Comments

Mallard v. United States District Court: Section 1915(d) and the Appointment of Counsel in Civil Cases

I. INTRODUCTION

At a time when the need for legal services among the poor is growing more critical, and public funding for such services has not kept pace, the power of the federal courts to compel lawyers to take indigent cases against their will has developed into an obvious, yet heavily criticized, solution. In the midst of this atmosphere, the United States Supreme Court recently decided the issue, long unresolved in the lower federal courts, of whether a federal district court possesses the authority under 28 U.S.C. § 1915(d) to coerce unwilling attorneys to accept *pro bono* appointments in civil cases.[1] Although counsels' duty to serve, and courts' authority to require service, is an amalgamation of historical tradition, ethical obligation, and the requirements imposed by in forma pauperis statutes such as 28 U.S.C. § 1915(d), such a duty is, in fact, "shrouded in obscurity, ambiguity, and qualification, and this murkiness is reflected in recent struggles of courts . . . to deal rationally with these issues."[2] From the nonconsenting lawyer's perspective, the imposition of such a duty by the courts raises legitimate constitutional issues and policy questions, which must be balanced against the needs of indigent litigants to obtain access to the courts and the bar's ethical duty to ensure that access. This Note will address these issues in the context of the Supreme Court's recent attempt, in *Mallard v. United States District Court for the Southern District of Iowa*, to reconcile the split among the lower courts—if only temporarily. The following Part of this Note will provide a historical background of the lawyer's duty of representation and the court's authority to compel such service, which served as a basis for Congress codifying this obligation in 28 U.S.C. § 1915(d). In Part III, this Note will survey the lower courts' interpretations of Section 1915(d), and offer some explanation for their disagreement. Part IV will focus on the Supreme Court's treatment of Section 1915(d) as presented to it in the *Mallard* case. Finally, in Part V, this Note will explore numerous public policy and constitutional issues left untouched by the Court in *Mallard*, and offer some proposed solutions to guide courts in the future.

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1. Mallard v. United States Dist. Court, 109 S. Ct. 1814 (1989). See also *Pro Bono Work — Appointment by Court — 28 U.S.C. 1915(d)*, 57 U.S.L.W. 3611 (Mar. 21, 1989).

2. Shapiro, *The Enigma of the Lawyers' Duty to Serve*, 55 N.Y.U. L. REV. 735, 738 (1980).

II. Historical Perspective of an Attorney's Duty to Serve

A. *Historical Origins*

Scholars and commentators generally agree that a system of mandatory public service is an ancient tradition of the legal profession dating back as early as fifteenth-century England. Although there exists no historical support for compelling an attorney to volunteer a fixed amount of time, it is clear that lawyers have long been willing to furnish such services without pay, and most courts will compel them to do so if they refuse.[3]

This English tradition has been the foundation upon which the American law was built; and while the early English common law has evolved into an independent and autonomous body of American law, American courts still rely on the law's historical roots. Thus, the historical recognition that the early English courts had the authority to compel an attorney to represent an indigent is frequently invoked to support the use of a similar power by courts in the United States. The Ninth Circuit Court of Appeals, in *United States v. Dillon*,[4] provided a notable example of the extent to which the judiciary has relied on this tradition to establish its control over the bar. There, the court noted the early English practice, whereby "serjeants-at-law [sic] 'from a very early period . . . might be required by any of these courts to plead for a poor man.' "[5] The court also recognized "the commitment of the lawyer to serve upon court assignment was put in unequivocal terms . . . by Chief Justice Hale, who stated that 'if the Court should assign [a serjeant] [sic] to be counsel, he ought to attend; and if he refuse . . . we would not hear him, nay, we would make bold to commit him.' "[6] Thus, it is evident that the English legal system developed a practice whereby counsel was obligated to serve, and the courts could require, by threat of sanction, such services.

The earliest-formed obligation of counsel was merely a creature of common law.[7] The earliest evidence of a statutory duty dates back to the latter fifteenth century; however, it was not until the seventeenth century that a statute embodied the present-day conception of mandatory representation. The Statute of Henry VII, enacted in 1695, and which remained in effect until 1883, gave the courts authority to compel:

> learned counsel . . . for the preparation of suits without any reward taking therefore; and after the said writ or writs be returned, if it be afore the king in his bench, the justices there shall assign to the same poor person or persons, counsel learned . . . which shall give their counsels, nothing taking for the same: and likewise the justices shall appoint attorney and attornies [sic] for the same poor person or persons . . . for the speed of said suits to be had and made, which shall do their duties without any reward for their counsels, help and business in the same.[8]

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3. *Id.*
4. 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).
5. *Id.* at 636 (quoting 2 Holdsworth, A History of English Law, 491 (3d ed. 1923)).
6. *Id.* (brackets in original).
7. *Id.*
8. Statutes Made at Westminster, 11 Hen. 7, c. 12 (1495), *cited in Dillon*, 346 F.2d at 636.

Although this right was often limited, and could not accurately be understood to impose a general duty on counsel to provide representation to the indigent, it nevertheless established the framework on which the American law would take shape.[9]

In the newly formed colonies, however, there is little evidence that the legal system sought to adopt the beneficence of its forefathers. This is, in part, attributable to the fact that there was not a great need of relief for poor civil litigants. The new world provided the colonists with room to expand and to achieve economic independence. Along with a better standard of living, the colonists enjoyed access to the courts with little or no fees or costs. This resulted in a society that was less litigious, and also better equipped to cope with the occasional disputes which eventually arose. It was not until the Civil War, and the growth of great cities, that the United States would experience "the infinite complexity of modern life, of business, and of the affairs in general which breed litigation,"[10] causing a corresponding rise in the need for counsel to represent the growing underclass in society.

By 1892, in response to swelling court dockets, a dozen state legislatures gave their courts the statutory authority to order lawyers to render assistance to indigent civil litigants, and there existed the common-law power to appoint or assign counsel in at least ten others.[11] Many of the same concerns which motivated the states to act provided the impetus for the United States government's legislation guaranteeing indigent litigants' access to the federal courts.

B. *The In Forma Pauperis Statute: 28 U.S.C. § 1915*

It was against this backdrop that Congress, in 1892, enacted a statute which it titled: "An act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court."[12] Although it appears from the title of the Act that Congress required counsel's representation, the text of the Act, which differs in significant respect from its title, raises some doubt. Section 4 of the Act reads, "[t]hat the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of trial . . ."[13] It is with the emphasis which should, or should not, be attached to Congress' choice

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9. Shapiro, *supra* note 2, at 739.

10. Maguire, *Property and Civil Litigation*, 36 HARV. L. REV. 361, 382. Even though a survey of the nascent colonies does not reveal a wide-spread recognition of the English tradition of assisting poor litigants, there was some start along this line. "Massachusetts, for example, in 1642 passed an act referring to admission of parties in forma pauperis." *Id.* at 381; CHARTERS AND GENERAL LAWS OF MASSACHUSETTS BAY, c. 5, § 4, p. 45 (1814). Whatever the practice in colonial times, at least six of the American states adopted versions of the Statute of Henry VII in the first thirty years of the republic, including Virginia in 1786, Kentucky in 1798, the Louisiana Territory in 1807, the Indiana Territory in 1813, and Tennessee in 1821. *See* Fisch, *Coercive Appointments of Counsel in Civil Cases in Forma Pauperis: An Easy Case Makes Hard Law*, 50 MO. L. REV. 527, 547 (1985).

11. *See* Mallard v. United States Dist. Court, 109 S. Ct. at 1819 (citing ARK. STAT. § 1053 (1884) (assign); ILL. REV. STAT., ch. 26, § 3 (1884) (assign); IND. REV. STAT., Vol. 2, pt. 2, ch. 1, Art. 2, § 15 (1892) (assign); KY. STAT. § 884 (1915) (Act of May 27, 1892) (assign); MO. REV. STAT. § 2918 (1889) (assign); N.J. GEN. STAT., Vol. 2, Practice § 369, p. 2598 (1896) (assign); 1876 N.Y. LAWS, ch. 448, Art. 3, § 460 (assign); 1869 N.C. PUBLIC LAWS, ch. 96, § 2 (assign); TENN. CODE § 3980 (1858) (appoint and assign); TEX. REV. STAT., Art. 1125 (1879) (appoint); VA. CODE ANN. § 3538 (1849) (assign); W. VA. CODE, ch. 138, § 1 (1897) (assign)).

12. 27 Stat. 252, ch. 209 (1892) (codified as amended at 28 U.S.C. § 1915 (1982)).

13. *Id.*

of the word "assign" in the title of the Act, and the word "request" in the text of the Act itself, that has given rise to confusion over the court's authority to order a coercive appointment of counsel in civil cases. Did Congress intend the terms to be synonymous? Or was the choice of verbiage a conscious one, intended to relieve the burden on an attorney who would not be compensated for his efforts? This Note will attempt to provide an answer to this question through an analysis of legislative history, and the federal courts' application of the Act in light of both its purposes and its plain meaning.

Because the language of the Act may be viewed as ambiguous, it is necessary to look elsewhere to determine the scope of a court's authority, and counsels' corresponding duties. To be sure, the Congress that adopted the original in forma pauperis statute, which is now amended as 28 U.S.C. § 1915, was undoubtedly aware of the numerous state appointment of counsel statutes then in existence that were designed to enable those persons who could not afford legal representation to avail themselves of the state courts.[14] Indeed, it was reported on the floor of the House of Representatives that, in enacting Section 1915, Congress intended to open the courts to impoverished litigants and to "keep pace" with the laws of the "[m]any humane and enlightened [s]tates."[15] Furthermore, a colloquy between representatives in the House evidenced the Congressional intent that "in these cases of charity and humanity [the Congress] is compelling these officers,[16] all of whom make good salaries to do this work for nothing."[17] Although these limited glimpses into the legislature's intent may not be conclusive, in the absence of any legislative history to the contrary, these statements are at least suggestive that Congress sought to follow the example set by the states.

Viewed in light of the legislation's stated purpose, the representatives' statements acquire greater importance. In enacting the in forma pauperis statute, Congress was motivated by its belief that access to the courts should not be denied "for want of sufficient money or property."[18] Concerned with an indigent's inability to tender the necessary filing and attorney's fees, Congress questioned a policy which effectively allowed the government to close its courts "to its own citizens, who are conceded to have valid and just rights, because they happen to be without the money to advance pay the tribunals of justice."[19] Because the Act also provided that the court could waive any filing fees and court

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14. *Mallard*, 109 S. Ct. at 1819.

15. *Id.*; *see also* H.R. REP. No. 1079, 52d Cong., 1st Sess. 1-2 (1892).

16. Debate also exists over the meaning of the term "officers" in the Act. In Section 3, the statute reads "the officers of court shall issue, serve all process, and perform all duties in such cases." 27 Stat. 252, ch. 209 § 3 (1892). Thus, there is support for the proposition that the act applies only to non-attorney court personnel. In rebuttal, however the argument is raised that if lower paid non-attorney court personnel can be compelled to serve without compensation, then certainly better compensated attorneys, who are also bound by traditional ethical duties, can likewise be compelled to serve.

