A Statutory Proposal Compensating Attorneys Appointed to Represent Indigent Civil Defendants

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A STATUTORY PROPOSAL COMPENSATING ATTOORNEYS APPOINTED TO REPRESENT INDIGENT CIVIL DEFENDANTS

I. INTRODUCTION

Perhaps the highest ideal to which the American judicial system can aspire is that justice must be blind to race, sex, religion, and wealth. Although this goal is not always attainable, the judicial system should always strive to reach it. Of the possible prejudicial characteristics, wealth, or the lack of wealth, is the most difficult for the legal system to neutralize as a factor in civil litigation. Not only can a shortage of funds reduce the quality of representation available, it affects the quality and extent of discovery, the ability to investigate the facts of a case thoroughly, the capacity to pursue an adverse judgment on appeal, and the initial decision to file or defend a case. Recognizing that money has such a profound effect upon lawsuits, California courts are aggressive in attempting to reduce any discrepancy in meting out justice in civil causes of action between the poor and the wealthy.

One way to neutralize differences in wealth between civil litigants is to provide an attorney to a person who cannot afford to hire one. California does not allow an indigent litigant to retain counsel at the expense of either the state or the lawyer in all civil cases, but the indigent defendant has the constitutional and/or statutory right to retain a court-appointed attorney in some civil litigation. A court-appointed attorney representing an indigent defendant in a civil suit must work gratuitously and may be inexperienced in handling the legal issues involved in the case. Due to the inadequacies in the court-appointed counsel system, conscripted counsel must shoulder a heavy financial burden and defendants may not receive committed and competent representation.

The problems with court-appointed attorneys representing indigent civil defendants are discussed in Cunningham v. Superior

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2. See infra text accompanying notes 104-08.
Court, a 1986 California decision. The appellant in Cunningham was an appointed attorney who was forced to represent an indigent civil defendant in a state prosecuted paternity case. The Second District Court of Appeals held that appointment of counsel without compensation violates the equal protection clause because the government "seeks to charge the cost of operation of a state function, conducted for the benefit of the public, to a particular class of persons." Although the Cunningham court's decision does not bind any district, the decision's logic, coupled with the California Supreme Court's refusal to hear the case, is potentially persuasive to other California courts.

If the Cunningham holding is adopted by other districts in California, California trial courts will be faced with a twofold dilemma. First, an indigent civil defendant who has the constitutional or statutory right to be represented by counsel must have an attorney, but the court will lack authority to appoint an involuntary, pro bono attorney. If the trial court cannot appropriate funds to pay an appointed attorney and if no volunteer or legal aid society steps forward to represent the indigent, the trial court will be required to dismiss the case against the indigent defendant.

This comment examines the dilemma created by the Cunningham decision. Section II gives the judicial history of the compensation and representation issues. Section III analyzes the constitutionality of appointing attorneys to indigent civil litigants and the unconstitutionality of failing to compensate attorneys who are appointed to represent indigent civil defendants. Finally, Section IV proposes statutory reform to provide compensation for fees and reimbursement for costs to attorneys who are appointed to represent indigent defendants in certain civil cases.

4. Id. at 348, 222 Cal. Rptr. at 862.
II. BACKGROUND

A. Early California Cases That Denied Compensation to Appointed Attorneys

The issue of whether attorneys must represent indigent defendants without compensation is not a recent one. In 1860, the California Supreme Court decided in *Rowe v. Yuba County* that absent a statute, attorneys must represent indigent defendants in criminal cases without compensation. In an often quoted passage from the decision, the *Rowe* court said:

[It is part of the general duty of counsel to render their professional services to persons accused of crime, who are destitute of means, upon the appointment of the Court, when not inconsistent with their obligations to others; and for compensation, they must trust to the possible future ability of the parties. Counsel are not considered at liberty to reject, under circumstances of this character, the cause of the defenseless, because no provision for their compensation is made by law.*

The same principle was continued in *Lamont v. Solano County.* In this criminal case, an appointed attorney spent a considerable amount of his own funds in investigating a possible defense for the accused. He filed suit against the county where the criminal case was tried for reimbursement of his expenses. The California Supreme Court rejected the attorney's claim and held that he had to give his services to the accused without any reimbursement.

There were no California cases holding that an attorney could not be forced to represent an indigent without compensation until *Cunningham.* Accordingly, the state Legislature's lack of action in providing money for court-appointed attorneys' costs and fees meant that conscripted attorneys were required to work for free. Even though court-appointed attorneys cannot be paid for their services, the judiciary and Legislature have expanded indigents' right to counsel in California.

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8. 17 Cal. 61 (1860).
9. Id. at 63.
10. 49 Cal. 158 (1874).
11. Id. at 159.
B. Federal Expansion of Indigents' Right to Appointed Counsel

California courts became receptive to the appointment of counsel for indigents in civil litigation because the United States Supreme Court expanded indigents' right to counsel and access to the courts. In *Gideon v. Wainwright* and *In re Gault*, the United States Supreme Court established precedent that formed the basis of subsequent California decisions establishing indigents' right to counsel in certain civil causes of action. In *Gideon*, the Court recognized that an unrepresented criminal defendant in the American judicial system is not guaranteed a fair trial. The *Gault* decision extended *Gideon* to a juvenile delinquency hearing because of its criminal nature and because the proceedings were "comparable in seriousness to a felony prosecution." The appointment of attorneys in *Gideon* and *Gault* was seen as essential to an indigent's fair defense. This rationale was soon extended to an indigent's financial inability to gain access to the court.

Unable to afford litigation costs, indigents lacked a meaningful opportunity to be heard in courts. In *Boddie v. Connecticut*, the United States Supreme Court ruled that indigents could not be forced to pay filing fees in order to dissolve their marriages. The *Boddie* Court recognized that the indigents' lack of access to the court in this civil case effectively denied them their rights; a state's monopoly over "techniques of final dispute settlement" demands that the state find ways to maintain an equal right of access to the proceedings. Although subsequent Supreme Court decisions limited the *Boddie* decision, they did not overrule the principle that indigents should have access to appointed counsel.

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13. 372 U.S. 335 (1963). The Court held that any person charged with a felony has a sixth amendment right to an appointed counsel.
14. 387 U.S. 1 (1967). Basing its decision on the defendant's due process rights, the Court appointed counsel to an indigent in a juvenile delinquency proceeding in which institutional commitment was a possibility.
16. 372 U.S. at 344.
19. Id. at 380-81.
20. Id. at 375. The Court perceived a divorce proceeding as being a technique of final dispute settlement.
21. Ortwein v. Schwab, 410 U.S. 656 (1972) (the Court upheld the validity of a twenty-five dollar filing fee required for appellate review of an agency determination that resulted in lower welfare payments for a poor person); United States v. Kras, 409 U.S. 434 (1971) (an indigent debtor was required to pay a fifty dollar filing fee in order to obtain a discharge in bankruptcy).
gents have rights of equal access to the courts in certain civil litiga-
tory situations.

C. California’s Treatment of Indigents’ Right to Counsel Before Payne v. Superior Court

The California courts did not initially participate in the expan-
sion of indigents’ rights in civil litigation. In In re Robinson, the Second District Court of Appeals found no statutory or constitu-
tional right to appointed counsel for either parents or children in dependency status proceedings. The court ruled that there was no legislative authorization for court-appointed counsel in proceedings under sections 634, 679, 700 and 729 of the California Welfare and Institutions Code and section 27706(e) of the Government Code. The Robinson court viewed the statutes as restricting court-appointed attorneys to delinquency proceedings and differentiated “a proceeding to adjudicate the dependency status of a child as a true civil cause, comparable in essentials to a child custody controversy between parents, except that the controversy is not between parents but one between a parent (or parents) and the state as parens patrie.”

