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Recommended Citation

Michael Millemann, *Mandatory Pro Bono in Civil Cases: a Partial Answer to the Right Question: For*, 49 Md. L. Rev. 18 (1990)
Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol49/iss1/5>

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MANDATORY PRO BONO IN CIVIL CASES: A PARTIAL ANSWER TO THE RIGHT QUESTION

MICHAEL MILLEMANN*

INTRODUCTION

Our democratic society is distinguished, we claim, by the primacy of law. It is a measure of our national commitment to not just law, but equality under law, that so many of our laws protect the poor. However, it is not the “rule of law” *idea* that is distinctive, but rather the realization of that idea.

We seek to realize the “rule of law” idea through an adversary process that is administered by public judges, but operated primarily by private lawyers. By and large, however, private lawyers do not represent the poor. We apportion public lawyers, and thus ration justice, to the poor, by triage; only the critically legally wounded can obtain legal help.

The obvious question posed by this national problem is: How can we better assure that the poor are protected by law in fact, as well as in theory. Part of the answer must be that government, which exists to make laws, should provide independent advocates to the poor in civil matters to enforce the laws that it makes.

That is not the whole of the answer, however. Private lawyers exercise government’s sovereignty when they are given a monopoly to operate the adversarial system that implements law. The delegated sovereignty that these “private” lawyers exercise includes the obligation to implement the law equally and, therefore, the duty to provide the legal help to the poor that is the predicate of equality.

The case for a mandatory pro bono rule includes policy, consti-

* Associate Professor, University of Maryland School of Law. B.A., Dartmouth College, 1966; J.D., Georgetown University Law Center, 1969. I would like to acknowledge several people who provided indispensable assistance and good counsel to me in the preparation of this article. Generally, I am deeply indebted to the members of the *Maryland Law Review* for their good research and editorial suggestions. I especially appreciate the extraordinary editorial work of John Poulton, as well as his seemingly unlimited patience. Richard Gordon and Joseph Tetrault also provided important help to me, for which I am very grateful. For me, pro bono is not just a good idea; it is the root value of the legal profession that, when given life in practice, makes the practice of law a true profession. There are many good lawyers in Maryland who give life to the pro bono value on a daily basis. I dedicate this article to them for their good works.

tutional, philosophical, and historical arguments. Like any long story, the place to start is at the beginning.

I. MANDATORY PRO BONO: TWO CASE EXAMPLES

A. *Medieval Scotland: The Pro Bono Tradition*

It was the sixteenth century in medieval Scotland and the feudal tenants of the Abbey of Arbroath were caught in the middle of a fierce legal feud involving both the Church and a powerful noble family. The plaintiff¹ in the civil law action that generated the tenants' legal troubles was the Abbot.² The "defender" was his uncle, the area Archbishop, one of the richest men in Scotland.³ At issue were the duties paid annually by the Abbey's tenants.⁴ The Abbot claimed them pursuant to the King's common law, asserting rights under a civilly enforceable contract.⁵ The Archbishop invoked a Papal Bull⁶ to support his claim to the duties, and he demanded payment from the tenants as well as the Abbot.⁷

The tenants' dilemma, aggravated by poverty and servitude, was that they already had paid the whole of their annual duties, in the form of a tithed percentage of crops,⁸ to the Abbot's storehouse keeper⁹ who was responsible for supplying the monks' victuals.¹⁰ The tenants argued, having once made the payment, they could not afford, and should not have to make, double payment to the Archbishop, even if the Abbot had breached his duty to the Archbishop.¹¹ Accordingly, the tenants filed a companion action against both the Abbot and Archbishop, seeking an order declaring that their legal duties had been satisfied fully.¹²

The tenants were represented in the companion cases by a

1. The "Pursuer." 7 THE SCOTTISH NATIONAL DICTIONARY 287 (1968).

2. *Arbroath v. Saint Andrews* (1532-33), reprinted in *SELECTED CASES FROM ACTA DOMINORUM CONCILII ET SESSIONIS 25-32* (1951) [hereinafter *ACTA DOMINORUM*].

3. *Id.*, reprinted in *ACTA DOMINORUM*, *supra* note 2, at 30.

4. *Id.*, reprinted in *ACTA DOMINORUM*, *supra* note 2, at 25. The "fruits" of the Abbey.

5. *Id.*

6. *Id.*, reprinted in *ACTA DOMINORUM*, *supra* note 2, at 26.

7. *Id.*, reprinted in *ACTA DOMINORUM*, *supra* note 2, at 25-26.

8. *Id.*, reprinted in *ACTA DOMINORUM*, *supra* note 2, at 31. "Maill teinds." 4 A DICTIONARY OF THE OLDER SCOTTISH TONGUE 15 (1937) [hereinafter *SCOTTISH TONGUE DICTIONARY*] (original Scottish text).

9. *Arbroath*, reprinted in *ACTA DOMINORUM*, *supra* note 2, at 31.

10. *Id.* Since the rents were paid to the storehouse keeper, it is apparent that, in general, the rents were paid in kind, not in money.

11. *Id.*, reprinted in *ACTA DOMINORUM*, *supra* note 2, at 28.

12. *Id.*

procurator,¹³ a “professional advocate.” They needed one. The trial tactics of the day were rough. After the tenants filed their action, the Archbishop responded by having the tenants excommunicated¹⁴ by a church court, to disqualify them from being heard in civil court.¹⁵ The tenants’ procurator answered by obtaining a civil court decree that “absolved” his clients and reinstated their legal status.¹⁶

During 1532 and 1533, the tenants’ procurator produced and obtained notarized records,¹⁷ contractual documents¹⁸ between the Abbot and Archbishop, and sworn statements that their claims were supported by just cause.¹⁹ By these parents of our contemporary discovery devices, the tenants’ procurator prepared the cases for trial.

The cases moved from civil court to church court to the Scottish House of Lords, sitting as Lords of Session,²⁰ as the procurators for the parties maneuvered for the different substantive and procedural advantages provided by the courts of church and state.²¹ In the end, the Lords ordered the tenants to make the additional payment to the Archbishop.²²

Today, that unhappy result is far less important than an extraordinary aspect of the procedure that governed the resolution of the cases. The tenants’ procurator had been provided to them with-

13. “One who has been authoritatively accredited to represent others in litigation.” 6 SCOTTISH TONGUE DICTIONARY, *supra* note 8, at 268.

14. *Arbroath*, reprinted in ACTA DOMINORUM, *supra* note 2, at 31. “Cursed” (original Scottish text).

15. *Id.*

16. *Id.*

17. *Id.*, reprinted in ACTA DOMINORUM, *supra* note 2, at 26. “Instruments.” 3 SCOTTISH TONGUE DICTIONARY, *supra* note 8, at 288-89 (original Scottish text).

18. *Arbroath*, reprinted in ACTA DOMINORUM, *supra* note 2, at 31. “Letters.” 3 SCOTTISH TONGUE DICTIONARY, *supra* note 8, at 706-07 (original Scottish text).

19. *Arbroath*, reprinted in ACTA DOMINORUM, *supra* note 2, at 31. “Oaths de calumnia” and “juramento” (original Scottish text).

20. *Id.* Although until 1357 there is little direct evidence, it is believed widely that during the 13th and 14th centuries, many legal disputes ultimately were resolved by the King and his Council, a committee composed of the King’s agents and members of the Scottish Parliament. “Parliament was the place in which the king and council heard the complaints and remedied the grievances of lieges . . .” Duncan, *The Central Courts Before 1532*, in AN INTRODUCTION TO SCOTTISH LEGAL HISTORY 321, 324 (1958). By the late 14th century, the Council “had become the hub of the administration, and not least, of the administration of justice.” *Id.* at 326. The Council could examine evidence, hear complaints, and issue a decree. *Id.* at 328.

21. *Arbroath*, reprinted in ACTA DOMINORUM, *supra* note 2, at 25-30.

22. *Id.*, reprinted in ACTA DOMINORUM, *supra* note 2, at 30.

out cost²³ so that they effectively could assert their rights in court. They, and many other clients of the Scottish *advocatus pauperum*,²⁴ were recipients of an embryonic form of pro bono²⁵ legal aid that was mandated by a medieval Scottish statute.²⁶ The pro bono work of the tenants' procurator was performed in an accepted egalitarian tradition, then already more than a century old in Scotland.²⁷

The fifteenth century Scottish statute provided that the King shall "ordain"²⁸ judges to appoint advocates, "persons knowledgeable in law,"²⁹ to represent the poor in civil cases.³⁰ This legal aid

23. C. STODDART, *THE LAW AND PRACTICE OF LEGAL AID IN SCOTLAND* 2 n.7 (1979).

24. Other representative clients of the *advocatus pauperum* who were contemporaries of the Arbroath tenants included "poor tenants of the lands of Grenok" whose goods had been "spuilzied" (stolen), *Donaldsone v. McFarlane* (1532-33), reprinted in *ACTA DOMINORUM*, *supra* note 2, at 83-84; a "poor tenant of the lands of Campsfield" whose oxen was spuilzied, *Matheson v. Logane* (1533), reprinted in *ACTA DOMINORUM*, *supra* note 2, at 90-92; and "poor tenants in the lands of Haystoun" whom a "cautioner" (surety) wrongly refused to reimburse for stolen goods. *Thomsoun v. Donochty* (1532-33), reprinted in *ACTA DOMINORUM*, *supra* note 2, at 100-01.

25. When the words "pro bono attorneys" are used in this article, I intend them to mean private attorneys who provide legal help to indigent clients without charge. I distinguish them in this article from "legal services attorneys," who are publicly funded attorneys who represent the poor, usually on a full-time basis.

26. Scot. Parl. Acts of 1424, ch. 45 [hereinafter Act of 1424]. The other Provisions of the Act of 1424 read:

Bills of complaints which may not be determined by the Parliament for diverse causes belonging of the common profit of the realm, it is ordained that the bills of complaints be executed and determined by the judges and officers of the courts to which they pertain of law either Justice, Chamberlein, Sheriffs, Bailees of Burghs, Barons, or Spiritual Judges. If it pertains to them, to the which judges all and sundry the King shall give straight commandment as well within regalities as outwith under all tain and charge that after may follow. That as well to poor as to rich without flaw or favor they do full law and justice. And if the judge refuses to do the law evenly, as is before said, the party complaining shall have recourse to the King, who shall see rigorously punished such judges that it be example to all others.

Id.

27. For a discussion of the history of this egalitarian reform, see *infra* note 30.

28. It is not entirely clear whether the word "ordain" meant "to authorize" or "to require," but the better construction of "ordain" is "to require" given the general protective purpose of the Act of 1424, the language of mandate throughout the Act, and the accepted meaning of the word in that context. Conversation with Michael Christie, Scottish legal historian and member of the Law Faculty at the University of Aberdeen, Aberdeen, Scotland (July 1988).

29. C. STODDART, *supra* note 23, at 1. In 15th century Scotland, "Judges" and "Advocates" were not yet members of an organized profession. "Advocates," for example, merely referred to a person who was knowledgeable in law. *Id.*

30. Act of 1424, *supra* note 26. Stoddart speculates that the French, not King James I of Scotland, deserve credit for this egalitarian reform.

Like many aspects of Scots law, legal aid was made the subject of legislation in the fifteenth century. But while it is popularly thought that the credit for this belongs to James I, it may well be that the origins of the system are to be

mandate was delivered by Parliament ostensibly to the King, but at King James' request, it was redirected to the judiciary and private bar.³¹ King James I had an enlightened "preoccupation with the impartial ministering of justice."³² The appointment of advocates for those "pure [poor] creatures" who lacked "cunning" and "expenses"³³ helped discharge the "duty of a king to give special hearing and protection to the weak."³⁴

The Scottish Parliament of 1424 spoke on behalf of the poor in the strongest terms:

If there be any poor person, for want of sophistication or expenses, that cannot or may not follow his cause, the King for the love of God shall order the judge, before whom the cause shall be determined, to obtain and get a loyal and a wise advocate, to follow such poor person's causes; and if such causes are successful, the wrongdoer

found in France, not in Scotland. The French Parliament had made provision for counsel for the poor in 1400 and 1414; it may therefore be no coincidence, in view of the changes in Scotland due to the Auld Alliance, that legislation followed with the accession of James I in 1424.

C. STODDART, *supra* note 23, at 1.

Other commentators on the laws of Scotland referred to the "[p]rovision of counsel for the poor" as "an old practice" that "was regulated anew by the French Parliament in 1400 and 1414, and was instituted by the Scottish Parliament in 1424-25." G. NEILSON & H. PATON, *ACTA DOMINORUM CONCILII* ("Acts of the Lords of Council in Civil Cases") lxiii (1918). Neilson's and Paton's authority is *Stilus Parlamenti* cap. I, p.2, 2 AUBERT, *PARLIAMENT DE PARIS 1314-1422* xxxviii.

It, however, appears likely that Scotland's legal aid system is derived from the legal tradition of Rome and France. See *infra* text accompanying notes 91-104. The conversion of Scotland to Christianity in the 5th century brought ecclesiastical law and practice to Scotland. The provision of legal aid to the poor was an important ecclesiastical tradition that, by 1424, was almost 1000 years old. C. STODDART, *supra* note 23, at 1.

31. The Act was an attempt by the King and Parliament, before there was a centralized court or organized bar, to nationalize the judiciary and extend the rule of law throughout the realm. C. STODDART, *supra* note 23, at 1. The first provision of the Act, see *supra* note 26, sought to delegate to local courts more of the judicial workload of Parliament, sitting as the King's Council. *Id.* The specific legal aid mandate, and the more general directive to "do full law and justice" to the "poor as to rich," were apparent conditions of the delegated judicial responsibility. *Id.*

32. Duncan, *supra* note 20, at 330.

33. Act of 1424, *supra* note 26.

34. Duncan, *supra* note 20, at 330. "The dispensation of justice was the duty of a medieval king and was all the more necessary in a country where the local courts, royal and private, were as yet in early stages of development." *Id.* at 321. Indeed, an Act of the Scottish Parliament in the 12th century (during the reign of David I) provided that "[a]ll destitute of help from all others are in the care and protection of the King." Maxwell, *Civil Procedure*, in *AN INTRODUCTION TO SCOTTISH LEGAL HISTORY* 413 (1958). Early Scottish kings, especially David, "personally handled much legal business; and David acted as a judge of first instance in the minor and summary complaints of poor people, sitting at his palace gate, or on circuit, and prescribed procedure in such causes." *Id.*

shall compensate both the party wronged, and the advocate's costs and travel.³⁵

The Parliament also warned local judges that, if they refused "to do the law evenly, as is before said, the party complaining shall have recourse to the King, who shall see rigorously punished such judges that it be example to all others."³⁶ The courts that were required to appoint advocates for the poor included virtually all the local courts of the day: "Justice, Chamberlein, Sheriffs, Baillies of Burghs, Barons, and Spiritual Judges."³⁷

The Act of 1424, which predated a centralized court system and organized bar,³⁸ did not by itself create a comprehensive legal aid program. A century later, in response to a request by King James V in 1535, in which James expressed deep concern about the legal difficulties that the poor encountered,³⁹ the developing bar selected two members, apparently on a rotating basis, to be *advocati pauperum*.⁴⁰ This title carried with it an honorarium of ten pounds annually and a reminder that the *advocatus* could be "deprived of his right to plead before the court if he failed to discharge his duty."⁴¹

Until 1949, when Parliament enacted the comprehensive Legal Aid and Advice Act,⁴² this basic structure, grounded in the 1424 Act, was the core of the Scottish civil legal aid system:

It is in these provisions that the rudiments of what came to be known as the Poor's Roll are found: the applicant's legal representative was appointed for him by the

35. In its original form, the statute read:

—gif there bee onie pure creature, for faulte of cunning or expenses, that cannot, nor may not follow his cause, the King for the love of GOD, sall ordain the judge, before quhom the cause suld be determined, to purvey and get a leill and a wise Advocate, to follow sik pure creatures causes; And gif sik causes be obtained, the wranger sal assyith baith the partie skaited, and the Advocatis coastes and travel

C. STODDART, *supra* note 23, at 1.

36. *See supra* note 26.

37. *Id.*

38. C. STODDART, *supra* note 23, at 1.

39. *See id.* at 2. In its original form, King James V recited that "we are daily infestit be the complant of divers our pur [poor] legis perserverand for justice, quhilkis an postponit tharfra in default of advocatis to procur for thame." *Id.* King James V requested that "ane man of gud conscience . . . be chosin be you quhilk sall be callit *advocatus pauperum*, quhem ye sall cause sweir that he sall administer to all our liegis cumand to him for help that will mak faith thai have nocht to persew justice with all of that awn." *Id.*

40. King James II enacted this into law by the Act of Sederunt on April 27, 1535, *cited in* C. STODDART, *supra* note 23, at 2.

41. *Id.*

42. 12 & 13 Geo. 6, ch. 51 (1949).

profession, but the court itself had to be satisfied of the appellant's poverty before admitting him. In a sense, all that occurred in the history of the Poor's Roll in civil cases thereafter was simply refinement and adaptation of these fundamental rules.⁴³

*B. Maryland's Modern Day Rent Court: The Need
for a Pro Bono Ethic Today*

Let us travel across an ocean and over 450 years into today's Baltimore City Rent Court.⁴⁴ We find a place to sit in the crowded courtroom, and observe several hundred tenants waiting silently for their cases to be called; over one thousand have had trials set for this day,⁴⁵ but the vast majority never appear.⁴⁶ Most who have ap-

43. C. STODDART, *supra* note 23, at 3. By 1784, amendments to the 1424 Act specified that "six advocates for the poor should be appointed annually . . . and that both the Writers to the Signet [Scottish solicitors] and agents should each nominate four of their number to be writers and agents for the poor." *Id.* at 6 (citation omitted). The 1784 legislation also responded to criticism that too many litigants were being admitted to the Poor's Roll, and thus made eligible for legal aid, by vesting the "minister and two elders of the parish in which [the applicant] resided" with the initial responsibility for determining the applicant's financial eligibility; requiring that notice of, and an opportunity to object to a petition for admission to the Poor's Roll be given to the applicant's adversary; and formalizing the procedure for determining the *probabilis causa litigandi* that was a second requirement of eligibility. *Id.* at 6-7.

44. A specialized court of the Maryland District Court for Baltimore City, Civil Division [hereinafter Rent Court].

45. In 1987-88, there were 672,384 civil cases filed in the District Courts of Maryland. 1987 ANN. REP. THE MD. JUDICIARY 75. "Landlord/Tenant filings accounted for 72.7 percent (488,531) of all civil filings reported for fiscal 1988." *Id.* During fiscal year 1988, there were 195,711 landlord-tenant filings reported in Baltimore City. *Id.* Most were "summary ejectment proceedings" filed by landlords. When a tenant fails to pay her rent, the Maryland Code authorizes a landlord to

make [a] written complaint . . . before the District Court . . . wherein the property is situated . . . praying by warrant to repossess the premises, together with judgment for the amount of rent due and costs. The District Court shall issue its summons . . . ordering [a sheriff or constable] to notify . . . the tenant . . . to appear . . . at the trial to be held on the *fifth day* after the filing of the complaint, to answer the landlord's complaint . . . then the constable or sheriff shall affix an attested copy of the summons conspicuously upon the property. . . .

MD. REAL PROP. CODE ANN. § 8-401(b) (Supp. 1988) (emphasis added). According to the Honorable Joseph P. McCurdy, Jr., the judge assigned to Rent Court when this article was published, the daily Rent Court docket ranges from "300 to 3,000" cases. Interview with the Hon. Joseph P. McCurdy, Jr. (Oct. 3, 1989) (copy on file with *Maryland Law Review*). A "Civil Statistical Report" issued monthly for the District Court of Maryland for Baltimore City reports that for July and August of 1988, 16,054 and 15,667 summary ejectment complaints were filed, respectively. See DISTRICT COURT OF MARYLAND FOR BALTIMORE CITY, CIVIL STATISTICAL REPORTS (July/Aug. 1988) [hereinafter CIVIL STATISTICAL REPORT]. The Rent Court's docket grows to its largest numbers during the middle weeks of the month because it takes this period of time for landlords to realize rent is

peared are responding to summary ejectment complaints alleging that they have failed to pay their rents.

The "white slip" line forms before the docket is called, and it snakes along three of the four courtroom walls to the clerk's desk, next to where the judge sits when court is convened. These tenants are accepting put-out orders ("white slips") because it is the only way they can obtain emergency Aid for Dependent Children (AFDC) grants to pay their rent. They rarely are represented by counsel who could tell them that they may have good defenses to eviction or that such orders may disqualify them in the future from asserting a number of claims and defenses.⁴⁷ When the court session begins, we watch the tenants nervously approach the bench as their cases

overdue, file summary ejectment proceedings, and have cases scheduled for trial. See interview with the Hon. Joseph P. McCurdy, Jr., *supra*.

