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# Current Status of the Traditional Duty of the Attorney to Serve without Compensation upon Court Appointment

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# CURRENT STATUS OF THE TRADITIONAL DUTY OF THE ATTORNEY TO SERVE WITHOUT COMPENSATION UPON COURT APPOINTMENT

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## I. INTRODUCTION

Prior commentators have consistently found the majority of American court systems staunchly adhering to the “traditional” unmodified duty of the attorney to represent indigents upon appointment by the court regardless of the availability of any compensation for such service.<sup>1</sup> But “[w]hat was a minor nuisance for the Nineteenth Century lawyer has become an awesome burden for the lawyers in smaller counties during the latter half of the Twentieth

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1. See D. Shapiro, *The Enigma of the Lawyer’s Duty to Serve*, 55 N.Y.U. L. REV. 735, 754-56 (1980); Note, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366, 371 (1981) (authored by Bruce Andrew Green) [hereinafter Note, *Court Appointment*]; Note, *Uncompensated Appointments of Attorneys for Indigent Criminal Defense: The Need for Supreme Court Standards*, 14 Sw. U.L. REV. 389, 393 (1984) (authored by Victoria R. Kendrick) [hereinafter Note, *Uncompensated Appointments*]; Annotation, *Right of Attorney Appointed by Court for Indigent Accused to, and Court’s Power to Award, Compensation by Public, in Absence of Statute or Court Rule*, 21 A.L.R. 819, 821-24 (1968).

Century.<sup>2</sup> The culprit has been the greatly expanded modern right to counsel.<sup>3</sup>

This Note will briefly review the usual justifications presented by courts favoring the duty to serve, including its presumed roots in English Common Law and professional tradition, in the critical light of recent scholarship. It will then examine the constitutional challenges that have been made to the duty in recent decades, as well as the public policy argument against the duty.

Finally, this Note will survey the current state of the duty in the case law of the federal system and all state systems. Although the federal system still adheres strongly to the traditional duty,<sup>4</sup> and the United States Supreme Court strenuously avoids the issue,<sup>5</sup> an apparent watershed point has now been passed in the state systems.<sup>6</sup> Of those states which have confronted the issue, a definite majority have departed to varying extents from the strict unmodified duty of appointed service regardless of compensation.

## II. THE DUTY PRESENTED

Under the early English Common Law, certain highly privileged attorneys, the Sergeants-at-Law, who were officials of the court itself, were considered to be obligated to represent indigent parties without compensation upon appointment by their court.<sup>7</sup> Harking back to this tradition, American courts after the Revolutionary War utilized such appointments in order to meet the requirements of state statutes that counsel be provided to pauper defendants in criminal proceedings.<sup>8</sup> It is not clear, however, that this practice was either frequent or burdensome due to that era's low incidence of actual

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2. R. Hunter, *Slave Labor in the Courts—A Suggested Solution*, 74 *CASE & COM.* 3, 9 (1969).

3. See *State ex rel. Stephan v. Smith*, 242 Kan. 336, 350, 747 P.2d 816, 830 (1987); Note, *Court Appointment*, *supra* note 1, at 367; Note, *Uncompensated Appointments*, *supra* note 1, at 391-93.

4. See *infra* notes 138-43 and accompanying text.

5. See *infra* notes 145-50 and accompanying text.

6. See *infra* notes 98-137 and accompanying text.

7. See Shapiro, *supra* note 1, at 746.

8. See *id.* at 749-51; see also Note, *Court Appointment*, *supra* note 1, at 367; Note, *Un-*

pauperism in a basically agrarian economy and to generally low levels of attorney compensation (and qualifications) in the first place.<sup>9</sup> Almost any educated person could be appointed (or volunteer) to defend an indigent.<sup>10</sup>

In the latter half of the Nineteenth Century, coincident to the rise of industrialism and corresponding large increase in the population of the functional poor and also coincident to increasing professionalization of the law as an occupational specialty, many courts turned to uncompensated appointments as their only visible source of compliance with state statutes, usually limited to capital or to felony cases, which frequently called for free counsel to be provided to defendants applying "in forma pauperis."<sup>11</sup> The first attorney protests to such appointment also date from this period, and courts defended the uncompensated appointment system with the following closely related justifications:<sup>12</sup> (a) The legal profession has since the days of the early English Common Law borne a "traditional" duty to so serve. (b) The attorney serves as an officer of the court and thus bears a duty to obey the orders of the court, including this one. (c) The attorney accepts admission to the bar with the knowledge of his "traditional" duty as an officer of the court, and so impliedly consents to appointments. (d) The legal profession assumes the duty of providing such uncompensated service to the legal system in return for the monopolistic privilege of providing legal services for hire within that system. (e) The courts, in any case, have inherent power to make such orders as may be necessary to assure the proper administration and functioning of the justice system.

With a few noteworthy exceptions, the courts of most states and of the Federal system utilized one or more of the foregoing arguments to squelch the occasional attorney protest, and the duty of

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9. See Hunter, *supra* note 2, at 8; Note, *Court Appointment*, *supra* note 1, at 375 n.64.

10. See Note, *Court Appointment*, *supra* note 1, at 375 n.64.

11. See generally Shapiro, *supra* note 1, at 749-53; Note, *Court Appointment*, *supra* note 1, at 367-77.

12. See generally Shapiro, *supra* note 1, at 749-55; Note, *Court Appointment*, *supra* note 1, at 367-77.

uncompensated appointed service to indigent defendants became the firmly established rule.<sup>13</sup>

Fair or not, the system was sufficiently stable to survive into the 1960's when the United States Supreme Court wrought a functional revolution in indigent representation with *Gideon v. Wainwright*<sup>14</sup> and its right-to-appointed-counsel progeny. Staggering under a deluge of cases involving constitutionally mandated provision of an attorney for immensely expanded classifications of indigent criminal defendants and already feeling the effects of a rising crime rate, the state courts placed an increasingly onerous burden upon the members of the criminal bar.<sup>15</sup>

Although public defender systems and statutory systems of compensation for appointments were instituted in most states to ease this burden, these systems have suffered from low legislative priority as spending money on criminals has never been a high-priority demand of the public, and underfunding has required the courts to impose on the private bar to take up the slack.<sup>16</sup> The effect has been very uneven resulting in little private bar economic burden in some urban centers with good public defender services, but in extreme economic loss to practitioners in areas, particularly rural counties with few practitioners, where the full impact falls upon the few available members of the private criminal bar.<sup>17</sup> Two-thirds incidence of free appointed cases in an individual attorney's case load is not unknown.<sup>18</sup>

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13. See, e.g., *United States v. Dillon*, 346 F.2d 633, 635-38 (9th Cir. 1965), cert. denied 382 U.S. 978 (1966) (basing rejection of an unconstitutional taking challenge upon duty of the lawyer as an officer of the court and upon obligation which is part of the professional tradition assumed by the lawyer). See generally Shapiro, *supra* note 1, at 749-53; Note, *Court Appointment*, *supra* note 1, at 370-71.