Further demonstrating the California judiciary’s initial reluc-
tance to appoint attorneys to represent indigent defendants, in Hunt v. Hacket, the Second District Court of Appeals refused to appoint counsel to an indigent defendant in a civil cause of action involving the sale of real estate. The Hunt court, while distinguishing Ferguson v. Keays, ruled that there is no California common law or constitutional right to the appointment of counsel for indigents in civil cases. The court reasoned that the indigents’ right of access to the courts “has not been extended to include any right to court-ap-

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24. Welfare and Institutions Code sections 634, 679, 700 and 729 discuss the procedures for appointing counsel to juvenile delinquents who are described in Welfare and Institutions Code sections 601 and 602. Section 27706(e) of the Government Code sets forth the proceed-
ings in which public defenders can be appointed to represent indigents. In re Robinson, 8 Cal. App. 3d 783, 785-86, 87 Cal. Rptr. 678, 679-80 (1970).
25. Robinson, 8 Cal. App. 3d at 786, 87 Cal. Rptr. at 680 (italics omitted).
27. 4 Cal. 3d 649, 484 P.2d 70, 94 Cal. Rptr. 398 (1971). In Ferguson v. Keays, the California Supreme Court held that an indigent with a meritorious appeal did not have to pay an appellate filing fee. 4 Cal. 3d at 652, 484 P.2d at 71, 94 Cal. Rptr. at 399. The Hunt v. Hacket court said that the Ferguson ruling was limited to its facts and could not be extended to any right to court-appointed counsel. 36 Cal. App. 3d at 137, 111 Cal. Rptr. at 458.
pointed counsel." The *Hunt* decision has not been overruled and is the current rule regarding the inability of courts to appoint counsel to all indigent civil litigants.

Although *Hunt* stands for the broad proposition that all indigent civil defendants cannot have appointed attorneys, an indigent defendant's right to counsel has been expanded to some civil situations. In *In re Rodriguez*, which was decided two months before *Hunt*, an appellate court held that an imprisoned father defending against a state initiated suit to remove his children from his custody was entitled to court-appointed counsel based on statutory and due process rights. After determining that California Civil Code section 237.5 mandated appointment of an attorney in a Civil Code section 232(d) custody case, the *Rodriguez* court relied on *Gideon* to decide that due process requires appointment of counsel for an accused when the state seeks to deprive parents of all further parental relationships with their children. This constitutional grounding, coupled

30. At the beginning of the proceeding on a petition filed pursuant to this chapter, the judge shall first read the petition to the child's parents, if they are present, and may explain to the child the effect of the granting of the petition and upon request of the minor upon whose behalf the petition has been brought or upon the request of either parent the judge shall explain any term or allegation contained therein and the nature of the proceeding, its procedures, and possible consequences. The judge shall ascertain whether the minor and his parent, have been informed of the right of the minor to be represented by counsel, and if not, the judge shall advise the minor and the parents, if present, of the right to have counsel present.

The court may appoint counsel to represent the minor whether or not the minor is able to afford counsel, and if they are unable to afford counsel, shall appoint counsel to represent the parents. The court may continue the proceeding for not to exceed seven days, as necessary to make an appointment of counsel, or to enable counsel to acquaint himself with the case, or to determine whether the parents are unable to afford counsel at their own expense.

When the court appoints counsel to represent either the minor or the parents under the provisions of this section, such counsel shall receive a reasonable sum for compensation and expenses, the amount of which shall be determined by the court. Such amount shall be paid by the real parties in interest, other than the minor, in such proportions as the court deems just. However, if the court finds that none of such real parties in interest is able to afford counsel, such amount shall be paid out of the general fund of the county.

*Rodriguez*, 34 Cal. App. 3d at 513-12 n.1, 110 Cal. Rptr. at 56-57 n.1.
31. Civil Code section 232(d) gives the procedures for declaring a minor free from the custody or control of the parent. If the parents have been convicted of a felony, the child could be declared free from the custody of the parents. *Rodriguez*, 34 Cal. App. 3d at 511-12 n.1, 110 Cal. Rptr. at 56-57 n.1.
with statutory authorization provides the basis for all subsequent cases authorizing appointment of counsel in civil litigation.

Without mentioning any of the due process considerations discussed in Rodriguez, three cases used statutory language to authorize the appointment of counsel in appellate court proceedings. These actions were brought by the state in order to remove the children from the custody of their parents and to make these children dependent upon the state. In a decision, In re Simeth, that partially reversed Robinson, the Second District Court of Appeals held that parents are entitled to counsel when their children are removed from them in a custody proceeding or are found to be dependent pursuant to Welfare and Institutions Code section 600(a). This change resulted from statutory alteration made by the Legislature since Robinson.

One year after Simeth, the same appellate court in In re Norma M. held that an indigent appealing a custody and dependency ruling pursuant to Civil Code section 232 was authorized by the statute to petition for counsel. The court based its decision on two factors. Recognizing the similarities between Welfare and Institutions Code section 600 proceedings and Civil Code section 232 proceedings, the court perceived the inconsistency of giving indigents free

33. See infra text accompanying notes 34-57 and 59-62.
36. Section 600(a) proceedings are brought by the state to declare the child a dependent of the juvenile court because the child has need of proper and effective parental care or control and has no parent or guardian willing to exercise, capable of exercising, or actually exercising such care or control. In re Simeth, 40 Cal. App. 3d 982, 115 Cal. Rptr. 617 (1974).
37. The statute itself was not altered, but similar statutes (Welfare and Institutions Code sections 634, 679 and 700) were amended to authorize the appointment of counsel in appellate proceedings. These sections were viewed in conjunction with Government Code section 27706(e), which authorized the appointment of public defenders to represent defendants in proceedings pursuant to Welfare and Institutions Code section 600. Because the public defender is appointed to represent the parent in this juvenile delinquency proceeding, the Simeth situation is not the type of civil court-appointed counsel that this comment examines. Simeth, 40 Cal. App. 3d at 984, 115 Cal. Rptr. at 618.
38. 53 Cal. App. 3d 344, 125 Cal. Rptr. 721 (1975).
39. This proceeding is brought by a government agency that believes the parent has abandoned her children. In re Norma M., 53 Cal. App. 3d 344, 346, 125 Cal. Rptr. 721, 722 (1975).
40. In fact, the court felt in several respects a California Civil Code section 232 appeal compels an appointment of counsel more than a Welfare and Institutions Code section 600 appeal. Civil Code section 237.5 requires the appointment of trial counsel in a section 232 proceeding, whereas Welfare and Institutions Code section 634 merely authorizes an appointment in a 600 proceeding. Furthermore, a section 232 proceeding could permanently free the children from the parent’s custody, while a 600 proceeding can only result in a parent’s loss of custody on a non-conclusive basis. Norma M., 53 Cal. App.3d at 346, 125 Cal. Rptr. at 722-23. For section 232’s context see supra note 31.
transcripts of the trial court proceedings while disallowing them free counsel. The California Supreme Court supported the Norma M. decision in its In re Jacqueline H. ruling, in which the court held that indigent defendants in a Civil Code section 232 proceeding are entitled to counsel.

D. Payne and the California Expansion of Indigents’ Right to Counsel in Paternity, Child Support and Parental Termination Proceedings

As evidenced by Simeth, Norma M. and Jacqueline H., California courts primarily relied on legislative authorization to decide whether indigents were entitled to court-appointed attorneys. Rodriguez stood alone in utilizing a due process argument to grant an indigent’s right to counsel. None of these cases addressed whether these appointed attorneys should be compensated for their services.

