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Preliminary Report on the Defense of Indigents in Missouri

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A PRELIMINARY REPORT ON THE DEFENSE OF INDIGENTS IN MISSOURI*

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INTRODUCTION

Last year the American Bar Foundation, in cooperation with the American Bar Association and other groups, launched a nationwide audit of the defense of indigent persons accused of crime. Information was gathered from every state. Within each state, questionnaires were mailed to most judges, all prosecuting attorneys, and a sampling of defense lawyers, and field surveys were conducted in several counties selected at random. One or more reporters, usually native lawyers presumably familiar with the state's administration of criminal law, interviewed the judge, the prosecuting attorney, the magistrate, and, if there was one, the public defender, in each survey county. They also prepared detailed analyses, called "docket studies," of a random sampling of the criminal cases processed by the survey counties in 1962.[1] The end product should be the most comprehensive compilation of data about the administration of criminal law yet attempted in the United States.[2]

This article is a preliminary report on the data collected in Missouri. In 1960, the state had a population of 4,319,813. It is divided into 114 coun-

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A special debt of gratitude is owed to Lee Silverstein, Project Director for the American Bar Foundation, who supervised the field research and was helpful in interpreting the results.

The conclusions drawn should not be attributed to either the American Bar Association or the American Bar Foundation.

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1. Magistrates were interviewed, and docket studies were compiled, in all survey counties in Missouri. In most other states, no magistrates were interviewed, and docket studies were made only in some of the survey counties.

A distinction is usually made between "public" and "private" defenders on the basis of their sources of funds, the former defined as financed entirely from tax revenues, the latter as supported entirely by non-governmental contributions. A "mixed" defender is supported by both. The text is meant to include all defender systems of whatever kind.

2. Results of the nationwide audit will be published in book form by the American Bar Foundation.

ties and the independent City of St. Louis. Institutions administering the criminal law are alike in all of these political subdivisions except the City of St. Louis. Each county has a prosecuting attorney who prosecutes all crimes, felonies and misdemeanors, that occur within his jurisdiction. Each has at least one magistrate before whom accused felons are brought for bail to be set and for preliminary hearings. These magistrates have concurrent jurisdiction (with the circuit courts) over the trial of misdemeanors; they also have inferior civil jurisdiction.

The City of St. Louis has two prosecutors instead of one, the Circuit Attorney for felonies, the Prosecuting Attorney for misdemeanors. The criminal jurisdiction of the magistrates is assigned in the City to the Court of Criminal Correction, composed of two judges who have no civil jurisdiction whatever.

The state has two public defender bureaus. One of venerable age, 26 years, is located in the City of St. Louis. The other, established January 1, 1963, is in St. Louis County. Both were created by local ordinance and operate without financial help from the state.

Exclusive jurisdiction over the trial of felonies is vested in the circuit courts. There are 43 circuits which vary in the number of judges assigned and the number of counties covered. Most circuits have only one judge; the largest has 18. Some circuits contain one county, some two; a few embrace as many as five. Since decisions of individual judges and prosecutors can have pronounced effects upon the administration of criminal law, the structure of the circuits results in a number of variables. In a multi-judge circuit the handling of a particular problem, the determination of indigency, for example, will change as judges are rotated through the "criminal divison." But because no multi-judge circuit includes more than one county, decisions of the prosecutor, such as how much information to reveal to the defense attorney, are likely to be consistent. On the other hand, however, in one-judge, multi-county circuits the judge's decisions are likely to be consistent throughout his circuit, but decisions made by prosecutors are likely to change from one county to the next.

Field surveys were conducted in eight of Missouri's 115 counties.[3] Some pertinent information about them is compiled in Table 1. They are diverse

3. Counties within a state were grouped into categories based upon the number of criminal cases handled by their courts during 1962. Counties were selected for survey at random, except that no two counties from the same judicial circuit were chosen. The National Opinion Research Center of the University of Chicago advised the Bar Foundation in making the selections so that reporters could not "load" the results by choosing counties they knew to be outstandingly good or bad.

St. Louis County was not included, but was added to the original sample because of its importance in the state.

For convenience, the City of St. Louis is often called a "county" in this article.

TABLE 1

COUNTIES SURVEYED

County	Number of counties in judicial circuit	1960 Population in 1000s		Felony def'ts 1962	Number of docket studies[a]	Number of of att'ys in private practice[b]
		County	Judicial Circuit			
Audrain	3	26	46	120[c]	50	15
City of St. Louis	1	750	750	2,101	144	2,208
Howell	4	22	43	95[c]	20	7
Jackson	1	623	623	1,380	80	2,120
Jasper	1	79	79	161	50	79
Miller	5	14	62	17	18	7
Putnam	4	7	37	14	12	2
St. Louis	1	703	703	311	48	628

[a] A few docket studies were discarded before final tabulations were made. This accounts for some of the peculiar numbers, such as that for the City of St. Louis.

[b] These figures include prosecuting and assistant prosecuting attorneys, and magistrates if they are lawyers. These office holders normally would not be appointed to represent defendants. The figures are accurate as of the time of the survey (July-August 1963) but may not reflect the situation that existed in 1962.

[c] The number of felony defendants in 1962 was determined by a count of court records in all counties except Audrain and Howell. The figures for these counties were taken from the annual report of the Judicial Conference of Missouri for the fiscal year ending June 15, 1962.

TABLE 2

AGE OF DEFENDANTS

County	Under 18	18-20	21-24	25-29	30-39	40-49	50-59	60 and Over	No Data	Total Studies
Audrain	1	0	1	0	1	1	1	1	44	50
City of St. Louis	12	25	25	28	25	14	10	4	1	144
Howell	0	0	0	0	1	0	0	0	19	20
Jackson	4	12	12	13	11	10	2	1	15	80
Jasper	3	2	4	1	3	1	0	0	36	50
Miller	0	1	3	1	0	0	0	0	13	18
Putnam	0	0	0	0	1	0	0	1	10	12
St. Louis	3	10	8	9	7	6	2	3	0	48
Totals	23	50	53	52	49	32	15	10	138	422

TABLE 3

SEX AND RACE OF DEFENDANTS

	Sex			Race		
County	Male	Female	No Data	White	Negro	No Data
Audrain	50	0	0	12	2	36
City of St. Louis	133	10	1	60	83	1
Howell	20	0	0	20	0	0
Jackson	78	2	0	33	34	13
Jasper	41	9	0	12	0	38
Miller	17	1	0	18	0	0
Putnam	11	0	1	11	0	1
St. Louis	46	2	0	34	14	0
	396	24	2	200	133	89

TABLE 4

YEARS OF SCHOOL COMPLETED

County	0-4	5-8	9-12	More than 12	No Data
Audrain	0	1	4	0	45
City of St. Louis	1	15	9	1	118
Howell	0	0	0	0	20
Jackson	0	0	0	1	79
Jasper	0	3	8	0	39
Miller	0	1	1	0	16
Putnam	0	1	0	0	11
St. Louis	0	1	1	1	45
	1	22	23	3	373

in many ways besides population and number of felony defendants. Most geographical areas of the state are represented. Putnam is a small community devoted almost entirely to agriculture. Miller is also small and agricultural, but it has a tourist industry. Howell County, which is larger but still rural, has many tourists. Audrain is a wealthy county supported by agriculture and light industry. Jasper County is a medium-sized commercial center. St. Louis County is predominantly suburban, but a few large industries are located there, and its commercial activity is growing. Jackson County (Kansas City) and the City of St. Louis are, of course, large commercial concentrations.

TABLE 5

OFFENSES CHARGED[a]

County	Assault	Auto Theft	Burglary	D.W.I.[b]	Embezz. Fraud	Forg. Bad Check	Grand Larceny	Rape	Robbery Armed	Robbery Unspec.
Audrain	7	1	4	6	1	17	1	0	0	0
City of St. Louis	14	12	28	0	2	1	18	3	8	9
Howell	0	0	4	0	7	2	0	0	1	1
Jackson	11	6	24	1	0	7	7	2	14	1
Jasper	1	2	14	0	1	12	11	3	1	1
Miller	1	0	4	0	1	3	12	1	0	0
Putnam	2	0	2	5	0	2	0	1	0	0
St. Louis	4	0	16	1	0	6	6	1	1	0
	40	21	96	13	12	50	55	11	25	12

[a] Offenses not listed were charged against the following numbers of defendants: Arson—2; Murder—7; Narcotics, possession—4; Narcotics, sale—3; Sodomy—2; Voluntary Manslaughter—2.

[b] Driving while Intoxicated, a felony in Missouri.

A total of 422 docket studies were made in the eight survey counties. Each study consisted of 32 questions about a felony case selected at random from calendar 1962.[4] Most answers were multiple choice so that they could be key-punched onto cards and processed by computers. Data about the age, sex, race, years of school completed, and offenses charged, of the defendants whose files were studied are shown in Tables 2 through 5 respec-

4. The number of studies made in particular counties, and the method established to guarantee that the sample would be random, were fixed by the American Bar Foundation in the following instruction:

> [T]he first step is to ascertain the number of persons formally charged with felonies in the year 1962 . . . . [T]he second step [is to] determine how many docket sheets should be prepared for the county. Use the following table for this purpose

Number of Persons Charged with Felonies	Number of Docket Sheets (Sample size)	Random Number
Less than 20	all	—
20 to 99	20	3
100 to 499	50	19
500 to 999	80	20
1,000 to 1,499	110	45
1,500 to 2,499	150	92
2,500 to 3,499	200	6
3,500 or more	250	168

> The third step is to decide which cases to use . . . . The total number of persons formally charged with felonies (first step above) should be divided by the size of

tively. Other information from the docket studies appears in subsequent tables. Information obtained by interviews and mail questionnaires is scattered throughout the article, but much of it is concentrated in Section IV, which also contains a summary of the sources from which it came and the sampling methods employed in obtaining it.

This report has been designated "preliminary" mainly because the amount of material collected has made it impossible either to digest all of the information, or to pursue all of the inquiries that appeared to be pertinent. For example, there was no time to determine whether significant relationships exist between the types of offenses charged (Table 5) on the one hand, and either the defendant's age (Table 2) or his race (Table 3) on the other. Furthermore, much of this information did not appear to be directly relevant to the problems of the indigent defendant, upon whom this report focuses. Many of these matters have been relegated to an article which will appear in a forthcoming issue of the LAW QUARTERLY.

This report is divided into five sections. Section I is an attempt to describe the criminal law in operation. How the indigent accused fits into this system is told in Section II, which deals mainly with problems peculiar to the defendant unable to retain a lawyer of his own choosing. Section III continues this discussion by comparing and contrasting the treatment of the indigent and the non-indigent. Section IV compiles the opinions of judges, prosecutors and defense attorneys throughout the state on the fairness of

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the sample (column 2 in the table above). The quotient is the *interval* to use in sampling. The first case to use is the one corresponding to the random number in Column 3 of the above table. The second case to use is the one corresponding to the random number plus the interval number. The third case is the one corresponding to the random number plus two times the interval number, and so on. If the result is a mixed number or decimal, it should be rounded to the nearest whole number.

Memorandum from American Bar Foundation to Reporters, June 3, 1963, pp. 2-3. (Emphasis in the original.)

Reporters were instructed to make studies only of felony files, if possible. "Felony" was defined as "a crime defined as a felony by state law and any other crime punishable by imprisonment for longer than one year." *Id.* at 1.

The questions were: (1) State. (2) County. (3) Population size of county, 1960 census. (4) Name of defendant. (5) Docket number. (6) Age. (7) Sex. (8) Race. (9) Years of school completed. (10) Date of arrest. (11) Was there a preliminary hearing? (12) Date of preliminary hearing. (13) Date of filing of indictment, information, etc. (14) Date of arraignment on indictment, information, etc. (15) Offense(s) charged. (16) Was defendant released on bail? (17) Date released on bail. (18) Was bail changed from original amount? (19) Date bail was changed. (20) Original amount of bail set. (21) Final amount of bail set. (22) Was defendant determined to be indigent? (23) Did defendant have counsel? (24) If name of counsel is known, insert here. (25) Date Counsel first appeared or was appointed. (26) Is case still pending? (27) Disposition. (28) Date of disposition without trial. (29) Date trial began. (30) Sentence. (31) Was defendant sentenced to a fixed term? (32) Was defendant sentenced to an indeterminate term? (33) Remarks.

the present system and on desirable changes. Section V contains conclusions and recommendations about which there was no substantial disagreement, as well as my personal opinions about some present practices and proposed changes.

Section I stresses points at which the practice of criminal law differs from standards set by statutes, and Sections I and II underscore procedures in the City of St. Louis and St. Louis County, where the state's two public defenders are found. Both of these emphases can be justified. It is known that the next session of the Missouri legislature, which will convene in a few months, will be concerned with revising criminal procedure. The extent to which the discretion of police officers, prosecutors and judges should be defined by statute is one issue the legislature must deal with. It is also known that a bill will be introduced that would establish public defenders in most, and perhaps all, of the judicial circuits. The points of emphasis, therefore, have been chosen with an eye to the problems that will be of immediate concern to the state.

I. Missouri Criminal Procedure

A. *Terminology*

"Initial appearance" refers to the stage in the criminal process when an accused for the first time is brought before a judicial officer. In Missouri that officer would be a county magistrate, except in the City of St. Louis, where he would be a judge of the Court of Criminal Correction. "Preliminary hearing" refers to the proceeding in which a determination is made that a crime has been committed and that there is probable cause to believe the defendant committed it. This also takes place in the magistrate court or the Court of Criminal Correction. "Arraignment" refers to the proceeding in which the defendant is formally charged with a felony and enters his plea. In Missouri this occurs in the circuit court.

B. *From Arrest to Arraignment*

Theoretically, the criminal process can be set in motion in either of two ways: the accused can be arrested upon a warrant that has already been issued, or he can be arrested without a warrant. Theoretically again, an arrest with a warrant is "better" because a judicial officer, usually a magistrate, has determined that there is reasonable cause to believe that the person named has committed a crime, that is, because somebody besides a cop has decided to arrest him. As far as protecting the rights of the accused is concerned, however, it does not matter which procedure is followed because the practice in Missouri does not resemble this theory. In the first place, no

matter of "reasonable cause" judgment seems to be involved; the magistrate must issue the warrant upon a sworn complaint. In the second place, the magistrate's clerk, not the magistrate, issues the warrant if the complainant is the prosecuting attorney,[5] as he invariably was in the survey counties. Typically, the prosecutor listened to the complaining witness, prepared an affidavit which the witness executed, prepared the warrant, took it before the magistrate's clerk, and had it issued. Thus the decision traditionally belonging to the prosecutor, *viz.*, whether a case can be made that justifies filing an information, or seeking an indictment, against the person named, was substituted in Missouri for the judicial determination of reasonable cause.[6] That the two were virtually identical is further evidenced by the fact that the informations filed in the survey counties were often verbatim copies of the warrants.

Some of these statements must be qualified with respect to Jackson County. The prosecuting attorney's office did prepare the warrants in that county during 1962, but apparently it issued warrants at every request of the police department without making any effort to screen weak cases. Therefore, although it remains true that the determination of reasonable cause was made by the prosecutor rather than a judicial officer, it is not true that this decision was replaced by one that the case was strong enough to justify filing an information. Since 1962, however, Jackson County has adopted a system similar to that of the City of St. Louis. Inside the circuit attorney's domain is the "warrant office," which is manned seven days a week by an assistant circuit attorney. All warrants coming from the circuit attorney originate from the warrant office. One duty of the assistant in charge of this office is to refuse a warrant if the evidence presented to him would not justify filing an information. This is perhaps the clearest example of substituting the prosecutor's decision for the theoretical judicial determination of reasonable cause.

Most felony cases begin with the arrest of the defendant without a warrant. Missouri law provides that

> All persons arrested and held in custody . . . without warrant, for the alleged commission of a criminal offense, or on suspicion thereof, shall be discharged from such custody within twenty hours from the time of arrest, unless they be held upon a warrant issued subsequent to such arrest.[7]

5. Mo. Sup. Ct. R. Crim. P. 21.08:

Whenever complaint shall be made . . . it shall be the duty of the judge or magistrate thereof, and, *upon complaint made by the prosecuting attorney, it shall also be the duty of the clerk thereof* to issue a warrant. . . . (Emphasis added.)

6. *Cf.* Miller & Tiffany, *Prosecutor Dominance of the Warrant Decision,* 1964 Wash. U.L.Q. 1.

