



1972

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Bill Deatherage
University of Kentucky

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Recommended Citation

Deatherage, Bill (1972) "The Uncompensated Appointed Counsel System: A Constitutional and Social Transgression," *Kentucky Law Journal*: Vol. 60 : Iss. 3 , Article 7.

Available at: <https://uknowledge.uky.edu/klj/vol60/iss3/7>

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Comments

THE UNCOMPENSATED APPOINTED COUNSEL SYSTEM: A CONSTITUTIONAL AND SOCIAL TRANSGRESSION

"Pay For Lawyers: Attorneys Ask Compensation For Aid To Indigent."¹ This and similar headlines are appearing in newspapers throughout the United States as attorneys are frequently turning to the arena they know best, the courts, in an attempt to vindicate the injustice thrust upon them as a result of the uncompensated, appointed counsel system. This system, antiquated as it may be, is still being used in one form or another, in several jurisdictions² in order to meet the increased constitutional requirements of counsel for an accused at the various stages of a criminal proceeding.³

Counsel for the poor in Kentucky always have served by court appointment and without pay.⁴ Instead of making changes in its traditional assigned counsel system to meet the increased demand for counsel, Kentucky has preferred to rely on assigning more and more cases to the new members of the bar.⁵ In doing so, Kentucky not only

¹ Sunday Herald-Leader (Lexington, Ky.), Nov. 22, 1970, at 79, cols. 5-8.

² In a 1965 report for the American Bar Foundation it was pointed out that the assigned attorney is usually paid a moderate fee for his services in 35 states, and in four states he is paid only in capital cases, while in six states, *i.e.*, Kentucky, Louisiana, Missouri, South Carolina, Tennessee, and Utah, and the District of Columbia he is not paid at all. 1 SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS [hereinafter cited as SILVERSTEIN], 16 (1965). It was also noted that the assigned counsel system is "still the only one used in about 2,900 of the 3,100 counties in the United States." *Id.* at 15.

See generally Bird, *The Representation of Indigent Criminal Defendants in Kentucky*, 53 Ky. L.J. 478 (1964) [hereinafter cited as Bird], for a description of Kentucky's appointed counsel system.

³ *Gideon v. Wainwright*, 327 U.S. 335 (1963), greatly expanded the need to provide counsel in state felony cases by requiring that every indigent person charged with a felony in the state courts be provided, if he so desires, with counsel to represent him. Counsel is also required in other critical stages of the litigation. *See* *Coleman v. Alabama*, 399 U.S. 1 (1970); *Mempa v. Rhay*, 389 U.S. 128 (1967); *In re Gault*, 387 U.S. 1 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966). *See also* Ky. Consr. § 11, which provides that an accused has the right to be heard by counsel in all criminal prosecutions; Ky. R. CRIM. P. [hereinafter cited as R.Cr.] 3.08, which provides for counsel at the preliminary proceeding; R.Cr. 8.04, which deals with the assignment of counsel in general; and R.Cr. 11.02, which provides for counsel on appeal.

⁴ Palmore, *Counsel for the Indigent in Criminal Cases* (address before the Governor's Conference on Bail and Right to Counsel, Louisville, Ky., Jan. 23, 1965) 29 Ky. S.B.J. No. 3, at 21, 23 (May, 1965) [hereinafter cited as Palmore].

⁵ There is no inflexible method of limiting assignments to a specific segment of the bar, although as a practical matter the newly admitted members of the bar receive the bulk of the assignments. Generally the judge makes his own selection

(Continued on next page)

has placed an unfair burden on its new attorneys, but has also failed to live up to the spirit of *Gideon v. Wainwright*⁶ in discharging its obligation to its indigent citizens. "A disparity exists between the representation provided indigent defendants in Kentucky and that contemplated by the due process and equal protection clauses of the federal constitution."⁷

In addition to the increased requirements for appointed counsel in order to satisfy an indigent accused's constitutional rights, our country has witnessed growing concern for the right of an indigent accused to *effective assistance of counsel*, which includes *assistance in addition to counsel*.⁸ Since an indigent's right to assistance in addition to counsel traditionally has not been recognized, only a few courts have sought to provide the resources necessary to appointed counsel to enable them to include such services as psychiatric evaluation in defense of the indigent.⁹ These decisions have generally been based on the sixth amendment "right to counsel" and the fourteenth amendment "due process" clause.¹⁰ Primarily, the deficiencies in the assigned counsel system are said to deny an indigent defendant the effective assistance of counsel in two ways: (1) the inferior quality of interest invested in the defense by the uncompensated, appointed counsel, and (2) the limited resources available for preparation of the defense.¹¹ However, since the purpose of this writing is to focus mainly on the constitutional rights of the attorney as affected by the appointed counsel system, the guaranteed rights of the indigent as affected by the system largely will be left unexplored.

In taking a critical look at the appointed counsel system, the first point that should be noted is the fact that an attorney actually has very little discretion as to whether or not he will accept his appointment as defense counsel for an indigent accused. Once he has been appointed by the court to represent an indigent defendant, the attorney, in almost

(Footnote continued from preceding page)

but the method used may vary from a straight rotation system of selection to selection of an attorney who happens to be present in the courtroom at the time. Bird, *supra* note 2, at 511-12.

⁶ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁷ Bird, *supra* note 2, at 512.

⁸ See generally Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. REV. 1054 (1963).