Payne v. Superior Court was the first California case to authorize appointing counsel to indigent civil defendants solely on constitutional, as opposed to statutory grounds. This decision was also the only judgment that combined the right to counsel issue with the court’s lack of authority to compensate court-appointed attorneys.

Payne was a prisoner who had a default judgment against him in a civil case due to his inability to attend the trial. Based on the due process arguments made in Boddie, the court found that Payne was denied his right of access to the courts and that in certain circumstances the only method of preserving an indigent prisoner’s right of access is appointment of counsel. In footnote six of the opinion, the court stated that until the Legislature “determines that appointed counsel may be compensated from public funds in civil cases, attorneys must serve gratuitously in accordance with their statutory duty not to reject ‘the cause of the defenseless or the oppressed.’” (Bus. and Prof. Code 6068, subd. (h)).

42. 21 Cal. 3d 170, 577 P.2d 683, 145 Cal. Rptr. 548 (1978).
44. See supra text accompanying note 34.
45. See supra text accompanying note 38.
46. See supra text accompanying note 42.
47. See supra text accompanying note 29.
50. Payne, 17 Cal. 3d at 924, 553 P.2d at 576, 132 Cal. Rptr. at 416.
51. Id. at 920 n.6, 553 P.2d at 574 n.6, 132 Cal. Rptr. at 414 n.6. “It is the duty of an
set forth the test to determine whether an indigent prisoner can obtain an appointed counsel.82

The expansion of indigents' right to counsel has continued. The landmark case in this area is *Salas v. Cortez*.83 In *Salas*, the California Supreme Court decided that indigents are constitutionally entitled to court-appointed counsel in proceedings to determine paternity where the state appears as a party or appears on behalf of a mother or a child.84 Without relying on an explicit statutory authorization, the court held that the appointment of counsel was justified by 1) the serious reputational, familial and possible criminal ramifications of a paternity adjudication; 2) the complexity of the proceedings; and 3) the importance of the outcome to the state.85 The court distinguished paternity proceedings from other civil actions because in a paternity proceeding, "the full power of the state is pitted against an indigent in an adjudication of the existence of a fundamental biological relationship entailing serious financial, legal and moral obligations."86 The state's interest in not appointing attorneys is largely financial, based on the extra expense of representing defendants. The *Salas* court found that the increased likelihood of accurate paternity determinations counterbalanced any extra expenses incurred by the state.87

Since *Salas*, no decisions curtail indigents' right to appointed counsel in paternity and child support cases. In fact, several cases refine this right. In *Lassiter v. Department of Social Services*,58 the United States Supreme Court, while rejecting the view that due process requires appointment of counsel in every parental status proceeding involving indigent parents, held that under the fourteenth

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82. CAL. BUS. & PROF. CODE § 6068(h) (West 1982).
83. Before a prisoner who is a defendant in a civil suit can be appointed counsel, the trial court must determine whether the prisoner is indigent. If the prisoner is indigent, then the court must decide if a continuance is feasible. If a continuance is not feasible, it should then ascertain whether the prisoner's interests are actually at stake in the suit. Finally, the court should decide whether an attorney would be helpful to him under the circumstances of the case. An attorney would not be necessary if the prisoner is not contesting the suit against him. An attorney would be necessary if the prisoner plans to defend the action and an adverse judgment would affect his present or future property rights. *Payne*, 17 Cal. 3d at 924, 553 P.2d at 577, 132 Cal. Rptr. at 417.
85. Id. at 34, 593 P.2d at 234, 154 Cal. Rptr. at 537.
86. Id. at 26-34, 593 P.2d at 229-34, 154 Cal. Rptr. at 532-37.
87. Id. at 32, 593 P.2d at 233, 154 Cal. Rptr. at 536.
88. Id. at 33, 593 P.2d at 233, 154 Cal. Rptr. at 536.
amendment, indigent parents may be entitled to appointed counsel in parental termination proceedings. This decision sustained California's treatment of the issue since the Supreme Court left to the states the issue of whether counsel should be appointed in parental termination proceedings.

With implicit United States Supreme Court support for California's treatment of appointing attorneys for indigents in parental termination proceedings, two more appellate courts expanded indigents' right to court-appointed counsel even further. Citing Lassiter, the Third District Court of Appeals in In re Jay R. held that an indigent non-custodial parent has a due process right to court-appointed counsel in a parental termination and adoption proceeding brought by the stepparent without the consent of the natural parents, pursuant to Civil Code section 224. Similarly, in County of Ventura v. Tillett, Division Four of the Second District Court of Appeals held that indigent defendants in child support actions prosecuted by the district attorney under Welfare and Institutions Code section 11350 are constitutionally entitled to the appointment of free counsel. With these two decisions, the indigents' right to court-appointed counsel reached its zenith.

E. California's Treatment of the Compensation for Conscriptioned Attorneys in Civil Litigation after Payne

Subsequent to Payne, California courts continued to expand indigent defendants' right to counsel to civil cases in which the Legislature had not authorized court-appointed representation. However, the courts did not grant compensation for the attorneys' services to the indigent defendants. The California Supreme Court refused to require public funds to be spent for court-appointed attorneys and for court-appointed interpreters absent some legislative mandate. Despite the lack of legislative authorization, three trial courts ordered counties to reimburse court-appointed attorneys' costs, but all three orders were reversed by appellate courts due to a lack of statu-

60. Civil Code section 224 gives the criteria for when a parent could have the power of consent over the adoption of his or her child taken away. CAL. CIV. CODE § 224 (West 1982).
62. In a section 11350 proceeding, the county attempts to obtain reimbursement for the money given to the defendant's child by the county for his or her support. CAL. WELF. & INST. CODE § 11350 (West 1982).
tory authorization. Legislative silence regarding compensation for court-appointed counsel is consistently interpreted by appellate courts as a legislative refusal to pay conscripted counsel.

Recognizing that they could not give direct payments to attorneys, two trial courts tried unique approaches to the problem. In Littlefield v. Superior Court the trial court, pursuant to Government Code section 27706, appointed the public defender to represent an indigent defendant in a paternity and child support action brought by the county. The Second District Court of Appeals construed Government Code section 27706 narrowly and thus reversed due to a lack of specific authorization. In County of Tulare v. Ybarra, the trial court dismissed a government suit for paternity and reimbursement for public assistance payments because the father could not afford counsel and there were no public funds to pay a court appointed attorney. The Fifth District Court of Appeals reversed the lower court decision because prior case law established that an indigent’s right to a court-appointed counsel requires the court-appointed attorney to serve gratuitously.

The trial court orders that attempted to either compensate court-appointed attorneys or alleviate the burden of representation of indigent civil defendants demonstrate the judiciary’s sympathy with the plight of conscripted counsel. While recognizing the unfairness of the present court-appointment system upon the lawyer who is forced to represent the indigent civil defendant, appellate courts could not provide compensation until the supreme court or the Legislature authorized reimbursement for the attorney’s services.

In 1984, the California Supreme Court granted a hearing for Yarbrough v. Superior Court, a decision that California attorneys hoped would establish the conscripted attorney’s right to compensa-

66. Smith v. Superior Court, 118 Cal. App. 3d 512, 173 Cal. Rptr. 437 (1981); County of Los Angeles v. Superior Court, 102 Cal. App. 3d 926, 162 Cal. Rptr. 636 (1980); County of Fresno v. Superior Court, 82 Cal. App. 3d 191, 146 Cal. Rptr. 880 (1978). The court rejected the argument that the Uniform Parentage Act authorizes payment of these fees and costs because the relevant section of the act applies only to a cause of action brought by a parent or a child and not to one brought by a country.
67. See, e.g., Payne, 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976); County of Fresno, 82 Cal. App. 3d at 196, 146 Cal. Rptr. at 882.
69. See supra notes 24 and 37.
71. See supra note 66.
72. See supra text accompanying notes 68 and 70.
73. See supra text accompanying notes 6 and 51.
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Yarbrough was convicted of second degree murder, and while in prison, was named as a defendant in a wrongful death suit. The trial court concluded that appointment of counsel was appropriate, but Yarbrough’s attorney in the criminal trial indicated that he would decline any gratuitous representation. The county refused to compensate Yarbrough’s attorney, and the trial court refused to appoint a public defender.  