7. Mo. Sup. Ct. R. Crim. P. 21.14.

TABLE 6

NUMBER OF DAYS BETWEEN DATE OF ARREST AND DATE OF PRELIMINARY HEARING

County	Same Day	1	2-3	4-6	7-13	14-29	30 or More	Longest Delay	Average[a]	Data Avail.	No Data[b]
Audrain	0	0	0	1	0	1	1	32	20.6	3	47
City of St. Louis	0	0	0	0	20	29	10	61	21.4	59	85
Howell	0	0	0	0	1	0	0	8	8.0	1	19
Jackson	0	0	0	4	23	14	9	212	21.1	51	29
Jasper	4	0	0	0	5	3	5	145	25.0	17	33
Miller	3	0	0	3	1	1	0	17	5.1	8	10
Putnam	1	0	0	0	1	1	1	32	16.0	4	8
St. Louis	0	0	0	2	1	2	1	38	17.3	6	42
	8	0	0	10	52	52	27	—	20.4	149	273

[a] For purposes of computing the average, a preliminary hearing on the same day as arrest was counted as zero days delay.

[b] This column includes all cases in which there was no preliminary hearing, either because it was waived or because the formal charge was by grand jury indictment, in addition to those few cases (seven) in which one date or the other was not available.

Missouri's courts, however, have refused to impose penalties upon the state for violating the "20 hour rule,"[8] and hence it is sometimes ignored and sometimes circumvented; how frequently could not be determined. In the City of St. Louis, the practice shifted from disregard to circumvention following repeated protests by the circuit attorney. A defendant whom the St. Louis police now wish to detain longer than 20 hours is released and immediately re-arrested, a process known as "re-booking." The date and time of arrest appearing on his record will be that of the re-booking.

Once the warrant has been issued and he is in custody (or vice versa), the accused must be taken before a magistrate "as soon as practicable."[9] The reporters were told this initial appearance usually occurred between 13 and 24 hours after arrest, except in St. Louis County. Unfortunately, verifying these statements is impossible because the docket study failed to request the date of initial appearance. Figures are available, however, showing the elapsed time between the date of arrest and the date of preliminary hearing. These are set out in Table 6. Of those counties yielding a significant

8. See State v. Bridges, 349 S.W.2d 214, 218 (Mo. 1961); State v. Scott, 298 S.W.2d 435, 438 (Mo. 1957).

9. MO. SUP. CT. R. CRIM. P. 21.11. This rule is interpreted as applying to all arrested persons, although it is reasonably subject to an interpretation limiting it to persons arrested under a warrant. *Compare* Rule 21.11, *with* Rule 21.14.

amount of data, only Miller averaged less than 10 days. If one assumes (a) that the law requiring a preliminary hearing to be held within 10 days of demand[10] was complied with, and (b) that only rarely did one side or the other request a postponement, then the statements given the reporters were inaccurate, except in Miller County. But assumption (b) is tenuous at best.

Parenthetically, it should be stressed that the figures in all tables appearing in this report relate only to the 422 docket studies. They should not be used to draw conclusions about the state as a whole because they are not weighted to take account of the varying proportions of criminal cases sampled in the survey counties, or of the varying proportions of the state's total criminal business handled by the survey counties. There is nothing wrong with concluding that the average delay between arrest and preliminary hearing was 20.4 days for the 422 cases studied, but it would be improper to say that the average delay in all 1962 criminal cases was 20.4 days. Similarly, with respect to Table 5, it is noteworthy that 96 of the 422 defendants studied were charged with burglary, but it would be erroneous to conclude that 23 percent of all felony defendants in the state were charged with burglary. Weighted figures should be ready in time to appear in the forthcoming supplemental report.

Magistrates are available at least five days a week everywhere. Such general availability probably accounts for the statements that initial appearances usually occur within 24 hours of arrest except in St. Louis County. The criminal jurisdiction of all magistrates is county wide; they have jurisdiction to try all misdemeanors, and to conduct initial appearances and preliminary hearings in all felonies, committed within their counties. In the smaller counties magistrates schedule these matters as the need arises, fitting them between civil litigation. In the City of St. Louis, one of the judges of the Court of Criminal Correction conducts initial appearances and preliminary hearings daily; because this court has no civil jurisdiction, there are no scheduling problems. In Jackson and St. Louis counties, however, each magistrate schedules only one "criminal docket" a week, staggered so that at least one such docket is being held every day but Sunday. In Jackson County, initial appearances will be sent to whichever one of the seven magistrates is having a criminal docket that day. St. Louis County is different because the prosecuting attorney uses only two of the eight magistrates for preliminary felony proceedings; rarely is an initial appearance sent to any of the other six magistrates.[11] A person arrested here will have to wait

10. Mo. Sup. Ct. R. Crim. P. 23.06.

11. The prosecuting attorney has absolute discretion to send any case, misdemeanor or felony, to any of the magistrates, all of whom have county-wide jurisdiction. He attempts to spread the misdemeanors evenly.

TABLE 7

AMOUNT OF BAIL[a]

County	Less than $250	250 to 499	500 to 999	1000 to 2999	3000 to 4999	5000 to 9999	10,000 to 14,999	15,000 and more	No Bail Set	No Data[b]
Audrain	3-3	3-3	19-20	21-20	0-0	0-0	0-0	0-0	0	4-4
City of St. Louis	0-0	0-0	0-0	108-103	3-3	11-11	4-5	1-3	5	12-14
Howell	0-0	0-0	0-0	13-13	0-0	1-1	0-0	0-0	0	6-6
Jackson	1-0	0-0	0-0	40-23	13-13	12-30	6-7	1-4	3	4-0
Jasper	0-0	0-1	2-2	31-30	3-2	7-7	2-1	0-0	0	5-7
Miller	0-0	0-0	1-1	2-2	0-0	11-11	0-0	0-0	0	4-4
Putnam	0-0	0-0	0-0	11-11	0-0	0-0	1-1	0-0	0	0-0
St. Louis	0-0	0-0	1-1	19-19	5-5	10-10	1-1	2-2	0	10-10
	4-3	3-4	23-24	245-221	24-23	52-70	14-15	4-9	8	45-45

[a] The first figure in each column represents the number of cases in which the amount shown was the original amount of bail, the second the number of cases in which it was the final amount; a difference indicates that bail was changed. Usually the change occurs at the arraignment; the circuit judge sets a different figure than the magistrate.

[b] A separate question, "Was bail changed?" made it possible to distinguish "no data" from "no change" cases when the blank for "Final Amount of Bail" was left unanswered.

for his initial appearance until one of the two selected magistrates has a criminal docket.

St. Louis County procedure is such that an arrested person with funds can be released on bail without an initial appearance. Before issuing the warrant to the prosecutor, the magistrate's clerk takes it to the magistrate who writes the amount of bail across its face. The clerk sets the case for a preliminary hearing on the next criminal docket day. The result is twofold: by posting bond with the sheriff in the amount written on the warrant, the defendant may make bail without ever having appeared before a magistrate, and his first appearance is likely to coincide with his preliminary hearing.

All magistrates are required to be lawyers. This recent requirement, however, contained a grandfather clause allowing non-lawyer incumbents to hold over.[12] Three of the survey counties had layman magistrates. Putnam and Audrain counties each have only one magistrate, neither of whom is a lawyer, but both of whom have long service. Two of the eight magistrates

12. MO. REV. STAT. § 482.030 (1959).

in St. Louis County are not lawyers, but one of them is a law school graduate. The judges of the Court of Criminal Correction must also be lawyers.

The magistrate is required to set bail at the initial appearance.[13] In all survey counties, bail was set according to unwritten, flexible schedules devised by each magistrate. Minimum felony bonds ranged from $500 in Audrain to $1,500 in St. Louis County. Magistrates in border counties stated that bail tended to be higher for non-residents. The figures in Table 7[14] disclose that bail was more likely to be increased than decreased if it was changed. The number of persons whose bond was between $1,000 and $2,999 decreased from 245 to 221, for example, while those whose bond was between $5,000 and $9,999 increased from 52 to 70. A change usually results from the circuit judge setting a different figure at the arraignment than the magistrate set at the initial appearance. Since, however, the docket studies do not reflect the circumstances surrounding a change, the figures do not necessarily support a conclusion that judges were tougher than magistrates. The figures also show that there is no necessary correlation, direct or inverse, between the amount of bail on the one hand and either the size of the county, or its volume of criminal cases, on the other:

	Percentage of cases in which the final amount of bail was	
	less than $3,000.	$5,000 or more.
Audrain	100	none
City of St. Louis	79.2	14.5
Howell	92.8	7.2
Jackson	28.7	51.2
Jasper	76.6	18.5
Miller	21.3	78.7
Putnam	91.6	8.4
St. Louis	52.6	34.1

The rarity of bonds between $3,000 and $5,000 (24, or about 6 percent, of the 377 studies in which data were available) was unexplained.

The Missouri Rules provide that

> No information charging the commission of a felony shall be filed against any person unless the accused shall first have been accorded the right of a preliminary examination before a magistrate in the county where the offense is alleged to have been committed. . . .[15]

13. Mo. Sup. Ct. R. Crim. P. 21.12 (arrest on warrant), 21.14 (arrest without warrant).

14. The first systematic program of releasing persons on their own recognizances was begun in the City of St. Louis in 1963, one year too late to be reflected in the docket studies, and hence in Table 7. The City program is discussed, and some of its results are tabulated, in Section II G *infra*.

15. Mo. Sup. Ct. R. Crim. P. 23.02.

This rule has been interpreted to mean that a defendant must be told, at his initial appearance, of his right to a preliminary hearing. But in the City of St. Louis, a clerk of the Court of Criminal Correction simply read the charge from the warrant and asked the defendant how he pleaded.[16] A plea of guilty was held to be a waiver of, one of not guilty a demand for, the hearing.[17]

The next sentence of the rule,

> The accused may waive a preliminary examination after consultation, or after being accorded the right of consultation, with his counsel.

had, so far as could be determined, never been obeyed in spirit. First, it had always been interpreted as though the words "if he has one" were appended. Only two years ago the Missouri Supreme Court said that "neither the federal or state constitution, nor any of our statutes require the magistrate to appoint counsel for the accused at the preliminary examination."[18] Second, until the Attorney General of Missouri told them otherwise just a month before the survey, many magistrates doubted that they had power to appoint counsel.[19] The result of these two influences was that magistrates did not inform defendants of their right to counsel. Except in the City, they began doing so after the attorney general delivered his opinion. It was too early to tell, at the time of the survey, whether they would also begin making appointments in preliminary felony proceedings. Some said they would; others were waiting to see what action would be taken by a committee appointed by the supreme court to make recommendations about defense of the indigent.

If the defendant demands one, a preliminary hearing must be scheduled within 10 days.[20] The defendant may cross-examine the state's witnesses and present his own. He may testify himself, but is subject to cross-examination. Although it rarely happened in the survey counties, the prosecutor may reduce the charge to a misdemeanor.[21] If he does, the defendant may

16. This practice has changed since the survey. See text accompanying note 71 *infra* for other changes that have taken place in the Court of Criminal Correction.

17. No one interviewed in the city remembered such a plea being used as a judicial admission in later circuit court proceedings. *Cf.* White v. Maryland, 373 U.S. 59 (1963).

18. State v. Turner, 353 S.W.2d 602, 604 (Mo. 1962).

19. Mo. Att'y Gen. Op. No. 207, June 21, 1963.

A few of the judges interviewed opposed providing lawyers for indigents at any prearraignment stage on the grounds that a magistrate who might not be a lawyer (see text accompanying note 12 *supra*) would have to make the appointments.

20. Mo. Sup. Ct. R. Crim. P. 23.06. The preliminary hearing is governed by Rules 23.01-.12.

21. Reducing the charge to a misdemeanor presents special problems in the City of St. Louis. As noted in the text, the City has two prosecutors, the Circuit Attorney for

plead guilty on the spot and be sentenced by the magistrate, or he may plead not guilty and stand trial, either then or later. Except in St. Louis County, transcripts are made of preliminary hearings only in homicide cases,[22] or upon request. The requesting party, usually the defendant, must arrange for and pay the stenographer, but it is not unusual for the state and defense to split the cost. In St. Louis County, the public defender and the prosecuting attorney have a standing agreement to transcribe all preliminaries; each office alternately supplies a stenographer for the purpose.

If the formal accusation is by grand jury indictment, the defendant has no right to a preliminary hearing because action by the grand jury is deemed to satisfy the requirement of probable cause normally fulfilled by the preliminary.[23] In rural Missouri the charge is always by information; of the eight survey counties, only the City of St. Louis, and Jackson and St. Louis counties impanelled grand juries. Prosecutors in these counties denied having any set policy as to which cases would be sent to the grand jury, although they stated that indictments were most often sought in homicides and rapes. There is no doubt, however, that tactical considerations influence the choice of procedure. The most obvious of these is the desire to hide the strength or weakness of the state's case. In at least some instances an indictment will be sought solely to circumvent the preliminary hearing.

Table 8, which summarizes data about preliminary hearings, reveals that approximately 25 percent of the felonies occurring in the City of St. Louis were prosecuted by indictment rather than information.[24] Indeed, as can be seen, the City was the only one of the survey counties that regularly made use of the grand jury. When the circuit attorney decides to seek an indictment, the words "Grand Jury" are typed on the warrant beneath the defendant's name. This signals the docket clerk in the Court of Criminal Correction to enter the case in a special grouping. The judge knows that the circuit attorney will request postponement of all cases in this group and that he therefore will not have to reserve court time for them. When such a case is called for preliminary hearing, the circuit attorney requests a 10-day postponement, which is granted as a matter of course. Postponements will continue

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felonies, the Prosecuting Attorney for misdemeanors. If the Circuit Attorney reduces the charge to a misdemeanor in the Court of Criminal Correction he loses jurisdiction over it. The Prosecuting Attorney must then be notified to assume the prosecution.

22. As required by Mo. Sup. Ct. R. Crim. P. 23.12.

23. State v. Cooper, 344 S.W.2d 72 (Mo.), *cert. denied,* 368 U.S. 855 (1961); State v. Allen, 343 S.W.2d 63 (Mo. 1961).

24. Because felonies and misdemeanors are prosecuted by separate offices in the City, and because the circuit attorney's files were used to compile the docket studies, it is known that none of the 35 cases in the third column of Table 8 was a misdemeanor.

TABLE 8

WAS THERE A PRELIMINARY HEARING?[a]

County	Yes	No				No Data	Total Cases
		Waived	Type Case[b]	Reason Unknown	Total		
Audrain	3	44	1	0	45	2	50
	(.06)	(.88)	(.02)		(.90)	(.04)	
City of	59	44	35	6	85	0	144
St. Louis	(.41)	(.31)	(.24)	(.04)	(.59)		
Howell	2	15	0	0	15	3	20
	(.10)	(.75)			(.75)	(.15)	
Jackson	59	12	3	2	17	4	80
	(.74)	(.15)	(.04)	(.03)	(.21)	(.05)	
Jasper	16	31	0	0	31	3	50
	(.32)	(.62)			(.62)	(.06)	
Miller	8	9	0	0	9	1	18
	(.44)	(.50)			(.50)	(.06)	
Putnam	2	10	0	0	10	0	12
	(.17)	(.83)			(.83)		
St. Louis	7	32	2	0	34	7	48
	(.15)	(.67)	(.04)		(.71)	(.14)	
	156	197	41	8	246	20	422
	(.37)	(.47)	(.10)	(.02)	(.58)	(.04)	(1.00)

[a]Numbers in parentheses represent percentages.

[b] The full answer was "No, not used in this kind of case." This category contains all cases in which indictments rather than informations were used.

to be granted at 10-day intervals until an indictment is returned.[25] The defendant will then be bound over to the circuit court on the indictment.

Preliminary hearings were held in only 37 percent of the cases studied. Jackson County, however, held preliminaries 74 percent of the time. Since it also had a significantly higher than average proportion of nolle prosequis (see Table 9), the question arose whether there was a correlation between

25. Since grand juries are empanelled monthly, this normally requires no more than three postponements. An assistant circuit attorney told me that the judge never inquires into the reasons for a postponement until three or more have been granted, from which he drew the conclusion that the state "has a right" to three. He also indicated that more than three postponements will be granted if there is a reason for them. One of the more common reasons is that the victim is confined to the hospital, unable to testify.

26. The figures for "number of cases" in the chart differ from those in Table 8 because the chart analyzes only cases disposed of without trial, whereas Table 8 includes all docket studies regardless of disposition.

