St. Mary's Law Journal

Volume 6 | Number 3 Article 3

9-1-1974

A Further Inquiry into the Quality of Indigent Felony Defense.

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A FURTHER INQUIRY INTO THE QUALITY OF INDIGENT FELONY DEFENSE

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One of the primary goals of a democracy is equality before the law for all of its citizens. In order to attain this goal, the indigent criminal defendant must be afforded the same quality of representation as the accused who can afford retained counsel.[1] Such a requirement is mandated if societal confidence in the judicial system is to be maintained. The lack of such equality not only fosters a contempt for the judicial process, but also can lead to a serious distrust in the authority of the state itself.

Even though the American adversary system is not necessarily the ideal form,[2] it is the system employed in our criminal courts. Those charged with crimes have not chosen the adversary system, but nevertheless, their futures are prescribed under it. The complexities of the criminal law, including trial tactics, the law of evidence, constitutional law, and criminal procedure, make it necessary for the adversaries to be of approximately equal skill, if justice is to be the end product. Due to experience, prosecutors almost uniformly exhibit a high degree of competence, therefore, the variable in the system of criminal justice is often the ability of the defense attorney. For the adversary system to function as designed,[3] and therefore justice and fairness to result, defense attorneys must exhibit a high degree of competence.[4]

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1. *See* Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 5 (1973). Justice Black's opinion in Griffin v. Illinois, 351 U.S. 12 (1956) states: "There can be no equal justice where the kind of trial a man gets depends upon the amount of money he has." *Id.* at 19.

2. For a discussion of the weaknesses of the adversary system, see J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 80-107 (1949).

3. The 1974 President of the American Bar Association has stated that the adversary system is a great system when the adversaries are equal, but too often this is not the case. Interview by J. Star, *Chesterfield Smith: The Lawyers*, Intellectual Digest, (March, 1974), 21-23.

4. The New York Court of Appeals has stated that assistance of counsel "deals neither with a shadowy figure standing beside the accused nor an abstract idea. It envisages a lawyer, skilled in advocacy, a match for the prosecutor, and in full control of the management of the defense at the trial." People v. De Renzzio, 277 N.Y.S.2d 688, 671 (1966).

Although the Sixth Amendment to the Constitution of the United United States provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense," only since 1963 has the Supreme Court held this right to be so fundamental as to require the states to provide, at their own expense, counsel for the indigent defendant in all felony trials.[5] Many jurisdictions, including Bexar County, Texas, have chosen to fulfill this obligation by the utilization of a system of assigning members of the local bar in rotation to represent indigent felony defendants. An analysis of Bexar County's method of providing criminal defense services to indigents will provide insight into one jurisdiction's attempt to meet this problem. The evaluation of the quality of indigent defense services under this system will illustrate the extent to which Bexar County has approached the goal of equal justice—in a sense it may be considered exemplary of the degree of success or failure of many assigned counsel systems throughout the nation. Therefore, narrowly stated, the purpose of this article is to show that Bexar County's system of assigned counsel provides adequate representation for indigents—a finding contrary to the prevailing view.

In order to support such a finding, several preliminary issues require consideration. As a foundation for the inquiry, the evolution, extent, and standards of adequacy of the right to counsel must be examined; the Sixth Amendment to the Constitution of the United States, the judicial interpretations of it, and the statutes of the State of Texas will serve as sources.

THE CONSTITUTIONAL RIGHT TO COUNSEL

It is a highly doubtful proposition that the framers of the Constitution and its appurtenant Bill of Rights intended the sixth amendment's right to counsel to be a requirement upon the states to provide gratis counsel to an indigent criminal defendant.[6] In all likelihood it was intended to be a prohibition of the practice followed in some English courts of denying an accused the opportunity of being represented by his retained attorney, or any attorney at all.[7] The case of *Powell*

5. Gideon v. Wainwright, 372 U.S. 335 (1963).

6. Betts v. Brady, 316 U.S. 455, 464-66 (1942).

7. *Id.* at 464-66; Powell v. Alabama, 287 U.S. 45 (1932). William M. Beany, describing the right to counsel in colonial America, has observed that

> Connecticut in its practice far surpassed the English custom, and its courts appointed counsel in all cases where an accused needed and could not retain counsel.

v. Alabama[8] germinated the modern concept of the right to counsel. In *Powell* the Supreme Court reversed a state conviction of rape with a sentence of death imposed upon five black youths for whom the trial judge had appointed the entire county bar to provide their defense. No one attorney was charged with the duty of defending them and no pretrial preparation was made. The last minute appointment of an attorney at the time of trial, and his pro forma appearance, resulted in the Court stating that the "defendants were not accorded the right of counsel in any substantial sense."[9] In holding that the defendants were deprived of a fair trial as required by the due process clause of the 14th amendment, the Court touched upon the history of the sixth amendment, but emphasized the basic unfairness of a procedure whereby five ignorant and friendless youths were pitted against a learned and experienced prosecutor with their lives literally hanging in the balance. The Court's stress upon the need for a "fair trial" under the 14th amendment's due process clause, rather than upon the sixth amendment's right to counsel, influenced the development of the indigent's right to representation over the next 30 years.

In 1938 the Supreme Court held that the sixth amendment required the appointment of counsel for all indigents tried in the federal courts,[10] but 4 years later a different criterion was applied to state trials. In *Betts v. Brady*[11] the Court held that the sixth amendment did not require the states to provide counsel for all those who cannot afford it themselves, in the absence of special circumstances.[12] During the following 20 years, the Court decided numerous cases setting out some sixteen "special circumstances" relating to the age of the accused, his mental capacity, the complexity of the case, whether the case was a capital one, among others. A "fair trial" could still be had without the assistance of counsel.

Finally in 1963 the Supreme Court abandoned the "special circumstances" rule by overruling *Betts* in *Gideon v. Wainwright*,[13] holding that

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Three colonies, Pennsylvania, South Carolina, and Delaware, went part way, and stated that in capital cases an accused should have counsel upon request.
W. BEANY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 25 (1955).

