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SIMMERING ON THE "BACKBURNER": THE CHALLENGE OF *YARBROUGH*

Gerald F. Uelmen*

I. INTRODUCTION

A. *The Case Law Leading to the Question*

In *Yarbrough v. Superior Court*,¹ California courts were confronted with the following question: can lawyers be compelled to accept appointments to represent indigents in complex civil cases without reimbursement for expenses or compensation? Or at least that is the question to which California lawyers expected an answer.

Terry Val Yarbrough is serving a term of 17 years to life at Folsom Prison, after conviction of second degree murder. He was named as a defendant in a wrongful death suit brought by the minor child of the victim.² In 1976, the California Supreme Court held, in *Payne v. Superior Court*,³ that an indigent prisoner who is named as a defendant in a civil suit has a right to the appointment of counsel if his access to the court is otherwise limited. Relying on this precedent, Yarbrough requested the appointment of counsel to represent him in his civil case. The trial court held a hearing on the issue of appointment of counsel and found that five private attorneys had declined to provide representation without compensation or reimbursement of expenses due to the complexity of the investigation the case would require and the substantial advanced costs it would demand. The contract public defender who represented Yarbrough in the criminal proceedings also informed the court that he was so overburdened with other pro bono matters that he could not represent Yarbrough with reasonable diligence.⁴ The trial

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1. 39 Cal. 3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985).

2. *Id.* at 201, 702 P.2d at 585, 216 Cal. Rptr. at 427. The suit also named the Brass Rail Bar, where the homicide occurred, and its owner and bartender as co-defendants. *Id.*

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

4. Under California law, public defenders can be appointed to provide representation in only certain specified civil cases. CAL. GOV'T CODE § 27706 (West 1968 & Supp. 1985). See *Littlefield v. Superior Court*, 98 Cal. App. 3d 652, 160 Cal. Rptr. 175 (1979).

court concluded that while Yarbrough was entitled to appointment of counsel under *Payne*, the court lacked authority to order compensation or reimbursement of counsel. The trial court declined to make a coercive appointment without compensation or reimbursement.⁵

On application for a writ of mandate to Division Five of the First District Court of Appeal, the trial court was ordered to make an appointment of counsel. The court of appeal felt bound by dicta in *Payne* which suggested attorneys must serve gratuitously until the legislature decides otherwise.⁶ Concurring, Justice King expressed the hope that "our Supreme Court will reexamine the issue of court appointment of counsel as it relates to the supplemental issues of compensation for counsel and of a source of costs for the actual expenses of litigation."⁷

A storm of protest from the organized bar greeted the court of appeal's ruling.⁸ When the California Supreme Court granted a hearing, no fewer than two dozen bar associations and lawyer organizations filed amicus briefs urging the recognition of a right to compensation and reimbursement for appointed lawyers.⁹

Before the supreme court could rule in *Yarbrough*, two more cases squarely presented similar issues. In *Mowrer v. Superior Court*,¹⁰ Division Six of the Second District Court of Appeal confronted an order appointing an assistant public defender to represent an indigent father named as a defendant in a civil paternity suit. The California Supreme Court had recognized a right to appointed counsel for indigents named in paternity cases in *Salas v. Cortez*.¹¹ In *Mowrer*, the supreme court

5. 150 Cal. App. 3d 388, 390, 197 Cal. Rptr. 737, 738-39 (1983).

6. *Id.* at 391, 197 Cal. Rptr. at 739-40. The California Supreme Court in *Payne* stated that:

The state . . . apparently assumes that if this court orders counsel appointed in certain cases, it will mandate that counsel be paid from public funds. We do not assert such power. If and how counsel will be compensated is for the Legislature to decide. Until that body 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."

17 Cal. 3d at 920 n.6, 553 P.2d at 579 n.6, 132 Cal. Rptr. at 414 n.6 (quoting CAL. BUS. & PROF. CODE § 6068(h) (West 1968 & Supp. 1985)).

7. 150 Cal. App. 3d at 393, 197 Cal. Rptr. at 743-44 (King, J., concurring). *Cf.* *County of Fresno v. Superior Court*, 82 Cal. App. 3d 191, 197, 146 Cal. Rptr. 880, 883 (1978).

8. *See* Hager, *Free-Work Order Alarms Lawyers*, L.A. Times, Jan. 29, 1984, Part I, at 3, col. 3; Hanst, *Yarbrough's Potential for Harm*, CAL. LAW., July 1984, at 8; Snider, *Counsel by Conscription*, L.A. LAW., June 1984, at 18; Uelmen, *Attorneys as a Public Resource*, CAL. LAW., Jan. 1984, at 9.

9. *Yarbrough*, 39 Cal. 3d at 201 n.1, 702 P.2d at 585 n.1, 216 Cal. Rptr. at 427 n.1.

10. 155 Cal. App. 3d 262, 201 Cal. Rptr. 893 (1984).

11. 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529, *cert. denied*, 444 U.S. 900 (1979). The *Salas* court made no reference to the issue of compensation or reimbursement, an omission

granted a writ of mandate to compel the superior court to vacate the appointment, and to either appoint a volunteer willing to serve without compensation or dismiss the action.¹² The court concluded that an order compelling any attorney to serve without compensation would be a denial of equal protection of the law, since "the government seeks to charge the cost of operation of a state function conducted for the benefit of the public to a particular class."¹³

Then, in *Jaffe v. Superior Court*,¹⁴ a Los Angeles attorney who had devoted years of service as a volunteer handling paternity and child support cases by court appointment submitted a bill seeking compensation of \$350 for one case. The superior court refused to order payment, but wrote a sympathetic opinion outlining the reasons why the attorney *should* be paid. The Second District Court of Appeal summarily denied an application for a writ.¹⁵ The California Supreme Court granted hearings in both *Mowrer* and *Jaffe*.¹⁶

Meanwhile, the California State Bar busily lobbied the legislature to respond to the crisis. The result was Senate Bill 2057, sponsored by Senator Petris, which was introduced on February 16, 1984. The bill 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."¹⁷ The bill limited the rate of compensation to a maximum of \$60 per hour, creating a presumption "that the lowest rate for appointed counsel in the county is the reasonable rate."¹⁸ The bill passed the Senate by a vote of twenty-seven to eleven, passed the Assembly by a vote of fifty-five to seventeen, and then was vetoed by Governor Deukmejian on September 28, 1984.¹⁹

The *Yarbrough* case was argued before the supreme court on November 7, 1984. The court announced its decision eight months later. The court reaffirmed its *Payne* holding, but explained that that holding

which was caustically noted in Justice Richardson's dissent: "The majority is strangely silent on the critical question—who is going to pay for counsel? Is it to be, as in *Payne*, a pro bono responsibility of the bar? Is it the legislature which must appropriate for it from public funds?" *Id.* at 42, 593 P.2d at 239, 154 Cal. Rptr. at 542 (Richardson, J., dissenting).

12. 155 Cal. App. 3d at 274-75, 201 Cal. Rptr. at 901.

13. *Id.* at 267, 201 Cal. Rptr. at 896.

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

15. No. 31874 (Cal. Ct. App. (2d Dist.) (1984)).

16. Minutes of California Supreme Court, July 12, 1984, 36 Cal. 3d Advance Sheets, No. 22 (Aug. 9, 1984), pp. 17-18.

17. Cal. S.B. 2057, 1983-84 Reg. Sess., § 1 (1983).

18. *Id.*

19. Cal. Legislature, Senate Final History, 1983-84 Reg. Sess., p. 1252.

mandates the appointment of counsel only for "the unusual case where future property rights are genuinely at stake."²⁰ Noting that the findings required to justify appointment of counsel are nonadversarial, the court demanded a searching inquiry into the potential loss to the prisoner, "weighing such factors as age, term of incarceration, employment history, education, skills, family background and the likelihood of inheriting or otherwise obtaining property."²¹ The case was remanded to the trial court for reconsideration of these factors. With respect to the issues of compensation and reimbursement for appointed attorneys, the court declined to rule, expressing the hope that a "fair legislative solution" can be found:

It is our hope that the Legislature, working closely with the State Bar and other interested groups, will use the respite afforded by our disposition on this case to enact a fair legislative solution to the vexing problems which, for the time being, have been placed on the judicial backburner.²²

Thus, the *Yarbrough* holding failed to dispose of the unanswered questions left by the *Mowrer* and *Jaffe* cases. These questions may also be left simply to simmer on the backburner until the remand hearing in *Yarbrough* is completed. In dissenting, Chief Justice Bird expressed the suspicion that "these problems will not disappear nor will they become any more tractable with the passage of time."²³

The court's disposition of *Yarbrough* poses a formidable challenge. To the extent that *Yarbrough* conveys the message that the appointment of counsel will rarely be justified for indigent prisoners, the costs of meeting the challenge may be substantially lower than previously envisioned. On the other hand, the cost of providing counsel for indigent defendants in paternity and child support cases cannot be minimized in the same way. As the court stressed in *Yarbrough*, the "keystone" of the *Payne* holding was access to the courts, *not* the "right to counsel."²⁴ Thus, the appointment of counsel could be limited on an ad hoc basis to unusual cases.²⁵ The *Salas* holding, on the other hand, is clearly premised on a

20. 39 Cal. 3d 197, 201, 702 P.2d 583, 585, 216 Cal. Rptr. 425, 427 (1985).

21. *Id.* at 205, 702 P.2d at 588, 216 Cal. Rptr. at 430.

22. *Id.* at 207, 702 P.2d at 589, 216 Cal. Rptr. at 431.

23. *Id.* at 207-08, 702 P.2d at 590, 216 Cal. Rptr. at 432 (Bird, C.J., dissenting).

24. *Id.* at 201, 702 P.2d at 585, 216 Cal. Rptr. at 427.

25. In this respect, the *Yarbrough* ruling is strikingly similar to *Betts v. Brady*, 316 U.S. 455 (1942), in which the United States Supreme Court limited the right to counsel in criminal cases to situations in which the defendant was "at a serious disadvantage by reason of lack of counsel." *Id.* at 472-73. Ironically, one of the arguments posited by the *Betts* majority for this limited "special circumstances" approach was that since the fourteenth amendment due pro-

constitutional right to counsel, with the only prerequisite being a showing of indigency.²⁶ Clearly, the issues simmering on the backburner transcend the problem of *Yarbrough*.

B. The Conference on Financing the Right to Counsel

In January of 1985, more than 100 bar leaders, legislators and county government officials convened in Sacramento to discuss the problems of financing the right to counsel in California.²⁷ The conference was co-sponsored by the State Bar of California, California Attorneys for Criminal Justice, the American Bar Association Standing Committee on Legal Aid and Indigent Defendants, and the bar associations of Los Angeles County, San Francisco and Sacramento. The problems posed by *Yarbrough*, *Mowrer* and *Jaffe* were uppermost in the minds of all who attended. This publication of the proceedings of that conference should make much constructive thought available at a time when it is most sorely needed. Each of the conference speakers approached the problem from a unique perspective. Ultimately, the conference participants reached a surprising consensus as to what was needed. They candidly assessed the difficulty of meeting those needs in the reality of today's political climate. The metaphor of a boiling pot sums it all up very nicely.