About the problem discussed in the text, see generally Miller & Dawson, *Non-Use of the Preliminary Examination: A Study of Current Practices*, 1964 WIS. L. REV. 252.

the two. The results of comparing its dispositions-without-trial with those of the City of St. Louis, the only other county with a substantial number of preliminaries, were as follows:[26]

	Jackson County	City of St. Louis	All Counties
Preliminary held:			
No. of cases	51	54	134
Nol. Pros., dismissal, etc.	24 (47%)	4 (7%)	35 (26%)
Plea/G, prin. off.	14 (27%)	45 (83%)	75 (56%)
Plea/G, lesser off.	13 (25%)	5 (9%)	24 (18%)
Preliminary not held:			
No. of cases	16	77	221
Nol. Pros., dismissal, etc.	4 (25%)	8 (10%)	39 (18%)
Plea/G, prin. off.	6 (38%)	54 (70%)	140 (63%)
Plea/G, lesser off.	6 (38%)	15 (19%)	42 (19%)

The figures suggest that a Jackson County defendant's chances for a pretrial no-conviction disposition increased 22 percentage points (from 25 to 47) if he insisted upon a preliminary hearing. One possible explanation is that the Jackson County preliminary hearing was used in 1962 to screen the obviously inadequate case, a function performed in other counties by the prosecuting attorney at the time of the request for a warrant. This also could account for the very high proportion of preliminary hearings in that county. In the City of St. Louis, whether a preliminary hearing was held seemed to make no significant difference whether the case would be disposed of before trial without a conviction. It did seem to make a difference, however, whether the City defendant would be permitted to plead to a lesser offense:

	Jackson County	City of St. Louis
Preliminary held:		
Total pleas of guilty	27	50
Principal offense	14 (52%)	45 (90%)
Lesser offense	13 (48%)	5 (10%)
Preliminary not held:		
Total pleas of guilty	12	69
Principal offense	6 (50%)	54 (78%)
Lesser offense	6 (50%)	15 (22%)

These figures would indicate that a City defendant had a better chance of pleading to a lesser offense if he waived his preliminary. One possible explanation is that indigent defendants were so inept at managing their defenses at the preliminaries[27] that they later were unable to bargain success-

27. In 1962, lawyers for indigents, whether appointed or, in the City of St. Louis, the public defender, almost never appeared until the arraignment. See Section II E *infra*.

fully for lesser pleas. This hardly rises above speculation, however, since it is not accurate for Jackson County, where indigents were also unrepresented at preliminary hearings. Perhaps the only safe conclusion is that the survey failed to uncover data proving a link between preliminary hearings on the one hand, and either no-trial dispositions, or the degree of offense to which a defendant was permitted to plead, on the other. Explanations, if there are any, for the phenomena in the charts must be sought elsewhere, or in different data.

Preliminary hearings are an important, and sometimes the only, defense discovery procedure. This is true in spite of Missouri law that requires the names of all prosecution witnesses to be endorsed on the information, and gives the defendant the right to depose them.[28] First, failure to endorse a witness's name will not necessarily preclude his testimony, nor will the admission of such testimony necessarily be reversible error.[29] Surprise witnesses, in other words, are still possible. Second, the right to take depositions is a hollow one if the defendant is without funds. Third, there is evidence that some prosecuting attorneys interfere with the defendant's right by instructing the victim of the crime not to discuss it with the defendant's lawyer,[30] apparently on the theory that he is a "participant" in the trial rather than a "witness." Finally, the statutes do not give the defendant a right to view exhibits. At least some of these handicaps can be overcome by an adroit use of the preliminary hearing.

If, then, the indigent defendant either waives his preliminary, or is bound over to the circuit court on an indictment, discovery will just about be limited to what the prosecuting attorney chooses to reveal. All of Missouri's 115 prosecutors were asked,[31] "Do you disclose to defense counsel such things as confessions, statements of witnesses, reports of expert witnesses, exhibits, etc? Please specify those things you do disclose and those things you do not." Of the 72 responding to this question, 33 said they grant full disclosure,[32] one of them qualifying "except for statements of witnesses." Two more disclose "everything that could be discovered" under the statute. Twenty-two replied

28. Mo. Sup. Ct. R. Crim. P. 24.17, 25.10; Mo. Rev. Stat. §§ 545.070, .240 (1959).

29. See, *e.g.*, State v. Farris, 243 S.W.2d 983 (Mo. 1951).

30. See State v. Berstein, 372 S.W.2d 57 (Mo. 1963), *cert. denied*, 84 Sup. Ct. 970 (1964); State v. Solven, 371 S.W.2d 328 (Mo. 1963) (en banc); Brief for Appellant, pp. 2-3, State v. Aubuchon, No. 49,909, Mo. Sup. Ct., April Sess. 1964.

31. Details about the methods employed in obtaining information from the prosecuting attorneys are found in Section IV B *infra*.

32. Prosecutors who answered this question with a simple "yes" or "no" were counted as practicing full disclosure or no disclosure, respectively. More complete answers that overlapped the categories in the text were nevertheless counted only in the one category that appeared most appropriate.

TABLE 9

DISPOSITIONS WITHOUT TRIAL[a]

County	Nol. Pros.	Dismissed[b]	Comm. to Ment. Hosp.	P/G Prin. Off. Chgd.	P/G Lesser Off.	Total Disp. w/o Trial	Total Cases
Audrain	3	10	0	26	9	48	50
	(.06)	(.20)		(.52)	(.18)	(.96)	
City of	9	3	0	99	20	131	144
St. Louis	(.06)	(.02)		(.69)	(.14)	(.91)	
Howell	6	0	1	11	0	18	20
	(.30)		(.05)	(.55)		(.90)	
Jackson	29	1	0	21	20	71	80
	(.36)	(.01)		(.26)	(.25)	(.89)	
Jasper	8	0	1	26	2	37	50
	(.16)		(.02)	(.52)	(.04)	(.74)	
Miller	4	0	0	7	3	14	18
	(.22)			(.39)	(.17)	(.78)	
Putnam	1	0	0	8	1	10	12
	(.08)			(.67)	(.08)	(.83)	
St. Louis	6	0	0	24	15	45	48
	(.12)			(.50)	(.31)	(.94)	
	66	14	2	222	70	374	422
	(.16)	(.04)	(.005)	(.52)	(.17)	(.89)	

[a] Numbers in parentheses represent percentages.

[b] This category includes, in addition to dismissals, sustained motions to suppress evidence and to quash the indictment or information.

that how much they disclose depends upon the circumstances; the three "circumstances" most often mentioned were the nature of the case, the lawyer on the other side, and the likelihood of being able to induce a guilty plea (by revealing a strong case). Four disclose nothing but confessions; two more disclose nothing but confessions and an occasional exhibit. One prosecutor said that he advises the defense attorney when he has a confession, but does not reveal its contents. Eight admitted a practice of disclosing nothing at all, three of them adding that they think discovery procedures are adequate. If these answers reflect Missouri practice generally, less than half the time (35 of 72) will a defendant who cannot afford depositions be able to regain discovery opportunities lost without a preliminary hearing, while the non-indigent will have to pay to recover what were his free.

If the preliminary hearing results in a finding of probable cause, or is waived, or if a grand jury returns an indictment, the prosecutor next files

a formal charge against the defendant in the circuit court.[33] The formal charge may be by indictment or information. Usually it is the latter, and typically it is a verbatim copy of the warrant. The defendant is then brought before the circuit court and arraigned,[34] that is, he is told what felony he is accused of having committed and asked how he pleads. If he is going to plead guilty, he normally does so at this point.

Table 9 lists the various ways in which cases that did not reach trial were disposed of. Of the 422 docket studies, 374, or 89 percent, were terminated at some pre-trial stage, 292, or 69 percent, upon pleas of guilty. Eighty cases, or 20 percent, were nolle pros'ed or dismissed. Because a number of prosecutors in small counties had indicated that much of their time was devoted to bad check cases[35] (see Table 5), and some of them admitted the practice of dismissing criminal charges if restitution was made, I thought there might be a correspondence between counties having higher than average percentages of the two. The results of comparing them were inconclusive, however:

	Number of Cases	Forgery or Bad Check	Nol. Pros. or Dism.
Audrain	50	17 (34%)	13 (26%)
City of St. Louis	144	1 (0.7%)	12 (8%)
Howell	20	2 (10%)	6 (30%)
Jackson	80	7 (9%)	30 (37%)
Jasper	50	12 (24%)	8 (16%)
Miller	18	3 (17%)	4 (22%)
Putnam	12	2 (17%)	1 (8%)
St. Louis	48	6 (13%)	6 (13%)

A remarkable feature of Table 9 is the figure that 69 percent of the docket studies from the City of St. Louis were disposed of before trial by pleas of guilty *to the principal offense charged.*[36] One explanation for this unusually high percentage might be the care taken by the circuit attorney in making the decision to issue the warrant, a procedure described earlier. The explanation might be, in other words, that the warrant is only issued for a charge that can be made to stick, and hence there is no need to bargain it down

33. The magistrate is required to certify "all papers in connection with the hearing" to the circuit court within 10 days "unless the court shall sooner convene." Mo. Sup. Ct. R. Crim. P. 23.11.

34. Defendant "shall not be required to plead" to an indictment or information "until he shall have had a reasonable time in which to examine the same." Mo. Sup. Ct. R. Crim. P. 25.03.

35. And non-support cases. But since non-support is not a felony, such cases were not picked up in the docket studies and do not influence the discussion in the text.

36. According to the circuit attorney's records for 1962, 1,232 defendants pleaded guilty as charged out of 1,780 total cases. The percentage derived from these figures coincides exactly with that from the docket study sampling.

later. But that almost certainly is not the whole story. Another part of the criminal process in the City that must be considered is the so-called "pre-arraignment conference."

C. *The St. Louis Pre-Arraignment Conference*

A number of reasons, in addition to trying to explain the large number of pleas as charged, can be offered for describing the City pre-arraignment conference in some detail. One is that, so far as I have been able to determine, it is the only formally-structured bargaining process in the country. Another is that the vast majority of defendants who pass through it are indigent.

Arraignments are scheduled in the City only once a week, on Thursdays. That morning, defendants who have been either bound over by the Court of Criminal Correction or indicted by the grand jury since the previous Thursday, and who have not been released on bail, are transferred from the jail to a cell behind the courtroom. The circuit judge who will do the arraigning is kept waiting until all such prisoners have been through the pre-arraignment conference. Occasionally a defendant who has been released on bond will appear, sometimes with, sometimes without, an attorney, but this is rare. More often, but still infrequently, a defendant yet in custody will have retained an attorney who will appear with him.

The circuit attorney's office prepares for the weekly conference by making a typewritten list of the persons to be arraigned that week and by evaluating the cases against them. The list contains, besides the defendant's name, his case file number, the current charge against him, and the number, but not the nature, of all previous convictions. A typical entry, for example, might read

"887-L John Doe
3 P.C. & C.C.W."

which would mean that John Doe, who has three prior convictions, is charged with carrying a concealed weapon by an information numbered 887-L. Cases are evaluated by the circuit attorney, his first assistant and his chief trial assistant, or by as many of them as can get together, on Wednesday afternoon. They agree upon the minimum sentence to be recommended in exchange for a plea to the charge, and put a note of the sentence in the dossier. Any one of these three men, but no one else, has authority to recommend a lighter sentence in later bargaining.

The conferences are held in an unoccupied office down the corridor from the transfer cell. Two deputy sheriffs escort the defendants, one at a time,

between the office and the cell.[37] One of them announces the defendant's name as he enters. I was told that each defendant is informed that everything said during the conference is confidential and nothing will be used against him. If so, however, they must be told before entering the conference room, for none of the 29 defendants whose conferences I witnessed were told in my presence.

The defendant sits facing four men across a desk. One is a detective sergeant from the police department on permanent assignment to the circuit attorney's office. He has before him the prosecutor's complete files on all defendants who are to be arraigned that day. He does most of the talking for the prosecution. Beside him sits either the circuit attorney or one of the two assistants who have authority to reduce the recommended sentence. A public defender sits at one end of the desk. He has the typewritten list and a form on each defendant completed by his office during an interview conducted in the jail while the defendant was awaiting arraignment.[38] The chief probation and parole officer for the circuit court sits at the other end of the desk.

The three "conferences" summarized were selected as representative of the ways in which different kinds of problems were handled. They are accurate summaries of actual incidents, except that I warrant the quotations to be only substantially correct.

Defendant 1 was charged in separate informations with three armed robberies; he had three prior convictions. The public defender introduced himself and identified the others sitting at the desk. Upon being told by defendant that he could not afford counsel, the public defender explained the purpose of the arraignment and told defendant that a lawyer would be appointed for him by the court unless he decided to plead guilty now, in which case he, the defender, would represent him. The defender asked, "How did you get into trouble?" Defendant replied that his wife had become ill and required three operations, after the last of which she had died. He said he had committed the robberies while his wife was alive to pay off medical bills. He said two policemen, whom he named, had promised him a light sentence if he confessed. The circuit attorney asked what the police had promised, and defendant answered, three to five years. "That's preposterous! I never talked to the police about you. Anyway, you've been around —how could you believe I would recommend three to five when you got [he glanced into defendant's file] fifteen on your last fall?" Defendant

37. They also talk and laugh among themselves, drum their fingers on the desk, tap their feet on the floor, and otherwise create disturbances while the conferences are taking place.

38. Detailed information about these interview forms is contained in Section II F *infra*.

shrugged and remained silent. The defender asked what recommendation would be made for a plea of guilty. The circuit attorney's answer was, "A reasonable recommendation would be 12 years. The regular recommendation for cases of this kind—three priors for [another glance at the file] armed robbery—is 15 years." The defender told the prisoner, "Based upon my experience, you would be very lucky to get off with 10 years if you are convicted." Then to the circuit attorney, "Would you recommend 10 years?" "No—12 years." The probation officer stated that the information about the deceased wife's operations would appear in a pre-sentence report, if it were true, and that the judge who would be taking pleas always requested such reports. He asked defendant how long it had been since his last conviction. Defendant answered that he had been released from the penitentiary six years earlier and had been clean until the current series of robberies. The defender said, "I think the best thing for you to do is plead not guilty this morning. I will ask the court to assign you a lawyer. Then he can check into your story and if it's true maybe work something out." Elapsed time: 18 minutes.

Defendant 2 was accused of stealing over $50 by stripping an automobile; he had one prior conviction. When his name was announced, the police sergeant exclaimed, "My God, are you here again? What did you do this time?" "I didn't do nothing. You cops just got it in for me. All I was doing was standing on the street." Sergeant: "Sure you were. How many times now have you been accidentally standing on the street next to a car that has just been stripped and been the only one arrested—[referring to file] eight? No, nine." "You never convicted me on one of those, either." "Well, we've got you this time. How much will you take?" "I might take six months in the workhouse [*i.e.*, plead guilty to a misdemeanor]." The sergeant laughed, threw defendant's file onto the completed stack, and said, "Go away." Elapsed time: two minutes.

