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THE RIGHT TO COUNSEL IN CIVIL CASES: AN INTERNATIONAL PERSPECTIVE

*Honorable Earl Johnson, Jr.**

The Attorney General spoke to you this morning about the right to counsel in criminal cases. In doing so, he was talking about a well-established principle and one which has been defined in case after case after case. My assigned topic this morning is the constitutional—or at least the legally enforceable—right to counsel in *civil* cases. This right, in contrast, is not as yet well-established either in California or anywhere else in this country. Indeed, the right to counsel in civil cases is best described as still glimmering on the horizon. And, at this point, I have difficulty telling whether it is a reality marching inexorably toward us or only a mirage forever dangling before the poor citizens of this land.

I think the existence of a right to counsel in civil cases presents difficult constitutional issues under California and federal law. But I do not intend to go into those questions today. Instead I am going to take you on a little excursion. I am going to talk to you about how other countries have dealt with the right to counsel in civil cases—historically and in the present. After we complete this excursion, I will give you my impression of what the California Supreme Court has already decided on the issue. And finally, I leave you with a series of questions about the relevance to California of what has happened in other countries and what this might mean for the way the California Supreme Court deals with this issue in the future.

I. THE HISTORICAL RIGHT TO COUNSEL IN EUROPE

As all of you know, the story of the right to counsel in California is in the process of being written by the California Supreme Court—with many chapters yet to come. But this story actually begins more than three centuries before the United States Constitution was adopted, and more than three and one-half centuries before the California State Con-

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stitution came into existence. For it was in 1495, during the reign of Henry VII and while England was still a Roman Catholic country, that the King signed a law which remained in effect in England until 1883.¹ Translated from ancient English into current vernacular, this law said:

And after the said writ or writs be returned, . . . the justices . . . shall assign to the same poor person or persons counsel learned by their discretions which shall give their counsels nothing taking for the same; and in likewise the same justices shall appoint an attorney and attorneys for the same poor person and persons . . . which shall do their duties without any rewards.²

This right did not apply in criminal cases, but in civil cases in the common law courts.³ Shortly thereafter the right was extended to equity courts as well.⁴

So it was almost 500 years ago that a legally enforceable right to counsel was incorporated into the common law by statute.⁵ It is noteworthy that the lawyers appointed to implement this right were expected to serve without compensation or, in the words of the Statute of Henry VII, "shall do their duties without any rewards."⁶ It should also be noted, however, that in *present day* England, the right to counsel in civil

1. Statute of Henry VII, 1495, 11 Hen. 7, c. 7, 2 Statutes of the Realm 578 (transcribed in 2 Statutes at Large) (repealed 1883, 46 & 47 Vict. c. 49), reprinted in S. POLLOCK, LEGAL AID—THE FIRST 25 YEARS 10 (1975).

2. *Id.* (translated by author).

3. In early common law England defendants did not even have a right to representation by a lawyer when they could afford to pay his fee. See rehearsal of English legal history on this question, in *Betts v. Brady*, 316 U.S. 455, 466 (1942).

4. See *Oldfield v. Cobbett*, 41 Eng. Rep. 765 (1845), and cases cited in JONES, THE ELIZABETHAN COURT OF CHANCERY 324-28, 501 (1967).

5. The fifteenth and sixteenth centuries also witnessed the beginnings of a right to counsel on the continent of Europe. "In Germany, the medieval practice of assigning poor men counsel culminated in the *Reichskammergerichtsordnungen* of the late fifteenth and the sixteenth centuries, and was maintained by the laws of various German states until unification." M. CAPPELLETTI, J. GORDLEY & E. JOHNSON, JR., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES 13 (1975) [hereinafter cited as M. CAPPELLETTI] (citing R. SCHOTT, DAS ARMENRECHT DER DEUTSCHEN CIVILPROZESSORDNUNG 4-5 (1900)).

In the sixteenth century, the statutes of Milan required the Bar (*Collegio degli avvocati*) to designate a set of lawyers for the gratuitous defense of the poor; in Tuscany, the *gratuita clientela*, instituted in 1767, made the gratuitous defense of the poor an obligation of lawyers as a class These provisions are late instances of a practice that had spread through other Italian states during the Middle Ages.

Id. at 13 n.35 (citing Ravizza, *Patrocinio gratuito*, 18 II DIGESTO ITALIANO I, at 964, 969 (1906-1910)).

"In 1610 . . . the King of France commanded that salaried lawyers be retained for the cases of the poor . . ." *Id.* at 14 (citing Edict of Mar. 6, 1610, of Henri IV, in P. FROTIER DE LA MESSELIÈRE, L'ASSISTANCE JUDICIAIRE (Etude Historique Et Pratique at 29 (1941))).

6. Statute of Henry VII, 1495, 11 Hen. 7, c. 7, 2 Statutes of the Realm 578 (repealed

cases is even broader, and lawyers are fully compensated out of government funds for the services they provide.⁷

But I am not ready to come to the twentieth century yet. Nor am I ready to return to the United States. Instead, let us move on to Continental Europe. The first landmark year is 1851 and the country, France. In that year the French Legislature enacted the so-called Law on Legal Aid, which said that free lawyers should be provided "to all persons . . . when these persons . . . find it impossible to exercise their legal rights, whether as plaintiff or as defendant, because of the insufficiency of their resources."⁸ This law of 1851 made no provision for compensating the lawyers appointed to serve indigent litigants. Instead, it was considered a charitable duty of members of the legal profession to accept these appointments.⁹ Indeed, it took 121 years before France reformed its legal aid system in the law of January 3, 1972 to, among other things, authorize government payment of lawyers appointed to represent the poor.¹⁰

Now, let us return again to the nineteenth century. The year is 1877 and Count Bismarck is creating the German nation. Included in the fundamental charter of that nation is a law guaranteeing poor people the right to counsel in civil cases.¹¹ Once again, the lawyers are expected to

1883, 46 & 47 Vict. c. 49), reprinted in S. POLLOCK, *LEGAL AID—THE FIRST 25 YEARS* 10 (1975).

7. Legal Aid Act, 1974, C. 4, Part I, reprinted in M. CAPPELLETTI, *supra* note 5, at 271-96.

8. The right to counsel in civil cases was first extended throughout France in 1851 with enactment of the Law of Jan. 22, 1851, arts. 1-20, [1851] Bull. des Lois 93, translated in M. CAPPELLETTI, *supra* note 5, at 256-69. In 1901, this legislation was amended to establish a national system of bureaus to determine eligibility and otherwise administer the system. Law of July 10, 1901, [1901] Bull. des Lois 3 ("*assistance judiciaire*").

9. Under this program, lawyers were appointed to represent all indigent litigants, both plaintiffs and defendants, who had a "sound case." The lawyers could not refuse an assignment and received no compensation from their clients or the government. However, if victorious, they would be eligible for the attorney fee award owed to the winner by the loser under the traditional European fee-shifting procedure. For discussions of the 1851 and 1901 French legal aid laws and their implementation, see Pelletier, *Legal Aid in France*, 42 NOTRE DAME LAW. 627 (1967); M. CAPPELLETTI, *supra* note 5, at 39-46. By the mid-1960's, uncompensated appointed lawyers were representing one party, or both, in more than 6.5% of the civil cases heard in French courts. M. CAPPELLETTI, *supra* note 5, at 44 n.138.

10. Law of Jan. 3, 1972, No. 72-11, J.O. (Jan. 5, 1972), translated in M. CAPPELLETTI, *supra* note 5, at 398-406.

11. The right to counsel in civil cases was created in Germany in 1877 with enactment of sections 114(27) of *Zivilprozessordnung* of Jan. 30, 1877, which actually became operational on October 1, 1879. *ZIVILPROZESSORDNUNG* [ZPO] § 114(27) (Ger.) (1877). The right itself is expressed in the following terms:

"A party who is not in a position to pay the costs of litigation without endangering the necessary support for himself and his family is to have his application for legal assistance approved, provided that the intended legal action—either as plaintiff or

provide this representation without compensation. However, this time it does not take 400 or 500 years for that situation to change. In Germany it was only 46 years until, in 1923, a law was enacted providing government compensation for the lawyers.¹²

In the early twentieth century the scene shifts to Northwestern Europe. In 1915, Norway passed a law creating a right to counsel in civil cases for indigent Norwegians.¹³ Within the decade Sweden,¹⁴ Den-

defendant—shows a sufficient promise of success and does not appear to be unreasonable.”

Klauser & Riegert, *Legal Assistance in the Federal Republic of Germany*, 20 BUFFALO L. REV. 583, 585 (1971) (quoting ZPO § 114(27)).

12. Under the original legislation, the judges appointed lawyers who were required to serve without compensation or reimbursement for their out-of-pocket expenses. However, in 1919, the law was amended to allow recovery of their actual disbursements. In 1923, further amendments authorized government payment of legal fees to appointed counsel, although at a level considerably below the prevailing fee schedule for paying clients. A translated version of the German legislation appears in M. CAPPELLETTI, *supra* note 5, at 387-92. For a discussion of the implementation of the law, see *id.* at 47-52; Klauser & Riegert, *supra* note 11, at 583.

13. Act No. 6 of 13 August 1915 § 423. Despite this early start, however, Norway has been slow to modernize its system of delivering this right. For a description of the Norwegian program, see Boman, *Scandinavia*, in PERSPECTIVES ON LEGAL AID 243, 265-71 (F. Zemans ed. 1974). According to Boman, in most categories of litigation low income people apply to the Justice Ministry for what is called “free process.” (The term “legal aid” is reserved for legal advice and other out-of-court services.) The applicant must show financial need and a “reasonable possibility” of prevailing, although the Justice Ministry rarely denies legal assistance on grounds that the applicant’s cause lacks merit. Services are given exclusively through private lawyers compensated according to a not very generous fee schedule. An applicant must reapply at every discrete stage of the proceedings (e.g., if he desires to appeal). However, the Ministry reportedly is very liberal in granting “free process” throughout proceedings where the poor person’s opponent is a government agency or a wealthy party, or where the case involves issues of “precedent-setting significance.” In 1980, Norway enacted new legislation governing legal services in civil cases. Legal Aid Act of 13 June 1980. For a description of the Act, see INTERNATIONAL DIRECTORY OF LEGAL AID 172-75 (J. Lane & S. Hillyard eds. 1985).

14. Law on Free Legal Proceedings, SFS 1919:387 and NJA II 1919, at 617-78, and G & B 2.10.a. This statute gave indigent litigants, both plaintiffs and defendants, free counsel and relief from other litigation expenses. From the beginning, it also provided government compensation for the lawyers appointed to represent these litigants. The Law on Free Legal Proceedings did not, however, compensate private lawyers to supply legal advice or other noncontentious representation to poor people. This need was met, to a limited extent, through another law also enacted in 1919 which gave state subsidies to official legal aid institutions. SFS 1919:639, and G & B 2.10.c. For a description of these laws, see Bruzelius & Bolding, *An Introduction to the Swedish Public Legal Aid Reform*, in M. CAPPELLETTI, *supra* note 5, at 561-66. By 1968, free legal proceedings were provided to the plaintiff or defendant, or both, in 40.9% of civil trials, in 55.3% of cases in the courts of appeal, and in nearly 12% of cases in the Swedish Supreme Court. *Id.* at 563-64 n.13.

In 1973, Sweden put into operation a comprehensive reform of its legal aid system. Public Legal Aid Law of May 26, 1972, SFS 1972:429, translated in M. CAPPELLETTI, *supra* note 5, at 526-60. This law established a nationwide network of public law offices staffed with full-time salaried lawyers. These offices function side-by-side with a national compensated private

mark¹⁵ and Belgium¹⁶ followed suit by creating a right to counsel in civil cases. And finally, in 1957, the Netherlands passed a law creating the right to counsel in civil cases for indigent Hollanders.¹⁷

Is a trend beginning to emerge? When it comes to the legal entitlement to free counsel for indigent civil litigants, the United States is in a distinct minority among the industrial democracies of the world.¹⁸ But let us continue on and see just how lonely we are.

We have pretty well covered all of Northern Europe. What about

counsel program. Each client is free to choose a staff lawyer or private lawyer to handle his or her legal problem. Available services include representation before administrative bodies, legal advice and other noncontentious legal services, as well as representation in the courts. For a description of the new Swedish system, see Bruzelius & Bolding, *supra*, at 568-74. See also Muther, *The Reform of Legal Aid in Sweden*, 9 INT'L LAW. 475 (1975); Boman, *supra* note 13, at 243-53.

15. In Denmark, the right to counsel in civil cases is part of the program of "free process," and is available to much of the middle class as well as the poor. The governing law is found in the Procedural Code (*Retsplejeloven*) and Special Proclamation No. 562, Dec. 19, 1969. Boman, *supra* note 13, at 255. Persons desiring "free process" apply to the regional government. The application will be granted if the applicant meets a rather generous financial eligibility standard and has a case he "would have pursued . . . if he had had means of his own to do so." *Id.* at 257. However, customarily this benefit is not available to litigate defamation or pure collection cases. *Id.* "Free process" includes a free lawyer unless the case is so simple the litigant can represent himself effectively, or unless he is a person with sufficient means to afford at least part of the expenses of litigating the case. The courts—rather than the regional governments—appoint the lawyers and decide the level of compensation the government will pay in each case. At the time the 1959 proclamation was filed, it established financial criteria making full or partial "free process" available to about 85% of adult Danes. *Id.* For a description of the current Danish program of "free process," see *id.* at 254-58.

16. Belgium has a right to counsel in civil cases as part of its Code of Civil Procedure. Code of Civil Procedure, Art. 455. The right is implemented through an uncompensated private counsel system similar to the pre-1972 French legal aid law. See *supra* notes 8-9. For a description of the Belgian legal aid program, see Pelgrims, *L'aide Juridique en Belgique*, 2 CANADIAN LEGAL AID BULL. 348 (1978). In recent years a movement has started to create so-called "law shops" staffed by lawyers working essentially full-time to serve poor people. For a description of these offices, see B. GARTH, *NEIGHBORHOOD LAW FIRMS FOR THE POOR* 125-27 (1980).

17. In 1957, the Netherlands enacted a comprehensive compensated private counsel system modeled on England's system. B. GARTH, *supra* note 16, at 118 (citing Royal Decree of 24 Dec. 1957). By 1972, nearly half the civil cases tried in Dutch courts involved one or more parties who were receiving legal aid. For a brief description of the Netherlands legal aid system, see B. GARTH, *supra* note 16, at 118-24. See also Boer, *Going Dutch on Legal Aid*, 3 LEGAL SERVICES BULL. 19 (1978); Schuyt, Groenendijk & Sloot, *Access to the Legal System and Legal Services Research*, in EUROPEAN Y.B. IN LAW AND SOC. 98 (B. Blegvad, C. Campbell & C. Schuyt eds. 1977); Ginsburg, *The Availability of Legal Services to Poor People and People of Limited Means in Foreign Systems*, 6 INT'L LAW. 128, 160-62 (1972).

18. South Africa is about the only industrialized noncommunist country other than the United States which still does not have a constitutional or statutory right to counsel in civil cases. See Gross, *South Africa*, in PERSPECTIVES ON LEGAL AID 295-96 (F. Zemans ed. 1974). It does have, however, like the United States, a modest government-funded legal aid program which furnishes representation to some poor people in civil cases.

Central and Southern Europe? Well, Austria has had a right to counsel in civil cases since 1895.¹⁹ Spain has had such a statutory right since at least 1855.²⁰ Portugal has had such a right since 1899.²¹ In Italy the right goes back to the birth of that nation in 1865²² and was reinforced by the legal aid law of 1923.²³

19. In Austria, a law enacted in 1781 exempted poor people from payment of court fees, JUSTIZGESETZSAMMLUNG [JGS] 28 (Aus.), and a decree of 1791 provided for appointment of free counsel to represent them in civil cases. JGS 106, HOFDEKRET VOM 24.1.1791. This right was incorporated in the *Zivilprozessordnung* in 1895. It provided that judges must appoint lawyers to represent poor people in all civil cases where there appeared some possible merit in their claim or defense. Then in 1973, Austria enacted a new Legal Aid Act which, among other things, simplified the process of demonstrating indigency. BUNDEGESETZ VOM 8.11.1973. Lawyers appointed to represent poor people do not receive direct compensation for their services. However, the government does make a payment into a bar association pension fund in recognition of these efforts. See *infra* note 66. For a description of the Austrian legislation and its implementation, see König, *Austria*, in PERSPECTIVES ON LEGAL AID 76-92 (F. Zemans ed. 1974).

20. The right to counsel in Spain can be traced back to an 1835 law establishing the duty to "Administer . . . complete justice to those who, according to the laws, are in the class of the poor, in the same fashion as to those who pay; taking care as well that in all litigation they should be defended and aided without any charge, as they should, by the lawyers and court officers." Regulations for the Administration of Justice of September 26, 1835, Arts. 2, 36. In 1855 Spain enacted its first Law of Spanish Civil Procedure. Articles 179-200 of this law deal with "defense for the poor" and exempt poor people from all legal expenses, taxes, tariffs and professional fees. These provisions have remained in effect, with only slight modifications, to the present day. For a critical examination of this statute and its implementation, see Miguel y Alonso, *Spain*, in PERSPECTIVES ON LEGAL AID 302-17 (F. Zemans ed. 1974). Free legal aid is available to anyone earning roughly 40% or less of the country's median income. Nonetheless, in 1972, legal aid was supplied in only 2.53% of the civil cases tried in Spanish courts. In 1973, this amount fell slightly to 2.51%. *Id.* at 303. A partial explanation for this disparity may be that the government provided no compensation for lawyers appointed to represent indigent litigants until 1975. This modest fund of 100 million pesetas was increased to 200 million pesetas in 1976. *Id.* at 309-10.

21. In Portugal, the right to counsel in civil cases goes back to a statute enacted in 1899 which was amended extensively in 1944 and 1970. Law No. 7/70 (June 9). The more recent version resembles the pre-1972 French legal aid system of uncompensated appointed private lawyers. See *supra* note 9. For an extensive discussion of the Portuguese legislation, see A. VIDAL, A ASSISTENCIA JUDICIÁRIA NOS TRIBUNAIS ORDINÁRIOS (1971). See also M. CAPPELLETTI, *supra* note 5, at 270.

22. As in Germany, the right to counsel in civil cases in Italy came into existence shortly after nationhood was achieved. Law of Dec. 6, 1865, No. 2627 (1865 Rac. Uff. 2846) (Italy). At that time, lawyers were required to serve without compensation.

23. The poor person's right to counsel and the lawyer's duty to provide representation without compensation continue to the present day through provisions of the Italian Constitution and the 1923 legal aid law. "Poor persons shall, by institutions created for that purpose, be assured the means to plead and to defend themselves before any judicial jurisdiction." M. CAPPELLETTI, *supra* note 5, at 245-46 (translating Costuzione, art. 24 (1948)). "1. Legal aid to the poor is an honorary and obligatory duty of the class of attorneys. 2. Admission to legal aid takes place in civil, commercial, or other contentious and non-contentious cases, as well as in criminal cases." *Id.* at 246-52 (translating Royal Decree of Dec. 30, 1923, No. 3282 (Approving the Law on Legal Aid)). According to Italian observers, however, this system is ad-

But the most important lesson for our purposes may come from the tiny nation of Switzerland. As all of you must recall from eighth-grade history, Switzerland is a confederation. By definition, a confederation is a looser association of individual states—they call them cantons—than our federal system. What I did not learn in eighth-grade world history, and you may have missed this also, is that the Swiss Constitution contains what in essence is an “equal protection” clause. It is called the “égalité before the law” provision and it is article 4 of the Constitution of the Swiss Confederation.²⁴ It is a short and simple section. It merely says: “All Swiss are equal before the law. In Switzerland there is neither subjection or privilege of locality, birth, family or person.”²⁵

What makes this significant for our purposes is that in 1937, almost one-half century ago, the Swiss Supreme Court was called upon to construe this constitutional guarantee and its implications for indigent Swiss who were involved in civil litigation. That court had no difficulty in holding that “all Swiss” meant “all Swiss”—including those who are poor.²⁶ The court also had no trouble in finding that no litigant has “égalité before the law” if required to defend himself or herself in a court of law without a lawyer.²⁷ Consequently, it held in the case titled *Judgment of October 8th, 1937* that the constitutional principle of “égalité before the law” mandates that each canton ensure that indigent civil litigants are afforded free legal representation “in a civil matter where the handling of the trial demands knowledge of the law.”²⁸

This pretty well takes care of Western Europe. Beyond that, what of the other industrial democracies scattered across the globe? By the early 1970's, New Zealand²⁹ and nearly all the Australian states³⁰ had

ministered in ways which minimize the amount of legal assistance the poor actually receive, as well as the degree of sacrifice the Italian legal profession actually experiences. See, e.g., Cappelletti, *Poor People's Justice*, 91 *Foro It.* V 114 (1968); Forcella, *An Illuminating Aspect*, 11 *Giorno* (Milano), Apr. 23, 1969; M. CAPPELLETTI, *supra* note 5, at 33-39.

24. Bundesverfassung, Constitution fédérale, constitutione federale, art. 4, translated in M. CAPPELLETTI, *supra* note 5, at 705 n.*.

25. M. CAPPELLETTI, *supra* note 5, at 705 n.* (translating BVERF., CONST., COST. FED. art. 4).

26. Shefer-Heer contre Conseil d'Etat d'Appenzell Rhodes-Exterieur, 8 Oct. 1937, *Arrets du Tribunal Federal*, 63, I, 209, excerpt translated in O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 *OHIO ST. L.J.* 1, 5 (1967).

27. *Id.*

28. *Id.*

29. In 1969, New Zealand enacted a law based on the English legal aid scheme. Legal Aid Act 1969 (N.Z.). Under this program, low income litigants are legally entitled to representation by compensated private counsel in civil litigation in the courts. For a brief description of the legislation and its implementation, see INTERNATIONAL DIRECTORY OF LEGAL AID, *supra* note 13, at 165-67.

created a right to counsel. Meanwhile, during the 1960's and 1970's, nearly all the provinces of Canada—one by one—enacted statutes creating a comprehensive right to counsel for low income Canadians in civil litigation.³¹ In most instances, the legislation simultaneously funded the lawyers needed to provide this representation. Some provinces accomplished this by paying the fees of private lawyers who worked on civil cases for indigents. Other set up salaried attorney programs to do the same, like American legal services agencies. And Quebec Province, Canada, did both.³² Quebec created a province-wide network of neighborhood law offices staffed by salaried attorneys and also set up a fund to compensate private lawyers for those clients who preferred private counsel over salaried staff lawyers. But more important to the present issue is the part of the Quebec law specifying who is to receive free legal representation. The Quebec statute is typical of other Canadian provinces. It defines the right in the following language: "An economically underprivileged person who can establish . . . the need of legal services *is entitled* to receive legal aid under this act"³³

Some of these historical developments in Europe and elsewhere bear more directly on the right to counsel in California than do others. As might be expected, what has happened in our mother country, England, appears more relevant. As you will recall, there has been a legal right to counsel in civil cases under the common law of England since the Statute

30. Legal aid in Australia is administered principally by state governments, not the federal government. During the 1960's and early 1970's, most states set up programs resembling the English scheme of compensated private lawyers. Although one commentator observed that there was no absolute right to counsel in civil cases, as a practical matter any poor person received legal assistance if he or she had "reasonable ground for taking, defending or being a party to proceedings." Epstein, *Australia*, in *PERSPECTIVES ON LEGAL AID* 53 (F. Zemans ed. 1974) (quoting Queensland Act, § 19(3)). For a description of the aid programs, see *id.* at 42-75.

