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NOTES

THE INDIGENT'S "RIGHT" TO COUNSEL IN CIVIL CASES

I. INTRODUCTION

The sixth amendment to the United States Constitution expressly provides a right to counsel in criminal cases, but is silent as to any similar right in civil cases.¹ The failure of the courts to recognize a right to counsel of an indigent in a civil action has led to considerable controversy. There has been, however, a noticeable reluctance to discuss the rights of the appointed counsel, if any, to compensation for his services.

This Note will examine the continuing debate concerning the indigent's right to counsel in civil actions as well as the oft-neglected rights of the appointed counsel. In addition, two inherent practical problems involved with court appointed counsel will be considered: the source from which a court may seek to appoint an attorney and the source of funds from which any compensation awarded by the courts or by statute may be derived.

II. THE INCREASING SCOPE OF RIGHT TO COUNSEL IN CRIMINAL CASES

At present, the Supreme Court recognizes no express right to counsel in civil cases. Whether the Supreme Court will eventually hold that an indigent civil litigant is, under some circumstances, entitled as a matter of right to have counsel appointed by the court is at this point conjectural. No discussion of the issue is meaningful, however, without a review of the scope of the right to counsel in criminal cases.

The Supreme Court in *Betts v. Brady*² established the rule that "appointment of counsel is not a fundamental right, essential to a fair trial."³ Some twenty-one years later, however, this principle was reversed in the landmark decision of *Gideon v. Wainwright*.⁴ The Court in *Gideon* held that the right to counsel in felony cases was a "fundamental" right.⁵ It is apparent from the

1. The sixth amendment reads in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." U.S. Const. amend. VI.

What the words "criminal prosecutions" include is questionable. That is, there may be certain actions which appear criminal in nature, but which, for purposes of constitutional right to counsel provisions, are deemed civil. The converse is also true. See, e.g., *In re Gault*, 387 U.S. 1, 17 (1967) (delinquency proceeding); *Powell v. State*, 19 Ariz. App. 377, 507 P.2d 989 (2d Div. 1973) (habeas corpus proceeding not a criminal action); *Honore v. Washington State Bd. of Prison Terms & Paroles*, 77 Wash. 2d 660, 676-77, 466 P.2d 485, 494-95 (1970) (same).

2. 316 U.S. 455 (1942), overruled by *Gideon v. Wainwright*, 372 U.S. 335 (1963).

3. 316 U.S. at 471.

4. 372 U.S. 335 (1963). Defendant Gideon was charged with a felony, but was denied appointment of counsel under a Florida rule calling for such appointment only when the defendant is charged with a capital offense. *Id.* at 337.

5. *Id.* at 342. Though the Court in *Gideon* was relying on the "fundamental" right theory, it

opinion, however, that the Court never intended to restrict the right to counsel to felony cases alone.⁶

The most significant development in this area since *Gideon* is found in *Argersinger v. Hamlin*,⁷ where the Court expressly extended the right to appointed counsel to misdemeanor cases.⁸ The Court, however, did not rely on the "fundamental" right theory it had enunciated in *Gideon*. Instead, the Court discussed the assistance of counsel in terms of the right to a fair trial.⁹ This approach, with its inherent concept of fairness, is of course much less restrictive than the "fundamental" right standard and lends itself much more readily to application in civil cases.

should be noted that in its decision, the Court declined to draw any arbitrary distinction between capital and non-capital criminal offenses. As will be seen, the Court has consistently avoided drawing any such lines in right to counsel cases. See note 6 *infra*.

Courts, including the Supreme Court, have applied the right to appointed counsel requirements in situations which the average layman might consider outside the criminal arena, but which are viewed as otherwise by the judiciary. In *In re Gault*, 387 U.S. 1 (1967), the Court was faced with a delinquency proceeding. Though clearly not in the nature of what is usually deemed criminal, the Court, on the theory that a proceeding to determine delinquency could result in certain curtailments of freedom by commitment to an institution, found that due process required both the child and the parents to be notified and the child to be represented by counsel, appointed if necessary. *Id.* at 41.

While freedom is curtailed in these delinquency proceedings by commitment in an institution, it is submitted that freedom can also be curtailed in other ways, both economically and socially, without actual physical restraint. See Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 Iowa L. Rev. 223, 248 (1970).

6. See *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972). Since this pronouncement in *Gideon*, there have been cases dealing with specific chargeable offenses in which the Court has indicated the scope of the *Gideon* rule. See, e.g., *Gagnon v. Scarpelli*, 411 U.S. 778, 790-91 (1973) (no constitutional requirement to appoint counsel for indigents in every probation or parole revocation case); *In re Gault*, 387 U.S. 1, 42 (1967) (requirement of appointed counsel in a proceeding to determine delinquency).

7. 407 U.S. 25 (1972). In this case, no felony charge was involved; the defendant was tried for an offense punishable by a \$1000 fine, imprisonment up to six months, or both. *Id.* at 26. The state court had decided that the right to counsel applied "only when the offense carries a possible penalty of more than six months imprisonment." *State ex rel. Argersinger v. Hamlin*, 236 So. 2d 442, 444 (Fla. 1970), *rev'd*, 407 U.S. 25 (1972).

8. 407 U.S. at 37. The offense charged was clearly a misdemeanor. The Court restricted its decision to those misdemeanors "that end up in the actual deprivation of a person's liberty." *Id.* at 40. This does not mean, however, that a blanket rule will never or should never be announced.

A survey of states taken in 1970 demonstrated that many states have themselves been moving along the lines begun by the Court in *Gideon*, even without the impetus of Supreme Court declarations. See Comment, *Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States*, 3 Creighton L. Rev. 103 (1970). As of 1970, some twelve states provided for appointment of counsel to indigents who were accused of serious misdemeanor crimes. *Id.* at 119-24. Nineteen states so provided in most misdemeanor cases. *Id.* at 124-33. Overall, more than a majority of states had extended the *Gideon* rule to offenses less serious than felonies. *Id.* at 134. One state, California, required the appointment of counsel for traffic violations. *Blake v. Municipal Court*, 242 Cal. App. 2d 731, 51 Cal. Rptr. 771 (1st Dist. 1966).

9. 407 U.S. at 31, 33.

In *Douglas v. California*,¹⁰ the Supreme Court held that the appointment of counsel for an indigent criminal defendant on his first appeal as of right is constitutionally required.¹¹ Recently, in *Ross v. Moffitt*,¹² the Supreme Court again discussed the rights of an indigent criminal defendant to appointed counsel in terms of fairness. The Court held that an indigent criminal defendant is not entitled to appointed counsel for purposes of obtaining discretionary appellate review or for petitioning for certiorari to the Supreme Court.¹³ The Court thus refused to extend its *Douglas* decision.¹⁴ In determining what is fair, the *Ross* Court drew a distinction between the actual trial of a criminal defendant and any subsequent discretionary appeal taken by him. The Court reasoned that at the trial stage, the defendant is being "haled into court," while at the appellate level, it is the defendant himself who initiates the discretionary appellate proceeding to which the state has given no one an absolute right.¹⁵ Accordingly, a state is not acting unfairly in failing to appoint counsel in his discretionary appeal to the higher state court. Rather, there is only unfairness when the state has singled out the indigent and, solely because of poverty, denied him meaningful access to the appellate system to which he has a statutory right.¹⁶

The actual scope of the *Ross* holding is at present uncertain. Although the Court sought to limit its discussion to the issue of right to appointed counsel in obtaining a discretionary appellate review, its reasoning leads one to the conclusion that even if a defendant succeeds in obtaining review, he would still not be entitled to appointed counsel at the actual appellate proceeding.¹⁷

10. 372 U.S. 353 (1963).

11. *Id.* at 356-57. In *Douglas*, the Court held unconstitutional a state requirement for appointment of counsel on appeal only when the appellate court had determined that counsel would be of assistance either to the defendant or the court. The operation of this requirement was found to discriminate unjustly between the indigent and the affluent. *Id.* at 356.

12. 417 U.S. 600 (1974).

13. *Id.* at 617-19.

