. 247, 15 S.E.2d 219, 225 (1941). See, e.g., U.S. ex rel. Hall v. Ragen, 60 F. Supp. 820 (N.D. Ill. 1945) (conviction reversed where defendant was represented by doctor admitted to bar who was disbarred after trial for ignorance and incompetence).
of competency.\textsuperscript{16} Neither will negligence nor demonstrable mistakes of judgment evident in the record be used to infer incompetence.\textsuperscript{17} The court will not "second guess a competent lawyer into incompetency."\textsuperscript{18} The margin between the degree of competence constitutionally required\textsuperscript{19} and that adequate to the purpose of legal representation is thus a legislative problem of substantial proportions.\textsuperscript{20}

B. The Utah Constitution and Statutes

The Utah Constitution provides that "in criminal prosecutions the accused shall have the right to appear and defend in person and by counsel..."\textsuperscript{21} It is uncertain what obligations this provision imposes. The United States Supreme Court has interpreted a similar provision in the Maryland Constitution as merely nullifying the common law rule that persons accused of felony might not be represented by counsel, and as not requiring the appointment of counsel for indigent defendants.\textsuperscript{22} On the other hand it may be that the Utah Constitution means something more. The common law rule was abolished by statute in England in 1836,\textsuperscript{23} long before the framing of the Utah Constitution in 1895. Further the Territorial legislature had already provided in 1878 that the court must assign counsel to defend the indigent defendant in criminal prosecutions.\textsuperscript{24}

The absence of judicial interpretation of this constitutional provision is probably due to the long standing statutory provision explicitly requiring the court to assign counsel to an indigent defendant so desiring who appears for arraignment without counsel.\textsuperscript{25} Since misdemeanors as well as felonies are

\textsuperscript{16}See Achtien v. Dowd, 117 F.2d 989, 992 (7th Cir. 1941); U.S. ex rel. Weber v. Ragen, 176 F.2d 579, 586 (7th Cir.), cert. denied, 338 U.S. 809 (1949).

\textsuperscript{17}U.S. ex rel. Weber v. Ragen, supra note 16; U.S. ex rel. Hamby v. Ragen, 178 F.2d 379 (7th Cir. 1949), cert. denied, 339 U.S. 905 (1950); Tompsett v. Ohio, 146 F.2d 95 (6th Cir. 1944), cert. denied, 324 U.S. 869 (1945). Cf. Aldredge v. Williams, 188 Ga. 607, 4 S.E.2d 469 (1939) (attorneys failed to move for new trial or ask for continuance, and allowed admission of irrelevant evidence); State v. Riley, 41 Utah 225, 242-244, 126 Pac. 294, 300-301 (1911-1912). But see Johnson v. U.S., 110 F.2d 562, 563 (D.C. Cir. 1940); "It would be a strange system of law which first assigned inexperienced or negligent counsel in a capital case and then made counsel's neglect a ground for refusing a new trial."

\textsuperscript{18}See Achtien v. Dowd, 117 F.2d 989, 992 (7th Cir.), cert. denied, 338 U.S. 809 (1949).

\textsuperscript{19}There are chiefly two situations in which the Sixth Amendment is given any real operative force after counsel is appointed—first, where counsel is appointed to represent defendants with conflicting interests (Glasser v. U.S., 315 U.S. 60 (1942); Wright v. Johnston, 77 F. Supp. 687 (N.D. Cal. 1948)); second, where appointed counsel is given a grossly inadequate time to prepare (U.S. v. Helwig, 159 F.2d 616 (3d Cir. 1947); Conley v. Cox, 138 F.2d 786 (8th Cir. 1943)). Even in these two situations the constitutional requirement imposed upon the states by due process is considerably less stringent. See Avery v. Alabama, 308 U.S. 444 (1940) (one day preparation sufficient in state capital case); Tompsett v. Ohio, 146 F.2d 95 (6th Cir. 1944), and cases cited.

\textsuperscript{20}See Callagy, supra note 5, at 613.


\textsuperscript{22}Bettes v. Brady, 316 U.S. 455, 466 (1942).

\textsuperscript{23}The Trials for Felony Act, 1836, 6 & 7 Will. 4, c. 114.

\textsuperscript{24}Utah Laws, 1878, Crim. Proc. §181. The statute was based upon a California statute (Journals of the Legislative Assembly of the Territory of Utah 43 (1878)) and is identical in substance with Utah Code Ann. §77-22-12 (1953).

\textsuperscript{25}Ibid.
arrailable offenses, the right would appear to extend to both misdemeanor and felony defendants who are arraigned. But because few misdemeanor defendants are actually arraigned, the statutory right to counsel in misdemeanor cases is actually very limited. The language of the statute appears to make the appointing of counsel mandatory upon the court, rather than dependent upon timely request by the defendant. Thus far, there has been no judicial interpretation of this aspect of the statute. While there are dicta suggesting that violation of the statute voids the conviction, no case has had occasion so to hold. Though the Utah Supreme Court has never passed on the questions, other courts have indicated that the right to the appointment of counsel does not extend to the appeal or to an application for a writ of habeas corpus.

The remaining provisions concerning representation by counsel are directed to the preliminary hearing stage. Section 77-15-1 requires the magistrate before whom a defendant is brought for preliminary hearing on a charge triable on information or indictment to inform the defendant “of his right to the aid of counsel in every stage of the proceedings.” The Utah Supreme Court has held that there is a presumption that such information was given the defendant, which presumption is not rebutted by the failure of the record so to state. Section 77-15-2 requires the magistrate to postpone the hearing to allow the defendant time to send for counsel and, if requested, to furnish

29 Utah Code Ann. §77-22-1 (1953) requires an arraignment when an information or indictment has been filed. Section 77-16-1 provides that “all public offenses triable in the district courts” (with exceptions not here relevant) “must be prosecuted by information or indictment.” Section 77-3-1 grants original jurisdiction to the district courts “in all matters civil and criminal.”

The instances where no arraignment (and hence no appointment of counsel) is required are: (1) criminal cases over which the justices’ court or the city court has original jurisdiction (i.e., petit larceny, certain assaults or batteries, certain breaches of the peace, and all misdemeanors punishable by less than $300 fine or six months imprisonment) (§78-5-4), wherein a special criminal procedure is applicable (§§7-5-1 et seq. and 78-4-16); and (2) criminal cases over which the city court has exclusive original jurisdiction (i.e., violations of city ordinances) (§78-4-16), in which cases also a separate procedure is established (§78-4-16). These instances where no arraignment is required, in point of fact, make up the great bulk of all misdemeanor cases handled by the courts.

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"If the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked whether he desires the aid of counsel. If he desires, but is unable to employ, counsel, the court must assign counsel to defend him." Utah Code Ann. §77-22-12 (1953). Cf. Brownell, Legal Aid in the United States Appendix C (1951).


31 Errington v. Hudspeth, 110 F.2d 384, 386 (10th Cir. 1940): “An appeal is not an essential of due process and a defendant is not entitled, as a matter of right, to the assistance of counsel to prosecute an appeal.” But see Note, 157 A.L.R. 1225, 1231 (1945): “It may be observed as a general proposition that in any criminal case in which it has been determined that the defendant is entitled to appeal, or in which an appeal has been duly taken, he is entitled to the same kind of representation by appointed counsel, in needful cases. . . ."

Inasmuch as habeas corpus proceedings are civil in nature, not criminal, there is no general right to the assistance of counsel. Note, 15 U. of Chi. L. Rev. 945 (1948); Note, 162 A.L.R. 922 (1946). Compare with this the right of the indigent in the federal courts to the appointment of counsel in habeas corpus proceedings if his case is deemed worthy of hearing. Ex parte Rosier, 133 F.2d 316 (D.C. Cir. 1942), construing 27 Stat. 252 (1892), as amended, 28 U.S.C. §1915(d) (1952).

32 "When the defendant is brought before the magistrate upon an arrest, either with or without a warrant, on a charge of having committed a public offense triable on information or indictment, the magistrate must immediately inform him of the charge against him and of his right to the aid of counsel in every stage of the proceedings." Utah Code Ann. §77-15-1 (1953).

33 State v. Cano, 64 Utah 87, 228 Pac. 563 (1924); State v. Mewhinney, 43 Utah 135, 139, 134 Pac. 632, 634 (1916).
a peace officer without fee to deliver defendant's message to any attorney within the precinct or city. In State v. Crank, the first case to consider whether these sections oblige the magistrate to appoint counsel at the preliminary hearing, the court held that they did not. In a later case, State v. Braasch, the defendant's request that counsel be appointed was refused by the magistrate on the basis of the language of the Crank case, which was quoted to defendant. The Utah Supreme Court this time stated that counsel "ought" to have been appointed but, in the absence of a showing of specific prejudice to defendant, declined to set aside a subsequent conviction. Whether the court's language was meant to express an ethical or legal conclusion is not clear.

II. THE SYSTEM OF PROVIDING COUNSEL FOR INDIGENTS IN UTAH

Turning from the minimum constitutional requirements and the statutory guarantees to the mechanics of providing counsel for indigents prevailing in Utah, we find a total absence of statutory law. Each individual judge appears to be free to develop his own standards for appointment, except as modified by the influence of custom in the particular jurisdiction. As far as can be determined from correspondence and conversations with judges and attorneys and examinations of judicial dockets, counsel for indigent defendants in Salt Lake County is appointed by the presiding judge in most felony and some misdemeanor cases as well as in some lunacy, bastardy, nonsupport, and extradition proceedings. Most appointments in felony cases are made at the preliminary hearing stage in the City Court. The appointments are made by the judges from the list of members of the bar, with special attention, apparently, to those most recently admitted. While the appointed attorney is free to attempt to obtain payment for his legal services from the indigent and his family (an enterprise in which the judge may lend a helping hand by directing the defendant to execute a promissory note) there is no provision for payment by the state, county or city either for expenses incurred by the attorney or for his professional services. That appointed counsel has no right in Utah to compensation from public funds is conclusively settled.

22 "The magistrate must also allow the defendant a reasonable time to send for counsel and postpone the examination for that purpose, and must, upon the request of the defendant, require a peace officer to take a message to any attorney the defendant may name in the precinct or the city. The officer must, without delay and without fee, perform that duty." Utah Code Ann. §77-15-2 (1953).
23 105 Utah 332, 142 P.2d 178 (1943).
24 229 P.2d 289 (Utah 1951).
25 Id. at 293-294; Note, 3 Utah L. Rev. 224 (1952).
26 Letter to Authors, Mar. 22, 1954, Judge Joseph G. Jeppson of the Third District Court of Utah.
27 See Tables IV and V infra.
28 See infra at 213.
29 Ruckenbrod v. Mullins, 102 Utah 548, 562, 133 P.2d 325, 331 (1943): "An attorney appointed for an indigent accused is under a duty, as an officer of the court, to render the services without regard to any possible compensation therefor, and consequently is not entitled to recover compensation from the county or state in the absence of statute." Pardee v. Salt Lake County, 39 Utah 482, 493, 118 Pac. 122, 126 (1911): "[T]he power to provide compensation . . . rests with the Legislature, and not with the courts."
LEGAL REPRESENTATION OF THE INDIGENT

In Utah, then, the traditional system of providing indigents with counsel in criminal cases prevails; i.e., the judicial appointment of unpaid attorneys to serve as a matter of public and professional duty.41 This may be contrasted with the two other systems in effect in various parts of the country — "assigned paid counsel, with compensation fixed by general statute or by the court; and defender offices, publicly or privately financed." 42 In evaluating the effectiveness of the traditional system in this state in attaining the ends of criminal justice recourse will be made to two levels of experience — first, the experience with similar appointive systems in general; and second, the experience with this system in the State of Utah in particular.

A. General Criticism of the Appointive System

Criticism of the traditional system of assigning unpaid counsel for indigent defendants is almost universal among commentators.43 As early as 1919, in Justice and the Poor, a work which has become a classic in the field, Mr. Reginald Heber Smith concluded:

"In the light of reason and in the face of the evidence which has been adduced it is clear that the assignment system in all but capital cases is unfair to the attorney, unfair to the accused, and that it does not work." 44

Similar conclusions have been subsequently expressed by an impressive array of committees and organizations — the American Bar Association,45 the National Legal Aid Association,46 The Wickersham Commission on Law Observance and Enforcement,47 the Judicial Conference of Senior Circuit Judges,48 various Circuit conferences,49 the Committee appointed by the Chief

44 In two states the public defender system is state-wide. Of the remaining states 13 pay appointed counsel in no case, 15 pay him for defense of some offenses, while only 16 states pay counsel in each case he is appointed to defend. Brawnell, Legal Aid in the United States Appendix C (1951). The traditional system is also exclusively followed in the federal courts. There has been much agitation for the institution of a federal public defender system coupled with compensation for private counsel appointed by the federal courts. Hearings, supra note 1, at 16-19. The latest attempt to secure such legislation was made with the introduction of H.R. 398 and H.R. 2091 in the last (83d) Congress. Though acclaim for the bills was practically unanimous, they were not even reported out of committee.

