periodic reforms of company law. Every twenty years or so the Board of Trade appoints a distinguished committee of experts to hold hearings and submit a report. It would be naive to assume a complete absence of political considerations. Yet the Cohen Committee's recommendations of 1945 were passed with few changes under the sponsorship of the Labor Government of 1947 notwithstanding that the committee had been appointed under the earlier Churchill regime. With us, by contrast, it seems next to impossible to push through major legislation like the SEC statutes except in times of crisis. And one who ventures the suggestion that a free stock market can go down as well as up is apt to be charged in some quarters with pulling down the pillars of the Republic.

It will have become apparent by now that I view the publication of Professor Gower's book as a significant event in legal literature. I do think the American reader should be warned about differences in terminology. The quip to the effect that England and America are divided by a common language becomes doubly true in the context of financial jargon. English lawyers speak of "shares," not stock,[35] and "debentures" or "debenture stock" instead of bonds.[36] Our articles of incorporation and by-laws are to them the "memorandum of association" and "articles of association." Stock dividends are generally called "bonus shares" (not to be confused with the American use of this expression), although attempts have been made to popularize the term "ploughshares," which is logical enough in view of the fact that undistributed profits are thus permanently ploughed back.[37] Paid-in or capital surplus goes into a "share premium account," as we have seen. Earned surplus is, with less precision, called simply a "reserve."[38] And, as if it were not confusing enough to have to add columns of pounds, shillings and pence, the English complement their habit of driving on the wrong side of the road by showing their assets on the right of the balance sheet and their liabilities on the left.

For all this, of course, the author is not to blame. If an American law office can afford one book on English company law, this is it.

Louis Loss†

THE RIGHT TO COUNSEL IN AMERICAN COURTS. By William M. Beaney. Ann Arbor: University of Michigan Press, 1955. Pp. xi, 268. $4.50.

PROFESSOR William M. Beaney of the Department of Politics of Princeton undertook this study in "an attempt to learn whether the right to counsel, which is vital in criminal cases, is enjoyed as consistently and widely in the

35. "Shares" may be converted into "stock," which theoretically is freely divisible into fractions of any amount, but the difference is now largely esoteric. Pp. 371-73.

36. Pp. 343-44.

37. P. 108.

38. Pp. 106-07.

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United States as the needs of justice require."[1] His general conclusion is that it is not—a conclusion shared by most persons familiar with the subject.

After an introductory chapter presenting the scope of his project, raising pertinent questions to be answered, and indicating his own value assumptions, Professor Beaney proceeds to sketch the historical background of the right to counsel in English and American law. He then examines the right to counsel in federal courts under the sixth amendment, and in state courts under state constitutional and statutory provisions. He next considers the Supreme Court's interpretation of the due process clause of the fourteenth amendment as a safeguard of the right to counsel in state proceedings. He closes with a chapter on the right to counsel in practice, and one summarizing his conclusions.

As the selected bibliography appended to the volume demonstrates, much has been written about the right to counsel. Professor Beaney adds very little to what has already been said. He has, however, read the cases and relevant literature carefully and it is useful to have this material analyzed and summarized in a single volume.[2]

With respect to the problem of counsel in the federal courts Professor Beaney concludes that, at least in legal theory, it is "substantially solved" by virtue of the decisions in *Johnson v. Zerbst*[3] and *Walker v. Johnston*,[4] and rule 44 of the Federal Rules of Criminal Procedure,[5] effective since 1946.

He is more critical of the status of the right to counsel in state prosecutions. Under the prevailing interpretation of the due process clause of the fourteenth amendment the states are not required to appoint counsel for impecunious defendants in non-capital cases unless an appraisal of the "totality of facts" shows special circumstances rendering the trial unfair without legal assistance.[6] Professor Beaney believes that the "fair trial" test has proved difficult to apply. "So many variables are included within its ill-defined limits that it has failed to provide adequate guidance for state trial courts and has confused state and federal courts called upon to review alleged denials of the right to counsel."[7] As a solution he proposes that the Supreme Court "either by

1. P. 1.

2. In terms of completeness of coverage the book is not as current as its publication date would indicate. Although published in 1955, the preface was written in 1953 and the latest case cited was decided in 1952.

3. 304 U.S. 458 (1938). This case established the proposition that if an accused in a criminal case "is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty." *Id.* at 468.

4. 312 U.S. 275 (1941), holding that a plea of guilty by a defendant who had not been informed of his right to counsel should not in itself be treated as a waiver of counsel.