⁹ See, e.g., *Bush v. McCollum*, 231 F. Supp. 560 (N.D. Tex. 1964) *aff'd*, 344 F.2d 672 (5th Cir. 1965), where the federal district court held that the denial, in a Texas state court, of an indigent defendant's motion to provide funds for psychiatric services amounted to a violation of the defendant's due process right under the fourteenth amendment. See also *Griffin v. Illinois*, 351 U.S. 12 (1956); but see *Huguley v. Martin*, 325 F. Supp. 489 (N.D. Ga. 1971).

¹⁰ Williams & Bost, *The Assigned Counsel System: An Exercise of Servitude?* 42 Miss. L.J. 32, 42 (1971) [hereinafter cited as Williams & Bost].

¹¹ *Id.* at 38.

all cases, must proceed with the defense of the indigent or risk a contempt judgment from the appointing court. It is an accepted general rule in most jurisdictions that a court has the right to appoint counsel for the defense and to require his services.¹² Conceivably, the only immediate recourse available to a dissatisfied appointed attorney is to continue with the defense of the indigent, and at the same time make a motion for an order directing payment of reasonable compensation for his services. This motion, however, is almost certain to be denied by the trial court, with little chance for success in the appellate courts.¹³ Looking to the future, the dissatisfied attorney can pressure his state bar association to lobby for a more equitable and just system of providing counsel for the indigent accused.

In addition to the constitutional rights of the indigent defendant which are contaminated by the present appointed counsel system, there are certain rights of the appointed attorney himself which appear to be transgressed by the system. These include the attorney's right to "property" as guaranteed by the federal¹⁴ and Kentucky¹⁵ constitutions, his right to "due process of law" and "equal protection of the laws" as guaranteed by the federal constitution,¹⁶ and his right to freedom from "involuntary servitude" as guaranteed by the federal¹⁷ and Kentucky¹⁸ constitutions. With a long history of litigation, dissatisfied appointed attorneys have attacked the constitutionality of the ap-

¹² See, e.g., *Schoolfield v. Darwin*, 185 S.W.2d 509 (Tenn. 1945), which affirmed a judgment of contempt against an attorney for refusing to act as defense counsel for two defendants in a prosecution for burglary.

¹³ See, e.g., *United States v. Dillon*, 346 F.2d 633 (9th Cir. 1965), cert. denied, 382 U.S. 978 (1966); *Dohan v. United States*, 351 F.2d 671 (5th Cir. 1965); *Jackson v. State*, 413 P.2d 488 (Alaska 1966); *Jones v. Commonwealth*, 457 S.W.2d 627 (Ky. 1970); *Commonwealth Dep't of Corrections v. Burke*, 426 S.W.2d 449 (Ky. 1968); *Jones v. Commonwealth*, 411 S.W.2d 37 (Ky. 1967); *Warner v. Commonwealth*, 400 S.W.2d 209 (Ky. 1966).

¹⁴ U.S. CONST. amend. V provides: ". . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. CONST. amend. XIV, § 1 provides: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

¹⁵ KY. CONST. § 242 provides: "Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed. . . ."

KY. CONST. § 13 provides: ". . . nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him. . . ."

¹⁶ U.S. CONST. amend. XIV, § 1, *supra* note 14.

¹⁷ U.S. CONST. amend. XIII, § 1 states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdictions."

¹⁸ KY. CONST. § 25 provides: "Slavery and involuntary servitude in this state are forbidden, except as a punishment for crime, whereof the party shall have been duly convicted."

pointed counsel system through various combinations of the above constitutional claims in an attempt to establish an additional right—the right of an attorney, appointed by the court, to compensation by the public. For the most part, these attempts have been unsuccessful, with the majority of jurisdictions holding that, in the absence of a state statute or court rule, assigned counsel for an indigent defendant have no right to compensation by the public.¹⁹ Generally, the attorney's right to compensation has been denied on the basis of two theories: (1) that it is the attorney's duty as an officer of the court to render gratuitous service when appointed by the court,²⁰ to defend an indigent accused and (2) that the obligation to render gratuitous service is a condition of the license to practice law, and the attorney consents to this condition when he applies for and accepts the license.²¹

But at least one court has rejected the theory that an attorney, in accepting his license, consents to render uncompensated services for indigent defendants under court appointment.²² Although it concluded

¹⁹ The following jurisdictions have recognized or held that, in the absence of a statute or court rule, assigned counsel for an indigent accused have no right to compensation by the public: the Second, Fifth, and Ninth Circuits of the United States Court of Appeals and the states of Alabama, Alaska, Arkansas, California, Georgia, Illinois, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, New Jersey, New York, North Carolina, Pennsylvania, Tennessee, Utah, Washington and West Virginia. For a listing of cases in the above jurisdictions, see 21 Annot., A.L.R.3d 822.

²⁰ This is the reason most frequently used by the courts in support of their view denying the attorney's right to compensation. See *United States v. Dillon*, 346 F.2d 633 (9th Cir. 1965), cert. denied, 382 U.S. 978; *Powell v. Alabama*, 287 U.S. 45 (1932); *Jackson v. State*, 413 P.2d 488 (Alaska 1966); *Rowe v. Yuba County*, 17 Cal. 61 (1860); *Weiner v. Fulton County*, 148 S.E.2d 143 (Ga. 1966); *Jones v. Commonwealth*, 411 S.W.2d 37 (Ky. 1967); *Warner v. Commonwealth*, 400 S.W.2d 209 (Ky. 1966); *Williams v. Commonwealth*, 110 S.W. 339 (Ky. 1908); *People v. Thompson*, 205 App. Div. 518, 199 N.Y.S. 868 (1923); *Scott v. State*, 392 S.W.2d 681 (Tenn. 1965); *Presby v. Klickitat County*, 31 P. 876 (Wash. 1892).