14. 372 U.S. 335 (1963).

15. See, e.g., *State ex rel. Stephan v. Smith*, 242 Kans. 336, 350-51, 747 P.2d 816, 830 (1987). See also Note, *Uncompensated Appointments*, *supra* note 1, at 392. For a thorough discussion of Gideon impact in West Virginia case law, see *State ex rel. Partain v. Oakley*, 159 W. Va. 805, 816-19, 227 S.E.2d 314, 320-22 (1976).

16. See Note, *Uncompensated Appointments*, *supra* note 1, at 292-93 & 292 n.39, 412-13. See, e.g., *Jewell v. Maynard*, 383 S.E.2d 536, 545 (W. Va. 1989) (quoting amicus brief of practicing attorney: "[P]ublic defenders are viewed as a necessary nuisance—one which would not exist at all if left to the public or the legislature, because the public doesn't believe that criminals should be provided lawyers and the legislature doesn't want to pay for them.").

17. Hunter, *supra* note 2, at 9-12.

18. Jewell, 383 S.E.2d at 540.

The result has been increasing attorney rebellion against and court challenge to the "traditional" duty to serve without compensation in recent decades.<sup>19</sup> Such resistance has been bolstered by recent scholarship which has tended to undermine the Common Law roots of the "traditional" duty, particularly in finding that although the Sergeants-at-Law, occupants of official and privileged positions in the court structure, may have technically had such a duty, it was quite rare for them actually to be so appointed. For the ordinary barristers, that class of English lawyers most comparable to the modern American attorney, no such duty of uncompensated service existed.<sup>20</sup> Also, it would appear that the appointment of an attorney for an indigent was a much more occasional occurrence than was previously thought and was employed only where the court perceived especially complex legal issues in the case of a felony accused. In English and early American Common Law, it represented a principle honored more in lip-service than in fact.<sup>21</sup>

As Shapiro concluded, "To justify coerced, uncompensated legal services on the basis of a firm tradition in England and the United States is to read into that tradition a story that is not there."<sup>22</sup>

The currently formulated "traditional" duty to serve thus appears today as rather more the expedient creation of the late Nineteenth Century American courts than as a time-hallowed precept of the law or as a central tenet of a coherent and continuous professional self-conception or dogma.<sup>23</sup>

### III. THE DUTY CHALLENGED

#### A. Refutation of the Justifications

Many courts have found coerced uncompensated appointments immune from constitutional scrutiny because attorneys are obligated

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19. Note, *Uncompensated Appointments*, *supra* note 1, at 398. See also Shapiro, *supra* note 1, at 756.

20. See Shapiro, *supra* note 1, at 346-49. See also Note, *Court Appointment*, *supra* note 1, at 374.

21. See Shapiro, *supra* note 1, at 740-53.

22. *Id.* at 753.

as "officers of the court" to so serve (justifications (a) and (b) in Part II above), or because the condition of such service is imposed upon the attorney's license to practice law (justifications (c) and (d) in Part II above).<sup>24</sup> We have examined the historical problems with application of these doctrines to modern American attorneys.<sup>25</sup>

Additionally, the "officer of the Court" theory is probably contrary to the Supreme Court's finding in *In re Griffiths* that attorneys are not comparable to public officials, such as bailiffs, under the direct supervision of the court.<sup>26</sup> And numerous cases have established that state-imposed conditions upon conferment of a privilege must pass constitutional muster.<sup>27</sup> It is clear that no other regulated professions bear such a burden of providing free service at the command of the court,<sup>28</sup> and the idea that a profession should enjoy "peculiar privileges" and be paid in "empty honors" belongs to a "state of society hostile to liberty and equal rights."<sup>29</sup>

As long ago as 1854, the Indiana Supreme Court in *Webb v. Baird* held that the American legal profession had been "stripped of all its odious distinctions and peculiar emoluments."<sup>30</sup> It is certainly not clear how any "monopoly" privilege accorded attorneys today differs either substantially or categorically from that accorded such professions as pharmacists or medical doctors.<sup>31</sup>

Courts undoubtedly do have inherent power (as in justification (e) above) to make such orders as may be necessary to their own proper administration and functioning, but this in no way avoids constitutional scrutiny of such use of state power.<sup>32</sup> Such inherent

24. See Note, *Uncompensated Appointments*, *supra* note 1, at 395-96.

25. See Note, *Court Appointment*, *supra* note 1, at 373-75. See also Shapiro, *supra* note 1, at 739-55.

26. 413 U.S. 717, 727-29 (1973).

27. Note, *Court Appointment*, *supra* note 1, at 376-77.

28. Hunter, *supra* note 2, at 10.

29. *Webb v. Baird*, 6 Ind. 13, 16 (1854).

30. *Id.* at 17.

31. See Shapiro, *supra* note 1, 775-77 & 776 n.207; but see Note, *Court Appointment*, *supra* note 1, at 388-89 (acknowledging monopoly is no distinction in itself, but further attempting to distinguish law from other professions by its supposedly higher entrance requirement, its number of tasks that could be performed by personnel with lesser qualifications and state regulation of the monopoly as affecting demand).

32. See Note, *Court Appointment*, *supra* note 1, at 373.

power is, in any case, at least equally cogent as justification for compulsion of state payment for appointed attorney expenses as for payment of any other expense of the system.

## B. *The Constitutional Arguments*

### 1. Equal Protection

The equal protection argument against coerced uncompensated or undercompensated appointment of counsel for the indigent is two-pronged. First, attorneys are singled out as a class to provide services in a way that other professions are not. Since attorneys are not a suspect class, such classification need only bear a rational relationship to a legitimate governmental purpose.<sup>33</sup> Assisting the indigent is undoubtedly such a purpose, especially in criminal cases where required by the Sixth Amendment.<sup>34</sup> Under such a test, the traditional ethical obligation of the bar to provide such service is often found to sustain the classification<sup>35</sup> although many courts have compromised so as to find that it does so only in part, justifying compensation under the market, but not justifying compensation less than average attorney expenses of practice.<sup>36</sup>

Second, however, coerced undercompensated service tends in practice to impact different classes of attorneys quite differently. The burden falls primarily upon rural attorneys engaged in criminal or general practice.<sup>37</sup> Many urban lawyers, especially those engaged in specialties such as corporate, patent, or probate law, may never be called upon, due to lesser need and the inappropriate character of their experience for providing adequate criminal defense.<sup>38</sup> It is difficult to articulate a rational basis for this kind of disparity.<sup>39</sup>

33. State *ex rel.* Stephan v. Smith, 242 Kan. 336, 373, 747 P.2d 816, 844 (1987).

34. Note, *Court Appointment*, *supra* note 1, at 378 (employing this conclusion under due process analysis).

35. See, e.g., Lindh v. O'Hara, 325 A.2d 84, 94 (Del. 1974).

36. See, e.g., People v. Johnson, 93 Ill. App. 3d 848, 853, 417 N.E.2d 1062, 1065 (1981); State *ex rel.* Stephan v. Smith, 242 Kan. 336, 373-77, 747 P.2d 816, 844-46 (1987); State v. Robinson, 465 A.2d 1214, 1217 (N.H. 1983); Jewell v. Maynard, 383 S.E.2d 536, 546 (W. Va. 1989).