5. "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

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

7. P. 230.

declaring that under modern conditions due process in criminal proceedings requires counsel, unless waived, or by formulating a new application of its fair trial doctrine, should take the firm position that a trial cannot be fair unless counsel assists every defendant who wants or needs the aid of counsel. . . . If our vaunted claim of 'equal justice under law' is to be more than an idle pretense, the right to have counsel must be extended in practice to all persons accused of crime."[8]

Professor Beaney attributes the Supreme Court's refusal to funnel sixth amendment right to counsel into fourteenth amendment due process to two factors: (1) A reluctance to extend federal power so as to affect the administration of state criminal law so long as state procedures are not inconsistent with fundamental fairness; (2) A desire to encourage the development of independent standards of fundamental rights and fairness. These factors are reinforced by the argument that historically the appointment of counsel was not considered a fundamental right essential to the conduct of a fair trial.[9]

Perhaps a more persuasive reason for the Court's refusal to extend the fourteenth amendment to require court-appointed counsel in all cases for indigents is the fear of an avalanche of habeas corpus petitions on behalf of prisoners incarcerated after state trials in which they were not represented by counsel.[10] This fear is not completely without foundation.[11] But the very uncertainty of the "fair trial" doctrine requiring defendants to establish special circumstances to entitle them to court-appointed counsel has encouraged numerous petitions for habeas corpus. And if it is assumed that the right to counsel is fundamental, pressing administrative considerations should not justify a refusal to vindicate basic rights.

There is a bewildering incongruity, not elaborated by Professor Beaney, in the Supreme Court's interpretation of the fourteenth amendment. The Court makes a distinction, which frequently goes unnoticed, between the right to court-appointed aid and the right to self-chosen counsel. Although there is

8. P. 234.

9. In Betts v. Brady, 316 U.S. 455 (1942), the Court's analysis of early state constitutional provisions guaranteeing the right to counsel convinced it that they ". . . were intended to do away with rules which denied representation, in whole or in part, by counsel in criminal prosecutions, but were not aimed to compel the State to provide counsel for a defendant." *Id.* at 466. For a sharp criticism of this view, see Becker & Heidelbaugh, *The Right to Counsel in Criminal Cases*, 28 NOTRE DAME LAW. 351 (1953).

10. This fear is rarely articulated. However, in Foster v. Illinois, 332 U.S. 134 (1947), the Court stated that the recognition of the claim that due process requires counsel to be appointed for all indigent defendants in state criminal proceedings ". . . would furnish opportunities hitherto uncontemplated for opening wide the prison doors of the land." *Id.* at 139.

11. Following Johnson v. Zerbst, 304 U.S. 458 (1938), a large number of petitions for habeas corpus, based upon an alleged denial of counsel, were filed by federal prisoners. In the district that includes Alcatraz Penitentiary, for example, 75 such petitions were filed in the ensuing three years. See Fellman, *The Constitutional Right to Counsel in Federal Courts*, 30 NEB. L. REV. 559, 571 (1951).

no right to court-appointed counsel in non-capital cases in the absence of special circumstances, it is apparently a violation of due process in all criminal cases, regardless of the circumstances, to deny an opportunity to obtain counsel of one's own choice.[12] The result of this doctrine is that a man has the fundamental right to the service of an attorney only if he can procure one on his own. Due process thus depends on the size of a man's pocketbook. In fact, it seems likely that equal protection of the laws is denied where the defendant is not represented by counsel because of indigence.[13]

With the states left pretty much at large in non-capital cases, a consideration of the right to counsel as interpreted by state courts is of great importance. Professor Beaney finds that notwithstanding variations in wording and phrasing the state courts have generally construed state constitutional provisions respecting counsel to mean nothing more than the right to appear in court with retained counsel.[14] Most states, however, have tried to solve the problem by statute. All provide for appointment in capital cases and at least thirty-four require it in all felony prosecutions. But these provisions are diluted in many instances by the additional requirement that defendant request counsel—failure to request being deemed a waiver.[15] Professor Beaney feels that the chief problems have arisen from state courts' eagerness to discover a waiver, their failure to grant continuances to permit adequate preparation for trial, and their unwillingness to entertain claims of incompetent representation.[16] He predicts that the ambiguity of the "fair trial" test will eventually force the states to adopt measures approximating the right enjoyed in federal trials under the sixth amendment. He recommends that the states adopt provisions similar to federal rule 44.[17]

In his chapter entitled "Right to Counsel in Practice" Professor Beaney discusses and evaluates the various methods of providing counsel for indigent and unrepresented persons accused of crime. He relies heavily upon Emery A. Brownell's definitive *Legal Aid in the United States* (1951) and Martin

12. In the recent case of Chandler v. Fretag, 348 U.S. 3 (1954), the Court in rejecting the state's reliance upon Betts v. Brady, 316 U.S. 455 (1942), said: "But that doctrine has no application here. Petitioner did not ask the trial judge to furnish him counsel; rather, he asked for a continuance so that he could obtain his own. The distinction is well established in this Court's decisions. . . . Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified." *Id.* at 9.