31. The right to counsel, and legal aid in general, is determined on a province-by-province basis in Canada. Starting with Ontario in 1966, nearly all Canadian provinces have developed comprehensive legal aid programs in civil as well as criminal cases. Indeed, as of 1979, only Prince Edward Island and New Brunswick had not yet established legal aid services for civil cases. Zemans, *Canada*, in *PERSPECTIVES ON LEGAL AID* 93-97 (F. Zemans ed. 1974).

32. The various Canadian provinces have followed different approaches. For example, Ontario relies primarily on a compensated private counsel system, administered by the Law Society, which closely resembles the English legal aid scheme. Saskatchewan has set up a network of "community law offices" similar to the American legal services program, but more generously financed on a per capita basis. And Quebec has innovated with a "mixed system," offering clients a choice between compensated private lawyers and salaried staff lawyers stationed at neighborhood offices. For a description of the Canadian legal aid programs, see *id.* at 93-133. For a description of the Quebec "mixed system," see M. CAPPELLETTI, *supra* note 5, at 584-619.

33. Legal Aid Act, ch. 14, Div. II § 4 (1972), *reprinted in* M. CAPPELLETTI, *supra* note 5, at 585-86 (emphasis added).

of Henry VII in 1495.³⁴ This is legally significant because California's first legislature said that the common law of California is to be the common law of England as that law stood in 1850.³⁵ Then, in 1917, the California Supreme Court, in the case of *Martin v. Superior Court*,³⁶ specifically applied this principle to the *in forma pauperis* rights of indigent civil litigants in California. It held that those rights are to be defined by what indigent English litigants enjoyed under the common law of England as it existed when California became a state in 1850.³⁷ True, *Martin* only involved waiver of court fees.³⁸ Nonetheless, when the supreme court set out in the *Martin* opinion to ascertain the scope of *in forma pauperis* rights under the English common law, it looked primarily to the writings of two noted English legal scholars—Blackstone and Marshall. In its opinion, the supreme court quoted the following language from Blackstone's classic *Commentary on Law*: “[P]aupers . . . are . . . to have original writs and subpoenas gratis, and counsel and attorney assigned them without fee; and are excused from paying costs”³⁹ Then, from *Marshall on the Law of Costs in All Suits and Proceedings in Courts of Common Law*, the supreme court quoted the following language: “‘With a view to enable such poor persons as have not ability to pay the expenses incidental to the prosecution of an action to enforce their rights, . . . the plaintiff is exempt from the payment of court fees, and he is entitled to the service of counsel, and of an attorney, who render their services without reward.’”⁴⁰

What you will notice is that both of these English scholars listed as one of the rights enjoyed by indigent civil litigants in England the right to have a free lawyer. In view of the Statute of Henry VII, which was already more than 250 years old when these gentlemen were writing their

34. See *supra* notes 1-3 and accompanying text.

35. CAL. CIV. CODE § 22.2 (West 1982) states: “The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State is the rule of decision in all the courts of this State.” Previously this provision was found in § 4468 of the now defunct Political Code which was first enacted in 1850.

36. 176 Cal. 289, 168 P. 135 (1917).

37. In *Martin*, the California Supreme Court held that this legislation incorporated the English common law as “the whole body of that jurisprudence as it stood, influenced by statute, at the time when the code section was adopted. And more than that, that it embraced also . . . the great handmaiden and coadjutor of the common law, equity.” *Id.* at 293, 168 P. at 136. See also, e.g., *Ferguson v. Keays*, 4 Cal. 3d 649, 484 P.2d 70, 94 Cal. Rptr. 398 (1971); *People v. One 1941 Chevrolet Coupe*, 37 Cal 2d. 283, 286-91, 231 P.2d 832, 835-38 (1951); *Moore v. Purse Seine Net*, 18 Cal. 2d 835, 838, 118 P.2d 1, 4 (1941).

38. 176 Cal. at 293, 168 P.2d at 135.

39. *Id.* at 294, 168 P. at 137 (emphasis added).

40. *Id.* at 294-95, 168 P. at 137 (emphasis added).

treatises, this is not a particularly startling revelation. However, what is interesting is that the California Supreme Court, in describing the *in forma pauperis* rights which are incorporated into the California common law, included the right to appointment of counsel, not merely the right to proceed without payment of court costs.

I leave you to speculate whether and when the California Supreme Court will breathe life into this dictum which has lain like a legal sleeping beauty buried in *Martin*. The appellant in *Martin* had a lawyer, so that was not an issue in 1917. One suspects that sometime in the future the supreme court will have to face the question of whether indigent California litigants indeed are to enjoy the full *in forma pauperis* rights indigent Englishmen enjoyed in 1850—and for 350 years before then.

When we shift from the common law to the constitutional grounds for a right to counsel, not only England but the example of the other European democracies becomes relevant—in a number of ways. I already mentioned the Swiss Supreme Court and its interpretation of a constitutional provision virtually identical in language and content to our own equal protection clause.⁴¹ It should be noted that the West German Constitutional Court applied a similar “equality before the law” provision as well as a “fair hearing” provision—which is analogous to American due process—in deciding whether and when that nation’s Constitution demanded appointment of counsel even when the legal aid system would not.⁴²

41. See *supra* notes 22-26 and accompanying text.

42. For instance, in Decision of June 18, 1957 (No. 6), 7 BVERFG 54 (1958), translated in M. CAPPELLETTI, *supra* note 5, at 697-700, the Federal Constitutional Court held that the lower court erred in denying a guardian’s request for legal aid to defend a child against a claim that he was illegitimate. The denial was based on the trial court’s finding that the child lacked “sufficient probability of success” in defending the action. The Court conceded that it had

earlier affirmed that it is not unconstitutional and, in particular, that it does not violate the principle of equality the right to a fair hearing if section 114 of the ZPO makes the granting of legal aid, . . . dependent on the assertion by plaintiff of a legal claim which offers a sufficient probability of success and does not appear frivolous.

M. CAPPELLETTI, *supra* note 5, at 698 (translating Decision of June 18, 1957 (No. 6)). Nonetheless, the Constitutional Court reversed the lower court denial of legal aid:

The challenged decision rests on the basic premise that a party who does not request legal aid would, after appropriate evaluation of the circumstances, do without representation by counsel in these proceedings since the obligation of the court to investigate the fact situation in an *ex officio* manner is sufficient to assure a just and proper decision. . . . The interpretation on which the challenged decision is based causes the defendant to become nothing more than an object of the proceeding, while the law itself assigns to him the formal position of an autonomous party to the proceeding. . . .

The challenged decision must therefore be annulled and the cause remanded. . . .

. . . It appears constitutionally doubtful that the law, on the one hand would assign the role of defendant involuntarily to a participant in a dispute over a question

These decisions by foreign courts are hardly precedent in the State of California. But is their logic so easy to escape? I leave this question to you as well.

The European example also is relevant at a more fundamental level. Due process is not a static concept. Rather it is a living principle. At a certain stage of history due process only requires certain procedural rights, but at a later stage the concept requires something more, and at a still later stage even more. Over the past two centuries, the kings and princes, and the legislatures and constitutional courts of nearly every European country—including all of the major ones—as well as nearly all the other industrial democracies on this globe, have come to recognize that courts cannot be fair unless indigent parties have lawyers in civil cases as well as in criminal cases. Significantly, this series of independent decisions in country after country implemented a fundamental democratic theory—the notion that the individual would not surrender his natural right to settle disputes through force unless society offered him a peaceful forum where he had a fair chance of winning when he was right.⁴³ And so it is quite natural to find a major international body representing nearly all the other industrial democracies, the Committee of Ministers of the Council of Europe, adopting a resolution in 1978 that states that “a right to necessary legal aid” and “the right of access to justice and to a fair hearing” constitute “an essential feature of *any* democratic society.”⁴⁴ Would it be out of line to ask at what point does a right so universally recognized throughout western civilization as an essential ingredient of fair procedure and democratic government also be-

of status, and on the other—if he is poor—impede him in his participation as a party on the basis that he does not have sufficient probability of success.

Id. at 698-700 (translating Decision of June 18, 1957 (No. 6)). See also Judgment of June 17, 1953 (No. 26), BVERFG 336 (1953) (“The fact that the legislature has not granted legal aid . . . allows one to conclude that the legislature decided to exclude the granting of legal aid in the former type of cases. The courts must determine, however, whether this denial by the legislature is still consonant with the Constitution.”).

43. The place of equal access to the courts and, by implication a right to counsel, in “social contract” theory is explored in Johnson & Schwartz, *Beyond Payne: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants*, 11 *LOY. L.A.L. REV.* 249, 290-95 (1978).

44. Resolution (78) 8 on Legal Aid and Advice and Explanatory Memorandum 5-6 (1978) (emphasis added). The Council of Europe comprises the member nations of the European Economic Community and most of the other industrial democracies on the European continent. The Resolution reads in pertinent part:

Considering that the right of access to justice and to a fair hearing, as guaranteed under Article 6 of the European Convention on Human Rights, is an essential feature of any democratic society;

Considering that it is therefore important to take all necessary steps with a view to eliminating economic obstacles, legal proceedings and that the existence of appro-

come an integral part of due process and equal protection in this country?

If this universality needed judicial confirmation, it was provided in 1979. The European Convention on the Protection of Human Rights and Fundamental Freedoms established a minimal but essential level of basic human rights the eighteen signatory European nations are expected to maintain.⁴⁵ It is very much a floor, not some pie-in-the-sky dream of what human beings should enjoy. Article 6, section 1 of this Convention deals with civil proceedings in the courts and says simply: "In the determination of his civil rights and obligations . . . everyone is entitled to a *fair* and public *hearing* within a reasonable time by an independent and impartial tribunal established by law."⁴⁶

appropriate systems of legal aid will contribute to the achievement of the same especially for those in an economically weak position;

Considering that the provision of legal aid should no longer be regarded as a charity to indigent persons but as an obligation of the community as a whole;

[The Committee of Ministers] recommends the governments of member states to take . . . all measures which they consider necessary with a view to the progressive implementation of the principles set out in the Appendix to this Resolution;

.....
Appendix to Resolution (78) 8

1. No one should be prevented by economic obstacles from pursuing or defending his right before any court determining civil, commercial, administrative, social or physical matters. To this end, all persons should have a right to necessary legal aid and proceedings. . . .

.....
 3. Legal aid should provide for all costs necessarily incurred by the assisted person in pursuing or defending his legal rights and in particular lawyer fees, costs of experts, witnesses and translations. . . .

.....
 5. Legal aid should always include the assistance of a person professionally qualified to practice law in accordance with the provisions of the state's regulations, not only where the national legal aid system always of itself so provides, but also:

a. when representation by such a person before a court of a state is compulsory in accordance with state's law;

b. when the competent authority of the granting of legal aid finds that such assistance is necessary having regard for the circumstances of the particular case.

. . . The person so appointed should be adequately remunerated for the work he does on behalf of the assisted person.

.....
 7. The legal aid system should provide for a review of a decision to refuse a grant of legal aid.

8. The responsibility for financing the legal aid system should be assumed by the state.

Resolution (78) 8 on Legal Aid and Advice and Explanatory Memorandum 5-7 (1978).

45. The European Convention Protecting Human Rights and Fundamental Freedoms [hereinafter cited and referred to as European Convention] went into effect on Sept. 3, 1953, when the tenth country ratified it. See M. CAPPELLETTI, *supra* note 5, at 657. The signatory nations include Austria, Belgium, Cyprus, Denmark, France, Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, the Netherlands, Norway, Sweden, Switzerland, Turkey and the United Kingdom. *Id.* at 658 n.***.

46. *Id.* at 661 (emphasis added).

This Convention is interpreted by the so-called European Court of Human Rights containing justices drawn from the member states.⁴⁷ It is the closest thing to a Supreme Court of Europe presently existing. In 1979, in a case called *Airey v. Ireland*,⁴⁸ an indigent Irish woman complained she had been denied a lawyer to litigate her judicial separation case. She could not afford an attorney, and neither the Irish government nor the High Court of Ireland had given her one. In a landmark decision, the European Court of Human Rights held member states, under the language of the provision I just quoted, must afford their citizens a "fair hearing."⁴⁹ And the court held this means that they either have to set up simplified procedures and forums where lawyers are unnecessary,

47. In addition to the Court, two other bodies also are involved in enforcement of the European Convention. These are the Committee of Ministers of the Council of Europe and the European Commission of Human Rights. Most applications for relief are first submitted to the Commission. Once this body determines that the European Convention is being violated, it attempts to negotiate with the offending government. If unsuccessful in this attempt, the Commission can take the matter either to the Committee of Ministers or to the European Court of Human Rights. This choice tends to depend upon political and practical factors. *Id.* at 658-60.

48. *Airey Case*, 1979 Y.B. EUR. CONV. ON HUMAN RIGHTS 428 (Eur. Court on Human Rights) (summary of result), Eur. Court H.R., *Airey Case*, Judgment of 9 Oct. 1979 Series A No. 32 (full text of opinion).

49. In *Airey*, the European Court of Human Rights first held Article 6 § I of the European Convention established a right of access to the courts in civil cases: "[In] the Golder judgment of 21 February 1975 (Series A no. 18) . . . the Court held that [Article 6 § I] embodies the right of access to a court for the determination of civil rights and obligations." *Airey*, Eur. Court H.R., Judgment of 9 Oct. 1979, Series A No. 32, 12.

The court then held that Mrs. Airey had a right of access to the courts for her judicial separation action: "There can be no doubt that the outcome of separation proceedings is 'decisive for private rights and obligations' and hence, *a fortiori* for 'civil rights and obligations' within the meaning of Article 6 § I; this being so, Article 6 § I is applicable to the present case." *Id.*

Then the court turned to the crucial issue of what is meant by "access to the courts": The [Irish] Government contend [sic] that the applicant does enjoy access to the [Irish] High Court since she is free to go before the court without the assistance of a lawyer.

The Court does not regard this possibility, of itself, as conclusive of the matter. The Convention is *intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective*. [citations omitted]. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial. [citations omitted]. It must therefore be ascertained whether Mrs. Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.

It seems *certain* to the Court that the *applicant would be at a disadvantage if her husband were represented by a lawyer and she were not*. Quite apart from this eventuality, it is not realistic, in the Court's opinion, to suppose that, in litigation of this nature, the applicant could effectively conduct her own case, despite the assistance which, as was stressed by the Government, the judge affords to parties acting in person.

. . . A specialist in Irish family law . . . regards the High Court as the least

or they must supply free lawyers to those citizens who cannot afford their own lawyers in regular courts.⁵⁰ The story has a happy ending. Mrs. Airey received a financial award to pay for a lawyer⁵¹ and Ireland has expanded its legal aid program to comply with this minimal standard established by the European Court of Human Rights. Since, as we have already seen, most countries in Europe already guarantee a fairly comprehensive right to counsel in civil cases, this decision will not have much practical effect on that continent. But the upshot is that, as a practical matter, the right to counsel in civil cases has now been recognized to be

accessible court . . . by reason of the fact that "the *procedure* for instituting proceedings . . . is complex. . . ."

Furthermore, litigation of this kind, in addition to involving complicated points of law, necessitates proof of adultery, unnatural practices or, as in the present case, cruelty; to establish the facts, expert evidence may have to be tendered and witnesses may have to be found, called and examined.

. . . [It is] most improbable that a person in Mrs. Airey's position . . . can effectively present his or her own case. This view is corroborated [by the fact] that in each of the 255 judicial separation proceedings initiated in Ireland in the period from January 1972 to December 1978, without exception, the petitioner was represented by a lawyer. . . .

The Court concludes from the foregoing that the possibility to appear in person before the High Court does not provide the applicant with an *effective* right of access.

Id. at 12-14 (emphasis added). Accordingly, the court found there had been a breach of Article 6 § I. *Id.* at 16.

50. The European Court of Human Rights in *Airey* recognized that society can afford *effective* access to the courts by simplifying the law and the procedures so that a layman does not need a lawyer to successfully present, or defend, a claim.

In certain eventualities, the possibility of appearing before a court in person, even without a lawyer's assistance, will meet the requirements of Article 6 § I. . . .

. . . [W]hilst Article 6 § I guarantees to litigants an effective right of access to the courts for the determination of their "civil rights and obligations," it leaves to the State a free choice of the means to be used towards this end . . . such as, for example, a simplification of procedure. . . .

. . . However . . . Article 6 § I may sometimes *compel* the State to provide for the *assistance of a lawyer* . . . by reasons of the *complexity of the procedure or of the case*.

Id. at 15-16 (emphasis added).

51. The European Court of Human Rights in *Airey* also dealt expressly with the contention that it is poverty, not the judicial system or the government, which denies effective access to those unable to employ their own lawyers.

The [Irish] Government maintain [sic] that . . . in the present case there is no positive obstacle emanating from the State and no deliberate attempt by the State to impede access: the alleged lack of access to court stems not from any act on the part of the authorities but solely from Mrs. Airey's personal circumstances, a matter for which Ireland cannot be held responsible under the Convention.

. . . [T]he Court does not agree. . . . In the first place, hindrance in fact can contravene the Convention just like a legal impediment. [citation omitted]. Furthermore, fulfillment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and "there is . . . no room to distinguish between acts and omissions." [citations omitted]. The obligation to secure an effective right of access to the courts falls into this category of duty.

Id. at 14.

one of the *fundamental human rights* guaranteed by the European Convention of Human Rights.

This poses still another question for this audience. Are the procedures in California courts so much simpler, and our laws so much easier to interpret, that the lawyers deemed essential to comply with the standard of a "fair hearing" in Europe are not essential to "due process" in the United States? Or, to put it another way, since the right to counsel in civil cases is now deemed "a fundamental human right" by most of western civilization, how much more is required before it becomes an essential ingredient of due process in this country?

II. THE RIGHT TO COUNSEL IN CALIFORNIA

It is against this backdrop that the California Supreme Court has in the last decade taken the first short, tentative steps towards a right to counsel in California. In *Payne v. Superior Court*,⁵² it held that equal protection requires the appointment of counsel for indigent civil defendants who are in prison and thus unable to effectively represent themselves.⁵³ The decision is really based on the most primitive notion of access to the courts—one which holds that a litigant has access to the courts if allowed to be physically present at the hearing and to put before the court whatever evidence he may be capable of gathering.⁵⁴ A prisoner is physically incapable of gathering and presenting evidence—indeed it may not be feasible for him to take depositions, look for witnesses, appear at hearings on motions and all the rest.⁵⁵ Consequently, according to the supreme court in *Payne*, he must be given a lawyer to perform all those functions.⁵⁶ The unanswered question is whether in reality indigent litigants of any stripe—whether in prison or free on the streets—possess the knowledge, the experience and the skill to have *effective*, as opposed to physical, access to the courts. The European Court of Human Rights had no trouble spotting the absurdity of regarding physical access as effective access to the courts.⁵⁷ But the *Payne* opinion ignores or perhaps merely sidesteps this patent absurdity.

It is for this reason that *Salas v. Cortez*⁵⁸ represents a longer stride toward a true right to counsel for indigent civil litigants than *Payne*. In

52. 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976).

53. *Id.* at 924, 553 P.2d at 576, 132 Cal. Rptr. at 416.

54. This is the notion of "access to justice" which was expressly rejected by the European Court of Human Rights. See *supra* notes 48-51 and accompanying text.

55. 17 Cal. 3d at 923, 553 P.2d at 576, 132 Cal. Rptr. at 416.

56. *Id.* at 924, 553 P.2d at 576, 132 Cal. Rptr. at 416-17.

57. See *supra* notes 49-51.

58. 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529, *cert. denied*, 444 U.S. 900 (1979).

Salas, there were no physical impediments preventing the alleged father from gathering and presenting evidence in the paternity suit. So, in that very primitive sense of access, he had access to the courts. Nonetheless, the California Supreme Court held he had a right to free counsel,⁵⁹ in effect a right to *effective* access to the courts. Still, *Salas* is also a very limited case. It was the government, not a private party, which sought to invoke the coercive power of the court against the indigent litigant.⁶⁰ And, it was not only money or property at stake—which after all are the usual ingredients of civil litigation—but rather the determination of whether this man would forever be considered the father of this child. Significantly, the California Supreme Court placed no such limitation on its holding in *Salas*.⁶¹ And, it should be added, the court in *Payne* expressly reserved the question whether the constitution requires appointment of free counsel for indigent civil litigants who are not prisoners.⁶²

And now comes *Yarbrough v. Superior Court*.⁶³ Looking to the European experience, this case would appear to be premature. The pattern in most of these countries was for the legislature or the courts to first establish a relatively comprehensive right to counsel in civil cases.⁶⁴ Only after years or decades or centuries of appointing uncompensated lawyers to provide that representation did the issue of compensation come to the fore. One might say California is putting the cart before the horse. Still, if we can draw a lesson from these other countries, it is a question that inevitably must be confronted. Moreover, it may be comforting to observe that with only two or three exceptions⁶⁵ every one of these countries has eventually decided—as a matter of sound policy if not of right—that lawyers who are asked to fulfill the state's obligation to

59. *Id.* at 34, 593 P.2d at 234, 154 Cal. Rptr. at 537.

60. *Id.* at 24, 593 P.2d at 228, 154 Cal. Rptr. at 531.

61. *Id.* at 34, 592 P.2d at 234, 154 Cal. Rptr. at 537.

62. *Payne*, 17 Cal. 3d at 926-27, 553 P.2d at 578, 132 Cal. Rptr. at 418.

63. 39 Cal. 3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985).

64. See *supra* notes 1-28 and accompanying text.

65. According to the most recent information that this author has been able to obtain, Italy is the only industrial democracy in Europe that still does not compensate lawyers who represent poor people in civil cases. See *supra* note 23. However, in Austria, only indirect compensation is offered. This takes the form of a lump sum payment by the government to a bar association pension fund subsidizing lawyers incapable of making a living—those temporarily indisposed, widows and orphans of lawyers, and the like. The adequacy of this lump sum payment and the entire Austrian scheme was successfully challenged by a leading member of the Austrian bar, Dr. H. Gussenbauer, in the early 1970's. See Judgment of Dec. 19, 1972, Supp. (Beilage) (Feb. 1973) *Osterreichisches Anwaltsblatt*, translated in M. CAPPELLETTI, *supra* note 5, at 721. In response to this decision of the Austrian Constitutional Court, the government nearly tripled its contribution to the bar association pension fund. However, it evidently does not provide any direct payment to the lawyers appointed to represent indigents. INTERNATIONAL DIRECTORY OF LEGAL AID, *supra* note 13, at 38.

provide representation to poor people are entitled to be compensated by the government for those services.⁶⁶

I also see the possibility the horse may stumble over the cart here in California. The supreme court may be hesitant to move in the direction of a comprehensive right to counsel in civil cases—even where it thinks this course is compelled by either the common law or constitutional principles—if each step on that path carries a price tag. The possibility is especially great if they—and we—overestimate the cost of a right to counsel in civil cases.

So let us try to put that price tag into perspective. Americans pay out something in the neighborhood of \$40 billion a year in legal fees to private lawyers for representation in civil cases.⁶⁷ In contrast, the budget of the Legal Services Corporation, which is nearly the sole source of funding for legal services to the at least 20% of our population unable to afford legal fees, is only a little more than \$300 million.⁶⁸ Thus, the governmental funding of civil legal services for the poor represents less than 1% of the total national expenditure on the services of lawyers in civil cases.

Translating these figures to California, the citizens of our state spend somewhere between \$4 and \$5 billion a year on lawyers,⁶⁹ nearly all of that in civil cases. At the same time, the Legal Service Corpora-

66. Among the nations which do provide at least government compensation to the lawyers representing poor people are: Australia, *see supra* note 30; Belgium, *see supra* note 16; Canada, *see supra* notes 31-33; Denmark, *see supra* note 15; and England, *see supra* note 7.