8. 287 U.S. 45 (1932).
9. *Id.* at 58.
10. Johnson v. Zerbst, 304 U.S. 458 (1938).
11. 316 U.S. 455 (1942).
12. *Id.* at 462.
13. 372 U.S. 335 (1962). For a detailed discussion of the background of the case as it wound its way through the Supreme Court culminating in Gideon's acquittal on

> reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him.[14]

In June of 1972, the Supreme Court, in *Argersinger v. Hamlin*,[15] expanded the *Gideon* rule, which applied only to felonies, to all cases in which imprisonment may be imposed.[16] The trial judge is now required to provide each indigent with "the guiding hand of counsel" in all felony cases, and misdemeanor cases as well, if in his opinion the case may result in a jail sentence.

It should be mentioned that the right to counsel has been held to apply to times other than during trial. An indigent has this right during all other "critical stages" of the criminal justice process: during an interrogation,[17] arraignment,[18] post-charge lineup identification,[19] preliminary hearing,[20] sentencing,[21] imposition of deferred sentence or probation revocation under some circumstances,[22] appeal,[23] and during juvenile proceedings.[24]

While the United States Supreme Court has set out these "critical stages" at which an indigent must be afforded counsel it has been reticent to delineate the standards of adequacy of that requirement. Although the Court has stated that "[t]he Constitution's guaranty of assistance of counsel cannot be satisfied by mere formal appointment,"[25] it has been interpreted by one court as a "procedural requirement, as

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retrial, this time with the assistance of counsel, see A. LEWIS, GIDEON'S TRUMPET (1964).

14. Gideon v. Wainwright, 372 U.S. 335, 344 (1962).

15. 407 U.S. 25 (1972).

16. *Id.* at 37.

17. *Id.* at 37. Miranda v. Arizona, 384 U.S. 436, 464-65 (1966); *cf.* Massiah v. United States, 377 U.S. 201, 206 (1964) (testimony elicited from defendant without his knowledge while free on bail inadmissible).

18. Hamilton v. Alabama, 368 U.S. 52, 54 (1961).

19. Gilbert v. California, 388 U.S. 263, 272 (1967); United States v. Wade, 388 U.S. 218, 227 (1967). *But see* Ellsworth v. State, 447 S.W.2d 170 (Tex. Crim. App. 1969) (lack of counsel did not deny defendant due process in that there was nothing in the record to indicate that the lineup confrontation was suggestive or tainted).

20. Pointer v. Texas, 380 U.S. 400, 401, 403 (1965) (Texas examining trial); White v. Maryland, 373 U.S. 59 (1963).

21. Townsend v. Burke, 334 U.S. 736, 740-41 (1948).

22. Gagnon v. Scarpelli, 411 U.S. 778, 786-87 (1973); Mempa v. Rhay, 389 U.S. 128, 137 (1967).

23. Douglas v. California, 372 U.S. 353, 357 (1963). *But see* Ross v. Moffit, — U.S. —, 94 S. Ct. 2437, — L. Ed. 2d — (1974). *Ross* limits the scope of this guarantee to appeals as a matter of right. *Id.* at —, 94 S. Ct. at 2443, — L. Ed. 2d at —.

24. *In re* Gault, 387 U.S. 1, 41 (1967).

25. Avery v. Alabama, 308 U.S. 444, 446 (1940).

contrasted with a standard of skill."[26] As such, the courts are only to be concerned with whether or not there was an operative appointment, that is, one in which there was sufficient time to prepare and no conflict of interest. Judge Prettyman, the originator of this position, stated that the Supreme Court "has not itself undertaken, nor has it imposed upon the inferior federal courts, the duty of appraising the quality of a defense."[27] This view has come under heavy criticism[28] for it is now generally accepted that at least some degree of adequacy is required. The early trend, and probably still the majority rule, in the state and lower federal courts is to require only that the defense counsel's action did not reduce the trial to a sham, farce, or mockery of justice.[29] Such a test of adequacy places a heavy burden on the defendant.[30]

Several jurisdictions have recently adopted a purportedly more liberal test of the standard of adequacy. In 1961 the Court of Appeals for the Fifth Circuit departed from the "mockery of justice" rule when it stated the applicable test to be "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance."[31] In 1964, the Fifth

26. Mitchell v. United States, 259 F.2d 787, 790 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).

27. *Id.* at 790.

28. Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289, 293-95 (1964); *see* Michel v. Louisiana, 350 U.S. 91 (1955).

29. W. LOCKHART, Y. KAMISAR, & J. CHOPER, CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 601 (3d ed. 1970); Note, *The Right to Counsel and the Neophyte Attorney*, 24 RUTGERS L. REV. 378, 380-81 & nn. 13-16 (1970). *See generally* Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973); Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973); Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175 (1970); Katz, *Gideon's Trumpet: Mournful and Muffled*, 55 IOWA L. REV. 523 (1970); Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289 (1964); Comment, *Incompetency of Counsel*, 25 BAYLOR L. REV. 299 (1973); Comment, *The Right to Effective Assistance of Counsel*, 42 MISS. L. REV. 213 (1971); Comment, *Effective Assistance of Counsel*, 14 S.D.L. REV. 287 (1969).

30. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 29 (1973). Adding to this burden is the presumption or assumption of many courts that the defense was adequate. *See* United States v. Katz, 425 F.2d 928 (2d Cir. 1970) (defense counsel sleeping during examination of co-defendant not prejudicial); United States v. Ragen, 176 F.2d 579 (7th Cir.), *cert. denied*, 338 U.S. 809 (1949) (membership in bar in good standing held to be prima facie evidence of competence); Hill v. State, 393 S.W.2d 901 (Tex. Crim. App. 1965) (counsel whose bar dues had lapsed, but were later repaid, held to have been competent). *But see* McKinzie v. Ellis, 287 F.2d 549 (5th Cir. 1961) (attorney whose bar dues had lapsed held not competent). For an example of a finding of inadequacy based on lack of bar membership, see Lunce v. Dowd, 261 F.2d 351 (7th Cir. 1958), *aff'g* Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957) (Indiana attorney incompetent in Ohio state prosecution).

