Louisiana Law Review

Volume 27 | Number 3
The Work of the Louisiana Appellate Courts for the 1965-1966 Term: A Symposium
April 1967

Representation of Indigents in Criminal Cases: Guidelines for Louisiana

Gerard A. Rault

submitted that these decisions support the idea that applying the after-acquired title doctrine to its fullest extent is not contrary to public policy because it too is a mere personal obligation of the vendor.

CONCLUSION

The basic problem in applying the after-acquired title doctrine to the mineral transactions in Louisiana lies in the apparent conflict between a desire to enforce the moral imperative behind the doctrine and the prohibition against intentional dealing with the reversionary interests in mineral rights. Although applying the after-acquired title doctrine in its entirety to all situations where the vendor remains owner of the land at the termination of the outstanding servitude is not inconsistent with established public policy against burdening the land for a period of time greater than ten years without user; if, for policy reasons, the doctrine must be limited, this limitation should be recognized as arbitrary, because the obstacle theory is theoretically inconsistent with the after-acquired title doctrine.

A. J. Gray, III

REPRESENTATION OF INDIGENTS IN CRIMINAL CASES: GUIDELINES FOR LOUISIANA

Never have the rights of those accused of crime been more zealously protected than in contemporary America; the right to legal representation has been the object of particularly close judicial scrutiny. *Gideon v. Wainwright*[1] held that the sixth amendment entitles an indigent accused of a felony to appointed counsel at trial, whether in state or federal court. *Escobedo v. Illinois*[2] established that once police investigation focuses on the accused, denial of his request to speak with a retained attorney violates his right to counsel; all statements elicited during subsequent detention are inadmissible at trial. The judicial movement toward full implementation of the constitutional protection perhaps reached culmination in *Miranda v. Arizona*,[3] which assured the indigent's right to appointed counsel during custodial

1. 372 U.S. 335 (1963).
2. 378 U.S. 478 (1964).
3. 384 U.S. 436 (1966).

interrogation. This Comment considers programs and suggests guidelines which might facilitate Louisiana's adaptation to these constitutional mandates to provide appointed counsel.[4]

EVALUATING THE PRESENT

The Federal Program

In the federal system counsel for an indigent is generally provided at the preliminary hearing, but in no case later than arraignment,[5] unless, of course, counsel must be provided during interrogation under *Miranda*. Attorneys are furnished in various ways, but usually through case-by-case assignment of lawyers engaged in private practice.[6] Where the criminal caseload is light, assignment can be made on a more individualized basis — the attorney is selected through personal contact, considering among other things his eagerness, his current workload, and his suitability to the case at hand. Where the criminal docket is crowded, however, selection is more mechanical, and attorneys are usually assigned, by rotation, from lists of those recently admitted to practice in the federal district court, or from lists of volunteers where sufficient. Assignment is the sole method in all but a small minority of the federal districts.[7] Other methods include: in the District of Columbia, a government-financed agency;[8] in Cleveland, a privately financed Legal Aid Society;[9] in Philadelphia, the cooperation of the Community Chest and the city in financing the program.[10]

Beyond the problem of the method of supplying counsel is the even greater problem of reimbursement. Prior to the Criminal Justice Act of 1964,[11] there appeared to be no relief, for

4. Discussion of the desirability of the developments of the law in this area is considered beyond the scope of this Comment. Excellent discussion, analysis, and evaluation of these cases and the developments within the field of criminal procedure can be found in *Developments in the Law — Confessions*, 79 HARV. L. REV. 935 (1966); Student Symposium, *Administration of Criminal Justice*, 26 LA. L. REV. 666 & 789 (1966); Note, 27 LA. L. REV. 87 (1967).

5. FED. R. CRIM. P. 44.

6. See Note, 76 HARV. L. REV. 579 (1963).

7. The federal districts invariably employ the method in use in local state courts. The assignment method is the only one used in approximately 2900 of the 3100 counties in the nation. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 15 (1965).

8. D.C. CODE ANN. §§ 2-2201-2210 (1961).

9. See Note, 76 HARV. L. REV. 579, 593 (1963).

10. *Id.* at 601.

