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## Forcing Attorneys to Represent Indigent Civil Litigants: The Problems and Some Proposals

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## FORCING ATTORNEYS TO REPRESENT INDIGENT CIVIL LITIGANTS: THE PROBLEMS AND SOME PROPOSALS

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Indigents confront a basic inequity in our civil litigation system: the inability to afford counsel. In response to this inequity, Congress established the Legal Services Corporation (Corporation) in 1974 to aid indigent litigants.<sup>1</sup> Congress originally sought to provide one legal services lawyer for every 5,000 poor people eligible for the program.<sup>2</sup> In 1981, however, Congress reduced the Corporation's budget<sup>3</sup> and, as a result, the ratio of legal services lawyers to indigents eligible for legal services has dropped to approximately one to 9,585.<sup>4</sup>

In addition, these budget cuts represent only a fraction of social services reductions.<sup>5</sup> Like the nonpoor, the poor need lawyers for tort, contract, civil liberty, and family law problems.<sup>6</sup> Unlike the nonpoor, however, the poor also need lawyers to as-

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1. See Legal Services Corporation Act of 1974, Pub. L. No. 88-452, 88 Stat. 378 (codified as amended at 42 U.S.C. §§ 2996-2996l (1982)). The Legal Services Corporation (Corporation) is a nonprofit, private corporation with its principal office in the District of Columbia. § 2996. The Corporation attempts to provide "financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." § 2996b. The Corporation is not an agency of the United States Government, and both private organizations and Congress provide the Corporation with funds. § 2996i(a), (c).

2. See Siegel, *Without a Lawyer the Poor Can't Complain*, Civil Liberties, June 1983, at 5; see also L. FORER, *MONEY AND JUSTICE* 103 (1984).

3. See 42 U.S.C. § 2996i amended 1981. The amendment cut the Corporation's budget 25%, from \$321 million to \$241 million. *Id.*; see also Siegel, *supra* note 2, at 5; N.Y. Times, June 19, 1981, § 1, at 1, col. 3. The budget has remained unchanged since the cut.

4. See Pollack, *Lawyers Flock to the Rich, Shun the Poor*, Rocky Mountain News, June 27, 1983, at 39, cited in L. FORER, *supra* note 2, at 58.

5. See L. FORER, *supra* note 2, at 103. See also N.Y. Times, July 26, 1984, § 1, at 19, col. 1 (reporting that the nonpartisan congressional research service estimated that federal social program restrictions created 557,000 more poor people); N.Y. Times, Jan. 9, 1982, § 1, at 27, col. 6 (stating that 3,000 New York City families lost welfare benefits because of federal spending cuts); N.Y. Times, Jan. 2, 1982, § 1, at 1, col. 1 (stating that social service programs are struggling to maintain activities as budgets decrease and number of people seeking aid increases).

6. See L. FORER, *supra* note 2, at 103.

sist with problems peculiar to indigency, for instance, to oppose utility rate hikes, foreclosures, and entitlement cutbacks.<sup>7</sup> Social services reductions create more legal problems for the poor in these areas,<sup>8</sup> necessitating an even greater demand for counsel.

In response to this, many courts have forced attorneys to represent, without compensation, indigent civil litigants.<sup>9</sup> Although these courts maintain that the practice is traditional,<sup>10</sup> in fact its origins are unclear.<sup>11</sup> Whatever its source, this practice places on attorneys the burden of representing indigent civil liti-

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7. *Id.*

8. *Id.*

9. See, e.g., *Caruth v. Pinkney*, 683 F.2d 1044, 1049 (7th Cir. 1982) (stating that request for appointment of counsel should not be denied solely because attorney is uncompensated), *cert. denied*, 459 U.S. 1214 (1983); *Ray v. Robinson*, 640 F.2d 474, 477 (3d Cir. 1981) (holding that although funds unavailable for compensation, court can appoint counsel in civil rights action); *Yarbrough v. Superior Court*, 197 Cal. Rptr. 737, 741 (1983) (holding that until legislature determines otherwise, attorneys must perform legal services for indigents gratuitously), *vacated*, 39 Cal.3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985) (ordering trial court to reconsider whether appointment of counsel necessary to give defendant access to court but not considering whether courts possess the power to appoint attorneys without compensation); *Ex parte Dibble*, 279 S.C. 592, 310 S.E.2d 440, 442 (1983) (holding that court may appoint attorneys to represent, without compensation, indigent civil litigant); *Brown v. Board of County Comm'rs*, 85 Nev. 149, 150, 451 P.2d 708, 709 (1969) (holding that upon court order, attorney is obligated to represent, without compensation, indigent civil litigants); see also Note, *The Indigent's "Right" to Counsel in Civil Cases*, 43 FORDHAM L. REV. 989, 1004-06 (1975). But see *Bradshaw v. Zoological Soc'y of San Diego*, 662 F.2d 1301 (9th Cir. 1981) (holding that in Title VII action, district court has power to deny coercive appointment of counsel when voluntary counsel could not be located to assist plaintiff; the court, however, remanded for appointment of counsel); *Mowrer v. Superior Court*, 155 Cal. App. 3d 262, 201 Cal. Rptr. 893, 895 (1984) (holding court cannot appoint unwilling counsel to represent indigent civil litigant); *Yarbrough v. Superior Court*, 197 Cal. Rptr. 737, 748 (1983) (King, J., concurring) (arguing that to alleviate burden on attorneys, legislature should appropriate funds to compensate appointed counsel in civil cases), *vacated*, 39 Cal.3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985) (ordering trial court to reconsider whether appointment of counsel necessary to give defendant access to courts but not considering whether courts possess the power to appoint attorneys without compensation); *State v. Rush*, 46 N.J. 399, 412, 217 A.2d 441, 448 (1966) (finding all constitutional claims against uncompensated, court appointments invalid, but relieving attorneys of this burden because it is too great); Comments, *The Uncompensated Appointed Counsel System: A Constitutional and Social Transgression*, 60 Ky. L.J. 710, 721 (1972) (stating that forced, uncompensated court appointments violate the Constitution and represent poor policy).

This Note does not address court appointments in criminal cases. Criminal defendants are entitled to representation under the sixth amendment, see *infra* note 30, while civil litigants are entitled to counsel only in certain cases, see *infra* note 31. Thus, the question of whether counsel should be forced to accept uncompensated court appointments in criminal cases involves a potentially overriding right of defendants, a right not involved in civil cases. Therefore, to avoid simplistic, overbroad analysis, appointments in civil cases should be considered separately from those in criminal cases.

10. See, e.g., *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

11. See Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 753 (1980); see also *infra* note 105.

gants in matters for which the nonpoor consult legal counsel, as well as in those additional matters that disproportionately affect the poor. Consequently, this burden has increased in response to the social services reductions.<sup>12</sup>

This practice has been considered by the American Bar Association as well. Ethical Consideration 2-16 of the Model Code of Professional Responsibility sets forth the presently nonobligatory, pro bono aspiration in the states.<sup>13</sup> Recently, the Kutak Commission proposed a mandatory Disciplinary Rule of the Model Rules of Professional Conduct that would have *required* a pro bono commitment of all attorneys.<sup>14</sup> The Bar Association de-

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12. See, e.g., *Yarbrough v. Superior Court*, 197 Cal. Rptr. 737, 744 (1983) (King, J., concurring), *vacated*, 39 Cal.3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985) (ordering trial court to reconsider whether appointment of counsel necessary to give defendant access to courts but not considering whether courts possess the power to appoint attorneys without compensation). The concurrence in *Yarbrough* stated:

In retrospect the federal government may have perpetrated a cruel hoax by making available free legal services to those who needed them but who could not afford them, and then sharply reducing, if not virtually terminating, this essential service. Just when poorer citizens were for the first time given a vehicle for the exercise of their legal rights, it is being withdrawn from them. For this reason now, more than at any other time in our history, more lawyers are representing more low income clients without compensation.

*Id.* at 744.

13. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-16, 2-19 (1980). Ethical Consideration 2-16 states that "persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective." Ethical Consideration 2-25 states:

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged.

These Ethical Considerations are, however, only "aspirational in character and represent [an objective] toward which every member of the profession should strive." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1980). The Ethical Considerations are nonobligatory. Although pro bono representation is a matter of choice, attorneys should strive to represent the financially disadvantaged.