As officers of the court, attorneys are thought to have a duty when called upon by the court to render services for indigents in criminal cases without payment of a fee except as may be provided by statute or court rule. *Jackson v. State supra* at 490. "[I]t is a duty which counsel so designated owes to his profession. . . . No one is at liberty to decline such an appointment. . . ." *Palmore, supra* note 4, at 21.

²¹ See *United States v. Dillon*, 346 F.2d 633 (1965), cert. denied 382 U.S. 978; *Dollan v. United States* 351 F.2d 671 (5th Cir. 1965); *Jackson v. State*, 413 P.2d 488 (Alaska 1966); *Weiner v. Fulton County*, 148 S.E.2d 143 (Ga. 1966), cert. denied 385 U.S. 958; *Johnson v. Whiteside County*, 110 Ill. 22 (1884). But see *Ruckenbrod v. Mullins*, 133 P.2d 325 (Utah 1943).

Under this theory when an attorney applies for and accepts a license to practice law he is deemed to be aware of the conditions of the license and therefore to consent to them, *United States v. Dillon, supra* at 635.

An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. *Id.* at 635.

²² *Ruckenbrod v. Mullins*, 133 P.2d 325 (Utah 1943).

that an attorney, as an officer of the court, may be compelled to render gratuitous services, the Supreme Court of Utah, in *Ruckenbrod v. Mullins*, rejected the consent theory in holding that a state cannot impose restrictions on the acceptance of a license which will deprive the licensee of his constitutional rights.²³

Most challenges to the uncompensated, appointed counsel system by attorneys have been based on the premise that the system amounts to an unconstitutional taking of private property for public use without just compensation.²⁴ Another argument often advanced in relation to this is that the system takes property without due process of law and denies equal protection of the laws.²⁵ Obviously, an underlying assumption in both of these arguments is that an attorney's time and services are considered his "property" in the constitutional sense. As early as 1854 the Supreme Court of Indiana intimated that an attorney's services are his "property,"²⁶ and in 1957 the United States Supreme Court likewise in *Schware v. Board of Bar Examiners*²⁷ and *Konigsberg v. State Bar*²⁸ insinuated that the practice of law is analogous to "property" as protected by the due process clause of the fourteenth amendment to the United States Constitution. In *Schware* the Court held that a state cannot exclude a person from taking a bar examination in such a manner that contravenes the due process or equal protection clause of the fourteenth amendment,²⁹ and in *Konigsberg* the Court held that a state cannot refuse to admit a person to the bar for reasons which constitute a denial of due process and equal protection of the laws, in violation of the fourteenth amendment.³⁰

Nine years later, two cases were decided which applied the *Schware* and *Konigsberg* cases to the problem of whether an attorney's services

²³ *Id.* at 327.

²⁴ This premise is based upon U.S. CONST. amend. V and amend. XIV, § 1, *supra* note 14; there are similar provisions in many state constitutions, e.g., Ky. CONST. §§ 13, 242, *supra* note 15.

²⁵ This argument is founded upon U.S. CONST. amend. XIV, § 1, *supra* note 15.

²⁶ In *Webb v. Baird*, 6 Ind. 13 (1854), the Supreme Court of Indiana upheld the power of a judge to employ an attorney at the expense of a county to defend a pauper in the absence of statutory authority. By its language the court seemed to imply that an attorney's services are his property:

To the attorney, his profession is his means of livelihood. His legal knowledge is his capital stock. His professional services are no more at the mercy of the public, as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic. *Id.* at 17.

²⁷ 353 U.S. 232 (1957).

²⁸ 353 U.S. 252 (1957).

²⁹ *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238 (1957).

³⁰ *Konigsberg v. State Bar*, 353 U.S. 252, 262 (1957).

constitute property but with different results. *Jackson v. State*³¹ suggests that *Schware* and *Konigsberg* do not stand for the fact that an attorney's services are "property". The Supreme Court of Alaska, in holding that an assigned attorney has no constitutional right to receive compensation and is entitled to compensation only to the extent that statute or court rule may so provide, said that *Schware* and *Konigsberg* do not suggest that a lawyer is deprived of his right to practice law without due process or has such a right taken from him without just compensation when he is required to represent an indigent defendant without pay.³² On the other hand, in *Weiner v. Fulton County*³³ the Court of Appeals of Georgia extended *Schware and Konigsberg* in declaring there to be in all practical effect a taking of property by the sovereign when an attorney is required to defend an indigent without compensation.³⁴ The Georgia court relied on *Schware and Konigsberg* when it said, "[T]he right to practice law has been held to be a property right within the meaning of the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States."³⁵

Just as it would seem that the services of a doctor, a plumber, or a barber are his "property" within the constitutional sense of the word, it should logically follow that the services of a lawyer constitute his "property." For just as a grocer, a clothing store owner, and an automobile dealer sell their goods, a doctor, a plumber, a barber, and a lawyer sell their services. It would be interesting to observe the uproar if an automobile dealer were required to give free cars to indigents or a barber were required to give free haircuts.

