Mallard v. United States District Court: Attorney May Refuse Federal Judge's Request to Represent Civil Plaintiff Proceeding In Forma Pauperis

Fred Springer

Follow this and additional works at: http://digitalcommons.law.villanova.edu/vlr

Part of the Legal Profession Commons

Recommended Citation
Available at: http://digitalcommons.law.villanova.edu/vlr/vol35/iss6/4
I. INTRODUCTION

Until recently, a conflict existed among the United States courts of appeals over the meaning of this portion of the federal in forma pauperis statute: 1 "The court may request an attorney to represent any such person unable to employ counsel." 2 Some courts read the statute as em-


(1175)
powering federal courts to appoint an attorney to represent indigent civil clients.\textsuperscript{3} Others held that a federal court could not appoint an attorney, but only request that the attorney represent the indigent.\textsuperscript{4} The Supreme Court resolved the issue in \textit{Mallard v. United States District Court},\textsuperscript{5} holding that section 1915(d) does not authorize a federal court to require an unwilling attorney to represent an indigent litigant in a civil case.\textsuperscript{6}

In \textit{Mallard}, the Court had an opportunity to contribute to the debate over the force of an attorney's ethical obligation to provide \textit{pro bono publico} services.\textsuperscript{7} Instead, the Court was careful to decide the case narrowly and thereby to avoid the broader policy issues.\textsuperscript{8} After sketching the broad parameters of the debate over an attorney's pro bono obligation,\textsuperscript{9} and situating the facts of \textit{Mallard} within that context,\textsuperscript{10} this Note
examine the Court's decision in the case. Because interpretation of section 1915(d) was dispositive, particularly close attention will be given to the Court's interpretive methodology. Despite the suggested weaknesses of that methodology, the result of the case was correct and does not greatly lessen the viability of section 1915(d).

II. BACKGROUND

A. Mandatory Pro Bono

Historically, it has rarely been controversial, at least within the legal community, to regard pro bono service with professional pride and as distinguishing the practice of law from other pursuits. The existence of the obligation to perform pro bono work has long been recognized, arguably without justification, but it was only recently that its sub-

11. For a discussion of Justice Brennan's majority opinion, see infra notes 82-125 and accompanying text. For a discussion of Justice Kennedy's concurring opinion, see infra notes 126-28 and accompanying text. For a discussion of Justice Stevens's dissenting opinion, see infra notes 129-57 and accompanying text.

12. See Mallard, 109 S. Ct. at 1822 ("[O]ur decision today is limited to interpreting § 1915(d)."").

13. For a discussion of the Court's interpretive methodology, see infra notes 88-115 and accompanying text.

14. For a critical discussion of the Court's interpretation of § 1915(d), see infra notes 158-265 and accompanying text.

15. For a discussion of the continuing viability of § 1915(d), see infra notes 333-34 and accompanying text.

16. See R. POUND, THE LAWYER FROM ANTIOCHY TO MODERN TIMES 5 (1953) (non-profit motivations distinguish profession from business pursuit); Brundage, Legal Aid for the Poor and the Professionalization of Law in the Middle Ages, 9 J. LEGAL HIST. 169, 175 (1988) ("[M]edieval lawyers regarded it as one mark of their superiority to other craftsmen that they furnished their specialized skills to economically and socially disadvantaged persons without compensation."); cf. ABA Lawyer's Pledge of Professionalism ("I will remember that the practice of law is first and foremost a profession, and I will subordinate business concerns to professionalism concerns."), reprinted in Greengard, Lawyer Discipline Today, BARRISTER, Spring 1990, at 11, 12.

17. See R. SMITH, JUSTICE AND THE POOR 230 (2d ed. 1921) (theory of lawyer's obligation to poor "is not peculiar to our law; it is characteristic of the lawyer's position in all civilized communities, and there is evidence that it has been recognized since the earliest times." (footnote omitted); Maguire, Poverty and Civil Litigation, 36 HARV. L. REV. 361, 385 (1923) (uncompensated service was "noble tradition of the early Roman bar"). The Ninth Circuit adopted these historical views in a seminal decision that rejected an attorney's constitutional challenge to being appointed under 28 U.S.C. § 2255 to represent an indigent without just compensation for his services. United States v. Dillon, 346 F.2d 633, 636 (9th Cir. 1965), cert. denied, 382 U.S. 978 (1966).

18. Recent scholarship regards with suspicion claims to historical justifications for mandatory uncompensated service. See generally Shapiro, The Enigma of the Lawyer's Duty to Serve, 55 N.Y.U. L. REV. 735 (1980). Based on a thorough historical investigation, Professor Shapiro concluded that "[t]o justify coerced, uncompensated legal services on the basis of a firm tradition in England and the United States is to read into that tradition a story that is not there." Id. at 753.
stance inspired heated debate.\textsuperscript{19}

In 1975, the American Bar Association (ABA) fueled the controversy when it began to take seriously the idea of requiring its members to perform public interest legal service in exchange for little or no compensation.\textsuperscript{20} Attention to the notion of a mandatory pro bono requirement arose in the context of the movement to replace the 1969 Model Code of Professional Responsibility\textsuperscript{21} with the Model Rules of Professional Conduct.\textsuperscript{22} At the same time, other legal organizations made

Professor Shapiro's conclusion was quoted with approval in \textit{Mallard}. See \textit{Mallard}, 109 S. Ct. at 1819.

Strong claims to an historical justification for uncompensated service accompanied the rise of the Legal Aid movement early in the twentieth century. See R. Smith, \textit{supra} note 17, at 250. Smith, a member of the Massachusetts bar, was a driving force in the movement. His classic work, \textit{Justice and the Poor}, is "the most thorough and excellent history of [its] beginnings." Maffei & Latham, Private Bar Involvement in the Development of Pro Bono Legal Services: The Massachusetts Experience, 73 MASS. L. REV. 153, 154 n.5 (1988). Thus, although Smith claimed that the obligation to represent the poor without charge had historical support, he did so in a discussion of "the widespread failure of the legal system to make inexpensive legal services available to the poor." \textit{Id.} at 155. Indeed, immediately after his claim of historical justification for the obligation, Smith himself remarked that "[i]n civil cases, ... the power [of a court to compel an attorney to represent indigents] has fallen into such disuse that its existence is forgotten or denied." R. Smith, \textit{supra} note 17, at 250.

19. It has been suggested that the notion of a mandatory duty to perform pro bono work "received its first serious articulation" with the publication of F. Marks, K. Leswing & B. Fortinsky, The Lawyer, the Public & Professional Responsibility (1972). Christensen, Lawyer's Pro Bono Publico Responsibility, 1981 \textit{Am. B. Found. Res. J.} 1, 3 n.5.

20. See ABA House of Delegates Resolution on Public Interest Legal Services (August, 1975) (provision of such service is "basic professional responsibility"). One proposed draft of the new Rules stated that "[a] lawyer shall render unpaid public interest legal service." Shapiro, \textit{supra} note 18, at 736 n.6 (citing \textit{Model rules of Professional Conduct} Rule 8.1 (Discussion Draft 1980)).


The ABA adopted the Model Code in recognition of the fact that lawyers require "an understanding . . . of their relationship with and function in our legal system." \textit{Id.} at preamble (footnote omitted); \textit{cf. id.} at preliminary statement ("In furtherance of the principles stated in the Preamble, the [ABA] has promulgated this Code . . . "). The Model Code consists of canons, ethical considerations and disciplinary rules. "The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct . . . . The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive . . . . The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character." \textit{Id.}


The Rules are not effective in a jurisdiction until they are adopted by the
similar proposals for recognition of a mandatory obligation. These suggestions prompted prodigious publication of arguments both for and against a mandatory obligation.

When the dust settled, the ABA had abandoned the idea of a mandatory pro bono obligation. The ABA eventually drafted Model Rule 6.1 to read:

A lawyer should render public interest legal service. A lawyer may discharge this responsibility [i] by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, [ii] by service in activities for improving the law, the legal system or the legal profession, and [iii] by financial support for organizations that provide legal service to persons of limited means.

To further stress its hortative nature, a comment states that the Rule "is not intended to be enforced through disciplinary process."


23. See Ass'n of the Bar of the City of New York, Special Comm. on the Lawyer's Pro Bono Obligations, Toward a Mandatory Contribution of Public Service Practice by Every Lawyer 11 (1980) ("Every lawyer shall devote a significant portion of his or her professional time each year to public service practice."); Eisenberg, NLADA on the ABA Model Rules, 37 NLADA BRIEFCASE 49 (1980) (proposing National Legal Aid and Defender's Association's alternative: "A lawyer shall render unpaid public interest service."). The proposals are reprinted at appendices C and D, respectively, in Spencer, Mandatory Public Service for Attorneys: A Proposal for the Future, 12 Sw. U.L. Rev. 493, 524-25 (1981).


25. See, e.g., Humbach, Serving the Public Interest: An Overstated Objective, 65 A.B.A. J. 564 (1979); Shapiro, supra note 18; see also, Comment, The Uncompensated Appointed Counsel System: A Constitutional and Social Transgression, 60 KY. L.J. 710 (1972).


27. MODEL RULES, supra note 22, Rule 6.1 (emphasis and numbering added). For a detailed account of the various proposed drafts of the Rule, and an appreciation of how it was weakened as it evolved, see Shapiro, supra note 18, at 736-38, and Rosenfeld, supra note 24, at 260-61.

28. MODEL RULES, supra note 22, Rule 6.1, at comment. "The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule." Id. at scope.

For the results of a thorough study of lawyer disciplinary agencies, see ABA Center for Professional Responsibility and the Standing Comm. of Professional
Following the adoption of Rule 6.1, debate over the notion of a mandatory pro bono obligation temporarily subsided. Within four years, however, the issue was once again “hot—and getting hotter.”

With political ill-winds blowing against the Legal Services Corporation, which distributes federal money to programs assisting the poor,

Discipline, Survey on Lawyer Discipline Systems (Dec. 1988) (average of one complaint per 10 licensed attorneys; 60% of complaints investigated; 7% of investigated claims result in private or public sanctions). For a discussion of due process problems in the context of disciplinary rules, see Grossman, Inherent Judicial Power and Disciplinary Due Process, 18 SETON HALL L. REV. 541 (1988).

29. Although the debate subsided, the issue still plagued the profession. See Miskiewicz, Mandatory Pro Bono Won't Disappear, NAT'L L.J., Mar. 23, 1987, at 1, 8.


Under President Bush, LSC continues to be a political battleground. Unable to kill LSC under President Reagan, conservative groups adopted a “fallback provision” in the summer of 1988. Barnes, supra, at 10. Under the auspices of the newly-formed Legal Services Reform Coalition (LSRC), these groups sought “to put conservatives on the LSC board . . . and sharper limits on what LSC attorneys can do for clients.” Id. at 11. White House Chief of Staff John Sununu selected M. Caldwell Butler to replace Durant, LSC Chairman under President Reagan. Id. at 10. Sununu won reluctant approval of Butler from conservative groups. Id. at 11. In a September 1988 meeting with LSRC members, however, Butler replied affirmatively to the question whether “a legal services lawyer should sue a hospital that refused to provide a Medicaid abortion to a poor person.” Id. at 12. The group rejected Butler, “Sununu acquiesced, and [he was] back to square one in finding a new LSC chairman.” Id. at 11. In January 1990, President Bush appointed nine new directors (out of 11 total) “just hours before Congress went back into session, . . . [thus making] it possible for the new board members to take office immediately rather than having to await Senate confirmation.” Barrett, Nine Directors of Legal Agency Appointed by Bush, Wall St. J., Jan. 24, 1990, at B6, col. 4.
the pressure was on to find a private solution to the problem of the unmet legal needs of the poor.\textsuperscript{32} Attempted solutions have taken a variety of forms, including local bar requirements,\textsuperscript{33} state bar recommendations,\textsuperscript{34} legislative inquiries,\textsuperscript{35} court rules\textsuperscript{36} and even requirements of service as a condition for graduation from law school.\textsuperscript{37} The ABA reen-

\textsuperscript{32} For a recent summary of the level of need, see \textit{Path to Equal Justice}, supra note 31, at 357–60 ("Although the exact quantification of the legal needs of the poor is not clear, it is obvious that they are vast."); \textit{see also} Born, \textit{Serving the Poor}, A.B.A. J., Mar. 1988, at 144 (over 95\% of legal needs of poor go unserved).

\textsuperscript{33} By the end of 1987, seven local bar associations had mandatory pro bono requirements for their members. Graham, supra note 30, at 62 (Orange, Leon and Palm Beach Counties, Fla.; Bryan and Athens Counties, Tex.; DuPage County, Ill.; Eau Claire County, Wisc.). The Boston and Chicago Bar Associations adopted resolutions to encourage their members to perform pro bono work. \textit{Path to Equal Justice}, supra note 31, at 364 n.73.

\textsuperscript{34} See Wall St. J., Feb. 7, 1990, at B7, col. 2. The Colorado bar has recommended that large Denver firms send their lawyers to rural towns to provide the poor with pro bono services. The bar is optimistic that firms will participate, but says "cost is a hurdle." \textit{Id.} at col. 4. Davis, Graham & Stubbs, the first firm to provide an attorney, estimates that it may lose $60,000, the amount the attorney would otherwise bill in the four months she is away from Denver. \textit{Id.} For a study of large firms' efforts to provide pro bono services, see Barr, \textit{Doers and Talkers}, Am. Law., July-Aug. 1990, at 51.


\textsuperscript{35} Oregon and Washington both studied the issue of requiring public service, but neither adopted the idea. Graham, supra note 30, at 62.

\textsuperscript{36} During the years 1982–1987, district courts in eight federal jurisdictions adopted local rules or general orders providing for mandatory service in civil cases. \textit{Id.} (Eastern and Western Dists. of Ark.; Northern and Central Dists. of Ill.; Northern and Southern Dists. of Iowa; Dist. of Conn.; San Antonio Div. of Western Dist. of Tex.). After \textit{Mallard}, the viability of these rules, at least those that draw their authority from § 1915, is questionable.

\textsuperscript{37} Tulane Law School was the first to adopt this requirement of public service in order to graduate. \textit{Pro Bono Makes the Grade at Tulane}, Student Law., Feb. 1988, at 7 (20 hours of service for indigents required for graduation). The University of Pennsylvania Law School was the second. Lambert, \textit{Penn Students Face Pro Bono Requirements}, Student Law., Sept. 1989, at 53 (70 hours required). Florida State University and Valparaiso University recently joined the movement, and several schools, including Georgetown, are studying the idea. Harold, \textit{Dilemmas}, Student Law., Jan. 1990, at 11. In August 1989, the Law Student Division (LSD) of the ABA "soundly defeated a proposal endorsing mandatory pro bono programs." \textit{Id.} In August 1990, however, the LSD passed Resolution
tered the controversy in 1987 with the publication of its first editorial in five years, calling for fifty hours of pro bono service a year.38 One year later, the ABA adopted the fifty hour minimum as its official policy.39

B. Court Appointed Representation

Under Model Rule 6.1, unpaid representation of clients in court proceedings is only one of the methods by which an attorney may discharge her pro bono obligation. It is also a method with a unique characteristic, for, unlike performance of pro bono work by, for example, serving on the board of directors of a church, performance in the courtroom opens the opportunity for judicial participation. A court's most straightforward manner of ensuring that an attorney performs pro bono work is to appoint the attorney to represent a client appearing in the court. Some attorneys have objected to what they perceive as an intrusion on the exercise of their professional skills. The discourse in most modern cases addressing attorneys' objections has been carried out within certain well-defined boundaries. This Note sketches those boundaries and demonstrates how courts have maneuvered within them.

1. General Boundaries

Courts have described attorneys in terms of the following dichotomies: willing/unwilling and compensated/uncompensated.40 Similarly, discussion of a litigant's status may also be described in terms of certain dichotomies: plaintiff/defendant, civil/criminal, indigent/nonindigent.

90-14, which "encourages" law schools to establish public service requirements for graduation. Lambert, Division Makes a Pro Bono Link, STUDENT LAW., Oct. 1990, at 54.

38. 50 Hours for the Poor, A.B.A. J., Dec. 1987, at 55. The editorial was co-published in the Journal of the American Medical Association. See 50 Hours for the Poor, 258 J. A.M.A. 3157 (1987). The editorial stated that "all doctors and all lawyers . . . should contribute a significant percentage of their total professional efforts without expectation of financial remuneration" and that "50 hours a year . . . is an appropriate minimum amount." 50 Hours for the Poor, A.B.A. J., Dec. 1987, at 55. Taking the message to heart, the Atlanta law firm of Smith, Gambrell & Russell recently undertook a joint effort with one of its clients, the American Academy of Facial Plastic and Reconstructive Surgery (AAFPRS). Klages, MDs, Lawyers Join for Pro Bono, A.B.A. J., Jan. 1989, at 23. The collaborative effort makes the services of plastic surgeons available "to the poor who are unemployed or unemployable because of facial deformities." Id. Smith, Gambrell & Russell will draw up the necessary legal documents. Id.

39. Marcotte, Pro Bono Policy Passed, A.B.A. J., Oct. 1988, at 140. The resolution was adopted by the ABA House of Delegates without opposition. It provides: "Lawyers should devote at least 50 hours to pro bono and other public service activities that serve those in need, improve the law, the legal system, or the legal profession." Id. (emphasis added).

40. For purposes of this section, "compensated" means compensated by the litigant. Thus, an "uncompensated" attorney might receive something for his services, but the compensation will not come from the litigant.
and deserving/undeserving. A full description of the problem of attorneys appointed to represent clients must combine the attorney and the litigant. For example, a description of a particular scenario within these boundaries might be “an unwilling, uncompensated attorney and a civil, indigent, undeserving plaintiff.” These restrictions yield a manageable playing-field for discussion. The following examples illustrate the ways of thinking about the problem within the suggested boundaries.

The simplest scenario involves a “nonindigent” litigant. This litigant, regardless of the other three litigant-dichotomies, simply has the ability to purchase representation and will enter into a private arrangement with an attorney. Another possible scenario involves the “plaintiff and criminal” litigant, in other words, the state. The attorney here is the state prosecutor, who is “willing and compensated”—willing, because he chose to work for the prosecutor’s office; compensated, because the job pays a salary.

A slightly more difficult scenario involves the “defendant and criminal” litigant. The Supreme Court has held that this litigant has a constitutional right to counsel under the sixth amendment. Because of the

41. For purposes of this section, “deserving” means that an attorney would assess the litigant’s case as either likely to succeed on the merits or worth devoting time to for any other reason. Thus, a litigant may be “undeserving” even if she has suffered a legal wrong.

42. The playing-field is manageable, yet still large. Within the proposed boundaries, there are 64 possible attorney-litigant scenarios. This number is arrived at by determining the number of “possible attorneys” and the number of “possible litigants,” and then multiplying the numbers to yield the number of possible attorney-litigant groupings.

For x variables, each of which can have n values, nx represents the number that exhausts all of the possible combinations. For example, description of an attorney is limited to two dichotomies (that is, two variables). The dichotomies may assume two values. Thus, the number of “possible attorneys” is 2^2, or four: (i) a willing, compensated attorney, (ii) a willing, uncompensated attorney, (iii) an unwilling, compensated attorney and (iv) an unwilling, uncompensated attorney. Similarly, description of a litigant is limited to four dichotomies, each of which may assume two values. Without listing them all, the formula above yields the inference that the number of “possible litigants” is 2^4, or 16.