14. See MODEL RULES OF PROFESSIONAL CONDUCT Chairman's Introduction (Proposed Final Draft 1981) (calling for mandatory pro bono legal services); see also Palmer & Aaronson, *Placing Pro Bono Publico in the National Legal Services Strategy*, 66 A.B.A. J. 851 (1980). The Model Rules of Professional Conduct (Rules) are a comprehensive revision of the Model Code of Professional Responsibility (Code). The Code, originally adopted by the American Bar Association in 1969, has been adopted, with variation, in the majority of states. ABA/BNA MANUAL ON PROFESSIONAL CONDUCT 1:301. The primary objective of the American Bar Association's Special Committee on Implementation of the Model Rules of Professional Conduct is to persuade the states to convert to the Rules. [Current Reports] ABA/BNA MANUAL ON PROFESSIONAL CONDUCT 93.

Under a mandatory obligation, an attorney would have been subject to coercive sanctions for failing to provide pro bono services. Courts enforce the Disciplinary Rules through disbarment, fine, or censure. See, e.g., *Tarver v. State Bar*, 37 Cal. 3d 122, 134-

cided, however, to continue "the nonobligatory professional standard set forth in the current Code . . .",<sup>15</sup> concluding that the constitutionality of forced, uncompensated court appointments remains uncertain.<sup>16</sup>

This Note argues that uncompensated court appointments represent an unsatisfactory means to provide counsel for indigents. Part I discusses the policy arguments for and against forced, uncompensated court appointments. Part I concludes that the arguments against these appointments outweigh the arguments in favor of them. Part II argues that they violate the Constitution's prohibitions against uncompensated takings and involuntary servitude. Part III offers a proposal that would provide effective representation for indigent civil litigants, while avoiding infringement of attorneys' constitutional rights.

## I. POLICY INTERESTS

Because attorneys should aid in improving the legal profession,<sup>17</sup> one could argue that attorneys should provide adequate representation for indigents, thus justifying uncompensated court appointments.<sup>18</sup> The Model Code of Professional Responsibility supports this position. Ethical Consideration 8-9 states that when attorneys represent indigent civil litigants rather than leave them unrepresented, attorneys enhance the judicial pro-

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35, 688 P.2d 911, 918, 207 Cal. Rptr. 302, 309 (1984) (holding that comingling funds, misappropriating funds, and charging unconscionable fee, in violation of professional code, justifies disbarment).

15. MODEL RULES OF PROFESSIONAL CONDUCT DR 6.1 (Proposed Final Draft 1981):

A lawyer *should* render public interest legal service. A lawyer *may* discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, or by service in activities for improving the law, the legal system or the legal profession. (Emphasis added.)

This provision avoids making pro bono representation obligatory.

16. See MODEL RULES OF PROFESSIONAL CONDUCT DR 6.1 notes (Proposed Final Draft 1981).

17. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-9 (1980) ("The advancement of our legal system is of vital importance in maintaining the rule of law and . . . lawyers should encourage, and should aid in making, needed changes and improvements.").

18. See, e.g., *Yarbrough v. Superior Court*, 197 Cal. Rptr. 737, 741 (1983) (noting that attorneys have an "interest in maintaining the integrity of the adversary system by seeing to it that every good faith litigant, regardless of means, is adequately represented."), *vacated*, 39 Cal. 3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985) (ordering trial court to reconsider whether appointment of counsel necessary to give defendant access to courts but not considering whether courts possess the power to appoint attorneys without compensation).

cess's integrity and fairness.<sup>19</sup>

Although attorneys have this interest, forcing only some attorneys to represent indigent civil litigants unfairly allocates the profession's burden. When courts unevenly distribute court appointments among attorneys, the chosen attorneys face a choice: they may either raise fees for paying clients or absorb the cost of representing indigent civil litigants themselves.<sup>20</sup> If a court-appointed attorney raises fees for paying clients, the attorney's paying clients may seek a more competitively priced attorney; thus, this choice could force the attorney to bear the high cost of lost business. Conversely, if these paying clients remain with the attorney, they must bear the burden.<sup>21</sup> Alternatively, the attorney may leave fees unchanged. Here, the attorney directly bears the burden. Hence, if courts unevenly distribute court appointments among attorneys, some attorneys, and their paying clients, disproportionately bear the cost of representing indigents.

Ostensibly, the even distribution of court appointments among attorneys offers a remedy to this dilemma because the entire profession would proportionately bear the burden. Two strong policy interests, however, justify public compensation of court-appointed attorneys for indigent clients. First, the public as a whole benefits both directly and indirectly from civil litigation brought by indigents. Second, the public has an interest in the fair administration of justice.

#### A. *Public Interest in Supporting Indigent Litigation*

The public as a whole has benefited from publicly-funded civil litigation brought by, or on behalf of, indigent plaintiffs.<sup>22</sup> For instance, malpractice suits against professionals have resulted in improved services and observance of ethical standards.<sup>23</sup> Suits

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19. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-9 (1980).

20. See Comments, *supra* note 9, at 722 (suggesting that attorneys will transfer cost of representing indigent clients to paying clients).

21. Cf. *id.*

22. See L. FORER, *supra* note 2, at 43; cf. *Yarbrough v. Superior Court*, 197 Cal. Rptr. 737, 745 (1983) (King, J., concurring) (noting that uncompensated court-appointed attorneys discharge a public function), *vacated*, 39 Cal.3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985) (ordering trial court to reconsider whether appointment of counsel necessary to give defendant access to courts but not considering whether courts possess the power to appoint attorneys without compensation); *State v. Green*, 470 S.W.2d 571, 573 (Mo. 1971) (en banc) (announcing that court will no longer compel attorneys to discharge the state's burden).

23. See L. FORER, *supra* note 2, at 34.

brought by prisoners have revealed illegal practices in our prison system,<sup>24</sup> improving the system's quality and, in the long run, decreasing the public expense of prisoner litigation through elimination of illegal practices.<sup>25</sup> Suits protecting the right of the mentally ill to receive treatment in the least possible restrictive environment have caused a decrease in the number of state mental institutions from 600,000 to 150,000, thus saving the public \$4.5 billion each year.<sup>26</sup> The New York State Legislature's appropriation of \$1 million to facilitate representation for people to whom the federal government denies social security disability or supplemental security income benefits could save state and local governments an estimated \$7 million to \$10 million each year.<sup>27</sup> These examples evidence the extensive public benefits derived from civil litigation brought by those unable to afford counsel.<sup>28</sup> Because the public benefits, fairness requires that the public share the expense. Rather than force some subgroup of the public, such as attorneys or their clients, to finance these cases, the federal and state governments, as representatives of the public, should provide counsel to the indigent.<sup>29</sup>

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24. See, e.g., *Estelle v. Gamble*, 429 U.S. 97 (1976) (finding that prisoners were denied medical attention); *Rennie v. Klein*, 653 F.2d 836 (3d Cir. 1981) (finding permanently disabling drugs were used on adults in mental institutions); *Morales v. Turman*, 383 F. Supp. 53 (E.D. Tex. 1974) (finding that children in custody were forced to use drugs), *rev'd*, 535 F.2d 864 (5th Cir. 1976), *reh'g denied*, 539 F.2d 710, *rev'd*, 430 U.S. 322 (1977); *Newman v. Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972) (finding that inadequate care was provided to inmates giving birth), *cert. denied*, 421 U.S. 948 (1975); see also L. FORER, *supra* note 2, at 33.

25. L. FORER, *supra* note 2, at 33. But see Note, *Abusive Pro Se Plaintiffs in the Federal Courts: Proposals for Judicial Control*, 18 U. MICH. J.L. REF. 93, 99-115 (1984) (arguing that increased opportunities for prisoner litigation have resulted in increasing public expense).

26. L. FORER, *supra* note 2, at 39.

27. N.Y. Times, Aug. 7, 1983, § 1, at 29, col. 1.

28. L. FORER, *supra* note 2, at 33-43. Forer lists many of the innumerable benefits to the public as a whole that have resulted from civil litigation brought by indigent clients.

29. See *Yarbrough v. Superior Court*, 197 Cal. Rptr. 737, 745 (1983) (King, J., concurring) (arguing that court-appointed attorneys perform a public function and deserve public compensation), *vacated*, 39 Cal.3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985) (ordering trial court to reconsider whether appointment of counsel necessary to give defendant access to courts but not considering whether courts possess the power to appoint attorneys without compensation); *Bradshaw v. Ball*, 487 S.W.2d 294, 298 (Ky. 1972) (discontinuing uncompensated court appointments and declaring that the duty to appropriate funds for compensating court-appointed attorneys rests on the legislature); *State v. Green*, 470 S.W.2d 571 (Mo. 1971) (en banc) (announcing court will no longer compel attorneys to accept court appointments but will wait for legislature to act); *State v. Rush*, 46 N.J. 399, 408, 217 A.2d 441, 448 (1966) (deciding financial burden and time commitment imposed on attorneys too great and leaving problem to legislature); *State ex rel. Partain v. Oakley*, 159 W. Va. 805, 822, 227 S.E.2d 314, 323 (1976) ("With deference to the legislative process, then, we conclude that the appropriate remedy is to order only that the lawyers of this State may no longer be required to accept appointments as in

Forcing attorneys to represent indigents may also reduce the public benefits that this litigation can provide. Effective representation for the indigent requires an attorney-client relationship based on trust and confidence and requires an attorney with the time and other resources necessary to pursue zealously a client's case. A forced appointment may undermine this relationship, and a court-appointed attorney may lack the time and resources necessary to represent the client effectively. This impaired effectiveness reduces the benefits that this litigation might otherwise provide the public. Therefore, the public as a whole has an interest in supplying the funds necessary to provide effective counsel to indigent civil litigants.