The lawyer has been placed in a class by himself and forced to give up his property, *i.e.*, his services, for public use without adequate compensation, without due process of law, and without equal protection of the laws. The attorney is being deprived of his property without due process of law in the sense that it is being taken in violation of the federal and state constitutions simply as a result of the failure of courts to take an affirmative stand and break away from tradition in those jurisdictions where the legislature has failed to provide for compensation. Likewise, the attorney is deprived of equal protection of the laws when he is compelled to perform services without compensation while no other profession is so required to give its goods or services free of charge. "It is especially ironic, in a land that cherishes its free-

³¹ 413 P.2d 488 (Alaska 1966).

³² *Id.* at 489.

³³ 148 S.E.2d 143 (Ga. 1966).

³⁴ *Id.* at 145.

³⁵ *Id.*

dom and constitutional rights, that the very person who is charged with the protection and perpetuation of those rights is most flagrantly deprived of his own rights."³⁶

A less frequently used argument for attacking the present uncompensated assigned counsel system is that the present system violates the federal and state constitutional prohibitions against involuntary servitude.³⁷ Incorporated in the involuntary servitude argument is the contention that the present system also violates the federal prohibition of peonage.³⁸ Peonage has been defined as a "condition of enforced servitude by which the servitor is compelled to labor in liquidation of some debt or obligation, either real or pretended, against his will."³⁹ Since it has been held that peonage was comprehended within the slavery and involuntary servitude proscribed by the thirteenth amendment,⁴⁰ the two arguments are necessarily compatible. Although the involuntary servitude argument has found almost no sympathy in the courts,⁴¹ it apparently is not because the argument itself lacks merit. The failure to give weight to the argument seemingly is because of the courts' fear to depart from the traditional concept of thinking of the attorney as an officer of the court, obligated to render gratuitous service, and because of the courts' fear of budgetary complications if an order were promulgated which required assigned attorneys to be compensated.⁴² In spite of the fact that many courts recognize the serious burden which the present system places on the bar, they prefer to maintain the status quo and wait for the legislature to act.⁴³ An attor-

³⁶ Hunter, *Slave Labor in the Courts—A Suggested Solution*, 74 CASE & COM. July-Aug., 3, 10 (1969).

³⁷ See U.S. CONST. amend. XIII, § 1, *supra* note 17, for the federal prohibition against slave labor, and KY. CONST. § 25, *supra* note 18, for a typical state prohibition.

³⁸ 42 U.S.C. § 1994 (1970) states:

The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any territory or state of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation or otherwise, are declared null and void.

³⁹ LEGISLATIVE REFERENCE SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION 1062 (1964).

⁴⁰ Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

⁴¹ See, e.g., *United States v. Dillon*, 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966); *State v. Rush*, 217 A.2d 441 (N.J. 1955).

⁴² See *Warner v. Commonwealth*, 400 S.W.2d 209 (Ky. 1966).

⁴³ See, e.g., *Jones v. Commonwealth*, 457 S.W.2d 627 (Ky. 1970); *Commonwealth, Dep't of Corrections v. Burke*, 426 S.W.2d 449 (Ky. 1968); *Jones v. Commonwealth*, 411 S.W.2d 37 (Ky. 1967); *Warner v. Commonwealth*, 400 S.W.2d 209 (Ky. 1966).

ney assigned to defend an indigent accused is being compelled to render the gratuitous service by the threat of a contempt judgment. If an attorney refuses the appointment he risks a possible fine, imprisonment, and loss of his livelihood. This form of coercion plus the fact that many attorneys perform these services unwillingly results in nothing less than involuntary servitude. The fact that attorneys are being forced to perform these gratuitous services because of an obligation which they are said to owe to the court amounts to "peonage."⁴⁴ Ironically, what emerges is a form of court-sanctioned servitude which is in violation of the very constitutions which the courts are sworn to uphold.

Historically, the courts in most jurisdictions have not been receptive to the constitutional arguments applicable to the assigned attorney. In *United States v. Dillon*,⁴⁵ an attorney appointed by a federal district court to represent an indigent defendant in a post-conviction proceeding filed a claim for compensation at the court's invitation. Since the appointment and service were prior to the enactment of the Criminal Justice Act of 1964,⁴⁶ the district court held that the appointment constituted a taking of the lawyer's property for public use, and therefore reasonable compensation was payable. The Ninth Circuit Court of Appeals reversed, holding that the court order appointing and directing counsel to represent an indigent defendant did not amount to a taking of the attorney's property which would require just compensation under the fifth amendment.⁴⁷

Although the Kentucky Court of Appeals in *Warren v. Commonwealth*⁴⁸ recognized that there was merit in the proposition that assigned counsel should be compensated, it skirted the constitutional issue of whether a court order requiring an attorney to represent an indigent defendant constitutes a taking of the attorney's property within the context of the fifth amendment.⁴⁹ Instead, the Kentucky Court chose to rely on the traditional notion of the attorney as an officer of the court and affirmed a lower court order overruling an assigned attorney's motion for allowance of a fee. The court indicated that the time for compelling the public treasury to make compensation

⁴⁴ See 42 U.S.C. § 1994 (1970), *supra* note 38.

⁴⁵ 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

⁴⁶ 18 U.S.C. § 3006A (1970). This act provides for compensation by the federal government to assigned counsel representing indigents in the federal courts.

⁴⁷ *United States v. Dillon*, 346 F.2d 633, 636 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

⁴⁸ 400 S.W.2d 209 (Ky. 1966).