67. The most recent official data is for 1983 and reflects \$32.5 billion expended on lawyer services in the United States. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 437 (Table No. 727), 780 (Table No. 1395) (1985) [hereinafter cited as STATISTICAL ABSTRACT]. However, these expenditures are on a steep upward curve, having increased almost \$9 billion between 1981 and 1983—from \$23.7 billion to \$32.5 billion. *Id.* Assuming any similar rate of increase since 1983, the 1985 totals would easily surpass the \$40 billion mark.

68. The Legal Services Corporation budget for fiscal year 1985 was \$305 million. Although it represents an increase over the previous three fiscal years, this figure remains substantially below the \$321 million appropriated for the Corporation in fiscal year 1981. 1981 LEGAL SERV. CORP. ANN. REP. 38.

69. The \$4 to \$5 billion figure can be estimated based on national expenditure and employment data. As of 1980, California had approximately 12.6% of the *practicing* lawyers in the United States. STATISTICAL ABSTRACT, *supra* note 67, at 177 (Table No. 301). Assuming those lawyers receive their proportionate share of the roughly \$40 billion to be spent on lawyers nationally during 1985—but no more—California lawyers will receive \$5.05 *billion* in the current year. On the other hand, assuming the California legal profession's gross receipts are proportionate to this state's share of the total United States population, rather than its lawyer population, the figure will be closer to \$4 *billion*. It should be noted that in 1980 of California's 64,840 lawyers, 46,601 were in private practice. *Id.* Since 1980, the California legal profession has grown dramatically, and undoubtedly represents more than 12.6% of the practicing bar in this country. For this reason, as well as the size of the California economy, it

tion's allocation to all the legal services programs in California amounted to a little over \$21 million in 1984—about one-half of 1% of what Californians spend on lawyers for the other 75% or 80% of the population.

When it comes to investment in civil legal services for the poor, America suffers by comparison with other countries as well. At the present time, the United States government is spending a little more than \$1 per capita on civil legal services for the poor, or \$300 million for a population of 225 million people. Meanwhile, England, with a much smaller economy, manages to allocate more than \$4 per capita for civil legal services for poor people.⁷⁰ This places England right up there with Canada⁷¹ and the Netherlands⁷²—both in the neighborhood of \$4 per capita—and Sweden⁷³—well over \$3 per capita.

In attempting to estimate the likely cost of implementing a comprehensive right to counsel in civil cases, the Province of Quebec may provide the most instructive example. This Province has had comprehensive right to counsel in civil cases for more than a decade.⁷⁴ During the last few years the saturation level has been approached. The case load has nearly leveled off and so have the budget expenditures.⁷⁵ Looking only at

would not be a surprise to find this state's share of national expenditures on lawyers actually surpassing \$5 billion in 1985.

70. With a population of 49 million people, England and Wales spent £266 million (roughly \$400 million at current exchange rates) on legal aid in 1984. *INTERNATIONAL DIRECTORY OF LEGAL AID*, *supra* note 13, at 104. England expends more than half of its legal aid budget on civil representation. *COUNCIL OF EUROPE, LEGAL AID AND ADVICE* 216 (1978).

71. With a population roughly the same as the state of California, Canada spent more than \$140 million on legal aid in 1984. *INTERNATIONAL DIRECTORY OF LEGAL AID*, *supra* note 13, at 60-83. Based on the experience of the two largest provinces, it can be estimated that about two-thirds of this sum (\$95 million) is expended on civil legal aid. Several of the provinces were more generous than this on a per capita basis. *Id.*

72. With a population of 14 million people, the Netherlands spent \$76 million on legal aid in 1983. *Id.* at 161. Of this sum, approximately three-quarters was expended on civil litigation. *COUNCIL OF EUROPE*, *supra* note 70, at 190.

73. With a population of eight million people, Sweden spent 212 million kroner (roughly \$40 million at current exchange rates) on legal aid in 1984. *INTERNATIONAL DIRECTORY OF LEGAL AID*, *supra* note 13, at 214. It is estimated that Sweden expends about two-thirds of its legal aid budget on civil representation. *COUNCIL OF EUROPE*, *supra* note 70, at 207.

74. *INTERNATIONAL DIRECTORY OF LEGAL AID*, *supra* note 13, at 75. *See also supra* notes 31-32 and accompanying text.

75. Although demand rose more than 10% per year during the first years after the inception of a comprehensive government-funded right to counsel, by fiscal year 1982-83 the rate of increase was down to 3.7% with only 1% growth projected for fiscal year 1983-84. 1984 *COMMISSION DES SERVICES JURIDIQUES, 12TH ANNUAL REPORT* 140-42. This meant the Quebec program represented 228,240 poor people in 1982-83. *Id.* at 142. Meanwhile, the budget for 1983-84 was \$54.6 million—less than 4% greater than 1982-83. *Id.* at 140, 146.

Quebec is a good benchmark for several reasons. Like California, it is highly urbanized,

civil representation, this apparently stable budget level would equate to something in the neighborhood of \$120 million a year in California.⁷⁶ This is more than four times the amount that the Legal Services Corporation presently allocates to California, and more than three times the amount that is currently available to represent this state's poor after adding in the new Client Trust Fund Revenues.⁷⁷ Still, by comparison with this state's Medi-Cal or Medicare programs, it is a miniscule appropriation. Medi-Cal and Medicare spend well over \$9.5 billion a year to keep needy and elderly Californians healthy,⁷⁸ almost eighty times what it would cost to guarantee a right to counsel for the poor.

As you can see, what we are talking about are tiny sums compared to Medi-Cal or Medicare or most health and social programs. This poses still another set of questions. What could be a more justifiable use of public monies than those needed to ensure that the courts can do their job right and afford equal justice to all? And if many nations, smaller and often poorer than the United States or the State of California, are willing to pay the price of equal justice, why not here?

III. CONCLUSION

If I were expected in this talk to define the present right to counsel

yet has many smaller cities and large agricultural areas. The quantity and type of legal problems facing the low income populations in Quebec and California are quite comparable. Quebec's eligibility standards are similar to those prevailing in California, although a higher percentage of the Quebec population is eligible to qualify for assistance. The Quebec program supplies about two-thirds of its services through 330 salaried attorneys who are akin to California's legal services lawyers. The rest of the cases are handled by compensated private counsel. For descriptions of these features of the Quebec Province program, see M. CAPPELLETTI, *supra* note 5, at 585-618; Zemans, *Canada*, in *PERSPECTIVES ON LEGAL AID*, *supra* note 31, at 98-103.

76. Quebec spends roughly \$4 per capita for services in civil cases. See *supra* note 71 and accompanying text. If California were to spend a similar sum the budget would project to \$96 million (24 million times \$4). In contrast, the Legal Services Corporation and Client Trust Fund programs are expected to supply roughly \$35 million in 1985—assuming both of these sources of funding survive.

77. The Client Trust Fund program has only recently come into existence in California, and even more recently has begun allocating funds to legal services agencies representing the poor. Known as IOLTA (Interest on Lawyer Trust Account Program), this program is authorized by CAL. BUS. & PROF. CODE § 6212 (West Supp. 1985) and administered by the California State Bar. CAL. BUS. & PROF. CODE §§ 6210-6228 (West Supp. 1985). The program survived a legal challenge to its constitutionality in *Carroll v. State Bar*, 162 Cal. App. 3d 1094, 209 Cal. Rptr. 740 (1984). It is estimated the California IOLTA will generate approximately \$12 million a year for civil representation of the poor when it becomes fully operational.

78. In 1982, Medicare expended \$5.985 billion in California and in 1983 Medi-Cal expended \$3.557 billion in this state. STATISTICAL ABSTRACT, *supra* note 67, at 373 (Table No. 628). By 1985, these figures are undoubtedly substantially higher.

in civil litigation in California there would not have been much to say. Viewed from the perspective of what already exists in most of western civilization, our supreme court has only taken a couple of puny baby steps with its decisions in *Payne v. Superior Court* and in *Salas v. Cortez*. Consequently, I have chosen to look to the future and where the right to counsel may evolve.

I realize how foolhardy it would be to attempt to predict whether or when the California Supreme Court will establish a comprehensive right to counsel for indigent civil litigants in this state. But I *will* leave you with the words of the California Supreme Court in *Martin v. Superior Court*,⁷⁹ an opinion written very early in the twentieth century:

[I]mperfect as was the ancient common-law system, harsh as it was in many of its methods and measures, it would strike one with surprise to be credibly informed that the common-law courts . . . shut their doors upon . . . poor suitors Even greater would be the reproach to the system of jurisprudence of the state of California if it could be truly declared that in this twentieth century . . . it had said the same thing⁸⁰

That is what an earlier supreme court told us when the century was young and the mood optimistic about twentieth century standards of justice. Seventy-eight years later, California courts are, as a practical matter, still "shut[ting] their doors upon . . . poor suitors." Now, as we approach the sunset of the twentieth century, the question for the present supreme court is whether this "reproach to the system of jurisprudence of the state of California" has assumed constitutional dimensions.

But for other governmental institutions, and for the legal profession, the question is different. It is whether this state will only respond to constitutional directives, or whether sound public policy and common morality should be reason enough for the legislature and the bar to erase this reproach from our system of justice. Perhaps California society should not depend on the courts to tell us whether minimal levels of due process and their equal protection *require* us to guarantee free lawyers to poor people in civil cases. Perhaps it is time for the legislature and the bar and people of the state to say we, as a state, can no longer remain a backwater of equal justice for poor people in civil cases.

79. 176 Cal. 2d 289, 168 P. 135 (1917).

80. *Id.* at 294, 168 P. at 137.

No matter what the supreme court may do, perhaps it is time to follow the lead of the legislatures of so many other democracies and enact a statutory right to counsel in civil cases. Let us let our consciences, not just our Constitution, be the guide.

FINANCING THE RIGHT TO COUNSEL: A VIEW FROM A LOCAL PUBLIC DEFENDER

*Sheldon Portman**

I have the disquieting feeling that we may be talking only to each other here. I hope that what we have to say here will get beyond the confines of this room, and that those of you who are not professional defenders or legal aid people or bar people will take the message back to your counties. I know there was some effort by myself and others in connection with this conference to try to invite and encourage more people from the legislative arena to come here. It is important that this message get out for a number of reasons, some of which you have already heard. I would like to thank the California Attorneys for Criminal Justice, the State Bar of California, the American Bar Association and the others who have been involved in the sponsorship of this conference.

I think it is important to bring this critical problem to the attention of our public officials because I have the feeling, as someone who is in the trenches, that we are alone out there, that nobody is listening to us and that we have some very vital problems that are not only affecting us and affecting our clients, but are also affecting the system and the fairness of the system of justice that we should all be concerned about.

When we speak of indigent defendants, we are not talking simply about people who are poor and destitute and have no place to live or have no money in the bank. That is the first principle that we ought to keep in mind. We are talking about people in the criminal justice area at least who, more and more, are being priced out of the ability to afford private counsel.

You have heard John Van de Kamp talk about all of the needed things lawyers have to do in order to maintain competence and assure that they are not going to be accused or found to have committed malpractice later on. Well, that is fine and dandy for the lawyers who are knowledgeable, have the skill and training and the background and the experience. But more and more we are finding that the pool of lawyers

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out there who have this knowledge and experience and background is becoming smaller and smaller and smaller. And the result of that, by the law of supply and demand, is that more and more of our middle-class people forget about the poor and the destitute—more and more of our middle-class people themselves are unable financially to afford counsel in criminal cases, let alone civil matters.

The result is that more and more of the people in the middle-class sector are being forced upon understaffed, overworked public defenders or upon assigned counsel who simply have no background, who are poorly paid, who are unskilled, who are inexperienced.

Now, what is the effect of that? Not only does it affect the individual client and leave that person in the situation of being wrongfully convicted or having their rights abused, but it also affects the entire criminal justice system in the process. While we hear all kinds of complaints these days about lawyers who abuse the system, who conduct voir dire unnecessarily, who cause delay, who file unnecessary motions and so on and so forth, very little thought is being given to the competence, the skill, the experience and the expertise that is required.

When I began the practice of criminal law nearly thirty years ago, it was a simple matter to handle the criminal case. I will never forget the experience of going to the police station to interview a client, who was then being interrogated, and being told by the officer: "Wait until we're done talking to him and then you can talk to him."

Well, in the meantime we have had *Miranda v. Arizona*,¹ we have had *Mapp v. Ohio*² and we have had a raft of other constitutional decisions. And along with that we have had all of these other statutes coming down the pike from our state legislature, especially in the last five or six years, which have simply compounded the practice of criminal law.³ They have made it a field that the State Bar recognizes as a specialty and that requires a high degree of technical skill and expertise.

Now, what about that indigent population out there? Do those of you who are involved in the funding process realize that ninety percent of the people charged with felonies in our superior courts are indigent; that roughly about forty and maybe even fifty percent of those charged in the municipal courts with misdemeanors are indigent; and that a tremendous segment of our criminal justice population is being represented by either overworked, understaffed public defenders or unskilled, untrained appointed private counsel? Is there any wonder at the fact, given the com-

1. 384 U.S. 436 (1966).

2. 367 U.S. 643 (1961).

3. See *infra* notes 6-10 and accompanying text.

plexity of today's criminal law process, that we have all of these appeals going on charging incompetence of counsel?⁴

Certainly there are many inappropriate charges against competent, skilled lawyers. But when you consider that most of the lawyers that are working out there, except for a handful of public defenders who, again, are overworked and understaffed, who do not have the support that they need with their support services and investigation and clerical staff and so forth, who are burning out, who are turning over year after year in our defender offices over the last several years as a result of Proposition 13 and as a result of all this new legislation that is coming down the pike—is it any wonder that we have this proliferation of malpractice claims?

Is it any wonder that the appellate courts are begging the Governor not to cut the State Public Defender Office because of the proliferation of issues that are coming up all the time, simply because trial counsel does not have the expertise, lacks the skill and lacks the ability to do all of the things that John Van de Kamp listed before that should be done by a competent criminal lawyer in practicing criminal law in our courts?

It was Justice Brandeis who put it most aptly when he said: "A judge rarely performs his function adequately unless the case before him is adequately presented." I venture to say that in as many as fifty percent of the criminal cases that are being presented in our courts—and I think that is a modest estimate—the defenses are not being adequately presented. And this is causing reversals. It is causing appellate litigation. It is causing an enormous expense, not just to the counties, but on the state level as well.

And so we have the Governor cutting back on the State Public Defender Office, but by the same token pouring another five million dollars into the cost of appointed private counsel on appeal in order to handle this raft of appeals that are being generated to the appellate courts from the trial courts because of the inadequacy of trial counsel.

Let us look at the different types of systems that we have by which we deliver this service that we are providing, this inadequate service. Then let us talk about some current problems, and then let me try to wind this up by a specific recommendation that I hope this group will consider.

First of all, we have the traditional public defender system, of which I know you are all very much aware. You know that the public defender

4. *See, e.g.*, *People v. Pope*, 23 Cal. 3d 412, 590 P.2d 859, 152 Cal. Rptr. 732 (1979); *People v. Haynes*, 104 Cal. App. 3d 118, 164 Cal. Rptr. 552 (1980); *People v. Lower*, 100 Cal. App. 3d 144, 161 Cal. Rptr. 24 (1979).

system started here in California. And we in San Jose take pride in having just discovered that the entire public defender movement in this country was founded by California's first woman lawyer in San Jose in 1878. A woman, mind you—who had to get the law changed to permit women to practice law—who, after her first few years of practice, conceived of this novel idea: that since public prosecutors are paid and skilled, the lawyers assigned to defend the indigent—who were not paid at that time—ought to be paid as well; and that there ought to be an office, an office of county public defender. And she went on over the next two decades. Her name was Clara Shortridge Foltz. You probably never heard of her. I didn't until just a few months ago.

She went on over the next two decades to put together a model defender bill. In 1914, the first public defender office was established in Los Angeles. And in 1921, when she was in her seventies, her legislation was adopted by the California Legislature and serves as the model upon which public defender offices are formed in this state.⁵

The public defender office concept has been a good one and has drawn all kinds of praise, as has been indicated in the very fine syllabus that has been prepared for this conference. If you look toward the end of this booklet, you will find a report that was prepared by the State Bar Standing Committee on indigent defense.

This State Bar report was prepared by a committee and a staff that was not made up primarily of public defenders. There were a few, but most were private lawyers. This report talks in glowing terms about the public defender system as being universally praised, as providing a high degree of quality representation, as generally providing the most cost-effective representation, and as best able to assure training and the kind of appearance that makes attorneys most effective. It also goes on to say it has become a repository of collective experience, knowledge, dedication to criminal justice, and so on and so forth, and ending up with the statement as being the best method in a densely populated area for providing high quality services at a predictable cost. Glowing phrases. Wonderful.

Well, if I asked the public defenders who are here amongst us, I am sure that they could get up here and tell you about all of the horrendous things that have been happening in public defenders offices ever since Proposition 13. It was bad before. It is far worse since. For example, since the adoption of Proposition 13, Alameda County lost sixteen per-

5. CAL. GOV'T CODE §§ 27700-27712 (West 1968 & Supp. 1985).

cent of its staff in a three-year period, while in the same three-year period its case load went up thirty-eight percent.

On top of that, we got the Death Penalty Initiative,⁶ which, according to the Public Defenders Association, would require an addition of twenty-five percent of the staffing of every public defender office in this state in order to keep up with the work.

And then on top of that, we got the Determinate Sentencing Law,⁷ and we got the drunk driving law,⁸ and we got the serious felony⁹ and the rape laws.¹⁰ And we got all of this horrendous state legislation on a yearly, almost monthly, basis. And there we are being cut to the bone and beyond the bone, having to go and beg our supervisors not to cut.

In Los Angeles, what do they do? They cut \$1.1 million from the Los Angeles County Public Defender's budget and they gave it to private counsel on the theory that they were going to save money in a contract system. What happened there? They ended up spending an additional \$400,000 in addition to the \$1.1 million that was cut from the public defender's budget.

That is what has been happening to our public defender system in this state. Public defenders, the system, the idea, the ideal of Clara Foltz back a hundred years ago, was a great idea. But our recent experiences indicate that we are having many, many problems.

What about the court-appointed system? There are two aspects of that. One is the old ad hoc system where judges make these appointments on an individual case basis. Now, we see what is going on in the County of Los Angeles. Those of you who are from that county can tell us about the scandal, the exposé involving a certain handful of apparently favorite lawyers—at least that is the suggestion—getting all these appointments, yet building up in six figures the fees that they are earning and giving the impression to the public that, look, we are spending lots of money for these indigent defendants.

What are they complaining about? Well, the ad hoc system, as proven in Los Angeles, is not working out too well. They have a great public defender system, but somebody got the bright idea on the Board of Supervisors a few years ago that we can save money by cutting back on the defender and going to a contract-bid system, giving more money to private lawyers.

6. CAL. CONST. art. 1 § 27 (West 1983).

7. CAL. PENAL CODE § 1170 (West Supp. 1985).

8. CAL. VEH. CODE § 23153 (West Supp. 1985).

9. CAL. PENAL CODE § 667 (West Supp. 1985).

10. CAL. PENAL CODE §§ 261-264.1 (West Supp. 1985).

Well, that is the other type of system that we have. The contract-bid system. And under that system, which has been very appealing to a lot of county types, the theory is that we are going to save a lot of money because there are a lot of hungry young lawyers out there and they are willing to take these cases for less.

San Diego County is the perfect example of what went on. In 1978, San Diego, which has fought the public defender system and resisted it for years and years, finally decided that they were going to set up this contract-bid system and have contracts let out to all these hungry young lawyers. And for \$62 a case, you are going to get all these good lawyers to handle these cases, and we do not have to worry about it.

What happened? In three years' time the cost of defense in San Diego County went from four million to seven million dollars. They had what we are very familiar with in the defense armament industry; they had cost overruns. And so the lure of the low price and the low bid that they started out with exploded in their faces. And now, belatedly, they are starting in San Diego to move into the public defender system.

Now, the State Bar minces no words in criticizing the contract-bid system as the wrong way to go, saying that it is ill-conceived, that it often appears to compromise the duties and obligations of advocacy. It disrupts the bar. It creates political dissension, chaos that can often rule for several months as these annual contracts are negotiated and renegotiated. So the lure of the contract-bid system is out. It has been proven a misconception and a false lure. The systems that we have in California, in addition to the two that I mentioned, involve a panel of lawyers that is set up by an administrator in which the lawyers are categorized and the fees are administered by a county official or by a bar association, which has a contract—those have worked out fairly well and helped in matching the lawyers to the skill or the complexity of the case.

FINANCING THE RIGHT TO COUNSEL: A VIEW FROM THE STATE PUBLIC DEFENDER

*Frank O. Bell, Jr.**

In preparing my remarks today, I thought it would be helpful to describe to you how the system that is presently in place works, what the State Public Defender's role in that system is and to suggest to you that the real question, in terms of funding the representation of indigents on appeal, is finding the proper balance between the institutional defender, which is represented by the State Public Defender in this state, and the input that private lawyers skilled in the criminal law can have in the criminal justice system.

In my twelve years of service in the federal public defender system and in my continued involvement in the criminal justice system over almost the entire eighteen years of my legal career, it seems evident that at least on the appellate level, and probably to some extent on the trial level, there must continue to be a significant involvement of private appointed counsel.

There is a lot to be gained by looking at the institutional defender in the sense that there can be developed a group of lawyers who have specific skills and specific expertise, who are appellate specialists—for example, as they are in our office—and who provide an extremely high level of representation.

In fact, they set the standard in my judgment. I am proud to say that on behalf of my office. They set the standard for quality appellate representation in the State of California. At the same time there are certain evils in having only an institutional defender. We need a fresh approach. We need the independence of the individual lawyers who are ready, willing and able to accept court-appointed representation in indigent cases.

In the State of California, according to the Judicial Council, we can expect approximately 6000 appeals which will require appointed lawyers.

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We have in place, in this system, what Mr. Portman referred to as a "mixed" system of representation.

The State Public Defender, on the one hand, represents a certain percentage, a certain number, of those appellants. Private appointed counsel represent the great bulk of those appellants. This has, in fact, been the case since the very institution of the State Public Defender.

The number of persons represented by the State Public Defender has changed from time to time, based on the funding for the office. But the State Public Defender has never handled more than approximately thirty to forty percent of the total number of appellants. The remaining appellants have been represented by private appointed counsel.

I would like to discuss what we, the State Public Defender, do in terms of two concepts. The first is the actual work that we do in the cases, including our caseload or workload problems or responsibilities; and the second is our non-case responsibilities. In the area of our caseload, of course, we have a number of different kinds and seriousness, a mix of kinds and seriousness, of cases within the system. Obviously, the most serious, the most sensitive, are death penalty cases. After you address the issue of the death penalty, you have, in my judgment, clearly the second most serious case, in which your client has received the sentence of life without the possibility of parole.

After that it becomes a question of definition in terms of the seriousness of the case. You can look at it in terms of the serious issues it presents. You can look at it in terms of the length of the record and the difficulty of getting a private appointed lawyer to take a substantial case with a long record involving a great development of time.

The court system has wrestled with that problem by attempting to categorize the seriousness of a case. Quite recently, as of July 1, 1984, they adopted a way of classifying cases. They classified, after death penalty cases, the most serious cases in the category of fifteen years to life, including life without parole; secondly, those cases where the sentences run between five years and fifteen years; and in the third category, they group cases where the sentence runs from probation to five years.