1. *Public interest in effective representation for indigents*—Although the sixth amendment entitles an indigent criminal defendant to representation,<sup>30</sup> the Constitution does not generally afford a right to representation to indigent civil litigants.<sup>31</sup> A convicted criminal defendant may face a direct loss of life or liberty not faced by a losing civil litigant.<sup>32</sup> Thus, the Constitution rightly requires representation for indigent criminal defendants. Nevertheless, a losing civil litigant may face losses as severe as

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the past."); see also Swygert, *Should Indigent Civil Litigants in the Federal Courts Have a Right to Appointed Counsel*, 39 WASH. & LEE L. REV. 1267, 1298 (1982) (arguing that forcing attorneys to represent, without compensation, indigent clients, is unfair to lawyers as a group); cf. *Gagnon v. Scarpelli*, 411 U.S. 778, 788 (1973) (appointing counsel for an indigent client, the Court spoke of the financial cost to the State for appointed counsel, though not deciding that the State should bear the cost).

30. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932). The sixth amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. CONST. amend. VI.

31. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-42 (1978). Indigents are entitled to counsel only in certain cases. Cf. *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (holding that indigent parent was not entitled to appointed counsel where claim was so weak that counsel would not have helped, but stating that decision whether to appoint counsel should be determined on a case-by-case basis). But see *Payne v. Superior Court*, 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976) (holding that indigent prisoner named as civil defendant entitled to appointed counsel in proper circumstances); Note, *Indigents' Right to Appointed Counsel in Civil Litigation*, 66 GEO. L.J. 113, 115 (1977) (arguing that indigents have a right to appointed counsel in civil cases).

32. See, e.g., *In re Nine Applications for Appointment of Counsel*, 475 F. Supp. 87, 89 (N.D. Ala. 1979) ("Special dispensations are made to the accused of our system of criminal justice, so it shall remain fair, and so as to protect the life and liberty of the defendant."); cf. Note, *supra* note 9, at 1004 (noting that although an attorney representing a criminal defendant may be entitled to compensation, an attorney representing an indigent civil litigant is not necessarily so entitled because of the lesser sanctions involved in civil cases).



those of a convicted criminal defendant.<sup>33</sup> Indeed, a losing civil litigant may indirectly lose a significant liberty interest.<sup>34</sup>

Furthermore, civil cases present substantive and procedural issues as complex as those found in criminal cases.<sup>35</sup> In cases where a court appoints an attorney, a judge has determined that the indigent cannot handle the case without assistance.<sup>36</sup> In addition, in civil cases trained counsel often represents the opposing party.<sup>37</sup> Therefore, although an indigent may have no constitutional right to counsel, if a court finds that an indigent needs representation<sup>38</sup> then that party should have effective representation.<sup>39</sup>

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33. A civil litigant could lose the means of subsistence. *See, e.g.,* *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (requiring hearing prior to termination of welfare benefits, which the Court characterized as a necessity).

34. The Court stated in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 551 (1972) that "a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither would have meaning without the other. That rights in property are basic civil rights has long been recognized." The property rights at stake in many civil suits are thus inextricably tied to individual personal liberty.

35. *See* *Brotherhood of Ry. Trainmen v. Virginia State Bar*, 377 U.S.1, 7 (1964) ("Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries . . ."); *Bradshaw v. Zoological Soc'y of San Diego*, 662 F.2d 1301, 1313 (9th Cir. 1981) ("Civil rights litigants are presumptively incapable of handling complex litigation themselves and of protecting themselves against the serious prejudice that occurs at trials in which the adversaries are represented by the most sophisticated law firms."); *Mowrer v. Superior Court*, 155 Cal. App. 3d 262, 271, 201 Cal. Rptr. 893, 898 (1984) ("[E]xpanding concepts in law have increased the volume of assignments, the complexity of the issues involved, and a mushrooming of the duties involved in an appointed case.") (quoting *County of Fresno v. Superior Court*, 82 Cal. App. 3d 191, 202, 146 Cal. Rptr. 880, 887 (1978) (Hopper, J., dissenting)); *cf. Note, Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366, 373 n.53 (1981) (arguing that uncompensated court appointments are constitutional and stating that in both civil and criminal cases, "the fairness of the proceeding is promoted" through the appointment of counsel).

36. *See supra* note 35.

37. *Id.*

38. Despite the absence of a constitutional right to counsel, a court may still find that an indigent civil litigant is entitled to representation for a number of reasons. One important reason is that the importance of the right at stake necessitates representation. *See, e.g.,* *Bradshaw v. Zoological Soc'y of San Diego*, 662 F.2d 1301, 1313 (9th Cir. 1981) (stating that in Title VII action lack of counsel severely prejudices civil rights litigants). Further, courts appoint attorneys to represent indigent civil litigants because "[t]he majority of indigents lack the education, the leisure, the facilities, and the familiarity with libraries and bureaucracies that are essential to pursue a legal claim, particularly one against the government. Without lawyers, these people have no access to civil justice." L. FORER, *supra* note 2, at 103. For a discussion of the need for a right to counsel in civil cases, *see* Note, *supra* note 31.

39. *Mowrer v. Superior Court*, 155 Cal. App. 3d 262, 272, 201 Cal. Rptr. 893, 898 (1984); *Yarbrough v. Superior Court*, 197 Cal. Rptr. 737, 746 (1983) (King, J., concurring), *vacated*, 39 Cal. 3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985) (ordering trial court to reconsider whether appointment of counsel necessary to give defendant access to courts but not considering whether courts possess the power to appoint attorneys with-

Unfortunately, forced appointments may provide ineffective representation. First, lack of compensation may reduce an attorney's incentives.<sup>40</sup> Second, lack of compensation may reduce the resources with which the attorney can represent the indigent client.<sup>41</sup> Third, as a result of accepting a forced, uncompensated court appointment, an attorney may become so overburdened with cases that the indigent client's case receives inadequate effort.<sup>42</sup>

One may argue that a contingent fee arrangement or a post-judgment claim for attorney's fees would eliminate or reduce these first two disincentives. Thus, when either a contingent fee or a claim for fee is available to a court-appointed attorney, the appointing judge need not worry about the lack of incentive or resources. Further, if a judge or an attorney could be confident that the appointment would not overburden the attorney, then the final disincentive would be removed as well. Hence, an appointment in these circumstances would not violate the policy of providing an indigent party with effective representation. Still, if

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out compensation); Comments, *supra* note 9, at 727.

40. See *Mowrer v. Superior Court*, 155 Cal. App. 3d 262, 273, 201 Cal. Rptr. 893, 898 (1984) (stating that compelled representation may "deprive the indigent of effective assistance of counsel"); *Honore v. Washington State Bd. of Prison Terms and Paroles*, 77 Wash. 2d 660, 679, 466 P.2d 485, 496 (1970) (en banc) (stating that forcing attorney to accept uncompensated, court appointment may tend to detract from quality of attorney's representation); REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND ADMINISTRATION OF FEDERAL COURT JUSTICE 29-30 (1963) (noting that 75% of criminal clients represented by federally appointed attorneys entered guilty pleas while only 25% of clients represented by retained counsel pled guilty); Ervin, *Uncompensated Counsel: They Do Not Meet Constitutional Mandate*, 49 A.B.A. J. 435, 436 (1963); Williams & Bost, *The Assigned Counsel System: An Exercise in Servitude?*, 42 Miss. L.J. 32 (1971); Comments, *supra* note 9, at 710. But see *State v. Rush*, 46 N.J. 399, 406, 217 A.2d 441, 444 (1966) ("A lawyer needs no motivation beyond his sense of duty and his pride."). In *Mowrer*, however, the court noted that despite its "hope that every attorney would derive satisfaction from a job done well, . . . it may be unrealistic . . . to expect satisfaction to constitute the sole motivation for an attorney to expend maximum effort. The more conscientious[ly] the attorney fights for the indigent's cause, the greater the financial loss suffered by the attorney." 155 Cal. App. 3d at 273, 201 Cal. Rptr. at 899. Thus, although satisfaction or pleasure derived from helping an indigent may be a strong motivating force, an uncompensated attorney may put forth a less than maximum effort.