14. It was because of the decision in *Douglas* that the Court chose to discuss both due process and equal protection in the *Ross* case. *Id.* at 608-09. As noted, due process "emphasizes fairness between the State and the individual . . . regardless of how other individuals in the same situation may be treated." *Id.* at 609. On the other hand, equal protection "emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." *Id.*; see Palmer, Implementing the Obligation of Advocacy in Review of Criminal Convictions, 65 J. Crim. L. & C. 267, 282 (1974).

15. 417 U.S. at 610-11.

16. *Id.* at 611.

17. Such a conclusion is supported by the interpretation given to the state's statutory provision calling for appointment of counsel. See N.C. Gen. Stat. § 7A-451(b)(6) (Cum. Supp. 1974). The section as it now reads is an amended version of the one on which the Supreme Court commented in *Ross*. The prior section had been construed as excluding appointment of counsel where discretionary or permissive appeals were involved. *Moffitt v. Ross*, 483 F.2d 650, 652 (4th Cir. 1973), rev'd, 417 U.S. 600 (1974). Since the Supreme Court noted this interpretation and seemingly approved it, it is a logical inference that counsel would not be required to be appointed at the actual proceeding after the discretionary appeal has been granted. See 417 U.S. at 614 & n.11. It is recognized, however, that the new state statutory provision may at some time in the future be given a different interpretation.

The Court noted, and deemed somewhat significant, the fact that the purposes of the discretionary appeal involved in *Ross* were of an unusual nature, as the reason for such review was not to decide whether there had been a proper adjudication of guilt at the lower court level.¹⁸ As such, it may be argued that the *Ross* decision will be limited to its peculiar facts and circumstances. The distinction found by the Court between the trial stage and the discretionary appellate stage may become dubious when the Court is faced with a case involving the usual appellate procedures, different from those presented in *Ross*.

In *Douglas*, Justice Harlan, in dissent, stated that he failed to see a difference between an initial appeal as a matter of right and any other subsequent appellate or review procedures.¹⁹ As he viewed it,

the requirements of fair procedure are [not] exhausted once an indigent has been given one appellate review. . . . Nor can it well be suggested that having appointed counsel is more necessary to the fair administration of justice in an initial appeal taken as a matter of right . . . than in a petition asking a higher appellate court to exercise its discretion to consider what may be a substantial constitutional claim.²⁰

18. Although the appeal is labeled as discretionary, the type of appeal presented in *Ross* is actually regulated by a state statute which provides that review is to be taken by the state's highest court when that court determines that "(1) The subject matter of the appeal has significant public interest, or (2) The cause involves legal principles of major significance to the jurisprudence of the State, or (3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court." N.C. Gen. Stat. § 7A-31(c) (Repl. Vol. 1969). The purposes served by such an appeal are clearly different from those of the ordinary criminal appellate proceeding.

19. 372 U.S. at 366 (Harlan, J., dissenting); see Day, Coming: The Right to Have Assistance of Counsel at All Appellate Stages, 52 A.B.A.J. 135 (1966).

20. 372 U.S. at 366 (Harlan, J., dissenting) (citation omitted). Justice Harlan's discussion raises another question which is relevant in an attempt to define the potential scope of the *Ross* holding. The Supreme Court in *Ross* spoke in terms of the purpose of the discretionary appeal in North Carolina and reached the conclusion that there was no necessity for appointed counsel in obtaining such an appeal. See 417 U.S. at 615. Similarly, when an individual petitions for certiorari to the Supreme Court, the first issue raised is whether certiorari should be granted so as to allow such petitioner to appear before the Court for review. The Court has long denied the appointment of counsel to individuals merely for purposes of petitioning for certiorari. *Id.* at 617; see *Oppenheimer v. California*, 374 U.S. 819 (1963) (mem.) (motion for appointment of counsel denied); *Drumm v. California*, 373 U.S. 947 (1963) (mem.) (same); 27 Vand. L. Rev. 365, 366 (1974).

However, if one accepts the suggestion that *Ross* may also be seen as denying the right to counsel at the appellate proceeding after the court has granted the appeal, then the truly analogous situation would be the presentation of argument before the Supreme Court after the grant of certiorari (as opposed to the petition for certiorari). It is the common practice of the Supreme Court to appoint counsel to represent an indigent when his case is to be briefed and argued before the Court. Boskey, *The Right to Counsel in Appellate Proceedings*, 45 Minn. L. Rev. 783, 797 (1961).

Some would like to see the Court change its practice. See *id.* It has been argued that "[c]ertiorari practice constitutes a highly specialized aspect of appellate work." *Id.* In making the decision to petition for certiorari and in understanding the factors which the Supreme Court looks for in such a petition, the aid of a trained attorney is essential. *Id.*

In this statement, Justice Harlan has at least implied that once an appellate process has been invoked in a criminal case and the defendant is before the court for actual review, the preservation of the integrity of the judicial system may require court appointed counsel for an indigent appellant, and that this consideration is at the heart of any fairness concept. If the *Ross* case is seen as denying the right to counsel at the appellate proceeding after discretionary review has been granted, then the Court's rationale in *Ross* seems almost irrelevant. The inconsistency lies in the recognition that once an appellate court has agreed to accept an appeal—be it as a matter of right or of discretion—there would appear to be no practical distinction in the conduct of the two respective appellate proceedings.

The problem of right to counsel in discretionary criminal appeal cases is closely analogous to the right to counsel problem in civil cases since there is no absolute right to initiate civil litigation, but just an opportunity. Obviously, if the Court continues to follow the rationale of *Ross* in determining what is fair, when there is in fact no legal right, but just an opportunity afforded a litigant to appeal, no rationale upon which a civil right to counsel could be based will be logically forthcoming from this line of cases.²¹

III. APPOINTED COUNSEL IN CIVIL CASES

A. *The "Right" to Counsel in Civil Cases*

Rights of civil litigants have always taken a subordinate position to rights of criminal defendants, at least in the constitutional sense. This of course can be attributed to the presence of the sixth amendment in the Bill of Rights.²² The courts have, however, begun to recognize that in some narrow circumstances civil litigants do in fact have a right to unfettered access to the judicial process and a right to the services of an attorney after they gain access.

In *Boddie v. Connecticut*,²³ the Supreme Court determined that a state statute requiring a fee to be paid by all persons before any civil action could be brought in the courts was a violation of due process, as applied to an indigent seeking a divorce.²⁴ The state could not deny, solely on the ground of poverty, access to its court system to individuals seeking certain types of

21. In *State ex rel. Old Underwriters, Inc. v. Bell*, 244 Ind. 701, 195 N.E.2d 464 (1964), the court stated that due process was not always violated merely by the absence of counsel to represent a criminal defendant. Relying on a test of fairness rather than searching for an underlying "fundamental" right, the court noted that a due process violation will be deemed to exist only when the assistance of legal counsel is essential to assure the conduct of a fair hearing. *Id.* at 704-05, 195 N.E.2d at 466. Use of such broad language, however, creates almost as many problems as it resolves, since it raises the question of what represents a fair hearing.

22. See note 1 *supra* and accompanying text.

23. 401 U.S. 371 (1971).

24. *Id.* at 380-83. The Court, in finding the fee requirement to be a denial of due process, noted that the only way a marriage can be dissolved is by resort to the courts. *Id.* at 376. This exclusivity of remedy was of primary importance. See *id.* at 376-77; cf. *United States v. Kras*, 409 U.S. 434, 445-46 (1973).

relief.²⁵ Although *Boddie* was an access case which did not raise the issue of the indigent's right to counsel, it does contain language that at least relates to such a right. Since "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, [a person forced to litigate] be given a meaningful opportunity to be heard,"²⁶ then that opportunity arguably requires the aid of counsel, appointed if necessary.

Another leading access case is *United States v. Kras*,²⁷ wherein the Supreme Court apparently limited *Boddie*, upholding a federal statute imposing a fee as a prerequisite to a petition for a bankruptcy proceeding.²⁸ In contrast to the divorce in *Boddie*, judicial proceedings were not considered to be the only methods open to the debtor seeking to adjust his legal obligations to his creditors.²⁹

It is not clear, however, from the Court's opinions in *Boddie* and *Kras* whether the essential difference between them is that marriage, and hence divorce, is a "fundamental" right, while a discharge in bankruptcy is not, or whether the distinction is that there is no other way to dissolve a marriage than through the courts, while with bankruptcy there is an alternative, albeit a remote one at times. *Boddie* involved both a "fundamental" right with judicial relief being the sole remedy possible. *Kras*, on the other hand, in the Court's view involved neither. It is thus unclear as to which of the two factors (or both) is the key to finding that access may or may not be conditioned on the payment of a fee.³⁰ The precedential value of both *Boddie* and *Kras* to the question of the right to appointed counsel in civil cases depends upon which interpretation is correct.³¹ While the Court has to date recognized only

25. See 401 U.S. at 383.

26. *Id.* at 377; see *Bartlett v. Kitchin*, 76 Misc. 2d 1087, 1090, 352 N.Y.S.2d 110, 114 (Sup. Ct. 1973).