37. See Hunter, *supra* note 2, at 10-11.

38. *Id.* See also Jewell v. Maynard, 383 S.E.2d at 541.

39. State *ex rel.* Stephan v. Smith, 747 P.2d at 845.



## 2. Due Process

Any qualification placed upon admission to the bar must have a rational relationship to the applicant's fitness or capacity to practice law.<sup>40</sup> Taking coerced undercompensated service as a condition of practice, then, requires finding that willingness to contribute free service is an element of the good moral character necessary to practice law, if a rational basis is to be sustained.<sup>41</sup>

Courts have tended to approach this analysis as a matter of degree, attempting to draw a line between that amount of free service which can reasonably be expected as a condition of practice and amounts which by their own magnitude or by their uneven distribution become arbitrary.<sup>42</sup> Thus, a due process analysis is rarely seen in pure form in this area, as the factors which enhance the due process or fundamental fairness argument are the same ones relied upon in the equal protection and unconstitutional taking arguments which, therefore, tend to subordinate the due process approach.<sup>43</sup>

Taking coerced service as a mere regulation of the legal profession, as at least one writer has done, rather than as a qualification upon admission to practice, results in a less stringent form of rational basis review wherein only the rational relation of the measure to the legitimate state goal of providing indigent defense is examined.<sup>44</sup> If this degree of deference is required, the due process challenge to coerced service fails.

## 3. Unconstitutional Taking

In recent years, the most popular and successful argument against undercompensated appointed service has been the Fifth Amendment unconstitutional taking approach.<sup>45</sup> "One who practices his profession has a property interest in that pursuit which may not be taken from him or her at the whim of the government without due

40. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957).

41. Note, *Court Appointment*, *supra* note 1, at 378 n.86.

42. See e.g., *State ex rel. Stephan v. Smith*, 242 Kan. 336, 361-64, 747 P.2d 816, 837-38 (1987).

43. See generally *Shapiro*, *supra* note 1, at 771, 773.

44. Note, *Court Appointment*, *supra* note 1, at 377-78.

45. See *infra* notes 115, 120, 131, 136, 139 and accompanying text.

process.”<sup>46</sup> As Shapiro points out, an obligation to perform work, backed by the sanction of loss of livelihood, is the most direct possible invasion of a person’s control over his own labor, and the obligation is clearly designed to extract a public benefit from the lawyer’s time, not to prevent its use to cause harm.<sup>47</sup> Although compensation is not always required to be paid for state action benefiting some persons at the expense of others,<sup>48</sup> the requirement of compensation appears to be governed by the extent and fairness of the state interference, allowing courts to find unconstitutional taking at some level of deleterious impact.<sup>49</sup>

On this basis, a number of states have held that state compensation statutes which dictate rates of compensation that are low in terms of attorney overhead expenses or market rates for attorney services fail to provide just compensation either absolutely or at some volume of appointed cases.<sup>50</sup> Such courts have varied their holdings broadly across a spectrum of constitutionally mandated compensation requirements, from that of merely requiring reimbursement of out-of-pocket expenses,<sup>51</sup> through a position of requiring compensation for average attorney overhead expenses,<sup>52</sup> through a further position of requiring expense coverage plus something toward the attorney’s living,<sup>53</sup> to the Alaska stance of requiring payment of fair market value (“the compensation received by the average competent attorney operating on the open market”).<sup>54</sup>

These results have been reached even by courts which do not wholly reject the traditional duty, but which conclude that compensation rates should “strike a balance between conflicting interests” such as the ethical obligation to make service available, on the one hand, and the increasing burden of same on the profession.<sup>55</sup>

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46. State *ex rel.* Stephan v. Smith, 747 P.2d at 841.

47. Shapiro, *supra* note 1, at 774.

48. *Id.* at 773.

49. *Id.* at 773-75.

50. See *infra* notes 51-54.

51. Williamson v. Vardeman, 674 F.2d 1211, 1216 (1981).

52. See State *ex rel.* Stephan v. Smith, 242 Kan. 336, 383, 747 P.2d 816, 849 (1987).

53. Jewell v. Maynard, 383 S.E.2d 536, 538 (W. Va. 1989).

54. DeLisio v. Alaska Superior Court, 740 P.2d 437, 443 (Alaska 1987).

55. Jewell v. Maynard, 383 S.E.2d at 546.

This approach lends particularly cogent support to finding unconstitutional taking in the case of individuals or subclasses within the bar where the hardship is not widely shared by the bar as a whole (the usual case).<sup>56</sup> It is less cogent where the burden is equitably distributed and not large.<sup>57</sup>

Opponents argue that a reciprocity of advantage exists for attorneys as a class, because of their "monopoly" of the practice of law, which justifies the burden of taking of their services for the public good.<sup>58</sup> As we noted above, it is not convincingly clear why this should be so with regard to attorneys as opposed to other licensed professions.<sup>59</sup> And Shapiro concludes, with regard to attorneys as a class, that their modern numbers in the population, as well as the increasing trend toward alternatives to adjudication, preclude an easy conclusion that lawyers hold a state sponsored monopoly.<sup>60</sup>

Also, of course, the reciprocity argument falls down in the face of unequal distribution of the burden of uncompensated appointment within the profession.<sup>61</sup>

#### 4. Involuntary Servitude

The argument that coerced attorney service violates the involuntary servitude prohibition of the thirteenth amendment has only occasionally been successful in the courts,<sup>62</sup> having two substantial hurdles to cross.

First, it is questionable that the self-executing prohibition of involuntary servitude, absent Congressional enforcement legislation, is applicable much beyond conditions of peonage closely related to the exemplar condition of African slavery in this country.<sup>63</sup> Although

56. See Shapiro, *supra* note 1, at 775.

57. *Id.*

58. See Note, *Court Appointment*, *supra* note 1, at 388-90.

59. See *supra* notes 28-31 and accompanying text.

60. See Shapiro, *supra* note 1, at 776-77.

61. See *id.* at 775.

62. See *id.* at 768. See, e.g., *Sparks v. Parker*, 368 So. 2d 528, 532-33 (Ala.), appeal dismissed, 444 U.S. 803 (1979).