46. For example, during July 1988, 1,373 of 16,059 defendants in summary ejectment proceedings appeared for trial. CIVIL STATISTICAL REPORT, *supra* note 45.

47. The Hon. Joseph P. McCurdy, Jr., the current Rent Court Judge estimates that approximately 5% of the tenants who appear for trial are represented by counsel, about one-half by attorneys from the Legal Aid Bureau, Inc., and about one-half by "student attorneys," law students practicing pursuant to Rule 18 of the Maryland Rules Governing Admission to the Bar, 2 Md. R. 18 (1989). Interview with the Hon. Joseph P. McCurdy, Jr., *supra* note 45; see CODE OF PUBLIC LOCAL LAWS OF BALTIMORE CITY § 9-9(d)(3) (1979 & Supp. 1988). After these tenants have accepted "white slips," the Rent Court Judge, in his "opening statement," advises tenants who are in the courtroom that:

If you are a tenant and you believe that your home is in need of substantial repairs, you are directed to send your landlord a certified letter return receipt requested listing the repairs that are needed in order to give the landlord notice of these conditions. The landlord will have a reasonable period of time after receiving the letter in which to complete the repairs. This usually means thirty (30) days. If the landlord fails to do so, then you have the option of withholding the following month[']s rent, and when the landlord files a rent notice against you, of coming to court, and bringing with you your copy of the certified letter, the green card from the post office which indicates the date that the landlord received the letter, and any other relevant evidence such as photographs. I will instruct you further if this becomes an issue in your case.

Baltimore City Rent Court Opening Statement (provided by the Hon. Joseph P. McCurdy, Jr.) (copy on file with *Maryland Law Review*).

In the summons served on a tenant, the only mention of possible defenses to the landlord's complaint is on the back side of the summons in the section designated: "To The Tenant." Summons of the District Court of Maryland, Failure to Pay Rent—Landlord's Complaint for Repossession of Rented Property (copy on file with *Maryland Law Review*). In item 4, the summons states that "If you have a defense or think you do not owe the rent, you should come to court and state the facts. You have a right to bring a lawyer to the court with you." *Id.* The vast majority of tenants have no knowledge of the landlord's duty to guarantee the tenants quiet enjoyment of the premises, *Sigmend v. Howard Bank*, 29 Md. 324 (1868); MD. REAL PROP. CODE ANN. § 8-211 (1988), the landlord's duty to remove lead-based paint, *id.* § 8-211.1, the landlord's duty to maintain a record of rent paid, *id.* § 8-208.2, or the landlord's duties to comply with the rent escrow and implied warranty of habitability laws. See *infra* note 48.

are called and make brief ineffective and nonresponsive arguments. The Rent Court Judges are selected, in part, because they have the patience and willingness to assist *pro se* litigants. In my experience, they usually protect the rights of *pro se* litigants as well as any "mass justice" court does, or can. However, given the extraordinary Rent Court docket and the limits of the judicial role, the judge is not a substitute for an advocate.

We witness an extraordinary paradoxical ritual. Many of the tenants have valid rent escrow, breach of the warranty of habitability, and other claims and defenses.⁴⁸ Yet very few assert them. Many tenants face eviction, and possibly homelessness, without laying claim to these basic protections primarily because they do not know about them.⁴⁹ The laws that in theory protect the tenants in Rent Court are inaccessible to them in fact. An injustice is occurring.

We repeat this fundamental institutional hypocrisy on a daily basis. The *pro se* litigants are disabled workers who seek disability

48. There are two rent escrow laws. CODE OF PUBLIC LOCAL LAWS OF BALTIMORE CITY § 9-9 (1979 & Supp. 1988) authorizes the Rent Court to establish an escrow fund and require tenants to pay either their full rent, or an abated amount of rent, into that escrow account if there are conditions within the leased premises that "constitute a fire hazard or serious threat to the life, health, or safety of occupants thereof" *Id.* § 9.9(b). Such conditions can include, but are not limited to, "a lack of heat or of hot or cold running water," a lack of "light" or "electricity," a lack of "adequate sewage disposal facilities," "an infestation of rodents (except if the property is a one-family dwelling)," or "the existence of paint containing lead pigment on surfaces within the dwelling, provided that the landlord has notice of the painted surfaces, and if such condition would be in violation of the Baltimore City Housing Code." *Id.* There is a similar statewide law. *See* MD. REAL PROP. CODE ANN. § 8-211 (1988).

CODE OF PUBLIC LOCAL LAWS OF BALTIMORE CITY § 9-14.1 (1979 & Supp. 1988), includes an "implied warranty of fitness for human habitation" in every written or oral lease for rental of a dwelling intended for human habitation. *Id.* The warranty of fitness "for human habitation" means that the leased premises "shall not have any conditions which endanger the life, health, and safety of the tenants, including, but not limited to vermin or rodent infestation, lack of sanitation, lack of heat, lack of running water, or lack of electricity." *Id.* § 9-14.1(b)(3). Breach of the rent escrow statutes and the warranty of habitability statute may be asserted as affirmative claims or defenses to a summary ejection proceeding. Damages are "computed retroactively to the date of the landlord's actual knowledge of the breach of warranty and shall be the amount of rent paid or owed to the landlord during the time of the breach less the reasonable rental value of the dwelling in its deteriorated condition." *Id.* § 9-14.2(d).

49. During August 1988, for example, there were only 226 rent escrow accounts established in 15,667 summary ejection cases. *See* CIVIL STATISTICAL REPORT, *supra* note 45. The extensive landlord-tenant experience of the University of Maryland's Clinical Law and Cardin Programs indicates that a far larger number—probably a majority—of "inner city" defendants in summary ejection proceedings have meritorious rent escrow or warranty of habitability defenses that would warrant the establishment of escrow accounts.

benefits that, if granted, will be the only income for them and their families; elderly persons who assert legal claims to Medicaid payments that would pay for essential health care; disabled children who seek a special education to which they claim they are entitled; women and children who ask for legal protections from life-threatening abuse; institutionalized persons—juveniles, the mentally ill, the mentally retarded, presumptively innocent pretrial inmates, and convicted persons—who assert rights to minimal living conditions or habilitative care and treatment; migrant workers and immigrants who claim the right to work and/or live in this country; and other indigent claimants. Like the tenants in Rent Court, these poor persons are not special pleaders who beg for gratuities; instead, they assert *rights* that are the predicates of life, personal health and safety. The rights they claim, however, are buried in the complex language of lawyers.

Only one in five of these indigent litigants will be able to obtain the legal help that is essential to enforce their rights;⁵⁰ the vast majority will be represented by lawyers who work for government-funded legal services programs.⁵¹ Most often, the rights of the remaining indigent litigants simply will not be enforced, despite romantic notions of *pro se* capacity and judicial paternalism. These millions of American citizens, hundreds of thousands in Maryland,⁵² live in a form of domestic exile from the law. For the last decade, the executive branch of the United States Government has sought to increase this number by attempting to abolish the national Legal Services Corporation, the primary source of funding for programs that provide legal help to the poor.⁵³ There is no evidence that the current national administration will alter this exclusionary policy significantly.⁵⁴

There is an obvious source of legal help that, to date, has not been tapped: the private bar. In Maryland, volunteerism has generated relatively little legal help for the poor.⁵⁵ Although private attorneys may *now* have a legally enforceable duty to represent the poor, the Maryland Court of Appeals should make it explicit in a comprehensive mandatory pro bono rule. The possible sources of

50. See MARYLAND LEGAL SERVICES CORPORATION ADVISORY COUNCIL, ACTION PLAN FOR LEGAL SERVICES TO MARYLAND'S POOR vi (1988) [hereinafter ACTION PLAN].

51. See *id.* at 12-17.

52. See *id.* at 6-8.

53. Edsall, *Consensus Builds to Expand Aid for Working Poor*, Wash. Post, Aug. 21, 1989, at A1, col. 1.

54. *Id.*

55. See *infra* note 199.

an existing pro bono duty, and the justifications for making it explicit in a rule, are the subject of this article.

II. POSSIBLE SOURCES OF AN EXISTING PRO BONO DUTY

There are suggestions of a pro bono duty in history,⁵⁶ state declarations of rights,⁵⁷ the ethical codes of lawyers,⁵⁸ and the inherent powers of courts.⁵⁹ However, the most important pro bono battle to reach the United States Supreme Court recently was fought over the meaning of one word in a federal statute.

A. *A Rejected Source: Title 28, Section 1915(d) of the United States Code*

In *Mallard v. The United States District Court For The Southern District of Iowa*,⁶⁰ the Supreme Court held that title 28, section 1915(d) of the United States Code,⁶¹ which provides that federal courts may "request" attorneys to represent civil litigants in in forma pauperis cases, does not authorize federal courts to *require* attorneys to do pro bono work.⁶² The Court, however, refused to decide whether federal courts have "inherent authority" to compel attorneys to represent the poor in civil cases.⁶³

56. See *infra* text accompanying notes 91-136.

57. See *infra* text accompanying notes 137-139.

58. See *infra* text accompanying notes 163, 173-179.

59. See *infra* text accompanying notes 82-85.

60. 109 S. Ct. 1814 (1989).

61. 28 U.S.C. § 1915(d) (1982) provides that: "The court may request an attorney to represent any such person [i.e., an indigent] unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious."

62. 109 S. Ct. at 1823.

63. *Id.* at 1822-23. The case is puzzling in several respects. The opinion was written by Justice Brennan; Chief Justice Rehnquist and Justices White, Scalia, and Kennedy joined in the opinion. *Id.* at 1816. This was the only 5-4 decision during the 1988-89 Term of the Court in which Chief Justice Rehnquist and Justice Brennan were on the same side. See Nat'l L.J., Aug. 21, 1989, at supp. 3. "The court split 5-4 in a total of 32 cases. Chief Justice William H. Rehnquist and Justice William J. Brennan, Jr. were on opposite sides in 31 of the 32 cases." *Id.* Moreover, there was a plainly narrower ground of decision. Justice Brennan might have held that, whether or not § 1915(d) authorizes federal courts to require attorneys to represent the poor, the mandatory appointment of Mallard was an abuse of discretion. Mallard was admitted to practice before the district court in January 1987. *Mallard*, 109 S. Ct. at 1817. He possessed some expertise in bankruptcy and securities law, not litigation. *Id.* He was asked to represent two then-incarcerated inmates and one former inmate in a prisoner rights case brought pursuant to the Federal Civil Rights Act, 42 U.S.C. § 1983 (1982). *Id.* After reviewing the case file, he filed a motion to withdraw with the United States Magistrate who was presiding over the case. *Id.* at 1817. He asserted that he was not familiar with civil rights actions and, in particular, prisoner rights cases. When the magistrate denied

Justice Kennedy cast the swing vote in this five to four decision.⁶⁴ Although in his concurring opinion he agrees that Congress, in enacting section 1915(d), did not intend to impose a pro bono duty upon lawyers, he suggests cryptically that this (perhaps nonenforceable) duty inheres in the tradition and nature of the profession.⁶⁵ In full, he says:

Our decision today speaks to the interpretation of a statute, to the requirements of the law, and not to the professional responsibility of the lawyer. Lawyers, like all those who practice a profession, have obligations to their calling which exceed their obligations to the State. Lawyers also have obligations by virtue of their special status as officers of the court. Accepting a court's request to represent the indigent is one of those traditional obligations. Our judgment here does not suggest otherwise. To the contrary, it is precisely because our duties go beyond what the law demands that ours remains a noble profession.⁶⁶

Justice Brennan's majority opinion in *Mallard* provides support for both those who advocate and those who oppose the mandatory pro bono concept. In the last paragraph of his opinion, Justice Brennan

emphasize[s] that our decision today is limited to interpreting Section 1915(d). We do not mean to question, let alone denigrate, lawyers' ethical obligation to assist those who are too poor to afford counsel, or to suggest that requests made pursuant to Section 1915(d) may be lightly declined because they give rise to no ethical claim. On the contrary, in a time when the need for legal services among the poor is growing and public funding for such services has not kept pace, lawyers' ethical obligation to volunteer their time and skills *pro bono publico* is manifest. Nor do we express an opinion on the question whether the federal

his motion to withdraw, Mallard argued to the district court that he was "not a litigator by training or temperament" and not competent to handle the assigned case. *Id.* The Iowa Volunteer Lawyers Project, which administered the federal court's mandatory appointment program, refused to create "an exception to the rule of assignment," even though there was a substantial pool of otherwise qualified lawyers and Mallard agreed to do substitute pro bono work. *Id.* Under these facts, the court certainly would have been justified in holding that, whether or not § 1915(d) authorizes mandatory appointment of counsel, the lower court had failed to develop a sensible, efficient, and fair assignment system.

64. See *Mallard*, 109 S. Ct. at 1823 (Kennedy, J., concurring).

65. See *id.*

66. *Id.*

courts possess inherent authority to require lawyers to serve. . . . [T]he District Court did not invoke its inherent power in its opinion below, and the Court of Appeals did not offer this ground for denying Mallard's application for writ of mandamus. We therefore leave that issue for another day.⁶⁷

Justice Brennan rests his majority opinion on the plain meaning of the "operative term"⁶⁸ of section 1915(d)—"request":

To request that somebody do something is to express a desire that he do it, even though he may not generally be disciplined or sanctioned if he declines. . . . In everyday speech, the closest synonyms of the verb "request" are "ask," "petition," and "entreat." . . . The verbs "require" and "demand" are not usually interchangeable with it.⁶⁹

He points out that the immediate companion of section 1915(d), section 1915(c), contains the language of command,⁷⁰ indicating that "Congress evidently knew how to require service when it deemed compulsory service appropriate."⁷¹ Justice Brennan also examines the language of section 1915(d), which was enacted in 1892, through an historical lens. He notes that, "[b]y the late 19th century, at least 12 States had statutes permitting courts to *assign* counsel to represent indigent litigants."⁷² He observes that: "[n]one of those state statutes, however, provided that a court could merely *request* that an attorney serve without compensation. All of them provided instead that a court could *assign* or *appoint* counsel."⁷³ The majority opinion concludes that, by choosing the word "request," Congress fully intended to adopt a less demanding federal practice.⁷⁴

Justice Brennan, bolsters his opinion by arguing, based on a law

67. *Id.* at 1822-23.

68. *Id.* at 1818.

69. *Id.* (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 1929 (3d ed. 1981); BLACK'S LAW DICTIONARY 1172 (5th ed. 1979)).

70. 28 U.S.C. § 1915(c) (1982). It requires court officers to serve process and perform all other relevant duties in in forma pauperis cases and similarly requires witnesses to attend and participate in in forma pauperis cases as they do in all other cases. *Id.*

71. *Mallard*, 109 S. Ct. at 1818. Later in his opinion, Justice Brennan completes the statutory analysis by comparing the discretionary language of § 1915(d) with mandatory appointment of counsel language in a number of other federal statutes. *Id.* at 1821.

72. *Id.* at 1818-19 (emphasis added). The twelve states were Arkansas, Illinois, Indiana, Kentucky, Missouri, New Jersey, New York, North Carolina, Tennessee, Texas, Virginia, and West Virginia. *Id.* at 1818.

73. *Id.* at 1819 (citations omitted) (emphasis added).

74. *Id.*

review article,⁷⁵ that there was no “firm [mandatory pro bono] tradition in England and the United States”⁷⁶ In this country, few appointments were made pursuant to the nineteenth century state statutes authorizing the assignment of counsel to indigents in civil cases, many legal proceedings were not transcribed, and “lawyers seem rarely to have balked at courts’ assignments.”⁷⁷ Therefore, it is “unclear” whether the state statutes authorize “courts to sanction attorneys who refused to serve without compensation”⁷⁸ This is “significant,” in Justice Brennan’s view, for it suggests the absence of a coercive pro bono appointment system that, in turn, “suggests that Congress did not intend to replicate a system of coercive appointments when it enacted Section 1915(d).”⁷⁹ Justice Brennan finds the English experience “equally murky.”⁸⁰ He states:

Few appointments were made in either civil or criminal cases; and although sergeants-at-law were expected to represent indigent persons upon demand of the court, they held public office and were court officers in a much fuller sense than advocates who appeared before it. Again, no reported decisions involve the imposition of sanctions on lawyers unwilling to serve.⁸¹

Dissenting, Justice Stevens⁸² identifies an aggregate source of mandatory pro bono responsibility far broader than the text of section 1915(d): “tradition, respect for the profession, the inherent power of the judiciary, and the commands that are set forth in canons of ethics, rules of court, and legislative enactments.”⁸³ In the view of the dissenters, a court is authorized to impose a pro bono duty upon the bar “to protect the functioning of its own processes” because that duty “is part of the ancient traditions of the bar long recognized by this Court and the courts of the several States.”⁸⁴ “Section 1915(d) embodies this authority to order counsel to represent indigent litigants even if it does not exhaust it.”⁸⁵

75. Shapiro, *The Enigma of the Lawyer’s Duty to Serve*, 55 N.Y.U. L. REV. 735 (1980).

76. *Mallard*, 109 S. Ct. at 1819 (citing Shapiro, *supra* note 75, at 753).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* (citing Shapiro, *supra* note 75, at 740-49).

82. *Id.* at 1823-27 (Stevens, J., dissenting). He was joined by Justices Marshall, Blackmun, and O’Connor.

83. *Id.* at 1823.

84. *Id.* at 1824.

85. *Id.* at 1825.

B. *A Possible Source: The Incorporation of A Mandatory Pro Bono Duty in Maryland's Received Law*

In *Mallard*, Justice Brennan employs accepted axioms of statutory construction to discover legislative intent, although in so doing he probably understates the mandatory pro bono tradition.⁸⁶ If Justice Brennan correctly recreates and interprets history, he does so for a very limited purpose: to divine the intent of the Congress that enacted title 28, section 1915(d) of the United States Code in 1892.

The history of mandatory pro bono is relevant in answering two questions that were not before the Court in *Mallard*. Did the settlers of our nation's earliest states, like Maryland, transport a mandatory pro bono duty from England and incorporate it into state law? Should the highest state courts or state legislatures explicitly impose such a duty on the bar today?

History helps us answer these questions. There is good reason to believe that, through Article 5 of the Maryland Declaration of Rights, Maryland's received law now includes an English statute that authorizes trial judges to appoint counsel to represent the poor in civil cases.⁸⁷

The history of mandatory pro bono also helps rebut the most powerful contemporary objection to the imposition of a mandatory pro bono rule: that it is the obligation of the government, one that is not shared by private lawyers, to provide legal services to the poor. In fact, government and the private bar have shared this fundamental obligation for many years. The early pro bono advocates often were leaders of the state, or were informally "deputized" by the state to represent the poor for free. These advocates, like today's lawyers, exercised government's delegated law enforcement sovereignty in return for permission to represent clients and, later, the monopolistic right to do so. When these historic advocates represented the poor, they did so because fulfilling that duty legitimized both the developing private profession (by justifying the concept of representation itself) and the state (by bringing the poor within the state's rule of law).⁸⁸ These historic sources of pro bono duty continue to be today's most forceful justifications for a mandatory pro bono rule.

The important lesson to learn from history is not, as Justice Brennan's opinion in *Mallard* sometimes intimates, that the societies

86. See *supra* text accompanying notes 67-81.

87. See *infra* text accompanying notes 137-161.

88. See *infra* text accompanying notes 91-161.

that fed humans to animals for recreation⁸⁹ and hung children for picking pockets⁹⁰ did not always faithfully implement the pro bono value. Rather, the striking features of history are that early, often brutal societies *did* endorse this value. If they did not always implement the pro bono value, they often did, giving it life through the combined efforts of the state and "private" advocates.

1. *The History.*—*a. Rome.*—During the late Republic and early Roman Empire, the poor's advisor and advocate was the patrician head of the extended Roman household.⁹¹ The relationship between the patrician and his household⁹² or "clients"⁹³ created reciprocal duties. The household member or client owed his patrician allegiance. In turn, the patrician provided legal aid to his dependent clients. In particular the patrician, called a *patronus* in court, was bound to appear in court for his clients, and to explain the law to them, since knowledge of the old customary law of the city was a monopoly of the heads of patrician households.⁹⁴

89. At the same time that a variant of the pro bono ethos flourished in Rome, *see infra* text accompanying notes 91-104, the regular spectacles at the Colosseum that were part of government's "bread and circus" strategy included feeding Christians, among others, to lions. *See* J. CARCOPINO, *DAILY LIFE IN ANCIENT ROME* 243-44 (1940).

90. By 1495, England had enacted a law that authorized a variety of courts to appoint private lawyers to represent the poor without fee. *See infra* text accompanying notes 105-107. At the same time, the penalty for many crimes, including pickpocketing, was death, even when the offenders were young children. *See* Bedau, *General Introduction*, in *CAPITAL PUNISHMENT* 24 (J. McCafferty ed. 1972).