45 Brawnell, Legal Aid in the United States 123 (1951).

46 Emerson and Haber, Political and Civil Rights in the United States 181 n. 1 (1952). In Hearings, supra note 1, criticism was universal from those who testified; the only intimation in the whole hearing of any dissent at all is in a question asked by a committee member (at 92).

47 Smith, Justice and the Poor 112 (1919). Compare his statement to the same effect in 1954 in Hearings, supra note 1, at 114.

48 The A.B.A. annual meeting in 1939 in San Francisco adopted a committee recommendation approving the public defender system for federal, state, and local courts. Since that time it has supported repeated efforts at institution of a federal public defender. Hearings, supra note 1, at 48, 64-65.

49 Id. at 45, 91.


51 Ever since 1937 the Conference has recommended that the federal courts abandon the old system. Keatinge, Report to Committee to Aid the Small Litigant, Junior Bar Conference, A.B.A. 6 (Sept. 8, 1947) (mimeographed report); Hearings, supra note 1, at 8, 15, 16-19, 54, 91.

52 Hearings, supra note 1, at 91, 117.
Justice of the United States in 1943, the Department of Justice and, most recently, the Committee on Legal Aid in Criminal Cases of the Survey of the Legal Profession. A review of the chief criticisms of the appointive system may serve as a useful starting point in examining the operation of the appointive system in Utah.

The failure of the appointive system is in large part a result of the changed character of the American community. In the small, stable community, where courthouse proceedings are centers of community interest, the number of criminal prosecutions few, and the prosecutor not a specialist in criminal prosecutions, no shocking inadequacies in the appointive system are apparent. But in the larger, metropolitan communities, which make up an ever greater portion of the American population, these conditions no longer prevail. The special competence of the public prosecutors, the lessening of community pressures to insure responsibility, and the mounting number of criminal cases create great handicaps for the appointive system.

The quality of legal representation for indigents under the appointive system is on the whole significantly poorer than that available to the accused with funds to hire his own counsel. Lawyers with experience tend to avoid gratuitous assignment to criminal cases as far as possible. The time lost from their regular practice is serious in itself. But where there is no provision at all for the public payment of even a moderate fee for their professional services and where even their necessary expenses are not reimbursed, the call of conscience tends to become understandably faint. Judges, moreover, tend to be sympathetic to the hardships appointment of busy counsel entails and find a ready solution to their dilemma in the constant pool of eager neophytes who solicit these appointments for experience and possible contacts. Consequently, in a great number of cases the indigent accused is represented by an earnest but inexperienced young attorney who, whatever his diligence and inherent brightness, is inadequate to give the accused the quality of representation available to the paying client. "No man stands equal with his fellows before the law when, with his liberty at stake, he has to depend upon the resources of an inexperienced attorney, a young man without background.

Hearings, supra note 1, at 7, 91.
Callagy, supra note 5, at 593 et seq.
Brownell, Legal Aid in the United States 136 (1951); Comment, 1 Cath. U.L. Rev. 75, 78 (1951); Hearings, supra note 1, at 20, 99, 114.
The number of cities in the United States over 25,000 increased from 376 in 1930 to 481 in 1950. Information Please Almanac 222 (1955).
Callagy, supra note 5, at 596; Hearings, supra note 1, at 20, 21, 43, 60, 75, 99, 114.
See note 76 infra. "[T] hose attorneys . . . best suited . . . are the most reluctant to accept a responsibility of this kind. . . ." Letter to Authors, Apr. 22, 1954, Judge Marcellus K. Snow of the Salt Lake City Court. "The experience was a great boon to me. The defendants usually tried to pay what they could. . . . I feel richly repaid for all the service I rendered, even if entirely without monetary reward at the time. This may be easier to say now than it seemed when I was working for nothing. . . . our system of providing defense. . . . often results in serious hardship and sacrifice in time, energy and expense to appointed counsel." Letter to Authors, Mar. 15, 1954, Justice J. Allan Crockett of the Utah Supreme Court. The reason for avoidance of assignments may be not only because they are gratuitous, but also because many reputable and successful attorneys choose to shun criminal practice entirely.

Hearings, supra note 1, at 24, 62.
of litigation which enables him to avoid pitfalls in the course of trial, and
to understand the necessity for preparing the defense in advance of trial." 58

Often as eager for such appointments are the courtroom hangers-on who
become "professional appointees," 59 finding in the pittances they often are
able to extract from defendants or their families the means of making a living
which they otherwise have been unable to achieve at the bar. But in general
these attorneys are among the less able of the legal profession and, in any
event, must experience a rapid turnover of a great number of cases to make
it a paying proposition. The quality of this representation, therefore, cannot
be expected to be greater than that of the neophytes; often it may be far
worse.

The situation is worsened by the high degree of special competence
possessed by the public prosecutors in metropolitan communities. Against
opposing counsel of such skill and experience in criminal law neither the
neophyte nor the "professional appointee" is in a position to provide his
indigent client with adequate representation. 60 The public clearly would
not permit the protection of the public interest by prosecution of alleged
criminals to be handled by whatever attorney in the community were available
for appointment on a catch as catch can basis. Yet the public interest in
providing with legal representation adequate to insure his full
rights under the law is at least as great as its interest in the prosecution of
persons accused of crime. It is as important that the innocent be acquitted as
that the guilty be convicted.

Beyond the general inadequacy of appointed counsel in experience and
training, his difficulty in giving adequate service is aggravated in those many
jurisdictions which do not even provide for reimbursing the appointed attorney
for the expenses necessarily incurred in preparing a defense. 61 Proper prepara-
tion frequently entails not inconsequential expense—photographic services,
detective services, procuring witnesses, etc. Counsel, therefore, must choose
between spending his own money or preparing inadequately. This is unjust
both to the appointed attorney and to the indigent.

In some jurisdictions criticisms have been made of aspects of the ap-
pointive systems other than the quality of legal representation. In many
the appointment is not made early enough to provide the accused with the

58 Justice Wiley Rutledge, Address at the Fifth Open Meeting on Legal Aid Work, A.B.A.
Convention, September, 1941, quoted in BROWNELL, LEGAL AID IN THE UNITED STATES 139
(1951). Compare the following standards for competent representation in criminal cases:
"The competency of representation includes competency in advice, in the general knowledge
of criminal procedure, in the ability to understand human relationships and an insight into
everyday living that can separate sham from truth. Competency means, as well, adequate
examination at the preliminary hearing, astuteness in discovering inaccuracy and faulty
memory, in recognizing overuse of imagination and downright dishonesty. Competency
should also include a full understanding of trial technique, of cross examination and
presentation before a jury. These concepts combined with a fertile knowledge of the law and
a freedom to respectfully present objections and counsel's views, all add up to what com-
petency and adequate representation should be." Callagy, supra note 5, at 606.
60 TWEED, THE LEGAL AID SOCIETY, NEW YORK CITY, 1876-1951 24, 26 (1954); Hearings,
supra note 1, at 99.
61 Apparently only two states (California and Pennsylvania) make any provision for
reimbursement of necessary expense; it is possible that some of the eight others which pay
"reasonable" compensation might permit the expense to be considered in setting a reasonable
fee. See BROWNELL, LEGAL AID IN THE UNITED STATES Appendix C (1951).
full protection required. Some statutes provide for appointment only just before trial; some only after indictment; some at the arraignment; but virtually none assure the appointment of counsel upon arrest, or at least before the preliminary hearing. In the words of one critic:

"In practically every state this right to counsel is interpreted to mean right to counsel during the trial of the case. Although competent counsel is of great value at that time, the time when an accused person really needs the help of a lawyer is when he is first arrested and from then on until trial. The intervening period is so full of hazards for the accused person that he may have lost any legitimate defense long before he is arraigned and put on trial." 63

Another criticism is that in many jurisdictions appointment of counsel for the accused without means is not mandatory. It is required only where the accused expressly demands that counsel be appointed. Failure to demand counsel in some jurisdictions constitutes a waiver. Yet it has been persuasively urged that the indispensable protection afforded by legal representation ought not to turn upon the alertness or sophistication of the accused, but should be provided unless the defendant objects. "[T]he ordinary indigent defendant is incompetent intelligently to waive the assistance of counsel. He needs the assistance of counsel to enable him to know how great is his need of counsel." 65

B. Operation of the Appointive System in Utah

Many of the more serious criticisms of the appointive system summarized above are based upon assumptions of fact; for example, the fact that defendants represented by appointed counsel tend to receive poorer representation; the fact that the vast majority of appointed counsel are novices in the law with very little legal experience in general and even less experience in criminal practice; the fact that counsel are appointed in a substantial percentage of the total number of criminal cases. To some degree, inquiries into the factual basis of these assumptions have been made for various jurisdictions, although perhaps short of the scope and quality required for convincing demonstration. 67 In any event, without a factual basis a critical...
appraisal of the appointive system as it operates in Utah must remain in the realm of a priori judgment and unverifiable personal experience. In the effort to reduce the guess element as far as practically possible a modest attempt has been made to collect factual data bearing on the appointment of counsel for indigents in this state.

Two studies were undertaken. The first constituted an attempt to collect relevant information from members of the Utah Bar. A questionnaire together with a covering letter over the signature of the President of the Utah Bar Association68 was sent in March, 1954, to all attorneys carried on the official roles as members in good standing of the Utah Bar. This took the form of a self-addressed postal card on which the recipient was asked to indicate his personal experience in representing indigent criminal defendants under appointment of court.69 Of the 952 questionnaires mailed,70 222 replies were received, or a sampling of 23.3 per cent.

Second, an examination was made of the minutes of criminal cases both in the Salt Lake City Court and in the Salt Lake County division of the District Court for the Third Judicial District of Utah for the period September, 1952, to September, 1953, particular note being taken of the cases in which counsel was appointed and the disposition thereof. The data thus derived was supplemented by the membership records of the Utah State Bar Association and the record of appeals to the Utah Supreme Court.

What these studies revealed we have attempted to present in the following tables and commentary.

The letter read as follows:

"Dear Sir:

Under a grant from the University of Utah, the Utah Law Review is undertaking an examination of the administration of justice in the State of Utah with regard to the appointment of counsel for indigent criminal defendants. The members of the bar have an opportunity of cooperating with this worthy study by filling out and returning the enclosed postal card. I hope each of you will make time to do so. The object of these cards is to compile as complete a list as possible of criminal cases in which counsel have been appointed. Apparently no adequate records exist.

It will be helpful if you will fill out the card, whether or not you have ever been appointed, and in addition advise the Review of any information you have concerning the appointment of attorneys now deceased, retired or practicing elsewhere. The information desired is: the names of cases where appointment was made, their dates and citations or docket numbers, the district and appointing judge, criminal and trial experience at the time of appointment (in either years or number of cases, whichever gives truer picture).

I am informed that the Review will welcome any comments you care to make on this survey or on the general project.

Respectfully yours,

(S) HENRY RUGGERI
President,
Utah State Bar."

The following information was asked for: "I have (not) served as appointed counsel in the following cases: Case: Date: Citat. or Dkt.: Dist.: Judge:
Crim. exper.: Trial exper.: Name: Address: Information concerning other attorneys: ."

The Survey of the Legal Profession, Second Statistical Report on the Lawyers of the U.S. 91-92 (1952), indicates that of 925 lawyers in Utah at that time 79 per cent were in private practice, 14 per cent were in government service, 4 per cent were in the judiciary, 3 per cent were salaried, and 3 per cent were inactive. A small number of lawyers (3 per cent) were counted in two categories.
1. Results of Questionnaire Survey

Of the 222 replies received not all furnish equally usable and meaningful data. This was in part due to lack of precision in phrasing the questions and in part from a similar imprecision in answering the questions asked.

Sixty-three of the replies received supply usable information on the previous criminal experience of appointed attorneys at the time of appointment. Of this group 41 answered the question relevant to their experience in terms of the number of previous criminal cases at the time of each of their appointments. These replies are summarized in Table I.