17. 23 Cong. Rec. 5199 (1892). Further supporting this view of Congressional intent, is the fact that the bill was introduced on the floor of both the House and Senate as a bill empowering the courts to "assign" counsel for poor persons. *Id.* at 6264.

18. H.R. REP. No. 1079, 52d Cong., 1st Sess. 2 (1892).

19. *Id.* The legislature's declaration of purpose must be viewed in the context of the ethical-intellectual climate which existed at the time the statute was proposed. The lawyers' tradition of professional service was best portrayed by Professor Thomas Cooley, who wrote:

costs, it could be argued that Congress' statements were only directed to this provision of the Act and that it did not speak to the necessity of giving a court the power to appoint counsel. However, such an interpretation ignores the fact that the waiver of filing fees and court costs merely provides access into the courtroom itself. In order to advance their interests beyond this limited point, the indigent must have the assistance of counsel. Certainly, Congress must have intended to make that access meaningful by authorizing the appointment of counsel in appropriate cases.[20]

It is apparent that Congress, in ratifying Section 1915, recognized the potential for injustice under the then-current system, and sought to fill this need—albeit by steps not clearly articulated in the language of the statute. It must be assumed, however, that if Congress identified a shortcoming in the legal system, it must have intended to cloak the courts with sufficient power to rectify that problem. Whether or not the Act gave courts authority to compel an attorney to represent an indigent civil litigant is a question which has continued to perplex the federal courts throughout the succeeding century.

III. FEDERAL COURTS' ANALYSIS OF SECTION 1915(d)

A. *Early Judicial Interpretation*

Often the decisions of a court, which functioned as a contemporary of the Congress which enacted an ambiguous statute, can be most telling as to how that statute should be interpreted.[21] Although not always conclusive as to the statute's proper application, the federal judges of the early 1900s, most likely imbued with the same values and beliefs as their counterparts in Congress, may have been more capable than their current brethren of interpreting the meaning of Section 1915(d).

> [T]he humanity of the law has provided that, if the prisoner is unable to employ counsel, the court may designate some one to defend him who shall be paid by the government; but when no such provision is made, it is a duty which counsel so designated owes to his profession, and to the court engaged in the trial, and to the cause of . . . justice, not to withhold his . . . best exertions, in the defense of one who has the double misfortune to be stricken by poverty and accused of a crime. No one is at liberty to decline such an appointment, and few, it is hoped, would be disposed to do so.

T. COOLEY, CONSTITUTIONAL LIMITATIONS, 334 (3d ed. 1874). Cooley added, "a court has the right to require the service, whether compensation is made or not; and that counsel should decline to perform it, for no other reason that the law does not provide pecuniary compensation, is unfit to be an officer of a court of justice." *Id.* Although Cooley's remarks are addressed to counsels' duty in a criminal case, his appeals are made to the laws' "humanity" and to the lawyers' professional obligation to serve the poor, which, presumably, are not dependent on whether the representation is being offered in a criminal or civil case.

20. Three possible interpretations have been offered to explain Congress' silence: (1) it was obvious to the legislature that counsel could be required to serve under a court appointment; (2) counsel was always so willing to accept court requests that it did not even occur to the legislators that attorneys would ever decline to accept an appointment; (3) Congress thought it was transparently obvious that counsel could not be coerced into accepting court appointments. Note, *Appointment of Counsel and Section 1915(d): Pauper Privilege and Judicial Discretionary Duty, cited in* Brief for Respondent, Mallard v. United States Dist. Court, 109 S. Ct. 1814 (1989) (No. 87-1490).

21. Lake County v. Rollins, 130 U.S. 662, 671 (1889) (words in a statute must be considered in light of their intended meaning).

Only two years after Section 1915 was enacted, a United States District Court, in *Boyle v. Great Northern Railroad*,[22] held that "by an act of Congress . . . any citizen of the United States entitled to commence any suit or action in any court of the United States who is unable, by reason of poverty, to prepay fees . . . may have process and all the rights of other litigants, and may have counsel *assigned* to represent him, free of charge."[23] Such a conclusion relies on the premise that without the assistance of counsel, providing indigents access to the courts would be a hollow promise.

Similarly, in 1898, a lower federal court, in *Whelan v. Manhattan Railway*,[24] was presented with the opportunity to construe the statute. Again, the court held that in order to make meaningful an indigent's day in court, Section 1915(d) required that the litigant not only "be relieved from securing the costs of his adversary, but an attorney is to be provided for him by the court, who will prosecute his cause of action without stipulating for some compensation in the event of success."[25] The court continued, "[t]he attorney *assigned* by the court, in the event of nonsuccess, will, of course, receive nothing."[26] Although the court did not appoint counsel in this case, the decision does not imply that the court lacked the necessary power, but demonstrated only that the exercise of that power was discretionary.[27]

Likewise, in *Brinkley v. Louisville & Nashville Railway*, the court once more interpreted Section 1915(d) as empowering a court to assign counsel if it deems the cause worthy.[28] More significant, however, is that the court traced the origin of Section 1915 back to the Statute of Henry VII,[29] and used the ancient statute to guide its interpretation of the scope of Section 1915(d). Thus, the line drawn between the words "request" and "appoint" became difficult to resolve when viewed from the perspective of the long-established tradition of service demanded by the courts.

Finally, in *United States ex rel. Randolph v. Ross*, the Sixth Circuit Court of Appeals held that "an impecunious plaintiff, with a meritorious cause of action, is not necessarily limited to the employment of an attorney by private contract; for by [Section 1915(d)] the trial court is expressly empowered to assign an attorney to represent such plaintiff."[30] Admittedly, the court's reading of Section 1915 strains the literal translation of that provision, because Congress had not *expressly* conferred such authority on the courts. But in 1892, the legal

22. Boyle v. Great N. Ry., 63 F. 539 (C.C.E.D. Wash. 1894).

23. *Id.* at 539 (emphasis added).

24. Whelan v. Manhattan Ry., 86 F. 219 (C.C.S.D.N.Y. 1898).

25. *Id.* at 220.

26. *Id.* at 220-21 (emphasis added). The court also refers, in other portions of its opinion, to the ability of the court to "provide an attorney to represent the poor person," and that an attorney "will be assigned to represent plaintiff." *Id.*

27. The court also noted that attorneys in such cases could expect payment only if their clients were successful, and seemed to recognize a lawyer's right to withdraw from the case if he did not agree with those terms. In that case, the court "will find some other attorney to prosecute the case." *Id.* at 221.

28. Brinkley v. Louisville & N. Ry., 95 F. 345, 353 (C.C.W.D. Tenn. 1899).

29. Statutes Made at Westminster, 11 Hen. 7 c.12, which reads in pertinent part, "the justices shall assign the same poor persons counsel learned . . . and shall appoint attorneys for the same poor persons." *Id.*

30. United States *ex rel.* Randolph v. Ross, 298 F. 64, 66 (6th Cir. 1924).

profession's perception of itself reflected a "strong duty to serve the court in administering justice to the poor;" therefore, the decision may be viewed as an attempt to uphold the ideals the profession had come to embody.[31]

These four decisions are representative of how the federal courts, at the turn of the century, interpreted the scope of Section 1915(d). In fact, during the first forty years after Section 1915(d) was enacted, every federal court decision construing that section used the word "assign" or "appoint" to describe the court's authority over counsel.[32] Given Congress' and the federal courts' interchangable use of "request" and "assign," it appears inconsequential that the word "request," rather than "assign" was used in the Act itself.[33] Instead, as these decisions demonstrate, the word was consistently construed so as to advance the underlying purpose of the Act.

B. *Modern Judicial Interpretation*

Much of the confusion obscuring the intended meaning of Section 1915(d) was produced by judicial decision-making in the past forty years. Unlike decisions of the previous forty years, the modern judiciary has not been able to reach a consensus as to the proper construction of "request" as used in Section 1915(d). The lack of coherence in the courts' reasoning is undoubtedly attributable, in part, to the fact that their decisions are no longer taking place in the contextual period of the statute's origin. Beyond this general impediment, however, other factors have been advanced to account for modern courts' confusion.[34]

First, the overwhelming majority of motions for counsel in federal courts seek to have counsel "appointed." Therefore, the federal courts have grown accustomed to using the language of mandatory appointment of counsel.[35] Secondly, confusion exists because Section 1915(d) motions are seldom successful. As one court noted, "[a] district court will secure counsel for an indigent civil litigant under Section 1915(d) only under 'exceptional circumstances,'[36] so

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31. Brief for Respondent, Mallard v. United States Dist. Court, 109 S. Ct. 1814 (1989) (No. 87-1490).

32. Other cases interpreting Section 1915(d) as authorizing a court to appoint counsel include Phillips v. Louisville & N. Ry., 153 F. 795 (C.C.N.D. Ala. 1907), *aff'd* 164 F. 1022 (5th Cir. 1908); Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331 (1948).

33. Further undermining support for the position that Congress, in using the word "request" in Section 1915(d), sought to alleviate the potential burden on attorneys, is the statute's stated purpose, which read: "An act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court." 27 Stat. 252 (1892). Since this statute sought primarily to safeguard indigent rights, one scholar has theorized that by using the word "request" rather than "assign," "Congress may have presumed that *pro se* litigants might not have even been aware that courts had authority to appoint counsel. Quite plausibly, the language was intended to urge courts to make appointments even when the indigent had not specifically asked for counsel." Note, *supra* note 20.

34. These factors were developed by the Ninth Circuit in United States v. 30.64 Acres of Land, 795 F.2d 796 (9th Cir. 1986).

35. *30.64 Acres*, 795 F.2d at 799-800. Statutes authorizing appointment of counsel in other circumstances include: 18 U.S.C. § 3006A (1982) (criminal); 28 U.S.C. §§ 2241, 2245, 2255 (1982) (habeas corpus); Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1) (employment discrimination cases); also under the sixth amendment, *see* Johnson v. Zerbst, 304 U.S. 458 (1938).

