Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance Note

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Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance

Whether an individual becomes a party to judicial proceeding involuntarily, as a criminal or civil defendant, or voluntarily, as a civil plaintiff seeking redress of an injury, the assistance of counsel will increase his chances for a favorable disposition. When an impecunious litigant is unable to retain counsel, the question arises of who must bear the burden created by the complexity of adjudication. Although the Supreme Court has been sympathetic to the need for counsel in criminal cases,1 an indigent litigant in civil cases often will be denied legal assistance, and therefore will bear the burden himself.2 In other instances, the public will assume this burden by procuring and compensating attorneys or public defenders to represent litigants who cannot afford counsel.3 Finally, members of the legal profession themselves may be required to carry this burden by representing the poor without compensation upon court appointment.4

The alternative that places the cost of representing impecunious litigants upon individual attorneys, rather than upon the public or upon the litigants themselves, might at first glance seem the least equitable. Such a system runs contrary to general expectations that professionals be compensated for their services.5 However, American courts have long exercised the authority, at least in criminal cases, to compel attorneys to donate their services.6 Recent constitutional challenges to this practice generally have been rejected, based either upon the broad licensing authority of the states or upon the unique relationship of attorneys to the courts.7

This Note considers the constitutionality of requiring attorneys to provide uncompensated legal assistance. While the discussion centers upon court appointment of attorneys in civil cases, the analysis is also applicable to criminal cases. First, the Note outlines the demand for legal assistance to the poor and the types of constitutional challenges usually raised to compelled representation. The Note then examines the power of courts to compel attorneys to provide gratuitous legal services, analyzing the traditional justifications advanced by courts to shield compelled representation from constitutional scrutiny. Finding these justifications unpersuasive, the Note proceeds to examine the constitutional challenges to court appointment of attorneys, concluding that there is no constitutional bar to compelling attorneys to render uncompensated legal assistance to poor litigants in civil cases.

1. See notes 13-14 and accompanying text infra.
2. See Haines v. United States, 433 F.2d 233 (3d Cir. 1971); Ehrlich v. Van Epps, 428 F.2d 363 (7th Cir. 1970); Bethea v. Crouse, 417 F.2d 504 (10th Cir. 1969).
3. See note 18 and accompanying text infra.
4. See note 21 and accompanying text infra.
5. See note 26 and accompanying text infra.
6. See notes 8-12 and accompanying text infra.
7. See notes 24-34 and accompanying text infra.

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I. BACKGROUND

Judicial appointment of attorneys to represent impeccunious litigants without compensation is not a new development. Colonial and early American statutes authorized courts to provide counsel at the request of indigents charged with capital crimes.10 By the late nineteenth century most state courts had ceased to depend on statutory authority, exercising the power to appoint counsel as part of their inherent or constitutional authority to regulate the practice of law within the state.11 Appointments during this period were still generally limited to criminal cases in which the defendant faced a serious penalty.12

In recent years the need for legal representation for the poor has increased. Growing recognition of the importance of legal representation to obtaining a fair outcome in criminal cases, culminating in the Supreme Court's announcement of a constitutional right to counsel in criminal prosecutions,14 has resulted in greater demands upon lawyers' time. An increasing rate of criminal activity and the requirement of representation at a greater number of stages of the criminal justice process have also contributed to this burden. In civil cases as well


9. E.g., 1 Stat. 118 (1790); Laws of New Hampshire 247 (Melcher 1792); Acts of the Nineteenth General Assembly of the State of New Jersey 1012, § 2 (1795). See generally W. Beaney, supra note 8, at 14-18.

10. This right was extensive, inasmuch as virtually all felonies were capital crimes during this period. See 4 W. Blackstone, Commentaries 94 (1st ed. 1769).


12. However, attorneys were also occasionally appointed in civil cases. See Louisiana v. Simpson, 38 La. Ann. 23, 25 (1886) (indicating that the court has power to appoint counsel to represent an absentee in civil cases); House v. Whitis, 64 Tenn. 690, 692 (1875) (appointment of guardian ad litem to minor party defendant in suit on contract for sale of land).

13. A line of Supreme Court decisions, beginning with Powell v. Alabama, 287 U.S. 45 (1932), has expanded the indigent criminal defendant's right to counsel, recognizing that most laymen lack the skill and training necessary to protect their interests in the adversary setting. Therefore, an attorney functioning as a skilled advocate is essential to obtain the rudiments of a fair trial.


15. From 1960 to 1971, the FBI's total crime index increased 196.9 percent. U.S. Dept of Justice, Sourcebook of Criminal Justice Statistics 1973, at 198, Table 3.51.

16. The sixth amendment right to counsel has been interpreted to guarantee the criminal defendant's right to representation by an attorney at a pretrial identification procedure, United States v. Wade, 388 U.S. 218 (1967), and at a preliminary hearing, Coleman v. Alabama, 399 U.S. 1 (1970). The right to counsel on appeal has been held to be guaranteed by the equal protection clause. Douglas v. California, 372 U.S. 353 (1963). The fifth amendment has been interpreted to require the presence of counsel, if requested, at a custodial interrogation, Miranda v. Arizona, 384 U.S. 436 (1966).
there has been a growing acceptance of the notion that legal representation of poor litigants results in fairer judicial determinations.\textsuperscript{17}

Several methods have been used to satisfy this increasing need for legal services for the poor. Legislatures have established organizations that employ lawyers to represent the poor or have provided compensation for court-appointed attorneys.\textsuperscript{18} In the absence of such legislative action, some courts have exercised their inherent power to compel legislative expenditures for necessary judicial operations, requiring localities to compensate court-appointed attorneys.\textsuperscript{19}


Other factors increasing the burden of compelled representation are the increasing complexity of legal representation and the maldistribution of the burden among members of the bar as a result of specialization in the profession. See, e.g., Abodeely v. County of Worcester, 227 N.E.2d 486, 488-89 (Mass. 1967).


Courts have generally regarded as inherent in the nature of judicial institutions a power to procure personnel, buildings, and supplies where necessary to the functioning of the courts. See,
Others have attempted to force legislative action by relieving attorneys of their obligation to accept uncompensated court appointments. Some courts, however, have continued to appoint attorneys without compensation in both criminal and civil cases. In addition, several proposals have recently been advanced to compel members of the bar to devote a minimum number of hours to public service such as the representation of impecunious clients. If adopted, these


Some courts believe that their inherent power does not extend as far as compelling compensation of court-appointed attorneys. See, e.g., Sparks v. Parker, 368 So. 2d 528 (Ala. 1979); Board of Supervisors v. Bailey, 236 So. 2d 420 (Miss. 1970); Menin v. Menin, 79 Misc. 2d 285, 359 N.Y.S.2d 721 (Sup. Ct. 1974). Other courts, while acknowledging their power to appropriate expenditures for this purpose, have expressed a willingness to exercise that power only in extreme cases. See, e.g., People ex rel. Conn v. Randolph, 35 Ill. 2d 24, 219 N.E.2d 337 (1966); State v. Second Judicial Dist. Court, 85 Nev. 241, 453 P.2d 421 (1969) (out-of-pocket expenses incurred by appointed counsel). But see Daines v. Markoff, 555 P.2d 490 ( Nev. 1976).

An exercise of inherent judicial power to compel legislative compensation of appointed attorneys would seem the most satisfactory solution from the point of view of indigent litigants. Indigent litigants would gain access to legal assistance not only when constitutionally or statutorily required, but whenever the court deems it required by fairness. See Caston v. Sears, Roebuck & Co., 556 F.2d 1305, 1308-10 (5th Cir. 1977) (guidelines for appointment of counsel in civil rights cases).

Courts finding no inherent power to compensate attorneys or unwilling to exercise their inherent power have given broad interpretations to statutes authorizing payment of expenses incident to judicial administration so as to find statutory authorization for the compensation of appointed attorneys. See, e.g., Ex rel. D.B. & D.S., 385 So. 2d 83 ( Fla. 1980); Abodeely v. County of Worcester, 352 Mass. 719, 1227 N.E.2d 486 (1967); State v. Rush, 46 N.J. 399, 217 A.2d 441 (1966).

Courts have also interpreted statutes authorizing appointment of counsel to imply legislative intent to compensate appointed attorneys. See, e.g., Luke v. County of Los Angeles, 269 Cal. App. 2d 495, 74 Cal. Rptr. 771 (1969).