13. Professor Beaney refers to the equal protection argument as an "unusual position." P. 197.

14. Only California, New York, Indiana, Georgia, Nevada, New Mexico and Nevada, according to Professor Beaney, have given their constitutional provisions "an interpretation comparable to that which the United States Supreme Court gave to the Sixth Amendment provision in *Johnson v. Zerbst*." P. 83.

15. For a detailed survey of state provisions regarding the furnishing of counsel in criminal cases, see Callagy, *Legal Aid in Criminal Cases*, 42 J. CRIM. L., C. & P.S. 589 (1952).

16. Pp. 138-39.

17. Pp. 140 and 197. Rule 44 is set out at note 5 *supra*.

Callagy's report on *Legal Aid in Criminal Cases*.[18] Court assignment of counsel from the local bar is still the most common method of providing legal assistance for the indigent. In the federal courts there is no provision for payment of compensation to attorneys assigned to represent defendants. On the other hand, most states provide, with varying degrees of adequacy, for payment of fees. Professor Beaney makes two generalizations regarding the effectiveness of the assigned counsel system. First, in murder cases indigent defendants have commonly received adequate representation. "[T]he notoriety, the opportunity for personal publicity as well as public service, and the fascination of defending the life of an accused have combined to make many able and experienced attorneys available for the defense in such cases. (Whether this has proved true, however, in certain communities where racial tension exists is doubtful.)"[19] "The second generalization is that in rural or small-town communities the concern of the bar and the people has been more evident, and a real effort to provide counsel has been the rule."[20] It therefore follows that the problem of providing counsel in non-capital cases is essentially an urban one. In the author's opinion, the solution lies in accepting one of two alternatives to the present assignment system: the assignment of "voluntary defenders" from legal-aid bureaus, or the public defender system.

Six out of every ten defendants in criminal cases are unable to employ counsel. "In 1947 an estimated 97,000 persons who could not afford a lawyer faced prosecution on serious criminal charges of a type classified in many states as felonies. Not more than 22,000 were assisted by public or voluntary defender organizations. Approximately 36,000 received the frequently inadequate services of assigned private counsel, and at least 38,000 went without any form of Legal Aid whatever."[21] These figures mean that more than one-half of the indigent criminal defendants facing serious charges must meet those charges without the help of a lawyer or with assistance so inadequate as to be virtually worthless.[22] Surely a wealthy nation committed to egali-

18. 42 J. CRIM. L., C. & P.S. 589 (1952). Professor Beaney also "observed court proceedings and . . . interviewed lawyers, trial judges, and members of prosecutors' staffs in order to gain insights which the printed page inevitably denies." P. v.

19. P. 213.

20. *Ibid.*

21. BROWNELL, LEGAL AID IN THE UNITED STATES 86 (1951).

22. Where a defendant has a right to counsel he also has a corollary right to *competent* counsel. Thus in federal and state prosecutions the defendant must have "effective" assistance of counsel. Powell v. Alabama, 287 U.S. 45, 71 (1932). But appellate courts have taken a suspicious attitude towards claims of ineffective and incompetent representation. The defendant must show that the performance of court appointed counsel was of such a low order as to amount to no representation at all. "An extreme case must be shown." Soulia v. O'Brien, 94 F. Supp. 764, 770 (D. Mass. 1950). *Cf.* People v. Morris, 3 Ill.2d 437, 121 N.E.2d 810 (1954). And where the defendant has selected his own attorney the courts hold, almost without exception, that the failure of such counsel to exercise care and skill in the trial of the case does not afford a basis for upsetting the conviction. *Cf.*

tarian principles which it has implemented by extensive economic, political, and social legislation can afford decent treatment for its poor who face loss of life or liberty in criminal proceedings. Perhaps the public defender system —now being proposed for the federal courts—or the "voluntary defender" employed by a charitable corporation is the best overall solution of the problem of defending indigent defendants. However, neither should be the exclusive method for providing counsel. It has always been a proud and honorable tradition of the bar to accept assignments by the court to defend clients unable to retain their own lawyers. This tradition should be nourished and the courts should retain the power to assign counsel in any case where they believe a public defender or private defender organization cannot adequately represent a defendant. Provision should also be made for a modest per diem as compensation—modest, because the bar must be willing to accept some part of the burden involved in the administration of justice.

