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## Coercive Appointments of Counsel in Civil Cases in Forma Pauperis: An Easy Case Makes Hard Law

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# COERCIVE APPOINTMENTS OF COUNSEL IN CIVIL CASES *IN* *FORMA PAUPERIS*: AN EASY CASE MAKES HARD LAW

WILLIAM B. FISCH\*

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“I do solemnly swear . . . [t]hat I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any person’s cause for lucre or malice. So help me God.”<sup>1</sup>

“Compelled legal service is totally inconsistent with the giving of pro bono service as a matter of professional responsibility or professional pride. The latter two involve a matter of professional choice. It is the choice that makes the rendering of the service self-fulfilling, pleasant, interesting, and successful.”<sup>2</sup>

In that uncertain number of American jurisdictions<sup>3</sup> in which the discre-

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1. From the oath prescribed in Missouri Supreme Court Rule 8.11, *quoted in State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 66 (Mo. 1981) (en banc) (in support of a ruling requiring attorneys to accept uncompensated appointments as defense counsel in criminal cases), *cert. denied*, 454 U.S. 1142 (1982).

2. *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 768 (Mo. 1985) (en banc) (per Welliver, J.) (holding that attorneys may not be appointed without compensation in civil cases).

3. For a survey which remains largely valid today, see Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 384-85, 388-89 (1923). Maguire named 12 states which include the power of appointment in their statutes, as well as perhaps two more which appear to have adopted English in forma pauperis practice through the

tionary power to appoint counsel is part of *in forma pauperis* procedure in civil cases, the propriety and conditions of its exercise are matters of inevitable controversy. The issue is gaining increasing currency, as a result of significant reductions in public support for legal assistance programs in the face of an increasing demand for such services. Where institutionalized legal assistance programs fail, and the litigant is unable to recruit voluntary private representation, the courts in many jurisdictions revert to appointment of counsel. The practice is controversial enough in criminal cases; it has met with special resistance from the bar in civil cases, however, where the perceived need seems less and the potential burden greater. Do the courts have the power to require lawyers to represent indigent persons in civil matters? If so, what are the conditions of its exercise, legally and prudentially?

The claim of judicial power to appoint counsel with or without compensation, and a concomitant duty of the lawyer to accept such appointments, is most often derived from the inherent powers of the judiciary, inferred from the nature of its constitutionally established role as a separate branch of government. In many jurisdictions, such as Missouri, there may also be statutory authorization for such appointments. As a matter of policy, regardless of its source, the power has been founded typically on one or more of three arguments: (i) the lawyer is an officer of the court, traditionally subject to judicial regulation and supervision, with an obligation to assist the courts in performing their responsibilities;<sup>4</sup> (ii) the lawyer enjoys the privilege of a monopoly on the practice of law, especially practice before the courts, and therefore cannot complain of having to bear a fair share of the burden of making the courts accessible to all;<sup>5</sup> and (iii) the ethical rules of the self-regulating profession, as embodied in the Canons of Ethics, Code of Professional Responsibility, and Model Rules of Professional Conduct, but also in the concept of a profession, require such uncompensated service.<sup>6</sup>

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common law.

4. *E.g.*, *Powell v. Alabama*, 287 U.S. 45, 73 (1932) ("The duty of the trial court to appoint counsel under such circumstances is clear . . . ; and its power to do so, even in the absence of a statute, can not be questioned. Attorneys are officers of the court, and are bound to render service when required by such an appointment."); *Ex parte Dibble*, 310 S.E.2d 440, 442 (S.C. Ct. App. 1983) ("Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible. . . . Accordingly, we hold that this inherent power must necessarily include the power to appoint lawyers to serve without compensation where it appears reasonably necessary for the court to do justice.").

5. *E.g.*, *Yarbrough v. Superior Court*, 150 Cal. App. 3d 388, 197 Cal. Rptr. 737, 741 (1983) ("On a more practical level it should be immediately apparent that an attorney's professional responsibilities represent a modest consideration for the valuable license entrusted to him or her."), *vacated*, 39 Cal. 3d 197, 216 Cal. Rptr. 425, 702 P.2d 583 (1985); *Vise v. County of Hamilton*, 19 Ill. 78, 79 (1857) ("The law confers on licensed attorneys rights and privileges, and with them imposes duties and obligations, which must be reciprocally enjoyed and performed . . .").

6. *E.g.*, *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 65-66 (Mo. 1981) (en banc) (quoting from CHROUST, 1 THE RISE OF THE LEGAL PROFESSION IN AMERICA x-

The power to appoint an unwilling attorney, whether judicial or statutory in origin, has been challenged in principle on three grounds, founded in the Federal Constitution and its state counterparts: (i) that to require the lawyer to serve constitutes involuntary servitude, within the meaning of the thirteenth amendment;<sup>7</sup> (ii) that it constitutes an unlawful taking of property, or at the very least constitutes a taking for a public use which requires just compensation, under the fifth amendment;<sup>8</sup> and (iii) that to subject attorneys as a class to such an obligation constitutes discrimination which would deny them equal protection of the laws, under the fourteenth amendment.<sup>9</sup>

If the issue is whether or not such a power exists at all, acceptance of the justifying propositions is generally regarded as sufficient to overcome the constitutional objections, by treating the burden as a condition of the license to practice. However, to the extent that the power exists and is considered discretionary in character, its exercise in a particular case may be challenged as an abuse of discretion, an unfair imposition on the lawyer in the specific circumstances. In this context, the considerations of fairness underlying the constitutional objections reappear as conditions of the exercise of the power in particular cases.

In *State ex rel. Scott v. Roper*,<sup>10</sup> a state prisoner filed a medical malpractice action against a university hospital and its (unnamed) attending surgeon,

xi (1965) to the effect that professions like law are "a common calling in the spirit of public service," and citing the CODE OF PROFESSIONAL RESPONSIBILITY EC 2-16 and the lawyers' oath for the proposition that "practice of law 'in the spirit of public service' is a primary consideration").

7. *E.g.*, *Bradshaw v. United States Dist. Ct.*, 742 F.2d 515, 517 (9th Cir. 1984) ("Several of the attorneys contacted by the district court suggested that issues of involuntary servitude are raised by coercive appointment."); *Bedford v. Salt Lake County*, 22 Utah 2d 12, 14, 447 P.2d 193, 194-95 (1968) ("For the legislature to attempt to compel a lawyer to work by passing a statute requiring the judge to order it done would . . . impose a form of involuntary servitude upon him.").

8. *E.g.*, *Bedford v. Salt Lake County*, 22 Utah 2d at 15, 447 P.2d at 195: Until the legislature provides a method by which a lawyer can be paid for compulsory services to an indigent person, a statute requiring such services is unconstitutional as requiring one to give services (a form of property) without just compensation being paid therefor. It matters not that the service is to be rendered to one other than the state. It would still be an involuntary taking by the state.

9. *E.g.*, *Knox County Council v. State*, 217 Ind. 493, 510, 29 N.E.2d 405, 412 (1940):

If a law should be enacted requiring every person licensed by the State to render services, or furnish the materials of their business, to paupers gratuitously, much difficulty would be found in justifying a decision holding the law unconstitutional as depriving the green grocer or the restaurant operator of his goods, or as depriving the physician, or the barber, or the plumber, or the electrician, or the mechanical engineer of his services, without compensation, while adhering to a rule that licensed attorneys' services may be taken without compensation.

10. 688 S.W.2d 757 (Mo. 1985) (en banc).

alleging that they had negligently treated wounds which he had inflicted on himself while undergoing pretrial psychiatric examination in the state mental hospital. The *pro se* petition, which claimed \$300,000 actual and \$300,000 punitive damages, was accompanied by a motion for leave to proceed *in forma pauperis* and to have counsel appointed, supported by an affidavit of indigency. The trial judge, in a single order entered three days after the petition was filed, granted the motion, and appointed the local Legal Services office to represent the plaintiff. The Legal Services office moved for leave to withdraw,<sup>11</sup> on the ground that the case was not within their priorities and that the regulations governing their federal funding precluded accepting a fee-generating case under the facts given. This motion was granted, and—again in the same order, apparently without any prior inquiry into the merits of the claim or the circumstances of the particular attorney—a private attorney was appointed to represent the plaintiff. That attorney in turn moved to quash the appointment, challenging it (i) as an abuse of discretion under the *in forma pauperis* statute,<sup>12</sup> (ii) as an unconstitutional taking of property without compensation, and (iii) as imposing involuntary servitude. After holding a hearing on this motion, at which both the plaintiff and the attorney testified, the judge announced her intention to deny it. The attorney filed a petition in the Missouri Supreme Court for a writ of prohibition, which was granted and eventually made absolute by that court over a single dissent. In its majority opinion, the court reached none of the federal constitutional issues raised by the petition, but held simply (i) that the plaintiff is not eligible for *in forma pauperis* relief under the statute, and (ii) that Missouri courts do not have inherent power to appoint unwilling counsel in civil cases without compensation. The dissent essentially disagreed with both propositions, and would have quashed the writ.

It is the thesis of this comment that the particular appointment, on the facts indicated in the record, should not have been made, either under the statute or under inherent power. Further, to the extent that the decision involved the scope of inherent power, it is difficult to say that the court has erroneously denied itself a power which is by definition its own creature. How-

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11. Designated as a "Motion to quash and withdraw as appointed attorney," but with a prayer "to allow it to withdraw as attorney," see motion filed Oct. 21, 1983, attached as Exhibit-E to the Petition for a Writ of Prohibition.

12. MO. REV. STAT. § 514.040 (1978), which reads as follows:

If any court shall, before or after the commencement of any suit pending before it, be satisfied that the plaintiff is a poor person, and unable to prosecute his or her suit, and pay the costs and expenses thereof, such court may, in its discretion, permit him or her to commence and prosecute his or her action as a poor person, and thereupon such poor person shall have all necessary process and proceedings as in other cases, without fees, tax or charge; and the court may assign to such person counsel, who, as well as all other officers of the court, shall perform their duties in such suit without fee or reward; but if judgment is entered for the plaintiff, costs shall be recovered, which shall be collected for the use of the officers of the court.

ever, the Missouri court's own prior decisions concerning inherent judicial power support the dissent's view, that the power to appoint counsel in civil cases should not be totally excluded. In the light of those decisions, as well as the uncertainty of the constitutional objections, the main lines of argument in the *Scott* majority opinion are most persuasive as reasons not for denying the power in all civil cases, but for refusing to exercise it in particular ones. A more satisfactory solution, therefore, would have been a "guidelines opinion" recognizing the power but outlining proper conditions of its exercise which would assure that coercive appointments would be truly exceptional if not rare occurrences. The role of uncompensated appointments supportable by prior decisions is in any event not that of *primary* resource for representation of indigent litigants, but rather a *residual* one to be used when other resources fail, and when appointment is necessary to enable the court to fulfill its constitutional responsibilities.

Further, it will be argued that the court's rationale for denying relief under the statute, because it extends to the cost-relief provisions as well as to appointment of counsel, is unsound and should not be extended beyond the specific facts of the present case. The statute's authorization to appoint can be interpreted as consistent with the courts' inherent power, thereby avoiding constitutional objection based on interference with that power. It should be regarded, therefore, as having only confirmatory effect.

Because of this primary function of the inherent power to appoint, the comment begins with an evaluation of the court's treatment of that issue. It then proceeds to discuss the holding that the *in forma pauperis* statute does not apply to the plaintiff in this case.

## I. INHERENT POWER OF THE COURT

Although the *Scott* court concludes that the inherent power of the courts to appoint counsel in civil cases is "the more important consideration,"<sup>13</sup> the opinion makes no attempt to relate that specific issue to the general subject of inherent judicial power. Since the Missouri Supreme Court has had quite a bit to say about the inherent power of the judiciary, it is necessary to preface discussion of the opinion in this case with a review of the court's earlier pronouncements on the broader subject.

### A. *The Scope of Inherent Judicial Power in Missouri*

After some uncertainty in the nineteenth and early twentieth centuries,<sup>14</sup> the Missouri Supreme Court laid claim, in a series of cases beginning in 1933, to sweeping inherent power to regulate the practice of law. In *In re Rich-*

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13. 688 S.W.2d at 759.