91. 5 R. POUND, *JURISPRUDENCE* 704 (1959). During the early Republican Period (509-27 B.C.), Roman society was organized around *gentes* (clans) that were composed of related *familiae* (families). The *paterfamilias* governed the family unit with virtually unlimited *patria potestas* (sovereignty of the home) that marked early Roman law. Collectively, the heads of the *familiae* were the early Republic's governing patricians whose descendants sat in the *Senatus* or Upper House of the popular assembly. *See* J. CARCOPINO, *supra* note 89, at 53. Roscoe Pound paints a warm paternal picture of the learned patrician who "knew the customary law" and "sat in the courtyard of his house and advised his dependents." 5 R. POUND, *supra*, at 704.

92. *See* 5 R. POUND, *supra* note 91, at 704; R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 44-45 (1953) [hereinafter *THE LAWYER FROM ANTIQUITY TO MODERN TIMES*]. The "household" included many members who were not related by blood or marriage to the patron, including those who "attached themselves to some households as dependents" and slaves manumitted by the patron. *Id.* at 45.

93. *THE LAWYER FROM ANTIQUITY TO MODERN TIMES*, *supra* note 92, at 44. There was a version of this relationship in Greece. Pound, describing the history of representation in ancient Greece, identified the "kin group" as the earliest legal unit and, therefore, the "head of the kin group" as the earliest representative. "The kin group speaks through its head on behalf of dependents because their cause is its cause. The kinless man, the emancipated man, the man who is not a dependent, speaks for himself." *Id.* at 31.

94. *Id.* at 44-45. Thus this duty of the patron toward his client was the basis both of the advocate's function and of the jurisconsult's [advisor's] function as they developed at

The *patroni* were eminent private citizens who also were governmental leaders.⁹⁵ As word of a patron's oratory skills spread, the number of his legal "clients" grew, including many who were not part of his household.⁹⁶ The result was a new profession of trial

Rome. *Id.* at 45. See Cappelletti and Gordley for a summary of the legal aid role of the *patronus* in *Legal Aid: Modern Themes and Variations: Part One: The Emergence of a Modern Theme*, 24 STAN. L. REV. 347, 348-51 (1972). "[T]he weak and impoverished attached themselves to [this] powerful man," who "assisted them in many of their difficulties, including litigation" and, most probably, also provided the "extralegal help necessary to prosecute a case against a powerful opponent in a Roman court." *Id.* at 349 (footnotes omitted). In return, the indigent client provided "certain services and political support" to the patron. *Id.*

95. The *patronus'* household was an important component of the governance structure. Unlike the Republic, the Empire was a plutocratic aristocracy. There were not sharp distinctions between public and private spheres. Instead, with limited exceptions, one's private status, defined in terms of class and wealth, determined whether or not he governed. J. CARCOPINO, *supra* note 89, at 52.

The rigid hierarchy of classes was complex. Free-born were distinct from slaves. *Id.* But free-born included citizens and noncitizens. *Id.* Citizens, in turn, included *honestiores*—for example, senators, knights, soldiers, veterans, municipal office-holders, and their descendants—and *humiliores*, the remainder of the citizenry. *Id.* *Honestiores* also were differentiated by titles: "distinguished man," "very perfect man," "most eminent man," and "most famous man". *Id.* at 53.

This elaborate class structure apportioned public rights and duties through a chain of interdependence:

From the parasite do-nothing up to the great aristocrat there was no man in Rome who did not feel himself bound to someone more powerful above him by the same obligations of respect, or, to use the technical term, the same *obsequium*, that bound the ex-slave to the master who had manumitted him.

Id. at 171 (footnote omitted).

At the summit of the social scale was the Senatorial Order. A member of this order had to own at least 1,000,000 *sesterces* (\$40,000). The emperor could at will appoint him to command his legions, to act as legate or proconsul in the most important provinces, to administer the chief services of the city, or to hold the highest posts in the priesthood.

Id. at 53 (footnotes omitted).

While the clients of the *patronus* were duty-bound to demonstrate their allegiance to, and dependence upon the *patronus*, the *patronus* for his part was honor-bound to protect them. *Id.* at 171.

96. THE LAWYER FROM ANTIQUITY TO MODERN TIMES, *supra* note 92, at 45-46. The assortment of legal skills that a patron had to have to effectively represent his dependent clients was as varied then as now. *Id.* at 42. In the initial *in jure* stage of civil litigation, the *praetor* or judicial magistrate identified the issues (claims and defenses) to be tried and fashioned instructions for the jury. The authority for a litigant's claims and defenses was the *praetor's* "edict," an a priori pronouncement generally indicating how the *praetor* would decide hypothetical cases. *Id.* at 35. "On taking office the *praetor* announced in his edict the relief he would be prepared to grant and the defenses he would allow on application of anyone asserting that the state of facts contemplated had arisen." *Id.* at 35. The careful analytical skills of an advocate were necessary to bring claims and defenses within the language of the edict. A plaintiff "had to go before the judicial magistrate and point out the particular provision of the edict upon which he relied as the basis of his action," and "a defendant who desired to assert a defense other than that the

lawyers, born in the dependency of Roman classes cultivated by the state, that was one segment of the developing bar.⁹⁷

Patrons represented their dependents without fee,⁹⁸ and this pro bono tradition was difficult to dislodge when *patroni* represented clients who lived and worked outside the household.⁹⁹ Indeed, one commentator notes that during the Republic and early Empire "we find no serious complaints that advocates' fees prevented the small man from litigating."¹⁰⁰

With the disintegration of the Empire, the law of the Church became increasingly authoritative in Rome. By the early Middle Ages, there was a well developed system of ecclesiastical courts, and the Pope had become "supreme legislator and judge in ecclesiastical causes as the emperor had been in temporal causes."¹⁰¹ Ecclesiastical jurisdiction was extensive, including many aspects of what today would be called probate, domestic, and family practice. Litigants appeared in person or were represented by a "proctor" or

plaintiff's case was not made out" was required to "point out to the judicial magistrate the particular clause of the edict on which he relied. One not thoroughly versed in the law would need advice or, better, would need someone to make the application to the judicial magistrate on his behalf." *Id.* at 36.

A number of *judices*, or a single *judex*, decided the case during the second *in judicio* stage of the civil lawsuit that we would find strikingly familiar today. *Id.* at 42. In the Republic, *judices* often were lay jurors. In the Empire, the *judex* initially often was a private arbitrator and later often was an official of the Empire. *Id.* at 42-43. Orators were the "trial" attorneys. *Id.* at 43. Testimony was presented by witnesses, without limiting rules of evidence. *See id.* at 47-48. "Cross examination was highly developed." *Id.* at 48. The quality of oratory during argument and examination often was decisive, and as orators Romans had few peers. "At the trial there might be speeches with introduction of evidence in the course of the speech, . . . or speeches followed by evidence," among other procedures. *Id.* at 43. "There was no limit to the number of orators who might speak, but, though six are known to have spoken on each side in one case, usually there were not more than four on a side." *Id.*

97. In addition to the "advocates" or "orators," who were the representatives in trials or *in judicio* proceedings, there were procurators, who were "agents" or "representatives" in *in jure* proceedings, and "jurisconsults," who were legal advisors. *Id.* at 55; *see also* 5 R. POUND, *supra* note 91, at 696-702.

98. "In the beginning the patron advised his client and supported his client's case or defended him because these were duties the patron owed to one dependent upon him." THE LAWYER FROM ANTIQUITY TO MODERN TIMES, *supra* note 92, at 51.

99. 5 R. POUND, *supra* note 91, at 697-98. Quintilian "laid down that advocacy was a service gratuitously rendered for its own sake for which the advocate might honorably accept a fair honorarium, voluntarily bestowed as a gift, but for which no bargain as to compensation and nothing in the way of hire was permitted." *Id.* at 698. Pound observed further that, "[i]f anything more than the texts of Roman law had been needed to establish the tradition the authority of [this] great treatise of antiquity was decisive." *Id.*

100. J. KELLY, ROMAN LITIGATION 84 & n.1 (1966).

101. THE LAWYER FROM ANTIQUITY TO MODERN TIMES, *supra* note 92, at 63.

“advocate.”¹⁰²

Clerical advocates became the *defensores pauperum*, who represented *miserabiles personae*, first in ecclesiastical courts and later, with lay advocates, in Rome’s secular courts.¹⁰³ Their practice was “that of advocates at law to defend the rights of the poor and the liberties of the Church against all aggressors and invaders.”¹⁰⁴

b. England.—The Roman legal aid experience had a significant impact on the English, and through England, on the early American experiences.¹⁰⁵ The primary Roman influence on the ethos of the English legal profession was established not by the direct transmission of the Empire’s legal culture through Rome’s occupation and governance of England, but several centuries later through the Church and its ecclesiastical courts.¹⁰⁶ With the conversion of England, Rome’s legal aid tradition gradually became part of England’s ecclesiastical court practice. Tracing the Roman influence, one commentator “safely assumes” that “the English bishops before the Conquest were well aware of the existence of ecclesiastical advocates in [Roman] ecclesiastical courts and almost certainly of lay advocates in secular courts, at any rate, as representatives of poor suitors—widows, orphans, *furiosi*, the mentally ill, etc., and of propertied persons under age.”¹⁰⁷

102. *Id.* at 66.

103. See H. COHEN, HISTORY OF THE ENGLISH BAR 24-29 (1967).

104. *Id.* at 24. The office of the *advocatus pauperum deputatus et stipendiatus* was created by canon law. The *advocatus* was paid by the Church to represent the poor in ecclesiastical courts. Cappelletti & Gordley, *supra* note 94, at 351. This “institution spread to the secular courts in several parts of France and to many of the free communes of Italy.” *Id.* (citations omitted).

105. See generally 5 R. POUND, *supra* note 91, at 696-710.

106. H. COHEN, *supra* note 103, at 19-22. “In the year 597, missionaries from Rome arrived in Kent; and the local kings of England began to issue laws, as Bede said, ‘in the Roman style’, but in the English language . . .” A. HARDING, A SOCIAL HISTORY OF ENGLISH LAW 13 (1966).

107. H. COHEN, *supra* note 103, at 28. The Digest, a compilation of Roman law, provided, as translated from Latin:

It will also be [the advocate’s] duty in most cases to allow the use of counsel by petitioners who are: women, *pupilli* [orphans], those otherwise under a disability, or those who are out of their minds, if anyone seeks this for them. Even if there be no one to seek it, he ought to give them it anyway. But if someone should represent himself as being unable to find an advocate because of his opponent’s power, it is just as much incumbent on the pro-consul to give him one. But it is wrong for anyone to be oppressed by the sheer power of his opponent . . .

FIG. 1.16.9.5 (Ulpian, Officio Proconsulis I), reprinted in 1 THE DIGEST OF JUSTINIAN 33-34 (T. Mommsen & P. Krueger eds., A. Watson trans. 1985).

The Digest further provided that:

By the early part of the ninth century in Anglo-Saxon England, churchmen were authorized to represent orphans and widows in secular courts,¹⁰⁸ as well as the poor generally in ecclesiastical

The *praetor* says: "If they do not have an advocate, I will appoint one." The *praetor* is accustomed to show this consideration not only to the persons mentioned above but also to anyone else who for certain reasons, because of either intrigues or duress on the part of his opponent, has not found an advocate.

DIG. 3.1.1.4 (Ulpian, Ad Edictum 6), reprinted in 1 THE DIGEST OF JUSTINIAN, *supra*, at 78.

Other commentators, however, caution that "it is not clear that these provisions were intended to help the poor rather than the more typical victims of the force and fraud which characterized the lawsuits of the powerful, and in any case they hardly seem to have affected the lot of the poor masses." Cappelletti & Gordley, *supra* note 94, at 350.

108. H. COHEN, *supra* note 103, at 158. As occurred in Rome, in England there was a secular pro bono tradition, rooted in a hierarchical class structure, which predated, and then co-existed with, the ecclesiastic legal aid practice. The Anglo-Saxon lord, like the Roman *patronus*, was duty-bound to protect an often large coterie of dependents. Serfs were "the mere chattels of their masters." The masters "represented" their serfs, and their own derivative interests, in court. *Id.*; see also A. HARDING, *supra* note 106, at 13. In a primitive version of respondeat superior, if a lord did not produce a defendant in court, the lord often was obligated to pay compensation to a dependent's victim and sometimes also to the King. *Id.* at 18-19.

The state also required the "landless man," who unlike the serf was "free in all personal relations," to "have a surety or a patron to answer for his forthcoming or to assert his rights in all matters of which the law took cognizance." H. COHEN, *supra* note 103, at 10. Maitland explained that it is the state that:

demands that the lordless man of whom no right can be had shall have a lord.

It makes the lord responsible for the appearance of his men in court to answer accusations In some instances the state may go further; it may treat the lord not merely as bound to produce his man but as responsible for his man's evil deeds. . . . Originally a lord 'does right' to the demandant by producing in a public court the man against whom the claim is urged; or he does it by satisfying the claim. . . .

Id. at 9-10 (quoting F. MAITLAND, COMMENDATION AND PROTECTION (1897)) (citation omitted). In the words of Maitland, "[t]he landless man is *represented* in the courts by his lord." *Id.* at 10 (emphasis in original).

A third class, "the ceorl [churl] who possessed a little alod of his own" also "often, perhaps generally, found it necessary to put himself under the protection of his powerful neighbour, who would defend his rights and discharge his public services in consideration of a rent paid or labour given or an acknowledgement of dependence." H. COHEN, *supra* note 103, at 6-7 (quoting Bishop Stubbs).

The costs of independence were high; "a man 'regarded with suspicion by all the people', said Canute, was to be put under surety by the king's reeve to answer any charges brought against him, and if he had no surety he was to be slain and to lie in unconsecrated ground." A. HARDING, *supra* note 106, at 22.

The Anglo-Saxon hierarchical structure served many purposes; for example, prior to the Conquest, noblemen protected the lands of freeholders from invading Norsemen and in return received both claim to lands and a standing army. *Id.* at 18. English kings, however, "encouraged the reorganization of society round the great nobles," *id.* at 18-19, in significant part because the lords discharged many functions considered public today; they were, for example, early peacemakers, policemen, bailbondsmen, and sureties for their dependents. *Id.* at 19. In short, "the lord [was] his [dependent's] *defensor, tutor, protector, advocatus*, in a word, his warrantor." H. COHEN, *supra* note 103, at 9 (quot-

courts.¹⁰⁹ During the ninth, tenth, and eleventh centuries, the "centuries of ignorance,"¹¹⁰ clerical advocates began appearing more regularly in secular courts on behalf of the poor.¹¹¹

In the ecclesiastical courts, at least, representation of the poor was a duty, not an egalitarian gesture. William of Drogheda was a "practising *advocatus* in ecclesiastical courts" and "a teacher of law at Oxford;"¹¹² but he is remembered best as a treatise writer on the

ing F. MAITLAND, *supra* (citation omitted) (emphasis in original). An important function of the lord was advocacy in court. Quadripartitus, "the best authority on pre-Norman law and procedure," *id.* at 4, called the lord in court an *advocatus*. Cohen concludes that "in Q.'s *advocatus* we have the rudimentary germ of legal representation in this country [England]." *Id.* at 11.

The representative's role in court was mixed; he might warrant his dependent's honesty and good character; stand as a surety for him; "come forward as his compurgator" and "swear a crushing oath;" or "take upon himself the task of defending an action to which his man was subjected." *Id.* at 8 (citations omitted).

After the Norman Conquest, the clerical advocates of the Church sometimes challenged the feudal lords. "[T]he bishop and the parish priest . . . could help the Saxon serf and the Norman villein in various ways . . . They stood between him and the oppression of his feudal superior . . . They were his advocates in the courts of law. . . ."

Id. at 45-46 (quoting 2 STEVENSON, CHRONICON MONAST. DE ABINGDON, lxxvii, §§ 71-72 (1858)).

109. "In 1072, the bishops ceased to sit in the shire-court, for William I issued an ordinance setting up separate ecclesiastical courts . . . The mutual encroachments of the secular and ecclesiastical jurisdictions were to cause endless conflict in medieval England . . ." A. HARDING, *supra* note 106, at 35.

110. H. COHEN, *supra* note 103, at 159. During part of this time, the Church (and its law) provided England with a nationalizing coherence and stability. The secular government was fragmented. Prior to Alfred, there was a "heptarchy;" "several kings reigned in different parts of England at the same time." A. HARDING, *supra* note 106, at 19.

111. "Between the ninth and thirteenth centuries a number of Church canons and regulations forbade ecclesiastical lawyers to pursue a general practice in the temporal courts. It, however, was customary to except from these prohibitions cases in which the legally skilled ecclesiastics represented or assisted poor people." Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 365 (1923) (footnotes omitted). In 1179, the Lateran Council, "which issued a more specific prohibition [and implicit grant of authority] to the same effect, made an exception on behalf of poor persons who could not manage their own causes." E. MATTHEWS & A. OULTON, LEGAL AID AND ADVICE UNDER THE LEGAL AID ACTS 1949 TO 1964, at 9 (1971). The Church's repeated prohibitions largely were ineffective.

In England in the thirteenth century many professed both the civil and common law and many practised both in the common-law courts and in the ecclesiastical courts. Many of the practitioners were in orders. But in that century began the discouragement of the clergy from practising law and the Fifth Lateran Council (1512-1517) forbade their acting as advocates in the secular courts.

5 R. POUND, *supra* note 91, at 699-700.

112. H. COHEN, *supra* note 103, at 101 (footnote omitted). Maitland later referred to William as "half priest, half lawyer." *Id.*

craft and responsibilities of the ecclesiastical court advocate.¹¹³ In his treatise, he describes finding "legal aid for poor suitors" as the probable "business" of ecclesiastical judges,¹¹⁴ and providing legal aid as the clear duty of an *advocatus*:

The *adv.* who refuses his services [gratuitously] when the judge asks for them, shall lose his right of audience (and perhaps, for ever): where the old praetor used to say "if you have not an *adv.* I will give you one," to-day the formula is "if you have no money to buy *consilium* I will give it to you" . . . and to the poor client he must give advice "intuitu dei"¹¹⁵

As a private bar developed,¹¹⁶ the duty to represent the poor became partly its responsibility. For example, the Magna Carta provided: "We neither sell, nor deny, nor delay, to any person, equity or justice."¹¹⁷ And, the University of Oxford decreed: "If anyone should have been harmed let him present his complaint to the chancellor with his doctor or, if he is indigent, with his advocate."¹¹⁸

The private advocate's pro bono responsibility was enhanced as English law became increasingly complex. Normally, to invoke the jurisdiction of the courts, litigants were required to obtain formally composed writs that were drafted with the most fastidious attention

113. He wrote *Summa Aurea de Ordine Judiciorum*, probably in 1239. *Id.*

114. *Id.* at 581.

115. *Id.* at 572 (citation omitted).

116. Pound states that:

In England, by the time of Edward I, the common-law courts were well established and the legal profession was definitely formative. The formative period extends from Edward I (1272) to Henry VI (1422). In the reign of Edward I there was a body of lawyers regularly practicing in the courts. They were of two types: attorneys and pleaders. If one appeared by attorney, the attorney represented him. If he had the assistance of a pleader, he was present by himself or his attorney, but the pleader supported the case by his learning, ingenuity and zeal. This was the difference between the agent for litigation and the advocate which goes back to antiquity. As in all systems representation in litigation was at first thought of as something exceptional and developed slowly. Appointment of an attorney was considered unusual and only allowed on special grounds and by formal authorization in court or by special writ The distinction between the pleaders, who later became the serjeants, and the attorneys was sharply drawn

5 R. POUND, *supra* note 91, at 685-86.

117. "Nulli vendemus, nulli negabimus aut differemus rectum vel justiciam." MAGNA CARTA, ch. 40. In the reissue of the Magna Carta, ch. 40 became ch. 29. *But see* Maguire, *supra* note 111, for a restricted view of what King John meant to concede by this language.

118. H. COHEN, *supra* note 103, at 24 n.(r) (English translation).

to formalistic detail.¹¹⁹ Legal help from the cadre of professional pleaders, initially called "countors" or "narratores" and later "serjeants,"¹²⁰ was essential to avoid hypertechnical drafting errors that doomed meritorious, but imperfectly composed writs.¹²¹

Primarily as a concession to indigent litigants, the Justices of Eyre adjudicated claims set forth in very informally drafted Bills in Eyre.¹²² However, a countor or narratore, however, significantly increased the chance that a Bill in Eyre would be successful, a fact recognized by numerous *pro se* litigants who prayed in the starkest terms that the court appoint a countor or a narratore for them.¹²³ The language of the oath of the serjeants, the most respected advo-

119. *See id.* at 173-75.