By refusing to compel representation upon court appointment, courts shift to legislatures the burden of developing and financing a system for providing legal services to indigent criminal defendants whose right to counsel is of constitutional dimension. Without counsel or an effective waiver of counsel, the defendant's conviction would be constitutionally defective; therefore, the legislature is put to the choice of either financing legal representation or precluding the state from prosecuting criminal cases. See Johnson v. City Comm'n, 272 N.W.2d 97, 101 (S.D. 1978). On the other hand, the legislature is not compelled to finance legal assistance for indigents to whom there is no constitutional guarantee of counsel. Therefore, indigent litigants in civil cases may be denied assistance absent the largesse of the legislature or of private attorneys.


22. See, e.g., ABA Proposed Model Rule of Professional Conduct 8.1 (would require an attorney to perform "unpaid public interest legal service," including "activities for improving the law, the legal system, or the legal profession, or by providing professional services to persons of limited means or to public service groups or organizations"); Association of the Bar of the City of New York, Toward a Mandatory Contribution of Public Service Practice by Every Lawyer: Recommendations and Report of the Special Committee on the Lawyer's Pro Bono Obligations (1980) [hereinafter cited as New York City Bar Proposal].

These proposals have not been endorsed by the membership of the bar associations. See 67 A.B.A.J. 33 (1981). The rules of the organized bar are susceptible to challenge not only on constit-
proposals would have the same force as court appointments,\textsuperscript{23} and would impose still more compulsory service requirements upon attorneys.

Lawyers have never passively accepted judicial directives to represent clients without compensation. Since the mid-nineteenth century, attorneys have raised constitutional challenges to court appointments.\textsuperscript{24} Until recently, however, such challenges were almost always rejected.\textsuperscript{25} While conceding that a state generally cannot compel uncompensated personal service from individuals in the community,\textsuperscript{26} early decisions distinguished legal representation from other types of personal service. Representation of indigents was viewed alternatively as a duty that could logically be imposed on attorneys as "officers of the court".

tional grounds, but also under federal antitrust law. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). Statutory challenges to compulsory gratuitous legal assistance fall outside the scope of this Note.

23. For example, the New York City Bar Proposal, supra note 22, at 22-25, would be implemented by the adoption of a Disciplinary Rule in each Appellate Division, upon the recommendation of the Bar. The Rule would provide that "[e]very lawyer shall devote a significant portion of his or her professional time each year to public service practice." Id. at 23.


Early decisions also considered claims for compensation based on an implied or quasi-contractual relationship between the attorney and the state or local government. For example, in Whicher v. Cedar County, 1 Greene 217 (Iowa 1848), an Iowa attorney assigned under a state statute to represent an indigent criminal defendant sued the county for remuneration. The attorney argued that as an "officer of the court" he was not free to refuse the court's assignment, but that the obligation to preserve the life and liberty of indigents by assuring them a defense in criminal cases attached to the community at large, which must therefore compensate members of the bar for their services. A majority of the court denied compensation, however, adopting the county's argument that the statute authorizing an appointment of counsel to indigent defendants did not impose a duty on any member of the bar to accept the appointment, but relied upon an attorney to serve either gratuitously as a "friend of the court" or with the hope of recovering his fee from the defendant. Therefore, attorneys had no right to be reimbursed for their services in the absence of a statute providing for compensation.

See also Bacon v. County of Wayne, 1 Mann. 461 (Mich. 1850); Wayne County v. Waller, 90 Pa. 99, 35 Am. Rep. 636 (1879); Case v. Shawnee County, 4 Kan. 511, 96 Am. Dec. 190 (1868).

25. Rare decisions in which courts adopted a requirement that court-appointed attorneys be compensated include Webb v. Baird, 6 Ind. 13 (1854) (requiring compensation under a state constitutional provision which states that "no man's particular services shall be demanded without just compensation"); Hall v. Washington, 2 Greene 473 (Iowa 1850); Dane County v. Smith, 13 Wis. 585, 80 Am. Dec. 754 (1861); Carpenter v. Dane County, 9 Wis. 274 (1859). But see Woodbury County v. Anderson, 164 N.W.2d 129 (Iowa 1969) (partial compensation not unconstitutional); Green Lake County v. Waupaca County, 113 Wis. 425, 89 N.W. 549 (1902) (same).

Most early cases rejecting attorneys' claims stressed the courts' lack of inherent power to compel the expenditure of public funds to compensate attorneys appointed to represent indigent litigants. See, e.g., Nabb v. United States, 1 Ct. Cl. 173 (1864); Presby v. Klickitat County, 5 Wash. 329, 31 P. 876 (1892); State v. Simmons, 43 La. Ann. 991, 10 So. 382 (1891); Johnson v. Whiteside County, 110 Ill. 22 (1884); Case v. Board of County Comm'rs, 4 Kan. 511 (1868). Some courts indicated that but for this limitation on the court's power, compensation would be provided. See, e.g., Pardee v. Salt Lake County, 39 Utah 482, 118 P. 122 (1911).

26. See House v. Whitis, 64 Tenn. 690, 692 (1875) (""The principle of the organic law which forbids the demand of any man's particular services without just compensation has no application to such a case.''). Some courts held that the failure of the government to compensate appointed attorneys was not a departure from this general rule, because attorneys might look to the future ability of their clients for compensation. See, e.g., Rowe v. Yuba County, 17 Cal. 62, 63 (1860); House v. Whitis, 64 Tenn. 690, 692 (1875).
subject to the court’s authority; an historically recognized obligation to which attorneys impliedly consent upon accepting the license to practice law; or a duty correlative to reciprocal rights and privileges conferred on licensed attorneys.

In recent years the increase in compulsory legal service has precipitated a renewal of constitutional challenges to the obligation to represent the poor. Most courts continue to reject constitutional challenges to court assignments, relying on the century-old conception of the peculiar status of legal representation. For example, in United States v. Dillon, the Court of Appeals for the Ninth Circuit upheld the appointment of an attorney against a constitutional challenge because the attorney “performs an obligation imposed upon him by the ancient traditions of his profession and as an officer of the court assisting the court in the administration of justice.” The court considered the duty to accept an appointment to be “a condition under which lawyers are licensed to practice” and to which “[a]n applicant for admission to practice law may justly be deemed [to have consented].” Nevertheless, several courts have held that the appointment of unpaid lawyers to represent indigent litigants is impermissible as a constitutional matter, at least in civil cases. Appointments have been found unconstitutional as a

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27. See, e.g., Arkansas County v. Freeman & Johnson, 31 Ark. 266, 267 (1876); Vise v. County of Hamilton, 19 Ill. 78, 79 (1857); Wayne County v. Waller, 90 Pa. 99, 104 (1879).
28. See, e.g., Johnson v. Whiteside County, 110 Ill. 22, 25 (1884).
29. See, e.g., Johnson v. Whiteside County, 110 Ill. 22, 25 (1884); Arkansas County v. Freeman & Johnson, 31 Ark. 266 (1876); Vise v. County of Hamilton, 19 Ill. 78, 79 (1857).
30. In addition to suits challenging court appointments, commentators have increasingly been questioning the practice on both constitutional and institutional grounds. See Williams & Bost, The Assigned Counsel System: An Exercise of Servitude?, 42 Miss. L.J. 32 (1971); Hunter, Slave Labor in the Courts—A Suggested Solution, 74 Case & Comment 3 (July-Aug. 1969); Ervin, Uncompensated Counsel: They Do Not Meet the Constitutional Mandate, 49 A.B.A.J. 435 (1963); Note, The Uncompensated Appointed Counsel System: A Constitutional and Social Transgression, 60 Ky. L.J. 710 (1972); Note, Indigent Criminal Defendant’s Constitutional Right to Compensated Counsel, 52 Cornell L.Q. 433 (1967); Note, 55 Ky. L.J. 707 (1967). See also Note, Dollars and Sense of an Expanded Right to Counsel, 55 Iowa L. Rev. 1249 (1970).
32. 346 F.2d 633 (9th Cir. 1965), cert. denied, 382 U.S. 978 (1966).
33. Id. at 636.
34. Id. at 635.
violation of due process, as a taking of property by the government without just compensation, and as an involuntary servitude in violation of the thirteenth amendment.

In *Bedford v. Salt Lake City,* the Supreme Court of Utah relied on the fifth amendment’s prohibition against uncompensated takings to invalidate a statute authorizing appointment of counsel to represent indigents in involuntary hospitalization proceedings. The court found that personal services are a form of property protected by the takings clause. Therefore, the statutory requirement that attorneys donate legal services constituted an uncompensated taking of private property.