36. Aldabe v. Aldabe, 616 F.2d 1089, 1093 (9th Cir. 1980); *see also* United States *ex rel.* Gardner v. Madden, 352 F.2d 792, 794 (9th Cir. 1965); Cook v. Bounds, 518 F.2d 779, 780 (4th Cir. 1975); Ehrlich v. Van Epps, 428 F.2d 363, 364 (7th Cir. 1970).

grants of such a motion are relatively rare."[37] Also, because trial judges are given a great deal of discretion in determining whether counsel is required, appellate courts are hesitant to reverse lower courts' decisions. As a result, "courts at both levels often have little incentive to choose their language carefully in ruling on Section 1915(d) motions; it little matters to a litigant who is denied counsel whether the court declines to 'appoint' an attorney or merely declines to 'request' an attorney to serve."[38] Lastly, as the court in *United States v. 30.64 Acres of Land* pointed out, "some of the confusion undoubtedly arises because the courts use the word 'appoint' in two different senses."[39] Some courts use the verb "to appoint" to denote an order for an attorney to represent an indigent litigant. Other courts, however, use the verb "to appoint" to "designate a *pro bono* volunteer attorney as counsel of record for an indigent client."[40] In these cases, the courts understand that the attorney has volunteered to do *pro bono* work, and thus issues an order "appointing" counsel in order "to put the attorney-client relationship on a more formal footing."[41]

An examination of recent case law reveals that the courts, almost carelessly, have used the terms "appoint" and "request" interchangeably. Often, this is because the court's choice of words has no significant impact on the resolution of the dispute. From counsel's perspective, however, the court's choice of words is not a distinction without a difference. Presumably, an attorney who is "requested" to represent an indigent may refuse to honor the request. However, an attorney who is "appointed" to serve as counsel cannot decline to represent the indigent in court.[42] Unfortunately, the modern judiciary has not shared the lawyers' concerns, as is evidenced by a bewildering series of opinions interpreting the meaning of Section 1915(d). A survey of recent lower court decisions will reveal this trend.

1. *Narrow Interpretation of Section 1915(d)*

A number of federal courts have construed Section 1915(d) narrowly and have held that the judiciary cannot coerce an unwilling attorney to represent an indigent litigant in a civil case. For example, in *Caruth v. Pinkney*,[43] the Seventh Circuit rejected a prison inmate's claim that the district court should have appointed counsel to represent him in his action against various prison offi-

37. *30.64 Acres*, 795 F.2d at 799-800.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id. See, e.g.*, Powell v. Alabama, 287 U.S. 45 (1932), which held that "[a]ttorneys are officers of the court, and are bound to render service when required by . . . appointment." *Id.* at 73. Although *Powell* dealt with the right of counsel in a criminal proceeding, the difficulties attendant to a criminal case are also present in a civil proceeding, and the denial of counsel would raise concerns in a civil case as well. The *Powell* majority stated "[i]f in any case, civil or criminal a . . . court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it . . . would be a denial of a hearing, and, therefore, of due process in a constitutional sense." *Id.* at 69.

43. Caruth v. Pinkney, 683 F.2d 1044 (7th Cir. 1982).

cials.[44] Although the court recognized that representation of indigents was a growing concern within the legal community, it placed the burden for resolving this crisis on the shoulders of counsel, and not the courts. The court noted that it is "the professional obligation of each lawyer to provide public interest services," and "[t]he basic responsibility for providing services to those unable to pay rests upon the individual lawyer."[45]

Construing its authority under Section 1915(d), the *Caruth* court ruled that it "has the authority only to request an attorney to represent an indigent, not to require him to do so."[46] The court realized that this might cause some hardship—especially where the court has determined that the litigant rightfully deserved representation. The court emphasized that "we are not unsympathetic with the burden a district court faces in attempting to secure *pro bono* counsel, we merely note that the existence of such a burden will not excuse a court from attempting" to provide representation in appropriate cases.[47] Thus, even though a court could not command an attorney to represent an indigent, it was not relieved of its duty to "secure" counsel with whatever power it possessed independent of Section 1915(d).

Similarly, in *Heidelberg v. Hammer*, the same court held that an interpretation of Section 1915(d) merely authorized a court to request an attorney to represent a party who is proceeding in forma pauperis.[48] As in *Caruth*, the court refused to look beyond the plain language of the statute to effectuate the purpose of the Act.[49]

Most recently, in *United States v. 30.64 Acres of Land*, the Ninth Circuit opined that Section 1915(d) did not authorize the appointment of counsel into involuntary service. To support its position, the court relied primarily on the bald language of the statute itself.[50] If Congress meant to authorize appointment, the court rationalized, it would not have used the word "request." The court argued that in other statutes where Congress felt it was justified to coerce an attorney to serve, it used the words "appoint" or "assign."[51]

The court also noted that if a statute intended to authorize the appointment of counsel, it often made provision for paying counsel.[52] In this case, no provision had been established to compensate attorneys who were appointed to represent an indigent under Section 1915(d).[53] Presumably, this rationale relies, in part, on the constitutional argument that requiring counsel to provide services

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44. In *Caruth*, the petitioner attempted to appeal the denial of counsel which he claimed was required by Section 1915(d); however, the denial of such a motion is not a final and appealable order. The petitioner continued as a *pro se* plaintiff, and appealed the denial of the motion for appointment from the trial court's judgment. *Id.* at 1047, n.2.

45. *Caruth*, 683 F.2d at 1049. *See also* AMERICAN BAR ASSOCIATION CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-25 (1980).

46. *Caruth*, 683 F.2d at 1049.

47. *Id.*

48. Heidelberg v. Hammer, 577 F.2d 429, 431 (7th Cir. 1978).

49. *Id.*

50. *30.64 Acres*, 795 F.2d at 801.

51. *Id. See also* 18 U.S.C. § 3006A(b) (1982); 25 U.S.C. § 1912(b) (1982) (appoint); 42 U.S.C. § 1971(f) (1982) (assignment in contempt proceeding); 42 U.S.C. § 2000e-5(f)(1) (1982) (appointment in Title VII action).

52. *30.64 Acres*, 795 F.2d at 801. *See also* 18 U.S.C. § 3006A(d); 25 U.S.C. § 1912(b) (1982).

53. *30.64 Acres*, 795 F.2d at 801.

without compensation would amount to a "taking" under the fifth amendment.[54] Such a construction of Section 1915(d), or other provisions authorizing the appointment of counsel, has little support in case law, and has been expressly rejected by a majority of the circuits.[55]

Finally, the court contrasted the nature of a civil proceeding with that of a criminal proceeding to read into Section 1915(d) an absence of authority for a court to appoint counsel. Based on its premise that there is normally no constitutional right to counsel in a civil proceeding, the court concluded that the failure of a court to secure counsel "would not normally prejudice the civil litigant's constitutional rights,"[56] and thus Congress must not have intended the courts to have this power. Although its major premise is sound, there seems to be a step missing in the Ninth Circuit's logic. Simply because a civil litigant does not have the constitutional right to counsel does not demand the conclusion that Congress did not intend for representation to be mandatory. Indeed, Congress has conferred to courts the authority to appoint counsel for indigents in other noncriminal proceedings.[57]

Moreover, the perils which confront a *pro se* litigant in a criminal proceeding are equally present in a civil litigation. Like a criminal trial, a civil trial is conducted under technical rules of evidence and procedure, demanding the same skill in marshalling and preparing facts.[58] There is little justification for drawing such a sharp distinction between poor civil and poor criminal litigants. In any event, making such a distinction only distracts the courts from the primary issue. The issue is not the indigent's right to counsel, but the court's authority to ensure indigent's equal access to the legal system.

In light of these considerations, it is doubtful that Congress intended courts to hold fast to the statute's language when faced with an indigent litigant who is forced to confront the complex machinery of the legal system.[59] Although the above decisions seem to place such a restriction on the judiciary, little in the way of clarity can be gleaned from these cases, because the courts in other circuits have adopted the contrary position.

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54. U.S. CONST. amend. V provides that private property may not be taken for public use without just compensation. *See infra* note 109, and accompanying text.

55. *30.64 Acres*, 795 F.2d at 802.

56. *30.64 Acres*, 795 F.2d at 801. The distinction between civil and criminal cases, as a determining factor in authorizing courts to appoint counsel to indigents, virtually disappears when one considers the context in which most Section 1915(d) cases arise. The vast majority of these cases are brought by prison inmates, or those alleging a violation of their constitutional rights. If the denial of counsel would result in fundamental unfairness impinging on due process rights, whether in the context of a criminal or civil proceeding, the result is still the same—the denial of individual rights guaranteed under the Constitution. *See* LaClair v. United States, 374 F.2d 486 (7th Cir. 1967). *But see* Allison v. Wilson, 277 F. Supp. 271 (N.D. Cal. 1967); Owens v. Swift Agricultural & Chem. Corp., 477 F. Supp. 91 (E.D. Va. 1979), *aff'd*, 612 F.2d 1309 (4th Cir. 1979) (presumption against appointing counsel in prisoner's civil rights suit).

57. *See supra* note 51.

58. Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 548 (1966); *see also* Powell v. Alabama, 287 U.S. 45, 69 (1932), where the court acknowledged that potential pitfalls for a *pro se* litigant were similar in civil and criminal trials.

59. *See* Ehrlich v. Van Epps, 428 F.2d 363, 364 (7th Cir. 1970); Gray v. Wisconsin Department of Health, 495 F. Supp. 321, 322 (E.D. Wisc. 1980) (denying motion to appoint counsel because it lacked power; it only had power to request that counsel provide service); Turner v. Steward, 497 F. Supp. 557, 558 (E.D. Ky. 1980); Chapman v. Kliendienst, 507 F.2d 1246, 1250 (7th Cir. 1974).

2. *Expansive Interpretation of Section 1915(d)*

At the opposite extreme, the courts in other circuits have read Section 1915(d) more broadly,[60] requiring an attorney to represent an indigent litigant when requested to do so by the court. In *McKeever v. Israel*,[61] the Seventh Circuit reversed a district court's dismissal of the petitioner's civil rights claim against the Wisconsin Department of Health and Social Services, and remanded the case for further proceedings and the appointment of counsel. At trial, the petitioner's motion for appointment of counsel under Section 1915(d) was denied, and the petitioner was forced to proceed *pro se*. On appeal, however, the court held that "[t]he district court failed entirely to exercise its discretion under Section 1915(d) because it did not recognize its authority to appoint counsel."[62] Rather, "the vast weight of authority in this Circuit and elsewhere demonstrates that the power of a court to provide counsel under Section 1915(d) is commonly referred to as the power to 'appoint.' "[63] The court also attacked a misperception which has been responsible for supporting the contrary view of Section 1915(d): that because Section 1915(d) does not provide a means for compensating appointed counsel, the statute cannot be construed as requiring an attorney to serve. The majority pointed out that "[t]he unavailability of funds to compensate an appointed attorney . . . has no bearing on the power of a court to provide counsel under Section 1915(d)."[64] In fact, Congress has authorized the appointment of counsel in other circumstances without providing for compensation.[65]

Like the Seventh Circuit, the Eighth Circuit has been liberal in construing Section 1915(d). In *Peterson v. Nadler*,[66] the court of appeals reversed a lower court ruling that it had no power to appoint counsel to represent an indigent in a civil case. The Eighth Circuit held that "[s]uch a ruling overlooks the *express authority* given it in 28 U.S.C. § 1915(d) to appoint counsel in civil cases."[67] In the overall interest of the proper administration of justice, the *Peterson* court

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60. A survey of over 300 district court and court of appeals decisions which have construed Section 1915(d) revealed that an overwhelming majority of courts referred to their power under that section as the power to "appoint" rather than merely to "request" that counsel serve. In 163 cases, the courts referred to their authority to "appoint" or their power of "appointment of counsel." On the other hand, only 34 decisions saw the court's power as limited to "requesting" that counsel represent an indigent. Although these results seem to point conclusively to the power under Section 1915(d) as being one of "appointment," one must be careful before drawing any conclusions based on these statistics alone. In more cases than not, the interpretation of Section 1915(d) was only a secondary issue in the case, so the court did not focus on its specific meaning. In most instances, the outcome of the case did not turn on the construction given to Section 1915(d), but on some other substantive or procedural ground. *See supra* notes 33-40 and accompanying text.