31. MacKenner v. Ellis, 280 F.2d 592, 599, *modified*, 289 F.2d 928 (5th Cir. 1960), *cert. denied*, 368 U.S. 877 (1961). For Texas cases applying this test, see *Ex parte*

Circuit clarified and redefined the standard of adequacy for indigent defense counsel, holding that their representation must be "at least equal to that expected from compensated counsel of an accused's own choosing."[32] The standard adopted by the Court of Appeals for the District of Columbia in 1967 at first appears to be a variant of the mockery of justice rule: ineffective representation is shown when the defense counsel's "gross incompetence . . . blotted out the essence of a substantial defense."[33] Judge Bazelon has observed that this test permits the defendant to focus upon a single defense, rather than being forced to attack the entire proceeding.[34] In 1968 the Court of Appeals for the Fourth Circuit articulated its test, not by enunciating a general formula, but by enumerating specific principles which must be satisfied in order to find adequate representation:

> Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an acused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.[35]

If a failure to abide by these requirements is shown, the burden shifts to the prosecution to establish that no prejudice resulted.[36]

Professor Grano has observed that the differences between the mockery of justice test and the standards followed by the Fourth, Fifth, and District of Columbia Circuits are more illusory than real.[37] His analysis of the conflicting holdings leads to the conclusion that the courts "seem to proceed on a case by case basis, recognizing that the

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Smith, 463 S.W.2d 185 (Tex. Crim. App. 1971); Newton v. State, 456 S.W.2d 939 (Tex. Crim. App. 1970).

32. Johnson v. United States, 328 F.2d 605 (5th Cir. 1964); *accord,* Calloway v. Powell, 393 F.2d 886, 888 (5th Cir. 1968).

33. Bruce v. United States, 379 F.2d 113, 117 (D.C. Cir. 1967); *accord,* Scott v. United States, 427 F.2d 609 (D.C. Cir. 1970). Both cases specifically disapprove of the farce or mockery of justice criteria, stating that such language is only illustrative of the defendant's heavy burden, not to be taken literally.

34. Bazelon, *The Defective Assistance of Counsel,* 42 U. CIN. L. REV. 1, 29 (1973).

35. Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), *cert. denied,* 393 U.S. 849 (1968).

36. *Id.* at 226.

37. Grano, *The Right to Counsel: Collateral Issues Affecting Due Process,* 54 MINN. L. REV. 1175, 1242 (1970); *see* Beasely v. United States, 491 F.2d 687, 692 (6th Cir. 1974).

guidelines are too indefinite to distinguish the effective from the ineffective, the competent from the incompetent and the diligent from the indifferent."[38]

Subsequent to the publication of Professor Grano's views, two courts have significantly increased the requirements for defense counsel competency. Both of these courts have addressed the issue of adequacy in relation to what is expected of a reasonably prudent criminal law attorney. The Court of Appeals for the Fourth Circuit in 1970 held that the standard applied in other professions, that of the customary skill and knowledge which normally prevails in that profession at that time and place, should also be applied to the criminal courts.[39] Specifically it should be the "same level of competency as that generally afforded at the bar to fee-paying clients."[40] The most far reaching decision on this subject is *Beasley v. United States*,[41] decided by the Court of Appeals for the Sixth Circuit in February of 1974. After rejecting the farce and mockery of justice rules, the Court held that

> [i]t is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence. . . . *Defense counsel must perform at*

38. Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1242 (1970).

39. Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970). Perhaps such a change could have been predicted as early as 1967 when the court stated that

> [a]s the concept of the Sixth Amendment right has broadened to encompass the provision of counsel for indigents, so too the *standards* to which appointing courts and appointed counsel must adhere have become more exacting.

Fields v. Peyton, 375 F.2d 624, 628 (4th Cir. 1967).

The standard approved here has been strongly advocated. ABA STANDARDS RELATING TO PROVIDING DEFENSE SERVICES 27 (Approved Draft 1968) ("experienced and active in trial practice"); L. SILVERSTEIN, DEFENSE OF THE PRIOR IN AMERICAN STATE COURTS 17 (1965) ("standard of a reasonably competent retained attorney"); Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1080 (1973) ("the normal and customary degree of skill possessed by attorneys who are *fairly skilled in the criminal law and who have a fair amount of experience at the criminal bar*").

For a discussion of this standard found in cases brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970) see Woods v. Virginia, 320 F. Supp. 1227 (W.D. Va. 1971); Vance v. Robinson, 292 F. Supp. 786 (W.D.N.C. 1968); Reinke v. Richardson, 279 F. Supp. 155 (E.D. Wis. 1968); Jackson v. Hader, 271 F. Supp. 990 (W.D. Mo. 1967); Pritt v. Johnson, 264 F. Supp. 167 (M.D. Pa. 1967); Puglian v. Staziak, 231 F. Supp. 347 (W.D. Pa. 1964). All are examples of federal courts refusing to find state action in the appointment of and defense provided by counsel for indigents. One writer has concluded, however, that Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), may portend a different result. Note, *The Right of the Indigent Client to Sue His Court-Appointed Attorney for Malpractice*, 33 LA. L. REV. 740 (1973).

40. Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970).

41. 491 F.2d 687 (6th Cir. 1974).

> *least as well as a lawyer with ordinary training and skill in the criminal law* and must conscientiously protect his client's interest, undeflected by conflicting considerations.[42]

It therefore would seem that if an indigent defendant is to receive equal protection under the law, he must be afforded the same opportunity to procure defense counsel services as the man of wealth who is tried in a criminal court. Criminal defendants of means do not merely hire good attorneys, they hire good *criminal law attorneys* to defend them. If the trend toward equal protection, as required by the Courts of Appeals for the Fourth, Fifth, and Sixth Circuits is to be satisfied, it is incumbent upon society to provide a system whereby indigent criminal defendants are represented at a level equivalent to that expected of a reasonably prudent criminal law practitioner. For this reason, it is necessary to examine the manner in which courts have treated the issue of inexperience as an element of adequacy or competency.

The appellate courts have generally been less than sympathetic to claims of inadequate representation based on the inexperience of counsel.[43] It has frequently been held that the defense counsel's lack of experience, standing alone, is not indicative of inadequacy of representation.[44] But the courts do consider the number of years an attorney has been practicing as a factor in bolstering a finding of adequacy.[45] Such a view, at least on the issue of inadequacy, is not necessarily unreasonable when viewing convictions on a case by case basis. It is certainly possible for an attorney inexperienced in the criminal law

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42. *Id.* at 696 (emphasis added).

