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Constitutional Challenges to Court Appointment: Increasing Recognition of an Unfair Burden

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CONSTITUTIONAL CHALLENGES TO COURT APPOINTMENT: INCREASING RECOGNITION OF AN UNFAIR BURDEN

by Christopher D. Atwell

I. INTRODUCTION

EVER since *Gideon v. Wainright*[1] and its progeny[2] dramatically expanded the indigent defendant's constitutional right to counsel, the courts and the legal profession have directed a renewed focus towards the extent of this right. Although opinions differ,[3] the attention the controversy has elicited[4] has produced little concrete action for providing the indigent with legal services.[5] State bars, for example, continue to con-

1. 372 U.S. 335, 345 (1963) (*overruling* Betts v. Brady, 316 U.S. 455, 465 (1942), and applying sixth amendment guarantee of counsel to states in felony proceedings). *See also* Johnson v. Zerbst, 304 U.S. 458, 468 (1938); Powell v. Alabama, 287 U.S. 45, 58 (1932) (both cases precursors to holding in *Gideon*).

2. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (determination of indigent defendant's right to counsel at parole revocation hearing made on case by case basis); Argersinger v. Hamlin, 407 U.S. 25, 40 (1972) (defendant to misdemeanor charges which resulted in imprisonment entitled to counsel); Coleman v. Alabama, 399 U.S. 1, 9-10 (1970) (indigent criminal defendant's right to counsel at preliminary hearing); Mempa v. Rhay, 389 U.S. 128, 137 (1967) (felony defendant's right to counsel at post-trial proceeding revoking probation and imposing deferred sentencing); United States v. Wade, 388 U.S. 218, 237 (1967) (defendant entitled to counsel at postindictment lineup); *In re* Gault, 387 U.S. 1, 41 (1967) (juvenile's right to counsel in proceeding which may lead to incarceration); Miranda v. Arizona, 384 U.S. 436, 469 (1966), *rehearing denied*, 385 U.S. 890 (1966) (indigent's right to counsel at custodial interrogation).

3. *See* Swygert, *Should Indigent Civil Litigants in the Federal Courts Have a Right to Appointed Counsel*, 39 WASH. & LEE L. REV. 1267, 1301 (1982) (contending indigent civil plaintiffs deserve counsel in some cases); Weinstein, *The Poor's Right to Equal Access to the Courts*, 13 CONN. L. REV. 651, 688-89 (1981) (proposing funding to satisfy all of the poor's legal needs); Botein, *Appointed Counsel for the Indigent Civil Defendant: A Constitutional Right Without a Judicial Remedy?*, 36 BROOKLYN L. REV. 368, 373-74, 377 (1970) (arguing all indigent civil defendents deserve representation).

4. *See infra* notes 145-152 and accompanying text (examining availability of legal services to indigent civil litigant).

5. *See* Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 738 (1980) [hereinafter Shapiro] ("for the moment at least, the drive for a nationwide system of mandatory service, backed by disciplinary sanctions has abated, though the controversy is likely to continue at both the national and local levels"); Note, *Why Mandatory Pro Bono Is a Bad Idea*, 3 GEO J.L. ETHICS 623, 632-38 (1990) (noting same failure of bar associations to adopt mandatory pro bono requirements since 1980). *See also Bars Grapple with Ways to Raise Legal Assistance*, B. LEADER, Mar.-Apr. 1988 at 27, 28. By early 1988 only six local bars, notably Greenwich, Conn. and El Paso, Tx., required mandatory pro bono service from their members. No state bar association has adopted such a requirement, however, despite many

duct so-called "harmless" studies on the need for legal services rather than implementing requirements of public service for their members.[6]

Much of the recent debate focuses on the indigent civil litigant's right to counsel[7] but this debate over the indigent's rights in a variety of proceedings, has largely ignored the rights of the counsel asked to provide free representation.[8] Although some scholarship has been specifically directed to an attorney's rights when asked to represent an indigent client,[9] much of this analysis is dated due to recent developments in both the organized bar and the courts.[10] Many courts now are unwilling to compel a lawyer to serve,

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state studies conducted on such a need. *Id. See generally Twenty Hour Requirement Urged by New York Commission*, PBI BULL. BOARD, Aug. 1989, at 1 (noting no state has adopted mandatory pro bono publico requirement although four states are now considering one); Shapiro, *supra* at 735-39 (movement on mandatory pro bono issue stalled at ABA and New York City bar levels); *Valparaiso Law Students Face Mandatory Requirement*, PBI BULL. BOARD, Sept. 1989, at 1 (Valapraiso now fourth school to adopt pro bono requirement for students).

6. *See Boards Adopt Voluntary Pro Bono Standards*, PBI BULL. BOARD, Sept. 1989, at 3 (noting Wisconsin and West Virginia state bars, acting on recommendations from long-standing committees, recently refused to go farther than requesting and exhorting members to donate time); Note, *supra* note 5, at 632-38 (examining failure of three state bars and legislatures to pass mandatory pro bono measures).

7. *See supra* note 3; *see also* Note, *Indigent's Right to Appointed Counsel in Civil Litigation*, 66 GEO. L.J. 113, 117-20 (1977) (examining California and New York's efforts to deal with indigent civil litigant's right to counsel); Johnson & Schwartz, *Beyond Paine: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants, Part One: The Legal Arguments*, 11 LOY. L.A.L. REV. 249, 251 (1978) (proposing solution to California's requirement of appointed counsel in certain civil proceedings); Note, *The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 U. MICH. J.L. REF. 554, 562-68 (1976) (outlining judicial developments concerning indigent civil litigant's right to counsel); Comment, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 547-58 (1967) (addressing civil litigant's need and right to counsel); Comment, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1325-36 (1966) (examination of theoretical support for indigent civil litigant's right to counsel).

8. *See supra* note 7 and accompanying text. The expanding right to counsel for civil litigants should be of special concern to lawyers. In many instances the newly established right to counsel is not accompanied by a provision for payment of the appointed counsel. As a result, a lawyer suffers another burden on their time without any expectation or basis for demanding payment. *See infra* note 158 (cases holding appointed counsel has no right to compensation when no statute authorizes compensation).

9. *See, e.g.*, Gilbert & Gorenfeld, *The Constitution Should Protect Everyone—Even Lawyers*, 12 PEPPERDINE L. REV. 90-93 (1984) (arguing appointed counsel deserve fair compensation for their time) [hereinafter Gilbert & Gorenfeld]; Comment, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366, 390 (1981) (concluding constitution does not prevent appointment of counsel) [hereinafter Comment]; Comment, *The Uncompensated Appointed Counsel System: A Constitutional and Social Transgression*, 60 KY. L.J. 710, 712, 721-26 (1972) (arguing uncompensated appointed counsel deprived of constitutional guarantees of due process, property, and freedom from involuntary servitude); Williams & Bost, *The Assigned Counsel System: An Exercise of Servitude?*, 42 MISS. L.J. 32, 45-52 (1971) (asserting Mississippi's lawyers and indigent clients deprived of constitutional guarantees by inadequate compensation scheme); Note, *Indigent Criminal Defendant's Constitutional Right to Compensated Counsel*, 52 CORNELL L.Q. 433, 435-38 (1967) (claiming appointed counsel deserves more than compensation for out of pocket expenses); Ervin, *Uncompensated Counsel: They Do Not Meet the Constitutional Mandate*, 49 A.B.A.J. 435 (1963) (Senator Ervin's proposal for compensation of appointed counsel).

10. *E.g.*, Mallard v. United States Dist. Ct., 109 S. Ct. 1814, 1821 n.6, 104 L. Ed. 2d 318, 329 n.6 (1989) (Supreme Court declines to address constitutional dimensions to unpaid appointments); United States v. 30.64 Acres of Land, 795 F.2d 796, 800-01 (9th Cir. 1986) (rejecting argument that unpaid appointments violate fifth and thirteenth amendments);

citing possible violations of the lawyer's constitutional rights.[11] Ten years ago, these courts would have concluded differently.[12]

This Comment supplements earlier works that discussed the constitutional rights of attorneys appointed for little or no compensation.[13] This Comment will not, however, express an opinion on the desirability of mandatory pro bono programs[14] or their use as an alternative to compulsory court appointment.[15] Numerous qualified sources exist for an examination

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Caruth v. Pinkney, 683 F.2d 1044, 1049 (7th Cir. 1982), *cert. denied*, 459 U.S. 1214 (1983) (declaring absence of compensation should not be factor in decision to appoint counsel); Williamson v. Vardeman, 674 F.2d 1211, 1215-16 (8th Cir. 1982) (holding unconstitutional state court's ruling that appointed counsel pay for expenses arising from appointment); White v. Board of County Comm'rs, 537 So. 2d 1376, 1379-80 (Fla. 1989) (addressing constitutional implications of court appointment with statutory cap on compensation and concluding indigent's rights and not attorney's rights give rise to constitutional reason for exceeding maximum); Postma v. Iowa Dist. Ct., 439 N.W.2d 179, 181-82 (Iowa 1989), *cert. denied*, 110 S. Ct. 278 (1989) (overruling claim that statutory cap on compensation threatens rights of indigent litigants); State *ex rel.* Stephan v. Smith, 242 Kan. 336, 747 P.2d 816, 842 (1987) (holding statutory system of compensation for appointed counsel unconstitutional); State *ex rel.* Scott v. Roper, 688 S.W.2d 757, 769 (Mo. 1985) (*en banc*) (holding unpaid appointment of counsel violates Missouri Constitution); Huskey v. State, 743 S.W.2d 609, 611 (Tenn. 1988) (rejecting claim that statutory cap on fees violates Constitution but expressing sympathy for lawyers shouldering burden of appointment). *But see* Anderson, *Court-Appointed Counsel: The Constituionality of Uncompensated Conscription*, 3 GEO. J.L. ETHICS 503, 506, 531 (1990) which re-examines the constitutional issues and concludes unpaid appointments are constitutional. Anderson rejects constitutional challenges in part because acknowledgment of these challenges engenders a detrimental erosion of the professional status of lawyers. *Id.* at 531. What Anderson's argument fails to acknowledge is the practical disappearance of "professional" vestiges accorded to attorneys. *See infra* notes 92, 120-95 and accompanying text (detailing changed nature of legal practice).

11. *See supra* note 10 and accompanying text.

12. *See, e.g.*, Delisio v. Superior Ct., 740 P.2d 437, 439 (Alaska 1987) (overturning prior rulings and holding unconstitutional statute which requires attorney to represent indigent defendant without reasonable compensation); State *ex rel.* Stephan v. Smith, 747 P.2d 816, 850 (Kan. 1988) (invalidating as unconstitutional existing compensation system for appointed counsel after approving it just five years earlier); *see also* Comment, *supra* note 9 (work on constitutionality of court appointment published too early to discuss new developments). *But see* Anderson, *supra* note 10 (writing on same topic as this Comment and reaching different conslusion; Anderson article published during writing of this Comment).

13. *See* supra note 9.

14. *See generally* NEW YORK CITY BAR ASS'N SPECIAL COMM. ON THE LAWYER'S PRO BONO OBLIGATIONS, *Report: Toward a Mandatory Contribution of Public Service Practice by Every Lawyer* 5-6 (1979) (offering unsuccessful recommendation that all New York City lawyers be obligated to tender unpaid legal services to poor); ABA SPECIAL COMM. ON PUBLIC INTEREST PRACTICE, RECOMMENDATION, 100 REPORTS OF ABA 965-67 (1975) (ABA position of encouraging but not requiring unpaid service by the bar); ABA SPECIAL COMM. ON PUBLIC INTEREST PRACTICE, *Implementing the Lawyer's Public Interest Practice Obligation* 3-7 (1977) (noting several possible solutions to public service dilemma); ABA COMM. ON EVALUATION OF PROF. STDS., MODEL RULES OF PROFESSIONAL CONDUCT 180 (Proposed Final Draft, May 30, 1981) (documenting ABA's short-lived effort to update Model Rules to include requirement of public service for its members). This Comment's author feels that, due to their unique abilities, all lawyers have a responsibility to serve the indigent and improve the administration of justice.

15. The author perceives this use of mandatory pro bono time to be both paternalistic and unlikely. The elimination of the Kutak Commission's original mandatory pro bono publico requirement in its proposed draft of the Code of Professional Responsibility and state bars' inaction indicate that enforced pro bono work likely will not happen on a wide scale. The spectre of state bar associations mandating pro bono publico service, however, raises the interesting question of whether such a system would have constitutional problems. Lawyers have

of these topics.[16]

This Comment instead will analyze the court appointment issue and specifically explore whether courts may constitutionally compel an attorney to provide legal representation for indigent clients. Part II discusses the expanding right to counsel granted to indigents by the federal courts;[17] Part III explores the historical background of court appointment and the sources of the attorney's traditional obligation to serve the indigent; Part IV analyzes the three primary constitutional challenges to court appointment and the judicial responses to those challenges. Finally, this Comment proposes a solution to the issue of uncompensated court appointment which resolves the constitutional challenges to compulsory representation and provides attorneys with their constitutional guarantees of due process and equal protection under the law.

II. THE EXPANDING RIGHT TO COUNSEL

A. *Protection for Criminal Defendants*

The expansion of the constitutional right to counsel is primarily responsible for altering the reality and number of court appointments in the twentieth century.[18] The well spring for the modern constitutional right to counsel is *Gideon v. Wainright*,[19] which marked a turning point in the Court's treatment of an indigent criminal defendant. In *Gideon* the Court overturned an earlier decision[20] granting an indigent criminal defendant the right to counsel only in capital proceedings.[21] The *Gideon* Court instead held that a constitutional right to counsel exists for all indigent defendants in all felony prosecutions.[22]

After *Gideon* the Court continued to expand the right to counsel in criminal proceedings. In *Miranda v. Arizona*[23] and *United States v. Wade*,[24] the Court established the indigent's right to counsel at the earliest phases of the criminal process.[25] Adhering to the import of these decisions, in *Mempa v.*

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previously challenged mandatory dues for bar association membership. *See* Lathrop v. Donohue, 367 U.S. 820, 843 (1961).

16. *See supra* note 5.

17. Not to be overlooked are state court decisions which also have considerably expanded the indigent civil litigant's rights. *See infra* notes 48-54.

18. Recent Supreme Court decisions have noted the importance of this right. *See, e.g.*, Kimmelman v. Morrison, 477 U.S. 365, 374 (1986) (lack of counsel undermines fairness of judicial process); United States v. Chronic, 466 U.S. 648, 653-57 (1984) (right to counsel is "most pervasive" of all the rights granted in Constitution) (quoting Schacter, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)); Strickland v. Washington, 466 U.S. 668, 686 (1984) (establishing standards determining constitutionally deficient representation). *See generally* Schacter, *Federalism & State Criminal Procedure*, 70 HARV. L. REV. 1 (1956) (asserting that right to counsel is most important right in Constitution).

19. 372 U.S. 335 (1963). *See also* Powell v. Alabama, 287 U.S. 45 (1932) (case presages *Gideon*); Johnson v. Zerbst, 304 U.S. 458 (1938) (same).

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

21. *Id.* at 465.

22. *Gideon*, 372 U.S. at 339.

23. 384 U.S. 436 (1966).

24. 388 U.S. 218 (1967).

25. *Miranda*, 384 U.S. at 467 (counsel must be available during custodial interrogation);

Rhay[26] the Court held that indigent criminal defendants have a right to counsel at preliminary hearings.[27] In the early 1970s, the Court granted the right to counsel to defendants to misdemeanor charges where imprisonment is actually imposed,[28] and to indigent defendants at parole revocation hearings.[29] *Douglas v. California*[30] finalized the expansion of the right to counsel in criminal proceedings. In *Douglas* the Court held that the criminal defendant has a right to counsel in a first appeal of right.[31]

After two decades of vigorously championing the indigent defendant's rights, the Court in the 1980s halted its expansion of these rights. In *Pennsylvania v. Finley*[32] the Court held that an indigent defendant does not have a right to counsel in a collateral attack upon his conviction.[33] Similarly, the Court, in *Murray v. Giarratano,*[34] held that an indigent defendant has no right to counsel in a state post-conviction action for relief.[35] These two cases, however, marked the extent of any retreat from providing legal services to the criminal defendant forged by the Court. The rights established in earlier cases,[36] therefore, remain good law.