While Yarbrough was pending before the supreme court, the California Legislature attempted to provide compensation for attorneys appointed to represent indigents in civil cases by passing Senate Bill 2057. The proposed bill provided $1,000,000 to compensate attorneys for legal services provided and reimburse costs incurred by attorneys appointed to represent indigent defendants in civil actions. The law limited the rate of compensation to a maximum of $60 per hour. The lawyer could receive compensation when appointed to represent an indigent who had the constitutional right to be represented by counsel. Governor Deukmejian vetoed the bill because Yarbrough was pending before the California Supreme Court and the bill allowed the court to control the expenditure of funds for representation of indigents. Also, noting that decisional law confined the right of appointed counsel to indigents incarcerated in prison, with this bill the court could expand the term “constitutional right” to apply to any indigent defendant.

Governor Deukmejian’s hope that Yarbrough would answer the question of whether lawyers can be compelled to represent indigents without compensation was in vain. The supreme court did not reach the issue in its decision. Rather, the California Supreme Court issued a writ of mandate directing the trial court to determine whether access could be provided for Yarbrough by abating the matter until he was released from prison. Upon reviewing the criteria set forth in Payne, used to determine whether indigent prisoners are required an appointed counsel, the supreme court criticized the trial court for not receiving evidence to permit an assessment of whether or how

75. Id. at 207, 702 P.2d at 589, 216 Cal. Rptr. at 431.
76. Id. at 202, 702 P.2d at 586, 216 Cal. Rptr. at 428.
78. Id.
81. SENATE JOURNAL, supra note 79, at 14,346.
83. See supra note 52.
the prisoner's future economic fortunes would be affected by a judgment against him. Chief Justice Bird dissented, criticizing the court for avoiding the issues regarding: (1) whether attorneys appointed to represent incarcerated, indigent civil defendants are entitled to compensation; (2) whether the courts possess the power to order such payment; 3) what will be the source of such compensation. The trial court reheard the case and followed the supreme court's instructions, and counsel was appointed for Yarbrough. The Fifth District Court of Appeals affirmed the trial court decision, and the California Supreme Court refused to review the case.

After both the Legislature and the supreme court failed to alleviate the compensation problem, a California appellate court decided to remove the financial burden on conscripted counsel. In Cunningham, an appellate court refused to order an attorney to represent an indigent civil defendant gratuitously. The appellate court reversed a superior court order compelling Cunningham to perform pro bono representation for an indigent defendant in a state initiated paternity proceeding. Cunningham, whose practice was limited to personal injury matters, had never handled a paternity case. The appointment was made pursuant to a plan designed by the Ventura County Bar Association and the superior court to allocate free representation among lawyers who have offices in Ventura County. Not only did the Second District Court of Appeals use the equal protection clause to reverse the superior court order, the court referred to various policy reasons for support of its ruling. The Cunningham court concluded that compulsory pro bono services discourage attorney participation in voluntary programs and reduce the effectiveness of counsel. Also, the court stated that the Legislature must provide compensation for conscripted attorneys if the legal profession is to provide its services to the poor. The appellate court ordered the

85. Id. at 207, 702 P.2d at 590, 216 Cal. Rptr. at 432.
86. The trial court decided that it had no legal authority to order any public entity to pay legal fees or costs in this defense. Yarbrough's counsel must serve without compensation. The appellate court affirmed in an unpublished opinion. Carrizosa, Yarbrough Case Still Awaits Trial - By Free Lawyer, 100 L.A. Daily J., Nov. 16, 1987, at 1, col. 6.
88. Id. at 339, 222 Cal. Rptr. at 855.
89. Id. at 347-52, 222 Cal. Rptr. at 861-64.
90. Id. at 352-56, 222 Cal. Rptr. at 864-67.
91. Id.
92. Id.
93. Id. at 356-57, 222 Cal. Rptr. at 867.
The Cunningham decision marks a drastic change in the judicial treatment of the issue of whether a court-appointed attorney is entitled to any compensation. Again, this ruling may only have limited persuasiveness, but trial courts in the second district can no longer conscript unwilling attorneys for indigent defendants in paternity, child support and dependency proceedings unless the county provides compensation for these attorneys' services. Courts have established the indigent civil defendant's right in certain cases to court-appointed counsel. But if there are no volunteers to represent these indigents and no legislative appropriation of funds for these court-appointed attorneys, then paternity, reimbursement for public assistance, child support and dependency proceedings could cease to be prosecuted in the second district.

III. Analysis

As a result of the Cunningham decision, trial courts are faced with a conflict. Certain indigent civil defendants have a statutory and constitutional right to court-appointed attorneys. On the other hand, trial courts violate the constitutional rights of the conscripted lawyers if they are not compensated for their services. An indigent defendant's right to counsel in various civil proceedings is authorized by the Legislature and the constitution, and his or her constitutional right to counsel is the product of a due process analysis. The argument against appointing attorneys without giving compensation for their services can be broken down into constitutional and policy rationales. After reviewing the reasons for and against appointing attorneys for certain indigent civil defendants as well as the reasons for and against compensating their appointed counsel, it is apparent that the California Legislature must appropriate funds to pay these attorneys.

94. Id. at 357, 222 Cal. Rptr. at 868.
95. See supra note 5.
96. See infra text accompanying notes 104-08.
97. See infra text accompanying notes 104-08.
98. See, e.g., Robinson, 8 Cal. App. 3d at 783, 87 Cal. Rptr. at 678; Salas, 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529 (1979).
A. An Indigent Defendant’s Right to Counsel

An indigent defendant may retain a court-appointed attorney only if the court believes he or she has a constitutional or statutory right to retain counsel. In a federal criminal case where a jail sentence is usually imposed, the sixth amendment requires that the court appoint counsel if the defendant is financially unable to retain one. This right is applicable to state criminal trials through the fourteenth amendment. The sixth amendment does not, however, provide a right to an appointed attorney in civil proceedings. Courts that appoint attorneys for indigent civil defendants without a legislative mandate, do so based on the indigent’s due process right to counsel, which is afforded the defendant through either a state’s constitution or the United States Constitution. California courts that appoint counsel to indigent civil defendants based their holdings on the indigent’s due process rights, using both the California and the United States Constitutions.

