McGeorge Law Review

Volume 7 | Issue 1 Article 9

1-1-1976

# Current Prospects for an Indigent's Right to Appointed Counsel and a Free Transcript in Civil Litigation

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# Current Prospects For An Indigent's Right To Appointed Counsel And A Free Transcript In Civil Litigation

The past decade has witnessed the judicial elimination of many financial barriers which once served to impede the path of the indigent litigant seeking access to the courts in civil cases.[1] In striking down certain bonds and fees, the United States Supreme Court has employed the due process[2] and equal protection[3] clauses of the fourteenth amendment. The California courts, on the other hand, have recognized a common law authority reposing in a court to waive its own fees upon application by an indigent litigant in a civil case,[4] and have made that waiver mandatory upon a proper showing of indigency by the litigant.[5]

While the lot of the indigent civil litigant seeking to avail himself of the judicial processes has, therefore, steadily improved, neither the federal nor the state courts have yet announced a broad right to a transcript on appeal or a right to appointed counsel in civil actions comparable to that enjoyed by indigent defendants in criminal cases.[6] Although the prospects are not promising for further extension of indigent rights under the constitutional or common law rationales, limited expansion may occur due to two recent California appellate decisions wherein statutes were liberally construed to confer upon indigent parties a right to a transcript and a right to appointed counsel in selected civil actions.[7]

This comment will first consider the theoretical limitations of the constitutional and common law arguments favoring the right to free counsel and a transcript for the indigent civil litigant. Next it will discuss the question of cost, in terms of manpower and money, of affording

1. *See, e.g.*, Lindsey v. Normet, 405 U.S. 56 (1972); Boddie v. Connecticut, 401 U.S. 371 (1971); Earls v. Super. Ct., 6 Cal. 3d 109, 490 P.2d 814, 98 Cal. Rptr. 302 (1971); Ferguson v. Keays, 4 Cal. 3d 649, 484 P.2d 70, 94 Cal. Rptr. 398 (1971).
2. Boddie v. Connecticut, 401 U.S. 371 (1971).
3. Lindsey v. Normet, 405 U.S. 56 (1972).
4. Martin v. Super. Ct., 176 Cal. 289, 168 P. 135 (1917).
5. Earls v. Super. Ct., 6 Cal. 3d 109, 490 P.2d 814, 98 Cal. Rptr. 302 (1971); Ferguson v. Keays, 4 Cal. 3d 649, 484 P.2d 70, 94 Cal. Rptr. 398 (1971).
6. *See, e.g.*, Gideon v. Wainright, 372 U.S. 335 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).
7. Crespo v. Super. Ct., 41 Cal. App. 3d 115, 115 Cal. Rptr. 681 (2nd D.C.A. 1974); In re Simeth, 40 Cal. App. 3d 982, 115 Cal. Rptr. 617 (2nd D.C.A. 1974).

such rights. Finally, it will review the two recent California decisions wherein the courts announced a right to counsel and a transcript.[8]

## THEORETICAL OBSTACLES TO THE EXPANSION OF THE CONSTITUTIONAL RATIONALE

Traditionally, the rights of indigents before the bar have rested on the due process and equal protection clauses of the Constitution.[9] Analytically, therefore, any argument extending a right to counsel or transcript must probably demonstrate that prior decisions lead straightaway to the conclusion that their provision to the indigent civil litigant is a constitutional imperative. The path from prior decisions to such a conclusion is not straight or easy, however, and any such argument will have to contend with a number of stumbling blocks. The two sections following deal, therefore, with due process and equal protection. In the analysis of each, the discussion will commence with a description of the tests employed by the courts to give force to the bare words of the Constitution, then proceed to consider the current application of these tests to obtain waiver of court fees for the indigent, and finally undertake to explore the possibility that the tests as applied in fee waiver cases will be extended to obtain counsel or a transcript for the indigent civil litigant.

### *A. Due Process*

Mr. Justice Jackson, writing for the majority in *Mullane v. Central Hanover Bank and Trust Co.*,[10] summarized the Court's interpretation of the due process clause of the fourteenth amendment:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.[11]

Under the procedural due process line of cases, the Court has begun to address the question of what interests are properly classified "liberty" and "property".

Liberty apparently includes not merely freedom from bodily restraint, but also the individual's right to engage in a common occupation, to acquire useful knowledge, to marry, to establish a home and bring up children, and to worship God according to the dictates of his own

8. *See* cases cited in note 7 *supra*.
9. *See, e.g.*, Lindsey v. Normet, 405 U.S. 56 (1972); Boddie v. Connecticut, 401 U.S. 371 (1971); Griffin v. Illinois, 351 U.S. 12 (1955).
10. 339 U.S. 306 (1950).
11. *Id.* at 313.

conscience.[12] Further, a person's interest in his good name, reputation, honor, or integrity is considered to fall under the aegis of "liberty."[13] The protection of "property" extends to interests created and defined "by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[14] Rights conferred by statute are, therefore, considered property interests. Once it has been determined that an interest falls within the protection of "liberty" or "property", and that due process requires notice and hearing prior to the impairment of that interest through state action, there still remains open the issue of what process is due.

As indicated above in Justice Jackson's remark, the conduct of the hearing and the procedures followed there must be appropriate to the nature of the case. Due process is a flexible concept, and in each situation a court will weigh the competing interests of state and individual and mandate greater or lesser procedural protection to the individual as the balance dictates.[15] The hearing may be informal, without right to call or cross-examine witnesses,[16] or formal, with full right to written notice, presentation of witnesses in one's support, confrontation of opposing witnesses, and a neutral hearing officer and written decision, depending on the state and individual interests in contention.[17] In some cases, the interests at stake may be such that the right to be heard requires access to a trial court,[18] or to appellate review,[19] or to appointed counsel.[20] It is within this context that the cases of indigents seeking access to the courts must be framed.

1. *Waiver of Bonds and Fees*

In *Boddie v. Connecticut*,[21] the Supreme Court declared invalid

12. Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972), *citing* Meyer v. Nebraska, 262 U.S. 390, 399 (1922).
13. Bd. of Regents v. Roth, 408 U.S. 564, 573 (1972), *citing* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1970).
14. Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).
15. *Id.* at 570.
16. *See* Goss v. Lopez, 419 U.S. 565, 583 (1975).
17. *See* Morrisey v. Brewer, 408 U.S. 471, 489 (1972).
18. Boddie v. Connecticut, 401 U.S. 371 (1971) (dissolution of marriage).
19. Griffin v. Illinois, 351 U.S. 12 (1956) (criminal conviction).
20. Gagnon v. Scarpelli, 411 U.S. 778 (1973) (revocation of parole or probation). "[T]he effectiveness of the rights guaranteed [to a defendant in a parole or probation revocation hearing] by *Morrisey* may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess." *Id.* at 786. Included among those guaranteed rights are, "(c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses . . . ." 408 U.S. at 489. Thus, in instances where these rights may be impaired by a defendant's lack of counsel, as where the case is a complex one, the state's asserted interest in economy and in a flexible, informal format must give way and counsel must be appointed. 411 U.S. at 786-88.
21. 401 U.S. 371 (1971).

Connecticut statutes requiring payment of court fees and cost of service of process as a condition precedent to suing for divorce, where those statutes operated to bar an indigent from bringing suit to dissolve a marriage.[22] One's interest in seeking divorce may be classed as a right grounded in either property or liberty, and Mr. Justice Harlan, writing for the Court, seems to dip his pen in both wells. The right to seek a divorce is one granted by statute,[23] and is thus a property right.[24] However, because it involves marriage and the adjustment of that "fundamental human relationship,"[25] it might also be listed as a liberty interest.[26] Whether classified as a liberty or property interest, it is sufficient to animate the right to be heard.

That right to be heard is unconstitutionally denied, the Court held, where, as in divorce, the means of settlement lies exclusively with the state, *and* where fee statutes operate to bar the indigent from the adjudicating tribunal.[27] The opportunity to be heard is *not* denied, even where access to the court is in some manner obstructed, in those disputes capable of being resolved privately between the parties.[28] Thus the due process clause mandates access to the courts by the indigent civil litigant only when, as with a party seeking divorce, he or she is *compelled* to seek resolution in the courts or abandon a claim of right altogether.