### Table I.

**EXPERIENCE OF 41 ATTORNEYS AT TIME OF APPOINTMENT IN TERMS OF NUMBER OF PREVIOUS CRIMINAL CASES**

<table>
<thead>
<tr>
<th>Number of Previous Criminal Cases</th>
<th>Number of Appointments</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td>35</td>
</tr>
<tr>
<td>1-2</td>
<td>30</td>
</tr>
<tr>
<td>3-5</td>
<td>18</td>
</tr>
<tr>
<td>6-10</td>
<td>13</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>96</strong></td>
</tr>
</tbody>
</table>

Of the 96 cases in which these 41 attorneys were appointed, in over two-thirds (65) the appointed attorney had handled two or less previous criminal cases; and in more than one-third (35) the case in which he was appointed was his first criminal case.

Of the aforementioned group of 63 attorneys, 22 answered the question relevant to previous criminal experience in terms of the length of time they had been admitted to the bar at the time of each of their appointments. These replies are summarized in Table II.

### Table II.

**EXPERIENCE OF 22 ATTORNEYS AT TIME OF APPOINTMENT IN TERMS OF LENGTH OF TIME ADMITTED TO PRACTICE**

<table>
<thead>
<tr>
<th>Years Admitted to Practice</th>
<th>Number of Appointments</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-1</td>
<td>46</td>
</tr>
<tr>
<td>1-2</td>
<td>27</td>
</tr>
<tr>
<td>2-3</td>
<td>20</td>
</tr>
<tr>
<td>3-4</td>
<td>23</td>
</tr>
<tr>
<td>4-5</td>
<td>0</td>
</tr>
<tr>
<td>5-8</td>
<td>7</td>
</tr>
<tr>
<td>8-</td>
<td>17</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>140</strong></td>
</tr>
</tbody>
</table>

More than one-half of the total number of appointments were of attorneys with two years or less legal experience at the time of appointment.

Tables I and II, so far as they are representative, would appear to indicate that in the bulk of the cases the attorney with limited experience tends to be appointed. However, these figures by themselves can not fairly be relied upon to justify such a conclusion. First, they are derived from only 28.4 per cent of the 222 replies received which themselves constitute but 23.3 per cent of
the questionnaires sent out. Second, they exclude, because the information given as to experience was not put in usable form, replies from some attorneys who indicated they had been appointed in a great number of cases. Plainly these attorneys had become highly experienced by the time a substantial number of their appointments were made. Nonetheless, despite such limitations these figures may well have meaning when considered in the corroborative context of other independently gathered data.

The 222 replies to the questionnaire are of some use also in evaluating the distribution among the members of the bar of the burden of serving as appointed counsel. The replies to the query concerning the total number of appointed cases handled are presented in Table III.

<p>| Number of | Number of | Total Number |</p>
<table>
<thead>
<tr>
<th>Appointments per Attorney</th>
<th>Attorneys</th>
<th>of Appointments</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>92</td>
<td>0</td>
</tr>
<tr>
<td>1</td>
<td>39</td>
<td>39</td>
</tr>
<tr>
<td>2-5</td>
<td>34</td>
<td>97</td>
</tr>
<tr>
<td>6-10</td>
<td>12</td>
<td>88</td>
</tr>
<tr>
<td>11-20</td>
<td>8</td>
<td>117</td>
</tr>
<tr>
<td>21-50</td>
<td>4</td>
<td>125</td>
</tr>
<tr>
<td>72</td>
<td>1</td>
<td>72</td>
</tr>
<tr>
<td>100</td>
<td>1</td>
<td>100</td>
</tr>
<tr>
<td>200</td>
<td>1</td>
<td>200</td>
</tr>
<tr>
<td>*</td>
<td>30</td>
<td>*</td>
</tr>
<tr>
<td>Total</td>
<td>222</td>
<td>838+</td>
</tr>
</tbody>
</table>

Examination of this table reveals that of the 192 attorneys who reported their number of appointments, 14 per cent (27) were appointed in 84 per cent of the reported cases (i.e., 702 out of 838). The remaining 86 per cent of the attorneys reporting (165) were appointed in but 16 per cent of the reported cases (136). It must be noted that the picture percentagewise is dominated by the few individuals who reported a very high number of appointments. Three individuals (less than 2 per cent of the total) accounted for 44 per cent of the reported cases (372). Even were these anomalous replies to be disregarded, the relative picture would remain unchanged. Excluding those three individuals and the cases in which they were appointed from the total figures, 13 per cent of the attorneys (24 out of 189) were appointed in 71 per cent of the cases (330 out of 466). It is apparent, therefore, that the replies to the questionnaire indicate that a very small minority of attorneys are carrying the great bulk of the burden; and a substantial minority (41 per cent) have never served as appointed counsel at all.

2. Results of Survey of Minutes of Criminal Cases

The data derived from an examination of the minutes of the Criminal Division of the City Court of Salt Lake City for the period August, 1952, to August, 1953, appear in Table IV. Table V constitutes a tabulation of similar
<table>
<thead>
<tr>
<th></th>
<th>Extradition Cases</th>
<th>Misdemeanors (except Involuntary Manslaughter)</th>
<th>Involuntary Manslaughter</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Continuation to Permit Defendant to Obtain Own Counsel</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Waived Counsel</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No Counsel</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Own Counsel</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appointed Counsel</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Continuation to Permit Defendant to Obtain Own Counsel</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Waived Counsel</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No Counsel</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Own Counsel</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appointed Counsel</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*All crimes not felonies are misdemeanors except those crimes which are also felonies (such as murder, treason, etc.); any misdemeanors which are not punishable with imprisonment are not shown. One murder by a soldier was tried in the county court; it is punishable with imprisonment for more than six months (879-190).
## Table V.
### Disposition and Representation, Criminal and Related Cases
#### in the District Court for the Third Judicial District
##### of Utah, September, 1952, to September, 1953

<table>
<thead>
<tr>
<th>Felonies and Involuntary Manslaughter</th>
<th>Non-support Cases</th>
<th>Bastardy Cases</th>
<th>Appeals from City Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appointed Counsel</td>
<td>Own Counsel</td>
<td>No Counsel</td>
<td>Appointed Counsel</td>
</tr>
<tr>
<td>Pledged Guilty</td>
<td>43</td>
<td>41</td>
<td>14</td>
</tr>
<tr>
<td>Pledged Guilty to Lesser Offense</td>
<td>9</td>
<td>13</td>
<td>2</td>
</tr>
<tr>
<td>Convicted</td>
<td>16</td>
<td>14</td>
<td>0</td>
</tr>
<tr>
<td>Convicted of Lesser Offense</td>
<td>7</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>Acquitted</td>
<td>5</td>
<td>11</td>
<td>0</td>
</tr>
<tr>
<td>Dismissed by Court</td>
<td>3</td>
<td>11</td>
<td>3</td>
</tr>
<tr>
<td>Dismissed by District Attorney</td>
<td>2</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>Compromised or Ordered to Pay</td>
<td></td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Dismissed and Remanded</td>
<td></td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Pending</td>
<td>2</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Totals</td>
<td>87</td>
<td>101</td>
<td>19</td>
</tr>
</tbody>
</table>

* Of appointed counsel appearing in the District Court, all but six were appointed in the City Court.

Data for the criminal and related cases in Salt Lake County handled in the District Court for the Third Judicial District of Utah for the period September, 1952, to September, 1953.

These tables comprise the raw data obtained from the examination of the minutes of the City and District Courts. It may be noted, in passing, that counsel is often appointed in cases which are not strictly criminal, i.e., bastardy, nonsupport and extradition proceedings which may result in imposition of criminal penalties. Further, most appointments of counsel appearing in the district court were made in the city court—151 as against 6 in the district court.\(^1\) This means that counsel is generally appointed at the

\(^1\) The Utah Supreme Court also sometimes makes appointments—some official, others unofficial. Between January, 1950, and October, 1954, the court records show 8 attorneys appointed in 4 cases. There may well have been others. In the following cases appealed to the Utah Supreme Court counsel was appointed at some stage in the proceedings from preliminary hearing to appeal: State v. St. Clair, Docket No. 8166 (still pending); State v. Neal, 262 P.2d 796 (1953); State v. Sullivan, 253 P.2d 378 (1953); State v. Waters, 253 P.2d 375 (1953); State v. Braasch, 229 P.2d 289 (1951); State v. Maries, 113 Utah 225, 192 P.2d 861 (1948); State v. Crank, 105 Utah 332, 142 P.2d 178 (1943); State v. Karumai, 101 Utah 597, 126 P.2d 1047 (1942); State v. Condit, 101 Utah 558, 125 P.2d 801 (1942); State v. Fairclough, 86 Utah 326, 44 P.2d 692 (1935); State v. Butterfield, 70 Utah 529, 261 Pac. 804 (1927); State v. Cano, 64 Utah 87, 228 Pac. 563 (1924); State v. Martin, 49 Utah 346, 164 Pac. 500 (1917); State v. Hillstrom, 46 Utah 341, 150 Pac. 935 (1915); State v. Riley, 41 Utah 225, 126 Pac. 294 (1911). Since no records are kept giving this information, this must necessarily be an incomplete list.
preliminary hearing stage (at least in Salt Lake County), since in those cases bound over to the District Court the City Court functions as the committing magistrate on the preliminary examination. In order more clearly to reveal the significance of these data the following tables, which purport to break down this data into more meaningful form, are presented.

Table VI indicates the proportion of cases in which counsel was appointed in both the City and District Courts for the period studied.

### Table VI.

<table>
<thead>
<tr>
<th></th>
<th>Total Cases in Which Counsel Appeared</th>
<th>Cases in Which Counsel Was Appointed</th>
<th>Percentage of Appointments</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>District Court:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Felonies and Involuntary Manslaughter</td>
<td>188</td>
<td>87</td>
<td>46.3%</td>
</tr>
<tr>
<td><strong>City Court:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Felonies and Involuntary Manslaughter</td>
<td>266</td>
<td>115</td>
<td>43.2%</td>
</tr>
<tr>
<td>Misdemeanors (except Involuntary Manslaughter)</td>
<td>131</td>
<td>18</td>
<td>13.7%</td>
</tr>
</tbody>
</table>

Table VI makes clear that legal representation for indigents in Utah's most populous community is a problem of some magnitude. For almost one half of the total number of defendants charged with serious crimes (felonies and involuntary manslaughter) it was necessary for the court to assign counsel. It may be noted that in cases involving other misdemeanors a considerably smaller percentage of appointments was made (13.7 per cent). However, Table IV indicates that 35 per cent of these misdemeanor defendants waived, or appeared without, counsel (76 out of 217). Many of these may well have been unable to afford their own counsel, but elected to plead guilty rather than make a defense. This inference finds some corroboration in the data appearing in Table IV, which reveal that 69 of 76 unrepresented misdemeanor defendants pleaded guilty as charged.

The data appearing in Table IV for the City Court are further broken down in Tables VII A and B. These tables compare the disposition in the City Court of cases in which counsel was appointed with those in which private counsel was retained.

These tables indicate that the defendant represented by privately retained counsel fared on the whole better than one represented by appointed counsel. In the City Court the defendant accused of one of the more serious crimes who was represented by appointed counsel was bound over more often (74.8 per cent compared with 66.7 per cent); was dismissed less frequently (20.9 per cent compared with 32.0 per cent); and pleaded guilty to a lesser offense more often (4.3 per cent compared with 1.3 per cent). The comparative disposition of misdemeanor cases follows a similar pattern. The

22 No clear relationship appears from the data between the particular kinds of crime and the frequency of the need for appointment, unless it be that there is a slightly higher need in cases where the offense charged was unlawful acquisition of property (e.g., larceny, robbery, bad check) as opposed to other offenses.
Tables VII A and B.