120. The countors (from conteur, or "storyteller," in French) and narratores were laymen not clergy. J. BAKER, *THE ORDER OF SERJEANTS AT LAW* 13 (1984). They appear in the records of 13th century court proceedings. *Id.* By the 14th century, they were a profession: limited members of a closed group, each of whom was admitted to practice before a single court, who had their own disciplinary mechanism and wore a distinctive costume ("coif"). *Id.* at 16-17. By the end of the 14th century, countors and narratores became known as *servientes ad legem*, or "serjeants at law." *See id.* at 21-27. They continued to serve "at the bar 'by pleading for pennies and pounds the law.'" *Id.* at 27 (quoting W. LANGLAND, *PIERS PLOWMAN* 38 (D. Pearsall ed. 1978)).

121. *See H. COHEN, supra* note 103, at 174. The writ before the court, "could not be subsequently amended in form, and the smallest error, even a grammatical error in the Latin in which it was written, might be fatal to the plaintiff's case . . ." *Id.* at 173.

122. *See id.* at 174. The King's representatives were the justices of these traveling courts.

One of their functions was to right wrongs of every description which might go unredressed because the ordinary courts were too slow, too expensive, too far away, or too much under the thumb of the wrong-doers. The Justices in Eyre were also to deal appropriately with cases in which the common law provided no remedies. Numerous private complaints were presented not (as at common law) by writ, but by bill. Whether or no[t] the use of these bills was confined to the poor, it is certain that poor persons presented a great many of them.

Maguire, *supra* note 111, at 367 (footnotes omitted). Quoting W.C. Bolland in part, Maguire concludes that this flexible procedure was "'the very beginning of our English equity'" and "the beginning, or one of the beginnings, of poor men's courts." *Id.* (quoting W. BOLLAND, *THE YEAR BOOKS* 57 (1921)).

By proceeding by "bill", rather than "writ", indigent litigants avoided payment of the equivalent of a filing fee, as well as the rigorous pleading requirements. A. HARDING, *supra* note 106, at 58.

Before the writ there had to come, of course, the simple complaint of injustice, the petition to Chancery for a writ. If the plaintiff was poor, or there was no time to get to Chancery and back before the justices in eyre left the county, the requirement of a writ might be waived and the complaint heard directly. Such complaints or petitions eventually came to be written down as *bills*

Id. at 57-58 (emphasis in original).

123. *See Maguire, supra* note 111, at 368.

William, son of Hugh of Smethumilne, says: "And I pray you, for your soul's sake, that you will give me remedy of this, for I am so poor that I can pay for no counter [S]on of Alan Plotman, speaking for himself and his mother for

cates of the day, directly informed them that they were obligated to discharge this responsibility:

Ye shall swear that well and truly ye shall serve the king's people as one of the serjeants at the law. And ye shall truly counsel them that ye shall be retained with, after your cunning. And ye shall not defer, tract or delay their causes willingly for covetise of money or other thing that may turn you to profit. And ye shall give attendance accordingly. As God you help, and his saints.¹²⁴

The public service promise in the serjeant's oath was more than hortatory. Dating from the thirteenth century, they were "required" to "plead for a poor man" in any court in which they practiced. This included a number of common law courts, as well as the courts of the chancellor and council.¹²⁵ "[I]f a serjeant decline[d] to plead for a poor man when the court order[ed] him"¹²⁶ to do so, he could be separated from the bar.¹²⁷

During the thirteenth, fourteenth, and fifteenth centuries, the Crown, recognizing "[t]he notion of personal sovereignty carried with it a paternal, or at least a proprietary, duty to enforce fairness and right between subject and subject,"¹²⁸ sponsored numerous reforms intended to make justice equally available to rich and poor.¹²⁹

that they are poor folk," asks "that you will, an it please you, grant them a serjeant for them."

Id. (citations omitted).

124. J. BAKER, *supra* note 120, at 88. "Serjeants were in honour bound to advise paupers gratuitously." E. MATTHEWS & A. OULTON, *supra* note 111, at 11 n.14.

125. 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 491 (1936) (footnote omitted).

126. *Id.* at 491 n.4.

127. In French, "estrange del barr." *Id.* (quoting S.C. Brian, C.J.).

128. Maguire, *supra* note 111, at 366.

129. England sought to ameliorate the consequences of poverty by vesting the Chancellor with jurisdiction over the claims of litigants who were "too poor to sue at common law;" giving additional special responsibilities for poor litigants to the Star Chamber and Court of Requests (the "Court of Poor Men's Causes"), divisions of the King's Council; disregarding otherwise fatal pleading errors by poor *pro se* litigants, at least in the Courts of Eyre; and excusing the poor from the requirements that they "pledge security" or pay costs to file lawsuits. E. MATTHEWS & A. OULTON, *supra* note 111, at 9-10; *see also* Maguire, *supra* note 111, at 369.

The Court of Requests was a particularly "enlightened" 15th, 16th, and 17th century "effort to bring justice to the poor." *Id.*

Poverty was the main reason for presenting bills in the king's courts rather than purchasing writs, and the king always felt a special duty to give justice to the poor. In 1483, under Richard III, there was already a second clerk of the council with responsibility for 'the custody, registration and expedition of bills, requests and supplications of poor persons'.

A. HARDING, *supra* note 106, at 154-55 (footnote omitted). Like our contemporary "peo-

One commentator summarizes these three centuries, by saying: "The humanitarianism of the English kings from 1216 to 1495 is rather surprising. They did or meant to do much more toward helping their poor subjects enforce legal claims than many of our states are doing today."¹³⁰

The culmination of these reforms was the enactment in 1495 of 11 Hen. 7, ch. 12.¹³¹ The right to counsel granted by the Act was broad. It applied to "every pouer persone" who "shall have [a]

ples courts," the Court of Requests' mass justice workload of causes included many relatively small commercial, and landlord-tenant cases. Maguire, *supra* note 111, at 369.

There is no doubt, however, that Requests did something to protect the small tenant-farmer and possibly to protect the lesser artisans of the towns, at a time of social upheaval, when enclosing landlords were ignoring manorial customs and imposing arbitrary fines and forfeitures, and when guilds were becoming more monopolistic.

A. HARDING, *supra* note 106, at 155 (footnote omitted).

130. Maguire, *supra* note 111, at 370. Compare Maguire's less generous critique of the implementation of these reforms. *Id.* at 371-72.

131. The Act provided:

An Acte to admytt such psons as are poore to sue in forma paupis.

Prayen the Commons in this present parliament assembled, that where the King our Sovereign Lord of his most gracious disposition willeth and intendeth indifferent justice to be had and ministered according to his common laws, to all his true subjects as well to the poor as rich, which poor subjects be not of ability ne power to sue according to the laws of this land for the redress of injuries and wrongs to them daily done, as well concerning their persons and their inheritance as other causes: (2) for remedy whereof, in the behalf of the poor persons of this land, not able to sue for their remedy after the course of the common law; be it ordained and enacted by your Highness and by the lords spiritual and temporal, and the commons, in this present parliament assembled and by authority of the same, that every poor person or persons, which have, or hereafter shall have cause of action or actions against any person or persons within the realm, shall have, by the discretion of the chancellor of this realm, for the time being, writ or writs original, and writ of subpoena, according to the nature of their causes, therefore nothing paying to your Highness for the seals of the same, nor to any person for the writing of the same writ and writs to be hereafter sued; (3) 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 attornies for the same, without any reward taking therefor: (4) And after the said writ or writs be returned, if it be afore the King in his bench, the justices there shall assign to the same poor person or persons, counsel learned, by their discretions, which shall give their counsels, nothing taking for the same: (5) And likewise the justices shall appoint attorney and attornies for the same poor person and persons, and all other officers requisite and necessary to be had for the speed of the said suits to be had and made, which shall do their duties without any reward for their counsels help, and business in the same: (6) And the same law and order shall be observed and kept of all such suits to be made afore the King's justices of his common place, and barons of the exchequer, and all other justices in the courts of record where any such suits shall be.

11 Hen. 7, ch. 12 (1495).

cause of accion" against "any persone" who may be "within the realme." It provided for the pro bono appointment of "learned Councill and attorneys," both to draft and prepare writs and litigate the cases. It governed in "all such suytes to be made afore the Kingis Justices," "Barons of his Eschequer," "and all other Justices in Courtes of Recorde."¹³²

Remarkably, this statute, in partnership with 23 Hen. 8, ch. 15,¹³³ was the backbone of the English legal aid system for almost four hundred years. Although the number of indigent clients who benefitted from the statute was limited greatly by restrictive interpretations of it¹³⁴ and the absence of a coherent and uniform implementation program, the statute did result in the appointment of counsel to represent the poor in many civil matters¹³⁵ until, in 1883, it was repealed in favor of a more comprehensive legal aid program.¹³⁶

2. *The Incorporation of the Historic Mandatory Pro Bono Rule in Contemporary Law: The Maryland Example.*—When the English settlers came to the New World they carried much of the English law with them. Much of that law was embodied in state constitutions and declarations of rights. The pro bono statute, 11 Hen. 7, ch. 12, is one law the settlers carried to Maryland, and there is a strong argument that it is Maryland's law *today*.

Article 5 of the Maryland Declaration of Rights, provides:

That the Inhabitants of Maryland are entitled to the Common Law of England . . . , and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circum-

132. *Id.* See generally E. MATTHEWS & A. OULTON, *supra* note 111, at 10-11.

133. Enacted in 1531, it "exempted an unsuccessful poor plaintiff from liability for costs . . ." E. MATTHEWS & A. OULTON, *supra* note 111, at 11. In lieu of costs, there was the theoretical power vested in the judiciary to order unsuccessful litigants to be physically punished. This power was seldom, if ever, exercised and was a dead letter by the seventeenth century. *Id.*

134. During the 16th, 17th, and 18th centuries, the 1495 Statute was limited by the English courts in several important respects. Those worth more than five pounds were ineligible to use it. It was applied, at least in the common law courts, only to indigent plaintiffs, not poor defendants. And, a litigant had to obtain a counsel's opinion, at his own expense, finding that his cause was meritorious. *Id.*

135. For an interesting discussion of the use of 11 Hen. 7, ch. 12 (1495), see BRITISH STATUTES IN FORCE IN MARYLAND, ACCORDING TO THE REPORT THEREOF MADE TO THE GENERAL ASSEMBLY BY THE LATE CHANCELLOR KILTY 346-48 (W. Coe ed. 1912) [hereinafter BRITISH STATUTES].

136. Statute Law Revision and Civil Procedure Act, 1883, 46 & 47 Vict., ch. 49.

stances, and have been introduced, used and practiced by the Courts of Law and Equity.¹³⁷

The early Maryland courts were charged with determining which English statutes were incorporated into the common law. This was a difficult task because there was a differential "incorporation" standard. The original Declaration of Rights of 1776¹³⁸ created an ambiguous distinction between statutes passed before the settlement of the Province, and statutes passed between 1632 and 1776.¹³⁹

In 1809, the General Assembly sought to clarify the "incorporation" standard and identify which English statutes had been made part of Maryland's law.¹⁴⁰ It passed a resolution asking the State's Chancellor, William Kilty, to determine which English statutes were part of Maryland's common law.¹⁴¹ *Kilty's Report*, published in 1811, contains a comprehensive list of British statutes that had been made part of Maryland's common law.¹⁴²

137. MD. DECL. OF RTS. art. V. Though this article is construed broadly, the courts have noted a sharp distinction between received common law and received English statutes. In *Dashiell v. Attorney-General*, 5 H. & J. 392 (1822), a leading case on this issue, the court stressed that "the common law is adopted in mass," without any restrictive words. *Id.* at 401. But with regard to the English Statutes, see *infra* note 139.

138. MD. DECL. OF RTS. art. V (1776) which read in pertinent part:

That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of the law, and to the benefit of such English Statutes as existed at the time of their first emigration, and which, by experience, have been found applicable to their local and other circumstances, and of such others as have been since made in England, or Great Britain, and have been introduced, used and practiced by the courts of law or equity.

139. See generally Steiner, *The Adoption of English Law in Maryland*, 8 YALE L.J. 353, 354 (1899).

In regard to Statutes of England, the old Constitution made two classes which were to be in force: Those which "existed at the time" of the "first emigration, and which, by experience, have been found applicable," and those made later and "introduced, used and practiced by the Courts of Law and Equity."

Id. (quoting *Dashiell*, 5 H. & J. at 401-02).

140. See A REPORT OF ALL SUCH ENGLISH STATUTES AS EXISTED AT THE TIME OF THE FIRST EMIGRATION OF THE PEOPLE OF MARYLAND, AND WHICH BY EXPERIENCE HAVE BEEN FOUND APPLICABLE TO THEIR LOCAL AND OTHER CIRCUMSTANCES; AND OF SUCH OTHERS AS HAVE BEEN MADE IN ENGLAND OR GREAT-BRITAIN, AND HAVE BEEN INTRODUCED, USED AND PRACTISED, BY THE COURTS OF LAW OR EQUITY; AND ALSO ALL SUCH PARTS OF THE SAME AS MAY BE PROPER TO BE INTRODUCED AND INCORPORATED INTO THE BODY OF THE STATUTE LAW OF THE STATE i (1811) [hereinafter *KILTY'S REPORT*] (a report made by the late Chancellor of Maryland, William Kilty).

141. *Id.*

142. In the introduction, Kilty wrote:

"It is a general principle, that the first settlers of Maryland brought with them all

The “most important” criterion Kilty used to analyze those British statutes that had not been incorporated expressly into Maryland’s law by an “express declaration of the parliament” or “provincial acts of Assembly”¹⁴³ was whether the statute had been “[i]ntroduced, [u]sed and [p]ractised, by the [c]ourts of [l]aw and [e]quity.”¹⁴⁴ Kilty “grounded” his report “on a careful perusal and consideration of the statutes at large, and on an examination, as far as it was practicable, of the records of the former provincial court, and the legislative and executive proceedings of the government before the revolution.”¹⁴⁵

Applying his test, Kilty divided the British statutes into three categories: (1) English Statutes existing at the time of the first emigration of the people of this State, which have not been found, by experience, applicable to their circumstances;¹⁴⁶ (2) Statutes and parts of Statutes which have been found applicable but are not proper to be introduced and incorporated into the body of the Statute Law of this State;¹⁴⁷ and, (3) Statutes and parts of Statutes which

English statutes made *before* the charter, and in force at the time, which were applicable to the *local and other circumstances* of the province, and the courts of justice always decided the applicability of any statute, and of consequence its extension. I have understood that the judges under the *old* government laid it down as a *general* rule, that all statutes *for the administration* of justice, whether made *before* or *since* the charter, so far as they were applicable, should be adopted by them.”

Id. at vi (emphasis in original) (quoting letter from Mr. Justice Samuel Chase to Judge Tilghman).

143. *Id.*

144. *Id.* at i. Explaining his criterion, Kilty quoted from “the late case of ‘*Whittington and Polk*,’” in which the “general court” said:

“None of the English statutes which passed anterior to the first emigration of the inhabitants of Maryland have been adopted by the constitution of Maryland, and incorporated with the laws, but such as have been found by experience applicable to our local and other circumstances; and it does not appear to the court, there can be any other safe criterion by which the applicability of such statutes to our local and other circumstances can be ascertained and established, but that of having been used and practised under in this state.”

Id. at vi-vii.

Kilty, however, added:

[i]n the application of this criterion to the several statutes as passed in review, it must however be observed, that many statutes relating to rights and rules of property have been tacitly and without contest acquiesced in, and that many have been used and practised under without the sanction of any express decision of the courts.

Id. at vii.

145. *Id.* at v.

146. *Id.*; *see also id.* at 9-136.

147. *Id.* at 139-201. “[M]ainly those Statutes whose existence depended on the connection with Great Britain, or on a monarchical form of government, or which were

have been found applicable and are proper to be incorporated into the body of the Statute Law of the State.¹⁴⁸

Kilty included within this last category, 11 Hen. 7, ch. 12—the English statute that created a mandatory pro bono duty in 1495.¹⁴⁹ Kilty gave as the reason for his decision, “I have found some instances of this statute being practiced under in the years 1664 and 1672; and although cases of this kind do not frequently occur, there is no reason why it should not be continued, together with 23 Hen. 8, ch. 15, on the same subject.”¹⁵⁰

There were other apparent “instances” of “this statute being practiced”¹⁵¹ in addition to the two that Kilty found. In 1721, the Maryland Court of Appeals granted the petition of John and Mary Smith that “Council” be “assigned” Mary’s son William, a minor, in an estate matter involving the “heirs and representatives of Colonel Thomas Ennalls.” The court found that, in apparent compliance with 11 Hen. 7, ch. 12, the Smiths had alleged they were not “[w]orth in their estate to the value of five pounds Sterling.”¹⁵²

It is apparent, therefore, that if *Kilty’s Report* is authoritative, then, absent an express contrary statement by the Maryland General Assembly or Court of Appeals, 11 Hen. 7, ch. 12 remains the law in Maryland. *Kilty’s Report* is an authoritative source for determining which English statutes were incorporated into the common law of Maryland. The Constitutional Convention of 1851 implicitly ratified Kilty’s work by merging the two-category provision of the Declaration of Rights of 1776 into one clause: Kilty’s Clause. Although the *Report of the Constitutional Convention of 1851*¹⁵³ is silent on whether *Kilty’s Report* theretofore had been implemented by the judiciary and General Assembly, the “existence of Kilty’s report and the habit of

contrary to laws subsequently passed by the General Assembly, or to the relation of the State to the Federal Union.” Steiner, *supra* note 139, at 358.

148. KILTY’S REPORT, *supra* note 140, at 205-53. In all, Kilty found 191 statutes applicable and proper to be incorporated. See also Steiner, *supra* note 139, at 359.

149. See KILTY’S REPORT, *supra* note 140, at 229.

150. *Id.*

151. *Id.*

152. PROCEEDINGS OF THE MARYLAND COURT OF APPEALS 303 (T. Bond ed. 1933). In 1724, the Maryland Court of Appeals apparently considered a similar request for appointment of counsel to prosecute an appeal in a civil case from John Bagby, who made “Oath that he was not worth five pounds Ster[ling] money his wearing apparel excepted.” *Id.* at 433. The 1883 British Parliament “liberalized” the 1495 statute, 11 Henry 7, ch. 12, “by raising the maximum capital requirement for receiving aid to 25 pounds from the absurdly low level of 5 pounds where it had remained since 1495, and by opening the procedure to all litigants rather than plaintiffs only.” Cappelletti & Gordley, *supra* note 94, at 356.

153. 1 MARYLAND REFORM CONVENTION: DEBATES AND PROCEEDINGS (1851).

referring to it by lawyers may have been one reason why the Constitution of 1851 . . . consolidated the two classes of the old clause into one."¹⁵⁴ Because the Convention of 1851 adopted Kilty's standard, it logically follows that the Convention, by implication, also adopted Kilty's conclusions.

The contemporary significance of *Kilty's Report* also is apparent from the deferential treatment it receives from Maryland courts. Only twice has the Maryland Court of Appeals incorporated statutes that *Kilty's Report* did not incorporate.¹⁵⁵ More importantly, there is not a single reported case in which the court (or any Maryland court in a reported decision), has overruled a decision by Kilty to include a specific English statute within Maryland's common law. In this respect, from the time that it was first published in 1811, *Kilty's Report* consistently has been cited as conclusive authority.¹⁵⁶ More recently, the Court of Special Appeals in *State v. Magliano*,¹⁵⁷ restated the importance of Kilty: "The only evidence to be found on [British Statutes] is furnished by Kilty's Report of the Statute * * *. That book was compiled, printed, and distributed, under the sanction of the State, for the use of its officers, and is a safe guide in exploring an otherwise very dubious path."¹⁵⁸

In sum, the inclusion of 11 Hen. 7, ch. 12, in both *Kilty's Report*, and its successor, Alexander's *British Statutes in Force in Maryland*,¹⁵⁹ indicates that mandatory pro bono is part of the law that Maryland (and probably many other states) "received" from England.¹⁶⁰ Through Rule 6.2 of the Maryland Lawyers' Rules of Professional

154. Steiner, *supra* note 139, at 359.

155. See *Shriver v. Maryland*, 9 G. & J. 1, 11-12 (1837) (holding that 9 & 10 Will. 3, ch. 15 was applicable, contravening Kilty's opinion); *Silbey v. Williams*, 3 G. & J. 52, 63 (1830) (holding that 4 & 5 W. & M., ch. 24 was applicable, disagreeing with Kilty).

156. See *Koones v. Maddox*, 2 H. & G. 106 (1827); *Dashiell v. Attorney-General*, 5 H. & J. 392 (1822).

157. 7 Md. App. 286, 255 A.2d 470 (1969).

158. *Id.* at 293, 255 A.2d at 474 (quoting *Dashiell*, 5 H. & J. at 403) (footnote omitted).

159. BRITISH STATUTES, *supra* note 135, at 346-48. In *Maryland Constitutional Law*, Alfred S. Niles wrote that *Kilty's Report* is obsolete, "but its place has been taken by '*Alexander's British Statutes*,' which is now our 'guide.'" A. NILES, MARYLAND CONSTITUTIONAL LAW 17 (1915).