Defendant 3, charged with stealing over $50, had no prior convictions.[39] The public defender introduced himself and the others, asked about his ability to hire a lawyer, explained the arraignment, etc. While this was happening, the circuit attorney was called out of the room. Defendant said that he had worked for the man who complained against him. His employer contracted to do janitor work in large office buildings and defendant had been his foreman in St. Louis. The business was headquartered in Springfield, Missouri. The employer required defendant to drive to Springfield, a

39. Because Defendant 3 was a first offender, he would be represented by the public defender throughout, and would not have a lawyer appointed by the court, as would Defendants 1 and 2. See Section II F *infra* for a description of the first-offender limitation on the St. Louis public defender.

distance of more than 200 miles, every Friday to pick up the paychecks for his crew. The parole officer asked, "Did he pay you extra for this?" "No sir." "Expenses?" "No sir, nothing." On one Friday, defendant called his employer, told him he had no money to buy gasoline for the trip, and asked that the checks be mailed. The employer refused and ordered defendant to drive out and pick up the checks. When defendant insisted he had no money, the employer told him to borrow some. Defendant pawned one of the commercial floor buffers belonging to his employer to obtain the money. He and his employer got into an argument when he arrived at Springfield, and defendant was fired. He said he forgot about the buffer until some months later when he discovered the pawn ticket in his wallet. He took the ticket to the foreman who had replaced him, explained the circumstances, and asked to be notified what it cost to redeem the buffer so that he could make restitution. Apparently, however, the buffer had already been sold. When the employer learned this, he filed charges against defendant. Defender: "What are you recommending in this case?" Sergeant: "Two years." Defender: "That's unreasonable. You've never been in trouble before, have you son?" Defendant: "They picked me up in Springfield once for a bad check, but that was a mistake. I paid the money, and nothing happened." Defender: "Two years is too much." Sergeant: "I agree with you, but you know I can't reduce it. The circuit attorney isn't here." Defender: "Have you got a 'Hoover sheet'[40] on him?" Sergeant: "No, it hasn't come yet." Defender: "Suppose we do this. Suppose we enter a guilty plea this morning to the felony. Then if his 'Hoover sheet' shows he is clean, we can come back later and get it reduced to a misdemeanor." Sergeant: "Nothing doing. I'm not about to be withdrawing pleas to felonies and substituting pleas to misdemeanors. Let's pass the case till next week. Have him plead not guilty this morning and we can talk about it again next week." The circuit attorney returned at this point, and the police sergeant recited the story defendant had told earlier, adding, "I think our recommendation is too high." The circuit attorney reduced the charge to a misdemeanor and agreed to recommend a six-months sentence. Parole officer: "You will make application for probation and my office will make the report on you. If you have been telling the truth, I think you have a good chance of being put on probation." Defender: "You understand, of course, that we can't promise you anything. It's up to the judge to say what the sentence will be and whether you will be put on probation. But the prosecutor is going to

40. A "Hoover sheet" is a record obtainable by police departments from the FBI listing the person's arrests and convictions. Assuming that all departments accurately report these matters to the FBI, the record contains a complete history of the person's prior contacts with the criminal law no matter where in the nation they occurred.

recommend six months, and the parole officer is going to recommend probation. I think you ought to take it." Defendant: "O.K., if you say so." Defender: "All right. When we get into court, the prosecutor will say the charge has been reduced and I will say that I represent you and that you want to plead guilty. The judge will ask you if you have talked this over with me, and you tell him yes. Then you will be sent back to jail—how long will it take to get that pre-sentence investigation?" Parole officer: "A couple of weeks or less. Not long, if he has been telling the truth." Defender: "You will be sent back to jail until the judge studies that report, and then you will be sentenced, and the parole officer says you have a good chance for probation. You understand all this?" Defendant: "Yes sir." Elapsed time: 45 minutes.

No figures are available to show what proportion of City defendants who plead guilty do so immediately upon their arraignment, *i.e.,* following, or as a result of, the pre-arraignment conference. In many, if not most, instances, bargaining for pleas follows the typical pattern of the individual defense lawyer negotiating with the circuit attorney. This almost always occurs, for example, when the defendant has been released on bond before his arraignment and therefore misses the conference. It also occurs for many defendants who are put through the conference procedure. For one reason or another they plead not guilty at their arraignments, lawyers are appointed for them, and the lawyers thereafter bargain in the usual manner. It is therefore impossible to prove, with the present lack of information, what this unique procedure contributes to the high percentage of pleas-as-charged in the City, or even, indeed, that it makes a contribution. That some account of it must be taken seems indisputable nevertheless.

D. *Arraignment and Thereafter*

Although a defendant who intends to plead guilty often does so at his arraignment, the judge is not required to accept the plea:

> The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge.[41]

Judges in the eight survey counties seemed to adhere to this rule scrupulously. Their questioning of defendants was more detailed than one might have expected. Some judges recited the maximum penalty permissible and asked defendant whether he was aware that he could be sentenced to it. One judge who followed this practice stated that he considered the maximum penalty a vital part of "the nature of the charge."

41. Mo. Sup. Ct. R. Crim. P. 25.04.

Heretofore, the practice in Missouri has been to appoint counsel for indigent defendants at the arraignment. Counsel is not often waived in Missouri, partly because of the exacting supreme court rule on the subject:

> If any person charged with the commission of a felony appears upon arraignment without counsel, it shall be the duty of the court to advise him of his right to counsel, and of the willingness of the court to appoint counsel to represent him if he is unable to employ counsel. If the defendant so requests, and if it appears that the defendant is unable to employ counsel, it shall be the duty of the court to appoint counsel to represent him. If, after being informed as to his rights, the defendant indicates his desire to proceed without the benefit of counsel, *and the court finds that he has intelligently waived his right to have counsel,* the court shall have no duty to appoint counsel *unless it appears to the court that, because of the gravity of the offense charged and other circumstances affecting the defendant, the failure to appoint counsel may result in injustice to the defendant.*[42]

Judges in the survey counties were particularly conscious of the italicized clauses, and repeatedly called attention to the words "intelligently waived" and "may result in injustice." As a consequence, reporters were told, waiver is not permitted, even on pleas of guilty, in seven of the eight counties surveyed. Results of the mail questionnaires were not as dramatic. Judges and prosecutors both were asked, "Of those felony defendants who are indigent, what percentage waive appointment of a lawyer to represent them?" Of the 68 prosecutors who responded, 13 said that waiver is not permitted, and another 13 answered "zero," which may or may not indicate a policy against waiver. Six of the 23 circuit judges replying by mail do not permit waivers.[43]

The figures in Table 10 do not entirely support what the reporters were told. They indicate that defendants were unrepresented in 22 of the 422 cases studied. Thirteen of these cases are from Audrain County, where waiver is permitted, and there is no reason to challenge that figure. The four cases from Putnam County are doubtful, however. The files in three of these cases simply failed to reflect the appearance of an attorney. It would seem questionable, given the haphazard record-keeping found almost everywhere, to conclude that a defendant had been unrepresented simply because

42. Mo. Sup. Ct. R. Crim. P. 29.01. (Emphasis added.) A more extended discussion of waivers will be found in Section II D *infra.*

43. Of course the question was asked only about indigent defendants, but there is no reason to suppose a different policy would be applied to non-indigents.

Two of the judges interviewed mentioned instances in which headstrong defendants absolutely had refused to accept attorneys and insisted upon trying their own cases. Both judges appointed lawyers to sit at the counsel table with the defendants to advise them upon request. Neither asked for help, and both were convicted.

TABLE 10

DID DEFENDANT HAVE COUNSEL?[a]

	Yes					No				
County	Ret.	Ass.	Publ. Def.	No Det.[b]	Total	Waived	No Det.[b]	Total	No Data	Total Cases
Audrain	17	6	—	0	23	4	9	13	14	50
	(.34)	(.12)			(.46)	(.08)	(.18)	(.26)	(.28)	
City of	63	18	54	3	138	0	0	0	6	144
St. Louis	(.44)	(.13)	(.37)	(.02)	(.96)				(.04)	
Howell	3	3	—	0	6	0	1	1	13	20
	(.15)	(.15)			(.30)		(.05)	(.05)	(.65)	
Jackson	39	33	—	7	79	0	0	0	1	80
	(.49)	(.41)		(.09)	(.99)				(.01)	
Jasper	33	11	—	1	45	0	2	2	3	50
	(.66)	(.22)		(.02)	(.90)		(.04)	(.04)	(.06)	
Miller	11	3	—	0	14	0	2	2	2	18
	(.61)	(.17)			(.78)		(.11)	(.11)	(.11)	
Putnam	6	2	—	0	8	0	4	4	0	12
	(.50)	(.17)			(.67)		(.33)	(.33)		
St. Louis	25	14	—	1	40	0	0	0	8	48
	(.52)	(.29)		(.02)	(.83)				(.17)	
	197	90	54	12	353	4	18	22	47	422
	(.47)	(.21)	(.13)	(.02)	(.84)	(.01)	(.04)	(.05)	(.11)	(1.00)

[a] Numbers in parentheses represent percentages.
[b] No details about circumstances available.

no notice of appearance had been filed. But I suspect the same conclusion was drawn from the same evidence in other counties. Although there is no way to prove it, I think, in other words, that some of the cases listed in the "No Details" column on the right side of Table 10 should properly appear in the "No Data" column.

The judge in Audrain County followed a set routine when a defendant wished to waive counsel. He explained the significance of the arraignment, made sure the defendant knew the charge and the maximum penalty, explained that counsel can be helpful, told him that an attorney would be appointed without cost, and urged him to accept the appointment.

Nothing need be said about Missouri trials since they do not differ materially from those conducted anywhere else. Table 11 lists the results of the 34 cases that went to trial, and shows that within each of the two categories, jury and non-jury, the number of acquittals approximately equalled the number of convictions.

TABLE 11

DISPOSITIONS WITH TRIAL

	Non-Jury			Jury					
				P/G	Found Guilty				Total
County	G[a]	N/G	Total	Prin. Off.	Prin. Off.	Lesser Off.	Found N/G[b]	Total	Dispo. with Trial
Audrain	0	1	1	0	0	0	1	1	2
City of St. Louis	1	0	1	2[c]	4	1	4	11	12
Howell	0	0	0	0	0	0	1	1	1
Jackson	0	1	1	0	3	0	5	8	9
Jasper	2	2	4	0	0	0	3	3	7
Miller	0	0	0	0	0	0	0	0	0
Putnam	0	0	0	0	0	0	0	0	0
St. Louis	0	0	0	0	3	0	0	3	3
	3	4	7	2	10	1	14	27	34

[a] Guilty of principal offense charged in all cases.

[b] Includes one verdict of not guilty by reason of insanity (City of St. Louis) and one directed verdict of acquittal (Jasper).

[c] Pleaded guilty after trials commenced.

Table 12 analyzes the 422 docket studies by the method of disposal and by the end result. The percentage of cases resulting in convictions varied from 55 percent (Howell, Jackson and Miller counties) to 88 percent (City of St. Louis). The interesting thing is that these variations were caused by variations in the cases disposed of without trial; there were no significant differences between counties in conviction percentages of cases disposed of with trials. One could conclude, perhaps, that the significant decisions in the criminal process as a whole were made in the largely invisible stages preceding the trials.

Two kinds of probation exist in Missouri, "bench parole"[44] and "probation."[45] The difference between the two, as commonly used,[46] is that a

44. Authority for both bench paroles and probation is now MO. REV. STAT. § 549.071 (Supp. 1963). Formerly, authority for bench paroles was MO. REV. STAT. § 549.070 (1959).

45. MO. REV. STAT. § 549.071 (Supp. 1963).

46. Actually, the superseded MO. REV. STAT. § 549.190 (1959) would seem to have authorized both procedures. The usage in the text was that given reporters by judges, prosecutors and parole officers in the survey counties. The usage is consistent with language in the new enactments: "The circuit and criminal courts of this state . . . have power . . . to place on probation or to parole . . . ." MO. REV. STAT. § 549.061 (Supp. 1963). "[T]he court . . . may in its discretion . . . suspend the imposition of sentence or may pronounce sentence and suspend the execution thereof . . . ." MO. REV. STAT. § 549.071 (Supp. 1963).

TABLE 12

DISPOSITIONS OF CASES[a]

County	W/O Trial		Non-Jury Trial		Jury Trial		Total		Not Disp. of	Total
	G	N/G[b]	G	N/G	G	N/G	G	N/G[b]		
Audrain	35	13	0	1	0	1	35	15	0	50
	(.70)	(.26)		(.05)		(.05)	(.70)	(.30)		
City of	119	12	1	0	7	4	127	16	1	144
St. Louis	(.83)	(.08)	(.01)		(.05)	(.03)	(.88)	(.11)	(.01)	
Howell	11	7	0	0	0	1	11	8	1	20
	(.55)	(.35)				(.05)	(.55)	(.40)	(.05)	
Jackson	41	30	0	1	3	5	44	36	0	80
	(.51)	(.37)		(.01)	(.04)	(.06)	(.55)	(.45)		
Jasper	28	9	2	2	0	3	30	14	6	50
	(.56)	(.18)	(.04)	(.04)		(.06)	(.60)	(.28)	(.12)	
Miller	10	4	0	0	0	0	10	4	4	18
	(.55)	(.22)					(.55)	(.22)	(.22)	
Putnam	9	1	0	0	0	0	9	1	2	12
	(.75)	(.08)					(.75)	(.08)	(.17)	
St. Louis	39	6	0	0	3	0	42	6	0	48
	(.81)	(.13)			(.06)		(.87)	(.13)		
	292	82	3	4	13	14	308	100	14	422
	(.69)	(.20)	(.01)	(.01)	(.03)	(.03)	(.73)	(.24)	(.03)	(1.00)

[a] Numbers in parentheses represent percentages.

[b] This column includes all cases in which no conviction resulted, such as nolle prosequis, dismissals, etc.

sentence has been imposed, but its execution has been suspended, in a bench parole, while the imposition of the sentence has been suspended in a probation; the defendant released on a bench parole will have been sentenced already, but the defendant released on probation will not have been sentenced. Both are on probation, as that term is normally understood, since both will have been placed under the supervision of the appropriate probation and parole board. The suspended sentence without supervision is virtually non-existent in Missouri.[47] So far as the reporters could determine, it is used almost exclusively in two kinds of cases: (1) where a hold order against the defendant is outstanding from another state or another county within Missouri; and (2) where the defendant is young, has no past record, and has promised to enlist in the armed forces.

Bench paroles were more often used than probations, especially in circuits covering more than one county, because their revocation was easier.

47. MO. REV. STAT. § 549.071 (Supp. 1963) would seem to authorize it, however.

All the judge needed to do to send the bench parolee to prison was notify the circuit clerk in the county where he was tried that the parole had been revoked, and order that the sentence be executed.[48] In the case of a probationer, he had to journey to that county, convene court, and impose sentence. However, probations were often granted to young defendants. Influencing the judge to prefer this method over the bench parole was the fact that in Missouri a person is not deemed to have been convicted of a crime if a sentence has never been imposed.[49]

II. The Indigent Defendant

A. *Scope of the Problem*

When we speak of "indigent persons accused of crime in Missouri," how many people are we talking about? What is the magnitude of the problem posed by the recent United States Supreme Court decisions concerning indigents? These fundamental questions cannot be answered with anything better than an educated guess. Before the nationwide survey, about the only data available were "estimates" supplied by officials engaged in administering the criminal law. But an analysis of the data obtained in the eight survey counties argues that such estimates may not be accurate. Every judge and prosecutor interviewed during the survey was asked to estimate the number of indigent felony defendants processed by his court annually.

48. This was the procedure before the probation and parole statutes were revised in late 1963. See Mo. Rev. Stat. §§ 549.070, 549.090 (1959). Whether it is permissible under the new statutes is questionable. Mo. Rev. Stat. § 549.101 (Supp. 1963) authorizes the court to order the apprehension of the defendant "by the issuance of a warrant for his arrest *and his appearance in court forthwith.*" (Emphasis added.) The statute goes on to provide, however, that "the court may in its discretion *with or without hearing* order the probation or parole revoked . . . ." (Emphasis added.) It is not clear what purpose the "appearance in court forthwith" is supposed to serve if (a) there is not to be a hearing, and (b) the defendant has already been sentenced (bench parole). Nothing in the statutes limits the situations in which § 549.101 may be used; apparently, therefore, probation may be revoked without a hearing as long as the judge purports to act under it.

Mo. Rev. Stat § 549.254 (Supp. 1963) requires a hearing, but appears to be applicable only to probationers and bench parolees arrested "for violation of the conditions of probation, or a notice to appear to answer a charge of violation." Suppose the probation officer reports to the judge that defendant has violated a condition of probation, and recommends revocation; what is to prevent the judge from proceeding under § 549.101, without a hearing, instead of § 549.254? Apparently nothing, so long as the judge does not cite the reason for revocation. It would seem, therefore, unless § 549.101 is construed to make the defendant's "appearance in court forthwith" mandatory even when there is going to be no hearing and he has already been sentenced, that the practice described in the text could be continued.

49. Meyer v. Missouri Real Estate Comm'n, 183 S.W.2d 342 (Mo. Ct. App. 1944).

The estimates of officials in each county were averaged together and compared with results of the docket studies.[50] The estimates were:[51]

49 percent too high in County 1;
19 percent too high in County 2;
12 percent too high in County 3;
on the nose in County 4;
2 percent too low in County 5;
5 percent too low in County 6;
14 percent too low in County 7; and
28 percent too low in County 8.

Part of the explanation for this lies in the fact that percentages of indigency fluctuate from year to year, depending upon national and local economic conditions, and that the persons interviewed were asked the question in 1963, whereas the docket studies were taken from 1962 files. Unfortunately, "estimates" are all we have to work with outside the survey counties, and I have used them to try to guess the annual number of indigent felony defendants in Missouri. All the ways error could be introduced into this calculation have been put into footnotes, however, so that the reader can form a conclusion about how educated the guess is.