There are other considerations that need to be addressed in terms of selection of the counsel to handle those cases. But those are the rough categories of seriousness of the cases in the appellate system.

Now, in a "mixed" system of representation, it presumes that the institutional defender, the State Public Defender, will not handle 100% of the cases. Once you make that assumption, then you come to a very difficult problem; a problem that is not easily resolved and a problem I do not have a ready answer for. If it is less than 100%, what percent of the

cases should the institutional defender handle? Throughout our United States, where we have a variety of appellate defender offices, the decision as to what percentage of the cases that the appellate defender handles can be found to vary from state to state.

For example, in the State of Michigan, it is expressed as "not . . . less than 25% of the . . . appellate cases . . . of this state."¹ The standard does not speak to the particular districts in the state, but it speaks about the overall appellate caseload. The same kinds of considerations apply here in the State of California.

In terms of our death penalty work, we have attempted to make a decision based on a number of factors. It seems to me these are the factors that must be weighed in determining, in whatever system which is considering installation of an institutional defender, how many cases or what the workload of that institutional defender should be.

For example, if you have a "mixed" system, you certainly must consider the availability or the willingness—availability and willingness being equated in my mind—of private lawyers willing to take on court appointed cases. The second consideration, after you have arrived at the number of lawyers who are willing to take on the cases, it seems to me, is the level of competence of those lawyers. In other words, as the cases become more serious, do you have enough private lawyers who are sufficiently competent, skilled and experienced to provide quality representation to their clients?

On the other hand, you have to look at the staffing of the institutional defender itself. And you have to look at the experience level, the competence of that staff, the caseload standard, the workload of an individual lawyer in that office and how many cases that lawyer can handle. The problem of caseload standard for lawyers is one of the most complicated problems in the defender system. Everyone has proposed solutions to the problem, but in my opinion no single solution is really an adequate one. That is an art, in terms of judging the caseload standards that apply to a particular lawyer, and many, many factors have to be taken into consideration in judging that.

You have to look at the complexity of the particular case. You have to look at whether or not the case falls in the category of the most serious case. For example, one should consider a life without parole case, which has a number of serious issues which are presented only in those cases, because they involve charges of special circumstances.

Or you look at the other question likely to be present in the area of a

1. MICH. COMP. LAWS ANN. § 780.716(c) (West 1982).

case which is likely to fall into the sentencing category, fifteen years to life. For example, many of those cases are homicides and sex cases with multiple consecutive sentences. You are likely to find great numbers of those cases in that fifteen year to life category, and those cases tend to be complex or noncomplex, depending upon the kinds of issues that often arise.

You have to look at what you want the institutional defender to do in terms of his total case responsibility. For example, in the State of California, the State Public Defender serves not only the supreme court, in death penalty cases, but it also serves the courts of appeal.

And there has to be a weighing of the responsibility and the ability to provide services to the various courts. It serves not only the supreme court and the courts of appeal, but it serves now five of the six districts within the State of California. The State Public Defender does not, at the present time, provide service to the fourth district. That service is provided by Appellate Defenders, Incorporated, a nonprofit corporation which provides services for a number of appellants in that district.

You have to look also at the non-case responsibility of your institutional defender. For example, in our situation we provide—and I will discuss these in a moment—an amicus program where we file briefs on legal issues in the courts of appeal and the California Supreme Court where we have no direct responsibility for representing the defendant in that case.

We feel that we have a function in training the private appointed lawyers who are interested in taking appointment in order to raise the general level of representation. For every hour we spend working on an amicus matter or in training a private lawyer, we have one hour less, of course, to spend on our own case responsibilities.

We have a brief bank that we make available to private lawyers so that they can shortcut their research, use it to begin their research and find the latest of our work product in our office, so that perhaps the cost of providing private representation can be kept as low as possible, and also to save those lawyers time and to give them direction in terms of the legal issues presented in those cases.

We also have a legislative function, and we take into account certain historical facts in terms of the level of representation we have provided. This is an area where—if I am correct—the latest projection is that there are approximately thirty death verdicts returned in California every year.

You must weigh these kinds of considerations against the total caseload. And when we did that, we came up with ten cases our office was prepared to provide representation in, or believed we could provide

representation in, during any given fiscal year. In other words, we could take on ten new death penalty cases, we had hoped, during the year 1984-85.

We also offer certain ad hoc consultation and attorney-of-the-day service to trial and appellate lawyers handling death penalty cases. And we maintain, in cooperation with the California Appellate Project (which Michael Millman will speak about in a few moments), a death penalty index of death penalty issues, relevant authorities and briefs, and death penalty information for the use of lawyers who are providing representation in death penalty cases.

We have the problem of a whole bunch of other cases, after we talked about those death penalty cases; and, we have definitely tried to prioritize those cases in terms of our involvement of time and effort. We have similar caseload considerations as to those cases. I believe that although the State Public Defender is authorized to represent individuals in a number of cases, our substantial involvement ought to be in criminal appellate and writ matters. We have tried to stay away from such matters as conservatorships and parental rights matters, mentally disordered sex offender proceedings and those matters involving persons committed by reason of their insanity. Instead, we have tried to concentrate on criminal appeals and writs.

In our non-case work, what we do besides the cases themselves, is our amicus program. We will file a number of amicus briefs in the California Supreme Court, and in some limited number of cases in the California courts of appeal, for the benefit of a present client whose case has not reached that high court yet, or for the benefit of a client or a potential client that we are likely to have in the near future. We will also file an amicus brief where the issue involved in that case has a broad impact in the appellate caseload of the State of California and is likely to impact on a number of appeals that will be coming up in the future.

We have a training function that we provide. The State Public Defender is planning to have a training program that will be offered in three areas of the State of California: in Sacramento, San Francisco and Los Angeles, a one-day seminar sometime in late April or early May of this year.

We have an attorney-of-the-day consultation number where private lawyers who are doing appointed appellate work can call our office and get the benefit of our expertise. We offer a number of publications in the field, including a criminal appeals manual, a supreme court report, a determinate sentencing law manual and the death penalty index that I previously referred to, as well as our brief bank, where any private lawyer

who is handling appointed cases can either purchase microfiche of the briefs in that bank or can come to our office and examine the actual brief in order to aid in the research.

Along with that system there will be instituted, as of January 1 of this year, a system of contract administrators which is intended to raise the level of representation provided by private lawyers. Mr. Millman's program, California Appellate Project, is a version of that which is being used in the California Supreme Court. It is also in place in other districts.

The court of appeal will contract with an administrator who will classify lawyers, bring them into the system and assess their qualifications to make sure that only qualified lawyers are appointed to represent people. They will match those lawyers to the individual cases to make sure that only lawyers with sufficient experience and skill represent people in the more serious cases. They will provide consultation on issues and procedures of law to shortcut the work required, if possible, and will make recommendations as to the further participation of the court of appeal, which has the ultimate responsibility of providing counsel in the case.

How is this system going to work in the future? That remains to be seen. It has already been touched on that in the Governor's budget, which was sent to the legislature this year, the cost of providing counsel to 6000 indigents will be approximately \$13.9 million. This is a \$5 million increase over previous budgeted amounts.

The cost of providing a loan to the contracted administrator is estimated to be \$4.9 million. I understand \$780,000 of that is allocated for the California Appellate Project, of which Mr. Millman is the Executive Director. And the cost of providing the actual lawyers to appellants in the state is considered to be approximately \$8.6 million, which works out to approximately \$1333 per case, as I figure, spread out over the 6000 cases.

I think the State of California is in the process of change. It is in the process of experimentation. How these programs will work in the future will remain to be seen, and I, like you, will be following them with great interest.

Thank you very much.

FINANCING THE RIGHT TO COUNSEL: A VIEW FROM THE PRIVATE BAR

*Patricia D. Phillips**

Thank you. Good morning, everyone.

It looks as though again I am the minority person here. It appears that each of my colleagues on the panel has a background in criminal law. Throughout my career, I have been a civil lawyer, although I did have one criminal law case. That one was enough. It went all the way to the Supreme Court of the United States.

The underlying premise of my remarks, which fortunately was validated by Justice Johnson today, is that in certain civil cases, indigent individuals have a right to representation without charge. Obviously, the real issue is whether the lawyers in those civil cases can be compelled to accept those appointments without compensation from any source whatsoever.

That issue is not one which I intend to resolve here today. But I will talk with you about what the organized bar has done, not just in response to *Yarbrough*¹ or *Payne*,² but what we in Los Angeles County have done over many years to provide pro bono services for indigent people in our area.

I am assuming that—although most of the cases with which we are familiar have involved appointments in civil matters where the client was jailed—the jailed civil litigant has no more of a right to appointed counsel than those civil litigants who are not in jail. Some have taken the equation one step further and have said that if persons sued as defendants in civil cases have a constitutional right to counsel, then there seems little reason to deny the right to persons who are indigent and wish to sue as plaintiffs in civil cases. I am not sure that this step is yet justified, but I think that my remarks apply in any event.

I would like to discuss first a phenomenon which may be obvious, but which certainly bears emphasis. Over the years that I have been in-

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1. *Yarbrough v. Superior Court*, 39 Cal. 3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985).

2. *Payne v. Superior Court*, 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976).

volved with the organized bar, there is no issue which, in my view, has evoked such an immediate, vocal and consistent response by members of the bar as has the issue of the mandated provision of uncompensated legal services for the benefit of indigent civil litigants. Lawyers have been united in opposing the concept of mandatory pro bono legal services for the indigent civil litigant as though we are all peas out of the same pod. Indeed, even opposition to the concept of mandatory pro bono legal services in criminal matters, for years a topic of discussion, has not so united the bar.

So why is this? Are we all a bunch of avaricious, self-centered people who are unwilling to make available the expertise which we have so painstakingly acquired in becoming and being successful lawyers? I do not think so.

I believe that almost without exception, you will find that the 90,000 lawyers of this state are doing work for free in one way or another—perhaps not in an organized project or for folks who can be classified as truly indigent—but California lawyers are contributing in an informal and enlightened way. I would like to share with you some of the many responses to the need, indeed demand, for pro bono services that the lawyers of Los Angeles County have developed.

As a result of the cutback in funding of the Legal Services Corporation in 1982, many lawyers developed a new interest in the extent to which the private bar was involved in providing pro bono services, and the extent to which it must become further involved. The Los Angeles County Bar Association appointed a two person committee³ to look into the issue of the funding of legal services, and particularly, to work with recognized pro bono providers to identify and coordinate the work of all the different groups in Los Angeles County. Just recently, in December 1984, our bar association published a current directory of pro bono services available throughout our large county.⁴ And I can tell you there are a lot of pro bono organizations in Los Angeles County.

The range of groups in which the volunteer lawyer may become involved in Los Angeles County is very broad. Some groups focus their efforts generally on providing legal services for the poor; others focus on providing services for specific client groups, such as the elderly or the disabled. Other volunteers attempt to aid in easing the burden on courts and administrative hearing agencies by acting as mediators and judges pro tem. Participation in some programs provides training and opportu-

3. The committee consisted of attorneys William Kurlander and Charles Palmer.

4. Copies of this directory can be obtained by writing: The Los Angeles County Bar Association, P.O. Box 55020, Los Angeles, CA 90055.

nities which can help lawyers to expand their practices, while other programs help attorneys perfect their lawyering skills. Many areas of law in which services are rendered require some familiarity with particular fields of law in addition to the good intention to provide pro bono legal services.

The Los Angeles County Bar Association, along with the Beverly Hills Bar, for many years has cosponsored a public interest law firm called "Public Counsel." Public Counsel serves, in large part, as an agency for bringing together attorneys who want to provide, and clients who require, legal services. This service is offered in a variety of ways. The most widely based is the Volunteer Legal Services Project which is serviced with the cooperation of one of the largest and most respected legal aid firms in the country, the Legal Aid Foundation of Los Angeles. There, litigators represent clients in matters of real property, fraud, consumer disputes, landlord-tenant problems and uninsured torts.

One project that does not require the services of litigators is our Community and Charitable Organization Counseling Project, which, through Public Counsel, is sponsored by two of our bar association substantive law sections. Here, tax and corporate advice is provided to qualifying organizations by members of the Los Angeles County Bar Association's Taxation Section and Business and Corporate Law Section.

Often you will find a willing, eager young attorney ready to give his or her time, but who may lack the requisite experience. He or she "has the will, but not the way." Through a vehicle called "Public Counselors," experienced trial attorneys provide supervision and backup to one or two younger lawyers from small firms or to those lawyers who are solo practitioners. This enables less experienced lawyers to handle cases through Public Counsel's Volunteer Legal Services Project. The Los Angeles County Bar Association Trial Lawyers Section is specifically involved in providing experienced lawyers for this task.

Various panels of volunteer attorneys which focus on specific areas of the law have been established, including a probate panel; conservatorship and guardianship panels; bankruptcy, unemployment, family law, student rights and nursing home panels; legal referral, the elderly, a hospice committee, a *pro se* tax program, an indigent taxpayer program and a paternity pro bono panel. These are all projects which have successfully solicited thousands of Los Angeles County lawyers and brought them together with the needy. Our Domestic Violence Project, Immigration Legal Assistance Project, and Volunteers in Parole Program also provide hundreds of lawyers free of charge to those affected in these ar-

eas. In addition, volunteer lawyers sit as judges pro tem in family law and in workers' compensation matters.

We provide mediation services in family law disputes, and counseling in child and spousal abuse programs. Perhaps our most well-known mediation program is the Neighborhood Justice Center, a program established many years ago by the Los Angeles County Bar Association as an alternative dispute resolution program, where people in conflict are brought together and, through mediation, helped to resolve their problems without reference to the expensive and overcrowded court system. The Neighborhood Justice Project has won awards from the American Bar Association and others for the service it provides.

Within a few weeks, a special committee⁵ which I appointed just this year, the "Ad Hoc Alternative Dispute Resolution Committee," will submit its proposals for legislation to establish a statewide alternative dispute resolution program to the Los Angeles County Bar Association trustees. I anticipate that the trustees will adopt the program and seek implementation of it by legislation.⁶ This program will provide an easy and inexpensive method of dispute resolution outside the cumbersome and slow processes of the court.

In addition, the Los Angeles County Bar Association has been asked by the California Supreme Court to establish a procedure for matching counsel with clients in indigent criminal appeals. It is a terrifically large and expensive job which may require as much as \$200,000 in seed money. I expect that proposal will be before our Board of Trustees shortly.

These few projects are by no means all of those which constitute the response of the legal profession to the need to provide pro bono and low-cost legal services to the poor in the Los Angeles County area. Several of our affiliate organizations have themselves sponsored projects of great benefit to the community, including the Harriet Buhai Family Law project, which is sponsored by the Women Lawyers Association of Los Angeles and the Black Women Lawyers Association of Los Angeles. This project provides a mechanism for bringing legal advice to indigents with family law problems.

Several of the bar associations including, of course, the Los Angeles

5. This committee is co-chaired by a former president of the Santa Monica Bar, who is currently a trustee of the Los Angeles County Bar Association, and by a member of the California State Bar Board of Governors.

6. Since these remarks were given, the trustees of the Los Angeles County Bar Association have voted to sponsor the legislation, Senate Bill 1215 carried by Sen. John Garamendi. Cal. S.B. 1215, 1985-86 Reg. Sess. (1985).

County Bar, have lawyer referral and informational services which provide clients with free counseling to help them to focus on what they really need in terms of legal services.

All of these organizations are fine. They are identified; they have phone numbers. And surely they must have numerous potential deserving clients seeking legal redress for a variety of legal problems.

But that skirts a principal question. What has the private bar done to provide lawyers to meet the demand? Traditionally, the medium to large size firms have committed a percentage of their lawyers' time to pro bono matters. This has been the custom for years. But all of a sudden, and indeed almost concurrently with the cutback in government funding for legal services, the law firms began a cutback of their own. Well, what happened? What happened was the recession. Attorneys' bills were put on the back burner; lawyers' bills began to take an even lower priority than doctors' bills, and doctors' bills at least were insured against.

And just prior to the cutback in the legal services budget, which in turn led to the need for an even greater commitment to pro bono work on the part of the private bar, the overhead expenses of law firms peaked. Office space in the urban centers of our state rose from eight to nine dollars a square foot per year to twenty-five to thirty dollars or more per square foot per year.

The firms, all sizes, began to feel the pinch and began to look more closely at their associates' billable hours. Instead of asking for 1500 to 1600 hours per year, we began looking for 1800 to 2000 billable hours per year.

Even my firm, which for thirty years has been known for its pro bono commitment, began to rein in our young lawyers—not by limiting their nonbillable time, but by increasing the expectation for billable time. Thus, in most cases, the individual lawyer was left to decide whether to stay on track for partnership by putting in the expected billable time, whether to give time to indigents, or whether to devote time to something that, for lawyers, often takes a backseat—his or her own family. We found that the choice was not hard for some of these young lawyers. The public spirited youngsters just coming out of school in the 1960's and 1970's had been replaced by a more conservative group of young lawyers, more attuned to their own economic survival than those in the past.

Even so, most professionals in the legal service field question the efficiency of mandatory pro bono services for each and every lawyer in this state. After all, as with any other aspect of the practice of law, some expertise, as well as devotion to the task, is necessary to the success of the particular representation.

Not each and every lawyer has that expertise and the Trustees of the Los Angeles County Bar Association have, in the past, taken the position that the most expedient and efficient way of providing the necessary pro bono services is through its organized projects which I have described above. Funding and the matching of attorney with client through one centrally located source has proven to be a much more efficient way of providing legal services for the poor or indigent.

The list of activities I have provided you, the thousands of lawyers who volunteer their time in difficult and time consuming tasks, underscores the commitment of the California Bar generally to aid in providing these services.

However, the obligation framed by the constitutional imperative we are discussing today is not the obligation of lawyers only, but of society as a whole. Something which is often overlooked, but should not be, is that the obligation to provide the wherewithal to meet that constitutional imperative is not exclusively that of lawyers. To the extent that society mandates legal services for the poor and the indigent, it should become the concern of all segments of society, not just lawyers. To urge otherwise would be similar to placing the full burden on the medical profession of supplying medical services to the poor and indigent, or the sole responsibility on farmers for feeding the poor. The legal rights and needs of the poor are a societal problem and responsibility.

Just as doctors did not invent diseased people neither did lawyers invent the poor with their particular legal problems. The organized bar is pleased to participate with the rest of society in helping to alleviate these societal problems. But we cannot do it alone and we should not be expected to do it alone.

I believe that this realization is what has caused the profession to sit up and take notice of, indeed, if not vehemently oppose, the concept that lawyers *only* bear the entire cost of providing these constitutionally mandated legal services to the indigent.

I thank you for allowing me to be with you today. And I am sorry that I will be unable to stay with you for the rest of the program, which I would like very much to do. As it happens, on the agenda of the Board of Trustees today is the issue of support for the identical legislation that was proposed and passed by the legislature last year,⁷ but which the Governor vetoed, having to do with the *Yarbrough* problem; that is, the state funding for appointed counsel for indigent civil litigants. Of course, the

7. Cal. S.B. 2057, 1983-84 Reg. Sess. (1984) (vetoed September 28, 1984).

bill now pending has a cap of a million dollars.⁸ So it is one that not everybody is in support of anyway. But in any event, I must get back to Los Angeles, and I thank you for your attention.

8. Cal. S.B. 66, 1985-86 Reg. Sess. (1985) (currently pending before the legislature).

FINANCING THE RIGHT TO COUNSEL IN CAPITAL CASES

*Michael G. Millman**

I want to talk about capital cases, primarily on the appellate level, and to some degree on the trial level. In the short time I have, I want to give you some statistical information, because I think you will see that numbers become important in any analysis of capital cases.¹

The system we have is already on overload, which has significance in terms of the representation we are considering. For your information, there are now more than 160 people on death row in California.² The rate of death judgments is running between thirty to forty per year, which means that the number of people on death row increases every year.³ California is now in third place among the states, and if the number of death sentences rendered continues at the present rate, we will soon have more people on death row than any state in the country.⁴

On the trial level, as of January of 1984, there were approximately 325 capital cases pending in the trial courts around the state.⁵ That is an enormous number of cases. When I talk to people in Colorado, they talk about their one or two pending capital cases. They have no concept of 325 or—at one point—400 pending cases.

* Executive Director, California Appellate Project (CAP). Mr. Millman has served as Assistant Public Defender for Alameda County, visiting lecturer at Stanford Law School and member of the Board of Directors of the Alameda County Bar Association. From 1976-1984, he was a Deputy State Public Defender and for most of that time was Statewide Death Penalty Coordinator for that office. Mr. Millman is the outgoing President of California Attorneys for Criminal Justice in 1984 and is the editor of the *California Death Penalty Manual*.

1. The statistical information cited by Mr. Millman in his remarks was derived from numerous sources and unpublished documents accessible to him in his capacity as Executive Director of California Appellate Project. Verification of or additional information regarding the statistics discussed herein may be obtained by writing: California Appellate Project, 345 Franklin Street, San Francisco, California 94102.

2. A recent statistical profile of inmates on California's Death Row revealed that 167 inmates are currently awaiting execution. *L.A. Times*, Aug. 21, 1985, at 3, col. 1.

3. California Supreme Court Justice Joseph R. Grodin recently remarked that reviewing this number of capital cases also greatly burdens the state supreme court:

[S]o long as the number of death penalty judgments remains at its present level—between 30 and 40 per year—and so long as all these judgments come directly to the Supreme Court for initial review, the court's task with respect to death penalty cases will remain a formidable one.

Grodin, . . . and *Easy Answers Don't Exist*, *L.A. Daily J.*, Aug. 26, 1985, at 4, col. 5.

4. A recent statistical profile of death sentences in the United States indicated that as of August 1, 1985, Texas had 201 inmates on its Death Row, Florida had 221 such inmates, and California had 167 such inmates. *L.A. Times*, Aug. 25, 1985, at 20, col. 1.

5. As of January, 1985, there were 372 capital cases pending in California trial courts.

There is a correlation between the death judgments and capital filings. We have been able to predict fairly consistently that the correlation will be ten percent; that is, for every 100 cases charged as capital, one or two years later there will be 10 death judgments.

We could see in 1983 that the number of capital cases in the trial courts was beginning to decline for the first time—from 400 cases down to 325 cases. Thus, it was predictable that the number of death judgments last year would be the lowest it has been in several years. There were 20 death judgments in 1979, 24 in 1980, 40 in 1981, 39 in 1982 and 37 in 1983. Last year, the number of death judgments was down to 29.

In the capital arena, we are talking almost entirely about indigent defendants. Of the 160 people on death row, exactly three have been able to retain their own counsel. The State Public Defender represents 39 appellants, the California Appellate Project represents 2 defendants, while the remaining 111 people have to be represented by appointed private counsel.

The problem then becomes: How do we find qualified lawyers who are willing to take these cases? Part of the problem has been financial. Until 1981, the California Supreme Court budget provided a grand total of \$1400 for representation on an automatic appeal, and that included expenses. Since an automatic appeal can take between 700 and 1000 hours of attorney time, and sometimes more, lawyers stood to net one dollar per hour or less. That changed dramatically in 1981, when the Judicial Council of California promulgated informal guidelines providing a rate of compensation at forty dollars per allowable hour and additional compensation for expenses. The Judicial Council also provided for interim fee applications, which becomes incredibly important when a case goes on for two or three years. Now a lawyer can bill every sixty days and receive interim compensation.

In 1984, the Judicial Council increased the compensation level for automatic appeals to sixty dollars per allowable hour.⁶ Much of the financial impediment to counsel coming forward has been alleviated by these increases. An hourly rate of sixty dollars is still small compared to what experienced counsel will charge their clients; but, it is a big improvement.