Two subsequent United States Supreme Court cases seem to indicate that the Court is not interested in broadening the scope of *Boddie.* In *U.S. v. Kras,*[29] the Court voted 5-4 to reverse the district court, and held that an indigent was not entitled to a waiver of filing fees which were a condition precedent to consideration of his petition for bankruptcy. Mr. Justice Blackmun, writing for the majority, noted that the state did not possess the exclusive means of settlement, since the debts which Kras sought to discharge in bankruptcy could also be privately negotiated with his creditors.[30] Two months later, the Court once again refused to soften the standards announced in *Boddie.* In *Ortwein v. Schwab,*[31] the Court held that due process did not require waiver of an appellate fee for a welfare recipient seeking judicial review of a departmental decision to reduce welfare benefits. In a *per curiam* opinion which echoed *Kras,*

22. *Id.* at 374.
23. *Id.* at 376.
24. See text accompanying note 14 *supra; see also* 401 U.S. at 379.
25. 401 U.S. at 382-83.
26. See text accompanying note 12 *supra.*
27. 401 U.S. at 381.
28. *Id.* at 375-76. "[W]e know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery." *Id.* at 376.
29. 409 U.S. 434 (1973).
30. *Id.* at 445.
31. 410 U.S. 656 (1973).

the Court observed that resort to the judicial system was not the only means of settlement, inasmuch as petitioner had a right to, and had received, a hearing at the departmental level.[32] Thus, where a meaningful right to be heard has been afforded, there is no denial of due process.[33] It is clear, then, after the *Boddie* line of cases, that the Court is not willing to employ due process to mandate waiver of fees which bar access to the court to the indigent party except in those few situations where resort to the court is the exclusive channel through which the indigent may lay claim to his statutory entitlement.[34] This requirement of exclusivity is the common thread running from *Boddie* and the rights of indigents in the civil area to *Griffin v. Illinois*[35] and the rights of criminal defendants. The thread must be followed to understand why indigents can always obtain transcripts as a matter of right in criminal cases, but seldom in civil proceedings.

### 2. *The Right to a Transcript*

In *Griffin*, the Court held that the state's refusal to furnish a free transcript to a convicted indigent defendant constituted a denial of due process, where the transcript was necessary for preparation of an effective appeal.[36] The analysis of the procedural due process cases discussed earlier appears to be applicable here. The criminal defendant has a statutory right to appeal his conviction, even as Gladys Boddie had a statutory right to seek divorce. The criminal defendant possesses no other means of resolving his dispute other than by resort to the courts,

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32. *Id.* at 659-60.
33. 401 U.S. at 377.
34. A recent article referring to *Boddie* suggests the existence of an evolving constitutional right to meaningfully participate in the litigation process. *See* McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Class Action Issues*, 25 HASTINGS L.J. 1351, 1378 (1974). The opinion there expressed concerning the prospects for an expansion of *Boddie* is more optimistic than that held by this writer.

It should also be noted that there is another line of reasoning in these three cases that requires some explication. Mr. Justice Harlan limited his opinion in *Boddie* very closely to the facts, and the opinion can be read to state that due process does not require waiver of court fees to the indigent unless resort to the court system is the exclusive means of settlement, *and* there is involved for the indigent claimant not merely a matter of statutory entitlement, but one which touches somehow on a fundamental interest. 401 U.S. at 382-83. In both *Kras* and *Ortwein*, the Court may have taken this route, for in addition to finding in each case that the state did not possess the exclusive means of settlement, the respective opinions each note that the petitioners' claims of right did not touch on any fundamental interest. 409 U.S. at 445 (bankruptcy); 410 U.S. at 659 (welfare benefits). If the court is in some manner giving more weight to "fundamental" interests in its determination of whether the right to be heard is to be extended, then it is proceeding inconsistently with its later formulation in *Roth*, wherein it announced that impairment of any liberty or property interest by the state required some prior hearing. *See* 408 U.S. at 569-71. "Weight" of the competing interests is to be taken into account only in determining the *form* of the hearing. *Id.* at 570.

35. 351 U.S. 12 (1956).
36. *Id.* at 18-20.

even as Gladys Boddie was obviously incapable of obtaining a divorce other than through the courts. The indigent criminal defendant, prior to *Griffin*, could be cut off from this right to appeal by his inability to purchase a trial transcript, even as the fee statutes stood between Gladys Boddie and her action for divorce. Any attempt to transplant *in toto* the doctrine of free transcripts from the criminal into the civil area is unlikely to be fruitful, however. Always there is the limiting factor explicit in *Boddie* and implicit in *Griffin*: the indigent must be able to show that he possesses no other means save resort to the courts to secure his claim of entitlement. In most civil actions, where private settlement is theoretically possible, this element is not satisfied. The right to appointed counsel, however, is on a different footing entirely.

3. *The Right to Counsel*

As indicated above, once the right to be heard is determined, the form of the hearing is dictated by the relative weights of the contending interests.[37] The right to appointed counsel is such a matter of form,[38] and therefore is determined by balancing the interests at stake.[39] Thus, if the question of the indigent's right to trial is not in doubt, but only his right to have appointed counsel at that trial, the courts will look to the weight of his asserted interest. Two lines of cases in the state and lower federal courts bear out the proposition that where there is involved some fundamental interest,[40] counsel will be afforded to an indigent party. Some jurisdictions have afforded counsel as a matter of right to the indigent defendant in civil actions where there was a possibility of incarceration[41] In the other line of cases, a number of courts have extended to indigent parents a due process right to counsel in proceedings where the state seeks to deprive them of the custody of their children.[42] The factors mentioned in support of that right demonstrate

37. See text accompanying note 15 *supra*.

38. This is implicit in Goss v. Lopez, 419 U.S. 565, 583 (1975), where the Court considers right to counsel in its discussion of what process is due at the hearing after the right to the hearing itself has been established.

39. *See, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778, 783-91 (1973) (granting conditional right to counsel in parole and probation revocation hearings), applying the weighing test to the question of right to appointed counsel.

40. *See* notes 58-63 and accompanying text *infra*, for discussion of what constitutes a fundamental right.

41. *See* In re Grand Jury, 468 F.2d 1368 (9th Cir. 1972) (right to appointed counsel in civil contempt proceeding based on witness's refusal to answer questions before a grand jury); Otton v. Zaborac, 525 P.2d 537 (Alaska 1974) (appointed counsel in non-support action); In re Harris, 69 Cal. 2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968), (appointed counsel in civil mesne process proceeding); People ex rel. Amendola v. Jackson, 74 Misc. 2d 797, 346 N.Y.S.2d 353 (Sup. Ct. 1973) (appointed counsel in non-support action); Commonwealth v. Hendrick, 220 Pa. Super. 225, 283 A.2d 722 (1971) (appointed counsel in non-support action).

42. *See, e.g.*, Danforth v. State Dep't of Health and Welfare, 303 A.2d 794 (Me. 1973).

the courts' weighing approach: (1) the fundamental nature of the child-parent relationship;[43] (2) the accusatory nature of the proceedings;[44] (3) the complexity and technical nature of the proceedings;[45] (4) the vastly greater resources available to the state;[46] (5) the possibility that in cases where the issue turns on alleged parental abuse, the parent might make statements giving rise to criminal liability.[47]

A weighing test of this sort does not augur well for extension of a right to appointed counsel in civil suits, where there often may be involved matters of property, but where there are seldom interests denominated as "fundamental." Here, then, the theoretical rationale supporting the present due process rights of indigents appears unable to support an extension of those rights. Thus the indigent civil litigant, if he is to find refuge in the Constitution with respect to questions of counsel or transcripts, may choose to seek it in the marginally more open embrace of the equal protection clause.

### *B. Equal Protection*

In determining whether a citizen has been denied equal protection under the law, the Court first looks to see whether the rule or statute sought to be challenged operates to classify some portion of the citizenry to the disadvantage of another portion.[48] If that classification is "suspect,"[49] because it is based on race,[50] alienage,[51] or nationality,[52] or

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43. Cleaver v. Wilcox, 499 F.2d 940 (1974); In re Welfare Luscier, 84 Wash. 2d 135, 524 P.2d 906 (1974); State ex rel. Lemaster v. Oakley, 203 S.E.2d 140 (W. Va. 1974); Crist v. Div. of Youth and Family Serv., 128 N.J. Super. 402, 320 A.2d 203 (1974); In Interest of Friesz, 190 Neb. 347, 208 N.W.2d 259 (1973); In re B, 30 N.Y.2d 352, 334 N.Y.S.2d 133, 285 N.E.2d 288 (1972); State v. Jamison, 251 Ore. 114, 444 P.2d 15 (1968).

44. In re Welfare Luscier, 84 Wash. 2d 135, 524 P.2d 906 (1974); State ex rel. Lemaster v. Oakley, 203 S.E.2d 140 (W. Va. 1974); Crist v. Div. of Youth and Family Serv., 128 N.J. Super. 402, 320 A.2d 203 (1974); Danforth v. State Dep't of Health and Welfare, 303 A.2d 794 (Me. 1973); In re B, 30 N.Y.2d 352, 334 N.Y.S.2d 133, 285 N.E.2d 288 (1972).