160. See, e.g., *Martin v. Superior Court*, 176 Cal. 289, 292-93, 168 P. 135, 136-37 (1917) (interpreting statute making the common law of England, so far as it is consistent with state constitution and laws, the law in California); E. BROWN, BRITISH STATUTES IN AMERICAN LAW 1776-1836, at 25-26 (1964) (indicating several states, including Maryland, may have "received" 11 Hen. 7, ch. 12).

Assuming, *arguendo*, that *Kilty's Report* retains its authoritative character, has 11 Hen. 7, ch. 12 been repealed in Maryland? It plainly has not been repealed expressly. The Maryland General Assembly has repealed British Statutes by expressly naming the stat-

Conduct, the Maryland Court of Appeals has given 11 Hen. 7, ch. 12 a modern day voice. Rule 6.2 provides that “[a] lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause”¹⁶¹ In appointing counsel to represent indigent litigants in civil cases, courts might rely upon both these specific sources of appointment authority—11 Hen. 7, ch. 12 and Rule 6.2—as well as their inherent authority to take those steps that are reasonably necessary to fairly administer justice.

ute and expressly repealing it. *See, e.g.*, MD. REAL PROP. CODE ANN. § 14-114 (1988). It has *not* done so with respect to 11 Hen. 7, ch. 12.

It could be argued that the mandatory pro bono rule codified in 11 Hen. 7, ch. 12 has been superseded by the Maryland Lawyers’ Rules of Professional Conduct Rule 6.1, which makes pro bono work permissive in Maryland. The Maryland Court of Appeals, however, has suggested that only the judiciary, sitting in its judicial—not regulatory—capacity, or the General Assembly is empowered to modify received English law. *See, e.g.*, Ireland v. State, 310 Md. 328, 331, 529 A.2d 365, 366 (1987) (“The determination of the nature of the common law as it existed in England in 1776, and as it then prevailed in Maryland either practically or potentially, and the determination of what part of that common law is consistent with the spirit of Maryland’s Constitution and her political institutions, are to be made by this Court.”); *Moexly v. Acker*, 294 Md. 47, 52-53, 447 A.2d 857, 860 (1982) (common law forcible entry and detainer no longer requires force). *But see* Hall v. State, 57 Md. App. 1, 12, 468 A.2d 1015, 1021 (1983) (“The emphasized portion of Rule 712(a) can only be regarded as intending and effecting a *clear departure from the caselaw* that had developed up to that point” (emphasis added)), *aff’d*, 302 Md. 806, 490 A.2d 1287 (1985).

Moreover, the pro bono duty imposed by 11 Hen. 7, ch. 12 is triggered by a court when it appoints counsel to represent an indigent litigant, and the Maryland Lawyers’ Rules of Professional Conduct Rule 6.2 expressly *preserves* counsel’s duty to accept pro bono appointments absent “good cause”:

A lawyer shall not seek to avoid appointment by a tribunal to represent a 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; or
- (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.

THE MARYLAND LAWYERS’ RULES OF PROFESSIONAL CONDUCT Rule 6.2 (1989).

Thus, if the Maryland Court of Appeals can “repeal” received law in an exercise of its rule-making power, it appears to have preserved, not repealed, 11 Hen. 7, ch. 12.

161. THE MARYLAND LAWYERS’ RULES OF PROFESSIONAL CONDUCT Rule 6.2 (1989). Ethical Consideration 2-29 of the Model Code of Professional Responsibility, which is still applicable in many states, provides that “[w]hen 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.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-29 (1981).

C. The Inherent Power of the Courts to Appoint Counsel for Indigent Litigants in Civil Cases

Courts have long recognized their inherent authority to sanction parties, witnesses, and attorneys for contempt,¹⁶² to regulate and discipline those who practice law before them,¹⁶³ to promulgate rules of procedure,¹⁶⁴ to assess attorney fees against counsel¹⁶⁵ or a party,¹⁶⁶ to refer cases to magistrates or auditors,¹⁶⁷ to admit a prisoner to bail,¹⁶⁸ and even to order the legislature to expend funds,¹⁶⁹ all for the purpose of administering justice—the chief business of the judiciary—and all in the absence of statutory authority.¹⁷⁰ If a

162. See *Levine v. United States*, 362 U.S. 610, 615 (1960) (“From the very beginning of this Nation and throughout its history the power to convict for criminal contempt has been deemed an essential and inherent aspect of the very existence of our courts.”); see also *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1874) (“The power to punish for contempt is inherent in all courts The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.”); *Ex parte Terry*, 128 U.S. 289, 302 (1888) (“[c]ourts of the United States, from the very nature of their institution, possess the power to fine for contempt”); *Michaelson v. United States*, 266 U.S. 42, 65 (1924) (contempt power is essential to the fair administration of justice).

163. See, e.g., *Sadler v. Oregon State Bar*, 275 Or. 279, 286, 550 P.2d 1218, 1222 (1976) (“[I]t is part of the inherent power of the judiciary to determine qualifications for practicing law”); *McLaughlin v. Philadelphia Newspapers, Inc.*, 465 Pa. 104, 113, 348 A.2d 376, 380 (1975) (“It is the right and duty of a court to discipline its members who appear before it guilty of wrongdoing Courts have an inherent power to make and follow rules governing such matters”) (quoting *In re Disbarment Proceedings*, 321 Pa. 81, 101, 184 A. 59, 68 (1936) (citations omitted)).

164. See, e.g., *Franquez v. United States*, 604 F.2d 1239, 1244-45 (9th Cir. 1979).

165. See, e.g., *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980).

166. See, e.g., *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 258-59 (1975); see also *Hall v. Cole*, 412 U.S. 1, 5 (1973) (“inherent equitable power”).

167. See, e.g., *Ex parte Peterson*, 253 U.S. 300, 314 (1920) (“The inherent power of a federal court to invoke such aid is the same whether the court sits in equity or law.”).

168. See, e.g., *Johnston v. Marsh*, 227 F.2d 528, 531 (3d Cir. 1955).

169. See *Wayne Circuit Judges v. Wayne County*, 386 Mich. 1, 32, 190 N.W.2d 228, 239-40 (1971) (judiciary has inherent power to compel county to expend reasonable sums necessary to exercise of constitutionally assigned functions of judicial branch), *cert. denied*, 405 U.S. 923 (1972).

170. For a scholarly discussion of the various types of “inherent authority,” see *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557 (3d Cir. 1985), in which the court stated:

This use of inherent power, which might be termed irreducible inherent authority, encompasses an extremely narrow range of authority involving activity so fundamental to the essence of a court as a constitutional tribunal that to divest the court of absolute command within this sphere is really to render meaningless the terms “court” and “judicial power.”

Id. at 562 (citation omitted); see also *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (implied powers “necessary to the exercise of all others . . .”). But see *ITT Community Dev. Corp. v. Barton*, 569 F.2d 1351, 1360 (5th Cir. 1978) (inherent powers limited to those required and essential to administration of justice) (citing *Ex parte Peterson*, 253 U.S. at 312). See generally *Dowling, The Inherent Power of the Judiciary*,

power is necessary to allow a court to function as a court, it is within that court's inherent authority.¹⁷¹ The power to appoint attorneys to represent indigent litigants in criminal cases¹⁷² is but one instance of the proper exercise of this inherent power.

In *Powell v. Alabama*,¹⁷³ the Supreme Court stated that, in a capital trial, "[t]he 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."¹⁷⁴ The rationale behind the near-universal accept-

21 A.B.A. J. 635 (1935); Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempt in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010 (1924).

171. See *Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962) (an "inherent power" is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases" (footnote omitted)); *Laughlin v. Clephane*, 77 F. Supp. 103, 105 (D.D.C. 1947) ("court of record possesses the inherent power to provide [itself with] the necessary assistance as a means of conducting its business with reasonable dispatch;" "court itself may determine the necessity").

172. See *Rowe v. Yuba County*, 17 Cal. 62, 63 (1860) ("Counsel are not considered at liberty to reject . . . the cause of the defenseless, because no provision for their compensation is made by law."); *Elam v. Johnson*, 48 Ga. 348, 350 (1873) (lawyer has common law and statutory duty never to reject "the cause of the defenseless or oppressed" (citation omitted)); *People ex rel. Conn v. Randolph*, 35 Ill. 2d 24, 28, 219 N.E.2d 337, 340 (1966) (inherent power of judiciary to regulate practice of law and conduct orderly administration of criminal justice includes power to appoint attorney for accused); *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 65-66 (Mo. 1981) (tradition of profession of law allows court to turn to the private bar—"without apology"—when public defender program insufficiently funded), *cert. denied*, 454 U.S. 1142 (1982); *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966) (obligation of lawyer to defend indigent without charge part of substantive common law); *House v. Whitis*, 64 Tenn. 690, 692 (1875) ("The court has a right to command the services of counsel for persons unable to pay, in civil as well as criminal cases." (citations omitted)); *cf.* *Knox County Council v. State ex rel. McCormick*, 217 Ind. 493, 501, 29 N.E.2d 405, 409 (1940) ("An attorney of the Court is under no obligation, honorary or otherwise, to volunteer his services." (quoting *Webb v. Baird*, 6 Ind. 13, 18 (1854))); *Hall v. Washington County*, 2 Greene 473, 476 (Iowa 1850) ("Where an act of service is performed in obedience to direct mandate of statutory law, under the direction of a tribunal to which the enforcement of that law is committed, reasonable compensation to the person who performs that service is a necessary incident; otherwise, the arm of the law will be too short to accomplish its designs.").

173. 287 U.S. 45 (1932).

174. *Id.* at 73; see also T. COOLEY, TREATISE ON CONSTITUTIONAL LIMITATIONS 700 (8th ed. 1927). The Court also relied upon *Hendryx v. State*, 130 Ind. 265, 29 N.E. 1131 (1892), in which "there was no statute authorizing the assignment of an attorney to defend an indigent person accused of crime, but the court held that such an assignment was necessary to accomplish the ends of public justice, and that the court possessed the inherent power to make it." *Powell*, 287 U.S. at 72; see also Annotation, *Right of Attorney Appointed by Court for Indigent Accused to, and Courts Power to Award, Compensation by Public, in Absence of Statute or Court Rule*, 21 A.L.R. 3d 819, 822 ("The [appointed] attorney's right

ance of appointments to serve as defense counsel in a criminal case is that "there is a preexisting duty to provide such service. The source of this duty is a lawyer's status as an officer of the court."¹⁷⁵ While the status of an attorney as an "officer of the court" has been subject to a revisionist critique,¹⁷⁶ the duty owed to the court is the same whether the case is civil or criminal, if "necessary to accomplish the ends of public justice."¹⁷⁷ The crucial factor is not whether the case is criminal or civil;¹⁷⁸ instead, the court's inherent power to appoint counsel should be shaped by the need of the litigant for representation, the litigant's interest at stake in the proceeding, and, most importantly, the impact of the litigant's *pro se* status on the court's capacity to administer justice fairly.¹⁷⁹ The in-

to compensation has been denied on the basis of one or both of two theories: that rendering gratuitous services when appointed by the court is the duty of the attorney as an officer of the court, and that, concomitant to receiving a license to practice law, the attorney consents to render gratuitous services when appointed to represent indigent defendants.").

175. *Williamson v. Vardeman*, 674 F.2d 1211, 1215 (8th Cir. 1982) (footnote & citation omitted). *Williamson* relied upon *United States v. Dillon*, 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966), in which it was stated that

[a]n applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order.

Id. at 635.

176. *See In re Cooper*, 22 N.Y. 67, 87-88 (1860). *But see People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 162 N.E. 487 (1928), in which Chief Judge Cardozo noted that barristers, although not technically officers of the court, were still subject to the supervision of the bench in its capacity as "visitors" to the Inns. *Id.* at 472-73, 162 N.E. at 490. The "officer of the court" and "inherent authority" doctrines are closely intertwined. *See In re Snyder*, 472 U.S. 634, 643 (1985) ("Courts have long recognized an inherent authority to suspend or disbar lawyers. This inherent power derives from the lawyer's role as an officer of the court which granted admission." (citing *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378-79 (1867)); *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 531 (1824)).

177. *Powell*, 287 U.S. at 72.

178. *See, e.g., United States v. Accetturo*, 842 F.2d 1408, 1412 (3d Cir. 1988) ("[C]ourts have upheld their inherent power to appoint counsel, sometimes even over counsel's objection, to represent defendants in need of such representation." (citations omitted)).

179. Such a contextual definition of a court's inherent authority to appoint counsel is consistent with the rules of procedure that govern civil litigation. For example, Rule 83 of the Federal Rules of Civil Procedure provides, in part, that "the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act." FED. R. CIV. P. 83; *see also* 28 U.S.C. § 2071 (1982) ("The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business" which "shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."). If a federal district court were to adopt a pro bono requirement by local rule, it would not be "inconsistent" with the Federal Rules of Civil Procedure. *See Frazier v. Heebe*, 482 U.S. 641 (1987) (evaluating the validity of a local district court rule by ask-

herent judicial power to appoint counsel should extend at least to those civil cases in which representation is essential to produce the facts that are necessary for reasonable decision-making.

The inherent judicial power to appoint counsel for indigent litigants also is informed by the indigent litigant's constitutional *right* to legal help. In this respect, the court's inherent power and its duty overlap, although they are not co-extensive.¹⁸⁰ All persons have a constitutional right to effective "access to the courts."¹⁸¹ That right implements government's duty to make its law accessible to its citizens. A limited, contextual and subsidiary right to legal help sometimes is a component of—or the remedy to implement—the broader access to court right.¹⁸² This subsidiary right is the *means* by which government now implements the broader access right for institutionalized persons.¹⁸³ For example, government is obligated constitutionally to provide either a law library or lawyers (often helped by paralegals and law students) to prison inmates who wish to evaluate and assert basic claims.¹⁸⁴ The predicate of this disjunctive remedy—law libraries *or* personal legal help—is the assumption that these institutionalized litigants are capable of legal self-help.¹⁸⁵ When involuntarily committed persons who lack the capacity for legal self-help—the mentally ill and retarded, children, and disabled adults—wish to assert basic claims, government ought to be obligated constitutionally to provide them with the personal services of

ing whether it: (1) conflicts with an Act of Congress; (2) conflicts with the rules of procedure promulgated by the Supreme Court; (3) is unconstitutional; or (4) regulates a matter not within the regulatory power of a local federal court). The inherent power of a federal court to appoint counsel to represent litigants in civil cases is not inconsistent with constitutional, statutory, or regulatory law. *See supra* text accompanying notes 162-178 and *infra* text accompanying notes 180-189. Instead, this power is a component of the court's authority to admit lawyers to practice before it and to regulate their practice. *See Snyder*, 472 U.S. at 643; *Theard v. United States*, 354 U.S. 278, 281 (1957) ("Membership in the bar is a privileged burden with conditions," one of which is that, "like the court itself," an attorney is "an instrument or agency to advance the ends of justice." (quoting *Karlin*, 248 N.Y. at 470-71, 162 N.E. at 489)).

180. A court's inherent power derives from its obligation to administer justice fairly. *See supra* text accompanying notes 82-85. There are cases in which a court *might* appoint counsel pursuant to this flexible standard that do not satisfy the three-part procedural due process standard which, when applied, determines whether there is a constitutional right to legal assistance. *See infra* text accompanying notes 186-191.

181. Millemann, *Capital Post-Conviction Petitioner's Right to Counsel: Integrating Access to Court Doctrine and Due Process Principles*, 48 Md. L. REV. 455, 459-60 (1989). *See generally* Millemann, *supra*.

182. *See id.* at 459-67.

183. *See id.*

184. *See id.*

185. *See id.*

a trained advocate.¹⁸⁶

The subsidiary right to legal help should not remain institution-bound. The primary source of the access to court right is the due process clause of the fourteenth amendment to the United States Constitution.¹⁸⁷ The hallmark of due process is flexibility.¹⁸⁸ Although the courts are not literally beyond the reach of noninstitutionalized indigent litigants, the complexity of law and law practice makes the law functionally inaccessible to many. If the litigant's "interest" in the underlying claim in a civil lawsuit is a significant and protected property or liberty interest, if the government's disinterest in providing legal help (a lawyer, paralegal, or trained advocate) is comparatively insignificant, and if the risk of error from uncounseled representation is substantial, government should be obligated constitutionally to provide the litigant with appropriate legal help.¹⁸⁹ Trained nonlawyers might provide this required help in

186. See, e.g., *Ward v. Kort*, 762 F.2d 856, 861 (10th Cir. 1985) (holding unconstitutional Colorado's failure to provide involuntarily confined mental patients with adequate legal help, including the legal help necessary to file and assert claims in federal habeas corpus petitions and civil rights cases).

187. U.S. CONST. amend. XIV; see Millemann, *supra* note 181, at 467-76. The additional sources of the access to court right include the first amendment and the equal protection clause. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-18, at 759 (2d ed. 1988).

188. See *supra* note 187.

189. See Millemann, *supra* note 181, at 467-72. In *Murray v. Giarratano*, 109 S. Ct. 2765 (1989), the Court reversed the holding of two lower courts that prisoners sentenced to death were constitutionally entitled to the assistance of counsel in investigating, asserting, and litigating capital post-conviction claims. *Id.* at 2772. Four Justices expressed their view that death-sentenced prisoners have no constitutional right to counsel. *Id.* at 2767 (plurality opinion) (Chief Justice Rehnquist was joined in his opinion by Justices White, O'Connor, and Scalia). Four Justices expressed the contrary view. *Id.* at 2773 (Stevens, Brennan, Marshall, and Blackmun, JJ., dissenting). The fifth vote to reverse was cast by Justice Kennedy, who said:

It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death.

.....

The requirement of meaningful access can be satisfied in various ways, however. . . . The intricacies and range of options are of sufficient complexity that state legislatures and prison administrators must be given "wide discretion" to select appropriate solutions. Indeed, judicial imposition of a categorical remedy such as that adopted by the court below might pretermit other responsible solutions being considered in Congress and state legislatures. Assessments of the difficulties presented by collateral litigation in capital cases are now being conducted by committees of the American Bar Association and the Judicial Conference, and Congress has stated its intention to give the matter serious consideration.

Unlike Congress, this Court lacks the capacity to undertake the searching and comprehensive review called for in this area, for we can decide only the case before us. While Virginia has not adopted procedures for securing repre-

many cases;¹⁹⁰ lawyers in others.¹⁹¹ In the latter cases, courts might

sentation that are as far reaching and effective as those available in other States, no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief. I am not prepared to say that this scheme violates the Constitution.

On the facts and record of this case, I concur in the judgment of the Court. *Id.* at 2773 (Kennedy, J., concurring) (citations omitted).

Justice Kennedy's opinion reasonably can be interpreted in at least two ways: (1) he left the decision of the constitutional issue for another day or; (2) he decided that there is a constitutional right to counsel, but it is not denied when a death-sentenced prisoner eventually obtains a volunteer lawyer, and has the right to seek help of a paid staff attorney in preparing his post conviction petition.

In two lines of decisions that predated *Murray*, the Court, however, was faced with, and resolved, arguments that various provisions of the United States Constitution guaranteed civil litigants the right to counsel. One line of decision, grounded in the equal protection and due process clauses of the fourteenth amendment, generally denied the right to noncapital post-conviction petitioners. *See* *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (denying the right to counsel to noncapital post-conviction petitioners); *cf.* *Ross v. Moffitt*, 417 U.S. 600, 617 (1974) (denying a right to counsel to an inmate seeking review of a state criminal conviction by certiorari). In a second line of decisions grounded in the due process clause, the Court developed either an absolute or qualified right to counsel in civil proceedings that, like criminal proceedings, can result in the loss of the litigant's liberty. *See, e.g.,* *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 31 (1981) (denying absolute right to counsel in proceedings to terminate parental status in part because such proceedings do not jeopardize personal liberty); *Gagnon v. Scarpelli*, 411 U.S. 778, 787-88 (1973) (establishing a qualified right to counsel in probation revocation cases); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (providing that "[t]he institutional parole staff shall render reasonable aid to the parolee in preparation for hearing and he shall be permitted to advise with his own legal counsel" but failing to reach or decide the question "whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent" (citing MODEL PENAL CODE § 305.15(1) (Proposed Official Draft 1962))); *In re Gault*, 387 U.S. 1, 41 (1967) (establishing a right to counsel in juvenile delinquency proceedings); *cf.* *Argersinger v. Hamlin*, 407 U.S. 25, 48 (1972) ("[w]hen the deprivation of property rights and interests is of sufficient consequence, denying the assistance of counsel to indigents who are incapable of defending themselves is a denial of due process" (footnote omitted)); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (Powell, J., concurring).