14. For a review, see Devine, *Lawyer Discipline in Missouri: Is New Ethics Code Necessary?*, 46 MO. L. REV. 709, 712-33 (1981).

ards,<sup>15</sup> the issue was whether the supreme court had original jurisdiction in a disbarment proceeding initiated against a Missouri lawyer.<sup>16</sup> Neither the constitution nor any statute gave the court such jurisdiction, but the court claimed it as a matter of inherent power.<sup>17</sup>

In the following year, the supreme court adopted a comprehensive set of rules regulating the practice of law, including rules of admission, disciplinary proceedings, ethical standards, and the like.<sup>18</sup> In 1935, in the context of another disbarment proceeding, the court sustained those rules against the objection that they violated substantive and procedural due process.<sup>19</sup>

In 1937,<sup>20</sup> the court claimed inherent power to regulate the practice of law by persons not admitted to practice, and asserted its own original jurisdiction over claims of unauthorized practice, even when that practice has nothing to do with judicial proceedings. More importantly, it declared its independence from the statute defining and punishing unauthorized practice, and asserted the power to adopt its own definition and to enforce it by means of the contempt power:

The primary duty of courts is the administration of justice. Attorneys are officers of the court. They are, in effect, a part of the judicial system of the state. Their duties, when honestly and ably performed, aid the courts in the administration of justice. Their educational and moral qualifications should be such as to insure the conscientious and efficient performance of such duties. The practice of law is so intimately connected with the exercise of judicial power in the administration of justice that the right to define and regulate such practice logically and naturally belongs to the judicial department . . .

15. 333 Mo. 907, 63 S.W.2d 672 (1933) (en banc).

16. The supreme court has been the sole licensing authority for attorneys in the state since territorial days. See 1 LAWS OF MISSOURI TERR. & ST. 49, c. 7, § 1 (1824, approved 1804)(two judges of the superior court); MO. REV. STAT. "Attorneys and Counselors" § 1 (1825).

17.

[I]t will scarcely be denied that a primary object essentially within the orbit of the judicial department is that courts properly function in the administration of justice, for which purpose they were created, and in the light of judicial history they cannot long continue to do this without power to admit and disbar attorneys who from time immemorial have in a peculiar sense been regarded as their officers. Since the object sought is not naturally within the orbit of the legislative department, the power to accomplish it is in its exercise judicial and not legislative . . .

*In re Richards*, 333 Mo. at 915, 63 S.W.2d at 675.

18. Mo. Sup. Ct. Rules 35-38 (1934), reprinted in 351 Mo. Reports at vii-xxiv (1944).

19. *In re Sparrow*, 338 Mo. 203, 206-07, 90 S.W.2d 401, 404 (1935) (en banc) (quoting with approval from WEEKS ON ATTORNEYS AT LAW § 80 (2d ed. 1892): "The power to strike from the rolls is inherent in the court itself. No statute or rule is necessary to authorize the punishment in proper cases. . . . It is necessary for the protection of the court, the proper administration of justice, the dignity and purity of the profession, and for the public good and the protection of clients.").

20. *Clark v. Austin*, 340 Mo. 467, 101 S.W.2d 977 (1937) (en banc).

[A]ny effort on the part of the Legislature to prescribe the qualifications of applicants for admission to the bar, or to define or regulate the practice of law would be an unconstitutional attempt on the part of the legislative department of government to encroach upon the powers and functions properly belonging to the judicial department.<sup>21</sup>

In 1944, the court adopted a rule which integrated the Missouri Bar, making every lawyer admitted to practice a member of the organization and providing for its governance.<sup>22</sup> The preamble to that rule stated that its purpose was to assist the bar in their obligation, specified in the Canons of Ethics, to "strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice."<sup>23</sup>

After the 1945 Constitution adopted a provision giving the supreme court power to make rules of "practice, procedure and pleading" for all courts, prohibiting rules from altering, *in absentia*, substantive right and the right of appeal, and providing that any such rule could be annulled or amended by a law limited to the purpose,<sup>24</sup> the court faced a challenge to its rule<sup>25</sup> allowing the circuit bar committee to file exceptions in the supreme court to a ruling of the circuit court in disciplinary proceedings, where the statute on the subject had allowed for no such appeal. In *In re Conner*,<sup>26</sup> the court denied that its regulation of disciplinary proceedings is based in the rule-making power as such, and placed it firmly in the realm of inherent power.

The judicial department of the state, acting through the Supreme Court, is inherently vested with power to control and conduct its own affairs, to maintain its own dignity, to see that justice is fairly and evenly administered and to fully regulate the admission and disbarment of its own officers. . . . Such power is protective and stems from the constitutional creation of the judiciary, the separation of powers, and its existence as 'the highest court in the state'. . . . The Supreme Court must maintain the dignity and purity of the judicial department and protect all courts and the public from those no longer qualified to practice law. . . . While the General Assembly has power to legislate in aid of the instant subject . . . , no statute can control, frustrate, limit or defeat the Supreme Court in the full performance of its duty, where review is sought, to finally decide who shall enjoy the privilege of an attorney-at-law. . . .<sup>27</sup>

Finally, in 1952<sup>28</sup> the court reiterated its claim to power to regulate the unau-

21. 340 Mo. at 476-77, 101 S.W.2d at 981.

22. Mo. Sup. Ct. Rule 40 (1944), renumbered in 1945 as 7, and reprinted in 352 Mo. Rep. at xxxi-xxxvi (1945).

23. *Id.*, Preamble, quoting from Mo. Sup. Ct. Rule 4.29.

24. Mo. CONST. art. V, § 5.

25. Mo. Sup. Ct. Rule 5.11 (1946), renumbered from former Rule 36.11 (1934).

26. 357 Mo. 270, 207 S.W.2d 492 (1948) (en banc).

27. *Id.* at 280-81, 207 S.W.2d at 496.

28. *Hulse v. Criger*, 363 Mo. 26, 247 S.W.2d 855 (1952) (en banc).



thorized practice of law, independent of any statutory definition.<sup>29</sup>

Some limitations have been placed on this inherent power by the United States Supreme Court as a matter of federal constitutional law—the state's judicial power being subject, as are all state powers, to the federal constitution via the Supremacy Clause of article VI. In particular, the concept that a lawyer is an officer of the court which admits her to practice has been held insufficient—because it does not make the lawyer a holder of public office in the narrow sense—to justify denial of admission either to aliens as such<sup>30</sup> or to non-resident citizens of other states.<sup>31</sup> Moreover, due process has been held to require that disbarment proceedings satisfy the requirements of notice and an opportunity to be heard,<sup>32</sup> and that disbarment not be premised solely on the invocation of the privilege against self-incrimination in respect of potential criminal charges.<sup>33</sup> Finally, the attorney has been held to have first amendment rights—in the interest of the public—which limit the courts' control over lawyer advertising<sup>34</sup> and solicitation of business,<sup>35</sup> lawyers' first amendment rights have been held to be implicated in the activities of a mandatory bar;<sup>36</sup>

29. *Id.* at 38-39, 247 S.W.2d at 857-58. The court noted:

Only the judicial department of the government has power to license persons to practice law. . . . Thus the judicial department is necessarily the sole arbiter of what constitutes the practice of law. . . . The duty of this Court is not to protect the Bar from competition but to protect the public from being advised or represented in legal matters by incompetent or unreliable persons.

30. *In re Griffiths*, 413 U.S. 717 (1973) (relying both on the plenary power of the federal government to regulate immigration and naturalization, and on the equal protection clause of the fourteenth amendment).

31. Supreme Court of New Hampshire v. Piper, \_\_\_ U.S. \_\_\_, 105 S. Ct. 1272 (1985) (applying the privileges and immunities clause of U.S. CONST. art. IV, § 2).

32. *In re Ruffalo*, 390 U.S. 544 (1968), which actually dealt only with federal discipline based on the record of state proceedings, but expressed a principle (that amendment of the charges after the evidence is in, without further opportunity to answer the new charges, is impermissible) which is understood to apply to state proceedings as well.

33. *Spevack v. Klein*, 385 U.S. 511 (1967).

34. *Bates & O'Steen v. State Bar*, 433 U.S. 350 (1977) (characterizing lawyer advertising as commercial speech and applying newly formulated first amendment protections for that category of speech to a state supreme court's advertising rules); *In re R.M.J.*, 455 U.S. 191 (1982) (reviewing and invalidating many of Missouri's post-*Bates* advertising rules).

35. *In re Primus*, 436 U.S. 412 (1978) (protecting public-interest solicitation); *cf. Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (sustaining the state's prohibition against solicitation in a private, contingent-fee situation).

36. *Lathrop v. Donohue*, 367 U.S. 820 (1961) (sustaining the mandatory membership program as such, including the requirement of annual dues, without reaching potential problems in the scope and character of the organization's activities). Subsequently, several lower-court and state court decisions have established limits on lobbying and political-action activity by integrated bar associations, or at least imposing a dues refund obligation, to protect the first amendment rights of involuntary members. *Arrow v. Dow*, 544 F.Supp. 458 (D.N.M. 1982), and 554 F. Supp 1086 (D.N.M. 1983); *Reynolds v. State Bar*, \_\_\_ Mont. \_\_\_, 660 P.2d 581 (1983); Report of Com-

and potential clients have been held to have related rights to associate and to petition the government for redress of grievances which limit the courts' control over group legal services agreements.<sup>37</sup>

Despite these federal constitutional limitations, however, the claim of the Missouri judiciary to plenary power to regulate the practice of law remains virtually complete in relation to the other branches of state government.

### B. *Inherent Power and Coercive Appointments*

In 1971,<sup>38</sup> the court relied on the inherent power of the judiciary to make its own determination whether lawyers should be required to represent indigent criminal defendants without compensation, and held that the bar should not be required to bear that burden *alone*:

[The constitutional right to counsel] means, in practical effect, that an indigent accused of crime cannot be prosecuted, convicted, and incarcerated in Missouri unless he is furnished counsel. The lawyers of Missouri, as officers of the Court, have fulfilled this State obligation, without compensation, since we attained statehood, although other persons essential to the administration of criminal justice . . . have not been asked to furnish services gratuitously. The question is whether the legal profession must continue to bear this burden alone. The question is one for the judicial department . . . and must be decided by this Court.<sup>39</sup>

Ten years later, however, the court held that, where the legislature had provided funding for criminal defense but these funds had been exhausted, it was appropriate to call on attorneys temporarily to fill the gap; and laid down guidelines for judicial exercise of the power of appointment.<sup>40</sup> In so doing, the court emphasized the "spirit of public service"<sup>41</sup> as a "*primary* consideration" in defining the "inherent nature of the practice of law,"<sup>42</sup> and the obligations *of the judiciary* which require reliance on that spirit:

We believe our primary obligation is to the people to insure the continued operation of the criminal justice system, for without it, the peace of the community cannot be attained as the guilty cannot be convicted or the innocent acquitted. As a necessary part of this system the accused is entitled to counsel and, where indigent, counsel must be provided. It is our first obligation to secure to the indigent accused all of his constitutional rights and guarantees. We also have an obligation to deal fairly and justly with the members of the

mittee to Review the State Bar, 334 N.W.2d 544, 549 (Wis. 1983).

37. *United Transp. Union v. State Bar*, 401 U.S. 576 (1971), and authorities cited therein; *NAACP v. Button*, 371 U.S. 415 (1963).

38. *State v. Green*, 470 S.W.2d 571 (Mo. 1971) (en banc).

39. *Id.* at 572-73.

40. *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981) (en banc).

41. *Id.* at 66 (quoting from 1 A. CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* x (1965)).

42. *Id.* 66-67 (citing also CODE OF PROFESSIONAL RESPONSIBILITY EC 2-16 and the Lawyer's Oath prescribed in Mo. Sup. Ct. Rule 8.11).

legal profession who are subject to our supervision.<sup>43</sup>

The Missouri court's claim to inherent power to appoint counsel in criminal cases, therefore, is clearly not an expression of an obligation owed by an individual attorney to an individual defendant, but of one owed by the judiciary to the public which, in a particular case, can be fulfilled only by coercive appointment. A second aspect of the inherent power to appoint is that it is regarded as discretionary with the court, and to that extent the supreme court's supervisory authority over all inferior courts clearly gives it the power to determine under what circumstances that discretion should be exercised.<sup>44</sup> The power to appoint is discretionary in two senses. On the one hand, it could be refused for the particular defendant altogether, for example because he has not sufficiently proven his indigency,<sup>45</sup> although the consequences of unjustified refusal to appoint might, in the criminal case at least, be unacceptable. On the other hand, appointment of a particular attorney can be refused, because it would work a hardship<sup>46</sup> or because of prior uncompensated service.<sup>47</sup>

Without benefit of any review of this background, the court in *Scott* begins its discussion of the inherent power to appoint in civil cases, simply by noting the "paucity of case law" on the subject, both in Missouri and in other jurisdictions, by comparison with criminal cases—in which latter, it is acknowledged, a long-standing tradition of uncompensated service is reflected.<sup>48</sup> The court goes on to point out, however, that a "substantial minority" of other jurisdictions deny compelled service without compensation even in criminal cases, and sets as its task "to examine these various decisions, their efficacy,

43. *Id.* at 66-67.