27. 409 U.S. 434 (1973).

28. *Id.* at 446. The Court found that the bankrupt's desire to begin anew was not on the same constitutional level as the desire to dissolve a marriage as in *Boddie*. *Id.* at 445.

29. *Id.* at 445-46. For a discussion of possible alternatives to judicial relief see *id.* The Court found that there was no constitutional right to obtain a discharge in bankruptcy, and that such a discharge was not a "fundamental" right. *Id.* at 446. Since there was a rational basis for the fee requirement, due process was not violated. *Id.* at 447-49.

30. The uncertainty is not resolved by the Court's decision in *Ortwein v. Schwab*, 410 U.S. 656 (1973) (*per curiam*). There, indigent welfare recipients claimed that requiring them to pay a fee to gain access to the courts to appeal an adverse welfare agency decision was a violation of due process and equal protection. In finding no such violation, the Court deemed *Kras* to be controlling. *Id.* at 659. Again, however, as in *Kras*, neither of the two considerations were present. The interest in obtaining increased welfare payments was not of a "fundamental" nature. See *id.* Furthermore, the indigents involved had been given adequate evidentiary hearings through which they might be able to seek relief. Thus, resort to the courts was not the sole remedy available. *Id.* at 659-60.

31. The ultimate resolution actually may lie in when the Court chooses to apply either the compelling state interest test or the rational basis test.

Where there is a "fundamental" right involved, a state may infringe upon it only if there is a compelling state interest to do so. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Supreme Court gave broad application to this test. There, the state had made a classification as to welfare

a limited number of "fundamental" rights,³² a right arguably need not be "fundamental" in order for access to the courts to be the sole effective mode of obtaining a desired remedy.

Boddie points out the extreme plight that the indigent would confront were he denied access to the courts on the basis of his inability to pay certain fees.³³ This plight can be analogized to the one endured by an indigent appearing before a court without the aid of counsel.

There are at present two situations in which courts have intimated that the services of an attorney for the indigent civil litigant may be constitutionally required: child custody cases and civil cases in which the privilege against self-incrimination is or may be invoked.

*Danforth v. State Department of Health & Welfare*³⁴ presented the situation of indigent parents seeking to regain custody of their child from a state welfare department.³⁵ It was held that in such a situation appointment of

recipients by imposing a one year residence requirement. The Court found that the classification concerned a "fundamental" right, namely interstate movement. *Id.* at 638; see B. Schwartz, *Constitutional Law* 291-92 (1972).

When a "fundamental" right is not in issue, if the Court finds a rational basis for the classification, then neither equal protection nor due process is violated. See, e.g., *Graham v. Richardson*, 403 U.S. 365, 371 (1971); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961); *Lindsay v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

However, it may be argued that the compelling state interest test has broader significance than its simple application to "fundamental" rights. When a "fundamental" right is not in issue, but relief to the individual from his specific situation is available for all practical purposes only by resort to the judicial system, then if the state or federal government should establish a classification, for example between affluence and indigence, by imposing certain filing fees and other costs, the classification could be deemed to require a compelling governmental interest, since relief would be denied the indigent, but accorded to the affluent. Cf. B. Schwartz, *supra* at 292.

The main drawback to such an argument is that as yet, the Supreme Court has not recognized wealth to be a suspect classification. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). In *San Antonio*, the Court noted that "wealth discrimination alone [did not] provide an adequate basis for invoking strict scrutiny." *Id.* at 29. However, it may be possible that where the additional factor of the necessity of resort to the judicial system for relief is present, the classification based on wealth will require a compelling state interest test. For a discussion of the potential future scope of the law as it relates to the indigent's access to the judicial system see Comment, *The Right of Access to Civil Courts by Indigents: A Prognosis*, 24 *Am. U.L. Rev.* 129 (1974).

32. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (fundamental right of interstate movement and travel); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966) (fundamental right to vote); *Aptheker v. Secretary of State*, 378 U.S. 500, 517 (1964) (fundamental right to travel); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (fundamental rights of marriage and procreation). Compare *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (fundamental right to education) with *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 30-31 (1973) (no fundamental right to education found, but case resolved on other grounds).

33. See 401 U.S. 371, 376-77 (1971).

34. 303 A.2d 794 (Me. 1973).

35. *Id.* at 795. In such a case, the welfare department has inevitably gained custody of the child pursuant to statutory authorization. E.g., *Me. Rev. Stat. Ann. tit. 22, § 3792 (Supp. 1974)*. The validity of such statutes is not here in question.

counsel is essential to satisfy due process.³⁶ Beginning within the framework that the parents' natural right to custody of their children involves constitutional overtones,³⁷ the court found due process to be applicable regardless of criminal-civil distinctions that may be made on the basis of the sixth amendment right to counsel in criminal cases.³⁸ What is involved in the first instance is *governmental interference*. That is, in the custody hearing, the full force of the state is being used against the parents. Confronted with this, the average parent-layman cannot effectively protect his interests in his child.³⁹ In addition, the mere fact that a parent is not threatened by deprivation of liberty does not mean that the parent is not to be subject to severe punishment. According to this court, the loss of custody of a child can easily be viewed as a punishment more severe than that of imprisonment.⁴⁰ Finally, the court was wary of the possibility that at such a hearing, the parent is likely to make statements tending to be self-incriminatory. The result might be criminal prosecution.⁴¹

This final consideration influenced the Supreme Court recently in *Maness v. Meyers*,⁴² which, although not dealing directly with the issue of appointed counsel, has raised the question of whether the privilege against self-incrimination afforded by the fifth amendment may mandate appointment of counsel in certain civil litigation. In that case, a city attorney pursuant to local statute⁴³ applied for an injunction to prevent the distribution of obscene publications. The injunction also ordered the alleged distributor to appear at a civil hearing and subpoenaed the publications sought to be restrained.⁴⁴ On the advice of his attorney, the distributor refused to produce the alleged obscene materials on the ground that to do so created a substantial risk of self-incrimination with possible criminal prosecution.⁴⁵ This position was advanced despite the fact that the city attorney stated that the hearing involved no attempt to acquire evidence for future criminal prosecution, and therefore none of the subpoenaed materials could or would be incriminating.⁴⁶ Because he advised his client to refuse to produce the materials

36. 303 A.2d at 801.

37. *Id.* at 796-97.

38. *Id.* at 799-800; cf. Botein, Appointed Counsel for the Indigent Civil Defendant: A Constitutional Right Without a Judicial Remedy?, 36 Brooklyn L. Rev. 368, 369-70 (1970); Goodpaster, The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts, 56 Iowa L. Rev. 223, 248 (1970).

39. See 303 A.2d at 799.

40. *Id.* at 800.

41. *Id.* at 799-800. It is submitted that this should be a prime consideration in any decision on the right to appointed counsel. Even if no criminal sanctions are involved in a particular proceeding, the potential for criminal prosecution may arise unless protection of counsel is afforded, and there should be no hesitation in providing such assistance.

42. 95 S. Ct. 584 (1975).

43. Law of June 14, 1971, ch. 887, § 3, [1971] Tex. Laws 2725 (repealed 1973). Compare Tex. Rev. Civ. Stat. art. 4667(a)(3) (Supp. 1974).

44. See 95 S. Ct. at 587.

45. *Id.* at 587-88.