The final step in arriving at the number of possible attorney-litigant scenarios is to multiply the number of attorneys, four, by the number of litigants, 16, the result of which is 64.

43. The notion that the litigant will be able to purchase representation rests, obviously, on certain economic assumptions. The “free market” approach to the delivery of legal services is well defended in Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship, 85 Yale L.J. 1060 (1976). According to Mr. Fried, “[t]he lawyer’s liberty . . . to take up or decline what clients he will is an aspect of the moral liberty of self to enter into personal relations freely.” Id. at 1078. It has also been argued that the “laissez-faire ideal” is one of “five ideas of primary importance” embodied in the ABA Model Code of Professional Responsibility. Penegar, The Five Pillars of Professionalism, 49 U. Pitt. L. Rev. 303, 307, 312-22 (1988).

44. The sixth amendment provides that “[i]n all criminal prosecutions, the
recognition of that constitutional right, it may be that wherever these two elements are present, the litigant should also be described as "deserving." Initially, much attention was given to identifying the substance of the right to counsel.\(^4\)\(^5\) It was also necessary, however, to address the satisfaction of the right—if a defendant has a right to counsel, then the correlative duty to assist the defendant must extend to someone.\(^4\)\(^6\)

This necessity raised, at least potentially, the problem of the "unwilling and uncompensated" attorney. But the "uncompensated" aspect of the scenario was avoided by the general availability of funds for public defenders.\(^4\)\(^7\) Likewise, the "unwilling" aspect was circumvented...

accused shall enjoy the right . . . to have the Assistance of counsel for his defence.” U.S. Const. amend. VI. Once thought to guarantee only the assistance of the accused’s own counsel, it has come to include the right to court-appointed counsel for indigent defendants. See Johnson v. Zerbst, 304 U.S. 458 (1938) (right to assigned counsel in all federal cases where defendant could not afford one); Powell v. Alabama, 287 U.S. 45 (1932) (right to court-appointed counsel in capital case). This right was held applicable to state trials under the fourteenth amendment in Gideon v. Wainwright, 372 U.S. 335 (1963).

45. After Gideon, the Supreme Court decided a series of cases defining the right. See generally Argersinger v. Hamlin, 407 U.S. 25 (1972) (defendant accused of misdemeanor has right to counsel if imprisonment is real possibility); Gilbert v. California, 388 U.S. 263 (1967) (right to counsel extends to police lineup); In re Gault, 387 U.S. 1 (1967) (counsel must be provided in juvenile proceedings which may result in commitment to institution if child and parents are unable to afford attorney); White v. Maryland, 373 U.S. 59 (1963) (right to counsel extends to preliminary hearing); Douglas v. California, 372 U.S. 353 (1963) (right to counsel extends to first appeal from criminal conviction which is normally given by state as matter of right). The Supreme Court has also held that the sixth amendment guarantees to a defendant in a state criminal trial the right to proceed without counsel when he voluntarily and intelligently elects to do so. Faretta v. California, 422 U.S. 806 (1975).

46. It does not follow from a particular defendant’s right to assistance of counsel that the correlative duty to provide assistance extends to any attorney individually. The duty may, for example, be that of the collective legal community, or even of society in general. Historically, the duty was assumed by the church, which had jurisdiction over personae miserables ("miserable persons"), including the poor, widows and orphans. See H. Berman, Law and Revolution 222 (1983). The partial secularization of this duty came about through instructing the laity, including corporate guilds, that "alms bought them merit and a foothold in Heaven." B. Tuchman, A Distant Mirror 35 (1978).

47. Contemporary with the recognition of the right to counsel in Gideon was the recognition that some source of financing was necessary if the right were to have any substance. Report of the Att’y Gen.’s Comm. On Poverty and the Administration of Criminal Justice 41-42 (1963) ("[A] system of justice that attempts . . . to meet the needs of the financially incapacitated accused through primary or exclusive reliance on the uncompensated services of counsel will prove unsuccessful and inadequate.") Shortly thereafter, both private and government funds were directed to public defenders. In 1964, the Ford Foundation created the National Defender Project and donated six million dollars over the next five years to the National Legal Aid and Defender Association. Serpe, Public Defenders, Case & Com., Sept.–Oct. 1989, at 27, 28. Also in 1964, Congress allocated money to attorneys appointed to represent indigent defendants with...
by the general assumption that it is within a court's power to compel the attorney to serve in a criminal case; thus the attorney's "will" is irrelevant. Recent state court decisions, however, have brought into question the earlier treatment of both the "uncompensated" and the "unwilling" variables in the context of criminal defendants.

The possibility of reconsidering the characterization of a particular litigant-attorney scenario indicates that, although clear boundaries may define the universe of discourse, there are no definite criteria to fix a scenario at a determinate point within that universe. The fluidity of description is most conspicuous in what is hereinafter referred to as "the prima facie case"—one that involves an indigent civil plaintiff and an unwilling, uncompensated attorney. Parties on both sides of the issue readily exploit the fluidity of description to justify their respective positions. Faced with the prima facie case, a court must decide either (i) to recharacterize the case by adjusting one or more of the variables, thus refusing to consider the case as presented and simplifying the task of justification, or (ii) to resist or ignore the indeterminacy of the description and to accept the prima facie characterization of the case. Courts that take the first route tend to condone appointment, while courts opting for the second tend to find in favor of the attorney.

2. Courts That Uphold Appointment

Courts that recharacterize the scenario have various options available. Few cases turn on recharacterization of the dichotomies that describe a litigant, because, with the exception of the deserving/undeserving dichotomy, there is little opportunity for ad-


48. If a court has the power to appoint an attorney, then the relevant inquiry is whether the court thinks it appropriate that the defendant be represented by a particular attorney, not whether the particular attorney thinks so. The threshold question, however, is whether the court indeed has the power to appoint counsel.

49. In 1980, Professor Shapiro counted 34 states that had addressed the issue of whether the private bar was under an enforceable duty to provide uncompensated defense services. Of those, 18 imposed an unqualified duty. Shapiro, supra note 18, at 756. Recent state court decisions have examined the problem of the "uncompensated" attorney appointed to represent a criminal defendant, and the majority is now 18-16 against an unqualified duty. See Delisio v. Alaska Superior Court, 740 P.2d 437 (Alaska 1987) (private attorney may not be compelled to represent indigent criminal defendant without just compensation); State ex rel. Stephan v. Smith, 747 P.2d 816 (Kan. 1987) (state has obligation to compensate attorneys appointed to represent indigent criminal defendants). For a discussion of the effect of Mallard on the issue at the federal level, see infra note 162.

50. Rarely does a case turn on recharacterizing an undeserving litigant as deserving. Nevertheless, the struggle over delimiting this aspect plays an important role at the more general policy level. For example, our society has statutorily characterized as deserving and provided counsel to civil rights litigants, who
Instead, most cases involve the two dichotomies that describe an attorney, since they afford the most flexibility. Where the willing/unwilling dichotomy is addressed, the legal issue generally is the validity of the appointment process itself. The court that upholds the appointment will either ignore the attorney’s will or redescribe an unwilling attorney as willing. On the other hand, where the compensated/uncompensated dichotomy is at stake, the concomitant legal issue is whether a “taking” has occurred. The court that finds no “taking” either will find that the attorney has, in a sense, “given,” or the court will redescribe an uncompensated attorney as compensated.

Recharacterization of the willing/unwilling dichotomy takes two forms. First, a court may regard the attorney’s will as irrelevant. This is accomplished by (a) focusing on the court’s power to compel service, or (b) focusing on the attorney’s ethical or professional obligation. Second, even where a court considers the attorney’s will, it nonetheless may (a) find that the attorney is an “officer of the court,” thereby subordinating the attorney’s will to the court’s, or (b) find “implied con-in the “free market” once may have been deemed undeserving and thus unable to procure representation. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 204(a), 78 Stat. 241, 244 (codified as amended at 42 U.S.C. § 2000a-3(a) (1988)) (appoint counsel to civil rights plaintiff seeking injunction); Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(e), 78 Stat. 241, 260 (codified as amended at 42 U.S.C. § 2000e-5(f)(1) (1988)) (appoint counsel to Title VII plaintiff). Where this policy determination is made, however, funds are usually made available to pay counsel.

51. Some commentators have struggled to recast the civil/criminal litigant dichotomy. See Leubsdorf, Constitutional Civil Procedure, 63 Tex. L. Rev. 579 (1984) (constitutional principles governing criminal cases should apply equally to civil litigation); Note, The Indigent’s Right to Counsel in Civil Cases, 76 Yale L.J. 545 (1967) (suggests incremental approach to development of right to counsel for both plaintiffs and defendants in civil cases by analogy to development in criminal cases). A similar argument has been addressed to the distinction between the “right” to counsel in criminal proceedings and the “privilege” of having counsel in civil proceedings. See Catz & Guyer, supra note 1, at 662-63 (right/privilege dichotomy should be abandoned).

52. See Ex parte Dibble, 279 S.C. 592, 310 S.E.2d 440 (Ct. App. 1983) (court has inherent power to appoint counsel, without compensation, to represent indigent civil litigant in civil case in which appointment is neither constitutional nor statutory right but nonetheless is necessary to render justice).

53. See Payne v. Superior Court, 17 Cal. 3d 908, 920 n.6, 192 Cal. Rptr. 405, 414 n.6, 553 P.2d 565, 574 n.6 (1976) (attorneys must provide uncompensated service in civil cases in accordance with duty not to reject cause of defenseless or oppressed); In re Romano, 109 Misc. 2d 99, 103, 458 N.Y.S.2d 967, 970 (Sur. Ct. 1981) (Code of Professional Responsibility requires bar members to respond to public need for uncompensated service and court may require representation of indigent civil plaintiff).

54. See Bartlett v. Kitchin, 76 Misc. 2d 1087, 352 N.Y.S.2d 110 (Sup. Ct. 1973) (as officer of court, attorney’s responsibility to provide uncompensated service to indigent criminal defendants applied in civil matrimonial proceeding). For disparate views on the “officer of the court” approach, compare Gaetke, Lawyers as Officers of the Court, 42 Vand. L. Rev. 89 (1989) (characterization is “vacuous and unduly self-laudatory” and should be invigorated) with Martineau,
Recharacterization of the compensated/uncompensated dichotomy also takes two forms. First, a court may find that the attorney, rather than having anything “taken,” is merely discharging a preexisting obligation. In this sense, the attorney is “giving” what she owes, and thereby has no claim to compensation. Second, a court may recognize that something has been “taken,” but find that the attorney has been compensated in return. The compensation is most often portrayed as a “monopoly privilege” or a “license” to practice law, but it is some-

The Attorney as an Officer of the Court: Time to Take the Gown off the Bar, 35 S.C.L. Rev. 541 (1984) (characterization leads to “fundamental defect of substituting a label for an analysis” and should be abandoned). The collective will of attorneys, while perhaps stronger than an individual attorney’s, poses other problems. See F.T.C. v. Superior Court Trial Lawyers Ass’n, 110 S. Ct. 768 (1990) (boycott by attorneys appointed to represent indigent defendants constituted restraint of trade in violation of antitrust laws).

55. See United States v. Dillon, 346 F.2d 633, 635 (9th Cir. 1965) (applicant for admission to bar may “justly be deemed to be aware” of obligation to provide uncompensated service), cert. denied, 382 U.S. 978 (1966); accord Dolan v. United States, 351 F.2d 671, 672 (5th Cir. 1965) (same) (quoting Dillon). Characterizing the attorney as willing by finding implied consent is closely related to both the “ethical obligation” approach and the “incident to license” approach.

In addition to finding an implied willingness on part of the attorney, a court may stretch far to find an expression of willingness. See Lewis v. Lane, 816 F.2d 1165 (7th Cir. 1987). In Lewis, plaintiff-prisoners filed a motion to substitute counsel and argued that the first appointment of counsel under § 1915(d) was invalid because the attorney did not validly consent to it. Lewis, 816 F.2d at 1168. Rather than reach the question of whether consent was necessary, the Seventh Circuit found that the attorney had consented to the appointment. Id.

When appointed, attorney Adams contacted a magistrate and gave a number of reasons why he did not want the case, including, like Mallard, an unfamiliarity with civil rights cases. Id. The magistrate found none of his reasons compelling and told Adams that if he declined the case, “his name would be submitted to the chief judge of the federal district for possible termination of his membership in the Southern District [of Illinois] bar. Adams then indicated that he would take the case.” Id.

The Seventh Circuit found that “[a]lthough Adams was a reluctant appointee, he did validly consent to represent the plaintiffs.” Id.

56. This “giving” approach was advanced in Dillon. The court stated that when an attorney is “called upon to fulfill” the obligation that accompanies admission to the bar, “he cannot contend that it is a ‘taking of his services.’” Dillon, 346 F.2d at 635. Proponents of the view were bolstered by the Supreme Court’s holding in Hurtado v. United States. See 410 U.S. 578 (1973). In holding that a witness may be detained with compensation of one dollar per day without affecting a “taking,” the Court stated that payment was not required “for the performance of a public duty [that] is already owed.” Id. at 588.

57. The Tennessee Supreme Court has stated that “the license to practice law carries with it as a condition and an obligation the rendition of public service, including service by appointment for indigents.” Huskey v. State, 743 S.W.2d 609, 611 (Tenn. 1988). The Supreme Court spoke to the issue in In re Snyder. 472 U.S. 634 (1985). Snyder was suspended from practice in the Eighth Circuit for refusing to apologize to the court after stating in a letter that he was “appalled by the amount of money which the federal court pays for indigent
times expressed more tangibly.\textsuperscript{58}

3. \textit{Courts That Refuse to Uphold Appointment}

Not all courts engage in these methods of recharacterizing the dichotomies; an equal number resist viewing the case as involving anything other than an indigent, minimally deserving, civil plaintiff and an unwilling, uncompensated attorney. Posing the issue in these terms, the courts hold that the attorney may not be compelled to serve.

With respect to the descriptions of the litigant, the courts recognize the unfortunate circumstance of those who cannot afford representation. But taken alone, that is not sufficient to outweigh the other characteristics of the scenario. The litigant is "minimally deserving" for two reasons. First, mere satisfaction of the threshold "frivolous or malicious" scrutiny does not necessitate a conclusion that the litigant is deserving.\textsuperscript{59} The second reason is closely related to the litigant's "civil" criminal defense work" and that he would not accept any more appointments under the Criminal Justice Act. \textit{Id.} at 637.

In reversing Snyder's suspension, Chief Justice Burger, writing for an unanimous Court, discussed the "complex code of behavior" to which lawyers are subject.

\begin{quote}
[A] member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers. Admission creates a license \ldots{} to appear in court and try cases \ldots{} The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice. \textit{Id.} at 644.
\end{quote}

For an example of the view that the obligation stems from the attorney's monopoly privilege, see Christensen, \textit{supra} note 19, at 14-18. For an example of the view that rejects "taking" arguments while also rejecting the "conditioned license" approach, see Note, \textit{supra} note 24, at 390 (absence of compensation for legal assistance rendered upon court appointment is not taking because economic benefit of monopoly is compensation).


As attorneys, we know that a positive image helps us achieve success for our profession. Relationships with the press, with the Legislature, and with other professions are enhanced when the Bar's image is favorable. Our jobs are made easier; our tasks are more readily accomplished.

\begin{quote}
\ldots{} The message is clear: Lawyers can help themselves \ldots{} by becoming involved in pro bono activities. \textit{Id.} at 324-35; \textit{accord} Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 287 (1985) (pro bono serves professional interest of attorneys).
\end{quote}

\textsuperscript{59} See Montague, \textit{supra} note 7. Mr. Montague reported the views of Jack London, co-author of the California Bar's amicus curiae brief in support of Mallard:

Although federal judges are empowered to dismiss pauper suits they deem frivolous, London says that judges have become more inclined to grant requests for counsel in those cases that they do accept. "The request is often not made by the litigant," he says. "In my
and "plaintiff" characteristics. Thus far, no court has held that such a
litigant has a constitutional right to counsel.60 This is so not only for
practical reasons,61 but also because of the generally unspoken attitude
that if such a right were recognized it would be abused.62

Courts that refuse to compel an attorney to serve display the greatest
degree of steadfastness to the prima facie characterization of the sce-
nario when they consider the dichotomies relating to the attorney. If the
issue is the validity of the appointment process—the attorney's will—the
courts reject the "inherent power"63 and the "officer of the court"64
arguments and regard the attorney's will as relevant. Further, they re-
ject the "professional obligation"65 and the "implied consent"66 argu-

experience, it is often made by the court, which wants to avoid a messy
pro se proceeding."
Montague, supra note 7, at 58 (quoting London). For a discussion of the "frivo-
lous or malicious" standard, see infra note 227.

60. The closest the Court has come to expressing a constitutional right for
civil litigants is the right of "meaningful access." Bounds v. Smith, 430 U.S.
817, 828 (1977) (right of access to court requires prison authorities to assist
inmates in preparation and filing of meaningful legal papers by providing pris-
oner with adequate law libraries or adequate assistance from persons trained in
law). In dissent, Justice Rehnquist proffered a "slippery slope" argument that
the holding entailed appointment of a lawyer. Id. at 841 (Rehnquist, J., dissent-
ing). This "broad view" reading of Bounds was rejected in Branch v. Cole, 686
F.2d 264, 266 n.1 (5th Cir. 1982).

61. See C. WOLFE, THE RISE OF MODERN JUDICIAL REVIEW 272 (1986) (major
argument against requiring assigned counsel in every case is sheer expense).

62. The real fear is that the abuse will come from prisoners with access to
legal materials and nothing better to do with their time. The Administrative
Office of the United States Courts reported that the number of prisoner suits
rose from 18,477 in fiscal year 1982-83 to 24,421 in 1987-88 and now accounts
for over 10% of civil actions in federal courts. Montague, supra note 7, at 58.
Although the attitude is generally unspoken, it was well articulated by Judge
Posner in McKeev v. Israel. See 689 F.2d 1315 (7th Cir. 1982) (Posner, J., dis-
senting). Judge Posner dauntlessly portrayed the plaintiff's case as "a routine
prisoners' civil rights case: a scatter shot of implausible charges." Id. at 1324
(Posner, J., dissenting). He foresaw as the result of enlarging a prisoner's right
to counsel an "apocalypse" consisting of the decreased legitimacy and increased
futility of criminal punishment. Id. at 1325 (Posner, J., dissenting).

63. See State ex rel. Scott v. Roper, 688 S.W.2d 757, 768 (Mo. 1985) ("[W]e
do not believe that courts have the inherent power in civil cases to . . . compel[]
representation without compensation.").

64. See DeLisio v. Alaska Superior Court, 740 P.2d 437, 441 (Alaska 1987)
(considered attorney may not be denied reasonable compensation solely on
basis of officer of court tradition), overruling Wood v. Superior Court, 690 P.2d
1225 (Alaska 1984); Roper, 688 S.W.2d at 766-67 (time has come to abandon
invoking doctrine that lawyers are officers of court).