45. See cases cited note 43 *supra.*

46. Crist v. Div. of Youth and Family Serv., 128 N.J. Super. 402, 320 A.2d 203 (1974); Danforth v. State Dep't of Health and Welfare, 303 A.2d 794 (Me. 1973).

47. State ex rel. Lemaster v. Oakley, 203 S.E.2d 140 (W. Va. 1974); Crist v. Div. of Youth and Family Serv., 128 N.J. Super. 402, 320 A.2d 203 (1974); In Interest of Friesz, 190 Neb. 347, 208 N.W.2d 259 (1973); Danforth v. State Dep't of Health and Welfare, 303 A.2d 794 (Me. 1973); In re B, 30 N.Y.2d 352, 334 N.Y.S.2d 133, 285 N.E.2d 288 (1972). It should be noted that Gideon v. Wainright, 372 U.S. 335 (1963), which confers on criminal defendants in state courts a right to appointed counsel, is grounded in the sixth amendment. That amendment is, by its express terms, limited to criminal prosecutions and thus not usually susceptible to application in civil cases.

48. *See* San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 60 (1973) (Stewart, J., concurring).

49. *See generally* Shapiro v. Thompson, 394 U.S. 618, 658-59 (1969) (Harlan, J. dissenting).

50. Mclaughlin v. Florida, 379 U.S. 184 (1964).

51. Graham v. Richardson, 403 U.S. 365 (1971).

52. Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214, 216 (1944).

if it operates to deprive the individual of a fundamental right protected explicitly or implicitly by the Constitution,[53] the rule or statute will be invalidated unless the state can demonstrate that it is required in order to promote a compelling state interest.[54] However, where the classification is neither suspect nor operates to affect a fundamental right, the statute or rule will be upheld so long as the state can show that it bears some rational relationship to a legitimate state purpose.[55] It is this second "rational basis" test which the Court has generally applied in those civil matters involving indigents.

1. *Waiver of Bonds and Fees*

The majority opinion in *Boddie*, however, did not mention equal protection, although two concurring opinions suggested that fee statutes created a suspect classification based on poverty in instances where fees served to bar the indigent from the courtroom.[56] Mr. Justice Harlan's failure to employ an equal protection argument in his majority opinion may have rested on two grounds. First, despite the assertions of the concurring opinions, the Court has never held that discrimination based on wealth alone is sufficient to trigger the compelling state interest test.[57] Second, while this test can be triggered by a classification affecting a "fundamental interest," the designation of a "fundamental" right of access to the courtroom in a civil suit would be a departure from the test for fundamentality announced in *San Antonio Independent School District v. Rodriguez*.[58] There, Mr. Justice Powell, writing for the majority, suggested that the question of fundamentality was to be decided with reference to whether the right claimed is explicitly or implicitly guaranteed by the Constitution.[59] Justice Powell noted four interests regarded as fundamental: the right to travel;[60] the right to participate in the electoral process;[61] the right to exercise freedoms guaranteed by the first amendment;[62] and the right to procreation.[63] The Court appears disinclined to expand this list.

53. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).
54. Shapiro v. Thompson, 394 U.S. 618, 634 (1969); NAACP v. Alabama, 357 U.S. 449, 463 (1958).
55. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973).
56. 401 U.S. at 386 (Douglas, J., concurring), 388-89 (Brennan, J., concurring).
57. *See* Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test For State Financial Structures*, 57 CAL. L. REV. 305, 349 (1969). "In those decisions involving relative wealth as the classifying fact, except where that fact has been combined with either the voting interest or the interest in fair criminal process, it has shown no capacity to move the Court." *Id.*
58. 411 U.S. 1 (1973).
59. *Id.* at 33-34.
60. *Id.* at 32, *citing primarily* Shapiro v. Thompson, 394 U.S. 618 (1969).
61. *Id.* at 34 n.74, *citing primarily* Dunn v. Blumstein, 405 U.S. 330 (1972).
62. *Id.* at 34 n.75, *citing* Police Dep't v. Mosely, 408 U.S. 92 (1972).
63. *Id.* at 34 n.76, *citing* Roe v. Wade, 410 U.S. 113 (1973) *and* Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).

In *Kras*,[64] the Court found neither a fundamental right[65] nor a suspect class, and invoking the second test, found the fee requirement reasonably related to the support of the bankruptcy court system.[66] Similarly, in *Ortwein*,[67] the appellate filing fee requirement was adequately justified by the need to offset appellate operating expenses.[68] It would be possible to say that the rational basis test had no teeth at all were it not for a single decision, *Lindsey v. Normet*,[69] in which it was employed to the advantage of an indigent petitioner. There, the petitioners challenged the constitutionality of a statute which required a tenant appealing an adverse decision in an action for forcible entry and detainer (FED) to post a bond of twice the rental value of the premises for the period between commencement of the suit and entry of final judgment. The bond was required in addition to the normal appeal bond and was forfeited if the appeal was unsuccessful, a circumstance which, the Court noted, heavily burdened the statutory right of such a defendant to appeal.[70] Rejecting invocation of the compelling state interest standard, the Court invalidated the bond requirement because the classification between FED appellants and non-FED appellants bore no reasonable relationship to any valid state objective.[71] The Court made it clear that normal appeal bonds, which *do* bear a rational relationship to furnishing the respondent with security for his judgment below, would not be violative of equal protection.[72] The constitutionality of appeal bonds *per se* is not in question then, and two lower court decisions, one decided before *Lindsey* and one after, have gone so far as to uphold requirements of bonds twice the amount of the lower court judgment against appellant where, however, only the amount of the judgment was forfeited upon an unsuccessful conclusion to the appeal.[73] Because most fee requirements bear some reasonable relation to fiscal support of the judicial system, the rational basis test would appear to be inadequate to support an expansion of indigent rights to include even a right to waiver

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64. See note 29 and accompanying text *supra.*
65. 409 U.S. at 445.
66. *Id.* at 447.
67. See note 31 and accompanying text *supra.*
68. 410 U.S. at 660.
69. 405 U.S. 56 (1972).
70. *Id.* at 77.
71. 405 U.S. at 76-77.
72. While a State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession, the double bond requirement here does not effectuate these purposes since it is unrelated to actual rent accrued or to specific damages sustained by the landlord.
*Id.* at 77.
73. Chidsey v. Guerin, 443 F.2d 584 (6th Cir. 1971); Patterson v. Warner, 371 F. Supp. 1362 (S.D.W. Va. 1972).

of all fees, much less to embrace appointed counsel and free transcripts in civil cases. On the other hand, resort to the compelling state interest standard has enhanced the position of the indigent before the bar of criminal justice, and may offer some limited support in the civil area.

2. *The Right to a Transcript*

Invocation of the compelling state interest test in *Griffin v. Illinois*[74] was triggered by a statute which required transcripts on appeal and which operated, as applied, to erect a classification between those criminal defendants who could afford transcripts and those who could not, which classification served to deprive the indigent defendant of his appeal.[75] Denial of appeal to those poor, the Court concluded, meant that many might lose their liberty because of unjust convictions which the appellate courts would otherwise set aside.[76] Physical liberty is certainly a fundamental right protected under the first amendment right to freedom of association,[77] but the Court has expanded its definition of liberty to comport more nearly with that proffered in the procedural due process cases.[78]

In *Mayer v. Chicago*,[79] the Court overturned an Illinois Supreme Court rule which granted a free transcript only to indigent defendants convicted of felonies. The Court ruled that notwithstanding the fact that the defendant had been convicted of a misdemeanor, a free transcript or reasonable alternative had to be granted for purposes of appeal. Striking down the state's attempt to distinguish between convictions likely to result in imprisonment and the case under consideration, which involved a fine, Mr. Justice Brennan observed:

> A fine may bear as heavily on an indigent accused as forced confinement. The collateral consequences of conviction may be even more serious, as when (as was apparently a possibility in this case) the impecunious medical student finds himself barred from the practice of medicine because of a conviction he is unable to appeal for lack of funds.[80]

Just as incarceration deprives a convicted defendant of his liberty, so the onus or stigma attached to a criminal conviction, even one for which the penalty is a mere fine, may act to restrict the defendant's opportunity to earn a livelihood in his chosen profession. This too is a

74. See note 36 and accompanying text *supra.*
75. 351 U.S. at 18.
76. *Id.* at 19.
77. See text accompanying note 62 *supra.*
78. See text accompanying note 13 *supra.*
79. 404 U.S. 189 (1971).
80. *Id.* at 197.

loss of liberty,[81] and it may offer some basis for extension of the compelling state interest test to civil cases. But "liberty" in the sense of reputation is seldom the principal issue in civil proceedings, where the parties are generally contending on matters involving damage to property. Even in defamation suits the plaintiff is normally treating his reputation as a kind of property interest, injury to which is considered compensable in money damages. Nor was reputation mentioned as fundamental in *San Antonio.*[82] In some future case, however, an indigent appellant seeking a free transcript may persuade the Court to extend the *Griffin-Mayer* rationale into the civil area by arguing that the *gravamen* of his complaint is an injury to liberty, not property. Of course, the controversy concerning fundamental and non-fundamental rights would be mooted if the Court ever decided to abandon the compelling state interest and rational basis tests.