Disposition of City Court Cases in which Counsel was Appointed and Privately Retained, August, 1952 to August, 1953

(A)

<table>
<thead>
<tr>
<th></th>
<th>Appointed Counsel</th>
<th>Private Counsel</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number of Cases</td>
<td>Percentage</td>
</tr>
<tr>
<td>Felonies and Involuntary Manslaughter</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bound Over</td>
<td>86</td>
<td>74.8%</td>
</tr>
<tr>
<td>Dismissed</td>
<td>24</td>
<td>20.9%</td>
</tr>
<tr>
<td>Pleaded Guilty to Lesser Offense</td>
<td>5</td>
<td>4.3%</td>
</tr>
<tr>
<td>Misdemeanors</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(except Involuntary Manslaughter)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pleased Guilty</td>
<td>11</td>
<td>57.9%</td>
</tr>
<tr>
<td>Dismissed</td>
<td>5</td>
<td>26.3%</td>
</tr>
<tr>
<td>Convicted</td>
<td>3</td>
<td>15.8%</td>
</tr>
<tr>
<td>Acquitted</td>
<td>0</td>
<td>0.0%</td>
</tr>
</tbody>
</table>

(B)

<table>
<thead>
<tr>
<th></th>
<th>Appointed Counsel</th>
<th>Private Counsel</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number of Cases</td>
<td>Percentage</td>
</tr>
<tr>
<td>Misdemeanors</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(except Involuntary Manslaughter)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Suffered Penalty (Convicted or Plead Guilty)</td>
<td>14</td>
<td>73.7%</td>
</tr>
<tr>
<td>Suffered No Penalty (Dismissed or Acquitted)</td>
<td>5</td>
<td>26.3%</td>
</tr>
</tbody>
</table>

Client of appointed counsel pleaded guilty more often (57.9 per cent compared with 46.0 per cent) and was acquitted less often (0.0 per cent compared with 5.3 per cent). While dismissals were about equal, a disparity in the pattern appears in the number of misdemeanor convictions. While 22.1 per cent of the defendants who retained their own counsel were convicted, only 15.8 per cent of defendants for whom counsel was appointed suffered conviction. This, however, does not necessarily demonstrate the greater success of appointed counsel. The difference in the number of convictions may readily be attributed to the fact that many cases in which appointed counsel would plead guilty are carried to trial by hired counsel. This inference is supported by the greater percentage of cases in which a plea of guilty is entered by appointed counsel (57.9 per cent compared with 46.0 per cent) and the greater percentage of cases which are carried to trial by hired counsel (27.4 per cent compared with 15.8 per cent). It is relevant further to observe that the greater willingness of hired counsel to go to trial proved of benefit to his client in a fair number of cases. Though no acquittals were obtained by appointed counsel in the three cases taken to trial, hired counsel obtained 6 acquittals in the 31 cases taken to trial.

Table VII B sets out the data for misdemeanors except involuntary manslaughter from a different perspective. By regrouping the kinds of dispositions into two classes — cases in which the defendant suffered a penalty and those in which he did not — private counsel’s greater success becomes even more apparent. The defendant represented by his own counsel was convicted or pleaded guilty to a misdemeanor less often (68.1 per cent compared with 73.7 per cent) and was dismissed or acquitted more often (31.9 per cent compared with 26.3 per cent).
Some of the data appearing in Table V for the District Court are further set out in Tables VIII A and B. These tables compare the disposition in the District Court of cases in which counsel was assigned by the court with those in which private counsel was hired by the defendant.

TABLES VIII A AND B.

DISPOSITION OF DISTRICT COURT CASES IN WHICH COUNSEL WAS APPOINTED AND PRIVATELY RETAINED, SEPTEMBER, 1952, TO SEPTEMBER, 1953

<table>
<thead>
<tr>
<th></th>
<th>APPOINTED COUNSEL</th>
<th>PRIVATE COUNSEL</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number of Cases</td>
<td>Percentage</td>
</tr>
<tr>
<td>Pleaded Guilty</td>
<td>43</td>
<td>49.4%</td>
</tr>
<tr>
<td>Pleaded Guilty to Lesser Offense</td>
<td>9</td>
<td>10.3%</td>
</tr>
<tr>
<td>Convicted</td>
<td>16</td>
<td>18.4%</td>
</tr>
<tr>
<td>Convicted of Lesser Offense</td>
<td>7</td>
<td>8.0%</td>
</tr>
<tr>
<td>Acquitted</td>
<td>5</td>
<td>5.8%</td>
</tr>
<tr>
<td>Dismissed</td>
<td>5</td>
<td>5.8%</td>
</tr>
<tr>
<td>Undisposed of at End of Year</td>
<td>2</td>
<td>2.3%</td>
</tr>
<tr>
<td>TOTALS</td>
<td>87</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>APPOINTED COUNSEL</th>
<th>PRIVATE COUNSEL</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number of Cases</td>
<td>Percentage</td>
</tr>
<tr>
<td>Suffered Full Penalty (Pleaded Guilty to or Convicted of Whole Charge)</td>
<td>59</td>
<td>69.4%</td>
</tr>
<tr>
<td>Suffered Lesser Penalty (Pleaded Guilty to or Convicted of Lesser Offense)</td>
<td>16</td>
<td>18.8%</td>
</tr>
<tr>
<td>Suffered No Penalty (Acquitted or Dismissed)</td>
<td>10</td>
<td>11.8%</td>
</tr>
<tr>
<td>TOTALS</td>
<td>85</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

These tables indicate that in the District Court as well as the City Court the defendant represented by private counsel does better on the whole. Table VIII A reveals that the defendant represented in the District Court by assigned counsel pleaded guilty more often (49.4 per cent compared with 40.6 per cent); pleaded guilty to a lesser offense less often (10.3 per cent compared with 12.9 per cent); was convicted of the offense originally charged more often (18.4 per cent compared with 13.9 per cent); was convicted of a lesser offense more often (8.0 per cent compared with 4.0 per cent); was acquitted less often (5.8 per cent compared with 10.8 per cent); and was dismissed less often (5.8 per cent compared with 15.8 per cent). Table VIII B reduces the various kinds of disposition of cases into three categories: those cases in which the full penalty was suffered (i.e., where defendant was convicted of or pleaded guilty to the original charges); those in which a lesser penalty was suffered (i.e., where defendant was convicted of or pleaded guilty to a lesser offense); and those in which no penalty was suffered (i.e., where defendant was acquitted or dismissed). Where the defendant retained his own counsel he suffered the full penalty in 55.5 per cent of the cases as compared with 69.4%

A plea of guilty to a lesser offense cannot categorically be designated a favorable or unfavorable disposition of a case. It is better than a plea of guilty to the whole charge, but less favorable than dismissal. That defendant with assigned counsel pleaded guilty to the whole charge much more often than defendant with hired counsel may be the reason that he pleaded guilty to a lesser offense less often.
per cent of the cases in which counsel was appointed; he suffered a lesser penalty in 17.2 per cent of the cases as compared with 18.8 per cent of the cases in which counsel was appointed; and he escaped any penalty in 27.3 per cent of the cases as compared with 11.8 per cent of the cases in which counsel was appointed.

The results of an examination of the record of appeals taken to the Utah Supreme Court to ascertain the subsequent history of convictions in the District Court for Salt Lake County during the year September, 1952, to September, 1953, are revealed in Table IX.

<table>
<thead>
<tr>
<th></th>
<th>Appointed Counsel</th>
<th>Private Counsel</th>
</tr>
</thead>
<tbody>
<tr>
<td>Convictions</td>
<td>23</td>
<td>18</td>
</tr>
<tr>
<td>Appeals</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Reversals</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

While the number of cases is not large enough to justify definitive conclusions, on the basis of the data available it would appear that appointed counsel is less likely to appeal than hired counsel. While appointed counsel failed to appeal any convictions during this period, hired counsel appealed 3 of 18 convictions, and was successful once in securing a reversal.

The dates of admission to the bar of the 57 attorneys who were appointed by the Salt Lake City Court during the year studied were determined from the records of the Bar Association. Table X correlates this data with the number of cases in which these attorneys were appointed.

<table>
<thead>
<tr>
<th>Admitted to Practice</th>
<th>Number of Attorneys</th>
<th>Number of Appointments</th>
</tr>
</thead>
<tbody>
<tr>
<td>1953</td>
<td>10</td>
<td>34</td>
</tr>
<tr>
<td>1952</td>
<td>11</td>
<td>31</td>
</tr>
<tr>
<td>1951</td>
<td>8</td>
<td>14</td>
</tr>
<tr>
<td>1950</td>
<td>13</td>
<td>25</td>
</tr>
<tr>
<td>1949</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>1948</td>
<td>4</td>
<td>7</td>
</tr>
<tr>
<td>1942</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>1940</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>1928</td>
<td>1</td>
<td>23</td>
</tr>
<tr>
<td>1924</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>1923</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td><strong>57</strong></td>
<td><strong>151</strong></td>
</tr>
</tbody>
</table>

One attorney with a substantial number of years of experience at the bar (24 years) handled a very large number of cases during the year (23) — more than twice as many as anyone else. He is clearly an exception. Only 16 of the remaining 56 attorneys had been admitted earlier than 1950 and this group accounted for but 24 of the remaining 127 appointments; 21 attorneys, who handled over half of the total appointments made (excluding those of the excepted attorney), were admitted to practice in 1952 or 1953.
3. Conclusions

The foregoing studies of the operation in Utah of the system of appointing counsel for indigent criminal defendants do not afford basis for definitive conclusions. The questionnaires are not necessarily representative, since less than 25 per cent of the attorneys circularized returned answers. The docket survey is limited to one year, 1952 to 1953. While there is no reason to believe that this year was an unusual one in appointment of counsel for indigents, there can be no doubt that a similar survey for a longer period of time would have afforded ground for more confident conclusions. Further, while some of the comparative figures for appointed and private counsel are sufficiently disparate to suggest meaningful differences, especially considered in light of the consistency of the disparities, others reveal differences which are not altogether statistically reliable. Further, some of the data, notably of appeals taken, involve too few cases to justify generalized conclusions. Nonetheless, with all these limitations, the data derived from the studies is at least revealing in its tendency to document as applicable to the State of Utah some of the chief criticisms of the appointive system as it has been observed to operate in other jurisdictions. Reliability of the data is further enhanced by the corroboration of some of its revelations by Utah judges who have been intimately involved in the process of making appointments.74

The adverse conclusions concerning the operation of the appointive system in Utah which can reasonably be drawn may be summarized as follows:

1. The problem is not a marginal one involving relatively few people. Almost one-half of the total number of criminal defendants in the Salt Lake community desire, but can not afford, representation by counsel.75

2. The burden of gratuitous representation of indigents76 is not borne equitably by all members of the bar of this state. Most of the cases are handled by a minority of the bar.77

3. The predominant number of appointments are of lawyers recently admitted to the bar with little or no previous litigation experience and even less experience trying criminal cases.78

74 See notes 78, 150 infra.

75 See Table VI supra. This figure is not unusual; it is reported that one-third of all defendants in the federal courts need to have counsel appointed (Hearings, supra note 1, at 5), that 44 per cent of defendants in the District of Columbia are indigent (Id. at 67), that 58 per cent of defendants in the federal Southern District of California in 1953 were indigent (Id. at 82).

76 The burden can become very substantial. For specific examples, see Hearings, supra note 1, at 58-59.

77 See Table III supra. Cf. Hearings, supra note 1, at 20, 23.

78 See Tables I, II and X supra. "[G]enerally speaking, we find that the great number of attorneys who are thus appointed, are from the ranks of the newer members of the Bar. I made it a practice to receive the list of each new Admission Group to the Utah Bar, and would add it to those groups admitted for the two or three years last past, and from among these attorneys, I would make the bulk of such appointments. I would leave this matter to my Criminal Clerk, and would order him to appoint these said attorneys in rotation upon my order. . . ." Letter to Authors, Apr. 21, 1954, Judge Marcellus K. Snow of the City Court of Salt Lake City, Utah. "I . . . usually appointed the young attorneys who wanted the appointment. If the case looked like it was more difficult than most of them, I appointed an older attorney to be associated with him." Letter to Authors, Mar. 22, 1954, Judge Joseph G. Jeppson of the Third District Court of Utah. That the appointive system gives experience to new attorneys is a stock argument used in its favor.
4. The defendant represented by appointed counsel on the average tends to receive poorer representation than the defendant who can afford to hire his own counsel. Statistically his chances of obtaining a favorable disposition of his case are significantly less than the chances of the client of a private attorney.79

On the other hand, there are certain favorable conclusions which can be drawn concerning the operation of the system of appointing counsel in Utah:

1. While the obligation to appoint counsel does not become jurisdictionally required until the arraignment it is the practice in the Salt Lake area to make the appointment at the preliminary hearing stage in the City Court.80

2. It is the practice in the Salt Lake area to appoint counsel not only in felonies and misdemeanors but also in proceedings not strictly criminal in nature but in which criminal penalties may be imposed, such as nonsupport and bastardy proceedings.81

On balance, the conclusion appears justifiable that while some of the criticisms generally made of the appointive system are inapplicable to Utah, all of the more serious points of criticism of the appointive system seem applicable to this state. The gap between the ideal of “equal justice under law” and the actual administration of criminal law in this state in regard to indigent defendants appears sufficiently serious to compel reflection upon ways and means of narrowing it.