But the problem is not merely financial. The problem is also historical. California has never really had an appellate bar on the same scale as its trial bar. We do not have a large array of appellate lawyers who are

6. THE JUDICIAL COUNCIL OF CALIFORNIA, PAYMENT GUIDELINES FOR APPOINTED COUNSEL REPRESENTING INDIGENT CRIMINAL APPELLANTS IN THE CALIFORNIA APPELLATE COURTS (1984).

qualified to take these cases. The inadequacy was such that in 1976, the State Public Defender Office was established to provide a much higher standard of representation and, as Frank Bell indicated, to set the standard for appellate representation in the state.

That is why, in my opinion, the cutback of the State Public Defender Office last year was so unfortunate. We were beginning to see the fruits of having a trained group of appellate lawyers. Most people will agree that the quality of representation provided by the state office has been significantly higher than that previously afforded indigent defendants.

I would estimate that in roughly twenty percent of the present death penalty appeals, serious problems exist regarding the adequacy of representation afforded. We are talking about some lawyers who simply miss appellate issues of which they are not aware. We are talking about other lawyers who brief those issues, but do so inadequately. Or, most recently, we are talking about lawyers who simply do not bother to file a brief at all, as in one recent case in which the California Supreme Court finally had to remove counsel from the case.⁷ If that twenty percent estimate is remotely correct, we are talking about twenty-five to thirty cases per year in which the representation being provided is substandard. That has to be a great concern to all of us in the system.

I conducted a quick survey of representation in capital cases in the trial courts, about which I have less direct information. I do not really have the time to tell you all that I learned. But I can tell you that people who returned our questionnaire confirmed that, at the trial level as well, we are not talking about a retained counsel system. People responding said that retained counsel rarely, or never, handle capital cases. It is either the public defender, a contract system or appointed private counsel who handles these cases.

The questionnaires revealed that, from county to county, representation was described as "fair or worse" in an estimated zero to fifty percent of the capital cases. From the questionnaires I saw, roughly fifteen percent to twenty percent of the trial representation was considered significantly substandard.

There was a division of opinion as to who provides the best representation. Some counties stated that the public defenders clearly provided the best representation because the public defender office had the expertise and the in-house training, which are very important. On the

7. See L.A. Daily J., Dec. 21, 1984, at 2, col. 3. The attorney, a former deputy state public defender, had delayed filing appellant's opening brief for over fourteen months. *Id.*

other hand, some counties said there was better representation from appointed counsel because the public defender's office was so overloaded that they simply did not have the time and the staff to prepare those cases adequately.

In the survey, I asked people to identify the most significant problems at the trial level. I got three basic answers.

The first problem identified was money. We always come back to money: the need for higher compensation for appointed counsel; the need for greater budget allowances for second counsel in capital cases. More than half of the counties that answered the survey said that they do, in fact, provide second counsel in many capital cases.

It is important for members of county boards of supervisors to realize how large these capital cases are and how important it is that there be second auxiliary counsel available to help in their preparation. That becomes very important for public defender offices, which complain that their budgets were set for normal caseloads. When one or two large capital cases came in unexpectedly, they were forced to squeeze their staff beyond acceptable limits, and it affected both the capital and noncapital cases. As a result, the capital cases did not really get the staff they needed; public defender offices did not have second counsel to work on the case. Also, as resources were diverted to the capital cases, the other noncapital cases suffered.

There was a suggestion that if county supervisors would understand this, they would be more willing to fund the enormous expenses that unavoidably go into these cases. We are not talking about *exaggerated* expenses; we are talking about *necessary* expenses.

The second major problem identified by those responding to the survey was the lack of screening of appointed counsel—the absence of some peer review system to assure that qualified attorneys are appointed. Some counties, such as Alameda County and Sacramento County, have been very progressive, with a panel system to make sure that only attorneys in the top classification are appointed to take these capital cases. Other counties have much less rigorous screening mechanisms, and the results could be seen in the lower quality of representation provided by appointed counsel who were not really up to taking these cases.

The third problem identified was the absence of adequate training. Most counties indicated that, except for occasional statewide seminars, they had no in-house or local training programs. Los Angeles County is an exception in that regard. Any money that could come either from the board of supervisors to public defenders, or from the Office of Criminal Justice Planning in its training grants to the California Public Defenders

Association, would make an enormous difference in raising the level of competence in public defender attorneys.

If we do not do that, we see the results which everyone here has indicated are undesirable: ineffective representation at the trial level, and reversal on appeal because of that ineffective representation.⁸ I want to emphasize that when you see reversals on this ground, these are not mere "technicalities" as they are described in the press. If we provide a capital defendant with inadequate representation, we are really undermining the legitimacy of the entire process and of the death judgment. We have to deal with that problem.

I must say that California has been among the more progressive states in addressing the adequacy of representation in capital cases. We have done several things which are really quite commendable. The first, as I indicated, was to increase the rate of compensation for appellate attorneys to sixty dollars an hour, which has made an enormous difference. The second was that, since 1977, when the death penalty came back into effect, California has had Penal Code section 987.9,⁹ which provides special moneys for preparation of capital cases at the trial level. That appropriation was originally one million dollars per year. Last year it was increased to four million dollars. It is probably the single most important contributor to the quality of representation in capital cases in California. I think most trial attorneys would agree with that.

On the appellate level, this year the California Appellate Project (CAP) was formed. If the funding cutback in the State Public Defender

8. See, e.g., *People v. Mroczko*, 35 Cal. 3d 86, 672 P.2d 835, 197 Cal. Rptr. 52 (1983) (first-degree murder conviction reversed due to attorney's failure to exploit facts favorable to defendant as a result of attorney's joint representation of multiple defendants); *People v. Mzingo*, 34 Cal. 3d 926, 671 P.2d 363, 196 Cal. Rptr. 212 (1983) (murder conviction reversed due to attorney's failure to investigate potentially viable diminished capacity or insanity defenses, to request appointment of a psychiatrist, and to introduce evidence of defendant's mental condition as mitigating circumstance at penalty phase at trial); *People v. Frierson*, 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979) (murder conviction reversed due to attorney's failure to properly investigate or present a diminished capacity defense), *rev'd on other grounds*, 39 Cal. 3d 803 (1985) (defense counsel cannot, for strategic reasons, refuse to present diminished capacity defense at guilt phase of capital trial when defendant expressly requests that counsel do so).

9. Section 987.9 of the California Penal Code, provides in pertinent part:

In the trial of a capital case the indigent defendant, through his counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. . . . Upon receipt of an application, a judge of the court, other than the trial judge presiding over the capital case . . . shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to defendant's attorney. . . . In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

CAL. PENAL CODE § 987.9 (Deering Supp. 1985).

Office was a step backwards, then the creation of CAP was a step forward. Its creation would have been necessary even if funding of the State Public Defender Office had not been cut back. Because the number of death penalty cases being assigned to private counsel had been growing so rapidly, we in the state office were really unable to provide the level of assistance to the private bar that those cases required.

CAP is a nonprofit corporation established by the California State Bar, partially in response to the cutback in the State Public Defender Office. We are funded by contract with the Administrative Office of the Courts.

One of the very encouraging aspects of CAP has been its nonpartisan support. Supporting CAP is not a question of whether you are for or against the death penalty, but whether you support the neutral principle that capital defendants should receive adequate representation. I am very gratified at the breadth of that support from the bar, from bar associations, from the courts and from the Attorney General.

What CAP does is recruit lawyers to take death penalty cases, as well as other appeals and writs in the California Supreme Court. We are trying to go not only to traditional sources, criminal appellate lawyers, but also to the large civil firms. We are encouraging them to take one of these cases as a quasi-pro bono effort—there is *some* compensation—with the assurance that we in CAP will provide the technical expertise needed in order to do these cases well.

The efforts so far have been very successful. In San Francisco, six major firms have already indicated they will support the CAP project and take a death penalty case. I encourage people from bar associations who are here today to join the bar associations in San Francisco, Los Angeles, Alameda and Kern Counties, which have been very helpful in supporting the CAP program.

When people apply to the CAP program, we have to screen their applications, not only for the amount of their experience, but also for the demonstrated quality of their appellate work. That is an important lesson we have to learn in terms of setting up a quality control system and correlating lawyers with cases: numbers alone are not enough. The number of cases the lawyer has handled may be a *necessary* condition, but it is not a *sufficient* condition. There are many lawyers who have done a lot of appeals who are not really qualified to do death penalty appeals. We try to make sure that only those people who are qualified to perform at the California Supreme Court level are appointed to capital cases.

We have developed two lists of qualified attorneys for capital and

noncapital cases in the state supreme court. Two years ago there was a backlog of twenty-four cases without appointed counsel because the court could not find qualified lawyers. That number is now down to three, and will be zero shortly. My hope is that from now on appellate counsel will be appointed shortly after the death judgment is filed.

The identification of qualified criminal appellate attorneys has been gratifying, I think, to prosecutors as well as to defense people, because it eliminates the delay in capital cases attributable to the inability to find qualified counsel. It will also reduce the cost of appellate representation, because I am convinced that doing a case right the first time with assistance from people with expertise is, in the long run, the most effective and economical way of providing these services. The CAP program is being emulated by other states that are following California's model. We have already won the American Bar Association's 1984 Harrison Tweed Award for the best new criminal law program by a bar association to improve the availability of legal services.

So to sum up, there are three basic things that are needed in order to do capital cases well. The first is money. But money alone is not enough. The second is a careful screening of lawyers, and a matching of lawyers with cases. The third is a training and assistance program that gives lawyers the expertise they need.

In the last two minutes, I would like to talk about what people here can do to make the system work better, recognizing the progress that we have already made.

One thing I might suggest, if there are any legislators here, is that you think hard before you expand further the number of categories of cases which make someone death-eligible. We already sentence forty people to death each year in California. How many more people do we need to sentence to death? There are almost 3000 homicides in California every year. The Briggs Initiative ostensibly tried to make every first-degree murderer death-eligible.¹⁰ The system cannot possibly handle that many people being sentenced to death.

More than that, if you look at the history of executions in California in the twentieth century, the highest number of people ever executed here in one year was seventeen—in 1933. The average for this century is less than six per year.

Do we really need to increase the number of death-eligible categories? Even if you are in favor of capital punishment, do we need to in-

10. See CALIFORNIA ATTORNEY GENERAL, PROPOSITION 7 MURDER PENALTY—INITIATIVE STATUTE (Argument in Favor of Proposition 7, distributed for Nov. 1978 election).

crease the categories so that more than forty people will be sentenced to death each year? Because if we do that, we will only overload the system even further.

Prosecutors are beginning to use increased discretion as to the cases in which they seek the death penalty. I think that is part of the reason we see the number of capital filings and the number of death judgments declining; and that is as it should be.

I hope you will continue to support the efforts to restore the State Public Defender Office to its previous funding level. I hope you will continue to support the CAP program. I hope county boards of supervisors will not only provide more support for their public defender offices' capital training programs, but will also try to set up an appointment system that does not look only to cost. Cost is a legitimate concern. I understand that. But cost alone, without a concern for quality, will not provide the representation which these cases require. Representation in capital cases must be high quality, not only because it is constitutionally required, but because it is, fundamentally, only right that capital defendants receive quality representation.

We have come a very long way in California. We also still have a considerable way to go. We at CAP will be happy to work with you to get there.

Thank you very much.

FINANCING THE RIGHT TO COUNSEL: A NATIONAL PERSPECTIVE

*Norman Lefstein**

Ladies and gentlemen, my assignment this morning, as the program indicates, is to provide a national perspective on financing the right to counsel.

As I contemplated last week what to tell this audience, I thought about an event that occurred to a friend of mine last summer. My friend, an attorney, purchased a power lawnmower. The lawnmower came with many parts and detailed instructions. My friend worked on assembling it for a long period of time. Finally, frustrated by his inability to put it together, he left it for another day and went out to play golf. He came back several hours later to discover, to his absolute amazement, that his lawnmower had been assembled by his uneducated and illiterate handyman. Since the instructions for assembling the lawnmower had been of no use to the handyman, my friend turned to him and said, "How is it that you were able to assemble this lawnmower?" The handyman replied, "Those of us who are unable to read have got to think."

What does this story have to do with financing the right to counsel? Well, in one sense, there is a relationship between the problem that confronted the handyman and the problem that faces the fifty states in providing attorneys to the poor in criminal cases. The handyman had detailed instructions on how to assemble the lawnmower; similarly the legal profession over the last decade has developed detailed written guidelines or standards, "instructions" if you will, on how to provide the right to counsel.

For example, there are the standards for defense representation to which Jerry Uelmen referred, which were developed by the American Bar Association.¹

However, in one major respect, the situation that confronts the de-

* Professor of Law, University of North Carolina and Reporter, ABA Standards on Providing Defense Services. Professor Lefstein served as an Assistant United States Attorney in Washington, D.C. and as Director of the District of Columbia Public Defender Office. He was a member of the ABA Standing Committee on Legal Aid and Indigent Defendants and the Board of Directors of the National Legal Aid and Defender Association. Professor Lefstein is currently Vice-chair of the ABA Criminal Justice Section. His publications include *Criminal Defense Services for the Poor* (1982) which addresses methods and programs for providing legal representation and the need for adequate financing.

1. ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES (2d ed. 1980 & Supp. 1982) [hereinafter cited as ABA STANDARDS].

livery of defense services in this country is very different from that of the handyman. The handyman could not have assembled the power lawnmower unless he had all of the necessary parts. And while he had all of the necessary parts, the "necessary parts" for defense services are contingent upon adequate financing.

Undoubtedly, some social problems in this country cannot be significantly ameliorated even if additional funding is provided. Perhaps some problems can be resolved without additional revenues. But the delivery of defense services requires sufficient funding if the representation is to be effective. You can have the finest instructions; they can be cogent and detailed; but instructions alone are not enough. Lawnmowers, to be assembled, must have the necessary parts; defense services, to be effective, must be financed at a high level.

In 1982, I prepared a report on behalf of the American Bar Association dealing with criminal defense services for the poor. I wrote in the report that "[t]he financing of defense services in the United States today is grossly inadequate."² This statement continues to be true in 1985. Based on data that were compiled in approximately 1980, I estimated that approximately \$435 million was being spent on criminal defense services nationwide.³ Subsequent to my report, the Bureau of Justice Statistics of the United States Department of Justice did another study of the defense services in which it was estimated that as of 1982, the amount of money spent for defense services in the United States was more than \$600 million.⁴ This points up the undeniable fact that during the past few years the amount of money spent on criminal defense services nationwide has increased, just as I know it has increased here in the State of California.⁵

Yet, there is today abundant evidence of enormous financial problems in the delivery of criminal defense services in this state and elsewhere. Accordingly, in the area of criminal defense services—an area in which a constitutional right is at stake—defense counsel are routinely asked to work for what is oftentimes patently inadequate compensation. In contrast, neither judges nor prosecutors are asked to donate their time in the way that defense lawyers are required to do.

What are the trends in the delivery of defense services in the United

2. N. LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR 14 (1982).

3. *Id.* at 10.

4. BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, UNITED STATES DEP'T OF JUSTICE, CRIMINAL DEFENSE SYSTEMS 7 (August 1984) [hereinafter cited as BUREAU REPORT].

5. The 1982 California expenditure for indigent defense services was \$166,761,094. BUREAU REPORT, *supra* note 4, at 6. The expenditure for those services in 1980 was \$93,290,267. N. LEFSTEIN, *supra* note 2, at A-10.

States today? I have already indicated that, generally, there has been some overall increase in the level of financing. What I would like to do now is sketch for you four other major trends in the area of criminal defense representation. All of these trends, moreover, are relevant to the situation here in California.

The first of these trends is the increased use of contract defense programs in providing criminal defense services. What do I mean by a "contract"? I refer to the practice of governmental units contracting with one or more attorneys, private law firms, or bar associations to provide defense services to a number of defendants for a fixed sum of money. This, of course, is quite different from using an institutional public defender, or from having an individual attorney assigned to a case who, upon completion of the representation, submits a voucher for compensation.

About ten years ago there were virtually no contract defenders in the United States. Five years ago they were relatively uncommon. Today it is estimated that perhaps as many as six percent of the counties in the United States provide defense representation pursuant to contracts with private attorneys.⁶ Unfortunately, this growth in contract defense has been accompanied by a trend toward awarding contracts based solely upon the cost to be borne by the county or other unit of government. All too often government officials have been insufficiently concerned about the defendant's constitutional right to adequate counsel. It is obviously critical that contracts for defense representation take into account the quality of representation as well as its cost. I know that this subject is a matter of deep concern here in California, just as it is in many other parts of the country.⁷

6%

In Arizona, concern about a contract for defense representation was made a subject of constitutional challenge. In April, 1984, the Arizona Supreme Court held in the case of *State v. Smith*⁸ that the contract defense system in use in Mojave County, Arizona violated the rights of defendants to due process and effective assistance of counsel under the Arizona and United States Constitutions.⁹ With only one exception, every award of a contract for defense representation during the four years preceding the case had gone to the lowest bidder. That one excep-

6. BUREAU REPORT, *supra* note 4, at 5.

7. Guidelines concerning the award of contracts for criminal defense were approved by the California State Bar several years ago. See Ranii, *Contract Defense Guidelines*, 4 NAT'L L.J., Dec. 14, 1981, at 28. See also NATIONAL LEGAL AID & DEFENDER ASSOCIATION GUIDELINES FOR NEGOTIATING AND AWARDING INDIGENT LEGAL DEFENSE CONTRACTS (Tent. Draft Sept. 19, 1983).

8. 140 Ariz. 355, 681 P.2d 1374 (1984).

9. *Id.* at 362, 681 P.2d at 1381.

tion was an instance where the lowest bid was by an attorney who had been held in contempt for failing to file a brief in a criminal case and who had been the subject of repeated complaints.¹⁰

Because of the growth of contract defense services and the concerns that that growth has generated, a resolution on the subject will be presented to the American Bar Association House of Delegates at its 1985 midwinter meeting. The resolution is sponsored by the Criminal Justice Section of the ABA and other interested association groups. It reads, in part, as follows:

The American Bar Association opposes the awarding of governmental contracts for criminal defense services on the basis of cost alone or through competitive bidding without reference to quality representation.

In order to achieve constitutionally effective representation, the awarding of governmental contracts for criminal defense should additionally be based on qualitative criteria such as experience, workload maximums, staffing ratios, criminal law practice expertise and training, supervision and compensation guidelines.¹¹

It is sometimes difficult to predict what the House of Delegates of the American Bar Association will do, but in this instance I think it is clear that the resolution will be unanimously approved. This issue is of considerable concern to the organized bar and the resolution cannot reasonably be opposed.¹²

A second major national trend relates to the increased use of separate attorneys for each defendant in multiple defendant cases. The trend can be traced to the 1978 Supreme Court decision in *Holloway v. Arkansas*,¹³ which has led to a more stringent definition of what constitutes a conflict of interest. The trend, of course, is evident here in California. As Attorney General Van de Kamp noted this morning, the California Supreme Court has held that normally each defendant in a multiple de-

10. *Id.* at 360, 681 P.2d at 1379.

11. House of Delegates Res. IIa (passed Feb., 1985).

12. The resolution was unanimously approved by the ABA House of Delegates at its midwinter meeting in Detroit, Michigan in February, 1985. See *ABA Approves Resolutions on Indigent Criminal Defendants*, 7 NAT'L LEGAL AID DEFENDER ASSOC. CORNERSTONE, March-April 1985, at 1.

13. 435 U.S. 475, 484 (1978) (failure of the trial court to either appoint separate counsel for codefendants or to be certain that a conflict warranting separate counsel does not exist deprives defendants of sixth amendment guarantee of "assistance of counsel").

fendant criminal case must receive separate counsel.¹⁴ Because this trend requires that additional attorneys be appointed, it necessarily increases the overall cost of defense representation in California and elsewhere.

A third major trend is the upward movement of the amount of fees paid to attorneys who accept assignments to cases on an individual basis. Last October, for the first time in fourteen years, Congress and the President agreed on amendments to the Federal Criminal Justice Act to increase the compensation paid to private attorneys who take appointments in the federal courts.¹⁵ The rate of compensation thus jumped from thirty dollars to sixty dollars an hour for out-of-court time and twenty dollars to forty dollars for in-court time, and the maximum level of compensation rose to \$800 for misdemeanors and \$2000 for felonies.¹⁶

During the past two years a number of states also have increased their rates of compensation to attorneys, among them Alabama,¹⁷ Kansas,¹⁸ Illinois¹⁹ and Tennessee.²⁰ Moreover, there is even one state supreme court—the Supreme Court of Iowa—which said in 1981 that attorneys should receive full compensation, ruling that no discounts should be required when an attorney represents the poor.²¹ In examining more recent decisions of the Iowa Supreme Court, however, it appears that this 1981 opinion is being given a narrow interpretation.²²

It is also important to keep this trend in proper perspective. Often, increases in the compensation paid to attorneys have come about as a result of a crisis in the jurisdiction. Several years ago, for example, the attorneys in the District of Columbia who normally took a majority of the assigned cases refused to accept additional appointments unless something was done about the fee structure; they simply walked out. The City Council and the Congress got the message and reformed the legislation for the payment of assigned counsel in the nation's capital.²³

14. *People v. Mroczko*, 35 Cal. 3d 86, 115, 672 P.2d 835, 853, 197 Cal. Rptr. 52, 70-71 (1983).

15. 18 U.S.C. § 3006A(d) (1969 & Supp. 1985).

16. *Id.*

17. ALA. CODE § 15-12-21 (1982 & Supp. 1984).

18. KAN. STAT. ANN. § 22-4507 (1981 & Supp. 1984).

19. ILL. REV. STAT. ch. 38, § 113-3(c) (1983 & Supp. 1984).

20. TENN. CODE ANN. § 40-14-207 (1982 & Supp. 1984).

21. *Hulse v. Wifvat*, 306 N.W.2d 707, 711 (Iowa 1981).

22. *Walters v. Herrick*, 351 N.W.2d 794, 797 (Iowa 1984) (burden of proof is on attorney to show that the reasonable compensation standard was not applied; "full compensation" is only the actual value of necessary services and does not guarantee a fixed hourly rate for all time spent by the attorney).

23. D.C. CODE § 11-2604 (1981 & Supp. 1985) (maximum amounts increased to \$900 for

In addition, in states where fees have been increased (as well as in states where they have not), judicial approval of vouchers continues to be required.²⁴ This means, regrettably, that compensation awards often are arbitrarily decreased.²⁵ As a result, attorneys do not receive even the full level of compensation that the legislature has authorized. I should add parenthetically that the American Bar Association Standards reject the idea of judicial approval of vouchers, stating that "compensation for assigned counsel should be approved by administrators of assigned counsel programs."²⁶ As the commentary explains, this procedure is essential to secure the independence of assigned counsel and to assure that the payments to private attorneys will be equitable.²⁷

Further, to keep this upward trend in fees in perspective, one also needs to understand that nationwide compensation levels are still exceedingly low. Oftentimes, the fees are in the range of twenty or thirty dollars an hour,²⁸ which is not even enough to cover the attorney's overhead.²⁹ And in some areas of the country, regardless of whether the fees are adequate, the budgetary appropriation is not. In New Hampshire, for example, it was recently reported that \$500,000 in approved vouchers cannot be paid because there is no appropriation to cover the cost.³⁰

A fourth trend in the area of defense services is toward the funding of criminal defense services by state governments. This trend recognizes that uniformity of defense services can best be assured if the state provides the payments. According to the Bureau of Justice Statistics report to which I referred earlier, as of 1982, in eighteen states the state governments provided all funds for criminal defense.³¹ Additionally, eight other state governments provided a majority of the defense funds.³² Since 1982, two additional states—Iowa and Oregon—have approved

misdemeanors and \$1700 for felonies). In response to the boycott by attorneys, the Federal Trade Commission filed an action alleging conduct in restraint of trade. The position of the Federal Trade Commission has been rejected by an administrative law judge. *In re Superior Court Trial Lawyers Ass'n*, 104 F.T.C. No. 9171, 3 TRADE REG. REP. (CCH) ¶ 22,204 (1984). See also Middleton, *The Indigent Fee Strike: Antitrust Law v. Lawyers*, 7 NAT'L L.J., Feb. 25, 1985, at 13.