43. Stevens v. Warden, 382 F.2d 429, 431 (4th Cir. 1967); Spaulding v. United States, 279 F.2d 65, 66 (9th Cir. 1960); Anderson v. Bannon, 250 F.2d 654, 655 (6th Cir. 1958). An excellent example of this view can be found in Alire v. United States, 365 F.2d 278 (10th Cir. 1966), in which the court upheld the conviction even though the trial defense attorney testified at the habeas corpus evidentiary hearing that he had been in practice for just 1 year, practicing exclusively in real estate law and would not have wanted an attorney of his experience defending him if he were tried. *Id.* at 279.

44. See Stinnett v. Commonwealth, 468 S.W.2d 784 (Ky. 1971), where the court held that

> [t]he bare fact that the fifteen attorneys [out of eighty in the county] making up the list [of appointed counsel] are the youngest members of the bar does not *ipso facto* mean that they are incapable or ineffective.

Id. at 786 (court's emphasis). Similarly, the Illinois Court of Appeals has stated that "[w]hile it is true that inexperience may result in incompetence, it is not necessarily equated with it." People v. Gonzales, 239 N.E.2d 783, 787 (Ill. 1968).

For examples of inadequate defense based on inexperience plus other factors, see *In re* Parker, 297 F. Supp. 367, 369 (D.S.D. 1969); Smotherman v. Beto, 276 F. Supp. 579, 590 (N.D. Tex. 1967); *Ex parte* Larkin, 420 S.W.2d 958, 959 (Tex. Crim. App. 1967); Rodriguez v. State, 340 S.W.2d 61, 63 (Tex. Crim. App. 1960).

45. Johnson v. United States, 380 F.2d 810, 812 (10th Cir. 1967); Opie v. Meacham, 293 F. Supp. 647, 650 (D. Wyo. 1968); Prince v. State, 461 S.W.2d 413, 415 (Tex. Crim. App. 1970).

to represent a client as well as one who is a criminal law specialist. Although it is possible, it would not seem likely. Such an approach by appellate courts may have a valid basis in that their function is to ensure that each individual who is convicted *was* adequately represented by counsel. Conversely, it may be a questionable approach when adopted by a legislative body whose duty it is to establish a system whereby it *is* likely that each indigent tried will receive adequate counsel.

It is submitted that the constitutional measure of the adequacy of indigent criminal defense should be that which is equivalent to the representation provided by retained attorneys. Therefore, it is appropriate to examine the structure and functioning of Bexar County's system of providing indigent representation.

BEXAR COUNTY'S SYSTEM OF PROVIDING COUNSEL FOR INDIGENT FELONY DEFENDANTS

There are two general forms for providing indigent criminal defense in the United States—defender systems and assigned counsel systems. The defender systems are those in which attorneys are hired full or part time to provide defense services on a continuing basis to all those unable to afford retained counsel. They are usually funded by state or local governmental units, although some are supported by charitable contributions, and a few have a mixture of both. The manner of selecting the defender varies from appointment by a board, commission, or official to being subject to the will of the electorate. Defender systems are most commonly found in large metropolitan jurisdictions. The older form—the assigned counsel system—operates through the action of a judge assigning, on a case by case basis, individual members of the local bar to defend indigents. Under some assigned counsel systems, the judge selects the attorneys in rotation from a list; under others, the judge selects them at random or from which ever of them happens to be in court at the time. Assigned counsel systems are most commonly found in rural jurisdictions.[46]

For the past several years the provision of defense services for indigents[47] in the Bexar County District Courts (felony cases) has been

46. For the possible combinations and permutations of these two different systems, see L. SILVERSTEIN, DEFENSE OF THE POOR IN AMERICAN STATE COURTS 15-17, 39-45 (1965).

47. There are no formal criteria for determining indigency in Bexar County; the classification of indigency depends upon the cost of the case being defended. The

accomplished under an assigned counsel system whereby the judge, through the Department of Court Administration, assigns cases to members of the local bar on a rotating basis. This system is commonly referred to as the "San Antonio Plan," although it applies to all attorneys practicing in Bexar County. The stated purpose of the San Antonio Plan is "to equalize the number of appointments, improve the representation of indigent defendants, and more adequately compensate attorneys accepting more than their normal number of appointments."[48]

Membership in the San Antonio Plan is not all inclusive. Exemptions are granted for reasons of age, disability, government employment, membership in the state legislature, and legal aid employment. Beyond these exemptions, forty-one attorneys licensed to practice in Bexar County cannot be located.[49] Of the 1,359 attorneys practicing in Bexar County, 269 are exempt, leaving a pool of 1,090. At this point the San Antonio Plan varies from the American Bar Association's recommendations for assigned counsel systems, which provide that

> [e]very lawyer licensed to practice law in the jurisdiction, experienced and active in trial practice, and familiar with the practice and procedure of the criminal courts should be included in the roster of attorneys from which assignments are made.[50]

The San Antonio Plan does not differentiate between those experienced and those not—all are included in the pool. The second, and perhaps the most unique, point at which the San Antonio Plan is at odds with the ABA Standards is that the Plan permits an attorney to buy his way out of participation for a yearly fee of $200, thereby avoiding all court appointments.[51] In 1972, 198 attorneys, or 18 percent of those in the pool eligible to be appointed, paid the $200 fee which went into a fund to provide additional compensation for attorneys who have volunteered for additional appointments.[52] There are approximately

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county classifies as indigent all defendants who file a pauper's oath. Rudy Esquivel, Administrator, Department of Court Administration, Bexar County, private interview held in San Antonio, Texas, on February 20, 1973. For the variations and difficulties in the definition of indigency, see Comment, *The Definition of Indigency: A Modern-Day Legal Jabberwocky?*, 4 ST. MARY'S L.J. 34 (1972).

48. Letter from Joe Warren Jones, President of the San Antonio Bar Association, to all attorneys licensed to practice law in Bexar County, August 21, 1972.

49. Rudy Esquivel, Administrator, Department of Court Administration, Bexar County, private interview held in San Antonio, Texas, on February 20, 1973.

50. ABA STANDARDS RELATING TO PROVIDING DEFENSE SERVICES 26 (Approved Draft 1968).

51. *Id.*; Letter from Joe Warren Jones, President of the San Antonio Bar Association, to all attorneys licensed to practice law in Bexar County, August 21, 1972.