41. See *Yarbrough v. Superior Court*, 197 Cal. Rptr. 737, 746 (1983) (King, J., concurring) (stating that lack of compensation deprives attorney of funds with which to represent the client), *vacated*, 39 Cal.3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985) (ordering trial court to reconsider whether appointment of counsel necessary to give defendant access to courts but not considering whether courts possess the power to appoint attorneys without compensation); Comments, *supra* note 9, at 710. But cf. *State v. Rush*, 46 N.J. 399, 406, 217 A.2d 441, 445 (1966) (stating that outcome of case is more dependent on applicable law than on advocate's skill).

42. Cf. *State v. Smith*, 140 Ariz. 355, 681 P.2d 1374 (1984) (finding that a bid system, in which attorneys submitted bids to state and state chose lowest bidder to represent indigent criminal defendants, resulted in overburdened attorneys).

a court forces only some attorneys to represent indigent civil litigants, the unfair burden on these attorneys or their clients remains.

Absent either a contingent fee arrangement or a claim for fee, an attorney judicially appointed to represent an indigent may provide that client with ineffective representation.<sup>43</sup> Because the public has an interest in civil litigation brought by indigents,<sup>44</sup> the public also has an interest in ensuring effective representation for those indigents. The public interest in effective representation thus justifies public compensation of attorneys who represent indigent civil litigants.

2. *Public interest in an effective attorney-client relationship*— Forced, uncompensated court appointments may also intrude upon the attorney-client relationship,<sup>45</sup> a relationship that depends upon trust and confidence.<sup>46</sup> A client's concern that a forced, uncompensated appointee will put forth less than an enthusiastic effort may undermine the trust and confidence that the relationship demands.<sup>47</sup> Absent trust and confidence, a client may be unwilling to disclose essential information. Thus, uncompensated court appointments may impair the trust and confidence essential to an effective attorney-client relationship. Because the public benefits from civil litigation,<sup>48</sup> and effective litigation requires trust and confidence between attorney and client, the public has an interest in promoting that trust and confidence. Therefore, the public has an interest in compensating attorneys appointed to represent indigents as a means to

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43. Indigents who have cases where a contingent fee may be possible can probably find their own attorneys and, therefore, will not seek court appointments. Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270, 1285 (1966). Thus, indigents receiving court appointments may be comprised of those litigants whose cases did not present the opportunity for a contingent fee. Absent a statutory claim for fees, an appointed attorney in such a case may not put forth a maximum effort.

44. See *supra* notes 22-29 and accompanying text.

45. *In re Nine Applications for Appointment of Counsel*, 475 F. Supp. 87, 91 (N.D. Ala. 1979). The court in *Nine Applications* objected "to the judicial intrusion upon the attorney-client relationship exacted by Section 2000e-5(f)(1)" of Title VII, which permits a court to appoint, at its discretion, uncompensated counsel. The court continued, "[T]he statute allows to be forced that which by its very nature cannot be forced, the fiduciary relationship between the client and his attorney." *Id.*

46. *In re Nine Applications for Appointment of Counsel*, 475 F. Supp. 87, 91 (N.D. Ala. 1979) ("Trust and confidence are imperative" to the attorney-client relationship); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1980) ("A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client.").

47. *In re Nine Applications for Appointment of Counsel*, 475 F. Supp. 87, 91 (N.D. Ala. 1979) ("[W]hile an attorney is ethically bound to give any client his all, the amount of trust and confidence to be found in a compelled relationship is questionable at best.").

48. See *supra* notes 22-29 and accompanying text.

achieve an effective attorney-client relationship.

### *B. Unfairness in the Judicial Process*

Forced, uncompensated court appointments also undermine the fairness of the judicial process.<sup>49</sup> When a court determines that an indigent needs representation, it bases its decision in part on the party's inability to handle the case without assistance or on the importance of the party's interest.<sup>50</sup> Thus, without counsel, an indigent that a court determines needs counsel stands at a severe disadvantage when compared with a litigant who can afford counsel. Courts, however, should dispense justice on the merits of the claim, not on the resources of the participants. By providing ineffective representation to those who need representation<sup>51</sup> and hindering the trust and confidence necessary between attorney and client,<sup>52</sup> forced, uncompensated court appointments undermine the fairness of the judicial process.

Furthermore, poverty unequally burdens different age groups, races, and sexes.<sup>53</sup> Therefore, when courts deny indigents effective legal representation, courts further prejudice already disadvantaged groups.<sup>54</sup> This additional hurdle of inadequate legal representation exacerbates the unfairness of the discriminatory practices that created the disproportionate poverty of these disadvantaged groups. Thus, forced, uncompensated court appointments increase existing unfairness in the judicial process.

## II. CONSTITUTIONAL CHALLENGES

The policy arguments against forced court appointments<sup>55</sup> have provided a strong impetus for finding that the practice violates the Constitution. Thus, courts and commentators have argued that forced, uncompensated court appointments are uncon-

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49. *Yarbrough v. Superior Court*, 197 Cal. Rptr. 737, 746 (1983) (King, J., concurring), *vacated*, 39 Cal. 3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985) (ordering trial court to reconsider whether appointment of counsel necessary to give defendant access to courts but not considering whether courts possess the power to appoint attorneys without compensation); Note, *supra* note 31, at 115; Comments, *supra* note 9, at 727.

50. See *supra* notes 35-37 and accompanying text.

51. See *supra* notes 40-42 and accompanying text.

52. See *supra* notes 45-48 and accompanying text.

53. L. FORER, *supra* note 2, at 18; see, e.g., N.Y. Times, Jan. 17, 1983, § 1, at 11, col. 1.

54. L. FORER, *supra* note 2, at 18; see, e.g., N.Y. Times, *supra* note 53.

55. See *supra* notes 17-54 and accompanying text.

stitutional.<sup>56</sup> These arguments have focused on invalidating the usual justification for forced, uncompensated court appointments: the attorney's position as officer of the court.<sup>57</sup> Proponents of forced appointments maintain that attorneys fulfill the officer-of-the-court obligation as a condition of the license to practice law.<sup>58</sup> Thus, by applying for admission to the bar, an attorney is deemed to have accepted the condition, because the prospective attorney should be aware of the profession's obligations.<sup>59</sup> Consequently, because attorneys accept the condition of becoming an officer of the court, they accept the concomitant

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56. See, e.g., *Bradshaw v. Zoological Soc'y of San Diego*, 662 F.2d 1301 (9th Cir. 1981) (holding that coercive appointments violate thirteenth amendment); *Mowrer v. Superior Court*, 155 Cal. App. 3d 262, 201 Cal. Rptr. 893 (1984) (holding that coercive appointments constitute a taking and violate fourteenth amendment equal protection clause); *Yarbrough v. Superior Court*, 197 Cal. Rptr. 737, 743 (1983) (King, J., concurring) (arguing same), *vacated*, 39 Cal.3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985) (ordering trial court to reconsider whether appointment of counsel necessary to give defendant access to courts but not considering whether courts possess the power to appoint attorneys without compensation); Comments, *supra* note 9 (arguing that forced court appointments violate fifth, fourteenth, and thirteenth amendments). But see *Yarbrough v. Superior Court*, 150 Cal. App. 3d 388, 197 Cal. Rptr. 737 (1983) (holding that coercive appointments do not violate the Constitution); *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966) (holding that coercive appointments are constitutional).

57. Many cases have discussed the traditional justification in favor of uncompensated court appointments, that an attorney is an officer of the court. See, e.g., *United States v. Dillon*, 230 F. Supp. 487 (D. Or. 1964), *rev'd*, 346 F.2d 633, 635 (9th Cir. 1965) ("[R]epresentation of indigents under court order, without a fee, is a condition under which lawyers are licensed to practice as officers of the court."), *cert. denied*, 382 U.S. 978 (1966); *Jackson v. State*, 413 P.2d 488, 490 (Alaska 1966) (holding that as officer of the court, attorney is obligated to accept uncompensated, court appointments); *Yarbrough v. Superior Court*, 197 Cal. Rptr. 737, 741 (1983) (accepting same traditional argument), *vacated*, 39 Cal.3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985) (ordering trial court to reconsider whether appointment of counsel necessary to give defendant access to courts); Note, *supra* note 9, at 1005 (same); cf. *Powell v. Alabama*, 287 U.S. 45, 73 (1932) (*dicta*) (stating that attorneys are officers of the court and are bound to accept court appointments). But see *Shapiro*, *supra* note 11, at 753 ("To justify coerced, uncompensated legal services on the basis of a firm tradition in England and the United States is to read into that tradition a story that is not there."), *quoted in* *Mowrer v. Superior Court*, 155 Cal. App. 3d 262, 268, 201 Cal. Rptr. 893, 895 (1984). The tradition is especially nebulous in the case of civil appointments. *Shapiro*, *supra* note 11, at 750-53.