B. Expansion to Civil Litigants

While the Supreme Court in the 1960s acted to provide appointed counsel to the indigent defendant in criminal cases, the lower federal courts generally refrained from appointing counsel in civil cases. In *United States v. Madden*[37] the Ninth Circuit Court of Appeals held appointment of counsel a privilege rather than a right for civil litigants.[38] Appointment in civil cases, therefore, remained a matter for the discretion of the trial court, whose decision would not be reversed unless fundamental unfairness resulted.[39] Similarly, another federal court recommended caution in court appointment by recognizing that the hardship weighed upon the appointed counsel should be considered by the court when appointing counsel in a civil case.[40]

Wade, 388 U.S. at 236-37 (right to counsel at post-indictment lineup). *See also* cases cited *supra* note 2 (discussing earlier cases regarding time in criminal process when indigent obtains right to counsel).

26. 389 U.S. 128 (1967).
27. *Id.* at 136.
28. *See* Argersinger v. Hamlin, 407 U.S. 25, 33 (1972).
29. Gagnon v. Scarpelli, 411 U.S. 778, 790-91 (1973) (determination of right to counsel in parole revocation cases to be made on case by case basis); *see also* Morrissey v. Brewer, 408 U.S. 471, 489 n.16 (1972) (due process may require counsel at probation revocation hearing but Court declines to address issue).
30. 372 U.S. 353 (1963).
31. *Id.* at 358.
32. 481 U.S 551 (1987).
33. *Id.* at 559.
34. 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989).
35. *Id.* at 109 S. Ct. at 2771-72, 106 L. Ed. 2d at 13.
36. *See supra* notes 17-31 and accompanying text.
37. 352 F.2d 792 (9th Cir. 1965).
38. *Id.* at 793.
39. *Id.*.
40. *See* Spears v. United States, 206 F. Supp. 22, 25-26 (S.D. W.Va. 1967).

Less than ten years after *Madden*, however, the Ninth Circuit changed its position. In *Cleaver v. Wilcox*[41] the court considered the indigent parent's right to counsel in proceedings to terminate parental rights. Although the court held no constitutional right to counsel existed in the case as presented, the Ninth Circuit formulated a test to use in future cases involving applications for counsel.[42] After *Cleaver*, a district court could appoint counsel in a parental rights proceeding upon weighing the possible length of separation from the child, the absence of parental consent, and the parent's ability for self-representation.[43]

Cleaver represented an important precursor to the landmark Supreme Court decision in *Lassiter v. Department of Social Services*.[44] In *Lassiter* the Supreme Court for the first time acknowledged that an indigent civil litigant has a right to counsel in certain cases where the state is the opposing party.[45] The Court announced a sliding scale test which declared that the indigent's right to counsel in civil cases decreased in proportion to the decrease in the threat to his personal liberty.[46] The Court held, moreover, that a presumption in favor of appointing counsel exists when the indigent risks being deprived of liberty upon losing the case.[47]

State courts, however, have gone much further than *Lassiter*. In New York, for example, an indigent civil litigant automatically possesses a right to counsel in parental rights cases,[48] in litigation involving "a substantial amount of money,"[49] in cases involving a possible eviction,[50] and in matrimonial litigation.[51] California is similarly progressive. In California, an indigent civil litigant is entitled to counsel in parental rights termination cases[52] and in paternity actions filed by the state.[53] These developments demonstrate the significant national expansion in the right to counsel and the widespread demand for the continued growth of this right.[54]

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41. 499 F.2d 940 (9th Cir. 1974).
42. *Id.* at 945.
43. *Id.* at 945-46.
44. 452 U.S. 18 (1981).
45. *Id.* at 26; *see also* Little v. Streeter, 452 U.S. 1, 9-11 (1981) (companion case to *Lassiter*); Scott v. Illinois, 440 U.S. 367, 372-73 (1979) (earlier case holding that sixth amendment does not compel appointment of counsel where law authorizes imprisonment as penalty but it is not imposed); English v. Missildine, 311 N.W.2d 292, 294 (Iowa 1981) (holding right to counsel in civil proceedings includes availability of funds to make possible reasonably necessary investigative services).
46. 452 U.S. at 27.
47. *Id.*
48. *E.g.*, *In re* Ella R. B., 30 N.Y.2d 352, 357, 285 N.E.2d 288, 290, 334 N.Y.S.2d 133, 136 (1972).
49. *E.g.*, Davis v. Hanna, 97 A.D.2d 943, 944, 468 N.Y.S.2d 729, 731 (N.Y. App. Div. 1983).
50. *E.g.*, Hotel Martha Washington Mgmt. Co., v. Swinick, 66 Misc. 2d 833, 322 N.Y.S.2d 139, 140 (N.Y. App. Term. 1971).
51. *E.g.*, *In re* Farrell, 127 Misc. 2d 350, 486 N.Y.S.2d 130, 131 (N.Y. Sup. Ct. 1985).
52. *E.g.*, *In re* Jacqueline H., 21 Cal. 3d 170, 175-76, 577 P.2d 683, 696-97, 145 Cal. Rptr. 548, 551-52 (1978).
53. *E.g.*, Salas v. Cortez, 24 Cal. 3d 22, 593 P.2d 226, 234, 154 Cal. Rptr. 529, 537, *cert. denied*, 444 U.S. 900 (1979).
54. *See* Gilbert & Gorenfeld, *supra* note 8, at 78 n.13 (noting numerous commentators favoring right to counsel for litigants in all civil cases).

III. THE HISTORY OF COURT APPOINTMENT AND THE LAWYER'S RESPONSIBILITY

Courts traditionally look at the historical obligations of the bar when forced to justify both their power of appointment and the lawyer's duty to serve.[55] Although some commentators have uncovered in Roman history[56] questionable support for this premise, most courts rely on the English and American history of court appointment as justification for this practice.[57]

A. The English Tradition

Many American courts consider the English history of court appointment as unqualified support for attorneys' continuing obligation to accept court appointments.[58] Courts and commentators alike assert that the history of court appointment in England establishes the bar's obligation to serve the indigent without payment.[59] The English system, however, does not conclusively establish the bar's obligation to serve the indigent upon request. Two thorough examinations of the English history of court appointment clearly assert that an irrefutable tradition of court appointment is not part of that history.[60]

The earliest reported cases betray a mixed response by the courts when faced with an occasion requiring appointment.[61] A number of cases dating back as far as the sixteenth century indicate that defendants frequently had to implore the court for the assistance of counsel, but oftentimes to no avail.[62] This result was not always the case, however. As noted in *United*

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55. *See generally* R. SMITH, JUSTICE AND THE POOR 230, 230-33 (2d ed. 1921) (noting tendency of courts to use historical obligation of bar to justify power to appoint and duty to serve). *But see* Webb v. Baird, 6 Ind. 13, 17 (1854) (concluding that historical basis for court appointment vanished by 1854 because profession was "properly stripped of all its odious distinctions and peculiar emoluments").

56. *E.g.*, Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 385 (1923) (footnote omitted); 2 H. ROBY, ROMAN PRIVATE LAW 407 (1902); 2 C. SHERMAN, ROMAN LAW IN THE MODERN WORLD 455 (2d ed. 1924). For criticism of this view and a very thorough documentation of this topic, see Shapiro, *supra* note 5, at 739-62.

57. *See , e.g.*, Powell v. Alabama, 287 U.S. 45, 73 (1932) (lawyers required to accept appointments as officers of court); United States v. Dillon, 346 F.2d 633, 636-37 (9th Cir. 1965) (appendix) (same), *cert. denied*, 382 U.S. 978 (1966); State v. Clifton, 247 La. 495, 172 So.2d 657, 667 (1965) (same).

58. *See infra* note 73.

59. *Dillon*, 346 F.2d at 637-38 ("The tradition of representation of indigents in England has existed for nearly half a millennium." *Id.* at 637.).

60. *See* REPORT OF THE COMM. ON LEGAL AID AND LEGAL ADVICE IN ENGLAND AND WALES, 7, 11 (1945) (circumstances dictate whether counsel appointed) [hereinafter REPORT OF THE COMM.]; Shapiro, *supra* note 5, at 740-49 (until eighteenth century, counsel usually not appointed in criminal cases).

61. C. ST. GERMAIN, DOCTOR AND STUDENT 256-59 (1974) (originally published c. 1530); E. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 29, 137 (4th ed. 1669).

62. *See, e.g.*, Lord Lovat's Case, 18 How. St. Tr. 529, 578-79 (1746) (blind, deaf invalid denied counsel); Scroop's Case, 5 How. St. Tr. 1034, 1043-46 (1660) (incarcerated defendant required to represent self); Love's Case, 5 How. St. Tr. 43, 54-66 (1651) (inability to solicit counsel does not constitute denial of counsel); Howard's (Duke of Norfolk's) Case, 1 How. St. Tr. 957, 966-67 (1571) (defendant accused of high treason denied counsel).

States v. Dillon,[63] some English statutes and case law support the proposition that certain attorneys, as officers of the court, were obligated to render unpaid services to the indigent.[64]

Unlike lawyers of today, in both England and the United States,[65] an officer of the court was usually a sergeant-at-law and thus a holder of public office.[66] A sergeant-at-law enjoyed unusual privileges not granted to other members of the bar. For example, sergeants commanded higher than normal fees, served as the exclusive source of appointment to the bench, and, until the nineteenth century, maintained an exclusive practice in the Common Pleas.[67] In short, sergeants formed a special strata within their own exclusive profession.[68]

With minor exceptions,[69] this elite body alone bore the burden of mandatory service to the indigent. The reliance by many courts on the long history of court appointment thus appears to be misplaced.[70] Although mandatory court appointment indeed burdened some especially privileged members of the legal profession, the claim is unwarranted that this isolated occurrence supports an obligation by all attorneys today.[71]

B. The American Experience: Abandonment of the English System

The history of court appointment in the United States reflects a general reluctance by courts to relinquish their power to appoint counsel without

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63. 346 F.2d 633, 636-37 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

64. *See* Anonymous v. Scroggs, 1 Freeman 390, 89 Eng. Rep. 289, 289 (K.B. 1674), where Chief Justice Hale stated, "if the Court should assign [a sergeant] to be counsel, he ought to attend; and if he refuse . . . we would not hear him, nay, we would make bold to commit him . . . ." (perhaps an early example of mandatory court appointment); Anonymous, 12 Mod. 583, 88 Eng. Rep. 1535 (K.B. 1702) (court appoints counsel for plaintiff who cannot enlist one). *But see* Shapiro, *supra* note 5, at 740-49 (extensive criticism of both *Dillon's* selective use of case law and proposition that counsel always appointed for indigent in England).

65. *See* 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW, 484-92 (4th ed. 1936)[hereinafter Holdsworth]; *see also* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 226 (1956); M. BIRKS, GENTLEMEN OF THE LAW (1960) (both noting that English courts abandoned sergeant-at-law system during nineteenth century).

66. Holdsworth, *supra* note 65, at 486.

67. *Id.*; *see also* Leigh's Case, 15 Va. (1 Munf.) 468, 482 (1810) (noting "a difference [in the status of attorneys] may probably exist in this country"); Respublica v. Fisher, 1 Yeates 350, 350-51 (Pa. 1794) (officers of court also immune from suit, service in militia, and, unlike other subjects, could not be compelled to take office against their will).

68. Shapiro, *supra* note 5, at 746 (sergeants "constituted the elite not only among all English lawyers but among members of the bar who tried cases in the King's courts").

69. REPORT OF THE COMM., *supra* note 60, at 6. The Committee noted:

> [f]or many years, and perhaps from time immemorial, there has existed the practice of granting "dock briefs." That is to say a prisoner on indictment has been entitled to the service in his defence of any barrister who happens to be in court at the time when he is in the dock on tendering to counsel the sum of one guinea without the intervention of a solicitor. A barrister so selected is under an obligation to accept the brief.

Id.

70. *See* United States v. Dillon, *supra* note 63, at 637 ("[T]he obligation of counsel to serve indigents is an ancient and established tradition of the legal profession").

71. *See* Shapiro, *supra* note 5, at 749. Shapiro noted, "But I think enough has been said to conclude that the case for compulsory, gratuitous service by American lawyers in particular cases or on a broader scale cannot be based in substantial part on the English tradition." *Id.*

compensation.[72] American courts rely in part on the fiction of a firm tradition of court appointment in England as a justification for their own appointment of counsel with little or no compensation.[73] Although commentators continue to disagree over the extent of the right to counsel during the colonial period,[74] the history of the time manifests a relative departure from the English tradition.[75] The colonial legislatures, unlike the English Parliament, acted with great frequency to produce a variety of statutes creating an entitlement to counsel.

For example in Georgia the legislature, rather than the courts, adopted the uncertain English tradition[76] of limiting the appointment of counsel in criminal cases.[77] In South Carolina, the right was much more expansive. South Carolina law after 1731 permitted courts to assign up to two counsel to indigents requesting legal assistance.[78] North Carolina was almost as progressive. In North Carolina, any accused, no matter the nature of his crime, was entitled to representation by counsel.[79] Other states, however, ignored such developments. Delaware and Pennsylvania, for example, limited the right to counsel to certain prosecutions at the request of the accused and perhaps still at the discretion of the court.[80]

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72. For a thorough analysis of the history of court appointment, see generally W. BEANEY, The RIGHT TO COUNSEL IN AMERICAN COURTS (1955) (comprehensive history of indigent's right to counsel) [hereinafter Beaney]; Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1048-51 (1964) (applying history to substantiate argument for extension of indigent's right to counsel).

73. *See, e.g.*, White v. Board of Co. Comm'rs, 537 So. 2d 1376, 1379-80 (Fla. 1989) (relying on officer of court theory which emanates from English common law); State v. Remeta, 547 So. 2d 181, 182 (Fla. Dist. Ct. App. 1989) (relying on officer of court theory); *Ex parte* Dribble, 279 S.C. 592, 310 S.E.2d 440, 441 (Ct. App. 1983) (stating lawyers are officers of court); Yarborough v. Superior Ct., 150 Cal. App. 3d 388, 197 Cal. Rptr. 737, 741 (1983), vacated, 39 Cal. 3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985) (stating in dicta that lawyers are officers of court).

74. *See* Note, *supra* note 72, at 1030, 1055-57 (appendix setting forth each colony/state's counsel provisions until 1800); Shapiro, *supra* note 5, at 750 (whether counsel appointed varied among colonies); *Beaney*, *supra* note 72, at 14-22 (no proof that American courts applied more liberal right to counsel than their English counterparts).

75. *See* Note, *supra* note 72, at 1030 (all states except Rhode Island and Georgia adopted some right to counsel provision by 1789).

76. *See supra* notes 59-71 (demonstrating that indigent defendent in England could not always rely on obtaining appointed counsel).

77. *See Beaney*, *supra* note 72, at 19 (Georgia followed English rule from at least 1754 through 1798). *But see* GA. CONST. art. III, § 8 (1798) ("no person shall be debarred from advocating or defending his cause before any court or tribunal, either by himself or counsel, or both").

78. 7 & 8 Will. 3, 3 S.C. PUB. LAWS 129-30 (Grimke ed. 1790) (the law "authorized and required . . . [the court] . . . to assign . . . such and so many council not exceeding two, as the person or persons [accused of a crime] shall desire, to whom such council shall have free access at all reasonable times").

79. 1 N.C. REV. LAWS 225 (Iredell & Martin ed. 1804). The statute passed in 1777 provided, "[E]very person accused of any crime or misdemeanor whatsoever, shall be entitled to counsel in all matters which may be necessary for his defence, as to facts as to law . . . ." *Id.* The last phrase in this statute deserves explanation. In England, an accused was sometimes deprived of the right to counsel on matters of fact. The courts deemed an accused capable of defending himself on these matters. The courts, therefore, at varying times only considered matters of law to be sufficiently complex to warrant an appointment of counsel for the accused. For more on this distinction, see Note, *supra* note 72, at 1022-30.