63. See Shapiro, *supra* note 1, at 768.

a few courts have applied the prohibition broadly enough to include coerced attorney service,<sup>64</sup> the test for voluntariness generally has been whether the threatened consequences of failure to perform include actual force or confinement, not mere loss of employment opportunity.<sup>65</sup> Since American courts exercising their contempt power over attorneys refusing to accept appointment have generally limited their sanctions to a maximum of disbarment, rather than imprisonment, such an attorney normally risks only his right to practice law.<sup>66</sup> Of course, where the attorney is coerced by actual threat of imprisonment for contempt, such a sanction probably would violate current standards of thirteenth amendment voluntariness, whereas performance of the same service at the risk of disbarment would not.<sup>67</sup>

Second, assuming *arguendo* that the voluntariness standard is met, the servitude argument must still demonstrate that coerced undercompensated attorney appointment does not fall within the well-established public service exception to the thirteenth amendment.<sup>68</sup> Although it can readily be argued that the very existence of the exception conflicts with the plain language of the amendment,<sup>69</sup> such an argument goes far beyond the status of coerced attorney service and would require the overturn of a long line of United States Supreme Court decisions in such areas as witness service and military service.<sup>70</sup> Indeed, that Court has determined that court-appointed attorney service in the criminal context is such a public service.<sup>71</sup>

Even in a civil context, it is clear that assuring fairness in the administration of justice would be a substantial state interest.<sup>72</sup> Although it is equally clear that coerced attorney service does not fit

64. *Id.* at 768-69.

65. *Id.* at 770; Note, *Court Appointment*, *supra* note 1, at 379.

66. See Note, *Court Appointment*, *supra* note 1, at 379 & n.96. See e.g., *State ex rel. Stephan v. Smith*, 242 Kan. 336, 378, 747 P.2d 816, 847 (1987).

67. See Shapiro, *supra* note 1, at 770.

68. *Id.* at 769; Note, *Court Appointment*, *supra* note 1, at 381.

69. See Shapiro, *supra* note 1, at 769.

70. *Id.* at 769-70; Note, *Court Appointment*, *supra* note 1, at 381- 82.

71. *Hurtado v. United States*, 410 U.S. 578, 588-89 (1973) (citing *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965)).

72. See Note, *Court Appointment*, *supra* note 1, at 382.

the usual public service mode of being a duty for which the great mass of citizens are at risk, and which would thus tend to be unnullable legislatively if not acceptable to such mass,<sup>73</sup> the arguments for avoiding public service status on this basis tend to parallel those of the equal protection and due process positions.<sup>74</sup>

Thus, the involuntary servitude argument appears to offer much hope of usefulness only in cases where, in a civil context, attorney service is being coerced by threat of imprisonment for contempt, and where equal protection and due process arguments are also being made.

### 5. Right to Effective Counsel

“It is clear that the United States Constitution guarantees the right to the *effective* assistance of counsel.”<sup>75</sup> Yet “[b]oth defense system studies and current cases support the correlation between the amount of money that is expended for defense services and the resulting quality of representation received.”<sup>76</sup> Numerous commentators have expressed serious concerns whether appointed attorneys providing free or undercompensated services will be able to provide the same attention normally provided a paying client, either through lack of availability of clerical or investigative services which must be paid for, or through reduced motivation of the attorney who knows that each hour he contributes to the case is failing to accrue anything toward his overhead costs.<sup>77</sup>

Some courts have held that merely because a system creates the potential for ineffective assistance of counsel is not sufficient reason to declare the system itself unconstitutional.<sup>78</sup> These courts believe

73. See Shapiro, *supra* note 1, at 771-72 (although arguing the possibility that legislative clout may qualify the legal profession in this respect).

74. See e.g., Note, *Court Appointment*, *supra* note 1, at 381 & n.116 (regarding the reasonable necessity limitation on public service even in areas of traditional state concern).

75. Jewell v. Maynard, 383 S.E.2d 536, 542 (W. Va. 1989).

76. Note, *Uncompensated Appointments*, *supra* note 1, at 398.

77. See A. Gilbert & W. Gorenfeld, *The Constitution Should Protect Everyone—Even Lawyers*, 12 PEPPERDINE L. REV. 75, 87-89 (1984); Hunter, *supra* note 2, at 7-8; Note, *Uncompensated Appointments*, *supra* note 1, at 398-99. See also *Okeechobee County v. Jennings*, 473 So. 2d 1314, 1317-18 (Fla. Dist. Ct. App. 1985); *Jewell v. Maynard*, 383 S.E.2d 536, 544 (W. Va. 1989).

78. See e.g., *State ex rel. Stephan v. Smith*, 242 Kan. 336, 352-53, 747 P.2d 816, 831 (1987).

that such cases would be infrequent and could be adequately handled on a case by case basis on appeal.<sup>79</sup> Yet the indigent criminal defendant has been repeatedly found to believe that equal justice is not in fact received by those who cannot afford to pay, and that the best way to assure your attorney will take a personal interest in and work hard for your case is to choose and pay him yourself.<sup>80</sup>

Courts have been reluctant to admit that a double standard may exist in criminal representation, although some few attorneys have done so.<sup>81</sup> And not only are appellate courts largely unreceptive to indigent claims of victimization by such a standard, but as a student author has recently argued most cogently, current standards for constitutional challenge to adequacy of counsel are set so high as to admit of proof in only the most exceptionally egregious cases and to fail entirely to detect and remedy such a dual standard in quality of counsel.<sup>82</sup>

As Hunter aptly asserted over 20 years ago:

It has been said that the rich and the poor are equal in the eyes of the law; both have the right to sleep under a bridge. A comparable statement would be that the rich and the poor are equal in the eyes of the law since they both have a right to counsel. But the rich are entitled to well-paid counsel who is happy about his employment, while the unpaid counsel appears reluctantly, possibly bitter over the imposition which has been cast upon him.<sup>83</sup>

### C. *The Public Policy Approach*

The New Jersey Supreme Court specifically rejected constitutional attacks on the duty to serve, but went on to hold that, as a matter of public policy, the burden imposed by the duty under modern conditions had become too heavy for the bar to carry alone. That court found authority to require compensation of appointed attorneys in a state statute providing for payment of necessary expenses for prosecution of criminal cases.<sup>84</sup> A few other courts have

79. See *State ex rel. Stephan v. Smith*, 747 P.2d at 831-32.

80. See Note, *Uncompensated Appointments*, *supra* note 1, at 399-400.

81. *Id.* at 405 & n.123, 407-08. See also Gilbert & Gorenfeld, *supra* note 77, at 89.

82. Note, *Uncompensated Appointments*, *supra* note 1, at 398-408.

83. Hunter, *supra* note 2, at 7-8.

84. Shapiro, *supra* note 1, at 759 (discussing *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966)).

avoided constitutional and inherent authority issues altogether by seeking such a statutory basis for court expense payment under which to hold for compensation of appointed attorneys as a matter of policy.<sup>85</sup>

Still other courts have found a state obligation to compensate implied in the United States Supreme Court right-to-counsel decisions,<sup>86</sup> often combining this finding with a review of the greatly expanded modern burden and acceptance of a constitutional taking argument at some level of "unreasonable" burden.<sup>87</sup> The West Virginia Supreme Court of Appeals recently reiterated the conclusion of the *Stephans* court that "[t]he emerging view is that the responsibility to provide the Sixth Amendment right to counsel is a public responsibility that is not to be borne *entirely* by the private bar."<sup>88</sup>

As opposed to a constitutionally based right to compensation, the public policy approach would superficially seem to afford a much weaker protection, subject to the winds of legislative and financial change. Although never overruling its policy expressed in *State v. Rush*,<sup>89</sup> the New Jersey Court has more than once overridden the attorney's statutory right to compensation in the face of an expanding right to counsel which has outpaced funding allocations.<sup>90</sup>

Under similar circumstances, however, the Missouri Supreme Court, which had held that the provision of legal services to indigent criminal defendants was constitutionally the burden of the state,<sup>91</sup> has likewise waffled in the face of exhausted budgets, requiring the

85. *Id.*

86. *See, e.g.,* *Menin v. Menin*, 79 Misc. 2d 285, 288, 359 N.Y.S.2d 721, 725 (N.Y. Sup. Ct. 1974).

