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GEOFFREY C. HAZARD, JR.

AFTER PROFESSIONAL VIRTUE

Mallard v. United States District Court for the Southern District of Iowa[1] involved the question whether a statute empowering a federal judge to "request" an attorney to represent an indigent in a civil case[2] meant to create an obligation on the part of the attorney. Five Justices, speaking through Justice Brennan, held that an attorney could decline such a request.

Four Justices—Marshall, Blackmun, and O'Connor dissenting with Justice Stevens—thought the statute was using polite language to describe an order. Hence, they thought an attorney had a legal obligation to accept an appointment. Both opinions cited history, not only the deliberations preceding the enactment of the statute in 1892 but more ancient antecedents as well. Both opinions acknowledged the tradition that members of the bar have an obligation to represent indigents. The majority relied on Professor David Shapiro's admirable study of the question.[3] The dissent quoted Justice Field from over a century ago: "Counsel are not considered at liberty to reject . . . the cause of the defenseless, because no provision for their compensation is made by law."[4]

The dissent also thought that the statute expressed: "the congressional design of ensuring the poor litigant equal justice whether the suit is prosecuted in federal or state court . . . ."[5]

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[1] 109 S.Ct. 1814 (1989).

[2] 28 U.S.C. §1915(d), which provides: "The court may request an attorney [to represent the indigent]."

[3] See Shapiro, The Enigma of the Duty to Serve, 55 N.Y.U. L. Rev. 735 (1980).

[4] 109. S.Ct. at 1824–25, quoting from Rowe v. Yaba County, 17 Cal. 61, 63 (1860).

[5] 109 S.Ct. at 1825.

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The majority seemed equally cognizant of the ideal of equal justice for the poor. They observed: "In a time when the need for legal services among the poor is growing and public funding for such services has not kept pace, lawyers' ethical obligation to volunteer their time *pro bono publico* is manifest."[6]

But the majority concluded that the term "request" in the statute did not seem to denote "order," "direct," or "appoint."

Both opinions happily were free of internecine zaps and zingers. Indeed, the opinions manifest a similar sadness that the "congressional design" notwithstanding, "public funding for such services has not kept pace." While questing equal justice, the law also has responsibility to decide, authoritatively and coherently, what to do inasmuch as equal justice cannot be realized. *Mallard* encapsulated that dilemma. Imagaining myself a member of the Court, I would have empathized with the minority but voted with the majority.

The case arose out of the refusal of Attorney John E. Mallard of the Iowa bar to accept appointment by a United State Magistrate to represent inmates of a state prison in their civil suit against prison officials seeking redress for brutalities and other wrongs. The inmates had filed the suit *in forma pauperis*. The Magistrate evidently thought the allegations were not frivolous. A meritorious claim of brutality perpetrated on incarcerated people surely qualifies for publicly-provided assistance of counsel. Attorney Mallard, however, refused the appointment. The Magistrate ordered him to comply. Mallard still refused and appealed to the District Judge. The District Judge ordered him to comply. Continuing his refusal, Mallard sought mandamus from the Court of Appeals for the Eighth Circuit. The Eighth Circuit denied the application. Mallard's petition for certiorari was granted by the Supreme Court, which then reversed.

Mallard's eligibility for appointment came from a list of attorneys admitted to practice before the United States District Court for the Southern District of Iowa. Becoming a member of a federal court bar is a step beyond admission to practice in the state and nominally entails special qualifications and special responsibilities. Mallard evidently got admitted to the federal court because his areas of practice included bankruptcy, which is within the exclusive federal jurisdiction, and securities law, which is primarily within the federal do-

[6] *Id.* at 1823.

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main. The question was whether admission entailed a legally enforceable responsibility to represent indigents.

The court's appointment system involved an organization called the Volunteer Lawyers Project. This organization was jointly sponsored by the Legal Services Corporation of Iowa, a federally funded legal assistance organization, and the Iowa State Bar Association. The Volunteer Lawyers Project, as the name implies, evidently began as a group of lawyers volunteering to accept indigent appointments. However, the system had become mandatory. Every lawyer on the federal court rolls was subject to a call to serve, which worked out to one appointment about every three years.

The system was conceived as giving effect to professional virtue, a lawyer's obligation to represent the poor. Such an obligation is a classic canon of the legal profession. The canon contemplates practitioners ready to provide services to whomever may be in need of legal assistance. The clients pay if they are able, but will be served nonetheless if they cannot. This vision accordingly contemplates practitioners competent to handle practically whatever matter may come through the door, whether it be a will, a deed, the replevin of a cow, or a criminal charge such as horse stealing.