In *Menin v. Menin,* a New York state trial court found that the due process clause of the fourteenth amendment prohibits the imposition on the right to practice law of conditions not reasonably related to an attorney’s fitness to practice law. The court held that a court appointment of a lawyer to render gratuitous service to indigent litigants in a divorce action did not meet this test and was therefore unconstitutional.

Most recently, in *Nine Applications for Appointment of Counsel in Title VII Proceedings,* a federal district court in Alabama declined to assign counsel to civil rights plaintiffs on the ground that appointment of counsel in civil cases imposes upon the attorney an involuntary servitude prohibited by the thirteenth amendment. In the court’s view, an obligation to represent indigent civil litigants, unlike the duty to defend indigents in criminal cases, did not fall within any exception to the thirteenth amendment prohibition because it was neither an obligation undertaken commensurate with the privilege to practice law nor was it a duty owed to the state.

Before evaluating these constitutional challenges, the Note discusses the power of courts to appoint attorneys to represent indigents in civil cases.

II. JUDICIAL POWER TO COMPEL GRATUITOUS REPRESENTATION BY ATTORNEYS

It has long been recognized that the states possess broad authority to regulate the legal profession because “‘lawyers are essential to the primary governmental function of administering justice.’” The breadth of this power is apparent in the wide sweep of the American Bar Association’s Code of Profes-

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39. Id. at 292-93, 359 N.Y.S.2d at 728-30.
41. Id. at 89-90.
sional Responsibility, which has been adopted by many states. The Code's provisions govern advertising, fees, confidentiality of client information, conflicts of interest, and conduct during trials. In almost all states, whether by constitutional provision, statute, or judicial decision, this regulatory power is vested in the state courts.

The appointment of counsel in both civil and criminal cases furthers the administration of justice by enhancing the fairness of judicial proceedings. Therefore, it is within the state's broad power. This view is supported by many decisions invoking the courts' regulatory authority to justify the appointment of counsel and by several statutes permitting appointment of counsel.

State regulation of attorneys, like all state regulatory power, is subject to limits imposed by the federal constitution. Many courts, however, have found appointments of attorneys to represent indigents immune from constitutional scrutiny, either because attorneys are "officers of the court" obligated to serve upon court appointment or because such a condition may permissibly be imposed upon the attorney's license to practice law. Analysis of the two doctrines indicates that they cannot be invoked to override constitutional prohibitions. Government power over attorneys is limited by applicable constitutional requirements.

A. "Officer of the Court"

The modern American attorney is often described as an "officer of the court." Many courts have relied upon this status in requiring attorneys to

44. ABA Code of Professional Responsibility, Disciplinary Rules 2-100, 2-101.
46. Id., Disciplinary Rule 4-101.
47. Id., Disciplinary Rules 5-101 to 5-107.
48. Id., Disciplinary Rules 7-101 to 7-110.
49. See, e.g., N.J. Const. art. VI, § II, ¶ 3.
53. There is no basis for distinguishing appointments in criminal cases from those in civil cases. In each situation, the fairness of the proceeding is promoted by the involvement of the attorney.
54. See note 21 supra.
carry out court appointments. In their view, lawyers may permissibly be subject to an otherwise unconstitutional burden because of the courts' supervisory authority. An examination of the officer of the court doctrine, however, indicates that it is not applicable to American attorneys.

In the English legal system lawyers were classified as either "attorneys" or "barristers." Attorneys, who were not permitted to plead and defend suits for clients, were considered officers of the court. Attorneys performed ministerial duties for the courts, were admitted to practice by a judge, and were subject to the judge's discipline, just as were members of the court clerical staff. In contrast, English barristers, who pleaded and defended lawsuits, were admitted to practice by self-regulating professional organizations, the Inns of Court. They were never considered officers of the court. Barristers were obligated to accept court appointments to represent the poor because they were required, as citizens, to defer to the commands of the King's courts, not because of their relationship to the courts.

Clearly the officer of the court doctrine cannot be used to support court-compelled representation by American lawyers. The doctrine did not apply to barristers, the English lawyers who most closely resemble American litigators, and it was never used to support compelled legal representation. The inapplicability of this doctrine to American attorneys is bolstered by the position of lawyers in the early American legal system.

The early practice of law in this country was characterized by low standards for admission and by scant judicial control over practitioners. Lawyers in the Colonies neither performed the ministerial functions nor maintained the rela-


60. The organization of a guild of sergeants-of-law, the precursors of barristers, developed during the fourteenth century. Selected by the chief justice of the Common Pleas, the sergeants were commanded to serve by the chancellor under the threat of heavy penalty, and could only be discharged by special royal writ. In addition to lucrative fees and a monopoly of practice at the Court of Common Pleas, the sergeants enjoyed rank equal with knights, freedom from suit except in their own court, and privileges to levy fines, attend Parliament, and try petitions. 2 W. Holdsworth, A History of English Law 484-93 (3d ed. 1923).

61. See Bradshaw, Attorneys as Officers of the Court, 46 N.Y.S.B.J. 351, 351-56 (1974); 6 W. Holdsworth, supra note 59, at 435-58 (1924).

62. See Trevanion v. Anonymous, 88 Eng. Rep. 1535 (K.B. 1702); Anonymous v. Scroggs, 89 Eng. Rep. 289 (K.B. 1674) ("[I]f the Court should assign a sergeant to be counsel, he ought to attend; and if he refuse . . . we would not hear him, nay, we would make bold to commit him."); 2 W. Holdsworth, supra note 60, at 494 n.4 (citing examples from fifteenth century Year Books).

Even when representing nonimpecunious clients, the sergeant was thought to practice gratis, for honor only, and his fee was viewed not as a salary but as a mere gratuity, a tradition that Professor Lewis traces to Roman law. 3 W. Lewis, Blackstone's Commentaries on the Laws of England 1046-47 & n.27 (1922).

tionship to the judiciary associated with attorneys in England. The elevation of law to its professional status after the Civil War resulted not from the courts’ assumption of regulatory power over lawyers, but from the emergence of self-regulating bar associations nationwide. Thus the close relationship between lawyer and court, which had been at the root of the English concept of an “officer of the court,” was never present in the United States.

Contemporary judicial decisions, while repeatedly describing attorneys as officers of the court, also recognize that the British model can not properly be applied to the American legal system. For example, in In re Griffiths, the Supreme Court rejected the argument that because of the status of attorneys as officers of the court citizenship could be made a condition of admission to the bar. The Court found that the position of lawyers is not like that of clerks, marshals, bailiffs, or other public officials under the courts’ supervision—the position of officers of the court in Britain. Therefore, the Griffiths Court found no reason to consider whether a citizenship requirement could constitutionally be imposed upon public officials. American lawyers are instead viewed as functioning “in a three-fold capacity, as self-employed businessmen . . . , as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes.” The courts have thus drawn a distinction between lawyers and the ministerial agents of the judiciary who are officers of the court, rendering

64. Although formally receiving the English common law, the Colonies departed radically from the English tradition in structuring legal services. See generally R. Pound, The Lawyer from Antiquity to Modern Times (1953). Throughout the sixteenth and seventeenth centuries legislation hostile to the practice of law was enacted in the Colonies. When the Colonies did establish systems of admission to the practice of law in the early eighteenth century, most rejected the traditional English system by which each court admitted attorneys to practice before it. Instead, an attorney admitted by a court or by the royal governor was permitted to practice before any of the courts of the colony. Whatever continuity existed between the legal profession in the colonies and its English counter-part dissolved after the American revolution. Decentralization and deprofessionalization of the practice of law was characterized by low standards for admission to practice. See, e.g., Mass. Act of March 6, 1790, 1 Laws of Massachusetts 1780-1807 at 493. Lack of judicial control over legal practitioners resulted from the combined effects of political hostility toward English institutions, geographical and economic conditions after the war, and a Jeffersonian distrust of professionalism as antithetical to democratic ideals. The independent professional status of attorneys was abolished in many states by the mid-nineteenth century. See, e.g., N.H. Rev. Stat. Ann. ch. 177, § 2 (1842) (“[a]ny citizen of the age of twenty one years, of good moral character, on application to the Supreme Court, shall be admitted to practice as an attorney”); 1843 Me. Acts ch. 12; Wis. Rev. Stat. ch. 87, § 26 (1849); Const. Ind. 1851, art. 7, § 21.

Most other states maintained only minimal requirements as to education and training of lawyers. The states’ unwillingness to structure the legal profession in accordance with the English tradition reflected a fear that specialization and requirements of special training for particular professions would establish an exclusive privileged class. See A. Reed, Training for the Public Profession of the Law 85-86 (1921).