24. See *supra* notes 17-20.

25. See, e.g., N. LEFSTEIN, *supra* note 2, at 47.

26. ABA STANDARDS, *supra* note 1, Standard 5.24.

27. *Id.* at 5.32-5.33.

28. BUREAU REPORT, *supra* note 4, at 5.

29. N. LEFSTEIN, *supra* note 2, at 22.

30. Silas, *Lag in Pay for Indigent Defense Riles N.H. Bar*, BAR LEADER, Jan.-Feb. 1985, at 25.

31. See BUREAU REPORT, *supra* note 4, at 6.

32. *Id.*

state funding for defense services.³³

The trends to which I refer—contract defense services, use of separate attorneys in conflict cases, increased fees for assigned counsel and the movement toward state funding of criminal defense services—all bear some relevance to the situation in California. On the other hand, there is one subject which has attracted great interest in California, but which has not received quite the same attention in the other forty-nine states. I refer to *Yarbrough v. Superior Court*,³⁴ in which a California appellate court has held that counsel can be appointed in a civil case, as a constitutional necessity, and can be required to serve without compensation. The California courts may well be on the cutting edge of legal history in this area. In other state courts in this country, the right to appointed counsel in civil cases has not been generally recognized.³⁵ It should be noted, however, that some federal court decisions have required counsel to serve in civil cases even when no compensation was available. These decisions have sometimes been based upon constitutional principles³⁶ and sometimes upon federal *in forma pauperis* statutes.³⁷ Consider, for example, the decision in *Bradshaw v. United States District Court*,³⁸ which held that counsel had to be appointed in a sex discrimination case pursuant to federal law. On September 7, 1984, after the case had been before the court on several occasions, the Ninth Circuit reversed itself.³⁹ In light of opposition from the bar, the court recognized, in effect, that a coercive appointment of counsel to provide representation simply did not make sense.⁴⁰ Counsel's unwillingness to provide representation in *Bradshaw* stemmed apparently from the plaintiff's litigiousness and from the substantial costs that would have been incurred by the attorney, without any assurance that the costs would ever be recovered.⁴¹ Although the court

33. OR. REV. STAT. § 135.055 (1983 & Supp. 1984); IOWA CODE ANN. § 815.7 (1979 & Supp. 1984).

34. 150 Cal. App. 3d 388, 197 Cal. Rptr. 737 (1983), *remanded*, 39 Cal. 3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985).

35. *See, e.g.*, *People v. Rodriguez*, 645 P.2d 851 (Colo. App. 1982); *Jolly v. Wright*, 300 N.C. 83, 265 S.E.2d 135 (1980); *In re Smiley*, 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975).

36. *See, e.g.*, *Maclin v. Freake*, 650 F.2d 885 (7th Cir. 1981); *United States v. McQuade*, 647 F.2d 938 (9th Cir. 1981), *cert. denied*, 455 U.S. 958 (1982).

37. *See, e.g.*, *Childs v. Ducksworth*, 705 F.2d 915 (7th Cir. 1983) (affirming denial of counsel but recognizing that due process and fundamental fairness would require appointment of counsel in some cases).

38. 662 F.2d 1301 (9th Cir. 1981) (*Bradshaw II*).

39. *Bradshaw v. United States District Court*, 742 F.2d 515 (9th Cir. 1984) (*Bradshaw III*).

40. *Id.* at 517-18.

41. *Id.*

in *Bradshaw* acknowledged that in extreme cases coercive appointments of counsel might sometimes be necessary,⁴² the lesson of the case is clear. It is the same lesson that has been learned in the criminal context: in order for a constitutional right to counsel to be meaningfully implemented, the attorneys appointed must be compensated.

The vast majority of courts have concluded that some compensation must be paid to counsel in criminal cases.⁴³ Usually, however, the courts have ruled that the amount need not equal what an attorney can earn in a retained case.⁴⁴ But occasionally even the requirement of minimal compensation has been declared unnecessary. For example, a few years ago in Missouri there was no appropriation from which to pay assigned counsel. The Missouri Supreme Court held that, at least for a short period, appointed attorneys in criminal cases could be required to serve without compensation.⁴⁵ Eventually, the court recognized, compensation would have to be provided.⁴⁶ In response to this decision, the Missouri Legislature established a statewide system for the appointment and payment of attorneys in criminal cases.⁴⁷

It has been twenty-two years since the Supreme Court guaranteed, in *Gideon v. Wainwright*,⁴⁸ the right to an attorney in state felony prosecutions. Twenty-two years is a relatively short period in this nation's history; yet during this time we have made great strides in delivering criminal defense services. But to say that we have progressed far is not to suggest that we have gone as far as we need to go or that all of the problems in providing counsel have been addressed in a satisfactory way. It is important, moreover, to remain mindful that without the necessary financing, without the requisite "parts," there can be no meaningful, adequate and effective defense services for the poor.

42. "[W]e do not mean to suggest that coercive appointments are never proper. In some situations they will be." *Id.* at 518.

43. N. LEFSTEIN, *supra* note 4, at 20.

44. *Id.* at 21-22.

45. *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981), *cert. denied*, 454 U.S. 1142 (1982).

46. *Id.* at 67.

47. MO. ANN. STAT. § 600.019 (Vernon Supp. 1985).

48. 372 U.S. 335 (1963).

FINANCING THE RIGHT TO COUNSEL: THE OREGON EXPERIENCE

*R. William Linden, Jr.**

I am pleased to be with you today to share, for what it is worth, the recent experience of the State of Oregon in financing and providing defense services for indigents.

This is an issue which I think all of you will agree is one of the most critical facing the justice system today. My remarks are going to be limited to our role in providing criminal indigent defense.

As I outline the Oregon experience, please keep in mind that our two states are very different. We have a statewide population of roughly 2.6 million. Our urban centers are few in number and very modest in size compared with yours. Statewide, we have just less than 8000 lawyers and we have only 159 trial court judges in Oregon. The practical solutions that we have found in this area may or may not be transferable or realistic in the State of California.

Until January 1, 1983, our trial courts and criminal indigent defense services were funded by the counties. In 1983, the trial and appellate court systems were administratively unified and state funds were provided for court operations and services.

Under this new system, the Office of the State Court Administrator is responsible by statute for administering the criminal defense system. In 1983, we expect to spend approximately \$34 million on indigent defense. This represents twenty-eight percent of the total amount for our budget, so it was a very significant part of our funding package. On a per capita basis, we spend \$4.80 on indigent defense. This is the fourth highest per capita expenditure figure in the United States.

In the upcoming biennium, which starts July 1, 1985, we expect to spend closer to \$40 million on indigent defense. Much of the increase will be attributable to the fact that in November of 1984 the voters of

* State Court Administrator for the Oregon Judicial Department. Mr. Linden has been involved in court administration for the last eleven years. He began his career as Research Assistant for the Colorado Judicial Department and has held the positions of Court Management Intern, Analyst, Assistant Project Director for the Courts' Technical Assistance Project and Trial Court Administrator. Mr. Linden is a member of the Institute for Judicial Administration and has served on the Board of Directors of the Oregon Association for Court Administration and on the Criminal Justice Coordinating Committee, Lane County Council of Governments.

Oregon instituted the death penalty. My office will also be responsible for coordinating the provision of defense services in these capital cases.

Transfer of responsibility for funding criminal indigent defense services was a direct result of local funding problems. The constant variable in the process was the counties' desire to rid themselves of an unpopular and largely uncontrollable expense at a time when their financial resources were diminishing.

Since the late 1970's, Oregon has experienced some very severe economic difficulties. High interest rates, and recession in response to those rates, have really weakened the state. The wood products industry has long been the linchpin of Oregon's economy. With housing starts down, the demand for wood products decreasing and foreign competition rising, the economic house of cards which the State of Oregon had in place began to crumble. The resulting negative impact on government revenues was predictable.

This was all exacerbated by the state's two-tier system of taxation. We have very high property taxes and very high income taxes, but no sales tax. Most of the property tax revenue goes to education. Most of the income tax revenue goes for state agency operations. The counties receive little from these two sources. The system stayed on its feet when times were flush. But as economic problems worsened, we reached a crisis point. The whole situation was worsened by the fact that federal revenues dropped significantly in this time period as well.

Many of the counties, because they received so little from the property tax and income tax revenues, had grown very dependent on federal timber receipts. These were moneys that the counties were paid when timber was cut on federal land in the various counties.

I will use my home county, Lane County, as an example. These federal revenues made up fifty percent of the county-generated budget. When all of these facts came together, Lane County in two fiscal years went from a general fund budget of \$50 million to a general fund budget of \$28 million. As this crisis hit us, popular programs such as services for veterans and seniors suffered. In five counties every single deputy in the sheriff's department was pulled off the road because we had no money to pay salaries and no money to pay for equipment. So, in this environment, it is probably not too hard to understand that the county commissioners were not the least bit pleased about having to allocate significant amounts of funds for indigent defense services.

All of these factors came together in the 1981 legislative session. The counties made a very concerted and well-organized effort to transfer funding responsibility to the state. Eventually, the legislature agreed to

this transfer. Many of us involved in the system thought that state funding was a necessary change and not simply because of the funding difficulty at the county level. State courts ought to be funded by the state.

This was an expensive proposition for the state. On a biennial basis, the courts cost about \$125 million, and the revenues that come in as a result of our operation run approximately at \$70 million. We had, and have, some grumbling from legislators about that additional cost, particularly since some of the county proponents painted a much rosier picture about revenues and represented that the new system would not cost the state much. For example, these proponents estimated that the state would recoup for indigent defendants close to seventy-five percent of the cost of providing court-appointed counsel. This would be recouped after the case was adjudicated and the indigent defendants had finished probation or served their sentence. We have found that ten percent recoupment is a lot closer to the norm.

You should keep in mind, in looking at the cost of the statewide system, that projections need to be realistic. The Chief Justice and I have encountered considerable problems with the legislature in trying to explain, three years after the fact, why the original estimates made by other interested parties were not quite on target. During the last year of county funding for criminal defense services we started to see some alarming trends, among them a tendency to go for low-bid contracts. There was also quite a bit of pressure put on the trial court judges to be very conservative in approving fee requests for appointed counsel.

A number of counties made it very clear that if the indigent defense pot in the county ran short, the balance would be made up out of general court operating budgets. For example, we actually had a county where the indigent defense funds ran out, and the court there was forced to suspend civil jury trials for six months in order to keep the criminal side of the court going. As a result of this, a significant number of lawyers asked to be taken off the court appointment list because they were not willing to work for fees which did not come close to compensating them at the level they thought was appropriate.

The system we now have in place uses a variety of types of indigent service. We have contracts and we make individual appointments. Our contractors include private, nonprofit public defender organizations, law firms, sole practitioners and consortiums of attorneys who have banded together to provide defense services. Roughly fifty-five percent of our cases are handled by contract. The balance are private appointments.

We have made a conscious effort in Oregon to keep the private bar involved in providing services. We have done this for one basic reason:

to make sure that we keep a number of lawyers in private practice proficient in defense work. We do not want this existing resource to dry up. The private bar has been very responsive in cooperating with us since the new system went into effect. We have been able to pay them a more reasonable fee, and they have been willing, in virtually all of our counties, to take whatever cases we ask them to handle.

In our contracting process, we have avoided and will continue to avoid overemphasizing cost. We stress attorney qualification and experience as well as the ability of the contractor to manage the indigent defense contract. We have to be satisfied in those two areas before we even start looking at the cost.

We require contract attorneys, for example, to maintain caseloads that are consistent with national guidelines. We require contractors to keep adequate staff, such as investigators and paralegals. We require contractors to meet regularly with our trial court judges and administrators to talk about any contract problems that may occur. We make them tell us how we can best supervise the inexperienced attorney staff. We make them give us a plan for continuing legal education and training for their staff. We do everything we can to build quality control factors in our contract system. Many of these quality-oriented requirements are included in our written contracts so that there is no question that the contractors remain aware of these concerns during their contract period.

Our indigent defense contracts are not the least expensive you will find in the United States. On the average, we pay approximately \$300 per contract case. I do think that our system works relatively well because of the built-in quality control features that I mentioned. We hope we will never be in a position where cost becomes the overriding factor. I think that if you can avoid this, you can have contract systems that work quite well. We found that the legislature is only slightly more excited about indigent defense expenditures than were the counties. We have had a very difficult time justifying these expenditures to them. I think this will always be the case.

If all government services were as closely scrutinized as our indigent defense budget, I am sure that the Oregon Legislature could find savings in all state agency programs. We have made a conscious effort to educate as many members of the legislature as we can on both the constitutional issues involved here and the practical aspects of providing defense services: what it costs, what is involved, who is to do the work. These efforts have helped us to reach what I think is a reasonable level of funding, and hopefully we will be able to maintain this in the future. Our legislators have jumped over the first big hurdle. They know about the responsibil-

ity to provide these service in an adequate manner. They are sensitive to the problems. It is just that when it comes down to putting the pencil to the paper and writing in the appropriate number, they balk a bit because it remains an unpopular way to spend public funds.

During the interim period after our 1983 legislative session, the court system worked very closely with the Legislative Interim Judiciary's Task Force on Defense. We worked quite closely with this group. The number one item on our agenda was the question whether the judicial branch ought to remain in its present role in the indigent delivery system. Frankly, the Chief Justice and I have always been uncomfortable with the present structure, which requires the judiciary to play an intimate role in the funding and administration of one side of the adversary process in the criminal justice system.

The result of our work with the committee is a bill that has been introduced by the Oregon Commission on the Judicial Branch, a statutory body designed for court operation, which would create an independent policy commission on the indigent defense area. The members of this commission would be appointed by the Chief Justice, but the bill provides that they would maintain virtual operational independence. We think this bill is going to pass. We really are convinced that, in the long run, this area is best administered by an independent board, not by the judicial branch of government. This is not to say that we will not remain supportive of funding adequacy and things of this nature.

To summarize, I think we have learned a few things in the past couple of years. First, the shift from county to state funding was needed and was desirable. State revenues are more stable than are local revenues, and we have a better level of funding today than we would have if we stayed under the county system.

As a matter of fact, if we had stayed with that system only another year or two more, we would have been in a real crisis, because the economic picture did not get better. We saw the trends of low-bid contracting and attorneys leaving the court appointed list because we could not pay them fairly. We are fortunate that Oregon made this change at the time that it did.

I am not thoroughly familiar with the situation here in California. I understand the effects of Proposition 13 are beginning to be felt at the local level. It may well be that looking at the issue of state funding for defense services now may be a better time than later.

We feel that our mixed system of contracts and court appointments is working. The key to the contract system is to make sure that contracts are quality-oriented and not simply cost-oriented.

We have also found that we are able to provide more consistent services statewide. Under the county system we had a sort of feast or famine arrangement: in some counties the defense system worked, in other counties it did not. I think one of the major advantages of state funding is that you can provide quality service in all jurisdictions, and you can also impose statewide standards on performance and quality.

One thing needs to be kept in mind: just as you have to have standards, you also have to leave contractors the independence to do the job right. Striking this balance is not the easiest thing in the world to do. To reemphasize, we do feel, on a statewide basis, that an independent policy board to govern defense services is the way to go. Neither the judicial nor the executive branches of government ought to be directly in charge of policy issues, funding or administering defense services.

Lastly, this will never be a popular expenditure. Those groups involved must continue to educate the public and themselves about the issues involved. I think that is the only way we are going to assure that we maintain a reasonable level of funding for a government service which must always be with us.

Thank you for your attention.

FINANCING THE RIGHT TO COUNSEL: REPORTS FROM DISCUSSION GROUPS

As the Conference broke for lunch, Conference Director Gerald F. Uelmen divided the attendees into six groups to discuss the issues and concerns raised that morning. What follows are the reports from each of the discussion groups, led by discussion leaders Ephraim Margolin, Clyde M. Blackmon, Gerald Blank, Alex Landon, David Heilbron and Wilbur Littlefield.

REPORT FROM DISCUSSION GROUP NUMBER ONE

*Ephraim Margolin**

It will be impossible to do justice to everything we discussed, but I will mention a couple of things that stimulated my own thinking and perhaps will be helpful to everyone.

The first issue we discussed was: What is the best system? It was our consensus that public defenders, with a mixture of the retained bar, is the preferable system. Any defense delivery system which excludes significant contributions from the private bar is unacceptable.

Then there was a question: Why not have two public defenders spell each other? And we had some discussion on that. Again, it was our consensus that cross-fertilization between the two branches of the defense bar is needed; you need noninstitutional input to spark innovation and experimentation, and to provide an "inter-tutorial function." We discussed the notion that we work in bureaucracies and that it is imperative, on occasion, to get out of the bureaucracy and get a breath of fresh air for good or for bad. So, the answer to the first question discussed in our group, with more consensus on that than on anything else, is to favor a system of public defenders with a strong mixture of private bar.

There were several who felt that it would be good if the private lawyers assigned had some supervision, and the Santa Clara experience was suggested. However, we did not really explore this enough to make a recommendation.

The next area of concern discussed was cost effectiveness. There was a fear that as soon as you start talking budgets, people become statistics and you go into assembly line justice, and you have four dollars per

* Attorney, Law Offices of Ephraim Margolin, San Francisco, California. Mr. Margolin was the founding President of the California Attorneys for Criminal Justice, and is currently Vice President of the National Association of Criminal Defense Lawyers.

person or you have five dollars per person; whatever it is, you lose sight of where you are going with individual cases. We must beware of any system in which the only really important thing is to dispose of the caseload so as to justify the budget. Here again, we feel that any system which will not permit some creativity, some experimentation, some unusual approaches in the unusual case, is not constitutionally acceptable. There was a response to this from a former legislator in our group who felt that, if you permit this spigot to be turned on without *any* controls, you may reach another unacceptable position.

In the end, we were unanimous that our concern with bureaucratic stultification is a close second to our concern with funding. You need money, but you also need to be damned sure that with that money you do not buy complacency.

The third issue we addressed was flexibility. What happens with the large cases? Not everybody has a *De Lorean*¹ or a *Corona*² or a *Corenevsky*³ in their midst. But some special arrangement is necessary, not only for capital cases and those cases identified here today as special areas requiring funding and supervision resources, but also in anticipation of the possibility that we will continue federalizing our criminal system and that tomorrow we may have local versions of RICO⁴ or CFA⁵ cases, which almost inevitably mean four, five or six month trials. This is an entirely different financial ballgame; it is entirely different from street crime cases. The extent to which we may have to face such problems is simply beyond our discussion today.

And now I turn to the discussion of the issue of county funding, which perhaps occupied half of our time, and in which I must say, I learned things and got quite a number of surprises.

Our discussion started with several people predicting that state funding is inevitable. Therefore, what more is there to talk about? State funding is coming. Very rapidly, a counter-argument developed that if "the state is coming," what then is there to protect state funding from a governor who did to the California appellate system what Governor George Deukmejian did last year?

If you go to the state for funding, you may face a governor who, for

1. *United States v. United States District Court*, 717 F.2d 478 (1983).

2. *People v. Superior Court*, 30 Cal. 3d 193, 636 P.2d 23, 178 Cal. Rptr. 334 (1981).

3. *Corenevsky v. Superior Court*, 36 Cal. 3d 307, 682 P.2d 360, 204 Cal. Rptr. 165 (1984).

4. *Racketeer Influenced & Corrupt Organizations Act*, 18 U.S.C. §§ 1961-1968 (1982).

5. *Comprehensive Forfeiture Act of 1984*, Pub. L. No. 98-473, 98 Stat. 2040 (1984) (codified throughout Titles 18, 19, 21, 26 & 28).

political reasons, will cut the whole system to the bone. But even before you get to the governor and to the "iffy" situation of budgeting by political whim, you have to sell the program to legislators.

And there was real concern in our group that the local public defender can establish a more personal relationship by going to the county supervisors. The moment you become statewide, this personal relationship will not exist; you will be left with the rule that quality, like water, always descends to the lowest point of the common denominator. It would be difficult to convince state legislators that defense efforts need to be adequately funded. It will be difficult to explain in politically palatable terms why more funding is needed, especially when a case is highly publicized.

Toward the end of our discussion we felt that the specter of deliberate gutting of the State Public Defenders Office requires reassessment of statewide financing. I think we all became troubled by this issue, even those of us who had not thought of it before.

And without saying that there was a consensus, because there cannot be after forty-five minutes of discussion, I think that all of us stood back in thoughtful consideration that there may be some mixture possible; that perhaps there ought to be some local option left; that perhaps we do need certain select items, such as the cost of jurors, the cost of the overhead, whatever, under state aegis to help the counties. Perhaps we can approach this in a political way so that what is allocated to the county by the state will keep the system going, without abolishing local option.

I was surprised to hear—and I do not lay a claim that we have a representative panel—but I was surprised to hear that at least three different counties are happy with what they had. Their representatives seem to think that, in an imperfect world, the solutions which they have developed are reasonable. The question was: Should it reasonably be expected that state funding will be any better than what presently is available?

I walk away from all of this feeling more disturbed by, and more thoughtful about, state financing than I was when I came in. When I came in here, I did see state funding as a likely alternative, responsive to our concern for quality representation. I was much clearer in my convictions, without realizing either their towering ignorance or the prejudices on which they were based. After listening for a short period of time to my colleagues in the group, I am no longer as positive that I could make any strong recommendations without further thought.

Finally, a question to the Chair: We would like to know where you

will go from here? Is the State Bar going to get into the business of developing standards? Are we going to start looking at the option of state versus county funding? Who will do it? How will they do it?

I, for one, feel that with this report I contributed to the possibility that there will be a next stage. Should there be such a next stage, we strongly recommend that, regardless of the outcome, that is, regardless of who funds the defense and how it is funded, there has to be careful protection for excellence, and an effort at integrating the retained and the appointed mixture of sections of the defense bar.

REPORT FROM DISCUSSION GROUP NUMBER TWO

*Clyde M. Blackmon***

The consensus of our group is that defense should best be provided primarily by the public defender, augmented by a panel of private attorneys who would handle those cases which could not be taken, for one reason or another, by the public defender. An example of that is the system already in effect in Santa Clara County. Sacramento County also has a system which utilizes panel attorneys to represent defendants whose cases cannot be handled by the public defender's office.

We feel that it is important to keep the private bar involved in the representation of indigent criminal defendants. The system which utilizes a panel of lawyers can accomplish that purpose. Of course, the competency of private lawyers who serve on the panel must be maintained at a level equal to that to be found in most of the public defenders' offices in this state. That can be done by assigning the panel attorneys to various categories based upon their length of practice and by conducting evaluations of their experience and performance in court. Only those lawyers in the highest categories of experience and performance should be permitted to handle the more serious cases.

The continued competency of the panel lawyers can be maintained by mandatory attendance at training sessions or seminars. Periodic peer review of the work done by the panel attorneys would also help to insure that the lawyers are competent to handle the cases assigned to them.

Finally, we felt that the courts should not be involved in the process by which the panel attorneys are paid for their services. The concern there is for the maintenance of the independence of the lawyers who represent the indigent defendant.