46. *Id.* at 588. It appears, however, as petitioner noted, that the mere representation by the

subpoenaed, the counsel for the distributor was held in contempt of court.⁴⁷

The Supreme Court decided the case on the narrow issue of "whether a lawyer may be held in contempt for advising his client, during the trial of a civil case, to refuse to produce material demanded by a subpoena *duces tecum* when the lawyer believes in good faith the material may tend to incriminate his client."⁴⁸ The Court's decision that the attorney was not in contempt of court has application well beyond the scope of these restrictive words, since if an attorney may be held in contempt of court in a civil action merely for advising his client, then the court is effectively denying such client the right to advice of counsel.

The fifth amendment privilege against self-incrimination has been broadly construed. According to the Court, its purpose is to ensure that a person will not be forced to produce evidence that at some future time might be used in a criminal prosecution against him.⁴⁹ As such, it is not relevant that the refusal to give evidence has occurred in a civil rather than a criminal matter; the privilege has application to any proceeding, whether "civil or criminal, administrative or judicial, investigatory or adjudicatory."⁵⁰ Moreover, it is irrelevant that the evidence sought to be produced may not lead directly to criminal prosecution. The Court indicated that the privilege operates just as strongly to protect against evidence that supplies a "link in the chain of evidence" from which prosecution might follow.⁵¹ It is sufficient that the individual involved entertains a reasonable belief that the information he is asked to supply could be used in a future criminal action against him.⁵² From this it is clear that in *Maness* the Court was looking not to the nature of the immediate proceeding, but to whether the proceeding involved circumstances which could lead to future prosecution, thereby necessitating advice of counsel in the immediate proceeding. In light of these principles, the Court found that *Maness*, the attorney, could not be held for contempt for advising his client of the privilege against self-incrimination.⁵³ This result itself certainly does not dictate a conclusion that the Court has opened the door to an absolute right of a civil litigant to appointed counsel, but it arguably indicates at least one instance where constitutional rights may be violated by the failure to appoint counsel in civil litigation.⁵⁴

city attorney is not a guarantee that no criminal prosecution would result. The assertion is binding only on the party making it, not on others who might later choose to prosecute. See *id.*

47. *Id.* at 589. It should be noted in the interest of clarity that the attorney involved, *Maness*, acted in good faith throughout the entire episode. Moreover, the record revealed that *Maness* had advised his client of the privilege against self-incrimination in the fifth amendment. He had not expressly instructed his client not to produce the publication involved. *Id.* at 590.

48. *Id.* at 591.

49. *Id.* at 592.

50. *Kastigar v. United States*, 406 U.S. 441, 444 (1972).

51. 95 S. Ct. at 592.

52. *Id.*

53. *Id.* at 594-95.

54. *Id.* at 595. The *Maness* decision may, however, have far-reaching effects. The privilege against self-incrimination is of a very technical nature. The average layman is not able, nor should he be expected, to understand fully the scope or effects of the privilege. The Court, in

Maness v. Meyers was a unanimous decision.⁵⁵ In a concurring opinion,⁵⁶ Justice Stewart stated his interpretation of the Court's decision:

The Court today holds that the constitutional privilege against compulsory self-incrimination embraces the right of a testifying party to the unfettered advice of counsel in a civil proceeding.

. . . The premise underlying the conclusion . . . must be that there is a constitutional right . . . to some advice of counsel The Court's rationale thus inexorably implies that counsel must be appointed for any indigent witness, whether or not he is a party, in any proceeding in which his testimony can be compelled.⁵⁷

The *Maness* case represents an important development in the law of the right to counsel in civil litigation, since it recognized implicitly that the grounding of the requirement of appointed counsel solely on the nature of the litigation in issue (civil as opposed to criminal) is fallacious. In *Maness*, the Court looked to the type of issues involved and whether such issues might potentially lead to a violation or inadvertent waiver of a constitutional privilege which could be avoided by appointing counsel at the very start. *Maness*, however, is specifically involved only with the fifth amendment privilege. It is thus apparent that the application of the decision may be restricted to those rights or privileges specifically granted by the Bill of Rights.

The discussion in this section thus far has been concerned with finding a right for an indigent to have counsel appointed to represent him in a civil proceeding. It is apparent that such a right has not yet been squarely recognized.⁵⁸ The case law does, however, seem to be developing exceptions under which such a right will be recognized.

B. *The Discretionary Appointment of Counsel in Civil Cases*

For the present, it is safe to say that indigent civil litigants, in both state and federal courts, have not completely been left to face the vagaries of the law totally unaided by trained members of the bar. Courts regularly appoint counsel to represent indigents in civil matters. Some do so on the basis of an

fact, speaks of the possibility of waiving the privilege unknowingly. *Id.* The range of situations in which such a possibility may occur is vast.

55. See *id.* at 584.

56. *Id.* at 597 (Stewart, J., concurring).

57. *Id.* Justice Stewart also indicated that he would not go this far in declaring an absolute right to appointed counsel in a civil action, since the case at bar did not demand such a conclusion. He concurred, however, on different grounds.

In a footnote to its decision, the Court stated that it did not believe that its rationale necessarily lead to the conclusions reached by Justice Stewart. *Id.* at 595 n.15. However, the Court's attack was actually directed at the other grounds on which Justice Stewart concurred, rather than the conclusions which he reached in the quoted portion of the text. It appears then that Justice Stewart's view of the implications of the Court's holding remains sound.

58. See *Peterson v. Nadler*, 452 F.2d 754, 757 (8th Cir. 1971) (*per curiam*) (civil action for conversion).

inherent power in the court;⁵⁹ some do so on the basis of statutory provisions;⁶⁰ others, on the basis of both inherent and statutory power.⁶¹ What they share in common is that the appointment, when made, is entirely discretionary.⁶²

This discretionary power is rarely defined. Certainly, the Supreme Court in the *Maness* decision has, at the very least, intimated that counsel should be appointed when the fifth amendment privilege is involved. Absent such constitutional considerations, it is usually a matter of the individual preferences of the judge before whom the request for counsel is made.⁶³

In New York, the courts have indicated several specific grounds to support the exercise of discretion in favor of appointment of counsel in civil litigation. In two matrimonial actions, the New York courts have found the appointment of counsel to be proper. One court recognized the principle that no indigent should be denied the meaningful opportunity to adjudicate legal claims.⁶⁴ The court reasoned that in order to assure equal and effective access to the judicial system, an indigent was entitled to have counsel appointed.⁶⁵ Another court found that the unique nature of the state's interest in the union of marriage, as well as the rights and relationships between the persons

59. *Dade County v. McCrary*, 260 So. 2d 543, 545 (Fla. App. 1972); cf. *Caron v. Betit*, 131 Vt. 53, 300 A.2d 618 (1972).

60. *Peterson v. Nadler*, 452 F.2d 754, 757 (8th Cir. 1971) (per curiam); *Sandoval v. Rattikin*, 395 S.W.2d 889, 893-94 (Tex. Civ. App. 1965), cert. denied, 385 U.S. 901 (1966). The respective statutory provisions are 28 U.S.C. § 1915 (1970); Tex. Rev. Civ. Stat. art. 1917 (1964).

61. Compare *People v. Monahan*, 17 N.Y.2d 310, 313, 217 N.E.2d 664, 666, 270 N.Y.S.2d 613, 615-16 (1966) (inherent power) with *Jacox v. Jacox*, 43 App. Div. 2d 716, 717, 350 N.Y.S.2d 435, 436 (2d Dep't 1973) (statutory power pursuant to N.Y. C.P.L.R. § 1102 (McKinney Supp. 1974)).

62. See, e.g., *Peace v. Peace*, — Mass. —, —, 288 N.E.2d 602, 603 (1972); *Hotel Martha Washington Management Co. v. Swinick*, 66 Misc. 2d 833, 835, 322 N.Y.S.2d 139, 141 (Sup. Ct. 1971); *Sandoval v. Rattikin*, 395 S.W.2d 889, 893-94 (Tex. Civ. App. 1965), cert. denied, 385 U.S. 901 (1966).