11. 18 U.S.C.A. § 3006A (Supp. 1964). By its terms, the act became effective one year from the date of its enactment. Pub. L. No. 445, 88th Cong., 2d Sess. § 3 (Aug. 20, 1965).

Dillon v. United States[12] had held that uncompensated appointed counsel were not deprived of property without due process since attorneys are "officers of the court" and have a duty to perform required functions.[13] This was in accord with most state court decisions. The power to reimburse court-appointed counsel was held not to reside in the courts — it could come only from the legislature.[14]

The Criminal Justice Act of 1964 is a substantial advance in the quest for equal justice in the federal system.[15] It requires each federal district court to adopt a program supplying adequate representation for defendants financially unable to procure counsel, and offers the options of supplying counsel engaged in private practice through appointment, through a bar association program or legal aid society, or through any combination of these methods.[16] The act provides for compensation of counsel at a rate not to exceed $15.00 per hour in court, $10.00 per hour for out of court work, plus reasonable expenses.[17] Total reimbursement for representation in district court shall not exceed $500.00 in a felony case, nor $300.00 in a misdemeanor, except in extraordinary situations. An important innovation is the provision authorizing expenditures for investigators and experts after a showing of necessity in an ex parte proceeding.[18]

It is still too early to attempt a thorough critique of the act's operation and potential. It may be that many appointed lawyers could receive far greater compensation for time spent in private practice than the amount received for the defense of an indigent.

12. 346 F.2d 633 (9th Cir. 1965), *reversing* 230 F. Supp. 487 (D. Ore. 1964).

13. The existing provisions at the time of the dispute were: FED. R. CRIM. P. 15(c), which allowed reimbursement of attorney's expenses for travel and subsistence when taking depositions; FED. R. CRIM. P. 17(b), which authorized government-financed subpoenas and witness fees for any necessary witnesses; and 28 U.S.C. § 753(f) (1958), which authorized government-financed transcripts to those allowed to appeal in forma pauperis.

14. See 1 SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 637 (1965).

15. 18 U.S.C.A. § 3006A (Supp. 1964). See generally Hastings, *The Criminal Justice Act of 1964*, 57 J. CRIM. L., C. & P.S. 426 (1966); Kutak, *The Criminal Justice Act of 1964*, 44 NEB. L. REV. 703 (1965).

16. The Senate Bill (S. 1057) had included the option of a public defender system, but the House Judiciary Committee rejected this provision. Compare REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, *Summary of Recommendations*, ch. II. (6)(a)(3) (Feb. 25, 1963) [hereinafter referred to as ALLEN COMMITTEE REPORT].

17. This provision adopts the Committee's recommendation. See *id.* ch. II (11)(a).

18. *Id.* at ch. II(8).

What should be noted, however, is that the act is a significant step toward minimizing the handicaps of impoverished defendants, and recognizes that responsibilities in this area must be borne by society at large, rather than exclusively by the legal profession.[19] Once the financial burden is lifted, even partially, from the shoulders of the courts and the bar, the problem of devising a system for obtaining the attorneys necessary for effective representation of indigents becomes one of administration and organization. In state courts, however, financial aid is not so easily available, and the problem remains.

The Louisiana Program

Appointed Counsel. The new Code of Criminal Procedure[20] requires that counsel be provided for a defendant charged with a felony,[21] stipulating that in capital cases counsel must have been a member of the bar for at least five years.[22] The minutes of the court must show either that the defendant was represented by an attorney or that he was informed by the court of his right to a court-appointed lawyer,[23] but there may be substitution of counsel at any stage of the proceedings.[24] While the new provisions are constitutional on their face, any practice limiting the assignment of counsel to situations specifically provided for in the Code would be unconstitutional in some situations. The comments of the Reporter explain that practical considerations forbade rigidly detailed legislation.[25]

Court appointment has been the primary means of obtaining attorneys to meet the needs of indigent defendants in Louisiana.[26] In larger cities the courts usually appoint counsel by rotation

19. Dillon v. United States, 346 F.2d 633 (9th Cir. 1965) did not hold otherwise. The case held that assigned attorneys are not deprived of constitutional rights when not compensated for representing indigents, but did not hold that the financial responsibility is *primarily* that of the bar. No case has been found where the question whether the *state* has the responsibility to finance the representation has been squarely adjudicated.