The above cases, which charted the limits of a *right to counsel* in civil cases, should not be viewed as rejecting a right to *legal help* in some civil cases. *See supra* note 63. The government's disinterest in providing some noninstitutionalized civil litigants with legal help from paralegals, trained advocates, or skilled lay persons is not nearly as substantial as it is in avoiding the costs of providing attorneys to litigants. This reduced government disinterest in providing legal help might well change the way the Court would strike the due process balance in civil cases in which uncounseled litigants faced the potential loss of important liberty and property interests.

190. The Supreme Court has recognized that some institutionalized litigants have a right to legal help from *nonlawyers* in some civil proceedings. For example, in *Johnson v. Avery*, 393 U.S. 483 (1969), the Court held that illiterate or poorly educated prisoners who wish to file habeas corpus or civil rights actions have a constitutional right to legal help from more articulate and experienced prisoner "writ writers." *Id.* at 485-90. In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court held that prisoners facing prison disciplinary proceedings that might result in the loss of good time credits or the imposi-

exercise their inherent authority to appoint counsel to represent indigent litigants.

III. ARGUMENTS IN SUPPORT OF A MANDATORY PRO BONO RULE

Even if they were accepted, the above arguments—that Article 5 of the Maryland Declaration of Rights has incorporated 11 Hen. 7, ch. 12 into Maryland law, that courts have inherent authority to appoint counsel to represent indigents in civil litigation, and/or that litigants in some cases constitutionally are entitled to legal help to enforce their access to court right—would not produce a comprehensive mandatory pro bono program. Thus, there is need for a comprehensive pro bono rule. The debate about it promises to be as vigorous as anywhere in the nation.¹⁹²

tion of solitary confinement were entitled to, *inter alia*, the personal assistance of counsel-substitute, a lay advocate. *Id.* at 563-70. And in *Vitek v. Jones*, 445 U.S. 480 (1980), Justice Powell casting the 5th vote, construed the plurality's requirement of "qualified and independent assistance" to an indigent state prisoner who was being threatened with involuntary transfer to a mental hospital to allow appointment of a trained or qualified lay person, rather than an attorney. *Id.* at 497-500 (Powell, J., concurring).

Even after *Bounds v. Smith*, 430 U.S. 817 (1977), which provided prisoners the disjunctive remedy of law books or lawyers to implement their access to court right, *id.* at 830-32, lower courts have held that special categories of prisoners are entitled to personal legal help. See *Hadix v. Johnson*, 694 F. Supp. 259, 294-95 (E.D. Mich. 1988) (legal assistance program including attorneys required to remedy, *inter alia*, deficiencies in access provided to illiterate or segregated prisoners), *aff'd*, 871 F.2d 1087 (6th Cir. 1989); *United States ex rel. Para-Professional Law Clinic v. Kane*, 656 F. Supp. 1099, 1107-08 (E.D. Pa.) (closing inmate-run legal clinic would violate rights of functionally illiterate prisoners), *aff'd mem.*, 835 F.2d 285 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988). See generally Millemann, *supra* note 181, at 466-67 & n.50.

Thus, although government's interest in avoiding a universal appointment of counsel requirement in civil litigation is very substantial, its interest is less in avoiding the selective appointment of trained lay advocates to civil litigants who are incapable of representing themselves and who face the loss of substantial property or liberty interests. See also D. LUBAN, *LAWYERS AND JUSTICE* 269-73 (1988) (arguing for the deregulation of the market for routine legal services). Thus, the due process balance might be struck quite differently in such cases, supporting the development of qualified rights to legal help from lay advocates in some civil cases.

191. Especially insofar as lawyers refuse both to accept a mandatory pro bono rule and to relinquish their monopoly power over the practice of law, thus preventing nonlawyers from representing the poor. See *United States v. Accetturo*, 842 F.2d 1408, 1413 (3d Cir. 1988) ("There is a symbiotic relationship between the court and the attorneys who are members of its bar. The court's responsibility for the administration of justice would be frustrated were it unable to enlist or acquire the services of those who have, by virtue of their license, a monopoly on the provision of such services.").

192. The mandatory pro bono debate has an extensive bibliography. See, e.g., Elliot, *The Proposed Model Rules of Professional Conduct: Invention Not Mothered by Necessity?*, 54 CONN. B.J. 265, 284-85 (1980); Maher, *No Bono: The Efforts of the Supreme Court of Florida to Promote the Full Availability of Legal Services*, 41 U. MIAMI L. REV. 973 (1987); Rosenfeld,

A. Introduction

In 1980, the American Bar Association rejected a proposed mandatory pro bono rule.¹⁹³ Although the idea then seemed dead, it has been resurrected,¹⁹⁴ especially in Maryland,¹⁹⁵ by a conver-

Mandatory Pro Bono: Historical and Constitutional Perspectives, 2 CARDOZO L. REV. 255 (1981); Shapiro, *supra* note 75.

193. In 1980, the Kutak Commission on Evaluation of Professional Standards of the American Bar Association, proposed a mandatory pro bono scheme. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.1 (Discussion Draft 1980). Though the commission originally proposed a rule that would have required every attorney to contribute a fixed amount of time each year to "unpaid public interest legal service," that rule was rejected. *Id.*; see also Kutak, *Coming: The New Model Rules of Professional Conduct*, 66 A.B.A. J. 47 (1980); Kutak, *Evaluating the Proposed Model Rules of Professional Conduct*, 1980 AM. B. FOUND. RES. J. 1016. THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT Rule 6.1 now provides:

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 improving the law, the legal system or the legal profession, or by financial support for organizations that provide legal services to persons of limited means.

Id. (emphasis added).

194. On June 30, 1989, the New York Committee to Improve the Availability of Legal Services, which had been appointed by the New York Court of Appeals Chief Judge, submitted a Preliminary Report which "propose[d] that all admitted attorneys actively practicing law in the State be required to provide a minimum standard of pro bono legal services in matters affecting the needs of the poor." See letter from Victor Marrero, Chair, Committee to Improve the Availability of Legal Services, to The Hon. Sol Wachtler, Chief Judge, New York State Court of Appeals 2 (June 30, 1989). In the Preliminary Report, the Committee recommended

that all lawyers admitted to practice in New York and who actually are engaged in the active practice of law be required to provide a minimum of 40 hours of qualifying pro bono legal services every two years. Time contributed in any given period in excess of the minimum standard would be allowed to be carried forward for four years

COMMITTEE TO IMPROVE THE AVAILABILITY OF LEGAL SERVICES, PRELIMINARY REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 6 (June 30, 1989) [hereinafter PRELIMINARY REPORT OF NEW YORK]. As defined, "qualifying pro bono legal services" include legal services in civil matters to indigent clients, legal services in criminal matters to indigent clients in cases in which there is no governmental obligation to provide representation, services intended to simplify the legal process for poor persons or increase the availability and quality of legal services to poor persons, and services provided to charitable and public interest organizations on matters that predominantly affect poor persons. *Id.*

Attorneys practicing as lawyers for government agencies, legal services, and public interest organizations and private corporations, as well as law schools, are within the proposal. *Id.* at 7. "The proposed pro bono service requirement would be an individual obligation of every attorney covered" with two exceptions. *Id.* First, attorneys would be allowed to "aggregate their individual requirements and satisfy their obligation in whole or in part by group services or activities performed on behalf of the entire group by one or more of its members." *Id.* Thus, a law firm could designate one or more pro bono associates or partners who have practiced law for more than two years. "[O]therwise unaffiliated lawyers" also could join together for the purpose of discharging their aggre-

gence of forces. The Reagan Administration sought to "zero-budget" the national Legal Services Corporation and, through the Corporation, placed draconian restrictions on expenditures of the reduced legal services funds that Congress appropriated over the President's objection.¹⁹⁶ This national effort to close local courthouse doors to the poor unintentionally highlighted the unmet need

gate pro bono responsibilities through one or more lawyers. *Id.* Second, "attorneys practicing alone or in firms of fewer than 10 lawyers" would be entitled to exercise a buy-out option. *Id.* at 8. The Committee's proposal initially fixes the rate at \$50 per hour. *Id.*

"The Committee propose[d] that administration and enforcement be kept as simple as possible," with compliance to be achieved through "existing administrative mechanisms and [reliance] on the personal and professional integrity and good faith" of attorneys. *Id.* The Committee recommended additional funding for legal services by government, expressing its view that the obligation to provide legal services to the poor is one that is shared by both the legal profession and "society in general." *Id.* at 9.

In a July 15, 1988, article in the *New York Times*, David Margolick summarized mandatory pro bono developments in other jurisdictions:

[T]here are numerous signs that such compulsory programs are inevitable if not exactly imminent. Courts and bar associations in Texas, Florida, and Arkansas have already put mandatory public service requirements into effect. The issue has been debated in Oregon and Washington. It is on the table in Maryland, and it will soon be addressed in New York by a panel created by Chief Judge Sol Wachtler and led by Victor Marrero of Brown & Wood and including the most impressive convert to the cause, former Secretary of State Cyrus R. Vance.

Margolick, *Lawyers and Compulsory Public Service: Resisting the Inevitable*, *N.Y. Times*, July 15, 1988, at B9, col. 1; *see also*, D. LUBAN, *supra* note 190, at 277-82 (proposing a model mandatory pro bono program).

195. *See* ACTION PLAN, *supra* note 50. In the aftermath of the Cardin Commission's recommendation that the Maryland Court of Appeals adopt a mandatory pro bono rule, the Chief Judge of the Maryland Court of Appeals sent a letter to 19,323 Maryland lawyers urging them to fill out a pro bono questionnaire prepared by the Maryland State Bar Association. The questionnaire is intended to measure and increase the level of voluntary pro bono work by Maryland attorneys. *See* Feeley, *MSBA Sends Pro Bono Survey to Md. Lawyers*, *The Daily Record*, Oct. 13, 1989, at 1, col. 3.

196. *See* Smith & Marr, *Poor People Without Lawyers Have No Enforceable Legal Rights: The Future of Legal Services*, 13 *LINCOLN L. REV.* 39 (1982) (discussing President Reagan's plans to zero-budget and restructure the Legal Services Corporation (LSC)); *Legal Services Still the Stepchild*, *N.Y. Times*, Dec. 12, 1984, at A30, col. 1 (editorial criticizing President Reagan's proposed elimination of funds for the LSC); *see also* D. LUBAN, *supra* note 190, at 241-43; *id.* at 241 ("Under the Reagan administration, the LSC has run into hard times. Its budget for fiscal 1982 and 1983 was cut to \$260 million, and its board of directors has been stacked with individuals hostile to the goals, indeed, to the very existence, of the LSC; in February of 1987, in fact, LSC Chairman W. Clark Durant III publicly proposed abolishing the corporation. This was in line with the view of the administration, which each year has proposed defunding the LSC entirely" (footnote omitted)); *cf.* Barnes, *Right Cross*, *THE NEW REPUBLIC*, Oct. 16, 1989, at 10, 11 (comparing President Reagan's desire to eliminate financing for the LSC with President Bush's ambivalent hope that "the issue . . . [just] go away").

for legal help,¹⁹⁷ which since then has become even more acute.¹⁹⁸

By the mid-1980s, participation in many volunteer programs, including Maryland's, was declining.¹⁹⁹ Often, the participation data overstated the services actually provided to the poor.²⁰⁰ However measured, the volunteer efforts have not begun to meet the need.²⁰¹

197. Smith & Marr, *supra* note 196, at 63, attributed part of this unmet need for legal help directly to the Reagan budget cuts and its stepchild, the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (codified in scattered sections of 7 U.S.C. (1982) and 42 U.S.C. (1982)). They affected "programs for the poor in the areas of welfare, nutrition, housing, community development, and special employment programs. . . . Those groups destined to receive the brunt of this curtailment are American Indians, immigrants, the elderly, and the disabled." Smith & Marr, *supra* note 196, at 63. As importantly, even if there were no decrease in the budget of the LSC, "current resources could not meet future client demands." *Id.*; see also Woods, *Challenges Facing Legal Services in the 1990s: Perspectives of Women and Family Law Advocates*, 22 CLEARINGHOUSE REV. 457 (1988) (discussing the unmet need for legal services for women).

198. See ACTION PLAN, *supra* note 50, at ix. The Report noted that less than 20% of the state's "low-income population is able to receive legal assistance for a wide range of critical civil legal problems." *Id.* (emphasis in original). Maryland's unmet legal needs, however, are not unique. "Similar studies in other states, including Massachusetts and North Dakota, have revealed that a whopping 85 percent of people embroiled in civil cases were not getting the help they needed." Bainbridge, *Pro Bono Service: What's a Lawyer to Do?*, 22 Md. B.J. 13, 14 (Sept./Oct. 1989).

199. In 1982, the year after the founding of the Maryland Volunteer Lawyer Service (MVLS), it listed 675 attorneys as members. Memorandum from John Michener, Executive Director, MVLS, to Richard Gordon (Sept. 20, 1989) (copy on file with *Maryland Law Review*). This number peaked at 1709 in 1986 after an intensive recruitment drive. *Id.* The interest of many of these attorneys, however, waned, and by 1989 the number of participating attorneys dropped to 1405. *Id.* More discouraging though, is that the number of volunteer attorneys substantially exceeds the number of cases actually placed, see *infra* note 200, because a large percentage of the volunteer attorneys refuse to accept case referrals. This problem has become significantly worse during the past year or so. Interview with John Michener, Executive Director, MVLS (Feb. 12, 1990).

200. Memorandum from John Michener to Richard Gordon, *supra* note 199. Below is a complete list of attorney participation in the MVLS from 1982-1989:

<u>Fiscal</u> <u>Year</u>	<u>Number</u> <u>of</u> <u>Attorneys</u>	<u>Cases</u> <u>Referred</u>
82	675	342
83	931	533
84	825	826
85	1,662	760
86	1,709	823
87	1,600	705
88	1,318	768
89	1,405	540

These data point out that, with the exception of 1984, there is a consistent 2:1 ratio between the number of attorneys listed as members of the MVLS and the actual number of pro bono cases.

201. In an article entitled *Defeating Mandatory Pro Bono by Making it Unnecessary*, John

These developments occurred during a decade that has earned its reputation as "the age of greed",²⁰² during which the development of megafirms,²⁰³ increasing salaries, and higher rates for billable hours have priced many out of the legal services market and have, in the view of many bar leaders, generated a lack of public confidence in the bar.

The mandatory pro bono debate has been revived both by increasing concerns about the unmet need for legal help and the pub-

Michener, Executive Director of the MVLS, identified the "trouble with the plea for the voluntary approach": in Maryland the "approach has been given an extensive try and has proven utterly inadequate." Md. St. B.A. Bull., Sept. 1988, at 6, col. 1. Michener persuasively argues that it is the relative *success* of the MVLS that best demonstrates the *failure* of the voluntary pro bono concept.

The Maryland Volunteer Lawyers Service is one of the largest pro bono programs in the United States, measured either by the size of its attorney panel or the number of cases handled. . . . [T]hese criteria of success mask a startling failure. There are currently about 1,450 attorneys on MVLS's panel [out of over 13,000 licensed attorneys in Maryland], but in the past year only about 700 of these attorneys have actually taken a new case or continued work on a case taken earlier. MVLS staff must spend approximately 3 hours contacting panel attorneys for each case they place. On the average, they encounter 3 refusals before the 4th attorney accepts.

Id. at 6, cols. 3-4.

This description of the MVLS program, made by its Executive Director, and the Maryland State Bar Association's self-description of its pro bono efforts share little in common. In the Report of the Maryland State Bar Association Special Committee on Pro Bono Services, the Committee justifies the bar's opposition to a mandatory pro bono rule by announcing that "the membership of the Maryland State Bar Association has always distinguished itself by its commitment to supporting organized efforts for meeting the broad range of public interest legal needs throughout Maryland" REPORT OF THE MARYLAND STATE BAR ASSOCIATION SPECIAL COMMITTEE ON PRO BONO SERVICES 2. The Committee includes the bar's support for the MVLS as an example of its "distinguished" record. *Id.*

202. Brill, *Big Business Gets Bigger in 87*, AM. LAW., July/Aug. 1988, supp. at 6.

203. A 1988 survey showed that the top 100 law firms in the United States produced revenue in excess of \$8.6 billion. *Id.* Each of these "megafirms" produced income in excess \$45 million. This was a 22% gain from 1987. *Id.* at 7.

There are two important consequences of this phenomenal growth. First, the skyrocketing price of legal services, which has accounted for some of the growth, has pushed legal costs beyond the reach of many middle and lower class people. Lancaster, *The Unrepresented: Litigious U.S. Society Affords Fewer Lawyers To the Poor Nowadays*, Wall St. J., June 3, 1986, at 1, col. 1. Second, many attorneys believe they do not have the time to represent the poor due, in part, to greater demand by their firms for increased billable hours.

The *American Lawyer's* 1988 survey stressed that it is possible to have high Revenue Per Lawyer (RPL) and at the same time devote a significant part of the firms' resources to pro bono representation. However, "many firms don't." Brill, *supra* note 202, supp. at 20. In fact, when associates were asked about the degree to which their firms encouraged pro bono work, the results showed that the firms with the highest RPL rated the lowest. Conversely, "one of New York's lowest RPL firms . . . scored highest in the pro bono question." *Id.*

lic perception of the bar, motivations that often pull the bar in inconsistent directions.²⁰⁴

B. *The Objections to Mandatory Pro Bono*

The arguments for a mandatory pro bono rule can be organized as responses to often-heard objections.

1. *The "We Are Incompetent To Help" Argument.*—Some of the objections to mandatory pro bono are substantial.²⁰⁵ Others trivialize the profession and underestimate the moral and intellectual capacities of lawyers; none more so than the "we are incompetent to help" argument.

"Poverty law" is a series of specialties. In the aggregate, poverty law is complex and comprehensive. This much of the argument is true. All lawyers, however, need not master all of poverty law, nor even all of one specialty, to help the poor. Although some components of the various poverty law specialties may be idiosyncratic, many are not. There *are* poverty law kinfolk within the various families of law. For example, there is little of domestic law practice that is unique to the poor.²⁰⁶ Landlord-tenant law includes common-law principles and statutory provisions that are familiar to lawyers who have real estate practices.²⁰⁷ Many commercial lawyers fully under-

204. Public criticism of the profession and the bar's response to it are the continuing content of a very old conversation. That conversation has more to do with public distrust of the traditional attorney's role, see *The Maryland Bar and the Poor*, Wash. Post, Jan. 5, 1990, at A2, col. 1 (editorial), than it does with perceived avarice. To the extent the bar develops a pro bono proposal to respond to public disaffection, it likely will have a minimalistic content that is dictated by public relations rather than the public good. Sometimes even the public relations campaign seems deficient. For example, when the Maryland State Bar Association's Board of Governors rejected the mandatory pro bono proposal that was generated by the Cardin Commission, it did so at a "closed-door" meeting to which representatives of the Daily Record, the State's primary legal newspaper, were denied access, see Feeley, *MSBA Decides on Pro Bono*, The Daily Record, Oct. 3, 1988, at 1, col. 3, and it justified its action, in part, by hypothesizing that many members of the Bar Association would leave the Association if the Association recommended that they be required to provide legal help to the poor. Although the decision is more complex, the Association *appeared* to reject the public good for the narrowest reasons of self-interest.

205. See generally Adler, Fisher, Marable & Rothschild, *Pro Bono Legal Services: The Objectives and Alternatives to Mandatory Pro Bono*, 53 CAL. ST. B.J. 24 (1978).

206. Maryland law that sets forth grounds for divorce, criteria for custody decisions, and the bases for awarding alimony and child support applies equally to the rich and poor.

207. Indeed, the Community Law Center, Inc., an organization that matches volunteer attorneys with non-profit organizations, works together with the Lawyer's Clearinghouse to recruit and place volunteer attorneys with organizations that wish to develop

stand how to incorporate and advise a non-profit corporation, and regularly deal with significant parts of the total body of "consumer law" that protects the poor.²⁰⁸ Thus, the first response to the "we are incompetent" argument is that most lawyers can call upon experiences within their areas of competency that equip them to help the poor in some significant way.

When they are not immediately and fully competent, private attorneys are educable.²⁰⁹ If required to do so, they can attain competence in a discreet area of poverty law that is connected to a private practice specialty.²¹⁰

When pushed, the sponsors of the "we are incompetent" argument probably would admit the above points, but predict that some private lawyers will resist the education needed to attain competence, refuse to represent indigent clients, or perform incompetently.

Assuming there is a lawful basis for a mandatory pro bono requirement, widespread civil disobedience is unlikely and the arguments for it are very difficult to identify.²¹¹ If this does occur, the

housing for low-income persons. The volunteer attorneys provide advice and counsel to the organizations about housing financing transactions.

208. It is customary for an attorney who regularly handles commercial matters to be familiar with the Truth in Lending Act, 15 U.S.C.A. §§ 1601-1667e (West 1982 & Supp. 1989).