44. *See generally id.*

45. "In this case or any similar case, the respondent circuit judge is admonished by this Court to hold all accused to a high standard of proof of indigency and to make every effort possible to fully verify indigency." *Id.* at 67.

46.

In this and any similar case, the respondent circuit judge should provide relator when requested with an evidentiary hearing as to the propriety of his appointment, taking into consideration his right to earn a livelihood for himself and his family and to be free from involuntary servitude. If respondent judge determines that the appointment will work any undue hardships, he should appoint another attorney.

*Id.*

47. "Non-payment to a lawyer for a period in excess of one hundred and twenty days for any prior appointed service may be deemed by the court to be grounds for excusing the lawyer from additional appointment in other cases." *Id.*

48. *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 760 (Mo. 1985). Curiously, the court's review of Missouri criminal decisions ends with reference to *State v. Green*, 470 S.W.2d 571 (1971), as holding that attorneys "would no longer be compelled to render gratuitous service," followed by a simple "*Cf.*" reference to *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (1981). Why the court thought it unnecessary to state—either here or anywhere else in the opinion—that *Ruddy* expressly held attorneys subject to compelled service absent sufficient legislative funds for compensation, is not entirely clear.

and their application to civil cases such as the one at bar."<sup>49</sup>

The opinion then proceeds to what appears to be a favorable review of what critics have perceived as historical and logical weaknesses of three traditional arguments for a power to appoint generally, without attempting to distinguish between criminal and civil cases. As the dissent notes, the principal impact of the review is to disclose a difference of opinion in the various jurisdictions, on which the Missouri court is free to take its own position.<sup>50</sup> At the core of the disagreement, however, appears to be a difference concerning the essential nature of the claim of inherent power both in general and specifically to appoint counsel, on which the Missouri court has already spoken helpfully.

### 1. The Lawyer as Officer of the Court

The majority opinion treats the concept of the lawyer as officer of the court essentially as an "anachronism from English legal history."<sup>51</sup> As has often been pointed out, the English practice was decidedly unclear, especially on the significance of that status:<sup>52</sup> not all lawyers were regarded as officers of the court in the general sense, especially not barristers;<sup>53</sup> it is not clear that the duty to serve, if any, derived from the status of the lawyer as officer of the court, or simply from the power of the courts over citizens subject to their jurisdiction;<sup>54</sup> and at least some British judges appear to have believed that they had no inherent power (that is, apart from statute) to compel (as distinguished from "appeal to") such service of any lawyer.<sup>55</sup> Moreover, the right to counsel itself (appointed or otherwise) was in doubt in England far longer in criminal cases<sup>56</sup> than in civil.<sup>57</sup>

Reflection on the Missouri court's own prior cases on inherent judicial power outlined above, however, surely affords reason to pause before so readily dismissing the officer-of-the-court concept precisely for the Missouri context. There is no mere mechanical "invocation of doctrine" in those cases, but a

49. 688 S.W.2d at 760.

50. *Id.* at 774.

51. *Id.* at 767.

52. For brief surveys in the American literature see, e.g., Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U.L. REV. 735, 740-749 (1980); Martineau, *The Attorney as an Officer of the Court: Time to Take the Gown off the Bar*, 35 S.C.L. REV. 541, 543-48 (1984).

53. E.g., 6 W. HOLDSWORTH, HISTORY OF ENGLISH LAW at 435-36 (1924).

54. See Martineau, *supra* note 52, at 546-47 (citing M. BURKS, GENTLEMEN OF THE LAW (1960)).

55. See *Regina v. Fogarty*, 5 Cox's Criminal Cases 161 (Crn. Ct., County Down, 1853), an Irish criminal case quoted in Shapiro, *supra* note 52 at 747-48. In that case, the court is quoted as saying, after some argument, that he could not compel either counsel or attorney to serve; but note that both counsel and attorney honored the judge's request.

56. See, e.g., Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 746-47 (1980).

57. See *infra* text accompanying notes 78-99.

clearly articulated claim that lawyers' services are so intimately bound up with and indispensable to the administration of justice that the judiciary has inherent power to regulate them, presumptively superior to that of the other branches of state government. That intimate practical relationship, and not the fictitiously presumed formal one of holding public office, forms the foundation of the judiciary's claim both to define the lawyer's obligations and to enforce them.

## 2. The "Monopoly" Argument

The majority opinion disposes of the argument from monopoly with three brief points: first, there is no monopoly on appearance because anyone "is free to" appear for himself, obtain the legal training required to do so effectively, or indeed pursue a legal career; second, the purpose of limiting those who can provide those services is not for the personal gain of the lawyer, but for protection of the public; and third, if the concept of a duty to render uncompensated service were inherent in the licensed monopoly, all other licensed professions would be subject to the same duty.

Again, the inherent power cases afford a better understanding of the nature of the argument, against which the court's objections are unpersuasive. The essence of the monopoly is the prohibition against lay representation, as one form of law practice which the court claims inherent power to regulate and with which the judiciary obviously has an especially intimate concern. If competent representation is necessary for effective access to the courts, and the litigant is not free to choose any representative but must have a licensed attorney or none at all, the courts, and the profession for which they are responsible, have a duty to ensure that the litigant has a fair opportunity to obtain counsel.

This argument—properly understood as asserting a collective obligation of the *profession* stemming from the prohibition against lay representation<sup>58</sup>—is not adequately answered, as a justification of the inherent power to appoint as such, by noting that admission practices are liberal and there are therefore plenty of lawyers. Rather, a surfeit of lawyers only makes it less likely that coercive appointment will be truly necessary in any particular case. In any event, there can be no comparison between the admission and disciplinary standards of today, loose as they may seem to those who have already "made it," and the anarchy (for example) of nineteenth-century Indiana, of which more below. To characterize these standards as so low as to make the monopoly argument "absurd"<sup>59</sup> does no justice to the effort and talent re-

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58. See, e.g., Christensen, *The Lawyer's Pro Bono Publico Responsibility*, 1981 A.B.F. RES. J. 1, 16-17.

59. 688 S.W.2d at 765 (citing Hazard, *The Lawyer's Pro Bono Obligation*, A.B.A. 2D NAT'L CONF. ON LEGAL SERVICES AND THE PUBLIC PROC. 101 (1981)). Professor Hazard, however, was addressing the issue of whether a generalized pro bono obligation should be imposed on all lawyers, not the specific issue of a judicial power to

quired to join the profession, or to the difficulties of *pro se* representation; it also confuses the bar's rigidly enforced monopoly on forensic representation with its less easily implemented claim to monopoly over legal services generally. Still less is it an adequate answer to the argument to say that "[a]lthough the complex nature of many legal issues may seem to make the presence of a person trained in law essential, anyone is free to . . . obtain the requisite legal knowledge."<sup>60</sup> Since not everyone is *able* to obtain that knowledge, and most professionals require at least three years of highly competitive training to do it, "freedom" to obtain it will in many cases be sheer illusion for the litigant contemplating self-representation.

That the purpose of the monopoly is to protect the public rather than to confer a personal privilege merely makes the monopoly legitimate; it says nothing about the impact of that monopoly on the availability of legal services to the individual litigant, which can only be given by individual licensed attorneys.

If it is indeed a responsibility of the courts to assure reasonable access to such services, as the Missouri inherent power cases claim, cooperation of individual attorneys is indispensable. The relationship of the burden of compelled service to the benefit of the license must vary from individual to individual, but that the license is an asset which the unlicensed person does not enjoy is beyond dispute. The issue is precisely whether and when it is necessary, in the same public interest, to expect any particular professional to help the court fulfill its obligations in any particular matter by uncompensated service.

Finally, the inherent power cases show the special status of the legal profession, which set it apart from other professions. No other profession has a similarly indispensable relationship to a major branch of government responsible for the formulation and implementation of public policy, and in none other is public service so much a part of the licensed activity.

### 3. The Professional Responsibility Argument

The court dismisses the "professional responsibility" argument principally on the basis of the contemporary debate over whether or not the new Model Rules of Professional Conduct should prescribe a general duty for all lawyers to render *pro bono* service, which ended in rejection of that concept in favor of a non-mandatory obligation, a "should."<sup>61</sup>

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appoint with concomitant duty to accept appointment in particular judicial proceedings.

60. *Id.*

61. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983):  
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

The difficulty with this dismissal is that it confuses the general obligation to render unpaid service, which has significant problems of enforcement, with that to represent specific clients in specific cases at the instance of a court. The Canons, the Code, and the Model Rules all recognize a professional obligation to respect court appointments by refraining from trivial requests for relief, although they do not address the power to compel as such. While the Canons speak only of appointments to represent indigent prisoners,<sup>62</sup> the Code<sup>63</sup> and the Model Rules<sup>64</sup> both speak of appointments to represent in general terms.

#### 4. The Court's "Reasoning and Analysis"

The *Scott* majority's disposal of these traditional arguments, as essentially conclusory, relies on objections which seem equally applicable to criminal and civil cases. In their place, the court offers a number of more pragmatic reasons (only two of which are peculiar to such cases) for rejecting an enforceable duty to accept uncompensated appointments in civil cases: (i) the burden on an attorney of adequate representation, even in criminal cases, has increased dramatically since the early days of compelled service; (ii) the cost of maintaining a law practice, and therefore the value of a lawyer's time, has also dramatically increased; (iii) law practice has become specialized, with rela-

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legal services to persons of limited means.

The ABA's Kutak Commission had proposed a mandatory duty ("shall") of similar scope, but it was dropped. ABA Comm'n on Evaluation of Professional Standards, Model Rules of Professional Conduct Rule 6.1 (Discussion Draft 1980). The ABA thereby remained with its first such effort, in the Model Code of Professional Responsibility, EC 2-25 (1969). The 1908 Canons of Ethics did not have any such provision.

62. 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."

63. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-29:

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 a 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 civil case.

64. MODEL RULES OF PROFESSIONAL CONDUCT RULE 6.2 (1983):

Accepting Appointments

A lawyer shall not seek to avoid appointment by a tribunal to represent person except for good cause, such as:

(a) representing the client is likely to result in violation of the rules of professional conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer;

(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.

tively few skilled trial lawyers; (iv) the historical evidence of actual exercise of a power to compel uncompensated service in civil cases is uncertain, and “illustrates little sympathy for the pauper;”<sup>65</sup> and (v) “there are fewer reasons justifying imposing a mandatory obligation on attorneys in civil cases than in criminal cases.”<sup>66</sup>

In particular, the court argues, an indigent person with a contingent-fee-generating case has no more difficulty obtaining a lawyer than a well-to-do person, and it is appropriate for the “market” (*i.e.*, attorneys asked to take the case) to determine whether or not the claim has sufficient merit to warrant litigation. For non-fee-generating cases, there are other mechanisms available for the provision of services, such as legal aid, lawyer referral, etc. A lawyer’s services are property, which should enjoy constitutional protection of which the lawyer should not be deprived as a condition of obtaining a license.

As a reason for denying the power of appointment as such, rather than for denying appointment in particular cases, the invocation of the “market test” for the viability of a fee-generating claim surely misses the mark. Picking up on a dissenting opinion by Judge Posner of the federal seventh circuit,<sup>67</sup> the court suggests that if a claim has merit, it will find its voluntary lawyer, implying that if the claimant cannot get a lawyer to take the case, it must not have sufficient merit to justify appointing counsel.<sup>68</sup> It is one thing to insist that a plaintiff undergo such a market test—assuming that it is a market to which the plaintiff has been given fair and full access—prior to invoking the court’s discretion, so as to avoid forcing a lawyer to take a case someone else would be willing to take voluntarily. It is quite another to deny the court any power to override the results of the test. Unless the judge proposes to grant summary judgment against the claimant on the ground that he tried and failed to get a lawyer to take the case, thereby proving its lack of merit, the issue is not whether the claimant will proceed, but whether he will do so *pro se* or with appointed counsel. Quite apart from the unacceptability of the court’s being bound by the personal decisions of private attorneys which may have motivations other than the merits of the claim,<sup>69</sup> there remains the burden placed on the *court* by having to try a case in which the parties are unequally represented. So long as it remains a possibility that a meritorious claim will fail to find its lawyer-financier, it remains a possibility that the court will be unable to fulfill its constitutional obligations without appointment, and the inherent power to appoint should be preserved.