52. Rudy Esquivel, Administrator, Department of Court Administration, Bexar County, private interview held in San Antonio, Texas, on February 20, 1973.

100 to 120 attorneys taking part in this bonus program.[53] These attorneys, in addition to receiving their regularly assigned cases, are given a bonus appointment, in rotation, whenever the name of one of the attorneys who has paid his $200 comes up in the regular rotation. The financial advantage, in addition to the experience gained, to the bonus plan attorney is that he not only receives his statutory fee of $50 per appearance from the county,[54] but also receives additional compensation based upon out-of-court time expended and the complexities of the case.[55] The amount of additional compensation paid is determined by a committee of the San Antonio Bar Association; the money used to compensate the bonus plan attorneys is derived from the fund contributed to by the attorneys not participating in the San Antonio Plan.[56]

The number and cost of assigned counsel for indigent felony defendants are as follows. In 1972, 1,115 appointments were made under the San Antonio Plan and 431 apcointments were made under the bonus plan.[57] Of these 431 bonus plan appointments, claims to the Bar Association for additional compensation were submitted in only 224 cases.[58] The attorneys appointed in these 1,546 cases made 3,152 appearances.[59] Total payments made to court appointed attorneys in 1972 amounted to $184,975.[60]

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53. *Id.*

54. TEX. CODE CRIM. PROC. ANN. art. 26.05 (Supp. 1974) requires the county in which a prosecution is initiated to compensate, out of its general fund, counsel for indigents accused of felonies or misdemeanors punishable by imprisonment. The act provides a minimum level of compensation to be paid the attorney: "For each day or fractional part thereof in court representing the accused, a reasonable fee to be set by the court but in no event to be less than $50." Other minimum fees are set for capital cases, appeals, and petitions for habeas corpus.

Article 26.05 has been interpreted to mean that an attorney is entitled to full compensation even though he is in court only for a part of a day. He is entitled to this compensation for each appearance, but if he represents more than one indigent defendant in one day, he is entitled to only one day's compensation. TEX. ATT'Y GEN. OP. No. C-639 (1966).

55. Letter from Joe Warren Jones, President of the San Antonio Bar Association, to all attorneys licensed to practice law in Bexar County, August 21, 1972.

56. *Id.*

57. Bexar County Department of Court Administration, Statistical Analysis for the Year 1972. It is interesting to note that each attorney participating in the San Antonio Plan received only one or two regularly assigned cases; those participating in the bonus plan received an additional four or five cases.

58. Jimmy Allison, Executive Director of the San Antonio Bar Association, private interview held in San Antonio, Texas, on March 7, 1973. The reason for the discrepancy between bonus appointments and requests for bonus compensation is due largely to the fact that many of these cases were still pending at the end of the year.

59. Bexar County Department of Court Administration, Bexar County Statistical Analysis for the Year 1972.

60. *Id.*

In that there is such a large expenditure of attorney man-hours and county dollars under the San Antonio Plan, it is relevant to examine this system to see whether it is meeting the constitutional mandate of adequate indigent defense service.

COMPARISON OF RESULTS OF RETAINED AND ASSIGNED COUNSEL

Difficulties arise in evaluating any system of defense services by analyzing that system in a vacuum. Due to wide differences among states, or even within one state, in criminal procedures, prosecutorial practices, and the criminal law itself, intrinsic standards are ill-suited for such an undertaking. The methodology employed in this study for determining the quality of indigent representation is that of an analytical comparison of the results of the two systems of criminal representation in Bexar County. The method by which indigents are represented in the criminal courts of Bexar County is the assigned counsel system. Under this system, the presiding judge assigns members of the local bar, in rotation, to defend indigent criminal defendants . The alternative method of representation is the retained counsel system. Under the latter system, the defendant himself chooses and pays an attorney to represent him.

In 1972 the District Attorney's Office filed 3,423 cases in the district courts servicing Bexar County.[61] Of this number 2,312 were disposed of by September 1, 1973.[62] Of these, 1,461 defendants were represented by retained counsel, 763 were represented by assigned counsel, and 88 had no attorney.[63] The scope of this study includes all felony cases which were filed by the District Attorney's Office in

61. The data were gathered by individually examining all 1972 cases on file in the Microfilm Section of the County Clerk's Office and in the probation files of the four criminal district courts serving Bexar County.

62. The District Attorney's Office does not classify a case as disposed of until it has been dismissed, resulted in a finding of not guilty, or resulted in a finding of guilty with a prison sentence imposed. If the defendant is granted probation his case is technically classified as pending until the probation is revoked or until its terms are completely fulfilled. If the probationer successfully fulfills the terms of his probation, his case is dismissed. For the purposes of this study, the case will be considered to be disposed of if probation is granted, whether or not the defendant successfully fulfills its terms.

63. Of the 88 cases in which the defendant had no attorney, 87 were dismissed before trial and one pleaded guilty. Most of these cases were dismissed shortly after indictment before the defendant had employed retained counsel or had counsel appointed for him. For this reason these cases will not be considered in the study.

1972, defended by either retained or appointed counsel,[64] which were disposed of by September 1, 1973.

The disposition of cases, by type of representation, is set out in Table 1.

TABLE 1

DISPOSITION OF FELONY CASES IN BEXAR COUNTY BY TYPE OF REPRESENTATION

Disposition	Retained (1.461 cases)		Assigned (763 cases)	
	Number	Percentage	Number	Percentage
Dismissal	640	43.8	267	35.0
Of those not dismissed, pleading guilty	744	90.6	440	88.7
Of those pleading not guilty, acquitted	37	48.1	22	44.9
Of those found guilty, granted probation	510	63.9	168	35.4

Source: Microfilm Section of the Bexar County Clerk's Office and Probation Files of the Bexar County District Courts.