The classic canon also assumes a limited number of practitioners, not simply "the bar" but *the* bar. Members of such a bar constitute an oligopoly. This economic position provides its members an income that is steady and large enough to permit them to maintain respectability and to afford professional beneficence. Also contemplated is a fellowship of the bar—a common identity, reciprocal obligations to each other, and a shared sense of duty to others. Every lawyer is supposed to share the burden of representing the poor and anyone who shirks is subject to tacit but forceful peer disapproval. This traditional vision is, of course, romantic. The bar of the past to which it relates had features that constrained practice of its ideals. These features include the following.

Members of the bar were always concerned primarily, if not exclusively, with matters involving fees, the more lucrative the better. Most lawyers had been strivers who had endured a long and precarious apprenticeship that could drain charitable instincts. Successful lawyers usually had differentiated themselves into specialties such as mortgage finance, wills and estates, business law, and maintaining relations with the county commissioners and the state legislature. Whatever technique in advocacy they once possessed had

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atrophied, many of them had not been in a courthouse for years, and some had never actually tried a case.

The social structure of the bar was another impediment to free legal services. Lawyers recognized that their status in practice was largely a function of the status of their clientele, and generally wanted no truck with impecunious felons. Relationships among members of the bar were shaped by professional status. The trial bar had something of a fellowship, bound together in chronic apprehension over unpredictability of juries and idiosyncrasy of judges, these being the primary subjects of their professional conversation. The mortgage, probate, and corporation lawyers found their way into sub-circles identified by where they took luncheon and played golf. Within each group there were great individual differences in competence, efficiency, sense of responsibility, and disposition toward public service. However, most were known to be very conserving of their time and advice, which after all, as Lincoln said, was their stock in trade.

The bar not only was divided along practice lines but also was riven by social division and personal animosities. Where entrance to the bar had been achieved by ethnic and religious minorities, for example Irish Catholics and Jews, there were additional divisions along such lines. The bar was a human institution embedded in local society. This meant that notions of professional virtue, though firmly proclaimed, were only tenuously shared. All these considerations militated against providing legal services to people lacking means to pay.

The community and the bar nevertheless held together more or less. Social peace is a blessing in itself and a necessary predicate for pursuit of property and happiness. Most people realize this truth, not least the lawyers. Their calling involves canalization of conflict into peaceful and stable resolutions. That task includes seeing to it that cries of injustice not go unheeded, at least sharp cries about manifest specific injustice. Ignoring such cries embarrasses the legal system's pretension to just ordering of relations within the community, and that in turn threatens the community's very fabric. A community whose fabric is torn apart offers no vocation for lawyers. There is thus an element of long term professional self-interest in the obligation to serve indigents who are accused of crime or in other kinds of legal trouble.

Persons in positions of authority in the traditional community generally acted in a sensible way. Otherwise, they did not remain in such positions. This was true in particular of authorities in the administra-

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tion of justice. Accordingly, in criminal cases by and large the prosecutor did not bring charges except on good ground. Good ground required that the accused be either provably guilty or probably guilty and socially marginal. Whether a defense would be interposed was up to the accused. An affluent accused, for example, a bank officer charged with defalcation, could retain counsel as he would have in a will contest or litigation over an easement. While there was a right to retain counsel, however, there was no right to have counsel.

Appointing counsel for an indigent accused criminal was therefore not a necessary practice, except in unusual cases. From time to time a judge would think the basis of a prosecution was doubtful, perhaps because the prosecutor was on a tear or because the police seemed to have bungled the investigation. Counsel then had to be appointed. In a heavy case, the judge would ask an experienced member of the trial bar to undertake the representation. In other cases one of the firms was asked to send over one of the young fellows.

The appointments would be accepted. These occasional undertakings were needed in order to maintain respect for the system of justice and to guard against injustice in the case of a defendant who was actually innocent. The bar understood that such appointments had to be made and that the judge would be sensible in distributing them. The burden on a leading lawyer of being appointed in a capital case or other heavy assignment was offset by the professional recognition implied in the appointment. Tendering the service of juniors solidified the leading law offices' commitment to professionalism. Accepting an appointment also banked good will with the judiciary.