87. *See, e.g.,* *State ex rel. Stephan v. Smith*, 242 Kan. 336, 361-70, 747 P.2d 816, 836-42 (1987).

88. *Jewell v. Maynard*, 383 S.E.2d 536, 543 (W. Va. 1989) (quoting *State ex rel. Stephan v. Smith*, 747 P.2d at 841).

89. *Rush*, 217 A.2d at 445-46, 448-49.

90. *See In re Spann Contempt*, 183 N.J. Super. 62, 68, 443 A.2d 239, 242-43 (1982) (imposing burden of uncompensated representation pending allocation of funds by legislature); *State ex rel. Antonini*, 53 N.J. 488, 494, 251 A.2d 291, 292 (1969) (declining full application of *Rush* to juvenile cases due to lesser burden on the bar and newly enacted statute that would extend the Public Defender to juvenile cases); Shapiro, *supra* note 1, at 759 n.120 (discussing *Antonini*); Note, *Uncompensated Appointments*, *supra* note 1, at 411-12 (discussing *Spann*).

91. *State v. Green*, 470 S.W.2d 571, 573 (Mo. 1971).

bar to provide gratuitous service within limits, pending legislative relief,<sup>92</sup> and failing to find statutory basis for expansion of the right to compensation to attorneys representing indigent juvenile defendants.<sup>93</sup> Thus, the tendency of courts to vacillate when in dire financial straits may not be too closely related to the basis for their original holding in favor of compensation.

As Shapiro notes, the public policy issue involved here boils down to this: "If legal services for those unable to pay are to be supplied at any level higher than voluntary contributions will sustain, who should pay the bill?"<sup>94</sup> That voluntary contributions can themselves be increased sufficiently to sustain the expanded modern right to counsel appears contradicted by the Italian experience with a total charity model mandated by law.<sup>95</sup> As long as the costs can be buried in a "professional obligation," they may be the less readily discernible and thus the more readily imposed.<sup>96</sup> The greater the burden, the more difficult this becomes, as witness recent history.

If neither attorneys (and their paying clients, to the extent the burden can be passed on in higher fees)<sup>97</sup> nor the public (through legislative appropriation) are willing to meet the full burden on a voluntary basis, then perhaps the issue must be resolved on a constitutional basis, either by finding that the level of required services can be constitutionally reduced, or in the likely alternative, by finding that where a constitutional duty is imposed upon the state, the burden to pay the costs associated with that duty is likewise so imposed.

Judicial systems, struggling now for over twenty years to balance the present constitutionally mandated right to counsel against the

92. *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 65-68 (Mo. 1981), cert. denied, 454 U.S. 1142 (1982) (turning to the bar "without apology" for limited uncompensated service under temporary guidelines due to funding shortfall); Comment, *Appointed Pro Bono Defense: Involuntary Servitude and/or an Unconstitutional Deprivation of Property?*, 50 UMKC L. REV. 207, 208-09 (1982) (discussing *Ruddy*).

93. *State ex rel. Cain v. Mitchell*, 543 S.W.2d 785, 786-87 (Mo. 1976).

94. Shapiro, *supra* note 1, at 781.

95. See Note, *Legal Assistance to the Indigent in Italy and the United States: Does Volunteer Defense Really Work?*, 11 BROOKLYN J. INT'L L. 651, 675, 684-85 (1985) (concluding that the mandated volunteer indigent defense system fails to provide effective and efficient counsel for indigents).

96. Shapiro, *supra* note 1, at 783.

97. For a brief discussion of burden-shifting and lawyer demand, see *id.*



fiscal and service resources that can be made either voluntarily or coercibly available to sustain that right, have had to wait far too long for the United States Supreme Court to address this issue.

#### IV. THE DUTY ON THE WANE: THE CURRENT TREND AWAY FROM THE TRADITIONAL DUTY IN THE STATE SYSTEMS

This writer was able to find relevant precedents in a total of thirty-nine state systems. Of these, a total of sixteen states, a minority of those that have considered the issue, may be fairly characterized as adhering to the unmodified traditional duty of the attorney to represent the indigent for little or no compensation when appointed by the court. Of these sixteen, the following eleven states seem clearly committed to the traditional duty: Alabama;<sup>98</sup> Arkansas;<sup>99</sup> Delaware;<sup>100</sup> Michigan;<sup>101</sup> Minnesota;<sup>102</sup> Mississippi;<sup>103</sup> North Carolina;<sup>104</sup> Oregon;<sup>105</sup> Pennsylvania;<sup>106</sup> Tennessee;<sup>107</sup> and Virginia.<sup>108</sup>

The following five states have also been included by this writer in the minority group as substantially adhering to the unmodified

98. *Sparks v. Parker*, 368 So. 2d 528, 532 (Ala.), *appeal dismissed*, 444 U.S. 803 (1979) (traditional obligation of the bar; condition of license).

99. *Arkansas County v. Freeman*, 31 Ark. 266, 267-68 (1876); *see also State v. Conley*, 270 Ark. 139, 603 S.W.2d 415, 416 (1980) (no burden to pay absent statute; statutory amounts controlling).

100. *Lindh v. O'Hara*, 325 A.2d 84, 92 (Del. 1974) (public duty owed as an officer of the court).

101. *In re Meizlish*, 387 Mich. 228, 240-41, 196 N.W.2d 129, 134-35 (1972) (right to effective counsel, due process, and equal protection challenges rejected).

102. *State v. Dahlgren*, 259 Minn. 307, 313, 107 N.W.2d 299, 303 (1961) (inherent Supreme Court power to appoint; no power to appropriate money to compensate).

103. *Board of Supervisors v. Bailey*, 236 So. 2d 420, 423 (Miss. 1970) (inherent court power to appoint; no power to order expenditure of public funds). *See also Young v. State*, 255 So. 2d 318, 321-22 (Miss. 1971) (condition of license to practice; fee not so inadequate as to deny accused due process).

104. *In re Hunoval*, 294 N.C. 740, 743, 247 S.E.2d 230, 232 (1977). *See also State v. Davis*, 270 N.C. 1, 10-12, 153 S.E.2d 749, 755-58 (1967) (no compensation absent statutory authorization).

105. *Keene v. Jackson County*, 3 Or. App. 551, 552-54, 474 P.2d 777, 777-78 (1970), *petition for review denied*, 257 Or. 335, 478 P.2d 393 (1970), *cert. denied*, 402 U.S. 995 (1971) (no compensation absent statute; statute controlling). *See also State v. Anderson*, 239 Or. 362, 370, 397 P.2d 838, 842 (1964) (duty).