These data indicate that defendants with retained attorneys are more likely than defendants with assigned attorneys to have their cases dismissed, to be plead guilty, to be acquitted on a plea of not guilty, and be granted probation. Not only do those defended by retained counsel have an 8.8 percent greater likelihood of having their cases dismissed than those defended by assigned counsel, indicating that they may be better represented, but the type of dismissal received by those defended by retained counsel is more advantageous to the defendant. The records of those defendants whose cases were dismissed provide eight reasons for such action, four favorable to the defendant, four not. Dismissals favorable to the defendants are those which completely exit them from the criminal justice system. The four reasons for such dismissals are: (1) insufficiency of the evidence; (2) complaining witness refusing to testify; (3) restitution; and (4) impending military orders to Vietnam. Unfavorable dismissals include: (1) his having plead guilty to a misdemeanor; (2) his having been found guilty in an-

64. In several cases the defendant switched from retained to assigned or assigned to retained counsel during the pendency of his case. For purposes of this study the classification of counsel was made based upon the type of representation at the time of disposition.

other felony case; (3) his having been re-indicted; and (4) his death. Table 2 reflects the causes for dismissals by type of representation.

TABLE 2

SAMPLE OF CASE DISMISSALS BY TYPE OF REPRESENTATION

Reason for Dismissal	Retained (100 cases)		Assigned (50 cases)	
	Number	Percentage	Number	Percentage
Evidence insufficient	51	51	14	28
Complaining witness refused to testify	6	6	3	6
Restitution	3	3	2	4
Orders to Vietnam	3	3	0	0
Plea of guilty to a misdemeanor	12	12	16	32
Guilty in another felony case	15	15	8	16
Re-indicted	9	9	7	14
Death	1	1	0	0

Source: Microfilm Section of the Bexar County Clerk's Office.

As the figures in Table 2 indicate, the defendants represented by retained counsel whose cases were dismissed received 68 percent favorable dismissals; those represented by assigned counsel received only 38 percent favorable dismissals. Of significance is the variance from 51 percent to 28 percent for cases dismissed due to insufficiency of evidence. A major cause for this type of dismissal is a successful motion to suppress evidence—a definite indication of an attorney's effort and ability. Therefore, it appears that those defended by retained counsel received better representation than those defended by assigned counsel based upon the frequency and type of dismissals.

A low percentage of guilty pleas can be considered to reflect a higher quality of representation. A guilty plea may be the wisest tactical choice for a defendant in that the District Attorney's Office may be willing to dismiss other charges, lower the charge, disregard prior offenses on sentencing, agree to recommend a set number of years confinement, or not to oppose probation. Almost all guilty pleas result in the District Attorneys Office giving something in return. But a

guilty plea is not always in the best interest of the client even though it is the easiest way for an attorney to avoid interviewing witnesses, examining the evidence, or researching the law. A guilty plea based on lack of preparation may result in a conviction of a defendant against whom the District Attorney's Office could not have proved a case. The frequency of guilty pleas is the only category in which defendants with assigned counsel fare better than those with retained counsel; however, the statistical variance is less than 2 percent.

An acquittal in a criminal trial is frequently believed to be the highest achievement of a criminal attorney: it requires a heavy expenditure of time to interview the accused and the witnesses, examine the evidence, and research the law. In addition, he must be able to organize all of this information and to present it in an effective and articulate manner. Those defended by retained counsel were acquitted more often than those defended by assigned counsel by a rate of 48.1 percent to 44.9 percent. Although the margin of difference is small, it tends to indicate that those represented by retained counsel receive slightly better representation.

A large statistical variance between the two groups is found in the likelihood of probation being granted; those represented by retained counsel fared better by an overwhelming rate of 63.9 percent to 35.4 percent. The granting of probation is of great importance to one convicted of a crime in that it makes the difference between confinement and freedom. Although some commentators have argued that in the sentencing portion of the trial an attorney can provide an important service for his client,[65] the practice in Bexar County does not seem to so indicate. Following a conviction in Bexar County the attorney, whether retained or assigned, requests that his client be given probation.[66] This is done almost pro forma, regardless of the likelihood of it being granted. It costs the defendant nothing, it can only help him, and it cannot work to his disadvantage. In that the request for probation is all but automatic, it does not seem to involve, or be a measure of, the legal skills of the attorney.

The most dramatic method of illustrating the disparity between the

65. *See* Kuh, *For A Meaningful Right to Counsel on Sentencing*, 57 A.B.A.J. 1906, 1908 (1971). *See also* ABA STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURES (Approved Draft 1968) which states that "[t]he defense attorney should recognize that the sentencing stage is the time at which for many defendants the most important service of the entire proceeding can be performed." *Id.* at 239.

66. In cases in which the defendant is going to plead guilty, it is not uncommon to have a request by the defense attorney for a probation report before the case goes to trial.

disposition of the cases of the members of these two groups is to examine the likelihood of each being imprisoned. Of the 763 cases in which defendants had assigned counsel, 306, or 40.1 percent were sent to prison. This compares with 1,461 cases in which defendants were represented by retained counsel, of which 283, or 19.4 percent were sent to prison. The data from this study indicate that indigent defendants are more than twice as likely to go to prison as defendants who can afford retained counsel.

Although the data appear to indicate that indigents statistically fare less well than those of means in the felony courts of Bexar County, such a variance may be due to other differences between the members of these groups.

When gathering the main body of data from the Microfilm Section of the Bexar County Clerk's Office, data as to whether the defendant was on bail or in pretrial confinement was also collected. These data were reflective only of the defendant's status at the time of trial. Table 3 shows the relationship between pretrial detention status and case disposition for each group of defendants.

TABLE 3

RELATIONSHIP BETWEEN PRETRIAL STATUS AND DISPOSITION BY TYPE OF COUNSEL IN BEXAR COUNTY

Disposition	Retained		Assigned	
	Bail	Jail	Bail	Jail
Convicted, prison	9%	54%	9%	50%
Convicted, probation	39%	18%	40%	16%
Not convicted	52%	28%	51%	34%
Number of defendants	(1098)	(363)	(187)	(569)

Source: Microfilm Section of the Bexar County Clerk's Office and Probation Files of the Bexar County District Courts.

These data demonstrate that defendants on bail, whether represented by retained or assigned counsel have a 9 percent chance of being convicted and going to prison, a 39 to 40 percent chance of being convicted with probation, and a 52 to 51 percent chance of being either acquitted or having their case dismissed. Defendants in jail represented by retained counsel are sent to prison 54 percent of the time, receive probation 18 percent of the time, and are not convicted 28 percent of the time. Similarly, defendants in jail represented by assigned counsel are

sent to prison in 50 percent of the cases, receive probation in 16 percent of the cases, and are not convicted in 34 percent of the cases. Therefore, it appears that the disposition of a case depends much more upon the pretrial detention status of the accused than the type of representation he receives.