Mr. Justice Marshall suggested just this in *San Antonio*, arguing in fact that previous cases demonstrated that such tests had never really been followed in any event.[83] In their stead, he proposed that the Court scale its standard of scrutiny in each case as the facts indicated: the more important the interest or invidious the classification, the stricter the standard of scrutiny.[84] There is some basis for believing the Court adopted this approach in cases ruling invalid statutes which imposed classifications based on sex[85] and illegitimacy.[86] In each instance, the Court apparently imposed some standard of scrutiny more strict than the rational basis test, yet stopped short of declaring all classifications based on sex or illegitimacy to be suspect.[87] The inference lies that the

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81. See text accompanying note 12 *supra.*
82. See text accompanying notes 58-63 *supra.*
83. 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting).
84. *Id.* at 99 (Marshall, J., dissenting).
85. Frontiero v. Richardson, 411 U.S. 677 (1973).
86. Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).
87. In *Frontiero*, the Court struck down a statute which denied female members of the armed forces the right to claim their spouses as dependents for the purpose of quarters allowances, unless those spouses were in fact dependents. The statute placed no such qualification on males. 411 U.S. at 679. Eight members of the Court, in three opinions, agreed to invalidate the statute. On the prevailing side, three members (Powell, J., Burger, C.J., and Blackmun, J.) ruled on due process grounds and expressly argued against denotation of sex as a suspect class. *Id.* at 691-92 (Powell, J., concurring). Of the five members who concerned themselves with equal protection, only the four man plurality (Brennan, J., Douglas, J., White, J., and Marshall, J.) was willing to declare sex a suspect classification. *Id.* at 682. Employing what it termed "strict judicial scrutiny", *id.* at 689, the plurality found the discrimination to lack sufficient justification and to be therefore invalid. It is the plurality's description of its test as strict judicial scrutiny rather than as compelling state interest which may indicate that scrutiny is more or less strict depending on the class or nature of interest involved. In the third concurring opinion, Justice Stewart spoke simply of the statute being based on "invidious discrimination," *id.* at 692, and did not indicate the test employed or whether he considered the class to be suspect.
In *Weber*, the Court ruled unconstitutional a statute which denied to unacknowledged

standard adopted was more strict than the rational basis test, yet less strict than the suspect class-fundamental interest test.

Under such a flexible standard of scrutiny, poverty might well prove to be a classification deserving of a scrutiny more strict than mere rational basis, a scrutiny sufficient to invalidate statutes concerning fees or transcripts which operated to deny to the poor their statutory right to litigate an issue. The standard of review attaching to a right to appointed counsel could, if sufficiently strict, invalidate as unjustifiable classifications embodied in statutes which furnish appointed counsel in some cases but not in others. Whether the Court is willing to take the Marshall approach, or, if it is, what standards of review will be assigned to the various interests and classifications is unclear. But there are other rationales, less abstract than the finely spun gossamer of due process and equal protection and more firmly rooted in the bedrock of English common law practice half a millenium old, which bear upon the indigent's right to counsel and a transcript.

## THEORETICAL OBSTACLES TO THE EXPANSION OF THE COMMON LAW RATIONALE

Civil Code Section 22.2 declares the common law of England to be in force in California insofar as it is not repugnant to or inconsistent with the federal or state constitutions, or laws of the state. The power of the courts of California to waive fees and bonds which would otherwise bar the indigent from the courtroom derives from the common law authority of the English courts to allow litigants to proceed *in forma pauperis*.[88] However, the California Supreme Court has not yet ruled directly on the question of whether this common law authority also requires that a transcript or counsel be furnished as a matter of right to the indigent civil litigant. The analysis which follows will first consider the successful use of the common law rationale to obtain waiver of fees, and will discuss afterward its potential application in cases concerning transcript and counsel.

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illegitimate children the right to share equally in a deceased parent's posthumous workman's compensation award with the legitimate children. 406 U.S. at 176-77. Justice Powell's opinion for the Court does not call illegitimacy a suspect class and yet invalidates the statute after speaking of a "stricter scrutiny," *id.* at 172, and a "significant relationship" to a legitimate state purpose. *Id.* at 176. These standards would appear to fall somewhere between the rational basis and the compelling state interest test. In *Levy*, the Court overturned a statute which denied to illegitimate children the right to recover damages upon the wrongful death of their mother. 391 U.S. at 72. Writing for the Court, Justice Douglas simply termed the discrimination "invidious," *id.*, without calling it suspect. Inasmuch as he cites cases dealing with both rational basis and the compelling state interest tests, *id.* at 71, it is not clear which, if either, test is employed. The inference that it is some sort of middle test arises from its later citation in *Weber* as an example of stricter, but perhaps not strictest, scrutiny. 406 U.S. at 172.

88. *See* Martin v. Super. Ct., 176 Cal. 289, 168 P. 135 (1917).

### A. Waiver of Bonds and Fees

As early as 1917, the California Supreme Court had announced an authority inherent in the state courts to waive their own fees for an indigent plaintiff. In the leading case, *Martin v. Superior Court*,[89] the California Supreme Court noted that except where expressly provided to the contrary by statute or the constitution, the common law of England had been ingrafted into the law of California by Political Code Section 4468.[90] The court ruled that inasmuch as the English courts had enjoyed a right to waive payment of their own fees by indigents,[91] the California courts were similarly empowered.[92] *Martin* failed to delineate precisely which court fees were being waived, but it appears that the plaintiff had paid initial filing fees and was unable to furnish the jury and reporter's fees required to be deposited with the clerk daily by the parties to an action.[93] Two years later, the California Supreme Court expressly extended the waiver authority to jury fees.[94]

The *Martin* opinion, broadly phrased so as to include all fees at the trial court level, including filing fees not immediately at issue there,[95] was nevertheless limited significantly in other respects. It did not declare a *right* of an indigent to proceed *in forma pauperis, i.e.* to obtain a waiver of fees, but rather announced only a power residing in the superior courts to waive fees as their discretion dictated.[96] Neither did the *Martin* opinion extend to fees at the appellate level. In fact, in *Rucker v. Superior Court*, a district court of appeal refused to recognize any common law authority to waive appellate fees.[97] However, two 1971 cases have had a significant impact on the precedent established by *Rucker*.

In *Ferguson v. Keays*,[98] the California Supreme Court extended the waiver authority to include a right of appellate courts to dispense with appellate filing fees.[99] Just as importantly, the *Ferguson* opinion instructed the appellate courts that waiver of fees was not discretionary, but rather *mandatory* where an appellant submitted (1) a certificate signed by counsel affirming that the appeal had merit and was under-

89. 176 Cal. 289, 168 P. 135 (1917).
90. CAL. STATS. 1850, c. 95, p. 219 (*currently* CAL. CIV. CODE §22.2).
91. 176 Cal. at 293-94, 168 P. at 137.
92. *Id.* at 296-97, 168 P. at 138. *But see* La Barbera v. Hart and Crouse, Inc., 248 App. 261, 289 N.Y.S. 567 (1936), *appeal dismissed*, 272 N.Y. 534, 4 N.E.2d 435 (1936).
93. 176 Cal. at 291, 168 P. at 136.
94. Majors v. Super. Ct., 181 Cal. 270, 184 P. 18 (1919).
95. 176 Cal. at 296, 168 P. at 138.
96. *Id.*
97. 104 Cal. App. 683, 685, 286 P. 732, 732 (1930).
98. 4 Cal. 3d 649, 484 P.2d 70, 94 Cal. Rptr. 398 (1971).
99. *Id.*

taken in good faith and (2) his own declaration, executed under penalty of perjury, swearing that he was unable to pay the filing fee without depriving himself and his dependents of the necessities of life, and setting forth briefly the facts which disclosed his indigence.[100] *Ferguson* did not concern fees at trial level, however, and therefore it created an anomaly whereby the indigent could obtain waiver of appellate fees as a matter of right, but waiver of trial fees only through exercise of the trial court's discretion. This anomaly was terminated eight months later by the decision in *Earls v. Superior Court.*[101] There, the California Supreme Court limited the discretion of a trial court to deny waiver of fees to an indigent party, instructing the courts that where a motion to proceed *in forma pauperis* is supported by an affidavit sufficient to show indigency, the motion must be granted. Under *Earls*, a trial court may deny waiver of fees only where the truthfulness of the affidavit is in doubt, and then only after considering conflicting affidavits, or, in rare instances, after holding a hearing on the matter.[102]