III. IMPROVING REPRESENTATION OF INDIGENTS

In considering means of improving the system of legal aid for indigent criminal defendants there are two chief alternatives available. The most extreme would entail scrapping the existing appointive system for one which furnishes legal aid on an organized basis through a staff of regularly maintained attorneys, either privately or tax supported. The other alternative is to attempt to improve the operation of the appointive system by appropriate statutory changes or judicial rules.

79 See Tables VIII, IX and X supra. But note: “It is my observation that notwithstanding the fact that our system of providing defense is theoretically very poor, in the main defendants have had remarkably good protection. This has been due to the high ideals and the sense of responsibility of the members of the profession, rather than to the system.” Letter to Authors, Mar. 15, 1954, Justice J. Allan Crockett of the Utah Supreme Court.

The alternative conclusions deducible from the data presented seem to be that poor persons are more likely to be guilty of the crimes with which they are charged than persons with some means or that the quality of representation with which they are provided is inferior. It would seem that there is no real reason why a poor defendant is more likely to be guilty than one with means. That crime may well be more prevalent among indigents would appear not to affect the answer. The determinative question is rather whether the police make fewer mistaken arrests among the poor than among those who can hire counsel. If they are as likely to make valid arrests in one group as in the other, the percentage dispositions in court should be the same. A further possibility is that juries and judges are more hostile to indigent defendants than to defendants with means, but this explanation is rejected as insufficient. Juries, at least, are usually unaware that counsel has been appointed in a case. It is the contention of this article that the explanation for the difference in result in the two classes of cases is more plausibly found in the kind of representation defendant enjoys. It is, however, by no means intended to suggest that appointed attorneys are knowingly giving inferior service; it is submitted that the limitations on experience, time, money and interest in the case may innocently result in inferior representation.

80 “Most defendants appearing in [the district] court have counsel of their own choosing, or that have been appointed by the City Judge . . . .” Letter to Authors, Mar. 22, 1954, Judge Joseph G. Jeppson of the Third District Court of Utah.

81 See Table IV supra.
A. The Voluntary Defender System

The system of providing legal counsel in criminal cases through privately financed organizations developed as an outgrowth of the legal aid movement, which was directed to giving legal assistance to the poor in civil matters. The first legal aid experiment with criminal cases occurred in New York when the New York Legal Aid Society undertook to secure competent volunteers to give legal assistance to the poor in criminal cases. The system of using a staff of volunteer unpaid attorneys was soon largely replaced by the use of a semipermanent staff of paid attorneys. Similar organizations subsequently appeared in five additional cities—Pittsburgh, New Orleans, Cincinnati, Boston and Philadelphia. In the latter two cities the criminal legal aid service is supported with Community Chest funds; in the others the service is an adjunct of and supported by the legal aid agency. The staff attorney has, under this system, no official status at court; he merely presents himself as available for appointment by the court whenever a criminal defendant is unable to afford private counsel.

Whatever the merits of this system of providing counsel for the poor, it warrants little consideration insofar as our concern is with a practical program for Utah. Support of such organizations requires voluntary financial outlays of substantial proportions. It is unlikely that the fund of private wealth available for charitable enterprises in this state is sufficient to sustain this addition to the already large demands regularly made.

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82 Tweed, The Legal Aid Society, New York City, 1876-1951 24 et seq. (1954).
83 The policy is to use volunteers supplied by private law firms on a full-time basis only, and for a minimum period of six weeks. Brownell, Legal Aid in the United States 227-228 (1951).
84 But he is almost always appointed. Hearings, supra note 1, at 105.
85 Brownell, Legal Aid and Democracy, 34 Cornell L.Q. 580 (1949).
87 "Experience has shown that the random appointment of practicing lawyers has usually produced unsatisfactory representation of indigent defendants, unfair to the defendants or to counsel who were forced to represent them without compensation, or unfair to both. Better results have been obtained by the appointment of counsel from a panel maintained by the local bar association. Still more satisfactory representation has been provided by legal-aid societies, and in my personal opinion this form of legal assistance is preferable to others; but unfortunately it seems very difficult to raise the necessary funds to extend legal-aid services to criminal cases." Statement by William H. Avery, Jr., Hearings, supra note 1, at 97.
88 One of the factors responsible for this situation may be the substantial financial contribution which members of the majority L.D.S. (Mormon) Church are called upon to make in support of the Church’s own wide range of social, welfare and educational, as well as strictly religious, activities. This, along with the general difficulty of getting support for organized charitable services in the less wealthy communities, may account for the relatively low per capita contribution to the Community Chest in Utah. The per capita contribution in Salt Lake County in 1954, according to the local Welfare Council office, was $2.04 as compared to a national average of about $3.00.
89 "I am compelled to admit that the financing of the work of legal aid societies on the criminal side is so difficult that it is, to my mind, impossible to rely upon that source . . . ." Statement by Harrison Tweed, Hearings, supra note 1, at 44. "Ideally I prefer the voluntary system . . . in New York I think it has been working reasonably well . . . . Yet, taking the country over, there are, so far as I know, only 2 or 3, maybe 4 or 5, volunteer defender committee organizations . . . in the entire United States. The answer is largely lack of funds."
B. The Public Defender System

The public defender system calls for the creation of a public agency supported by tax funds and entrusted with the responsibility of furnishing counsel to defend indigent criminal defendants. It has gained widespread adherence in communities where the appointment of private counsel has proved unsatisfactory. The idea was advocated by Benjamin Austin as long ago as the end of the eighteenth century, but was first realized in 1913 when the Los Angeles County Defender’s office was chartered. By 1921 there were sixteen such offices. From 1921 to 1937 only two more were added, but thereafter interest was renewed and today the total stands at 32 offices in eleven states. Only in Connecticut and Rhode Island does the system operate state-wide. There are eleven offices in California, nine in Connecticut, two each in Oklahoma, Illinois and Minnesota, one in Rhode Island, and one (generally in the largest population center) in Indiana, Missouri, Nebraska, Ohio and Tennessee. A large body of periodical literature exists concerning the system, most of it favorable in varying degrees, but with a strong and vociferous opposition.

Except for a few California and Connecticut offices the system has been instituted only in metropolitan areas, which are said to be its natural habitat. In all but four offices the defender’s job demands his full time. He generally has the aid of a staff of investigators, assistants and clerks, and has available some funds for the extra expenses of trial. His average salary is $6600 per year; and he may be chosen variously by public election, by civil service examination, or by some official body—the governor, city council, county commissioners, or the judges of one or more courts. Five offices are supported by

... we simply cannot wait any longer for the time when voluntary funds are going to be made. ...” Statement by Timothy N. Pfeiffer, id. at 75. “The matter of financing is a difficult one. ... Very few communities can raise the necessary funds through private philanthropy. The tendency is therefore toward tax-supported offices. ...” Letter from Emery A. Brownell, quoted in Potts, supra note 66, at 517.

93 Smith, Justice and the Poor 115 (1919).
94 Brownell in Legal Aid in the United States, at 126, states that the total number of public defenders is 28, but he counts only eight for Connecticut (one for each county) though there appear to be nine (one for each judicial district). Mars, The Public Defender System in Connecticut, 27 STATE GYVT. 29 (1954). Since Brownell’s book public defender’s offices have been opened for Sangamon County (Springfield), Illinois, and Ramsey County (St. Paul), Minnesota. Hearings, supra note 1, at 27, 100.
95 In addition to the currently operating offices, there was a short-lived office in Portland, Oregon (Brownell, Legal Aid in the United States 126 (1951)), and provision for a defender in Virginia which was never effectuated (Rubin, Justice for the Indigent: The Need for Public Defenders, 39 A.B.A.J. 893 (1953)). Statutory authorization for the defender offices is cited in Hearings, supra note 1, at 26-8, in Brownell’s book, at 130, in Note, 4 INTR. L. REV., N.Y.U. 105, notes 58-64 (1949), and in Potts, supra note 66, at 512.
98 E.g., Brown, Lawyers and the Promotion of Justice 255 (1938).
city funds, seventeen by county funds and ten by state funds. The cost of support is comparable to that of a prosecutor's office.\footnote{95}{Information in this paragraph is taken primarily from BROWNELL, LEGAL AID IN THE UNITED STATES 126 et seq., 225 et seq. (1951).}

The arguments in favor of the public defender system have been stated many times in the course of the long-standing public debate between its advocates and its opponents. As recently observed, there are no longer any new ideas on the subject.\footnote{96}{See id. at 144.} The general proposition advanced by its proponents is that it makes possible in far greater measure than any alternative the attainment of a fair and efficient system of criminal justice for the poor. The arguments may be summarized as follows:\footnote{97}{Variations of these same arguments may be found in most of the literature dealing with the defender systems. See notes 86, 92, 93 supra.}

1. The defender's goal is justice rather than acquittal. Since he has no interest in preventing the guilty from being convicted he can be relied upon to reject unscrupulous and perjured defenses and to sift the defendant deserving his utmost efforts from those patently guilty.\footnote{98}{See, e.g., "We don't at all measure our success by the number of cases we win. We have no interest in that, at all. All we are interested in is to see that a man gets his day in court, that he is not pushed around, and that everything that possibly could be said is said for that man at the bar of the court." Statement by Herman I. Pollock, Voluntary Defender of Philadelphia, Hearings, supra note 1, at 108. It has even been proposed that a public defender should be appointed whose services should be compulsory for all defendants — rich and poor alike — as a means of attaining completely "equal justice under law." Goldman, Public Defenders in Criminal Cases, 205 ANNALS 16 (1939); criticized in Comment, 11 U. OF Chi. L. Rev. 444 (1944), and Tweed, op. cit. supra note 82, at 27.}

2. The defender becomes an experienced specialist in the defense of criminal cases and therefore a fair match for the highly specialized public prosecutor. His skill and experience enable him to make informed judgments on when to enter a timely plea of guilty to obtain minimum sentence, to detect and evaluate reliably any possible defenses and to present defenses in the most effective manner. In short, he is highly competent counsel for the defense.\footnote{99}{"The enormous growth in the number and size of large cities, the greater ease with which people can move about the country and the increased menace of organized crime have combined to make necessary the establishment of highly specialized crime detection facilities and to man prosecuting offices very largely with lawyers who become specialists in criminal law practice. This trend toward a more efficient prosecution of crime should be encouraged. It does, however, put the scales of justice out of balance for the very large number of ordinary citizens, innocent and guilty, who find themselves charged with crime, who have no money for a lawyer's fee. . . . In these circumstances, reliance upon a system of unpaid counsel is unrealistic. It is unfair to the lawyer. . . . It is also unfair to the defendant . . ." Statement of Emery A. Brownell, Hearings, supra note 1, at 99.}

3. The defender has not only the skills but the resources to conduct a competent defense. First there is no problem of availability of funds for the great amount of investigative work frequently required in the preparation of a defense. Secondly, his close relationship to the office of the prosecutor can be of great assistance in his preparation. The facilities for conducting investigations and the results of the prosecutor's investigations are available to him.
4. The presence of the defender serves to elevate the practice of the criminal law. Trick defenses, faked alibis, perjured testimony, the jail lawyer and similar unsavory institutions of American criminal law practice find a less salutary climate.

5. The administration of criminal justice is also improved by the saving of time in conducting trials occasioned by the defender's disinclination to procure unnecessary procedural delays. Since a private practice does not compete for his time and he has the resources and skill to prepare his cases expeditiously, he is commonly ready to go forward with the prosecution in the trial of a case. Further, and for related reasons, unnecessary trials are avoided and the duration of trials is shortened.

6. While the above advantages of the public defender system would be worth the added cost of sustaining such a system, in the long run the cost to the taxpayer would be reduced. The defender requires half the time which a private defense attorney takes to bring a case to final disposition. He recommends a plea of guilty when he sees no valid basis for a defense. He stipulates to facts which the state could, with expense, nonetheless prove. He is quickly prepared, does not request a change of venue, requires little time to choose a jury, shuns dilatory tactics and often waives a jury trial. The cost of conducting criminal trials is thereby reduced considerably. When this saving is added to the existing expense in some communities of compensating assigned counsel, which would no longer be necessary, the defender system acquires the virtue of economy in addition to a more perfect justice.

These considerations make out a persuasive case for the public defender system. With hardly an exception the experience of communities which have adopted the system has been highly favorable. This endorsement by those who have put the theories to the test is far more significant than a priori judgments one way or the other. Further, the large number of esteemed lawyers, judges and public officials who have endorsed the defender system commands that the most respectful and serious consideration be given to it by any community contemplating ways of improving legal representation for the poor in criminal cases. Nevertheless the system has serious drawbacks.