⁴⁹ U.S. CONST. amend. V provides for "just compensation" whenever private property is taken for public use. See note 14 *supra*.

available was not appropriate and thus deferred to legislative action.⁵⁰

The decision of the New Jersey Supreme Court in *State v. Rush*⁵¹ represents what is perhaps the turning point in the courts' theretofore unwillingness to relieve attorneys of the increased burden of the appointed counsel system. Although it disposed of all constitutional arguments as they affect an attorney,⁵² the court decided that relief, in the form of compensation, should be ordered. Since it possessed the power to control the practice of law before it, the New Jersey court concluded that it also had the power to order compensation for those officers of the court whose performance was necessary for the proper functioning of the system. The court found authority for the payment in a state statute which required the county treasurer to pay the necessary expenses of the prosecutor. The court further concluded that the expense of providing an indigent defendant with counsel, without which the prosecution would fail, must be included as a necessary expense of the prosecutor. The court decided, however, that it would delay ordering payment until the legislature had reasonable opportunity to determine how the obligation was to be met. The same year the Court of Appeals of Georgia, on the other hand, held that although taking an attorney's time and expenses by appointment to represent an indigent accused constituted taking of private property for a public purpose, such taking was not compensable.⁵³

Again in 1970 the Kentucky Court of Appeals chose to follow the precedent set by *Warner*⁵⁴ and two other cases⁵⁵ and continued to defer to legislative action.⁵⁶ In reaching its decision not to order compensation, the Kentucky Court reasoned that a judicial order for payment would present difficulties because of the lack of a standard for determining reasonable compensation and because of the lack of a system for payment. The Court did recognize, however, that "the burden of the legal profession is continuing to increase, and to some

⁵⁰ 400 S.W.2d 209, 212 (Ky. 1966). See also *Jones v. Commonwealth*, 457 S.W.2d 627 (Ky. 1970); *Commonwealth, Dep't of Corrections v. Burke*, 426 S.W.2d 449 (Ky. 1968); *Jones v. Commonwealth*, 411 S.W.2d 37 (Ky. 1967).

⁵¹ 217 A.2d 441 (N.J. 1966).

⁵² The constitutional claims advanced by appellant in his own behalf were that an assignment without compensation for services takes private property for public use without just compensation, U.S. CONST. amends. V & XIV; takes property without due process of law and denies equal protection of the law, U.S. CONST. amend. XIV; and constitutes involuntary servitude, U.S. CONST. amend. XIII. *State v. Rush*, 217 A.2d 441, 445 (N.J. 1966). Appellant also advanced the claim that the assignment constituted peonage which is prohibited by federal law, 42 U.S.C. § 1994 (1970), but the court likewise held this to be without merit. *Id.* at 446.

⁵³ *Weiner v. Fulton County*, 148 S.E.2d 143 (Ga. 1966).

⁵⁴ 400 S.W.2d 209 (Ky. 1966).

⁵⁵ *Commonwealth, Dep't. of Corrections v. Burke*, 426 S.W.2d 449 (Ky. 1968); *Jones v. Commonwealth*, 411 S.W.2d 37 (Ky. 1967).

⁵⁶ *Jones v. Commonwealth*, 457 S.W.2d 627 (Ky. 1970).

of those members of the profession who are being called upon to bear the brunt of the load it may actually be amounting to a taking of property without compensation."⁵⁷

Thus a history of cases emerges which, in all but approximately four jurisdictions,⁵⁸ demonstrates a refusal to grant relief from the increasing burden on the legal profession. Although a majority of the courts may be sympathetic to the hardship imposed by this uncompensated, appointed counsel system, they refuse to break from tradition and order some type of payment. The decision in *Jackson v. State*⁵⁹ appears to be indicative of the general rule that an attorney appointed to represent an indigent defendant in a criminal matter has no constitutional right to receive compensation for his services in the absence of statute or court rule. "[A]lthough the majority view thus places the burden upon the members of the bar, no one suggests they may not constitutionally be relieved of it. Indeed the vast majority of the state legislatures have provided for some compensation for assigned counsel . . ."⁶⁰ and Congress itself has provided for compensation with passage of the Criminal Justice Act of 1964.⁶¹

In the minority are at least four jurisdictions; Indiana,⁶² Iowa,⁶³ New Jersey,⁶⁴ and Wisconsin,⁶⁵ which have held or recognized that courts have the power to relieve lawyers assigned to represent indigents of the burden of rendering free services, even though no statute or court rule provides for compensation. It should be noted that other jurisdictions have also provided for compensation, but in doing so the courts have relied on statutory interpretation.⁶⁶

In the early case of *Webb v. Baird*⁶⁷ the Supreme Court of Indiana relied on a provision of the state constitution⁶⁸ in deciding that appointed counsel have a non-statutory right to compensation. The court went on to say:

⁵⁷ *Id.* at 631.

⁵⁸ Indiana, Iowa, New Jersey and Wisconsin. See notes 62-65 *infra*.

⁵⁹ 413 P.2d 488 (Alaska 1966).

⁶⁰ *State v. Rush*, 217 A.2d 441, 444 (N.J. 1966).

⁶¹ 18 U.S.C. § 3006A (1970).

⁶² See *State ex rel. Grecco v. Allen Circuit Court*, 153 N.E. 914 (Ind. 1958); *Knox County Council v. State*, 29 N.E.2d 405 (Ind. 1940); *Webb v. Baird*, 6 Ind. 13 (1854); *Blythe v. State*, 4 Ind. 525 (1853).

⁶³ See *Ferguson v. Pattawattamie County*, 278 N.W. 223 (Iowa 1938); *Hall v. Washington County*, 2 Greene 473 (Iowa 1850).