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65. 688 S.W.2d at 768.

66. *Id.*

67. *McKeever v. Israel*, 689 F.2d 1315, 1325 (7th Cir. 1982) (Posner, J., dissenting).

68. 688 S.W.2d at 768.

69. Such as fear of malpractice suits which the particular plaintiff was in the habit of filing, as in *Bradshaw v. District Court*, 742 F.2d 515 (9th Cir. 1984) (showing of this propensity held to support the trial court’s denial of appointment, after long unsuccessful search for voluntary counsel).



Finally, the general availability of other resources is no more persuasive in civil cases than in criminal cases, so long as the role of coercive appointment is understood, as it is in criminal cases,<sup>70</sup> as residual rather than primary—that is, appropriate only when the other resources fail.

### 5. The Criminal-Civil Case Distinction

The single strongest argument for distinguishing civil from criminal cases would seem to be one simply asserted but not discussed by the majority: that the court's own obligations to the public and to the indigent civil litigant do not include appointment of counsel. It is likely that, as a matter of federal constitutional law, litigants do not have a personal right to appointed counsel in the vast majority of cases usually denominated "civil." The Supreme Court decisions on the right to counsel have yet to reach a case in which the state itself was not either a formal party or substantially interested in the outcome,<sup>71</sup> but it seems likely that when such a case is reached, no obligation *to the litigant* to provide counsel will be found. Moreover, even where the state is directly interested, the Court has all but limited the unqualified right to cases in which physical liberty is at stake,<sup>72</sup> and has denied it, for example, to a defendant in a proceeding for termination of parental rights.<sup>73</sup>

It is important to note, however, that the Court did not rest those decisions on any sharp definitional distinction between criminal and civil cases, but rather on the flexible test developed for procedural due process generally in *Mathews v. Eldredge*:<sup>74</sup> the court is to weigh the interest of the requesting party, the value of the particular procedural protection sought in preventing erroneous decisions, and the interest of the state. Moreover, the Court emphasized the absence in the particular case of the kinds of complication which might justify imposing an obligation to provide counsel—potential criminal responsibility on the alleged facts, expert witnesses, troublesome questions of law or fact, jury trial.<sup>75</sup> There is, therefore, basis for argument not only in policy but even in constitutional law that a residual right to appointed counsel exists where justice cannot otherwise be fairly administered. In any event, it should

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70. See *supra* text accompanying notes 40-43 for discussion of *State ex rel. Wolff v. Ruddy*.

71. Cf. *Little v. Streater*, 452 U.S. 1 (1981), a civil paternity suit brought by a welfare recipient, in which the issue was whether the state had an obligation to provide the defendant with a blood test to be used as evidence, and in which the Court emphasized the substantial involvement of the state—attorney general as automatic party, criminally enforceable statutory duty of support on finding of paternity—as justifying the imposition of such a right to access to evidence.

72. This was the rationale for extending the right to counsel to misdemeanor cases in *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

73. *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).

74. 424 U.S. 319 (1976).

75. *Lassiter v. Department of Social Services*, 452 U.S. at 32-33, noting further that the petitioner had given "a plain demonstration that she [was] not interested in attending a hearing." *Id.* at 33.

be noted that the *Scott* case itself is not one involving purely private interests, but one in which a state prisoner is complaining of treatment received at the hands of a public university's medical center while in public custody.

Beyond the determination that a duty is not owed to the *litigant*, in the sense that it would not violate *his* rights to proceed to judgment without providing him counsel, lies the need of the court itself for the assistance of counsel in trying a modern lawsuit. Precisely the technical complexity and time-consuming character of such a proceeding makes the court more dependent than ever on the ability of the parties and their representatives to present evidence in an orderly fashion and to restrict argument and offers of proof to those that are relevant. It has been argued, moreover, that the propriety of a judge's accommodation to the civil litigant's lack of skill and technical understanding is, if anything, more questionable than such accommodation to a criminal defendant, because the expectation of impartiality is greater.<sup>76</sup> It may, therefore, be at least as difficult for the court fairly to administer justice in a civil case where one party is without counsel, as in a criminal case where the defendant appears *pro se*.<sup>77</sup>

## II. THE IN FORMA PAUPERIS STATUTE

The Missouri Supreme Court's dismissal of the state's *in forma pauperis* statute as a basis for appointment of counsel in *Scott* was based on an assumption about its historic purpose. It seems appropriate, therefore, to preface a discussion of that decision with a sketch of the historical origins of that statute, with special reference to two jurisdictions which also played a role in the court's treatment of inherent power: England, where the statute had its origins, and Indiana, which has functioned as a leading authority against coercive appointments.

### A. *Origins in English Law*<sup>78</sup>

The first known statutory provision for free judicial services for poor persons in civil cases, which appeared in 1495 under Henry VII, provided for

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76. Comment, *The Right to Counsel in Civil Litigation*, 66 COL. L. REV. 1322, 1331-32 (1966). A recent case which vindicates the litigant's right to appear *pro se* but discusses and illustrates its difficulties for the court is *Blair v. Maynard*, 324 S.E.2d 391 (W. Va. 1984).

77. For an argument that the right to counsel should not be limited even to cases to which the state is a party, see Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 633-37 (1984).

78. For a comprehensive historical review of English practice relating to poor litigants, see Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 363f. (1923). See also Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U.L. REV. 735 (1980), focussing specifically on the uncompensated appointment of counsel as an element of that practice. On the present scheme of legal aid, see, e.g., Jacob, *Access to Justice In England*, in I M. CAPPELLETTI & B. GARTH, ACCESS TO JUSTICE 417, 442-49 (1978).

uncompensated appointment of counsel and attorneys.<sup>79</sup> In fact, however, the principal advance made by this statute was relief from other costs, since the power of the courts to require serjeants (precursors of the barristers, selected by the crown on nomination by the judges)<sup>80</sup> to plead for poor persons, on pain of contempt, was already well-established by that time.<sup>81</sup> One major weakness in the text was that the privilege was available only to plaintiffs—a limitation not changed until the statute was replaced by court rules in 1883.<sup>82</sup>

Practice under this provision eventually deviated substantially from its intent, specifically in the case of a plaintiff seeking monetary relief. If a plaintiff *in forma pauperis* was unsuccessful, costs could be assessed against him in favor of the defendant, and he could be punished for failure to pay them;<sup>83</sup> a statute of 1531<sup>84</sup> exempted him from liability for costs, but left open the possibility, largely exploited by threat rather than enforcement, of punishment.<sup>85</sup> If a plaintiff *in forma pauperis* was successful, and obtained a judgment for more than £5 costs were awarded to him from the defendant as if he were not a pauper. Since taxable costs—already in 1275 for plaintiffs obtaining damages judgments<sup>86</sup>—included both court and attorneys' fees, the lawyers would have their clients pay such fees, and then include them in the claim for costs.

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79. 11 Hen. VII, c. 12 (1495), which read in pertinent part as follows, with modern orthography:

[E]very poor person or persons which have & hereafter shall have cause of action or actions against any person or person within the realm shall have, by the discretion of the Chancellor of this realm, for the time being writ or writes original and writs of sub poena according to the nature of their causes, therefor paying nothing to your Highness for the seals of the same, nor to any person for the making of the same writ or writs to be hereafter sued. And that the said Chancellor for the same time being shall assign such of the Clerks which shall do and use the making and writing of the same writs to write the same ready to be sealed, and also learned Counsel and attorneys for the same, without taking any reward therefor; And after the said writ or writs be returned, . . . the Justices . . . shall assign to the same poor person or persons Counsel learned by their discretions which shall give their counsels taking nothing for the same, and in like wise the same Justices shall appoint attorney and attorneys for the same poor person and persons and all other officers requisite and necessary to be had for the speed of the said duties without any reward for their Counsels help and business in the same; . . .

80. See 2 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 485-86 (4TH ED. 1936).

81. *Id.* at 491. By the seventeenth century, Chief Justice Hale is quoted in dictum as characterizing refusal to serve as contempt: "[I]f the Court should assign [a serjeant] to be counsel, he ought to attend; and if he refuse, . . . we would not hear him, nay, we would make bold to commit him; . . ." — *v. Scroggs*, 1 Freeman 389, 89 Eng. Repr. 289 (1674).

82. Rules of the Supreme Court, 1883, Order XVI., r. 22, as quoted in *Carson v. Pickersgill & Sons*, 14 Q.B.D. 859 (1885).

83. See Maguire, *supra* note 78, at 374-75.

84. 23 Hen. VIII, c. 15 (1531).

85. See Maguire, *supra* note 78, at 375.

86. Statute of Gloucester, 6 Edw. I, c. 1; see 4 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 537 (2d ed. 1937).

Apparently many courts were willing to allow it, despite the express prohibition in the statute against receiving any reward for services.<sup>87</sup> This practice was expressly abolished by court rule in 1853,<sup>88</sup> and the prohibition was retained in 1883 in the rules which replaced the statute of Henry VII.<sup>89</sup> There can be little doubt that the concern for this practice was related not only to the absence of reciprocal cost relief to the successful opponent, but also to the long-standing prohibition against the contingent fee, which was and still is a crime (champerty) under English law.<sup>90</sup>

As a further discouragement to "abusive" *in forma pauperis* proceedings, the 1853 Rules required the party or his attorney to obtain an opinion of counsel on his case to be submitted with the application.<sup>91</sup>

With these safeguards against lawyer profiteering, the Rules of 1883 ex-

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87. For a disapproving description of the practice, see *Dooly v. Great N. Ry.*, 4 E. & B. 341 (1854). "The consequence was that there was a great and growing evil, arising from harassing actions brought in the names of paupers, but in reality on speculation to obtain costs." *Id.* at 344 (per Erle, J.); see also *Carson v. Pickersgill & Sons*, 14 Q.B. 859, 866 (1885) (in which the principal objection to the practice is the inability of the defendant to obtain reciprocal relief if the plaintiff loses).

This perception of abuse in *in forma pauperis* proceedings is reinforced by the fact that the maximum amount of assets an eligible pauper could have was £51, virtually from the beginning until the statute was replaced by rules in 1883, which raised the amount to £251. See Maguire, *supra* note 78, at 376, 380, and *supra* note 82.

88. General Rules of Hilary Term, 16 Vict., Rule 121, 1 E. & B. xxi (1853).  
89.

Whilst a person sues or defends as a pauper no person shall take or agree to take, or seek to obtain from him any fee, profit, or reward, for the conduct of his business in the Court, and any person who takes, or agrees to take, or seeks to obtain any such fee, profit, or reward shall be guilty of a contempt of Court.

Rules of the Supreme Court, 1883, Order XVI., r. 27, as quoted in *Carson v. Pickersgill & Sons*, 14 Q.B.D. 859, 860 (1885). The cited opinions also disclose that the objectionable practice had also arisen in the Chancery Courts, where the statute had never applied, but where the same principle of reciprocity should have dictated the same result.

90. See, e.g., Winfield, *The History of Maintenance and Champerty*, 35 L.Q. REV. 50 (1919) (tracing the history at least to three thirteenth-century statutes under Edward I); F. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES 36-38 (1964); R. ARONSON, ATTORNEY-CLIENT FEE ARRANGEMENTS 76 (1980).

91. The full text of the rule is as follows:

No person shall be admitted to sue in *in forma pauperis* unless the case laid before counsel for his opinion, and his opinion thereon, with an affidavit of the party or his attorney that the same case contains a full and true statement of all the material facts, to the best of his knowledge and belief, shall be produced before the Court or Judge to whom application may be made; and no fees shall be payable by a pauper to his counsel and attorney, nor at the offices of the Masters, or Associates, or at the Judges' Chambers, or elsewhere by reason of a verdict being found for such pauper exceeding five pounds.