20. LA. CODE OF CRIMINAL PROCEDURE (1966) makes no substantial change in the existing law in this area. It became effective on January 1, 1966. La. H.B. No. 66, § 7 (1966).

21. LA. CODE OF CRIMINAL PROCEDURE art. 513 (1966).

22. *Id.* art. 512.

23. *Id.* art. 514.

24. *Id.* art. 515.

25. *Id.* arts. 511-516, comments by Reporters.

26. Published information on the Louisiana system is scant, and has been supplemented by interviews with numerous attorneys and other knowledgeable persons or agencies from various parts of the state. Many of the textual observations in this section represent the writer's conclusions based upon such interviews, and citation of particular sources will often be impractical.

from lists of attorneys without considering whether the attorney's practice has been primarily civil or criminal.[27] An attorney is allowed to decline service for serious reasons, such as a prior court commitment on the assigned trial date, but an excused attorney is generally placed on a priority list for future service. In smaller cities and towns, the procedure is less formal. Attorneys are appointed either from informal lists kept by the judges or clerks, by selection of attorneys whose current workload is light, or from those who happen to be present when the need of the accused becomes apparent, whether this be at the arrest, preliminary hearing, or arraignment.

Although lawyers representing indigents sometimes elicit an informal promise of payment on a "when-and-if-you-can" basis, compensation and reimbursement is not assured.[28] Lack of compensation seems to lie at the heart of the problem. It has even been alleged that it motivates some attorneys to offer — usually unsuccessfully — frivolous claims of prior commitment or other excuses when called upon to represent indigents.[29] It may be the reason for the general dissatisfaction of the Louisiana bar; most states employ the system of appointment, but in few is the system received less enthusiastically than in Louisiana.[30]

It is sometimes alleged that assigned attorneys, often young or inexperienced in criminal law, are no match for prosecutors.[31] Often coupled with this belief are assertions that these inexperienced defenders are inept at plea-bargaining, or tend to advise their clients to make pleas which an experienced criminal lawyer would advise against.[32] It is not surprising that there is a lack of reliable empirical data to support these claims, for the statistical method is not easily applicable in so involved a process. Attorneys appointed to defend indigents in state courts are often

27. The drawbacks of this approach are evident: attorneys who have never handled criminal cases may prove mediocre defenders regardless of years of experience. It would seem that there is no alternative but to take both civil and criminal lawyers under the present system, however.

28. LA. R.S. 15:141 (Supp. 1966) provides the structural framework for indigent defendant boards in each of the state's judicial districts, and authorizes a two dollar tax on every defendant convicted in district court criminal cases to provide financial aid for the operation of the boards. The act became effective on Jan. 1, 1967. It is under the subsection *Planning for the Future, infra.*

29. See 1 SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 33-34 (1965). This excellent work is the result of a national study initiated by the American Bar Association and financed in cooperation with the Ford Foundation.

30. *Id.* at 35.

31. *Id.* at 20-21.

32. *Id.* at 21, 25.

young, but they are not always inexperienced. In most cases they have been practicing at least a few years, and in Louisiana capital cases five years is demanded by the Code.[33] But because the appointive system has ignored fields of specialization, tenure in the bar is by no means an accurate standard for judgment. A young attorney who has practiced criminal law for two years is likely to be much more adept as an indigent defender than an attorney who has dealt exclusively with civil cases for ten years. This is particularly true in Louisiana, where few civil cases are tried before juries. Although the judge may sometimes be able to mitigate adverse effects of a young attorney's handicaps, inexperience in jury persuasion could give rise to an occasional adverse verdict which might otherwise have been avoided. A national survey did indicate that appointed attorneys have a somewhat inferior record than retained criminal lawyers, but it could not isolate the causes for the disparity.[34] Innumerable uncontrolled variables may play significant roles in the trial process: the lack of funds available for investigative or expert services in support of the indigent's defense; the inexperience of the attorney in trial work, jury persuasion, plea-bargaining, or criminal law in general; the fact that many accused indigents are repeated offenders, often clearly guilty of the charge; or the very fact of the accused's poverty and his accompanying lack of standing in the community. Little of substance, in short, can be offered for or against these attacks on the appointive system, and the fact that retained attorneys enjoy a superior record of acquittals loses much of its initial apparent relevance once the above factors are considered.