Mail questionnaires asked judges and prosecutors throughout the state to estimate the annual percentage of felony defendants in their circuit or county who are indigent. These were the results:

Estimated Percent Indigent:	Judges (Circuits)	Prosecutors (Counties)
0 to 24	1	11
25 to 49	6	7
50 to 74	4	24
75 to 100	12	25
No answer	12	40
	35	107

Seventy percent of the judges (16 of 23), and 73 percent of the prosecutors (49 of 67), who answered thought their indigency rates were 50 percent or higher.

The estimate given by each judge was multiplied by the number of cases

50. For purposes of determining the percentage of indigents shown, docket studies containing no data about the subject were ignored. This is an obvious source of potential error, particularly in Howell and Putnam counties, where data were available in only 6 of 20, and 2 of 12, cases, respectively.

51. Counties are listed in a different order here than elsewhere to prevent embarrassment.

filed in his circuit, as reported by the Judicial Conference.[52] The estimate of each prosecutor was multiplied by the number of cases filed in his county. When the sum of the prosecutors' estimates in any circuit differed from the estimate of the judge, the average of all of them was taken. In the survey counties, the Judicial Conference figure was multiplied by the percentage derived from the docket studies. Two figures were now available for each county and circuit from which information had been obtained, the number of cases filed, and the estimated number of indigent defendants. Totaling the figures in each category separately, the sums were 7,737 cases filed and 3,857 estimated indigent, a percentage of 49.8. This percentage was multiplied by the Judicial Conference figure for cases filed in counties from which no data had been obtained. Adding these to the figures previously derived, the sums were 4,544 estimated indigent out of 9,167 cases.

In spite of the obvious shortcomings of the method, it does not seem unreasonable to conclude that Missouri has something in excess of 4,000 indigent felony defendants annually, a problem of sufficient scope to merit more attention than it has received in the past.

B. *Standards of Indigency*

The St. Louis County public defender begins to represent an indigent defendant at his first appearance before a magistrate; in effect, therefore, he decides whether a person is indigent when he interviews him shortly after his arrest.[53] In the other survey counties, the determination was made by the circuit judge at the arraignment;[54] he questioned the defendant in open court until satisfied of the latter's inability to hire counsel.[55] This pattern

52. MISSOURI JUDICIAL CONFERENCE, CONSOLIDATED REPORT ON CRIMINAL CASES, June 16, 1962-June 15, 1963. Potential errors introduced by using these figures:

(a) What the heading "Filed During Period" means varies from circuit clerk to circuit clerk. Some clerks count each information as a separate case "filed during period," introducing a potential error each time more than one information is filed against one person and each time more than one person is named in one information; these potential errors are compensatory to some extent. Other clerks also count each information against the same person as a separate case, but they count each person named in one indictment as a separate case, thereby failing to introduce the compensation.

Some clerks count cases reversed and remanded by the supreme court under this heading; others do not.

(b) Some misdemeanors inevitably will be included. Misdemeanor cases get into the circuit courts in two ways, by appeal and on change of venue. Appeals from the magistrate courts go to the circuit courts, MO. REV. STAT. § 478.070 (1959), where they are tried de novo, § 512.270. In counties with only one magistrate, a change of venue goes to the circuit court in that county. § 517.520; MO. SUP. CT. R. CRIM. P. 22.05.

53. The procedure is described in Section II F *infra*.

54. See text accompanying note 42 *supra*.

55. Shortly before the survey, the judge in Audrain County began placing defendants

seems to be established throughout Missouri, for all 24 judges responding to the mail questionnaire checked the answer "I ask the defendant a series of questions in open court" as being most nearly descriptive of his practice.[56]

A list of eight factors relevant to deciding whether a defendant is eligible to have counsel appointed was given to all of the judges contacted, and they were asked to check all of them they took into account in making their decisions. The factors, with the number of judges checking each one, were:

(1) Salary or wages of accused: 33
(2) Ownership of automobile and other personal property: 29.
(3) Ownership of real property: 32.
(4) Stocks, bonds, and bank accounts: 30.
(5) Pensions, social security, and unemployment compensation: 24.
(6) Whether defendant is out on bail: 27.
(7) Financial resources of parents or spouse: 18, a number qualifying "spouse" with phrases such as "if they are living together."
(8) Financial resources of other relatives: 11.

Disregarding two judges who did not answer, factor 1 was a unanimous choice, and 3 was nearly so.

The judges then were asked to check all applicable answers to the question, "Does any one of the following factors, standing alone, preclude a finding of indigency?" Results were:

(1) Defendant is out on bail: 12.
(2) Defendant owns an automobile: 15, many writing in qualifications such as "if he has sufficient equity," or "if it's not a piece of junk."
(3) Financial resources of parents are adequate: 3.
(4) Financial resources of spouse are adequate: 6, all of whom qualified the answer with "if they are living together."
(5) Financial resources of other relatives are adequate: 1.
(6) Other: none.

No one factor precludes such a finding:[57] 10.

Among the 12 judges for whom release on bail precluded a finding of indigency were those interviewed in four of the survey counties, the City of St.

under oath when questioning them about indigency. Other judges are known to be considering the use of oaths such as that of the voluntary bankrupt.

56. The 24 answers came from 23 circuits. See Section IV A *infra* for additional details.

57. This is one of several poorly drafted questions that appeared on forms used in the survey. Its defect is that the alternatives given do not cover the entire range of possibilities. See the opening paragraph of Section IV *infra*. This alternative did not appear on the form; I counted within it all judges who checked nothing (5) as well as those who wrote in "no" or "none" (5).

TABLE 13

RELATIONSHIP BETWEEN INDIGENCY AND BAIL

County	Indigent		Non-Indigent		No Data about Indigency		Total	
	No. Cases	No. Bail	No. Cases	No. Bail	No. Cases	No. Bail	No. Cases	No. Bail
Audrain	19	1	18	13	13	5	50	19
City of St. Louis	72	5[a]	63	47	9	0	144	52
Howell	3	0	3	1	14	2	20	3
Jackson	35	3	43	20	2	0	80	23
Jasper	11	1	31	21	8	1	50	23
Miller	4	0	10	5	4	3	18	8
Putnam	1	1	1	0	10	6	12	7
St. Louis	14	1	26	18	8	0	48	19
	159	12	195	125	68	17	422	154
	(.075)		(.64)		(.25)		(.37)	

[a] Includes three defendants whose bonds were cancelled after they had been released.

Louis, and Jackson, Jasper and St. Louis counties. Unlike those responding by mail, these judges had an opportunity to qualify their answers. Most of them distinguished between cash (or other negotiable security) bonds issued by professional bondsmen, which precluded indigency, and property bonds posted by relatives or other non-professionals, which did not.

A defendant who has been released on a professional bond in St. Louis or St. Louis County, and who shows up at his arraignment without a lawyer, is likely to have the bond revoked and be remanded to jail. Sometimes, instead of revoking outright, the judge will set a date, usually well in advance of the scheduled trial, by which time some lawyer must file a formal notice of appearance for the defendant or the bond will be revoked. Requiring a person to choose between his constitutional right to bail and his constitutional right to a lawyer raises some difficult questions.

That there is a high correlation between release on bond and indigency is demonstrated in Table 13. Only 7½ percent of the identifiable indigents were released, as opposed to 64 percent of the identifiable non-indigents. Cases in which it could not be determined whether identifiable indigents had been released were so few (5 cases, or less than 3 percent) as to be insignificant.[58] There are, of course, at least two reasons besides lack of funds

58. It could not be determined whether defendant had been released in 13 (7 percent) of the 195 studies of identifiable non-indigents, and in 28 (41 percent) of the 68 studies in which no data about indigency were available. If the 46 studies containing no data about release are ignored, the overall rate is 41 percent (154 releases in 376 studies) instead of the 37 percent shown in Table 13.

why an indigent would not be set free: the crime is not bailable, and he has decided to plead guilty at the first opportunity. Both of these are applicable to the non-indigent too, however, and thus do not explain a difference in release rates.

All prosecuting attorneys were asked, "How do you feel about the present system for determining eligibility for free counsel?

"a. Too lenient

"b. Too strict

"c. About right."

No one thought it too strict. Of the 64 who answered by mail, 27 thought it too lenient and 37 about right. Prosecutors in the survey counties split evenly, 4 on each side. Overall, then, 41 of the 72 responding prosecutors, a majority of 57 percent, thought the system satisfactory. But 43 percent is not an insignificant proportion, and that so many should think the determination of indigency too lenient suggests the need for further study.[59] It became apparent during the survey that two judges who agreed completely on what factors ought to be considered, and what factors ought to preclude eligibility, for free counsel might nevertheless disagree in specific cases. The large measure of consensus in the generalities set out earlier should not be misinterpreted to mean that the determination of indigency is uniform throughout the state, or between different judges in the same circuit.

The judges were asked, "If you find defendant is ineligible to have counsel provided for him as an indigent, what happens then?" The alternatives given, with the number of judges checking each (they were told to check everything applicable), were:

(1) I tell the defendant that he is not eligible to have counsel provided for him: 14.

(2) I tell the defendant he should retain his own lawyer if he wishes to have a lawyer: 28.

(3) I ask the defendant if he knows a lawyer, and if he does not, I appoint a lawyer for him who makes his own arrangements for a fee: 1.

(4) I ask the defendant if he knows a lawyer, and if he does not, I refer him to the local bar association or lawyer referral service for assistance: 2.

(5) Other: 2.

59. Mail questionnaires sent to defense attorneys did not inquire about this specific problem. Nevertheless, asked for their opinions about the present system, three lawyers wrote in recommendations for stricter determinations of indigency.

Suspicions that determinations were too lenient prompted the move towards the use of oaths described in note 55 *supra*.

One of the judges who checked "other" gave the defendant a list of attorneys "who are available for criminal trials"; this judge had also marked alternatives 1 and 2. The other judge, who had marked none of the first four alternatives, said that he appointed an attorney if the defendant did not hire one whether or not he was indigent.

C. *Appointed Counsel*

In the rural counties surveyed, the system of selecting appointed counsel reflected the judge's effort to distribute appointments evenly among the lawyers. Since they knew all of the lawyers practicing in their circuits, they usually relied upon their memories to do this. Sometimes there was no choice: Putnam County had only one lawyer besides the prosecuting attorney; Miller County had only three. Although none appeared in the survey sample, there are counties in Missouri where the prosecutor is the only lawyer; in such cases, the reporters were told, the judges attempted to spread appointments among lawyers practicing in nearby counties that are part of their circuits. The judge in Audrain County kept a detailed record of appointments, containing such things as the seriousness of the crime and the disposition of the case (whether by plea or trial, etc.) to which he invariably referred when making new appointments.

In the urban and suburban survey counties, where it was a practical impossibility for the judges to know all of the lawyers, the reporters failed to discover anything that could be glorified by the name "system." One judge took note of bar association officers who made speeches about the obligations of lawyers and appointed them. Another kept a file of calling cards given him by recently-admitted members of the bar. Another selected lawyers in alphabetical order as they appeared in the yellow pages of the telephone directory. In January, 1963, the assignment division in the City of St. Louis began keeping a record of appointments in an effort to distribute them evenly,[60] but its usefulness as a tool of selection, as opposed to disqualification, is doubtful.

It is with these grains of salt that the judges' answers to the question, "What system do you use for providing lawyers to appoint in ordinary felony cases?" must be taken. Nine alternative answers were given, but the responses from Missouri were limited to four of them.[61] They were:

60. At the time, the City public defender represented only first offenders. See Section II F *infra*. Attorneys for other indigents were appointed by the court.

61. Except for the last alternative, "Other." The three answers in this category are set out in the preceding paragraph of the text.

(1) Bar association list of names: 2.
(2) Any attorney present in court: 3.
(3) Judge's own list of names: 10.
(4) Roster of all attorneys admitted to practice, subject to exceptions for age, infirmity, state agency employment, etc.: 19.

Of the 57 defense attorneys who returned questionnaires, 28, or nearly half, checked the answer "Improve the system which the judge uses in selecting lawyers to be appointed" when asked "What changes, if any, would you recommend?"[62] The two gripes voiced most often by these 28 were that appointments fell upon too few lawyers, and recently-admitted and inexperienced attorneys were appointed too frequently.

A separate question asked, "Do you have a special system for very serious cases, such as crimes punishable by death or a long prison sentence?" No answers were provided to this question; the judges had to write their own. Seven replied yes, 11 no. Ten said they appointed the best lawyer available; seven said they appointed two lawyers in such cases.

Responses to the question, "Do you have a problem in getting lawyers to serve as assigned counsel?" broke down as follows:

	Yes	No	No Answer
Judges interviewed	1	10	0
Judges replying by mail	2	20	2

The ratio of no to yes answers was the same in both categories, 10 to 1. However, when asked, "What percentage ask to be excused?" the answers were:

	None	1% to 9%
Judges interviewed	1	10
Judges replying by mail	12	12

Replies to the question "What is your policy with lawyers who ask to be excused?" fell into two principal groups. The substance of replies in the larger group was, "I ask why, and if he has a legitimate reason, I excuse him." The thrust of answers in the other group was, "I excuse him because he won't do a good job if I force the appointment on him."

One might speculate that the results of this series of answers might have been less cheerful had more judges been interviewed and fewer sent questionnaires. Nevertheless, they were surprisingly optimistic in view of the fact that appointed lawyers in Missouri are not even repaid the expenses incurred in defending their indigent clients. Defense attorneys were asked,

62. See Section IV C *infra* for limitations on the statistical validity of defense attorney questionnaires.

concerning the last case in which they had been appointed in 1962, "How much would you have charged a client who retained you for your services in this case?"[63] The figures written in by the 48 lawyers responding fell into this arrangement:

less than $250	5
$250 to $499	9
$500 to $999	16
$1,000 or more	18

The largest figure was $25,000, the smallest $100. The total of all figures given was $68,000, an average of $1,412.50 per lawyer responding.

In one survey county, the judge made payment of the appointed lawyer a condition of probation. In another, the judge informed prospective probationers that he thinks payment of the lawyer is a clear indication of a willingness to accept responsibility; he also required probationers to report to him periodically and never failed to ask whether they had paid their attorneys. In a third, the judge urged defendants to pay their lawyers when he put them on probation. It was permissible for the appointed attorney to obtain whatever fee he could from his "indigent" client in all of the survey counties except Putnam.

D. *Waiver*

Indigents were not permitted to waive appointment of attorneys in seven of the eight survey counties.[64] Six judges answering mail questionnaires also indicated that they do not permit waiver in their circuits. According to figures released by the Judicial Conference,[65] 58 percent of the felonies committed in the state during fiscal 1963 occurred in these areas. Roughly 40 percent of Missouri's indigent defendants, therefore, can waive their right to an attorney, and the problem is to determine how many of them actually do so.

The estimates of the 18 judges responding by mail who permit waiver were distributed as follows:

24 percent or less	5
25 to 49 percent	4
50 to 74 percent	4
75 percent or more	4[66]

63. Unfortunately, the questionnaire did not ask how that case had been disposed of (by plea, trial, etc.), nor did it ask what services the lawyer had rendered. See the opening paragraph of Section IV *infra.*

64. See text accompanying note 43 *supra.*

65. MISSOURI JUDICIAL CONFERENCE, CONSOLIDATED REPORT ON CRIMINAL CASES, June 16, 1962-June 15, 1963. These calculations are subject to the same infirmities mentioned in note 52 *supra.*

66. Two judges from the same circuit answered; their estimates (which differed by 15 percent) were averaged and counted only once.

Their average estimate was 38.6 percent. Among the prosecuting attorneys, 13 said that waiver was not permitted, and another 13 answered "zero" when asked to estimate the number of indigents who waived appointment. The remaining 42 questionnaires divided this way:

24 percent or less	16
25 to 49 percent	6
50 to 74 percent	11
75 percent or more	6
No answer	3

Although the prosecutors were spread among the categories less evenly, their average estimate, 33.9 percent, was within 5 points of the judges'.

Pyramiding these guesses on top of the guess that Missouri has approximately 4,000 indigent felony defendants a year, I "estimate" that somewhere in the neighborhood of 600 felony defendants annually waive their right to appointed counsel.

E. *Time of Appointment*

In June, 1963, Missouri's attorney general rendered an opinion stating that magistrates had the power to appoint attorneys for indigent defendants.[67] Many magistrates had believed until then that they had no such authority, perhaps because many of them were laymen.[68] Whatever the reason, the inevitable result was that lawyers were not appointed until the indigent felony defendants appeared in circuit court, usually for arraignment.[69] Defense lawyers were asked to specify, with respect to the last case in which they were appointed in 1962, at what stage of the proceeding they had been appointed. The 49 answers received were as follows:[70]

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67. Mo. Att'y Gen. Op. No. 207, June 21, 1963. The opinion dealt only with the question of appointing lawyers for indigents accused of misdemeanors, but its relevance is obvious.