63. This is especially true when the power of appointment is deemed to be inherent. There is seldom anything in the opinion indicating what guidelines are to be followed or what circumstances are to be considered. See *Peace v. Peace*, — Mass. —, —, 288 N.E.2d 602, 603 (1972), in which the probate court was told to consider appointing counsel if the litigant were indigent and desired such appointment. When appointment is authorized pursuant to statutory regulation, there are of course some guidelines provided in the statute, but nevertheless it is necessary to look to case law to determine how the courts have interpreted the meaning of the guidelines. For example, in Arkansas, the court must be satisfied that the applicant for appointment of counsel has a meritorious cause of action. Ark. Stat. Ann. § 27-403 (Repl. Vol. 1962). New York specifies instances in which an indigent may have appointed counsel, such as a hearing to inquire into the commitment of a person alleged to be mentally ill or a narcotics addict, or a hearing into the detention of an individual in a state institution. N.Y. Judiciary Law § 35(1)(a) (McKinney Supp. 1974). However, despite the presence of specific circumstances, the court is still at liberty to appoint counsel or to deny counsel almost at will.

64. *Bartlett v. Kitchin*, 76 Misc. 2d 1087, 1090, 352 N.Y.S.2d 110, 114 (Sup. Ct. 1973).

65. *Id.*

involved, dictates that counsel should be appointed for indigent matrimonial litigants.⁶⁶ Although the court did not expand upon its decision, it is submitted that the need for legal assistance rests not merely in the state's interest in preserving the bonds of matrimony,⁶⁷ but also in ensuring that upon dissolution of the marriage, the respective rights of the parties will be fully protected.⁶⁸

From this it appears that the New York courts have adopted a test of fairness in using the discretionary power to appoint counsel for indigents. Whether this will be applied to all civil proceedings is yet to be determined. However, under this vague rubric, it is apparent that the indigent civil litigant's right to free counsel will depend upon the discretion of individual judges, and that the judge will be guided in his decision by his own subjective idea of fairness. The only more explicit test yet devised by the courts is the *Maness* approach, which arguably dictates appointment of counsel to indigent civil litigants whenever the possibility of waiver of a constitutional right or privilege arises. The impact that this decision will have in this area remains to be seen.

IV. THE SOURCE OF THE APPOINTED COUNSEL: RESORT TO THE PRIVATE BAR

When a court is faced with an indigent's request for appointment of counsel, two practical problems immediately arise: first, from what source may the court select an attorney to represent an indigent; and second, who, if anyone, is to bear the cost of compensation.

It is true, of course, that there are many programs and organizations which have been created to help the indigent by providing legal services. There is a question, however, as to how effective these services are in delivering legal assistance to those indigents who require it and in providing *adequate* legal assistance.⁶⁹ An indigent seeking legal counsel must begin his search through either private legal aid or some form of public legal service. Only if this fails should he be permitted to request counsel from the private bar.⁷⁰ It has become almost accepted fact that neither private legal aid, depending as it must upon charitable contributions, nor legal assistance programs, such as

66. *Jacox v. Jacox*, 43 App. Div. 2d 716, 717, 350 N.Y.S.2d 435, 436 (2d Dep't 1973).

67. The New York State Constitution reads in part: "[N]or shall any divorce be granted otherwise than by due judicial proceedings . . ." N.Y. Const. art. I, § 9(1).

68. In addition, there are other types of actions in which New York courts have found appointment of counsel to be appropriate. In an action by an indigent tenant against a landlord, counsel was appointed because the court reasoned that there is a likelihood of unfairness as a result of the differences in expertise between the attorney representing the landlord and the tenant representing himself. *Hotel Martha Washington Management Co. v. Swinick*, 66 Misc. 2d 833, 835, 322 N.Y.S.2d 139, 141 (App. T. 1971).

69. See Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 J. Urban L. 217 (1969); Note, *The Indigent's Right to Counsel in Civil Cases*, 76 Yale L.J. 545, 546 (1967).

70. Cf. Note, *The Indigent's Right to Counsel in Civil Cases*, 76 Yale L.J. 545, 546 (1967).

those under the federal Economic Opportunity Act,⁷¹ are physically capable of administering to even a majority of the requests from poor persons for assistance in litigating civil matters.⁷² Despite the current flood of lawyers being graduated by law schools throughout the country, the demand for legal aid to the indigent still continues to exceed the available supply.⁷³ The consequences of this shortage are apparent. First, the number of cases that must be handled by the available attorneys is excessive, with the result that the time available for the preparation of individual cases is lessened. The attorney faced with this predicament may have no choice but to compromise the case of one client for another.⁷⁴ Any attempt to strike a balance among cases is made all the more difficult by the uncertain nature of judicial proceedings in general. Much time must initially be spent on a particular matter before the attorney can even conjecture the amount of time that must ultimately be devoted to it. The second consequence concerns selection among the different classes of cases. To illustrate, most of the civil litigation embarked upon by poor persons is in the area of domestic relations.⁷⁵ Yet many legal aid programs have selectively chosen to refuse to provide counsel for divorce actions,⁷⁶ because of the lack of available attorneys. In fact, it has recently been held to be an abuse of discretion for a court to appoint an attorney when the particular legal assistance program involved has objected to such assignment because of certain limitations on the program's authority to render legal aid.⁷⁷

The conclusion is unavoidable that in order to provide adequate legal assistance to indigent civil litigants, the courts must go beyond the existing private and public legal aid programs and turn to the private bar for some

71. 42 U.S.C. §§ 2701-2994(d) (1970).

72. Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 *J. Urban L.* 217 (1969); Note, *The Indigent's Right to Counsel in Civil Cases*, 76 *Yale L.J.* 545, 546 (1967). One of the reasons for this inability with respect to civil actions may be the preferred status given to criminal defendants.

73. Perhaps with constant increases in the number of trained attorneys, the percentage choosing to make themselves available to help poor persons will increase, thus closing the gap between supply and demand. For a discussion of the problem see Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 *J. Urban L.* 217, 217-21 (1969).

74. Regarding the effects of this alternative see *id.* at 224-27.

75. Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 *Iowa L. Rev.* 223, 231-32 (1970).

76. Note, *The Indigent's Right to Counsel in Civil Cases*, 76 *Yale L.J.* 545, 553 (1967); see Carlin & Howard, *Legal Representation and Class Justice*, 12 *U.C.L.A.L. Rev.* 381, 413-15 (1965). The selective process is not restricted to divorce actions. Note, *The Indigent's Right to Counsel in Civil Cases*, 76 *Yale L.J.* 545, 546 (1967); cf. Note, *The Right to Counsel in Civil Litigation*, 66 *Colum. L. Rev.* 1322, 1337-38 (1966).

77. *Cerami v. Cerami*, 44 App. Div. 2d 890, 355 N.Y.S.2d 861 (4th Dep't 1974). In that case in an action for divorce, the court assigned the Monroe County Legal Assistance Corporation to represent an indigent litigant. The Corporation was a federally funded agency whose participation in legal services was restricted. The original request for appointment of counsel had been made pursuant to N.Y. C.P.L.R. § 1102 (McKinney Supp. 1974).

relief. While this may seem to be a simple solution to a difficult dilemma, there is a multitude of problems that must be resolved before such a practice can be put into operation, not the least of which is the problem of compensation.

V. THE "RIGHT" TO COMPENSATION FOR THE APPOINTED ATTORNEY

A. *Criminal Cases*

Direct constitutional attacks have been levied against appointing counsel without compensation. These are concerned primarily with the fifth amendment prohibition against the taking of property without just compensation.⁷⁸ There are two elements which must exist for this constitutional provision to apply: there must be a "taking;" it must be a "taking of property." The vast majority of jurisdictions has held that the absence of compensation is not violative of the fifth amendment. The basis for these decisions is that there was no "taking" involved.⁷⁹ In reaching this conclusion, the courts state that the license to practice law carries with it the condition that the attorney will undertake the representation of indigent criminal defendants without monetary reward.⁸⁰ Persons seeking to practice law are charged with the knowledge of this condition, and by entering the profession are deemed to give consent to satisfying this condition. It follows then that the appointed attorney cannot later claim there had been a "taking" of his services.⁸¹ Since there is no "taking," the majority of jurisdictions does not reach the question of whether the attorney's services can be considered "property" under the fifth amendment.⁸²

78. U.S. Const. amend. V.

79. *United States v. Dillon*, 346 F.2d 633, 635-36 (9th Cir. 1965), cert. denied, 382 U.S. 978 (1966).

80. *Id.* at 635; *Young v. State*, 255 So. 2d 318, 321 (Miss. 1971); see *House v. Whitis*, 64 Tenn. 690 (1875).