General Rules of Hilary Term, 16 Vict., rule 121, 1 E. & B. xxi (1853). This requirement was retained in the 1883 Rules of the Supreme Court, Order XVI, r. 24, *supra* note 89.

pressly provided what had been implicit in the Statute of Henry VII,<sup>92</sup> that "a counsel or solicitor so assigned shall not be at liberty to refuse his assistance unless he satisfies the Court or judge of some good reason for refusing."<sup>93</sup>

There is some doubt about the extent to which coercive appointments were actually made which did not involve lawyers who had some special relationship to the court. Lord Hale's seventeenth-century dictum focuses on serjeants, who were indeed specially selected members of the bar who performed a number of more or less official functions other than arguing in court.<sup>94</sup> It is also clear that prior to the nineteenth century, when the rather loosely regulated professions of attorney and solicitor were combined and subjected to the general jurisdiction of the newly organized Supreme Court of Judicature,<sup>95</sup> many of those who appeared as attorneys for litigants in court were at the same time court officials in a more literal sense.<sup>96</sup> Such coercive appointment of attorneys as occurred under the *in forma pauperis* statute may have been concentrated on such persons. By 1883, however, the court is unmistakably identifying persons ("a counsel or solicitor, or both"<sup>97</sup>) as subject to appoint-

92. See, e.g., the opinion of Lord Campbell in *Dooly v. Great N. Ry.*, 4 E. & B. 341, 345, 119 Eng. Rep. 131, 133 (Q.B. 1854): "No pauper having a real just cause of action will ever fail to find respectable members of both branches of the profession ready to assist gratuitously in the furtherance of justice. If it should be necessary, the Court has power to assign both."

93. Rules of the Supreme Court 1883, Order XVI, rule 26. *supra* note 89.

94. See, e.g., Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 745-46 (1980).

95. Supreme Court of Judicature Act of 1873, 36 & 37 Vict. c. 66, § 87, denominating the new professionals "Solicitors of the Supreme Court." Attorneys, whose function was to act for the litigant in pre- and post-trial formalities and to instruct the barrister in oral argument, were always officially appointed by the courts; but the appointment was largely a formality and carried with it no assurance of training or qualification. As of the time of the adoption of the *in forma pauperis* statute in 1495, and for long thereafter, the appointment rolls were extremely long and included many amateurs and part-timers, see H. KIRK, *PORTRAIT OF A PROFESSION* 12-13 (1976).

The first attempt to provide a disciplinary system for the two professions, the Attorneys and Solicitors Act 1729, sought to regulate the process of enrolling the lawyers by the courts, and to set rudimentary standards of behavior; it also stimulated the formation of a voluntary professional organization ("Society of Gentlemen Practisers") which eventually took some initiative in pursuing disciplinary matters before the courts. Nonetheless it was not an efficient system. See KIRK, *supra* at 72-76. Finally, the Solicitors Act 1888 gave principal training, admission and disciplinary responsibility to the Law Society, subject to supervision of the courts, and at the same time eliminated the right of court officials to act as representatives of parties. In the present system, the courts retain jurisdiction over solicitors, and the latter retain their designation as officers of the Supreme Court, but it appears to be largely obsolete as a disciplinary alternative. See H. ADAMSON, *THE SOLICITORS ACT 1974* 34 (1975).

96. Clerks, prothonotaries and proctors were actively exercising their right to appear as attorneys in common law and chancery courts through the eighteenth century, taking advantage of what amounted in many cases to a sinecure. The right of officials to act as attorneys was excluded in the County Courts in 1846, and eventually eliminated elsewhere in 1888. KIRK, *supra* note 95 at 9-21.

97. Rules of the Supreme Court, 1883, Order XVI, rule 26, *supra* note 89.

ment who are not in any practical sense court officials.

In 1914, the court-appointment system was abandoned altogether as a mechanism for providing legal aid to the poor, and the present practice of maintaining registries of lawyers willing to accept such cases was instituted.<sup>98</sup> Since 1949, lawyers participating in the various forms of legal assistance to the poor have been usually been eligible for some degree of compensation.<sup>99</sup>

### B. *American Adoptions, and The Special Case of Indiana*

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-odd years of the Republic, which included provision for appointment of counsel: Virginia in 1786,<sup>100</sup> Kentucky in 1798,<sup>101</sup> Louisiana Territory in 1807,<sup>102</sup> Indiana Territory in 1813,<sup>103</sup> and Tennessee in 1821.<sup>104</sup> Five other states followed suit later in the nineteenth century.<sup>105</sup> Of the eleven statutes, all but one (New York, 1876) at least initially incorporated the express prohibition against the lawyer taking a fee. All of these statutes remain in essence on the books today.<sup>106</sup>

98. For a description of the 1914 arrangements, see Maguire, *supra* note 78, at 391f.

99. For a relatively recent description of the system see Jacob, *Access to Justice in England*, 1 M. CAPPELLETTI & B. GARTH, ACCESS TO JUSTICE 417, 443-46 (1978).

100. Act of Oct. 15, 1786, ch. 65, 1786 Va. Acts 42.

101. Act of Jan. 30, 1798, ch. 13, 1786 Ky. Acts 39. See Herbert, *Kentucky's In Forma Pauperis Statute: Indifferent Justice or Merely Different Justice?*, 5 No. KY. L. REV. 169, 171-72 (1978).

102. Act of July 3, 1807, ch. 38, 1807 La. Terr. Acts 118, § 35. This provision was later incorporated into the laws of Missouri and Arkansas after they achieved statehood. It should be noted that by this time the Louisiana Territory did not include any part of the present state of Louisiana, which was in a separate Territory of Orleans established by the Act of March 26, 1804, 2 U.S. STAT. 283. That same act, § 12, designated the northern section of the Louisiana purchase the District of Louisiana, and transferred its administration to Indiana Territory; an Act of March 3, 1805, ch. 31, 2 STAT. 331, established it as a separate Territory of Louisiana; and an Act of June 4, 1812, ch. 95, 2 STAT. 743, renamed it the Territory of Missouri.

103. Act of Feb. 24, 1813, ch. 4, § 1, 1813 Ind. Terr. Laws. After statehood, the statute was reenacted, 1818 Ind. Acts, ch. 14, § 20, adding a clause levying a fine upon any assigned counsel who receives any fee or reward, directly or indirectly. This statute improved on that of Henry VII by covering defendants as well as plaintiffs.

104. Tenn. Acts. 1821, ch. 22, § 3.

105. Ill. Rev. Stat. 1845, p. 126, § 3; Act to Organize the District Courts and to Define their Powers and Jurisdiction, § 11, 1876 N.Y. Laws, ch. 448, § 458 (Code of Remedial Justice); 1836 N.C. Laws, ch. 31, § 47; Tex. Laws 1846, p. 203; Code of West Virginia, 1868, ch. 138, § 1. The North Carolina courts, at least, appear to have treated the Statute of Henry VII as part of their common law prior to its enactment into state statute. *Clark v. Dupree*, 13 N.C. 411 (1830).

106. ARK. STAT. ANN., § 27-403 (1947); ILL. ANN. STAT. ch. 110, § 5-105 (Smith-Hurd 1982); IND. CODE ANN. § 34-1-1-3 (Burns 1973); KY. REV. STAT. § 453.190 (1978); MO. REV. STAT. § 514.040 (1978); N.Y. CIV. PRACT. LAW & R. §

Of these states expressly adopting appointment of counsel *in forma pauperis*, the most interesting in terms of the issues raised by the statute is Indiana. Its territorial legislature was governed by various provisions of the Northwest Ordinance of 1787, including a series of "Articles of Compact," of which article II provided that if "public exigencies" made it necessary "to demand [a man's] particular services," compensation should be made.<sup>107</sup> This in turn was incorporated into article I, section 7 of the first Constitution of 1816, which read as follows: "That no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without a just compensation being made therefor."<sup>108</sup>

In 1851, at the height of post-Jacksonian populism, Indiana adopted a new constitution, which retained the above provision<sup>109</sup> but added a new twist by abolishing all competency-based requirements for a license to practice law: "Every person of good moral character, being a voter, shall be entitled to admission to practice law in all Courts of Justice."<sup>110</sup> Shortly thereafter the Indiana Supreme Court handed down two decisions on representation of the poor, reflecting the interplay of these constitutional provisions. In 1853, it held that the *in forma pauperis* statute was unconstitutional insofar as it required uncompensated representation, and that a lawyer could not be held in contempt under the statute for refusing to defend an indigent accused of a crime.<sup>111</sup> In 1854, however, the court held that an attorney who does represent a poor defendant in a criminal case, in fulfillment of the state's duty to provide counsel, is entitled to compensation from the county, as for a taking.<sup>112</sup> The court's rather chilling rationale, reflecting the state of the profession at the time, is quoted in the majority opinion in *Scott* as indicative of a rejection of any tradition of public service in the bar.<sup>113</sup> It is set forth at slightly greater length in the margin.<sup>114</sup> The important point to be made about this passage, however,

1102(a)(McKinney 1976); N.C. GEN. STAT. § 1-110 (1971); TENN. CODE ANN. § 23-2-101 (1980); TEX. REV. CIV. CODE ANN. art. 1917 (Vernon 1964) (prohibition against taking fee omitted); VA. CODE § 14-1-183 (1950); W. VA. CODE § 59-2-1 (1966).

107. Reprinted in IND. CODE ANN., Constitutions, 409 (Burns 1978); see also Law of May 7, 1800, § 2, 2 STAT. 58, 59, incorporating the provisions of the ordinance into the territorial government.

108. 1819 Ind. Acts 10.

109. IND. CONST., art. 1, § 21, IND. STAT. ANN., CONSTITUTIONS, 79 (Burns 1978): "No man's particular services shall be demanded, without just compensation. No man's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered."

110. Art. 7 § 21, *id.* at p. 225.

111. *Blythe v. State*, 4 Ind. 525 (1853).

112. *Webb v. Baird*, 6 Ind. 13 (1854).

113. 688 S.W.2d at 761.

114.

The gratuitous defence of a pauper is placed upon two grounds, viz., as an honorary duty, even as far back as the civil law; and as a statutory requirement. Honorary duties are hardly susceptible of enforcement in a Court of law. Besides, in this state, the profession of the law was never much favored

is that it clearly emphasizes not only the absence of special lawyer privileges (such as immunity from arrest or the right to be sued only in the court in which they are licensed, or to receive special fees, or to be free of other public service duties)<sup>115</sup> but also the absence of any substantive requirements for admission to the bar. Since any citizen could obtain a license to practice merely by asking for it, there was no reason to treat the lawyer as having obligations different from the citizen.

The *in forma pauperis* statute nonetheless remained on the books, and was reenacted in 1881 in the same mandatory form, requiring appointment of counsel if a person is admitted to sue *in forma pauperis* and requiring the attorney to serve without taking a fee from the client.<sup>116</sup> In 1899, the Indiana Supreme Court denied relief to an attorney who was appointed *in forma pauperis* in a civil case and sought compensation from the county, holding that since under the prior decisions the attorney could not have been required to

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by special pecuniary emoluments, save, some years ago, in the case of docket-fees in certain contingencies. The reciprocal obligations of the profession to the body politic, are slender in proportion. Under our present constitution, it is reduced to where it always should have been, a common level with all other professions and pursuits. Its practitioners have no specific fees taxed by law—no special privileges or odious discriminations in their favor. Every voter who can find business, may practice on such terms as he contracts for. The practitioner, therefore, owes no honorary services to any other citizen, or to the public.

The constitution and laws of the state go upon the just presumption that the public are discriminating enough in regard to qualifications. Every man having business in Court, is presumed to be as competent to select his legal adviser as he is to select his watchmaker or carpenter. The idea of one calling enjoying peculiar privileges, and therefore being more honorable than any other, is not congenial to our institutions. And that any class should be paid for their particular services in empty honors, is an obsolete idea, belonging to another age and to a state of society hostile to liberty and equal rights. "The legal profession having been thus properly stripped of all its odious distinctions and peculiar emoluments, the public can no longer justly demand of that class of citizens any gratuitous services which would not be demandable of every other class. To the attorney, his profession is his means of livelihood. His legal knowledge is his capital stock. His professional services are no more at the mercy of the public, as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic. The law which requires gratuitous services from a particular class, in effect imposes a tax to that extent upon such class—clearly in violation of the fundamental law, which provides for a uniform and equal rate of assessment and taxation upon all the citizens. "It must be matter of congratulation to the profession that they are thus relieved from the burden of gratuitous services and useless honors; and remitted to the more substantial rewards of other citizens."

*Id.* at 16-17.