80. *See* PENN FRAME OF GOV., *Laws Agreed upon in England*, art. VI (1682); 5 THORPE

This brief examination of the early history of court appointment in America indicates that no definite tendency can be culled from an examination of available materials.[81] Claims that colonial courts appointed counsel solely on the basis of an English tradition appear unsubstantiated. Furthermore, although some courts have been inclined to describe this historical background as definitive support for the right of the accused to counsel, a thorough examination of the period concludes otherwise.[82]

1. The 19th Century: Challenges to Appointment Begin

The birth of the nation neither disturbed the Colonies' existing framework for appointment of counsel nor prevented Congress from acting to provide counsel. Indeed, the first Congress passed a measure authorizing the appointment of counsel for defendants in capital cases.[83] Moreover, Delaware's 1776 Constitution specifically retained all earlier acts of the state legislature, including those providing for counsel.[84] Additionally, Pennsylvania retained its rudimentary provisions for counsel,[85] and nothing indicates that the progressive states of South and North Carolina abandoned their novel extensions of the right to counsel.[86]

Against this background of colonial legislation, the United States supplanted existing state measures, at least in the federal courts, with the passage of the sixth amendment.[87] The importance of appointed counsel was not lost upon the members of the constitutional convention.[88] Three states proposed different versions of the sixth amendment to the convention.[89] The final version of the amendment, however, which passed with almost no debate,[90] also indicates that the drafters decided to abandon the fact-law dis-

3060; DEL. LAWS 30, 32 (Franklin & Hall ed. 1752) (1720 statute requires assignment of counsel in capital cases). *But see* note, *supra* note 72, at 1056-57 (concluding all defendants could obtain counsel).

81. Shapiro, *supra* note 5, at 753.

82. *Id.* (Shapiro fails to denote adherence to English tradition of court appointment). *But see* note, *supra* note 72, at 1030-31 (finds dubious inference that colonies did not regard right to counsel as fundamental).

83. *See* Act of April 30, 1790, ch. 9 § 29, 1 STATUTES AT LARGE 112 (current version at 18 *U.S.C.* § 3005 (1988)) (implying that defendant had right to counsel).

84. DEL. CONST. art. XXIV (1776); 1 THORPE 566. The 1792 Delaware Constitution went further by providing criminal defendants' attorneys the right to seasonable access to their clients. DEL. CONST. art. 1, §§ 7, 12 (1792).

85. PENN. CHARTER art. V (1701); J. THORPE 3079. In addition, both New Jersey and Rhode Island had comparable statutes. *See* 2 R.I. COLONIAL RECORDS 238-39 (Bartlett ed. 1857); R. I. REV. PUB. LAWS 80-81 (1798).

86. *See supra* notes 78-79.

87. U.S. CONST. amend. VI. The sixth amendment provides in pertinent part: "[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, . . . and to have the Assistance of Counsel for his defense."

88. *See* Rackow, *The Right to Counsel: English and American Precedents*, 11 WM. & MARY QUART. 1, 21-26 (3d ser. 1954) (excellent legislative history of development of sixth amendment).

89. *See* Note, *supra* note 72, at 1031. (Virginia, North Carolina, and New York proposed provisions for the right to counsel and refused to ratify the Constitution without its inclusion).

90. *See* Rackow, *supra* note 88, at 24-5 (final draft very similar to original proposed language).

tinction deemed important by English courts.[91]

The American lawyers affected by these developments bore no relation to their English counterparts. The only remaining vestige of the English system was the preference for court appointment embodied in state and federal statutes. Barristers, the closest English counterparts to American litigators, were officers of the court only if also seargents-of-law[92] and were the object of hushed respect.

In contrast, American lawyers were admitted easily to the bar and were subjected to little judicial supervision,[93] whereas English attorneys enjoyed unusual privileges because of the high standards for admission.[94] Moreover, states abandoned stringent requirements for entrance to the bar because of a widespread fear of class distinction and exclusivity.[95] Any system reviving privileges for lawyers as a class would have been suspect, if not an anathema, to the new American ethic.[96] As the court noted in *State ex rel. Scott v. Roper,*[97] ". . . we cannot transplant the English experience onto American soil, nor can we merely claim that lawyers are officers of the court . . . ."[98]

The absence of special privileges for American lawyers, however, failed to prevent courts from applying two older rationales, premised upon English tradition, which supported an attorney's obligation to accept an appointment without compensation. Courts continued to rely on the officer of the court theory to justify such appointments.[99] Despite the reliability of this

91. *See supra* note 79 (important difference between issues of fact and law in England should not be overlooked); Rackow, *supra* note 89, at 24-26; *see generally Beaney, Right to Counsel Before Arraignment,* 45 MINN. L. REV. 771 (1961) (helpful outline of indigent's historical right to counsel before arraignment); *Beaney, supra* note 72, at 27-76 (documenting indigent's right to counsel in federal courts).

92. *See* Shapiro, *supra* note 5, at 746.

93. *See* Comment, *supra* note 9, at 374-75 (American lawyers did not suffer same obligations placed on English lawyers); *see also* R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES (1953) (colonies' legal systems totally unlike English system). In sum, animosity for English institutions and a Jeffersonian fear of professionalism and privilege reduced the legal profession to a more common status in accordance with the ideals of the young nation. Many states eradicated the professional status of attorneys altogether. *See, e.g.,* N.H. REV. STAT. ch. 177, § 2 (1842) (any moral citizen over 21 permitted to practice); 1843 ME. PUBLIC LAWS ch. 12 (any state citizen of good moral character admitted to practice); WIS. REV. STAT. ch. 87, § 26 (1849) (any resident of good moral character allowed to practice law); IND. CONST. art. 7, § 21 (1852) (any voter of good moral character may practice law).

94. *See supra* notes 65-67 and accompanying text.

95. *See* A. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 85-86 (1921) (public policy against lawyers becoming elitist group outweighed importance of legal education).

96. *See* The Declaration of Independence para. 2 (U.S. 1776) (providing in pertinent part "that all men are created equal"); *see also* Webb v. Baird, 6 Ind. 13, 16-17 (1854) (interpretation of new role attorneys played in American system).

97. 688 S.W.2d 757 (Mo. 1985) (en banc).

98. *Id.* at 766.

99. *See, e.g.,* Vise v. The County of Hamilton, 19 Ill. 78, 79 (1857) (noting lawyers are officers of court and "the law confers on licensed attorneys rights and privileges, and with them duties and obligations, which must be reciprocally enjoyed and performed"); *see also In re* Baum, 55 Hun. 611, 8 N.Y.S. 771, 771 (1890) (declaring attorney is officer of court, but not officer of state); Case of Austin, 5 Rawle 191, 203 (Pa. 1835) (considering whether attorney is officer of state); Byrne v. Stewart, 3 S.C. Eq. (3 Des.) 466, 471-72 (1812) (attorneys not holders of public office despite existence of several statutes superficially regulating lawyers like public

theory, however, courts seemed to prefer another rationale. This second rationale, utilized far more often than the first, imposed the burden of court appointment on the bar because courts viewed appointment as a traditional obligation of the bar.[100] Courts also held either that lawyers accepted the obligation to serve without pay when they chose to become members of the bar[101] or that the duty to serve without pay arose as an acceptable condition to the practice of law.[102]

The Supreme Court of Indiana addressed and dismissed each of these justifications in its famous opinion in *Webb v. Baird*.[103] *Webb* represents the first rejection by a state supreme court of the various theories advanced in support of compulsory legal assistance. The court recognized the traditional argument that the attorney has an honorary duty to aid the indigent.[104] The *Webb* holding, however, flatly dismissed this claim as ancient and having no place under the laws of its state or the Constitution.[105] The court considered all professions equal and, therefore, none could be subjected to unique bur-

officials). *Compare* Ferri v. Ackerman, 444 U.S. 193, 202-05 (1979) (considering whether appointed counsel is federal officer); *with In re* Griffiths, 413 U.S. 717, 723-27 (1973) (discussing role played by attorney as officer of court); and Cammer v. United States, 350 U.S. 399, 405 (1956); and Powell v. Alabama, 287 U.S. 45, 73 (1932); and *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 378-79 (1866) (all instances where Supreme Court addressed meaning of "officer of the court").

100. *See e.g.*, Nebb v. United States, 1 Ct. Cl. 173, 174 (1863) (attorneys bound to represent indigent when appointed); Posey & Tompkins v. Mobile County, 50 Ala. 6 (1873) (law provides for appointment but not compensation of counsel); Arkansas Co. v. Freeman & Johnson, 31 Ark. 266, 267 (1876) (attorney's privileged position brings with it duty to serve poor); Lamont v. Solano County, 49 Cal. 158, 159 (1874) (attorneys have duty to aid destitute); Rowe v. Yuba County, 17 Cal. 62, 63-64 (1860) (Field, J.) (rejecting claim for compensation because lawyer has duty to serve defenseless); Elam v. Johnson, 48 Ga. 348, 350 (1873) (attorney's obligation to serve poor a source of pride); Johnson v. Whiteside Co., 110 Ill. 22, 24 (1884) (recognizing that courts possess power and duty to appoint counsel); Vise v. County of Hamilton, 19 Ill. 78, 79 (1857) (noting that court has power to appoint and compel counsel to aid poor); Johnston v. Lewis & Clarke Co., 2 Mont. 159, 163 (1874) (recognizing long history of burden of unpaid appointment); People *ex rel.* Whedon v. Board of Supervisors, 192 App. Div. 705, 138, 438 N.Y.S. 483, 483 (1920) (noting that historically attorney considered officer of court); Presby v. Klickitat Co., 5 Wash. 329, 31 P. 876, 877-78 (1892), *overruled*, 77 Wash. 2d 660, 466 P.2d 485 (1970) (lawyer has duty to profession, humanity, and justice).

101. *See* Weiner v. Fulton County, 113 Ga. App. 343, 148 S.E.2d 143, 146-47 (1966), *cert. denied*, 385 U.S. 958 (1966); *see also* Johnson v. Whiteside County, 110 Ill. 22, 24-25 (1884) (lawyer impliedly consents to appointments).

102. *See* United States v. Dillon, 346 F.2d 633, 637 (1966), *cert. denied*, 382 U.S. 978 (1966) (court appointed counsel traditionally uncompensated); Jackson v. State, 413 P.2d 488, 490 (Alaska 1966), *overruled*, 740 P.2d 439 (Alaska 1987) (duty to serve without pay condition of legal practice rooted in legal history); Case v. Board of Co. Comm'rs, 4 Kan. 411, 411 (1868) (attorneys, like private parties, cannot look for counties to aid to charitable causes); State v. Simmons, 43 La. Ann. 991, 10 So. 382, 383-84 (1891) (attorney not entitled to fees when county is not party to suit); Dismukes v. Board of Supervisors, 58 Miss. 612, 613 (1881) (court appointed counsel not entitled to compensation); Kelley v. Andrew County, 43 Mo. 338, 342-43 (1869) (county not liable for payment of counsel, and state had not provided for payment); People *ex rel.* Ransom v. Board of Supervisors, 78 N.Y. 622, 622 (1879) (county not responsible for attorney's fees claim); Ruckenbrod v. Mullins, 102 Utah 548, 133 P.2d 325, 326, 331 (1921) (court follows majority rule that attorneys may be required to tender gratuitous service).

103. 6 Ind. 13 (1854).

104. *Id.* at 16.

105. *Id.* at 16-17.

dens or granted special treatment.[106] Having reached these conclusions, the *Webb* court easily held that the legal profession no longer enjoyed an unusual status.[107]

Webb, however, was only one of three early decisions holding on constitutional grounds that an attorney could not be compelled to represent an indigent without compensation. In *Carpenter v. Dane County*[108] the Wisconsin Supreme Court rejected court appointment without provision for compensation on roughly the same grounds used in *Webb*.[109] The Iowa Supreme Court, relying on the fifth amendment to the United States Constitution,[110] similarly held unconstitutional court appointment without provision for compensation.[111] The court considered the right to just compensation a fundamental right abridged by such an appointment.[112]

The acknowledgement of the just compensation argument by these courts indicates that some courts were not entirely content with the traditional arguments raised in support of an attorney's obligation to serve the indigent without pay. These holdings, although later repudiated,[113] indicate that constitutional objections to compelled representation were recognized and accepted at an early date.

Other jurisdictions which continued to recognize the duty to serve without pay formed only a plurality of states in existence at the end of the nineteenth century.[114] These same states, moreover, seldom disciplined lawyers for refusing to serve when appointed without provision for compensation.[115] In addition, commentators at the time split on the issue.[116] For these rea-

106. *Id.* at 16.

107. *Id.*

108. 9 Wis. 274 (1859).

109. The *Webb* court relied on art. 1, § 21 of the Indiana Constitution which declared that "no man's particular services shall be demanded without just compensation." *Webb*, 6 Ind. at 15. The Wisconsin Supreme Court similarly employed the fifth amendment to the United States Constitution to justify, as correlative to its power to appoint, its power to pay for an appointed attorney's services. *Carpenter*, 9 Wis. at 276-77 (counsel entitled to payment as indigent is entitled to representation); County of Dane v. Smith, 13 Wis. 585, 587 (1861) (county appointing counsel must pay him). *But see* Greene Lake Co. v. Waupaca Co., 113 Wis. 425, 89 N.W. 549, 552 (1902) (appointed counsel award limited to prescribed statutory amount on basis of officer of court theory).

110. *See supra* note 96 and accompanying text (quoting text of fifth amendment).

111. Hall v. Washington Co., 2 Greene 473, 478 (Iowa 1850).

112. *Id.* at 478. The court held the county responsible for the attorney's compensation and stated, "[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.' " *Id. But see* Samuels v. County of Dubuque, 13 Iowa 536, 538 (1862) (attorney must accept representation for statutory fee; no just compensation problem presented because lawyers are officers of law).

113. *See* Samuels v. County of Dubuque, 13 Iowa 536, 538 (1862) (repudiating earlier holdings in deference to statutory pay schedule and on basis of officer of court theory); Greene Lake Co. v. Waupaca Co., 113 Wis. 425, 89 N.W. 549, 552-24 (1902) (overruling earlier precedent because of new statutory enactment limiting compensation to set amount computed by days in trial).

114. *See* 7 AM. JUR. 2D. *Attorneys at Law* § 207 (1980).

115. *See* 36 A.L.R. 3d 1221 (1971 & 1990) (collecting cases on topic).

116. *Compare* T. COOLEY, CONSTITUTIONAL LIMITATIONS 330-31 n.2 (3d ed. 1874) (relying on advocate's oath for responsibility not "to reject, for any consideration personal to myself, the cause of the weak, the stranger, or the oppressed") *with* J. BISHOP, COMMENTARY ON

sons, the practice of compelled representation without pay already was losing credence in the nineteenth century.

2. *The 20th Century: The Amplified Burdens of Court Appointment*

The early judicial responses to challenges against court appointment failed to dictate the future course. In the twentieth century, more courts recognized that constitutional problems existed with court appointment for both criminal and civil litigants. Courts grew reluctant to place the same demands on attorneys they once had[117] and to exercise their inherent judicial power to compel attorneys to serve.[118] A responsiveness surfaced to many lawyers' pleas that uncompensated service constituted an excessive burden. The once strong majority of courts willing to command attorneys to serve, no matter the personal and professional cost, disappeared behind an advancing wall of statutory and common law.[119]

a. The Changing Nature of the Legal Practice

Most court appointments are no longer a simple matter. In the past, a criminal defense attorney need only know the rudiments of procedure and evidence.[120] The modern system, nurtured by years of evolution in both common and statutory law, changed this required breadth of knowledge. Today, as a practical matter, a lawyer faces a series of technical hurdles when handling a criminal matter. Even the most accomplished criminal defense attorney cannot truthfully claim familiarity with all the complexities of criminal law.[121] Though an attorney's best resource remains his ability to supply a client with expertise, learning, and cogent thought, this ability alone is not enough with today's convoluted, specialized practice.[122] For example, the criminal defense attorney must know the rules of discovery, the intricacies of search and seizure law, jury selection, conspiracy rules, and the myriad sciences relied upon by prosecutors to prove their cases.[123]

The changed nature of law practice compounds this problem. Traditionally, general practice was the norm for most lawyers. Today, very few practitioners continue to carry this flame of the past.[124] An increasingly

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THE LAW OF CRIMINAL PROCEDURE 179 (2d ed. Boston 1872) (1st ed. 1860) (disagreeing with Cooley's thesis on constitutional and other grounds).

117. *In re* D.B., 385 So. 2d 83, 92 (Fla. 1980); State *ex rel.* Wolff v. Ruddy, 617 S.W.2d 64, 67-68 (Mo. 1981), *cert. denied*, 454 U.S. 1142 (1982); Kovarik v. County of Banner, 192 Neb. 816, 823, 224 N.W.2d 761, 763 (1975).

118. *See* State *ex rel.* Scott v. Roper, 688 S.W.2d 757, 769 (Mo. 1985).