It is well established that an attorney is an officer of the court, and thus he owes various duties and obligations to the court. E.g., *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378 (1867); *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965), cert. denied, 382 U.S. 978 (1966); *Jackson v. State*, 413 P.2d 488, 490 (Alas. 1966); *People ex rel. Conn v. Randolph*, 35 Ill. 2d 24, 28-29, 219 N.E.2d 337, 340 (1966); *State v. Rush*, 46 N.J. 399, 411, 217 A.2d 441, 447 (1966); *In re Zuckerman*, 20 N.Y.2d 430, 439, 231 N.E.2d 718, 721-22, 285 N.Y.S.2d 1, 6 (1967), cert. denied, 390 U.S. 925 (1968).

81. *United States v. Dillon*, 346 F.2d 633, 635-36 (9th Cir. 1965), cert. denied, 382 U.S. 978 (1966); see *Scott v. State*, 216 Tenn. 375, 385-88, 392 S.W.2d 681, 685-87 (1965); cf. *Dade County v. McCrary*, 260 So. 2d 543 (Fla. Dist. Ct. App. 1972); *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143, cert. denied, 385 U.S. 958 (1966).

82. An excellent summary of the positions taken by these majority jurisdictions has recently been set forth by the Supreme Court of Washington as follows: "In favor of the majority rule, it is argued that to serve the cause of justice on behalf of an indigent is a professional honor for which an appointed counsel need not and ought not demand compensation . . . ; that such gratuitous service is a duty imposed by tradition, the Canons of Professional Ethics, and the attorney's oath and is a price paid by the attorney for the privileges attaching to his profession . . . ; that gratuitous service may be required of an attorney because representation of an indigent is a duty incident to his station as an officer of the court charged with the administration of justice and

It seems reasonable, however, to say that the services of an attorney may indeed be a form of "property."⁸³ If it then can be said that failure to compensate appointed counsel is a "taking," the right of compensation would fall clearly within the scope of the fifth amendment. There is a growing minority of jurisdictions which recognizes that an unconstitutional "taking" is involved, and four jurisdictions have expressly held that there is a right to compensation for an attorney appointed by the court to represent an indigent criminal defendant.⁸⁴ The earlier minority cases simply found that a right to expect compensation is consistent with the attorney's obligations as an officer of the court. They reasoned variously either that the appointment of counsel pursuant to statutory mandate creates an obligation upon those responsible for the legislation to pay reasonable compensation;⁸⁵ or that the statutory power of the courts to appoint counsel implies a promise to pay;⁸⁶ or that the legislature cannot demand the services of an individual relating directly to his profession without also providing for remuneration.⁸⁷

there is no constitutional requirement that every public official be paid for his services . . . ; that courts have no power over public funds collected for public purposes absent legislative authorization . . . ; and that requiring an attorney to render gratuitous service on behalf of an indigent is not a taking of his property for public purposes without just compensation contrary to constitutional provisions." *Honore v. Washington State Bd. of Prison Terms & Paroles*, 77 Wash. 2d 660, 667-78, 466 P.2d 485, 495-96 (1970) (citations omitted).

83. See *Bedford v. Salt Lake County*, 22 Utah 2d 12, 15, 447 P.2d 193, 195 (1968); cf. *Bender v. Board of Regents*, 262 App. Div. 627, 631, 30 N.Y.S.2d 779, 784 (3d Dep't 1941) ("[t]he right to practice dentistry is, like the right to practice any other profession, a valuable property right . . ."). See also *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143, cert. denied, 385 U.S. 958 (1966).

84. These four minority jurisdictions have stated that the appointment of counsel to serve without compensation is wrong. *Webb v. Baird*, 6 Ind. 11, 14 (1854); *Hall v. Washington County*, 2 Greene 473 (Iowa 1850); *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966); *County of Dane v. Smith*, 13 Wis. 654 (1861). These courts have recognized that there is more at stake than mere tradition. At the very basis of this view is the fact that to the lawyer, the legal profession is a means of livelihood. *Webb v. Baird*, supra at 14. As such it should be accorded no different treatment from any other. Though still recognized as an officer of the court, thus owing a duty to the court, the attorney nevertheless is not obliged to render free service to the public when it is demanded of him. *State v. Rush*, supra at 410, 217 A.2d at 447. The attorney is certainly not a public officer. *Ferguson v. Pottawattamie County*, 224 Iowa 516, 278 N.W. 223 (1938).

This distinction is an important one, for it takes into consideration the scope of the phrase "officer of the court" which the majority jurisdictions do not. Yet it retains the basic concepts of the legal profession as honorable and steeped in traditions. The minority courts shift the emphasis of these responsibilities so as to better conform with our present constitutional and legal institutions. It is evident therefore that in reaching the conclusion that appointed counsel are entitled to compensation, the minority courts are not abandoning the time-honored obligations adhering to the legal profession. Instead, they find that just as attorneys are burdened with certain obligations, so are they entitled to certain rights. *Hall v. Washington County*, supra at 476. One of these rights is that of compensation for their services. *Id.*

85. See *Board of Comm'rs v. Courtney*, 105 Ind. 311, 4 N.E. 896 (1886); *Ferguson v. Pottawattamie County*, 224 Iowa 516, 278 N.W. 223 (1938).

86. *County of Dane v. Smith*, 13 Wis. 654, 656-58 (1861).

87. *Id.* at 657-58.

The more recent cases, in which several jurisdictions have joined in the minority viewpoint, recognize that new factors warrant consideration in light of the developing law concerning the indigent's right to counsel. In *State v. Rush*,⁸⁸ New Jersey found that a serious policy issue of fairness was presented.⁸⁹ The New Jersey court opined that the constitutional right to counsel in criminal cases established by *Gideon*⁹⁰ is an obligation imposed upon the state and not upon the bar.⁹¹ The state, in discharging this obligation by appointment of counsel, must compensate the attorney since he is not an officer of the state.⁹² The court in *Rush* held on this basis that the courts of New Jersey could no longer require attorneys alone to carry the burden which in fact belonged to the state.⁹³ Missouri has recently chosen to follow the reasoning of the New Jersey court and has held that attorneys will no longer be required to render uncompensated services to indigent criminal defendants, in order to discharge the constitutional burden belonging to the state.⁹⁴ In *Bradshaw v. Ball*,⁹⁵ Kentucky joined the growing number of jurisdictions espousing the pro-compensation viewpoint. The court reasoned that the state's duty to afford counsel to indigent criminal defendants can be discharged only in a manner which does not deprive the attorney of his property without compensation.⁹⁶

B. Civil Cases

Even if one were to agree with the minority jurisdictions that an attorney appointed by a court to represent an indigent *criminal* defendant is entitled to compensation, it does not follow that an attorney appointed to represent civil litigants is also entitled to compensation. The vast majority of cases in which compensation is discussed involve criminal prosecutions, since the expanding right to counsel movement began in the criminal area. Only recently has the problem arisen in civil litigation. The history to date indicates that the courts generally will hold that an attorney appointed to represent a civil litigant should not expect to be compensated.

88. 46 N.J. 399, 217 A.2d 441 (1966).

89. *Id.* at 408, 217 A.2d at 446.

90. It is recognized that the scope of the *Gideon* case has been subject to review by subsequent decisions. The general statement in the text is meant only to indicate the constitutional nature of the right.

91. 46 N.J. at 408, 217 A.2d at 445-46.

92. *Id.* at 411-12, 217 A.2d at 447.

93. *Id.* at 412-13, 217 A.2d at 448.

94. *State v. Green*, 470 S.W.2d 571 (Mo. 1971). The court found that private attorneys were being treated unfairly since other individuals in the criminal judicial process such as prosecuting attorneys were not compelled to serve without compensation. *Id.* at 572-73.

95. 487 S.W.2d 294 (Ky. 1972).

96. *Id.* at 298. One reason for this decision is that no other profession has been required to bear such a burden. *Id.* The decision in *Bradshaw* is the only clear example of a court attempting to balance the relative rights of the indigent accused of crime with those of the attorney who is expected to represent him in his defense. For an excellent summary of the position espoused by the growing number of pro-compensation minority jurisdictions see *Honore v. Washington State Bd. of Prison Terms & Paroles*, 77 Wash. 2d 660, 678-80, 466 P.2d 485, 496-97 (1970).