58. See, e.g., *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966); *Yarbrough v. Superior Court*, 197 Cal. Rptr. 737, 741 (1983), *vacated*, 39 Cal.3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985) (ordering trial court to reconsider whether appointment of counsel necessary to give defendant access to courts but not considering whether courts possess the power to appoint attorneys without compensation); *Daines v. Markoff*, 92 Nev. 582, 585, 555 P.2d 490, 492 (1976) (stating that a duty to accept uncompensated court appointments "is an incident of the license to practice law").

59. *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965) ("An applicant for admission to practice law may justly be deemed to . . . know that one of those conditions [of the profession] is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order."), *cert. denied*, 382 U.S. 978 (1966).

duty to represent, without compensation, indigent clients.

Although the argument's adherents assert that an individual may choose not to represent indigent clients by choosing not to become an attorney, those who argue against forced, uncompensated court appointments note that the government cannot condition a benefit on the relinquishment of a constitutional right.<sup>60</sup> Specifically, they refer to cases in which the Supreme Court has invalidated conditions attached to the license to practice law that induce an attorney to relinquish first amendment rights,<sup>61</sup> equal protection rights,<sup>62</sup> and the right to free association.<sup>63</sup> In these cases, the Court seems to suggest that the choice between relinquishing these rights or foregoing the practice of law is no real choice.

Relying on these cases, courts and commentators have argued that for the practicing attorney, the choice between accepting a court appointment or facing either disbarment or loss of professional status also constitutes no real choice.<sup>64</sup> Because of the ex-

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60. See Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968), which defines the doctrine of unconstitutional conditions as follows:

[W]hile a government, state or federal, may not be obligated to provide its citizens with a certain benefit or privilege, it may not grant the benefit or privilege on conditions requiring the recipient in some manner to relinquish his constitutional rights. Furthermore, it cannot withhold or cancel the benefit as a price of the assertion of such rights.

*Id.* at 144 (footnote omitted). But see *State v. Rush*, 46 N.J. 399, 406, 217 A.2d 441, 445 (1966) (holding that if obligation to represent indigent clients without compensation is viewed as a condition to the practice of law, constitutional claims fail).

The doctrine of unconstitutional conditions has been applied, *inter alia*, to freedom of speech, *Bates v. State Bar*, 433 U.S. 350 (1977); *Sherbert v. Verner*, 374 U.S. 398 (1963), freedom of association, *Baird v. State Bar*, 401 U.S. 1 (1971); *Bagley v. Washington Township Hosp. Dist.*, 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966); *Lawsen v. Housing Auth.*, 270 Wis. 269, 70 N.W.2d 605, *cert. denied*, 350 U.S. 882 (1955), and takings of property without just compensation, *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926).

61. *Bates v. State Bar*, 433 U.S. 350 (1977) (holding that state bar may not impose ban on legal clinic's advertisement of services and fees).

62. *In re Griffiths*, 413 U.S. 717 (1973) (holding that state bar may not exclude resident aliens).

63. *Baird v. State Bar*, 401 U.S. 1 (1971) (holding that state bar may not require applicant to disclose whether he or she is a member of an organization that advocates forcible overthrow of the government).

64. See, e.g., *In re Nine Applications for Appointment of Counsel*, 475 F. Supp. 87, 88 (N.D. Ala. 1979) ("A member of the bar is hard pressed to refuse to cooperate with the court before which he or she practices."); *Yarbrough v. Superior Court*, 197 Cal. Rptr. 737, 741 (1983) (holding that appointing courts can compel attorneys to represent civil litigants), *vacated*, 39 Cal.3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985) (ordering trial court to reconsider whether appointment of counsel necessary to give defendant access to courts but not considering whether courts possess the power to appoint attorneys without compensation); Comments, *supra* note 9, at 717 ("If an attorney refuses the appointment he risks a possible [contempt] fine, imprisonment, and loss of his

treme loss of benefits accompanying a denial of the ability to practice law, the situation virtually compels an attorney to accept an appointment. Similarly, the potential attorney faces the choice whether to pursue the practice of law and possibly forego constitutional rights or not to practice law. But because the state cannot condition either the decision to remain an attorney or to become an attorney upon the relinquishment of a constitutional right, the existence of an apparent choice whether to remain an attorney or whether to become one does not defeat a constitutional challenge.

Opponents of forced appointments have proffered at least three such challenges. One may summarily dismiss the first of these, which is based on the fourteenth amendment equal protection clause.<sup>65</sup> Because the Court does not recognize attorneys as a suspect classification,<sup>66</sup> or the ability to practice law as a fundamental right,<sup>67</sup> the Court would apply only a minimum

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livelihood.”).

65. “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws . . . .” U.S. CONST. amend. XIV, § 1. Under this clause, some have argued that because the state forces no other professional to perform services gratuitously, when the state forces an attorney to accept an uncompensated court appointment the state denies the attorney equal protection of the laws. *Mowrer v. Superior Court*, 155 Cal. App. 3d 262, 201 Cal. Rptr. 893 (1984); *Yarbrough v. Superior Court*, 197 Cal. Rptr. 737, 743 (1983) (King, J., concurring), *vacated*, 39 Cal.3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985) (ordering trial court to reconsider whether appointment of counsel necessary to give defendant access to courts but not considering whether courts possess the power to appoint attorneys without compensation); *Knox County Council v. State ex rel. McCormick*, 217 Ind. 493, 29 N.E.2d 405 (1940); *Bradshaw v. Ball*, 487 S.W.2d 294 (Ky. 1972); Comments, *supra* note 9, at 715. *But see Sparks v. Parker*, 368 So. 2d 528, 533 (Ala.) (holding that because attorneys are members of a unique profession, attorneys are not denied equal protection of the laws when forced to represent indigent clients gratuitously), *appeal dismissed*, 444 U.S. 803 (1979).

66. *See, e.g., L. TRIBE, supra* note 31, at §§ 15-14 to -15; *cf. Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (stating that classifications based on race, national origin and, potentially, sex are suspect classifications).

67. *See L. TRIBE, supra* note 31, at §§ 15-14 to -15. Concededly, the Court has shown increased willingness to apply greater scrutiny to economic rights. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 37 (1972). Nevertheless, the willingness would not extend to attorneys. In *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 n.23 (1976), the Court decided that, because a rule barring noncitizens imposed a further disadvantage on an already disadvantaged group, the Court would apply greater than a minimum scrutiny test. The Court would not be similarly sympathetic to attorneys, a nondisadvantaged group. In *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957), the Court applied a rational basis test to strike down a state practice that denied an individual admission to the bar for arbitrary reasons. Because courts do not force attorneys to accept uncompensated court appointments for arbitrary reasons, the practice would not violate due process. Therefore, although the Court has shown a tendency to protect economic rights, it would probably not find that forced, uncompensated court appointments infringe on a constitutionally protectable interest in a vocation.

scrutiny, rational basis test to court appointments.<sup>68</sup> This equal protection challenge would probably fail because there exists some rational relation between forced, uncompensated court appointments and indigent parties' welfare<sup>69</sup>—the need to provide indigents legal services where funding is otherwise lacking, and the special obligations imposed upon members of the professional bar.

Nonetheless, two valid constitutional claims against forced, uncompensated court appointments still exist. First, these appointments may deprive attorneys of property without just compensation in violation of the fifth and fourteenth amendment taking clauses. Second, they may impose involuntary servitude on attorneys in violation of the thirteenth amendment.

#### A. *Deprivation of Property without Just Compensation*

Courts and commentators have argued that forced, uncompensated court appointments violate the fifth and fourteenth amendment guarantees<sup>70</sup> against the taking of property without just compensation.<sup>71</sup> To constitute a compensable taking of

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68. Under this test, equal protection requires only that a classification rationally relates to a legitimate state interest. See generally *L. TRIBE*, *supra* note 31, at §§ 16-2 to -4.