61. McKeever v. Israel, 689 F.2d 1315 (7th Cir. 1982).

62. *Id.* at 1319.

63. *Id.*

64. *Id.* at 1320.

65. *See also* Maclin v. Freake, 650 F.2d 885, 886-87 (7th Cir. 1981) (appoint); McBride v. Soos, 594 F.2d 610, 613 (7th Cir. 1979) (appoint); LaClair v. United States, 374 F.2d 486, 489 (7th Cir. 1967) (appointment); *see infra* notes 111-17 and accompanying text (discussing the validity of the argument that such appointments constitute a taking in violation of the fifth amendment).

66. Peterson v. Nadler, 452 F.2d 754 (8th Cir. 1971).

67. *Id.* at 757 (emphasis added).

found that such cases present circumstances requiring the appointment of counsel.[68]

Finally, in *Nelson v. Redfield Lithograph Printing*,[69] the Eighth Circuit again took a more expansive view of its powers under Section 1915(d). Although it conceded that indigents have no constitutional or statutory right to counsel in civil cases, the court had "in the past acknowledged the express authority of the district court to make such appointments."[70] Even though the *Nelson* court refused to reverse the decision of the district court denying the appointment of counsel, it underscored the policy on which the circuit had long relied:

> Lawyers have long served in state and federal practice as appointed counsel for indigents in both criminal and civil cases. The vast majority of the bar have viewed such appointments to be integrally within their professional duty to provide public service. Only rarely are lawyers asked to serve in civil matters. We have the utmost confidence that lawyers will always be found who will fully cooperate in rendering the indigent equal justice at the bar.[71]

It was in the midst of this uncertain atmosphere that a dispute arose between a lawyer in a small rural town, and the United States District Court for the Southern District of Iowa.

IV. *MALLARD V. UNITED STATES DISTRICT COURT*

A. *Background*

John Mallard was a thirty-three year old business attorney with the three-lawyer firm of Marcus & Mallard located in Fairfield, Iowa. In June 1987, Mallard was asked to represent two inmates and one former inmate from the Iowa State Penitentiary. The three indigents had sued prison officials under 42 U.S.C. § 1983, alleging that prison guards and administrators had filed false disciplinary reports against them, mistreated them physically, and endangered their lives by exposing them as informants.[72]

Mallard was selected to serve under a system instituted in Iowa in February 1986 upon the urging of the Eighth Circuit.[73] Pursuant to the court's directive, once a district court determined that an indigent party qualified for representation under Section 1915(d), the clerk of courts would forward the case to the Volunteer Lawyers Project ("VLP"), a joint venture of the Legal Services Corporation of Iowa and the Iowa State Bar Association.[74] The VLP had a roster of all attorneys licensed to practice and in good standing in the district,

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68. *Id.*

69. 728 F.2d 1003 (8th Cir. 1984).

70. *Id.* at 1004.

71. *Id.* at 1007 (quoting Peterson v. Nadler, 452 F.2d 754, 758 (8th Cir. 1971)); *see, e.g.*, Whisenant v. Yuam, 739 F.2d 160 (4th Cir. 1984); Ray v. Robinson, 640 F.2d 474 (3d Cir. 1981); Shields v. Jackson, 570 F.2d 284 (8th Cir. 1978).

72. This summary of facts was paraphrased from Montague, *Take This Case for Free . . . or Else*, A.B.A. J. 54, 54 (May 1989).

73. *Nelson*, 728 F.2d at 1005.

74. Mallard v. United States Dist. Court, 109 S. Ct. 1814, 1816 (1989).

and selected lawyers from this list after passing over any attorney who had volunteered for VLP referrals of *pro bono* state court cases.[75]

If an attorney contacted by the VLP objected to the appointment because of time constraints, a grace period of up to one month would allow the attorney to rearrange his caseload. If the attorney expressed concern about a lack of familiarity with the area of the law, a VLP lawyer would explain the resource materials and other support available to assist the attorney. Lawyers who were chosen under the plan could apply to the district court for reimbursement of out-of-pocket costs.[76] They could also keep any fee award provided by statute, but were not guaranteed any compensation under Section 1915(d).[77]

Mallard was to appear before the district court in the case of *Mark Allen Traman v. Steve Parkin.* After reviewing the issues involved, Mallard filed a motion to withdraw, believing himself incompetent to handle the litigation of a Section 1983 action. He asserted that he did not like the "role of confronting other persons in a litigation setting, accusing them of misdeeds, or questioning their veracity."[78] Although Mallard stressed his unfamiliarity with Section 1983 actions, he argued that he should be permitted to withdraw, not because of his inexperience in interpreting the statute and case law, but because he was not a litigation attorney.[79] Instead, he offered to volunteer his services "in an area of the law in which he possessed some expertise, such as bankruptcy, and securities law."[80] A magistrate denied Mallard's motion, and he appealed to the district court. The district court affirmed the magistrate's decision, and expressly ruled that Section 1915(d) "empowers the court to appoint attorneys to represent indigent civil litigants."[81] Mallard then sought a writ of mandamus from the Eighth Circuit Court of Appeals to compel the district court to grant his motion to withdraw the appointment. The circuit court, without opinion, denied the application for mandamus, and the United States Supreme Court granted certiorari.

B. *Majority Opinion: The Plain Meaning of Section 1915(d)*

In a rather terse and narrowly-tailored opinion, Justice Brennan, writing for the majority, reversed the decision of the court below. Refusing to let its analysis stray beyond the language of the statute itself, the majority determined that by using the word "request" in Section 1915(d), Congress did not intend to license the compulsory appointment of counsel in civil cases. The basis for the majority's decision was its holding in *United States v. Ron Pair Enterprises*, in which the Court underscored a guiding principle of constitutional and statutory interpretation: "The plain meaning of the legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce

75. *Id.* at 1816.
76. *Id.* at 1817.
77. *Id.*
78. Brief for Respondent at 3, Mallard v. United States Dist. Court, 109 S. Ct. 1814 (1989) (No. 87-1490).
79. *Mallard*, 109 S. Ct. at 1817.
80. *Id.*
81. Brief for Respondent, *supra* note 78, at 5.

a result demonstrably at odds with the intention of its drafters. In such cases, the intention of the drafters, rather than the strict language, controls."[82] As this part of the analysis will point out, the majority's decision fails under both prongs of the *Ron Pair* test.

The majority began by defining the word "request" according to the meaning commonly given to it by Webster's Dictionary. There, "request" means simply to "ask," "petition," or "entreat."[83] "There is little reason," the Court continued, "to think that Congress did not intend 'request' to bear its most common meaning when it used the word in § 1915(d)."[84] To support its view, the majority contrasted Subsection 1915(d) with Subsection 1915(c), which reads: "The officers of the court *shall* issue and serve all process, and perform all duties in such cases. Witnesses *shall* attend as in other cases and the same remedies shall be available as are provided for by law in other cases."[85] The majority concluded that "Congress evidently knew how to require service when it deemed compulsory service appropriate."[86] The Court's logic, although certainly plausible, is not as conclusive as the majority suggests. An equally valid rationale for Congress' choice of the word "request" is that language any more coercive was not necessary in light of an attorney's preexisting obligation to render service when a court deemed such service necessary.[87]

Moreover, the majority's strict linguistic analysis is unconvincing because it was interpreting those words only as they appeared on paper. A proper analysis would have considered the meaning of the words as spoken from the mouths of the federal judges who are responsible for implementing them. There is little doubt that the word "request" means something completely different when invoked by an acquaintance or a subordinate rather than by one in a position of authority.[88] A court's "request" that an attorney perform some service certainly carries greater persuasive force than if the indigent had made the request himself. Thus, to attempt to construe the plain meaning of "request" outside its intended context imparts a meaning to Section 1915(d) which Congress never intended.

Even if the "plain meaning" of Section 1915(d) were beyond dispute, *Ron Pair* requires that the statutory interpretation not conflict with the clear intent

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82. United States v. Ron Pair Enters., 109 S. Ct. 1026, 1031 (1989); *see also* Landreth Timber Co. v. Landreth, 471 U.S. 681, 687-88 (1985).

83. *Mallard*, 109 S. Ct. at 1818.

84. *Id.*

85. *Id.*

86. *Id.* As recent scholarship makes clear,

> the better comparison is between "shall" in § 1915(c), commanding court officers to perform their normal duties, and "may" in § 1915(d), giving the court discretionary power to request. To compare "shall" to "request," as Justice Brennan did, ignores the sentence structure of the two sections and does not illuminate the meaning of "request," for the statute retains a comprehensible structure whether "request" is read as mandatory or not.

Leading Cases, *Proceedings in Forma Pauperis, 1988 Term*, 103 HARV. L. REV. 384, 390 n.53 (1989).

87. *Powell*, 287 U.S. at 73 (attorney is an officer of court and as such must provide service when required by court).

88. Justice Brennan conceded that " 'request' may double for 'demand' or 'command' when it is used as a noun;" however, he continued, "its ordinary and natural signification when used as a verb was precatory when Congress enacted the provision." *Mallard*, 109 S. Ct. at 1818.

of Congress. The Court, however, could find no clear evidence that Congress intended the verb "request" to be synonymous with the verb "appoint."[89] First the majority dismissed, as inconclusive, the fact that Section 1915(d) was adopted "to keep pace" with the in forma pauperis statutes then in effect in the states.[90] Because the state statutes expressly authorized a court to appoint or assign counsel, "Congress' decision to allow the federal courts to do no more than 'request' attorneys to serve, in full awareness of the more stringent state practices, seems to evince a desire to permit attorneys to decline representation of indigent litigants."[91] However, such reasoning is difficult to reconcile with the express Congressional desire to insure that a party to a diversity suit, suing in a state which authorized the appointment of counsel to indigents, would not be made to suffer by the defendant's removal of the suit to federal court.[92]

The majority minimized the significance of the courts' historical authority to assign counsel to indigents, stating that the "English precedents from the fifteenth to the late nineteenth century, . . . which . . . Congress might have had in mind . . . were equally murky."[93] As it dismissed common-law history as inconclusive, the majority also rejected more modern historical evidence. Rather than reconciling the body of case law which developed within the decade after Section 1915(d) was enacted, it relegated this analysis to a footnote, merely stating that these decisions "certainly do not support this inference. On the contrary, they tell against it."[94] By interpreting Section 1915(d) in a historical vacuum, the Court avoided becoming enmeshed in the policy issues which undergirded the district court's position.