The greatest challenge, as noted by Assembly Speaker Willie Brown,²⁸ stems from a "political atmosphere" which attaches low priority to the quality of justice meted out to indigents. How does one go about changing the "political atmosphere"?

The best place to start is by turning down the flame under the boiling pot to reduce the temperature. The problem must be assessed in a climate of cold history, cold ethics, cold economics and cold politics. Hopefully, these conference proceedings will make a positive contribution to such an analysis.

cess clause protects property as well as life and liberty, "if we hold with the petitioner logic would require the furnishing of counsel in civil cases involving property." *Id.* at 473. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Betts* was condemned as "an anachronism when handed down" and overruled. *Id.* at 345. See Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211. The "anachronism" was revived, however, in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (holding that the right to counsel in probation and parole revocation proceedings must be assessed on a "case by case" basis).

26. 24 Cal. 3d at 28-29, 593 P.2d at 230-31, 154 Cal. Rptr. at 533-34.

27. The transcripts of the Conference on Financing the Right to Counsel in California are published in this issue of the *Loyola of Los Angeles Law Review*. See *infra Financing the Right to Counsel in California*, 19 LOY. L.A.L. REV. 325 (1985).

28. See *id.* at 417 (remarks of Assembly Speaker Willie L. Brown, Jr.).

II. SOME COLD HISTORY

Many of the proposals being considered to meet the challenge of providing counsel to indigent civil litigants have been tried before. We tend to forget that the system now in place for the representation of indigent *criminal* defendants was the product of years of struggle in trial-and-error fashion. Before we repeat the mistakes of the past, it may be worthwhile to review the lessons of a century of experience.

A century ago, the right to appointed counsel in criminal cases was implemented by the appointment of counsel to serve without compensation. The *Yarbrough v. Superior Court* case of a century ago was *Rowe v. Yuba County*,²⁹ in which an early California lawyer sued the county for compensation for the services he rendered to an accused indigent. The attorney received the following lecture from Chief Justice Stephen Field:

[I]t 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.³⁰

The burden imposed by this system was not a heavy one. A relatively small proportion of defendants were "paupers," and their cases could often be disposed of quickly. Appointments were spread out among a broad cross-section of the bar. In ruling that lawyers must serve without compensation, Chief Justice Field confidently concluded: "The duty imposed in this way may, it is true, be carried to unreasonable lengths, so as to become exceedingly burdensome; but we have heard no complaints of this character."³¹

When counsel did have the temerity to complain, the response clearly indicated that the best way to handle the burden was to do less for the client. No better example can be found than that of George A.

29. 17 Cal. 61 (1860).

30. *Id.* at 63.

31. *Id.* Chief Justice Field apparently enjoyed delivering pompous lectures, a quality much despised by his colleague, Justice David Terry. After Field was appointed to the United States Supreme Court by President Abraham Lincoln, an angry encounter between Field and Terry in a railway station near Stockton ended with Justice Field's bodyguard shooting and killing Terry. R. KRONINGER, SARAH AND THE SENATOR 213-17 (1964). See *In re Neagle*, 135 U.S. 1 (1889). Thus it may have been Chief Justice Field's temperament, rather than the generosity of the lawyers appearing before him, which accounted for his failure to hear any complaints . . . at least when his bodyguard was nearby.

Lamont, a lawyer practicing in Solano County in the 1870's who learned this postulate the hard way. Assigned to represent a man accused of the murder of a fellow worker, Lamont presented a defense of insanity based on the defendant's paranoid delusion that he was being persecuted by Catholics. Even after the defendant was convicted, Lamont continued his investigation, discovering several other witnesses, procuring affidavits, presenting a motion for a new trial and ultimately appealing the case to the California Supreme Court, which commended his "unusual diligence."³² Seeking more than a judicial pat on the head as a reward for his diligence, Lamont then brought suit against Solano County to recover \$1500 in compensation and \$300 in costs for procuring the affidavits and appealing the case. The court rejected his claim for compensation, citing *Rowe v. Yuba County*, and adding:

In regard to the claim for moneys expended, counsel have not cited any provision of the statute which would require an attorney to make advances out of his own pocket in procuring affidavits while conducting the defense of a prisoner. He is simply to give his professional services.³³

As the burden of providing defense services through uncompensated appointments grew, the quality of representation provided declined. In the early part of this century, a movement to establish a paid staff of lawyers to provide defense to indigents accused of crime began to achieve some success. It is important to recognize that the impetus for this movement was *not* the financial self-interest of lawyers, but a genuine concern over the quality of representation being provided. The "cross-section" of the bar providing representation was becoming smaller and smaller, until it was reduced to a small cadre of the worst elements of the bar.³⁴

32. *People v. M'Donell*, 47 Cal. 134, 137 (1873).

33. *Lamont v. Solano County*, 49 Cal. 158, 159 (1874).

34. M. GOLDMAN, *THE PUBLIC DEFENDER* 16 (1917).

The courts do appoint lawyers to defend such persons—but are they really defended? These attorneys serve without compensation, except that in some states a fee is paid in murder cases. . . . On very rare occasions distinguished counsel is assigned to defend a prisoner, but, as a general rule, these assignments go to young and inexperienced attorneys—very often to the practitioner who happens to be in court at the time. . . . The classes of lawyers who are usually assigned to defend, present a phase of this question which cannot be regarded as unimportant. It is a regrettable fact that in nearly all communities (particularly in the larger cities) there is a type of lawyers who are not truly representative of a great profession. Their regard for the rights and liberties of their clients is measured solely from a commercial or financial standpoint. These are more persistent than any other lawyers in their search for clients. Too frequently their services, if rewarded by small fees, are half-hearted or openly negligible. This leaves their clients practically or wholly unprotected. They are commonly referred to as

The public defender movement gained its first foothold in the nation with the establishment of a public defender office in Los Angeles in 1914.³⁵ One of the most vociferous proponents in California was Clara Shortridge Foltz, the first woman admitted to the California bar.³⁶ The establishment of the Los Angeles public defender office produced a very dramatic demonstration of the shortcomings of the previous system of uncompensated appointments. A comparison of the performance of appointed lawyers in 1913 with the performance of public defenders in 1914 revealed:

(1) The number of cases handled more than doubled in one year. Why?

The difference between the number of cases handled by the assigned attorneys in 1913 and the cases handled by the public defender in 1914 cannot be accounted for by the growth of population. It is due to the fact that the lawyers who commonly took the assignments were of such a low grade that the defendants avoided them whenever it was possible. These men hung about the jails and solicited business, but with the advent of the public defender they have almost entirely disappeared.³⁷

(2) The acquittal rate for the cases going to trial rose from 20% when attorneys were not compensated to 34.5% when the public defender was established.³⁸

(3) While the rate of cases disposed of by guilty pleas increased slightly, the sentencing results were much more favorable to defendants.³⁹

The ensuing spread of the public defender movement and corre-

"shysters," but also described . . . as "snitch lawyers," "jail lawyers," "vampires," "legal vermin," "harpies" and by other inelegant but extremely emphatic phraseology. They are grasping and mercenary—without character, ability or conscience. They prey upon the ignorance or fear of the prisoner, or of his relatives or friends, in their effort to extort a fee. If it be not forthcoming (or often when it is) they advise the prisoner to plead guilty, on the pretext that he will get greater leniency from the court than by standing trial. He may at times go through the forms of a trial, but the defense is perfunctory on its face, and the client pays the penalty, perhaps not for the crime charged, but often for his poverty.

Id. at 16-20.

35. See Cuff, *Public Defender System: The Los Angeles Story*, 45 MINN. L. REV. 715 (1961).

36. Schwartz, Brandt & Milrod, *Clara Shortridge Foltz: Pioneer in the Law*, 27 HASTINGS L.J. 545 (1976).

37. SMITH & BRADWAY, U.S. DEP'T OF LABOR, BULL. NO. 607, GROWTH OF LEGAL-AID WORK IN THE UNITED STATES 90 (Rev. ed. 1936).

38. *Id.*

39. *Id.*

sponding decline of the use of uncompensated assignments was well documented. A series of national studies analyzed the trend on a recurring basis.

As part of a comprehensive study of legal education and the legal profession financed by the Carnegie Foundation, Reginald Heber Smith published *Justice and the Poor* in 1919.⁴⁰ At that time, the public defender movement was still a fledgling, with defender offices functioning in only five United States cities.⁴¹ Smith found that courts universally assigned counsel in murder cases, and that these attorneys were paid and reimbursed for expenses in many states. In other felony cases, however, he discovered that only half the states regularly assigned counsel, and only seven states paid counsel or reimbursed expenses.⁴² Paradoxically, he concluded that the system worked reasonably well in murder cases, but failed dismally in other cases:

[T]he newspaper publicity which attends a murder trial gives a lawyer the best advertising he can ever have and is just as valuable as a cash payment. The fact that the defendant's life is in his hands naturally spurs the lawyer on. In a word, the case appeals simultaneously to the lawyer's self-interest and to the best traditions of his profession. The situation is reversed in other cases. The prisoner arrested for burglary, rape, or assault may arouse no sympathy, in fact the matter may be revolting. More important, the average lawyer, however honest and desirous of performing his professional obligations, cannot afford to give a thorough defense. Even if he could devote several days' time to the trial, he cannot pay out of his own pocket for investigators, detectives, and medical, handwriting or other experts. . . . The more well-to-do attorneys are entirely out of criminal practice, and as they lack experience in this work are virtually exempt from assignment.⁴³

When Smith surveyed the scene again in 1936,⁴⁴ he found the situation somewhat improved. As many as twenty cities now were served by functioning public defender offices.⁴⁵ He found that thirty-seven states provided for assignment of counsel in felony cases, while twenty-nine

40. R. SMITH, *JUSTICE AND THE POOR* (1919).

41. Los Angeles (established in 1914); Portland (established in 1915); Omaha (established in 1915); Columbus (established in 1916); and New York (established in 1917). *Id.* at 117.

42. *Id.* at 112-13.

43. *Id.*

44. SMITH & BRADWAY, *supra* note 37.

45. *Id.* at 87-88.

states made such provision for misdemeanors. With respect to compensation of appointed counsel, payment was allowed in twenty-six states, but eight limited compensation to capital cases, while another five limited compensation to felony cases.⁴⁶ Thus, thirty states made no provision for the payment of counsel assigned in non-capital felony cases. He also surveyed the level of compensation:

The amount of compensation throws a curious light on the relative value set by the States on such matters. In capital cases the lump-sum compensation ranges between \$25 and \$1000; in felony cases between \$25 and \$50; in capital cases per diem compensation averages about \$20 or \$25; and in felony cases per diem compensation averages about \$10.⁴⁷

Despite the low level of compensation, however, Smith concluded that "paid assigned counsel did their work reasonably well." While acquittal rates and sentencing results were "a little less favorable" than those obtained by retained counsel, the discrepancy was "too small to warrant any assumption that the assigned counsel were remiss or delinquent in their duties."⁴⁸ In assessing the performance of assigned counsel who were *not* compensated, however, Smith's judgment was much harsher.