65. See DeLisio, 740 P.2d at 441-42 (rejects professional obligation argument);
Roper, 688 S.W.2d at 763-64 (same).

66. See DeLisio, 740 P.2d at 442 (rejects implied condition argument); Roper,
688 S.W.2d at 769 (same); Ruckenbrod v. Mullins, 102 Utah 548, 553, 133 P.2d
325, 327 (1943) (state cannot impose restrictions on acceptance of license which
deprive licensee of constitutional rights); State v. McKenney, 20 Wash. App.
ments and find that the attorney is indeed unwilling.

Where the case involves a "taking" argument, the courts hold that the attorney has experienced a deprivation of property, has not been compensated and has suffered a taking.67 Some courts have found, in the nature of pro bono work itself, the necessary condition that it be the result of a free will in order to be meaningful.68 Finally, some courts


68. The view that the nature of pro bono work entails free choice was well expressed by the Missouri Supreme Court.

The distinction between the furnishing of pro bono legal services and court compelled legal services seems to have been lost in American case law. The same principles are not applicable to both. Compelled legal service is totally inconsistent with the giving of pro bono service as a matter of professional responsibility or professional pride. The latter two involve a matter of professional choice. It is the choice that makes the rendering of the service self-fulfilling, pleasant, interesting, and successful. Compelling the service deprives the professional of the element of professional choice. The quality of the uncompensated service can be expected to decrease in almost direct proportion to the loss of choice of the professional rendering the service.

Roper, 688 S.W.2d at 768 (emphases added); see also, Shapiro, supra note 18, at 788 (responsibility implies an element of choice).

It is tautologous to say "a compelled act is not an act freely chosen." This proposition is useful only to dispute those who would characterize an attorney as "willing" to provide service, when in fact she is not. For a discussion of the implied-will approach, see supra note 55 and accompanying text. But the tautology does not address the arguments of those who, finding that attorneys are not "choosing" to render uncompensated service, would compel them to do so, even if that meant that the rendering of the service was not self-fulfilling, pleasant or interesting.

Contained within the Missouri court's passage, however, is a separate argument that responds to such an approach. The court suggests that compelled service would, in addition to being unpleasant or uninteresting, also be unsuccessful. Roper, 688 S.W.2d at 768. Indeed, the last sentence of the passage predicts a mathematical relationship between quality and choice. Id. Others have advanced a similar argument. See Uelmen, Simmering on the "Backburner": The Challenge of Yarbrough, 19 Loy. L.A.L. Rev. 285, 310 (1985) ("[T]here is a direct relationship between the level of compensation provided and the quality of services rendered to indigents."); see also Gilbert & Gorenfeld, The Constitution Should Protect Everyone—Even Lawyers, 12 Pepperdine L. Rev. 75, 88-89 (1984) (lawyers lack skills poor need, and if they have skills, would intentionally lessen quality of service if forced to provide them). For a response to these arguments, see Path to Equal Justice, supra note 31, at 370-72 (problems eliminated by "buy-
have refused to compel service on equal protection and involuntary servitude grounds.\(^{69}\)

C. The Background of Mallard

The foregoing provides an appreciation of the general atmosphere besetting the matter of court-appointed representation as a form of mandatory pro bono when, in January 1987, John Mallard gained admission to the Iowa bar.\(^{71}\) Six months later, the Volunteer Lawyers' Project informed him that he had been selected to represent inmates at the Iowa State Penitentiary in an \textit{in forma pauperis} proceeding in the United States District Court for the Southern District of Iowa.\(^{73}\) After

\(^{69}\) \textit{See} Cunningham v. Superior Court, 177 Cal. App. 3d 336, 222 Cal. Rptr. 854 (1986) (insuperable obstacles stand in way of allocating pro bono work in paternity cases so as not to violate equal protection); \textit{see also} Family Div. Trial Lawyers v. Moultrie, 725 F.2d 695 (D.C. Cir. 1984) (material fact issue existed as to attorneys' equal protection claim).


\(^{71}\) Mallard graduated from law school in December 1980 and spent his first two years of practice in San Diego, where he was involved "primarily in representation of creditors in debt collection and bankruptcy proceedings." \textit{Affidavit of John Mallard in Support of Motion to Withdraw}, Traman v. Parkin, No. 87-317-B (S.D. Iowa 1987), \textit{reprinted in Joint Appendix at 30, Mallard} (No. 87-1490). After a year as in-house counsel for an investment group, he became associated with Iowa attorney Jay B. Marcus. \textit{Id.} at 31-32. In January 1987, he was admitted to the bar of the United States District Court for the Southern District of Iowa and became a partner at Marcus & Mallard. \textit{Id.} at 32, 35.

\(^{72}\) The Volunteer Lawyer's Project (VLP) was created in 1982 by the Legal Services Corporation of Iowa and the Iowa State Bar Association "as an attempt to harness the resources of private attorneys throughout the state on behalf of low-income individuals." \textit{Amicus Curiae Brief for Legal Services Corporation of Iowa at 3, Mallard} (No. 87-1490).

\(^{73}\) \textit{Mallard}, 109 S. Ct. at 1817. VLP requested that Mallard represent "two current inmates and one former inmate who sued prison officials under 42 U.S.C. § 1983, alleging that prison guards and administrators had filed false disciplinary reports against them, mistreated them physically, and endangered their lives by exposing them as informants." \textit{Id.} The prisoners' case involved three plaintiffs and eight defendants. \textit{Motion to Withdraw}, Traman v. Parkin, No. 87-317-B (S.D. Iowa 1987), \textit{reprinted in Joint Appendix at 5, Mallard} (No. 87-1490).

The request was a routine procedure under a referral program adopted by VLP pursuant to the order of the Eighth Circuit Court of Appeals that each district court "obtain a sufficient list of attorneys practicing throughout the district so as to supply the court with competent attorneys who will serve in pro bono situations." \textit{Mallard}, 109 S. Ct. at 1816 (quoting Nelson v. Redfield Lithograph Printing, 728 F.2d 1003, 1005 (8th Cir. 1984)). 

"[A]ny attorney admitted
reviewing the case, Mallard filed a motion to withdraw. When a magistrate denied his motion, Mallard appealed. Along with his appeal, he filed a motion to be dismissed on the grounds that section 1915(d) did not authorize mandatory appointment. The court denied

to practice in the Southern District of Iowa who has appeared in a non-bankruptcy federal case in the past five years is eligible for appointment." Amicus Curiae Brief for Legal Services Corporation of Iowa at 3, Mallard (No. 87-1490). The list of eligible attorneys was divided alphabetically into thirds, and requests were made from each third in successive years. Id. at 4. An attorney's odds of being selected to handle one case every three years were one in nine. Mallard, 109 S. Ct. at 1817 n.1.

74. Mallard contacted VLP and attempted to withdraw from the case. Motion to Withdraw, Traman v. Parkin, No. 87-317-B (S.D. Iowa 1987), reprinted in Joint Appendix at 7, Mallard (No. 87-1490). He offered to "substitute as counsel in another case which involved an area of practice which [he understood], such as bankruptcy law or securities law." Id. VLP informed him that one could be relieved of an obligation to participate in the program by "signing up for other volunteer lawyers projects with the legal services program." Id. VLP told him, however, that because his "name had been given to the court, [he] would have to make a motion to the court to withdraw." Id.

Thus, had Mallard previously rendered pro bono service, he would not have been selected under the referral program. VLP deleted from the selection pool the names of attorneys who voluntarily performed pro bono work. Mallard, 109 S. Ct. at 1816. The effect of the program, then, was to remedy the unequal distribution of pro bono work. Cf. C. Wolfram, Modern Legal Ethics 950 (1986) ("Probably many lawyers, perhaps a majority, engage in no pro bono work and the bulk of the work is performed by the few.") (footnote omitted). Mysteriously, Mallard claimed, "I provide voluntary services in my practice." Coyle, Should Pro Bono Be Mandatory: Organized Bar, Courts Are Split, NAT'L L.J., Mar. 6, 1989, at 3, 48 (quoting Mallard).

75. Mallard, 109 S. Ct. at 1817. Mallard stated that he was unfamiliar with §1983 issues, lacked deposition and cross-examination experience, and repeated his offer to take a different case. Id.

76. Id.

77. Id. In addition to advancing the new argument that the court lacked authority under §1915(d) to require him to take the case, Mallard attempted to strengthen his original argument. The ABA Model Rules of Professional Conduct state: "A Lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES supra note 22, Rule 1.1. Mallard argued that, due to his unfamiliarity with §1983 and his lack of the skills necessary to handle such a case, he would violate the ethical obligation imposed on him by Rule 1.1 if he were forced to take the case. Mallard, 109 S. Ct. at 1817.

A similar argument, involving an ethics opinion rather than bar rules, failed in a recent state case. See State v. Jones, 726 S.W.2d 515 (Tenn. 1987). Interpreting Disciplinary Rule 5-105(D) of the Code of Professional Responsibility, the Board of Professional Responsibility of the Supreme Court of Tennessee opined: "[T]he County Attorney cannot represent criminal defendants prosecuted by County officers .... [T]he partner or associate of the County attorney is also prohibited from such representation." Jones, 726 S.W.2d at 522. Attorney Banks was the law partner of the county attorney. Id. at 517. Banks was appointed to represent a defendant charged with disorderly conduct. He objected to the appointment and invoked the ethics opinion in his support. Id. Nonetheless, the trial judge ordered him to represent the defendant. When he refused, the judge found Banks in contempt. Id. The court of appeals affirmed,
both the appeal and the motion.\textsuperscript{78}

Mallard then sought a writ of mandamus from the Eighth Circuit Court of Appeals to compel the district court to permit him to withdraw.\textsuperscript{79} When the court, without opinion, denied the writ, Mallard sought review from the United States Supreme Court, which granted certiorari\textsuperscript{80} to resolve the conflict over the meaning of section 1915(d).\textsuperscript{81}

Justice Brennan, writing for a majority of the Supreme Court,\textsuperscript{82} reversed the judgment of the Eighth Circuit Court of Appeals and remanded the case for further proceedings.\textsuperscript{83} Following "the judicial practice of dealing with the largest questions in the most narrow way,"\textsuperscript{84} Justice Brennan was careful to confine the opinion to the statutory question and to sidestep the volatile ethical and public policy issues of the

holding that the ethics opinion "did not have the force of law and was not binding on the courts." \textit{Id.} The supreme court affirmed. \textit{Id.} at 521.

\textsuperscript{78} \textit{Mallard}, 109 S. Ct. at 1817. The court agreed with the magistrate's finding that Mallard was competent. \textit{Id.} In response to Mallard's § 1915(d) challenge, the district court cited authority for the proposition that § 1915(d) empowers the court to appoint attorneys. \textit{See Coburn v. Nix}, No. 86-716-B (S.D. Iowa 1987), \textit{reprinted in} Petition for a Writ of Certiorari at 3a, \textit{Mallard} (No. 87-1490).

\textsuperscript{79} \textit{Mallard}, 109 S. Ct. at 1817.

\textsuperscript{80} \textit{Mallard v. United States Dist. Court}, 109 S. Ct. 51 (1988) (granting petition for certiorari). Recognizing the important policy issues in the case, amici curiae from across the country filed briefs. Mallard received support from the State Bar of California and the California Attorneys for Criminal Justice together with the National Association of Criminal Defense Lawyers. Amicus Curiae Brief for State Bar of California, \textit{Mallard} (No. 87-1490); Amici Curiae Brief of California Attorneys for Criminal Justice and the National Association of Criminal Defense Lawyers, \textit{Mallard} (No. 87-1490). That \textit{Mallard} piqued the California Bar's interest was perhaps unsurprising. "Except for California, state bar associations appear to have little direct formal institutional contact with the federal courts . . . ." \textit{Wasby, The Bar's Role in Governance of the Ninth Circuit}, 25 \textit{WILLAMETTE L. REV.} 471, 499 (1989) (emphasis added). One of the California Bar's federal court-related activities "includes meetings in each district with the chief judge and other district judges present, at which pending federal legislation, ramifications of particular court rulings, and other topics such as lawyer discipline . . . are discussed." \textit{Id.} at 501.

In favor of the district court were the Legal Services Corporation of Iowa and the Association of the Bar of the City of New York. Amicus Curiae Brief for Legal Services Corporation of Iowa, \textit{Mallard} (No. 87-1490); Amici Curiae Brief of the Association of the Bar of the City of New York, \textit{Mallard} (No. 87-1490).

The ABA, perhaps mindful of or exhausted from the furor surrounding the development of Model Rule 6.1, did not take a position on the case. \textit{See Montague, supra} note 7, at 55.

\textsuperscript{81} \textit{See Mallard}, 109 S. Ct. at 1817.

\textsuperscript{82} Chief Justice Rehnquist and Justices Brennan, White, Scalia and Kennedy comprised the majority. Justice Kennedy also wrote a concurring opinion.

\textsuperscript{83} \textit{Mallard}, 109 S. Ct. at 1823.

\textsuperscript{84} \textit{Youngstown Sheet & Tube Co. v. Sawyer}, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).
In the first, and most protracted, portion of the opinion, the Court construed the meaning of request in section 1915(d) and concluded that it was not synonymous with appoint.

In the second part of the opinion, the Court sanctioned Mallard's use of the writ of mandamus.

The Court quickly reached a definition of request as used in section 1915(d). The Court proceeded from the premise that "interpretation of a statute must begin with the statute's language." The Court stated that the operative term in the statute is request, and commenced to investigate its meaning. First, the Court determined that the term commonly is used to express a desire that someone do something, but lacks the imperative force of a demand. Having discovered its ordinary meaning, the Court stated that there was no reason to think that Congress intended it to have any other. Therefore, the Court concluded, the term as used in section 1915(d) is precatory.

Equipped with this interpretation of the definition that Congress

85. See Mallard, 109 S. Ct. at 1823. Justice Brennan was explicit in his avoidance of the larger issues. "We do not decide today whether, or under what conditions, . . . any . . . federal statute providing for the 'assignment' or 'appointment' of counsel authorizes federal courts to compel an unwilling attorney to render service. Nor do we offer an opinion on the constitutionality of compulsory assignments." Id. at 1821 n.6. "[W]e do not reach the question whether the federal courts have inherent authority to order attorneys to represent litigants without pay . . . . Id. at n.8.

In case the point was missed, the last section of the opinion was devoted to limiting the decision:

We emphasize that our decision today is limited to interpreting § 1915(d). We do not mean to question . . . lawyers' ethical obligation to assist those who are too poor to afford counsel . . . . Nor do we express an opinion on the question whether the federal courts possess inherent authority to require lawyers to serve . . . . We hold only that § 1915(d) does not authorize the federal courts to make coercive appointments of counsel.

Id. at 1822-23.

86. Id. at 1818-21.

87. Id. at 1822.

88. Id. at 1818 (citing United States v. Ron Pair Enters., Inc., 109 S. Ct. 1026, 1030 (1989) and Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985)).

89. Id.

90. Id. The Court stated:

The import of the term seems plain. To request that somebody do something is to express a desire that he do it, even though he may not generally be disciplined or sanctioned if he declines . . . . [S]omebody who refuses a request, as the word is ordinarily used, may not be penalized formally for doing so . . . .

Id. In contrast to the "ordinary usage," Justice Brennan offered as an example a soldier who fails to fulfill a superior's request and who may then be court-martialed for refusal to obey orders. Id.

91. Id.

92. Id.
intended, Justice Brennan mounted a protracted justification of it.\textsuperscript{93} In the first defense of its interpretation,\textsuperscript{94} the Court contrasted subsections (c) and (d) of section 1915.\textsuperscript{95} The Court read subsection (c) to exemplify Congress's ability to employ compulsory language, i.e., the term \textit{shall}.\textsuperscript{96} The Court stated that the reasonable interpretation of subsection (d), in which Congress did not use that compulsory language, is that Congress did not intend subsection (d) to authorize mandatory appointment.\textsuperscript{97}

In its second defense of the interpretation,\textsuperscript{98} the Court examined state statutes governing \textit{in forma pauperis} proceedings when Congress adopted section 1915(d) in 1892.\textsuperscript{99} Of the twelve states that at that time had \textit{in forma pauperis} statutes permitting courts to secure counsel,\textsuperscript{100} each provided that a court could “assign” or “appoint” counsel. The Court concluded that Congress's decision, in light of its awareness of the state practices, to allow the federal courts only to request attorneys to serve suggested that Congress intended to permit attorneys to decline the request.\textsuperscript{101}

Having distinguished the original section 1915(d) from its contem-
porary state statutes, the Court put forth its third defense of the interpretation of request.\textsuperscript{102} The Court expressed doubt over the extent to which any of the state statutes authorized courts to sanction attorneys who refused to serve without compensation.\textsuperscript{103} The Court attributed its doubt to the fact that “few appointments were made pursuant to those statutes, . . . many legal proceedings went unrecorded, and . . . lawyers seem rarely to have balked at courts’ assignments.”\textsuperscript{104} As evidence that Congress did not intend to replicate a system of coercive appointment, the Court noted that prior to the enactment of section 1915(d) no reported decision held that a lawyer must provide representation without compensation.\textsuperscript{105} Thus, even if Congress did not intend to distinguish section 1915(d) from the state statutes, it would not necessarily follow that it intended to enact a coercive system of appointment.

The Court’s fourth and fifth defenses of its interpretation involved comparisons of section 1915(d) to similar federal statutes enacted before and after section 1915(d). In its fourth defense,\textsuperscript{106} the Court pointed out that the only federal statute providing for court-ordered representation enacted prior to section 1915(d) contained the term assign.\textsuperscript{107} From this evidence the Court concluded that “‘assign’ was already part of the federal lexicon,” and Congress’s decision not to employ it “might be taken to display a reluctance to require attorneys to serve” indigent civil litigants.\textsuperscript{108} Similarly, in its fifth defense,\textsuperscript{109} the Court noted that “[e]very federal statute still in force that was passed after [section 1915(d)] and that authorize[d] courts to provide counsel state[d] that courts [could] ‘assign’ or ‘appoint’ attorneys.”\textsuperscript{110} The Court concluded that these later enactments “afford no reason to believe that the plain meaning of section 1915(d) is not its intended meaning.”\textsuperscript{111}

\textsuperscript{102} See id.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id. (citing Shapiro, supra note 18, at 749-62). The Court found English precedent “equally murky,” and quoted Professor Shapiro’s conclusion: “To justify coerced, uncompensated legal services on the basis of a firm tradition in England and the United States is to read into that tradition a story that is not there.” Id. (quoting Shapiro, supra note 18, at 753).
\textsuperscript{106} Id. at 1820-21.
\textsuperscript{107} Id. at 1820 (citing Act of Apr. 30, 1790, ch. 9, § 29, 1 Stat. [112,] 118 [codified as amended at 18 U.S.C. § 3005 (1988)]).
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 1821.
\textsuperscript{110} Id. at 1821. In both the fourth and fifth defenses the Court carefully avoided the appearance of endorsing the compulsory nature of those other statutes. The Court played the term request off of the terms assign and appoint in other statutes in order to demonstrate the weakness of § 1915(d), not to demonstrate the coercive nature of those other statutes. See id. at 1821 n.6. In its fifth defense, the Court implicitly made the point by referring to the subsequently enacted statutes as “apparently coercive.” Id. at 1821.
\textsuperscript{111} Id.
Finally, the Court, in its sixth defense, rejected the district court's argument that construing request to allow courts to ask but not compel attorneys to represent indigent clients rendered the subsection a nullity. 112 The argument was: (1) statutory authorization is unnecessary for a court simply to ask an attorney to represent someone; (2) section 1915(d) would be superfluous if it did no more than that; (3) a statute should be construed so that no part of it is superfluous; (4) therefore, section 1915(d) must be read to confer coercive power upon the federal courts; (4) therefore, to read it otherwise is to misread it—to render it a nullity. 113

The Court dismissed the argument on two grounds. First, the Court rejected the initial premise as too strong. Contrary to being "unnecessary," the Court stated, statutory provisions may simply codify existing rights and powers. 114 Second, the Court denied that the conclusion followed from the premises. Section 1915(d) as construed informs lawyers that a court's request is "appropriate" rather than "improper"; therefore, claimed the Court, it "plays a useful role in the statutory scheme" and is not a nullity. 115

Distinct from the statutory construction issue was the appropriateness of Mallard's use of the writ of mandamus as a remedy. Mallard filed his petition for certiorari after the Eighth Circuit Court of Appeals had denied his application for a writ of mandamus. 116 To confine a district court to a lawful exercise of its prescribed jurisdiction, the Court noted, was one of the traditional uses of the writ. 117 The writ is an extraordinary remedy, however, and the Court is reluctant to condone its use. 118

112. Id. at 1821.
113. Id.
114. Id. The Court provided an example: "Section 1915(d) . . . authorizes courts to dismiss a 'frivolous or malicious' action, but there is little doubt they would have power to do so even in absence of this statutory provision." Id.
115. Id.
116. Id. at 1822. The Attorney General of Iowa had posed as a counterstatement of the question presented for review the following: "Is 28 U.S.C. 1915(d) so unambiguous that rational and substantial legal argument on its construction cannot be made, so that a pretrial petition for mandamus to the district court must be granted?" Respondent's Brief in Opposition to Petition for a Writ of Certiorari at i, Mallard (No. 87-1490).