65. See R. Pound, supra note 64, at 353, 355.
67. Id. at 727-29. See also Spevack v. Klein, 385 U.S. 511, 520 (1967) (Fortas, J., concurring).
68. Cohen v. Hurley, 366 U.S. 117, 124 (1961). See also Ferri v. Ackerman, 444 U.S. 193, 193-204 (1979). As assistants to the court, attorneys are subject to a variety of obligations imposed pursuant to the courts’ regulatory power. See text accompanying notes 44-48 supra. This power is, of course, subject to constitutional limitations. Id.
the officer of the court doctrine inapplicable to American attorneys. The doctrine therefore cannot be used to uphold the authority of the judiciary to impose otherwise unconstitutional burdens upon attorneys.

B. Conditions on Occupational Licensing

Courts have also upheld the obligation to accept court appointments as a condition permissibly imposed upon the attorney's license to practice law.\textsuperscript{70} In this view, the practice of a profession is a privilege granted by the state, which the state is under no obligation to bestow and which therefore may be unilaterally revoked. A license to practice law may be lawfully withheld by the state except upon the conditions it imposes, including conditions that would otherwise violate the constitutional rights of attorneys.\textsuperscript{71} Therefore, the duty to represent indigents, or any other obligation, could permissibly be imposed upon lawyers.

The notion that access to government benefits may be conditioned upon the relinquishment of constitutional rights was dominant during the nineteenth century,\textsuperscript{72} when the issue of the constitutionality of court appointment of attorneys first arose. In the past two decades, however, it has been soundly rejected by the Supreme Court.

Recalling the \textit{Lochner}\textsuperscript{73} era doctrine of "unconstitutional conditions,"\textsuperscript{74} the Court has repeatedly affirmed that constitutional rights "may [not] be infringed

\begin{itemize}
\item (1975) (clerks of the court), and Gonzales v. Beto, 405 U.S. 1052, 1055 & n.3 (1972) (bailiff)
\item (citing Parker v. Gladden, 385 U.S. 363, 365 (1966)), with Ferri v. Ackerman, 444 U.S. 193, 199-200 & n.19 (1979) (office of appointed defense counsel, unlike that of prosecutor or judge, does not give rise to federal officer immunity), Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974) (attorneys as "officers of the court" are not "public officials" for purposes of defamation rule of New York Times Co. v. Sullivan, 376 U.S. 254 (1964)), Lynch v. Household Fin. Corp., 405 U.S. 538, 554 n.25 (1972) (although attorneys are formally "officers of the court," state garnishment process was not a state court proceeding for 28 U.S.C. § 2283 purposes, since attorneys, who had complete discretion to issue a writ, were not proceeding under a court's supervision), and Cammer v. United States, 350 U.S. 399, 405 (1956) (unlike marshals, bailiffs, court clerks, or judges, attorneys are not "officers of the court" within meaning of a federal summary contempt statute).
\item 72. For example, Davis v. Massachusetts, 167 U.S. 43 (1897), upheld an ordinance prohibiting public speaking in Boston Commons without a license. The Court reasoned that ownership of the Commons allowed the city to withhold access completely; therefore, the city legitimately could permit access subject to any conditions, including limits on the exercise of first amendment rights. See also McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892) (opinion of Holmes, C.J.) (upholding a ban on police participation in political activities) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.").
\item 73. Lochner v. New York, 198 U.S. 45 (1905).
\item 74. See Frost & Frost Trucking Co. v. Railroad Comm’n, 271 U.S. 583, 598 (1926) ("[A] state is without power to impose an unconstitutional requirement as a condition for granting a privilege."). See generally Hale, Unconstitutional Conditions and Constitutional Rights, 35 Colum. L. Rev. 321 (1935); Merrill, Unconstitutional Conditions, 77 U. Pa. L. Rev. 879 (1929).
\end{itemize}
by the denial of or placing of conditions upon a benefit or privilege."

Several of these decisions struck down state-imposed conditions on the license to practice law that violated lawyers' constitutional rights. For example, in Spevack v. Klein a New York attorney was disbarred for failing to cooperate with a judicial inquiry. Petitioner challenged his disbarment for professional misconduct on the ground that his failure to produce financial records and to testify was an exercise of his constitutional privilege against self-incrimination. The Court upheld his challenge, reasoning that the government's power to license attorneys does not carry with it the power to deny or to limit their fifth amendment rights.

Conditions on the license to practice law have also been struck down when inconsistent with due process, with the first amendment rights of free speech or free association, or with the right to equal protection. These cases establish the clear principle that the license to practice law may not be conditioned on an attorney's relinquishment of constitutional rights.

III. CONSTITUTIONAL CHALLENGES TO COMPELLED REPRESENTATION

A. Due Process

The precipitous decline of substantive due process since the 1930's has had its greatest impact on federal judicial review of state regulation of businesses and professions. Although state laws in the economics area were formerly subject to intense scrutiny under the due process clause, it is now "enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." Of course, the evil sought to be corrected or the goal sought to be advanced must be a proper object of state legislation.


76. 385 U.S. 511 (1967).

77. Id. at 516 (opinion of Douglas, J.); id. at 520 (Fortas, J., concurring).


81. See, e.g., In re Griffiths, 413 U.S. 717 (1973).


83. See generally L. Tribe, supra note 82, §§ 8.2-.4.


This is the test applied to state regulation of the legal profession. For example, in *Lathrop v. Donohue,* the Supreme Court heard a challenge to a requirement that all lawyers practicing in Wisconsin pay annual dues to the state bar. While focusing for the most part on plaintiff's claim that his right of free association had been infringed, the Court did note that the dues requirement satisfied due process inasmuch as it had a reasonable relationship to the legitimate state policy of improving legal services.

Under this standard, court appointment of attorneys to represent indigents without compensation should be upheld against a due process challenge. The appointments seek to further a policy of improving legal services to the poor. This is certainly a legitimate state policy; it is basically the same one endorsed in *Lathrop.* The means of achieving the goal is also reasonable: the court acts directly to provide legal services to the poor. Thus the court's conclusion in *Menin v. Menin* that due process forbids the appointment of attorneys in civil cases is contrary to the applicable precedents.

B. Involuntary Servitude

The thirteenth amendment bars both "slavery" and "involuntary servitude" within the United States. In addition to this self-executing prohibition, the

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86. The due process clause does impose more substantial constraints upon the criteria that a state may use in regulating admission to the bar. The Supreme Court has stated that "any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957). See also *In re Anastaplo*, 366 U.S. 82 (1961); *Konigsberg v. State Bar*, 366 U.S. 36 (1961). The attorney's obligation to accept court appointments, however, is not a condition upon his admission to the bar; rather, it is a regulation of the practice of law, and the less stringent due process test applies.

87. *Id.* at 276-77.

88. *Id.* at 243. The test has been applied by other courts as well. See *Person v. Association of the Bar*, 554 F.2d 534, 538-39 (2d Cir.), cert. denied, 434 U.S. 924 (1977).

89. *Id.* at 126-27. He suggested in addition, however, that an attorney should be interested both in the effective functioning of the judicial process and in the public standing of the legal profession, so that a lawyer's failure to cooperate in an investigation into professional misconduct might reflect an absence of the degree of concern for judicial administration that the state may reasonably require of its attorneys. *Id.* at 127.

90. *Id.* at 358-59. The act was approved in *Lathrop* without significant comment.

91. The thirteenth amendment provides:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime
amendment gives Congress legislative power to enforce its commands. Although the amendment was ratified during the Civil War with the object of abolishing slavery, the scope of Congress’s enforcement power has been interpreted in recent years to encompass a broad range of discriminatory activities.

In contrast, the amendment’s self-executing prohibition has been limited in its application by the Supreme Court to instances in which state criminal statutes create a risk of imprisonment for breach of an employment contract. Under this construction of the thirteenth amendment, it seems unlikely that court appointment of attorneys would be undermined. The attorney who refuses to represent an indigent risks losing only his right to practice law; he is not threatened with prison. Nevertheless, broad statements by the Supreme Court indicate that the ban on involuntary servitude may extend beyond traditional conceptions of slavery and peonage.