Smith's 1936 study also surveyed the extent of assignment of counsel for civil cases, finding that twelve states authorized assignment of counsel to indigents in civil cases by statute, but none provided compensation, and assignments were rarely made. He found that the failure of the unpaid assigned counsel system in the United States was consistent with the experience in European countries which did not compensate appointed counsel.⁴⁹ He concluded that the failure of legal aid in the United States was not attributable to the assigned counsel system, but to the general lack of provision for compensating assigned counsel:

The assignment plan in America has been an altogether inadequate solution, but it should not be abandoned. Potentially it has great usefulness, and if reasonable compensation were allowed to assigned attorneys the inherent weakness of the plan as it now exists would be removed.⁵⁰

From 1956 to 1959, with a grant from the Fund for the Republic, a special committee of the Association of the Bar of the City of New York and the National Legal Aid and Defender Association undertook a com-

46. *Id.* at 77.

47. *Id.*

48. *Id.* at 92-93.

49. *Id.* at 28.

50. *Id.* at 30.

prehensive study of alternative systems for providing counsel to indigents in criminal cases.⁵¹ The survey of various state systems disclosed that the number of public defender offices had steadily increased from thirty-eight to eighty-eight between 1951 and 1956.⁵² The assigned counsel system was still the prevailing system, however, serving over half the total population of the United States.⁵³ But the prevalence and level of compensation for assigned counsel had changed little in the twenty years since Smith's 1936 survey: "No provision for the payment of counsel assigned in non-capital cases is found in twenty-seven states. Most of the remaining states provide only token payments which are grossly unremunerative for the services performed. Frequently the payments do not cover the expenses of counsel."⁵⁴

In making a qualitative assessment of the services provided by assigned counsel, the study relied upon field surveys of county-wide areas in New York state and New Jersey. The study concluded that the most serious defect of the system of uncompensated assigned counsel was its failure to provide experienced, competent and zealous representation. This failure was attributed to a fundamental assumption that "every lawyer is equally qualified to handle criminal cases."⁵⁵

This assumption was largely correct in the smaller communities of eighteenth and early nineteenth century America. As long as the assigned-counsel system functioned in a predominantly rural society in which the practice of law was not specialized, the experience of most members of the bar was similar and almost every attorney could be expected to have sufficient knowledge of criminal practice to prepare and present an adequate defense.⁵⁶

The field surveys revealed that 43.4% of Essex County, New Jersey lawyers and 33.3% of Thompson County, New York lawyers assigned to criminal cases had no criminal law experience prior to their first assignment.⁵⁷ Thus, the system was offering training to young lawyers, but hardly offering competent representation to clients. The dilemma could not be resolved by limiting appointments to experienced lawyers, since that "would place an unjustified burden upon a small segment of the

51. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMM. TO STUDY DEFENDER SYSTS., *EQUAL JUSTICE FOR THE ACCUSED* (1959).

52. *Id.* at 134 n.1.

53. *Id.* at 48.

54. *Id.* at 120 n.6.

55. *Id.* at 65.

56. *Id.*

57. *Id.*

Bar.”⁵⁸ The lack of adequate compensation and reimbursement for investigative expenses, it was noted, put economic pressure on an appointed attorney “to dispose of his assignment with as little investigation and as hastily as possible.”⁵⁹

Shortly after the landmark decision in *Gideon v. Wainwright*⁶⁰ mandated that counsel be supplied to indigents in all felony cases, the American Bar Foundation undertook a monumental survey based on thousands of personal interviews and questionnaires administered in every state.⁶¹ This survey indicated that the number of public defender offices had then grown to 117.⁶² However, in 2900 of the 3100 counties (93%) in the United States, where 70% of felony defendants resided, the use of assigned counsel still prevailed.⁶³ The Foundation’s survey reported a dramatic improvement in the availability of compensation, although the rates were still parsimonious. In thirty-five states, counsel were paid for all felony cases. Only six states did not authorize payment; and four states limited payment to capital cases. The three remaining states followed a system of local option.⁶⁴ Most states placed a maximum limit on fees, ranging in noncapital cases from \$25 to \$500.⁶⁵ Still it was noted that since *Gideon*, fourteen states had increased compensation for appointed counsel or had provided compensation for the first time.⁶⁶ While data from many counties showed a substantially higher guilty plea rate for defendants represented by appointed counsel compared to retained counsel,⁶⁷ the most telling criticism of the appointed counsel system was the lack of reimbursement for investigative expenses:

[I]t is one thing for an attorney to donate his time to a worthwhile cause and another to perform the task inadequately because of lack of funds to cover out-of-pocket expenditures. There is no means by which he can obtain an expert witness except by payment from his own pocket. Only nine states and the District of Columbia specifically provide for reimbursement of expenses, although in other states the judge may take such expenses into account in awarding the attorney fee. The result

58. *Id.* at 66.

59. *Id.* at 67.

60. 372 U.S. 335 (1963).

61. See 1 L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS (1965).

62. *Id.* at 41.

63. *Id.* at 15.

64. *Id.* at 16.

65. *Id.*

66. *Id.* at 150.

67. *Id.* at 21.

of the variations among systems is that most appointed lawyers are forced to subsidize the administration of justice by paying such costs, while other appointees are reimbursed in part, and still others are repaid in full.⁶⁸

Even in counties where the level of compensation was relatively high, the change most frequently recommended by the lawyers surveyed was that attorneys be paid more for their services so as to improve the system of assigned counsel.⁶⁹

In 1973, the National Legal Aid and Defender Organization fielded a major survey of indigent defense systems, which disclosed that the number of counties primarily relying on assigned counsel had declined to 72%.⁷⁰ A total of 650 public defender offices served 883 counties, encompassing 64% of the population served.⁷¹ The survey canvassed the opinions of judges, prosecutors and defense lawyers in a broad cross-section of counties utilizing both systems, and found an overwhelming preference for the full-time public defender as the "ideal" system. The criticisms of the assigned counsel system sounded like a familiar refrain. Although only 5% of the judges surveyed reported they had *no* funds to reimburse appointed counsel, the most frequently voiced recommendation for improvement was to increase compensation for appointed counsel, followed by an increase in resources for better investigation.⁷² Over two-thirds of the judges reported that public funds were unavailable to hire investigators to assist appointed counsel.⁷³ The survey revealed that the lawyers who received appointments were seldom experienced criminal practitioners. Two-thirds of the 815 reporting attorneys indicated that they handled "very few" criminal cases, and three-fourths had never attended a seminar to keep abreast of new developments in criminal law and procedure.⁷⁴

The most recent survey of indigent defense services was published by the Bureau of Justice Statistics of the United States Department of Justice in 1984.⁷⁵ The survey disclosed that the public defender system continues as the dominant method of providing counsel to indigents,

68. *Id.* at 29-30 (footnote omitted).

69. *Id.* at 33.

70. NATIONAL LEGAL AID AND DEFENDER ASS'N, *THE OTHER FACE OF JUSTICE* 9 (1973).

71. *Id.* at 13.

72. *Id.* at 52.

73. *Id.* at 44.

74. *Id.*

75. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *A NATIONAL SURVEY, CRIMINAL DEFENSE SYSTEMS* (1984).

although its rate of growth has slowed considerably. Forty-three of the fifty largest counties are served by public defenders, and 68% of the United States population is now served. Assigned counsel systems still dominate in rural areas, including 60% of counties in this country.⁷⁶ Virtually all of the assigned counsel systems provide compensation for the assigned lawyers, most frequently at \$30-40 per hour for in-court time, \$20-30 for out-of-court time. Forty percent of counties establish maximum limits for fees, generally between \$500 and \$1000 for felonies, and between \$200 and \$500 for misdemeanors.⁷⁷

The most startling finding was the rise in the proportion of cases in which the public defender declared unavailability due to conflict of interest. The courts have applied much stricter standards as to what constitutes a conflict between co-defendants.⁷⁸ If a conflict exists, the public defender's office can only represent one of the co-defendants.⁷⁹ Since there are multiple defendants in approximately 25% of all adult felony cases,⁸⁰ an alternative source of counsel is frequently a necessity. In most jurisdictions, alternative counsel is supplied by appointment of assigned counsel. Thus, systems of assigned counsel and public defender offices often coexist in the same jurisdiction. The survey found that, in a growing number of counties, alternative counsel for conflicts—and sometimes the primary source of appointed counsel—are provided by a fixed-fee contract, in which an attorney agrees to handle all such cases for a fixed sum.⁸¹ The increasing use of this system has raised concern that a flat-fee rate of compensation may discourage lawyers from pursuing full investigation and litigation in the cases which require more than routine effort.⁸² These concerns motivated the American Bar Association to adopt a policy recommending that "cost alone" not be the criterion for awarding such contracts.⁸³

The historical evolution of our present system of providing counsel

76. *Id.* at 2.

77. *Id.* at 5.

78. *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978); *People v. Mrozcko*, 35 Cal. 3d 86, 672 P.2d 835, 192 Cal. Rptr. 52 (1983).

79. *Holloway v. Arkansas*, 435 U.S. 475 (1978). See also Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119 (1978); Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 GEO. L.J. 1075 (1979).

80. BUREAU OF JUSTICE STATISTICS, *supra* note 75, at 4.

81. *Id.* at 5-6.

82. See, e.g., STANDING COMM. ON THE DELIVERY OF LEGAL SERVS. TO CRIM. DEFENDANTS, LEGAL SERVS. SECTION, STATE BAR OF CAL., REPORT AND RECOMMENDATION TO THE BD. OF GOVERNORS OF THE STATE BAR OF CAL., INDIGENT CRIMINAL DEFENSE SERVICES IN CALIFORNIA (Nov. 1984) [hereinafter cited as STANDING COMMITTEE].

83. 36 CRIM. L. RPTR. 2427 (1985).

to indigents in criminal cases reveals an inexorable trend away from the system of uncompensated appointments which prevailed a century ago. The suggestion that we meet the challenge to provide counsel to indigent civil litigants by resurrecting that system ignores the momentous changes which accompanied, indeed compelled, that trend. First, the shift from uncompensated appointments to public defenders paralleled a massive shift from a rural population to an urban one. In 1880, about 28% of the population in this country resided in communities designated as urban.⁸⁴ In 1970, the figure was 73.5%.⁸⁵ Today, the system of assigned counsel still prevails predominantly in rural counties.⁸⁶ The public defender system predominates in urban counties simply because it is a more efficient vehicle for the delivery of legal services where the demand for those services is great.

Secondly, the shift reflects an enormous change in the character of the bar. A century ago, the vast majority of lawyers were general practitioners who were equally comfortable trying a criminal case and drafting a commercial contract. Appointments could be spread out among the bar because lawyers were almost a fungible commodity. Today, the era of specialization means that only a small portion of the bar can competently respond to the need for appointed lawyers. The use of public defenders increases the level of competency, because the lawyers assigned to represent indigents are themselves specialists. A final trend worth noting is the growth of the proportion of the population which qualifies as "indigent." Ten years ago, less than 50% of all criminal defendants qualified as indigents. Today, the figure ranges from 55% to 60%.⁸⁷

In the face of these trends, the suggestion that a system of uncompensated appointments of counsel can meet the challenge of providing legal representation to indigents in civil cases is akin to the suggestion that we can solve the problem of smog produced by internal combustion engines by returning to the use of horses and buggies. Our problem has simply outgrown that solution.