Justice Stevens was of a like mind. He stated: "As this case comes to us . . . the question is whether a lawyer may seek relief by way of mandamus from the court's request . . . ." Mallard, 109 S. Ct. at 1823 (Stevens, J., dissenting).

117. Mallard, 109 S. Ct. at 1822. Apart from the use of the writ to confine an inferior court to a lawful exercise of its jurisdiction, the Court noted one other traditional use, that of "compel[ling] [an inferior court] to exercise its authority when it is its duty to do so." Id. (citing Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943)).

118. Id. The Court gave two reasons for its reluctance: the undesirability of making a district court judge a litigant and the inefficiency of piecemeal appellate litigation. Id. (citing Kerr v. United States Dist. Court, 426 U.S. 394, 402-03 (1976) and Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980)).
To be entitled to the writ, a petitioner must demonstrate a clear abuse of discretion\textsuperscript{119} or conduct amounting to usurpation of the judicial power,\textsuperscript{120} a lack of adequate alternative means to obtain the relief sought\textsuperscript{121} and a clear and indisputable right to issuance of the writ.\textsuperscript{122}

The Court found that Mallard met this standard. Because the district court rested its decision solely on section 1915(d), and because the Supreme Court determined that section 1915(d) does not authorize coercive appointments of counsel, the district court "plainly acted beyond its jurisdiction."\textsuperscript{123} Mallard had no alternative remedy available, and the reasons for the reluctance to issue the writ were not present.\textsuperscript{124} Therefore, the Court concluded that the court of appeals erred in denying the application.\textsuperscript{125}

Justice Kennedy, who provided the fifth vote, wrote a short concurring opinion.\textsuperscript{126} His opinion stressed two points. First, he reiterated the Court's attempt to narrow the decision: "[It] speaks to the interpretation of a statute, to the requirements of the law, and not to the professional responsibility of the lawyer."\textsuperscript{127} Next, he went further than Justice Brennan and expounded on the nature of that professional ethical responsibility:

Lawyers . . . have obligations to their calling which exceed their obligations to the State . . . . Accepting a court's request to represent the indigent is one of [the lawyer's] traditional obligations. Our judgement here does not suggest otherwise. To the contrary, it is precisely because our duties go beyond what the law demands that ours remains a noble profession.\textsuperscript{128}

Justice Stevens wrote a dissenting opinion.\textsuperscript{129} Unlike the majority, which had first interpreted section 1915(d) and then, based on that in-

\textsuperscript{119} Id. (quoting Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383 (1953)).
\textsuperscript{120} Id. (quoting De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945)).
\textsuperscript{121} Id. (citing Kerr v. United States Dist. Court, 426 U.S. 394, 403 (1976)).
\textsuperscript{122} Id. (quoting Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384 (1953)).
\textsuperscript{123} Id.
\textsuperscript{124} For a discussion of the reasons why the Court is reluctant to issue a writ of mandamus, see supra note 118. Those reasons were not present in Mallard because Judge Vietor, the district court judge, was not a litigant, and Mallard was not attempting to sever one element of the case from the rest. See Mallard, 109 S. Ct. at 1822.
\textsuperscript{125} Mallard, 109 S. Ct. at 1822.
\textsuperscript{126} Id. at 1823 (Kennedy, J., concurring).
\textsuperscript{127} Id. (Kennedy, J., concurring).
\textsuperscript{128} Id. (Kennedy, J., concurring). For a discussion of the relationship between Justice Kennedy's view and Justice Stevens's view, see infra note 136.
\textsuperscript{129} Mallard, 109 S. Ct. at 1823 (Stevens, J., dissenting). Justices Marshall, Blackmun and O'Connor joined in the dissent. Id.
terpretation, concluded that Mallard's use of mandamus was appropriate. Justice Stevens would have disposed of the case on procedural grounds. For him, the issue was whether Mallard was entitled to relief from the district court's request by way of mandamus. He neither defined the elements that Mallard would have had to prove to be entitled to the writ nor objected to any of the majority's standards. He did suggest, however, that Mallard should have had an "absolute right" to withdraw in order for mandamus to be appropriate. Thus, although Justice Stevens stated that the case "involves much more than the parsing of the plain meaning of the word 'request' as used in 28 U.S.C. [section] 1915(d)," he devoted much of his opinion to doing just that in order to demonstrate that Mallard, if not absolutely compelled to accept the case, did not have an absolute right to withdraw.

190. Id. at 1823 (Stevens, J., dissenting). Justice Stevens rhetorically narrowed the question: "[T]he question is whether a lawyer may seek relief by way of mandamus from the court's request simply because he would rather do something else with his time." Id. (Stevens, J., dissenting).

191. For a discussion of the standards used by the majority, see supra notes 117-22 and accompanying text.

192. Cf. Mallard, 109 S. Ct. at 1826 (Stevens, J., dissenting) ("The notion that this petitioner had an absolute right to have his 'motion to withdraw' granted by the District Court—and therefore that a writ of mandamus should properly issue—is completely unacceptable to me.").

193. Id. at 1823 (Stevens, J., dissenting). In addition, Justice Stevens stated, the case did not involve the sufficiency of an attorney's reasons for declining appointment nor the possible sanctions for declining. Id. (Stevens, J., dissenting). He did, however, offer examples of reasons he thought would be sufficient. For a discussion of those reasons, see infra note 194.

194. Justice Stevens would not construe § 1915(d) as imparting an absolute duty to accept a case. See Mallard, 109 S. Ct. at 1825 (Stevens, J., dissenting). Rather, he appears to have suggested that § 1915(d) establishes a presumption of duty, under which counsel is required to serve "absent good reason." Id. (Stevens, J., dissenting). As examples of such good reasons, for which an attorney "may properly decline" appointment, he offered: (1) conflict of interest; (2) engagement in another trial; (3) previous acceptance of "more than a fair share" of the profession's uncompensated burdens; and (4) lack of qualification for a particular case. Id. at 182 (Stevens, J., dissenting).

Justice Stevens's list of sufficient reasons for declining appointment are in accordance with those listed in the ABA's Model Rule 6.2:

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:
(a) representing the client is likely to result in violation of the rules of professional conduct or other law;
(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

MODEL RULES, supra note 22, Rule 6.2. Comment 1 to the Rule states that "[a] lawyer may . . . be subject to appointment by a court to serve . . . persons unable to afford legal counsel." Id. at comment 1. The same ideal was expressed in the Model Code:

When a lawyer is appointed by a court or requested by a bar associ-
In his view, section 1915(d) "should be construed to require counsel to serve, absent good reason, when requested to do so by the court." Justice Stevens's opinion proceeded from the premise that "[t]he relationship between a court and the members of its bar is not defined by statute alone." Having proclaimed his willingness to probe beyond the confines of the statute, he first turned to the issue of a court's inherent authority. He noted the Court's recent recognition of the legitimacy of the bar's interest in requiring its members to share the burden of representing indigent defendants in criminal cases, and asserted that the recognition "reflects the fact that a court's power . . . is firmly rooted in the authority to define the terms and conditions upon which members are admitted to the bar . . . and to exercise 'those powers necessary to protect the functioning of its own processes.'"

After providing examples of the "ancient tradition[]" of the lawyer's duty to serve, correlutive to the court's right to require service, Justice Stevens maintained that a collection of elements shapes the relationship between a court and an attorney. In addition to statutory definition of an attorney's duty, he would include "tradition, respect for the profession, the inherent power of the judiciary, and the commands that are set forth in canons of ethics, rules of court, and legislative enactments." In his view, section 1915(d) "should be construed to require counsel to serve, absent good reason, when requested to do so by the court." Justice Stevens's opinion proceeded from the premise that "[t]he relationship between a court and the members of its bar is not defined by statute alone." Having proclaimed his willingness to probe beyond the confines of the statute, he first turned to the issue of a court's inherent authority. He noted the Court's recent recognition of the legitimacy of the bar's interest in requiring its members to share the burden of representing indigent defendants in criminal cases, and asserted that the recognition "reflects the fact that a court's power . . . is firmly rooted in the authority to define the terms and conditions upon which members are admitted to the bar . . . and to exercise 'those powers necessary to protect the functioning of its own processes.'"
Justice Stevens concluded that section 1915(d) "embodies this authority to order counsel to represent indigent litigants." It was this power to appoint counsel, he opined, already codified in the "humane and enlightened States" laws, that Congress intended to codify in section 1915(d). To construe it otherwise, he maintained, would be to defeat Congress's purpose.

Justice Stevens next attempted to refute the majority's second defense of its interpretation by downplaying the significance of Congress's use in section 1915(d) of the word request while all the states' statutes used either appoint or assign. He pointed out that both Congress in debating the statute and courts in applying it had used the terms interchangeably. He concluded that Congress understood request and appoint or assign to impose "similar obligations[,] and simply assumed" that attorneys would perform their duty.

To further his point that Mallard did not have an absolute right to withdraw from the case and, therefore, was not entitled to a writ of mandamus, Justice Stevens analogized to the quasi-estoppel principle that once an attorney has made an appearance in a case, the attorney may not withdraw without leave of court. Because Justice Stevens viewed the procedural posture of the case as limited solely to Mallard's request for a writ of mandamus, he thought the majority "largely misse[d] the point" with its third defense.

For a discussion of the Court's second defense, see supra notes 98-101 and accompanying text. For a discussion of the Court's third defense, see infra note 193.
lard did not quite fit this scenario, since Mallard had filed his motion to withdraw without entering an appearance. Nevertheless, he found evidence of Mallard’s recognition of the duty to accept the appointment in the fact that Mallard thought it appropriate to request permission to withdraw.

Justice Stevens next maintained that Mallard implicitly assumed an obligation to participate in the court’s assignment program when he became a member of the Iowa bar. Because Justice Stevens viewed court rules as a determinative element of an attorney's duty, he concluded that a request, pursuant to a “fair and detailed procedure,” to represent an indigent, is “tantamount to a command.”

Finally, on the basis of these arguments Justice Stevens concluded that he would construe the term request to mean “respectfully command.” He claimed that, “[i]f that is not what Congress intended, the statute is virtually meaningless.” He rejected the majority’s contention that request could be merely precatory and that the statute could remain purposeful by alerting attorneys that the court’s request was “appropriate” and should not be lightly disregarded. To the contrary, he was of the opinion that the Congress that enacted section represented and that the orderly prosecution of the lawsuit is not disrupted is paramount to a lawyer’s personal interest in terminating a relationship with a client.”

148. Mallard, 109 S. Ct. at 1826 (Stevens, J., dissenting). Because Mallard had not made an appearance before filing his motion to withdraw, Justice Stevens suggested that the motion “might more appropriately have been captioned as a ‘petition to be excused from performing a nonexistent duty to enter an appearance in a pending case.’” Id. (Stevens, J., dissenting).

149. Id. (Stevens, J., dissenting) (motion to withdraw “is evidence of [Mallard’s] recognition of some duty to accept the appointment unless there was a valid excuse for declining it.”).

150. Id. (Stevens, J., dissenting). Justice Brennan endeavored to answer this implied-obligation argument in the majority opinion. See id. at 1819 n.4.

151. For a discussion of the elements that Justice Stevens thought shaped the relationship of the court and the members of its bar, see supra note 136.


153. Mallard, 109 S. Ct. at 1826 (Stevens, J., dissenting).

154. Id. (Stevens, J., dissenting).

155. Id. (Stevens, J., dissenting). Justice Stevens here advanced the view dealt with by the majority in its sixth defense. For a discussion of the sixth defense, see supra notes 112-15 and accompanying text.

156. Mallard, 109 S. Ct. at 1826 (Stevens, J., dissenting).
1915(d) assumed it would be "unthinkable" for an attorney to decline the request without good reason.\footnote{Id. at 1826-27 (Stevens, J., dissenting). At this point, Justice Stevens made reference to the remarks of Missouri Supreme Court Justice Blackmar's dissenting opinion in \textit{State ex rel. Scott v. Roper}. Id. at 1827 n.9 (Stevens, J., dissenting) (citing \textit{State ex rel. Scott v. Roper}, 688 S.W.2d 757, 773 (Mo. 1985) (Blackmar, J., dissenting)). In \textit{Roper}, the Missouri Supreme Court denied that state courts have the power to compel attorneys to represent indigent civil litigants. \textit{Roper}, 688 S.W.2d at 769.}

\textbf{III. Analysis}

The opinion of the "unlikely majority"\footnote{See Stewart, Pro Bono, Sex and Partnership, A.B.A. J., July 1989, at 44 ("The \textit{Mallard} majority was an unlikely one, with Justice Brennan writing on behalf of four conservative justices—White, Scalia, Kennedy and Rehnquist."); cf. Wermiel, \textit{Four Justices Seem Prepared to Assent to a Full-Time Role Focusing on Dissent}, Wall St. J., Oct. 16, 1989, at B13, col. 1 (identifying Justices Brennan, Marshall, Blackmun and Stevens as "liberal and moderate allies" most likely to join in dissent from opinions of Court's new five-member conservative majority). A recent analysis suggests that this categorization of the Justices on general ideological grounds validly applies to the Court's approach to the more specific issue of the affairs of lawyers and the legal profession. Schwartz, \textit{Lawyers and the Supreme Court: Of Means and Ends}, 3 GA. STA. L. REV. 179, 180 (1987).} in \textit{Mallard v. United States District Court}\footnote{Id. at 1814 (1989).} was narrow, limited to the interpretation of the term \textit{request} in 28 U.S.C. § 1915(d).\footnote{Id. at 203 (citing Brennan, \textit{The Responsibilities of the Legal Profession}, in \textit{The Path of the Law from 1967} (A. Sutherland ed. 1968)). He also said "that the profession, dedicated to the service of business, had neglected its social responsibility. He doubted then that the legal profession was fully capable of or even willing to carry out its professional charge." \textit{Id.} at 203 (citing Brennan, \textit{The Responsibilities of the Legal Profession}, in \textit{The Path of the Law from 1967} (A. Sutherland ed. 1968)).} Concluding that the term as used by
Congress in that statute was precatory, the Court refused to read the statute as empowering federal courts to compel an unwilling attorney to represent an indigent litigant in a civil case. This Note first examines the Court’s interpretive method. Second, it discusses the decision’s possible effects on the attorney-client (particularly the imprisoned client) and court-attorney relationships.

A. Interpretation of Request as Used in Section 1915(d)

1. Styles of Statutory Construction

Because Mallard was a paradigmatic instance of statutory interpretation, it is appropriate to examine the Court’s interpretive process. Although interpretation of the law is preeminently a judicial task, judicial construction does not take place in a vacuum. Judges must employ reasonably well-defined methods if the rest of the political community is to accept their decisions. These methods have evolved

162. Id. at 1816. After Mallard, courts will do well not to rely on § 1915 for the power to appoint counsel in either a criminal or a civil case. Under § 1915(a), the statute applies to both civil and criminal litigants. 28 U.S.C. § 1915(a) (1988) (applies to “any suit, action or proceeding, civil or criminal.”). The court is to request counsel under § 1915(d) for “any such person who is unable to employ counsel.” Therefore, the court’s interpretation of request in Mallard should control in criminal cases as well.

This conclusion finds support in the language used by the Court in the two instances that it stated what was at stake in Mallard. The first sentence of Justice Brennan’s opinion stated, “We are called upon to decide whether 28 U.S.C. § 1915(d) authorizes a federal court to require an unwilling attorney to represent an indigent litigant in a civil case.” Mallard, 109 S. Ct. at 1816 (emphasis added). His penultimate sentence, however, stated: “We hold only that § 1915(d) does not authorize the federal courts to make coercive appointments of counsel.” Id. at 1823. This statement of the holding is not explicitly limited to civil cases, and may be presumed to apply to criminal cases.

There are, of course, other sources of statutory authority for appointment of counsel in criminal cases. See 18 U.S.C. § 3006A (1988); Fed. R. Crim. P. 44. The Court, if not casting into doubt the constitutionality of statutes authorizing courts to compel an unwilling attorney to render service in a criminal case, at least avoided endorsing them. See Mallard, 109 S. Ct. at 1821 & n.6 This reservation on the part of the Court might, with enough imagination, be construed as implicitly denigrating those statutes. A better interpretation is that Mallard was simply an inappropriate context for considering the issue of appointing counsel under statutes like 18 U.S.C. § 3006A, that apply only to criminal cases. The various dichotomies should not be considered in isolation. The element common to both Mallard and the criminal context is that the attorney might be unwilling to accept the appointment. But Mallard involved a civil plaintiff and an uncompensated attorney, whereas § 3006A involves a criminal defendant and a compensated attorney. These differences, considered as a whole, weigh heavily against extrapolating Mallard beyond the narrow context of § 1915(d).

from litigants' ceaseless demands for a statement of what the law is.164

No matter which interpretive method one adopts, the necessary ini-
tial step is to determine the proper standard against which to measure
the correctness of the result.165 Courts most often employ one of two
standards: "legislative intent" and the "meaning of the statute."166 Im-
plicit in both standards is a functional, communicative model of stat-
utes—the text communicates "the will of society, articulated
by

[336x568]the

[352x568]legislature as society's agent for that purpose, to society's members, telling
them how they should or should not behave or what consequences
should or might attach to certain actions or events."167 While the two
standards share this functional model of what a statute is, they differ in
the perspective they adopt for determining what a statute says. Commu-
nication involves two perspectives, the sender's and the receiver's. The

---

164. Frequently courts will state that interpretation is not necessary where
the words of a statute are "clear." See, e.g., Adams Fruit Co. v. Barrett, 110 S. Ct.
1984, 1387 (1990) ("Where the terms of a statute are unambiguous, judicial
inquiry is complete."); Burlington N. R.R. Co. v. Oklahoma Tax Comm'n, 481
(same); Garcia v. United States, 469 U.S. 70, 75 (1984) (same), reh'g denied,
the language is plain and admits of no more than one meaning the duty of inter-
pretation does not arise."). Nevertheless, before a judge can decide if a statu-
tory term is unambiguous, she must assign a meaning to it. See Marbury v.
Madison, 5 U.S. (1 Cranch) 137, 175 (1803) ("Those who apply the rule to a
particular case, must of necessity expound and interpret that rule."). In the
broadest sense, interpretation is involved whenever one "makes a choice . . .
about what to do regarding a matter to which a statute arguably applies." 2A N.
Singer, SUTHERLAND STAT. CONST. (rev. 4th ed. 1984) § 45.03, at 15 (hereinafter
SUTHERLAND). Thus, some commentators suggest that "[t]he assertion . . . that a
statute needs no interpretation because it is 'clear and unambiguous' is in reality
evidence that the court has already considered and construed the act." Id.
§ 45.02, at 5.