209. The Maryland Institute for Continuing Professional Education of Lawyers (MICPEL) has developed a number of "poverty law" offerings for private attorneys. In 1988 alone, MICPEL sponsored programs on lead paint poisoning, AIDS and other contagious diseases in the health care workplace, juvenile law, and special education law. In addition, MICPEL offered two programs about legal aspects of representing organizations that provide shelter and personal services to homeless persons. In 1989, MICPEL offered a series of programs that were designed both to educate practitioners in areas of "poverty law," and recruit them to do pro bono work. These programs were being offered at a reduced rate for attorneys who agree to accept a pro bono referral.

210. It is anomalous at the least to suggest that law students are competent to represent indigents in Maryland's courts, but members of the bar, including many with years of experience, are not. Both the University of Maryland and University of Baltimore Schools of Law have well-developed clinical law programs in which law students, working under faculty supervision, provide legal help to the poor. As a result of the Report of the Cardin Commission, *see supra* note 50, the University of Maryland School of Law has adopted and is implementing a mandatory clinical education program for approximately two-thirds of the day division students. The other one-third are enrolled in courses that simulate client experiences but are not "real" client experiences. The law students who are enrolled in the mandatory clinical component help represent indigent clients in court. The integrated law school course gives them a minimal level of competency to do so. Thus, upon graduation, an increasing percentage of the Maryland bar will have had a clinical education program focused on poverty law.

211. Attorney competence not only benefits clients, it benefits the profession itself. For example, it "underpins the legal profession's claims to monopoly and to self regula-

bar has several readily available remedies to deal with it. It can reward pro bono attorneys with public recognition and private expressions of gratitude. It can make participation in continuing education courses that enhance pro bono competence mandatory, and sanction refusal to participate. It can enforce minimal competency requirements of the Maryland Rules of Professional Conduct.²¹² Or, it can ignore the recalcitrants—at least the disobedients who refuse to participate—writing off the few attorneys who will steadfastly resist and happily accepting the many who likely will respond.

The ultimate flaw in the “we are incompetent” argument is best revealed by acknowledging, *arguendo*, some truth in it. Assume that after four years of college, three years of law school, and varying periods of law practice, some lawyers are “incompetent” to help the poor, either in court or outside a courtroom setting. All this despairing assumption tells us is that the poor are far less competent to represent themselves, and do not have the readily available access to attaining competency that lawyers have. Competency is a comparative concept. Lawyers, even the least proficient lawyers, are *more* competent than *pro se* litigants.²¹³

tion.” Garth, *Rethinking the Legal Profession’s Approach to Collective Self-Improvement: Competence and the Consumer Perspective*, 1983 WIS. L. REV. 639, 651.

212. THE MARYLAND LAWYERS’ RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1989) requires lawyers to “provide competent representation” to all clients, and defines its components: “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” The comment to Rule 1.1 identifies the essential ingredients of competency that would enable a non-specialized private lawyer to provide competent assistance to indigent clients:

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

THE MARYLAND LAWYERS’ RULES OF PROFESSIONAL CONDUCT Rule 1.1 comment (1989).

It is apparent that attorney competence is in the interest of lawyers as well as their clients. “[T]he guarantee of competence is what justifies the professional monopoly. The adversary system is built on the assumption that each side’s position will be represented effectively by a trained legal advocate.” Garth, *supra* note 211, at 640.

213. One rejoinder is that a minimally competent lawyer can provide a legal matter with an affirmatively injurious patina of legitimacy. For example, it is contended that trial judges will not provide the protections to incompetently represented litigants that

2. *The "We Are Too Litigious" Argument.*—Our justice system has not institutionalized alternative dispute resolution (ADR) techniques. It ought to. This proposed normative behavior, however, ought to be the rule for *all* litigants, not just the poor.

If we were to develop a piecemeal ADR requirement, the last place to start would be with a category of indigent litigants. There is no evidence that the poor have fewer meritorious claims, nor is it apparent that the claims of the poor are less important than the claims of nonindigent litigants. It is through litigation that the poor seek to protect life,²¹⁴ health,²¹⁵ and personal safety.²¹⁶ The rights they assert in litigation often are the rights to food,²¹⁷ housing,²¹⁸ a minimal education,²¹⁹ and the most rudimentary protection and care.²²⁰ There is no more important litigation in our litigious society.

In addition, the effectiveness of ADR techniques, like mediation, depends upon a power balance.²²¹ Indigent *pro se* litigants are the least skillful and powerful advocates. One step in redressing this power imbalance would be to provide them with counsel (or other skilled advocates).²²² This might make ADR more effective and fair,

they do to *pro se* litigants; nor will reviewing courts be as generous to badly represented litigants as they are to *pro se* litigants. This response operates on the Alice-In-Wonderland assumption that busy judges who sit from 10:00 a.m. to 4:30 p.m. (with an hour for lunch) to consider many cases—sometimes as many as one hundred or more—have reviewed carefully the scribbled pleadings of *pro se* litigants, and will patiently divine merit from often excited and fractious *pro se* exclamations. Judges, particularly "mass justice" judges who sit in the nation's lower courts, simply cannot, and probably should not, perform these basic functions of an advocate.

For thoughtful discussion about the relative and variable concept of lawyer competence, see Cort & Sammons, *The Search for "Good Lawyering": A Concept and Model of Lawyering Competencies*, 29 CLEV. ST. L. REV. 397 (1980); Garth, *supra* note 211; Trakman, *Competence in the Law: An Unending Search*, 11 CAP. U.L. REV. 401 (1982).

214. See, e.g., *Ford v. Wainwright*, 477 U.S. 399 (1986).

215. See, e.g., *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974).

216. See, e.g., *Youngberg v. Romeo*, 457 U.S. 307 (1982).

217. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970); *King v. Smith*, 392 U.S. 309 (1968).

218. See, e.g., *Thorpe v. Durham Hous. Auth.*, 393 U.S. 268 (1969).

219. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982).

220. See, e.g., *Youngberg*, 457 U.S. 307; *O'Connor v. Donaldson*, 422 U.S. 563 (1974).

221. This is so despite its seemingly neutral character. See J. FOLBERG & A. TAYLOR, *MEDIATION* (1986). Folberg and Taylor note that the mediation "alternative" lacks the precise checks and balances that are the primary benefit of the adversarial system. "The purposeful 'alegal' character of mediation creates a constant risk of dominance by the more knowledgeable, powerful, or less emotional party." *Id.* at 244.

222. See Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 41 (1982) (lawyers are necessary to "protect against the dangers of [mediation's] alegal character"); see also J. FOLBERG & A. TAYLOR, *supra* note 221, at 247 ("Independent legal review is a necessity in divorce settlements, labor contracts, environmental issues, and other legally oriented

but it undercuts the mandatory pro bono opponent's purpose in proposing ADR: to *avoid* appointing counsel to the poor.

3. *The "It Would Not Be As Satisfying" Argument.*—Requiring lawyers to help the poor would deprive *them* of some of the sense of self-satisfaction that comes from volunteering to do charitable work. This is true; as I assume, is the tale of the "beautiful youth in Greek mythology who pines away for love of his own reflection and is then turned into the narcissus flower."²²³ Pro bono work, whether mandatory or voluntary, is not a pool in which we can admire our own reflection. It is not intended primarily to provide lawyers with emotional perks. It is intended to provide the poor with essential legal help.²²⁴

The narcissist response would have more force if it had an utilitarian apologetic; that is, if it were reasonable to predict that a pro bono requirement would decrease either the actual level of existing volunteer services or a hypothetical higher level that would result from enhanced efforts to encourage volunteer help. Neither argument seems very plausible. Lawyers who now volunteer their time likely would not be discouraged and would not do less because their nonparticipating colleagues are told they must help as well. And, the experience in Maryland does not support a prediction that an enhanced recruitment effort will produce a hypothetical degree of encouraged attorney participation greater than that generated by a *requirement* that all attorneys provide legal help to the poor.²²⁵

and complex disputes. The reviewing attorneys serve as a check to assure that all necessary items have been considered by the participants and that the proposed agreement accurately states their understanding.").

223. The definition of "narcissus." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 787 (9th ed. 1986).

224. See *supra* notes 50-55 and accompanying text.

225. See *supra* note 200 and accompanying text. In Maryland, the Maryland State Bar Association appointed a Special Committee on Pro Bono in response to the mandatory pro bono recommendation of the Cardin Commission. That Committee initially supported a "workable, mandatory *pro bono* legal services program" to "get the most service for people in need." Eveleth, *Bar Committee Seeks Workable Mandatory Pro Bono Plan*, Md. St. B.A. Bull., June 1988, at 2, col. 1. Reconsidering, the Committee subsequently recommended that the Maryland State Bar Association Board of Governors take reasonable steps to measure and increase the participation of attorneys in pro bono programs on a voluntary basis. The Committee intimated that it might support a mandatory pro bono program if a significant increase in voluntary participation did not occur. Feeley, *Bar Group Backs Away from Required Pro Bono*, The Daily Record, Sept. 13, 1988, at 1, col. 3. The Maryland State Bar Association Board of Governors approved the Committee's recommendation and forwarded it to the Standing Committee on Rules of Practice and Procedure of the Maryland Court of Appeals. That Committee recommended that the Maryland Court of Appeals send a questionnaire to each attorney in the

The lawyers who are most likely to be discouraged by a pro bono requirement are the lawyers who refuse to volunteer, not the lawyers who now volunteer or are most likely to volunteer as the result of an enhanced recruitment effort in the future.

4. *The "It Must Be Unconstitutional" Argument.*—The response of some lawyers to mandatory pro bono proposals has been a Pavlovian "it must be unconstitutional" plea. However, the constitutional objections to mandatory pro bono are strained at best. A pro bono requirement universally imposed upon all members of the bar, reasonably administered, and with reasonable exemptions, would deny no lawyer any constitutional right.

a. *The First Amendment Challenge to Mandatory Pro Bono.*—One possible constitutional challenge to mandatory pro bono is that it violates asserted rights of speech, association, and personal autonomy protected by the first and fourteenth amendments.²²⁶ The Supreme Court has held that the constitution protects one's "right to associate with others to promote certain causes and ideas."²²⁷ Representing another person is a form of speech or association and an expression of personal autonomy. Therefore, the argument goes, if an attorney is forced to represent a client whose beliefs and value system are contrary to her own, she is denied these important first and fourteenth amendment rights. The issue is posed most starkly when a lawyer is required to represent a client whose values, conduct, or ideas she personally abhors.

The proponents of this argument might invoke arguably analogous first amendment cases, like *Wooley v. Maynard*,²²⁸ in which the Court struck down a New Hampshire statute that required noncommercial motor vehicles to have license plates embossed with the

State asking attorneys to indicate how much pro bono work they do and whether they are interested in doing more. The court has done so. See Feeley, *MSBA Sends Pro Bono Survey to Md. Lawyers*, *The Daily Record*, Oct. 13, 1989, at 1, col. 3.

226. U.S. CONST. amend. I, which reads in relevant part: "Congress shall make no law . . . abridging the freedom of speech."

227. Shapiro, *supra* note 75, at 763; see also *Elrod v. Burns*, 427 U.S. 347, 358 n.11 (1976) ("[t]his Court's decisions have prohibited conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights"); *Cousins v. Wigoda*, 419 U.S. 477, 491 (1975) (finding that a circuit court erred in issuing an injunction that abridged a political delegation's associational rights); *Phillips v. Bureau of Prisons*, 591 F.2d 966, 970 (D.C. Cir. 1979) (noting that right to hold specific employment and follow a chosen profession is a protectable property interest and must be free from unreasonable governmental interference).

228. 430 U.S. 705 (1977).

state motto, "Live Free or Die."²²⁹ Maynard, a Jehovah's Witness, objected to the motto on the ground that it was repugnant to his moral, political, and religious beliefs.²³⁰

In addressing the issue of whether the state can require an individual to disseminate an ideological message,²³¹ the Court stated that a system that protects one's right to proselytize ideological causes "must also guarantee the concomitant right to decline to foster such concepts."²³² The statute, the opinion concluded, in effect required citizens to use their cars as "mobile billboards" for the State's ideological message.²³³

The problem with this argument, of course, is that, pursuant to the traditional concept of a lawyer's role in representing a client, a lawyer does not (and may not) directly endorse her client's views or even express her personal opinion about the merits of the client's claim. The root concept of the lawyer's role is value neutrality. The American Bar Association's Model Rules of Professional Conduct, for example, provide explicitly that "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."²³⁴

Admittedly, by selecting a client, the lawyer indirectly can endorse a political viewpoint, and during the course of this representation, she sometimes may be able to endorse directly the client's views, when to do so advances the client's legal claim. In addition, the most exciting and happy parts of the practice of law, despite traditional orthodoxy,²³⁵ are not amoral, detached, and value-neutral experiences that consciously sever the values of client from those of lawyer.

However, even when the marriage of lawyer and client values is perfect, an appointed lawyer has not *chosen*, even indirectly, to endorse her client's viewpoints. In this context, the lawyer's argument

229. *Id.* at 717.

230. *Id.* at 707.

231. *Id.* at 713. The Court noted that the express purpose of the license plate, on private property, was that it be observed and read by the public. *Id.*

232. *Id.* at 714.

233. *Id.* at 715; *cf.* *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977) (requiring dues payments for "agency shop" that engaged in collective bargaining for public employees was permissible so long as employees' dues were not used to promote ideological activities or causes not directly connected to the collective bargaining process that the employee opposed).

234. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1983).

235. *See, e.g.*, Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613.

that her client's claim has legal merit, even if she truly believes the legal claim is morally correct, cannot reasonably be viewed as an endorsement of her client's values. She did not choose to endorse it. She was appointed to do so.

Thus, the only possible injury to expressive rights is that, by being appointed to represent one client, a lawyer has one less client possibility to be personally expressive. That is a *de minimis* injury, particularly when weighed against the fundamental law-implementing interest of the client.

A well-designed and properly administered mandatory pro bono program, however, should (although constitutionally it need not) avoid this tension by giving lawyers a range of pro bono work choices that preserves as completely as possible the autonomous and expressive interests of lawyers.

b. The Takings Challenge To Mandatory Pro Bono.—In *Konigsberg v. State Bar*,²³⁶ the Court wrote that “the right to practice law has been held to be a property right within the meaning of the due process and equal protection provisions of the Fourteenth Amendment to the Constitution.”²³⁷ As with any protectable property right, the argument goes, the taking of legal services for public use, without compensation, violates the fifth amendment to the United States Constitution.²³⁸

Most authorities, however, reject this contention.²³⁹ In *United*

236. 353 U.S. 252 (1957).

237. *Id.* at 253-54.

238. U.S. CONST. amend. V, which reads in pertinent part: “[N]or shall private property be taken for public use, without just compensation.” See Recent Developments, *Requirement That Attorney Pay Expenses for Defense of Indigent Client Held Unconstitutional Without Reimbursement*, 6 AM. J. TRIAL ADVOC. 184 (1982-1983). Cases addressing the attorney's constitutional right to compensation for the representation of indigent clients are collected in Annotation, *supra* note 174. See also Family Div. Trial Lawyers of the Superior Court-D.C., Inc. v. Moultrie, 725 F.2d 695, 705-06 (D.C. Cir. 1984) (attorneys not compensated for pro bono appointments to represent indigent parents in child neglect proceedings); *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965) (attorney uncompensated for representation of indigent criminal defendant), *cert. denied*, 382 U.S. 978 (1966).

239. See, e.g., *Moultrie*, 725 F.2d at 705 (compulsory appointment of attorney was not a taking of property); *Dillon*, 346 F.2d at 636 (representation did not constitute a taking of property); cf. *Williamson v. Vardeman*, 674 F.2d 1211 (8th Cir. 1982) (though court determined that compelled representation does not constitute a violation of the takings clause, a violation exists when an attorney additionally is required to pay his expenses without reimbursement). But see *State ex. rel. Stephan v. Smith*, 242 Kan. 336, 370, 747 P.2d 816, 842 (1987) (attorney's services are property and, therefore, are protected by takings clause); *State v. Roper*, 688 S.W.2d 757 (Mo. 1985) (en banc) (court had no inherent power to appoint attorney without compensation).

States v. Dillon,²⁴⁰ for example, the Ninth Circuit Court of Appeals faced the question of whether an attorney was entitled, as a matter of constitutional law, to attorney's fees after appointment to represent an indigent.²⁴¹ The court denied compensation based on two theories: first, that there is no taking under the fifth amendment when a lawyer is required to fulfill an obligation that the traditions of the legal profession call on him to accept;²⁴² and, second, the representation of indigents "is a condition under which lawyers are licensed to practice as officers of the court."²⁴³ The problem of providing some system of compensation for appointed counsel, the court wrote, "is a matter for legislative and not judicial treatment."²⁴⁴ *Dillon's* reasoning is cited with approval in many other cases denying compensation for pro bono legal services.²⁴⁵

The Supreme Court's recent interpretations of the "takings" clause of the fifth amendment provide more complete rationales for the *Dillon* holding. In *First English Evangelical Lutheran Church of Glen Dale v. County of Los Angeles*,²⁴⁶ the Court imposed a high threshold on the degree of interference with property that is a "taking;" it must cause "irreparable and permanent injury" and "destroy its value entirely."²⁴⁷ The Court held that there is a temporary taking

240. 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

241. *Id.* at 635.

242. *Id.* Many of the cases that have rejected fifth amendment takings have focused on the notion that attorneys have a "duty" to represent indigents concomitant to their role as "officers of the court." See, e.g., *Jackson v. State*, 413 P.2d 488 (Alaska 1966); *Scott v. State*, 216 Tenn. 375, 392 S.W.2d 681 (1965).

243. *Dillon*, 346 F.2d at 635. In *Dillon*, the government also argued that the uncompensated services of an appointed attorney are not within the scope of the fifth amendment's "takings clause" because that clause does not protect personal services. *Id.* The court found it unnecessary to consider this argument because it determined that there was no "taking" in the constitutional sense. *Id.* at 636; see also *Shapiro*, *supra* note 75, at 771 ("[w]hatever protection the due process clause may afford to the interest in practicing law, services are not property within the scope of the just compensation requirement of the constitution").

244. *Dillon*, 346 F.2d at 636.

245. See, e.g., *Williamson v. Vardeman*, 674 F.2d 1211 (8th Cir. 1982); *Warner v. Connell*, 400 S.W.2d 209 (Ky.), *cert. denied*, 385 U.S. 858 (1966); *Daines v. Markoff*, 92 Nev. 582, 555 P.2d 490 (1976); *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966); *Ex parte Dibble*, 279 S.C. 592, 310 S.E.2d 440 (1983). But see *State ex rel. Scott v. Roper*, 688 S.W.2d 757 (Mo. 1985) (en banc); *Menin v. Menin*, 79 Misc. 2d 285, 359 N.Y.S.2d 721 (Sup. Ct. 1974), *aff'd mem.*, 48 A.D.2d 904, 372 N.Y.S.2d 985 (App. Div. 1975). See generally Annotation, *supra* note 174.

246. 482 U.S. 304 (1987).

247. *Id.* at 316-17 (quoting *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177-78 (1872)); see also *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). At least one commentator on the takings clause concludes that after the Supreme Court's holdings in *First English* and *Nollan*, there is no reliable standard available to determine whether

if the government denies a landowner "all use of his property."²⁴⁸

Assuming that the personal services of an attorney constitute "property,"²⁴⁹ it is difficult to imagine that the minimal burden of even the most ambitious mandatory pro bono program could constitute a "taking."²⁵⁰ Moreover, a mandatory pro bono rule would be part of a system of regulating the admission and practice of lawyers that grants monopoly status to lawyers. Although the attorney's license to practice law would be conditioned upon a pro bono requirement, the license also would grant the exclusive right to practice. When a comprehensive regulatory scheme provides a "reciprocity of advantage,"²⁵¹ there is no taking because the economic harm is linked to economic advantage.²⁵² Certainly, the benefits that lawyers derive from monopoly status far outweigh the minor obligations that would be imposed by a reasonable mandatory pro bono rule.

there has been a "taking." Wilkins, *The Takings Clause: A Modern Plot for an Old Constitutional Tale*, 64 NOTRE DAME L. REV. 1 (1989). Professor Wilkins notes that, "the Court has candidly recognized its inability to deduce 'objective rules' that will clearly indicate when government action 'becomes a taking.'" *Id.* at 1 (quoting *First English*, 482 U.S. at 340 (Stevens, J., dissenting)); see also Note, *Private Rights v. Public Needs*: Nollan v. California Coastal Commission, 1987 DET. C.L. REV. 1201, 1203 (noting lack of precise standards).

248. *First English*, 482 U.S. at 318.

249. See *supra* note 239. In some circumstances, services may constitute "property." See *Butler v. Perry*, 240 U.S. 328 (1916); Green, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366 (1981).