An essentially similar system took care of civil legal assistance, but appropriately at a lower level of regularity and intensity. In the first place, injustice in civil matters generally was considered to have less severe and obvious consequences than injustice in criminal matters. In the second place, it was assumed that when poor people came to a lawyer's office with a substantial meritorious legal problem, they would get help. Legal assistance would be provided either directly by the lawyer or by referral to a legal aid office, which would have been established in larger communities. In this way the poor were assisted in dealing with unjust evictions, repossessions, marital discord such as spousal assault, and juvenile court proceedings. Unmeritorious cases were not given assistance. A competent lawyer could tell an uumeritorious case when he saw one, especially if he was free to decline it. Occasionally the poor were wrongly turned away, or intimidated from seeking legal help in the first place.

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Sometimes an indigent would take a civil matter directly to court, appearing *in propia persona*. If the indigent was a defendant, the court tried to assure itself that the claim was at least facially valid. Judicial scrutiny was sometimes superficial and was difficult to give effect in matters prosecuted by lawyers over whom the court had no effective leverage, such as sleazy collection attorneys. Nevertheless, it provided a safeguard against serious abuse.

Pro per plaintiffs presented much greater difficulty for the court. Most *pro per* claims had poor legal foundation, even if they might be morally worthy. The judge would accurately conjecture that a *pro per* plaintiff had been turned down by lawyers on this very ground. Few claimants understood court procedure or the limitations of the judge's role and powers. However, now and then a case appeared that had something to it. A substantial non-frivolous civil claim by a poor person is entitled to the judicial system's attention on a par with criminal cases. The system did not give an indigent civil claimant a right to counsel for that would clog the courts with frivolous cases and put the administration of justice in disrepute. It therefore required the judge to assess whether a case had such apparent merit that a lawyer should be prevailed on.

Appointment of counsel in this classic situation rested on essentially the same institutions as appointments in criminal cases. The judge exercised prudent restraint in asking lawyers to serve and lawyers exercised prudent alacrity in responding, both guided by a professional narrative concerning law and justice.[7] Lawyers who were unwilling or unfit to serve simply remained outside the system, unburdened by professional obligation but also unbenefited by judicial and professional approbation. The system thus depended on reciprocity, the medium of exchange being elemental political currency, which is to say standing and influence.

Circumstances gradually changed. The appellate courts came to lay it down that counsel had to be provided in every siguificant criminal case. First, it was capital cases where the particular facts indicated that an acquittal might well have resulted if the defendant had had the assistance of counsel. Then cases involving serious procedural irregularity. Then felony prosecutions generally. Then all cases where jail was a possibility. The state appellate courts in politi-

[7]See The Supreme Court, 1982 Term—Cover, Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4 (1983).

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cally liberal states pointed the way, but the weight of authority was provided in Supreme Court decisions making appointment of counsel a matter of due process.[8]

Congress ratified the requirement that counsel be appointed in criminal cases in federal court. The states that had public defender systems, many since the early part of the century, enlarged those systems. States that previously depended on the appointment system created defender systems for the cities and larger towns. Other states continued to rely on the appointment system but required that appointed counsel be compensated.

Requiring that a criminal defendant have legal representation made hostage of the public's concern that criminals be put in jail. Criminals could not be put in jail except according to due process; due process, so held the Supreme Court, now required that defense lawyers be provided; since the public wanted criminals put in jail, defense lawyers had to be provided. It was inconceivable that the Supreme Court would recede from *Gideon* in the foreseeable future. It was also inconceivable that criminal prosecutions should abate for want of defense lawyers. Conservatives and liberals would join in voting appropriations. Public provision for criminal legal aid might be grudging and insufficient but there was no getting around it.

Civil legal aid was something else. The notion that due process meant lawyer-assisted process never took hold in civil matters. For one thing, there was a long tradition, exemplified in workman's compensation proceedings, juvenile court, and small claims, that legal dispute resolution could be more just, more expeditious and less expensive if lawyers were kept out. For another thing, in civil cases there was no apparatus of legal assistance provided by the state to assist one side, as was provided for the prosecution in criminal cases.[9]

There was a more fundamental difficulty in fixing the provision of civil legal aid. The measure of necessary legal aid in criminal cases was the quantum provided the prosecution. There was no similar measure for civil legal aid. To provide a lawyer to an indigent civil grievant was in effect to confer a subsidy in the amount of nuisance

[8]The seminal case is of course Gidcon v. Wainwright, 372 U.S. 335 (1963).

[9]In Gidcon v. Wainwright, *id.* at 344, the Court observed: "Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential . . . That government hires lawyers to prosecute and defeudants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries."