106. *Wayne County v. Waller*, 90 Pa. 99, 103-05 (1879). *See also Commonwealth v. Johnson*, 409 Pa. 639, 644-45, 187 A.2d 761, 763 (1963) (statutory amount controlling).

107. *Huskey v. State*, 743 S.W.2d 609, 613 (Tenn. 1988) (rejecting Fifth Amendment challenge). *See also House v. Whitis*, 64 Tenn. 690, 692 (1875).

108. *Barnes v. Commonwealth*, 92 Va. 794, 803, 23 S.E. 784, 787 (1895) (dictum: no right to refuse; compensation not discussed).

traditional duty despite some "mixed signals" from their courts, in varying degrees, or some expressed hesitation to extension of the traditional duty into new areas of appointment where funding for compensation has not been made available: Arizona;<sup>109</sup> California;<sup>110</sup> Georgia;<sup>111</sup> Louisiana;<sup>112</sup> and New York.<sup>113</sup> It should also be noted that certain of the minority group states have apparently been assisted in maintaining their pro-duty position by the fact that they have effective reasonable compensation statutes in place.<sup>114</sup>

A total of twenty-three states, a new majority of those that have considered the issue, may now be fairly characterized as departing substantially from the unmodified traditional duty position along a range extending from required compensation for out-of-pocket expenses incurred to required full fair market value compensation for appointed service. The positions of these states are briefly summarized below:

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109. *Johnson & Douglas v. Superior Court*, 2 Ariz. App. 407, 409 P.2d 566, 570 (1966), *vacated*, 101 Ariz. 373, 374-75, 419 P.2d 730, 732 (1966). In *Johnson & Douglas*, a trial judge had awarded a "de facto" limit fee of \$50.00 to an appointed attorney who had made five court appearances, including two motion arguments, resulting in reduction of his client's charge from felony to misdemeanor, despite existence of a statute authorizing the court in its discretion to set reasonable compensation. Arizona Court of Appeals, although acknowledging the duty to render public service incident to the practice privilege, held that \$50.00 was not reasonable in the circumstances. Arizona Supreme Court held that the "de facto" limit did not conflict with the statute, and that the trial judge had exercised discretion in an area in which he had jurisdiction to act.

110. *Arnelle v. City and County of San Francisco*, 141 Cal. App. 3d 693, 696, 190 Cal. Rptr. 490, 492 (1983) (asserting "settled in this state" that appointed attorney must serve gratuitously in accordance with his duty). *But see* *Luke v. County of Los Angeles*, 269 Cal. App. 2d 495, 498-500, 74 Cal. Rptr. 771, 772-74 (1969) (finding implied authority to fix compensation).

111. *Elam v. Johnson*, 48 Ga. 349, 350-51 (1873). *But see* *Weiner v. Fulton County*, 113 Ga. App. 343, 348-49, 148 S.E.2d 143, 146-47, *cert. denied* 385 U.S. 958 (1966) (Georgia Court of Appeals believed uncompensated service duty to be unconstitutional, but held itself bound by *Elam*).

112. *State ex rel. Johnson*, 475 So. 2d 340, 341-42 (La. 1985) (court has inherent power to require attorney to represent indigent, with or without compensation, as a condition of practice and as officer of court, but when "reasonably necessary," court may also use its inherent power to award a reasonable fee from an appropriate source).

113. *In re Smiley*, 36 N.Y.2d 433, 440-41, 330 N.E.2d 53, 56-57, 369 N.Y.S.2d 87, 92-94 (1975) (inherent court power to assign counsel in a proper case to serve without compensation, but "injudicious" to expand such to indigent divorce litigants). *See also* *In re Cohen*, 7 N.Y.2d 488, 495-96, 166 N.E.2d 672, 676, 199 N.Y.S.2d 658, 663 (1960), *but cf.* *Menin v. Menin*, 79 Misc. 2d 285, 293, 359 N.Y.S.2d 721, 729-30 (Sup. Ct. 1974), *aff'd mem.*, 48 A.D.2d 904, 372 N.Y.S.2d 985 (App. Div. 1975) (trial court held uncompensated appointment to represent divorce litigant violated due process).

114. *See* *Gilbert & Gorenfeld*, *supra* note 77, at 79 (discussing California); *Shapiro*, *supra* note 1, at 758-59 (discussing California and New York).

**Alaska:** Major change of position in 1987. Now requires "the compensation received by the average competent attorney operating on the open market." Taking argument.<sup>115</sup>

**Florida:** Major change of position in 1986. Statutory maximum fee limitation unconstitutional when applied in manner encroaching on court's inherent power to ensure adequate representation and interfering with defendant's right to effective counsel.<sup>116</sup>

**Illinois:** Reasonable compensation should reimburse assigned counsel for his overhead and yield something toward his own support.<sup>117</sup>

**Indiana:** Anti-duty position since 1854. Attorney cannot be required to serve without compensation. Court has inherent authority to award expenses.<sup>118</sup>

**Iowa:** Since 1850, authority for compensation found in statute requiring appointment for indigents. As of 1984, attorney should receive "full" compensation without any discount based on duty to represent the poor.<sup>119</sup>

**Kansas:** Major change of position in 1987. State obligation to fairly compensate attorneys appointed to represent indigent criminal defendants at a rate which is not confiscatory considering overhead and expenses. Taking and equal protection arguments.<sup>120</sup>

**Kentucky:** Attorneys not required to accept appointments to represent indigent criminal defendants; appointment without compensation would be unconstitutional.<sup>121</sup>

**Massachusetts:** Authority to require compensation found in statute requiring counties to pay accounts allowed by the courts. (State has waffled between extending the right to compensation to certain juvenile civil matters and affirming appointment without compensation in other such matters, apparently based on availability of public funds.)<sup>122</sup>

**Missouri:** Burden of furnishing legal services to indigent criminal defendants is constitutionally the burden of the state, and attorneys should not be compelled

115. *DeLisio v. Alaska Superior Court*, 740 P.2d 437, 443 (Alaska 1987).

116. *Makemson v. Martin County*, 491 So. 2d 1109, 1112-13 (Fla. 1986). *See also* *Remeta v. State*, 559 So. 2d 1132, 1135 (Fla. 1990); *Okeechobee County v. Jennings*, 473 So. 2d 1314, 1317-18 (Fla. Dist. Ct. App. 1985).

117. *People v. Johnson*, 93 Ill. App. 3d 848, 853-54, 417 N.E.2d 1062, 1065-66 (Ill. App. Ct.), *aff'd* 87 Ill.2d 98, 429 N.E.2d 497 (1981). *See also* *People ex rel. Conn v. Randolph*, 35 Ill.2d 24, 30, 219 N.E.2d 337, 340 (1966).