115. For extended discussion of these special privileges of the English lawyer, see BIRKS, GENTLEMEN OF THE LAW 32-38 (1960); Martineau, *The Attorney as Officer of the Court: Time to Take the Gown off the Bar*, 35 S.C.L. REV. 541, 546-48 (1984).

116. Ind. Acts 1881 (Spec. Sess.), ch. 38, § 17. That provision remains in force today, IND. CODE ANN. § 341-1-3 (1973).



take the appointment, he must have accepted appointment voluntarily, and therefore was bound by the condition that he not be compensated.<sup>117</sup>

While a number of other states adopted statutes in the mid-nineteenth century opening up the legal profession to virtually all comers,<sup>118</sup> Indiana may have been the only state to embody such anti-professional egalitarianism in its constitution.<sup>119</sup> The Indiana provision resisted the efforts of lawyers to repeal it until 1931.<sup>120</sup> Maine, on the other hand, whose 1843 statute<sup>121</sup> gave every citizen of good moral character a right to admission to practice and every litigant the right to be represented by any citizen whom he authorized in writing to do so, was able in 1859 to repeal the open-admission provision and prohibit the lay advocate from charging a fee,<sup>122</sup> although the right to appear by a lay representative remained until 1931.

Only two other states appear to have adopted the constitutional prohibition against demanding of "particular services" without just compensation: Tennessee<sup>123</sup> and Oregon.<sup>124</sup> Indiana's interpretation of it as applied to legal

117. Board of Comm'rs v. Pollard, 153 Ind. 371, 55 N.E. 87 (1899).

118. For a review of the legislation of the period, critical not only of statutory abolition of admissions standards but also of the laxness of standards applied by courts free to formulate them, see Blackard, *The Demoralization of the Legal Profession in Nineteenth Century America*, 16 TENN. L. REV. 314 (1940).

119. New York came close in its 1846 constitution, which provided in art. 6, § 8 that "[a]ny male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to practice in all the courts of this State." This was interpreted by the courts, however, as requiring substantial training and experience. A statute of 1847, permitting any person to appear in court for another if specifically authorized in writing by the latter, was declared unconstitutional by lower courts (e.g., *McKoan v. Devries*, 3 Barb. (N.Y.) 196 (Spec. Term 1848)), and never came to application. For a critical review, see *Admission to the Bar*, 4 ALBANY L.J. 309 (1871).

120. The repeal was put to the voters in the general election of 1932, and passed. In *In re Todd*, 208 Ind. 168, 193 N.E. 865 (1935), the repeal was sustained as an amendment to the constitution, and the demand of a voter of good moral character to be licensed according to the old provision was denied. For an interesting debate between a law school dean and a practitioner over the permissibility of subsuming the obligation to prove competence under the rubric "good moral character," thus perhaps avoiding the cumbersome task of constitutional amendment, see Gavit, *Legal Education and Admission to the Bar*, 6 IND. L.J. 67 (1930); Hurley, *Learning in the Law and Admission to Practice*, 7 IND. L.J. 205 (1932); Gavit, Reply, *id.* at 209; Hurley, Rejoinder, *id.* at 223; and Gavit, *id.* at 226. The state supreme court did manage, at least, to interpret the constitutional provision as not precluding other admissions on the traditional basis of reading, formal study and/or examination. In *In re Leach*, 134 Ind. 665, 34 N.E. 641 (1893), it was held that a woman, not being a voter and therefore not eligible for admission under the constitution, could nonetheless be admitted on examination.

121. Maine Acts 1843, ch. 12.

122. Maine Acts 1859, ch. 12, §§ 1 and 2.

123. TENN. CONST. of 1796, art. XI, § 11, 1 TENN. CODE ANN. 854 (1980), carried forward without change to TENN. CONST. of 1870, art. I § 21, *id.* at 370.

124. OR. CONST. art. I § 18, 5 OR. REV. STAT. 1421 (1983).

services is unique.<sup>125</sup> To date Indiana remains the only state which has declared an *in forma pauperis* statute expressly calling for uncompensated appointment of counsel to be invalid as an infringement on the rights of lawyers.

The upshot of these developments is that in Indiana the court has the power coercively to appoint counsel in criminal cases, where the defendant has a constitutional right to counsel, but that the government is obligated to compensate counsel so appointed as for a taking.<sup>126</sup> In civil cases, at least those where there is no constitutional right to counsel, the court is limited to requests and persuasion, and any attorney has the right to refuse appointment; but if appointment is accepted, the statutory prohibition against taking a fee is enforceable.

### C. *Applicability of the Missouri Statute to this Plaintiff*

The *Scott* case is rare if not unique among reported state court decisions under *in forma pauperis* provisions,<sup>127</sup> in that it involves a client asserting a major damages claim for which a contingent fee could normally be charged, with the attorney advancing expenses of litigation.<sup>128</sup> That fact alone would

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125. The Tennessee Supreme Court has denied the right of appointed counsel to receive compensation in criminal cases, *Wright v. State*, 50 Tenn. (3 Heisk.) 256 (1871), and in civil cases, *House v. Whitis*, 64 Tenn. 690 (1875), in the latter case invoking the *in forma pauperis* statute and expressly rejecting the argument that the constitutional provision required otherwise. *See also State v. Henley*, 98 Tenn. 665, 41 S.W. 352 (1897), for a more extended discussion. The Supreme Court of Oregon, without reference to the constitutional provision, has also held that where appointment of counsel is constitutionally required—as in a case of termination of parental rights, for the parent—the attorney has no right to compensation absent statute. *State v. Jamison*, 251 Or. 114, 444 P.2d 1005 (1968). Where compensation is provided by statute, claims for additional compensation have been rejected, *State v. Apodaca*, 252 Or. 345, 449 P.2d 445 (1969), even when the claim is based on the constitutional provision. *Keene v. Jackson County*, 3 Or. App. 551, 474 P.2d 777 (1970), *petition denied* 257 Or. 335, 478 P.2d 393 (1970), *cert. denied*, 402 U.S. 995 (1971).

126. *See, e.g., Knox County Council v. State ex rel. McCormick*, 217 Ind. 493, 29 N.E.2d 405 (1940).

127. Federal law contains, in addition to the general *in forma pauperis* statute, 28 U.S.C. § 1915 (1970), at least one provision, in conjunction with Title VII (employment discrimination) of the Civil Rights Act of 1964, in which appointment of counsel for plaintiffs with potentially fee-generating claims is clearly contemplated without reference to compensation. Civil Rights Act of 1964, § 706(e)(B), 42 U.S.C. § 2000e-5(f)(1)(B), *as amended*, (1972). *See, e.g., Bradshaw v. United States Dist. Ct.*, 742 F.2d 515 (9th Cir. 1984). In state court cases, assignments generating challenge seem more typically to have been divorce cases such as *In re Farrell*, 127 Misc. 2d 350, 486 N.Y.S.2d 130 (Sup. Ct. 1985)(counsel's motion to vacate denied), or prisoner complaints such as *Ex parte Dibble*, 310 S.E.2d 440 (S.C. App. 1983)(counsel's appeal from denial of relief partially successful, remand for review under guidelines), where the likelihood of a recovery from which compensation can be ordered is doubtful.

128. The official position of the Missouri Code of Professional Responsibility, which remains in effect today, is that a lawyer may not agree beforehand that litigation expenses advanced to her client need not be repaid, MO. SUP. CT. R. 4, DR 5-103(B)

have been sufficient to justify characterizing the appointment as an abuse of discretion *under the Missouri statute*, where no showing was made that voluntary attorneys were not obtainable. Since the statute requires a finding that the plaintiff be "unable to prosecute his or her suit, and pay the costs and expenses thereof," a plaintiff who can get a voluntary attorney on such a contingent fee basis is arguably ineligible.

At first blush this would appear to be the holding of the Missouri Supreme Court in *Scott*.<sup>129</sup> Its rationale, however, is not based on the inability-to-pay language of the *in forma pauperis* statute itself, but rather on another statute which the court treats as a general legislative definition of "poor person," namely that which defines the poor for the support of whom the county is given responsibility.<sup>130</sup> Since "aged, infirm, lame, blind or sick persons" who cannot support themselves are "deemed poor persons" for purposes of *entitlement* to county support, the court seems to be arguing, only such persons can be deemed "poor persons" eligible for *discretionary* relief from litigation costs.<sup>131</sup> The *in forma pauperis* statute, says the court, was adopted against the background of existing poor laws of the same tenor, and should be understood as intended to protect only the same class of persons.<sup>132</sup>

Neither the language of the "deemed poor persons" provision nor the legislative history compels this inference from inclusive definition to exclusive definition; indeed they rather strongly suggest otherwise. While it is true that the language "is a poor person, and unable to prosecute, etc." appears in the *in forma pauperis* provision for the first time in 1822,<sup>133</sup> the phrase "poor person" was used in the first *in forma pauperis* statute adopted by the (Louisiana) territorial legislature in 1807,<sup>134</sup> more than seven years before the first

(client must remain ultimately liable for expenses). Under such a rule, a person who could not afford to reimburse his lawyer for expenses in the event he loses the case would be at least potentially unable to get a lawyer on his own. The reality, however, is that lawyers frequently take such cases without hope of reimbursement in case of loss; therefore the ABA's Model Rules of Professional Conduct abandon the requirement that the client remain ultimately liable for litigation expenses advanced. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(e) (1983).

129. 688 S.W.2d at 757.

130. Present MO. REV. STAT. § 205.590 (1978): "Aged, infirm, lame, blind or sick persons, who are unable to support themselves, and when there are no other persons required by law and able to maintain them, shall be deemed poor persons."

131. 688 S.W.2d at 759.

132. *Id.*

133. Act of Jan. 11, 1822, ch. 363 § 4, 1824 Mo. Laws 843.

134. Act of July 3, 1807, ch. 38 § 35, 1824 Mo. Laws 118 provides:

Every poor person who shall have cause of action against any person in this territory, shall have by the discretion of the court before whom he would sue, writs original and writs of subpoena according to the nature of the case, nothing paying for the same. And the said court shall direct the clerk to issue the necessary process, and shall assign to him counsel learned in the law, and appoint all other officers requisite and necessary, to be had for the speed of said suit, who shall do their duties without any reward for their counsels, help, and business in the same.

county poor law.<sup>135</sup> Indeed the first poor law itself made it clear that the phrase "poor person" was not limited to the infirm, although the support obligation was.<sup>136</sup> Moreover, another provision of the present county welfare laws, traceable at least to 1835,<sup>137</sup> calls on the county's discretion to help anyone in need.<sup>138</sup>

The distinction is important, because the court's interpretation of the phrase "poor person" naturally leads to the conclusion that persons who are not infirm are *ineligible* not only for appointment of counsel but also for discretionary relief from court fees and costs. Even if they can show that they are unable to pay costs, no lawyer is willing to take on their case on an expenses-advanced basis, and they wish to proceed either *pro se* or with counsel investing only his time. This would be a departure, surely, from the expectations reflected in earlier decisions under the statute, associating the *in forma pauperis* statute with the right of access to the courts.<sup>139</sup> If such a person is a

135. Act of Jan. 2, 1815, ch. 121, Mo. Laws 340.

136. *Id.* § 1: "Each and every county in this territory shall relieve, support and maintain its poor, such as the lame, blind, sick and other persons . . ."

*Id.* § 2:

The courts of common pleas in their respective counties, on the information of any justice of the peace of the county where any poor person may have resided for the space of time in the section of this act mentioned, or on the knowledge of the judges of said court, or any of them, that such person is lame, blind or sick and thereby unable to support himself or herself, or from age and infirmity unable to support him or herself, and has no sufficient estate for that purpose.—And on such court being satisfied of the truth of such information, it shall be their duty from time to time . . . to provide at the expense of the county, etc.

137. MO. REV. STAT. § 2 (1835) ("Poor" defined).

138. MO. REV. STAT. § 205.620 (1978): "The county court shall at all times use its discretion and grant relief to all persons, without regard to residence, who may require its assistance."

139.

Recognition of the right of an individual to sue as a poor person began while our State was yet a territory. . . . An *in forma pauperis* statute was one of this State's first enacted laws after admittance to the Union. . . . The Bill of Rights to our first state constitution, the language of which today remains unchanged in Article 1, Section 14 of the Missouri Constitution (1945), . . . is a recognition by our organic law of the principle that access to the courts must not depend on ability to pay fees and costs.