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settlement value to beneficiaries arbitrarily selected in terms of income or wealth and self-selecting in terms of disposition to litigate. Implicitly recognizing this, the courts were willing to say that due process required legal aid only in narrowly limited civil categories.[10] In other civil matters provision of legal aid would have to remain dependent on someone's exercise of discretion to calibrate demand with a supply.

The old system rationed supply through waiting lines at lawyers' chambers, courthouses, and legal-aid offices, and judicial discretion in *pro per* cases. This arrangement constituted charity, which was considered obnoxious by champions of the poor, and depended on grace, which is always in short and erratic supply. But it did the job of rationing justice.[11] The authority to allocate those means was widely diffused and low in visibility and accountability. In terms of the system as it existed, however, it was exercised by politically responsible authority.

In the late 1960s an attempt was made through the Great Society program to make civil legal aid a matter of legal right or at least political right. It was to be a matter not of the bar's professional responsibility but of entitlement under public law. However, the scope of potential entitlement was to be defined by budgetary constraints, not in terms of legally specified categories. The causes for which legal aid might be provided thus were limited only by fiscal resources and legal imagination. In time, that imagination would embrace racial equality, gender equality, a pollution-free environment, a drug-free America, the right to live for the unborn, the right to die for the afflicted, the right of association, the right of privacy, the right to see, the right not to see. In aggregate, civil legal aid was seen as a writ of entry into the New Jerusalem. Skeptics thought these possibilities could not be realized; conservatives feared that they might be.

The result has been continuous political struggle over legal aid.[12] Public funding of civil legal aid has been held nominally static for a decade, and in real terms has been cut about in half through inflation. Conflict over the scope and aims of legal aid can be found even in the more confined domain of legal assistance in criminal cases. The pay-

[10]See, *e.g.*, Lassiter v. Dept. of Social Service, 452 U.S. 18 (1981).

[11]See Hazard, Rationing Justice, 8 J. Law & Econ. 1 (1965)

[12]See generally Cramton, Crisis in Legal Services for the Poor, 26 Villanova L. Rev. 521 (1981).

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ment rates authorized by Congress for appointed counsel in the federal criminal cases have rapidly eroded through inflation. The payment rates authorized for appointed counsel in the state systems have been generally worse than the federal allowances. Public defender systems are kept spare in professional staff, sparer still in paralegal staff and wage scales. None of the systems adequately provides for expenses such as necessary investigations. Those responsible for appropriations at the federal, state and local level generally begrudge the money, and understandably so. There are many other poor and unfortunates—mothers with dependent children, old people, homeless, bed-ridden, sick, abused, ill-housed, uneducated, and just poor—who are just as badly off and much more deserving.

Among the signs of strain has been the attempt to make the appointed counsel system work notwithstanding the burdens imposed on it, as in the Southern District of Iowa. A system of voluntary service can work if the providers are few in number and have sustaining relationships with each other. Everyone can scrutinize how burdens are shared and can effectively inflict the sanction of disapproval on the shirkers. When the system becomes large, informality is no longer sustainable. Participants have to be identified by list, assignments have to be made according to systematic selection, and those who fail to comply have to be brought to book with formal legal sanctions.

Although the service in the Southern District of Iowa was still called the Lawyer's Volunteer Project, a compulsory procedure determined the number and schedule of needed appointments, selected the appointees, approved compensation in criminal cases, and imposed sanctions against the uncooperative. The bar provided sponsorship, but the local profession had long ceased to be a fellowship of similarly accomplished practitioners of a commonly understood craft. The transformation of the profession in the Southern District of Iowa was starkly illustrated in Attorney Mallard's plea of avoidance from service.[13]

> In his motion to withdraw from the appointment petitioner's stated that he had no familiarity with the legal issues presented in the case, that he lacked experience in deposing and cross-examining witnesses, and that he would willing volunteer his ser-

[13] 109 S.Ct. at 1817.

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> vices in an area in which he possessed some expertise, such as bankruptcy and securities law.

It is difficult to dispute that Attorney Mallard had a strong point. It is perhaps more difficult to deal with the implications of the point. Alasdair MacIntyre's *After Virtue* concludes with the thought that: "In a society where there is no longer a shared conception of the community's good . . . the alternatives become those of defining justice in terms of some sort of equality . . . or in terms of legal entitlement."[14]

Mallard memorializes our situation after professional virtue has ceased to be a plausible foundation for legal assistance to the poor. But where is the shared conception of the community's good that would enable us to formulate coherent terms of entitlement to such assistance?

[14]MacIntyre, After Virtue 217–18 (1981).

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