III. SOME COLD ETHICS

Some courts have suggested that counsel possess an ethical obliga-

84. 18 ENCYCLOPEDIA BRITANNICA 974 (15th ed. 1974) (communities with a population in excess of 2,500 are designated as "urban").

85. *Id.* at 1076.

86. BUREAU OF JUSTICE STATISTICS, *supra* note 75, at 4 ("Assigned counsel systems . . . predominate in small counties with fewer than 50,000 residents.").

87. Gideon *Undone: The Crisis in Indigent Defense Spending*, Transcript of a Hearing on the Crisis in Indigent Defense Funding held during the Annual Conference of the National Legal Aid and Defender Association, at 1 (November, 1982).

tion to serve without compensation by virtue of section 6068(h) of the California Business and Professions Code, which provides that a lawyer should not "reject 'the cause of the defenseless or the oppressed.'" ⁸⁸ This view is misguided; section 6068(h) lends no support whatever to the proposition that lawyers owe an obligation to the state to accept appointments to serve without compensation. Section 6068 simply codifies an Oath of Admission to the Bar which was first formulated for use in the state of Washington and was adopted by the American Bar Association in 1908.⁸⁹ Many other states have a virtually identical statutory provision.⁹⁰ The provision describing the duty not to reject the cause of the defenseless or oppressed was clearly not intended to address the question of compensation, but simply to describe the lawyer's obligation to represent the unpopular client. The best evidence of this is that among the earliest states to adopt the oath by statute were three states which have long recognized that attorneys appointed to represent indigents are constitutionally entitled to compensation.⁹¹ Yet none of these three states saw any inconsistency in defining the duties of attorneys in precisely the same language utilized in section 6068(h). A growing number of other states, including Kentucky⁹² and Nebraska,⁹³ recognize a right to compensation while continuing to utilize the A.B.A. Oath of Admission. Even the State of Washington, where the oath originated a century ago and is still required by both statute⁹⁴ and rule,⁹⁵ has joined the ranks of those states which no longer countenance the appointment of counsel to serve without compensation.⁹⁶

The true meaning of the duty never to reject "the cause of the defenseless or oppressed" was explored by former Yale Law School Dean Eugene V. Rostow in the Morrison Lecture presented to the State Bar of California in 1961.⁹⁷ Describing the tradition of British barristers, who

88. *Payne v. Superior Court*, 17 Cal. 3d 908, 920 n.6, 553 P.2d 565, 574 n.6, 132 Cal. Rptr. 405, 416 n.6 (1976) (quoting CAL. BUS. & PROF. CODE § 6068(h) (West 1968 & Supp. 1985)); *County of Tulare v. Ybarra*, 143 Cal. App. 3d 580, 586-87, 192 Cal. Rptr. 49, 52-53 (1983); *County of Fresno v. Superior Court*, 82 Cal. App. 3d 191, 194, 196, 146 Cal. Rptr. 880, 884 (1978).

89. See 33 RULES OF THE A.B.A. 584 (1908).

90. See, e.g., OR. REV. STAT. § 9.460(8) (1983).

91. Indiana, Iowa and Wisconsin were among the first states to adopt the oath. 33 RULES OF THE A.B.A. 584 n.1 (1908). Cf. *Webb v. Baird*, 6 Ind. 13 (1854); *Hall v. Washington Co.*, 2 Greene 473 (Iowa 1850); *County of Dane v. Smith*, 13 Wis. 654 (1861).

92. *Bradshaw v. Ball*, 487 S.W.2d 294 (Ky. 1972).

93. *Kovarik v. County of Banner*, 192 Neb. 816, 224 N.W.2d 761 (1975).

94. WASH. REV. CODE § 2.48.210 (1961).

95. WASH. RULES FOR ADMISSION TO PRACTICE, Rule 5(G) (1965).

96. *Honore v. Board of Prison Terms & Paroles*, 77 Wash. 2d 660, 466 P.2d 485 (1970).

97. Rostow, *The Lawyer and His Client*, 48 A.B.A. J. 25 (1962).

are obligated to take every case that walks in the door, Dean Rostow compared the barrister's role to that of a cab driver—"bound to answer to the first hail."⁹⁸ Accompanying this tradition, however, is a governmental commitment to provide adequate compensation to the barristers who take on representation of the indigent.⁹⁹ Dean Rostow then described the very different tradition of American lawyers:

The code of ethics of the American Bar has never accepted the British rule in its full majesty, even in criminal cases. Canon 31 of the Canons of Professional Ethics adopted by the American Bar Association declares that "no lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment." The Canon stresses the lawyer's individual responsibility for accepting or declining requests for professional services. And it makes no reference, directly or indirectly, to the principle of the English rule as a factor the lawyer is to take into account in exercising his responsibility. It should be added, however, that the lawyer's oath, recommended by the American Bar Association and widely used, contains these words: "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed." At least one authority has said that "where the English rule is obligation to accept except under special circumstances, the American rule is obligation not to refuse where special circumstances exist."¹⁰⁰

Dean Rostow concluded that the oath simply describes the aspiration of American lawyers to strive for the ideal personified by John Adams representing the British soldiers accused of the "Boston Massacre."¹⁰¹

There is a vital difference between the power of a court to appoint an attorney and the power of a court to conscript an unwilling attorney and compel him to represent a client over his objection. While a lawyer has an ethical obligation to render service in the public interest, the acceptance of court appointments is just one of several alternatives available to meet this obligation.

A lawyer who shirks this ethical obligation may be subject to appro-

98. *Id.* at 29. *Cf.* *Tower v. Glover*, 104 S. Ct. 2820 (1984).

99. *See* 1963 U.S. ATT'Y GEN. COMM. ON POVERTY AND THE ADMIN. OF FED. CRIMINAL JUSTICE 37.

100. Rostow, *supra* note 97, at 29-30.

101. Adams was retained in that case for a one-guinea fee. P. SMITH, A NEW AGE NOW BEGINS 346 (1976).

appropriate professional discipline. But the courts are not empowered to enforce the obligation on a selective basis by compelling private attorneys to accept appointments to represent particular clients.

California courts have frequently exercised their power to make appointments of private counsel, but no reported decisions uphold the power of a court to compel a private lawyer to accept an appointment over his or her objection. The cases which discuss the power of the court over the assignment of public defenders, while not entirely consistent with each other, *are* totally consistent with a denial of the power to compel *private* lawyers to accept appointments.

In *Mowrer v. Superior Court*,¹⁰² the court held that an order compelling a deputy public defender to appear in a particular division at a particular time "to represent defendants in matters assigned and to be assigned" was in excess of the jurisdiction of the superior court. While conceding the inherent power of the court to control the proceedings before it, and noting the power conferred by statute "[t]o control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every manner appertaining thereto,"¹⁰³ the court found a significant limitation upon those powers: "The court's right to control its own proceedings must be exercised in the light of 'the fundamental interest of the public in maintaining an independent bar.'"¹⁰⁴

The court concluded that the power of the court to control an attorney's appearances arises only *after* the attorney has a matter before the court:

Petitioner concedes the fact that in any given case, as any other attorney, he can be ordered to appear in any department of respondent court at a given time if he has a matter scheduled in that department. However, petitioner correctly contends that there is no basis upon which the respondent court can appropriate his exclusive services and order him to be present continually in Department 115 between 9 a.m. and 5 p.m. of every working day.¹⁰⁵

Significantly, the *Mowrer* court equated the public defender with private attorneys: "The judge in a trial court has no more authority or control over a public defender than any other attorney practicing before

102. 3 Cal. App. 3d 223, 83 Cal. Rptr. 125 (1969).

103. CAL. CIV. PROC. CODE § 128(5) (West 1968 & Supp. 1985).

104. 3 Cal. App. 3d at 230, 83 Cal. Rptr. at 129 (quoting *Smith v. Superior Court*, 68 Cal. 2d 547, 560, 440 P.2d 65, 79, 68 Cal. Rptr. 1, 13 (1968).

105. *Id.* at 231, 83 Cal. Rptr. at 129.

the court.”¹⁰⁶ In *Ligda v. Superior Court*,¹⁰⁷ on the other hand, the court asserted greater control over public defenders than over private lawyers. In holding that a deputy public defender could be compelled to assist a defendant who chose to represent himself, the court relied upon its statutory authority to control the conduct of ministerial officers: “The public defender as a ministerial officer of the court does not have the power to decline an assignment to defend or any function thereof, *as if he were a private attorney*. He is employed by the people to render such services.”¹⁰⁸

It must be noted that the deputy in *Ligda* had already *accepted* appointment to represent the defendant prior to the defendant’s assertion of his right of self-representation. Thus, even *Ligda* does not stand for the proposition that any lawyer, including a public defender, can be compelled to accept an initial appointment.¹⁰⁹

In *Chaleff v. Superior Court*,¹¹⁰ a deputy public defender was held in contempt of court for declining an appointment to serve as “advisory counsel” to a defendant who insisted upon his right of self-representation. The attorney cited, among his reasons for declining the appointment, conflicts with the client over what defenses or witnesses should be presented and adverse consequences to his other case load. The court of appeal vacated the judgment of contempt, concluding that Rule 2-111 of the California Rules of Professional Responsibility permits a lawyer to withdraw from representation of a client whenever the duty to a client impinges upon his ethical responsibility as a member of the bar. Noting that public defenders “are subject to the Rules of Professional Conduct governing the action of lawyers no less than other members of the State Bar,” the court concluded that Chaleff went as far as he could in disclosing his untenable ethical position without divulging privileged information.¹¹¹ The court noted that its reliance upon Rule 2-111 required neither agreement nor disagreement with *Ligda*, characterizing that case as holding “that a deputy public defender may, *with his consent*, be appointed as advisory counsel despite the absence of authority for such an appointment in Government Code section 27706.”¹¹² While *Mowrer*, *Ligda* and *Chaleff* are somewhat inconsistent on the issue of whether the courts have greater control over public defenders than over private attor-

106. *Id.* at 230, 83 Cal. Rptr. at 129.

107. 5 Cal. App. 3d 811, 85 Cal. Rptr. 744 (1970).

108. *Id.* at 827, 85 Cal. Rptr. at 754 (emphasis added).

109. *Id.* at 826, 85 Cal. Rptr. at 753.

110. 69 Cal. App. 3d 721, 138 Cal. Rptr. 735 (1977).

111. *Id.* at 724, 138 Cal. Rptr. at 737.