68. See text accompanying note 12 *supra*.

69. Two committees, one appointed by the Missouri Supreme Court, the other organized by the President of the Missouri Bar, are now investigating problems of the defense of indigents. Many magistrates seem content to await action by these committees before beginning to make appointments. It is impossible to determine how many magistrates have already begun taking action, although it is known that five have. What changes, if any, will result from the activities of the two committees cannot be foretold at this time.

70. No one selected any of the first three possible answers. Eight of the 57 lawyers who responded to this questionnaire had not been appointed in 1962, and hence did not answer this question.

(4) At preliminary hearing: 3.
(5) After preliminary hearing but before the filing of an indictment, information, etc.: 2.
(6) After the filing of an indictment, information, etc. but before arraignment thereon: 6.
(7) At arraignment: 9.
(8) After arraignment, but before trial: 28.
(9) At trial: 1.

Only five clearly were appointed before the arraignment. The significance of answer number 6 is debatable. When an unrepresented defendant appears for arraignment, the judge, not infrequently, will appoint a lawyer who happens to be in the courtroom and ask him to confer with the defendant immediately, perhaps in the jury room. The conference may last as long as 30 minutes, at which time the defendant will be arraigned. Such a course of events, which could come within the terms of answer 6, is indistinguishable from an appointment at the arraignment.

At the time of the survey, the first contact between the City of St. Louis's public defender and an indigent felony defendant came at the pre-arraignment conference, except for a brief interview conducted in the jail. Since that time, however, the public defender has begun representing indigents at their first appearance in the Court of Criminal Correction. One of the defenders told me not long ago that the result has been to reduce the number of preliminary hearings. "Once I explain to them what the preliminary is for, they waive it," he said.[71] Since the establishment of his office last year, the St. Louis County public defender has always represented defendants from the time they first appear before a magistrate.

F. *Public Defenders*

The *City of St. Louis* Public Defender Bureau was created in 1938 by city ordinance.[72] The Bureau's office is located in the Municipal Courts Building, which also houses the circuit court, the Court of Criminal Correction, the circuit attorney, and the probation and parole officer. The office is furnished with a few ancient desks and office chairs, an unupholstered bench in the waiting room, some decrepit file cabinets, one manual typewriter and an obsolete dictaphone that has not worked in years. Its li-

71. Defendants no longer enter a plea, either. See text accompanying note 16 *supra*. "I tell them, 'Don't say anything about guilt in there. Just say you waive your preliminary,'" my informant said.

72. ST. LOUIS, MO., REV. CODE § 186.010 (1960). The ordinance was recently amended in two important respects. See note 76 *infra* and accompanying text.

brary consists of a set of the *Missouri Revised Statutes,* requisitioned by moonlight from another office, and a subscription to *Popular Science* magazine contributed by some public benefactor. To maintain these lavish surroundings in their customary splendor, to supplement the library, and to pay normal office expenses, the City appropriates a handsome $300 annually. The state contributes nothing.

The remainder of the Bureau's annual budget, $29,505, pays the salaries of the three lawyers, including the director, and a stenographer-clerk.[73] The director is also the director of the Legal Aid Society.[74] The Bureau has no funds for investigation. The extent to which the circuit attorney's office compensates for this lack by revealing information it has obtained depends upon whether you ask the public defender or the circuit attorney. The latter does permit the defender unlimited use of his library, however.

During the fiscal year ending March 31, 1963, the Bureau handled the cases of 714 indigents to conclusion.[75] Dividing the Bureau's annual budget by this figure indicates that the City spent an average of $41.75 per completed case.

At the time of the survey, the defender was authorized to represent only (a) first offenders (b) accused of felonies. A few months ago, however, the ordinance was amended to eliminate both of these restrictions, and to add new authority:

> The functions of the Public Defender Bureau shall be (1) to provide legal services for any poor person . . . accused of committing a state felony or state misdemeanor . . . (3) . . . at all stages of the proceeding necessary fully to advise and protect any such poor person . . . .[76]

The defender has begun entering cases at the initial appearances in the Court of Criminal Correction as a result of the latter provision. At the time of this writing, procedures for representing indigents accused of misdemeanors, and for handling the inevitable increase caused by lifting the first-offender limitation, had not been crystallized.

Even when the first-offender limitation was in effect, the defender did

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73. The breakdown of salaries is

Director	$10,000.00
Assistant Director	8,228.00
Attorney	6,224.00
Stenographer	5,053.00

74. ST. LOUIS, MO., REV. CODE §§ 186.020—.030 (1960).

75. 1962-1963 [ST. LOUIS, MO.] PUBLIC DEFENDER BUREAU ANN. REP. 3.

76. Board Bill No. 75 (1964), amending ST. LOUIS, MO., REV. CODE § 186.010 (1960), which provided in part:

> The functions of the Public Defender Bureau shall be to provide legal services for any poor person accused of committing a felony, who has not previously been convicted of a felony . . . .

represent some multiple-offenders. Sometimes the court appointed the Bureau. Much more numerous, however, were the defendants who decided at the pre-arraignment conference or earlier to plead guilty at their arraignments; the defender represented most of them, whether or not they had prior convictions.

The circuit attorney furnishes the Bureau with the names of and charges against all persons jailed on felonies. Sometime before his arraignment, each such person is interviewed by one of the defenders and, if he qualifies for assistance, a brief form is completed about him. In addition to requesting vital statistics about the defendant, his father, mother, sisters, brothers, spouse and children, the form asks for such things as date of arrest, prior arrests, "Court Record," the defendant's church and pastor, his employers' names and addresses, and three character references. If any useful information is obtained, it is written into the four inch blank space at the bottom entitled "Remarks." The defender who conducts the pre-arraignment conferences has before him these forms and the typewritten list prepared by the circuit attorney.

At the weekly arraignment in circuit court, the defender enters a formal appearance for all defendants who qualify for his assistance[77] and for all those who have decided to plead guilty. He requests the court to appoint lawyers for the other defendants who are unable to hire them.

The *St. Louis County* Division of Public Defender was established by county ordinance on January 1, 1963.[78] Its offices are located in the same building as the circuit court, the prosecuting attorney, and the probation and parole officer. Some magistrates are, some are not, located there. Furnishings are new and adequate. The library contains the *Southwestern Reporter, Missouri Digest, Vernon's Annotated Missouri Statutes,* and a few miscellaneous volumes. The office is manned by two attorneys, including the director, neither of whom engages in outside activities, and a stenographer-clerk. It was recommended that a salaried investigator be part of the defender's staff at the time the County Council was deliberating creation of the division. The recommendation was not followed, however, and no investigator has yet been added. But the division does have an annual budget allotment of $1,200 for "analytical and evidence expenses," from which deposition expenses and expert witness fees are paid.

Unlike the City defender, the County defender has never been restricted to first offenders; instead, he is required to

77. As determined by the judge in the procedure described in Section II B *supra.*

78. ST. LOUIS COUNTY, MO., REV. ORDINANCES § 606.100 (1958).

> Provide counsel for every indigent person unable to employ counsel who faces the possibility of the deprivation of his liberty for a period of more than one year . . . .[79]

As a result, the County defender represented 29 juvenile offenders and 88 persons subjected to civil proceedings for commitment of the mentally ill, in addition to 152 felony defendants, during his first year of operation. If this total case load of 274 is divided into an annual budget of $30,300,[80] to which the state contributes nothing, the quotient indicates the County spent an average of $110.60 per case.

Every day one of the defenders secures from the prosecuting attorney a list of persons against whom felony warrants were issued. This list is taken to the sheriff's office and those persons who have made bond are scratched off. Those remaining on the list will be interviewed in the jail before their initial appearance, a procedure made possible by the fact that initial appearances normally are conducted only two days a week.[81] If the defender decides a prisoner is indigent, he requires him to sign a form stating, among other things, that he is "wholly without funds and unable to employ counsel." The form has the appearance of an affidavit, but is neither sworn to nor notarized. He also completes a data sheet which, besides vital statistics, asks only for the charge, prior record, and a resume of the present charge.

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79. *Ibid.*

80. This figure is the total 1964 budget. I used it rather than the 1963 figure because the latter contained some non-recurring items, such as office furniture. The breakdown of the 1963 budget was:

Salaries	$24,252.00
Printing and binding	1,500.00
Postage (special only)	10.00
Telephone	360.00
Travel and transportation	700.00
Office maintenance	100.00
Analytical and evidence	1,200.00
Supplies	500.00
Miscellaneous	50.00
Subscriptions and memberships	2,070.00
Office equipment	4,300.00
	$35,042.00

The item for office equipment was eliminated from the 1964 budget; that for "subscriptions and memberships," from which the basic library had been purchased in 1963, was reduced to $500. On the other hand, "travel and transportation" was increased to $1,200. There were a few other minor changes.

81. See text accompanying note 11 *supra.*

The ordinance creating his office requires the defender to

> Come into operation at a sufficiently early stage of the proceedings so as to fully advise and protect the defendant . . . .[82]

At a meeting with the circuit judges during 1963, the defender argued that this required him to appear before the preliminary hearing. This in turn, he contended, meant that he was going to have to make the determination of indigency at the time he interviewed the defendant in jail. The judges agreed. The result is that the County defender appears for the indigent defendant at every stage of the proceeding beginning with the initial appearance before a magistrate. The defender and the prosecuting attorney have agreed that all preliminary hearings should be transcribed. Each office furnishes a stenographer to perform the task alternately, and a free copy of the transcript is provided the other office.

G. *Bail*

The high degree of correlation between whether a defendant was released on bail and whether he was determined to be indigent is revealed in Table 13, set out earlier. Nevertheless, some indigents are released on bond. One explanation for this is that the premium was so low the judge did not feel it should influence him. Another is that the bond was posted by a relative or friend. There were no professional bondsmen in a number of the survey counties; in two of these the reporters were told that most lawyers had wealthy clients who were willing to post bonds on behalf of indigents they represented. A third is that the defendant was released on his own recognizance, that is, his promise to return. In the rural survey counties, defendants were released regularly, but not frequently, on their own recognizances. These releases were motivated partly by a hope that the defendant would be able to work during the period and pay his appointed lawyer some fee. In one survey county, the judge said he regularly passed cases from one term to the next, at the request of lawyers, to give indigents time to accumulate more money.

The first systematic program in Missouri for the release of defendants on their own recognizances was begun in the City of St. Louis in 1963, too late to be reflected in the docket studies. However, since Attorney General Robert Kennedy's recent national conference on bail has focused so much attention on the problem, and because it is so intimately connected with the defense of indigents, I thought it worthwhile to include some statistics

82. ST. LOUIS COUNTY, MO., REV. ORDINANCES § 606.100 (1958).

on the program.[83] Preliminarily, it should be stressed that defendants are not released on recognizance unless the probation and parole officer recommends it, and recommendations are forthcoming only after careful screening. These are not, in other words, randomly sampled defendants, and hence the statistics which follow are not comparable to any others reported in this study.[84]

From February 14 to December 31, 1963, 71 defendants were released on recognizance,[85] and 12 were denied release. Ultimate dispositions were:

	Not Guilty	Guilty	Still Pending
Released	3	68	0
Not released	2	9	1

Sentences of those who were guilty were:

	Jail	Fine	Probation or Bench Parole
Released	6	2	60
Not released	4	0	5

Had they not been released, these 71 defendants would have spent an average of 48 days in jail awaiting dispositions of their cases.

H. *Sentencing and Appeals*

Attorneys appointed to represent defendants who plead guilty were uniformly expected to be present at the sentencing in the eight survey counties. The same was true for those who had represented defendants convicted

83. I am indebted to Charles Mann, Chief Probation and Parole Officer of the Circuit Court for Criminal Causes (the name given the divisions of the circuit court processing criminal matters in the City) for these figures.

84. Release was recommended for 83 defendants out of a total of 1,469 warrants issued during the same period.

85. The types of offenses charged against defendants who were released were:

Burglary 2d degree	32
Stealing over $50	20
Car theft	6
Establishing a lottery	3
Carrying concealed weapon	2
Robbery	2
Assault	1
Forgery	1
Mistreating a child	1
Murder 2d degree	1
Rape	1
Sodomy	1
	71

after trials. The two public defenders attend all sentencings of persons they have represented.

Until recently, Missouri had an unusual method of handling indigent appeals. Appeals from felony convictions go directly to the supreme court, bypassing the courts of appeal.[86] As part of his duties, the lawyer who represented defendant at his trial was expected to file a motion for new trial in the circuit court. An indigent wishing to appeal could do so by notifying the supreme court of his desire. For this purpose he was given a free trial transcript. That court read the transcript, reviewing all questions preserved in the motion for new trial.[87] Effective March 1, 1964, however, the supreme court rule has been amended to require the trial court to appoint an attorney to represent an indigent appellant; "such counsel may, in the discretion of the court, be the same counsel who represented the defendant at the trial or other counsel."[88] The County public defender thus far has carried his own cases on appeal. The City defender has heretofore terminated his services after the sentencing.

I. *Miscellaneous Matters*

None of the sample counties had appointed attorneys for indigents accused of misdemeanors at the time of the survey. A recent opinion by Missouri's attorney general, however, stated that "counsel must be appointed in all misdemeanor cases of more than minor significance and in all cases where prejudice might result."[89] It is known that magistrates in at least five counties have been making appointments since then, but it was impossible to determine how widespread the practice is.

Problems associated with habeas corpus and other post-conviction remedies are largely confined to Cole County, the location of the penitentiary. Since this was not a sample county, very little data about these problems were collected.

III. Comparisons Between Indigents and Non-Indigents

Presumably, all the measures described in Section II were devised for the purpose of giving the indigent the same quantity and quality of protection

86. Mo. Const. art. V, § 3.

87. The procedure is described in State v. Bosler, 366 S.W.2d 369 (Mo. 1963), which rejected the contention that it had been made unconstitutional by Douglas v. California, 372 U.S. 353 (1963).

88. Mo. Sup. Ct. R. Crim. P. 29.01 as printed in 19 J. Mo. B. 439-40 (1963). A footnote appended to the amendment, apparently by the court, reads

> It is suggested that in all multiple-judge circuits the court should compile and keep a panel or docket of available counsel from which all appointments shall be made, in order not to impose unduly upon any individual or firm.

89. Mo. Att'y. Gen. Op. No. 207, June 21, 1963.

TABLE 14

COMPARISON OF GUILT DETERMINATIONS: BAIL AND NOT RELEASED[a]

County	Without Trial			All Dispositions		
	No. Cases	No. Guilty	% Guilty	No. Cases	No. Guilty	% Guilty
Audrian—bail	17	10	59	19	10	53
—not released	24	22	92	28	22	88
City of St. Louis—bail	45	41	91	51	44	86
—not released	76	75	99	84	80	95
Howell—bail	3	2	67	3	2	67
—not released	10	6	60	10	6	60
Jackson—bail	22	6	27	23	6	26
—not released	47	33	70	54	36	67
Jasper—bail	15	12	80	21	14	67
—not released	16	13	81	17	14	82
Miller—bail	4	2	50	4	2	50
—not released	7	6	86	7	6	86
Putnam—bail	6	5	83	7	6	86
—not released	3	3	100	3	3	100
St. Louis—bail	18	18	100	19	19	100
—not released	19	17	90	20	18	90
Total—bail	130	96	74	147	103	70
—not released	202	175	86	223	185	83

[a] Cases in which no data about bail were available, and cases not finally disposed of, are omitted. Hence the figures in the "number of cases" columns may vary from those found in Tables 9, 12, 13 and 15.

as the non-indigent claims by right. Hence one standard of their effectiveness ought to be the extent to which the results reached in cases involving different classes of defendants are the same. If this be the standard, Missouri falls short of it.

Table 14 compares the conviction rates of defendants released on bail with those of defendants not released.[90] The difference was a staggering 43 percentage points for Jackson County in pre-trial dispositions, and 41 points overall. Audrain County, the only one that permitted defendants to waive

90. Release on bail rather than indigency was selected to make the comparison for a number of reasons, the most important being that data were more uniformly available throughout the survey counties. Besides, Table 13, and Tables 15 and 16 together, indicate that the results would not have been appreciably different.