The objections most easily substantiated by empirical data come from the bar itself, and focus more on the inequities suffered by the appointed attorneys than on functional shortcomings of the assignment system. Three major complaints have been advanced: that the method of selection is unfair to the younger members of the bar; that assigned counsel are not reimbursed for operational expenditures, and that assigned counsel receive little or no compensation for their time and services. It may be that the older, more experienced members of the bar represent indigent defendants less frequently than younger attorneys. That this should be so is particularly incongruous in

33. LA. CODE OF CRIMINAL PROCEDURE art. 512 (1966).
34. 1 SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 28 (1965).

view of the fact that the more experienced attorneys are often more adept at arguing a case before a jury.

In at least thirty-five states the appointed attorney receives moderate compensation for his services through state or local funds.[35] Other states have partial, occasional, or conditional compensation.[36] Four states, including Louisiana, have provided no compensation.[37] This, it is submitted, is a major cause of the widespread dissatisfaction with the Louisiana system.

Attorneys rightly resent having to pay day-to-day operational costs of conducting an indigent's defense when they are already contributing their time and efforts to the cause of equal justice.[38] Although attorneys would usually prefer to see justice applied with an even hand than to avoid these expensese, the occasional result is that the indigent is denied benefits which are often considered an essential part of a complete defense. Investigative services, expert testimony, and similar aids can give rise to substantial financial obligations; many attorneys refuse to suffer positive financial losses when they are already donating their time and talents.[39] Reimbursement for these operational expenses is occasionally had in Louisiana, but normally only on a disorganized and sporadic basis.

The system of appointed counsel in Louisiana is at least a partially effective remedy for the plight of the indigent accused.[40] Its major drawbacks are that it sometimes provides a less than

35. *Id.* at 16.

36. *Ibid.; e.g.*, Florida, Georgia, New Jersey, New York, Tennessee, Utah.

37. See *id.* at 16. The four states are Kentucky, Louisiana, Missouri, and South Carolina.

38. *Id.* at 17. Silverstein cites the example of two attorneys appointed from a northern rural Louisiana parish to represent an indigent in a rape case. They bore the expenses of a three-day trial, an appeal to the State Supreme Court, an application for certiorari to the United States Supreme Court, an application for writ of habeas corpus to the federal district court, an appeal to the Fifth Circuit Court of Appeals. They were reimbursed the cost of printed briefs for the State Supreme Court appeal by their local bar association; the local sheriff provided transportation to Baton Rouge for the habeas corpus hearing. All other services and expenses went unremunerated.

39. Conversations with various New Orleans and Baton Rouge attorneys who prefer to remain anonymous.

40. What effect Miranda v. Arizona, 384 U.S. 436 (1966), will have on the operation of the system is still uncertain. New Orleans District Attorney Jim Garrison, for example, is of the belief that the decision is an insurmountable obstacle to an effective appointment system in the future. Conversation with writer of Dec. 25, 1966. Consideration of the problems of supplying attorneys for pre-arraignment investigation is beyond the scope of this Comment.

optimal defense[41] and places the financial responsibilities of representation on the appointed attorneys.

Institutions. In 1932 a Legal Aid Bureau was formed in New Orleans.[42] It serviced only the civil law field until 1940, when it opened its Criminal Law Division, staffed by one permanent attorney, several volunteer attorneys and law students, and one secretary. It was supported by the Community Chest, the New Orleans Bar Association, and donations from attorneys and other interested persons.[43] Although the Criminal Law Division was very well received, it soon developed financial difficulties; today it handles but a fractional number of the indigent cases in the New Orleans area, most attorneys being supplied by the appointive method. The Legal Aid Society of Baton Rouge specializes in civil matters, and has handled virtually no criminal cases. Attorneys are obtained for the representation of indigent defendants by the appointive system, although administrators are hopeful that volunteers will meet the need in the future. Elsewhere in the state there are no significant operations of organized legal aid associations serving the criminal field.