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100 It is strongly asserted by James V. Bennett, Director of the Federal Bureau of Prisons, in To Secure the Right to Counsel, 32 J. Am. Jud. Soc'y 177 (1949), that the public defender system could be of untold value in shaping attitudes of prisoners. Prisoners who had appointed counsel often feel that they were treated unfairly.


which have been too often passed over by its proponents in their eagerness to gain support for an alternative to the desperately poor situation prevailing in many parts of the country.\textsuperscript{105} The system may possibly constitute the best alternative available, but it is no panacea.

The chief defects in the defender system stem from the factor responsible also for its chief virtues — the defense of the accused becomes a state function. Both the limited statistical evidence available and the arguments advanced in favor of the defender system suggest that the indigent defendant is tried first by his public defender lawyer before he is tried by the court.\textsuperscript{106} For example, data comparing the performance in Los Angeles County of private attorneys appointed by the courts in 1913 with that of the newly established public defender office in 1914\textsuperscript{107} indicate that slightly more persons represented by the defender were convicted, that the defender entered a plea of guilty more often and went to trial less often (but that when the defender did go to trial he secured more acquittals). A similar pattern is observable in a survey comparing the performance during 1932-1933 in Alameda County, California, of a public defender's office with that of hired private counsel.\textsuperscript{108} The data reveal that the person who hired his own counsel had a better chance of acquittal, that the defender pleaded his client guilty much more often and waived jury trial more frequently, and that the defender took just half as much time at trial or for final disposition of his case.

What these figures tend to suggest concerning the defender's view of his primary role is corroborated by the arguments frequently given in justification of the system: the defender sifts the meritorious and unmeritorious defenses; he encourages a plea of guilty where he finds the defendant unworthy of defending in the circumstances; he stipulates to facts he knows to be true rather than put the prosecutor to his proof; he shuns dilatory tactics, tends to waive juries and tries his cases in much less time than the private counsel for the defense. All this is conducive to speed and economy in the administration of criminal justice.\textsuperscript{109} But in making of the defender a preliminary court before which the accused must be adjudged probably innocent before he is entitled to a wholehearted defense, it also raises some very basic questions. Fundamental to the accusatorial system and the legal code of ethics which is based upon it are the concepts that the accused is entitled to the fullest

\textsuperscript{105} See the letter from Emery A. Brownell, quoted in Potts, supra note 66, at 517: "The key problem, of course, is to develop a plan which will eliminate politics as much as possible and give the Defender's office freedom to act without pressure either from the prosecutor's office, the dominant political party, or the court." "Disadvantages of a Public Defender organization are primarily that it is likely to suffer from the bureaucratic lethargy found in many governmental agencies, that an indigent defendant may in a particular case not get the individual attention that he would otherwise get from assigned counsel. . . ." Keatinge, supra note 48, at 10. See also Comment, 28 Tex. L. Rev. 236 (1949).

\textsuperscript{106} Comment, 11 U. of Chi. L. Rev. 444 (1944).


\textsuperscript{109} See notes 67, 101, 102 supra.
exploitation of every advantage provided by the law, and that it is the attorney’s responsibility to advance the interests of his client, leaving the function of judging to the court and the jury and the function of convicting the guilty to the prosecution.\textsuperscript{110} This sharp division of responsibility is plainly founded upon the judgment that the ultimate end of criminal justice—the conviction of the guilty and the protection of the innocent—is in the long run thereby best achieved.\textsuperscript{111} Whether this judgment is valid or not is less relevant than the fact that it underlies our present legal institutions. To depart from this principle solely for those accused of crime who are financially unable to hire counsel tends to subvert rather than subserve the goal of "equal justice under law."

There are other, though perhaps less ineluctable, defects of the defender system. There is the constant danger that politics and the urge to continuation in office will operate to undermine the main purposes of the defender. These factors may manifest themselves in a variety of ways—in the outright use of graft; in the controlling pressures of the dominant political parties; in the more subtle pressures emanating from the judge and the prosecutor, in whose good graces there is a constant incentive for the defender to remain;\textsuperscript{112} in the incentive to effect savings at the expense of the defendants. The experience of the defender in Cook County, Illinois, is an example of the adverse influence of these factors upon the work of the public defender.\textsuperscript{113} Of more than negligible concern, likewise, is the common inadequacy of appropriations for the public defender offices.\textsuperscript{114} The arguments in its favor are premised upon the defender's having the resources to discharge his functions. But when, as is apparently often the case, the defender operates under the substantial handicap of wholly inadequate funds, he may be so overburdened and pressed that the final job he does is perhaps less adequate than the system of privately assigned counsel.

The merit of the defender system if conceded, however, answers only half the problem. The further consideration remains of its adaptability to conditions in the state of Utah. It is at once apparent that the heavy concentration of the population of the state in the Salt Lake Valley area as compared to the relative sparsity of population in the rest of the state makes a state-wide system, such as that existing in Connecticut and Rhode Island, highly impractical. The further question is whether there is any city or county in the state with a sufficiently high concentration of population to justify a public defender office. Even the most ardent proponents of the defender system concede that it is primarily in the high-population metropolitan areas that the defender system finds full justification. Salt Lake County, with a

\textsuperscript{110} Revised Rules of the Utah State Bar Governing Professional Conduct and Discipline, 22 UTAH BAR BULL. Rules 5, 15 (Special Number Nov., 1952).

\textsuperscript{111} "The guilty should be accorded every right in order that the innocent be protected..." Stewart, The Public Defender System is Unsound in Principle, 52 J. AM. JUD. SOC'Y 115, 117 (1948).

\textsuperscript{112} This may also be true of appointed counsel, though, especially where the judge makes a practice of dispensing favors to appointees as is evidenced in Hearings, supra note 1, at 51, 69.

\textsuperscript{113} Stewart, supra note 111, at 115.

\textsuperscript{114} Id. at 118; BROWNELL, LEGAL AID IN THE UNITED STATES 202, 243, and Appendices A(2) and B(2) (1951).
population of 274,895 (including Salt Lake City with a population of 182,121) is clearly the only community in the State of sufficient population to warrant serious consideration.115

It is likely, though not beyond argument, that the population of Salt Lake County is large enough to sustain a public defender system.116 Its population is greater than that of six of the Connecticut judicial districts, of Long Beach City, and of Tulsa County, but is considerably smaller than the population served by each of the twenty-four other existing public defender offices.

How much a public defender office for Salt Lake County would cost cannot be prophesied with accuracy. However, on the basis of the comparable operating costs in other communities some notion of the range can be surmised.117 In Salt Lake County only about 150 indigents required representation during the year discussed in the survey above.118 It is likely that some persons who would under the appointive system have waived counsel might elect to have counsel if a public defender were available. In any case, the number of cases per year is probably not too great at present for a single attorney to handle, working full time. This is borne out by the fact that in 1947 the case load per attorney in defender offices where only felony cases were handled ranged from 174 in Rhode Island to 536 in Philadelphia; and where all cases were handled, from 247 in Oakland to 1037 in Pittsburgh.119 It was also true that in 1947 defenders in charge of an office were paid an average annual salary of approximately $6,600.120 Even if the salary of a secretary and office expense is added, the cost of a defender's office itself would be relatively small. The expenses of investigation, exhibits, etc., might amount to a considerable additional amount, though not nearly the amount paid in salaries.121 In addition it is forcefully argued that the initial expense of sustaining a public defender's office would more than be offset by savings to the court in time.122 Each day by which a jury trial is shortened means a saving of several hundred dollars.123 In short, the cost of the public defender institution should be no serious bar to its acceptance.

115 Other population centers are Ogden (57,112), Provo (28,937), and Logan (16,832). The total Utah population is 688,862. U.S. CENSUS REPORT P-A44, P-B44 (1950).

116 The Committee to Aid the Small Litigant recommended that the "Junior Bar Conference go on record in favor of supporting the adoption of the Public Defender system in all cities and counties throughout the United States having a population in excess of 200,000." Keatinge, supra note 48, at 10.

117 In the New York federal court for the Southern District the voluntary defender office represents indigents in 650 to 750 cases each year for about $15,000. Hearings, supra note 1, at 105. The Tulsa public defender office in 1946 handled 452 cases for $3,600. Keatinge, supra note 48, at Appendix A, p. 2. See Brownell, Legal Aid in the United States 225-229 (1951).

118 See Table IV supra.

119 Brownell, Legal Aid in the United States 225-229 (1951).

120 Ibid.

121 Statistics as to separate cost of expenses is unavailable, but note that the Connecticut defender is permitted reimbursement for expenses during one term in excess of 5 per cent of his annual salary only by permission of court. Mars, supra note 103, at 30.

122 See note 101 supra.

123 Judge Herbert M. Schiller, formerly of the Third District Court of Utah, estimated to the authors that he had once figured the cost of a day of jury trial, including building upkeep, heat, fees, salaries, etc., at approximately $375.
The public defender system, even with its disadvantages, may be the best of the available alternatives for providing legal representation for the indigent criminal defendant. It may be the closest we can expect to come to the ideal of equal justice. Yet it is not likely that such a drastically different system will be adopted in Utah in the near future. It is likely that more experimentation with the system in other communities, adoption in the federal judicial system, and the adoption of some half-way measures in Utah will be necessary before any such movement can gain real momentum in this state. In the meantime a problem of substantial dimensions continues to exist in this state and a pressing consideration is whether there are means of improving the legal representation of indigents, short of the radical changes entailed in the creation of a public defender system, which stand a fair chance of adoption in the immediate future.

C. Improving the Appointive System.

There are two facets to the problem of improving the system of furnishing counsel to indigent criminal defendants. The first has to do with the statutory designation of the circumstances in which the defendant has a right to have counsel appointed; the second has to do with the machinery of appointment which gives effect to this right.

1. The Right to Counsel

We have pointed out above the crucial importance of having counsel appointed early enough in the proceedings to maximize the benefit of legal representation. We have further indicated that at least in the courts studied the practice appears to be to appoint counsel for indigents at the preliminary hearing which precedes the information and subsequent arraignment. However, there is much to be said for compelling as a statutory duty what enlightened courts do as a matter of policy. The Utah Supreme Court has already indicated that even under the existing statute the proper practice is for the magistrate to appoint counsel at the preliminary hearing, even though failure to do so will not, under the present law, void the conviction.

A bill was introduced in the 1953 regular session of the Utah legislature to provide for appointment at the preliminary hearing stage by amending Section 77-15-2 to require that the magistrate appoint counsel if the defendant proves unable to procure his own. The "magistrate," however, may be

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224 We have found no evidence that the public defender system has ever been given any consideration in this state, either by the Bar or any other group in the community.

225 See notes 62, 63 supra and text.

226 See note 80 supra and text.

227 One of the central issues in the now locally famous Braasch and Sullivan cases (State v. Braasch, 229 P.2d 289 (Utah 1951), cert. denied, 342 U.S. 910 (1952); Ex parte Sullivan, 107 F. Supp. 514 (D. Utah 1952); Ex parte Sullivan, 253 P.2d 378 (Utah 1953); Ex parte Sullivan, Civil No. 21-52 (D. Utah Nov. 30, 1954), turned on the refusal of the committing magistrate (a justice of the peace) to appoint counsel at the preliminary examination. See discussion in Note, 3 UTAH L. REV. 224 (1952).

228 See note 36 supra.

229 H.B. No. 132 (1953): "The magistrate must also allow the defendant a reasonable time to send for counsel and postpone the examination for that purpose. . . . But should the defendant for any reason be unable to procure counsel, the magistrate must appoint counsel."
(and often is, in the rural areas) a justice of the peace,\textsuperscript{129} who, the Supreme Court has indicated, lacks the inherent power to appoint counsel.\textsuperscript{130} It is questionable whether this contemplated provision constitutes the grant of power to do so. This might be remedied by making express grant of the power to justices of the peace, but an alternative and perhaps preferable\textsuperscript{131} provision would impose the duty of appointment upon all magistrates with the exception of justices of the peace, who would be obliged to stay the preliminary hearing pending fulfillment by the District Court of request to appoint counsel. The Supreme Court has pointed out in the Braasch case that this is the common practice and expressly approved it.\textsuperscript{132}

An improvement may further be made by extending the right to have counsel appointed to all misdemeanors and not simply those prosecuted through arraignment in the district courts. In Salt Lake County virtually all misdemeanor prosecutions take place in the City Court in which, since there is no arraignment, no statutory duty to appoint counsel exists. While Salt Lake City courts do tend to appoint counsel nonetheless, as a matter of judicial discretion, it would appear desirable to impose this statewide as a duty in all courts. There is little sense in requiring appointment of counsel for misdemeanor cases tried by district courts but not for those tried by city courts or justices’ courts — the penalty is the same.\textsuperscript{133}

Protection against uninformed and unwise waiver is a third way in which the right to counsel can be better assured. The experienced criminal needs no judicial tutoring in his right to counsel. This, however, is not often true of the first offender, the illiterate, the uneducated and especially of the youthful offender.\textsuperscript{134} As we have indicated, the importance of legal assistance should require the court to appoint counsel for indigents as a matter of course, even without request, unless appointment is objected to. Further it would appear

\textsuperscript{129} "The following persons are magistrates: (1) Justices of the Supreme Court. (2) Judges of the district courts. (3) Judges of city courts. (4) Justices of the peace." Utah Code Ann. §77-10-5 (1953).