⁶⁴ See *State v. Rush*, 217 A.2d 441 (N.J. 1966); *State v. Horton*, 170 A.2d 1 (N.J. 1961).

⁶⁵ See *Dave County v. Smith*, 13 Wis. 585 (1861); *Carpenter v. Dave County*, 9 Wis. 274 (1859).

⁶⁶ See, e.g., *Aboderly v. County of Worcester*, 227 N.E.2d 486 (Mass. 1967).

⁶⁷ 6 Ind. 13 (1854).

⁶⁸ IND. CONST. art. 1, § 21, provides that "no man's particular services shall be demanded without just compensation."

The law which requires gratuitous services from a particular class, in effect imposes a tax to that extent upon such class—clearly in violation of the fundamental law which provides for a uniform and equal rate of assessment and taxation upon all the citizens.⁶⁹

Approximately 85 years later in a 1940 case,⁷⁰ the Supreme Court of Indiana interpreted the same constitutional provision⁷¹ again and held that the state had no right to assign counsel without payment. In so holding the court relied on the seemingly universal rule that "a court has the inherent power and authority to incur and order paid all such expenses as are necessary for the holding of court and the administration of its duties."⁷² The Supreme Court of Iowa in *Hall v. Washington County*,⁷³ concluded that an appointed attorney was entitled to compensation under the principles of the fifth amendment.⁷⁴ In holding that a county was liable for compensating an assigned attorney, the Iowa court pointed out that "[I]t is a fundamental rule of right, established by the Constitution of the United States, 'that private property shall not be taken for public use without just compensation.'"⁷⁵ Likewise, the Supreme Court of Wisconsin in the case of *Dane County v. Smith*⁷⁶ relied on the fifth amendment principle of just compensation in holding that the power and duty to compensate appointed counsel arises out of the power to appoint.⁷⁷ As has been noted, the Supreme Court of New Jersey in *State v. Rush*⁷⁸ derived its power to order compensation from its power to control the practice of law before it, although it did rely on a statute as authority for the payment.

Adopting the reasoning of the *Rush* decision, the Supreme Judicial Court of Massachusetts in *Abodeely v. County of Worcester*,⁷⁹ extended a state statute, which authorized courts to order payment of expenses incident to their sittings out of county treasuries, to cover also the costs of appointed defense counsel. The court reasoned that if it were to provide proper prosecution, then it must also provide appropriate defense, and therefore concluded that court-assigned counsel for indigent defendants should be paid from the county treasury.⁸⁰

Thus, a minority of courts, while casting aside the shackles of

⁶⁹ 6 Ind. 13, 17 (1854).

⁷⁰ *Knox County Council v. State ex rel. McCormick*, 29 N.E.2d 405 (Ind. 1940).

⁷¹ IND. CONST. art. 1, § 21, *supra* note 68.

⁷² 29 N.E.2d 405, 413 (Ind. 1940).

⁷³ 2 Greene 473 (Iowa 1850).

⁷⁴ U.S. CONST. amend. V, *supra* note 14.

⁷⁵ 2 Greene 473, 478 (Iowa 1850).

⁷⁶ *County of Dane v. Smith*, 13 Wis. 654 (1861).

⁷⁷ *Id.* at 658.

⁷⁸ 217 A.2d 441 (N.J. 1966).

⁷⁹ 227 N.E.2d 486 (Mass. 1967).

⁸⁰ *Id.* at 489.

tradition, have secured the right of an appointed attorney to be compensated for his services. These courts, for a variety of reasons, have recognized the inequitable nature of an antiquated, assigned counsel system which singles out one profession in our society and forces that profession to give up its "property" without just compensation. The indigent defense system as it stands, denying compensation to appointed attorneys, forces a limited class of citizens to bear burdens, which in all fairness, should be borne by the public as a whole. The increasing demand for counsel at the various stages of a criminal proceeding have caused the burden placed on the legal profession to become intolerable by requiring it to meet these demands with gratuitous services. Not only is this burden unfair and unjust, but it is basically unconstitutional both to the attorney and to the indigent. "The lawyer himself should not fear indigency while defending the indigent. This unfairness to the accused and hardship on the Bar are intolerable. They are not at all conducive to the effective administration of justice."⁸¹

Just as the uncompensated, appointed counsel system deprives the attorney of his property without just compensation, without due process, and without equal protection of the laws, it also deprives the indigent defendant of effective assistance of counsel.⁸² Not only is the attorney forced by the sovereign to render his services in payment of an obligation which he is said to owe to the state, but the indigent defendant likewise is forced to accept something less than effective assistance of counsel. In all probability, an attorney who is forced to render free legal services to an indigent defendant will not devote as much time and effort to that defendant's case as he will to the case of a paying client. Furthermore, an attorney may resent the fact that he is forced, under threat of contempt, to represent an indigent accused without compensation. This resentment may adversely affect the quality of the legal representation which the defendant receives. Therefore, the uncompensated, appointed counsel system, in all likelihood, serves to deny the indigent accused effective assistance of counsel as guaranteed by the United States Constitution.⁸³

⁸¹ Ervin, *Uncompensated Counsel: They Do Not Meet the Constitutional Mandate*, 49 A.B.A.J. 435, 436 (1963).

⁸² The right to "effective assistance of counsel" is now generally recognized as a constitutional requirement of due process in accordance with the sixth amendment right to counsel and the due process provisions of the fifth and fourteenth amendments. See generally *Reece v. Georgia*, 350 U.S. 85 (1955); *Powell v. Alabama*, 287 U.S. 45 (1932); *Neufeld v. United States*, 118 F.2d 375 (D.C., Cir. 1941), *cert. denied*, 315 U.S. 798 (1942); *Jones v. Commonwealth of Kentucky*, 97 F.2d 335 (6th Cir. 1938).