For example, Pollock v. Williams attributed to the thirteenth amendment the intent not only to abolish slavery, but also to “maintain a system of completely free and voluntary labor throughout the United States.” In Nine Applications for Appointment of Counsel in Title VII Proceedings, a federal district court relied on generalizations such as this one, as well as on the “plain meaning” of the amendment, in characterizing the appointment of an attorney to

whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

97. 322 U.S. 4 (1944). In Pollock, the Court considered a provision making a person’s failure to perform under an agreement to render services prima facie evidence of intent to defraud for purposes of a Florida statute criminalizing fraudulent procurement of an advance. The provision was held unconstitutional since it created a peonage: the defendant was liable for criminal sanctions if he did not work, whether or not his intent was in fact fraudulent.
98. Id. at 17. See also Bailey v. Alabama, 219 U.S. 219, 241 (1911); Hodges v. United States, 203 U.S. 1, 16 (1906).
indigent civil rights plaintiffs as the creation of an involuntary servitude. The correctness of this conclusion, however, is doubtful.

Traditionally, courts faced with the question of whether service was "involuntary" have looked to the threatened consequences of a refusal to serve, rather than to the voluntariness of the initial agreement to work or to the actual mental state of the servitor at the time of service. The possibility of civil damages for breach of an employment contract is not so harsh as to render a performance of labor involuntary; in contrast, labor is involuntary when, as in the case of peonage, "law or force compels performance." In rare instances courts have been required to decide whether threatened consequences of a refusal to provide services short of force or confinement are coercive enough to render a servitude "involuntary."

In United States v. Shackney the Court of Appeals for the Second Circuit was asked to decide whether labor performed under threat of deportation was involuntary. Shackney, a chicken farmer, was charged under a federal criminal statute with subjecting Mexican employees to involuntary servitude by threatening to have them deported if they refused to work. The government argued that involuntary servitude included any willful procurement of services by duress. The government's interpretation would have barred employment under threats to blackball an employee in the industry, to reveal a crime to the police, or even to prevent the employee's son from obtaining admission to a desirable college. The court rejected the government's broad reading, and held that "the statute applies only to service compelled by law, by force or by threat of continued confinement." Therefore, the threat of deportation, at least where the employee did not anticipate violence or confinement upon return to the country of his origin, was not sufficiently coercive to make labor "involuntary" for the purposes of the Federal criminal statute.

Under the Second Circuit's reading, the threatened loss of employment opportunities similarly would not render a servitude involuntary. Thus, in Flood v. Kuhn the court relied on Shackney, holding that the baseball reserve system

100. The consequences, such as force or imprisonment, that establish "involuntariness" need not actually be imposed. The threat of force or imprisonment, at least if reasonably capable of being carried out, will suffice to establish involuntary servitude. See, e.g., Pollock v. Williams, 322 U.S. 4 (1944) (threat of imprisonment); United States v. Reynolds, 235 U.S. 133 (1914) (same).

101. See Pollock v. Williams, 322 U.S. at 24; Phoebe v. Jay, 1 Ill. (Bresse) 268 (1828).

102. The thirteenth amendment has not been interpreted to impose a subjective test for involuntariness, which would turn upon the mental state of the servitor alone. See United States v. Shackney, 333 F.2d 475, 487-88 (2d Cir. 1964) (Dimock, J., concurring).


104. 333 F.2d 475 (2d Cir. 1964).

105. Defendant was charged under 18 U.S.C. § 1584 (1976), which makes it a crime to "knowingly and willfully hold[ ] to involuntary servitude or sell[ ] into any condition of involuntary servitude, any other person for any term, or bring[ ] within the United States any person so held . . . ." 333 F.2d at 476.

106. Id. at 480.

107. Id. at 487.

108. 443 F.2d 264, 268 (2d Cir. 1971), aff'd, 407 U.S. 258 (1972). See also Burgess Bros. v. Stewart, 112 Misc. 347, 184 N.Y.S. 199 (Sup. Ct.), aff'd, 194 App. Div. 913, 185 N.Y.S. 85 (1920) (injunction against unlawfully striking not involuntary servitude, because individual employees were not forbidden to quit work, accept better employment, or change positions).
did not establish an involuntary servitude, inasmuch as an employee constrained by the system was free to abandon his profession as a baseball player and to seek or accept other employment. Under Shackney and Flood, the threatened loss of the license to practice law would not make acceptance of court appointments involuntary; an attorney remains free to abandon the practice of law without risking imprisonment or bodily harm. Therefore, an attorney's compelled representation of poor litigants cannot be characterized as an involuntary servitude.

Even if denominated an involuntary servitude, an attorney's duty to serve court-assigned clients probably falls within the "public service" exception to the thirteenth amendment. Under this exception, the government may compel citizens to render a public service, even when the compulsion amounts to involuntary servitude. Thus in the Selective Draft Law Cases the Supreme Court reaffirmed that the thirteenth amendment was not intended "to destroy the power of the Government to compel a citizen to render public service." On this theory, the Court has upheld military conscription, the incarceration of material witnesses, a Florida statute requiring able-bodied men to labor on public roads without compensation, and a Michigan statute forbidding public officers to relinquish their positions without the consent of the state. This exception to the prohibition of involuntary servitude would allow a state to demand virtually any public service of its citizens, although the scope of "public service" may be reasonably limited to services in areas of traditional concern to the state. The state could thereby compel its residents to serve in such areas as police protection, sanitation, public health, and education, but perhaps not in the commercial realm.

109. A servitude that otherwise would be precluded by the thirteenth amendment may be permissible under one other exception. Robertson v. Baldwin, 165 U.S. 275 (1897), held that "services which have from time immemorial been treated as exceptional" will not be affected by the thirteenth amendment prohibition. Id. at 282. In that case a statute authorizing justices of the peace to apprehend deserted seamen and return them to their vessel was upheld as such a historical exception. See also Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). The obligation of attorneys to serve upon court assignment, particularly in civil cases, lacks the historical foundation to come under the Robertson exception. But see Act for the Regulation of Attorneys, Act LXI of 1642-43, 1 Hening Statutes at Large of Virginia 275-76 (forbidding a licensed attorney to refuse to be retained unless already retained on the other side of the controversy).

110. 245 U.S. 366, 373 (1917).

111. Id.


115. Cf. National League of Cities v. Usery, 426 U.S. 833, 851 (1976) (defining "activities... typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services" [footnote omitted]). But see Wilson v. New, 243 U.S. 332, 351 (1917) (suggesting that the state possibly is not prohibited from requiring private employees to work).

116. In Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966), the Second Circuit suggested that the power of the government to compel personal service may also be limited by a requirement of reasonable necessity. In Jobson an inmate of a mental institution claimed that the institution's mandatory work program imposed an involuntary servitude. The court acknowledged that the compulsory commission of the mentally ill represented an exception to the thirteenth amendment prohibition, because such individuals may be harmful to themselves or to society if allowed to remain at large. The court
The Supreme Court has made clear that it regards representation of indigents by court-appointed attorneys, at least in criminal cases, to be the performance of a public service.\(^{117}\) It has been argued that the representation of civil litigants, on the other hand, entails only a private service. Proponents of this position point to the public values at issue in criminal proceedings as opposed to the private rights pressed in civil suits, and note that the states are under no obligation to provide counsel to civil litigants comparable to their constitutional mandate to provide legal assistance to indigent criminal defendants.\(^{118}\) But the state interest necessary to justify compulsion of public service need not be of constitutional dimension.\(^{119}\) Regardless of the nature of the case, the substantial state interest in assuring fairness in the administration of justice\(^{120}\) would justify the states in providing legal assistance to litigants.\(^{121}\) The existence of state and federally funded programs to provide legal assistance to the poor in civil cases\(^{122}\) affirms that such assistance serves a public purpose. If it did not, such expenditures would be improper exercises of governmental spending powers.\(^{123}\)

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\(^{118}\) See New York City Bar Proposal, supra note 22, at 57. However, the duty of attorneys to serve under appointment arose well before the Supreme Court recognized an indigent accused's constitutional right to counsel in Powell v. Alabama, 287 U.S. 45 (1932). As a result, appointment of counsel in criminal cases conventionally has not turned upon the existence of the defendant's constitutional right to be provided counsel. See, e.g., People v. Monahan, 17 N.Y.2d 310, 313, 270 N.Y.S.2d 613, 615, 217 N.E.2d 664, 666 (1966) (inherent power to assign counsel to indigent defendants extends to coram nobis proceedings).

\(^{119}\) For example, the state's power to require its citizens to labor on the public roads, upheld in Butler v. Perry, 240 U.S. 328 (1916), was not premised on the state's constitutional obligation to build roads.