PLANNING FOR THE FUTURE

Recent Legislation

In response to the plight of the indigent accused and the burden presently imposed on the bar, the Louisiana legislature has established the structural framework for organized defender procedures.[44] The new legislation requires establishment of an

41. The national survey produced the following response from a West Coast lawyer. "I answered 'mostly yes' to the question regarding fairness to the indigent because a large percentage of those charged are guilty, as we all know, and the representation largely consists of mitigating the charges and punishment somewhat, i.e., dismissals of cumulative counts, reductions to misdemeanor, working with adult probation officer, etc. The situation can be grossly less than fair in those situations where guilt beyond a reasonable doubt is really questionable. Here a routine handling by an inexperienced attorney can work substantial injustice, especially when said attorney is opposed by an astute and experienced deputy D.A. who is not above taking advantage of inexperience to fatten his conviction record." 1 SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 35-36 (1965).

42. In 1935 it was incorporated as the Legal Aid Bureau; the incorporators were approximately 75 members of the New Orleans Bar Association. See generally THE ANNUAL REPORT OF THE LEGAL AID BUREAU OF NEW ORLEANS (Dec. 31, 1941).

43. In the fiscal year 1941 total receipts of the Bureau were $4,588.77: Community Chest — $1,000.00, New Orleans Bar Association — $500.00, other contributions and advances — $3,088.77. Of the total received, $3,980.00 was used for salaries, the remainder for operational expenses. *Id.* at 18.

44. LA. R.S. 15:414 (Supp. 1966). The act became effective Jan. 1, 1967.

indigent defendant board in each judicial district, and entrusts them the task of enforcing the sixth amendment's mandates.[45] The statute carefully avoids expanding the existing jurisprudence; boards must supply counsel for all *felony* cases, but no mention is made of misdemeanors. Whether the right to counsel applies in misdemeanor cases is a matter of considerable speculation. The United States Supreme Court has denied certiorari in *Winters v. Beck*,[46] a case in which the Arkansas Supreme Court held that *Gideon*[47] and *Escobedo*[48] do not apply to misdemeanors. Justices Black and Stewart dissented from the denial of certiorari, however.[49]

The boards are to maintain a panel of volunteer attorneys from which defenders shall be assigned.[50] The legislature is perhaps too optimistic in its apparent confidence that the number of volunteers will prove sufficient. The district courts have never been blessed with an over-abundance of volunteers; and without reasonable compensation, for which the availability of sufficient funds is doubtful, the situation is not likely to change. Following local custom, the statute provides that the attorney appointed to represent the defendant shall represent him at every stage of the proceedings, including appeals or like remedies.[51]

A subsection which will certainly brighten the legal aid picture in Louisiana provides that each defendant convicted in district court shall be taxed two dollars in addition to other costs and fines imposed.[52] Even the most enthusiastic proponents of the statute, however, admit that the tax income alone will not provide adequate compensation for attorneys,[53] and it is at best

Most of the newly-appointed indigent defender boards had their first organizational meetings in late January or early February. It is much too early, therefore, to collect empirical data on the effectiveness of the program. Many of the opinions here expressed reflect the estimates given the writer by board members from various districts. Research for this Comment ended March 1.

45. LA. R.S. 15:141, § A (Supp. 1966).

46. 385 U.S. 907 (1966); *but see* Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965); McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965).

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

48. Escobedo v. Illinois, 378 U.S. 478 (1964).

49. 385 U.S. 907 (1966).

50. LA. R.S. 15:141, § C (Supp. 1966).

51. *Id.* § E.

52. *Id.* § H.