\textsuperscript{130} State v. Crank, 105 Utah 332, 341, 142 P.2d 178, 182 (1943).

\textsuperscript{131} It is preferable because the justice of the peace is not necessarily an attorney, because his court is not of record, because of a possible constitutional question whether such power is not an interference with the control of the judiciary over the bar, and because (if compensation is made available for appointees) too much power and discretion open to abuse would be his.


\textsuperscript{133} That this anomaly exists today seems due to historical accident. The statute requiring appointment of counsel at arraignment was enacted (Utah Laws 1878, Crim. Proc. §181) at a time when city courts did not exist and when the only offenses not proceeded upon by way of indictment and arraignment were those very few offenses triable upon complaint in the justices’ courts — those punishable by not to exceed 100 days imprisonment or $100 fine or both (Utah Comp. Laws §§2301, 2302 (1876) ). These offenses included, in addition to vagrancy, selling liquor to a minor and a few others, such transgressions as the doing of unnecessary work on Sunday (Id. at §1855) and the dancing or playing of a musical instrument by a woman in a dance hall (Id. at §§1989, 1990). The subsequent expansion of the criminal jurisdiction of the justices’ courts over most misdemeanors (Utah Laws 1884, c. 55, §48) and the creation of the city courts with substantial criminal jurisdiction (Utah Laws 1901, c. 109), in neither of which courts is arraignment a part of the criminal procedure, resulted in the serious discrepancy described.

\textsuperscript{134} See Ritter, J., in Ex parte Sullivan, 107 F. Supp. 514, 517 (D. Utah 1952). Cf. Virtue, Survey of Metropolitan Courts, Detroit Area 108 (1950): "Any misdemeanant who requests assigned counsel is provided with an attorney at public expense. [Mich. Comp. Laws §775.16 (1948)]. This happens only a few times a year, the clerk estimates. Misdemeanants are not informed of their right to counsel. . . ."

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desirable for the court to refuse waiver of counsel unless satisfied from an examination of the accused in open court that he fully understands his right to counsel and the consequences of pleading guilty without counsel. Finally, a transcript of such examination ought to be a required part of the record in every case to insure continued adherence to these requirements. There is no indication that courts always examine the defendant carefully in open court as to his awareness of his rights to representation before accepting a plea of guilty and waiver of counsel, although some judges may do so as a matter of practice. And the Utah Supreme Court has held that the record need not contain any recital that the accused was properly advised by the court.\textsuperscript{136}

Formal promulgation of these standards to govern waiver need not wait upon statutory enactment. The Supreme Court of Illinois formalized requirements similar to those here suggested in 1948\textsuperscript{137} by the adoption of a Rule of Court under its general statutory power to "make rules of pleading, practice and procedure" for the courts of the state.\textsuperscript{138} The Supreme Court of Utah would appear to have no less authority under Section 78-2-4 of the 1953 Code which empowers the Supreme Court to "prescribe, alter and revise, by rules, for all courts of the state of Utah . . . the practice and procedure in all civil and criminal actions and proceedings . . . ."

2. The Appointment of Counsel

The suggested clarification and amplification of the statutory right to the appointment of counsel, important as it is, cannot remedy the chief inadequacies of the appointive system. If the public defender system is dismissed as unlikely to find early adoption in Utah, it would appear that at the very least serious efforts should be made to improve the quality of legal representation within the bounds of the prevailing appointive system. There are two primary means through which this might be achieved: (a) by public compensation of the appointed attorneys, and (b) by stricter standards for appointment.

(a) Compensation

The conception of the lawyer as dedicated selflessly to the cause of justice at any personal cost is an admirable ideal. The heroic lives of many outstanding lawyers in the course of history evidence that the ideal is sometimes attained; and the numerous examples of dedicated service on the part of attorneys in every community suggest the motivating force of this ideal. Yet preoccupation with the ideal can hinder solution of practical problems.\textsuperscript{125}

\textsuperscript{125} See note 32 supra.

\textsuperscript{137} Supreme Court Rule 27A, ILL. REV. STAT. 110 §259.27A (1953): "In all criminal cases wherein the accused upon conviction shall, or may, be punished by imprisonment in the penitentiary, if, at the time of his arraignment, the accused is not represented by counsel, the court shall, before receiving, entering, or allowing the change of any plea to an indictment, advise the accused he has a right to be defended by counsel. If he desires counsel, and states under oath he is unable to employ such counsel, the court shall appoint competent counsel to represent him. The court shall not permit waiver of counsel, or a plea of guilty, by any person accused of a crime for which upon conviction the punishment may be imprisonment in the penitentiary, unless the court finds from the proceedings had in open court that the accused understands the nature of the charge against him, and the consequences thereof if he is found guilty, and understands he has a right to counsel, and understandingly waives such right . . . [This] shall be recited in . . . record in the case . . . ."

\textsuperscript{125} ILL. REV. STAT. 110 §126 (1953).
Consistent with the ideal, unpaid appointed counsel should furnish representation equal to that offered by hired counsel. The fact is, however, that he does not. And it is most unlikely that homilies upon the public duty of the lawyer will have any appreciable effect. This is not to disparage the legal profession; there are few others which have contributed as much to society. But lawyers are men, deeply immersed in a material world. To expect in them complete selflessness is to expect too much, especially in view of the substantial portion of accused who require gratuitous representation. It should, therefore, not be surprising that busy, successful attorneys shun the burden of gratuitous appointments; that it is generally the young attorney in search of experience who acts as appointed counsel; that appointed counsel succeeds less often than hired counsel in securing favorable disposition of his client's case. These factors are most usefully viewable not as moral failure, but rather as demonstrative of the fact that beyond certain limits society cannot expect the attorney to permit moral commitments to interfere with the material task of earning a livelihood.

It is not likely that the community can afford the cost of fees for appointed counsel equivalent to those they could command if they were privately retained. But even a lesser fee may not unreasonably be expected to increase willingness to accept appointment and diligence in defense and to decrease the reluctance of judges to appoint more successful practitioners.

The least that would appear reasonable is reimbursement for out of pocket expenses incurred by appointed counsel in conducting the defense. It scarcely needs documentation that adequate preparation frequently entails expense for investigations, private detectives, tests, depositions, photographing and photostating, etc. In many instances the final outcome of the case turns upon how thoroughly such preparation has been made. Where a defendant cannot afford to retain counsel it is not often that he can afford these expenses, and the attorney is obliged to choose between undertaking a thorough defense out of his own pocket or doing what he can without making the expenditure. In the greater number of instances it is likely that the latter alternative is chosen, especially in view of the financial sacrifice already incurred in taking time from regular practice. In some cases the attorney will choose the first alternative, although the justice of demanding such sacrifice of the devoted attorney is subject to serious question.

While provision for reimbursement of expenditures is the least that should be done it is questionable whether it goes far enough. The question whether appointed counsel should receive compensation for his services, either in addition to or in place of reimbursement for expenses, has received considerable attention in this state. As early as 1911, in *Pardee v. Salt Lake County*, the Utah Supreme Court denied the right of an attorney to recover against [Footnote: *Cf. Utah Const. Art. I, §12: "In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights guaranteed herein [to have a jury trial and to have witnesses attend on his behalf]." See discussion in 1 Pro-ceedings and Debates of the Utah Constitutional Convention, 1895 306 et seq. (1898).]

[Footnote: *E.g., in one case counsel spent several days in trial and $400 actual expenses out of pocket. Letter to Authors, Mar. 12, 1954, Harold Cline. See also Hearings, supra note 1, at 58-59.*]

[Footnote: *39 Utah 482, 118 Pac. 122 (1911).*]
Salt Lake County for services rendered by him in defending an indigent defendant against a murder charge under appointment of a district court. The court took pains to state its opinion that the legislature should provide for such compensation:

"We do not only concede—we assert—the proposition that the Legislature of this state should at the first opportunity provide for a reasonable compensation to be allowed to attorneys in cases where they are required to devote their attention, skill, and time to defending indigent persons charged with crime, and are placed on trial therefor."  

In 1941 Mr. (now Justice) Henriod in an article in the Utah Bar Bulletin scored the failure of the three previous sessions of the legislature to heed the pleas of members of the bar "for an insignificant honorarium in cases where attorneys are appointed to defend indigents," and urged that the Supreme Court reconsider and overrule the Pardee case at the first opportunity on the authority of a then recently decided Indiana decision. Mr. Henriod helped provide the court with such an opportunity in the case of Ruckebrod v. Mullins, wherein he represented an attorney seeking relief similar to that sought in the Pardee case. Mr. Justice Wolfe, writing for a unanimous court, reasserted the validity of the Pardee case in a thoroughly considered opinion. He made clear, however, that he was not suggesting that it would not be a "fair thing" for the legislature to provide for such compensation. Further, attempts to have the legislature provide for compensation in these cases were made in the 1947, 1949, 1951, and 1953 sessions of the legislature, but without success.

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142 State v. Riley, 41 Utah 225, 126 Pac. 294 (1911).
143 Pardee v. Salt Lake County, 39 Utah 482, 495, 118 Pac. 122, 127 (1911).
144 Henriod, Quare: Why the Professional Peonage?, 11 Utah Bar Bull. 50 (1941).
145 Ibid.
146 Knox County Council v. Indiana, 217 Ind. 493, 29 N.E.2d 405 (1940).
147 102 Utah 548, 133 P.2d 325 (1943).
148 Id. at 562, 133 P.2d at 331.
149 A number of bills providing for appointment of counsel at preliminary hearing and at arraignment and on appeal, and for payment of appointed counsel have been introduced. In the 1947 session the Committee on Judiciary introduced S.B. No. 119, entitled "RELATING TO APPOINTMENT OF COUNSEL TO CONDUCT THE APPEAL OF AN INDIGNANT [sic] PERSON CONVICTED OF CRIME AND PROVIDING FOR FEES FOR COUNSEL IN SUCH CASES." A companion bill, S.B. No. 120 provided for appointment upon arraignment and payment of counsel. These bills were reintroduced in the 1949 session by Mr. Davis as H.B. Nos. 33, 34, and in the 1951 session (with insignificant changes) by Messrs. Sheffield, Bonacci, Postma and C. Gardner as H.B. Nos. 72, 73. In the 1953 session of the Utah legislature, differently phrased bills to the same general effect as the foregoing were introduced by Messrs. Sheffield, Durham, Palmer and Spence as H.B. Nos. 133, 134. H.B. No. 133 provided as follows: "77-22-12.10. In all cases where counsel is appointed to represent a person charged with a crime, who is for any reason unable to pay counsel, the counsel may apply to the court where the case is finally terminated, excluding appeals to the Utah Supreme Court, for a fee for services rendered. Such court shall award a reasonable fee to such counsel. Fees awarded under this section shall be paid out of the County treasury of the County in which the complaint or indictment is filed." H.B. No. 134 provided: "77-39-1.10. Whenever in a criminal action an appeal is made to the Supreme Court of this State, the Supreme Court or the Chief Justice upon being satisfied of the inability of the defendant to pay counsel fees must appoint counsel to represent said defendant. Said counsel shall be paid for such services and expenses as the Supreme Court shall determine, to be certified by the Clerk of the Supreme Court and paid by the County Treasurer of the county in which the appeal was taken." Both bills in the 1953 legislature were reported out of committee without recommendation. House Journal 236 (30th Sess. Utah Legislature 1953). Both later suffered a striking of the enacting clause. Id. at 981.
Wholly apart from considerations of fairness to attorneys, it would appear that, if the appointive system is to be retained, provision for compensation is demanded in the interests of equal justice for indigent defendants. Careful students of the problems of legal aid have been unanimous in urging compensation for appointed counsel in those communities where a public defender system could not be adopted. The State of Utah is one of thirteen states in this country which make no provision whatsoever for compensation of attorneys called upon to represent the indigent accused. Among states providing for compensation are neighbor states with no greater resources and lesser population than Utah — Idaho, Arizona, Nevada, New Mexico and Wyoming.