112. *Id.* at 725 n.2, 138 Cal. Rptr. at 737 n.2 (emphasis added).

neys, the California Supreme Court has squarely held that the attorney-client relationship is entitled to the same respect whether the attorney be retained, appointed, or a public defender.¹¹³

The concern for the independence of the bar and the inviolability of the attorney-client relationship expressed in these cases lends strong support to the argument that California courts lack the power to conscript unwilling attorneys to represent assigned clients. The acceptance of a client by a lawyer involves a complex set of professional and personal judgments. The lawyer cannot and should not accept a client unless he concludes that:

(1) He or she possesses "the learning and skill ordinarily possessed by lawyers in good standing who perform, but do not specialize in, similar services";¹¹⁴

(2) The employment is not adverse to a client, a former client, the lawyer's own self-interest or any other conflicting interest;¹¹⁵

(3) He has adequate time to pursue the matter with reasonable diligence. "When an attorney takes on more than he can properly handle, he jeopardizes both his client's cause and the public interest in sound and efficient administration of justice";¹¹⁶

(4) Representation of the client is not likely to result in an unreasonable financial burden on the lawyer;¹¹⁷

(5) The intensity of any personal feeling of repugnance for the client will not impair the effectiveness of his representation of the client.¹¹⁸

The evaluation of these factors requires intensive self-assessment and examination of conscience that only the lawyer involved can perform. The courts must presume that this professional judgment is made in good faith. If a lawyer's assessment of his own competency, potential conflicts, existing workload, current financial ability or intensity of personal feelings is to be second-guessed and overridden by an appointing court, the effectiveness of the ensuing attorney-client relationship may be doomed from the start. This is not to suggest that a lawyer is always the final judge of whether he is meeting his responsibility to serve the public

113. *Ingram v. Justice Court*, 69 Cal. 2d 832, 840-41, 447 P.2d 650, 654-55, 73 Cal. Rptr. 410, 414-15 (1968); *Smith v. Superior Court*, 68 Cal. 2d 547, 582, 440 P.2d 65, 75, 68 Cal. Rptr. 1, 11 (1968).

114. CAL. RULES OF PROFESSIONAL CONDUCT Rule 6-101(1), *quoted in* *Lewis v. State Bar*, 28 Cal. 3d 683, 621 P.2d 258, 170 Cal. Rptr. 634 (1981).

115. CAL. RULES OF PROFESSIONAL CONDUCT Rules 4-101, 5-101-02.

116. *Lopez v. Larson*, 91 Cal. App. 3d 383, 400, 153 Cal. Rptr. 912, 922 (1979).

117. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2(b) (1981).

118. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2(c) (1981); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-30 (1981).

interest. That question might be addressed in a disciplinary proceeding brought by the bar, a forum which protects both the lawyer's interest in the privacy of his or her financial affairs and conscience, and the privacy of his or her other clients whose cases may create conflicts or excessive workload.

The necessity for courts to defer to the good faith judgments of attorneys who seek to decline appointment has been recognized in the reported decisions of Florida and Ohio. In *Easley v. State*,¹¹⁹ the Florida District Court of Appeal reversed a judgment of contempt against a lawyer who filed a client's affidavit concurring in the lawyer's own assessment of incompetence after the trial court had denied a previous motion to withdraw.¹²⁰ The trial court interpreted counsel's action as "a scheme to secure release from appellant's obligation as an attorney to assist the court in the representation of indigent criminal defendants."¹²¹ On appeal, the court concluded that counsel who feels himself incompetent to represent a client, despite a court order to provide such representation, has a *duty* "to communicate his feelings of lack of competence" to the client:

There is no finding, nor indeed on the evidence could there be, that appellant did not in good faith feel his inadequacy to handle felonies. Moreover, in accord with the ethical obligations of an attorney, we think it was incumbent upon appellant to communicate his feelings of lack of competence to the defendant.¹²²

The Florida court recognized that a lawyer's own conclusions about his competency, his conflicting loyalties, his availability and solvency and his feelings of repugnance are likely to interfere with the lawyer-client relationship, regardless of the fact that an appointing court may disagree with those conclusions:

The court's finding of appellant's competence in criminal matters wouldn't make it a fact; and nothing in the evidence impeaches appellant's assertion to the contrary. Furthermore, appellant never actually *refused* to represent [defendant] in contravention of the court order. He simply informed the defendant, as he should have, that he felt incompetent to represent him and thereafter filed a motion consistent with the desires of his client. He could have done no less and is not guilty of con-

119. 334 So. 2d 630 (Fla. 1976).

120. *Id.* at 635.

121. *Id.*

122. *Id.* at 632.

tempt for doing so.¹²³

A similar dilemma was presented to the Ohio Court of Appeals in *State v. Gasen*.¹²⁴ There, the trial court appointed a deputy public defender to represent a criminal defendant over the lawyer's objection that he could not effectively represent the client and that to do so would violate the Code of Professional Responsibility, since the defendant was already represented by another lawyer who had failed to appear. Significantly, the court of appeals held that a lawyer's *duty to decline* to represent a client is no different when the attorney is appointed by the court than it would be if the client walked in off the street:

Clearly, the ethics of the legal profession demand that any attorney, private or public, decline to represent a party when such attorney is unable, for valid reasons, to fully and adequately prepare such party's case, or when such party is already represented by competent counsel. Failure of an attorney to *decline* to perform such representation may result in disciplinary measures being taken against him.¹²⁵

Since the duty to decline employment arises from such a complex matrix of ethical judgments by the attorney involved, it is difficult to imagine any circumstances in which a court would be justified in substituting its judgment for that of the attorney.

It must also be noted that the risks which a court imposes upon an unwilling attorney with a mandatory appointment go far beyond the disruption of the normal lawyer-client relationship. The risks may extend to the harassment of subsequent malpractice suits. In *Ferri v. Ackerman*,¹²⁶ the United States Supreme Court held that attorneys appointed to represent indigent clients in federal criminal proceedings are not entitled to the absolute immunity conferred upon judges and prosecutors. In so doing, however, the Court noted that the increased risk of malpractice liability for such lawyers was "not implausible":

Respondent argues that there are valid policy reasons that justify an immunity for appointed counsel not accorded privately retained counsel. The claim is that a defendant's relationship with appointed counsel is substantially different than it would be with retained counsel because of the inability to choose and freely to discharge counsel. *See, e.g., Criminal Justice Act Plan for the Western District of Pennsylvania* § IV A(3). The de-

123. *Id.* (emphasis in original).

124. 48 Ohio App. 2d 191, 356 N.E.2d 505 (1976).

125. *Id.* at 193, 356 N.E.2d at 507 (emphasis in original).

126. 444 U.S. 193 (1979).

fendant would therefore tend to perceive appointed counsel as a representative of the government and to view him with suspicion. After conviction, a defendant's inevitable bitterness would lead to a high risk of retaliatory law suits, the same fear that underlies immunity for judges and prosecutors. *Butz v. Economou*, 438 U.S. 478. Further, because of the increased risk of malpractice actions, appointed counsel would be more susceptible to pressure from clients to call additional witnesses or to make additional arguments that would, in fact, prejudice the defendant's own case. But respondent has not directed our attention to any empirical data—in judicial decisions, legislative hearings, or scholarly studies—to support his conclusions that the risk of malpractice litigation deters members of the private bar from accepting the representation of indigent defendants or adversely affects the quality of representation. Given the speculative, though not implausible, nature of respondent's arguments, we are unwilling to ascribe to Congress an intent to accord an immunity to appointed counsel not given retained counsel in the face of the silent legislative history on this point.¹²⁷

Significantly, the Court avoided this problem in *Ferri* by assuming that lawyers were free to decline such appointments. Noting that the risk of malpractice liability must be offset by the level of compensation offered to ensure a supply of lawyers willing to accept appointments, the Court left that equation for Congress to resolve.¹²⁸

The dilemma of compelling appointed attorneys to accept the risk of subsequent litigation with their court-imposed client can find no better illustration than the case of *Bradshaw v. District Court*.¹²⁹ The plaintiff sought appointment of counsel to represent her in an action brought under Title VII of the Civil Rights Act of 1964. While the Act authorizes the appointment of counsel,¹³⁰ Congress has never appropriated funds to compensate lawyers for such appointments. Numerous lawyers declined to accept appointment, not just because of the expense involved, but because of the plaintiff's reputation for turning on her lawyers. The Ninth Circuit Court of Appeals characterized the case as follows:

Bradshaw has been a litigant in numerous cases over the last ten years in municipal, superior, and federal courts. Attorneys

127. *Id.* at 200-01 n.17.

128. *Id.* at 204-05.

129. 742 F.2d 515 (9th Cir. 1984).

130. 42 U.S.C. § 2000e-5(f)(1)(B) (1982).

who have been appointed to represent her interests in the past have themselves been the subject of court hearings and public exposure due to questions raised by Bradshaw about their competency and ability to represent her interests.

. . . Moreover, the district court found that members of the bar were afraid of jeopardizing their malpractice insurance coverage and concerned they would be subject to state bar disciplinary proceedings. These fears apparently stem from their assessment of the merits of Bradshaw's claims, coupled with the present willingness of litigants to join attorneys with their clients as defendants in seeking redress from frivolous, meritless or vexatious claims.¹³¹

These concerns led the court to uphold the district court's refusal to make a coercive appointment of counsel, although it indicated its willingness to uphold coercive appointments in other circumstances.

Ferri thus poses a question that must be addressed in any system which relies upon involuntary appointments to provide representation to civil litigants. If no immunity from subsequent malpractice liability is afforded, then every lawyer subjected to an involuntary appointment is saddled with the additional burden of insuring himself or herself against the increased risk to which he is exposed. If immunity is afforded, the indigent client is given less protection against incompetence than the non-indigent. The dilemma can only be avoided by making the same assumption that the Supreme Court made in *Ferri*: the acceptance of a court-appointed client is a voluntary act by the attorney, who willingly assumes all the risks and the rewards that the ensuing lawyer-client relationship might bring.

IV. SOME COLD ECONOMICS

I grew up in a generation that learned the lessons of what life is *really* all about from the comic strips rather than from the television tube. As an avid fan of Dick Tracy, Pogo and Li'l Abner, I assimilated certain core principles and values that have been consistently reaffirmed by my life experiences. One such principle is a very simple one: There is generally a strong correlation between the quality of a product or service and its price. In other words, you get what you pay for. The cartoon character who taught this lesson most effectively was one created by Al Capp in Li'l Abner—a judge by the name of "Marryin' Sam." "Marryin' Sam" offered his customers a wide range of choices for a nuptial cere-

131. 742 F.2d at 517-18.

mony, ranging from the simplest exchange of vows for twenty-five cents all the way up to the greatest extravaganza imaginable—the eight-dollar wedding. Here is “Marryin’ Sam’s” description of his eight-dollar wedding:

Fust—Ah Strips t’ th’ waist, an’ rassles th’ four biggest guests!!
Next—a fast demon-stray-shun o’ how t’ cheat yore friends at cards!!—follayed by four snappy jokes—guaranteed t’ embarrass man or beast—an’—then after ah dances a jig wif a pig, Ah yanks out two o’ mah teeth, an’ presents ’em t’ th’ bride an’ groom—as mementos o’ th’ occasion!!—then—Ah really gits going!!—Ah offers t’ remove any weddin’ guest’s appendix, wif mah bar hands—free!! Then yo’ spreadeagles me, fastens mah arms an’ laigs t’ four wild jackasses—an’—bam!! yo’ fires a gun!!—While they tears me t’ pieces—Ah puffawms th’ weddin’ ceremony!!¹³²

Having accepted the lesson that you get what you pay for, which I learned from “Marryin’ Sam,” I must confess that I was a bit skeptical when I went to law school and was told that these principles had no application to our system of justice. In the courtrooms of America, I was told, every accused stands equal before the law. Both the millionaire and the pauper are given the same right to counsel, and if you cannot afford a lawyer, one will be provided without cost. When I first heard that, the image of “Marryin’ Sam” appeared in my head, saying I can give you a twenty-five cent trial, in which I plead you guilty and throw you on the mercy of the court, or I can give you an eight-dollar trial, in which we hire investigators to interview witnesses, prepare charts and demonstrations to dazzle the jury, employ consultants to cogitate, experts to pontificate, and psychiatrists to prognosticate, and file reams of motions to dismiss, to discover, to disqualify and to discombobulate. I was assured that such images should be banished from my brain, however, because they are unprofessional. After all, lawyers take an oath which permanently eradicates avarice and greed from their breasts, and our system of justice is immune from the law of supply and demand which dominates the marketplace.