\(^{120}\) Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975). The layman's inability to overcome the intricacy of the adjudicative process, which gives rise to a constitutional guarantee of counsel in criminal prosecutions, equally impedes effective access of un counselled litigants to the judicial process in civil cases. See Goldberg v. Kelly, 397 U.S. 254, 270 (1970); Caston v. Sears, Roebuck & Co., 556 F.2d 1305, 1308 (5th Cir. 1977). Because states hold a monopoly over techniques of dispute settlement in certain civil cases, the states are forbidden in such instances to impose court fees that have the effect of denying indigents access to the courts. See Boddie v. Connecticut, 401 U.S. 371 (1971) (divorce decrees). A state may reasonably determine that adjudicative complexity, although not rising to the level of a constitutional violation, impedes the access of un counselled indigents to expeditious resolution of civil disputes. The resultant state interest in providing attorneys to impecunious litigants in civil suits will not be diminished in the case of a plaintiff who voluntarily comes into court, inasmuch as his inability to redress an injury causes an involuntary loss equal to that of a civil defendant who is unable effectively to protect his interests in court. See Schlagenhauf v. Holder, 379 U.S. 104, 114 (1964).

\(^{121}\) An affirmative finding that assistance of counsel will advance the fairness of the proceeding might be necessary, at least in civil cases, to ensure the applicability of the public service exception. See note 116 supra.

\(^{122}\) See note 18 supra.

C. Uncompensated Taking of Private Property

The fifth amendment provides that "private property [shall not] be taken for public use, without just compensation." The principle behind this restriction is that the government may not require a small number of individuals to bear costs that properly ought to be assumed by the public as a whole. Although this principle antedates the Constitution, no clear-cut test has yet been formulated to determine whether government action affecting private property is a compensable taking. Once it is shown that government action interferes with interests in private property without the claimant’s consent, courts undertake an ad hoc consideration of factors that have traditionally been deemed relevant to the takings question.

For example, a court is most likely to require compensation when government interference with property can be characterized as a "physical invasion" or an "acquisition[ ] of resources to permit or facilitate uniquely public functions." When the government does not affirmatively acquire property,

124. U.S. Const. amend. V. The takings clause has been made applicable to the states by the fourteenth amendment. Chicago B. & Q.R. v. Chicago, 166 U.S. 226, 239 (1897).
126. See, 2 S. Pufendorf, Of the Law of Nature and Nations 829-30 (1729): [W]hen Contributions are to be made for the Preservation of some particular Thing, by Persons that enjoy it in common, every Man should pay his Quota, and one should not be forced to bear more of the Burthen than another . . . . [B]ut because the State of a Commonwealth may often be such . . . that the Publick may be forced to want the use of something in the Possession of some private Subject; it must be allowed that the Sovereign Power may sieze upon it, to answer the Necessities of the State. But then, all above the Proportion that was due from the Proprietors, is to be refunded to them by the rest of the Subjects.
128. Decisions rejecting "takings" challenges on the basis that no "property" had been interfered with have generally held that despite economic harm from government action, the claimant’s interests were not sufficiently bound up with reasonable proprietary expectations. See, e.g., United States v. Willow River Power Co., 324 U.S. 499 (1945); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913).
129. See, e.g., Kunhardt & Co. v. United States, 266 U.S. 537, 540 (1925) (no "taking" of vessel in order to comply with the demands of government officials that it deliver goods in accordance with its sales contract, claimant was forced to forego a profitable disposition of a vessel it owned).

The rationale that "takings" to which the claimant has consented require no compensation has been applied to deny compensation "for the performance of a public duty [that the Government] is already owed." Hurtado v. United States, 410 U.S. 578, 588-89 (1973) (citing Monongahela Bridge Co. v. United States, 216 U.S. 177, 193 (1910) (modification of bridge to prevent obstruction of navigation); United States v. Hobbs, 450 F.2d 935 (10th Cir. 1971) (military conscription); Roaden v. United States, 147 F.2d 752, 754 (10th Cir. 1944) (alternative service of conscientious objectors)). The idea that consent vitiates a "taking" has also been applied when an owner took his property with notice that it was subject to the challenged government interference. See, e.g., HFF, Ltd. v. Superior Court, 15 Cal. 3d 508, 521, 542 P.2d 237, 246, 125 Cal. Rptr. 365, 374 (1975), cert. denied, 425 U.S. 904 (1976) (land investors on notice that environmental controls might be imposed). The property owner's ability to anticipate his loss traditionally excused the sovereign from the duty to compensate seizures of private property for the public benefit. See, 2 S. Pufendorf, supra note 126, at 830.
but instead lowers the value of property by prohibiting particular present or contemplated uses, so as to frustrate investment-backed expectations, compensation may also be required.\textsuperscript{132} However, restrictions on the use of property often need not be compensated, on the theory that the claimant retained a reciprocal benefit,\textsuperscript{133} that the restriction did not have an unduly harsh impact,\textsuperscript{134} or that the desired use of property would destroy or be inconsistent with the use of neighboring properties.\textsuperscript{135}

A number of courts have held that the takings clause compels the government to compensate attorneys appointed to represent indigent litigants.\textsuperscript{136} In considering whether governmental appropriation of personal services requires just compensation, courts must confront two questions. The first is whether personal services are "property" protected by the fifth amendment's takings clause. Second, courts must determine whether the government's appropriation of the particular services in question requires compensation under traditional ad hoc takings analysis.

Supreme Court precedent offers little guidance on these questions. Although the Court has twice faced challenges to the appropriation of personal services, in each case the Court avoided these questions. In \textit{Butler v. Perry},\textsuperscript{137} the Court concluded that even if personal labor can be considered "property" for purposes of the takings provision, compelled labor on the public roads would not be compensable. The Court found the takings clause subordinate to the power of the government since colonial days to conscript labor for the construction and

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In characterizing government action, "takings" jurisprudence does not divide a particular property into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated, but rather focuses on the nature and extent of the interference with rights in the property as a whole. As a result, laws that impose a servitude by restricting the development of air rights or prohibiting the subjacent or lateral development of particular parcels have not been characterized as a physical acquisition of air, subjacent, or lateral rights. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130 (1978) (citing Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Gorieb v. Fox, 274 U.S. 603 (1927); Welch v. Swasey, 214 U.S. 91 (1909)).


133. See, e.g., Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 131-35 (1978). The principle that no taking is effected when burdens and benefits are allocated nondiscriminatorily has been advanced to justify historic-district legislation and zoning laws. Id. at 132; id. at 139-40 (Rehnquist, J., dissenting). See also 2 S. Pufendorf, supra note 126, at 830 (compensation is to be denied "where the Necessity was universal, and every Subject suffer'd equal Loss").


A use restriction will constitute a taking, however, where not reasonably related to the public health, safety, morals, or general welfare. See, e.g., Cusack Co. v. City of Chicago, 242 U.S. 526, 530-31 (1917); Jacobson v. Massachusetts, 197 U.S. 11, 30-31 (1905).

136. See notes 36-37 and accompanying text supra.

137. 240 U.S. 328, 333 (1916).
maintenance of roads.\textsuperscript{138} Similarly, in \textit{Hurtado v. United States}\textsuperscript{139} an individual's donation of personal services was found to be a "public duty," which was not compensable under the takings clause. \textit{Hurtado} rejected a challenge to the incarceration of material witnesses. The Court held that giving evidence at trial is a traditional public obligation owed by every person within the government's jurisdiction.\textsuperscript{140}

Although the Supreme Court has not clearly determined that personal services are property for the purposes of the takings clause, there is much support for that conclusion. The courts have not limited the application of the takings clause to tangible property.\textsuperscript{141} Arguments that the only intangibles protected by the takings clause are those related to physical items have been accepted by a few courts.\textsuperscript{142} The lower courts, however, generally consider an affirmative use of the time, experience, and skill of a professional to be "property" that is "taken" when services are compelled, because these attributes make up a professional's stock in trade.\textsuperscript{143} Courts have also analogized professional services to the work-product of an inventor\textsuperscript{144} or laborer,\textsuperscript{145} which traditionally are compen-

\textsuperscript{138} See also Sawyer v. City of Alton, 4 Ill. (3 Scam.) 127 (1840); In re Dassler, 35 Kan. 678, 12 P. 130 (1886); State v. Comm'r's of Halifax, 15 N.C. 295 (1833); State v. Wheeler, 141 N.C. 773, 53 S.E. 358 (1906); Dennis v. Simon, 51 Ohio St. 233, 36 N.E. 832 (1894); State v. Rayburn, 2 Okla. Crim. 413, 101 P. 1029 (1909).

\textsuperscript{139} 410 U.S. 578, 588-89 (1973).