119. *See infra* notes 153-171 and accompanying text for analysis of these changes in the law.

120. State *ex rel.* Partain v. Oakley, 227 S.E.2d 314, 322 (W.Va 1976).

121. *See* State v. Rush, 46 N.J. 399, 217 A.2d 441, 444 (1966).

122. *See* State *ex rel.* Stephan v. Smith, 242 Kan. 336, 747 P.2d 816, 841 (1987).

123. *See Rush*, 217 A.2d at 448 (choosing not to compel attorney to render uncompensated service in part because of increasing complexity of criminal representation and resultant time burden imposed upon attorney who must familiarize himself with ever-changing face of criminal law).

124. *See* Abodeely v. County of Worcester, 352 Mass. 719, 227 N.E.2d 486, 489 (1967) (noting fragmentation of profession and increasingly small minority of lawyers who litigate

specialized and narrowly trained attorney typifies the profession. Many lawyers appointed to serve the indigent begin their experience relatively incompetent.[125] For that matter, very few lawyers even specialize in criminal law or civil litigation.[126]

The current practice of law also requires a significant infrastructure not needed in the past.[127] Lawyers must support the costs of personnel, libraries, equipment, and overhead, leading to a very expensive practice.[128] Also, in the past lawyers received numerous intangible benefits[129] from representing the indigent. Today, those benefits largely are gone due to the number of appointments and the value of lost billable time.[130] The truth of this statement is illustrated in part by the 30.2% of all lawyers in private practice that never give any time to pro bono causes.[131]

In addition, the competition among lawyers for business is intense.[132] This factor alone alters the landscape upon which court appointments are made. A number of developments have irrevocably altered the profession. For example, obstacles which hindered competition among lawyers are being removed.[133] The disappearance of many law firms is one indicator of the competitiveness which characterizes the legal marketplace. Other barriers to competitiveness, which kept the layperson out of the practice of law, are also vanishing.[134] The growth in small claims courts and alternative dispute

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cases); *cf. supra* notes 117-118 and accompanying text (noting courts' acknowledgment of tremendous burden of appointment).

125. *See generally* Evitts v. Lucey, 469 U.S. 387 (1985) (an example of lawyer's incompetence in failure to comply with procedural rules).

126. *See Rush*, 217 A.2d at 444 (noting small number of criminal law specialists).

127. *Id.* at 448 (observing that "the overhead of the average law office probably runs about 40% of gross income").

128. *See, e.g.*, County of Fresno v. Superior Ct., 82 Cal. App. 3d 191, 198, 146 Cal. Rptr. 880, 886-88 (1978) (Hopper, J., dissenting) (outlining differences in law practice which make appointments burdensome); State v. McKenney, 20 Wash. App. 797, 582 P.2d 573, 576-78 (1978) (noting immense burden unpaid appointments place upon practitioner); State v. Rush, 46 N.J. 399, 217 A.2d 441, 448 (1966) (stating overhead accounts for up to half of an attorney's gross income).

129. *See* Shapiro, *supra* note 5, at 752 n.236 (typical benefits were notoriety and acquisition of experience).

130. *Id.*; *see also* State v. Allies, 182 Mont. 323, 594 P.2d 64, 65 (1979) (appointed counsel spends $42,000 of billable time at trial stage alone). *But see* Lochner, *The No Fee and Low Fee Legal Practice of Private Attorneys*, 9 LAW & SOC'Y REV. 431, 444, 449, 462-66 (1975) (concluding that private practice lawyers perform much of low and no fee practice for middle class as means of gaining experience and clients, thus potentially realizing benefit from such service).

131. *See* Handler, Hollingsworth, Erlanger & Ladinsky, *The Public Interest Activities of Private Practice Lawyers*, 61 A.B.A. J. 1388, 1389 (1975). On a better note, the study found that 6.2% of all billable hours spent in private practice are spent on low and no fee cases. *Id.*

132. *See* Shapiro, *supra* note 5, at 776.

133. *See generally* Bates v. State Bar, 433 U.S. 350, 377 n.35 (1977), *reh'g denied*, 434 U.S. 881 (1977) (legitimizing advertising by lawyers; asserting that advertising may increase competition and lower prices for legal services); Goldfarb v. Virginia State Bar, 421 U.S. 773, 780-93 (1975) (disapproving of minimum fee schedule established by local bar as anticompetitive violation of Sherman Act); Koffler v. Joint Bar Ass'n Grievance Comm., 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (N.Y. 1980) (direct mail solicitation by lawyers is constitutionally protected).

134. *See* Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make*

resolution techniques attest to this fact.[135] In addition, the sheer expense of retaining counsel deters many potential clients even from seeking legal assistance in the first place. Although lawyers continue to succeed in today's society,[136] their sinecure is no longer unassailable.

C. *The Growing Demand for Appointed Counsel*

Complicating the problems precipitated by the changed nature of law practice is an increasing need for the provision of legal assistance without payment.[137] More poor in need of legal assistance exist today than ever before.[138] In particular, many poor criminal defendants find themselves in need of legal assistance. Exacerbating this development are the huge annual increases in crime. In one eleven year period alone, the national crime index increased 196.9%.[139]

Finally, the existing legal aid network[140] cannot and does not come close to meeting the needs created by society, the courts, and the relative indifference of lawyers to the needs of the poor.[141] Although Congress created the Legal Services Corporation ("LSC") to provide equal access to the justice system,[142] Congress has, within the last four years alone, decreased LSC funding by twenty-five percent.[143] Compounding the problems inherent in reduced funding is the practical absence of LSC activity in most rural areas.[144]

Good Neighbors-Or Even Good Sense?, AM. B. FOUND. RES. J. 159, 203-12 (1980) (noting serious changes in acceptability of non-lawyers performing traditional lawyer tasks).

135. *See* Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 282-83 (1978) (commenting on increasing availability of small claims courts for those who wish to proceed without counsel).

136. See American Bar Endowment Annual Report, 1978-79, 66 A.B.A. J. 63 (1980) (claiming over 465,000 lawyers licensed in the United States); *see also* N.Y. Times, Nov. 4 1980, at B1, col. 1 (estimating number of lawyers at 500,000 in 1980).

137. *See generally* Swygert, *supra* note 3, at 1267 (existing legal assistance programs only provide for twenty percent of thirty million poor in United States).

138. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 457 (106th ed. 1986) (revealing that percentage of population living underneath poverty line rose from 11.7% in 1979 to 14.4% in 1984). The percentage, however, may be dramatically understated. Currently, in order to be "poor", a family of four must earn less than $12,675 annually. *See* Dallas Morning News, Sept. 27, 1990, at 18a (reporting Census Bureau guidelines on poverty; also reporting 12.8% poverty rate for 1989).

139. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1973 198, Table 3.51; *see also* BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME SURVEY 1989 (general overview of crime in United States).

140. Legal aid is generally available through public defender offices, the Legal Services Corporation, organized efforts sponsored by the local and state bars, and private pro bono publico efforts.

141. *See infra* notes 138-139 (noting societal change of mushrooming crime rates).

142. *See* Legal Services Corporation Act, 42 U.S.C. §§ 2996-2996j (1982). Congress established the Legal Services Corporation and declared that " . . . there is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances . . .." *Id.*

143. *See* H.R. REP. NO. 97, 97th Cong., 1st Sess., at 10 ("[T]he corporation should be continued . . . but in light of the needs for fiscal restraint, it has reduced its funding level . . . resulting in a 25 percent savings . . .."); *see also* 97 L.A. Daily J., Jan. 17, 1984, at 1, col. 2 (reporting same development).

144. See State *ex rel.* Stephan v. Smith, 242 Kan. 336, 747 P.2d 816, 845 (1987) (noting

One may attempt to dismiss the ill-effects court appointment imposes on lawyers and their indigent clients by pointing to the existence and availability of legal assistance and pro bono publico services for the indigent. This assertion, however, lacks merit. Courts recognize that legal aid normally is not available for the prospective civil litigant.[145] Empirical evidence also disproves the argument that enough legal services exist to meet the needs of the poor.[146]

With the increasing number of persons living in poverty and the decreasing amount of subsidized legal assistance,[147] only twenty percent of the thirty million poor in the United States receives assistance from legal aid programs.[148] Obviously, this development directly influences the required number of court appointments. One example may be found in *444 W. 54th S. Tenant Association v. Costello*.[149] Although the defendant in this case did not procure counsel, the court noted that even if she had sought legal assistance, a legal assistance law firm could not have taken the case due to an already overwhelming burden and demand for representation in much more important matters.[150] Because the system established to provide counsel could not afford to do so, the *Costello* court was in a sense forced to appoint counsel for the defendant.[151] The court acted in spite of the normal reluctance by New York courts to assign counsel in civil proceedings.[152]

D. The Overdue Advent of Payment for Appointed Counsel

Much of the nineteenth century case law on court appointment held that

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disproportionate impact on lawyers in small counties due to funding pattern which benefits metropolitan areas); *see also* Cogan, *Governor's Perspective*, OR. ST. BAR BULL. 1 (Nov. 1988) (Oregon's governer estimating that 9,000 legal matters cannot be handled by Oregon's rural legal assistance programs).

145. *See supra* notes 33-47 and accompanying text.

146. *See supra* notes 137-145 (with number of poor increasing and amount of subsidized legal aid contracting, little doubt exists that poor cannot rely on government legal aid for help).

147. Swygert, *supra* note 3, at 1267 n.4. Many poor do not seek legal assistance. The problem may therefore be understated. The poor's reluctance to seek legal help, in turn, may result from a previous inability to find free legal service or the poor quality of earlier services. *See also* THE LEGAL SERVICES CORPORATION AND THE ACTIVITIES OF ITS GRANTEES: A FACT BOOK 7 (1979) (estimating poor's need for legal services at three times the capacity of Legal Services Corporation); *cf.* Comment, *The Uncompensated Appointed Counsel System: A Constitutional and Social Transgression*, 60 KY. L.J. 710, 721-23 (1972) (attacking court appointment system); Williams & Bost, *The Assigned Counsel System: An Exercise of Servitude?*, 42 MISS. L.J. 32, 42-43 (1971) (attacking system of appointed counsel).

148. Swygert, *supra* note 3, at 1267 n.2.

149. 138 Misc. 2d 5, 523 N.Y.S.2d 374 (N.Y. Civ. Ct. 1987).

150. 523 N.Y.S.2d at 378. The court stated, "[m]erely because of the sheer volume of work in the trial courts, and the drain on their limited available funds, these legal service law firms cannot accept every indigent who presently seeks their sage counsel, especially in the 'landlord-tenant' arena." *Id.*

151. *Id.*

152. *See, e.g., In re* Smiley, 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975) (court may only appoint counsel to civil litigant in proper case); *In re* Daley, 123 Misc. 2d 139, 473 N.Y.S.2d 114 (Surrogate's Ct. 1984) (no right to counsel in most civil cases); *In re* Romano, 109 Misc. 2d 99, 438 N.Y.S.2d 967 (Surrogate's Ct. 1981) (same proposition as *Daley*).

the appointed attorney had no action for compensation.[153] Courts relied upon the "officer of the court" and "traditional obligation of the bar" theories to support holdings that lawyers may be compelled to render gratuituous services.[154] In the twentieth century, some state courts continued to apply these rationales.[155] In Texas and Arkansas, for example, both of which authorize payment of counsel by county authority, some counties have either neglected to or decided not to establish funds for payment of assigned counsel.[156] The state courts, however, have not found this county action objectionable.[157] Some federal courts, moreover, have found that an appointed attorney does not have an action for payment in the absence of statutory authorization.[158]

Other states, however, chose to follow the lead of the United States Congress. In the Criminal Justice Act,[159] Congress established a pay scale for appointed counsel in federal criminal cases which, despite providing a fee far below an appointed counsel's normal rate, notably covers the attorney's reasonable expenses.[160] North Carolina's statute closely tracks the Criminal Justice Act provision by providing for limited compensation and reimbursement for out of pocket expenses.[161] The Wisconsin legislature also provided

153. *See supra* notes 83-116 and accompanying text (examining nineteenth century history of court appointment).

154. *See supra* notes 100-107 and accompanying text (exploring officer of court and traditional obligation of bar theories).

155. *E.g.*, Huskey v. State, 743 S.W.2d 609, 610-11 (Tenn. 1988) (one of the burdens and responsibilities of a professional holding license to practice law is to serve the court system as a sworn minister of justice); Sanders v. State, 276 Ark. 342, 635 S.W.2d 222, 224 (1982) (duty and responsibility of lawyer to serve); State v. Conley, 270 Ark. 139, 603 S.W.2d 415 (1980); State v. Ruiz, 269 Ark. 331, 602 S.W.2d 625, 626-27 (1980) (lawyers swear to uphold rights of indigent); Keene v. Jackson County, 3 Or. App. 551, 474 P.2d 777, 778 (1970) (attorneys aware of professional obligation rooted in history), *cert. denied*, 402 U.S. 995 (1971). *See also* 3 A.L.R.4th 576 (1981) (annotation on topic).

156. *See* L. SILVERSTEIN, 1 THE AVAILABILITY OF LEGAL SERVICES FOR THE POOR 16 (1968).

157. *Id.* at 16. *Cf.* TEX. CODE CRIM. PROC. ANN. art. 26.05 (Vernon 1988) (providing set fees, subject to the discretion of the trial court, for reimbursement of counsel appointed to represent indigent criminal defendant).

158. *See* Dolan v. United States, 351 F.2d 671, 672 (5th Cir. 1965) (attorney not entitled to compensation absent statute authorizing payment); United States v. Dillon, 346 F.2d 633, 636 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1965) (lawyers have ancient obligations to tender unpaid service); Miller v. Pleasure, 296 F.2d 283, 284 (2nd Cir. 1961), *cert. denied*, 370 U.S. 964 (1961) (holding United States is not liable for appointed counsel's fees).

159. *Crim. Justice Act of* 1969, Pub. L. No. 88-455, § 2, 78 Stat. 552, 553 (codified as amended at 18 U.S.C. § 3006A (1988)) (providing for compensation up to a $60 hourly rate for in court time and $40 hourly rate for out of court time; also allowing Judicial Conference to increase payment for in court time to $75 an hour in judicial districts where higher rate is justified).

160. 18 U.S.C. § 3006A(d)(1) (1988). A deserving note, however, is the discretion vested in the Judicial Conference to vary compensation by circuit and district in accordance with local prevailing rates for qualified attorneys. The expenses provision is also particularly important in light of potential total expenses. Without such a provision, the appointed lawyer would be forced to cover various costs, including transcripts, expert witnesses, and travel. The Kansas Supreme Court recently recognized that these costs alone may make the burdens on appointed counsel unbearable and unconstitutional. *See* State *ex rel.* Stephan v. Smith, 242 Kan. 336, 747 P.2d 816, 824-30 (1987).

161. N.C. GEN. STAT. §§ 15-9, 15-4.1, 15.5 (1988). *See* State v. Davis, 270 N.C. 1, 153 S.E.2d 749 (1967), *cert. denied*, 389 U.S. 828 (1987) (explaining statute's operation). *See also*

for payment, but at a lesser fee than normally charged in similar situations.[162]

Few states, however, adhere to a standard of limited compensation with an allowance for expenses.[163] Most states limit awards to a moderate amount computed on the basis of a standardized hourly rate and the reasonable hours needed for preparation.[164] This procedure alone represents a great improvement. A clear majority of states now have established at least some mechanism for an appointed attorney to recover his fees, albeit at a reduced rate, and sometimes his expenses.[165] Twenty-two of these states impose an artificial limit on compensation, and seventeen others allow the court to decide what constitutes reasonable compensation.[166] Consequently, although most states now have some provisions for payment, the fees allotted are low and oftentimes insufficient.[167]

Some state courts literally provoked their legislatures into action by rendering decisions forcing the legislatures to finance legal services for indigents with a constitutional right to representation.[168] In cases where the indigent had an undisputed right to counsel, the state faced the choice of either pay-

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State v. Remeta, 547 So. 2d 181, 181-83 (Fla. Dist. Ct. App. 1989) (applying another state's statutory scheme for compensation).

162. WIS. STAT. ANN § 967.06 (West 1985); WIS. S. CT. R. 81.01-2 (1989); *see also* State v. Sidney, 66 Wis. 2d 602, 225 N.W.2d 438 (1975) (detailing effect of statute). Wisconsin currently compensates appointed counsel at the generous rate of $60 per hour. WIS S. CT. R. 81.02 (1989).