Finally, again falling back on statutory construction, the majority rejected the District Court's contention that if Section 1915(d) only allowed the courts to ask, but not to compel, lawyers to represent indigent litigants, the statute would be rendered a nullity. The District Court reasoned that it was unnecessary to give courts the statutory authorization simply to ask an attorney to represent an indigent. Such a reading of the statute, conferring no coercive power on the federal courts, would be superfluous.[95] The majority, however, responded

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89. A comparison of a federal statute of 1790, Act of Apr. 30, 1790, ch. 9 § 29, 1 Stat. 118 (codified as amended at 18 U.S.C. § 3005 (1982)), the only relevant antecedent statute, with the 1892 Act 28 U.S.C. § 1915, does not reveal, as the majority suggests, that Congress demonstrated a conscious desire to depart from the compulsory language. Although the Act of 1790 does use the word "assign," it also speaks of the defendant's "request" for counsel—a request with which the court is required to comply. Thus, prior to 1892, Congress had used "request" to signify mandatory compliance. Leading Cases, *supra* note 86 at 391.

90. *Mallard*, 109 S. Ct. at 1819 n.4. *See* H.R. REP. No. 1079, 52d Cong., 1st Sess. 1-2 (1892). The House Judiciary Committee reported that "[m]any humane and enlightened states have such a law [allowing actions to proceed in forma pauperis], and the United States Government ought to keep pace with this enlightened judgment." *Id.* at 2.

91. *Mallard*, 109 S. Ct. at 1819. Although the Congress sought to achieve the same ends as the states, there is no evidence that Congress considered, and then rejected, the idea that its statute should exactly mimic the state statutes. Thus, the variance between the language of the federal statute, and that used in some states' statutes should not, in and of itself, be a sufficient reason for the Court to construe Section 1915(d) in direct contradistinction to the state statutes. *See* Leading Cases, *supra* note 86 at 390.

92. H.R. REP. No. 1079, 52d Cong., 1st Sess. 1 (1892).

93. *Mallard*, 109 S. Ct. at 1819.

94. *Mallard*, 109 S. Ct. at 1819-20, n.4.

95. *Id.* at 1821.

that "[s]tatutory provisions may simply codify existing rights or powers."[96] Therefore, Section 1915(d) was to be read only to legitimize a court's power, thereby confronting "a lawyer with an important ethical decision; one need not interpret it to authorize the imposition of sanctions should a lawyer decide not to serve."[97] Such a construction, by necessity, casts doubt on the notion that federal courts are vested with some measure of inherent power.[98]

At the close of its opinion, the majority appeared to concede that its restrictive view of Section 1915(d) in *Mallard* would not lay to rest the confusion and controversy that has characterized judicial interpretation of the statute. The majority understood that certain collateral issues, which they refused to decide in *Mallard*, would again bring Section 1915(d) into the Court's scrutiny. First, the majority emphasized that it did "not mean to question, let alone denigrate, lawyers' ethical obligation to assist those who are too poor to afford counsel, or to suggest that requests made pursuant to Section 1915(d) may be lightly declined because they give rise to no ethical claim."[99] Secondly, the Court refused to express an opinion on the question of whether the federal courts possess inherent authority to compel lawyers to represent an indigent litigant. The majority foreshadowed the decision it may be forced to reach if an attorney declines to serve under Section 1915(d) in the future:

> Although respondent . . . urge[s] us to affirm the court of appeal's judgment on the ground that the federal courts do not have such authority, the District Court did not invoke its inherent power in its opinion below, and the Court of Appeals did not offer this ground for denying Mallard's application for a writ of mandamus. We therefore reserve that question for another day.[100]

Thus it appears that the law, as it relates to Section 1915(d) and, more importantly, to coercive appointments of counsel in civil cases generally, will remain in flux.

V. AN ANALYSIS OF *MALLARD*: THE POLICY BEHIND THE HOLDING

As the dissent in *Mallard* makes clear, "[t]he relationship between a court and the members of its bar is not defined by statute alone. The duties of the practitioner are an amalgam of tradition, respect for the profession, the inherent power of the judiciary, and the commands that are set forth in the canons of ethics, rules of court, and legislative enactments."[101] In addition, the imposition of such a duty upon a nonconsenting attorney raises legitimate constitutional questions which may proscribe a court's power of appointment. This section of the Note will explore these issues, a number of which may be implicit in the majority's opinion, and others of which were omitted from the *Mallard* decision but must certainly be addressed by the Court in the future.

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96. *Id.*
97. *Id.*
98. Brief for Respondent, *supra* note 78, at 5.
99. *Mallard*, 109 S. Ct. at 1822-23.
100. *Id.* at 1823.
101. *Id.*

A. *Constitutional Dimensions*

A central tenet of constitutional jurisprudence requires that when a court is confronted with the choice of deciding a case based on statutory interpretation alone, or looking beyond the statute to decide the underlying constitutional issue, a court will ordinarily construe the statute so as to avoid the constitutional question.[102] In *Mallard*, the Supreme Court was presented with just such a choice. Because a broad view of a court's powers under Section 1915 may have drawn the constitutionality of the statute into question and required the Court to resolve a number of constitutional issues, the Court opted to decide the *Mallard* case on narrow statutory grounds. Therefore, the Court's decision may reflect, to a great degree, its reluctance to become embroiled in constitutional disputes, rather than a decided attempt to strip the courts of any of their authority under Section 1915(d). This section will lay out the constitutional arguments which may have influenced the Court's decision in *Mallard*, and comment as to how these arguments may affect the determination of this issue in the future.[103]

1. *First Amendment Considerations*

It is generally understood that the prohibitions of the first amendment extend beyond the guarantee that an individual shall have the right to speak as he chooses; it also protects an individual's right to associate with others to promote certain causes and ideas, and to be free from coerced association with causes, ideas, and conduct engaged in by others which he finds disagreeable.[104] Thus, on occasion, the first amendment has been invoked by creative lawyers to protect them from entering into certain associations, within the lawyer-client context itself, which they might find to be repugnant. The argument runs as follows: If a lawyer is compelled[105] to represent a client who holds values and beliefs which are offensive to the attorney, and the attorney is forced to associate with, and adopt the views of this individual, then counsel is being compelled

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102. Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936). In *Ashwander*, the Court stated that "[w]hen the validity of an act of Congress is drawn in question, . . . it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Id.* at 348-49.

103. Mallard's brief raises a questionable equal protection argument, and thus it will not be discussed in detail in the text. Nevertheless, the Court might have felt compelled to address this issue if it decided to interpret Section 1915(d) more expansively. In essence, Mallard argued that the list of attorneys relied on by the VLP did not include the names of every attorney practicing law in Iowa, thus those whose names appeared on the list would be required to carry a disproportionate burden of the Section 1915 cases. However, attorneys do not constitute a suspect class, and therefore the argument is easily disposed of because the state need only have a rational basis on which to support such appointments. *See* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam); Morey v. Doud, 354 U.S. 457, 463-65 (1957).

104. *See* PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980). *See, e.g.*, Cousins v. Wigoda, 419 U.S. 477, 487 (1975); NAACP v. Button, 371 U.S. 415, 431 (1963).

105. In order for this argument to have any validity, the attorney must be "compelled" to represent a client under a penalty of forfeiture of the attorney's admission to practice before the bar. This theory is based on the presumption that the government cannot condition a benefit on the relinquishment of a constitutional right. *See, e.g.*, Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (admission to state bar may not be conditioned upon the surrender of a first amendment right to advertise services and fees); Baird v. State Bar of Arizona, 401 U.S. 1, 5-6 (1971) (admission to state bar may not be conditioned upon an individual's beliefs).

to espouse ideas and associate with individuals, contrary to the dictates of his conscience. To be sure, the first amendment does not contemplate such an interference with an individual's freedom of association or speech. Its guarantees apply to attorneys and non-attorneys alike, even though lawyers have been traditionally advised that they should advocate a client's cause even if disagreeable with his personal beliefs.[106]

However, in order to act in the client's best interests, the lawyer must often adopt, at least in part, the mind-set of the client. Thus when an attorney is compelled by a court to embrace the views of another, the government's decree may well be at odds with the attorney's conscience, and first amendment guarantees are clearly put in jeopardy.[107]

This argument loses much of its force when the attorney is being compelled to advocate on behalf of a client with whom he only mildly disagrees. Unlike the situation where an attorney is required to represent a client whose views he finds obnoxious, the attorney who simply cannot identify with his client's opinion is not presented with a similar crisis of conscience. In such a case, it is unlikely that the attorney would have to adopt the beliefs of the client, but need only act as an advocate on his behalf.[108] Therefore, the state's interest in ensuring equal access to the justice system, and maintaining the character of its bar is certainly compelling enough to outweigh any first amendment interests claimed by counsel.[109] By accepting a license to practice law, the lawyer has, in effect, consented to accepting certain duties and obligations to which the lay population in general is not subject.[110] Thus, neither the courts nor counsel should lightly regard a lawyer's attempt to forsake a professional duty on the basis of an ambiguous first amendment protection.

In *Mallard*, the petitioner raised the first amendment challenge in his brief, arguing that requiring counsel to represent an indigent "necessarily requires the exercise of his speech (i) against his will (in light of his belief that he is not competent to undertake the representation) and (ii) in a manner that is contrary to his good conscience (in light of his dislike for confrontational and accusatory speech)."[111] However, these allegations alone do not appear to be enough to support a first amendment violation. Mallard was not being forced to adopt a belief which he found personally abhorrent; he merely claimed that he disliked litigious situations (a shaky foundation on which to build a first amendment claim, considering Mallard personally represented himself throughout

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106. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-26 to 2-29; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15(a) (1980) ("A lawyer's representation of a client, whether by retainer or appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.").

107. Baird v. Arizona, 401 U.S. 1, 7-8 (1971) (state cannot inquire into individual's beliefs, views or associations "to lay a foundation for barring an applicant from the practice of law").

108. Advocacy and belief are distinct in the sense that the tradition of the lawyer's profession strongly urges the lawyer to represent a client regardless of the lawyer's personal beliefs. In order to be an effective advocate, a lawyer need not always personally accept the client's views or beliefs. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-26 to 2-29.

109. *See* Lathrop v. Donohue, 367 U.S. 820 (1961) (payment of $15.00 as a condition of practicing law did not violate first amendment).

110. United States v. Dillon, 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

111. Brief for Petitioner at 3, Mallard v. United States Dist. Court, 109 S.Ct. 1814 (1989) (No. 87-1490).

every stage of this lawsuit). If an attorney could escape the representation of a client in this type of situation, it is difficult to conceive of any situation in which the first amendment would not be implicated. It is doubtful that the federal courts would want to open such a Pandora's Box.