⁸³ See note 82, *id.*

The *costs* of the uncompensated appointed counsel system should not be overlooked. The actual *economic costs* of the present system arise largely as a result of forcing attorneys to provide services without compensation. Attorneys are just like other citizens in that they must make a living. Thus, if a lawyer must provide free service to indigents, his fees for his paying clients will no doubt be adjusted upward in order to minimize his loss. The end result is that the citizens who find it necessary to purchase legal services are actually paying part of the costs of the appointed counsel system. Likewise, those citizens who could barely afford legal services in the first place are now precluded from seeking such services as a result of the increased cost. Also resulting from the uncompensated, appointed counsel system is the cost of extra litigation which arises from dissatisfaction with the present system. The indigent defendant may feel that he has not been afforded effective assistance of counsel and, consequently, may appeal the decision on that ground. It is not uncommon to find a young, inexperienced attorney⁸⁴ serving as court-appointed counsel for an indigent defendant, while the prosecutor is a seasoned veteran. Needless to say, this does not encourage the defendant to believe that he has received a fair trial. On the other hand, the appointed attorney may not be satisfied with working without pay and may appeal the denial of his motion for compensation. The result is more litigation to further crowd an already over-crowded court docket.

The *social costs* of the present system should also be considered. An indigent defendant, already stripped of his dignity by society, cannot be expected to feel that justice has been administered when his newly licensed, court-appointed, uncompensated attorney attempts to persuade him to plead guilty because the attorney doesn't want to bear the cost of a full trial. And surely the indigent defendant cannot be expected to feel that justice has prevailed when he is denied assistance in addition to counsel simply because there are no funds with which to pay for the additional assistance. Here is a member of society who feels that he has been wronged. He does not believe that justice can be attained in the courts, and as a result he will not respect the laws. He probably will become an habitual offender. Likewise, the lawyer who is forced to represent an indigent without pay cannot really be expected to feel that justice is at work. Where are the protections which the constitution is supposed to afford against taking property without just compensation, without due process, and

⁸⁴ A 1965 report showed that in roughly one-fourth of the counties surveyed which used the assigned counsel system exclusively, appointments were concentrated among the younger members of the bar. SILVERSTEIN, *supra* note 2, at 16.

without equal protection of the laws? Where is the protection against involuntary servitude? And this is the very constitution which the lawyer is expected to uphold. But maybe this is good in that it may tend to radicalize the lawyer to the extent that he will work fervishly for change. As has been said in a recent article dealing with this problem, "It may well be that the indirect cost of our failure to adequately compensate assigned counsel and to provide funds for the preparation of a defense outweigh the actual monetary cost of furnishing such assistance."⁸⁵

Kentucky, until recently, has been one of a small number of states which do not provide for compensating court appointed attorneys in some manner.⁸⁶ In retaining its antique system of providing counsel for indigent defendants, Kentucky has failed to keep pace with the changing concept as to the character of legal aid. Historically, legal aid has been viewed as a charity to be handed out in criminal cases somewhat at the discretion of the courts. Attorneys, as officers of the court, were said to owe a charitable obligation to the recipients of their gratuitous services and an affirmative duty to the court to carry out their appointment. The traditional notion has gradually given way to the concept that legal aid is a *political and social right*.⁸⁷ Just as one has a right to free speech, he also has a right to counsel in criminal proceedings. Included in this new concept is the supposition that those criminal defendants who need legal aid should receive it and those attorneys who provide legal aid should be compensated for their services. Since legal aid is considered a social right, it is the responsibility of society as a whole to bear the burden of providing it. There is no logical reason why a single class of citizens should have to bear the expense of meeting society's responsibility. Providing medical care, food, and shelter are responsibilities rightfully imposed on the community as a whole, and the people who furnish these necessities, therefore, are compensated by the state. It is submitted that legal aid, *i.e.*, counsel and legal assistance in addition to counsel, in criminal proceedings is also a necessity and should be provided and paid for by the state. Obviously lawyers should provide the legal service, but they should be compensated for their efforts. Attorneys should not have to carry the community's burden, but should pay their fair share of the burden through their tax dollars just like every other tax-paying citizen of the community.

⁸⁵ Williams & Bost, *supra* note 10, at 34.

⁸⁶ In 1965 those states which provided no compensation for assigned counsel were as follows: Kentucky, Louisiana, Missouri, South Carolina, Tennessee and Utah. SILVERSTEIN, *supra* note 2, at 253-67.

⁸⁷ Pollock, *Equal Justice in Practice*, 45 MINN. L. REV. 737, 744 (1961).

As improvements over the present uncompensated, assigned counsel system, four alternatives have been suggested: (1) payment of assigned counsel, (2) a public defender system, (3) a voluntary defender system, and (4) a public-private defender system.⁸⁸ The first alternative, payment of assigned counsel, involves the creation of statutory provisions for compensating court-appointed counsel.⁸⁹ In order for this method to be effective, a proper means of selecting attorneys to defend indigents must be installed whereby the younger members of the bar are not relied upon more than other members. In addition, the pay for defending indigents must be reasonably adequate so to eliminate resentment at having been appointed. The second alternative, a public defender system, entails hiring public defenders and assistant public defenders as salaried employees of the state and counties to represent those defendants who qualify as indigents.⁹⁰ This system can provide effective representation only if the compensation is reasonably adequate so as to attract competent attorneys to serve as defenders. A voluntary defender system, the third alternative, is not supported by state or local government, but is a charitable organization with local control.⁹¹ This system is effective only if supported by adequate funds. The fourth alternative, a public-private defender system, involves private control but governmental funding.⁹² This system is a combination of the public defender and voluntary defender systems and, like the others, could function effectively with adequate funding and competent personnel.