In addition to fees, *i.e.*, money paid by a litigant directly to an officer of the court, the waiver authority has also been extended to cover security for costs, the expenses of litigation which one party must pay to the other at the conclusion of the suit.[103] In *County of Sutter v. Superior Court,*[104] a district court of appeal found that the common law courts of England had enjoyed an authority to dispense with security bonds which might bar the indigent plaintiff from his day in court.[105] *Sutter* dealt specifically with security for costs against a public entity,[106] but in subsequent cases waiver authority has been extended expressly to include security for costs from a non-resident plaintiff,[107] security for costs on appeal from a justice court,[108] and injunction bonds.[109]

The trend appears clear. A litigant proceeding *in forma pauperis* in California may obtain waiver of fees and costs as a matter of right upon proper showing of indigency. The courts have balked, however, at

100. *Id.* at 658, 484 P.2d at 75, 94 Cal. Rptr. at 403.
101. 6 Cal. 3d 109, 490 P.2d 814, 98 Cal. Rptr. 302 (1971).
102. *Id.* at 114, 490 P.2d at 816, 98 Cal. Rptr. at 304.
103. County of Sutter v. Super. Ct., 244 Cal. App. 2d 770, 772 & n.2, 53 Cal. Rptr. 424, 426 & n.2 (1966). If a plaintiff's indigency prevents him from posting security for costs before trial, his ability to pay those costs afterwards should he lose must be considered doubtful at best. Thus, the practical effect of waiving security, as the court in *Sutter* understood, is to render it unlikely that a successful defendant will be able to recover his costs from an indigent plaintiff, even where entitled to them by court award. *See id.* at 776, 53 Cal. Rptr. at 428.
104. 244 Cal. App. 2d 770, 53 Cal. Rptr. 424 (1966).
105. *Id.* at 774, 53 Cal. Rptr. at 427.
106. *Id.* at 771, 53 Cal. Rptr. at 425.
107. Bank of America v. Super. Ct., 255 Cal. App. 2d 575, 63 Cal. Rptr. 366 (1967).
108. Roberts v. Super. Ct., 264 Cal. App. 2d 235, 70 Cal. Rptr. 226 (1968).
109. Conover v. Hall, 11 Cal. 3d 842, 523 P.2d 682, 114 Cal. Rptr. 642 (1974).

extending the common law rationale to include a right to a free transcript and a right to counsel.

### B. The Right to a Transcript

Although the California Supreme Court has never decided the issue, the California appellate courts have continued to hold that the common law authority to waive fees does not extend to the provision of free transcripts,[110] and that absent statutory authorization, no free transcript may be furnished in civil cases.[111] In an early unreported case, the California Supreme Court denied a petition for a writ of mandate which would have required the superior court to furnish the indigent petitioner with a free transcript on appeal.[112] Insofar as the attitude of the current California Supreme Court appears to be open to question, some historical perspective is in order.

*Ferguson*, announcing the right of an indigent appellant proceeding *in forma pauperis* to obtain waiver of fees and costs on appeal, partially overruled the appellate decision of *Rucker v. Superior Court*,[113] which had previously declared that there was no common law right to appeal *in forma pauperis* and no right to obtain a free transcript on appeal. While overturning *Rucker* on the question of the right to appeal, *Ferguson* expressly refused to decide whether an indigent must in fact be furnished the means to pay transcript costs. This refusal, coupled with the court's more recent denial of a hearing in a case where the issue of free transcript to the indigent was squarely presented,[114] points to the conclusion that the California Supreme Court's willingness to waive court costs and fees to indigents does not extend to waiver of such outside charges as transcript costs. There are two reasons why such a limitation seems reasonable.

First, there appears to be no common law precedent for furnishing a free transcript to the indigent, and the California courts have proved scrupulous in citing English precedents to support their extensions of *in forma pauperis* rights under the common law rationale.[115] Second, the courts possess no statutory authority in a civil case to compensate the

110. *E.g.*, Rucker v. Super. Ct., 104 Cal. App. 683, 685-86, 286 P. 732-33 (1930).
111. *E.g.*, Leslie v. Roe, 41 Cal. App. 3d 104, 116 Cal. Rptr. 386 (1974); Agnew v. Contractors Safety Ass'n, 216 Cal. App. 2d 154, 30 Cal. Rptr. 690 (1963); Legg v. Super. Ct., 156 Cal. App. 2d 723, 320 P.2d 227 (1958).
112. 104 Cal. App. at 686, 286 P. at 732, *citing* Brandow v. Super. Ct., L.A. No. 11606 (1929).
113. 104 Cal. App. 683, 286 P. 732 (1930).
114. Leslie v. Roe, 41 Cal. App. 3d 104, 116 Cal. Rptr. 386 (1974) (*petition for hearing denied* September 25, 1974, *id.* at 108).
115. *See, e.g.*, Ferguson v. Keays, 4 Cal. 3d 649, 484 P.2d 70, 94 Cal. Rptr. 398 (1971); Martin v. Super. Ct., 176 Cal. 289, 168 P. 135 (1917); County of Sutter v. Super. Ct., 244 Cal. App. 2d 770, 53 Cal. Rptr. 424 (1966).

reporter out of the public treasury for his costs in preparing a transcript,[116] and to compel a court reporter to produce a transcript without compensation at all would violate Rule 4(c) of the California Rules of Court, which provides that before a request for transcript can be honored,

> [t]he appellant shall either deposit with the clerk an amount of cash equal to the estimated cost of the transcription with directions to apply the same to the fees of the reporter or file with the clerk a waiver of such deposit signed by the reporter.

Thus, the reasoning which supports a common law right to waiver of fees and costs would appear possessed of insufficient force to support an accompanying right to a transcript for indigent civil litigants.[117]

### *C. Right to Counsel*

Conversely, a strong argument can be made that a right to counsel for an indigent did exist at common law. A statute promulgated in 1495 by Henry VII provided that the judge should appoint counsel for the poor in civil suits.[118] The statute remained in effect well into the nineteenth century,[119] when presumably it was absorbed into California law by Political Code Section 4468.[120] Indeed, in *Martin v. Superior Court*,[121] the same English statute is noted in support of the proposition that the discretion to waive fees to an indigent civil litigant was a power enjoyed by the common law courts of England and, derivatively, by the present day courts of California.[122]

Any contention that this common law guarantee of counsel to the indigent in civil cases did not become part of California law under Political Code Section 4468 can be sustained only by demonstrating that provision of counsel to the indigent is in some way repugnant or contrary to the state statutes or constitution. An appellate decision, *Hunt v. Hackett*,[123] appears to hold just that. There, the court refused to acquiesce in the appellant's common law arguments, noting:

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116. *E.g.*, Legg v. Super. Ct., 156 Cal. App. 2d 723, 725, 320 P.2d 227, 228 (1958); Rucker v. Super. Ct., 104 Cal. App. 683, 685, 286 P. 732, 732 (1930).

117. *But see* Note, *California's Appeal In Forma Pauperis—An Inherent Power of the Court*, 23 HASTINGS L.J. 683, 693 (1972), for the view that the court is inclined to extend the right to transcript under a common law rationale.

118. In Forma Pauperis Act, II Hen. Vii, c. 12 (1495); *see* 4 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 538 (1924); Cappelletti and Gordley, *Legal Aid: Modern Themes and Variations, Part One: The Emergence of a Modern Theme*, 24 STAN. L. REV. 347, 352 (1972) [hereinafter cited as Cappelletti].

119. *See* Perry v. Walker, 63 Eng. Rep. 293 (1843); Lewis v. Kennett, 38 Eng. Rep. 650 (1872); *see also* Cappelletti, *supra* note 118, at 352.

120. CAL. STATS. 1850, c. 95, p. 219 (*currently* CAL. CIV. CODE §22.2).

121. 176 Cal. 289, 168 P. 135 (1917).

122. *Id.* at 294-96, 168 P. at 137-38.

123. 36 Cal. App. 3d 134, 111 Cal. Rptr. 456 (1973).