163. *See* Silverstein, *supra* note 113, at 17 (noting that only nine states support payment for a lawyer's expenses, while prescribing certain types of covered costs and limiting recovery to representation in certain cases). Silversteins' statistics, although accurate when published, are becoming inaccurate due to movement by state courts. *See, e.g.*, Delisio v. Superior Ct., 740 P.2d 437, 439 (Alaska 1987) (striking as unconstitutional statute which authorizes appointment without compensation); State *ex rel.* Stephen v. Smith, 242 Kan. 336, 747 P.2d 816, 842 (1987) (holding statutory compensation rates unconstitutional); State *ex. rel.* Scott v. Roper, 688 S.W.2d 757, 769 (Mo. 1985) (invalidating state compensation rates for appointments).

164. L. Silverstein, 1 DEFENSE OF THE POOR 16 n.3 (author counts 35 states). For an example of one state's provisions see PA. STAT. ANN. tit. 16, §§ 9960.1-9960.13 (Purdon Cum. Supp. 1990).

165. Silverstein, *supra* note 164 (counting 35 jurisdictions). For an example of state statutes establishing a mechanism for appointed attorneys to recover fees see N.Y. COUNTY LAW § 722-b (McKinney Cum. Supp. 1990); N.Y. FAM. CT. ACT § 245 (McKinney 1973 & Cum. Supp. 1990); N.Y. JUD. LAW § 35 (McKinney 1968 & Cum. Supp. 1990).

166. *See* Silverstein, *supra* note 113, at 17-30.

167. *Id.* In the 24 states that limit the fee in non-capital cases, the maximum ranges from $25 to $500. For states that limit fees in capital cases, the maximums range from $500 to $1500. *Id. But see* White v. Board of County Comm'rs, 537 So. 2d 1376, 1379-80 (Fla. 1989) (approving trial court's fee award in excess of statutory maximum); People *ex rel.* Conn. v. Randolph, 35 Ill. 2d 24, 219 N.E.2d 337, 340 (1966) (exceeding statutory maximum for awards in unusual case); State *ex rel.* Stephan v. Smith, 242 Kan. 336, 747 P.2d 816, 824-30 (1987) (noting that attorneys do not recover even costs of overhead when serving appointment); Bias v. State, 568 P.2d 1269, 1271-73 (Okla. 1977) (recognizing that courts may exceed statutory maximum in cases where attorney unduly imposed upon).

168. *See* State v. Green, 470 S.W.2d 571, 573 (Mo. 1971) (en banc) (threatening not to appoint attorneys without provision for compensation thereby forcing legislature to act); State *ex rel.* Partain v. Oakley, 227 S.E.2d 314, 321-23 (W. Va. 1976) (refusing to permit unpaid appointments after set future date and advising legislature to act); *see also* Allen v. McWilliams, 715 S.W.2d 28, 32 (Tenn. 1986) (advancing new rules for compensation in misdemeanor cases); Johnson v. City Comm'n, 272 N.W.2d 97, 101 (S.D. 1978) (holding attorneys entitled to reasonable compensation simultaneously with legislative action compelling counties to pro-

ing for counsel's services or risking a possible reversal of any conviction where counsel was not provided.[169]

Although on first glance these statutes appear to solve any potential constitutional problems, application of the statutes leaves the appointed counsel relatively undercompensated, if compensated at all.[170] In addition, recent constitutional challenges to existing provisions for payment of appointed counsel indicate that the advent of these statutes failed to diffuse the issue.[171]

IV. ANALYSIS AND PROPOSAL: THE CONSTITUTIONAL PROBLEMS OF COURT APPOINTMENT WITHOUT PROVISION FOR COMPENSATION

The changed nature of legal practice, the poor's increasing demand for legal services, the lack of a network to provide for the needs of the poor, and the increasing number of court appointments make the constitutional issues surrounding court appointment more compelling today than ever before. Each of these factors amplifies what once was a tolerable inconvenience but what now is a significant burden on appointed counsel. Courts' recognition of these changes has led to a new sympathy toward constitutional challenges by attorneys to such appointments.

In the years following the Supreme Court's decision in *Gideon*,[172] some courts questioned the appropriateness of appointing counsel without provisions for adequate compensation.[173] These decisions, however, by no means represent a majority, and many courts refuse to find constitutional or other challenges to mandatory court appointment compelling or even cognizable.[174] Even today, many courts fail to recognize that when an indigent de-

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vide it). *But see* State v. Ruiz, 269 Ark. 331, 335, 602 S.W.2d 625, 627 (1980) (defering to legislative determination).

169. *See generally* State v. Rush, 46 N.J. 399, 217 A.2d 441, 449 (1966) (noting that "the 'necessary expenses' of the prosecution are the burden of the county. Within that category must fall the expense of providing counsel for an indigent accused, without which a prosecution would halt and inevitably fail under *Gideon* . . . ."); Johnson v. City Comm'n, 272 N.W.2d 97, 101 (S.D. 1978) (state bound to pay costs of prosecution including fees of appointed counsel).

170. *See supra* notes 158-65 and accompanying text.

171. *See, e.g.*, Delisio v. Superior Ct., 740 P.2d 437 (Alaska 1987) (constitutional attack on appointment system); State v. Ruiz, 269 Ark. 331, 602 S.W.2d 625 (1980) (constitutional challenge to compensation scheme); State *ex rel.* Stephan v. Smith, 242 Kan. 336, 747 P.2d 816 (1987) (challenge to statutory system as applied); State *ex rel.* Scott v. Roper, 688 S.W.2d 757 (Mo. 1985) (en banc) (same); Huskey v. State 743 S.W.2d 609 (Tenn. 1988) (constitutional challenge to provision providing reasonable compensation to appointed counsel).

172. 372 U.S. 335 (1963).

173. *E.g.*, Spears v. United States, 266 F. Supp. 22, 25-26 (S.D. W. Va. 1976) (in dicta, mentioning advisability of weighing hardship on counsel when appointed); *In re* Smiley, 36 N.Y.2d 433, 441, 330 N.E.2d 53, 57-58, 369 N.Y.S.2d 87, 92-93 (1972) (recognizing that power to appoint counsel is oftentimes a matter of discretionary authority which should not be used too frequently because it "might . . . be unfair to the Bar to impose such a burden on them"); *cf. supra* notes 120-36 and accompanying text (asserting that changed nature of law practice has made burdens more severe).

174. *See* Family Div. Trial Lawyers v. Moultrie, 725 F.2d 695, 705 (D.C. Cir. 1984) (rejecting challenge to court appointment, however, noting that repeated appointments may represent an unreasonable burden); *In re* Farrell, 127 Misc. 2d 350, 486 N.Y.S.2d 130, 131 (N.Y. Sup. Ct. 1985) (following *Moultrie* and rejecting constitutional challenge).

fendant's constitutional right to equal protection is threatened because he may not receive a fair trial without representation by counsel,[175] the counsel appointed to represent him without pay also may have constitutional rights threatened.[176]

A. *Involuntary Servitude*

In what appeared a landmark decision in *In the Matter of Nine Applications for Appointment of Counsel in Title VII Proceedings*,[177] the United States District Court for the Southern District of Alabama held unconstitutional and void a Title VII provision[178] granting courts the discretion to compel representation without provision for payment.[179] The court considered an application for appointment by several complainants who claimed indigency and who sought counsel under the Title VII provision. The court, taking a very bold stance,[180] held the Title VII provision unconstitutional because it allowed for the creation of a form of involuntary servitude prohibited by the thirteenth amendment.[181]

The court relied upon the factual determination that appointment in this case would be compulsory.[182] The court was influenced both by the absence

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175. *See* Murray v. Giarratano, 109 S. Ct. 2765, 2768-69, 106 L. Ed. 2d 1, 11 (1989); Evitts v. Lucey, 469 U.S. 387, 404-05 (1985).

176. *See* Shapiro, *supra* note 5, at 771 (noting that constitutional challenges to court appointment are "grounded in the failure to provide adequate compensation"). The constitutional questions raised by compulsory court appointment represent only a few of the problems with the system. Some commentators have noted that an uncompensated appointed counsel may not deliver effective legal assistance to the indigent he is appointed to serve. *See* Comment, *The Uncompensated Appointed Counsel System: A Constitutional and Social Transgression*, 60 KY. L.J. 710, 721 (1972) (asserting that appointed counsel would not "devote as much time and effort to that defendant's case as he will to the case of a paying client . . . ."); Gilbert & Gorenfeld, *supra* note 6, at 85-88 (same). *But see* State *ex rel.* Stephan v. Smith, 242 Kan. 336, 747 P.2d 816, 843 (1987) (court dismisses claim that uncompensated counsel will not deliver effective service).

Other problems which may occur as a result of the system are economic in nature. Paying clients will supplement the cost of appointments through increased fees, which ultimately may prevent some potential clients from seeking legal assistance because of the cost. *See* Comment, *supra*, at 721. Another possible problem of appointments concerns the ill-will an indigent client may harbor after being represented by an inexperienced young attorney who frequently is the only one willing to take the appointment. Both the appointed attorney and the indigent defendant may feel they have been wronged. *Id. See generally* Williams & Bost, *The Assigned Counsel System: An Exercise of Servitude?*, 42 MISS. L.J. 32, 35-38 (1971) (outlining myriad costs suffered by the appointed lawyer); Shapiro, *supra* note 5, at 777-84 (remarking on economic costs of appointment and possible benefits devolving from provision for payment).

177. *In re* Nine Applications for Appointment of Counsel in Title VII Proceedings, 475 F. Supp. 87 (N.D. Ala. 1979), *vacated sub nom.*, White v. United States Pipe & Foundry Co., 646 F.2d 203, 204-07 (5th Cir. 1981) [hereinafter Nine Applications].

178. *Title VII of Civil Rights Act of 1964*, 42 U.S.C. § 2000e-5(f)(1) (1982) provides that an indigent complainant may apply "and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant . . . ."

179. 475 F. Supp. at 88-89.

180. *See infra* note 185 and accompanying text (indicating most courts reject the district court's holding).

181. 475 F. Supp. at 88. U.S. CONST. amend. XIII, § 1 provides "[n]either 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 jurisdiction."

182. 475 F. Supp. at 88. *See also* Rheinstein, *Pro Bono Cons*, STUDENT LAWYER, March

of constitutional imperatives of counsel found in criminal proceedings[183] and by the use of the word "appoint" rather than "request" in other federal statutes.[184]

Many courts, however, have not followed the approach of the Alabama district court to court appointment in civil matters,[185] and the Fifth Circuit Court of Appeals in fact later vacated the decision.[186] Circuit courts addressing the issue of court appointments constituting involuntary servitude have also rejected the *Nine Applications* holding.[187]

1. The Public Service Exception

The rejection of thirteenth amendment challenges to court appointment rests on a number of grounds. First, courts frequently rely on forms of the public service exception to justify uncompensated service by appointed counsel.[188] The public service exception is based on a line of cases permitting the state to impress its citizens temporarily into service.[189] The cases establish-

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1990, at 3. Rheinstein finds mandatory pro bono programs voluntarily administered by law schools objectionable as a form of "involuntary servitude of law students." *Id.* Rheinstein's argument, however, seems an illogical extension of established law and appears grounded more on emotion than on analysis of current law. Rheinstein characterizes students at schools requiring service as "foot soldiers in someone else's crusade." *Id. But see* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-25 (1980), *infra* note 216 (remarking that lawyers have historically donated their time to the poor).

183. 475 F. Supp. at 92.

184. *Compare* 28 U.S.C. § 1915(d) (1982) (providing that the court "may request an attorney to represent any person [claiming *in forma pauperis* status and] unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious") *with* 18 U.S.C. § 3006A (1982 & Supp. V 1987) (providing for the appointment of counsel for criminal defendant); 18 U.S.C. § 3503(c) (1988) (assigning counsel for criminal defendant at deposition); 18 U.S.C. § 4109 (1982) (appointing counsel to indigent defendant before transfer).

185. The few courts that have accepted this argument did so largely before the holding in *Nine Applications*, 475 F. Supp. at 87. *See* Bedford v. Salt Lake County, 22 Utah 2d 12, 14-15, 447 P.2d 193, 194-95 (1968) (acknowledging involuntary servitude argument and striking down uncompensated appointment system). *See also* Rheinstein, *supra*, note 182 (characterizing mandatory participation in pro bono programs at law schools as involuntary servitude).

186. White v. United States Pipe & Foundry Co., 646 F.2d 203, 205 (5th Cir. 1981).

187. *See* Family Div. Trial Lawyers v. Moutrie, 725 F.2d 695, 704-05 (D.C. Cir. 1984); Bradshaw v. United States Dist. Ct., 742 F.2d 515, 517 n.2 (9th Cir. 1984); Williamson v. Vardeman, 674 F.2d 1211, 1214-15 (8th Cir. 1982); White v. United States Pipe & Foundry, 646 F.2d 203, 205 n.3 (5th Cir. 1981).

188. See *supra* notes 100-102 (courts noting duty of lawyers to serve society).

189. *See, e.g.*, Hurtado v. United States, 410 U.S. 578, 588-89 (1973) (holding threat of deportation does not create involuntary servitude); Selective Draft Law Cases, 245 U.S. 366, 373 (1918) (holding threat of conscription does not create involuntary servitude); Butler v. Perry, 240 U.S. 328, 333 (1916) (holding state's requirement that all able-bodied men contribute two days of work to improve public roads does not create involuntary servitude); Edwards v. United States, 103 U.S. 471, 473-74 (1880) (upholding Michigan law barring public officer's resignation from office without consent of the state). *See also* Comment, *Court Appointment of Attorneys In Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366, 380-82 (1981) (describing and analyzing these cases); Shapiro, *supra* note 5, at 769. Shapiro notes "[w]hatever the thirteenth amendment's lateral reach, its application [in court appointment cases] may be excluded by a line of decisions upholding the power of the state to requisition an individual's services to meet a public need." *Id. Cf.* Robertson v. Baldwin, 165 U.S. 275, 282 (1897) (holding that "services which have from time to time immemorial been treated as exceptional" will not be touched by scope of thirteenth amendment).

ing this exception to the scope of the thirteenth amendment[190] look either to a duty the citizen owes the state or to the sensibility of allowing the state to call on its citizens in time of need[191] to perform state functions.[192]

The Supreme Court's holding in *Hurtado v. United States*[193] virtually guaranteed application of the public service exception to court appointment challenges. In *Hurtado* the Court considered provisions for payment of incarcerated witnesses who could not provide for bail. In a decision largely directed at fifth amendment issues,[194] the Court also set the stage for rejection of future thirteenth amendment claims.[195] The *Hurtado* decision jeopardized later court challenges to court appointment because the Court reinforced the public service exception when applied to criminal justice proceedings.[196] The *Hurtado* Court predicated the public service exception on the public's obligation to provide evidence in criminal cases, a duty analogous to the attorney's duty to represent the indigent.[197]

Other public service exception cases uphold conscription, impressment of labor for road gangs, and a state law prohibiting state employees from quitting their jobs prior to receiving the sanction of their employer.[198] The application of the public service exception, however, is not unlimited. A Second Circuit Court of Appeals decision[199] held that the government's power to compel public service is restricted by the requirement that the service bear a reasonable relation to the state's needs.[200]

2. *The Nature of the Threat Analysis*

Courts also dismiss thirteenth amendment claims by examining the nature of the threat underlying the alleged servitude. As made clear by the Supreme Court, the nature of the threat will determine the success of any thirteenth amendment challenge.[201] In addition, relatively recent interpreta-

190. *See infra* notes 191-218 and accompanying text.

191. *See* Hurtado v. United States, 410 U.S. 578, 588-90 (1973). *Cf.* Jobson v. Henne, 355 F.2d 129, 131-32 n.3 (2d Cir. 1966) (traditional state interests must be furthered when state compels assistance of citizens).

192. *See* National League of Cities v. Usery, 426 U.S. 833, 851 (1976) (defining traditional state functions), *overruled*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (rejecting traditional state functions test as anachronistic and proposing new standards for determining state immunity from federal regulation).

193. 410 U.S. 578 (1973).

194. 28 U.S.C. § 1821 (1976) (Federal law concerning compensation of witnesses). This law, along with the potential for incarceration of material witnesses unable to make bail, was tested under due process standards in *Hurtado*. 410 U.S. at 588-89.