The legislature, obedient to this mandate, provided indigents access to our courts even though unable to pay the costs of litigation because of their poverty by the enactment of what is now Section 514.040. The courts in the construction of the statute that was the predecessor to Section 514.040 enunciated the basic nature of the right expressed in this statute. '[T]he provision of our law, opening our courts to all, regardless of any pecuniary qualifications—to the poor man as well as to the man of substance—is at the very foundation of the right of access to the courts, and is firmly set into the very foundation of our government, and extends over all legislation regulating the due administration of justice.' (Emphasis added.) *State ex rel. LaRue v. Hitchcock*, 171 Mo. App. 109, 125-26, 153 S.W. 546, 552 (St. L. 1913).

proper beneficiary of discretionary county welfare assistance, there is no reason to suppose that the legislature did not intend him to be a discretionary beneficiary of litigation-cost relief. As the court itself pointed out in *Scott*,<sup>140</sup> such relief does not come from the pockets of individual officers of the court in the modern era, and cannot be objected to on that ground.

If eligibility for appointed counsel under the statute is conditioned on an adequate showing of unsuccessful effort to employ counsel on a voluntary basis, and such a showing is made, does it follow that appointment under the statute must be "without compensation?" The statute does purport to require appointed counsel to serve "without fee or reward." Moreover, the proviso calling for the recovery of "costs" for the benefit of the officers of the court, in the event of a judgment for the plaintiff, would not normally include attorney's fees in so far as recovery from the *defendant* is concerned.<sup>141</sup> If the statute were interpreted as directing appointed counsel to serve without fee even if a recovery is had from which a contingent fee could have been paid to voluntary counsel, however, that would present at least two grounds for constitutional infirmity which would justify a contrary interpretation.<sup>142</sup> First, this would be the strongest possible case for an improper uncompensated taking of property in violation of the attorney's own constitutional rights.<sup>143</sup> Second, and more importantly, such a prohibition would infringe on the inherent power of the judiciary to regulate the practice of law and, in particular, the setting of fees for legal services.<sup>144</sup> In the exercise of its power to appoint, therefore, the court should be no more bound by the statutory prohibition against taking a fee than it was by the statutory definitions of unauthorized practice in the exercise of its contempt power, or by the statutory definitions of appellate jurisdiction in the exercise of its disciplinary power over attorneys.

In other respects, the statute is consistent with the claims of inherent power to appoint outlined above, and the language of the statute helps articulate considerations which are clearly appropriate under inherent power. It identifies the power to appoint as discretionary, and presupposes a finding that the plaintiff is unable, by reason of poverty, to defray the costs of litigation—one, and probably the most important, type of case in which appointment may be necessary to the performance of the court's constitutional responsibilities. The statute can, therefore, aid the court in the exercise of its

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State *ex rel.* Taylor v. Clymer, 503 S.W.2d 53, 55-56 (Mo. App., K.C. 1973).

140. 688 S.W.2d at 759 n.2.

141. See, e.g., Mayor, Councilmen and Citizens of Liberty v. Beard, 636 S.W.2d 330 (Mo. 1982) (en banc) (statutory authorization of the court to assess costs does not include attorney's fees). The dissenting opinion of Judge Blackmar in *Scott*, however, suggests that an expansive interpretation of the term might be in order. 688 S.W.2d at 744.

142. When a statute can be construed consistently with its language and within constitutional limitations, a construction which leads to invalidity is to be avoided. See *City of Kirkwood v. Allen*, 399 S.W.2d 30 (Mo. 1966) (en banc).

143. See *infra* notes 154-63 and accompanying text.

144. See *supra* notes 18-19, 22-27 and accompanying text.

discretion without encroaching on its inherent powers.

### III. DEFENSES TO PARTICULAR APPOINTMENTS

Having found the statute inapplicable and the inherent power to appoint non-existent, the court had no occasion in *Scott* to define, much less to decide, defenses or objections which might be made to particular exercises of a discretionary power to appoint. Since this paper argues the existence of the power, it is necessary to address those issues, and to indicate the sorts of guidelines which ought to govern the making of specific appointments.

#### A. *Constitutional Objections Personal to the Lawyer*

Beyond the inherent power of the judiciary itself, the *Scott* court did not decide the personal constitutional issues raised by the relator, either under the statute or under the inherent power. It did at least touch upon them, however, and suggested resolutions which are appropriate for review here.

(i) *Involuntary servitude*. With respect to the question of involuntary servitude, the court contented itself with pointing out, in a footnote, that "such arguments have been uniformly rejected as without merit."<sup>145</sup> While the rejection has not been quite uniform,<sup>146</sup> it appears to be soundly based in the United States Supreme Court's decisions, which, for example, have held compulsory service for the county in building roads valid against such challenge in *Butler v. Perry*.<sup>147</sup>

After this decision, the military draft was specifically upheld in the *Selective Draft Law Cases*,<sup>148</sup> with the Court professing to be "unable to conceive

145. 688 S.W.2d at 758 n.1 (citing *Family Division Trial Lawyers v. Moultrie*, 725 F.2d 695, 704-05 (D.C.Cir. 1984); *Bradshaw v. United States Dist. Ct.*, 742 F.2d 515, 517 n.2 (9th Cir. 1984); *Williamson v. Vardeman*, 674 F.2d 1211, 1214-15 (8th Cir. 1982); *White v. United States Pipe & Foundry Co.*, 646 F.2d 203, 205 n.3 (5th Cir. 1981)).

146. See *Bedford v. Salt Lake County*, 22 Utah 2d 12, 14-15, 447 P.2d 193, 194-95 (1968) (the court in dictum apparently confuses involuntary servitude with uncompensated taking of services as property).

147. 240 U.S. 328 (1916):

Utilizing the language of the Ordinance of 1787, the Thirteenth Amendment declares that neither slavery nor involuntary servitude shall exist. This amendment was adopted with reference to conditions existing since the foundation of our Government, and the term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results. It introduced no novel doctrine with respect to services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers. . . .  
*Id.* at 332-33 (1916).

148. 245 U.S. 366 (1918).

upon what theory" the draft could be said to violate the thirteenth amendment. So long as serving as counsel to the indigent is characterized as a service to the *public*, therefore—a traditional "duty which individuals owe to the State"—it is outside the prohibition against involuntary servitude.<sup>149</sup> Even if that specific duty is attached to a particular profession rather than to citizenship as such, the voluntary character of entry into the profession may be seen as precluding application of that concept.<sup>150</sup>

On the other hand, if the lawyer's duty were seen as owed to the indigent person individually, the Supreme Court's cases might support characterizing coerced performance of that duty as a violation of the thirteenth amendment and implementing legislation.<sup>151</sup> The Court twice struck down, as "peonage," provisions making it a crime fraudulently to obtain advance payment for labor not performed, where it interpreted the laws as permitting conviction merely on a showing that advances were paid and the services not performed.<sup>152</sup> Since it is the court which appoints the particular lawyer, however, and the applicant exercises no control over the choice, it is difficult to conceive of the lawyer's obligation to serve, if any at all, as being owed to the individual indigent client.

It is worth noting, in any event, that the presence or absence of compensation is irrelevant in involuntary servitude cases. The entire premise of the compelled-service-for-debt cases is that it is impermissible, even though payment already received is not claimed to be inadequate.

(ii) *Uncompensated taking*. The Eighth Circuit Court of Appeals had already held,<sup>153</sup> as a matter of federal constitutional law, that to require a lawyer to expend his own funds for the representation of an indigent accused without reimbursement constitutes an unconstitutional taking. The absence of any obligation to do so was established as well as by the Missouri Supreme Court in 1981.<sup>154</sup>

With respect to services as such, the federal cases appear to preclude the argument that the fourteenth amendment's due process clause protects against all uncompensated takings.<sup>155</sup> As a matter of state constitutional law, however,

149. See *Williamson v. Vardeman*, 674 F.2d 1211 (8th Cir. 1982).

150. See *Family Division Trial Lawyers v. Moultrie*, 725 F.2d 695, 705 (D.C. Cir. 1984) ("Inability to avoid continued service is the essential ingredient of involuntary servitude.").

151. Specifically, the federal Anti-Peonage Act, 14 STAT. 546 (1867) (current version at 18 U.S.C. § 1581(a) (1948)), under which "peonage" was defined as "the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation . . .," and which was sustained as an exercise of thirteenth amendment enforcement power in *Clyatt v. United States*, 197 U.S. 207 (1905).

152. *Bailey v. Alabama*, 219 U.S. 219 (1911); *Pollock v. Williams*, 322 U.S. 4 (1944).

153. *Williamson v. Vardeman*, 674 F.2d 1211, 1216 (8th Cir. 1982).

154. *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 67 (Mo. 1981) (en banc).

155. See *Williamson v. Vardeman*, 674 F.2d 1211 (8th Cir. 1982). The leading case is *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied*, 382

the *Scott* opinion comes close to holding that compelled representation without compensation is an unconstitutional taking, whether done by the legislature or by the courts. It characterized "a lawyer's services" as a "protectible property right," found protection for that right in the state constitutional provision announcing that "all persons have a natural right to . . . the enjoyment of the gains of their own industry,"<sup>156</sup> and stated that "[w]e will not permit the State to deprive a citizen of this constitutional right as a condition to granting a license or privilege."<sup>157</sup> If that is to be taken as a statement of constitutional law, then of course neither the judiciary nor the legislature (as in an *in forma pauperis* statute) has power to require any person—whether a member of a licensed profession or not—to perform services without compensation.

It is not at all clear that the court meant to hand down such a far-reaching decision. If it did, its reasoning in arriving at this conclusion is extremely tenuous. The provision of the Missouri Constitution relied upon has never been cited in a prior reported case as a basis for invalidating a regulatory law or a tax. Rather, the provision has been held not violated by a police board prohibition against officers' membership in a union,<sup>158</sup> and not violated by a city ordinance denying a city vehicle license to a person who had not paid the city personal property tax.<sup>159</sup> The purpose of the court's reference to this provision, presumably, was to support the characterization of services as "property," for purposes of the taking clause. Yet the taking of property for public use is governed by an entirely separate provision of the Missouri constitution,<sup>160</sup> and it has never been held to govern the taking of personal services.

Moreover, the characterization of services as property does not end, but merely begins the analysis required to invalidate a particular "taking." Does every service, however small, constitute a separate item of property, so that *any* compelled service constitutes a taking,<sup>161</sup> or is it the capacity to earn a living through practicing law which is the "property," so that a taking occurs when the burden *on the particular attorney* of uncompensated service constitutes a substantial impairment of that earning capacity?<sup>162</sup> If the former, what

U.S. 978 (1966), where the rationale is that the service is an obligation attached to the license to practice, of which the attorney is deemed aware at the time of application and which therefore cannot be considered a taking of services.

156. MO. CONST. art. I, § 2 (1945).

157. 688 S.W.2d at 769.

158. *King v. Priest*, 357 Mo. 68, 206 S.W.2d 547 (1947) (en banc).

159. *Hammett v. Kansas City*, 351 Mo. 192, 173 S.W.2d 70 (1943).

160. MO. CONST. art., I § 26 (1945): "That private property shall not be taken or damaged for public use without just compensation. . . ."

161. *See, e.g., Hall v. Washington County*, 2 Iowa 473 (1850).

162. This is the rationale of most of the recent opinions finding due process or taking violations in uncompensated service. *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143 (1966) (dictum) (court held itself bound by prior decision declaring the "taking" noncompensable); *Bradshaw v. Ball*, 487 S.W.2d 294, 298 (Ky. 1972) ("No other profession in recent years has been expected to bear such a burden for services to the indigent without compensation—not even reimbursement of expenses was allowed. Therefore, we conclude as did the learned trial judge that the time has



is the effect of legislative provision of some, but less than market-rate compensation? Some states which are counted in the "strong minority"<sup>163</sup> requiring compensation for criminal appointments have refused to overturn legislative limitations on compensation, even though less than adequate.<sup>164</sup>

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arrived to declare the burden of such service a substantial deprivation of property and constitutionally infirm."). It is also the ground recognized by those courts which have found the burden involved in their appointment systems not yet at the unconstitutionally burdensome level. *State v. Rush*, 46 N.J. 399, 217 A.2d 441, 446 (1966) ("Conceivably the burden upon the bar could reach such proportions as to give the due process argument a force it does not now have. We have not reached that extraordinary stage. Nonetheless, and far short of that point, there is the policy question whether in fairness the bar alone should be required to discharge a duty which constitutionally is the burden of the State."); see also *State ex rel. Partain v. Oakley*, 227 S.E.2d 314, 319 (W.Va. 1976) ("[W]here the caseload of appointments is so large as to occupy a substantial amount of the attorney's time and thus substantially impairs his ability to engage in the remunerative practice of law, or where the attorney's costs and out-of-pocket expenses attributable to representing indigent persons charged with crime reduce the attorney's net income from private practice to a substantial and deleterious degree, the requirements must be considered confiscatory and unconstitutional."); *People ex rel. Conn v. Randolph*, 35 Ill. 2d 24, 219 N.E.2d 337, 341 (1966) (striking down a statutory limitation on compensation in case of "extreme, if not ruinous" hardship).