TABLE 15

COMPARISON OF SENTENCES BETWEEN DEFENDANTS RELEASED AND DEFENDANTS NOT RELEASED ON BAIL[a]

	Not Released				Released			
County	No. Cases	Prison	Fine	Prob., Bench Parole	No. Cases	Prison	Fine	Prob., Bench Parole
Audrain	22	12	6	4	10	3	1	6
		(.55)	(.27)	(.18)		(.30)	(.10)	(.60)
City of	80	69	0	11	43	16	7	20
St. Louis		(.86)		(.14)		(.37)	(.16)	(.46)
Howell	6	5	0	1	2	0	0	2
		(.83)		(.17)				(1.0)
Jackson	36	29	0	7	6	2	1	3
		(.81)		(.19)		(.33)	(.17)	(.50)
Jasper	14	10	1	3	14	5	2	7
		(.71)	(.07)	(.22)		(.36)	(.14)	(.50)
Miller	6	3	0	3	1	0	0	1
		(.50)		(.50)				(1.0)
Putnam	3	1	1	1	6	2	3	1
		(.33)	(.33)	(.33)		(.33)	(.50)	(.17)
St. Louis	18	12	1	5[b]	19	9	0	10
		(.66)	(.06)	(.28)		(.47)		(.53)
	185	141	9	35	101	37	14	50
		(.76)	(.05)	(.19)		(.37)	(.14)	(.50)

[a] Numbers in parentheses represent percentages.

[b] Includes the only discovered instance in which defendant's sentence was suspended without probation. This is rare in Missouri. See Section I D.

appointments, had differences of 33 and 35 points.[91] The difference between rates for all counties in all dispositions was 13 points.

The next two tables compare the types of sentences assessed against persons released on bail with those not released (Table 15) and against indigents with non-indigents (Table 16). They show that the indigent defendant not released on bail was about twice as likely to be sent to prison, one-third as likely to be let off with a fine, and one-third as likely to be put on probation, as his counterpart.

How can figures as unsettling as these be explained? One possibility is that the lawyers appointed for indigents are not doing their jobs. All judges were

91. Miller County is being ignored because some might think the data insufficient.

TABLE 16

COMPARISON OF SENTENCES BETWEEN INDIGENTS AND NON-INDIGENTS[a]

	Indigent				Non-Indigent			
County	No. Cases	Prison	Fine	Prob., Bench Parole	No. Cases	Prison	Fine	Prob., Bench Parole
Audrain	18	11 (.61)	4 (.22)	3 (.17)	14	4 (.29)	4 (.29)	6 (.43)
City of St. Louis	69	61 (.88)	0	8 (.12)	55	26 (.47)	7 (.13)	22 (.40)
Howell[b]	2	2 (1.0)	0	0	0	0	0	0
Jackson	25	19 (.76)	0	6 (.24)	18	12 (.67)	1 (.06)	5 (.27)
Jasper	11	8 (.73)	0	3 (.27)	18	8 (.44)	2 (.11)	8 (.44)
Miller	4	3 (.75)	0	1 (.25)	6	1 (.17)	0	5 (.83)
Putnam[b]	1	1 (1.0)	0	0	1	0	0	1 (1.0)
St. Louis	14	10 (.71)	0	4[c] (.29)	24	12 (.50)	1 (.04)	11 (.46)
	144	115 (.80)	4 (.03)	25 (.17)	136	63 (.46)	15 (.11)	58 (.43)

[a] Numbers in parentheses represent percentages.

[b] So little data about indigency were available in Howell (6 of 20 cases) and Putnam (2 of 12 cases) that conclusions with respect to these counties would be little more than guesses.

[c] Includes the only discovered instance in which defendant's sentence was suspended and he was excused from probation. This rarely happens in Missouri. See Section I D.

asked, "How do you think appointed lawyers compare in experience and ability with lawyers retained by defendants?" The results were:

	Judges Replying by Mail	Judges Interviewed	Total
Better	3	0	3
Too few lawyers to make a difference	6	2	8
Equal	10	8	18
Not as good	1	1	2
No answer	4	0	4
Total	24	11	35

Asked the same questions, prosecuting attorneys answered as follows:

	Prosecutors Replying by Mail	Prosecutors Interviewed	Total
Better	4	0	4
Too few lawyers to make a difference	9	0	9
Equal	38	7	45
Not as good	5	1	6
No answer	12	0	12
Total	68	8	76

The judges were also asked, "How do you think appointed lawyers compare in experience and ability with the district attorney?" Their answers were:

	Judges Replying by Mail	Judges Interviewed	Total
Better	6	2	8
Equal	16	9	25
Not as good	0	0	0
No answer	2	0	2
Total	24	11	35

What these figures do not reveal is that many of the persons who rated the appointed lawyers at least equal to the retained lawyers and the prosecuting attorneys modified their answers with such comments as "lack of enthusiasm," "subconsciously, he won't try as hard," "can't afford to spend the time he would if he were being paid," and others of similar import.

The significance of these qualifications lies in the fact that the questions were asked in terms of "experience and ability," not in terms of effectiveness. No great discrepancy in experience was uncovered between defense lawyers and prosecutors by the mail questionnaires. Defense lawyers were asked the number of years they had been practicing; 38 had been in practice 6 years or longer, 19 less, a ratio of 2 to 1.[92] Prosecutors were asked the number of years they had served as prosecuting or assistant prosecuting attorneys. Exactly half of the 76 from whom information was obtained had 5 years or more experience, the other half had less. Defense attorneys were also asked to "state your experience in criminal practice before the first case in which you were appointed in 1962." Eight of the 57 returning questionnaires had

92. See Section IV C *infra* for limitations on the statistical validity of these questionnaires.

TABLE 17

COMPARISON OF DISPOSITIONS IN THE CITY OF ST. LOUIS BY TYPE OF ATTORNEY[a]

Type of Counsel	No. Cases	Without Trial: Nol. Pros.	Without Trial: Dismissal	Without Trial: P/G Prin. Off.	Without Trial: P/G Lesser Off.	Non-Jury Trial: G	Non-Jury Trial: N/G	Jury Trial: G	Jury Trial: N/G	Not Disp. of
Retained	63	4[b] (.06)	1 (.02)	38 (.60)	13 (.21)	1	0	3[c]	2	1
Assigned	18	1 (.06)	0	13 (.72)	1 (.06)	0	0	2	1	0
Publ. Def.	54	0	0	47 (.87)	5 (.09)	0	0	1	1[d]	0
Unspecified	3	1	1	1	0	0	0	0	0	0
No Data	6	3	1	0	1	0	0	1	0	0
	144	9 (.06)	3 (.02)	99 (.69)	20 (.14)	1	0	7	4	1

[a] Numbers in parentheses represent percentages.
[b] Includes one abated by death.
[c] Includes one guilty of lesser offense.
[d] By reason of insanity.

not been appointed in 1962, and did not reply; answers of the remaining 49 broke down like this:

None	5
1 to 4 cases	8
5 to 9 cases	5
10 to 19 cases	6
20 to 49 cases	4
50 cases or more	21

More than half had had 20 or more cases. The point is not that assigned lawyers were more experienced than prosecutors, or vice versa. The figures simply suggest that there was no discrepancy between the two large enough to account for the gross inequality of treatment between indigents and non-indigents.

All three classes of defense lawyers, retained, assigned and public defender, function within the City of St. Louis. Table 17 compares the disposition of the City's 144 docket studies by type of attorney. Defendants represented by retained lawyers pleaded guilty to the principal offense charged 60 percent, those represented by appointed attorneys 72 percent,

TABLE 18

COMPARISON OF SENTENCES IN THE CITY OF ST. LOUIS BY TYPE OF ATTORNEY[a]

Type of Counsel	No. Cases	No Conviction[b]	Prison	Fine	Probation	Bench Parole	Not Disp. of
Retained	63	7	26	7	8	14	1
		(.11)	(.41)	(.11)	(.13)	(.22)	(.02)
Assigned	18	2	15	0	1	0	0
		(.11)	(.83)		(.06)		
Pub. Def.	54	1	46	0	0	7	0
		(.02)	(.85)			(.13)	
Unspecified	3	2	0	0	1	0	0
No Data	6	4	1	0	0	0	1[c]
	144	16	88	7	10	21	2
		(.11)	(.61)	(.05)	(.07)	(.14)	(.01)

[a] Numbers in parentheses represent percentages.
[b] All cases in which no conviction resulted.
[c] Guilty, but not sentenced.

and those by the public defender 87 percent of the time.[93] The retained lawyers' success in getting charges reduced in exchange for pleas, 21 percent, was more than twice that of the public defender, and more than three times that of the appointed lawyers. Since two of the three defenders have been practicing more than 15 years, lack of experience obviously is not the answer to different treatment in the City.

Table 18 discloses that retained lawyers held their advantage over the other classes in securing lighter sentences for their clients. They were able to secure no-prison sentences in 46 percent of their cases, more than three times the rate of success of the public defender—although the defender represents many first-offenders, and almost eight times that of appointed attorneys.

But why should the type of attorney make a difference in whether the defendant is placed on probation; is not that a decision made by the judge and the probation officer? My guess, which is based only on an impression picked up in the course of the survey, is that the answer is twofold. First, judges normally do not place defendants on probation unless someone asks

93. Two things help explain the very high proportion of guilty pleas in cases handled by the public defender. One is that the pre-arraignment conference funnels an unusually large number of them to him. The other is the Director's attitude about guilty pleas:

> As may be observed in this Report, the great majority of the cases handled by this Bureau were disposed of at arraignment by a plea of guilty. This procedure has

them to. Second, appointed lawyers do not ask. Even though they were required to be present at the sentencing in the eight survey counties, appointed lawyers generally seemed to view their obligation as being only that of protecting the indigent against an improper determination of guilt.

IV. What the Missouri Bar Thinks

The survey had two goals. One was to learn how the criminal process actually functioned with respect to indigent persons accused of crime. The second was to canvass the opinions of judges, prosecuting attorneys and defense lawyers about the process they administer. Many of these opinions were gathered in interviews, but most of them came from mail questionnaires. It may as well be admitted that the results were not entirely satisfactory. So much attention was devoted to designing questions suitable at the same time for different state procedures but uniform reporting that some defects went unnoticed.[94] Such oversights were rare, fortunately, and some of them are probably insignificant. Nonetheless, I have called attention to all of them.

A. *Judges*

There are 85 circuit judges in Missouri, 46 of whom sit in the eight survey counties. Eleven of these 46 were interviewed.[95] Thirty-five of the 39 judges sitting in non-survey counties were sent questionnaires.[96] Replies were received from 24 judges, a response rate of 69 percent, sitting in 23 circuits. Altogether, therefore, information was received from 35, or 41 percent, of the 85 judges. Fourteen of the 35 had more than 10 years service on the circuit bench, the others less. Ten of them sat in circuits con-

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been found to have a manifold benefit. Firstly, and certainly foremost, has been the interest of the defendant in each individual case. When the defendant has made an admission of guilt and has expressed a desire to enter a plea of guilty, a consultation is held with the Assistant Circuit Attorney . . . and the case disposed of promptly. In this manner, a defendant's constitutional right to a speedy trial (or disposition) is fully protected. Secondly, the burden and expenditure of tax money on maintaining persons for a long period of time is greatly reduced. Furthermore, the personnel of the Bureau attempt, at all times when trial by Jury is indicated, to be ready at the first setting of the case.

1961-1962 [St. Louis, Mo.] Public Defender Bureau Ann. Rep. 3.

94. Each of the following flaws appeared at least once: the question was confusing; it was drafted in such a manner, or against such a background, that even a "yes" or "no" answer was ambiguous; a multiple choice answer did not offer a full range of possibilities; questions intended to be identical appeared in one form on the mail questionnaire and in a different form on the interview sheet.

95. An attempt was made to interview at least two judges in multi-judge circuits—the senior judge and the judge then currently assigned to the criminal division.

96. Questionnaires normally were sent only to the senior judge of a multi-judge circuit. In one instance they were sent to two judges, both of whom replied.

taining only one county, a rough, but reasonably accurate, way of separating urban from rural communities. The 35 judges represented 31, or 72 percent, of the 43 circuits. In fiscal 1963, 84 percent of all felony filings occurred in these 31 circuits.[97]

The judges were asked, "Under an ideal[98] system, at what stage in a criminal case do you think a lawyer should first be made available to the indigent person?"[99] Twenty-six thought the lawyer should be provided earlier than he is at present, which is at the arraignment, and 21 of these thought this should occur no later than the first appearance.[100] Eight judges thought the present practice satisfactory. One did not answer.

The second part of the question was, "Do you think it is unfair to the indigent person if he does not get a lawyer at this stage?" The answers split like this:

	Favoring Earlier Appointments	Present Practice Satisfactory
Yes	9	5
Not necessarily	4	0
Don't know	3	0
No	7	2
No answer	3	1

The next question was, "Do you think that such a system could be financed?"[101] Of the 26 favoring earlier appointments, 13 thought it could be, 6 that it could not, 3 did not know, and 4 did not answer. Many, including some who said yes, doubted that the counties could finance earlier appointments without state aid. The significance of these replies is impossible

97. A total of 9,167 cases was filed throughout the state, 7,737 of them in the 31 circuits whose judges were contacted. MISSOURI JUDICIAL CONFERENCE CONSOLIDATED REPORT ON CRIMINAL CASES, June 16, 1962-June 15, 1963.

98. The word "ideal" appeared in two questions asked of both judges and prosecutors, and it may have confused a few of them. The first part of both questions asked, "Under an ideal system" should an indigent get such-and-such? And the second part asked, "Do you think it is unfair" if he doesn't get it? A few judges and a few prosecutors pointed out that if "ideal" is given its classical meaning, the answer to the "unfairness" part of the question would have to be yes by definition.

99. This was how the question appeared on the mail questionnaires. Judges who were interviewed (11 of the 35) were asked, "Under an ideal system, at what stage in a criminal case do you think the indigent person should first be provided with a lawyer *if he wants one?*" (Emphasis added.)

100. Between arrest and first appearance—7; at first appearance—14; before preliminary hearing—2. One judge each voted for the following three choices: at preliminary hearing; after preliminary but before filing of the information or indictment; after filing but before arraignment.

101. Those interviewed were asked, "What do you think about the problem of financing such a system?"

to assess. If Missouri continues to pay appointed attorneys neither fees nor expenses, what additional cost would there be? Did those who answered yes assume the present practice would be continued, or did they assume that lawyers "under an ideal system" would be paid?

The judges then were asked, "Under an ideal[102] system do you think a lawyer should be made available to the indigent person in the following kinds of cases and proceedings?" Responses were:

	Yes	No	Don't Know	No Answer
Sentencing of a defendant who pleaded guilty	18	5	1	11
Sentencing of a defendant convicted by trial	17	8	0	10
Habeas corpus or other post-conviction remedy	12	16	2	5
Hearing on revocation of probation	6	27	1	1
Sexual psychopath hearing	16	5	0	14
Misdemeanors	10	21	2	2
Civil commitment of the mentally ill, including alcoholics and narcotics addicts	18	4	0	13

Asked, "Do you think it is unfair to the indigent person if he does not have a lawyer for such cases and proceedings?"[103] the replies were as follows:

	Yes	No	Don't Know	No Answer
Sentencing of a defendant who pleaded guilty	16	8	2	9
Sentencing of a defendant convicted by trial	16	8	2	9
Habeas corpus or other post-conviction remedy	10	13	2	10
Hearing on revocation of probation	4	21	3	7
Sexual psychopath hearing	17	3	1	14
Misdemeanors	5	15	3	12
Civil commitment of the mentally ill, including alcoholics and narcotics addicts	16	2	1	16

The responses suggest that the judges' thinking about what would be desirable was influenced by current practice. The kinds of cases that won pluralities of yes votes were those in which lawyers are provided at the present time; conversely, those with pluralities of no votes were cases in which attorneys are not appointed.

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102. See note 98 *supra.*

103. The significance of the replies to this question is problematical. At least a few did not know how to interpret the word "such"; they did not know whether the question meant "Do you think it is unfair if the indigent person does not have a lawyer for *those cases and proceedings you marked 'yes'* in the preceding question?" or whether it meant "Do you think it is unfair . . . for *the following kinds of cases and proceedings?*" The former was the intended meaning. Since, however, many more judges answered this question (26 in the first horizontal line) than answered yes in the previous one (18 in the first line), there obviously was confusion. I think the answers are relevant whichever meaning the question is given.

When asked whether appointing lawyers should be compensated for their services, 26 of the 31 answering said yes, 5 no, one of the latter adding "at least not in rural counties." All but one judge answered the question whether appointed counsel should be reimbursed "for their out-of-pocket expenses for investigation and preparation," and all 34 said yes.