69. One might also argue that because uncompensated attorneys are more likely to provide inadequate service, see *supra* notes 40-42, uncompensated court appointments deny indigent plaintiffs equal protection of the laws. See *L. FORER*, *supra* note 2, at 18; cf. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (invalidating a classification that caused ineligibility for federal employment to a class of persons already subject to a discriminatory bias). Because the Court has stated, however, that wealth is not a suspect classification, *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973), the Court would apply only a rational basis test. Again, the Court would probably find that, where funding is not otherwise forthcoming, this practice is rationally based.

70. The fifth amendment states that "[n]o person . . . shall be deprived of . . . property . . . without just compensation." U.S. CONST. amend. V. The fourteenth amendment states that "[n]o state . . . shall deprive any person of . . . property, without due process of law." U.S. CONST. amend. XIV, §1. The fifth amendment just compensation requirement has been held applicable to the states through the due process clause of the fourteenth amendment. *Chicago, B. & Q. Ry. v. Chicago*, 166 U.S. 226 (1897); *L. TRIBE*, *supra* note 31, at § 9-2. The fifth and fourteenth amendment prohibitions against taking property without just compensation applies to the judiciary as well as to the legislature. *Id.*; see, e.g., *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring).

71. See, e.g., *United States v. Dillon*, 230 F. Supp. 487, 491-92 (D. Or. 1964) (noting that time is all that an attorney has to sell and holding that forced court appointments violate the fourteenth amendment taking clause), *rev'd*, 346 F.2d 633, *cert. denied*, 382 U.S. 978 (1966); *Mowrer v. Superior Court*, 155 Cal. App. 3d 262, 268, 201 Cal. Rptr. 893, 896 (1984) (stating that uncompensated, court-appointed attorney "is in effect forced to give away a portion of his livelihood" in violation of the fourteenth amendment taking clause); *Bedford v. Salt Lake City*, 22 Utah 2d 12, 14, 447 P.2d 193, 194 (1968) (stating that service is attorney's only means to earn a living and holding that forcing an attorney



property, forced, uncompensated court appointments must satisfy two requirements. First, an attorney's services must be property.<sup>72</sup> Second, the practice of forced appointments must amount to a taking of that property.<sup>73</sup>

First, an attorney's services should be considered property. On two occasions, the Court has suggested that the practice of law constitutes property and, therefore, deserves protection against taking without just compensation.<sup>74</sup> In one instance, the Court held that a state cannot exclude an individual from the practice of law for arbitrary reasons<sup>75</sup> and, in the other, it held that a state cannot refuse admittance to the bar for reasons that deny due process or equal protection.<sup>76</sup> Although these cases narrowly suggest that not to be *excluded* from the practice of law represents an interest in liberty, the cases suggest a broader tendency of the Court to regard the practice of law as protected by the fifth and fourteenth amendments. Under this broader reading of the cases, the *distribution* of attorney services by the government would also be subject to constitutional scrutiny.

The Court has also applied the fifth and fourteenth amendment taking clauses to analogous situations, ruling that compensation is required for governmental taking of materialman's liens<sup>77</sup> and the taking of a patentee's ideas.<sup>78</sup> An attorney's services are property in the same way as the labor of a materialman or a patentee.<sup>79</sup> Of course, state and federal legislatures have enacted specific laws to protect liens and patents. Thus, one may

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to give this service without compensation constitutes a compensable taking); *State ex rel. Partain v. Oakley*, 159 W. Va. 805, 813-14, 227 S.E.2d 314, 319 (1976) (noting that an attorney's "stock in trade" is time and holding that forcing an attorney to accept an uncompensated court appointment is a taking); see also Cheatham, *Availability of Legal Services: The Responsibility of the Organized Bar*, 12 UCLA L. REV. 438, 444 (1965) (arguing that uncompensated court appointment constitutes a taking of property without just compensation); Comments, *supra* note 9, at 715 (stating that an attorney's service is attorney's property and, therefore, uncompensated court appointment amounts to a taking of that property).

72. Note, *supra* note 35, at 384.

73. *Id.* at 384; cf. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (finding no violation of taking clause because designation of Grand Central Terminal as an historical landmark did not constitute a taking), *aff'g* 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977).

74. See *Konigsberg v. State Bar*, 353 U.S. 252 (1957); Note, *supra* note 35, at 385; *Schwartz v. Board of Bar Examiners*, 353 U.S. 538 (1957).

75. *Schwartz v. Board of Bar Examiners*, 353 U.S. 538 (1957).

76. *Konigsberg v. State Bar*, 353 U.S. 252 (1957).

77. *Armstrong v. United States*, 364 U.S. 40 (1960).

78. *United States v. Palmer*, 128 U.S. 262 (1888).

79. *United States v. Dillon*, 230 F. Supp. 487 (D. Or. 1964), *rev'd*, 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966); *Yarbrough v. Superior Court*, 150 Cal. App. 3d 388, 197 Cal. Rptr. 737 (1983).

distinguish the lien and patent cases because, unlike labor generally, they represent a specific governmental grant of a property interest. Nonetheless, because labor represents an attorney's only marketable product,<sup>80</sup> and the Court has protected the practice of law against intrusions generally,<sup>81</sup> an attorney's labor should qualify as property, at least where the state gives it to indigents.

In addition, the state deprives the uncompensated, court-appointed attorney of the expenses of operating a law office. An attorney not only devotes time and labor to an uncompensated case but expends office resources as well. These expenses can be substantial.<sup>82</sup> These resources also qualify as property for purposes of the constitutional taking clauses.

Even if a court were to find that attorney services constitute property, it would still face the difficult question of whether forced court appointments amount to a taking of property. Because the Supreme Court has never directly held services equivalent to property, it has not had the opportunity to determine what circumstances would constitute a taking of such property. The Court has stated as a general matter, however, that "[t]he Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation was designed to bar Government from forcing some people to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>83</sup> As Professor Tribe writes, "the just compensation requirement appears to express a limit on government's power to isolate particular individuals for sacrifice to the general good."<sup>84</sup> When forced to accept uncompensated court appointments, attorneys bear such a burden. Because the fair administration of justice constitutes a public good, forcing attorneys to represent indigent clients without compensation uncon-

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80. See *supra* note 71.

81. Note, *supra* note 35, at 377; see *Bates v. State Bar*, 433 U.S. 350 (1977) (holding that state bar may not impose ban on legal clinic's advertisement of services and fees); *In re Griffiths*, 413 U.S. 717 (1973) (holding that state bar may not exclude resident aliens); *Baird v. State Bar*, 401 U.S. 1 (1971) (holding that state bar may not require applicant to disclose whether he or she is a member of an organization that advocates forcible overthrow of the government).

82. *Yarbrough v. Superior Court*, 197 Cal. Rptr. 737, 747 (1983) (King, J., concurring), *vacated*, 39 Cal.3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985) (ordering trial court to reconsider whether appointment of counsel necessary to give defendant access to courts but not considering whether courts possess the power to appoint attorneys without compensation); *Williams & Bost*, *supra* note 40, at 34. *Williams and Bost* determined that an average law office's overhead is about 40% of gross income. *Id.* at 36.

83. *Armstrong v. United States*, 364 U.S. 40 (1960).

84. L. TRIBE, *supra* note 31, at § 9-4.

stitutionally isolates attorneys for sacrifice to the general good of the fair administration of justice.

A final response to the taking clauses argument can also be dismissed. The Court has suggested that where the government provides a benefit with a reciprocal regulation, that regulation does not constitute a taking.<sup>85</sup> One could use this suggestion to argue that because attorneys receive a benefit through a monopoly in the practice of law, any regulation such as compelled representation of indigents does not amount to a taking.<sup>86</sup> The profession's status as a monopoly, however, remains questionable because there exists great competition among attorneys, and alternative forms of dispute resolution reduce the monopoly power of the profession as a whole.<sup>87</sup> Thus, the government confers no special benefit upon lawyers that corresponds to the regulation. Consequently, when a court requires an attorney to represent an indigent client without compensation, it deprives the attorney of property without just compensation in violation of the taking clause of the fifth or fourteenth amendments.

### *B. Imposition of Involuntary Servitude*

Courts and commentators<sup>88</sup> have also argued that forced, uncompensated court appointments violate the thirteenth amendment's prohibition against involuntary servitude.<sup>89</sup> Because the amendment is self-executing, Congress need not enact any particular statute to realize the amendment's purpose.<sup>90</sup> Therefore, opponents of forced appointments maintain that although there exists no specific statutory prohibition, the thirteenth amendment itself forbids these appointments.

The Supreme Court has made sweeping statements suggesting that the thirteenth amendment prohibits all forms of compul-

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85. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); see also Note, *supra* note 35, at 388.