165. SUTHERLAND, supra note 164, § 45.05, at 20 ("When a question arises
concerning applicability of a statute a decision can be reached only by applying
some kind of criterion."). A suspicious mind may inquire how to test the cor-
rectness of the standard, but this Note will not pursue that problem. Cf. M.
Heidegger, Being and Time 194 (J. Macquarrie & E. Robinson trans. 1962)
("Any interpretation which is to contribute understanding, must already have
understood what is to be interpreted.").

166. See SUTHERLAND, supra note 164, § 45.05, at 20-21, § 45.07, at 29. In
making judgments about intent or meaning, judges also consider the purpose of
the legislation, public policy, the constitution and whether the result is reason-
able. Id. §§ 45.09-45.12. With respect to the criterion of reasonableness, see
of legal interpretation are rules of common sense, adopted by the courts in the
construction of the laws.") (emphasis in original).

167. SUTHERLAND, supra note 164, § 45.01, at 2. While courts generally ac-
cept this communicative model of statutes, many commentators reject it. See,
e.g., R. Dworkin, Law's Empire 313-27 (1986) (criticizing "speaker's meaning"
theory of statutory construction, which supposes that statutes are an instance of
communication and that judges look to legislative history when a statute is not
clear to discover what state of mind legislators tried to communicate through
their votes).
"legislative intent" approach emphasizes the meaning attached by the sender, while the "meaning" inquiry focuses on the meaning attached by the receiver. 168

Most courts traditionally have invoked fidelity to the legislature's will to justify their interpretations. 169 The history of deference to the legislature's will is as rich as it is interesting. One finds traces of the notion in medieval philosophy 170 and the struggle to establish the supremacy of civil over celestial government, 171 in early modern polit-

168. SUTHERLAND, supra note 164, § 45.07, at 30, § 45.08, at 31.

169. Id. § 45.05, at 21. Fidelity to legislative intent remains the standard most often declared by courts. See, e.g., Pinter v. Dahl, 486 U.S. 622, 653 (1988) ("The ultimate question is one of congressional intent, not whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law."); Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) (Court's function is to "give effect to the unambiguously expressed intent of Congress"); Lavin v. Marsh, 644 F.2d 1378, 1380 (10th Cir. 1981) ("The statutory scheme . . . on first reading seems incredible. Nonetheless, this scheme was promulgated by Congress and this court is bound to follow its letter absent any indication that Congress intended otherwise."); Sunstein, Norms in Surprising Places: The Case of Statutory Interpretation, 100 Ethics 803, 807-08 (1990) ("[T]he most well known approach to the matter [of] statutory construction . . . sees the courts as agents or servants of the legislature.").

170. Christian thought from the early Church through the middle ages was thoroughly platonic. See P. TILLICH, A HISTORY OF CHRISTIAN THOUGHT 6, 78, 114 (C. Braaten ed. 1972) (influence of Plato and neo-platonism on Christianity). The works of Plato’s student and subsequent "rival," Aristotle, were virtually unknown to the Western world until the 13th century. See W. Ross, ARISTOTLE 24 (2d ed. 1959) (Aristotle’s withdrawal from Plato’s influence); Wick, Aristotelianism, in 1 ENCYCLOPEDIA OF PHILOSOPHY 148, 149 (1967) (Categories and De Interpretatione only works of Aristotle known in Europe before 12th century). In 1169, Averroës (ibn-Rushd), a Spanish lawyer and Islamic philosopher, commenced a vast series of commentaries on Aristotle’s natural philosophy. MacClintock, Averroës, in 1 ENCYCLOPEDIA OF PHILOSOPHY 220, 220 (1967). His death coincided with the exponential acceleration of Western philosophy, fueled in part by the translation of Aristotle’s works into Latin and a reliance on Averroës’s commentaries for their study. Id.; see F. COPLESTON, A HISTORY OF MEDIEVAL PHILOSOPHY 154 (Torchbook ed. 1974) (greatest impact on 13th century thought was made by extended knowledge of aristotelianism); cf. D. ALIGHIERI, DIVINE COMEDY, Inferno, IV, 144 (J. Ciardi trans. 1954) (referring to “Avertoës, of the Great Commentary”).

Averroës influenced modern politics in two ways. First, his work caught the attention of Frederick II of Sicily. MacClintock, Averroism, in 1 ENCYCLOPEDIA OF PHILOSOPHY 223, 223 (1967). Frederick II, known as immutator mundi (“transformer of the world”), “not only defied the temporal power of the papacy but fought it with the force of arms.” H. BERMAN, supra note 46, at 425, 428. Second, from about 1300 Averroism became associated with philosophical activity in Italian universities, especially Padua. MacClintock, Averroism, supra, at 225. It was there that a young student, Marsilio dei Mainardini (Marsilius of Padua), was studying medicine. Gewirth, Marsilius of Padua, in 5 ENCYCLOPEDIA OF PHILOSOPHY 166, 166 (1967). It was Marsilius’s political theory that eventually was to clinch the supremacy of civil government and to influence Anglo-American jurisprudence.

171. Ironically, the likelihood of the Church realizing its aspirations to
Some commentators have noted the influence Marsilius had on Machiavelli. See G. Sabine, supra note 171, at 303, 340. More important for present purposes, however, is his influence on Hobbes. See id. at 303, 473. For Hobbes, the law is what “the Common-wealth hath Commanded.” T. Hobbes, Leviathan 137 (Head ed. 1651). The commonwealth acts through its representative, the sovereign, who is the sole legislator. Id. According to Hobbes, “Lawyers are agreed . . . that not the Letter (that is, every construction of it,) but that which is according to the Intention of the Legislator, is the Law.” Id. at 139. All laws need to be interpreted, but not all interpretations are valid. The authority of judges’ interpretations is derived from their positions as agents of the sovereign:

[It is] the authentique Interpretation of the Law (which is the sense of the Legislator,) in which the nature of the Law consisteth; And therefore the Interpretation of all Lawes dependeth on the Authority Sovereign; and the Interpreters can be none but those, which the Sovereign . . . shall appoint. For else, by the craft of an Interpreter, the Law may be made to bear a sense, contrary to that of the Sovereign; by which means the Interpreter becomes the Legislator.

Id. at 142-43.

According to one commentator, “Hobbes’s theory of sovereignty brings to completion the process of subordinating the church to the civil power which was begun when Marsilio of Padua carried through to its logical conclusion the separation of the spiritual and temporal authorities.” G. Sabine, supra note 171, at 473. Hobbes’s notion of the unlimited authority of the sovereign was prevalent in early modern political philosophy. See I. Kant, The Metaphysical Elements of Justice § 49A, at 84 (J. Ladd trans. 1965) (1797); N. Machiavelli, The Discourses Bk. 1, ch. 9, at 138 (Mod. Lib. ed. 1950) (1513); J. Rousseau, On the Social Contract Bk. 2, chs. 1-5 in The Basic Political Writings 153-60 (Hackett ed. 1987) (1762).

172. See Osborn v. United States Bank, 22 U.S. (9 Wheat.) 737, 866 (1824)
Today, the most common justification for the "legislative intent" standard is that the principle of separation of powers obliges the judiciary to carry out the will of the legislature.174

The "meaning" standard does not enjoy as glorious a pedigree. Arguably its best spokesperson was Justice Holmes, who remarked: "We do not inquire what the legislature meant; we ask only what the statute means."175 Perhaps his innovative approach derived from his skepti-
cism about the doctrinal abstractions of separated powers; he believed it useful to insist "on a more conscious recognition of the legislative function of the courts." 176 Whatever its source, Holmes's preference for the "meaning" standard influenced modern jurisprudence. 177

A word of caution is in order, lest one oversimplify the contrast between the two justificatory standards. Under either standard, the inquiry always concerns a single act of communication—the statute. Although there are two parties to every communication, they are closely related. If the sender desires to be understood, she will employ language whose meaning is familiar to the receiver. Similarly, if the receiver desires to understand the communication, he will consider what the sender might have intended. Because each party to an act of communication considers the other party in performing his own role, what "is primarily relevant to the question of what a legislature intended is also secondarily relevant to the question of what a statute means to others, and vice versa." 178 In other words, an inquiry into legislative intent takes as evidence the meaning of the words that the legislature used. So, for example, the Court has declared: "The language of the statute is clear, and we have historically assumed that Congress intended what it enacted." 179 Where the legislature's intent can be read off of the statute's language, further inquiry is unnecessary. 180

177. See Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 397 (1951) (Jackson, J., concurring); Frankfurter, Some Reflections of the Reading of Statutes, 47 COLUM. L. REV. 527, 538 (1947) ("All these years I have avoided speaking of the 'legislative intent' and I shall continue to be on my guard against using it.") (remarks at Meeting of Ass'n of Bar of City of New York, Mar. 18, 1947), reprinted in LANDMARKS OF LAW 210, 221 (R. Henson ed. 1960); see also Fein, Scalia's Way, A.B.A. J., Feb. 1990, at 38 (dramatic alteration in Court's method of statutory interpretation, attributed mainly to Justice Scalia's presence on bench).
179. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980); see G. Heileman Brewing Co. v. Joseph Oat Corp., 872 F.2d 648, 668 (7th Cir. 1989) (Manion, J., dissenting) ("[A] rule's words are meant to convey a meaning to those who read the rule. This court should give the drafters credit for being able to communicate what they actually intended.").
180. See, e.g., Davis v. Michigan Dep't of Treasury, 109 S. Ct. 1500, 1504 n. 3 (1989) (if language is unambiguous, plain meaning of statute is given effect and legislative history is irrelevant); Moore v. Raine, 907 F.2d 1476, 1478 (4th Cir.)
The interrelatedness of the two justificatory standards indicates that rarely will adoption of one over the other determine the outcome of a court's interpretive process. Instead, the standards principally affect the relevance of the evidence and the persuasiveness of the arguments offered by the parties before the court. It is customary to divide the evidence and arguments offered in cases of statutory construction into two categories, labelled "intrinsic" and "extrinsic." The intrinsic category includes arguments based on the structure of the statute and on the meaning of its words. These arguments are most persuasive before a court that adopts the "meaning" standard for justification of its interpretations. Because this standard focuses on the receiver of the communication, and the receiver of a statutory communication is the general community, the arguments will often appeal to objective indicia of conventional meaning, such as dictionary definitions and maxims of interpretation that generalize from ordinary language usage. The extrinsic category, in contrast, consists of arguments based on factors external to the text of the statute. These arguments are most persuasive before a court that adopts the "intent" standard for justification of its interpretations. Because this standard focuses on the sender of the communication, and the sender of a statutory communication is the enacting legislature, the arguments will often appeal to subjective indicia of what the legislature "had in mind" when it enacted the statute, such as specific statements in the legislative history and the relationship to other statutes enacted by the same legislature.

2. The Court's Interpretation

The theory of interpretation suggests, and the practice of courts confirms, that the distinction between the "meaning" and "intent" standards often is far from lucid. The Mallard Court's interpretive strategy was no exception. The Court first purported to establish the "plain meaning" of the term request. The Court then determined that Con-
gress intended this meaning when it enacted section 1915(d). Each of these steps requires examination.

a. The "Meaning" Standard

To interpret the meaning of section 1915(d), it was necessary that the Court interpret its language. The "operative term" in the statute, and that to which the Court limited its interpretation, was request. To engage in a search for the "plain meaning" of a word is to risk a charge of serious misunderstanding of the nature of language. It was not the Court's tactic, however, to decide on the meaning of request, but rather to reach a negative definition—to distinguish it from require, assign and appoint. In this sense, the Court professed only to establish the "plain

Id., at 1823 (Stevens, J., dissenting). Therefore, this Note will use the phrase plain meaning to denote that which the Court sought to establish.

186. Id. at 1818.

187. Id. ("Interpretation of a statute must begin with the statute's language.").

188. Id.

189. The charge that a search for the meaning of "a word" simply demonstrates a misunderstanding of language is levied from many camps, but the following passage clearly articulates its substance.

Any sophisticated theorist of language would point out that the meaning of an utterance isn't a function of the words themselves or even of sentences, but of the use to which the words and sentences are put by speakers and writers. . . . Meaning is an affair of the use of words and sentences, not of words and sentences considered as things-in-themselves which somehow bear meanings within them. . . . [S]trictly speaking, no word or sentence means anything determinate until it is used in a specific situation by somebody, until it is employed in a speech act.


190. See Mallard, 109 S. Ct. at 1818-21. It is possible to read the opinion as concerned with positive definition; it offers ask, petition and entreat as synonyms of request. Id. at 1818. In defense of its interpretation of § 1915(d), the Court might have proceeded to offer examples of how Congress understood and used the verb request. But in subsequent portions of the opinion, the Court consistently resorts to historical examples of the usage of the terms appoint and assign and relies on the absence of the term request in those contexts to justify its interpretation. Id. at 1818-21.
use" of the term, and to show that it did not equate with the use of those other terms.\textsuperscript{191}

Nevertheless, it is not clear that the Court, by basing its analysis on the "plain use" of the term, overcame any of the problems associated with a search for "plain meaning." For example, suppose an interpreter inquires into the meaning of \textit{to check}. If she accepts the "meaning is use" philosophy, the inquiry will turn to the use of the term. But what is the term's "plain use"? Is it the use made by a chess player? a hockey player? a coat-room attendant? To derive meaning from use, it is necessary to select a relevant context of use.\textsuperscript{192}

The context appropriate to \textit{Mallard} is that of a judge requesting an attorney to represent a litigant.\textsuperscript{193} Both Justice Kennedy and Justice Stevens, throughout their opinions, considered the term in this context.\textsuperscript{194} The majority, however, considered the term in this context only

\textsuperscript{191.} See id. at 1818. The Court did offer synonyms for the term \textit{request}. See \textit{supra} note 190. Nevertheless, the Court's reasoning did not depend on finding an agreed-upon meaning that could be substituted for the verb \textit{to request}. Thus, the Court did not ignore the fact that meaning is use. For a discussion of the idea that meaning is use, see \textit{supra} note 189. Instead, the Court reached a definition of \textit{how the verb request was used}. That is, the Court proceeded in its inquiry equipped with an adjective—"precatory"—to describe the "ordinary and natural signification" of the use of the verb \textit{to request}. \textit{Mallard}, 109 S. Ct. at 1818. Beyond this "ordinary use," however, the Court did not offer any example of the use of \textit{request} other than its use in § 1915(d). \textit{Id.} at 1821.

\textsuperscript{192.} See Graff, \textit{supra} note 189, at 407 ("[N]o word or sentence means anything determinate until it is used in a specific situation by somebody[,]") (emphasis added). It is necessary to select a relevant context of use because words are used differently, that is, have different meanings, in different contexts. See Schauer, \textit{An Essay on Constitutional Language}, 29 U.C.L.A. L. Rev. 797, 799-800 (1982) ("If... meaning is use, then legal use ought to produce different meanings than a physicist's use, a sociologist's use, or the use of the man on the Clapham omnibus.") (citations omitted).


\textsuperscript{194.} See \textit{Mallard}, 109 S. Ct. at 1823 (Kennedy, J., concurring); \textit{Id.} at 1826 (Stevens, J., dissenting). In the context of a court requesting an attorney to represent a litigant, both Justice Kennedy and Justice Stevens interpreted \textit{request} as more than simply "precatory." Justice Kennedy stated that "[a]ccepting a court's request to represent the indigent is one of [a lawyer's] traditional obligations." \textit{Id.} at 1823 (Kennedy, J., concurring). Justice Stevens insisted that "a formal request to a lawyer by the court pursuant to [a fair and detailed] procedure is tantamount to a command." \textit{Id.} at 1826 (Stevens, J., dissenting). Cf. Stewart, \textit{supra} note 158, at 48 ("[F]ew lawyers take [the] view that a request from a federal judge is precatory.").
in the sixth defense of its interpretation.\textsuperscript{195} There the Court conceded that the term \textit{request} might have a meaning different than ‘merely precatory,’ the plain-use meaning identified earlier.\textsuperscript{196} The Court advanced the amorphous notion of the ‘appropriate request,’\textsuperscript{197} which presumably hovers somewhere between ‘merely precatory’ and the stronger ‘respectfully command’ that Justice Stevens would have adopted.\textsuperscript{198}

H.L.A. Hart has noted that ‘the natural expressions [of imperatives] are coloured by the special features of the different situations in which they are normally used.’\textsuperscript{199} The disagreement among the Justices was over what ‘color’ to give to the term \textit{request} in this particular situation. Significantly, Hart identifies as one classification of imperatives the ‘mere \textit{request},’ which is ‘addressed by the speaker to one who is able to render him a service, [without] suggestion either of any great urgency or any hint of what may follow on failure to comply.’\textsuperscript{200} Hart gives as an example, ‘Pass the salt, please.’\textsuperscript{201} This is the sense reflected in Justice Brennan’s plain-use definition, ‘merely precatory.’ At the opposite end of the spectrum Hart identifies \textit{ordering}: ‘to secure compliance with his expressed wishes, the speaker threatens to do something which a normal man would regard as harmful or unpleasant.’\textsuperscript{202} Hart employs the example of a gunman saying to a bank clerk, ‘Hand over the money or I will shoot.’\textsuperscript{203}

Quite clearly, the majority rejected this sense. But so, too, did the dissent. Justice Stevens allowed that, unlike the bank clerk held at gunpoint, an attorney could decline a case upon offering good reason for

\textsuperscript{195} See Mallard, 109 S. Ct. at 1821. In its sixth defense, the Court rejected the district court’s argument that construing § 1915(d) to allow judges to ask but not compel attorneys to serve rendered the statute a nullity. \textit{Id.}\textsuperscript{196} The Court went only so far as to say that the judge-attorney context made the request ‘appropriate,’ as opposed to ‘improper.’ For a discussion of the Court’s sixth defense, see \textit{supra} notes 112-15 and accompanying text.

\textsuperscript{196} See Mallard, 109 S. Ct. at 1821.