The Code of Professional Responsibility provides in part that

[t]he basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. . . . The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. . . . Every lawyer should support all proper efforts to meet this need for legal services.⁹⁷

In *Bartlett v. Kitchin*,⁹⁸ a lower court in New York, in reliance on this provision, held that the duty of an attorney to represent indigent litigants without compensation applies to civil proceedings as well as criminal prosecutions.⁹⁹ Moreover, there is some indirect support for such a proposition. Many civil proceedings have involved the appointment of counsel; matrimonial actions are the most prevalent. It has been asserted that in the absence of statutory authority, a court in appointing counsel in a matrimonial action does not have the power to require either the state or local government to provide monetary compensation.¹⁰⁰ However, lack of authority to offer compensation does not appear to hamper the ability of the court to assign counsel. It must follow then, that in a civil matrimonial action, assigned counsel may be called to serve without compensation.

One jurisdiction, Utah, has squarely held that an attorney may not be compelled by legislative fiat to represent indigent civil litigants.¹⁰¹ There, the policy had been to assign counsel without compensation to indigent criminal defendants.¹⁰² However, in *Bedford v. Salt Lake County*,¹⁰³ the Supreme Court of Utah was presented with a statute under which the legislature authorized the assignment of an attorney, without compensation, to represent an allegedly insane person at an involuntary proceeding to determine the person's sanity.¹⁰⁴ Holding strictly to the concept that the attorney is an officer of the court, rather than of the state, the court concluded that this attempt by the legislature to compel an attorney to serve without compensation was an unlawful taking of property.¹⁰⁵ This decision, however, leaves open

97. Code of Professional Responsibility, N.Y. Judiciary Law, EC 2-25 (McKinney Supp. 1974). See also *id.* EC 2-29.

98. 76 Misc. 2d 1087, 352 N.Y.S.2d 110 (Sup. Ct. 1973).

99. *Id.* at 1091, 352 N.Y.S.2d at 115. The court recognized, however, that "the Bar cannot be expected to bear the burden of representing indigent parties in matrimonial actions to the extent that this court can envision may come to pass." *Id.* at 1092, 352 N.Y.S.2d at 115 (dictum).

100. *Jacox v. Jacox*, 43 App. Div. 2d 716, 717, 350 N.Y.S.2d 435, 436-37 (2d Dep't 1973); accord, *Cerami v. Cerami*, 44 App. Div. 2d 890, 355 N.Y.S.2d 861 (4th Dep't 1974). In an analogous situation, involving an action by a welfare recipient, Vermont has stated that in the absence of statutory authorization, payment can be justified only if constitutionally mandated. *Caron v. Betit*, 131 Vt. 53, 300 A.2d 618 (1972). The court did not find such a mandate.

101. Compare *Bedford v. Salt Lake County*, 22 Utah 2d 12, 447 P.2d 193 (1968) with *Ruckenbrod v. Mullins*, 102 Utah 548, 133 P.2d 325 (1943).

102. *Ruckenbrod v. Mullins*, 102 Utah 548, 133 P.2d 325 (1943).

103. 22 Utah 2d 12, 447 P.2d 193 (1968).

104. *Id.* at 12-13, 447 P.2d at 193.

105. *Id.* at 14-15, 447 P.2d at 194-95. The court analogized the situation to one in which the

the question of whether the courts in Utah would themselves be permitted to assign counsel to an indigent civil litigant without providing compensation to the attorney. It is stated in the opinion that the defense of indigents is a matter between the attorney and the court,¹⁰⁶ and this clearly implies that it is the duty of the court to determine when to call upon the uncompensated services of the bar and that such authority is not within the province of the legislature.

Similarly, in Illinois, even though there is a statute providing a certain sum as compensation for assigned counsel, the court in *People ex rel. Conn v. Randolph*¹⁰⁷ held that the statute could not be applied within the requirements of the Constitution if assigned counsel is forced to suffer "extreme, if not ruinous, loss of practice and income and must expend large out-of-pocket sums in the course of trial."¹⁰⁸ Therefore, in order to prevent insufferable hardship to the attorney, the court asserted that the inherent judicial power to appoint counsel also included the power to award compensation.¹⁰⁹

VI. THE PROBLEM OF FUNDING

Coincident with the issues of right to appointed counsel in civil or criminal proceedings and the right of the attorney to compensation for his services is the basic problem of who is to bear this expense.

While there are examples of courts awarding compensation to appointed counsel without statutory authority,¹¹⁰ the feasibility of this approach is questionable since it is unclear how the judicial system will obtain the funds to enforce such orders. Clearly the appropriation of funds from the public treasury is a function of the legislature rather than the judiciary.¹¹¹ Although a number of state legislatures continue to deny compensation to assigned

legislature simply by enacting a statute would require a physician to treat a sick or injured indigent without remuneration. Clearly the attempt was a taking and also could be seen as a form of involuntary servitude. *Id.* at 14, 447 P.2d at 194. Furthermore, there was a taking by the state, even though the services were to be rendered to someone other than the state itself, namely the indigent. *Id.* at 15, 447 P.2d at 195.

106. *Id.* at 14, 447 P.2d at 194.

107. 35 Ill. 2d 24, 219 N.E.2d 337 (1966).

108. *Id.* at 30, 219 N.E.2d at 341.

109. *Id.* at 29, 219 N.E.2d at 340. But cf. *Board of Supervisors v. Bailey*, 236 So. 2d 420, 423 (Miss. 1970).

110. See *People ex rel. Conn v. Randolph*, 35 Ill. 2d 24, 219 N.E.2d 337 (1966). Washington has recognized the constantly increasing burden that is being placed on the legal profession to serve indigents not only in criminal actions and appeals, but also in certain civil commitment situations. *Honore v. Washington State Bd. of Prison Terms & Paroles*, 77 Wash. 2d 660, 679, 466 P.2d 485, 496 (1970). Thus, even in the absence of a statute, an attorney who prosecutes a non-frivolous appeal from a disposition of a habeas corpus petition is entitled to be compensated from public funds. *Id.* at 680, 466 P.2d at 496.

111. *Board of Supervisors v. Bailey*, 236 So. 2d 420, 423 (Miss. 1970); see *Jackson v. State*, 413 P.2d 488, 490 (Alas. 1966); cf. *Honore v. Washington State Bd. of Prison Terms & Paroles*, 77 Wash. 2d 660, 679, 466 P.2d 485, 496 (1970).

counsel,¹¹² many legislatures have answered the call and, along with a federal statute, provide certain forms of remuneration.¹¹³

The uncertainty of the courts in this area, in the absence of specific statutory directives, is illustrated by the struggle of the New York courts with the imposition of court costs and fees of indigent civil litigation.¹¹⁴ In resolving the question of who is to bear these expenses, the New York Court of Appeals has held that until the legislature speaks on the issue, the burden of court fees and costs, specifically publication costs, rests on the local governing unit, rather than on the state.¹¹⁵ The court, acutely aware of the financial impact that this added expense might have on municipal budgets, did sanction the use of judicially devised service as an alternative to the statutory method for service by publication.¹¹⁶ Since that decision by New York's highest court,

112. E.g., Ark. Stat. Ann. § 27-403 (Repl. Vol. 1962); Ill. Ann. Stat. ch. 33, § 5 (Smith-Hurd Supp. 1974).

113. E.g., Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1970); Fla. Stat. Ann. § 925.035 (1973) (attorney appointed to represent a defendant in a capital case may obtain compensation not exceeding \$750 for trial and \$500 for appeal); Iowa Code Ann. § 232.52(4) (1969) (reasonable compensation for attorney appointed in civil actions involving neglected, dependent, or delinquent children); id. § 775.5 (Supp. 1974) (reasonable compensation for attorney appointed to defend any person charged with a crime); N.Y. Judiciary Law § 35(2) (McKinney 1968) (limited specific compensation for attorney appointed in certain habeas corpus proceedings). See also N.Y. County Law § 722-b (McKinney Supp. 1974). It should be noted that even when the state legislature has provided for reasonable compensation to an appointed attorney, two of the jurisdictions representing the minority view that assigned counsel is entitled to be paid for his services have modified their previous rulings and held that the specified amount of payment though not full compensation is still sufficient to allow the courts to compel the bar to serve the indigent. Compare *Woodbury County v. Anderson*, 164 N.W.2d 129 (Iowa 1969) with *Ferguson v. Pottawattamie County*, 224 Iowa 516, 278 N.W. 223 (1938). Compare *Green Lake County v. Waupaca County*, 113 Wis. 425, 89 N.W. 549 (1902) with *County of Dane v. Smith*, 13 Wis. 654 (1861); see notes 84-87 *supra* and accompanying text.