86. See Note, *supra* note 35, at 388.

87. See *Mowrer v. Superior Court*, 155 Cal. App. 3d 262, 270, 201 Cal. Rptr. 893, 897 (1984).

88. *In re Nine Applications for Appointment of Counsel*, 475 F. Supp. 87, 88-89 (N.D. Ala. 1979); *Sparks v. Parker*, 368 So. 2d 528, 533 (Ala.), *appeal dismissed*, 444 U.S. 803 (1979); see also Comments, *supra* note 9, at 716-17.

89. The thirteenth amendment states that "[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

90. *Bailey v. Alabama*, 219 U.S. 219, 241 (1911).

sory labor.<sup>91</sup> It has stated that "[t]he undoubted aim of the Thirteenth Amendment was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States."<sup>92</sup> The thirteenth amendment thus served to achieve liberty not only for black slaves but serves to achieve liberty for all people.<sup>93</sup>

This language supports the claim that the thirteenth amendment prohibits forced, uncompensated court appointments. The Court has applied the amendment to an analogous situation, holding on two occasions that statutes that compel debtors to perform labor to relieve indebtedness impose involuntary servitude.<sup>94</sup> The Court found in those cases that the state had unconstitutionally substituted its will for the debtor's will. An attorney asked to accept a court appointment faces similarly powerful coercion.<sup>95</sup> Because the court compels an attorney to accept an appointment,<sup>96</sup> the attorney represents the indigent client involuntarily. In essence, the state substitutes its will for the attorney's will, and this substitution constitutes an unconstitutional deprivation of the attorney's liberty.

The debtor cases, however, involved state criminal statutes that authorized imprisonment of violators. Because attorneys do not generally face imprisonment for refusing to accept a court appointment,<sup>97</sup> the reasoning of those cases may not extend to forced appointments.<sup>98</sup> In an analogous case, the Court has affirmed a district court's decision that forcing a baseball player either to accept a trade to another club or to leave baseball did not constitute sufficient compulsion to amount to involuntary servitude because the player could still seek employment outside of baseball.<sup>99</sup> This decision suggests that forcing an attorney to

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91. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438 (1968) ("[T]he thirteenth amendment is not a mere prohibition of the State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States . . .") (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883)); *Pollock v. Williams*, 322 U.S. 4, 17 (1944) (stating that thirteenth amendment was meant to achieve voluntary labor); *Bailey v. Alabama*, 219 U.S. 219, 241 (1911) (stating that the intention behind thirteenth amendment was to make labor free).

92. *Pollock v. Williams*, 322 U.S. 4, 17 (1944).

93. *Id.*; *Bailey v. Alabama*, 219 U.S. 219, 241 (1911); *In re Nine Applications for Appointment of Counsel*, 475 F. Supp. 87, 88 (N.D. Ala. 1979).

94. *Pollock v. Williams*, 322 U.S. 4, 17 (1944); *Bailey v. Alabama*, 219 U.S. 219, 241 (1911); see Note, *supra* note 35, at 389.

95. See *supra* note 64.

96. See *supra* note 64.

97. See *Shapiro*, *supra* note 11, at 757. But see *supra* note 64.

98. Note, *supra* note 35, at 389.

99. *Flood v. Kuhn*, 316 F. Supp. 271, 281 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264, 268 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

choose between accepting a court appointment or looking for employment outside the legal profession does not violate the thirteenth amendment. The holding was not based on the district court's reasoning, however; the Supreme Court merely mentioned the district court's decision on the issue of involuntary servitude and instead concentrated its attention on other issues.<sup>100</sup> Additionally, the debtor cases on compulsory labor are more analogous to compelled representation because debtors faced the same element of work without pay as court-appointed attorneys.<sup>101</sup> Finally, the absence of a threat of imprisonment should not be condemning to the thirteenth amendment argument, because the debtor cases were grounded primarily on the state's substitution of its will for that of the worker, whatever the consequences of failure to comply. The presence of compulsion is the controlling basis for the thirteenth amendment claim, and compulsion is present in the case of forced court appointments.

An additional argument against the thirteenth amendment challenge has been created by the Court's holding that to compel an individual to perform a duty owed to the state does not constitute involuntary servitude.<sup>102</sup> In the related criminal area, when faced with the issue of whether the sixth amendment entitled a criminal defendant to appointed counsel, the Court stated in dictum that "[a]ttorneys are officers of the court, and are bound to render service when required by such an appointment."<sup>103</sup> Unfortunately, these statements fail to address a number of important questions.<sup>104</sup> For instance, are court-appointed attorneys entitled to compensation? Do attorneys have an ethical duty to the state to represent indigents, and if not, may the state still compel them to render free services? The Court has never directly held that attorneys owe the state a duty to represent indigents, either civil litigants or criminal defendants, with-

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100. Shapiro, *supra* note 11, at 769; Note, *supra* note 35, at 389.

101. See *supra* note 64.

102. See, e.g., *Hurtado v. United States*, 410 U.S. 578, 588-89 & n.11 (1973) (upholding statutory requirement that incarcerated witness serve as witness for one dollar); *Butler v. Perry*, 240 U.S. 328, 333 (1916) (stating that prohibition against involuntary servitude was not intended to cover duties owed to the state, "such as services in the army, militia, on the jury, etc."); see also *United States v. Hoepker*, 223 F.2d 921 (7th Cir.) (requiring conscientious objector to perform civilian labor), *cert. denied*, 350 U.S. 841 (1955); *Heflin v. Sanford*, 142 F.2d 798 (5th Cir. 1944) (same); *United States v. Sutter*, 127 F. Supp. 109 (S.D. Cal. 1954) (same); *Crews v. Lundquist*, 361 Ill. 193, 201, 197 N.E. 768, 772 (1935) (noting that thirteenth amendment does not prohibit state from requiring services of citizens owed to state).

103. *Powell v. Alabama*, 287 U.S. 45, 73 (1932).

104. Shapiro, *supra* note 11, at 757.

out compensation.<sup>105</sup> Finally, the sixth amendment right to counsel in criminal proceedings may rationally be distinguished from appointments in civil cases because of the greater sanctions attending a criminal conviction. The dictum becomes even less significant because the existence of the tradition of forced appointment of which the Court speaks appears doubtful at best.<sup>106</sup> Thus, because the general goal of the thirteenth amendment is a system of voluntary labor, the substitution of a court's will for the attorney's decision regarding for whom to work is a form of involuntary servitude.

### III. CALIFORNIA'S STATUTE AND SOME PROPOSALS

Forced, uncompensated court appointments present a number of serious problems: unfairness to both attorneys and indigents, hinderance of the benefits derived from publicly funded civil litigation, and unconstitutionality. Because the Supreme Court<sup>107</sup> and Congress<sup>108</sup> are unlikely to redress these problems, state leg-

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105. *Id.*; L. TRIBE, *supra* note 31, at § 16-42. One could argue that because forced representation is rooted in the legal tradition, the amendment was not meant to prohibit it. *Cf. Butler v. Perry*, 240 U.S. 328 (1916) (holding that statute requiring able-bodied males between 21 and 45 to work on public roads did not violate the thirteenth amendment because the custom of road crews existed at the time of the amendment's enactment). As Professor Shapiro writes, however, "[t]he custom of conscripting able-bodied men to work on road gangs may have long been recognized, but so was the custom of slavery itself in its most blatant form." Shapiro, *supra* note 11, at 769 (footnote omitted). Further, it is not at all clear that there existed a tradition of forced representation. *Id.* at 753. Because early judges rarely appointed counsel in civil cases, the tradition is especially uncertain in the case of civil litigants. *Id.* at 750-53.

One may also argue that court appointments do not differ from requirements that an individual serve as a witness, *see, e.g., Hurtado v. United States*, 410 U.S. 578 (1973), or perform labor in the armed forces, *see, e.g., Arver v. United States*, 245 U.S. 366 (1918), or perform labor though a conscientious objector, *see, e.g., United States v. Hoepker*, 223 F.2d 921 (7th Cir.), *cert. denied*, 350 U.S. 841 (1955). In these cases and in the case of road gangs, though, all people, or in some cases all males, are at risk. Shapiro, *supra* note 11, at 769. Forced, uncompensated court-appointments are thus distinguishable, because they place only attorneys at risk. *Id.*

106. Shapiro, *supra* note 11, at 750-53.

107. Although the Supreme Court could resolve the forced appointment issue, the Court has seemed unwilling to address the question. *See, e.g., United States v. Dillon*, 230 F. Supp. 487 (D. Or. 1964), *rev'd*, 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966); *Sparks v. Parker*, 368 So. 2d 528 (Ala.), *appeal dismissed*, 444 U.S. 803 (1979). Moreover, even if the Court determined that forced appointments are constitutional, the practice would remain unwise. *See supra* notes 17-54 and accompanying text.