> Whether the appointment of counsel was a part of the common law of England, as appellant now contends, need not be determined here, because the current and past practice of California courts is compelling authority for the ruling of the trial court in this case.[124]

Three observations must be made concerning *Hunt*. First, the court entertains a solecism insofar as it asserts that the common law right to counsel lies beyond the pale of California law because it runs counter to current and past practice of the California courts. If practice alone were conclusive, then, *reductio ad absurdum*, what had not heretofore been done could not in the future be done, and no change in contemporary procedures would ever be wrought by the reintroduction of disused common law principles into current practice. The very *Martin* decision itself, wherein the Supreme Court authorized what had not previously been authorized, the waiver of fees to indigents, could never have been rendered. The correct rule is that a practice is sufficient to bar introduction of a common law right into California law only if, upon examination, the practice appeared to be supported by statutory or constitutional considerations repugnant to that right.[125] The *Hunt* opinion does not manifest such an examination, however.[126] Second, it is clear that the court never reached the question of whether the common law did in fact include a right to appointed counsel for indigent civil litigants, and thus the issue still remains open. Third, everything that the court said concerning the common law right to counsel may possibly be regarded as *dicta*, since the court cited three additional factors in support of its denial of counsel: (1) failure by appellants to contend that their cause of action was meritorious,[127] (2) failure to file with the superior court a timely affidavit alleging indigency,[128] and (3) failure to make request for assistance to the public defender, who is statutorily authorized to assist

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124. *Id.* at 138, 111 Cal. Rptr. at 458.
125. *See* 4 Cal. 3d at 654, 484 P.2d at 73, 94 Cal. Rptr. at 401.
126. *Hunt*'s recitation of California authority rejecting a right to counsel in civil matters is limited to three cases denying a *constitutional* right to counsel in proceedings affecting the dependency status of minors. 36 Cal. App. 3d at 137-38, 111 Cal. Rptr. at 458, *citing* In re Joseph T., 25 Cal. App. 3d 120, 101 Cal. Rptr. 606 (1972) *and* In re George S., 18 Cal. App. 3d 788, 96 Cal. Rptr. 203 (1971) *and* In re Robinson, 8 Cal. App. 3d 783, 87 Cal. Rptr. 678 (1970). Obviously it does not follow, nor did the court suggest, that the absence of a constitutional right to counsel implies a constitutional or statutory hostility to a right to counsel grounded in common law. It is noteworthy, nevertheless, that all three cases have since been expressly overruled on the grounds that statutes enacted subsequently confer a right to counsel in such proceedings. *See* In re Simeth, 40 Cal. App. 3d 982, 115 Cal. Rptr. 617 (1974). If, then, the cases ever gave force to the argument that the law of California was hostile to a common law right to counsel, that force is now dissipated. Rather, the very basis on which they were overturned would tend, if anything, to indicate precisely the contrary.
127. 36 Cal. App. 3d at 136, 111 Cal. Rptr. at 457.
128. *Id.* at 137, 111 Cal. Rptr. at 457.

indigents being sued on unjust claims.[129] Thus *Hunt* can be easily distinguished on its facts from a future case in which an indigent appellant again raises the common law right to counsel but performs satisfactorily in those three areas where the *Hunt* appellant failed.

Despite its historical and analytical soundness, adoption by the California Supreme Court of a common law right to appointed counsel in civil cases is unlikely. As mentioned above and discussed at length below, imposition on the judicial system of a right to free counsel in civil actions would be a matter of presently indeterminable, but probably substantial, cost. The infirmity of the common law rationale is that it does not permit a gradual application by limited extensions following one on the other, thereby allowing the judicial system to absorb the impact with minimal dislocation. By its nature the common law argument, if accepted, would confer a right to counsel on all indigent litigants in all civil cases, a step of extraordinary, if uncertain, magnitude, which the courts will probably decline to take.

### COST: A PRACTICAL LIMITATION ON EXTENSION OF A RIGHT TO A TRANSCRIPT AND COUNSEL

That the economic and social cost of expanding legal rights to indigents is a matter of concern, at least to some members of the United States Supreme Court, is manifest in two recent criminal cases.[130] While it is the rights of indigents in civil actions that are at issue in this comment, the concerns voiced in these cases are not inapposite. Rather, given the view that the criminal defendant stands in greater jeopardy than the civil litigant,[131] and thus is entitled to greater constitutional protection,[132] the cautionary observations on cost of expanding rights may have even more weight on the civil side.

In *Mayer v. Chicago*,[133] which extended the right to transcript on appeal to criminal indigents convicted of misdemeanors, Mr. Chief Justice Burger's concurring opinion focused on the difficulties occasioned by the provision of transcripts at public expense. Setting aside the economic cost, which he thought properly chargeable to society's interest in maintaining a system of justice,[134] he nevertheless touched on two other dilemmas: (1) counsel is often more willing to request transcript for the indigent defendant than for the paying client, since no cost devolves

129. *Id.* at 138, 111 Cal. Rptr. at 458.
130. Argersinger v. Hamlin, 407 U.S. 25 (1972); Mayer v. Chicago, 404 U.S. 189 (1971).
131. Boddie v. Connecticut, 401 U.S. 371, 391 (1971) (Black, J., dissenting).
132. *Id.*
133. 404 U.S. 189 (1971).
134. *Id.* at 201 (Burger, C.J., concurring).

upon the former,[135] and (2) court reporters, unable to cope adequately with the annually rising number of appeals from indigents and non-indigents alike, fail to render transcripts promptly, thereby sparking delays in the resolution of those appeals.[136]

Six months later, in *Argersinger v. Hamlin*,[137] the Court announced that no confinement might be imposed upon a convicted indigent defendant unless he had been provided with an opportunity to be represented by counsel. In his lengthy concurring opinion, Mr. Justice Powell, joined by Mr. Justice Rehnquist, argued against the majority's flat requirement of appointed counsel in every case where confinement might result.[138] Rather, he suggested that appointment of counsel in petty offenses be made discretionary with the trial court.[139] Justice Powell suggested three adverse consequences deriving from the majority's new rule: (1) the prospect that there would be too few attorneys to handle the additional caseload, at least in some localities;[140] (2) the possibility that already overworked courts might prove unable to adequately accommodate the increased workload which would result from the attempts of appointed counsel to exhaust every potential avenue of redress for his client;[141] and (3) the probability that some locales might not possess the financial resources to make the additional services and facilities available.[142]

It is fair to inquire, however, whether the Court ought properly to consider the matter of cost when weighing the vital questions of what safeguards must be furnished to insure justice under the law. Both the due process and compelling state interest tests discussed above[143] provide that state interest, if sufficiently weighty, may override the individual's interest and be determinative in favor of a statute otherwise invalid.[144] In *Boddie*, the state's assertion that the filing fee was necessary to assist in defraying the expenses of the judicial system did not make it sufficiently compelling in the Court's eyes to override the petitioner's due process right to litigate her divorce.[145] On the other hand, in *Kras* and *Lindsey*, which employed a rational basis equal protection test, the Court willingly admitted that the requirement of

135. *Id.* at 200-01 (Burger, C.J., concurring).
136. *Id.* at 200 & n.1 (Burger, C.J., concurring).
137. 407 U.S. 25 (1972).
138. 407 U.S. at 47 (Powell, J., concurring).
139. *Id.* at 63 (Powell, J., concurring).
140. *Id.* at 56-59 (Powell, J., concurring).
141. *Id.* at 58-59 (Powell, J., concurring).
142. *Id.* at 60-61 (Powell, J., concurring).
143. *See* text accompanying notes 10-20, and notes 48-55 *supra*.
144. Boddie v. Connecticut, 401 U.S. 371, 377 (1971); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); NAACP v. Alabama, 357 U.S. 449, 463 (1958).
145. 401 U.S. at 381.

fees bears a rational relation to a valid state purpose—operation of the judicial system.[146] Thus it is clear the Court does not shrink from reckoning the cost of the system into its determination of what justice and the Constitution require. There is, moreover, California dicta favoring the proposition that where a legal issue is neatly poised between two contending parties, it is proper for the Court to consider the practical results that will flow from a decision for one side or the other.[147] Considerations of cost may also be proper in determining whether to adopt the common law rationale for right to counsel.

In *Martin v. Superior Court*, the California Supreme Court noted that California law embraced such common law practices as were not inconsistent with statutory or constitutional law.[148] Expanding on this, the court made reference to the "spirit" of the law,[149] by which it meant presumably that a common law rule or practice might fail even though it violated no express statute if it nevertheless ran counter to some legislative policy.[150] It has for some time been the policy of the State of California to ensure swift justice and to facilitate the business of the courts.[151] The imposition on the judicial system of any burden such as right to appointed counsel or free transcript which, though intended to promote justice, might tend rather to frustrate or delay it (as Mr. Justice Powell suggests),[152] must be characterized as in some manner contrary to the spirit of the law. Whether the burden is sufficiently opprobrious to be termed "repugnant" to or "inconsistent" with the law is of course the crucial matter for determination, hinging probably on the court's estimate of what demands on its resources can be satisfied without compromising its essential functions.