When I left law school and ventured into the criminal courts, however, my skepticism was rekindled. While I never saw a lawyer offer a client a menu of choices akin to those offered by “Marryin’ Sam,” I found that the full spectrum of such choices was still represented at the bar. There were lawyers who pled every client guilty, and there were

132. BERGER, LI’L ABNER: A STUDY IN AMERICAN SATIRE 58 (1975).

lawyers who put on eight-dollar trials, and generally which you got depended on how much you had to pay.

My comic strip analogy should not be misinterpreted as a criticism of the legal profession. I find it hard to fault lawyers for abiding by the economic principles that guide every other human endeavor. Where I find fault is in the pious hypocrisy which posits legal doctrine upon the fiction that we are immune from the operation of those principles.

Although lawyers are reluctant to admit it, history confirms that there is a direct relationship between the level of compensation provided and the quality of services rendered to indigents.¹³³ Legislators and courts must recognize that the answer to the question, "how much?", must be preceded by the question "how good?" If we are serious about the promise of equal justice, then we need to set a level of compensation high enough to attract the same lawyers available to those with money to pay. The criterion must ultimately be based on the law of supply and demand. At what level of compensation will a broad cross-section of competent lawyers be available to accept appointments?

"Reasonable" compensation does not necessarily imply compensation at the prevailing rates for comparable private sector employment, although that is certainly a relevant factor. In *Hill v. Superior Court*,¹³⁴ the California Supreme Court interpreted the right to "reasonable compensation" for court appointments pursuant to then section 987a of the California Penal Code¹³⁵ and rejected the petitioner's claim that "reasonable" fees should be determined by reference to private sector rates:

As we view the situation, it is essentially one where court-appointed counsel, as officers of the court, perform a public service at public expense. More appropriate criteria, therefore, may be found by considering the amounts deemed proper as compensation for the services of court-appointed counsel in other jurisdictions, and also by considering the compensation paid to public officers generally.¹³⁶

While the conclusion in *Hill* that the prevailing rates for private transactions should not control appears sound, the reliance upon appointed rates in other jurisdictions and the salaries of public employees

133. SMITH & BRADWAY, *supra* note 37, at 92-93.

134. 46 Cal. 2d 169, 293 P.2d 10 (1956).

135. *Id.* at 171, 293 P.2d at 11-12. "In any case in which counsel is assigned in the superior court to defend a person who is charged therein with crime, . . . such counsel . . . shall receive a reasonable sum for compensation and for necessary expenses, the amount of which shall be determined by the court . . ." *Id.* (quoting 1951 Cal. Stat. 1160, § 2).

136. 46 Cal. 2d at 171, 293 P.2d at 12.

appears strained. Appointed rates vary greatly, ranging from ten dollars per hour in some states to sixty-five dollars per hour in others.¹³⁷ These variances often reflect differences in the cost of living and the community tax base rather than judgments about the intrinsic value of services. The salaries paid to public lawyers are also of limited relevance, since these officials have no overhead expenses of maintaining an office. The basic premise of *Hill* was that a lower level of compensation is justified by the lawyer's duty to the "defenseless" pursuant to section 6068(h) of the Business and Professions Code.¹³⁸ That premise is a faulty one if the objective of providing "reasonable" compensation is to ensure competent representation.

The *Hill* criteria were repudiated in the subsequent enactment of Penal Code section 987.3, which enumerates the factors currently considered in determining reasonable compensation for court-appointed attorneys in criminal cases:

- (a) Customary fee in the community for similar services rendered by privately retained counsel to a nonindigent client.
- (b) The time and labor required by the attorney.
- (c) The difficulty of the defense.
- (d) The novelty or uncertainty of the law upon which the decision depended.
- (e) The degree of professional ability, skill and experience called for and exercised in the performance of the services.
- (f) The professional character, qualification, and standing of the attorney.¹³⁹

No one of these factors is deemed controlling.

There appears to be no reason why the same factors would not be of equal relevance in setting reasonable fees for counsel appointed to civil cases.

In this regard, it is interesting to note the provision for compensation in *Yarbrough v. Superior Court* civil appointments contained in Senate Bill 2057, which was vetoed by Governor Deukmejian in 1984.¹⁴⁰ The bill set forth the same factors listed in section 987.3, leaving the amount of compensation up to the judge. But the following caveat was added in a last-minute amendment on the Assembly floor:

In no event shall the award exceed the rate of reimbursement for appointed counsel in comparable cases in the community.

137. BUREAU OF JUSTICE STATISTICS, *supra* note 75, at 5.

138. 46 Cal. 2d at 174-75, 293 P.2d at 14.

139. CAL. PENAL CODE § 987.3 (West Supp. 1985).

140. Cal. S.B. 2057, 1983-84 Reg. Sess. (1983). See *supra* note 17 and accompanying text.

There shall be a presumption that the lowest rate for appointed counsel in the community is the reasonable rate. . . . In no event shall the rate exceed sixty dollars (\$60) per hour.¹⁴¹

Sixty dollars per hour is also the rate paid for representation of death row inmates on their appeals before the California Supreme Court.¹⁴² The question we need to address is whether even that rate is sufficient to attract a broad cross-section of competent lawyers to accept appointments.

It is essential to carefully separate the economic issues raised by compensation of counsel from the very different issues raised by reimbursement of counsel for the costs and expenses of litigation. To require appointed counsel to pay these expenses out of his or her own pocket creates a significant conflict of interest and violates the constitutional guarantee that property will not be taken without due process of law. In recognizing a limited right to appointment of counsel in *Payne v. Superior Court*,¹⁴³ the California Supreme Court never addressed the questions posed by the costs and expenses of litigation. An obligation to provide services cannot be expanded to include liability for the expenses incurred in providing representation without creating a serious ethical dilemma for appointed counsel.

The distinction between compensation for services and reimbursement for expenses finds deeply rooted support in the ethical canons which have traditionally guided the legal profession. Canon 42 of the Canons of Professional Ethics, adopted by the American Bar Association in 1928, provides: "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."¹⁴⁴

In Opinion 259, this canon was construed by the A.B.A. Committee on Professional Ethics and Grievances to preclude lawyers from directly advancing costs without an agreement for reimbursement when doing volunteer legal work for servicemen: "We think, however, it would not prohibit the committee [on war work] from advancing costs in indigent cases out of funds provided for that purpose and, of course, a lawyer member of the committee could subscribe to such a fund if he so desired."¹⁴⁵

141. Cal. S.B. 2057, 1983-84 Reg. Sess., § 2 (1983) (Assembly amendment, July 6, 1984).

142. CAL. PENAL CODE § 1241 (West Supp. 1985).

143. 17 Cal. 3d 908, 533 P.2d 565, 132 Cal. Rptr. 405 (1976).

144. CANONS OF ETHICS Canon 42 (1928).

145. A.B.A. Comm. on Professional Ethics and Grievances, Formal Op. 259 (1957).

This prohibition was incorporated in the Rules of Professional Conduct adopted pursuant to California Business and Professions Code section 6076. Rule 5-104 prohibits any direct or indirect payment of expenses for a client, with a limited exception which permits *advancing* the costs of prosecuting or defending a claim or action.¹⁴⁶

The A.B.A. carried forward the same proscription into the Code of Professional Responsibility, promulgated in 1969. The disciplinary rules codified under Canon 5, which addresses conflicts of interest, includes DR 5-103:

Avoiding Acquisition of Interest in Litigation.

(B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, *provided the client remains ultimately liable for such expenses.*¹⁴⁷

It is important to recognize that the prohibition of the lawyer's payment of costs and expenses of litigation has always coexisted with rules *allowing* contingency fee agreements, although *both* give a lawyer an interest in the litigation. The Ethical Considerations offered to explicate Canon 5 directly addressed this dichotomy:

Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice. But a lawyer, because he is in a better position to evaluate a cause of action, should enter into a contingent fee arrangement only in those instances where the arrangement will be beneficial to the client.¹⁴⁸

....

A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to his client.

146. CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 5-104 (1975). Even a guaranty of reimbursement, compelling an attorney to *advance* the cost and expenses of litigation, would still constitute an unconstitutional taking of the attorney's property, since the attorney is deprived of the income he or she could derive from investing the funds during the period of time they are "advanced." Cf. *Pierpont Inn, Inc. v. California*, 70 Cal. 2d 282, 449 P.2d 737, 74 Cal. Rptr. 521 (1969).

147. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103 (1981) (emphasis added).

148. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-7 (1981).

Although this assistance generally is not encouraged, there are instances when it is not improper to make loans to a client. For example, the advancing or guaranteeing of payment of the costs and expenses of litigation by a lawyer may be the only way a client can enforce his cause of action, but the ultimate liability for such costs and expenses must be that of the client.¹⁴⁹

One can certainly question the significance of this distinction where the lawyer represents a plaintiff. In that instance, the interests of the lawyer and the client largely coincide: If the case is successful, the lawyer is assured of both his or her fee and reimbursement of expenses, and if the case is not successful, the lawyer's claim for reimbursement of expenses may not be worth much. There may be a difference in the appearance of propriety between cash outlays for a client and the devotion of hours without billing. But the real risk of conflict seems academic. A lawyer investing many hours of time in a case is unlikely to jeopardize his client's interests, and his own, by not undertaking discovery or retaining necessary experts simply to avoid the expense.¹⁵⁰

The difference between compensation for services and reimbursement for expenses assumes a very different posture, however, when the lawyer is representing a defendant. There is no contingency: win or lose, the lawyer will not be compensated. While the lawyer realizes that the hours he or she devotes to the case carry no expectancy of reward, he or

149. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-8 (1981).

150. These considerations led to a revision of the A.B.A.'s Model Rules of Professional Conduct adopted in August, 1983. Rule 1.5(e) now provides:

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1983). Rule 1.5(e)(1) simply recognizes that the distinction between a contingent fee for services and contingent reimbursement of expenses is a difference hardly worth preserving. Rule 1.5, however, requires that contingent fee agreements clearly specify whether litigation expenses are to be deducted "before or after the contingent fee is calculated." The comment to the Rule cautions lawyers that:

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise the client might have to bargain for further assistance in the midst of a proceeding or transaction.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5, Comment 2 (1983). Rule 1.5(e)(2), of course, goes no further than Opinion 259, *supra* note 141, in *permitting* a lawyer to contribute court costs voluntarily in addition to contributing his services. The new A.B.A. Rules have not been adopted in California.

she accepts that consequence at the outset when he or she agrees to take on the case. It is in making the dozens of tactical decisions that ensue that a pervasive conflict of interest casts its cloud. Should the deposition of a particular witness be taken? Should an expert be consulted or retained? Each such decision requires the lawyer to reach for his own wallet and ask himself, "can I really afford this?"