"Unpopular cause" cases would be the ones most likely to warrant the assignment of counsel. Although many public defenders present vigorous and searching defenses, would a public defender representing a Communist defendant accused of advocating the overthrow of the Government by force contend that the Communist party is innocent of any such intentions? Would a public defender be likely to attack a jury selection system approved by the judge who appointed him?

But a defender system supplemented by compensated, appointed counsel in special cases is not enough. To make the right to counsel meaningful and effective, legislation should include the following:

1. An indigent defendant in a criminal trial should be entitled, at government expense, to a copy of the stenographic transcript.
2. An indigent defendant in a criminal case should be reimbursed for all out-of-pocket expenses reasonably incurred in his defense, including expert witness fees.
3. A defendant, even though not impecunious, if found not guilty, should be reimbursed for reasonable expenses including a fair attorney's fee. A

United States v. Parrino, 212 F.2d 919 (2d Cir. 1954). One of the most extreme cases is Hudspeth v. McDonald, 120 F.2d 962 (10th Cir. 1941): "The most that can be said for this testimony is that it establishes that appellee's counsel drank throughout the trial and that he was under the influence of intoxicating liquor to a greater or less degree during the whole trial. But what of it? Appellee employed him; he paid him a substantial fee, and had a right to his services if he desired them, even though he might have been under the influence of intoxicants." *Id.* at 967.

Some courts hold court appointed counsel to a higher standard than counsel selected by the defendant. People v. Morris, 3 Ill.2d 437, 121 N.E.2d 810 (1954). This distinction is difficult to support. It is not applied where a defendant claims he was deprived of effective assistance of counsel because of a conflict of interest on the part of counsel representing two different defendants. Craig v. United States, 217 F.2d 355 (6th Cir. 1954). "It is immaterial whether such counsel was appointed by the Court or selected by the accused, in the absence of facts constituting a waiver of the right." *Id.* at 359.

For good discussions of the right to competent counsel, see Notes, 47 COLUM. L. REV. 115 (1947), 38 MINN. L. REV. 667 (1954).

> defendant who is acquitted may nevertheless be ruined financially by the cost of a trial.[23]

Professor Beaney makes one other point that warrants brief comment. Although the Supreme Court has declared that a prisoner "requires the guiding hand of counsel in every step in the proceedings against him,"[24] the right to court-appointed counsel has generally been interpreted as applying only to proceedings in court, and not to preliminary proceedings before a committing magistrate,[25] nor during police interrogation. An accused person sorely needs the help of a lawyer when he is first arrested and from then on until the trial. The intervening period is so full of hazards that an accused may lose any legitimate defense long before he is arraigned and put to trial. Lack of counsel before trial may very well result in lack of effective counsel at the trial itself.[26] In any event, it would seem that the right to court-appointed counsel should extend to include the preliminary hearing.

One hundred and one years ago Judge Stuart of the Indiana Supreme Court wrote:

> "It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. No court could be respected, or respect itself, to sit and hear such a trial. The defense of the poor, in such cases is a duty resting somewhere, which will be at once conceded as essential to the accused, to the court and to the public."[27]

Professor Beaney has demonstrated that to this day in most of the courts of the United States Judge Stuart's words constitute a statement of an ideal to be attained, not a description of the law in operation.

RICHARD C. DONNELLY†

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23. These suggestions are derived from Cross, *"The Assistance of Counsel for his Defense": Is This Becoming a Meaningless Guarantee?*, 38 A.B.A.J. 995 (1952).

24. Powell v. Alabama, 287 U.S. 45, 69 (1932); Johnson v. Zerbst, 304 U.S. 458, 463 (1938).

25. Although a defendant is not entitled to have counsel assigned to him under the Federal Rules in connection with preliminary hearings, he is entitled to be represented by counsel retained by him, if he so chooses. FED. R. CRIM. P. 5(b). See Note, 3 UTAH L. REV. 224 (1952).

26. In the recent case of Application of Sullivan, 126 F. Supp. 564 (D. Utah 1954), Chief Judge Ritter held that in a state capital case due process requires assistance of counsel at the preliminary hearing. *Cf.* the opinions of Justice Jackson, concurring in the result in Watts v. Indiana, 338 U.S. 49, 57 (1949), and dissenting in Harris v. South Carolina, 338 U.S. 68, 71 (1949), and Turner v. Pennsylvania, 338 U.S. 62, 66 (1949). See also Note, 26 IND. L.J. 234 (1951).

27. Webb v. Baird, 6 Ind. 13, 18 (1854).

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