It is submitted, then, that the burdens to be potentially imposed on the system of justice, and the cost of those burdens, are proper factors for the courts to consider in passing on the merits of furnishing counsel or a transcript to an indigent under either a constitutional or common law rationale. To the empirical question—what demand on the resources of the community would be created by a rule requiring free transcript or counsel for the indigent civil litigant—there is unfortunately no answer. The California cases have reiterated the proposition that

146. 409 U.S. at 447; 410 U.S. at 660.
147. Estate of Sahlender, 89 Cal. App. 2d 329, 345, 201 P.2d 69, 79 (1948).
148. 176 Cal. at 292, 168 P. at 136.
149. *Id.* at 293, 168 P. at 137.
150. *See* Ferguson v. Keays, 4 Cal. 3d 649, 654, 484 P.2d 70, 73, 94 Cal. Rptr. 398, 401 (1971).
151. Helbush v. Helbush, 209 Cal. 758, 763, 290 P. 18, 21 (1930); Coats v. Coats, 146 Cal. 443, 444, 80 P. 694, 694 (1905); Shain v. People's Lumber Co., 98 Cal. 120, 122, 32 P. 878, 878 (1893).
152. 407 U.S. at 59 (Powell, J., concurring).

although the litigant need not plead total destitution to be accorded *in forma pauperis* status, he may nevertheless be required to establish that payment of fees asked of him would be more than merely burdensome or inconvenient.[153] There appear to have been no studies conducted to measure the number of potential litigants who would be entitled to, or who would avail themselves of, such relief under the California standard. Nor are any statewide statistics maintained concerning the number of *in forma pauperis* actions currently authorized each year in California. Even if available, however, current statistics would not provide an accurate guide, since expansion of rights would logically induce large numbers of indigent litigants, presently cut off from a legal remedy by the expense of counsel or transcript, to press their claim in court or on appeal.[154] While neither the prospective financial impact nor the requirement for additional lawyers can be estimated with any certitude, it is clear that any extension of rights will impose additional costs which the courts ought properly to consider. Caution induced by that consideration, and by the theoretical obstacles noted earlier, may have persuaded some California courts to ground any expansion of such rights in statute rather than in constitutional or common law.

### Liberal Construction

In two cases analyzed below, one affording transcripts to indigents[155] and one furnishing appointed counsel,[156] California appellate courts have eschewed a common law or constitutional approach. Rather, they have employed liberal construction: the interpretation of statutory language to attain a desired result. The result of this liberal construction was the provision of counsel or a transcript to the indigent, when a better reasoned and more restrained reading might have yielded a contrary result.

By liberally construing legislation, the California courts may skirt two shoals. First, the need to grapple with the theoretical limitations of the common law or constitutional arguments does not arise. Second, so long as the cost factor is both a matter of concern and uncertain in its dimensions, liberal construction allows the courts to gradually expand rights and to assess the impact of expansion as it proceeds: to test the temperature of the water without becoming entirely immersed.

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153. Earls v. Super. Ct., 6 Cal. 3d 109, 117, 490 P.2d 814, 818, 98 Cal. Rptr. 302, 306 (1971); Ferguson v. Keays, 4 Cal. 3d 649, 658 n.8, 484 P.2d 70, 75 n.8, 94 Cal. Rptr. 398, 403 n.8 (1971).

154. Pye, *The Role of Legal Services in the Anti-Poverty Program*, 31 Law and Contemp. Prob. 211, 217 (1966).

155. Crespo v. Super. Ct., 41 Cal. App. 3d 115, 115 Cal. Rptr. 681 (1974).

156. In re Simeth, 40 Cal. App. 3d 982, 115 Cal. Rptr. 617 (1974).

There are, of course, significant limitations on the utility of the approach. Succinctly put, there can be no construction where there is no statute. There must be some legislative enactment amenable to interpretation in order for the courts to expand indigent rights by means of liberal construction. Further, the courts cannot take unlimited license with a statute. There are bounds beyond which language and logic may not be stretched without running contrary to the rule of law itself. Such limitations compel no more, perhaps, than the observation that there is presently no perfect vehicle by which to furnish counsel and a transcript to the indigent litigant in every civil action.

*A. Right to Transcript*

Two cases decided the same day, one denying a free transcript to an indigent and one furnishing it, illuminate the liberal construction approach of the California courts in this area. In *Leslie v. Roe*,[157] a California district court of appeal reaffirmed earlier decisions[158] and denied a transcript to an indigent seeking to appeal an adverse judgment in a personal injury case. The court referred to *Ferguson* and *Boddie* and indicated that neither the common law nor the Constitution required provision of a transcript. Absent statutory authority, which the court did not find, no transcript could be furnished. However, in *Crespo v. Superior Court*,[159] the court did announce a limited right to free transcript grounded in statute. Analysis of the pertinent statutes affords an indication of the court's willingness to attenuate its construction in order to provide the indigent a free transcript, when a more restrained interpretation would have resulted in denial.

In *Crespo*, the state sought to terminate the appellant parent's custody of his child under Civil Code Section 232, which provides for such termination where the parent has abandoned the child. Alleging indigency, appellants sought a free transcript for the purpose of appealing the lower court's adverse judgment.[160] The appellate court granted the free transcript, observing that Civil Code Section 237.5 required appointment of counsel for the indigent parent at the initial hearing and that Civil Code Section 238 preserved the right of appeal for a parent unsuccessful at the trial level.[161] The inference could be drawn, the court said, that the legislature would not guarantee a right to appointed counsel and a right to appeal, only to impair that right to appeal by failing to furnish a free transcript.[162]

157. 41 Cal. App. 3d 104, 116 Cal. Rptr. 386 (1974) (2nd D.C.A.).
158. *See* cases cited note 111 *supra*.
159. 41 Cal. App. 3d 115, 115 Cal. Rptr. 681 (1974) (2nd D.C.A.).
160. *Id.* at 117, 115 Cal. Rptr. at 682.
161. *Id.* at 118-19, 115 Cal. Rptr. at 683.
162. *Id.*

The inference may be equally well drawn, of course, that where the legislature sought to guarantee counsel and appeal so explicitly, its failure to mention free transcripts indicates a lack of intent to include them. But even granting that the court's inference is well drawn, it would seem to stand only if there is a right to counsel guaranteed on appeal as well as at trial. If counsel on appeal is not made a matter of right for the indigent, then no inference lies that the legislature intended to enact special safeguards for indigents, such as a right to free transcript, at the appellate level.

No statute expressly guarantees right to appointed counsel on appeal. However, Civil Code Section 237.5 states that at the initial proceedings concerning the state's petition to terminate parental custody: "The court may appoint counsel to represent the minor whether or nor the minor is able to afford counsel, and, if they are unable to afford counsel, shall appoint counsel to represent the parents." The court appears to have interpreted this provision to confer a right to counsel on appeal. In defining the showing that must be made to obtain a free transcript, the court states:

> The appellant and counsel should first make the same minimum showing of indigency and merit to the appeal required at the appellate level by Ferguson v. Keays, . . . . Second, counsel should submit a declaration showing the grounds of the appeal and the reasons why a transcript is necessary for effective appellate review.[163]

Thus the criteria for obtaining a transcript seems to presuppose that the indigent appellant possesses counsel. Section 237.5, however, makes mention only of hearings at the trial court level. No mention is made of any appellate proceedings. The court simply did not directly address the question of how it determined that counsel on appeal was guaranteed, though it pointed out that in *In re Rodriguez*[164] another appellate court appointed counsel for an indigent parent undertaking an appeal. In *Rodriguez,* however, the parent was incarcerated at the time and was clearly unable to prosecute his own appeal. Further, *Rodriguez* did not announce a right to counsel on appeal. The decision merely noted that counsel had been appointed.[165] If counsel is not guaranteed on appeal, the strength of the inference that the legislature intended the indigent to enjoy unimpeded access to the appellate level appears to diminish.

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163. *Id.* at 119-20, 115 Cal. Rptr. at 684.
164. 34 Cal. App. 3d 510, 110 Cal. Rptr. 56 (1973).
165. *Id.* at 513, 110 Cal. Rptr. at 57.

The court's position is not without some logical force, of course. It may be reasoned simply that the appointment of counsel in the initial proceeding under Section 237.5 is intended to carry through to the final adjudication of the issues in dispute and that to limit counsel to the trial level would be to afford rather truncated rights to the indigent. This is apparently the view taken by the court and it is neither illogical nor unreasonable. It would appear, however, not to be the *better* reasoned of the two reasonable choices.