250. The total annual hour commitment required by most of the mandatory pro bono proposals is less than one work week. See *supra* note 194. And, in Maryland, at least when an attorney who volunteers for time through the MVLS program spends more than 20 hours on a case, she is entitled to \$30 per hour reimbursement for the additional hours. See letter from Robert J. Rhudy, Executive Director of the Maryland Legal Services Corporation, to Ann Bartsch, Oregon Law Foundation (May 4, 1988) (copy on file with *Maryland Law Review*). The donation of such a minimal period of uncompensated time would fall short of a "taking." See, e.g., *Family Div. Trial Lawyers of the Superior Court-D.C., Inc. v. Moultrie*, 725 F.2d 695, 705 (D.C. Cir. 1984) (if the practice of assigning uncompensated counsel to cases "effectively denies . . . [attorneys] the opportunity to maintain a remunerative practice . . ." it might constitute a "taking"); accord *State ex rel. Stephan v. Smith*, 242 Kan. 336, 747 P.2d 816 (1987); *Bradshaw v. Ball*, 487 S.W.2d 294, 298 (Ky. 1972); *In re Smiley*, 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975); *State ex rel. Partain v. Oakley*, 159 W. Va. 805, 227 S.E.2d 314 (1976).

251. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (opinion of Justice Holmes).

252. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 147 (1978) (Rehnquist, J., dissenting) (zoning laws do not result in an unconstitutional "taking" because "on the whole an individual who is harmed by one aspect of zoning will be benefited by another").

c. *The Thirteenth Amendment Challenge To Mandatory Pro Bono.*—Critics of mandatory pro bono have sometimes argued that the requirement amounts to “involuntary servitude,” in violation of the thirteenth amendment. This argument has “generally, though not universally, been rejected by the courts.”²⁵³

It is surprising—surprising is a polite word—to hear some of the most wealthy, unregulated, and successful entrepreneurs in the modern economic world invoke the amendment that abolished slavery to justify their refusal to provide a little legal help to those, who in today’s society, are most like the freed slaves.

A condition of “servitude” exists only when an individual is subjected to physical restraint or the threat of legal confinement as an alternative to coerced service. Thus, the thirteenth amendment does not prohibit even coerced work if the worker has a choice between continued service or freedom, even if the “master” has led the individual to believe that his choice may entail exceedingly harmful consequences. In short, the inability to avoid continued service is the essential ingredient of involuntary servitude. “In the case of lawyers, then, the imposition of professional discipline, even to the point of disbarment, for refusal to accept an assignment, appears to pass muster under the thirteenth amendment.”²⁵⁴

253. See, e.g., *Moultrie*, 725 F.2d at 705 (“the essential ingredient” of involuntary servitude is the “inability to avoid continued service;” a lawyer always may cease to practice law); *Williamson v. Vardeman*, 674 F.2d 1211 (8th Cir. 1982); *State ex rel. Stephan v. Smith*, 242 Kan. 336, 747 P.2d 816 (1987); *People v. Hutchinson*, 38 Mich. App. 138, 195 N.W.2d 787 (1972); *State ex rel. Scott v. Roper*, 688 S.W.2d 757 (Mo. 1985); *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966). However, in *Bedford v. Salt Lake County*, 22 Utah 2d 12, 447 P.2d 193 (1968), the court invalidated a statute providing for the uncompensated appointment of counsel to represent an alleged insane person in a proceeding for involuntary hospitalization. The court found that “[u]ntil the legislature provides a method by which a lawyer can be paid for compulsory services to an indigent person,” the statute will subject appointed counsel to involuntary servitude. *Id.* at 15, 447 P.2d at 195. In *Brooks v. Central Bank of Birmingham*, 29 Fair Empl. Prac. Cas. (BNA) 182 (N.D. Ala. 1982), *vacated*, 717 F.2d 1340 (11th Cir. 1983), the court held that § 706(f)(1) of the Civil Rights Act of 1964, which authorizes federal district courts to appoint counsel to represent Title VII litigants, violates the constitutional prohibition on involuntary servitude. The court rejected the appellants’ contention that the thirteenth amendment should be limited to chattel slavery. *Id.* at 184. The court reasoned that “[i]f the meaning of involuntary servitude were limited to the narrow categories appellants say it is, what would be the point in excluding from the operation of those words the forced labor of a convicted criminal?” *Id.* In the court’s view, the thirteenth amendment must have a “broader and far more humane meaning than appellants’ argument ascribes to it.” *Id.* The court concluded that “‘to decree that a man shall perform his contract of service, or be imprisoned for contempt of court should he refuse, is to subject him to involuntary servitude.’” *Id.* at 186 (quoting Stevens, *Involuntary Servitude by Injunction*, 6 CORNELL L.Q. 235, 245 (1921)).

254. *Smith*, 242 Kan. at 378, 747 P.2d at 847 (citation omitted).

d. The Equal Protection Challenge to Mandatory Pro Bono.—There is a rational basis for a mandatory pro bono requirement. There need be no greater justification. A mandatory pro bono requirement would neither abridge a fundamental right,²⁵⁵ nor be “suspect”; the legal profession hardly qualifies as a class whose members have been targets of historic discrimination or are politically powerless.²⁵⁶

Classifications in mandatory pro bono rules commonly are assailed on at least two grounds. First, opponents question why lawyers should be subject to special requirements when other professions—for example, doctors and plumbers—are not. A simple answer might be that there is a Medicaid system that, however imperfect, gives indigents minimal access to medical care. Plumbers do not have a monopoly that precludes others—friends, family, or inexpensive helpers—from fixing leaky pipes. A more complete answer is that the access to law that an appointed lawyer would provide has singular importance in a democratic society. At a minimum, it is not irrational for a government to so conclude.²⁵⁷

Second, opponents of a mandatory pro bono program argue that inevitably its burdens will fall disproportionately upon some subclasses of lawyers. This inequality, however, is not inevitable. All lawyers, litigators and nonlitigators, are capable of providing some help to the poor. A thoughtful mandatory pro bono program ought to include a menu of contributed services that allows, and conversely requires, every lawyer to participate. So conceived and administered, a mandatory pro bono program would not run afoul of the fourteenth amendment’s guarantee of equal protection.²⁵⁸

255. See *supra* text accompanying notes 226-254.

256. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 238 & n.2 (1982) (Powell, J., concurring) (explaining the Supreme Court’s treatment of certain classifications as “suspect”).

257. See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (holding that the fourteenth amendment “does not empower th[e] Court to second-guess state officials charged with . . . allocating limited public welfare among the myriad of potential recipients”); *McGowan v. Maryland*, 366 U.S. 420, 425 (1961) (holding that the fourteenth amendment “permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others”); see also *Williamson v. Vardeman*, 674 F.2d 1211 (8th Cir. 1982); *In re Meizlish*, 387 Mich. 228, 196 N.W.2d 129 (1972); *People v. Hutchinson*, 38 Mich. App. 138, 195 N.W.2d 787 (1972); *Daines v. Markoff*, 92 Nev. 582, 555 P.2d 490 (1976). But see *Smith*, 242 Kan. at 361, 747 P.2d at 836 (invalidating a mandatory pro bono requirement that imposed a significantly disproportionate burden on a small percentage of lawyers).

258. Maryland’s Attorney General, J. Joseph Curran, Jr., has developed a voluntary pro bono program in the Office of the Attorney General. That program includes litigators and nonlitigators who are paid to work full-time for the state. It harnesses the pro bono energies of lawyers who represent state agencies that touch the lives of the

5. “*The Government, not the Private Bar, has the Responsibility to Provide Legal Services to the Poor*” Argument.—This argument is half right and, to that extent, is seductive. It should be the duty of government—the people collectively—to provide legal services to the poor. In significant part, government exists to make²⁵⁹ and enforce²⁶⁰ laws. This basic duty derives from, and is as old as, the Social Compact. Laws usually are not self-enforcing; lawyers play a significant role in enforcing them. Government should accept and discharge the primary duty to provide lawyers to the poor so that the laws that it enacts to protect the poor are enforced. The civil law enforcement obligation inheres in the law-giving function.²⁶¹

However, the second part of the argument—that private attorneys have *no* obligation to provide pro bono legal help to the poor—does not logically follow from the valid premise that the duty to provide such help belongs primarily to the government. Historically, lawyers shared this duty with government. Indeed, they often acted as the informal partners of government when they represented the poor; in so doing, they helped government fulfill, not deny, its responsibility.²⁶²

This government-private partnership is as important today as it was in fifteenth century England. Government is *not* providing adequate legal help to the poor. The private bar’s resistance to

poor every day and, thus, are most likely to have conflicts of interests with indigent clients. Because it is the most difficult law office in which to institute a pro bono program, the Attorney General’s program demonstrates that the pro bono burden can be apportioned fairly throughout the bar. The participating assistant attorneys general take all necessary steps to separate their pro bono representation from office work. Assistants do their pro bono work on their own time. Cases are referred to the Office’s Pro Bono Coordinating Committee from the MVLS, the Community Law Center, Inc., and the House of Ruth. These organizations interview prospective clients to make sure they are financially eligible. The Committee, which consists of a Deputy Attorney General and seven assistants, screens the referred cases for any potential conflicts of interest. If there appears to be no conflict in a case, it is then sent to one of the volunteer lawyers. If a conflict arises, it is sent back to the referring organization.

The office sponsors training programs, gives seminars, and provides training materials to volunteer attorneys. All expenses for the program are paid by the Public Lawyers Legal Services Program, Inc., a non-profit corporation.

To minimize any potential conflict between an assistant’s responsibility to her official duties and her pro bono work, the volunteer is not asked to handle more than one case at a time. As of August 1989, approximately 125 of the 300 assistants at the Maryland Office of the Attorney General had volunteered to take cases.

259. See U.S. CONST. art. I.

260. See U.S. CONST. arts. II-III.

261. Indeed, it can be argued plausibly that government not only *should* provide legal help to the poor in civil cases, but that it *must* do so, at least in a significant number of civil cases. See *supra* text accompanying notes 180-191.

262. See *supra* text accompanying notes 116-136.

mandatory pro bono has not revealed a void that an embarrassed government has rushed to fill. If there is to be a significant increase in the amount of legal help that is provided to the poor, it will be because: (1) the private bar adds its resources to government's; and (2) in so doing, convinces government that *it* should do more. This partnership agreement should be negotiated with government as an explicit predicate to a mandatory pro bono program. Mandatory pro bono makes little sense as a substitute for government-sponsored legal services programs. It is justifiable if it adds resources to the indigent legal services delivery system. Its real potential, however, lies in using significant private resources to encourage government to provide significantly more help.²⁶³ To be an effective leader, the private bar must match its rhetoric with action, demanding reciprocal action from government.²⁶⁴

There is a moral tone to the argument that the private bar and government are partners (at least metaphorical partners), and *both* have responsibilities to the poor.²⁶⁵ But, like any partnership agreement, the reciprocal obligations in the "agreement" between the bar and government are grounded in self-interest.²⁶⁶

For its part, the bar obtains not only the right to regulate itself, which follows from government's recognition of the practice of law as a profession,²⁶⁷ but also government-sanctioned monopoly sta-

263. The Cardin Commission understood this. It successfully encouraged Maryland's Governor, William Donald Schaefer, to increase state funding for state legal services programs by indicating how the private bar also would do more to help the poor. See ACTION PLAN, *supra* note 50, at 34.

264. The Preamble and Preliminary Statement of the American Bar Association's Model Code of Professional Responsibility recognizes the primary role attorneys play in enforcing government's law. It states that "justice is based upon the rule of law" and that lawyers are "guardians of the law," thus "play[ing] a vital role in the preservation of society." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble and Preliminary Statement (1981).

265. For the moral argument, see D. LUBAN, *supra* note 190, at 248-49.

266. In thirty-seven jurisdictions, it is a misdemeanor for a nonlawyer to practice law ("practicing law" is construed to include a large number of activities that on the surface do not require legal training, such as assisting people in filling out do-it-yourself divorce forms); seven other jurisdictions have formalized the power of courts to cite unauthorized practitioners for contempt. By restricting the practice of law to members of the bar, of course, a professional monopoly is guaranteed and a higher-than-otherwise level of lawyers' fees is maintained.

Id. at 246-47.

267. "The very idea of a profession connotes the function of service, the notion that to some degree the professional is to subordinate his interests to the interests to those in need of his services." See Pepper, *supra* note 235, at 615. Among the seven characteristics of a profession suggested by Pepper are that the "profession holds a monopoly on a service frequently needed by individuals, and as a result wields significant economic

tus. That sanction immunizes the bar's monopoly status from anti-trust laws,²⁶⁸ and grants a significant anticompetitive economic advantage to lawyers. One consequence of this monopoly status is that poor people cannot call upon law students, paralegals, or more intelligent and articulate friends to help them draft pleadings or make arguments in court.²⁶⁹

In return for recognizing the practice of law as a profession and granting it monopoly status and the power to regulate itself, government obtains the civilian police force that is necessary to discharge *its* civil law enforcement duty. It is "private" lawyers who enforce government's civil laws in government's institutions before government's agents. As their contribution to the partnership, lawyers exercise government's delegated sovereignty. Because the law enforcement delegation is made by a constitutional democracy that includes the promise of equal justice within its positive law, the delegation to the bar includes not only the power and responsibility to enforce laws, but also the duty to enforce them equally.²⁷⁰ Thus, it inevitably includes a mandatory pro bono requirement.²⁷¹

In recommending a pro bono requirement of forty hours every two years, the New York Committee to Improve the Availability of

power" and that it "is largely self-regulated in determining and administering the qualifications for membership and in policing professional activities." *Id.*

268. See *Bates v. State Bar*, 433 U.S. 350, 363 (1977) (holding that the action of a state Supreme Court acting "legislatively" in regulating a state bar is exempt from the anti-trust laws); see also *Hoover v. Ronwin*, 466 U.S. 558 (1984).

269. In *Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective*, *supra* note 21, Garth describes the historic self-interest that gave rise to the rigid and over-inclusive unauthorized practice of law rules:

In 1938, participating in a symposium condemning "the unauthorized practice of law," Carl Llewellyn asked a somewhat embarrassing question: "Who is worrying about unauthorized practice, and why? Is it the public, complaining of quacks? Is it the profession concerned about the public welfare? Or who and why?" As Llewellyn and other commentators have recognized, the lack of paying work in the depression to a large extent explained the bar's sensitivity to the problem of unauthorized practice, or competition by nonlawyers. Neither public demand nor concern about public welfare adequately justified the sudden emphasis on eliminating the unauthorized practice of law. It was primarily the profession's issue—not that of the general public.

Garth, *supra* note 211, at 650 (footnotes omitted).

270. See, e.g., U.S. CONST. amend. XIV, § 1 ("nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

271. See D. LUBAN, *supra* note 190, at 285-87; see also H. DRINKER, *LEGAL ETHICS* 59 (1953) ("In recognition of these exclusive privileges, the lawyer is charged with certain obligations to the public [including the duty] to represent without charge those unable to pay.").

Legal Services implicitly recognized the significance of this basic bargain between government and the bar. It said:

This [mandatory pro bono] duty flows from the lawyer's role as a professional and an officer of the court and arises particularly from the lawyer's possession of unique training and skills and of the exclusive, publicly granted franchise to practice law. Indeed, no other group is qualified or lawfully entitled to fill the need for legal services.²⁷²

Recognition of a pro bono duty in the delegation of law enforcement sovereignty that is the quid pro quo for private advantage is not a new idea. King James understood it when he deputized the Scottish advocate as an "advocatus pauperum." The patrician senators of Rome—the *patroni*—understood it when they represented their allegiants in court. So did the Church's ecclesiastical lawyers, the English Serjeants, and the private lawyers who were appointed without fee to represent the poor in England pursuant to 11 Hen. 7, ch. 12. Many lawyers today understand and accept this duty, born in reciprocity. We all should.²⁷³

272. PRELIMINARY REPORT OF NEW YORK, *supra* note 194, at 21.

273. In many European countries, the historic pro bono duty is embodied in contemporary legal aid programs. In Italy, "legal aid (*patrocinio gratuito*) is declared 'un officio onorifico ed obbligatorio' of the legal profession, meaning that lawyers must act for the poor if called upon to do so but receive no fees unless the client prevails and costs are recovered from his opponent." Cappelletti & Gordley, *supra* note 94, at 364. In France, as in Italy, "lawyers are assigned to the cases of indigents who qualify for aid and are neither compensated for their services nor allowed, under normal conditions, to refuse an assignment." *Id.* at 368. In Germany, private attorneys who handle legal aid cases are compensated at a level "well below that normal litigation." *Id.* at 371. Appointment of an attorney "rests within the discretion of the judge." *Id.* at 372. As the result of the Legal Aid and Advice Act of 1949, indigents in England may choose their lawyers "from a panel of practitioners who have announced their willingness to accept such cases." *Id.* at 374. The participating attorneys are paid substantial fees, although below market rate. *Id.* "Aid is available in courts of limited jurisdiction on the same basis as in other courts, but it is generally not available in proceedings before special tribunals." *Id.* In addition, "legal advice is available under the program from solicitors chosen freely by the applicant." *Id.*

To a greater or lesser extent, the European legal aid programs rely heavily upon the volunteer efforts of private attorneys. There is much that is wrong with such substantial reliance upon the private bar to deliver a service that the government should be obligated to provide in significant part. *See, e.g., id.* at 364-76. There is just as much wrong with relying almost exclusively on the beneficence of government (that often are defendants in legal aid lawsuits) to provide legal help to the poor. In view of our national resources,

the funds spent on the legal services program [in this country] can only be regarded as trivial. As a result, case loads have become vastly disproportionate to those of the private practitioner and have raised concern over the quality of services provided. Many communities have no office at all, and even where

CONCLUSION

Let us return to Baltimore City's Rent Court. It is five years after the adoption of the mandatory pro bono rule in Maryland. There still is a "white slip" line, but there now is a lawyer who counsels each person in that line about possible defenses to eviction that person might have and the impact that accepting a put-out order might have on the future assertion of rights.²⁷⁴

Before court convenes, the trial judge advises the *pro se* landlords and tenants in the crowded courtroom that, as an alternative to trial that day, the *pro se* parties can talk to a settlement officer who will attempt to assist the parties in reaching a mutually acceptable settlement of their dispute.²⁷⁵

Yet another attorney, who is supervising a paralegal, law student, and trained lay advocate, interviews eligible clients (tenants and landlords) who wish to either present their case to the settlement officer or try it in court. The interviewer advises each of the interested clients whether they have meritorious claims and defenses. If they do, the attorney either advises them about the settlement process or represents them in court for the purpose of obtaining a postponement to investigate more fully, and present, their claims or defenses. The attorney, or one of her trained paralegals, law students, or lay advocates (working under her supervision), will represent the client in court when the case eventually is heard. The above attorneys and advocates are a mixture of private and public attorneys.

The private attorneys, whether they be advisors, supervisors, settlement officers or litigators, perform their obligations as part of the mandatory pro bono program. Their time requirement is fifty hours per year; the time they spend attaining competency by participating in a continuing legal education program (or other training program) is counted towards the time requirement. The Maryland Institute for The Continuing Professional Education of Lawyers (MICPEL) sponsors the training on a pro bono basis, and the lawyers who teach in the MICPEL program count those hours toward their pro bono requirements. When any of the participants in the

offices are available lawyers have been forced to turn away numbers of potential clients simply because of a shortage of time.

Id. at 379. Thus, the need for a mandatory pro bono rule remains great.

274. See *supra* note 49.

275. See Tidus, *Barristers' Pro Bono Projects/A Little of Your Time Goes a Long Way*, L.A. LAWYER, Sept. 1986, at 60-61 (describing a Landlord-Tenant Settlement Officer Program in Los Angeles that is staffed by volunteer attorneys).

mandatory pro bono program exceeds his/her fifty hours per year, for example, to conclude a case, the excess hours are either credited towards the future pro bono requirement or reimbursed at the rate of thirty dollars per hour.²⁷⁶

The participating public attorneys are newly funded by the state as the result of a negotiated grant that is intended to “match” the extensive private contributions of legal resources. The Maryland Volunteer Lawyers Service, with an additional grant from the Maryland Legal Services Corporation, administers the mandatory pro bono program. It refers indigent clients to participating attorneys, accepts the self-reports filed by the participating attorneys that indicate how much time they have spent on a case or matter, and certifies that attorneys have satisfied their pro bono requirements.

Participating attorneys are given a wide range of choices that include providing advice and counsel to indigent clients (individually or through groups), teaching interested indigent clients how to represent themselves, interviewing clients, preparing cases for trials or settlement proceedings, or representing the clients before the court or settlement officer.

The Scottish *advocatus pauperum*, who represented the feudal tenants of the Abbey of Arbroath, would be proud!

276. As a result of negotiations with the state, the state has expanded its Judicare program to bear these costs, as well as litigation expenses of the indigent clients and the cost of malpractice insurance for participating attorneys whose malpractice policies do not cover them.