114. To illustrate, there is a line of cases in New York concerning the question of who must bear certain litigation expenses of an indigent in a matrimonial action. As will be recalled, it is a violation of due process to deny access to the courts to an indigent seeking a divorce merely because of the inability to pay court costs and fees. *Boddie v. Connecticut*, 401 U.S. 371 (1971); see notes 24-27 *supra* and accompanying text. New York has followed the general rule that absent legislation, the court has no authority to order payment for services by counsel. In *re Alesi*, 297 N.Y. 190, 195-96, 78 N.E.2d 467, 470 (1948) (action to determine mental condition); *Smiley v. Smiley*, 45 App. Div. 2d 785, 356 N.Y.S.2d 733 (3d Dep't 1974); see *Snitkin v. Taylor*, 276 N.Y. 148, 11 N.E.2d 573 (1937). Where, however, there is a constitutional mandate involved, such a rule must necessarily become subordinate. See *Smiley v. Smiley*, *supra* at 785, 356 N.Y.S.2d at 734.

115. *Deason v. Deason*, 32 N.Y.2d 93, 95, 296 N.E.2d 229, 230, 343 N.Y.S.2d 321, 322 (1973). New Hampshire by statute makes fees for service of process payable by the county. N.H. Rev. Stat. Ann. § 499:18-b (Supp. 1973). Iowa calls for compensation by the county for counsel assigned in actions concerning neglected, dependent, or delinquent children. Iowa Code Ann. § 232.52(4) (1969).

116. 32 N.Y.2d at 95, 296 N.E.2d at 230, 343 N.Y.S.2d at 323. The alternative was pursuant to N.Y. C.P.L.R. § 308(5) (McKinney Supp. 1974), and involves judicially devised

the issue of whether attorney compensation may also be imposed on the local government has arisen in several of that state's intermediate courts. The response has been consistently in the negative.¹¹⁷ Nor may payment for counsel be imposed on the state without appropriate legislation.¹¹⁸

In light of these decisions by the New York courts, it seems clear that compensation for court appointed attorneys will not be imposed by the courts on local governing units. The alternative is, of course, express legislation. Proposed legislation might be modeled upon an existing New York statute which provides for compensation to assigned counsel with respect to proceedings on a writ of habeas corpus to inquire into the propriety of various civil custody matters.¹¹⁹ The statute sets a maximum amount that is compensable, but also provides that the court may award an amount in excess of these limits where circumstances are unusual.¹²⁰ By its express terms, the legislation calls for "[a]ll expenses for compensation and reimbursement under [the statute to] be a *state charge* to be paid out of funds appropriated to the office of the state administrator of the judicial conference for that purpose."¹²¹

Clearly such a statute, authorizing fixed compensation, but also providing for judicial discretion in unusual circumstances, and designating the fund from which compensation is to be acquired, is a viable general alternative to the present confusion. Under such a statute the legislature could provide for the fixed and discretionary compensation outlined above and in addition expressly provide that the appointment of counsel in civil cases is in the sound discretion of the courts.

VII. CONCLUSION

While courts have recognized that an individual accused of crime is entitled to appointment of counsel when he cannot obtain an attorney to represent him, the general rule with respect to indigent civil litigants continues to be that no such right to counsel exists.

From this general rule, however, the courts have begun to carve out certain exceptions. In so doing, courts are beginning to recognize that there are certain aspects of civil litigation which are analogous to criminal prosecutions, thus making appointment of counsel essential. Situations in which this

service. For a discussion of the important role this statute has assumed as a result of the Deason decision see McLaughlin, *Supplementary Practice Commentary*, N. Y. C.P.L.R. § 308:5 (McKinney Supp. 1974).

117. *Smiley v. Smiley*, 45 App. Div. 2d 785, 356 N.Y.S.2d 733 (3d Dep't 1974); *Jacox v. Jacox*, 43 App. Div. 2d 716, 350 N.Y.S.2d 435 (2d Dep't 1973); see *Bartlett v. Kitchin*, 76 Misc. 2d 1087, 352 N.Y.S.2d 110 (Sup. Ct. 1973).

118. As stated by the court in *Jacox v. Jacox*, 43 App. Div. 2d 716, 350 N.Y.S.2d 435 (2d Dep't 1973): "Absent statutory authority for the payment of assigned counsel in matrimonial actions . . . counsel must be provided by the Bar through the personal obligation of its members, traditionally recognized, to willingly accept assignments made by the Bench and to help those who cannot afford financially to help themselves." *Id.* at 717, 350 N.Y.S.2d at 436-37.

119. N.Y. Judiciary Law § 35(1)(a) (McKinney Supp. 1974); *id.* § 35(2) (McKinney 1968).

120. *Id.* § 35(2).

121. *Id.* § 35(4).

analogy can be applied are admittedly limited. An example of this is the civil proceeding in which there are criminal overtones, such as a delinquency proceeding.¹²²

A more promising area through which a right to counsel in civil litigation might be forthcoming is evidenced by the Supreme Court's decision in *Maness v. Meyers*.¹²³ While *Maness* may be viewed as supplying a foundation upon which a civil litigant will be entitled to appointment of counsel, it would be restricted to situations involving the possibility of waiving the fifth amendment privilege against self-incrimination. It is not necessary, however, to limit a right to counsel argument solely to this specific constitutional guarantee. Admittedly, self-incrimination may be the constitutional privilege most easily waived. This does not mean that other privileges in the Bill of Rights should not be given the same consideration. A possible test that the courts might wish to consider is one in which counsel will be appointed to any indigent whenever the circumstances of the case may result in a waiver or violation of any right guaranteed by the Constitution.

When the sovereign has on the one hand given an individual, purportedly as an incident of his citizenship, the privilege to go to court to adjudicate a specific claim, it should not allow that privilege to be effectively abrogated in the case of indigent litigants by lack of adequate legal assistance. Proceeding *pro se*, even in the presence of the most protective trial judge, the average litigant may waive certain privileges, fail to assert some essential fact or issue, or even enter into an unconscionable settlement for lack of knowledge of his full rights under the law.

Once counsel is appointed, the problem of compensating him for his services arises.¹²⁴ As this Note has indicated, many state legislatures, as well as the federal government, have responded by providing a token amount of remuneration to the appointed counsel. With the constantly growing need for the court to call on members of the bar to represent indigent civil and criminal litigants, the present statutory scheme will not suffice.¹²⁵ Furthermore, it is clear that the courts must rely on the legislature to provide the financial resources for compensation. Most courts recognize that in the absence of statutory authorization their power to order compensation is severely limited. Consequently, some jurisdictions have chosen to refuse to

122. See note 5 *supra*.

123. 95 S. Ct. 584 (1975); see notes 42-58 *supra* and accompanying text.

124. The issue of contingency fees is not here under consideration. It is recognized that in certain situations, there may be no need for a court to be concerned with the manner in which court appointed counsel will be compensated, since an attorney can take on the representation of an indigent on a contingency basis. There are in fact state statutory provisions which call for an attorney's expenses to be paid out of any sum that the indigent litigant recovers by way of prosecuting his claim. See, e.g., N.Y. C.P.L.R. § 1102(d) (McKinney Supp. 1974).

125. For a discussion of certain doubts as to the capacity of the legal profession to meet the burden of representing indigents on court appointment see *Argersinger v. Hamlin*, 407 U.S. 25, 56-60 (1972) (Powell, J., concurring). Though the majority of the Court did not share Justice Powell's reservations at that time, *id.* at 37 n.7, with the increasing scope of right to counsel in civil litigation, the doubts to Justice Powell may come to be realized.

appoint counsel at all. This is manifestly an untenable resolution of the problem. It is up to the legislature to respond to the increasing number of court appointed attorneys by providing the courts with the means to award just compensation to those called upon to serve the indigent litigant.

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