195. 410 U.S. at 588-89.

196. *Id.*

197. *Id.*; *see also* United States v. Bryan, 339 U.S. 323, 331 (1949) (expounding upon public's duty to provide evidence when summoned); Blackmer v. United States, 284 U.S. 421, 438 (1932) (U.S. national required to return to United States when properly summoned to appear as witness in criminal case).

198. *See* Selective Draft Law Cases, 245 U.S. 366, 373 (1918) (conscription case); Butler v. Perry, 240 U.S. 328, 333 (1916) (road gangs case); Edwards v. United States, 103 U.S. 471, 473-74 (1880) (state law case).

199. Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966).

200. *Id.* at 132-50.

201. *See, e.g.*, United States v. Shackney, 333 F.2d 475, 486 (2d Cir. 1964) (threat must

tions of the thirteenth amendment foretell the predictable failure of thirteenth amendment challenges to court appointment.

In *United States v. Shackney*[202] the court of appeals for the Second Circuit held that the threat of deportation was an insufficient reason to find a condition of involuntary servitude.[203] The court considered the implications of reaching a different conclusion. According to the court, finding that a form of involuntary servitude existed would be tantamount to holding that a condition of involuntary servitude existed when an employee worked because of an employer's threats.[204] The court voiced its unwillingness to go that far by holding that "the statute applies only to service compelled by law, by force or by threat of continued confinement."[205]

Another second circuit decision, *Flood v. Kuhn*,[206] used the same threat analysis in a thirteenth amendment claim. In *Flood*, a baseball player claimed the baseball reserve system violated the thirteenth amendment.[207] The baseball reserve system forced a player to negotiate with the team he was either employed by or traded to prior to negotiating with any other team. The court held that since the player chose baseball as his profession, he was subject to the constraints implicit in that choice.[208] The court found this factor and the *Shackney* analysis influential in dismissing the thirteenth amendment claim.[209]

Recent commentary concludes that these two decisions forclose any claim that uncompensated appointment forms a condition of involuntary servitude.[210] This conclusion, however, overlooks some differences between these cases and the typical instance where an attorney is called upon to render gratuitous services. In *Flood* the player signed a contract obliging him to adhere to the baseball reserve system;[211] attorneys do not sign such a contract.[212] In contrast, attorneys are expected to tolerate appointments because, as attorneys, they are cognizant of the rich tradition supporting the system of court appointment.[213] These two situations are not analogous, however, because the player purposefully binds himself while the lawyer is bound by an unclear tradition. In the *Flood* case, moreover, the player possessed a certain amount of bargaining power not enjoyed by a hopeful appli-

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amount to inescapable confinement for thirteenth amendment to apply); Pollock v. Williams, 322 U.S. 4, 23-24 (1944) (threat of imprisonment for not honoring promise triggers thirteenth amendment); United States v. Reynolds, 235 U.S. 133, 149-50 (1914) (threat of resentencing convict to longer term does not implicate thirteenth amendment).

202. 333 F.2d 475 (2d Cir. 1964).
203. *Id.* at 487.
204. *Id.* at 480.
205. *Id.* at 487.
206. 443 F.2d 264, 268 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).
207. *Id.* at 265.
208. *Id.* at 268.
209. *Id.* at 265-68.
210. *See* Shapiro, *supra* note 5, at 769.
211. *Id.*
212. Lawyers are bound only by the rules of the state, local, and American bar associations; no contract *per se* exists.
213. *See* United States v. Dillon, 346 F.2d 633, 637 (9th Cir. 1965), *cert denied*, 382 U.S. 978 (1966) (attaching appendix detailing allegedly long history of court appointment).

cant to the bar.[214] These differences, however, are not sufficient to allow a thirteenth amendment challenge to succeed.

Application of the public service exception to instances of court appointment prevents the success of thirteenth amendment challenges. In traditional public service exception cases, all the members of a large public class shared equally in the burden.[215] In contrast, only members of the bar are burdened by court appointment. This objection, however, fails to defeat the argument. Lawyers commit themselves to service of the needs of the poor.[216] Lawyers also may be aware of this practice upon entry to the bar.[217]

Furthermore, stronger constitutional imperatives underlie court appointment than underlie instances where the state temporarily requires the services of its citizens.[218] Courts designed the public service exception to permit the states flexibility in meeting unusual situations. The constitutional requirement of counsel is such a situation. Only a select group may aid the state, and states need the flexibility that requiring court appointment provides. Rejection of thirteenth amendment challenges, therefore, should be premised on this unusual need.

Lawyers are burdened infrequently by court appointments and do not have to serve involuntarily all that often. The voluntary nature of the service may be imputed from the oath taken upon entrance to the bar. For that matter, cases of court appointment provide an insufficient threat to form a condition of involuntary servitude. On the basis of the public service exception and the nature of the threat, rejection of thirteenth amendment claims should continue as both warranted and reasonable.

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214. *See Dillon*, 346 F.2d at 635-36 (implying lawyers have no bargaining power, holding that lawyers must shoulder burden of unpaid appointments merely because of their profession).

215. *See supra* notes 189-124 and accompanying text (in *Perry* it was all able-bodied men and in *Edwards* it was all public employees).

216. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-25 (1980) which states:

> [h]istorically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments . . . . The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer . . . . Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer . . . .

217. *See Dillon*, 346 F.2d at 635 (duty to accept appointments is "a condition under which lawyers are licensed to practice" of which "[a]n applicant for admission to practice law may justly be deemed [to be aware]"). *But see* Shapiro, *supra* note 5 (criticizing *Dillon*).

218. Court appointments for criminal cases implicate the fundamental rights of the indigent defendant. *Cf.* Gideon v. Wainright, 372 U.S. 335, 345 (1963) (establishing right to counsel in most criminal proceedings). *But see* Davison v. Joseph Horne & Co., 265 F. Supp. 750, 752 (W.D. Pa. 1967) (dictum) (citing United States v. Leser, 233 F. Supp. 535 (S.D. Cal. 1964) (constitutional issues entailed in court appointment for criminal defendant not present in civil appointment case)).

B. Due Process Considerations

1. United States v. Dillon

The seminal case rejecting a deprivation of property challenge[219] to an uncompensated court appointment is *United States v. Dillon*,[220] which commands a strong following in both the state and federal courts.[221] In *Dillon* the court held that lawyers have a professional responsibility to render unpaid services.[222] This element of the court's opinion received wide acclaim in various state and federal courts,[223] and a recent Eighth Circuit decision also accepted *Dillon's* conclusion that all lawyers have a professional obligation to render unpaid services.[224]

Dillon, however, has been the subject of much criticism. Scholarly attacks occur most frequently,[225] one of which characterizes *Dillon's* reasoning as

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219. The claims emanating from an appointment with insufficient provisions for compensation may be styled as either a due process or deprivation of property without just compensation challenge. *See* State *ex rel.* Stephan v. Smith, 242 Kan. 336, 747 P.2d 816, 837 (1987) (acknowledging potential for dual violations); *see also* Bearden v. Georgia, 461 U.S. 660, 665 (1983) (due process analysis often implicates equal protection questions even though inquiries are distinct).

220. 346 F.2d 633 (9th Cir. 1965).

221. *See* White v. United States Pipe & Foundry Co., 646 F.2d 203, 205 (5th Cir. 1981); Tyler v. Lark, 472 F.2d 1077, 1079 (8th Cir. 1973), *cert. denied*, 414 U.S. 864 (1973); Dolan v. United States, 351 F.2d 671, 672 (5th Cir. 1965); Jackson v. State, 413 P.2d 488, 490 (Alaska 1966). The Supreme Court recently opted not to address the constitutional challenges to court appointment in Mallard v. United States Dist. Ct., 109 S. Ct. 1814, 1821 n.6, 104 L. Ed. 2d 318, 329 n.6 (1989), leaving unresolved the status of these challenges. *See also* Chicago B. & Q.R.R. v. Chicago, 166 U.S. 226, 241 (1897) (applying fifth amendment to states).

222. 346 F.2d at 635-36.

223. *E.g.*, Tyler v. Lark, 472 F.2d 1077, 1079 (8th Cir. 1973), *cert. denied*, 414 U.S. 864 (1973) (quoting *Dillon*); Peterson v. Nadler, 452 F.2d 754, 758 (8th Cir. 1971) (lawyer undertakes implied obligation to represent indigent); State v. Keener, 224 Kan. 100, 577 P.2d 1182, 1184-85 (1978), *cert. denied*, 439 U.S. 953 (1978); State *ex rel.* Wolff v. Ruddy, 617 S.W.2d 64, 65-66 (Mo. 1981) (lawyers have professional duty to aid indigent); Penrod v. Cupp, 284 Or. 417, 587 P.2d 96, 97 (1978) (refusing to contravene professional duty to serve poor); *Ex parte* Dribble, 310 S.E.2d 440, 441 (S.C. Ct. App. 1983) (lawyers assume obligation to represent indigent).

224. *In re* Snyder, 734 F.2d 334, 338-39 (8th Cir. 1984), *rev'd on other grounds*, 472 U.S. 834 (1985) (stating that "[t]he profession of law rests upon its commitment to public service and has long been recognized as a profession that requires its membership to engage in pro bono activities"). *Cf. supra* note 216, for the ABA position on the ethical obligation of lawyers to aid the indigent.

225. This may be due in part to increasing sympathy in the courts for attorneys' pleas to have maximum limits on compensation waived. *See, e.g.*, White v. Board of County Comm'rs, 537 So. 2d 1376, 1380 (Fla. 1989) (court exceeds statutory cap); Makemson v. Martin County, 491 So. 2d 1109, 1110-12 (Fla. 1986), *cert denied*, 479 U.S. 1043 (1987) (court establishes guidelines for awards in excess of statutory maximum); State v. Remeta, 547 So. 2d 181, 183 (Fla. Dist. Ct. App. 1989) (not following *Makemson* due to unexceptional circumstances); Bias v. State, 568 P.2d 1269, 1271-73 (Okla. 1977) (allowing courts to exceed statutory maximum when attorney unduly imposed upon by appointment. For discussions on the scholarly criticisms of the *Dillon* decision, see Proceedings of the Second National Conference on Legal Services & The Public, December 7 & 8, 1979 at 21 (1981) (statements of Dan Bradley, then President of the Legal Services Corporation); Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 UCLA L. REV. 438 (1965); Christensen, *The Lawyer's Pro Bono Public Responsibility*, 1981 AM. B. FOUND. RES. J. 1 (1981); Ervin, *Uncompensated Counsel: They Do Not Meet the Constitutional Mandate*, 49 A.B.A. J. 435 (1963); Gilbert & Gorenfeld, *supra* note 6; Lamkin, *Compensation of Appointed Counsel in Criminal Cases*, 19 J. MO. BAR 412 (1962); Marks, *A Lawyer's Duty to Take All*

"fuzzy and unconvincing."[226] In addition, one court admonished the *Dillon* court both for misreading the history of court appintment and for flatly accepting the government's brief in support of an obligation on the bar to accept court appointments.[227]

A similar undercurrent of dissatisfaction with *Dillon's* analysis is evident in other courts.[228] Early decisions in at least three states found illusory the historical obligation touted by the *Dillon* court.[229] Recent decisions in two states also rejected the *Dillon* contention,[230] and other states rejected the *Dillon* holding in particular instances where the burden placed upon an appointed attorney may become so excessive as to constitute a taking.[231] In addition, a minority of courts held that uncompensated appointments *per se* violate the takings clause of the fifth amendment.[232]

2. *Due Process Analysis*

The primary question in a due process analysis must be whether the program bears a reasonable relation to a legitimate government objective.[233] This question frequently is answered in the affirmative, because the state's

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Comers and Many Who Do Not Come, 30 U. MIAMI L. REV. 915 (1976); Martineau, *The Attorney As An Officer of The Court: Time To Take The Gown Off the Bar*, 35 S.C.L. REV. 541 (1984); Podgers, *Mandatory Pro Bono: Basic Question Remains*, 66 A.B.A. J. 280 (1980); Shapiro, *supra* note 5; Smith, *Lawyers Who Take Must-At Least a Bit*, 1 J. LEGAL PROFESSION 27 (1976); Note, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366 (1981).

226. Christensen, *The Lawyer's Pro Bono Publico Responsibility*, 1981 AM. B. FOUND. RES. J. 1, 5 n.14 (1981).

227. State *ex. rel* Scott v. Roper, 688 S.W.2d 757, 763-66 (Mo. 1985) (en banc) (undertaking lengthy refutation of *Dillon*'s holding); *see also* Shapiro, *supra* note 5, at 776 (asserting that "the argument from history and tradition . . . is a good deal weaker than is sometimes thought"); *supra* notes 55-176 and accompanying text (analyzing history of court appointment).

228. *See infra* notes 220-62.

229. *See supra* notes 103-12 and accompanying text.

230. *See* DeLisio v. Alaska Superior Ct., 740 P.2d 437, 443 (Alaska 1987); State *ex rel* Scott v. Roper, 688 S.W.2d 757, 769 (Mo. 1985) (disagreeing with *Dillon's* version of history).

231. *See* Warner v. Commonwealth, 400 S.W.2d 209, 211 (Ky. 1966), *cert. denied*, 385 U.S. 858 (1966); Abodeely v. County of Worcester, 352 Mass. 719, 227 N.E.2d 486, 489 (1967); State *ex rel.* Partain v. Oakley, 227 S.E.2d 314, 319 (W. Va. 1976); *see also* Weiner v. Fulton County, 113 Ga. 343, 148 S.E.2d 143, 147 (Ga. Ct. App. 1966), *cert. denied*, 385 U.S. 958 (1966) (holding that taking occurred but finding taking not compensable); *cf.* Note, *Indigent Criminal Defendant's Constitutional Right to Compensated Counsel*, 52 CORNELL L.Q. 433, 436-38 (1967) (noting rationales employed by courts to defeat taking claims).

232. *See* Bedford v. Salt Lake City, 22 Utah 2d 12, 447 P.2d 193, 194-95 (1968) (striking statute authorizing court to appoint counsel to indigent parties to involuntary hospitalization proceedings); Menin v. Menin, 79 Misc. 2d 285, 359 N.Y.S.2d 721, 730 (N.Y. Sup. Ct. 1974) (asserting that appointed attorney has constitutional right to demand compensation when appointed in civil case).

233. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 451-86, 506 (1987) (examining Pennsylvania statute imposing liability on mining companies for subsidence of surface resulting from mining); Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 239-42 (1984) (noting that court will normally not question legislature's judgment as to public use, rather judicial review begins with question of legislature's action being reasonably related to public use); State *ex rel.* Stephan v. Smith, 242 Kan. 336, 747 P.2d 816, 838 (1987) (applying analysis suggested by Supreme Court).

vital interest in promoting justice is at stake.[234]

Disposal of the first issue permits an examination of the due process rights of lawyers. Although the Supreme Court has not held that legal services are a property right, the Court has held that lawyers and other professionals are entitled to due process in admission and disciplinary proceedings.[235] These holdings appear to establish a property interest in the practice of law.[236] Similarly, the Supreme Court has held that intangibles may be considered property in a fifth amendment takings analysis.[237]

Lower court decisions have found that a professional's work constitutes property because thoughts constitute a product.[238] Other instances of state imposition upon the public, however, indicate that services are not always a form of property. The most frequently cited examples occur with witnesses and jurors.[239] Courts, however, consistently reject fifth amendment challenges by persons suing in these capacities.[240] The analogy between the witness and juror situations and that of an appointed counsel, however, lacks strength. The duties placed upon witnesses and jurors are universal among the populace. In addition, the size of the populace makes such impositions both inexpensive and infrequent.[241] By comparison, lawyers constitute the only class eligible to serve as appointed counsel and the imposition, there-

234. *See generally* State v. Rush, 46 N.J. 399, 217 A.2d 441, 449 (1966) (noting that " . . . the 'necessary expenses' of the prosecution are the burden of the county. Within that category must fall the expense of providing counsel for an indigent accused, without which a prosecution would halt and inevitably fail under *Gideon* . . . ."); Johnson v. City Comm'n, 272 N.W.2d 97, 101 (S.D. 1978) (same).