\textsuperscript{140} See also United States v. Dauphin Deposit Trust Co., 385 F.2d 129, 130 (3d Cir. 1967) (response to summons of documents relevant to a lawful investigation is a public duty, and financial burden is not a taking without just compensation).


\textsuperscript{142} In Gardner v. United States, 446 F.2d 1195 (2d Cir. 1971), the court denied a takings claim for lost earnings caused by false imprisonment. Although the government in that case could not be said to have affirmatively appropriated his services, it did bar the claimant from acquiring property through the use of his services. In rejecting the claim, the court indicated that the fifth amendment right to recover compensation for property taken for public use is "confined to a taking of an interest in property which the Supreme Court has defined as 'the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it.'" Id. at 1197 (citing United States v. General Motors Corp., 323 U.S. 373, 378 (1945)). It may also be argued that the right to one's own services constitutes a "liberty" interest under the due process clause of the fifth amendment, excluded by expressio unius from "property" under the due process clause, and thus, by analogy, from "property" under the takings clause of the same amendment. Cf. Campbell v. Holt, 115 U.S. 620, 630 (1885) (Bradley, J., dissenting) ("property" in the due process clause "embraces all valuable interests which a man may possess outside of . . . his life and liberty"). However, the ambit of "property" within the takings and due process clauses need not be coextensive. Moreover, courts have increasingly come to regard the right to labor as property within the meaning of the due process clause. See, e.g., Greene v. McElroy, 360 U.S. 474, 492 (1959). See also Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

\textsuperscript{143} See, e.g., United States v. Howe, 26 F. Cas. 394 (W.D. Ark. 1881) (No. 15404a); Weiner v. Fulton County, 113 Ga. App. 343, 346, 148 S.E.2d 143, 145, cert. denied, 385 U.S. 1978 (1966); Mount v. Welsh, 118 Or. 568, 585, 247 P. 815, 821 (1926); Pruden v. Grant County, 12 Or. 308, 7 P. 308 (1885); cases cited at note 150 infra. An analogy of personal labor to property is embedded in natural law principles that antecede the Constitution. See 2 S. Pufendorf, supra note 126, at 498.


\textsuperscript{145} Cf. Armstrong v. United States, 364 U.S. 40 (1960) (materialmen's liens deemed compensable property under the fifth amendment, suggesting that laborer's liens equally would be compensable).
sable under the takings clause. Thus, the exercise of the state’s power to compel personal service may give rise to a right to compensation, in the same way that a right to compensation is created by the exercise of the state’s power of eminent domain. For example, courts may require the appearance of a disinterested expert witness, because his testimony would provide a public service. But if a court chooses to summon an expert witness, the expert’s services must be compensated under the fifth amendment, because they are not a previously owed public duty. Once personal services are acknowledged to be property, the more complex task remains to adapt traditional takings analysis to cases of government interference with the private allocation of personal services.

The distinction between compensable “takings” and noncompensable “regulations” may be applied to interference with labor. For instance, criminal prohibitions of such acts as theft or assault, or civil wage and hour limitations, are not “takings” but “regulations,” which restrict socially undesirable uses of one’s services. On the other hand, the requirement in Butler that able-bodied men work on the public roads or the obligation of attorneys to represent indigents at trial constitute an affirmative appropriation of property of the type that traditionally compels compensation.


147. There are numerous traditional public services which may be compelled by the state. These include acceptance of municipal office, see Edwards v. United States, 103 U.S. 471 (1880); People v. Williams, 145 Ill. 573, 33 N.E. 849 (1893), the duty of witnesses to attend court and testify, see Ex parte Dement, 53 Ala. 389 (1875); Bennett v. Kroth, 37 Kan. 235, 15 P. 221 (1887); Henley v. State, 98 Tenn. 665, 41 S.W. 352 (1897), and service as a juror, Neely v. State, 63 Tenn. (4 Baxt.) 174 (1874). See text accompanying notes 109-16 supra. See generally 1 P. Nichols, The Law of Eminent Domain § 1.4[3] (3d rev. ed. 1980).

148. It has been suggested that the thirteenth amendment prohibition of involuntary servitude precludes a taking of personal services on the theory of eminent domain. See 1 P. Nichols, The Law of Eminent Domain § 2.1[5] (3d rev. ed. 1980). Clearly, a state cannot compel a service merely because it would promote public health, safety, morals, or general welfare. At the other extreme, Hurtado and Butler affirm that the state need provide no compensation for the exercise of a duty owed as an incident of residence within the jurisdiction. It seems likely, however, that the state may also require public service that is not traditionally regarded as a public duty, and such services could require compensation under the takings clause.


150. While an expert, like an ordinary witness, may be required to appear at trial and provide unpromptu answers to questions put before him, courts have generally been held unable to require an expert witness to conduct examinations or prepare himself for trial without compensation. See Boynton v. R.J. Reynolds Tobacco Co., 36 F. Supp. 593 (D. Mass. 1941); Flinn v. Prairie County, 60 Ark. 204, 29 S.W. 459 (1895); Bradley v. Davidson, 47 App. D.C. 266, 285 (1918); Dixon v. People, 168 Ill. 179, 48 N.E. 108 (1897); Stevens v. Worcester, 196 Mass. 45, 56, 81 N.E. 907, 910 (1907); 8 J. Wigmore, Evidence § 2203(2)(c) (McNaughton rev. ed. 1960); 4 Moore’s Federal Practice ¶ 26.66(1) (2d ed. 1979).

151. See notes 131-32 and accompanying text supra.


153. The requirement that an individual labor on behalf of the public would seem best characterized as a temporary appropriation and use of personal services. See note 131 and accompanying text supra. It may nevertheless be argued that the alternative civil sanction results in the establishment of a “use restriction” rather than a physical acquisition of property, because the indi-
The substantial public purpose promoted by the services appropriated in such cases as Butler and Hurtado would not in itself have been enough to justify a denial of compensation, in the absence of an historical obligation that supplanted the fifth amendment.\textsuperscript{154} The appropriation of services in either case, however, could have been justified under traditional takings analysis, even though government actions involved an affirmative acquisition of property, rather than a restriction of undesirable uses. In each case the burdens and benefits of the appropriated services were equitably distributed; there was "an average reciprocity of advantage."\textsuperscript{155} The road labor exacted in Butler furthered a legitimate public interest in transportation, and all who labored would ultimately benefit from access to the roads; the work was divided evenly among members of the public, rather than allocated to a select class; and the six days of work demanded each year did not substantially frustrate any individual's economic interest in his own labor. Similarly, the requirement in Hurtado that residents appear as witnesses for negligible compensation promoted the public interest in the administration of justice, and gave rise to a reciprocal right to call upon others to appear as witnesses in one's own trial. Furthermore, the obligation fell equally upon all residents and did not create an excessive economic hardship.

In contrast, in cases of disinterested expert witnesses compelled to testify at trial, there is no reciprocal benefit to offset the burden imposed. The obligation does not fall equally on all citizens, but applies only to a select segment of society. Moreover, the professional suffers the frustration of economic expectations derived from his or her prior investment in special education and training.\textsuperscript{156} Therefore, an appropriation of personal services of this kind, directed at a particular class of professionals, would require compensation under an ad hoc takings approach.\textsuperscript{157}

\textsuperscript{154} Although a considerable number of takings cases deny compensation largely on the ground of the extent of the public purpose served by challenged government action, these cases generally consider action in the nature of a restriction on the use of property. See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-28 (1978). The distinction between affirmative appropriations and prohibitions that affect economic values may be rationalized on the basis that in the former cases the government acts in an enterprise capacity appropriating property for a strictly governmental purpose, while in the latter case, the government simple arbitrates between conflicting private uses. See id. at 135 (citing United States v. Causby, 328 U.S. 256 (1946)); L. Tribe, supra note 82, § 9-5, at 464 & n.8. Were the mere presence of a legitimate purpose sufficient in itself to deny compensation, little if any force would remain to the guarantee of just compensation, inasmuch as any government interference with property is required to serve a public purpose. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962).

\textsuperscript{155} Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (opinion of Holmes, J.).

\textsuperscript{156} Investment-backed expectations will be frustrated to a lesser degree, however, when the state previously subsidized the cost of an individual's professional education.