The purpose of this article was to determine the quality of indigent representation in the felony courts of Bexar County. Data taken from all cases filed in 1972 and disposed of by September 1, 1973, indicated that those represented by retained counsel are more likely to have their cases dismissed, to have more favorable dismissals, to be plead guilty, and to be acquitted on a plea of not guilty. Of the 1,461 defendants with retained counsel, 784, or 53.7 percent were found guilty, while of the 763 defendants with assigned counsel, 467, or 61.2 percent were found guilty. Therefore, those in the assigned group are 7.5 percent more likely to be found guilty. The data also show that of all defendants convicted 63.9 percent of those with retained counsel, and only 35.4 percent of those with assigned counsel receive probation. Therefore, those in the retained group are 28.5 percent more likely to be granted probation.

One of the two most significant findings of this study is that the San Antonio Plan does provide equal protection under law for indigent criminal defendants. The quality of defense services, as measured by case disposition, is almost identical for jailed defendants represented by assigned counsel and jailed defendants represented by retained counsel. The same was found to be the case for bailed defendants represented by each type of counsel. The fact that assigned counsel defendants are convicted 7.5 percent more frequently than retained counsel defendants can be explained by noting that only 25 percent of retained counsel defendants are in jail, while 75 percent of the assigned counsel defendants are in pretrial confinement. Again, pretrial detention status is found to be the significant factor.

The finding that the system of assigned counsel provides adequate, that is, equal, representation in San Antonio is significant in that such a conclusion is contrary to the prevailing view of legal commentators. The Texas Criminal Justice Council has stated that the low statutory fees received by court appointed attorneys causes many of them to "shun appointments, and when appointed, [they] lack the incentive to prepare properly for trial."[67] Arnold Trebach has commented that

67. Texas Criminal Justice Council, 1973 Criminal Justice Plan for Texas 111 (1973).

the pressure of meeting office expenses, family expenses, plus the desire to get ahead may be too much to resist, causing their investigation not to go beyond the defendant's jail cell or the district attorney's office.[68] In addition to the lack of financial reward, Chief Justice Warren Burger has observed that many attorneys are not competent to practice law at the trial level.[69] Such criticisms are often based upon the minimal attention given to the subjects of criminal law and evidence in law school and on the bar examinations, as well as the high degree of specialization and unique procedures found in the criminal courts.[70] The argument in favor of a broad based assigned counsel system with full participation of the bar has frequently been criticized on this basis.[71]

The court appointed system of representation has been criticized on a sociological basis for not providing quality indigent representation due to a conflict between the attorney's self-image and what he perceives to be an undignified process. Judge Bazelon has observed that uptown, non-criminal law specialists often experience "cultural shock" in representing indigent criminal defendants in that their clients are neither middle class nor what they would consider "deserving poor."[72] This view holds that not only is the client viewed with disdain, but also the criminal court judges are considered as "professionally incompetent and sometimes venal. The lack of decorum and the disrespect for de-

68. A. TREBACH, THE RATIONING OF JUSTICE: CONSTITUTIONAL RIGHTS AND THE CRIMINAL PROCESS 138 (1964); *see* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORTS: THE COURTS 58 (1967).

69. *See* Burger, *Counsel for the Prosecution and Defense—Their Roles Under the Minimum Standards*, 8 AM. CRIM. L.Q. 2, 7-8 (1969). *See also* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORTS: THE COURTS 58 (1967); Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 11-12 (1973).

70. Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1079-80 (1973).

71. For example, see W. Steele, The Doctrine of Right to Counsel: Its Impact on the Administration of Criminal Justice and the Legal Profession, August, 1969 (unpublished thesis in University of Texas Law School Library), where it is observed that

> it is facetious to imply that noticeable improvement will be made in criminal justice by a smorgasbord of general practitioners and commercial specialists. Such logic is part of the self-serving myth that states that all ordinary lawyers are willing to devote themselves to the cause of an indigent client. The unspoken assumption of this myth is that the "civil lawyer" has as much skill as a "criminal lawyer" in criminal cases. More rational support for this assumption would be provided if it was conceded that many "civil lawyers" spend an abnormal amount of time preparing for court appointed cases. If this is true, then it still appears that the appointive method is a circuitous means of providing adequate and competent counsel to the indigent.

Id. at 88.

72. Bazelon, *The Defective Assistant of Counsel*, 42 U. CIN. L. REV. 1, 12 (1973).

fendants and defense counsel often seen in these courts confirms this impression."[73]

This prevailing view concerning the inferiority of assigned counsel systems has been in large part responsible for much of the trend toward public defender systems. A public defender system is viewed as preferable to an assigned system in that its attorneys are more likely to be experienced in criminal practice as well as having a large collection of legal sourcework such as pleadings, motions, and briefs.[74] A statewide study of assigned and public defender systems in North Carolina, without data concerning pretrial detention status, concluded that for metropolitan areas the public defender system provided a higher quality of defense at a lower cost per case.[75] A similar study in Texas without the benefit of case analysis has reached similar conclusions.[76] Although a cost analysis of the two systems is beyond the scope of this study, the data and conclusions found herein do not justify the establishment of a public defender on the basis of an inferior quality of indigent representation.[77]

The results and conclusions of this study generally agree with those of cognate studies that have approached the problem by analyzing case dispositions. Silverstein, in his nationwide study using 1962 data, found that indigents are slightly less likely to have their cases dismissed, slightly more likely to be plead guilty, and slightly less likely to be acquitted in a contested trial.[78] The data from Bexar County are similar, except that they show that those with assigned attorneys are slightly less likely to plead guilty than those with retained counsel. Stuart S. Nagel, using Silverstein's data, concluded that indigents were more likely to be found guilty than retained counsel defendants, and that the disparity is due in part to the different manner of providing

73. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORTS: THE COURTS 57 (1967).

74. A. LEWIS, GIDEON'S TRUMPET 198 (1964); Foster, *The Public Defender and Other Systems for Defense of Indigents*, 53 J. AM. JUD. SOC'Y 247, 248 (1970).

75. Note, *Analysis and Comparison of the Assigned Counsel and Public Defender Systems*, 49 N.C.L. REV. 705, 709 (1971).

76. Comment, *The Texas Indigent—Counsel for His Defense: Is It Time For A Public Defender System?*, 25 BAYLOR L. REV. 55, 66-67 (1973).