Presently in California, as developed in the previous section, there are five scenarios in which courts recognize that an indigent civil defendant has a right to an appointed attorney: (1) when the indigent is a prisoner and his or her right of access to the courts cannot be attained unless counsel is appointed for him or her; (2) in a paternity suit where the state appears as a party or appears on behalf of a mother or a child; (3) when the state is attempting to take custody of the indigent’s children; (4) when a stepparent attempts to take custody of the children belonging to an indigent non-custodial parent; (5) when a county attempts to obtain reimbursement for the money given to the defendant’s child by the county for his or her support. There are several rationales for granting the indigent defendant counsel in these civil proceedings. Courts provided indigents with attorneys in civil suits based solely on statutory interpretation and based on the defendant’s constitutional

101. U.S. Const. amend. VI.
103. Salas, 24 Cal. 3d at 34, 593 P.2d at 234, 154 Cal. Rptr. at 537; County of Ventura v. Tillett, 133 Cal. App. 3d 105, 183 Cal. Rptr. 741, 746-47 (1982).
109. In re Jacqueline H., 21 Cal. 3d 170, 577 P.2d 683, 145 Cal. Rptr. 548 (1978);
rights.\textsuperscript{110} Other courts assigned counsel to indigents using a combination of statutory and constitutional rights.\textsuperscript{111}

When the California Supreme Court decides whether or not to appoint counsel for an indigent civil defendant, its due process analysis differs from that propounded by the United States Supreme Court in \textit{Lassiter}.\textsuperscript{112} The biggest difference between California's treatment of this issue and the United States Supreme Court's treatment of this issue is that the United States Supreme Court presumes that there is no right to appointed counsel when the defeated indigent defendant will not be deprived of his or her personal freedom.\textsuperscript{113} California courts do not analyze the indigent's due process rights with this presumption.\textsuperscript{114}

Both the California and federal due process tests balance the interests of the state and of the individual.\textsuperscript{115} In \textit{Salas},\textsuperscript{116} the California Supreme Court balanced these concerns and examined the nature of the proceedings in order to develop the factors which distinguish paternity proceedings from other civil proceedings.\textsuperscript{117} In \textit{Lassiter},\textsuperscript{118} the United States Supreme Court balanced the identical interests and evaluated the risk that the procedures used will lead to erroneous decisions.\textsuperscript{119} The \textit{Salas} court also noted the potential unreliability of a paternity determination when the indigent defendant does not have representation.\textsuperscript{120} The \textit{Jay R.} court examined "the nature of the proceedings to determine whether counsel is necessary to obviate the risk of erroneous and unfair results,"\textsuperscript{121} thus combining the \textit{Salas} test with the \textit{Lassiter} test.

California courts that give indigent defendants in civil cases the right to court-appointed counsel based upon the indigents' due pro-

\textsuperscript{113} 452 U.S. 18 (1981).
\textsuperscript{114} \textit{Salas}, 24 Cal. 3d at 26-27, 593 P.2d at 229-30, 154 Cal. Rptr. at 532-33; \textit{Jay R.}, 150 Cal. App. 3d at 260-62, 197 Cal. Rptr. at 678-79.
\textsuperscript{115} \textit{Salas}, 24 Cal. 3d at 27, 593 P.2d at 230, 154 Cal. Rptr. at 533; \textit{Lassiter} v. Department of Social Services, 452 U.S. 18, 27 (1981).
\textsuperscript{116} 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529 (1979).
\textsuperscript{117} \textit{Id.} at 26-27, 593 P.2d at 230, 154 Cal. Rptr. at 533.
\textsuperscript{118} 452 U.S. 18 (1981).
\textsuperscript{119} \textit{Id.} at 27.
\textsuperscript{120} 24 Cal. 3d at 31, 593 P.2d at 232, 154 Cal. Rptr. at 535.
\textsuperscript{121} 150 Cal. App. 3d 251, 262, 197 Cal. Rptr. 672, 679 (1983).
cess rights provide many reasons to justify the indigents' need for these attorneys. With the exception of *Payne*, these cases involve state participation in parental termination, paternity determination or the reimbursement of state child support payments proceedings. In such cases, the state is an adversary to the indigent. This adversarial relationship is an important factor in the due process discussion, as its existence distinguishes these three types of cases from other civil litigation, where there usually is no right to a court-appointed attorney. Courts which found a right to counsel recognized that an unrepresented indigent is not an adversarial match for the power of the state.

Not only does the indigent defendant's unequal position as compared to the state warrant the appointment of counsel, the substantial deprivations that an indigent defendant risks in all of the before mentioned proceedings further justifies the appointment of counsel for him or her. In a parental termination case, either one brought by the state or by a step-parent, the indigent defendant risks losing the parental relationship to his or her children, which is a "vastly greater punishment than the levying of a fine or even imprisonment resulting from a criminal conviction." In a paternity proceeding, the father risks the declaration of the existence of a biological relationship, which has profound ramifications for him. Not only does

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122. 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976). *Payne*’s decision primarily relates to an indigent prisoner’s right of access to the courts and how the right to court-appointed counsel is needed to preserve the prisoner’s right of access to the courts. Since the court did not rule on the prisoner’s right to counsel separately from the prisoner’s right of access, the *Payne* court’s discussion of when the court-appointed attorney should be appointed does not factor in the state participation in the trial. Thus, the *Payne* court did not analyze why an indigent defendant has a due process right to a court-appointed attorney in a civil case when the state is a participant.

123. In fact, a parent receiving state AFDC aid must assign to the county any rights to support from any other person and must cooperate in establishing the paternity of a child born out of wedlock for whom aid is claimed. *Cal. Welf. & Inst. Code* §§11475.1, 11476 (West 1982 & Supp. 1987). The district attorney is authorized to bring an action on behalf of either the mother, the child or the county to determine parentage and enforce support. *Cal. Welf. & Inst. Code* § 11350.1 (West 1982 & Supp. 1987). Although these services are voluntarily provided, these suits are mandatory where the custodial parent is receiving welfare payments. *Salas*, 24 Cal. 3d at 30, 154 Cal. Rptr. at 534, 593 P.2d at 231.


125. *Rodriguez*, 34 Cal. App. 3d at 514, 110 Cal. Rptr. at 59; *Salas*, 24 Cal. 3d at 30-31, 593 P.2d at 232-33, 154 Cal. Rptr. at 535; *Jay R.*, 150 Cal. App. 3d at 263, 197 Cal. Rptr. at 680. Even though *Jay R.* involved a stepparent adoption, the parent’s lack of consent to the adoption often involves the state as a party to the suit by its report to the court on whether it approves of the stepparent’s adoption, along with its reasons why it approves of the adoption.

this determination present possible negative reputational and familial implications, a paternity judgment could result in child support obligations. If these payments are not made, the father could face a civil contempt ruling. An adverse civil contempt ruling might ultimately lead to imprisonment. When the state brings a suit to gain reimbursement for money it provides to support defendant's children, the defendant risks possible deprivation of property and liberty. This risk is a private interest which merits the appointment of counsel to represent the indigent defendant. Even the state has an interest in appointing counsel for indigent defendants. In a paternity case—an attorney adds to the reliability of the paternity proceeding.

In opposition to the reasons supporting appointment of counsel, the state's interest in refusing to appoint counsel is financial. According to the Lassiter court, the state wishes these proceedings to be decided "as economically as possible and thus wants to avoid both the expense of appointed counsel and the cost of the lengthened proceedings his presence may cause. But though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here." A minority of states do not appoint attorneys to represent indigent defendants in paternity, child support and parental termination proceedings. The jurisdictions that do not appoint counsel to indigent defendants in paternity and non-support proceedings base their holdings on insufficient threats to the defendant's liberty or property and/or on the lack of complexity involved in the suits. The majority of jurisdictions hold that indigent defendants in a parental termination hearing brought by the state have a due process right to appointed counsel. The states that do appoint attorneys to indigent

127. Salas, 24 Cal. 3d at 28, 593 P.2d at 230, 154 Cal. Rptr. at 533. Also, a child support order is more freely enforceable by garnishment than an ordinary civil judgment and is not dischargeable in bankruptcy.

128. Salas, 24 Cal. 3d at 28-29, 593 P.2d at 230-31, 154 Cal. Rptr. at 533.

129. Id. at 28, 593 P.2d at 230, 154 Cal.Rptr. at 553.

130. Id. at 31, 593 P.2d at 232, 154 Cal. Rptr. at 535. "Unless the rights of indigent paternity defendants are protected, courts risk finding not the right man, but simply the poorest man to be the father of a child." Id.