118. *Webb v. Baird*, 6 Ind. 13, 15-19 (1854). *See also* *State ex rel. White v. Hilgeman*, 218 Ind. 572, 575, 34 N.E.2d 129, 130 (1941); *Knox County Council v. State ex rel. McCormick*, 217 Ind. 493, 509-11, 29 N.E.2d 405, 412-13 (1940).

119. *Walters v. Herrick*, 351 N.W.2d 794, 797 (Iowa 1984); *Hall v. Washington County*, 2 Greene 473, 474-78 (Iowa 1850).

120. *State ex rel. Stephan v. Smith*, 242 Kan. 336, 383, 747 P.2d 816, 849 (1987).

121. *Bradshaw v. Ball*, 487 S.W.2d 294, 299 (Ky. 1972).

122. *Abodeely v. County of Worcester*, 352 Mass. 719, 722-23, 227 N.E.2d 486, 489 (1967). *See also* *Department of Public Welfare v. J. K. B.*, 379 Mass. 1, 6, 393 N.E.2d 406, 409 (1979) (extending state-compensated appointed counsel to indigent parents contesting adoption); *but cf.* *Baird v. Attorney General*, 371 Mass. 741, 763-64, 360 N.E.2d 288, 301 (1977) (approving appointment when in best interest of minor seeking judicial consent to abortion, despite unavailability of public funds for compensation).

to discharge that duty alone. (Considered to be still substantially in anti-duty camp despite significant vacillations when under funding pressure.)<sup>123</sup>

*Montana*: Major change of position in 1979-1981. Reasonable compensation must reimburse the attorney for office overhead and expenses and yield something toward his own support.<sup>124</sup>

*Nebraska*: Appointment carries with it obligation on the part of state/county to pay attorney reasonable fees and expenses for his services.<sup>125</sup>

*Nevada*: Court has inherent authority to award expenses. Award of excess fees is in discretion of trial judge.<sup>126</sup>

*New Hampshire*: Attorney has duty to serve when appointed, but statutory compensation rates are unconstitutional if they shift state's burden to legal profession. Trial courts have authority to award rates which neither "unjustly enrich nor unduly impoverish."<sup>127</sup>

*New Jersey*: Constitutional attacks on the duty rejected, but authority to require compensation found under statute providing for payment of necessary criminal prosecution expenses, and reasonable compensation required as a matter of public policy. (Still considered to be substantially in anti-duty camp despite significant vacillation under condition of funding shortfall.)<sup>128</sup>

*New Mexico*: Attorney has duty to accept appointment, but court by rule may award fees in excess of the established fee schedule where complexity of the case warrants or exceptional circumstances exist.<sup>129</sup>

*North Dakota*: Attorneys accepting assignments in defense of indigents need not expect to render services at less than the going rate charged by privately retained counsel for such services.<sup>130</sup>

*Oklahoma*: Statute limiting fees unconstitutional as applied. Appointed attorney to be reimbursed for extraordinary out-of-pocket expenses, but to be similarly reimbursed for extraordinary professional services only where he is not able to maintain his regular practice. Taking argument.<sup>131</sup>

123. *State v. Green*, 470 S.W.2d 571, 573 (Mo. 1971). *Cf. State ex rel. Scott v. Roper*, 688 S.W.2d 757, 769 (Mo. 1985) (courts have no inherent power to compel attorneys to serve in civil actions without compensation). *But see supra* notes 91-93 and accompanying text; *Danforth v. Levitt*, 540 S.W.2d 19, 20 (Mo. 1976) (holding trial judge was without power to order state to compensate counsel for indigent defendants).

124. *State v. Boyken*, 196 Mont. 122, 637 P.2d 1193, 1195 (1981); *State v. Allies*, 182 Mont. 323, 597 P.2d 64, 65 (1979).

125. *Kovarik v. County of Banner*, 192 Neb. 816, 818-23, 224 N.W.2d 761, 763-65 (1975). *See also State ex rel. Belding v. Belding*, 192 Neb. 555, 556, 222 N.W.2d 835, 836 (1974).

126. *County of Clark v. Smith*, 96 Nev. 854, 856-57, 619 P.2d 1217, 1218-19 (1980); *State v. Second Judicial Dist. Ct.*, 85 Nev. 241, 245-46, 453 P.2d 421, 422-24 (1969).

127. *State v. Robinson*, 123 N.H. 665, 668-69, 465 A.2d 1214, 1216 (1983); *Smith v. State*, 118 N.H. 764, 769-70, 394 A.2d 834, 838 (1978).

128. *State v. Rush*, 46 N.J. 399, 405-09, 412-14, 217 A.2d 441, 445-46, 448-49 (1966). *But see supra* notes 89-90 and accompanying text.

129. *State ex rel. Robins v. Hodges*, 105 N.M. 48, 728 P.2d 458, 458-59 (1986); *but cf. Hale v. Brewster*, 81 N.M. 342, 344-45, 467 P.2d 8, 10-11 (1970) (duty to accept payment from court fund as sole compensation).

130. *Baer v. O'Keefe*, 235 N.W.2d 885, 891 (N.D. 1975).

131. *Bias v. State*, 568 P.2d 1269, 1271-73 (Okla. 1977).

*Rhode Island:* Courts have statutory authority to require compensation of appointed attorneys.<sup>132</sup>

*South Dakota:* Attorneys may not be ordered by courts to represent indigents without reasonable compensation. Trial court has discretion to determine reasonableness, but must consider several specified factors and adequately explain any modification of the requested fees.<sup>133</sup>

*Utah:* Statute requiring appointment of counsel in competency hearing without available compensation unconstitutional. Attorneys appointed to represent indigent criminal defendants have cause of action if claim properly filed with county is rejected.<sup>134</sup>

*Washington:* Appointed attorney entitled to compensation from public funds in an amount to be fixed by the court. Reasonable compensation must reimburse the attorney for office overhead and expenses and yield something toward his own support.<sup>135</sup>

*West Virginia:* 1977 statutory limits on compensation, hours, and expenses constituted unconstitutional taking by 1989, and implicated defendant's right to effective counsel. Compensation must strike balance between ethical obligation of lawyer and the increasing burden on the legal profession. No lawyer may be required to devote more than 10 percent of his normal work year to court-appointed cases.<sup>136</sup>

*Wisconsin:* Prohibition on payment of criminal defense fee invalidated. Court could properly set rates in excess of those set forth in Supreme Court rule and could properly set such rates before attorney accepted appointment.<sup>137</sup>

In the federal system, precedents supporting the unmodified traditional duty to serve in criminal cases were found at the Circuit Court of Appeals level in the Second, Fifth, Seventh, Ninth, Eleventh, and D.C. Circuits.<sup>138</sup> The only contrary precedent found was

132. *State v. Hudson*, 55 R.I. 141, 144-48, 179 A. 130, 131-32 (1935).

133. *Tappe v. Circuit Court*, 326 N.W.2d 892, 894-95 (S.D. 1982); *Johnson v. City of Aberdeen*, 272 N.W.2d 97, 101 (S.D. 1978).