2. *Fifth Amendment Considerations*

Constitutional scholars have recognized that the fifth amendment's takings clause may provide an obstacle to a court's appointment of counsel in a civil case.[112] This argument rests on the premise that a requirement of service, with or without financial alternative, might constitute a taking without just compensation.[113]

In order for this argument to have any merit, it must first be demonstrated that an attorney's professional services constitute "property" within the meaning of the fifth amendment.[114] In *Willner v. Committee on Character and Fitness*,[115] the Supreme Court held that "[a] State cannot exclude a person from the practice of law . . . in a manner or for reasons that contravene the Due Process Clause."[116] Because the government is only required to provide due process protections when a property interest or a liberty interest is taken away, it is evident that the Court equated the license to practice law with a protected property interest in the due process context. However, this rationale has not been extended to fifth amendment cases.[117] Even if an attorney's license to practice law is considered a compensable property interest, the question remains as to whether an attorney's personal services are a property interest protected under the fifth amendment. Like a license to practice law, the Supreme Court has never held that an attorney's services, alone, are a compensable property interest. However, a number of lower courts have held that a professional who is compelled to perform uncompensated services has suffered a taking because the government has forced him to expend his time, experience and skills—attributes which the courts considered to be "the professional's stock in trade."[118] Because

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112. *See generally* Stevens, *Forcing Attorneys to Represent Indigent Civil Litigants: The Problems and Some Proposals*, 18 U. MICH. J.L. REF. 767 (1985). Unlike some scholars, the courts have not been so receptive of this novel legal theory; *see, e.g.*, Hurtado v. United States, 410 U.S. 578 (1973); *Dillon*, 346 F.2d 633.

113. Shapiro, *supra* note 2, at 771; *see* U.S. CONST. amend. V ("private property may not be taken for public use, without just compensation").

114. An attorney's professional services can only be considered a taking if the appointment interferes with "reasonable, investment-backed expectations." United States v. Locke, 471 U.S. 84, 107 (1985); Andrus v. Allard, 444 U.S. 51, 65-66 n.21 (1979); *see also* Hodel v. Irving, 481 U.S. 704, 715 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 499 (1987).

115. Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963).

116. *Id.* at 102.

117. *See, e.g.*, Lathrop v. Donohue, 367 U.S. 820, 865 (1961) (license to practice law a privilege, not compensable property interest); Ruckenbrod v. Mullins, 102 Utah 548, 558-62, 133 P.2d 325, 330-31 (1943).

It is important to note that the Court found the license to practice law to be a property interest which could not be taken without due process, but not property within the compensation clause of the fifth amendment. *See also* Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

118. Green, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 385 (1981); *see also* Weiner v. Fulton County, 113 Ga. App. 343, 148 S.E.2d 143, *cert. denied*, 385 U.S. 958 (1966); State *ex rel.* Partain v. Oakley, 159 W. Va. 805, 227 S.E.2d 314 (1976) (taking if appointment denies attorney the opportunity to maintain remunerative practice); Bias v. State, 568 P.2d 1269 (Okla. 1977); People *ex rel.* Conn v. Randolph, 35 Ill. 2d 24, 219 N.E.2d 337 (1966); State v. Green, 470

Mallard's license to practice law was not put in jeopardy, but rather he was only required to surrender a portion of his services in exchange for the privilege of practicing law, his fifth amendment claims are open to doubt.[119]

The characterization of services as property is simply the threshold inquiry in establishing an uncompensated taking under the fifth amendment. In addition, it must be demonstrated that the government's requirement of coerced representation constitutes a "taking" of private property[120] and not just a noncompensable "regulation."[121] A regulation has been defined as a restriction on a socially undesirable use of one's property, while a "taking" constitutes an affirmative appropriation, or physical acquisition, of property.[122] One scholar has argued that a taking can only be justified where the burdens and benefits of the appropriated services are equally distributed, and where there was an average reciprocity of advantage.[123] Thus where one is called on by the government to perform a service—appearing as a witness at trial for example—the taking will be justified because it promotes the public interest (the administration of justice), and gives rise to a reciprocal right in the property owner (the right to call upon others to appear as witnesses at his own trial).[124] The validity of the argument also rests on the assumption that the obligation falls equally upon all citizens and does not create economic hardship.[125] This commentator thus concludes that court-appointed attorneys "enjoy reciprocal advantages from the state that justify a denial of compensation under the takings clause."[126]

Therefore, if Mallard did indeed suffer a "taking," under the circumstances of this case, it was probably justified. He derived substantial economic benefit from the profession, and was expected to contribute something of equal value. Additionally, Mallard knew upon entering the legal profession that the Iowa Bar would expect him to devote a certain amount of his time and skill to

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S.W.2d 571 (Mo. 1971) (where burden is more than profession should shoulder); Honore v. Washington State Bd. of Prison Terms & Paroles, 77 Wash. 2d 660, 466 P.2d 485 (1970) (extremely heavy and time-consuming burden). *See, e.g.*, Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Konigsberg v. State Bar, 353 U.S. 252 (1957). *Schware* and *Konigsberg* were not truly "takings" cases, but instead dealt with the definition of property under the due process clause. In that context, the practice of law was viewed as a protectable property interest, and unreasonable standards for admission to the bar were struck down as violating an attorney's due process rights.

119. In order to conclusively establish a protectable property interest within the meaning of the fifth amendment, it is necessary to show: (1) a reasonable expectation that legal services are property for private use only, and (2) that compulsory representation without compensation is not fair. *See generally*, Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 124-25 (1978). It is equally unlikely that Mallard's services would be considered property under this test.

120. An attorney's consent to provide representation obviates the need to construe the appointment under the takings clause. An application for membership to the bar has been construed as consent to appointment. Lewis v. Lane, 816 F.2d 1165, 1168-69 (7th Cir. 1987); Family Div. of Trial Lawyers v. Moultrie, 725 F.2d 695, 705 (D.C. Cir. 1984); Branch v. Cole, 686 F.2d 264, 266-67 (5th Cir. 1982).

121. Green, *supra* note 118, at 386.

122. *Id.*

123. *Id.* at 387.

124. *Id.* (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)). *See also* Penn Cent. Transp. Co. v. New York, 438 U.S. 104 (1978) (no taking where there is exchange of benefits).

125. *Id.*

126. *Id.* at 388. The economic benefit of the monopoly to practice law offsets the burden of accepting court appointments. *Id. See also Penn Cent. Transp. Co.*, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd* 438 U.S. 104 (1978); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969).

public service.[127] As such, the government has simply required Mallard to perform a civic obligation owed by a citizen to his government, and has not "taken" property within the meaning of the fifth amendment.[128]

3. *Thirteenth Amendment Considerations*

The thirteenth amendment states that "[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."[129] This amendment was ratified after the Civil War with the primary object of abolishing slavery.[130] Although the Court has hinted that the thirteenth amendment extends beyond the abolition of slavery as an institution,[131] such an expansion has been restricted to situations where there is some type of forced service, or where labor is compelled by law, or by threat of continued confinement, and where the individual is left with no alternative but to perform the service, or suffer an equally oppressive loss of liberty.[132] Thus, in *Flood v. Kuhn*, the Second Circuit held that the thirteenth amendment is not violated when an individual is threatened with the loss of employment, because the individual is free to seek other, even unrelated, forms of employment.[133] Therefore, in cases of coerced appointments of counsel in civil cases, an attorney could argue that a compulsory appointment would violate the thirteenth amendment's proscription against involuntary servitude; however, because counsel is not presented with a choice of complying with the court order, or facing confinement, or another equally egregious loss of liberty, the thirteenth amendment will most likely not be implicated. In fact, the Fifth Circuit, in *White v. United*

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127. Nelson v. Redfield Lithograph Printing, 728 F.2d 1003 (8th Cir. 1984) (quoting Peterson v. Nadler, 452 F.2d 754, 758 (8th Cir. 1971)); *see also* Powell v. Alabama, 287 U.S. 45 (1932). *Powell* cannot be distinguished on the ground that it was a criminal case and this is a civil case, because "if a requirement of uncompensated service in a criminal case does not constitute a 'taking' . . . then it cannot be said categorically that such violations exist in civil appointments. The two kinds of cases differ in degree but not in quality. State *ex rel.* Scott v. Roper, 688 S.W.2d 757, 773 (Mo. 1985). Under the ethical rules, an attorney should anticipate that a portion of his services will be directed toward the public welfare. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-29 (1980) (ethical obligation to accept *pro bono* appointments absent compelling reasons). *Accord* MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 (1984).

128. Hurtado v. United States, 410 U.S. 578 (1973). *See* United States v. Dillon, 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966), where the court considered the claim of an attorney appointed to represent a prisoner under 28 U.S.C. § 2255 (1984) who claimed that such representation required compensation under the fifth amendment. The court rejected this argument, noting that

> An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a "taking of his services."

Id. at 635.

129. U.S. CONST. amend. XIII.

130. The Civil Rights Cases, 109 U.S. 3 (1883).

131. Pollock v. Williams, 322 U.S. 4 (1944).

132. *See* United States v. Shackney, 333 F.2d 475 (2d Cir. 1964).

133. Flood v. Kuhn, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972); *but see In re* Nine Applications for Appointment of Counsel in Title VII Proceedings, 475 F. Supp. 87 (N.D. Ala. 1979), (assignment of counsel may violate thirteenth amendment; attorney has no responsibility to court or to public and state cannot exact such duty).

States Pipe & Foundry Co., held that the involuntary appointment of counsel could never form the basis of a thirteenth amendment claim.[134] The court reasoned that, because lawyers owe certain obligations to the courts and to the public, the lawyer's public duty overrides any constitutional challenge. The court equated the claim of "involuntary servitude" under the thirteenth amendment with a nonconsenting attorney's claim that compulsory representation imposes a "servitude" under the fifth amendment.[135] Because it was clear that an appointment of counsel in a civil case will not constitute a "taking" without just compensation, it is "highly improbable that a thirteenth amendment attack . . . can ever be sustained."[136]

Further undermining any thirteenth amendment claim is the "public duty" exception created by the courts. Under this doctrine, the government has a recognized right to compel citizens to render public service, even when the compulsion amounts to involuntary service. An obvious example is the government's right to compel military service.[137] The government can legislate on those matters which are in the interests of the health, safety, and welfare of its citizens, and by so doing, define what is in the public's interest, giving rise to corresponding public duty.[138] Because Congress believed that access to the judicial system was of critical concern to its citizens, it enacted Section 1915(d), and by so doing, imposed a duty upon the legal profession. Therefore, it is doubtful that a court would entertain an objection to Section 1915(d) based on the thirteenth amendment. Nor is it likely that the Supreme Court had this argument in mind when it decided *Mallard*. It nevertheless raises interesting questions over which scholars and commentators will continue to debate.

B. *The Nature of the Profession and the Lawyer's Ethical Duty*

"The practice of law is distinguished from an ordinary occupation in business or trade by its high standards of conduct and commitment to public service."[139] For attorneys, the pursuit of a livelihood is only incidental to the primary reason for singling out the legal profession from a number of other professions which also require a significant amount of education and training,[140]

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

135. *Id.* at 205 n.3.