53. Mr. Horace Lane, for example, a member of the indigent defender board for the 19th Judicial District, Parish of East Baton Rouge, estimates that the funds received in that district will be sufficient to meet the expenses of the board and reimburse assigned counsel's necessary out-of-pocket expenses, but insufficient to provide compensation. Conversation with writer on Jan. 28, 1967.

doubtful that it will produce funds sufficient to meet even moderate operational expenses of these defenders. Whether an area be densely or sparcely populated should have little effect on the relative adequacy of the funds available. Where volume is greater, representation needs will probably be proportionately greater. At best, funds received will meet the operating expenses of the boards and, hopefully, provide considerable reimbursement to attorneys for expenses. Realizing that this is but partial relief, some have suggested that the statute be amended to provide that persons convicted in the city courts (in New Orleans, traffic court) also be taxed. This would unquestionably effect far greater revenues.

When considered in light of the foregoing, the statute should be read as offering subtle notice to the parishes that they (and ultimately, the local bars) must continue to bear the brunt of the financial burdens involved in supplying indigents with adequate defenses in criminal cases.[54]

An important subsection of the statute provides that the proceeds from the tax fund may be allocated to private defender organizations which are performing the functions of an indigent defender board.[55] Any defender association organized in the future could presumably avail itself of these tax funds if it proved effective in obtaining and channelling attorneys to meet existing needs.

The statute is a step, however short, toward the systematic defense of indigents in criminal cases in Louisiana. It establishes the structure of this system, and assures funds sufficient to reimburse assigned counsel for at least some of their expenses. It is particularly deficient, however, in that it establishes no method of obtaining attorneys other than the already-existing and inefficient volunteer system (necessitating continued use of assignments), and it fails to provide reasonable compensation for the attorney's time and services. The programs which follow have effectively solved these problems in other jurisdictions.

Agencies

Defender organizations across the nation, though differing

54. *E.g.*, the statute provides: "The parish governing authority may, at the end of the fiscal year, . . . meet any deficit in the indigent defender fund by payment from the parish general fund." LA. R.S. 15:141, § C (Supp. 1966).

55. *Id.* § I.

in many respects, have at least one common factor: they effectively meet the demand for adequate legal representation of indigents accused of crime. Some, such as the National Legal Aid and Defender Association, operate on a national level functioning chiefly as advisor to scores of local operations.[56] Others (Chicago, Houston, Salt Lake City, San Francisco) are independent units serving metropolitan areas. In many smaller communities, private clubs have assumed the task of financing defender operations. Some objections to defender organizations are based on a misunderstanding of their nature. These associations are not in competition with the bar. In fact they have lessened the burdens of those in private practice, for the only tasks performed are those of which the private bar has long complained.

A notable advantage agencies have over the type of defender boards now established in Louisiana is that corporations, foundations, charitable organizations, and individuals are usually more willing to devote time or money to independent, non-profit organizations than to a government subsidiary. Starting funds are available to such agencies through the federal anti-poverty program if local initiative can devise feasible long-range plans.[57]

Public Defender Systems

Public defender programs have been used predominately in metropolitan areas. More than 117 public defender offices exist in the United States, providing services for more than 178 counties.[58] The first office was established in Los Angeles in 1914,[59] and is an excellent example of an efficient public defender operation.[60] The Public Defender in the County of Los Angeles

56. See generally *The Legal Aid Briefcase.*

57. *E.g.*, twenty-seven local projects and two national programs were financed by the Office of Economic Opportunity (OEO) alone by the start of 1966. A total of $3,127,217 had been expended, and eighteen formal proposals were then under consideration. Not all of these, of course, were criminal defender projects. Pye, *The Role of Legal Services in the Antipoverty Program*, 31 LAW & CONTEMP. PROB. 211, 230 (1966).

58. 1 SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 41 (1965).

59. *Ibid.*

60. See generally MANCUSO, THE PUBLIC DEFENDER SYSTEM IN THE STATE OF CALIFORNIA (1959); Notes, *The Public Defender System of Los Angeles County*, 36 So. CALIF. L. REV. 125 (1962); *Representation of Indigents in California — A Field Study of the Public Defender and Assigned Counsel Systems*, 13 STAN. L. REV. 522 (1961). All of the information on the Los Angeles system included in this section can be found in any of these sources, and the writer has taken liberally from each without citation.

is appointed for life by the County Board of Supervisors. He has sixty deputies, all subject to civil service provisions establishing four promotional grades. Advancement depends on tenure and performance on civil service examinations, and salaries correspond to those of the District Attorney's deputies. The great advantage of an appointive position coupled with civil service requirements is that it virtually precludes charges that public defender systems tend to bring politics into the judicial process.[61]