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On the question of whether the state or the counties should pay for indigent representation, it was the consensus of our group that the state must pick up the tab. It is the case that since the passage of Proposition 13 the counties are finding it increasingly more difficult to pay the costs of indigent representation. Thus, sooner or later, the state will have to provide the money. In this regard, we have concerns similar to those just expressed by Ephraim Margolin. The funding apparatus at the state level must be insulated in some degree from the political process. Unfortunately, we did not come up with many ideas on how that might be done.

On the question of how much money we need, our answer is: more, much more.

The final question that concerned us was: Is anyone in this building listening to what is going on here today? I just see the same people here talking about the same old things that many of us have talked about at various meetings around the state for a long time. How do we make the political process work in terms of dealing with the questions that brought us here today?

REPORT FROM DISCUSSION GROUP NUMBER THREE

*Gerald Blank****

Well, as I understood the assignment that Gerald Uelmen gave us when we broke for lunch, it was to find the ideal system for the delivery of quality legal services to indigents. Our discussion group quickly agreed that the ideal system is one with unlimited funding (which comes from wherever it comes from) to well-qualified and well-trained criminal defense lawyers (who will do an excellent job in defending their clients), so the system works. Only those actually guilty are sentenced and those who are innocent are acquitted. Consequently, our discussion group quickly turned away from the ideal system. We frankly did not go down the list because several ideas quickly came out. Some of them in particular may be very helpful.

We were fortunate in our group to have a diverse cross-section of county representation. We had people from Imperial, San Joaquin, San Bernardino and Kern Counties.

The main feeling, I think, was that the biggest problem in the system now that has to be dealt with is the large case; death penalty cases and

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major trials. You see problems, for example, in Los Angeles County, in cases like the *McMartin* case⁶ which will take months just to do the preliminary hearings. You have six defense lawyers in there. I am not sure how many are appointed. I know some are. But in such cases, tremendous local costs are suddenly and unpredictably imposed.

One proposal, which has some good ideas in it that need to be refined, of course, was that perhaps the state at this point, if it is not ready to take over the entire funding of the criminal justice system, should take over absolute, 100% funding of the major caseload. That way, when you have a problem such as *Corenevsky*⁷ in Imperial County, or *McMartin* in Los Angeles County, the state would be responsible for its funding. On the local level, this would allow predictability in what the local costs are going to be.

However, as everybody recognizes, the state at this point is not even meeting its burden of the reimbursement required under section 987 of the California Penal Code in capital cases.⁸ Of course, having the state take on the burden of the large cases is but another question. Defining what constitutes a "major" case is a further problem still.

These problems are demonstrative of the tension between the counties and the state that appeared in our discussion group: How does a basically poor county like Imperial afford the *Corenevsky* case or whether a large county like Los Angeles should afford a *McMartin* kind of case?

There were other important proposals made to improve functioning of the system. One such proposal was for substantial expansion of what section 987.9 money exactly covers: It should cover additional expenses and it should cover the situation in which a case is not a death penalty case, but is filed as a special circumstances, such as a life without parole situation. The situations to which such funding is provided need to be expanded to ensure that the level of representation in those cases is constitutionally adequate by enabling appointed counsel to do the necessary job when faced with those kinds of charges.

Another proposal we discussed—by virtue of my position as the Chair of the State Bar's Committee on Delivery of Legal Services—is the proposal for a statewide commission. That commission, as envisioned in our proposal, is one that would have the ability to go to Imperial County

6. *People v. Buckley*, No. A750900 (Muni. Ct. of Los Angeles Judicial Dist. filed Mar. 22, 1984); *People v. Buckley*, No. A753005 (Muni. Ct. of Los Angeles Judicial Dist. filed May 23, 1984).

7. 36 Cal. 3d 307, 682 P.2d 360, 204 Cal. Rptr. 165 (1984).

8. CAL. PENAL CODE § 987 (West Supp. 1985).

and study the problem, to go to Los Angeles and study the problem, and to approve or disapprove the system for delivery of services.

There was great support in our lunch discussion group of that concept, and others suggested expanding the concept. There was an idea that the commission could also take over the determination of which cases should be funded on a statewide basis if the other plan is adopted. There was a suggestion that the types of cases could be isolated by the commission so that a funding range or even an hourly attorney compensation range could be established for certain types of cases.

Overall, the bottom line was that the main thrust has to be for the state to pick up its fair share of these costs, no matter how it goes about it. Whether it is by expansion of an oversight commission with statewide powers, expansion of section 987.9, fixing the cost of major cases, or whatever; the clear feeling of everyone involved was that the state is *not* meeting its burden.

These cases are not prosecuted in the names of "The People of the County of Imperial," or "The People of the County of Plumas." They are prosecuted in the name of "The People of the State of California." They are considered by the prosecuting authority to be an offense against "The People of the State of California," yet the people of the State of California do not fund the cost involved with the case. In other words, our discussion group clearly agreed that the main focus must be for the state to pick up its fair share.

In closing, our feelings, I think, were very close to the group led by Ephraim Margolin. Many people end up with an initial plan that the state has to fund the whole system, or at least the defense component. And as that conversation continues, we find there are indeed grave problems and issues to be addressed, as the state bar symposium discovered two years ago when it went around the state talking to people in various jurisdictions on that point. It is a difficult question because, as Sheldon Portman put it, the problem is that California is really an amalgamation of several states. That summarizes our committee's lunch discussion's work.

REPORT FROM DISCUSSION GROUP NUMBER FOUR

*Alex Landon*****

Group Number Four fell in line with the previous groups and indi-

**** Attorney and Director, Defenders, Inc., San Diego, California. Mr. Landon is currently President of California Attorneys for Criminal Justice.

cated that in an ideal program, we would have adequate funding. The word "adequate" was used, not "unlimited," and there were a number of county governmental officials who were present in our group who made it clear that there probably should be some limitation on adequate funding. But we were unable to arrive at a specific figure or dollar amount or formula to define what "adequate funding" really means.

However, I think it was clear that everyone agreed that adequate funding would include adequate staffing, that adequate funding would include adequate training, and I think most of the people in the group agreed that the best system to go with would be a public defender system.

In addition, we discussed this concept of whether or not civil work should be done in a public defender office or whether there should be separate offices. There was a consensus that there definitely should be some commitment made to providing funds for counsel to do civil work.

There was a question raised as to how you define the civil work; that is, if it is a government-raised question, such as a paternity action, that government should be involved in paying for the services of an attorney. But if it is a case between two citizens, is government responsible for picking up the tab? The tendency, I think, was for the people who are responsible for administering county budgets to be somewhat hesitant about whether there should be an open-door policy to funding that type of service.

We also discussed whether or not judges should be involved in the administration of these programs. And I think it was the consensus of our group that judges should not be involved; that there should be some type of independent board which would be responsible for discussing the guidelines and discussing what type of program the county should have. It was discussed that by having judges involved, there are too many conflicting interests; and by having judges outside of the program, it is easier for an independent board to discuss how counsel should be appointed and how the defense cost should be apportioned.

Finally, we discussed the funding problem. And I think that, as has been discussed by other groups, there is a strong feeling that the state should be more involved than it is today.

How to apportion funds was also discussed. I think that everyone in our group agreed that there should be more emphasis put on equality of funding. Where there is a district attorney's office funded at the particular level, there should be more emphasis placed on making sure the defense gets its equal share of the budget. And the formula that has been used for a number of years—three prosecutors, two defense attorneys—is perhaps out of date; things have changed. We now have a determinate

sentencing law in California, and we do have Proposition 8 to contend with. This provides additional burdens for the defense.

Finally, we discussed whether the county should be completely cut out of that process of funding; that by giving up the involvement of the county, we may give up the ability to control what the county gets. And so I think we were left with a question mark as to whether we should be going toward complete state funding or whether there perhaps should be a mix, which would allow the county to retain some type of involvement in how the money is doled out and how it is apportioned.

REPORT FROM DISCUSSION GROUP NUMBER FIVE

David Heilbron†

We had quite a cross-section of people represented in our discussion group. We had an assembly person, a public defender, some county supervisors, a judge, private lawyers and a county administrative officer. And we had no trouble figuring out what the goals ought to be: We thought that the system ought to be infinitely economical, absolutely fair, serviced by only competent and experienced people, and that it would be a good idea, in general, if the guilty were convicted and the innocent went free.

With respect to funding, I guess we join the parade, although by a fairly small margin. We generally thought that the state really ought to fund the system.

First, we thought that it is simply wrong for the quality of justice to depend upon *where* in the state it happens to be dispensed. If the state mandates a right—and that's really what we are talking about here—then the state ought to pay for the realization of that right.

We thought that it really made no sense at all to have a dichotomy between funding in the appellate process, on the one hand, and in the trial process, on the other.

Some people expressed concerns about state funding, voiced most strongly by those representing the smaller counties. People were also concerned about state control. But nonetheless, we thought funding ought to come from the state.

We all thought there ought to be statewide standards. We were concerned that without such standards the system would tend to fall apart and be relatively hit-and-miss as it is presently. Furthermore, we

† Attorney, McCutchen, Doyle, Brown & Everson, San Francisco, California. Mr. Heilbron is currently President of the State Bar of California.

thought it imperative that somebody monitor the application of those standards. As to who that would be—some group members thought that the Bar ought to do it, but those people were not affiliated with the Bar. County supervisors thought that if there would be a state monitoring system, then, by God, it ought to be made up of supervisors.

With respect to the civil side of things, we thought that if we were king, we were ready for the year 1495, and we would do exactly what King Henry VII did. We were not, however, very confident that that was going to happen in the year 1984. However, with respect to the *Yarbrough v. Superior Court* issue specifically, we were all again very clear that where the state mandates that you be given a right, the state ought to pay for it. So I guess we are ready for the cart, if not the horse.

As to the delivery system, we were clear on what we did and did not want to have. We were all *quite* clear. We did *not* want to have a San Diego contract-type system, although some group members thought that this might be okay in small counties where you are really dealing on a personal level with one another. But beyond that, I think most people basically agreed that we had to be flexible in deciding what type of system was right; what was good for a big county might not be good for a small county. Members representing the big counties seemed confident that the laboring oar ought to be taken by the public defender's office.

Many group members were intrigued by the San Mateo model under which, in effect, a block grant is given to the local Bar. The local Bar then pays based on experience: panels composed of local Bar members perform the job public defenders perform elsewhere. There is no Public Defender in San Mateo at all. Although some members expressed concern that this was not the most economical way of delivering legal services, all acknowledged that the system seemed to be working out very well in San Mateo.

Everybody thought that, one way or another, whatever system you use, it is a good idea to keep the private bar involved. Group members valued its independence and were quite concerned that the whole thing *not* be taken over by an institutional dealer.

I guess the bottom line was that, perhaps expressed only by a bar type, whatever system you have, in whatever county you have it, it is apt to function best if there is some kind of local watchdog, probably the local bar association, actively involved in pushing for what is good and making a fuss about those things that do not work out.

Thank you.

REPORT FROM DISCUSSION GROUP NUMBER SIX

Wilbur Littlefield††

Mr. Chairman, I see that, as always, we are running late. I will not repeat what has been said before, which was also discussed in our group. Just to give you the basic things that we developed would be very helpful.

First, we felt that the program should be state funded. It should be run by an independent body independent from the legislature.

That with respect to urban areas, a public defender system would be the best system, with conflicts handled by a panel of the Bar. This panel would be run by an administrator, and the cases would be assigned based on the degree of complexity, with the various levels of lawyers, depending upon their experience and competency. In other areas, it might be a public defender for several counties, or it might be a panel of lawyers or a rotation among all of the lawyers if it is a very small county.

So as far as payment is concerned, there was an agreement—on two ideas, I should say. One was that payment should be on an hourly basis and that it should be a reasonable sum. The other asked that payment should be by courtroom incident with perhaps so much money for each case besides the courtroom incidents. In different cases, attorneys could apply for additional payment.

We all felt, however, that the present system has problems because of the fact that there is not enough money to fund adequately defense services; however, we hope that sometime in the future there will be such funding. And perhaps it will be a long time from now.

Thank you, Mr. Chairman.

†† Public Defender, Los Angeles County, California.

MEETING THE CHALLENGE: A PANEL DISCUSSION OF POLITICAL LEADERS

To conclude the Conference on Financing the Right to Counsel in California, a panel of three key elected officials discussed the current prospects for, and problems with, additional state financing of counsel for indigent defendants. The comments of the Honorable David S. Roberti, President Pro Tempore of the California State Senate, the Honorable Willie L. Brown, Jr., Speaker of the California Assembly, and the Honorable Edmund D. Edelman, Chairman of the Los Angeles County Board of Supervisors, are reprinted below.

*Robert D. Raven, Moderator**

Ladies and gentlemen, Senator Roberti, Speaker of the Assembly Willie Brown, and Chair of the Board of Supervisors in Los Angeles, Supervisor Edelman: First, we are honored to have you all here today. We know how busy you are. We are grateful for that. We are grateful for the interest you had in this subject over the years behind us, and we look forward to your continuing interest in the years ahead.

We are at the bottom of the program. And the bottom line, like the bottom line on a budget, really comes down to this question: Where is the money? And in due course, I am going to start out with a question as to who should pay.

But before I do that, I would like to give each of our panelists an opportunity, if they wish, to make any general remarks.

Professor Lefstein, in talking about the national perspective today, is talking about one of the trends, the trend towards more state financing and away from local financing. Of course, at this time in the state we have a dichotomy: We have local financing for trial courts and state financing for appellate courts.

I am going to ask each of you, if you would comment on whether you think that we are going to join that national trend and go towards

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more state financing. And I would like to, as a prelude to that, mention a few things that have been discussed here and some items you might want to consider.

The groups that have reported indicated that there was a great trend towards state financing at the beginning of the conference. After the discussions today people are a little less sure of that and maybe they would like to see a little more flexible financing system where perhaps the big cases, like *Corenevsky v. Superior Court*,¹ would be special. So what about some flexible system?

Others have suggested that you cut it by the type of cases, that the state be concerned with capital cases and most serious felony cases, perhaps when you get up to fifty years' imprisonment. I would like to hear your comments.

We had some discussion in our group about this issue. If the state did do the funding, what does it do to the local control of the justice system? All of the media often concentrates on the court in talking about the criminal justice system.

We all know that if we look at it as a process that starts with the law enforcement people, the prosecutors, the courts and finally the people that deal with the sanction, what does it do there?

There was concern expressed in some of the groups about this issue: If it did go to state financing, would we have to be concerned about the experience we had in the last couple of years with the cut in State Public Defender programs?

Finally, a point that I am interested in—I do not know about the group as a whole—but it seems to me that one of the problems is: Who is the client from the viewpoint of cost control? Right now there is no problem in that regard because, by and large, the lawyers do not get the support that they should have, the extra support, the experts and so forth. But if as we get into this more and as it gets a higher profile, are we going to have a problem such as we had in the medical field with third party payers where you do not have that cost control?

In the civil field where I practice, we are now getting cost control with a vengeance. Corporate counsel are telling us what we can do and what we cannot do.

So with those matters in mind, I would like to ask each of you to comment. And maybe it would be appropriate to start with the representative of the Los Angeles County Board of Supervisors, although I know you gentlemen represent local government as well.

1. 36 Cal. 3d 307, 682 P.2d 360, 204 Cal. Rptr. 165 (1984).

*Honorable Edmund D. Edelman***

I think obviously local government would like the state to always come to its rescue, especially after Proposition 13, and the state has come to the rescue.

There were a number of cookies left in that cookie jar that Governor Jerry Brown had, so we were bailed out. What I see happening, obviously, is the state having more and more of the funding responsibility. At least as you pointed out, maybe we should have a fund that would help counties when a trial was so great—the financial burden was so great—that a particular county could not meet its obligation.

I guess that happened in one case that we know about, wherein Imperial County refused to provide adequate legal defense. Obviously that kind of system—where the legal defense costs are so great—turns off the majority of the public to our criminal justice system. And I think we all suffer as a result of that. I think the state is going to have to face up to that.

Local governments, particularly counties that have the primary responsibility of financing or running the criminal justice system, do not have the revenue-raising abilities that they used to have.

It was simple before Proposition 13. We would simply get our assessed value and then figure out if we wanted to play the political game. And if the assessed value went up, we lowered the tax rate. If we needed revenue and the assessment rolls were not sufficient, we would raise the tax rate. Probably if it was an off-election year, we would raise the tax rate.

Well, local government does not have that flexibility anymore. That flexibility is gone and, to some degree, my good colleagues here—who I know have stood up in very difficult times to help local government—now have more of the burden of financing local government on them.

Now, I would be willing if they would say to me, “Look, we don’t want the tax review because we take your heat.” I would be willing to just accept some powers of taxation, and let us wrestle with the fallout of raising revenue at the local level. I would like to see an independent revenue base and let local officials take the heat.

** County Supervisor, 3rd District, Los Angeles County, California. Supervisor Edelman was first elected to the City Council, Fifth District for the City of Los Angeles in 1965, and was re-elected in 1969 and in 1973. In 1974, he was elected to the Board of Supervisors, Third District, for the County of Los Angeles, and is currently Chair of the Board of Supervisors. He served as Deputy Legislative Counsel for the California State Legislature, member of the Intergovernmental Relations Task Force and First Vice-chair of the Administration of Justice Committee, County Supervisors Association of California.

Why should you fellows take the heat for raising revenue that we spend? But this gets mired in the whole question of state versus local responsibilities and alignments. I think that yes, the state has to do more. And yes, if you ask the state to do more, you give up some local control. You cannot ask the state to give you money without some strings attached. They have the right to attach a few strings, if they give us the money. So you pay that price.

But I think in terms of the criminal justice system and preserving it, you are going to need some limitation. Because otherwise, people are going to point to these cases that cost so much money and they will say, "Well, where do we get it?" And I think there will be a rejection of the criminal justice system as we know it.

*Honorable David S. Roberti****

Thank you very much.

I guess when we talk about any kind of state financing, we first have to examine the role of the state as to what its responsibilities and duties are, and obviously we have to make sure that we have a sufficient amount of money to provide for those things that are the state's responsibilities.

The first thing in the area of defense of indigents is the State Public Defender's Office. Now, the State Public Defender has, in my estimation and maybe yours as well, not been adequately funded. Two years ago, the Governor vetoed approximately half of the budget for the State Public Defender.

It now has come to a point where the budget is stabilized; but, nevertheless, we have a court backlog due, in some part, to the fact that the kinds of cases that reach the supreme court often are cases dealt with by the State Public Defender. And the Public Defender himself says there are numerous cases—one in particular comes to my mind—that he cannot at this point, with his funding, adequately represent.

So the state has the primary responsibility of funding those institutions which are directly related to the state and it is not currently fulfilling that responsibility.

Now, what do we do as far as local California public defense is con-

*** California State Senator, 23rd District, President Pro Tempore, California State Senate. Senator Roberti is a 17-year democratic veteran of the California Legislature. He was first elected to the Assembly in 1966 after serving as Deputy State Attorney General, was elected to the State Senate in 1971, and was elected Chair of the Senate Democratic Caucus in 1975. He later served as Senate Majority Leader for four years. In 1980, Senator Roberti was elected by his colleagues to the Senate's top leadership post, the office of the President Pro Tempore, and was re-elected in 1982 and in December of 1984.

cerned? I would suggest that when we talk about the administration of the justice system, we have to talk about it in totality and not scrutinize it down as far as public defender or marshals, bailiffs or whatever.

There were some suggestions last year during the budget negotiations that the state assume the cost of local administration of justice. The negotiations were unsuccessful, but at least the matter was open to debate.

And I would just suggest that if the state does that, we cannot break the funding down by assuming the cost of marshals and sheriffs, but not bailiffs. You have to look at the whole thing in its totality.

Supervisor Edelman made an interesting point; interesting to me, because I know he has been rather consistent in willing to have the localities assume more of the California tax base and, at the same time, in having a greater authority to tax, to have the ability to spend the money that the localities raise.

But it is interesting to me that, by and large, the vast majority of the local legislators two years ago were asking for bailout help, especially when legislation was circulating on something called "Project Independence," that was to give localities a greater tax base, to let them tax and then spend the money where the needs arose.

The agitation for that kind of legislation was very, very great when we were in recess. As soon as the legislature came back into session, much of the attention on local bailout came to be just straight-out, direct remuneration or subventions of state government to local government. And there was not too much talk about "Project Independence," because most local officers, like other politicians, frankly would like to be able to spend the money, but would not want to have the responsibility for raising the money.

So, Supervisor, your position did not change. But I suspect that many of the organizations that you belong to did change, and it is a very great problem.

Frankly, in the current climate and the current realities in Sacramento, I would suggest that for public defense funding the very best we can do is bring the State Public Defender up to an adequate funding that is consistent with the real and fair administration of justice and to handle local problems as we have, and that is through the various measures that we have passed in the state legislature to attempt to bail out local government in a wide variety of other areas.

There is one thing, however, that the legislature has done when a case becomes extremely expensive to a county. There have been about four or five instances that I can recall since I have been a member of the

legislature. We have assumed the cost of those cases. Generally, however, they are not the kinds of cases that are found in the large metropolitan areas like Los Angeles or the Bay Area, but rather the kinds of cases that a small county finds itself burdened with where the case itself makes a very definite impact on the budget of the county.

The state legislature in the past assumed the cost of those cases. But I would say at this point, that is about the only area where we are going to single out local public defender and other administration of justice costs by themselves.

The reality is that, with the court backlog and the needs of the State Public Defender system, whether the Public Defender himself knows those needs are pressing or not, the best we can do is to maintain that kind of funding. And everything else, I think, is going to have to come under the category of general local relief, local bailout.

That is my opinion and my projection for the future.

*Honorable Willie L. Brown, Jr. *****

You must know that Mr. Roberti's description of the atmosphere in Sacramento is very accurate in that there may be in his house something less than fifteen people who would be prepared to vote for a proposition that would directly be used to fund the defense costs of people who commit crimes.

In the Assembly, the number probably of the eighty members who would be prepared to vote for such a proposition would be less than twenty-five assemblymen. You should understand that that is, in fact, the atmosphere that is here.

Legislators—politicians generally—are faced with having to respond to their voting constituency. In this day and age, their voting constituency indicates, when properly stroked by people like Senator Bill Richardson and others, that they really do not want you doing anything on behalf of anyone who gets arrested for any crime. If the individual gets arrested, that is the individual's problem. And independent of any resources available through the public sector, that individual should provide his or her own defense.

**** Speaker, California Assembly. Assemblyman Brown was elected Speaker of the California Assembly in 1980 and re-elected in 1982 and 1984. During twenty years in the legislature, he has served as Assembly Majority Floor Leader, Chair of the California Legislative Black Caucus, Chair of the Ways and Means Committee, Chair of the Revenue and Taxation Committee, Chair of the Governmental Efficiency and Economy Committee and Democratic Whip. In 1972 and 1980, Speaker Brown co-chaired the California Delegation to the National Democratic Convention.

So, as Mr. Roberti said, one place in which the lack of voter support evidenced itself to us was when the Public Defender's Office was cut so dramatically two years ago. We were unable to mount a sufficient number of votes in each house of the legislature to overcome that; when, in fact, on merit, by numbers and by all of the logical applications and by the humane applications, it was clear that we should have been able to get those numbers.

But the practical problem presented itself; and that was that. If it had been for law enforcement and for prosecution and for expanding the opportunity to catch people and to prosecute them, the moneys would be there because the politics would dictate that that is a good place to spend the money. If it is for the purpose of trying to protect the integrity of the defense system and trying to protect the integrity of the criminal justice system on behalf of everybody, the money is not there to do that.