B. *Prosecuting Attorney*

Eight of Missouri's 115 prosecuting attorneys were interviewed. Mail questionnaires were sent to the other 107, of whom 68, or 64 percent, replied. Thus information was received from 76, or 66 percent, of all prosecutors. Exactly half of them had five or more years experience as prosecuting or assistant prosecuting attorneys. All of them are permitted to engage in private practice, and only nine devoted full time to their official duties. The remaining 67 answered the question, "How much time do you spend [per week], on the average, in your capacity as prosecuting attorney?" as follows:

More than 30 hours	17
Between 20 and 29 hours	20
Between 10 and 19 hours	21
Less than 10 hours	9

Thirty replied no to the question, "Do you feel the funds you have are adequate to run your office?" A number of these specifically mentioned the court house janitor as a person whose salary exceeded his own. One who thought his funds adequate under normal circumstances complained that he was required to try all cases moved out of his county on changes of venue and that he was not reimbursed for the extra expenses incurred.

Sixty-three of the 76 from whom information was obtained thought that appointments should be made earlier than they now are.[104] Answers to the question "Do you think it is unfair to the indigent person if he does not get a lawyer at this stage?" were:

	Favoring Earlier Appointments	Present Practice Satisfactory
Yes	31	9
No	30	2
No answer	2	2

104. See note 98 *supra* for a discussion of the problems caused by use of the word "ideal." See note 99 *supra* and accompanying text for the exact wordings of the questions.

The vote breakdown was: between arrest and first appearance—19; at first appearance —22; between first appearance and preliminary hearing—9; at preliminary hearing—3; before arraignment—10; present practice satisfactory—13.

This set of responses might fairly be summarized by saying that among those in the best position to know, the prosecuting attorneys, 83 percent favored earlier appointments, half of whom believed that it was unfair to the indigent if the appointment was not made at the earlier stage.[105]

The prosecutor's answers respecting the kinds of cases and proceedings in which lawyers should be furnished were:

	Yes	No	Don't Know	No Answer
Sentencing of a defendant who pleaded guilty	49	20	0	7
Sentencing of a defendant convicted by trial	51	16	0	9
Habeas corpus or other post-conviction remedy	40	30	0	6
Hearing on revocation of probation	35	36	0	5
Sexual psychopath hearing	53	12	0	11
Misdemeanors	17	49	1	9
Civil commitment of the mentally ill, including alcoholics and narcotics addicts	52	8	0	16

Responses to the question whether it was unfair if the attorney was not provided in such[106] cases were:

	Yes	No	Don't Know	No Answer
Sentencing of a defendant who pleaded guilty	29	21	4	22
Sentencing of a defendant convicted by trial	33	16	5	22
Habeas corpus or other post-conviction remedy	23	19	5	29
Hearing on revocation of probation	13	28	4	31
Sexual psychopath hearing	33	9	4	30
Misdemeanors	10	36	4	26
Civil commitment of the mentally ill, including alcoholics and narcotics addicts	33	7	5	31

Unlike the judges, the prosecutors did not limit their affirmative votes for cases in which lawyers are provided under current practice.

Approximately the same proportion (75 percent) of prosecutors as judges favored compensating the appointed lawyer; 57 were in favor, 15 opposed, and 4 did not answer. Seventy-one replied to the question whether expenses of appointed lawyers should be reimbursed; 68 said yes, 3 said no.

C. *Defense Attorneys*

With a few exceptions for widely-known criminal lawyers, questionnaires were sent only to attorneys who appeared as counsel in the 422 docket

105. For reasons given in the text earlier, I have not summarized answers to the question whether such a system could be financed. Those interested can obtain that information from Table 19.

106. See note 103 *supra*.

studies. Hence, most of them went to lawyers practicing in the eight survey counties. Lawyers who had been retained were eliminated, to the extent possible, and only those who had been appointed were sampled. The number of these was still too large, however, and was reduced further by random selection. Altogether 95 attorneys were sent questionnaires, of whom 57, or exactly 60 percent, replied. For the reasons stated, however, the responses were not as representative, statistically or geographically, as those obtained from judges and prosecutors.

Questions about the present system of defending indigents, and recommended changes, were put to defense lawyers in forms different than those used with judges and prosecutors:

Please state your opinion about the present system for assignment of lawyers to represent indigent persons accused of crime.

a. Is the system fair to the indigent person?
b. Is the system fair to the lawyers?
c. What changes, if any, would you recommend? (Circle all numbers that apply.)
   1. Appoint lawyer at earlier stage of case, *viz.* ————.
   2. Pay out-of-pocket expenses of lawyers incurred in investigation and preparing case.
   3. Pay lawyers for their services.
   . . . .
   5. Provide counsel in additional kinds of cases, such as serious misdemeanors.
   6. Improve the system which the judge uses in selecting lawyers to be appointed (explain below).
   7. Other (explain below).

Only one lawyer thought no changes should be made in the present system. Of the other 56, 38 recommended earlier appointments. Fifteen of these did not specify at what stage they thought the lawyer should be appointed. Those who were specific answered as follows: between arrest and first appearance—12; at first appearance—4; before preliminary hearing—6; at preliminary hearing—1.

Eleven defense lawyers favored furnishing attorneys in additional kinds of cases. This total might have been greater had the "such as" been something other than "serious misdemeanors." This proposal was the least popular of all those inquired about among the judges and prosecutors. Thirty-seven approved reimbursing expenses of appointed counsel, and 35 checked the answer "pay lawyers for their services." Thirty answered no to the question whether the present system is fair to indigent persons, and 38 said it is unfair to the lawyers.

TABLE 19

IDEAL STAGE FOR APPOINTMENT OF COUNSEL:
COMPARISON BETWEEN JUDGES, PROSECUTORS AND DEFENDERS

	Senior Judges	Junior Judges	Senior Prose-cutors	Junior Prose-cutors	Public Defen-ders	Total
Total responding	14	21	38	38	2	113
Ideal stage for apptmt. of atty:						
1) Between arrest and 1st appearance	2	5	8	11	2	28
2) At 1st appearance	4	10	13	9	0	36
3) Before preliminary	2	0	5	4	0	11
4) At preliminary	1	0	3	0	0	4
5) Before arraignment	0	1	5	5	0	11
6) Present practice satisfactory	4	5	5	8	0	22
7) No answer	1	0	0	0	0	1
Unfair if not apptd. at that stage?						
1) Yes	4	10	18	23	1	56
2) Not necessarily	2	2	8	8	1	21
3) No	4	5	10	5	0	24
4) Don't know	1	2	0	0	0	3
5) No answer	3	2	2	2	0	9
Can system be financed?						
1) Yes	4	12	18	21	1	56
2) No	2	2	11	8	1	24
3) Don't know	4	1	1	1	0	7
4) No answer	4	6	8	8	0	26

Probably the most significant question asked was with respect to the last case in which the defense attorney had been appointed in 1962. It was, "Were you appointed in time to represent the accused person adequately?" Twenty-seven said yes, but 17 said no. (Eight of those responding had not been appointed in 1962, and therefore were not requested to answer this question.) That more than 38 percent of the defense lawyers should answer such a question negatively lends compelling weight to the opinions of judges and prosecutors that appointments should be made at an earlier stage of the proceeding.

D. *Comparisons*

Judges were divided into two groups for purposes of comparison, those with 10 or more years service on their present courts, and those with less. Prosecuting attorneys were also separated into two groups according to length of service, but the dividing line was five years. Some of the results are presented in Table 19. Surprisingly, perhaps, there were no meaningful differences between prosecutors and judges. The only significant difference between juniors and seniors appeared to be that the juniors more often thought a system without earlier appointment was unfair to the indigent.[107]

There were noteworthy differences between judges and prosecutors, however, with respect to the kinds of cases in which attorneys should be provided:

	Percentage of total responses favoring appointment of attorney:[108]	
	Judges	Prosecutors
Sentencing of a defendant who pleaded guilty	51	64
Sentencing of a defendant convicted by trial	49	67
Habeas corpus or other post-conviction remedy	34	53
Hearing on revocation of probation	17	46
Sexual psychopath hearing	45	70
Misdemeanors	29	22
Civil commitment of the mentally ill, etc.	51	69

Only for misdemeanors did a higher percentage of judges than prosecutors favor appointment. The spectacular disagreement over probation revocation hearings ought to be cause for concern. One of Missouri's public defenders commented during an interview, "The prosecuting attorney is always present at these hearings; why shouldn't the defendant be represented?" Perhaps notice should also be taken that a majority of prosecutors favored appointments for post-conviction remedies.

No meaningful differences were detected between the responses of urban and rural judges and prosecutors. Whatever factors cause varying opinions, this does not seem to be one of them.

V. Comments

That parts of Missouri's criminal process are not functioning as they should is obvious. The purpose of this section, however, is not to review the weak spots but to offer some considerations that are pertinent to deciding what ought to be done about them.

107. Because of the difference in questions, defense attorneys could not be compared directly with the judges and prosecutors.

108. "No answer" responses were counted in determining percentages, and they were numerous. The percentages shown would increase substantially if they were disregarded.

Initially, of course, a goal must be selected.[109] With respect to the indigent person accused of crime, this requires deciding whether to supply him with all of the protections his more affluent counterpart can buy, or whether to begrudge him only those rights the United States Supreme Court has declared are constitutionally his. It seems to me the proper alternative, ethically, legally and practically, is the first one. There is no justification for distinctions based on wealth when all the subjects of the criminal process are sucked into it unwillingly. Arguing that the indigent freely chose to engage in criminal conduct begs the question by ignoring on the one hand that significant numbers are acquitted and on the other that the non-indigent made the same choice. Furthermore, it is at least arguable that the philosophically ethical and the pragmatically legal coincide in the Supreme Court's view of 14th Amendment equal protection.[110] Determining for any one opinion what minimum requirements were established and which principles will later be built upon is a difficult and humbling task.[111] A piecemeal approach runs two risks—that of being wrong today, and that of being inadequate tomorrow. It is also a wasteful approach, for it requires either continual revision of invalidated practices or time-consuming appeals to higher courts, either of which can be enormously expensive—to society as well as to defendants.

Secondly, it is the reality, not the appearance, of the criminal law that needs repair. The divergence between the illusion created by statutes and the reality confronted in jails, offices and courtrooms is so great that some law school graduates never realize they are supposed to be viewing the same thing. To deal with substance rather than shadow requires that at least two subsidiary problems be resolved: (a) How can the goal be defined precisely

109. Theoretically, of course, the first step ought to be defining the frame of reference within which solutions will be sought. For example, it could be argued that now is an appropriate time to question the desirability of a system in which the state underwrites the entire cost of investigation and prosecution, but imposes upon the individual the whole burden of defending himself, even when the defense is successful. The assumption that prosecution and defense functions are so incompatible as to require separate organizational structures might also be challenged. The military services, for example, function with one group of lawyers who variously and randomly perform the three roles of prosecutor, defense attorney and trial judge (law officer) and do so, on the surface at least, adequately. It seems unlikely, however, that such basic rethinking will occur in Missouri within the foreseeable future. Therefore I have assumed in the text that the present system will remain unchanged in these major respects.

110. I have not felt constrained to discuss the holdings and implications of Supreme Court decisions because that job has been done brilliantly by Professors Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations,* 48 MINN. L. REV. 1 (1963).

111. Professors Kamisar and Choper, *supra* note 110, at 55-61, failed to anticipate Escobedo v. Illinois, 84 Sup. Ct. 1758 (1964), even though their predilections lay in that direction.

and without incorporating invalid assumptions that will emasculate it? and (b) How is it to be enforced?

Take the "20 hour rule" for example.[112] Its drafters conceivably could have thought that requiring a warrant to issue within twenty hours of a person's arrest without one would achieve any or all of the following: judicial scrutiny of the evidence; a limitation on police interrogation; bail being fixed promptly; the person being promptly informed of his rights, both constitutional (right to an attorney) and statutory (right to a preliminary hearing). In practice none of these was achieved at all times in all places, and some of them were never achieved anywhere. The rule failed partly because its goals were not defined precisely; they were hidden behind the warrant issuing process. But a major reason for its failure lies in the statute's implicit assumptions that certain things automatically follow the issuance of a warrant. It was assumed, for example, that the rule would get the defendant before a magistrate promptly, and that the magistrate would inform him of his rights. Neither of these assumptions proved valid.

The assumptions were invalid partly because the rule was not obeyed, and this points to the other major reason for its failure. Experience with Missouri's discovery rules[113] indicates that no statute designed for the indigent's benefit will be fully effective unless it is self-enforcing, that is, unless it is available without cost and carries mandatory penalties for violation serious enough to compel obedience. Prosecutors have been permitted not to endorse witnesses, in contravention of the letter of the statute, and to endorse them too late (in the opinion of defense attorneys) to permit effective preparation, in contravention of its spirit. No indigent can afford the formal deposition process and prosecutors have attempted to take advantage of that fact by telling their witnesses they need not talk to the defense attorney except at a deposition. Whether such discovery is or is not desirable is beside the point. The point is that creating "rules" which are nothing but precatory admonitions and which are not available to all deepens the cleavage between the illusion and the reality of the criminal process.

The lesson that goals must be defined precisely, and must not incorporate assumptions that may or may not be valid, also remains pertinent. Many lawyers, not only in Missouri, apparently believe that creating public defenders will solve the problems of the indigent defendant. But any perceptive reader of this report will realize that the only trouble which will automatically be relieved by public defenders is a guilty conscience. For instance, the problem of the unenthusiastic, inexperienced counsel would not be solved by legislation establishing pay scales for defenders that do not even attract part-

112. See text accompanying notes 7-8 *supra.*

113. See text accompanying notes 28-30 *supra.*

time prosecutors, or attract only recent graduates. Two thirds of the persons contacted during this survey agreed that one of the indigent's critical needs is the early appearance of his lawyer. This need would not be met, for example, by legislation establishing one defender in a circuit containing five counties and requiring him to appear simultaneously at a felony trial in County A, at initial appearances in Counties B and C, and at preliminary hearings in Counties D and E.

The difficulty, it seems to me, is that "defending the indigent" is not one problem at all, as most people seem to think, but a myriad of problems. Attempting to solve all of them simply by creating a new institution, to be called a "public defender," is tinkering with the illusion rather than overhauling the substance. No public defender is needed to make discovery effective in Missouri, for example; a change in the rules is needed. By the same token, discovery will not be effective, irrespective of public defenders, until the rule is changed to make it enforceable. Whether or not public defenders should be created is beside the point. The point is that the treatment accorded the indigent is not going to improve until his problems are solved, and it is absurd to suppose that any one institution will be able to solve them without statutes that clearly define them, provide for their solutions in terms that make no unwarranted assumptions about how the criminal process really works, and incorporate penalty provisons that will make them fully effective. I suggest, in other words, that the proper method of attack is first to identify the problems, second to solve by statutory revision those that are amenable, and then, and only then, to make whatever institutional changes are necessary to take care of the rest.

With respect to those revisions compelled by Supreme Court decision, the question of cost is academic. Two things can be said about the cost of the others. The consequences of refusing, for reasons of economy, to accord an indigent something that later becomes his constitutional right can be expensive. The avalanche of habeas corpus petitions that inundated Illinois after the *Griffin* case[114] and Florida after the *Gideon* case[115] are cogent proof of the folly of being penny-wise and pound-foolish. Furthermore, no one can make even an educated guess about the cost of any program because there is virtually no information about the criminal process upon which estimates could be based.

Lack of information, indeed, is one of the major obstacles in the way of effectively improving the system. Without information, the actual workings of the process cannot be determined, problems cannot be identified, and changes cannot be made—except blindly. By actually counting cases, the

114. Griffin v. Illinois, 351 U.S. 12 (1956).
115. Gideon v. Wainwright, 372 U.S. 335 (1963).

reporters found that the superficial figures now reported to the Judicial Conference by some of the survey counties are either incorrect or meaningless. It would not be difficult to devise a form upon which meaningful data about each case could be recorded and reported to the Judicial Conference. A uniform record system would provide a continuing check on the operations of the criminal process and would make future revisions both more meaningful and less expensive.

The need for revisions is obvious. Because detailed information is available for the first time, and because publicity has created a wide public interest, the time to make them is now. It will be a real tragedy if this opportunity is wasted by glossing over intricate problems, by making short-sighted improvements that cannot hope to survive a decade, or by failing to provide a method that will allow continuous surveillance of the process.

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