136. *Id.*

137. Selective Draft Law Cases, 245 U.S. 366, 373 (1918) (thirteenth amendment not intended to "destroy the power of the government to compel citizens to public service").

138. Green, *supra* note 118, at 381.

139. Brief for Respondent, *supra* note 78, at 26; R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953). *But see* Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 UCLA L. REV. 438 (1965) (lawyers, like grocers or housebuilders, should not be required to provide free stock in trade to needy); Note, *The Uncompensated Appointed Counsel System: A Constitutional and Social Transgression*, 60 KY. L.J. 710 (1972).

140. Opponents of mandatory *pro bono* argue that the state cannot require them to provide valuable resources unless similar burdens are imposed on doctors, dentists, educators, accountants and other professionals. C. WOLFRAM, MODERN LEGAL ETHICS, 953 (1983). However, unlike these other professions, a lawyer's relationship with society is defined by the Constitution—explicitly, in its recognition of a constitutional right to counsel, U.S. CONST. amend. VI, and implicitly—through the preeminent status given to the concepts of justice, due process, and fair trial. *See* U.S. CONST. amend. V, XIV; *see also* U.S. CONST. preamble.

namely, the "[p]ursuit of the learned art in the public service."[141] Counsel's obligation to advance the cause of justice was best articulated by Justice Cardozo:

> Membership in the bar is a privilege burdened with conditions . . . . The [attorney] appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, is an instrument or agency to advance the ends of justice. His co-operation with the court was due whenever justice would be imperiled if co-operation was withheld. He might be assigned as counsel for the needy, in causes criminal or civil, serving without pay.[142]

Although the new Model Rules of Professional Conduct[143] rejected the imposition of a general duty for all lawyers to render *pro bono* service—instead opting to use more permissive language—in certain circumstances counsel is strongly urged to accept its obligation to render unpaid service. The Canons of Professional Ethics,[144] The Model Code of Professional Responsibility,[145] and The Model Rules of Professional Conduct[146] all recognize counsels' professional obligation to serve when requested to do so by a court. While the Canons speak only of appointments to represent indigent prisoners, the Code and Model Rules both speak of appointments to represent indigents generally.

The Iowa Code of Professional Responsibility imposes similar duties upon attorneys, and in certain circumstances compliance with the Iowa Code requires

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141. R. POUND, *supra* note 139, at 5.

142. People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 470-71, 162 N.E. 487, 489 (1928).

143. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1989) states:

> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improvement of the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

144. CANONS OF PROFESSIONAL ETHICS, Canon 4 (1908) ("A lawyer assigned as counsel to an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts on his behalf.").

145. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-29 (1980) reads as follows:

> When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of the person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the case.

(footnotes omitted). *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25 (1980) (rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, and every attorney should support all proper efforts to meet this need for legal services).

146. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 (1989), Accepting Appointments:

> A lawyer shall not seek to avoid appointment by a tribunal to represent persons except for good cause, such as:
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> (a) representing the client is likely to result in the violation of the Rules of Professional Conduct or other law;
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> (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
>
> (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 comment (1984) ("The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer."); *but see* Iowa Code of Professional Responsibility, DR 6-101(A)(1), IOWA CODE ANN. § 602 app. A (West 1988) ("A lawyer shall not: (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.").

that an attorney do more than come to grips with some personal moral or ethical dilemma.[147] Although the Iowa statute imposes only an ethical consideration, and not any express disciplinary sanctions, the Iowa courts have made the violation of an ethical consideration, standing alone, grounds for disciplinary action.[148] In *Committee on Professional Ethics and Conduct v. Behnke*, the Iowa Supreme Court held that "[a]ll lawyers practicing before this court are bound by the canons . . . . They are not free to view them merely as aspirational."[149] By failing to take into account the lawyer's ethical responsibilities, which are encouraged under the professional codes, and made mandatory under Iowa law, the Supreme Court in *Mallard* trivializes both the lawyer's professional and ethical duties, and the court's ability to encourage compliance.[150] Surely, when Congress enacted Section 1915(d), it did not, at the very least, intend it to be an instrument which would allow lawyers to evade their ethical obligations. However, that appears to be a possible consequence of *Mallard*.[151]

Certain commentators have suggested that a policy of dragooning lawyers into service of indigents will neither advance the cause of the indigent, nor that of the profession generally.[152] Instead, critics contend, such a system will work an injustice on indigents, while at the same time placing a substantial financial and professional burden on the attorney. Some also suggest that a mandatory standard would be demeaning to an attorney's professional status,[153] and that

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147. Iowa Code of Professional Responsibility, EC 2-27, IOWA CODE ANN. § 602 app. A (West 1988) ("Every lawyer, regardless of professional prominence or professional workload, should find the 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." (emphasis added)). *See also* IOWA CODE ANN. § 602.10112(7) (West 1988) (each lawyer, upon admission to the bar, must agree "never to reject for any consideration personal to the attorney or counsellor the cause of the defenseless or oppressed").

148. Committee on Professional Ethics & Conduct v. Behnke, 276 N.W.2d 838 (Iowa 1979) (*app. dismissed*, 444 U.S. 805 (1979)).

149. *Id.* at 840 (quoting *In re* Frerichs, 238 N.W.2d 764, 769 (Iowa 1976)). In addition, the Iowa courts have disciplined attorneys for violations of ethical considerations in at least six other cases, including Committee on Professional Ethics & Conduct v. Wilson, 270 N.W.2d 613 (Iowa 1978); Committee on Professional Ethics & Conduct v. Baker, 269 N.W.2d 463 (Iowa 1978); Committee on Professional Ethics & Conduct v. Sloan, 262 N.W.2d 262 (Iowa 1978); Committee on Professional Ethics & Conduct v. Tommey, 253 N.W.2d 573 (Iowa 1977); Committee on Professional Ethics & Conduct v. Bromwell, 221 N.W.2d 777 (Iowa 1977); *In re* Frerichs, 238 N.W.2d 764 (Iowa 1976).

150. *See* Branch v. Cole, 686 F.2d 264 (5th Cir. 1982). In *Branch*, the court expressed concern about a district court's "inability to find counsel willing to take appointments in civil rights actions." *Id.* at 266. It hoped that this occurrence was "incorrectly perceived, or that it did not represent a common condition in trial courts." *Id.* In the court's opinion, "[a]ttorneys admitted to practice in the federal courts . . . are or ought to be bound in the discharge of their duties as court officers by ethical precepts similar to those set out in the American Bar Association's Model Code of Professional Responsibility." *Id.* at 266-67. The court then proposed a solution: "If the court continues to have difficulty in obtaining voluntary service of counsel despite their ethical responsibilities, it may wish to limit the compensated practice by members of its bar to those willing to accept their share of indigent cases." *Id.* at 267. *See also* Rhodes v. Houston, 258 F. Supp. 546, 579 (D. Neb. 1966), *aff'd*, 418 F.2d 1309 (8th Cir. 1969), *cert. denied*, 397 U.S. 1049 (1970) (*Pro bono publico* work by attorneys is an established tradition and part of counsel's professional duty).

151. Had counsel been incompetent or unable, for legitimate reasons, to prepare his client's case, his ethical obligation of representation vanishes. In fact, the attorney has a legal obligation to decline representation. *See* Easley v. State, 334 So. 2d 630 (Fla. Dist. Ct. App. 1976); State v. Gasen, 2 Ohio App. 3d 156, 356 N.E.2d 505 (1976); Chaleff v. Superior Court, 69 Cal. App. 3d 721, 138 Cal. Rptr. 735 (1977).

152. *See* C. WOLFRAM, MODERN LEGAL ETHICS 952-53 (1986).

153. *See* Sundberg, *Professional Duty and Pro Bono*, 55 FLA. B.J. 502 (1981). Along these lines opponents of mandatory appointment point to the unavoidable consequences of such a system; namely, the transfer of wealth,

those attorneys who do not cherish the high ideals of the profession should simply do something else for a living.[154] Even though it is true that a mandatory system of appointing counsel to serve the indigent is less than ideal, such a system exists because the traditional system has failed.[155] As the former President of the American Bar Association so aptly recognized, "No lawyer should accept the profession as it is. The law and the profession are dynamic; they are constantly changing to meet society's needs. Indeed, it seems that the lawyers who accept the profession's status quo do it little justice, while those who seek to improve it bring it the greatest honor."[156] Therefore, the lawyer turns his back on the tradition and ideals of his profession when he defers to society or the government to cure the ills of a system which he swore to uphold.[157]

Because lawyers have control over a valuable resource—namely, the ability to gain access to the courts—a system must exist which ensures that each member of society will have access to those tribunals, even if it means that each side must give something up in the process.[158] If the legal profession does not address society's needs, those in need of legal assistance will be forced to turn to other sources, thus reducing the autonomy that the profession currently enjoys.[159]

C. *The Judiciary's Inherent Authority*

The Supreme Court has recognized that the federal courts "are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, decorum in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers

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either from the lawyer personally or, if the lawyer is able to transfer its burdens to other clients through higher fees, from paying clients. *See also* G. HAZARD, ETHICS IN THE PRACTICE OF LAW 87-88 (1978).

154. Smith, *A Mandatory Pro Bono Service Standard—Its Time Has Come*, 35 U. MIAMI L. REV. 727, 734 (1981).

155. For an analysis of the need for the assistance of lawyers in general, *see* A.B.A. FINAL REPORT OF THE SPECIAL COMMITTEE TO SURVEY LEGAL NEEDS (1978).

156. Smith, *supra* note 154, at 734.

157. Fried, *The Lawyer as Friend: The Moral Foundation of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1079 (1976). Fried contends that "[i]f the lawyer is really to be impressed to serve these admitted social needs, then his independence and discretion disappear, and he does indeed become a public resource cut up and disposed of by the public's needs. There would be no justice to such a conception." *Id.*

158. *See also* H. DRINKER, LEGAL ETHICS 59 (1953) ("In recognition of these exclusive privileges the lawyer is charged with certain obligations to the public . . . [including the duty] to represent without charge those unable to pay.").

159. *Id.* It has become increasingly apparent that the legal profession is losing monopolistic foothold in the legal services market. *See, e.g.*, State Bar v. Cramer, 399 Mich. 116, 123, 249 N.W.2d 1, 2 (1976) ("do-it-yourself" divorce kits). In *Cramer*, Justice Williams predicted that laymen would increasingly continue to encroach on the legal profession's monopoly to practice law unless the organized bar acts to "make skilled professional services available to those who have reasonable need for them." *Id.* at 140, 249 N.W.2d at 10 (Williams, J., concurring). *See also* Colorado Bar Ass'n v. Miles, 192 Colo. 294, 557 P.2d 1202 (1976); *In re* Thompson, 574 S.W.2d 365 (Mo. 1978); Florida Bar v. Peake, 364 So. 2d 431 (Fla. 1978); Palmer v. Unauthorized Practice Committee of the State Bar of Texas, 438 S.W.2d 374 (Tex. Civ. App. 1969).