Even if sufficient public support could be marshalled behind such a proposal, however, there are many subordinate questions of policy which would have to be determined. How much should be paid? How should it be paid — per diem or a flat amount? How should the amount be determined — by exercise of the court's discretion or by the legislature's setting a flat sum or minima and maxima? Who should pay it — the county or the state? Answers to these questions turn upon considerations beyond the scope of this study. In general, however, it may be observed that the final amount

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150 See, e.g., Callagy, supra note 5, at 607; Potts, supra note 66, at 507. The public defender bills proposed for the federal courts provide for compensation for counsel in districts where a full-time defender is not warranted. Hearings, supra note 1. See also Letter to Authors, Mar. 27, 1954, Justice F. Henri Hendriod of the Utah Supreme Court: "Many years ago . . . I took the Ruckenbrod case to the Utah Supreme Court in an effort to get some compensation for young lawyer appointees in such cases. I was met with defeat and a stirring thesis about the nobility of the legal profession and the fact that its members should be proud to work gratis, only to find many years later that in the Ogden case where lawyers were taxed by ordinance as a business, our station in life, formerly high above the butcher, the baker and candlestick maker, was reduced, for tax purposes, to that of the green grocer and the tire repairman." Letter to Authors, Mar. 15, 1954, Justice J. Allan Crockett of the Utah Supreme Court: "Adequate compensation for appointed counsel: I think this at least should be done. It seems manifestly unfair to expend the funds we do for prosecution, and leave the defense to such a haphazard situation as now exists." Letter to Authors, Apr. 21, 1954, Judge Marcellus K. Snow of the Salt Lake City Court: "I do think that some arrangement should be made, whereby these Attorneys could be paid from public funds, a reasonable fee for their services, and the . . . quality of said services . . . would increase." Letter to Authors, Mar. 22, 1954, Judge Joseph G. Jeppson of the Third District Court of Utah: "I believe they would do better work. . . . if a small fee of perhaps $25 were paid when there is not a trial, and $50 where there is a trial." But see Letters to Authors, Mar. 17 and 23, 1954, Justice James H. Wolfe then of the Utah Supreme Court: "Never once did I have even the busiest and ablest of counsel refuse to take his turn, and many of the men personally told me that they thought it was their duty to accept the assignment and were glad to serve. . . . In those days we did not pay counsel . . . because we considered that defending the poor was the business of the lawyers. . . ." Communication to Authors, Mar 11, 1954, Judge A. H. Ellett of the Third District Court of Utah: "I have always thought the attorney should be paid by the state or city, whichever accused the defendant."

151 The thirteen states are Arkansas, Delaware, Georgia, Kentucky, Louisiana, Missouri, Oklahoma (though there are public defenders in Tulsa and Oklahoma counties), South Carolina, South Dakota, Tennessee, Texas, Utah and West Virginia. See note 40 supra.

152 It is said that where minima and maxima are set the maxima tend to become the standard amounts. Comment, 31 J. CRIM. L. & CRIMINOLOGY 731 (1941).

153 See, however, the report to the Judicial Conference by Attorney General Brownell, summarized in 23 U.S.L. WEEK 2146 (1954), which "advocates the maintenance of full-time public defenders in heavily populated [federal] districts and a flexible system for counsel fees on a per diem basis in less populated areas. Even for this purpose, he said, the maximums set by H.R. 10150 [$250 in capital cases and $100 for other felonies] are 'most unrealistic' and would encourage guilty pleas or hasty disposition of cases without adequate investigation."

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of compensation decided upon must be large enough to attain the objectives sought by payment. A nominal fee can be expected to effect no more than a nominal change.\textsuperscript{154}

(b) Judicial Standards

It cannot be overlooked that the provision for adequate compensation for appointed counsel creates the opportunity for serious abuses. Appointments could become an item of patronage dispensed by the courts; political influences could dominate the making of appointments; and a class of attorneys could arise who look to these appointments as a means of making a living at the bar. It would appear, therefore, that provision for compensation by itself may not be enough to effect an improvement and it is important to consider the possibility of institutionalizing and regularizing the appointment of counsel under adequate judicial supervision to prevent abuses from arising. Indeed, it may be that an improved system of making appointments might serve to eliminate some of the defects of the appointive system in Utah even without legislative provision for compensation.

The systematization and supervision of appointments would appear to be best left to the judiciary. The making of appointments has traditionally been viewed as an inherent power of the courts,\textsuperscript{156} and, for better or worse, has been exercised without legislative regulation or interference. Further, closer contact with problems of legal administration qualifies the judiciary, far more than the

\textbf{Table XI.}

\textbf{COMPENSATION OF APPOINTED COUNSEL}

<table>
<thead>
<tr>
<th>Capital Cases Only</th>
<th>Felony Cases Only</th>
<th>All Criminal Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maximum Amount</td>
<td></td>
<td></td>
</tr>
<tr>
<td>$1000 (Mass., N.Y.*)</td>
<td>$150 (N.H.*)</td>
<td>Mansl., $350; Fel., $100 (Ohio)</td>
</tr>
<tr>
<td>$500 (Penn.)</td>
<td>$100 (Neb.)</td>
<td>Homic., $150; Other, $30 (Ore.)</td>
</tr>
<tr>
<td>$250 (Ill.)</td>
<td>$25-100 (N.M.)</td>
<td>$100 (Md.)</td>
</tr>
<tr>
<td>$100 (Fla.)</td>
<td>$5-100 (Ariz.*)</td>
<td>Cap., $100; Other, $50 (Nev.)</td>
</tr>
<tr>
<td>$50-100 (Ala.*)</td>
<td>10 Yr. Impr., $25;</td>
<td>Cap., $50; Fel., $25; Misd., $15 (Wyo.)</td>
</tr>
<tr>
<td>$25-50 (Miss.)</td>
<td>Other, $15 (Va.)</td>
<td>Cap., $50; Fel., $25; Misd., $10 (Ida.)</td>
</tr>
</tbody>
</table>

Per Diem

\$25/day; \$25 max.; Preparataion (Wash.\*)

\$25/day max.; Preparation, \$75 max. (Wis.)

\$25/day max. (except lesser misdemeanors) (Minn.)

\$15/day max. (N.D.)

\$10/day max. (Kan.)

Public Defender

(Conn. R.I)

Reasonable or Discretionary

(Me. (Cap.), N.J. (Homic.), Vt.)

(Neb. (Cap.), N.M. (Homic.), Wyo.)

(Cal., Colo., Ind., Mich., N.C., Ohio (Murder))

\textsuperscript{154} Two attorneys may be compensated; apparently each may receive the specified sum, except in N.Y. where the total may not exceed \$150.

Source: Compiled from Brownell, Legal Aid in the United States Appendix C (1951).

\textsuperscript{155} While we do not propose to offer any formulas for resolution of these subordinate questions, it may prove useful as a starting point to consider how these questions have been resolved in other states. The following table (Table XI) is provided for this purpose:

\textsuperscript{156} Report of Committee on Professional Problems: Availability of Legal Services, 10 Law. Guild. Rev. 8, 22 (1950); see note 59 supra.

\textsuperscript{157} See note 131 supra.
legislature, to undertake the task. Finally, it is likely that the necessary action can be taken more promptly and more effectively by a small group of judges in continuous session than by a biennial state legislature.

The state supreme court, with power to "prescribe, alter and revise, by rules, for all courts of the state of Utah, ... the practice and procedure in all civil and criminal actions and proceedings, ..." would appear to possess sufficient authority to undertake the task of regulation and supervision. However ably and diligently lower court judges go about making appointments for indigents, progress can be made by standardizing the criteria for making appointments. Much might thus be accomplished even with no legislative changes in the appointment system. With provision for compensation, however, regulation becomes even more imperative.

While it might be presumptuous of us to specify what rules the court should adopt, we may, perhaps, without impropriety, venture a suggestion of the kind of regulation which the Supreme Court might undertake. The first step toward preventing the excessive appointment of neophytes and "professional appointees," the insufficient appointment of more experienced and successful practitioners, and the unequal distribution of the burden of defending the poor might be the substitution of a more useful listing of available attorneys than is provided by the presently used roster of members of the bar. Such a list would contain not only the names and dates of admission, but would contain appropriate entries beside each name designed to reveal, for example, whether the attorney is in active practice; the county of his practice; whether his practice is specialized or general and his major specialty; the extent of his litigation experience, civil and criminal; the number of his previous appointments; and (if compensation were provided for) the amount of public compensation previously received. The distribution of this list to all the courts of the state under a rule that appointments should, as far as practicable, be made from the list would, simply in providing the relevant information to the judges in readily accessible form, itself contribute to the rationalization of selection of attorneys.

The initial preparation of this list and its continued revision (without which it would soon lose its usefulness) would appear to constitute no excessive burden for the bar of the state to assume. In an enterprise directed to improving the administration of justice no organization can more appropriately take the lead. The Judicial Code itself contemplates an active role for the bar in the administration of justice. Section 78-51-20 provides that "... the Supreme Court ... may request of the board [of bar commissioners] an investigation and study of and recommendations upon any matter relating to the courts of this state, practice, and procedure therein, practice of the law, and the administration of justice, and thereupon it shall be the duty of said board to cause such investigation and study to be made, to report thereon to an annual meeting of the Utah state bar, and, after the action of said meeting thereon, to report the same to the officer or body making the request." Indeed, under this provision the Supreme Court could delegate the task of preparing and revising such a list to the bar association as a matter of statutory duty.

157 UTAH CODE ANN. §78-24 (1953).
The usefulness of this list would be enhanced by the promulgation of rules to govern its use. For example, the Utah Supreme Court could provide that no attorney without a designated minimum experience should be appointed in certain types of cases without the simultaneous appointment of more experienced co-counsel;¹⁵⁸ that no attorney should be reappointed in more than a given number of cases per year, except for special cause, or that (if compensation were provided) no attorney should be entitled generally to receive more than a given amount of compensation in any year; and that appointing judges should try, as far as possible, to distribute the burden of assignments equitably among all the members of the bar practicing in the county.¹⁵⁹ These are meant to be only suggestive of the kind of regulations which the Supreme Court might promulgate. Experience with such rules may well suggest the inadvisability of some and the desirability of others.

A further assurance that proper standards were being maintained, as well as an incentive for the lower courts continuously to evaluate their discharge of the appointive function, would be a provision in the Supreme Court rules that periodic reports be made to that court by all inferior courts disclosing the names of counsel appointed, the cases in which appointed and similar information.

A program of the nature outlined here would no doubt impose additional administrative burdens upon a judiciary already heavily laden with judicial duties. It is no new insight, however, that the administration of the law is of no less significance in the attainment of justice than the formulation and application of the laws.

IV. CONCLUSION

A gross disparity in the quality of legal representation of the criminally accused and of the state in criminal prosecutions subverts the basic principle of the accusatorial system. Where the disparity exists primarily in the representation of those too poor to pay for legal services a fundamental principle of American democracy is likewise subverted — the principle of equal justice under law. Significant studies both of specific communities and the nation as a whole have demonstrated that these conditions exist today in the United States. Our analysis of the system of appointing counsel for indigents in Utah justifies the conclusion, we believe, that our state is no exception; in fact, that these conditions exist in more acute form than in a number of other jurisdictions. The reasons are not to be found in the moral failure of any single group in the community, but rather in the failure of society through its agencies of government rationally and deliberatively to come to grips with the problem in twentieth century terms. We are, by and large, relying upon an inherited appointive system of outworn usefulness.

¹⁵⁸ We are not suggesting that young attorneys should not be appointed in any case. In fact the enthusiasm they generally have for the case is valuable. It is meant to suggest that such attorneys need close supervision until they have gained experience.

¹⁵⁹ Though it might not be true in Utah, experience in Chicago showed that without affirmative duty to do so, judges paid little heed to a list of available attorneys provided by the bar association. They appointed from the list only about 10% of the time. Mishkin, The Public Defender, 22 J. CRIM. L. & CRIMINOLOGY 489 (1931).
In the matter of securing equal justice for the poor we are faced with vindicating the force of the democratic principle in the United States against the contemporary international challenge. It is, moreover, a challenge which, if it is to be met at all, must be met, not by the national government, but by its component communities—the cities, the counties and the states. We believe that the state of Utah has the resources successfully to meet the challenge. Whether the final choice be the extreme one of replacing the appointive system with the public defender, or the more modest one of providing for compensation or judicial standardization and centralized administration of the making of appointments, or both, the need for thoughtful and intelligent action is pressing.
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