131. Lassiter, 452 U.S. at 28. Salas expressed the same sentiments, including the possibility of indigent defendants being represented at public expense. The Salas court did not give anymore indication of whether these defendants should be represented at public expense. 24 Cal. 3d at 33, 593 P.2d at 233, 154 Cal. Rptr. at 536.


defendants in paternity proceedings base the appointments on a due process rationale similar to California. California’s treatment of the appointment of counsel in certain civil litigation is not only rational and fair, but it has support in the majority of other jurisdictions.

The California judiciary has given indigent defendants a right to counsel in a greater amount of civil litigation. The increase in cases requiring court-appointed attorneys was accomplished on a gradual basis. This expansion should not be viewed as an opening of Pandora’s box. The growth was caused by the fact that certain indigent defendants have an unequal access to the courts when pitted against the powers of the state. Courts that recognize the indigent defendant’s constitutional right to counsel demonstrate a comprehension of the ramifications of insufficient resources upon the outcome of a trial. California courts’ efforts to decrease the disparity in justice caused by the differences in legal and monetary resources between the litigants are laudable and should not be circumscribed.

B. Compensation for Conscripted Attorneys’ Services

The justifications for not compensating attorneys that are assigned to represent indigent defendants in California, absent statutory authorization, are derived from common law and from California Business and Professions Code section 6068(h). English barristers have always been required to represent indigents without indemnification upon court assignment, and the tradition has become an American lawyer’s obligation as well. Although there exists some skepticism over whether English barristers actually were obligated to provide free legal service whenever it was demanded of them, American courts have used this supposed British tradition to justify not compensating court-appointed attorneys.


140. The vast majority of courts, which have passed on the question, have de-
California courts that have ruled on this issue also apply California Business and Professions Code section 6068(h), which provides that a lawyer should not reject "the cause of the defenseless or the oppressed"141 as part of the rationale for not giving compensation.142 The use of this section to justify this proposition was maligned on the basis that it is a codification of an Oath of Admission to the Bar and is meant to describe the lawyer's obligation to represent the unpopular client.143 Cunningham was the first case to question whether the English tradition is factual and whether the quoted part of section 6068(h) dictates that attorneys must accept court appointments without receiving payment.144

Although the inability of California attorneys to refuse a case results from the California Business and Professions Code section 6068(h), it is the lack of statutory authorization to give funds to court-appointed attorneys that keeps California courts from giving them compensation for their services.145 The Cunningham court recognized its lack of authority to order the expenditure of public funds when the Legislature has not sanctioned such.146 The combination of common law precedents, judicial interpretation of California Business and Professions Code section 6068(h) and the lack of legislative action impede the court-appointed counsel's ability to receive payment for his or her services in California.

Since the Cunningham court could not authorize money for the conscripted attorney, the court believed it was obligated to block the appointment of Cunningham. The court achieved this result by finding the county appointment plan in general and the conscription of Cunningham specifically in violation of Cunningham's constitutional rights. The court found that he was denied equal protection of the

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141. Payne, 17 Cal. 3d at 920 n.6, 553 P.2d at 574 n.6, 132 Cal. Rptr. at 414 n.6 (quoting Cal. Bus. & Prof. Code § 6068(h) (West 1968 & Supp. 1987)).

142. Payne, 17 Cal. 3d at 920 n.6, 553 P.2d at 574 n.6, 132 Cal. Rptr. at 414 n.6; County of Tulare v. Ybarra, 143 Cal. App. 3d 580, 585-86, 192 Cal. Rptr. 49, 52-53 (1983); County of Fresno, 82 Cal. App. 3d at 194, 146 Cal. Rptr. at 881.

143. Uelmen, supra note 138, at 300.

144. 177 Cal. App. 3d at 343, 222 Cal. Rptr. at 858.

145. Payne, 17 Cal. 3d at 920 n.6, 553 P.2d at 574 n.6, 132 Cal. Rptr. at 414 n.6; County of Fresno, 82 Cal. App. 3d at 194, 146 Cal. Rptr. at 881; County of Tulare, 143 Cal. App. 3d at 585-86, 192 Cal. Rptr. at 52-53.

146. 177 Cal. App. 3d at 356, 222 Cal. Rptr. at 867.
The court declined to strictly scrutinize the Ventura County court-appointed counsel plan. Instead, the court reviewed whether the conscription of attorneys to represent indigent defendants bore a rational relationship to the legitimate state purpose of assisting the poor. Without explicitly answering this question, the Cunningham court stated that this purpose "cannot be accomplished at the expense of one particular group of people."  

Recognizing that "a reasonable burden as a condition of licensing does not offend constitutional principles," the court determined that requiring "lawyers to devote a reasonable amount of time to represent indigent defendants in paternity cases as a condition of licensing, might not offend constitutional principles if all lawyers were to bear the burden evenly." Yet, the court believed that this potential requirement might leave indigent defendants with attorneys who are inexperienced in paternity proceedings, if not litigation in general. However, if only trial lawyers are selected to represent these indigents, these appointments would violate these attorneys' constitutional rights. The Cunningham court concluded, "[i]t therefore appears that insuperable obstacles stand in the way of any attempt to allocate pro bono work in paternity cases so as not to offend equal protection principles."  

The Cunningham decision stands alone in refusing to allow a court to appoint an attorney to represent an indigent without compensation because of an equal protection violation. Other jurisdictions, however, disallow this conscription on different constitutional grounds. The latter courts hold that forcing an attorney to represent an indigent civil litigant without compensation was a taking of the attorney's property without due process of law. Other courts al-

147. Id. at 336, 222 Cal. Rptr. at 854.
148. Id. at 348, 222 Cal. Rptr. at 861. "The right to pursue one's chosen profession is not a fundamental right for the purpose of invoking the strict scrutiny test." (citations omitted) Id.
149. Id. at 348, 222 Cal. Rptr. at 861.
150. Id.
151. Id. at 349, 222 Cal. Rptr. at 862. The court noted taking exams, paying dues and completing courses would be a reasonable burden. Id.
152. Id. at 349, 222 Cal. Rptr. at 862.
153. Id.
154. Id. at 350, 222 Cal. Rptr. at 863.
155. 177 Cal. App. 3d at 350, 222 Cal. Rptr. at 863.
ollowed the appointment of attorneys without compensation but decided that the attorney’s payment of litigation costs and expenses was a taking of the counsel’s property without due process of law.\textsuperscript{157} It is difficult to assess whether the isolation of the \textit{Cunningham} holding diminishes its impact, but the \textit{Cunningham} court, along with at least one other non-California court that decided against the conscription of attorneys,\textsuperscript{158} displayed other reasons for striking down the Ventura County conscription plan.

Before the \textit{Cunningham} court discussed whether Cunningham’s appointment violated his constitutional rights, the court traced the history of an attorney’s special position in American society. The court noted that this privileged status no longer exists, if it ever did at all.\textsuperscript{159} Within the equal protection violation analysis, the \textit{Cunningham} court discussed the difficulties involved in attempting to formulate a representation plan that would not violate the appointed attorney’s constitutional rights while still providing the indigent defendant with adequate representation.\textsuperscript{160} In that discussion, the court was concerned with the conscription of attorneys who have no family law and/or litigation experience.\textsuperscript{161} Also, the court worried that a conscripted attorney may not be able or willing to provide the time, effort and conscientiousness that he or she would normally give if the case had been voluntarily taken by him or her.\textsuperscript{162} Since the foundation of the \textit{Cunningham} decision rests upon the equal protection analysis, it is difficult to estimate how much weight these policy factors influenced the ruling. Still, they have their logical appeal and were considered by the \textit{Cunningham} court in making its decision.