163. This is the language of the Iowa Supreme Court in *McNabb v. Osmundson*, 315 N.W.2d 9, 16 (Iowa 1982), quoted with apparent approval in *Scott*, 688 S.W.2d at 764. The numbers (16 out of 34) assigned to the "strong minority" are derived from Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. Rev. 735, 759 (1980).

164. Already in 1862 the Iowa Supreme Court, whose decision in *Hall v. Washington County*, 2 Iowa 473 (1850), was a leading one for the right to compensation, held that a statutory limitation of \$25 was enforceable against a claim of \$110, *Samuels v. County of Dubuque*, 13 Iowa 536 (1862):

[Plaintiff's claim] overlooks the fact, that the compensation, in cases of this kind, must be paid from the county revenue, the collection and disbursement of which are under the general control of the Legislature. It also overlooks the still more important fact, that attorneys are officers of the law, whose fees, duties and responsibilities may legitimately be the subject of legislative regulation, like that of other officers, and inasmuch as a class, they enjoy certain special privileges under the law, something is justly expected from the esprit de corps of the profession in effectuating the policy of the government, in giving to every pauper offender arraigned for trial, the assistance of learned counsel.

*Id.* at 538; see also *Green Lake County v. Waupaca County*, 113 Wis. 425, 89 N.W. 549, 552 (1902):

It is undeniably a sacrifice for a lawyer of standing and ability to devote himself to the defense of an indigent person charged with crime, and spend a number of days in preparing for trial, at the expense of his other business, and receive pay only for the days spent in the actual trial. But such lawyers will remember that they are officers of the court, bearing a commission from the state; that they are admitted to the rank of the bar not only that they may practice their profession on behalf of those who can pay well for their services, but that they may assist the courts in the administration of justice;

*In re Estate of Trotalli*, 366 N.W.2d 879, 888 (Wis. 1985) ("Reduced compensation to the court-appointed attorney, below the compensation comparable to private practice, is

As with the inherent power problem generally, the greatest analytical difficulty here is the distinction between criminal and civil cases. The 1981 Missouri decision sustaining compelled service in criminal cases did not even mention either the "gains-of-his-industry" or the eminent domain clauses.<sup>165</sup> Ten years before that, the same court had rested its resistance to compelled attorney service as a *primary* mechanism for representation of indigent prisoners, not on the concept of taking but on the inherent power of the judiciary to determine whether lawyers should be required to perform such service.<sup>166</sup> No other jurisdiction appears to have taken this position, and yet struck down civil appointments as unconstitutional.<sup>167</sup> Can the two types of cases be distinguished on grounds that are relevant to the due process/taking argument?<sup>168</sup>

Aside from the scope of the civil litigant's constitutional right to counsel, the one suggestion which appears in the *Scott* majority opinion is that the history of actual exercise of the power to appoint in civil cases is uncertain and "illustrates little sympathy for the pauper."<sup>169</sup> The implication appears to be that in fact the duty to accept such appointments in civil cases is not understood to be attached to the license to practice law, in the same way that the duty to accept criminal appointments has been held by the Missouri court to be.<sup>170</sup> One difficulty with the argument, however, is that no information is offered by the court in this case concerning the frequency of civil appointments in Missouri (the relevant jurisdiction, of course, for purposes of identifying actual practice). The dissent suggests that such appointments are not infrequent,<sup>171</sup> and one must wonder whether the court would have rendered such a sweeping judgment if the "problem" were not a widespread one. Another difficulty is that the assertion is a self-fulfilling prophecy, which would simply assume that the average admittee to practice is aware—if indeed that is the case—that the statutory power is seldom exercised and that the inherent power is exercised only in criminal cases.

One other argument might be made, that appointments in civil cases are more burdensome than in criminal cases. However, it is not at all clear that

a burden Wisconsin attorneys have traditionally borne as part of the their obligation to serve the public and the courts in the administration of justice.").

165. *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981) (en banc).

166. *State v. Green*, 470 S.W.2d 571, 573 (Mo. 1971) (en banc): "The question is whether the legal profession must continue to bear this burden alone. The question is one for the judicial department . . . and must be decided by this court. . . ."

167. The Utah Supreme Court in *Bedford v. Salt Lake County*, 22 Utah 2d 12, 447 P.2d 193 (1968), for example, addressed itself to an hypothetical legislative compulsion, and insisted on judicial control of appointments.

168. The dissenting opinion in *Scott* by Blackmar, J., rejected the distinction, saying only that "[t]he two kinds of cases differ in degree but not in quality." 688 S.W.2d at 773 (Blackmar, J., dissenting); see also Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 599-604 (1984).

169. 688 S.W.2d at 768.

170. *State ex rel. Gentry v. Becker*, 351 Mo. 769, 779, 174 S.W.2d 181, 184 (1943).

171. 688 S.W.2d at 773 (Blackmar, J., dissenting).

that is true as a factual matter, and indeed the Missouri court itself, in describing the increased complexity of modern litigation as imposing an increased burden on counsel, uses criminal cases as its referent.<sup>172</sup>

Unless the court proposes to overrule its prior decisions authorizing uncompensated appointment in criminal cases, therefore, the constitutional objections have persuasive force—as do the historical objections to the claim of inherent power—only in relation to specific cases. It remains to summarize the limitations inherent in those objections.

## B. *Limits on the Exercise of Discretion*

### 1. Availability of Voluntary Counsel

It has been argued here that the claim to inherent power to appoint, properly understood, is based upon its necessity in order for the court to perform its constitutional responsibilities. A more persuasive rationale for denying the plaintiff's eligibility for appointment of counsel in *Scott*, therefore, would have been (using the language of the statute as an aid) that he had not made an adequate showing of inability to defray the particular expense of counsel by voluntary means, namely, by obtaining counsel on a contingent fee or other voluntary basis. At the hearing on Scott's motion to quash appointment, the plaintiff testified merely that he had written two attorneys, one in St. Louis and one in Kansas City, and had received no response; he had not contacted any lawyers in the immediate area where suit was to be brought.<sup>173</sup> There is no indication in any of the papers or opinions in the case that either the judge or the Legal Services office or appointed counsel made any effort, through Lawyer Referral or any other mechanism, to assist the plaintiff—who as a prisoner is clearly at a disadvantage in searching for counsel on the outside—in locating possible willing counsel.<sup>174</sup> One need not presuppose an obligation to duplicate the year-long judicial pilgrimage (ultimately fruitless) recounted in a recent federal case from California,<sup>175</sup> involving twenty private attorneys, the lawyer referral service of the county bar, and half a dozen other public and public-service legal agencies, to conclude that greater effort was required in *this* case before resorting to any discretionary coercive appointment.

### 2. Feasibility of *Pro Se* Representation

The concept of necessity, also implicit in the statutory phrase "inability to

172. 688 S.W.2d at 768.

173. Petition of Stephen C. Scott for Writ of Prohibition, 3-4 (para. 9(a)), filed April 17, 1984.

174. The absence of any such effort led the dissenting Judge Blackmar to suspect that the case was intended by all parties to be a test case for the power to appoint, 688 S.W.2d at 771-72.

175. *Bradshaw v. United States Dist. Ct.*, 742 F.2d 515, 516 (9th Cir. 1984).

prosecute his or her suit," should call for an inquiry into whether or not it is feasible for the indigent party to proceed *pro se*. While it may be assumed that the *Scott* case, because of the technical complexity of medical malpractice cases, was not one which the plaintiff could do by himself, nonetheless the inquiry is appropriate<sup>176</sup> and appointment is occasionally denied in other jurisdictions on that ground.<sup>177</sup> The absence of an absolute right to counsel in civil cases makes it possible, as indicated above,<sup>178</sup> that the court can properly perform its responsibilities even when one party is unrepresented.

### 3. Non-meritoriousness of the Claim or Defense

The possibility in a case of this character that counsel will be forced to pursue lengthy litigation without success or compensation can be further reduced by a requirement that the judge review the petition for *prima facie* merit, as the New York<sup>179</sup> and federal<sup>180</sup> courts do, and that the judge entertain counsel's post-appointment motion for leave to withdraw on the ground that, after reasonable preliminary investigation and perhaps also settlement negotiation, she believes it to be without reasonable likelihood of success.<sup>181</sup>

### 4. Undue Burden on Counsel

As was held in the criminal appointment case,<sup>182</sup> the particular attorney initially assigned to any un- or undercompensated representation should always be allowed to show that the appointment is unduly burdensome, either because of the excessive demands of the particular case or because of prior uncompensated service, all in relation to that attorney's personal circum-

176. *E.g.*, Childs v. Duckworth, 705 F.2d 915 (7th Cir. 1983).

177. *E.g.*, Hudak v. Curators of University of Missouri, 586 F.2d 105 (8th Cir. 1978), *cert. denied*, 440 U.S. 985 (1979).

178. *See supra* text accompanying notes 71-77.

179. *E.g.*, Application of Romano, 109 Misc. 2d 99, 438 N.Y.S.2d 967, 970 (Sur. Ct. 1981). New York CPLR § 1101(b) authorizes the court to require an applicant for *in forma pauperis* permission to submit a certificate of an attorney that she has examined the action and believes that there is merit to the applicant's contentions. N.Y. CIV. PRAC. LAW § 1101(b) (McKinney 1962); *see supra* text accompanying note 91 for the English practice before coercive appointment of counsel was discontinued.

180. *E.g.*, Bounds v. Smith, 430 U.S. 817 (1977); Maclin v. Freake, 650 F.2d 885 (7th Cir. 1981). The latter opinion indicates that denial of appointment need not be based on frivolousness, but may also rest on a finding that the claimant's "chances of success are extremely slim." *Id.* at 887; *see also* Inmates of Washington County Jail v. England, 516 F.Supp. 132, 144 (E.D. Tenn. 1980), *aff'd*, 659 F.2d 1081 (6th Cir. 1981).

181. For a suggestion to this effect, *see Scott*, 688 S.W.2d at 773 (Blackmar, J., dissenting). Specifically, the rule of *State v. Gates*, 466 S.W.2d 681 (Mo. 1971) (en banc), precluding motions to withdraw from appointed representation on criminal appeal based on frivolousness of the appeal, should not apply to a civil case in which the client does not have a personal constitutional right to counsel.

182. *See supra* notes 40-43.

stances. The court can relieve the attorney either by providing additional assistance or by substituting other counsel.<sup>183</sup>

#### IV. CONCLUSION

The decision in *Scott* is defensible in immediate result, but the reasoning of the majority is unsatisfactory in several respects. First, the decision concerning the inherent power to appoint in civil cases can be reconciled with prior Missouri caselaw only if it is understood not as a denial of power in the strict sense but as a statement of conditions under which the exercise of the discretionary power in a particular case is abusive. Second, the decision on inherent power should not turn on the over-technical distinction between criminal and civil cases, but on the extent to which the exercise of power to appoint is necessary to the effective performance of the court's constitutional responsibilities. Third, the decision on the applicability of the *in forma pauperis* statute to the particular case should be limited to the appointment of counsel, not to eligibility for all *in forma pauperis* relief. Fourth, the statutory provision for appointment of counsel should be interpreted as merely confirmatory of the courts' inherent power, and the prohibition against appointed counsel's receiving compensation should be treated, as are other legislative encroachments upon inherent judicial power, as not binding on the courts.

If the opinion were so interpreted and limited, it could afford the intended relief to the legal profession from unfair burdens, while reserving to the courts the power in the truly exceptional case to protect their impartiality by assuring adequate representation to all sides of a civil dispute. At the very least, it should not be understood to forbid judicial appeals for that purpose to the professional responsibility both of the organized bar and of individual lawyers.

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183. See also Judge Blackmar's dissent in *Scott*. 688 S.W.2d at 773.