The California Supreme Court has addressed the problem of the conflict between a lawyer's financial self-interest and the interests of his or her client in two recent cases. In *People v. Barboza*,¹⁵¹ the court found that a budgetary scheme which reduced the compensation for the public defender when a conflict of interest was declared deprived a criminal defendant of the effective assistance of counsel by creating a direct "financial disincentive for the public defender either to investigate or declare the existence of actual or potential conflicts of interest requiring the employment of other counsel."¹⁵²

In *Maxwell v. Superior Court*,¹⁵³ the court held that a criminal defendant could waive the potential conflict created by a contract with his retained counsel which gave the attorney publication rights to his life story. While the court recognized the serious potential for conflict between counsel's economic motivations and the defendant's optimum trial strategy, it concluded that the defendant's countervailing right to retain counsel of his choice was controlling, and permitted a waiver of the conflict. However, the situation is dramatically different with appointed counsel. To require an indigent to waive the conflict created by appointment of counsel who is required to pay the costs of litigation out of his own pocket places an intolerable burden on the right to competent counsel. Rather than a voluntary waiver, the indigent is compelled to accept counsel with conflicting self-interest or proceed with no counsel at all.

Quite apart from the ethical dilemma of conflicting self-interest created by appointment of counsel without reimbursement for expenses, however, is the constitutional problem of taking counsel's property without due process of law. In *State ex rel. Wolff v. Ruddy*,¹⁵⁴ while upholding a plan requiring counsel to provide services to indigents without compensation, the Missouri Supreme Court held that this plan could not

151. 29 Cal. 3d 375, 627 P.2d 188, 173 Cal. Rptr. 458 (1981).

152. *Id.* at 379, 627 P.2d at 189, 173 Cal. Rptr. at 459.

153. 30 Cal. 3d 606, 639 P.2d 248, 180 Cal. Rptr. 177 (1982).

154. 617 S.W.2d 64 (Mo. 1981). See also *State ex rel. Scott v. Roper*, 688 S.W.2d 757 (Mo. 1985), where the Missouri Supreme Court held that "the courts of this state have no inherent power to appoint or compel attorneys to serve in civil actions without compensation." *Id.* at 769.

require attorneys to advance personal funds for costs or expenses.¹⁵⁵ In *Williamson v. Vardeman*,¹⁵⁶ a federal writ of habeas corpus was granted to an attorney who had been held in contempt by a Missouri judge for refusing to accept an appointment which would require him to advance the costs of taking depositions, hiring an investigator and retaining experts to evaluate laboratory evidence. The court concluded:

Requiring lawyers to pay the necessary expenses of criminal defense work without reimbursement is, however, constitutionally distinct from merely compelling lawyers to provide their services. Expenses might include investigatory services, deposition costs, witness fees, payment of expert witnesses, and similar outlays. While we understand that in many cases, because of lost opportunities and payment of fixed costs, the burden of providing services without compensation is comparable to that of paying expenses, lawyers have no duty to pay expenses. The class of lawyers has no more obligation to pay such expenses than any other class of citizens. Compelling individual attorneys to bear such costs raises serious due process issues. . . . Counsel's rights were violated when he was asked to pay the expense involved in defending an indigent and held in contempt when he refused to assume the defense under these conditions.

Thus, although we find Missouri has adopted a constitutional procedure, we hold the trial court impermissibly failed to implement that procedure by denying counsel's request for an order requiring the State to pay his expenses or upon the State's failure to so pay, that the court discharge the accused. If this procedure had been followed, counsel would have been relieved of his appointment. This did not happen. Counsel was thus ordered to advance payment of funds necessary to the defense of the accused. *We find that execution of this order would constitute a "taking" of counsel's property without just compensation in violation of the due process clause of the fourteenth amendment.*¹⁵⁷

The Supreme Court of New Hampshire recently expressed agreement with both of these cases in holding that a denial of full reimbursement of expenses to an attorney appointed to represent an indigent was an unconstitutional taking of property.¹⁵⁸ In addition to Missouri and

155. 617 S.W.2d at 67.

156. 674 F.2d 1211 (8th Cir. 1982).

157. *Id.* at 1215-16 (emphasis added).

158. *State v. Robinson*, 123 N.H. 665, 465 A.2d 1214, 1217 (1983).

New Hampshire, three other states which have rejected a right of compensation for the services of appointed counsel have carefully distinguished counsel's right to reimbursement for out-of-pocket expenditures.¹⁵⁹

The right to competent counsel becomes a meaningless gesture if counsel for an indigent is denied the use of working tools essential to the establishment of a tenable claim or defense.¹⁶⁰ To require appointed counsel to supply these tools out of his own pocket, however, would impose an intolerable conflict of interest upon the client and an unconstitutional deprivation of property upon counsel. Thus, *full* reimbursement for expenses is constitutionally compelled.

The right to reimbursement for expenses must be limited, however, to *reasonably necessary* expenses. Some control is necessary to prevent expenditure of public funds on the employment of experts or pursuit of discovery where cost far exceeds the value. In the criminal context, this control is exerted by requiring court approval of such expenditures, based on an *in camera* showing.¹⁶¹ A similar procedure could be implemented to control expenditures in civil actions.

V. SOME COLD POLITICS

As a result of the cutbacks in funding for legal services programs, many of those who qualify as indigent are not being served by the programs in California.¹⁶² New "volunteer" programs have fallen far short of filling the gap.¹⁶³ This fiscal reality has required legal services programs to allocate scarce resources to the cases of greatest need. Invariably, "need" is defined by reference to what is at stake. Those clients facing the most immediate threat of the most irretrievable losses get priority.

In constructing a program to respond to the challenge of *Yarbrough v. Superior Court*, it should be obvious that resources are not immediately

159. *People v. Kinion*, 97 Ill. 2d 322, 328, 454 N.E.2d 625, 630-32 (1983); *State v. Second Judicial Dist. Court*, 85 Nev. 241, 243, 453 P.2d 421, 422-23 (1969); *State v. Horton*, 34 N.J. 518, 525, 170 A.2d 1, 9-10 (1961); *State v. Rush*, 46 N.J. 399, 408, 217 A.2d 441, 450 (1966); *State ex rel. Antini*, 53 N.J. 488, 491, 251 A.2d 291, 294 (1969).

160. *Cf. Ake v. Oklahoma*, 105 S. Ct. 1087 (1985); *People v. Gunnerson*, 74 Cal. App. 3d 370, 379, 141 Cal. Rptr. 488, 493 (1977).

161. CAL. PENAL CODE § 987.2 (West Supp. 1985); *Puett v. Superior Court*, 96 Cal. App. 3d 936, 158 Cal. Rptr. 266 (1979).

162. Cochran, *Down and Out in the Valley*, CAL. LAW., June, 1984, at 51; Smegal, *The Future of Federal Funding of Civil Legal Services for Indigents*, SAN FRANCISCO ATT'Y, Apr.-May 1985, at 18.

163. Hager, *Private Bar Offering Legal Aid to Poor, Filling Gap Left by U.S. Cutbacks*, L.A. Times, July 29, 1984, Part I, at 10, col. 1.

available to fulfill the counsel needs of every indigent litigant. In a way, it may be unfortunate that *Yarbrough* became a vehicle for the recognition of a right to reasonably compensated counsel. In structuring a list of priorities based on need, it is unlikely that many would place convicted felons who are sued for damages by their victims near the top of the list and in front of elderly or mentally disabled persons facing eviction,¹⁶⁴ immigrants facing deportation, or parents facing loss of their children. While a persuasive argument can be made that the access of prisoners to the courts should receive high priority,¹⁶⁵ the real reason cases like *Yarbrough* move to the front of the line is because the state is directly involved in the deprivation which creates the need for counsel.¹⁶⁶ While this element of state action triggers recognition of a right to counsel, it is hardly the most relevant factor in objectively identifying those indigent litigants who have the greatest need for counsel.

In this respect, the evolution of a right to counsel for civil litigants assumes a very different posture from the evolution of that right in criminal cases. In the criminal context, some very distinct and very relevant lines of demarcation were available. The earliest recognition of a right to counsel was limited to capital cases, where the defendant's life was at stake.¹⁶⁷ Thirty years later, the right was extended to felony cases in which the defendant faced a risk of imprisonment for more than one year.¹⁶⁸ Only nine years later, in 1972, the right was extended to misdemeanor cases which actually lead to incarceration.¹⁶⁹ As the history of implementation of the right to counsel in criminal cases shows,¹⁷⁰ the expansion of state efforts closely parallels the constitutional mandates.

While the guidelines are not as clear, the courts which have recognized a right to counsel for civil litigants repeatedly stressed that the interest at stake is an important dimension in defining this right.¹⁷¹ To some extent, the *Yarbrough* opinion recognizes this element by its insis-

164. See *Quail v. Municipal Court*, 85 Daily J. D.A.R., Aug. 23, 1985, at 2996 (Johnson, J., dissenting).

165. Ducey, *Survey of Prisoner Access to the Courts: Local Experimentation a' Bounds*, 9 NEW ENG. J. ON CRIM. AND CIV. CONFINEMENT 47 (1983); Note, *A Prisoner's Constitutional Right to Attorney Assistance*, 83 COLUM. L. REV. 1279 (1983).

166. *Payne v. Superior Court*, 17 Cal. 3d 908, 915-17, 553 P.2d 565, 571-72, 132 Cal. Rptr. 405, 412 (1976). Cf. *Rhodes v. Chapman*, 452 U.S. 337, 352-68 (1981) (Brennan, J., concurring); *Bounds v. Smith*, 430 U.S. 817 (1977).

167. *Powell v. Alabama*, 287 U.S. 45 (1932).

168. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

169. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). See also *Scott v. Illinois*, 440 U.S. 367 (1979).

170. See *supra* text accompanying notes 29-87.

171. Catz & Firak, *The Right to Appointed Counsel in Quasi-Criminal Cases: Towards an Effective Assistance of Counsel Standard*, 19 HARV. C.R.-C.L. L. REV. 397 (1984); Herman &

tence upon a detailed inquiry directed to "finding a potential for loss that is not wholly ephemeral."¹⁷² Leaving the determination of a particular defendant's need for counsel to ad hoc judicial assessment is not a satisfactory solution. Inconsistency in rulings can be anticipated, and the initial hurdle of showing the need for a lawyer will become a complex task which itself requires a lawyer's assistance. Legislative or administrative guidelines should be formulated to identify the classes of cases in which the necessity for counsel can be presumed. When such a list is composed, however, consideration must be given to the *non-incarcerated* indigents who are named as defendants in these same categories of cases. Should the limitations on those defendants' access to the courts, by virtue of physical disabilities, inability to speak or understand English, or similar handicaps, entitle them to the assistance of counsel? The fact that a court has not declared that these categories of people possess a *constitutional* right to counsel¹⁷³ should not dissuade the legislature from addressing and prioritizing these defendants' needs as well.¹⁷⁴

The challenge of *Yarbrough* also presents a unique opportunity to avoid one of the major problems presented by our system of financing the appointment of counsel for indigents in criminal cases: the disparity injected by local financing. By creating a system to finance the appointment of counsel in civil cases on a statewide basis, uniform standards can be assured and local political pressures which are resistant to change can be avoided.