The Public Defender assigns deputies to the various criminal court sections, where they handle all cases demanding their services which come to that section. There is no reason, however, why deputies could not be assigned to individual cases from the main office. The deputies are assisted by investigators retained by the county office. If the court, in summary proceedings prior to arraignment, ascertains that the accused is unable to afford representation, the Public Defender is notified. His office makes a more complete investigation of the financial circumstances of the defendant, and if the claim of indigency is supported, the deputies on call in the court section to which the case has been assigned conduct the defense. The Los Angeles system is generally recognized as one of the most effective. New Orleans, however, would probably be the only Louisiana city with a criminal caseload sufficient to warrant a public operation. Were such a system adopted in a Louisiana community, modification to meet particular local exigencies ought to be considered.

Foreign Methods

The English approach to the problem of adequate representation and the German method of contribution are worthy of serious debate. One must be particularly careful in examining foreign systems, however, since their effectiveness is grounded in the social, cultural, and political evironment.

The most relevant aspect of the English system is the settled belief that it is the *state*, rather than any specific professional group, which should assume the financial responsibility for providing a defense.[62] When the United States decided that elderly

61. See, *e.g.*, Dimock, *The Public Defender: A Step Towards a Police State?*, 42 A.B.A.J. 219 (1956); Stewart, *The Public Defender System Is Unsound in Principle*, 32 J. AM. JUD. SOC'Y 115 (1948).

62. See generally REPORT OF THE WIDGERY COMMITTEE, Cmnd. 2934; Zander, *Departmental Committee Report: Legal Aid in Criminal Proceedings*, 29 MODERN L. REV. 639 (1966).

citizens should have free medical care we did not simply enact laws shifting the financial burdens to the medical profession; rather, we distributed the costs by altering the tax system to provide funds. Why has it been considered the responsibility of the legal profession to finance adequate representation for indigent defendants? The opinion that it is the obligation of the state has not been disapproved by the jurisprudence.[63]

The German *Armenrecht* (law for the poor) has minimized the disadvantages of poverty for those involved in *civil litigation.*[64] The system might be applied to criminal proceedings with equal success. The German Code of Civil Procedure permits the state to look to the indigent himself for reimbursement of expenses involved in providing counsel, although he is compelled to pay only if during or after his trial his financial condition improves.[65] The court administrators have the task of following the indigent's financial condition. This device ought to be studied for possible adoption in Louisiana. When an accused is unable to obtain counsel, the defender board might assign counsel, using any effective method for obtaining a sufficient number of attorneys to meet the district's need. The board, rather than the court, would then watch the financial condition of the indigent. As in the German system, the appointed attorney or any other person could suggest that the indigent's financial circumstances warrant re-examination. If the board determines, after notice and hearing, that the indigent's economic circumstances allow him to contribute to the board's permanent fund, it would obtain a court order directing him to do so. Payment to the board need not be in one flat sum, but could be made in monthly installments, and the party would retain the right to request cancellation of the order to pay if his financial situation worsens. If this system were applied in Louisiana criminal cases, the board would have a larger fund than the two dollar tax alone can provide — an appreciable step toward full compensation of assigned attorneys.

---

63. See note 19 *supra.*

64. The *Armenrecht* is implemented by seventeen provisions in the German Code of Civil Procedure (Zivilprozessordnung, hereafter cited as ZPO). The German system is thoroughly discussed in Stohr, *The German System of Legal Aid: An Alternate Approach*, 54 CALIF. L. REV. 801 (1966).

65. ZPO § 125. The statute does not specifically require an improvement in the financial status of the litigant, but the weight of authority so holds. See BAUMBACH & LAUTERBACH, ZIVILPROZESSORDNUNG § 125, 254 (27th ed. 1963).