\textsuperscript{197} \textit{Id.}\textsuperscript{198} The Court opined that § 1915(d) ‘plays a useful role in the statutory scheme if it informs lawyers that the court’s requests are \textit{appropriate} requests, hence not to be ignored in the mistaken belief that they are improper, like a judge’s request to cut short cross-examination so that he can go fishing.’ \textit{Id.} (emphasis in original).

\textsuperscript{198} \textit{Id.} at 1826 (Stevens, J., dissenting). Justice Stevens found ‘no substance to the Court’s speculation that Congress enacted [§ 1915(d)] because of a concern that a court’s requests . . . might otherwise be ‘disregarded in the mistaken belief that they are improper.’’ \textit{Id.}\textsuperscript{199} (Stevens, J., dissenting) (quoting the majority opinion at 1821). Justice Stevens stated that ‘in context, [he] would . . . construe the word ‘request’ as used in § 1915(d) as meaning ‘respectfully command.’’ \textit{Id.}\textsuperscript{200} (Stevens, J., dissenting).

\textsuperscript{199} H.L.A. Hart, \textit{The Concept of Law} 235 (1961). Hart recognized that the social situation and relationships of the parties influence whether an imperative properly should be classified as an order, a plea, etc. \textit{Id.} at 234-35.

\textsuperscript{200} \textit{Id.} at 18 (emphasis in original).

\textsuperscript{201} \textit{Id.}

\textsuperscript{202} \textit{Id.} at 19.

\textsuperscript{203} \textit{Id.}
doing so. Justice Kennedy also refused to give this sense to the term. The language he chose to depict the position he rejected—"requirements of the law" and "the law demands"—captures the coercive nature of the gunman situation. If that were the end of the matter, we would not have three opinions and a 5-4 decision. It is not the end of the matter, however, because we have not exhausted the varieties of imperatives. There is much ground between a mere request and an order, between "Pass the salt, please" and "Hand over the money or I will shoot." Each of the opinions recognized this ground: the majority with its "appropriate request"; the concurrence with its professional "responsibility," "obligation" and "duty"; and the dissent with its "respectfully command." The tension in the case arose from defining exactly what this form of imperative required.

In Hart’s scheme, this form of imperative is a command, a word which carries with it very strong implications that there is a relatively stable hierarchical organization . . . in which the commander occupies a position of pre-eminence . . . [I]t need not be the case, where a command is given, that there should be latent threat of harm in the event of disobedience. To command is characteristically to exercise authority over men, not power to inflict harm, and though it may be combined with threats of harm a command is primarily an appeal not to fear but to respect for authority.

It is fairly simple to construe the facts of Mallard in terms of Hart’s description. The bar represents the hierarchical organization. A judge, occupying the position of pre-eminence, issues commands. To be sure, judges do have the power to sanction attorneys, but it is not unreasonable to suppose that most members of the bar obey most judges’ commands out of respect for authority, not because they fear the harm associated with noncompliance. This interpretation captures what is common to the three opinions—the recognition that, no matter what term is used to describe the action, a judge’s request of an attorney derives considerable force simply from the context in which it is made.

The divisive issue, of course, was how much force? The answer turns on how accurately the description in the previous paragraph characterizes the profession. The holding in Mallard reveals a more honest understanding of the current state of the profession than does the portrayal in the previous paragraph, which unduly depicts the bar as a homogeneous, "relatively stable hierarchical organization." For this reason at least, the result in the case was correct.

204. See Mallard, 109 S. Ct. at 1823, 1825 (Stevens, J., dissenting).
205. Id. at 1823 (Kennedy, J., concurring).
206. H.L.A. Hart, supra note 199, at 20. For an alternative analysis of the logic of imperatives issued in the legal context, see Morris, Imperatives and Orders, 26 Theoria 183 (1960).
The result was correct because gone are the days of the cliquish, almost metaphysical entity reverently known as THE BAR. The bar's priestly characteristics have succumbed to the two primary hallmarks of the modern American landscape, liberalism and market economics. The liberal impulse disfavors the bar's traditionally exclusionary practices. The modern profession's ranks have swelled so dramatically that it is nearly impossible to attribute to any one of its members qua member any single quality, other than having graduated from law school and having passed an exam. Increased membership in the profession has brought with it an increase of diversity, both in demographics and in viewpoints. The economic forces of our

207. "Liberalism" has many meanings. Here it is used primarily to describe a commitment to freedom and equality and an opposition to unjustified privilege. In this sense, the civil rights and women's movements were liberal phenomena. A slightly different but related—and more specific to the law—form of liberalism is found in the works of Bentham and Marx, who, despite their vast differences, agreed on the fundamental point "that human society and its legal structure which had worked so much misery, had been protected from criticism by myths, mysteries, and illusions, not all of them intentionally generated, yet all of them profitable to interested parties." H.L.A. HART, ESSAYS ON BENTHAM 25-26 (1982).

208. See, e.g., Goldberg, Then and Now: 75 Years of Change, A.B.A. J., Jan. 1990, at 56, 58 ("The market forces that affect everyone have caught up with lawyers . . .").

209. In the single decade of the 1970s, as many people graduated from law school as had in the previous 100 years. D'Alemberte, Talbot D'Alemberte on Legal Education, A.B.A. J., Sept. 1990, at 52.

210. Until the beginning of this century, the legal profession was overwhelmingly Protestant, white and male. Abel, The Contradictions of Professionalism, in 1 LAWYERS IN SOCIETY: THE COMMON LAW WORLD 200-05 (R. Abel & P. Lewis eds. 1988). Exclusion of Jews and Catholics began to crumble by the 1930s. Id. at 201. Some law schools excluded blacks until the late 1950s and women as late as 1972. Id. at 202-03. The number of women in ABA-accredited law schools has grown from 1700 in 1963 to 53,000 in 1990. Goldberg, Bridging the Gap, A.B.A. J., Sept. 1990, at 44, 45-46. Women currently account for 42.7% of the student population at ABA-approved schools. Lempinen, A Student Challenge to the Old Guard, STUDENT LAW., Sept. 1990, at 12, 16. For a discussion of the positive impact the increased number of women may have on the profession, see Schafran, Lawyers' Lives, Clients' Lives: Can Women Liberate the Profession?, 34 VILL. L. REV. 1105 (1989). Despite these gains by traditionally excluded groups, much remains to be done. Even today, whites account for 87.4% of the enrollment in ABA-accredited law schools. Lempinen, supra, at 16.

211. A glaring example of the diversity within the bar is the recent controversy over the ABA's adoption in February 1990 of Resolution 106(c), which supported a woman's right to choose to have an abortion. See Resolution 106(c) Revisited, A.B.A. J., July 1990, at 8, 8-10 (letters to editor); The Battle Continues, A.B.A. J., May 1990, at 10, 10-12 (letters to editor). The divisiveness of the issue recently led the ABA to rescind the resolution. See Marcotte, ABA Neutral on Abortion, A.B.A. J., Oct. 1990, at 30. One may argue that the abortion controversy divides the general public, and that the bar is no exception. But that is exactly the point: the bar is more like a sample of the general public than it is a homogeneous body that thinks and acts with one mind. Moreover, members of the bar divide over more than just the abortion issue. See, e.g., Keller v. State Bar.
consumer-oriented market society have had a similarly tumultuous impact on the modern legal profession. A recurring controversy concerns the extent to which attorneys should have at their disposal options available to other market participants. Market forces have altered not only what lawyers do, but also the ways in which they do it.

The result of the changes wrought by liberalization and the pressure of market forces is a profession markedly different from the body presupposed by Hart's definition of a command. This is not to say that attorneys do not respect judges, nor that they do not often respond out of that respect. Rather, it suggests that only a slight exaggeration would of Cal., 110 S. Ct. 2228 (1990) (successful challenge to use of mandatory bar membership fees to finance controversial political activities).

212. Important for any market participant is the ability to communicate with consumers. See P. Samuelson, Economics 43 (11th ed. 1980) (“In the idealized model of an efficiently acting competitive market mechanism, consumers are supposed to be well informed.”). Attorneys' recent efforts to secure this ability, or at least aspects of it, generally have succeeded. See Peel v. Attorney Disciplinary Comm'n of Ill., 110 S. Ct. 2281 (1990) (reversing sanctions against attorney whose letterhead stated that he held “Certificate in Trial Advocacy”); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (striking down prohibition of targeted solicitation of business by mail); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (striking down prohibitions on illustrations in advertising and on solicitations of business with respect to specific legal problems); In re R.M.J., 455 U.S. 191 (1982) (holding unconstitutional a variety of restrictions on lawyer advertising, including restrictions to certain categories of information and, in some instances, to certain specified language); In re Primus, 436 U.S. 412 (1978) (reversing reprimand of attorney who wrote to potential plaintiff in suit); Bates v. State Bar of Ariz., 483 U.S. 350 (1987) (holding unconstitutional prohibitions on lawyers' price advertising of routine legal services).


213. The proportion of lawyers in private practice fell from nearly 90% in 1948 to roughly 66% in 1980. Abel, supra note 210, at 228. Attorneys today may instead choose to become government employees, in-house counsel, law professors or politicians. A related phenomenon within private practice is the stratification between “elite” and “ordinary” lawyers. Id. at 232 (“[E]lite lawyers represent only large business clients and extremely wealthy individuals, whereas ordinary lawyers represent small businesses and middle-class individuals.”); see also Goldberg, supra note 208, at 61 (“The things we [lawyers] work on run the full gamut of society from domestic relations to international arms control. No other vocation has the same scope.”) (quoting Professor Geoffrey Hazard of Yale Law School).

214. The most significant recent change has been the rise of the “megafirm.” See generally Gibbons, Law Practice in 2001, A.B.A. J., Jan. 1990, at 69 (describing recent changes and discussing predictions of future structure of law practice); cf. K. Eisler, Shark Tank: Greed, Politics, and the Collapse of Finley, Kumble, One of America's Largest Law Firms (1990) (entertaining chronicle of demise of one large firm).
be involved in comparing the facts of Mallard, in which an attorney primarily serving creditor and corporate interests was expected to handle a civil rights suit simply because he was a member of the bar, to expecting a podiatrist to perform heart surgery simply because she was a physician. The Court's holding may be understood as a response to the new realities of the profession. This interpretation of Mallard may explain how Justice Brennan, often criticized by his more conservative brethren for "result oriented" jurisprudence that strayed beyond the text of a statute,215 came to author the majority opinion for them. In this case it did not matter that his usual allies perhaps did not perceive the legal profession's changing social conditions, since he was able to respond to the changes with the type of literalist analysis that attracted the conservative Justices.

b. The Intent Defense

The Court was not content to rely solely on the "plain meaning" of request. Instead, it offered six defenses of why its interpretation of the term was the "correct" one, i.e., the one that Congress intended.216 This Note addresses the first217 and sixth218 defenses.

(1) Mandatory and Directory Construction

The Court took its first defense to be "[p]erhaps the clearest proof that Congress did not intend [section] 1915(d) to license compulsory appointment."219 The Court noted Congress's use of shall in subsection (c) and its failure to employ the term in subsection (d).220 Based on this difference in vocabulary, the Court concluded that Congress's "decision to allow federal courts to request attorneys to represent impoverished litigants, rather than command, as in the case of court officers, that lawyers shall or must take on cases assigned to them, bespeaks an intent not to authorize mandatory appointments of counsel."221


216. For a list of the majority's defenses of its interpretation of request, see supra note 99.

217. For a discussion of the first defense of the Court's interpretation of request, see supra notes 94-97 and accompanying text.

218. For a discussion of the sixth defense of the Court's interpretation of request, see supra notes 112-15 and accompanying text.


220. Id.

221. Id.
The first defense does not support the Court’s interpretation of request as that term is used in subsection (d). Ordinarily, a distinction is drawn between the terms shall and may.222 This distinction is the relevant one to draw between subsections (c) and (d). Subsection (c) speaks to officers of the court and witnesses, and its message is that they have no discretion, that they “shall” do something. In contrast, subsection (d) speaks to the court, and its message is that the court has discretion, it “may” request counsel to serve. The difference in Congress’s word-choice indicates only that it did not intend to require the court to make the request of an attorney.

But subsection (d) is silent as to what an attorney may do once a court has exercised its discretion to make the request. The subsection does not use attorney as a subject; it does not ascribe an action to an attorney and a fortiori does not grant or withhold discretion as to an action. The Court’s comparison of shall and request offers little evidence of congressional intent. The best evidence would result not from the use of a different term in subsection (d), but from the use of a different sentence structure. Congress could have stated “an attorney may” or “an attorney shall.” Since it did neither, the most reasonable interpretation of congressional intent that the subsection yields is simply that Congress did not even consider what an attorney would do. Therefore, the first defense does not “bespeak[] an intent not to authorize mandatory appointments of counsel.”223 Rather, it “bespeaks” no intent at all.

(2) The “Whole Statute” Defense

A fundamental principle of statutory construction is that a statute should be construed so that effect is given to all its provisions.224 The district court advanced this principle in its argument that section 1915(d) authorized appointment of counsel, and in addressing it the Court came dangerously close to what it wanted to avoid—addressing the issue of a court’s inherent power to appoint counsel. The district court had put forth the premise that “statutory authorization is unnec-

222. One authority has stated that “‘may’ is chiefly used to express permission or possibility. [When] may [is] used to express permission . . . [in the] second or third persons[,] . . . the speaker is giving . . . permission.” A. THOMSON & A. MARTINET, A PRACTICAL ENGLISH GRAMMAR 113 (3rd ed. 1980).

In contrast, “‘shall’ in the second and third persons is used to express (A) the subject’s intention to perform a certain action or to cause it to be performed, and (B) a command. . . . [(B)] is chiefly used in regulations or legal documents.” Id. at 204.


necessary for a court simply to ask an attorney to represent someone."\(^{225}\)
The Court refused to accept that premise, stating that "statutory provisions may simply codify existing rights or powers."\(^{226}\) As an example, the Court noted that section 1915(d) "authorizes courts to dismiss a 'frivolous or malicious' action, but there is little doubt they would have power to do so even in the absence of this statutory provision."\(^{227}\)

---

\(^{225}\) *Mallard*, 109 S. Ct. at 1821. For a discussion of the district court's argument, and of the Court's rejection of it, see supra notes 112-15 and accompanying text.

\(^{226}\) *Mallard*, 109 S. Ct. at 1821.

\(^{227}\) *Id.* In a case decided the same day as *Mallard*, the Court also clarified the standard for dismissal under § 1915(d). See *Neitzke v. Williams*, 109 S. Ct. 1827 (1989), aff'g *Williams v. Faulkner*, 837 F.2d 304 (7th Cir. 1988). Section 1915(d) permits a federal judge to dismiss a case if satisfied that the action is "frivolous or malicious." 28 U.S.C. § 1915(d) (1988). In a unanimous opinion authored by Justice Marshall, the *Neitzke* Court held that a complaint which fails to state a claim under Federal Rule of Civil Procedure 12(b)(6) is not automatically frivolous within the meaning of § 1915(d). *Neitzke*, 109 S. Ct. at 1829.

The Seventh Circuit Court of Appeals had held that the frivolousness standard was more lenient than the Rule 12(b)(6) standard. *Id.* at 1830 (citing Williams v. Faulkner, 837 F.2d 304, 307 (7th Cir. 1988)). The court stated that a suit should be dismissed for frivolousness only if the litigant "cannot make any rational argument in law or fact which would entitle him or her to relief." *Id.* Therefore, unless the complaint "indisputably" lacks any factual or legal basis, the court should permit the claim in a close case "to proceed at least to the point where responsive pleadings are required." *Id.*

In affirming the Seventh Circuit's reading of the statute, Justice Marshall noted that Rule 12(b)(6) and § 1915(d) were designed to serve different ends. *Id.* at 1832. The Court stated that Rule 12(b)(6) "streamlines" litigation by authorizing a court to assume the truth of a complaint's factual allegations and to dismiss it if as a matter of law "no relief could be granted under any set of facts consistent with the allegations." *Id.* (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). Because the plaintiff ordinarily has notice of the pending Rule 12(b)(6) motion, she has an opportunity to amend the complaint before the action is dismissed. *Id.* at 1834.

The role of § 1915(d) is not to "streamline" litigation, but to "discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate . . . ." *Id.* at 1832-33. That is, § 1915(d) "replicat[es] the function of screening out inarguable claims which is played in the realm of paid cases by financial considerations." *Id.* at 1833. Toward this end, the "frivolous" standard authorizes a court not only to dismiss an action if it is based on an "indisputably meritless legal theory," as Rule 12(b)(6) does, but also "to pierce the veil of the complaint's factual allegations" and dismiss the claim if its "factual contentions are clearly baseless." *Id.* In addition, the court may dismiss the claim sua sponte; thus the plaintiff lacks the procedural protection afforded to paying plaintiffs under Rule 12(b)(6). *Id.* at 1834.

In short, not only do Rule 12(b)(6) and § 1915(d) serve different ends, but they also employ different means toward their respective ends. *Id.* at 1833-34. The means employed by § 1915(d) give to a court more power to examine and to dismiss a claim than do those employed by Rule 12(b)(6). *Id.* at 1833. Interpretation of the extent of these differences must be checked, however, against the legislative purpose of § 1915, which is "to assure equality of consideration for all litigants." *Id.* (citing *Coppedge v. United States*, 369 U.S. 438, 447 (1962)). Because indigent litigants already have a more difficult time proceeding in federal court under § 1915(d), the Court condooned the Seventh Circuit's
From this example one might infer that courts do have the inherent authority to appoint counsel. That is, just as a court would have the power to dismiss a frivolous suit in the absence of section 1915(d), so too it would have the power to compel an attorney to represent an indigent litigant. The Court was aware of this reading, but deftly used it to the advantage of its own interpretation of request as used in section 1915(d). First, the Court denied that it was reaching the question of a court's inherent authority. Second, the Court employed an indirect argument that allegedly demonstrated that the respondent would have to agree that the statute did not function to confer upon a court the power to appoint counsel.

The Court's indirect argument was of the form commonly referred to as reductio ad absurdum. The method is indirect because in order to prove something one assumes its contradictory, derives a contradiction from it and then concludes that what one wished to prove is true. It rests on the principle that if from a proposition P a logical contradiction may be deduced, then P cannot be true; thus, not-P is true. Its symbolic form is \((P \rightarrow \neg P) \rightarrow \neg P\).

One logician has noted that the method "is easy to understand, though a little difficult to state precisely." It is all the more difficult to state precisely the Court's reductio, because it contained a second reductio within it. Before examining it in detail, here is a condensed

choice of the "more lenient" "no rational basis in law or fact" standard over the Rule 12(b)(6) "failure to state a claim" standard. Id. at 1830. To do otherwise, the Court concluded, would "deny indigent plaintiffs the practical protections against unwarranted dismissal generally accorded paying plaintiffs under the Federal Rules." Id. at 1834.