Currently, each county in California must provide the funds to operate a public defender's office, or pay the costs of appointing private lawyers pursuant to section 987.2 of the Penal Code, or both.¹⁷⁵ State funds

Donahue, *Fathers Behind Bars: The Right to Counsel in Civil Contempt Proceedings*, 14 N.M.L. REV. 275 (1984).

172. 39 Cal. 3d 197, 205, 702 P.2d 583, 592, 216 Cal. Rptr. 425, 434 (1985).

173. The persuasive legal arguments for an extension of the right to counsel recognized in *Payne* to other indigent litigants are presented 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 (1978).

174. Senate Bill 2057 would have limited compensation to attorneys appointed to cases in which the defendant "has the constitutional right to be represented by counsel." Cal. S.B. 2057, 1983-84 Reg. Sess., § 1 (1983); see *supra* note 17 and accompanying text. This may create an open-ended invitation for the courts to expand the categories of cases in which the right to counsel will be given constitutional recognition. Prioritizing competing claims to scarce resources and identifying the categories of cases in which *all* indigent defendants should be provided with appointed counsel who will be publicly compensated are tasks best handled by the legislature.

175. Where a public defender is unavailable due to conflict of interest or prior caseload, the courts may appoint a private lawyer. CAL. PENAL CODE § 987.2(a) (West Supp. 1985). The rising cost of such appointments has led some California counties to contract with private

are available only in three exceptional situations:

(1) Where the defendant is a prisoner charged with a criminal offense committed during his confinement in state prison, the costs of his defense are chargeable to the State Department of Corrections.¹⁷⁶

(2) Where the defendant is charged with a capital offense, the expenses for investigators, experts and others necessary for the preparation of a defense are reimbursed to counties by the state.¹⁷⁷ Such reimbursement is not available where the death penalty is precluded, however, such as in the case of a juvenile defendant¹⁷⁸ or a case in which the prosecution has stipulated the death penalty will not be sought.¹⁷⁹ This arrangement may actually provide an incentive for prosecutors to seek the death penalty in cases where they might otherwise seek life without parole. By prosecuting the case as a capital one, the county may be able to charge thousands of dollars in expenses to the state.

(3) The legislature may appropriate funds to reimburse counties for up to ten percent of their expenditures for public defenders or appointed counsel.¹⁸⁰ While this option has been available since 1965, it has rarely been exercised.

Local funding has created a serious problem for some less populous counties, in which a single major case can threaten the solvency of the county government.¹⁸¹ A dramatic example of such a crisis was presented in the case of *Corenevsky v. Superior Court*.¹⁸² The prosecutor originally charged Corenevsky with murder, alleging special circumstances required for imposition of the death penalty.¹⁸³ Pursuant to a California decision allowing a second defense lawyer to be appointed in capital cases,¹⁸⁴ the court appointed a private lawyer to assist the public

attorneys to accept all such appointments, or to establish a separate "alternate" public defender office. See STANDING COMMITTEE, *supra* note 80.

176. Sections 4700 and 6005 of the California Penal Code impose all costs of such trials on the Department of Corrections. CAL. PENAL CODE §§ 4700, 6005 (West Supp. 1985). Compensation and expenses for appointed defense attorneys are included in these costs. 11 OP. CAL. ATT'Y GEN. 273 (1948). Even where the public defender is appointed to represent a prisoner in such cases, reasonable fees for his services may be charged to the Department of Corrections. CAL. PENAL CODE § 987.2(c) (West Supp. 1985).

177. CAL. PENAL CODE § 987.9 (West Supp. 1985); CAL. REV. & TAX CODE § 2231 (West Supp. 1985).

178. *County of San Diego v. Board of Control*, 161 Cal. App. 3d 868, 207 Cal. Rptr. 886 (1984).

179. *Sand v. Superior Court*, 34 Cal. 3d 567, 668 P.2d 787, 194 Cal. Rptr. 480 (1983).

180. CAL. PENAL CODE § 987.6(a) (West Supp. 1985).

181. Kirsch, *Rural Justice at the Crossroads*, CAL. LAW., Apr. 1984, at 22.

182. 36 Cal. 3d 307, 682 P.2d 360, 204 Cal. Rptr. 165 (1984).

183. *Id.* at 314, 682 P.2d at 367, 204 Cal. Rptr. at 173.

184. *Keenan v. Superior Court*, 31 Cal. 3d 424, 640 P.2d 108, 180 Cal. Rptr. 489 (1982).

defender. When the county refused to pay the costs for the second lawyer, the court ordered the charges reduced so the death penalty could not be sought. Defense counsel then sought the appointment of four expert witnesses. Since the case was no longer capital, such appointments could not be funded at state expense under California Penal Code section 987.9.¹⁸⁵ The county refused to pay for the experts, alleging that the \$13,314 requested would "bankrupt" the county.¹⁸⁶ When the County Auditor ignored a court order to make payment, he was held in contempt of court. The California Supreme Court upheld the contempt order, holding that county officials have no authority to review judicial determinations authorizing the expenditure of such funds: "To hold otherwise would be to encourage and facilitate local government intrusion into exclusive powers of the judiciary. As stated above, it is solely a judicial question whether a given defendant shall be afforded requested defense services."¹⁸⁷

The court also rejected a suggestion that trial courts be required to "balance" the demonstrated need for defense services against the budgeted monies available in determining whether the request is reasonable. The court concluded that "such a rule would pose serious problems of equal protection: it would directly condition a defendant's right to ancillary services, and hence effectiveness of counsel, on the fisc of the county in which he is being prosecuted."¹⁸⁸

The problem of local funding for defense services in criminal cases may create support for a measure to permit state funding of all expenses of court operations.¹⁸⁹ But many California lawyers are hesitant to place ultimate control of the funding of all indigent defense services in the

Keenan held that payment of second counsel was not encompassed by § 987.9 of the California Penal Code, which would allow state funding, but fell under §§ 987b and 987.2 of the Penal Code, which require local funding. *Id.* at 430, 640 P.2d at 111, 180 Cal. Rptr. at 492-93. The state legislature subsequently provided for such state funding. CAL. PENAL CODE § 987(d) (West Supp. 1985).

185. *Corenevsky*, 36 Cal. 3d at 314, 682 P.2d at 363, 204 Cal. Rptr. at 169. Appointment of experts can be made in non-capital cases. CAL. EVID. CODE §§ 730-731 (West 1968 & Supp. 1985). Such appointments must be paid from county funds. CAL. GOV'T CODE § 29603 (West 1968 & Supp. 1985).

186. 36 Cal. 3d at 315, 682 P.2d at 364, 204 Cal. Rptr. at 169.

187. *Id.* at 326, 682 P.2d at 371, 204 Cal. Rptr. at 176.

188. *Id.* at 320 n.13, 682 P.2d at 367 n.13, 204 Cal. Rptr. at 172 n.13.

189. On October 2, 1985, Governor George Deukmejian signed A.B. 19, authorizing a massive shift to state funding of trial courts in California instead of the local funding which previously prevailed. The bill will not be implemented until funds are appropriated in the state budget, however. The Governor announced he would seek enactment of court reform measures before implementing state funding. Roberts, "Deukmejian Signs Bill to Let State Fund Trial Courts," L.A. Daily J., Oct. 4, 1985, § 1, at 1.

hands of the Governor.¹⁹⁰ In other states, a trend toward statewide funding of all defense services for indigents in criminal cases is readily discernible.¹⁹¹ In eighteen states, including Oregon,¹⁹² state government now provides all funding.¹⁹³

The argument for state funding of the costs of appointed counsel is even more compelling for civil cases than for criminal cases. At least in criminal cases the county may choose not to prosecute a case if it wishes to avoid the expense of appointed counsel.¹⁹⁴ In civil cases, where the choice of venue is made by a private litigant, that choice is governed by tactical considerations having little to do with the solvency of the county. The problem is especially significant in cases such as *Yarbrough* involving prisoners. The twelve largest prisons in California are located in largely rural counties with relatively small lawyer populations.¹⁹⁵ If civil suits naming prisoners as defendants are filed in the county in which the prisoner is incarcerated, the cost of providing defense services will fall disproportionately on the local budgets of the rural counties in which large prisons are located.

VI. CONCLUSION: A WARM EXHORTATION

The disposition of *Yarbrough v. Superior Court* is a cry for help. In an era when the courts are constantly criticized for taking on the management of social problems beyond their expertise, this exercise in judicial restraint deserves an energetic response. The most constructive approach to the pot boiling on our backburner is to coldly assess the lessons of history, ethics, economics and politics.

History should teach us that a double standard of justice is inevitable if we consign the indigent to seeking handouts from uncompensated

190. See *infra* *Financing the Right to Counsel in California*, 19 LOY. L.A.L. REV. 405 (1985) (Discussion Groups). Under California law, the Governor can veto individual line items in the state budget. CAL. CONST. art. IV, § 10(b). In 1983, Governor Deukmejian exercised that power to cut the budget of the State Public Defender's Office in half. State of Calif., Budget for Fiscal Year 1983-84, Final Change Book, at 488-89 (1983).

191. See *Financing the Right to Counsel in California*, 19 LOY. L.A.L. REV. 391 (1985) (Remarks of N. Lefstein).

192. Oregon recently enacted legislation shifting funding from the local to the state level. See *id.* at 399 (remarks of R. Linden).

193. BUREAU OF JUSTICE STATISTICS, *supra* note 75, at 6.

194. Although venue in criminal cases lies in the county where a crime was committed, in many cases prosecutors may choose between several options since venue may lie in more than one county. See, e.g., CAL. PENAL CODE §§ 182, 184 (West 1968 & Supp. 1985) (prosecution for conspiracy may be brought in any county where any overt act committed).

195. See Brief of *Amici Curiae*, Ventura County Bar Ass'n at 16-19, *Yarbrough v. Superior Court*, 39 Cal. 3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985).

volunteers. Ethics should teach us that if indigent clients deserve the same level of competence in their representation that other clients command, then the only way to insure that standard is by giving them access to the same pool of lawyers. Creating a caste of court-mandated volunteers who must reach into their own pockets to finance their clients' litigation deprives the indigent of the independent, conflict-free representation to which every client is entitled. Economics should teach us that legal services respond to the same laws of supply and demand as do other products and services in our free economy. Unless a full cross-section of the bar is attracted to the representation of indigents, two classes of justice are inevitable. Politics should teach us that the prioritization of competing claims for scarce resources is essentially a legislative process. The buck-passing should stop, and the prioritizing should begin, with standards which are uniform throughout the State of California.

Ultimately, our response to the challenge of *Yarbrough* will fully test the depth of our commitment to the ideal of equal justice for all. That ideal must be pursued just as vigorously by legislators and governors as by judges. The spectre of two classes of lawyers serving two classes of justice to two classes of clients makes hypocrites of us all. It makes the blindfold on our statue of justice the mask of a dissembler.