The effect of the \textit{Cunningham} decision could be substantial. As a result of this case, Ventura County cannot prosecute a paternity proceeding unless a volunteer represents the indigent defendant or unless the county or state provides reasonable compensation for an appointed counsel.\textsuperscript{163} Even though this decision is contrary to the holding in \textit{County of Tulare},\textsuperscript{164} the violation of the attorney’s consti-


\textsuperscript{158} Scott, 688 S.W.2d 757 (Mo. banc. 1985).

\textsuperscript{159} Cunningham, 177 Cal. App. 3d at 345-47, 222 Cal. Rptr. at 859-61.

\textsuperscript{160} 177 Cal. App. 3d at 349-51, 222 Cal. Rptr. at 862-63.

\textsuperscript{161} Id.

\textsuperscript{162} Cunningham, 177 Cal. App. 3d at 354-55, 222 Cal. Rptr. at 866.

\textsuperscript{163} Id. at 356, 222 Cal. Rptr. at 867.

\textsuperscript{164} 143 Cal. App. 3d 580, 192 Cal. Rptr. 49 (1983). The court of appeals disallowed the trial court from dismissing a paternity cause of action because of no public funds to pay the appointed attorney.
tutional rights combined with section 128 of the Code of Civil Procedure165 gave the trial court the power to dismiss the action.166 The Cunningham court presumes that state agencies will continue to enforce these actions against non-indigent defendants.167 But what of the proceedings with indigent defendants? Will the state turn around and decide that the mothers receiving state child support cannot receive the funds since the state agencies cannot prosecute these actions?168 The possible ramifications of Cunningham could have adverse effects upon the state, the county and welfare recipients.

In order to avoid these potentially negative consequences, the California Legislature should act. Both the Cunningham and Yarbrough courts requested legislative action.169 The Legislature passed Senate Bill 2057 in 1984,170 which appropriated $1,000,000 for compensation and reimbursement of attorneys “involuntarily appointed” to provide representation in civil actions “whenever an indigent party... has the constitutional right to be represented by counsel.”171 Governor Deukmejian vetoed the bill.172 He hoped that Yarbrough,173 which was pending before the California Supreme Court at the time of the veto, would resolve the issue.174 Governor Deukmejian stated:

In any event, I do not support this measure since it, in effect, creates an open ended appropriation which will be subject to substantial expansion by the court. This bill provides that as a matter of statutory right an indigent party has the right to representation by State paid counsel whenever a constitutional right is in question. This allows the California Supreme Court to control the expenditure of funds for representation of indigents. Additionally, I note that the decisional law thus far has been confined to indigents who are incarcerated in prison. This measure, however, could potentially be expanded by the court broadening the term ‘constitutional right’ to apply to any indi-

166. Cunningham, 177 Cal. App. 3d at 356, 222 Cal. Rptr. at 867.
167. Id. at 357, 222 Cal. Rptr. at 867.
168. See supra note 117.
169. Cunningham, 177 Cal. App. 3d at 356-57, 222 Cal. Rptr. at 867; Yarbrough, 39 Cal. 3d at 207, 702 P.2d at 589, 216 Cal. Rptr. at 431.
gent defendant.

I, however, sympathize with the members of the Bar who find themselves mandatorily required to represent indigent defendants; I believe this approach is unhealthy for the legal profession and the defendants who are faced with being represented by reluctant counsel.\textsuperscript{176}

Although this position ignores the extent to which indigents were judicially recognized as being entitled to representation, the veto also indicates Deukmejian's displeasure with the open-ended language of the bill. A law more narrowly drawn might avoid such a veto and become enacted into law, especially since the Governor expressed sympathy for the problem. Judicial inability to require funding for these indigent defendants has been noted. Counties could provide compensation to these attorneys, but local funding of public defender offices has created problems for some small counties which cannot even afford to pay for some expensive defenses.\textsuperscript{176} Thus, the logical solution is for the Legislature to try again by passing another statute that takes into account the governor's concerns.

IV. PROPOSAL

Governor Deukmejian's veto of Senate Bill 2057\textsuperscript{177} should not discourage the Legislature from providing compensation to court-appointed counsel for indigent civil defendants. The Governor expressed his sympathy with the plight of these conscripted attorneys, and his criticisms of the bill centered on the potential for substantial expansion by the Supreme Court of the right of an indigent civil litigant to retain pro bono representation.\textsuperscript{178} As described in the analysis, California courts recognize five civil suits where an indigent defendant has the right to an appointed attorney.\textsuperscript{179} A bill that specifically lists the civil suits in which indigent defendants may be assigned counsel might be more appealing to the Governor. If Deukmejian's silence in his veto\textsuperscript{180} regarding the compensatory aspects of Senate Bill 2057 are construed as a tacit approval of that language in the bill, the new bill need only differ from the old bill in its entitlement phraseology.

\bibitem{175} Id. at 14,347.
\bibitem{177} \textit{SENATE JOURNAL}, \textit{supra} note 79, at 14,346.
\bibitem{178} Id.
\bibitem{179} See supra notes 104-08 and accompanying text.
\bibitem{180} \textit{SENATE JOURNAL}, \textit{supra} note 79, at 14,346.
The California Legislature would not have to guess which proceedings would entail a right to counsel. The California courts have decided in which civil cases indigent defendants should be appointed attorneys. Not only will prior judicial decisions indicate which causes of action indigents should be given the right to counsel, the Legislature should review two New York statutes which precisely list the proceedings in which indigents are entitled to assigned counsel. These statutes do not give these appointed attorneys compensation, but their description of the applicable causes of action would be helpful as guidance for the formation of the right to counsel section of the new bill. By looking to other states for guidance, the California Legislature will not be creating an unprecedented law.

The goals of the Legislature are twofold: First, identify the civil proceeding in which indigent defendants have the right to court-appointed counsel, and second, provide reasonable compensation to court-appointed attorneys for their fees and litigation costs. The Legislature cannot wait for the courts to order compensation for these conscripted attorneys; the delay will not change the situation. Procrastination in the hope of a reversal of the holding in Cunningham is probably a vain aspiration. The Legislature should act to meet these goals. The following proposed legislation achieves the desired objectives.

The following is an act which adds section 1021.8 to the Code of Civil Procedure, making an appropriation therefore.

**Legislative Counsel's Digest**

S.B. #__________ Civil Actions: Attorney fees.

Existing law does not provide for reimbursement of attorney fees and litigation expenses and costs borne by an attorney appointed to represent an indigent defendant in a civil action. Existing law specifically authorizes a court to appoint an attorney to represent an

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181. See *supra* notes 104-08 and accompanying text.
182. 29(A) N.Y. Fam. Ct. Act §§ 261-262 (McKinney 1983). Subsection b of section 262 provides representation to any adult if a judge believes an attorney appointment is mandated by the Constitution of the State of New York or of the United States.
183. Not only has the representation issue been handled by New York, many states have adopted the Uniform Parentage Act, which gives certain indigents court-appointed attorneys. See *supra* notes 145-46 and accompanying text.
184. See *supra* notes 145-46 and accompanying text.
indigent in a civil action, without compensation, upon the withdraw-

al of a legal service agency representing the indigent, as

specified.

This bill would require a court to award reasonable compensa-
tion, as specified, for legal services provided and litigation expenses
and costs incurred, whenever an indigent defendant in a civil action,
as specified, is entitled to representation by counsel, and an attorney
is involuntarily appointed by the court to provide that representation.
The bill would limit the rate of compensation for appointed counsel
to a maximum of $60 per hour. The bill would state that, unless
otherwise provided by law, a court award for compensation shall be
paid by the state.

This bill would appropriate $1,000,000 to the Controller to
make payments in accordance with the bill, 3% of which amount
may be allocated by the Controller for administrative costs.