134. *Bedford v. Salt Lake County*, 22 Utah 2d 12, 14-15, 447 P.2d 193, 194-95 (1968); *State v. Dixon*, 22 Utah 2d 58, 60, 448 P.2d 716, 717 (1968).

135. *State v. Lehirondele*, 15 Wa. App. 502, 504, 550 P.2d 33, 34 (1976); *Honore v. Washington State Board*, 77 Wash. 2d 660, 680, 466 P.2d 485, 496-97 (1970) (stating also that, at that time, attorney had to file claim with legislature for payment).

136. *Jewell v. Maynard*, 383 S.E.2d 536, 546-47 (W. Va. 1989). See also *State ex rel. Partain v. Oakley*, 159 W. Va. 805, 813-14, 227 S.E.2d 314, 319 (1976).

137. *County of Door v. Hayes-Brook*, 153 Wis. 2d 1, 14-15, 449 N.W.2d 601, 606-07 (1990); *County of Dane v. Smith*, 13 Wis. 585, 587-89 (1861). See also *Feldner v. County of Milwaukee*, 108 Wis. 2d 32, 36-37, 321 N.W.2d 123, 125 (1982) (where no specifically applicable provision for payment of fees to appointed guardian ad litem appeared in statute, county of venue was required to pay).

138. *Lewis v. Lane*, 816 F.2d 1165, 1168-69 (7th Cir. 1987) (even if consent is prerequisite to appointment, attorney validly consented after warned of disbarment); *Family Division Trial Lawyers v. Moultrie*, 725 F.2d 695, 704-09 (D.C. Cir. 1984) (rejected involuntary servitude claim, but found

the Eighth Circuit's holding in *Williamson v. Vardeman* that an attorney appointed by a state court to represent an indigent criminal defendant could not be ordered to advance expenses necessary to the defense without an unconstitutional taking in violation of Fourteenth Amendment due process.<sup>139</sup> Even this case otherwise upheld the constitutionality of compulsion of the attorney's services.<sup>140</sup>

These results confirm Shapiro's prior comment that it is well established that federal courts may require lawyers to represent indigents in criminal matters.<sup>141</sup> Ninth Circuit's *United States v. Dillon*<sup>142</sup> is considered the seminal case in the federal jurisdiction, and it is often quoted, along with the United States Supreme Court's dictum in *Powell v. Alabama* that attorneys are officers of the court and are bound to render services when appointed,<sup>143</sup> by courts rejecting or avoiding constitutional challenges along officer of the court and duty of public service lines.

But the premises of *Dillon* have been substantially destroyed by the research of Shapiro,<sup>144</sup> and *Powell* did not address the issue of compensation for appointed attorneys.<sup>145</sup> Aside from the summary dismissal of *Sparks v. Parker*,<sup>146</sup> the United States Supreme Court has consistently denied certiorari in cases that would have presented that issue.<sup>147</sup>

Recently, the Supreme Court did act in *Mallard v. United States District Court* to clarify that the language of 28 U.S.C.A. § 1915(d),

material fact issues on taking claim); *Wright v. Louisiana*, 362 F.2d 95, 95 (5th Cir. 1966) (question of compensation for attorneys appointed by state court is for state legislature); *United States v. Dillon*, 346 F.2d 633, 638 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966) (rejected taking challenge based on traditional duty of officer of the court); *Dolan v. United States*, 351 F.2d 671, 672 (5th Cir. 1965) (no right to compensation absent statute); *Miller V. Pleasure*, 296 F.2d 283, 284 (2d Cir. 1961), *cert. denied*, 370 U.S. 964 (1962) (recognized no right to compensation). *See also* *Nabb v. United States*, 1 Ct. Cl. 173, 173-74 (1864) (rejecting implied contract claim).

139. *Williamson v. Vardeman*, 674 F.2d 1211, 1215 (8th Cir. 1982).

140. *Williamson v. Vardeman*, 674 F.2d at 1215.

141. Shapiro, *supra* note 1, at 756.

142. 346 F.2d 633 (9th Cir. 1965).

143. 287 U.S. 45, 73 (1932).

144. *See* Shapiro, *supra* note 1, at 740-53. *See also* *Jewell v. Maynard*, 383 S.E.2d 536, 543 (W. Va. 1989).

145. *See* Note, *Uncompensated Appointments*, *supra* note 1, at 395 n.55.

146. 444 U.S. 803 (1979).

147. *See supra* notes 13, 92, 105, 111, 138. *See also* Shapiro, *supra* note 1, at 757; Note, *Uncompensated Appointments*, *supra* note 1, at 415.

authorizing federal courts to “request” attorneys to represent indigent civil litigants, does not authorize them to require such service.<sup>148</sup> But the holding was limited strictly to statutory construction, did not address criminal representation, and expressly did not consider the issue of inherent authority of the court to require lawyers to serve, a question not raised below.<sup>149</sup>

By itself, *Mallard* may not portend a break in the more than two decade long “wall of silence”<sup>150</sup> of the Supreme Court regarding the traditional duty to serve, especially in light of last year’s holding in *F.T.C. v. Superior Court Trial Lawyers Association* that the District of Columbia boycott by private practice lawyers of indigent criminal defense appointments, aimed at increasing the hourly compensation paid, constituted a “classic restraint of trade” under the Sherman Act.<sup>151</sup> Although not directly on point, the majority’s ready support of the F.T.C.’s *per se* presumption of illegality “without even requiring a showing that the participants possessed market power or that their conduct triggered any anticompetitive effects”<sup>152</sup> certainly gives little reason to believe that the Court has shed its apparent traditional lack of concern for compensation levels of indigent defense lawyers.

And it must be remembered that Justice Brennan, who wrote the opinion in the five-to-four *Mallard* decision and the dissent in *F.T.C. v. Superior Court Trial Lawyers Association*, is now among the missing.

## V. CONCLUSION

Although the unmodified “traditional” duty of the attorney to serve with little or no compensation upon appointment by the court remains enshrined within the federal system,<sup>153</sup> the state systems, acting under pressure of a much magnified modern right-to-counsel burden and without guidance from the United States Supreme Court,

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148. 109 S. Ct. 1814, 1818-21 (1989).

149. 109 S. Ct. at 1822-23.

150. Note, *Uncompensated Appointments*, *supra* note 1, at 415.

151. 110 S. Ct. 768, 774-76 (1990).

152. 110 S. Ct. at 787 (Brennan, J., dissenting).

153. See *supra* notes 138-43 and accompanying text.

have evolved away from that doctrine.<sup>154</sup> Today, state jurisdictions departing from the traditional duty constitute a fifty-nine percent majority of the state systems that have considered the issue, and the trend would suggest continued deviation.

As prior commentators have frequently urged, only the United States Supreme Court can satisfactorily resolve the issue.<sup>155</sup> By now, that Court will cause substantial dislocations no matter which way it goes.

*Henry M. Hills*

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154. See *supra* notes 98-137 and accompanying text.

155. See Hunter, *supra* note 2, at 12; Note, *Uncompensated Appointments*, *supra* note 1, at