The juxtaposition of *Leslie* and *Crespo*, handed down the same day by the same court, provides an insight into the court's attitude. *Leslie* reaffirms the court's reluctance to adopt the common law or constitutional arguments in this area, while *Crespo* can be read as indicative of a court reaching beyond the most reasonable construction to attain what it views as a socially desirable goal: furnishing a transcript to an indigent appellant.

### *B. Right to Counsel*

By far the most striking example of a court's willingness to stretch thin its logic in order to extend rights to indigents lies in *In re Simeth*,[166] which overruled *In re Robinson*.[167]

In *Robinson* the state sought to renew the status of appellant's children as dependents of the court in a hearing convened under Welfare and Institutions Code Section 729. On appeal, appellant urged that she had been denied a right to counsel at the hearing. The court of appeal rejected any such constitutional right, and said further that no statutory right to counsel existed.[168] In canvassing the statutes on which appellant had relied as supportive of a right to counsel and which the court had rejected, the court's opinion listed Welfare and Institutions Code Sections 634, 679, 700, 729, and Government Code Section 27706(e).

Four years later, in *Simeth*, the same appellate court overruled *Robinson*, and held specifically that counsel must be afforded on appeal as a matter of statutory right to indigent parents appealing from an adverse decision in a dependency hearing. The court stated that amendments to statutes in the years intervening since *Robinson* furnished a basis for overruling *Robinson*.[169] The court specifically excluded constitutional and common law grounds as rationales for its decision.[170]

166. 40 Cal. App. 3d 982, 115 Cal. Rptr. 617 (1974).
167. 8 Cal. App. 3d 783, 87 Cal. Rptr. 678 (*petition for hearing denied* October 1, 1970, *id.* at 787), *cert. denied sub nom.*, Kaufman v. Carter, 402 U.S. 964 (1970).
168. 8 Cal. App. 3d at 785-86, 87 Cal. Rptr. at 679-80.
169. 40 Cal. App. 3d at 985-86, 115 Cal. Rptr. at 618.
170. *Id.*

The statutes relied upon for the overruling included all those mentioned in *Robinson*, as well as Penal Code Section 1241,[171] which deals with compensation of court-appointed counsel. A comparison of all these statutes, as they stood at the time of the *Robinson* decision and as they stood in amended form at the time of *Simeth*, indicates that the intervening amendments do not substantially support the *Simeth* court's reasoning. An analysis of these statutes is instructive.

At the time *Robinson* was decided, Welfare and Institutions Code Section 634 provided that in a hearing to declare a child a dependent of the court under Welfare and Institutions Code Section 600, the court had the discretion to appoint counsel for indigent parents.[172] Appointment of counsel was not mandatory. Section 634, as amended at the time of the *Simeth* decision,[173] left unaffected the dependency hearings with which *Robinson* and *Simeth* were concerned and primarily affected wardship hearings.[174] The changes in Welfare and Institutions Code Section 634 would not appear then, logically, to have affected the *Simeth* decision.[175]

The next statute noted in the *Simeth* opinion is Welfare and Institutions Code Section 679, which permits the minor to be represented by counsel of his own choosing and further requires appointment of counsel to represent indigent minors in wardship hearings. This statute was unchanged between the *Robinson* and *Simeth* decisions.

Similarly, Welfare and Institutions Code Section 700 provided at the time of both the *Robinson* and *Simeth* decisions that appointment of counsel in dependency hearings was discretionary with the court.[176] The intervening amendments only affected the minor's right to counsel in wardship proceedings.

Welfare and Institutions Code Section 729 pertains to the notice requirements prior to a dependency hearing, and does not speak to the substantive question of a right to counsel.

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171. CAL. PEN. CODE §1241, *as amended*, CAL. STATS. 1971, c. 1158, §1, at 2180.

172. CAL. WELF. & INST. CODE §634, *as amended* CAL. STATS. 1968, c. 1223, §1, at 2332.

173. CAL. WELF. & INST. CODE §634, *as amended*, CAL. STATS. 1971, c. 667, §2, at 1322.

174. A child may be determined to be a dependent of the court where he lacks effective parental guidance or support or where he is physically dangerous to the public because he suffers some physical or mental deficiency. CAL. WELF. & INST. CODE §600. A child may be adjudged a ward of the court where he habitually refuses to obey his parents or school authorities, or where he is found to have violated the law. CAL. WELF. AND INST. CODE §§601, 601.1, 602.

175. An amendment unmentioned by the court is Welfare and Institutions Code Section 634.5, added in 1971, which provides that at a dependency hearing convened under section 600(d), counsel must be furnished to the minor. The hearing in *Simeth*, however, was covered under section 600(a).

176. CAL. WELF. & INST. CODE §700, *as amended*, CAL. STATS. 1968, c. 1223, §2, at 2333; *as amended*, CAL. STATS. 1970, c. 625, §2, at 1242.

Government Code Section 27706 deals with the duties of the public defender. At the time of the *Robinson* decision, Section 27706(e) provided that upon court order, the public defender might represent indigent parties at wardship hearings. As amended at the time of *Simeth*, it had been broadened to include dependency hearings as well.[177] However, representation still hinged upon the court order, a matter of discretion with the court, and not a right inhering in the indigent.

At the time of the *Robinson* decision, Penal Code Section 1241 provided for compensation for attorneys appointed by the California Supreme Court or any appellate court to represent criminal defendants on appeal or in other proceedings.[178] As amended at the time of the *Simeth* decision, it dealt with compensation in criminal as well as civil matters.[179] Obviously, however, provision of compensation for attorneys, where appointed to represent indigents, is not tantamount to announcing a right of indigents to that representation.

The statutes relied upon in *Simeth*, then, furnish very little direct support for the proposition that a statutory right to counsel in dependency hearings had arisen due to legislative enactments in the years intervening since *Robinson*. The court undertook to support its conclusion, however, by quoting an amicus brief filed by the District Attorney of Los Angeles County which argued that legislative intent dictated the decision in *Simeth*.[180] This argument is supported by reasoning that since intervening amendments authorized the public defender to represent the indigents in dependency hearings, upon court order,[181] and authorized a mode of payment for appointed counsel in civil appeals,[182] the legislature manifested an intent to confer a *right* to counsel.[183] This argument may be overreaching. While it may be manifest that the legislature intended to invest the court with discretion to appoint counsel for the indigent, it does not appear that it intended to afford counsel as a matter of right. Thus in *Simeth* and *Crespo* a court rejected the common law and constitutional arguments advanced in support of an indigent's right, and instead granted relief grounded in an interpretation of the statute which, while perhaps not unreasonable, is nevertheless less compelling logically than another, more restrained, construction.

177. CAL. GOV'T CODE §27706(e), *as amended*, CAL. STATS. 1971, c. 1800, §1, at 3896.
178. CAL. PEN. CODE §1241, *as amended*, CAL. STATS. 1967, c. 17, §108, at 848.
179. *See* note 171 *supra*.
180. 40 Cal. App. 3d at 984, 115 Cal. Rptr. at 618.
181. CAL. GOV'T CODE §27706(e), *as amended*, CAL. STATS. 1971, c. 1800, §1, at 3896.
182. CAL. PEN. CODE §1241, *as amended*, CAL. STATS. 1971, c. 1158, §1, at 2180.
183. *See* 40 Cal. App. 3d at 984, 115 Cal. Rptr. at 618.

## CONCLUSION

This comment has attempted to suggest that the courts are reluctant to extend to indigent civil litigants a right to counsel or transcript under the common law and constitutional arguments successfully advanced in the past to obtain a waiver of fees. The reasons for this reluctance are two-fold. First, those arguments, as presently made, appear to be self-limiting, and do not impel the courts to undertake further expansions. Second, there is a legitimate concern that the cost in dollars and manpower of furnishing counsel or transcript may prove so burdensome on the judicial system as to outweigh any benefit gained.

In place of the common law or constitutional rationale, the courts of California have manifested their concern for the legal situation of indigents by employing a liberal construction of statutes where possible. Although clearly limited to situations where there is present a statute susceptible to interpretation, this liberal construction possesses two advantages. It escapes the theoretical difficulties inherent in the constitutional and common law approaches, and it allows for a gradual and controlled expansion of rights, thereby affording the judicial system an opportunity to assess and absorb the practical impact of each incremental extension. Obviously, however, liberal construction is not an ultimate answer to the question of inequalities before the bar of justice.

Rather the answer, if there is to be one, must come from the legislature which, unlike the courts, is free from the constraints of nearly closed-ended theoretical rationales and better able to gather information on the practical implications of expanded rights. In this regard, it must be marked as significant that the courts appear inclined to put aside constitutional and common law arguments in the area, and to cleave instead to statutes for authority even where those statutes offer only a toe hold, for it points to the conclusion that the judicial branch is in fact looking to the legislature to perform the broader fact-finding and policy-weighing role for which it is designed.

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