Considering the alternatives to the uncompensated, appointed counsel system, the public defender system appears to be the preference most able to deliver efficient, effective representation for the indigent accused. The principal obstacle, proper funding, can be overcome under this system by allotting an adequate portion of the state and local budgets for the public defender offices, just as is done for the other branches of the legal system, *i.e.*, the police, the prosecutor, the judiciary, and the corrections system. Just as the state⁹³ employs judges, prosecutors, and court stenographers, the state can also employ defense counsel in order to maintain a complete and equitable judicial system which administers equal justice to all, regard-

⁸⁸ Grove, *Gideon's Trumpet: Taps for an Antiquated System? A Proposal for Kentucky*, 54 Ky. L.J. 527, 544-52 (1966).

⁸⁹ *Id.* at 544.

⁹⁰ *Id.* at 548.

⁹¹ *Id.* at 551.

⁹² *Id.* at 552.

⁹³ This word is used to indicate a political organization representing a form of civil government. It refers to all levels of government—city, county, state and federal.

less of their economic status. The adversarial proceeding, which is contemplated by Anglo-American jurisprudence, with each party adequately and equally equipped to oppose one another is merely a myth if the defendant is disadvantaged by court-appointed counsel. Hopefully, a public defender system will attract defense oriented attorneys with an interest in criminal law and procedure who want to defend indigents and who are equally as capable as prosecution attorneys. Also, the concept of equal justice is nothing more than a myth if the indigent defendant is not given the same opportunity for a defense as the wealthy defendant who is able to pay for counsel of his choosing. "[U]se of the public defender system would do much to minimize the inequities which continue to exist between those who can and those who cannot afford adequate defense counsel."⁹⁴ In comparison with Kentucky's present system, the public defender system would provide better prepared and more competent representation for indigents. There would be additional time and proper facilities for investigation, and defense counsel, as a rule, would be more experienced and better equipped to meet the prosecution. Besides being less of a financial burden on attorneys, the defender system would be "accompanied by a distinct saving of time and money."⁹⁵

In searching for reasons why Kentucky has failed to alleviate the undesirable derivations of the uncompensated, appointed counsel system for so many years, one must consider the perplexing reasons why up until now both the legislature and the courts have failed to provide for an alternative system. Generally, the courts have recognized the problem but have deferred to the legislature on the grounds that this is a legislative problem and that the courts cannot order compensation unless the legislature provides the funds. On the other hand, the legislature, in keeping with the best of its sectarian tradition, has demonstrated a tenacious reluctance to revise Kentucky's antiquated system for defending indigents until recently. This is difficult to comprehend since many of Kentucky's legislators are attorneys themselves. But at last relief appears to be in sight. The 1970 Kentucky General Assembly passed a bill⁹⁶ which would have provided for a defender system in Kentucky, but the bill was amended to cover only cities of the first class⁹⁷ and, after passing both Houses, it was vetoed by Kentucky's Governor. Three bills⁹⁸ of a similar nature were

⁹⁴ Cuff, *Public Defender System: The Los Angeles Story*, 45 MINN. L. R. 715, 722 (1961).

⁹⁵ Bird, *supra* note 2, at 521.

⁹⁶ S.B. 261, 1970 Kentucky General Assembly.

⁹⁷ Louisville.

⁹⁸ S.B. 33, H.B. 198, H.B. 461, 1972 Kentucky General Assembly.

introduced in the 1972 Kentucky General Assembly. The surviving bill, House Bill 461, provides for the creation of an office of a Public Defender as an independent state agency and *requires* counties with a judicial district containing ten or more circuit judges to establish an office of District Public Defender. Circuit court districts with fewer than ten circuit judges are *permitted* to create an office of District Public Defender under the bill.⁹⁹ More importantly, House Bill 461 requires that attorneys, who are assigned to represent indigent defendants in those circuit court districts with fewer than ten circuit judges which chose to retain the appointed-counsel method of providing defense attorneys for indigent accused, must be compensated by the county.¹⁰⁰ As of this writing, House Bill 461 has passed both Houses of the Kentucky General Assembly and has been signed by the Governor. Hopefully, this act will provide adequate relief for Kentucky's attorneys and indigent defendants who are presently being deprived of their constitutional and social rights by Kentucky's outdated, court-appointed counsel system. All Kentuckians, not only attorneys and indigent defendants, are presently bearing the social and economic costs of the antiquated, uncompensated, appointed counsel system, and all Kentuckians are presently affected by the social ills which this system has created. Conceivably, a form of palliation has been offered in House Bill 461.

Bill Deatherage

⁹⁹ Legislative Record, Official Summary of Action by the Kentucky General Assembly (Frankfort, Ky.), March 30, 1972, at 92, col. 1.

Essentially, H.B. 461 provides that Jefferson County must establish an Office of District Public Defender, and all other counties in Kentucky may either establish an Office of District Public Defender in their respective judicial districts or may provide for representation of indigent defendants in some other acceptable manner.

¹⁰⁰ House Bill 461, 1972 Kentucky General Assembly.