The people of the State of California do enact as follows:

SECTION 1. Section 1021.8 is added to the Code of Civil Pro-
cedure, to read:

1021.8 (a) Any indigent defendant in the following civil actions
has the right to be represented by counsel.

(1) A prisoner in any civil action if the trial court ascertains
that a continuance is not feasible, the prisoner’s interests are actually
at stake in the suit, and an attorney would be helpful to him under
the circumstances of the case.\(^{187}\)

(2) Any man in a paternity suit where the state appears as a
party or appears on behalf of a mother or a child.\(^{188}\)

(3) Any person in a suit brought by the state pursuant to Civil
Code section 232 or Welfare and Institutions Code section 600(a),
where the state is attempting to take custody of the person’s child or
children.\(^{189}\)

(4) Any person in a suit brought by the stepparent to adopt and
take custody of the person’s child or children, pursuant to Civil Code
section 224.\(^{190}\)

(5) Any person in a suit brought by the state pursuant to Wel-
fare and Institutions Code section 11350, where the state attempts to
obtain reimbursement for money given to the person’s child or chil-

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dren for their support.  

(6) Any person in an appeal of any suit identified in (1) through (5) above.  

(b) Whenever an indigent is a defendant in a civil action set forth in subdivision (a), and an attorney has been involuntarily appointed by the court to provide that representation, the court shall award the attorney reasonable compensation for the legal services provided and reasonably necessary litigation expenses and costs incurred. In no event shall the award exceed the rate of reimbursement for appointed counsel in comparable cases in the community. There shall be a presumption that the lowest rate in the county is the reasonable rate unless the judge states on the record, after consideration of the factors set forth in subdivision (d), that another rate for appointed counsel is more appropriate. In no event shall the rate exceed sixty dollars ($60) per hour.  

(c) Unless otherwise provided by law, the award shall be paid by the Controller from funds appropriated for that purpose, upon submission to the Controller of a Controller's claim form, containing a certification by the clerk that the claim is in accordance with the court order for payment. Upon a showing of good cause, an order granting payment for these services and costs shall be made on a periodic or interim basis during the pendency of any such civil action.  

(d) In determining the reasonableness of the compensation, the court shall consider the following factors, no one of which shall be controlling.  

(1) The customary fee in the community for similar services rendered by privately retained counsel to a non-indigent client.  
(2) The time and labor required to be spent by the attorney.  
(3) The difficulty of the representation.  
(4) The novelty or uncertainty of the law upon which the decision depended.  
(5) The degree of professional ability, skill, and experience called for and exercised in the performance of the services.  
(6) The professional character, qualification, and standing of the attorney.  

Section 2. The sum of one million dollars ($1,000,000.00) is
hereby appropriated from the General Fund to the Controller to
make payments in accordance with this act. Three percent of this
appropriation and of any subsequent appropriations made for the
same purpose may be retained and used by the Comptroller to ad-
minister the provisions of this act.

The proposed legislation accomplishes both goals that must be
achieved in the law’s drafting. The proposed law appoints counsel to
indigent civil defendants in five specific civil causes of action and any
appeals of decisions in these five suits. The legislation also gives
compensation to court-appointed attorneys in these five suits.

Section (1)(a) of the proposed law addresses the Governor’s
fears that the judiciary will expand the right to counsel to any civil
proceeding.194 The detailed description of which civil suits are to
have the right to a court-appointed attorney not only alleviates any
of Governor Deukmejian’s qualms, but section (1)(a), more impor-
tantly, is a statutory recognition of an indigent’s right to counsel in
these particular civil suits. Even though courts already assign attor-
neys in these civil proceedings without statutory authorization, this
law’s specific guidance ensures that indigents receive proper repre-
sentation in the proceedings listed in section (1)(a).

Section (1)(b) answers the call for legislative action that Califor-
nia courts have been requesting for two years.195 The compensation
given by this section should meet the requirements of Cunningham.196 If there have been dismissals or continuances of any patern-
ity proceeding because of the Cunningham decision,197 section
(1)(b) allows courts to appoint counsel in the civil causes of action
detailed in section (1)(a) without violating these attorneys’ constitu-
tional rights.198 Because this law considers community standards,
there is flexibility in the attorneys’ fees. This flexibility demonstrates
the legislation’s balance between reasonable compensation and reim-
bursement for fees, costs and expenses and the need for fiscal
accountability.

The presumption set forth in section (1)(b) that the lowest rate
in the county is the reasonable rate appears to discourage representa-
tion of indigents in the suits listed in section (1)(a). Yet, a judge
could decide to increase any attorney’s compensation by considering

195. See supra note 171 and accompanying text.
197. See supra notes 171-75 and accompanying text.
198. See supra notes 147-49 and accompanying text.
the factors listed in section (l)(d). The judge's ability to determine what the appropriate compensation and/or reimbursement for appointed counsel not only ensures a fair indemnification, but also alleviates attorneys' fears that they will not be paid a fair fee for involved and complex litigation.

Although this bill accomplishes the goals established in the paragraph before the proposed legislation, this bill is not a panacea for all potential problems in this field. This bill does not establish a workable plan as to how these attorneys will be appointed. The Cunningham court expressed concern that any selection process adopted by a county might violate these appointed attorneys' constitutional rights.199 Yet, after expressing these concerns, the court concluded that the lack of state-appropriated funds is the "root of the problem."200 This bill solves the Cunningham court's equal protection concerns. Attorneys are no longer appointed to indigent defendants without compensation.

Another potential problem that this bill does not address is ensuring that these indigent defendants will receive qualified representation. The proposed law does not give any guidelines for appointing attorneys that are experienced in the suits listed in section (l)(a). The Cunningham court expressed concern that these indigent defendants might receive inadequate counsel.201 This bill does not render related decisions immune from ineffective assistance attacks, and these appointed attorneys are still liable for any malpractice claims. One can only guess if judges who appoint counsel pursuant to this bill will find willing and qualified counsel.

Although this proposed legislation does not remedy all possible problems of court-appointed attorneys for indigent civil defendants, the bill satisfies the requirements of Cunningham202 and gives reasonable compensation to conscripted attorneys. If trial courts are unable to try cases listed in section (l)(a) of this bill due to the Cunningham decision, the proposed legislation gives indigent defendants in these suits the representation that the Constitution guarantees, and, further, it will give these court-appointed attorneys the compensation that the Constitution mandates.

199. 177 Cal. App. 3d at 350-51, 222 Cal. Rptr. at 863.
200. Id. at 351, 222 Cal. Rptr. at 863.
201. Id. at 353-56, 222 Cal. Rptr. at 865-67.
V. Conclusion

The expansion of indigent defendants' right to counsel has created a corresponding problem regarding the compensation for their court-appointed attorneys. Without any statutory authorization for payment, conscripted counsel have had to represent defendants without receiving reimbursement for their services. Departing from a well-established judicial precedent, the Cunningham\textsuperscript{203} court decision disallowed a pro bono appointment due to a violation of the conscripted counsel's constitutional rights. If the other districts adopt the Cunningham approach, no attorneys can be assigned to indigent civil defendants unless they receive some indemnification for their work. The judiciary's inability to appropriate funds for compensation for these attorneys has made it incumbent on the California Legislature to give money to conscripted counsel.

The statutory reform proposed in this comment recognizes the right of indigent defendants to receive assigned counsel in certain civil proceedings. In addition, the proposed bill compensates appointed attorneys for their services and gives reasonable indemnification to these lawyers. The constitutional problems with appointing attorneys in appropriate civil suits are eliminated, and the indigent defendants will receive better representation. The Legislature must take action in order to resolve the constitutional conflict between the need to appoint counsel for indigent civil defendants and the necessity that appointed attorneys receive reasonable compensation.

Charles S. Redfield

\textsuperscript{203} Id.