235. *See* Withrow v. Larkin, 421 U.S. 35, 46 (1975); *In re* Ruffalo, 390 U.S. 544, 550 (1968); Willner v. Committee on Character & Fitness, 373 U.S. 96, 102 (1963); Schware v. Board of Bar Examiners, 353 U.S. 232, 238-89 (1957). *But cf.* Lathrop v. Donohue, 367 U.S. 820, 843 (1961) (upholding payment of membership dues as prerequisite to entrance to bar).

236. *See* Shapiro, *supra* note 5, at 771.

237. *E.g.*, City of Cincinnati v. Louisville & N.R.R., 223 U.S. 390, 400 (1912) (chose in action constitutes property right); United States v. Burns, 79 U.S. (12 Wall.) 246, 252 (1870) (patent rights are property). *But see* Gardner v. United States, 446 F.2d 1195, 1197 (2d Cir. 1971) (concluding Supreme Court decisions establish property right only in tangible things).

238. *See, e.g.*, United States v. Howe, 26 F. Cas. 394, 394 (W.D. Ark. 1881) (No. 15404a); Weiner v. Fulton County, 113 Ga. App. 343, 346, 148 S.E.2d 143, 145, *cert. denied*, 385 U.S. 958 (1966); Mount v. Welsh, 118 Or. 568, 585, 247 P. 815, 821 (1921).

239. *See* State v. Setzer, 92 N.C. App. 98, 256 S.E.2d 485, 488 (1979) (jury service is civic responsibility); United Dev. Corp. v. State Highway Dep't, 133 N.W.2d 439, 442 (N.D. 1965) (witness' right to compensation is statutory only).

240. *See* Brief for the United States in Opposition to Petition for Certiorari at 8-9, Dillon v. United States, 382 U.S. 978 (1966). *But see* the numerous early cases which hold an expert witness must be compensated for time spent in preparation. *E.g.*, Flinn v. Prairie County, 60 Ark. 204, 29 S.W. 459, 460 (1895) (expert entitled to demand extra compensation for preparation time); Dixon v. People, 168 Ill. 179, 48 N.E. 108, 112 (1897) (noting split in courts over compensation of expert witness for preparation time); Stevens v. Worcester, 196 Mass. 45, 56, 81 N.E. 907, 910 (1907) (noting difference between requiring expert to offer opinion and requiring expert to study in order to form an opinion). One commentator has formulated a convincing argument analogizing the situation of the appointed attorney to that of an expert witness. *See* Note, *infra* note 243, at 387-89. The author noted, however, that unlike expert witnesses, lawyers may enjoy "an average reciprocity of advantage" because of the exclusive nature of the practice of law and the benefits lawyers receive from state regulation. *Id.* at 388-89.

241. *See* Shapiro, *supra* note 5, at 772.

fore, may be both harsh and frequent.[242]

The lawyer's predicament is more analogous to the compulsion of expert witnesses to testify without pay. In this instance, a small group is burdened, sometimes at great expense, thereby creating a property interest.[243] Recent examinations of the duty of an expert witness to serve without pay questioned the courts' refusal to accept fifth amendment challenges.[244] The inference that no fifth amendment rights are implicated appears debatable, at best, in light of a recent willingness by the Supreme Court to analyze due process claims on a case-by-case basis.[245] The analogy is also tenuous because attorneys will be called upon far more often than the typical cadre of expert witnesses.[246] In addition, the burden on the attorney lasts from long before the trial until long after,[247] while the expert witness must testify only once.

Due process analysis requires the determination that a taking of property has occurred. The court in *Dillon*[248] readily disposed of this question by holding that no taking of services occurs with court appointments because lawyers impliedly consent to gratuitous service upon entering the profession.[249] The court, without comment, relied upon the government's assertion that no taking occurs because lawyers continue to be officers of the court.[250]

a. The Penn Central Test

Dillon's conclusion appears unsound in light of the Supreme Court's current test for examining takings challenges. The Court, in *Pennsylvania Cen-*

242. *See* State *ex rel.* Stephan v. Smith, 242 Kan. 336, 747 P.2d 816, 832-34 (1987) (detailing specific instances where appointed attorneys had to travel great distances and tender large sums of money in furtherance of appointed client's cases).

243. *See* Note, *Court Appointment of Attorneys in Civil Cases: The Unconstitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366, 387 (1981) ("professional suffers the frustration of economic expectations derived from his or her prior investment in special education and training").

244. *See* Kaufman v. Edelstein, 539 F.2d 811, 817-22 (2d Cir. 1976); Commonwealth v. Vitello, 367 Mass. 224, 234-36, 327 N.E.2d 819, 827-28 (1975); People *ex rel.* Kraushaar Bros. & Co. v. Thorpe, 296 N.Y. 223, 72 N.E.2d 165, 166 (1947).

245. *See* Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 110-15 (1978) (announcing that ad hoc inquiry is best measure of due process challenge).

246. At least one commentator refutes this assertion. *See* Anderson, *Court-Appointed Counsel: The Constitutionality of Uncompensated Conscription*, 3 GEO. J.L. ETHICS 503, 521-23 (1990). Anderson analogizes the services attorneys render when appointed to the duties imposed upon land developers to pay for intrastructure improvements needed for their projects. *Id.* at 523. Anderson notes that this cost is then passed on to users of the developer's service. Attorneys, however, unlike developers, cannot always pass on this cost. For that matter, in many cases, only a portion of the organized bar, i.e. criminal defense counsel, will be forced to pass on costs to clients. Anderson's analogy also fails in that the users of a developer's services do so voluntarily and with the ability to foresee government imposed costs. Moreover, one might question the equation of consumers of legal services with consumers of a developer's services.

247. *See infra* note 258 (cases detailing excessive burden on appointed attorneys).

248. United States v. Dillon, 346 F.2d 633 (9th Cir. 1965).

249. *Id.* at 635-36.

250. *Id.* at 635.

tral Transportation Co. v. New York City,[251] held that a good case for asserting a taking arises when the state conducts "acquisitions of resources to permit or facilitate uniquely public functions."[252] Court appointments facilitate a public function because appointment allows the state to fulfill the duty imposed upon it by *Gideon*[253] and subsequent cases.[254]

The other element in the *Penn Central* analysis also is present. Attorneys cannot perform two jobs at once. When appointed to represent an indigent client, the time spent on that case cannot be charged to a paying client. The appointed counsel thus loses remunerative time because of the appointment, just as expert witnesses lose some of the value of their education when called upon to testify.[255]

When compared to eminent domain law, court appointment clearly appears to constitute a taking.[256] The Court accepts as a taking of property mere interferences with property interests when the imposition is direct.[257] When an attorney receives an appointment, he is directly imposed upon because his property becomes the property of the state until the case or appointment terminates. When appointments sometimes last for intolerable periods,[258] the appointed attorney suffers a direct burden which nullifies his earning power.[259]

After a taking of property without the consent of the owner[260] has been established, courts conduct an ad hoc examination of several factors to determine if due process has been abridged.[261] The Supreme Court, however, has not yet formulated a clear test for this determination.[262] The current test examines the extent of physical invasion of the property, the amount of harm inflicted upon the property, and the quantity of good that comes from the challenged action or the amount of evil prevented.[263] Some commenta-

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251. 438 U.S. 104 (1978).

252. *Id.* at 128 (citing United States v. Causby, 328 U.S. 256 (1946)).

253. Gideon v. Wainright, 372 U.S. 335 (1963).

254. *See supra* notes 19-35 and accompanying text.

255. *See supra* note 243 and accompanying text.

256. *See* United States v. Causby, 328 U.S. 256, 265-66 (1946) (holding that direct invasion of respondent's domain occurs when government frequently flies planes over land).

257. *Id.* at 265-67.

258. *See , e.g.*, White v. Board of County Comm'rs , 537 So. 2d 1376, 1377 (Fla. 1989) (attorney spends three and one-half months on case, jeopardizing his private practice); People v. Devin, 123 Ill. App. 2d 60, 525 N.E.2d 56, 57 (1988) (lawyer spends 48 hours on one brief alone); State *ex rel.* Stephan v. Smith, 242 Kan. 336, 747 P.2d 816, 838 (1987) (noting that one attorney had 11 indigent appointments in six months; noting that in one locale an average attorney receives 16 to 24 appointments annually; noting another case where attorney spends 90% of his time on one appointment case for three months).

259. *See* State *ex. rel.* Stephan v. Smith, 242 Kan. 336, 747 P.2d 816, 838 (1987).

260. *See* Kunhardt & Co. v. United States, 266 U.S. 537, 540 (1925) (claimant may not assert involuntary taking when he previously bound himself contractually).

261. *See* Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 124-28 (1978); United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958); *see also infra* note 263 and accompanying text (factors in test are laid out).

262. *See* Comment, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366, 383 (1981).

263. *See Pennsylvania Cent.*, 438 U.S. at 124-28. *See also* Anderson, *supra* note 10, at 529-30 (arguing that challenges to legislatively created, as opposed to judicial, appointments and compensation programs must be limited to constitutional grounds). The *Penn Central* para-

tors assert, however, that this test should be the test employed in a due process challenge to attorney appointment.[264] Although one noted commentator asserted that the principle of fairness should dictate the outcome,[265] the Court relies heavily on its promulgated test to the exclusion of equitable considerations.[266]

Moreover, any equitable consideration by a court conducting a due process analysis may be detrimental to the petitioner's case. This result appears especially true in the case of an appointed attorney. In *Penn Central* the Court held that compensation, even when due after the requisite analysis, may be denied if the complainant enjoys a reciprocal benefit from the taking.[267] In the case of an appointed attorney, a number of benefits may result. The attorney may receive publicity, new clients, and, arguably, already has received the benefits of an exclusive right to practice law.

Many of these benefits, however, if they ever existed, now may be illusory.[268] As a practical matter, the public pays little attention to most criminal cases. The appointed attorney, therefore, most likely labors without the recognition that may lead later to remuneration. In addition, the practice of law is both so expensive and competitive that the average attorney may not receive any considerable benefit from his status.[269] In addition, the development of alternative dispute resolution techniques, small claims courts, and "do it yourself" manuals for laypersons substantially lessen the demand for attorneys.[270] Despite these changes, some persons still consider attorneys the beneficiaries of a monopoly over the practice of law that offsets the burden of court appointment.[271]

In *Goldblatt v. Town of Hempstead*[272] the Supreme Court held that, absent a harsh impact on the petitioner, no compensation will be awarded.[273] Some courts use a harsh impact analysis similar to *Goldblatt* when addressing takings challenges to court appointment.[274] At least one federal court, however, while appearing to ignore *Goldblatt*, applied a cursory takings

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digm clearly rejects such a narrow inquiry proferred by Anderson. In addition, social science policy arguments have been favorably received by the Court when making equal protection and due process decisions. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

264. *See* Comment, *supra* note 262, at 387-88.

265. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1190-93 (1967).

266. *See* PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980).

267. *Pennsylvania Cent.*, 438 U.S. at 131-35.

268. *See* Shapiro, *supra* note 5; State *ex rel.* Scott v. Roper, 688 S.W.2d 757, 765 (Mo. 1985) (refuting alleged benefits enjoyed by appointed lawyers).

269. *See* Shapiro, *supra* note 5 (noting that lawyers do not enjoy many benefits from their protected status); *see also supra* notes 106-148 and accompanying text.

270. *See supra* notes 134-135 and accompanying text.

271. *See* Comment, *supra* note 262, at 388-89. *See also* M. GREEN, THE OTHER GOVERNMENT 270 (1973) ("Justice Brandeis came to regard lawyers as a kind of public utility").

272. 369 U.S. 590 (1962).

273. *Id.* at 596.

274. *See* People *ex rel.* Conn. v. Randolph, 35 Ill. 2d 24, 219 N.E.2d 337, 340 (1966) (holding courts may award fees in excess of statutory allotment only when harsh impact on attorney proven); State *ex rel.* Stephan v. Smith, 242 Kan. 336, 747 P.2d 816, 836 (1987) (holding system unconstitutional in unusual situations); Daines v. Markoff, 92 Nev. 582, 555 P.2d 490, 492-93 (1976) (following *Conn*).

analysis and awarded an attorney compensation for expenses in the absence of a truly harsh impact.[275]

Courts which implicitly follow *Goldblatt* find compensation systems to violate the fifth amendment in certain instances. In *State ex rel. Partain v. Oakley*[276] the West Virginia Supreme Court held the state's system for appointment approached unconstitutionality because it prevented the remunerative practice of law.[277] In addition, other state supreme courts hold unconstitutional any limits on compensation when those limits are applied in exceptional circumstances or when the loss imposed upon the appointed attorney is too great.[278] Moreover, another line of decisions simply declares uncompensated appointments patent violations of the fifth amendment.[279]

In sum, a trend exists in today's courts toward relieving the attorney of the historic obligation to accept uncompensated court appointments.[280] This trend, however, often overlooks the prescribed analysis announced by the Supreme Court in *Penn Central*.[281] The *Penn Central* paradigm requires the satisfaction of all of its elements in the typical court appointment. An attorney's property would be imposed upon and in some cases temporarily eradicated by an appointment.[282] The same deprivation, however, would serve a public end and create much needed services. Although this deprivation could reach substantial proportions, the extent of good flowing from the deprivation apparently satisfies the *Penn Central* requirements. Only in the most extreme cases, therefore, should courts declare a counsel's appointment a deprivation of property.

A remedy for the disparate results in the state courts is warranted by the sheer variety of decisions. Adherance to the *Penn Central* holding provides both uniformity and predictability for courts and attorneys. The number of

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275. *See* Williamson v. Vardeman, 674 F.2d 1211, 1216 (8th Cir. 1982) (holding that compelling appointed attorney to advance out of pocket costs violates fifth amendment).

276. 159 W. Va. 805, 227 S.E.2d 314 (1976).

277. 227 S.E.2d at 319 (West Virginia Supreme Court declared that if appointments interfere with the ability to " . . . engage in remunerative practice of law or substantially reduce an attorney's income the requirements must be considered confiscatory and unconstitutional [under the fifth and fourteenth amendments]").

278. *See, e.g.*, White v. Board of County Comm'rs, 537 So. 2d 1376, 1379 (Fla. 1989) (enlarging trial court's fee award in exceptional case); Makemson v. Martin County, 491 So. 2d 1109, 1112 (Fla. 1986) (same); People *ex rel.* Conn v. Randolph, 35 Ill. 2d 24, 219 N.E.2d 337, 340-41 (1966) (holding courts possess inherent power to award few exceeding statutory maximum in exceptional cases); State *ex rel.* Stephan v. Smith, 242 Kan. 336, 747 P.2d 816, 842 (1987) (holding statutory system of compensation unconstitutional as applied to exceptional cases of hardship); Daines v. Markoff, 92 Nev. 582, 555 P.2d 490, 493 (1976) (following rule announced in *Conn*); Bias v. State, 568 P.2d 1269, 1271 (Okla. 1977) (following *Conn*).

279. *See* Bradshaw v. Ball, 487 S.W.2d 294, 298 (Ky. 1972); McNabb v. Osmundson, 315 N.W.2d 9, 16 (Iowa 1982); Bedford v. Salt Lake City, 22 Utah 2d 12, 14-15, 447 P.2d 193, 194-95 (1968) (all using fifth amendment to invalidate uncompensated appointments).

280. *See* State *ex rel.* Stephan v. Smith, 242 Kan. 336, 747 P.2d 816, 841 (1987) (remarking that "[t]he later cases reflect a definite trend toward recognizing that the historical conditions from which the duty to provide free legal services evolved no longer exists in modern America").

281. Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

282. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318-22 (1987) (accepting temporary takings as compensable under *Penn Central* analysis).

challenges, moreover, would decrease as a coherent body of law developed following an established standard. The beneficial effects would be manifold. Fewer challenges would be considered or even commenced by disgruntled attorneys, resulting in a lessening of the litigation burden. The best solution, of course, arises from awarding standard rates, without limits, for compensation.[283] The Supreme Court, however, must resolve the issue. The current disparity in lower court holdings results in part from the Court's refusal to assert a position on constitutional challenges to court appointment.[284] So long as the Court refrains from deciding this important constitutional issue, attorneys must continue to suffer deprivations of property and, therefore, must continue to challenge the system.