Law Students

Students in Louisiana's law schools are an untapped source of assistance in the struggle to meet the constitutional mandates.[66] They can assist assigned counsel in investigation, preparation, and at the trial itself. The experience would be an invaluable complement to the student's coursework.[67] The use of law students should not become merely an inexpensive method of providing a law clerk to aid indigent defenders, for the students would soon tire of the arrangement. If the student were also allowed to take an active part in the defense process — visits to the jail to elicit information from the accused, participation in trial-strategy conferences, a seat next to the attorney at the trial — both the lawyer and the student would profit. Several jurisdictions have, by court rule or statute, authorized the use of law students as assistants to attorneys representing indigent defendants.[68] For all out-of-court assistance, of course, no such authorization is necessary.

SUMMARY AND CONCLUSIONS

Louisiana's challenge is to bring its criminal procedure into compliance with recent Supreme Court decisions in the manner least likely to burden the bar inequitably. Administrators of the federal system have lightened the federal court burden through the Criminal Justice Act of 1964, but the funds necessary to implement such a statute are not so easily available to state courts. The present system of uncompensated assigned counsel is subject to severe criticism. Recent state legislation is inadequate, and the absence of organized agencies dedicated to aiding the administration of criminal justice is in sharp contrast to most other states. Private agencies, public defenders, law student programs, or a combination of these methods have been successful in many states. All of these should be seriously con-

66. See Cleary, *Law Students in Criminal Law Practice*, 16 DEPAUL L. REV. 1 (1966). For a discussion of some of the successful student programs currently in effect, see U.S. DEP'T HEALTH, EDUCATION & WELFARE, THE EXTENSION OF LEGAL SERVICES TO THE POOR 165-90 (1965).

67. See Wright, *Law School Training in Criminal Law: A Judge's Viewpoint*, 3 AM. CRIM. L.Q. 172 (1965).

68. The German system permits the use of post-graduate law students in civil adjudications involving less than $250. See Stohr, *The German System of Legal Aid: An Alternate Approach*, 54 CALIF. L. REV. 801, 802 (1966) and authorities cited. For a summary of statutes and court rules allowing student participation, see *Law Students in Court*, 24 LEGAL AID BRIEF CASE 266 (1966). See also McArdle, *Law Students' Participation in National Defender Projects*, 24 LEGAL AID BRIEF CASE 262 (1966).

sidered by those who must rearrange the state's machinery to conform with the constitutional requirements. Proper conceptual orientation is essential—the English view that providing counsel is the state's responsibility, not the bar's. The devices used in German civil cases should be studied as a possible partial solution to Louisiana's problem.

The behavior of too many states has far too long been self-defeating — to a mandate they reply with inaction; to a challenge, with lethargy. Louisiana is now challenged to continue its tradition of sound legal progress supported by spirited civic action. The means are at our disposal.

Gerard A. Rault

FAIRNESS IN JUVENILE COURT*

Juvenile court legislation recognizes that children who break the law should be treated different from adult lawbreakers, and has sought to provide specialized correction and rehabilitation through limited publicity, informal hearings, social work, and probation.[1] In this area where little jurisprudence and few clear principles can be found, this Comment focuses on possible solutions to developing problems. It is concerned more with the delinquent child who commits a wrongful act than the neglected child who comes to the juvenile court because his parents have failed to care for him properly.

Rather than punishing a child, seeking retribution from him or merely protecting society from him, the juvenile court calls on the social worker to provide guidance and correction and to use the tools of modern psychology to help him into responsible

*This Comment is a result of the author's participation in the LSU Law School's fieldwork in modern social legislation project. In this program, law students worked with social agencies during the summer of 1966 to observe their activities and to assess the impact of social and welfare laws. The project was financed by the American Bar Association through the Ford Foundation and was directed by Visiting Professor Walter J. Wadlington III and Mrs. Leila Cutshaw. Appreciation is expressed to the staff of the East Baton Rouge Family Court Center for its assistance and advice in preparing this article.

1. See LA. R.S. 13:1561-1599 (1950); Standard Juvenile Court Act; Standard Family Court Act; Garrett, When the Lawyer Comes to Juvenile Court, mimeographed materials, St. Louis University Institute for Delinquency Control, 3d Inst. 1966; GLUECK, UNRAVELING JUVENILE DELINQUENCY (1950); Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957); Comment, 10 LOYOLA L. REV. 88 (1960).