I am not optimistic about any change in this session of the legislature. As a matter of fact, I am not optimistic about any change in the *next* session of the legislature. Come 1987, there may be a different attitude or there may be a different governor. But before then, I suspect conditions are going to get worse before they get better.

Because, you see, judges in the court system are going to insist that when people come before them charged with crimes that may cost them their liberty, those individuals must be defended. And, they are going to measure the quality of that defense in the most objective measuring standard that can be imposed.

And when that happens, a number of cases are going to be bounced back. Because the State Public Defender, or the system as we now have it, is so hopelessly underfunded and is so hopelessly overworked, so hopelessly overloaded with cases, so hopelessly underfunded for investigators and for clerical help and all the other support services, that any court reviewing a particular conviction or a particular decision is going to find that this was not an adequate defense. Such a finding will not be based upon the quality of the person defended, but the resources available to assist that individual. And when that happens, the attitude about the courts that is being expressed on a consistent basis is going to harden and conditions are going to get even worse here in Sacramento.

I am sorry that we cannot frankly, seriously explore, from a legislative standpoint, transferring the cost of administering the court system totally to the general fund of the state budget. I suspect if we were able to do that, we would have probably a greater lobbying effort on behalf of maintaining a certain quality of expenditures.

Because you see, in many cases, Mr. Edelman, the prosecutors

would be in there pursuing the same general fund dollars as would the persons on the defense side. And if the prosecutors had to get their money from the same trough, they would be hard put to convince the senate or the assembly to do something greater for them on a per-cost basis than they would do for the defenders.

But we cannot even address that issue. We cannot even get to the point. I am talking about the alternatives, about options as you described them in your question; because, the political atmosphere will not permit us to do that.

Mr. Roberti addressed the reality. The only thing we have been able to do in the time period that we have been here is to provide case-by-case bailouts to particular counties, but only on occasion when it is so outrageous, and then if they have something to exchange with other members who have something that they need, they may be able to move it through the halls of the legislature. All on merit; but, nevertheless, they may be able to move it through the halls of the legislature. And that has been our experience in those very rare cases.

There may be an opportunity for the State Bar, on a more conservative measure, to suggest that there ought to be in the Governor's budget—and it can be put in the Governor's budget from this year's funding—an amount of money available to local communities to make application rather than by the billed route.

This should not be the Board of Control, but an amount of money that could be administered by an appropriate agency of government under the Governor's direction. Counties could make application for that assistance on an ongoing basis rather than by way of the processing money that we currently have; where it becomes a question of whether or not Mr. Roberti wishes to carry the bill or whether or not Mr. Brown wishes to carry the bill and cash in all their political capital that they may have or the equity they have in order to move that bill.

It may be that even this Governor might be willing to put away two, five, seven, ten million dollars on an experimental basis in this session. But it cannot come from Senator Roberti, and it cannot come from Willie Brown, and I suspect it cannot even come from Supervisor Edelman. It will have to come from a more conservative element that clearly indicates that it is not for the purpose of—in any manner—allowing public defenders to have access to it.

It is not for the purpose of enhancing and making completely competitive the investigatory arms of the public defense versus the local police force or the sheriff's department or the marshal's office. But it is for the purpose of rewarding those who do provide prosecutions in a proper

manner that allows society's gifts or society's compensation to be given to society. Under those circumstances, they may very well be able to have that kind of money set aside; and I would suggest that that might be a start down the road to ultimately producing some form of state funding that would allow for a fair and adequate criminal justice system insuring equal protection under the law.

Let me tell you, in both houses of the legislature almost every member will tell you, when you give him or her the respective facts of any given cases, they will conclude you are correct that that is not equal justice under the law. But so what? This is not a perfect society. This is an absolutely terrible response, but a very practical political response.

Those of us who are interested in trying to maintain the concept of equal justice under the law recognize that it is going to be a long, hard struggle. And I hope we can change the political atmosphere in the near future so that we can begin to address the issues.

We can remove the courts from the attacks that they will experience by virtue of having to do what they believe to be the proper thing to do and to, I suppose, do the things where the courts are not subject to any kind of limitation when they assign and adequately compensate competent counsel, and where it will be possible for competent members of the bar who really want to work in this area to, in fact, be appropriately compensated for their efforts.

That is not the case now. The political atmosphere is not there now to create that. We must create the political atmosphere to allow us to address it on that very—what I think would be an intelligent—basis.

Thank you.

Robert D. Raven

Thank you for your very candid remarks. I guess I learned some years ago the difference between the prosecution side and the defense side when I went out for the swearing-in of the first public defender in our Northern District of California, United States District Court.

Many of us got up to speak and waxed eloquently on how now the presumption of innocence was being recognized, that each side was being cloaked with the dignity of government. Then it came to the question of who would be the investigative arm for the new public defender.

And I had just gone through a civil case in which I asked the assistant United States Attorney about who had investigated the complaint, who knew about it, and they came back and gave me the names of twenty-three FBI agents, whereupon I settled the case. Having that in

mind, I asked who the investigator for the federal public defender was going to be, and they pointed out a nice gentleman, who was probably competent, a retired bailiff of the court. So it came home to me very clearly that it was, at least at that point, an unequal struggle.

I would like to turn now, if I may, to the civil side of the *Yarbrough* problem, the *Jaffe v. Superior Court*² problem. We had a very stirring presentation by Justice Johnson that took us back into history and pointed out that, nearly 500 years ago in England, the English law was that indigent people had a right to representation, either plaintiffs or defendants in civil cases. Then he took us through the other countries and we found out the same thing happened. Then at the second stage, at some point along the way, the legislative bodies or the courts had taken the second step and said the appointed counsel will be compensated.

That is before us, of course, the problem in the *Yarbrough* case, as we all know. And I would like to have you comment, if I may, on what the status is now on this. Are we ready for that in California? Are we? I think by statute all indigent people in even civil cases will have the right to be represented.

Are we ready for the second step, to be compensated? That is wound up with the question of whether the bill that was passed last year and then vetoed, whether that is likely to be passed again. And if so, whether the Governor will sign it. If anyone wants to speculate on that, in any event, I would like to ask for your comments on the civil side.

The other point I would like to ask is: What is the prediction as to whether the legislature will expand those categories where someone in the civil case cannot afford counsel? We are entitled—now that we have a situation that is involved in *Yarbrough*, *Payne v. Superior Court*³—where prisoners under certain circumstances or defendants in paternity cases are entitled to be represented. Will that be expanded? I know you cannot speak for the court, but what do you foresee there in the legislature?

Honorable David S. Roberti

Well, I really do not think that there is going to be much expansion of programs that are trying to enunciate rights or rights of access for poor people or even for moderate income people. I first would suggest that Senator Petris' bill—and I voted for his bill—is that maybe everybody has access to the court except independent indigents.

2. No. B002890 (Los Angeles County Super. Ct. of Cal. (1984)).

3. 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976).

First, without talking about what our roles in the legislature are, I speak to your roles as attorneys. Quite frankly, especially in the civil area, you have access to justice based on how much money you have and how long you can hold out in court.

And many people, even the middle-class people, would not dream of using the justice system to right any wrong. Consider it as a setup to adjudicate differences, for peaceful alleviation of differences. But think about it. When would any butcher, baker or candlestick maker drop into a law firm and say they have a property problem with their next-door neighbor? It is just never going to happen.

Unless you have an insurance company that is representing you in an auto insurance problem or an attorney representing you in similar kinds of cases, this whole court system in the civil area that we have built up, this amazing paraphernalia, is not available to too many people. It is there only for a select group of wealthy people or corporate litigants, and it has absolutely no relationship to the average citizen's life.

What is the problem? I think the State Bar has to think a little bit in terms of identifying the problem. But I suggest one reason why sometimes you do not have too much support for lawyers or for the court system is simply because the average citizen would not ever dream of going to court. It is not there for them. And if they are in court through some terrible misfortune in which they may be sued by somebody who has more access to discovery, to attorneys, to investigators, to more money than they do, they are going to settle as quickly as they can and as cheaply as they can.

Frankly, in my mind, the civil justice system, not only for indigents—that is another issue—but for everybody, is really a convoluted travesty of litigation for the elite, by the elite and of the elite, and for nobody else. And I cannot even blame that one on Governor Deukmejian. It has been here for quite some time.

Part of the problem is the profession itself. And I am a lawyer. Part is just the problem of inability to address the situation, everybody going about his or her own way, not attempting to deal with the totality of the situation. But whether or not this civil justice system which has evolved has any relationship to the average citizen is a serious issue.

Frankly, I think in your heart of hearts, you know that the problem does not have any relationship at all to the vast majority of the public. They just would not dream of trying to hold out in court if they were being sued and never would dream of suing if they had the opportunity, unless it is one of the standard kinds of cases, like an automobile accident, or unless it is a class action suit of great sex appeal. If your prop-

erty abuts the XYZ Insurance Company and they have taken three inches of your property, you are not going to court. But they might go to court against you.

And those kinds of day-to-day disputes that people are engaged in mean a lot to an average citizen. There is just no remedy for the average citizen to find redress in the criminal justice system.

As far as indigents are concerned, I think it is just a temper of the times in Sacramento; I really do not think we are going to be able to broaden the categories although I think we ought to.

But there are so many areas that demand our funding, and we are in a mind fix in Sacramento that if we address the status quo and continue the status quo and try to keep everything together, we have done our job, as if there are no problems with the future. And we have no vision of the future that has to be addressed. That is just something for another day and another year, because we are in a bookkeeping mode right now.

I suggest that I am not optimistic. The best that leaders of the legislature can do in these areas—and we are speaking in terms of a social program—is to hold the line and maintain what we have. And I would say that is across the board with both civil and criminal justice.

Some bills passed by my house leave much to be said about the limitless power of people to lead the legislature, which is absolutely not true. There are some things the Speaker and I both care about very much, especially many areas of civil liberties where you simply have to see some things pass even though you do not want them to pass, where we are trying to hold the line for the Bill of Rights. I would suggest that it is going to be very difficult to expend your capital on something which is important, but considered of secondary importance; that is, expansion of public defender rights in civil cases.

And I think that is a tenor of the times right now in Sacramento. It is the tenor of the times in our state. And those of us who have a different vision are going to have to wait it out and have to be more clever and wilier than the opposition. But those kinds of battles in which you really believe the problems must be addressed are just not always yours to be won. As I said, we both would like to see the categories expanded, but realistically that will not occur.

Finally, let me tell you that I do not think a motion in either house of the legislature that said, "We believe that everybody should be represented on each side of each civil case at public expense," could get a sufficient number of votes to cause a resolution to be passed. That would never pass either house in the legislature, and I am not even sure that the members I previously predicted would be there would vote for that kind

of a proposal. So realistically, an answer, in part, to your question is no. No!

Honorable Edmund D. Edelman

Generally, I have been critical of the bar, both criminal and civil, when it comes time to reform the justice system.

For example, the County of Los Angeles needs more judges. We know that we need about forty more judges, but the bill that was signed by the Governor, that went through the legislature, provided only eighteen judges, I believe. Those judges cost the local taxpayers money. I think the state gives us some help on the judges' salaries, ninety percent of the judges' salaries.

But then if you have a criminal court, paying the criminal cost, the cost for criminal involvement with the sheriff and all other court attendants, those are local costs. Therefore, I have taken a position that we have a role to play and ought to get the civil and criminal justice system improved.

And that means that some of the lawyers have to give up some of what they have been used to in state courts. For example, the judicial voir dire—the lawyer voir dire as compared to judicial voir dire that you have in federal courts—to eliminate some of the peremptory challenges so that we can speed the system along, so we do not always have to keep adding more and more judges without changing the system.

Now, I think that is going to be very difficult, because the Bar Association's trial lawyers do not want to give up anything. They like the system as it is because they probably, for their purposes, reach their goals. It gives them the greatest ability to represent their clients. But you have to look at the cost of the system for everyone, for the taxpayers who are supporting and assisting it. And it cries out for some reform.

And I must differ a little bit with my good colleague David Roberti. He says people do not have access to the system. They do have access. It is true it is a delayed access. It is true that sometimes it is a costly access. But the bar makes that possible by virtue of taking a case on contingency to be fulfilled, if you are successful.

So I believe that people do have access. Not all have as much as others, but the average person does have access. Cases are filed. We have a very litigious society. More cases are filed every year than the year before. So while that access is there, it is not as swift. It is not as cost-free. There is expense involved.

I think we all share responsibility for improving the system, includ-

ing the Governor—who I see was invited to be here today, but unfortunately is not here. He has the top position in the state. I believe that he should be calling for some reforms in the civil and criminal justice system so that we can reduce the cost, so that we can continue the system that we all enjoy in this country.

We all take this system for granted. And yet we see that it is under attack from the standpoint of providing fair and equal justice to all. I think we all have an obligation to maintain that system, to improve that system, and I think that is the way to keep it going rather than just say, well, it is too expensive and so on.

Let us find out where it is too expensive. Let us make some changes. Let us enact legislation that will maintain that system and improve that system. And I am hopeful. That is why I am not going to vote for more judges continually, not just because it is a Republican who is going to make the judicial appointments. I think it is important across the board that we get some reform in the system and we get some consensus from the trial part, the defense part, and move ahead in California to bring our system somewhat in tune with the times.

Honorable Willie L. Brown, Jr.

On the comments made by Mr. Edelman, I would be very, very careful about reforming the system by addressing substantive aspects of the system without clear commitment to adequately fund whatever system eventually results.

Too often in these halls of the legislature, you can develop the thrust to allegedly reform the system. And what they mean by “reform” of the system is to make it easier for “the haves” to continue to win or to make it easier to give the business to the indigents by restricting the opportunity for attorneys to represent people on a contingency fee basis.

And they do that, Mr. Edelman. They come here with a measure that proposes to, first, eliminate contingency fee arrangements; or if they cannot eliminate them, they want to restrict them to ten percent of the bounty; or they want to propose periodic payments of the lawyer’s fee, as well as for the winning litigant. All of those things have zero to do, in my opinion, with reducing the cost of the system and thereby expanding the opportunity for equal justice under the law with the civil and criminal situations.

The thrust will always be, in my opinion, to reform by taking away some of the rights people currently enjoy, while under no circumstances providing adequate funding which is desperately needed and has been desperately needed for a long time. To change the opportunity to ex-

amine jurors by lawyers probably is not a savings at all, ultimately. And it certainly does not change the fact that a retired bailiff is the investigator for the public defender's offices and every single solitary person working for the Attorney General's office is available as an investigator on an unlimited basis. On the other side of the issue, the person who selects the jury does not contribute at all to expanding equal justice of the law or access to equal justice under the law under those circumstances.

So I would be very careful before I would join a movement; I would be very careful before I sign on with a movement in pursuit of savings by restricting the rights of human beings. I would be very, very careful about it.

Robert D. Raven

Let me turn for a moment now to go back to the criminal defense side and to the question of what is the best system and what is the best mixture.

And again, group discussion on that was very revealing in the reports; mostly, the preference was toward a mixed system of a public defender's office and assigned counsel involved in a private bar. But we know there are other alternatives. There are the alternatives of a public defender office and an alternative public defender office for conflict cases. I think the Supervisor has spoken on that.

I appreciate that Senator Roberti and the Speaker are probably not going to get a chance to pass on those things in this year or the next year, but we would be very interested in their remarks. So I will start with the Supervisor. What do you see as the best system?

Honorable Edmund D. Edelman

The experience in Los Angeles County has been an interesting one. Let me just share with you what our experience has been. The county runs a large publicly-financed public defender system: 420 attorneys and 54 investigators.

We have done a good job in Los Angeles County, but not good enough; what we are finding is that there are some problems not necessarily with the public defender—because that office is run very well—but with court-appointed attorneys.

I do not know how many of you read the Los Angeles Times or listen to Channel 4, KNBC, but one of our supervisors asked for a list of the highest paid attorneys who were court-appointed to represent indigent defendants when there is a conflict or unavailability of public de-

fenders. Obviously then, the individual is entitled—the individual defendant is entitled—to proper representation. Well, these figures were somewhat shocking. One attorney, over a period of one and one-third years, received \$352,000.

Now, let me make it clear. I am not saying that he was not entitled to it. I am not suggesting that at all; but just repeating to you what the figures show. The second highest paid attorney received \$300,000. The third highest paid attorney received \$278,000.

The CAO further found that one attorney averaged 77 hours per week of billing and one week as high as 128 hours. This is a court appointed attorney. One judge awarded hourly rates of up to \$140. The average was \$60 to \$65 per hour.

There was one attorney who received per diem payments on occasions when he claimed that he was in both the municipal and superior courts on that same day. It could have been that he had an assistant.

Again, I am only repeating what the CAO said. With the records that were kept, documentation of ten percent of the reimbursements was not available. So the amount of payments could have been higher.

Now, I say this to you not to criticize the judges or to criticize the attorneys, but just to tell you that there is a lot of money being paid to private attorneys. I have long believed that we should have in Los Angeles County, with the high number of cases that we have, a second public defender office that would handle the conflict cases.

According to Wilbur Littlefield, the number of cases appointed because of conflict or because of unavailability run around ten to fifteen percent, sometimes as high as twenty percent. It is going down, but it is running around five percent. So it is twenty percent, at the most. You could do away with that by having a second public defender. You are probably not going to have a third public defender, so you are going to have to use the outside bar.

The question is: What method do you use? I have tried to get the second public defender office created and have not been successful. Only one vote. None of my colleagues wanted to support that idea.

And that is even though it shows—and the CAO made a study on my motion—it would have saved millions of dollars every year. That is obviously because a public defender costs thirty, thirty-five or forty-five dollars per hour or less, whereas a court appointed attorney is going to be hired by the court at more money. It is cheaper to do it by more county employees. We have not taken the second public defender, but we have set up an alternate defense counsel.

An alternate defense counsel, how does that work? We have not

done this in all cases because it takes the consent of the courts. You can not just tell the courts you are going to do this. They have to consent that they will utilize this alternate defense counsel. The alternate defense counsel is not a county employee. He is under contract.

The chief person, Karl Jones, is the fellow that is the alternate defense counsel. And he hires attorneys. He interviews. They are generally ex-city attorneys, ex-district attorneys. They have had some experience in the criminal area, obviously, and they are hired at a salary. But they work for the alternate defense counsel. We have not saved through this means as much as we would have saved by a second public defender, but we have saved about \$400,000 this year.

Now, not all the courts have agreed to this. We only have it operating in certain courts of Los Angeles County. We have it in twenty-six municipal court districts. The other courts use their own system. They hire, or appoint, whomever they want. The judge can do whatever he wants, hire whomever he wants to handle a case. And we know that some of the problems mentioned by people this morning were created when a judge appoints attorneys, because that sets up potential conflicts. We ought to be concerned about that.

Now, Alameda County, I am told, uses a panel where the attorneys are graded A, B and C, and they handle the varieties of complexity of the cases. The judge selects from that package. He has veto power. That is another way to go. You have also, in other counties, maybe other systems. There is no perfect system. It depends upon which kind of county you are in. It depends upon the kind of control you exercise.

Maybe the court appointed counsel would not be so bad if the county would exercise some control and the courts would exercise some control over this kind of information. When it gets out to the public that \$300,000 is being paid to attorneys billing 128 hours per week, it raises a lot of questions.

And so the system itself has to be carefully devised. I think it has to be protective of the public treasury, yet it has to guarantee that the defendant is going to receive adequate representation. And it is up to all of us to make sure that that is done.

I think we are making some inroads. The county is expanding with the judges' help now. We got a letter from the presiding judge of the Los Angeles County Municipal Court, where he is saying we are now going to have this system in the arraignment court and in the traffic court. But he is saying we ought not try it yet in the general criminal court because the superior court does not want to do it, and we are going to have to bang some heads. Again, it is very difficult.

The judges in the judicial system are an independent body of the State of California, and we have to respect that. But we need their cooperation. Because if we do not reform the system, if we do not do it internally—and I say this to my good friend Willie Brown—if we do not do it, then we face these initiatives. These initiatives get on the ballot, and that causes a good deal of damage.

It is difficult to bring change about. And maybe sometimes when you want to change something, you are better off leaving it alone for fear of what may come out of this system.

But on the other hand, I think if we do not reduce the cost for protecting the rights of individuals, protecting fairness, protecting equal justice under the law, then I think we are going to face many more initiatives coming down the line.

So I am working at my level to do this. And I am appealing to my good colleagues. They know this legislature better than anybody; otherwise, they would not be in the position they are in. So I defer to them and I respect them. But I think we have got to keep working at the local level and the state level to try to help bring some reforms; not to do away with rights, but reforms that will truly help this system survive.

Honorable David S. Roberti

A system which relies on a public defender system is probably the better in terms of representation involved. I frankly feel that there is a certain amount of departmental dignity that the public defender is going to want to keep for his clients and use as part of a career rather than even the best paid of the private defender system. This does not mean that all private defenders are poor; but, there is less control over that kind of representation.

I think the Los Angeles system is about the best that I know about. And Supervisor Edelman and his colleagues obtaining alternate defense counsel does give a certain amount of control over the types of representation and of the costs that are involved, and I think it is a system that is going to work. It has worked for the people of Los Angeles County.

But just frankly, my feeling is that in terms of representation, the feeling of self-esteem in the department, a well-funded public defender program is, in the long run, preferable to private counsel taking cases. But in many cases it is seen as a chore or a burden, to be dispensed with, and neither the quality of representation nor the cost savings are the kinds of considerations that will be priority.

Honorable Willie L. Brown, Jr.

I would agree, Supervisor Edelman, and also with Senator Roberti in indicating to you that the public defenders' office on a structured basis is preferable from my standpoint. And that is the one that I would like to support in every way.

I have great respect for my colleagues in the bar who get appointed to all these cases; but I also respect your plight, Supervisor Edelman. Some of the hourly billings of lawyers, including my own office, are just outrageous, outrageously offensive and held up by example as to what things should not be done by way of funding.

And as long as we are going to have that way of funding and as long as we are going to have the brothers of the bar billing 124 hours per week to the public sector—and I guarantee you the private sector was billed a similar number of hours in that week, probably beyond the number of hours that actually were in that week—that just makes life awfully complicated for those of us that have to do the defending. And we would rather get out of that. And the best way is to do it by way of a subdefender.

Secondly, I suspect, as Mr. Roberti said, the quality of the representation is substantially enhanced across the board. There will obviously be some areas in which that is not the case. But on balance, ninety to ninety-five percent of the public defenders are superior, skilled persons at that effort.

Just on an ongoing basis, they are more familiar with it. They are more familiar with the nuances of it. They know the bailiffs. They know all the local things that are not on the statutes and not in the case precedent that also have some application to the criminal defense system. And it seems to me the public defender is in a better position to know that and, in fact, should be adequately funded. And I do favor the concept of the public defender.

I am impressed with the Alameda County situation in which, for conflict purposes, there is a predetermined panel. There also ought to be a predetermined fee for that panel so you eliminate the need to do 127 hours of billing in a single week in order to be adequately compensated for what your efforts obviously are at \$62 an hour. I do not know any lawyer that is working for \$62 an hour these days, unless he is billing you for four hours for each one that he works.

So I think it would be better if we go for a fee-for-service basis. It is a stated amount and is an absolutely adequate amount for those in the

private sector who decide to become a part of that panel. And the selection process would be from that panel only in the conflict situations.

I was unaware of your contract arrangement with Mr. Jones in Los Angeles County. I am also impressed with that method of handling your conflict cases. But I would frankly like to have us utilize an adequately staffed public defender's office, fully funded and with a better quality of representation at a price that is politically defensible and defensible, and probably at a price less than it costs us currently.