C. *Equal Protection*

Equal protection challenges to court appointment allege that certain individual lawyers and lawyers as a class are deprived of equal protection under the laws[285] as guaranteed by the fourteenth amendment.[286] This argument has arisen relatively recently, at least when applied to attorneys appointed without provision for compensation.[287] Only very recently, moreover, has a state supreme court fully acknowledged and accepted this argument.[288]

In *State ex rel. Stephan v. Smith*[289] the Kansas Supreme Court became the first high court to hold that certain lawyers are denied equal protection when

283. The only permissible variance in compensation should adhere to the current federal standards for compensation. The federal structure implicitly acknowledges higher practice costs in regions by vesting limited authority to raise rates in the Judicial Conferences.

284. *E.g.*, Mallard v. United States Dist. Ct., 109 S. Ct. 1814, 1821 n.6, 104 L. Ed. 2d 318, 329 n.6 (1989) (choosing not to address constitutional problems surrounding court appointment, despite relieving appointed attorney of obligation to serve).

285. A corollary equal protection issue concerns the rights of the indigent. In State *ex rel.* Stephan v. Smith, 242 Kan. 336, 747 P.2d 816, 843 (1987), the respondents contended that equal protection was denied both to the appointed counsel and to the indigent the counsel was appointed to serve.

286. U.S. CONST. amend. XIV provides in pertinent part "No state shall . . . 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." *But cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-24 (1980) which states:

> A layman whose financial ability is not sufficient to permit payment of any fee cannot obtain legal services, other than in cases where a contingent fee is appropriate, unless the services are provided for him. Even a person of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors.

287. *See* Cunningham v. Superior Court, 177 Cal. App. 3d 336, 348, 222 Cal. Rptr. 854, 867 (1986) (upholding equal protection challenge); Daines v. Markoff, 92 Nev. 582, 587, 555 P.2d 490, 492-93 (1976) (rejecting equal protection challenge because bar has standing ethical obligation to render gratuitous assistance); *see also* Gilbert & Gorenfeld, *supra* note 9 at 92; Hunter, *Slave Labor in the Courts-A Suggested Solution*, 74 CASE & COM. 3, 10 (1969); Comment, *The Uncompensated Appointed Counsel System: A Constitutional and Social Transgression*, 60 KY. L.J. 710, 721 (1972) (decisions in *Cunningham* and *Smith* might be interpreted as overdue response to pleas by the commentators noted above that appointed counsel systems deny lawyers equal protection under laws). *But see* Webb v. Baird, *supra* note 95 and accompanying text (invalidation of court appointment system without provisions for compensation may be construed as early acceptance of equal protection argument).

288. *See* State *ex rel.* Stephan v. Smith, 242 Kan. 336, 747 P.2d 816, 846 (1987).

289. *Id.*

appointed to represent an indigent.[290] *Smith* involved two Kansas district court judges who chose to ignore the standing statutory provisions for payment of counsel. The judges, perceiving an undue burden on members of the local bar, authorized payments far in excess of the existing statutory maximum.[291] The State of Kansas filed a petition for mandamus to compel the rogue judges to adhere to the statutory provisions, and the Kansas Supreme Court agreed to hear the novel case.

The judges contended that the system violated the Equal Protection clause of the fourteenth amendment[292] because attorneys were treated differently than other professionals, and certain attorneys were treated differently because of their geographic location.[293] The court identified all Kansas attorneys and certain subsections of the bar as the class subject to invidious discrimination.[294] Such identification of a discriminated class is the preliminary step in any equal protection analysis.[295]

To analyze the equal protection claim, the court initially applied the reasonable basis test,[296] which invalidates a state action only if the means employed are "wholly irrelevent to the achievement of the State's objective."[297] The court, however, ultimately reached its decison by employing a different Supreme Court test,[298] which asks whether the state action bears a rational relationship to a legitimate government purpose.[299] The chosen test represents a more lenient standard for application of the equal protection guarantee against invidious discrimination between persons and groups.[300]

The *Smith* court dealt with issues reached only by one other court.[301] These two courts basically adapted due process arguments[302] to the equal protection question. In *Smith* the court examined cases in other jurisdictions which held that the bar must not be forced to shoulder the entire bur-

290. *Id.* at 846.
291. *Id.* at 822.
292. *See supra* note 286.
293. *Smith*, 747 P.2d at 843.
294. *Id.* at 843-46.
295. *See* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969); McCowan v. Maryland, 306 U.S. 420, 425-26 (1961); Westbrook v. Mihaly, 2 Cal. 3d 765, 784, 471 P.2d 487, 498, 87 Cal. Rptr. 839, 852 (1970), *vacated on other grounds*, 403 U.S. 915 (1971), *cert. denied*, 403 U.S. 922 (1971). This test is understandably less stringent than the one used when examining a law which employs a suspect classification, such as race or wealth. *See* McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964) (race); Douglas v. California, 372 U.S. 353, 356-58 (1963) (wealth).
296. *Smith*, 747 P.2d at 843.
297. *Id.*
298. *See* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 754-57 (1986).
299. *Id.*
300. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (source of the test); *see generally* Tussman & ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949) (examining Court's varying formulations of equal protection test).
301. *See* Cunningham v. Superior Court, 177 Cal. App. 3d 336, 348, 222 Cal. Rptr. 854, 867 (1986).
302. *See*, State *ex rel.* Stephan v. Smith, 242 Kan 336, 747 P.2d 816, 845 (1987 (lawyers denied equal protection because treated differently; same argument applied as due process challenge in Menin v. Menin, 79 Misc. 2d 285, 359 N.Y.S.2d 721 (1974)); *see also supra* note 219 and accompanying text (noting overlap of claims).

den of appointment.[303] The court then applied this rationale to the equal protection issue.[304] After looking both at the ethical obligation owed by lawyers to serve the poor and their rights to equal protection, the court held that lawyers as a class and lawyers in rural areas were subjected to invidious discrimination.[305]

These courts departed from established case law by recognizing that systems for the protection of the indigent's rights impose an unfair burden on the class appointed to represent them.[306] What serves as a legitimate state purpose, protecting the indigent's rights, actually engenders a parallel violation of the appointed attorney's rights.[307] The absence of comparable requirements for other professionals and existing systems for full compensation of those professionals provides strong support for this conclusion.[308]

Despite the degree of overlap between the equal protection and due process questions, the two inquiries are distinct. In an equal protection examination, the welfare of the individual in the class imposed upon produces the primary concern.[309] In contrast, due process considerations distinctly revolve around the individual's rights.[310] The difference in examination of these challenges, though, does not preclude application of the same solution for both.

In both instances, the valid challenge rests upon unusual and extreme facts. Compensating an attorney's expenses eliminates the undeniable burden on an attorney's personal property.[311] Each state, therefore, should adopt such a provison without limitation. Payment for the attorney's services, predicated on a firm, unvariable standard without regard to location or ability, eliminates the causes of action presently asserted and treats all attorneys equally. Although some lawyers still would be forced to take additional cases because of the absence of legal services agencies in their locale, every lawyer nationwide would receive just and equal compensation for the services rendered.

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303. *Smith*, 747 P.2d at 844-45 (citations omitted).

304. *Id.*

305. *Id.* at 844.

306. *See* Gilbert & Gorenfeld, *supra* note 9, at 85-86.

307. *Id.* at 86.

308. *Smith*, 747 P.2d at 844-45 (noting that "veterinarians are statutorily entitled to *reasonable* compensation for services which those professionals provide for the benefit of the state" (emphasis in original)).

309. *See* Regents of the University v. Bakke, 438 U.S. 265, 299 (1978) (equal protection right is a personal right but the infringement of that right results from a group classification).

310. *See* Williams v. Illinois, 399 U.S. 233, 260 (1970) (Harlan, J., concurring) (inquiry is directed towards the affected individual right).

311. *See Smith*, 747 P.2d at 842 (requiring attorneys to cover costs of litigation without reimbursement deprives them of due process property right); Bradshaw v. Ball, 487 S.W.2d 294, 298 (Ky. 1972) (requiring attorneys to take appointments without compensation deprives them of property); State *ex rel.* Partain v. Oakley, 159 W.Va. 805, 813-14, 227 S.E.2d 314, 319 (1976) (when costs of appointment "substantially reduce the attorney's net income" attorney's property right is abridged).

D. Proposal: A Uniform Standard of Compensation

Currently, lawyers dread the possibility of court appointment. The intolerable burden placed upon many in the profession can hardly be called public service. Lawyers with little or no interest in criminal representation are forced to accept appointments for little or no pay. Consequently, lawyers accept the financial and professional imposition reluctantly and, in some cases, under the duress of potential court sanctions.[312] To make matters worse, only lawyers can be and are burdened with the problem of indigent defendants. Appointments, however, threaten the lawyer's practice, clients, financial worth, and, unfortunately, the quality of legal services.[313] Such factors define the dimensions of the constitutional problems with unpaid court appointment.

Uniformity provides the answer to the constitutional challenges and to the concomitant problems attending uncompensated court appointments. Strict adherance to pronounced standards, either legislative or judicial, allows a degree of predictability unseen in the past. Fewer challenges will merit consideration by the courts and more time will thus be created for other pressing legal issues. Most importantly, however, adoption of a uniform standard eliminates an incongruous anomaly in the judicial treatment of professionals.

The uniformity suggested here revolves around a universal standard for compensation.[314] The first step is compensation of all appointed counsel for expenses incurred while in the employ of an indigent client. This single change largely eliminates the due process challenges now mounted by rural lawyers.[315] Second, a set hourly fee for services rendered, without an artificial ceiling, eradicates the other bases for constitutional challenge. The entire class of appointed counsel would be accorded the same status and

312. *See* State v. Gasen, 48 Ohio App. 2d 191, 356 N.E.2d 505, 506 (Ohio Ct. App. 1976) (attorney found in contempt for refusing to accept court appointment); *Ex parte* Gray, 649 S.W.2d 640, 641 (Tex. Crim. App. 1983) (attorney found in contempt for declining to accept appointment).

313. As yet another ground for attacking court appointments, lawyers have asserted inadequate payment raises the possibility of inadequate representation for the indigent client. See, for example, *Smith*, 747 P.2d at 846, where the party challenging the state's payment provisions alleged an indigent client's representation was jeopardized because appointed counsel do not provide effective assistance. One commentator has alleged unpaid appointed attorneys do not provide effective assistance to their underprivileged clients. *See* Comment, *The Uncompensated Appointed Counsel System: A Constitutional and Social Transgression*, 60 KY. L.J. 710, 721 (1972); *see also supra* note 87 (text of sixth amendment).

314. The most enlightened effort yet made to uniformly compensate appointed counsel is in the Criminal Justice Act. *See* 18 U.S.C. § 3006A(d)(1)(1988). The act allows for variations in rates according to the average cost of legal services in the area. *See supra* notes 159-160 and accompanying text (describing system of compensation); *see also* Comment, *A Statutory Proposal Compensating Attorneys Appointed To Represent Indigent Civil Defendents*, 28 SANTA CLARA L. REV. 195, 218-23 (1988) (submitting proposed bill with uniformity as a critical ingredient).

315. *See Mallard*, 109 S. Ct. 1814, 104 L. Ed. 2d 318 (1989) (rural lawyer challenges appointment); *Smith*, 747 P.2d 816 (Kansas 1988) (same). Rural lawyers suffer more when appointed because of uncompensated travel time, expenses, and overhead. *Smith*, 747 P.2d at 845-6. Rural lawyers may also lack the potential reserves and financial backing many firms make available to their lawyers.

compensation. Although lawyers in certain regions[316] still would suffer the imposition of more frequent appointment, the impact upon them would be tolerable with adequate compensation. Such a program notably parallels the new Medicare guidelines for payment of doctors which compensates doctors for services rendered at pre-determined, standardized rates.[317]

V. CONCLUSION

As the practice of law changes, very few courts are adapting to meet the new challenges engendered by these changes in the profession. The Supreme Court is no exception. Its recent holding in *Mallard*[318] indicates that the Court remains content with the existing system for court appointment. The Court's decision fails to recognize, however, that lawyers are no longer officers of the court or a special breed. Increasingly, though, state courts recognize this fact.[319] As more and more courts follow suit, fewer barriers to fair compensation for appointed counsel will remain.

While thirteenth amendment challenges carry little weight,[320] challenges based upon the fifth and fourteenth amendments merit continued and widening recognition by the Supreme Court as the appropriate forum for determination of these constitutional questions.[321] At this stage, however, reluctant courts and state legislatures, guided by inertia, prevent realization of this proposal. Absent action by the Court, the future holds opportunity for state courts and legislatures to relieve the ever-increasing burden placed upon a profession that no longer enjoys the privileges of a *noblesse oblige* existence.[322]

Obviously, the expense of a uniform standard of compensation must be

316. *See Smith*, 747 P.2d at 845 (attorneys in rural areas inherently suffer more appointments in part because of absence of public defender).

317. The only difference between compensation for appointed counsel and for Medicare doctors is that Medicare compensates doctors on the basis of the service rendered rather than by the time expended. Medicare's alluring approach of fixed reimbursement on the basis of the service performed might appeal to increasingly cost conscious legislators. This system, however, as noted by many doctors, fails to take into account numerous procedures which occasionally complicate or lengthen the compensated service. Legal services, moreover, rarely are performed in exactly the same way each time. This uniqueness of service results in fixed compensation for drafting a response, for example, inherently over or undercompensating certain attorneys. The obvious solution, then, is to adopt fixed hourly rates for services rendered, with certain discretion similar to remittitur entrusted to the trial judge.

318. *Mallard*, 109 S. Ct. at 1821 n.6, 104 L. Ed. 2d at 329 n.6. *See also* Barnard v. Thornstenn, 109 S. Ct. 1294, 1299, 103 L. Ed. 2d 559, 564 (1989) (implying bar could compel lawyers to take indigent's case); Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 285 (1985) (implying attorneys might be required to counsel destitute).

319. *See supra* notes 97-98, 219-22 and accompanying text (cases acknowledging attorneys are no longer a special breed).

320. *See supra* notes 177-218 and accompanying text (analysis of thirteen amendment challenges to court appointment).

321. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), where Chief Justice Marshall opined that "it is emphatically the province and duty of the judicial department to say what the law is . . .[t]his is of the very essence of judicial duty." *Id.* at 177-78.

322. *See* Cohen v. Hurley, 366 U.S. 117 (1960), *overruled* in Spevack v. Klein, 385 U.S. 511 (1967). Justice Harlan notes that "[w]e do not hold that lawyers, because of their special status in society, can *therefore* be deprived of constitutional rights assured to others." *Cohen*, 366 U.S. at 129-30.

considered. The cost of such a change, however, may bring more benefits than initially envisioned. Although such a standard provides no guarantee of effective legal assistance, as a practical matter, assured payment would bolster the morale of many practicing attorneys. Consequently, the financial and professional stigma of court appointment would likely diminish. Most importantly, the constitutional grounds now asserted by attorneys challenging the system would disappear.

Such advantages may fall upon deaf ears in America's legislatures. Legislators would be ill-advised, however, to ignore the merits of the propostion. Constituents are tired of deferred adjudication, plea bargaining, and other examples of our congested court system. In addition, elimination of this needless source of litigation surely would ease the strain on courts' dockets.

Court appointments which face constitutional difficulty are a creature of an overworked criminal justice system and inadequate funding. Although this Comment makes no attempt to address the plague of crime, compensation of appointed counsel aids society in its prosecution of crime and, therefore, helps to guarantee the rights of all those involved in the criminal justice system. The unusual privileges accorded attorneys, however, should not override their entitlement to equal protection and due process of law. Other professions neither shoulder nor face the uncompensated service expected of attorneys.

Furthermore, the mere existence of budgetary constraints should not lead to the exaction of a pound of flesh from attorneys. The same arguments failed to persuade the Supreme Court when deciding the extent of rights for indigent criminal defendants.[323] Similarly, these arguments should not prevail in the case of potentially impoverished attorneys.[324] The constitutional protections and other advantages far outweigh the costs of reasonable compensation for all appointed counsel.

323. *See* Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963). To the contrary, the vast sums spent by criminal defendants on the best available counsel indicated to the Court that financial constraints should not be a factor in extending the right to counsel to all criminal defendants.

324. For that matter, legislators would be ill-advised to ignore Professor Maguire's prescient comment that "[a]ny plan of doing justice to the poor by doing injustice to the bar will soon collapse." Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 392 (1923). The collapse Maguire foresaw appears to be culminating now. *See* Anderson, *Court Appointed Counsel, The Constitutionality of Uncompensated Conscription*, 3 GEO. J.L. ETHICS 503, 509 (1990) (noting "recent flurry of reversals" striking down appointments as unconstitutional).