228. Mallard, 109 S. Ct. at 1821 n.8.
229. Id. This indirect argument will be referred to in the text as the "primary reductio." For the structure of this argument, see infra notes 230-59 and accompanying text.
231. A contradiction is a conjunction whose conjuncts are contradictories, for example, \(Q\) and \(\neg Q\). E. Lemmon, Beginning Logic 26 (1978).
232. B. Mates, supra note 230, at 120.
233. E. Lemmon, supra note 231, at 26. One of the three "laws of thought" is the principle of contradiction: no statement can be both true and false. I. Copi, Introduction to Logic 306 (7th ed. 1986). This is the principle upon which reductio ad absurdum rests; if a proposition P leads to a violation of the principle, it cannot be true. If the proposition cannot be true, then it is false. This conclusion follows from another "law of thought," the principle of the excluded middle: any statement is either true or false. Id.
234. See D. Kalish, R. Montague & G. Mar, Logic: Techniques of Formal Reasoning 43 (2d ed. 1980). \(\rightarrow\) is a conditional sign. \(P \rightarrow Q\) roughly translates into ordinary language as "if \(P\) then \(Q\).\( \&\) is a conjunction sign which translates as and. \(\neg\) is a negation sign which translates as not. The method has various forms. Another one is: \((P \rightarrow Q) \& (P \rightarrow \neg Q) \rightarrow \neg P.\) Id. at 66.
236. This second reductio will be referred to in the text as the "internal reduc-
version of the argument. The Court wanted to conclude that section 1915(d) did not confer coercive authority on federal courts. The district court argued that it did. For the sake of the argument, the Court assumed that it did, thereby adopting the contradictory of what it wanted to prove. The district court also argued that federal courts possess inherent authority for coercive appointment.\(^\text{237}\) For the sake of the argument, the Court also assumed that was true. The Court next launched its internal *reductio*: if courts did have inherent authority to appoint counsel, “then by respondent’s reasoning\(^\text{238}\) § 1915(d) would have been otiose;\(^\text{239}\) respondent would therefore have to conclude, it seems, that the federal courts lacked inherent authority.”\(^\text{240}\) The Court then completed the primary *reductio*: if the district court’s argument about section 1915(d) were correct, “it would seriously undermine [the] assertion that the federal courts possess inherent power to direct unwilling lawyers to serve.”\(^\text{241}\) But the district court would not want its assertion undermined and, therefore, would agree that its interpretation of the statute was incorrect.\(^\text{242}\)

This argument is not persuasive. Its flaw lies in the internal *reductio*, in which the Court distorts the district court’s argument. Only by doing

---

\(^{237}\) In *Mallard*, the Attorney General argued that federal courts possess the inherent authority “to require lawyers to serve.” *Mallard*, 109 S. Ct. at 1823 (emphasis added). The power “to provide counsel for the indigent” has been classified as inherent. *20 Am. Jur. 2d Courts* § 79 (1965) (emphasis added). Conceivably, a power to “provide” counsel might be consistent with the holding in *Mallard*, but the question remains open.

\(^{238}\) *Mallard*, 109 S. Ct. at 1821 n.8. Unfortunately, the Court did not state exactly what it took “respondent’s reasoning” to be. At this point in the opinion, the Court was addressing the argument that § 1915(d) conferred on federal courts the authority to make coercive appointments of counsel. The district court had also argued that federal courts have the inherent authority to appoint counsel. *Id.* at 1823. Presumably, by “respondent’s reasoning” the Court was referring to this argument in the alternative. Arguing in the alternative is permitted in federal court. *Fed. R. Civ. P.* 8(e)(2).

\(^{239}\) *Mallard*, 109 S. Ct. at 1821 n.8. The Court did not elaborate on this cryptic conclusion. It is unclear how “respondent’s reasoning” entailed the otiosity of § 1915(d). The only textual clue to the statement’s meaning is found in the sentence that preceded it. “[I]f respondent’s argument regarding the function of § 1915(d) were correct, it would seriously undermine respondent’s assertion that the federal courts possess inherent power to direct unwilling lawyers to serve.” *Id.* The reference to the district court’s “argument regarding the function of § 1915(d)” presumably is meant to denote that it “confer[s] coercive power upon the federal courts.” *Id.* at 1821. For a construction of an argument that would lead to the conclusion that § 1915(d) is otiose, see *infra* notes 250-54 and accompanying text.

\(^{240}\) *Mallard*, 109 S. Ct. at 1821 n.8. The force of this conclusion depends on the implied premise that § 1915(d) is not otiose.

\(^{241}\) *Id.*

\(^{242}\) The same form of argument is used when one informs a child, “If you eat a lot of sweets, your teeth will decay.”
so does the "respondent's reasoning" render section 1915(d) "otiose." The premise was that "statutory authorization is unnecessary for a court simply to ask an attorney to represent someone." This premise involves three elements: authority, source of authority and action. A faithful reading of the premise is that it concerns the last element, action. In its reductio, however, the Court misconstrued the premise as concerned with the second element, source of authority.

The district court had argued that interpreting request to mean ask would render section 1915(d) a nullity. Its premise was that for this type of action—asking—statutory authorization is not necessary. But neither is inherent authority necessary, since asking is not the kind of action that requires authority. Because no authority is involved, it is meaningless to inquire after the source of authority. The argument is that to read the statute as concerned with a type of action that does not require authority is to render it a nullity, since under such an interpretation no authority—no statute—would be necessary. Therefore, the statute should be read as concerned with a type of action that does require authority, namely, compelling.

The Court, however, substituted for that premise, which concerns the type of action, one that concerns the source of authority. Apparently, the Court mistook the premise to be "any statute that codifies existing powers is unnecessary." Only by attributing this proposition to the district court was the Court able to engage in the internal reductio; only under this interpretation of the premise could "respondent's reasoning" be alluded to as rendering section 1915(d) "otiose." By substituting its premise for the respondent's premise, the Court intimated that "respondent's reasoning" was of the following form:

1. This action, coercive appointment of counsel, requires authority.

244. Id.
245. That authority, statutory or inherent, is unnecessary for a court to "ask" something of an attorney may be made clearer by example. A judge would not require authority to ask an attorney, "What time is it?" or "Should I put mauve carpet in my chambers?"
246. Mallard, 109 S. Ct. at 1821 (respondent argued that § 1915(d) "must be read to confer coercive power upon the federal courts.").
247. See id. at 1821. The Court stated that "[s]tatutory provisions may simply codify existing rights or powers." This statement suggests a misunderstanding of the district court's premise—asking does not require a right or power.
248. Id. That the Court's understanding of the premise was "any statute that codifies existing powers is unnecessary" is implied by its assertion in rejecting the premise: "Statutory provisions may simply codify existing rights or powers." Id.
249. The reasoning will be referred to in the text as the "otiose" argument.
250. Neither the Court nor the respondent questioned the truth of the proposition that coercive appointment of counsel requires authority.
(2) If there exists inherent authority for coercive appointment, then any statute that purports to confer authority for coercive appointment is unnecessary.251

(3) Either (a) there exists no inherent authority for coercive appointment or (b) if such authority does exist, then section 1915(d) should not be read as granting that authority.252

(4) There exists inherent authority for coercive appointment.253

(5) Thus, section 1915(d) should not be read as granting that authority. It is otiose.254

From this point, it was a short step for the Court to complete the internal reductio. The truth of the fourth premise entails conclusion (5).255 But the district court would not want to assent to the conclusion. Thus, it would not want to maintain that premise four is true. Or, as the Court stated, "respondent would therefore have to conclude, it seems, that the federal courts lacked inherent authority" for coercive appointment.256 In other words, the Court alleged to have proved that "if respondent's argument regarding the function of section 1915(d) were correct, it would seriously undermine [the] assertion that the federal courts possess inherent authority to direct unwilling lawyers to serve."257

The establishment of that conditional conclusion was sufficient for the Court to complete its primary reductio. For the respondent would want to maintain that premise four is true; after all, it had argued that

251. The second premise in the line of reasoning derives from the Court's substitution of its premise, "any statute that codifies existing powers is unnecessary," for that offered by the district court, "no power is needed simply to ask."

252. Premise (3)(b) follows from premise (2) and the implied premise that a statute should not be read in a manner that renders it unnecessary. It should be noted that premise (3) is an exclusive disjunction. Both (a) and (b) cannot be true, because that would entail the contradiction "there exists and does not exist inherent authority for coercive appointment of counsel."

253. The district court argued for inherent authority for coercive appointment. Mallard, 109 S. Ct. at 1823. Justice Brennan did not sanction that claim, he simply assumed its truth for the purpose of this argument against the claim that § 1915(d) granted the power.

254. The Court's reductio depended on proving that "if the federal courts already had the authority to compel representation, then by respondents reasoning § 1915(d) would have been otiose." See id. at 1821 n.8. Therefore, for the purpose of this stage of the argument, the Court presumed that premise (4) was true. The truth of premise (4) entails the truth of premise (3)(b). The conclusion follows from these two premises.

255. For a discussion of why premise (4) entails the conclusion (5), see supra note 254.

256. Mallard, 109 S. Ct. at 1821 n.8.

257. Id. The establishment of this proposition completes the internal reductio.
courts do possess inherent authority to appoint counsel, \(^{258}\) and would not want to "seriously undermine" its own argument. Therefore, it would have to assent to the conclusion that its argument concerning the function of the statute was incorrect. That is, it would have to accept that section 1915(d) does not confer upon courts the power to appoint counsel. \(^{259}\)

This conclusion is incorrect. Unravelling the argument, the primary \textit{reductio} \(^{260}\) depended on the internal \textit{reductio}, \(^{261}\) which depended on the "otiose" argument, \(^{262}\) which depended on the Court's substitution of its premise \(^{263}\) for that advanced by the respondent. \(^{264}\) As demonstrated above, however, the Court was mistaken in substituting its premise for the respondent's, since the Court's premise was concerned with source of authority, while the respondent's was concerned with type of action. \(^{265}\) Therefore, the conclusion of the primary \textit{reductio} is not necessary and section 1915(d), absent some other reason for not doing so, could have been read to confer upon courts the power to appoint counsel.

B. The Future

Underlying \textit{Mallard} there were two relationships: the indigent litigant's to Mallard, and Mallard's to the court. Because Mallard framed his challenge as an action in mandamus, much of the Court's opinion focused on the latter relationship. The decision probably will have its greatest impact on questions of a court's power over those who practice before it, and its implications on those questions are examined below. But first the client-attorney relationship deserves attention.

1. \textit{Prisoner Suits}

Mallard was appointed to represent inmates who sued prison officials under 42 U.S.C. § 1983. \(^{266}\) Courts have held that civil rights ac-

\(^{258}\) \textit{Id.} at 1823.

\(^{259}\) At this point, the Court has completed its primary \textit{reductio}.

\(^{260}\) For a discussion of the primary \textit{reductio}, see supra notes 229-59 and accompanying text.

\(^{261}\) For a discussion of the internal \textit{reductio}, see supra notes 236-57 and accompanying text.

\(^{262}\) For a discussion of the "otiose" argument, see supra notes 250-54 and accompanying text.

\(^{263}\) For a discussion of the Court's premise, see supra notes 247-49 and accompanying text.

\(^{264}\) For a discussion of the respondent's premise, see supra notes 243-46 and accompanying text.

\(^{265}\) For a discussion of the impropriety of this substitution of premises, see supra notes 243-49 and accompanying text.

\(^{266}\) \textit{Mallard}, 109 S. Ct. at 1817. The prisoners' case involved three plaintiffs and eight defendants. Motion to Withdraw, Traman v. Parkin, No. 87-317-B (S.D. Iowa 1987), \textit{reprinted} in Joint Appendix at 5, \textit{Mallard} (No. 87-1490).
tions, as well as habeas corpus actions, are civil proceedings. With rare exception, the Court is adamant that civil litigants have neither a right to counsel nor a right of access to courts, through the assertion of which they may avoid the standard costs of litigation. In Bounds v. Smith, however, the Court held that prisoners have a right of "meaningful access" to the courts. It is not clear whether this right derives from the due process clause or from the equal protection clause. What is clear, though, is that for indigent prisoners pursuing post-conviction 1983 actions, the right to meaningful access does not equate with a right to appointed counsel.

Arguably, this is as it should be, for the following reason. So long as a person faces prosecution by the state, he is entitled to certain protections. But when he assumes the role of plaintiff, there is nothing about his status of "one previously prosecuted," or even "one convicted," that entitles him to more than the usual civil plaintiff. The ABA endorses this view: "Prisoners should have access to legal advice and counseling, and, in appropriate circumstances, will have a right to counsel, in connection with . . . civil matters, to the same extent as provided to members of the general public who are financially unable to obtain adequate representation." Thus, the argument goes, since the usual civil plaintiff does not have a right to appointed counsel simply because


272. Id. at 828. The right may be satisfied either by access to an adequate law library or by adequate assistance from persons with legal training.


275. Id. (no right to counsel in post-conviction § 1983 proceedings instituted by indigent inmates); see also Murray v. Giarratano, 109 S. Ct. 2765 (1989) (Finley rule applies to death row inmates).

she cannot afford to pay her own, neither should a prisoner who institutes a civil action.

The flaw in this argument is apparent. It suggests that imprisoned plaintiffs are on equal footing with other litigants, and that their assertion of a right to counsel is somehow overreaching. But as many problems as the indigent litigant faces, the imprisoned indigent litigant faces more. Not only does physical confinement impair the ability to litigate effectively, but in addition a prisoner often faces legal hurdles that the usual plaintiff does not. Far from overreaching, then, many prisoners struggle simply to reach the level of the nonimprisoned litigant. In recognition of these disabilities, Congress has in some instances provided relief.

Despite the flaws in the argument against a prisoner’s right to counsel in civil actions, Mallard should not defeat many prisoners’ expectations. Recent statistics indicate that prisoner suits account for almost eighteen percent of all civil cases commenced in federal court. Over sixty percent of the prisoner suits are civil rights actions, in which a court’s authority to appoint and pay counsel is narrowest. Abuse of the system by individual prisoners has resulted in an understandable reluctance to expose the courts to an even greater number of such


280. In the twelve months ending June 30, 1989, 233,293 civil cases were commenced in federal court. 1988 ADMIN. OFF. U.S. CTS. ANN. REP. app. I at 20 (1989) [hereinafter ANNUAL REPORT]. Of that number, 41,390, or 17.7%, were prisoner suits. Id. at 23. In 1989, 26% of the American population was incarcerated, up from .096% in 1970. Moss, Drug Cases Clog the Courts, A.B.A. J., Apr. 1990, at 34.

281. Of the 41,390 prisoner petitions filed in the 12 months ending June 30, 1989, 25,905, or 62.6%, were civil rights actions. ANNUAL REPORT, supra note 280, at 23. Habeas corpus petitions accounted for 12,343, or 29.8%, of the total. Id.
Prisoners are not oblivious to this reluctance. As one self-help manual written for imprisoned litigants states:

Even though you do not have a constitutional right to have counsel appointed in a civil action, it is recommended that all pro se litigants seek appointment of counsel.

When you file your motion for leave to proceed in forma pauperis, you should file a motion for appointment of counsel pursuant to 28 U.S.C. § 1915(d).

... However, the court has no authority to order an attorney to represent you, or—more important—to pay an attorney to represent you.\(^{283}\)

It seems safe to conclude, then, that although an opposite outcome in Mallard might have left prisoners better off then they were before the decision, the actual result will leave them no worse off.

The Court may have acted not out of a desire to leave prisoners no better off, but rather out of concern that an opposite decision would spell potential disaster for the federal court system. Already, prisoner suits account for a substantial percentage of actions in federal court.\(^{284}\) Recognition of a right to counsel in collateral post-conviction proceedings would remove one of the few disincentives to filing suit that prisoners have. In addition, our nation's fervent "war on drugs," quite apart from its other ill-effects,\(^{285}\) can only lead to an increased strain on the courts. The Federal Courts Study Committee\(^{286}\) recognized that one of


\(^{283}\) D. Manville, Prisoners' Self-Help Litigation Manual 232 (rev. 2d ed. 1983) (citations omitted); cf. J. Gobert & N. Cohen, Rights of Prisoners § 2.04, at 33 (1981 & Supp. 1989) (stating "§ 1915 provides authority for the appointment of counsel in civil . . . cases involving indigents"). The latter source should be read as concerned with the attorney-court aspect of Mallard, rather than the attorney-client aspect, since the authors also state that "[a]ppointment generally is held to lie within the sound discretion of the court." Id. at 92.

\(^{284}\) For the statistics on prisoner suits, see supra notes 280-81 and accompanying text.

\(^{285}\) See, e.g., National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989) (upholding Customs Service's drug-testing program which included warrantless urinalysis despite absence of individualized suspicion of drug use).

the effects was increased prosecution of drug cases in federal courts;\textsuperscript{287} its recommendation urged Congress to refocus federal drug enforcement strategy by limiting federal prosecutions to cases that state courts could not effectively handle.\textsuperscript{288} But no matter which courts the cases are prosecuted in, the consequence of increased prosecution has been a startling increase in prison population—in the first six months of 1989, the number of state and federal prisoners grew at a rate of almost 1800 per week.\textsuperscript{289}

More people in prison will inevitably lead to more prisoner suits. Aside from the increased tensions associated with overcrowding,\textsuperscript{290} the mere institutional structure of the prison system invites litigation. To the incarcerated, the prison represents nearly everyone against whom a cause of action might exist in ordinary life, e.g., health-care provider, employer, police, landlord, restaurant, etc.\textsuperscript{291} Moreover, section 1983 provides the ideal means for asserting the action.\textsuperscript{292} The development of constitutional law since 1871, when Congress enacted what is now section 1983 to combat the Ku Klux Klan,\textsuperscript{293} has resulted in "an astonishing spectrum of governmental conduct [that] give[s] rise to at least a

\begin{quote}
progress established the committee to study the federal court system, its role, its workload, its structure and its relationship with the state courts.
\end{quote}

287. During the 1980s, federal drug prosecutions increased 280\%. Moss, \textit{supra} note 280, at 34.

288. \textit{REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 35 (1990) [hereinafter FEDERAL COURTS STUDY]}. Assistant Attorney General Edward Dennis and Representative Carlos Moorehead strongly opposed the suggestion to move drug cases to state courts, arguing for the necessity of a prominent federal role in the war on drugs. \textit{Id.} at 38. Attorney General Thornburgh advanced a similar argument during hearings on the committee's tentative proposals. \textit{See Sweeping Changes Recommended by Federal Courts Study Committee, 58 U.S.L.W. 2442, 2443 (Feb. 6, 1990).}

289. Moss, \textit{supra} note 280, at 34. Prison population increased 7.3\% in the first six months of 1989, exceeding all previously recorded annual rates. \textit{Id.}

290. In April 1990, 43 states were under court order to reduce overcrowding. \textit{Id.}; \textit{cf.} Tillery v. Owens, 907 F.2d 418 (3d Cir. 1990) ("double-celling" in response to overcrowding violative of eighth amendment).

291. This peculiar feature of prisoner suits was pointed out in an interview on March 9, 1990, with Judge Garrett E. Brown, Jr., United States District Court for the District of New Jersey.