77. Much of the opposition to a public defender system, at least in Texas, does not seem to be centered upon the issue of the quality of representation, but upon a more generalized fear of "socialized law" and "governmental paternalism." L. SILVERSTEIN, DEFENSE OF THE POOR IN AMERICAN STATE COURTS 720 (1965); Jimmy Allison, Executive Director of the San Antonio Bar Association, private interview held in San Antonio, Texas, on March 7, 1973.

78. L. SILVERSTEIN, DEFENSE OF THE POOR IN AMERICAN STATE COURTS 27 (1965).

representation.[79] On the issue of probation, Nagel has observed that although indigents have a higher likelihood of having prior convictions, this difference was not so large as to explain the disparity in the proportions of probation granted.[80] The Bexar County data led to a similar conclusion, except that pretrial detention characteristics of the two groups seem to provide an explanation for such inequality of treatment.

Anne Rankin, using 1962 data from Manhattan's Magistrate's Felony Court, has concluded that pretrial confinement was most significant as a causal factor in the determination of guilt and the likelihood of probation.[81]

TABLE 4

RELATIONSHIP BETWEEN PRETRIAL STATUS AND DISPOSITION BY TYPE OF COUNSEL IN MANHATTAN

Disposition	Retained		Assigned	
	Bail	Jail	Bail	Jail
Sentenced to prison	16%	60%	21%	64%
Convicted without prison	40%	12%	28%	9%
Not convicted	44%	28%	51%	27%
Number of defendants	(212)	(40)	(130)	(306)

Source: Anne Rankin, "The Effect of Pretrial Detention," 39 N.Y.U.L. Rev. 641, 651 (1964).

Her data showed that defendants in jail had approximately the same likelihood of not being convicted, irrespective of the type of representation, but of the defendants on bail, 51 percent of those represented by assigned counsel and 44 percent of those with retained counsel were not convicted. She also found that bailed individuals with retained counsel were sentenced to prison 16 percent of the time—their jailed counterparts were sentenced to jail 60 percent of the time. Bailed individuals with assigned counsel went to prison 21 percent of the time—their jailed counterparts went to prison 64 percent of the time.[82] The Bexar County data are similar to that from the Manhattan Magistrate's

79. Nagel, *Disparities in Criminal Procedure*, 14 U.C.L.A.L. REV. 1272, 1281-83 (1967).

80. *Id.* at 1282.

81. *See* Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641, 650-51 (1964).

82. *Id.* at 651. For a confirmation and update of the results of this survey, conducted in somewhat greater depth, see *The Unconstitutional Administration of Bail: Bellamy v. The Judges of New York City*, 8 CRIM. L. BUL. 459 (1972).

Felony Court, except that the differences in representation are even further minimized in Bexar County.

Although the primary purpose of this article was directed at the quality of indigent representation, significant conclusions concerning the effect of pretrial detention seem to be in order. In Bexar County, the decision setting the amount of bail has a very heavy impact upon the ultimate disposition of the case. Regardless of the type of counsel, the jailed defendant is far more likely to be convicted than those on bail; of those convicted, jailed defendants are far more likely to be sent to prison.[83]

Several causes for such a disparity in the disposition of jailed and bailed defendants have been suggested. Jailed defendants are under heavy pressure to plead guilty even when they are not guilty[84] or have an arguable defense,[85] if only so that they may be transferred from the squalid conditions of local jails to the better facilities maintained by most state prison authorities. A jailed defendant is unable to seek out witnesses in his behalf,[86] and if he does go to trial, his demeanor and psychological state work to his disadvantage.[87] Finally, if the defendant should be convicted, his chance of receiving probation is decreased due to his unemployment.[88]

Although the primary question of this article has been answered, the significance of pretrial detention in the criminal justice process leaves much study yet to be done. Further inquiry into the law and practice of bail procedures would seem to be indicated.[89] If the con-

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83. See Table 3 p. 601 *supra.*

84. Fabricant, *Bail as a Preferred Freedom and the Failures of New York's Revision*, 18 BUF. L. REV. 303, 304-305 (1969).

85. *Id.* at 304-305; Note, *An Answer to the Problem of Bail: A Proposal in Need of Empirical Confirmation*, 9 COLUM. J.L. & SOC. PROB. 394, 399 (1973).

86. Fabricant, *Bail as a Preferred Freedom and the Failures of New York's Revision*, 18 BUF. L. REV. 303 (1969); Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U.L. REV. 631, 632-33 (1964); Note, *An Answer to the Problem of Bail: A Proposal in Need of Empirical Confirmation*, 9 COLUM. J.L. & SOC. PROB. 394, 400 (1973).

87. Fabricant, *Bail as a Preferred Freedom and the Failures of New York's Revision*, 18 BUF. L. REV. 303, 305 (1969); Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U.L. REV. 631, 632 (1964); Note, *An Answer to the Problem of Bail: A Proposal in Need of Empirical Confirmation*, 9 COLUM. J.L. & SOC. PROB.. 394, 401 (1973).

88. Fabricant, *Bail as a Preferred Freedom and the Failures of New York Revision*, 18 BUF. L. REV. 303, 305-306 (1969); Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U.L. REV. 631, 632 (1964).

89. An excellent beginning on this subject in the State of Texas is provided by Teague, *The Administration of Bail and Pretrial Freedom in Texas*, 43 TEXAS L. REV. 356 (1965). For a discussion of methodological difficulties in studying the problem of

clusions reached in this study are borne out by future research, a major reform of the bail system would appear to be justified.[90]

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the effects of pretrial detention on the outcome of a criminal case, see Hindelang, *On the Methodological Rigor of the Bellamy Memorandum*, 8 CRIM. L. BUL. 507 (1972).

90. For various approaches to reform, see R. GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM 150-212 (1965); Levin, *The San Francisco Bail Project*, 55 A.B.A.J. 135 (1969); Bogomolny & Gaus, *An Evaluation of the Dallas Pretrial Release Project*, 26 SW. L.J. 510 (1972); Botein, *The Manhattan Bail Project: Its Impact on Criminology and the Criminal Law Process*, 43 TEXAS L. REV. 319 (1965).