\textsuperscript{157} The case in which an individual is called upon to render professional services incidental to the fulfillment of a military obligation can be distinguished. In such a case the obligation to serve is spread out among the citizenry.
An attorney's state-imposed obligation to represent the poor is an affirmative acquisition of services directed at a select class of professionals. As such, it is the type of government interference with property that ordinarily would have to be compensated, in accordance with the general principle that select individuals ought not be compelled to assume costly public burdens. In the case of court-appointed attorneys, however, the burdens and benefits of service are equitably distributed; attorneys enjoy reciprocal advantages from the state that justify a denial of compensation under the takings clause.

Although the license to practice law no longer carries with it such privileges as limited immunity to suit bestowed on practitioners in seventeenth-century England, the license conveys benefits of great value to attorneys. Through the exercise of its licensing authority to exclude unqualified individuals from the practice of law, the state grants attorneys a monopoly to practice law. The economic benefit of this monopoly offsets the burden of accepting court appointments. Like many other occupational groups, lawyers are permitted wide latitude in establishing eligibility requirements for professional practice, with the exclusion of individuals from practice enforced by the police power of the state.

The enjoyment of a monopoly does not in itself distinguish attorneys from nurses, teachers, insurance agents, brokers, pharmacists, and other groups subject to state licensing or regulatory authority. However, the proportionately higher entrance requirement for the legal profession and the great number of tasks relegated by law to attorneys in the United States, although the same tasks could be performed satisfactorily by laymen with lesser qualifications, results in a significantly greater economic benefit to attorneys.

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158. See note 60 supra.
159. Courts have held in several instances that a government-granted monopoly justifies the imposition of reciprocal financial burdens than otherwise might be compensable. For example, in Penn Cent. Transp. Co. v. City of New York, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), aff'd, 438 U.S. 104 (1978), the New York Court of Appeals denied compensation for profits lost by Penn Central as a result of the city's designation of Grand Central Terminal as a "landmark." The court stressed that much of the value of the terminal resulted from a history of government assistance to the railroad, noting that "railroads have always been a franchised and regulated public utility, favored monopolies at public expense, subsidy, and with limited powers of eminent domain, without which their existence and character would not have been possible." Id. at 332, 366 N.E.2d at 1275, 397 N.Y.S.2d at 919 (citation omitted). The court concluded that "[a] fair return [on its investment] is to be accorded the owner [of the Terminal], but society is to receive its due for its share in the making of a once great railroad." Id. at 333, 366 N.E.2d at 1276, 397 N.Y.S.2d at 919. See also Fort Smith Light & Traction Co. v. Bourland, 267 U.S. 330 (1925); People ex rel. New York & Queens Gas Co. v. McCall, 245 U.S. 345 (1917); Western Union Tel. Co. v. City of Richmond, 224 U.S. 160 (1912); cf. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389-92, 396-401 (1969) (requirement that broadcast media yield reply time is reciprocal to its license to use scarce broadcasting frequencies).
160. In virtually all cases of occupational licensing in the United States, licensing legislation provides a recognizable economic benefit to occupational groups. As a result, licensing has rarely been a response to pressure to protect the public from unqualified practitioners. Most often, licensing has been a response to pressure from the occupational group seeking a monopoly over a particular area of work. See generally B. Shimberg, B. Esser & D. Cruger, Occupational Licensing: Practices and Policies (1973); W. Gellhorn, Individual Freedom and Governmental Restraints 105-151 (1956).
161. Statutes that proscribe unlawful practice of law generally define the practice of law to include advocacy on behalf of others before judicial or administrative bodies, giving advice on legal
Attorneys also enjoy a state-conferred benefit far beyond their monopoly position, because the demand for their services is largely a product of the state regulatory mechanism. Many services that in other countries are provided by the state are performed by lawyers in the United States. The government's establishment of legal controls over the private sector creates an additional need for lawyers.

Finally, the attorney's role as advocate is almost entirely a creation of the state. And at least in the civil area, states have considerable power to expand or limit that role. As a result, the economic benefit that flows from the attorney's right to represent others at adjudicative proceedings is directly related to the burden imposed on attorneys in representing the poor without compensation. Absent the willingness of attorneys to accept civil appointments, states wishing to provide indigents equal access to the legal process might be compelled to establish a less complicated means of adjudication, so that litigants would need no special expertise in order to safeguard their own interests. A requirement

problems, and drafting legal instruments. See, e.g., N.Y. Jud. Law §§ 478-481, 484 (McKinney Supp. 1970). Particularly in the areas of giving advice and drafting or preparing instruments, many tasks are relegated exclusively to lawyers that reasonably could be performed by individuals in other professions. Yet statutes barring the unlawful practice of law are invoked to limit the services provided by such groups as accountants, see, e.g., In re Bercu, 273 App. Div. 524, 78 N.Y.S.2d 209 (1948), aff'd, 299 N.Y. 728, 87 N.E.2d 451 (1949) (advice as to tax liability), trust companies, see, e.g., Frazer v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1964) (drafting wills), banks and insurance companies, see, e.g., Green v. Huntington Nat'l Bank, 4 Ohio St. 2d 78, 212 N.E.2d 585 (1965) (estate planning), drafting and abstract companies, see, e.g., Beach Abstract & Guaranty Co. v. Arkansas Bar Ass'n, 230 Ark. 494, 326 S.W.2d 900 (1959) (drafting and title examination), realtors, see, e.g., State v. Bender, 106 N.J. Super. 196, 254 A.2d 552 (1969) (preparation of instruments), and surveyors, see, e.g., In re Welch, 123 Vt. 180, 185 A.2d 458 (1962) (preparation of instruments).

162. The lawyer in Europe, by comparison, performs a far narrower function:

In France and to a lesser degree in Britain a large number of functions relating to the lives of individuals, including many matters having to do with birth, inheritance, death, divorce, etc., are not necessarily carried out by lawyers. The state, through a series of regulations and administrative decisions, as well as administrative organizations, readily handles these simple functions in a way that minimizes or eliminates the need for lawyers at each step of the way. The kind of legal work performed by most lawyers in the United States—accident work, wills, divorce cases, etc.—is absorbed by administrative routine rather than arbitrative or needing legal advocates, courts, or people functioning on any advocate capacity whatsoever.


163. In contrast, regulation of the banking community, the insurance industry, and the stock exchange is accomplished in England largely by negotiation and by moral pressure. As a result, this aspect of the function performed by American lawyers is performed by others in England. B. Abel-Smith & R. Stevens, Lawyers and the Courts 1 (1967).

164. The fifth and sixth amendments largely circumscribe the process by which the state may mete out punishment for criminal acts; in the absence of these limits, the states have considerable latitude in establishing a system for resolving civil disputes. See L. Tribe, supra note 82, § 16-11, at 1008.

165. Puritan Massachusetts provided an example of an elaborate and relatively comprehensive judicial system, which functioned effectively without lawyers, yet afforded its citizens such rights as notice, hearing, trial and appeal. See G. Hasbins, Law and Authority in Early Massachusetts 25-42 (1960).

166. See Gagnon v. Scarpelli, 411 U.S. 778, 786-88 (1973) (parole revocation proceedings generally provide sufficient protection against wrongful deprivation without incurring cost of providing counsel to parolees, because of the informal nature of the proceedings and the absence of technical rules of evidence).
that attorneys donate their services at the request of the court is related to the benefit enjoyed by attorneys as advocates—the opportunity to obtain a fee from clients who are unable to represent themselves but can afford to retain counsel to represent them in the resolution of civil disputes.\textsuperscript{167}

\section*{Conclusion}

Prudential concern for minimizing the burden upon members of the legal profession militates for judicious use by courts of their authority to compel attorneys to represent indigent litigants in civil cases. Although exercises of this authority are not immune from constitutional scrutiny, neither are they unconstitutional. Appointment of attorneys to represent litigants in civil cases does not violate due process. The thirteenth amendment prohibition of involuntary servitude does not limit government authority to compel public services of this nature. Moreover, the absence of compensation for legal assistance rendered upon court appointment does not contravene the takings clause because of the reciprocal economic benefit granted attorneys by virtue of their monopoly of practice in the state-created adjudicative system.

\textit{Bruce Andrew Green}

\textsuperscript{167} In individual cases the extent of the financial cost of accepting a court appointment may be extreme enough to justify compensation, on the theory that the burden far outweighed any possible benefit from the license to practice law. Courts rejecting constitutional challenges to court appointments have conceded that the requirement may be unconstitutional in particular cases. See, e.g., State ex rel. Partain v. Oakley, 227 S.E.2d 314 (W. Va. 1976); People ex rel. Conn v. Randolph, 35 Ill. 2d 24, 219 N.E.2d 337 (1966). But see Wright v. Louisiana, 362 F.2d 95 (5th Cir. 1966).