In one case, Florida Bar v. Furman, 376 So. 2d 378 (Fla. 1979), *appeal dismissed*, 444 U.S. 1061 (1980), where a legal secretary gave legal advice to individuals seeking divorce, the secretary's attorney proposed the innovative, and perhaps inevitable, legal theory that the state may not constitutionally deny access to the legal system to those unable to pay for matters such as divorce. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971); Johnson v. Avery, 393 U.S. 483 (1969).

from the approach and insults of pollution."[160] As such, the federal courts have the inherent authority to exercise those "powers necessary to protect the functioning of its own processes."[161] The inherent judicial power of the federal courts is derived from the very fact that the courts have been created and charged by the Constitution and Congress with certain duties and powers, not authorized by statute.[162]

More specifically, the Supreme Court has held that a federal court's inherent authority to regulate the conduct of counsel and the bar is derived from the lawyer's role as an officer of the court and the court's duty to control the proceeding before it.[163] In essence, the rationale of these decisions relies on the fact that as an officer of the court,[164] the attorney, like the court itself, is an instrument used to advance the cause of justice.[165] Justice in its most basic form requires, at least, that both parties to a dispute are effective advocates of their causes,[166] and that the parties confront one another in the context of the adversarial system. Thus, as the Court pointed out in *Penson v. Ohio*,[167] "The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well tested principle that truth—as well as fairness—is 'best discovered by powerful statements on both sides of the question.' "[168] Because the courts function in this role, they

160. Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 820-21 (1987) (Scalia, J., concurring) (quoting Anderson v. Dunn, 6 Wheat. 204, 227 (1821)).

161. *Vuitton et Fils*, 481 U.S. at 821 (Scalia, J., concurring). There, the Court upheld a district court's power to appoint a private attorney to prosecute a criminal contempt action arising out of a civil case then before the court. Although the execution of the criminal law is generally a function in which only the executive branch may engage, the Court held that the "initiation of contempt proceedings to punish disobedience to court orders is a part of the judicial function" and hence, appointment of private attorneys is within the court's inherent power. *Id.* at 795. The Court has defined the inherent powers of the federal courts as those which are "necessary to the exercise of all others." United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812). Simply stated, these powers are those that the court can call upon to aid in the exercise of its jurisdiction, the administration of justice, and the preservation of its independence and integrity. United States v. Scholnick, 606 F.2d 160, 166 (6th Cir. 1979); State *ex rel.* Gentry v. Becker, 351 Mo. 769, 777, 174 S.W.2d 181, 183 (1943); People v. Cirillo, 100 Misc. 2d 527, 531, 419 N.Y.S.2d 820, 824 (Sup. Ct. 1979). *See, also e.g.*, Michaelson v. United States, 266 U.S. 42 (1924) (power of contempt essential to administration of justice); Cooke v. United States, 267 U.S. 517 (1925) (power of contempt essential to protecting orderly administration of justice and maintaining authority of court).

162. Richey, *A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to be Submitted in Written Form Prior to Trial*, 72 GEO. L.J. 73, 75 (1983).

163. *See* Barnard v. Thorstenn, 489 U.S. 546 (1989); Frazier v. Heebe, 482 U.S. 641 (1987); United States v. Hvass, 355 U.S. 570 (1958); *In re* Snyder, 472 U.S. 634 (1985); *Ex Parte* Garland, 71 U.S. (4 Wall.) 333 (1867); Theard v. United States, 354 U.S. 278 (1957); *see also* Powell v. Alabama, 287 U.S. 45 (1932).

164. There is some dispute as to whether an attorney is truly an "officer of the court" under the English conception of that term. At least one scholar has suggested that it is inaccurate to characterize American lawyers as officers of the court. Unlike the English "attorney," who was nothing more than a part of the court's clerical staff, the American attorneys do not merely possess ministerial duties, nor do they have such an "employer-employee" relationship with the court. Rather, the American attorney more closely resembles the English "barrister," who defended and pleaded lawsuits, and had no duty to the courts which arose by the nature of their relationship, but only from their duty to the King's courts. Green, *supra* note 118, at 374.

165. Rowe v. Yuba County, 17 Cal. 61, 63 (1860); People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 470-71, 162 N.E. 487, 489 (1928); Theard v. United States, 354 U.S. 278, 281 (1957).

166. Maguire, *supra* note 10.

167. Penson v. Ohio, 488 U.S. 75 (1988).

168. *Id.* at 352 (quoting Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A. J. 569, 569 (1975) (quoting Lord Eldon)).

must of necessity have the inherent authority to require the services of counsel, if in the absence of counsel, justice would be denied.[169]

It cannot be doubted that the federal courts have the authority to appoint counsel in criminal cases. In *United States v. Accetturo*, the Third Circuit expressed its concern that the courts' "responsibility for the administration of justice would be frustrated were it unable to enlist or require the services of those who have, by virtue of their license, a monopoly on the provision of such services. Attorneys who have a privilege of practicing before the court have a correlative obligation to be available to serve the court."[170] Even though *Accetturo* was a criminal case, the court's focus was not on the litigant's constitutional right to counsel, but on the "symbiotic relationship between the court and the attorneys who are members of the bar."[171] It is only by maintaining the integrity of this relationship that the courts can ensure that fairness will define the adversarial process. In either a criminal or civil dispute, the same goals of fairness to the litigant and the proper resolution of the controversy trigger the court's authority to require the services of counsel. Thus the court's inherent authority cannot be circumscribed according to the nature of the dispute before it, but exists independent of such labels, and applies by necessity to all cases where fairness is threatened.[172]

While the Supreme Court has never addressed the relationship between the courts' inherent powers, and the power conferred upon it by Section 1915(d), the Fourth Circuit has taken this step. In *Bowman v. White*, the Fourth Circuit held that Section 1915(d) "is merely descriptive of the court's inherent power."[173] Thus, it is clear that Section 1915(d) does not operate as a constraint on that power, but as the majority in *Mallard* so readily pointed out, it "simply codifies existing rights and powers."[174] It is unlikely that Congress, if it was merely codifying the existing powers of the federal judiciary, meant to exclude its inherent authority over the bar.

Even if it were assumed that the federal courts did not possess inherent authority to control the proceeding before it by appointing counsel to indigent litigants, it must be acknowledged that the district courts have the discretion to adopt local rules that are necessary to carry out the conduct of its business.[175]

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169. *See* Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985). In *Piper*, Justice Powell reasoned that "a nonresident bar member, like the resident member, could be required to represent indigents and perhaps to participate in formal legal aid work." *Id.* at 287. *See also* People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 470-71, 162 N.E. 487, 489 (1928); Tyler v. Lark, 472 F.2d 1077 (8th Cir. 1972) (inherent power to do that necessary to administer justice).

170. United States v. Accetturo, 842 F.2d 1408, 1413 (3d Cir. 1988).

171. *Id.*

172. People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928) (cooperation is due whenever justice would be imperilled if withheld).

173. Bowman v. White, 388 F.2d 756, 761 (4th Cir. 1968).

174. Mallard v. United States Dist. Court, 109 S. Ct. 1814, 1821 (1989).

175. *See* 28 U.S.C. §§ 1654, 2071 (1984). *See also* FED. R. CIV. P. 83, which states:

> Each district court by action of a majority of the judges thereof may from time to time . . . make and amend rules governing its practice not inconsistent with these rules. . . . Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the . . . [Supreme Court of the United States]. In all cases not provided for by rules, the district [courts] . . . may regulate their practice in any manner not inconsistent with these rules.

This authority includes the regulation of admissions to its own bar, and the ability to control the practice of counsel in order to ensure the proliferation of "principles of right and justice."[176]

The Advisory Committee on the Federal Rules of Civil Procedure found that the regional courts must be given the authority to fill in the interstices in the Federal Rules, depending on each court's individual needs. Local rules have been viewed as essential tools in implementing court policy in administrative matters. Courts differ from most organizations in that they rely heavily on outsiders, especially the bar, in their operations. Particularly in matters affecting the management of case flow, the court's policies directly involve the lawyers who practice before it.[177] Pursuant to its discretion under Rule 83, and upon a directive from the Eighth Circuit Court of Appeals,[178] the United States District Court for the Southern District of Iowa implemented the Volunteer Lawyers Project, whereby the clerk of court was ordered to prepare a list of attorneys from which appointments were to be made in *pro bono* cases under Section 1915(d). Such a rule, based on the court's concern that there were an insufficient number of attorneys willing to serve in *pro bono* cases, and that many judges were reluctant to request lawyers to appear, was promulgated to solve a problem left unanswered by the Federal Rules. This was the precise type of ad hoc rule-making which the framers of Rule 83 envisioned. Viewed apart from the intricacies associated with the *Mallard* case and Section 1915(d) in general, the Iowa court's response to the problem of representation seems to be "in accordance with general principles of justice and common sense."[179] Given the broad discretion accorded to the district courts in the exercise of rule-making, and the substantial deference given those rules by the Supreme Court,[180] Mallard's appointment under the Volunteer Lawyers Project should have been upheld by the Supreme Court.

VI. CONCLUSION

Because of the significant questions left unanswered by the Supreme Court in *Mallard*, the Court will most assuredly revisit the issue of the scope of a court's power to appoint counsel in civil cases in the near future. Even though the Court refused to construe the statute in the context of the history behind the

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Id.

176. Frazier v. Heebe, 482 U.S. 641, 645 (1987); *see also In re* Ruffalo, 390 U.S. 544, 554 (1968) (White, J., concurring) (citation omitted).

177. Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation, or Information?* 14 LOY. L.A.L. REV. 213, 218-19 (1981).

178. Nelson v. Redfield Lithograph Printing, 728 F.2d 1003 (8th Cir. 1984).

179. Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251, 1253-55 (1967) (quoting A.B.A., *Federal Rules of Civil Procedure, Proceedings of the Institute at Washington and of the Symposium at New York City* 28, 129 (1938).

180. *Frazier*, 482 U.S. at 654 (Rehnquist, C.J., dissenting) (1987). In his dissent to *Frazier*, Chief Justice Rehnquist outlined the standards to be applied to Supreme Court review of local rules. In order for a local rule to be overturned, the Court must find (1) the rule conflicts with an act of Congress; (2) the rule is contrary to a rule of procedure promulgated by the Supreme Court; (3) the rule is constitutionally infirm; or (4) the subject matter of the rule is not within the power of a lower federal court to regulate. *Id.* Applying these standards to the rule at issue in *Mallard*, it is certain that, if applied, it would meet the strictures of the *Frazier* test.

Act, the courts' inherent authority, or the lawyers' ethical obligations, it appears prepared to address those issues. At that time the courts, if not through Section 1915(d) itself, will undoubtedly be given the authority to remedy the problem Congress thought it had resolved in 1892.

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