292. Section 1983 provides:

\begin{quote}
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
\end{quote}


293. Civil Rights Act of 1871, tit. xxiv, \textsection{} 1979 (also known as Ku Klux Klan Act).
colorable claim that substantive or process rights protected by the Constitution have been violated. 294

It is beyond the scope of this Note to do so, but eventually either Congress or the judicial system will have to develop a response to the increased number of suits. Some methods are in place. Under a 1979 amendment to the Federal Magistrates Act, 295 magistrates enjoy some post-conviction motion jurisdiction. 296 The Federal Courts Study Committee has recommended that Congress stiffen the statutory requirement of exhaustion of state administrative remedies in state prisoner section 1983 cases. 297 Another possible approach deserves attention: instituting procedures to assist article III courts in handling section 1983 prisoner suits. 298

This approach is promising but also troublesome. Federal courts could establish a system of court-annexed arbitration to resolve disputed factual issues in section 1983 prisoner suits, thus “packaging” the case for speedier disposition by the court. 299 Congress has already conformed the use of court-annexed arbitration in twenty district courts, 300 and the Federal Courts Study Committee has recommended that Congress broaden the use of the procedure. 301 At the same time, however, Congress exempted from arbitration any “action based on an alleged violation of a right secured by the Constitution” unless both parties con-

297. See FEDERAL COURTS STUDY, supra note 288, at 48. The committee has recommended that Congress delete the requirement of 42 U.S.C. § 1997e(b), under which exhaustion is required only if the United States Attorney General or a federal court has certified as adequate the state prison’s administrative remedy.
298. Another approach may well be underway, at least in other contexts of prisoner litigation: decisions that curtail prisoners’ access to federal courts. See Saffle v. Parks, 110 S. Ct. 1257 (death row inmates who claim conviction violated rights not entitled to benefit from changes in law while their cases are pending), reh’g denied, 110 S. Ct. 1940 (1990); Bulter v. McKellar, 110 S. Ct. 1212 (1990) (same); Teague v. Lane, 109 S. Ct. 1060 (1989) (state prisoners cannot use federal habeas corpus to make new federal law unless proposed new rule pertains to “bedrock” constitutional rights).
299. As one commentator has pointed out, such a procedure would not amount to a pure form of arbitration if the decision is non-binding. See Perritt, “And the Whole Earth Was of One Language”— A Broad View of Dispute Resolution, 29 Vill. L. REV. 1221, 1231, 1305 n.426 (1983-84). Professor Perritt’s article provides a detailed conceptual framework for thinking about alternative dispute resolution.
301. See FEDERAL COURTS STUDY, supra note 288, at 83.
sent to it.\textsuperscript{302} In other words, most prisoner section 1983 actions would require consent.\textsuperscript{303} The Eastern District of Pennsylvania has eliminated any doubt of the requirement by explicitly excluding prisoner civil rights cases from its compulsory arbitration program.\textsuperscript{304}

Why exclude prisoner section 1983 suits from the arbitration process? In addition to the exclusion of constitutional cases from arbitration, Congress has directed district courts to establish procedures for exempting from the process any case "in which the objectives of arbitration would not be realized (1) because the case involves complex or novel legal issues, (2) because legal issues predominate over factual issues, or (3) for other good cause."\textsuperscript{305} It is probably true that most constitutional litigation satisfies either of the first two conditions, thereby supporting a blanket exclusion of constitutional cases from mandatory arbitration. But it is less clear that prisoner section 1983 cases do so; generally, the legal issues are clear enough and only the facts are contested. Thus, if there is any justification for excluding the suits from the arbitration process, it must arise from the "for other good cause" exception.

That vague language supplies the ideal release valve by which the political process accommodates competing interests. There is, or should be, a strong social interest in securing a level of decency below which we will not tolerate prisons subjecting the increasing number of persons they house. It is this interest that section 1983 suits serve so well. But there is also a social interest in the maintenance of a functioning federal court system. It is this interest that the already high, and likely to increase, number of section 1983 suits threatens to cripple. By not expanding prisoners' access to courts, \textit{Mallard} postponed the showdown between these two interests. But the legal community should prepare for it.

2. \textit{Courts' Inherent Authority to Appoint Counsel}

Because \textit{Mallard} has foreclosed reliance on section 1915(d) for the authority to appoint counsel, federal courts will have to appeal to some other source of authority if they are to continue supplying counsel to indigent litigants. A court that attempts to appoint counsel in the future will most likely appeal to its "inherent power" to do so. If an attorney


\footnotesize{303. For a discussion of the relationship among prisoners' grievances, § 1983 and constitutional rights, see \textit{supra} notes 292-94 and accompanying text.}

\footnotesize{304. \textit{See R. U.S. Dist. Ct. E. Dist. Pa. Rule 8.3.A.} (1990). The procedure instructs the clerk to refer to compulsory arbitration all civil cases in which money damages only (less than $100,000) are sought, but excludes social security cases and prisoners' civil rights cases.}

were to challenge the appointment, it is not clear how the case would come out. *Mallard* does not provide much guidance; the Court decided to "leave that issue for another day." 306 Further, as one court has noted, the notion of inherent authority is nebulous and its boundaries are shadowy. 307 Before exploring the possibilities, therefore, it is necessary to examine the idea of inherent authority.

a. The Idea of Inherent Powers

Statutes, including the federal rules of procedure, 308 are the clearest source of a court's power. 309 These sources do not, however, completely exhaust the scope of the district courts' powers. 310 There also exists what courts commonly refer to as "inherent" 311 or "supervisory" 312 power. While there is no doubt about the existence of this power, delineating its content has proved notoriously difficult. 313 Noting that "conceptual and definitional problems regarding inherent power . . . have bedeviled commentators for years," 314 the Third Circuit has undertaken an analysis of the notion of federal courts' inherent power.

In *Eash v. Riggins Trucking Inc.*, 315 the court identified three catego-

---

306. See *Mallard*, 109 S. Ct. at 1823.
308. Although the Court promulgates the rules, it does so pursuant to statutory authority. See 28 U.S.C. § 2071 (1988) (rule-making power generally).
309. See, e.g., 18 U.S.C. § 401 (1988) (contempt power); Fed. R. Crim. Pro. 42 (contempt power); Fed. R. Civ. Pro. 11 (power to sanction parties for papers filed in bad faith); id. Rule 16 (power to direct pretrial conference); id. Rule 37 (power to sanction parties for failure to cooperate in discovery).
311. See, e.g., *Link*, 370 U.S. at 630.
313. See *Heileman Brewing*, 871 F.2d 648. The Seventh Circuit faced the issue whether a district court has the authority to order a litigant, and not just its attorney, to appear in a pretrial conference and to impose sanctions for failure to comply. In holding that the court did have the authority, this 6-5 decision produced six different opinions.
314. *Eash*, 757 F.2d at 561. The court attributed the conceptual problems to two sources. First, because federal courts do not often resort to their inherent powers, and because when they do they are not often challenged, few cases discuss the topic. *Id.* Second, when they do address the topic, courts use the one generic term, inherent power, to describe various distinguishable powers. *Id.* at 562.
315. 757 F.2d 557 (3d Cir. 1985) (en banc) (district court has power to
eries of usage of the term inherent power. The first, and narrowest, category the court named "irreducible inherent authority." In this category are powers, derived from article III, that are "fundamental to the essence of a court as a constitutional tribunal." The second category encompasses what the court referred to as "necessary" powers. The third category consists of what the court alluded to as "highly useful" powers. In this category of highly useful powers the court included general equitable powers.

Problems arise when the two sources of power, statutory and inherent, arguably prescribe different results. According to the Eash court, a court's ability to exercise an inherent power in an area addressed by legislation depends on the category to which the power belongs. Within the domain of the first category, or irreducible inherent authority, "courts may act notwithstanding contrary legislative direction." Necessary powers, the secondary category, "may be regulated within limits not precisely defined," ... [but] can 'neither be abrogated nor rendered practically inoperative' by legislation. A court may invoke the highly useful powers of the third category, by contrast, "only in the ab-


316. Id. at 562.

318. Id. The term necessary derives from the Supreme Court's early pronouncement that a court's inherent powers are those "necessary to the exercise of all others." United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812); see also Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980) (quoting Hudson). The Eash court cited both cases in support of its recognition of this "second" category. Eash, 757 F.2d at 562. Alternatively, these might be named "essential" powers. See id. at 563 (citing Levine v. United States, 362 U.S. 610, 616 (1959); Cooke v. United States, 267 U.S. 517, 539 (1925); Michaelson v. United States, 266 U.S. 42, 65 (1924); Myers v. United States, 264 U.S. 95, 103 (1924)).

319. Eash, 757 F.2d at 562.
320. Id. at 563 (citing Ex parte Peterson, 253 U.S. 300, 312 (1920); Ruiz v. Estelle, 679 F.2d 1115, 1161 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983); Schwimmer v. United States, 232 F.2d 855, 865 (8th Cir.), cert. denied, 352 U.S. 833 (1956)).

321. Id. (citing Hall v. Cole, 412 U.S. 1, 5 (1973); ITT Community Dev. Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978); Johnston v. Marsh, 227 F.2d 528, 531 (3d Cir. 1955)).

322. Id. at 562. Because the first category is rooted in the concept of separation of powers, within its domain the judiciary is free from legislative interference.

323. Id. at 563 (quoting Michaelson v. United States, 266 U.S. 42, 66 (1924)).
b. The Inherent Power to Appoint Attorneys

Where in this framework should one place a court’s invocation of inherent power to appoint an attorney? Although the Eash court addressed the issue of sanctioning an attorney for misconduct, its analysis suggests that the proper category in the case of appointment is that of “highly useful” powers. It would not be the first category, for it is difficult to imagine an argument that article III speaks to the issue, or that there is anything about unrepresented indigents that threatens the essence of a court as a constitutional tribunal. Likewise, one could not seriously maintain that a court’s power to appoint an attorney is necessary to the exercise of all its other powers, which is the distinguishing feature of powers contained in the second category. By elimination, then, only the third category remains.

In addition, there is a positive argument for placing the power to appoint an attorney in the third category. Eash addressed a court’s power to impose sanctions for attorney misconduct. The court described the misconduct involved as an “unjustified failure to discharge an administrative responsibility as an officer of the court” and as “conduct unbecoming a member of the bar.” In holding that district courts have inherent power to sanction an attorney for such misconduct, the Eash court used the limiting language “in the absence of contrary legislation” and “absent a statute or rule... to the contrary.” In light of the relationship between inherent powers and legislation, this language indicates that the power falls under the category of highly useful powers. Assuming that there is some relation between the relevant category of power and the subject matter over which the power is exercised, it follows that any power that concerns an attorney’s responsibility as an officer of the court or as a member of the bar should fall into the third category of inherent powers. Because an attorney’s responsibility to represent the indigent arguably arises both from her relationship to

324. Id. (citing Alyeska Pipeline Serv. v. Wilderness Society, 421 U.S. 240, 259 (1975) and Williams, The Source of Authority for Rules of Court Affecting Procedure, 22 WASH. U.L.Q, 459, 473 (1937)). The Federal Rules of Civil Procedure suggest this restriction on inherent powers. See Fed. R. Civ. Pro. 83 (“In all cases not provided for by rules, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.”) (emphasis added); see also 28 U.S.C. § 2071 (1988) (courts may establish rules, but rules must be “consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court”).

325. Eash, 757 F.2d at 566.
326. Id. at 566, 569.
327. Id. at 564.
328. Id. at 569.
329. For a statement of the relationship between legislation and the third category of inherent power, see supra note 324 and accompanying text.
the court and from her membership in the bar, the court's inherent power with respect to this responsibility falls within the third category.

Recall that a court may invoke the third category of its inherent powers "only in the absence of contrary legislative direction." Suppose, then, that a court invokes its inherent power to appoint an attorney to represent an indigent. If the attorney challenges the appointment, he may argue that section 1915(d), as interpreted by Mallard, amounts to the contrary legislative direction in the face of which the court has no inherent power. That is, future debate will center on whether Mallard stands for either (1) the proposition, 'Section 1915(d) is not a legislative expression in favor of appointment,' or (2) the proposition, 'Section 1915(d) is a legislative expression against appointment.' The appointing court will advance the first interpretation, while the attorney challenging the appointment will stress the second.

IV. CONCLUSION

The fundamental problem in Mallard and similar cases is how our society should reconcile its ideal that access to justice should not depend on financial status with its ideal of liberty. The solution reached in the case was correct, even if the Court's way of reaching the solution was less than persuasive. To those unconvinced by the Court's reasoning, one can only say that the judicial constructions of "plain meaning" and "legislative intent," as incoherent as they may prove under close analysis, are nevertheless so much a part of our tradition that it is unlikely courts will abandon them anytime soon. The limits of our language are such that one can always expose weaknesses and inconsistencies in any written text, including judicial opinions. While there is some pleasure in

330. For a discussion of the conditions under which a court may invoke the third category of inherent powers, see supra note 324 and accompanying text.

331. It is too soon to decide which interpretation will win out. For example, one federal court, faced with an attorney's violation of Federal Rule of Civil Procedure 11, sanctioned the attorney by ordering that he undertake pro bono a case from a list of pro se litigants. Bleckner v. General Accident Ins. Co., 713 F. Supp. 642 (S.D.N.Y. 1989). The court cited Mallard in acknowledging that 28 U.S.C. § 1915(d) did not give it the authority to impose the sanction, yet immediately referred to Justice Stevens's dissent with a "but cf id." cite. Id. at 653 n.4. It is not clear if the court did so in order to cast doubt on the majority opinion, or to refer to Justice Stevens's discussion of inherent powers.

Justice Blackmun recently stated that Mallard is not contrary to the proposition that attorneys, as officers of the court, have a duty to serve the public by representing indigent litigants. F.T.C. v. Superior Court Trial Lawyers Ass'n, 110 S. Ct. 768, 791 & n.* (1990) (Blackmun, J., concurring in part and dissenting in part).

332. For a discussion of the problems arising from the "plain meaning" approach, see supra note 189 and accompanying text. With regard to the problems with the "legislative intent" strategy, see R. Dworkin, supra note 167, at 311-27.
that exercise, it is ultimately unproductive. The importance of an opinion lies not in how well constructed it is, but in its practical effects.

*Mallard* does not emasculate the ideal that access to justice should not depend on financial status. Section 1915(d) will continue to be a useful element of an indigent litigant's resources. It can be read as relieving a litigant of all non-attorney fee expenses of litigation. Granted, attorney fees often comprise the largest portion of the cost of litigation, but court costs and fees may also be substantial, particularly for the less well-off litigant. In addition, an attorney may be appointed under another statute, and there is no bar to proceeding under section 1915(d) with an appointed attorney. Some attorneys may be more likely to volunteer their services if they know that they will not be responsible for as many out-of-pocket expenses.

By contrast, an opposite outcome in the case would have greatly thwarted the ideal of liberty. Moreover, the actual result does not entail that lawyers must adopt a mean-spirited, selfish self-image. *Mallard* concerned an issue much narrower than an attorney's ethical obligation to provide pro bono services. That broad issue constitutes the general context in which the case arose, but it would do well to specify its exact position within the larger framework. Only under the narrowest definition of the term could the case be said strictly to involve a "pro bono obligation." The pro bono obligation as defined by the ABA may be satisfied in more ways than one. The Court was correct to read section 1915(d) as not limiting an attorney's options to one. The reality of

---

333. See *United States v. 30.64 Acres of Land*, 795 F.2d 796 (9th Cir. 1986). Judge Wiggins, writing for the court, stated: "As a practical matter, we observe that the lack of court power to make mandatory assignments should not reduce the availability of counsel to needful indigent civil litigants under section 1915(d)." *Id.* at 803.

334. Some courts have recognized the need for incentives to perform public interest work. The District of Columbia Court of Appeals affirmed the enhancement of an attorney fee award in a Title VII action by 25%, despite the fact that the attorneys in the case worked for a non-profit organization. See *McKenzie v. Kennickell*, 875 F.2d 330, 338 (D.C. Cir. 1989). The court stated that "[f]ar from constituting 'economic relief' or a 'windfall' to non-profit firms, the equal availability of contingency enhancements creates a level playing field." *Id.* at 334.

335. See *Christensen*, *supra* note 19, at 2-3. Christensen devoted a whole section of his work to "Some Definitional Problems." *Id.* In his view, the narrowest definition—actual representation of needy clients—would appear to be too restrictive. . . . Of course, there is something to be said for the position that the public, the profession, and the individual lawyer would all benefit significantly if all lawyers were to devote at least some of their public service time to the performance of their quintessential role—the actual representation of clients—in the cause of the defenseless and oppressed. But perhaps this would best be left as an ideal rather than as a definition of the pro bono obligation. *Id.*

336. For a discussion of the ways in which an attorney may satisfy the pro bono obligation, see *supra* note 27 and accompanying text.
today's profession does not support such a narrow approach.\textsuperscript{337}

Of course, the legal profession is not the touchstone of every attempt to solve social problems—one could as easily say that the reality of the poor's needs does support a narrow approach. But the breakdown of homogeneity within the profession will have other consequences which lawyers may perceive as less self-serving and which will benefit the poor. The most notable consequence is the recognition that perhaps some legal services can be delivered by nonlawyers.\textsuperscript{338} As horrifying as that prospect may appear to some attorneys, at least it advances the goal of increased access to the judicial system without conscripting lawyers.

A continuing and increasing articulation of the profession's ethical obligation,\textsuperscript{339} and a willingness on the part of the members to strive to meet those obligations, would do more to satisfy both the ideal of liberty and of justice than would a system of coercive appointment enforced by legal sanctions. The proper approach is to continue to rely on attorneys' voluntary acceptance of their share of the burden. Already lawyers do more than other professions to meet the needs of the indigent.\textsuperscript{340} As long as attorneys recognize that their "duties go beyond what the law demands [will ours] remain a noble profession."\textsuperscript{341}

Fred Springer*

\textsuperscript{337} For a discussion of how the changes in the legal profession support the Court's result, see supra notes 207-15 and accompanying text.

\textsuperscript{338} See California Is Poised to Let Paralegals Go It Alone, N.Y. Times, Oct. 12, 1990, at B5, col.1. A commission appointed by the California State Bar has proposed that independent paralegals (not affiliated with a law firm) be permitted to practice in such areas as divorce, landlord-tenant and personal bankruptcy. The bar "is acting in part to stymie a more permissive plan being studied in the California Legislature." Id. The article notes: "Consumer advocates maintain that many routine legal chores . . . do not require a lawyer's costly services and that such tasks can be performed by paralegals . . ., who charge much less. Some lawyers' groups are beginning to agree, especially as they feel pressure from the courts to provide low-cost representation." Id. One California state senator has warned, "[Lawyers] better get out front and try to help and quit stone-walling. . . . One way or the other, there is going to be some movement in the direction of paralegals doing this kind of work." Id.

\textsuperscript{339} For a discussion of the recent articulation of an attorney's ethical obligations, see supra notes 29-39 and accompanying text.

\textsuperscript{340} See J. Kultgen, Ethics and Professionalism 125 (1988). Professor Kultgen suggests that "most [professional ethical] codes ignore the matter of the needs of the indigent." Id. He states, however, that the ABA "comes closest to attacking the issue of ability to pay head on," and that "[t]he ABA's concern is unusual among professions." Id.

\textsuperscript{341} Mallard, 109 S. Ct. at 1823 (Kennedy, J., concurring).

* For their contributions to this Note, I am grateful to the following members of the Villanova University School of Law: Rob Dugan, Professor Catherine Lanctot, Jim McHugh, Scott Price and Susan Straka. Special thanks to Maria Morales of the University of Pennsylvania graduate department of philosophy.