108. Recent congressional hostility toward the national legal services effort, however, *see supra* notes 1-4 and accompanying text, makes an expansion of the national program unlikely. In addition, because a state or locally administered program could tailor organization to local needs, *see infra* notes 136-37, such a program would be preferable to a national program.

islative action is required.<sup>109</sup> Regretfully, "[t]here is no quick fix—no cheap, easy device for ensuring equal justice. Neither platitudes nor panaceas will suffice."<sup>110</sup> The following proposal, however, provides better representation for indigent civil litigants and avoids the unfairness and constitutional problems of forced court appointments.

Section A of the proposal borrows from a new California statute<sup>111</sup> that offers a way of supplementing the funds presently available for compensating attorneys who represent indigent civil litigants. Section B offers a means of reducing the number of indigents who require representation by reducing spurious claims that waste available resources. Section C proposes an integration and effective allocation of pro bono attorneys and local organizations that regularly represent indigent clients without charge, to provide better representation for indigent civil litigants than the forced appointment method.

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109. In fact, California enacted a statute in 1981, CAL. BUS. & PROF. CODE §§ 6210-6228 (Deering Supp. 1984), to expand the availability and improve the quality of free legal services to indigent civil litigants. See *infra* notes 112-14 and accompanying text. Massachusetts has authorized the creation of a committee to establish a system for representing indigent litigants in criminal and noncriminal proceedings. MASS. ANN. LAWS ch. 211D, § 1 (Michie/Law. Co-op. 1985).

Legislative action remains necessary because courts lack the power to raise and distribute funding for large public programs and, even where such power exists, legislative action remains the preferred route to correct social problems. See *Yarbrough v. Superior Court*, 197 Cal. Rptr. 737, 748 (1983) (King, J., concurring) ("[T]he doctrine of separation of powers . . . precludes one branch of government from infringing upon and failing to adequately provide the resources for another branch of government to perform its constitutional functions"), *vacated*, 39 Cal. 3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985) (ordering trial court to reconsider whether appointment of counsel necessary to give defendant access to courts but not considering whether courts possess the power to appoint attorneys without compensation); *Board of Supervisors v. Bailey*, 236 So. 2d 420 (Miss. 1970) (noting that courts lack power to order procurement of public funds to pay appointed counsel); *Daines v. Markoff*, 92 Nev. 582, 585, 555 P.2d 490, 492 (1976) (noting that court lacks power to procure compensation for court-appointed attorney beyond that which legislature has designated); Note, *supra* note 9, at 1006 ("Clearly the appropriation of funds from the public treasury is a function of the legislature rather than the judiciary."). But see *Kovarik v. County of Banner*, 192 Neb. 816, 818-23, 224 N.W.2d 761, 763-65 (1975) (holding that court has power to require compensation for appointed attorney absent statutory provision); *Carroll v. Tate*, 442 Pa. 45, 51-53, 274 A.2d 193, 196-97, (holding that courts can compel legislature to pay court funds reasonably necessary for efficient and effective operation), *cert. denied* 402 U.S. 974 (1971). *Shapiro*, *supra* note 11, at 753; Note, *The Courts' Inherent Power to Compel Legislative Funding of Judicial Functions*, 81 MICH. L. REV. 1687 (1983); cf. *Stanley v. City of Ferndale*, 115 Mich. App. 703, 709, 321 N.W.2d 681, 683 (1982) (holding that court could procure funds necessary to fulfill collective bargaining agreement with court employees).

110. L. FORER, *supra* note 2, at 204.

111. CAL. BUS. & PROF. CODE §§ 6210-6228 (Deering Supp. 1984).

*A. Increasing Resources*

In 1981, California enacted a statute to require the establishment and maintenance of interest bearing demand trust accounts used to compensate certain attorneys who represent indigent civil litigants.<sup>112</sup> Attorneys and law firms must deposit short-term client trust funds to earn interest in these accounts.<sup>113</sup> The interest, in turn, is paid to the state bar association, which then distributes fund monies to qualified legal services projects<sup>114</sup> and qualified support organizations.<sup>115</sup> Although deposits to these accounts are mandatory in California, deposits should be voluntary to avoid invalidity under the taking clauses<sup>116</sup> and because one group should not involuntarily bear the cost of a public good.<sup>117</sup>

This voluntary contribution to interest bearing demand accounts, though, should only supplement public compensation of attorneys who represent indigent civil litigants. Because the public as a whole should provide representation to indigents,<sup>118</sup> state and local governments should also directly compensate representation. Congressional reductions in the Legal Services Corporation's budget<sup>119</sup> necessitate state and local funding. In addition, state and local governments can better tailor fund distribution to local needs.<sup>120</sup> This additional public funding would help eliminate ineffective representation and the problems associated with it.<sup>121</sup> The creation of such a fund by other states would help increase resources available for providing representation to indigent civil litigants.

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112. *Id.*

113. *Id.* § 6211.

114. "Qualified legal services project [is defined as] a nonprofit project incorporated and operated exclusively in California which provides as its primary purpose and function legal services without charge to indigent persons . . . ." *Id.* § 6213(a).

115. *Id.* § 6216(c). "Qualified support center" is defined as "an incorporated nonprofit legal services center, which has as its primary purpose and function the provision of legal training, legal technical assistance, or advocacy support without charge . . . ." *Id.* § 6213(b).

116. *See supra* notes 70-87 and accompanying text.

117. *See supra* notes 22-29 and accompanying text.

118. *See supra* notes 17-54 and accompanying text.

119. *See supra* notes 1-4 and accompanying text.

120. *See infra* notes 136-37.

121. *See supra* notes 40-54 and accompanying text.



### B. Reducing Spurious Claims

The disproportionate number of spurious claims pursued by a small number of indigent litigants<sup>122</sup> imposes heavy burdens on the courts and other litigants.<sup>123</sup> Similarly, expending public funds on cases that private attorneys would accept on a contingent fee basis also misallocates these resources. To eliminate this drain on funds, legal assistance organizations should provide attorneys to represent only those indigents who have tried unsuccessfully to obtain counsel in another way<sup>124</sup> but were not refused representation because of the spuriousness of their claims.

In response to these concerns, the California statute provides sound guidance regarding who should receive funding. Organizations that receive funds from the state bar association may expend these funds only on indigent civil litigants, qualified support services, and qualified legal services projects, and then only when the case is not "fee generating."<sup>125</sup> A case is not "fee generating" if adequate representation is unavailable and either: (1) a local lawyer referral service or two attorneys in private practice with experience in that particular area of law rejected the case; (2) a referral service or attorney would not consider the case without a consultation fee; (3) attorneys do not normally accept the type of case without prepayment of a fee; or (4) emergency circumstances demand immediate action.<sup>126</sup> These criteria allow an indigent to obtain counsel either by establishing that although no attorney would take the case on a contingent fee basis, the refusing attorneys did not find the indigent's claim spurious, or that an emergency demands immediate action.

Under the California statute, funded organizations may also finance cases in three other situations where adequate representation is unavailable: (1) where recovery of damages is not the principal objective of the case; (2) where the case involves rights of the claimant under a publicly supported benefit program based on need; or (3) where the court has appointed counsel.<sup>127</sup>

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122. See Note, *Abusive Pro Se Plaintiffs in the Federal Courts: Proposals for Judicial Control*, 18 U. MICH. J.L. REF. 93, 99-111 (1984).

123. *Id.* at 111-15.

124. *Cf.* Swygert, *supra* note 29, at 1292 (finding that among the federal courts, six courts required an indigent client to attempt to hire an attorney on a contingent fee basis or obtain one from a legal aid clinic).

125. CAL. BUS. & PROF. CODE § 6223 (Deering Supp. 1984). Those cases that are not "fee generating" are defined at § 6213(e).

126. *Id.* § 6213(e)(1).

127. *Id.* § 6213(e)(2)-(4).

These situations also provide for the efficient allocation of resources. If a client does not primarily seek to recover damages, then the case is far less likely to be frivolous. Similarly, if the case involves rights of the claimant under a publicly supported benefit program, then the rights will probably be of such importance that the case demands immediate action. In either case, the organizations are less likely to be financing spurious claims. The exception for appointed counsel should be rejected because of problems of deficient representation and constitutional invalidity created by forced appointment.

Organizations, such as the Legal Services Corporation, that do not employ interest bearing accounts but receive direct public or private funds should also use this screening process. Regardless of the source of financing, the review serves the same valuable purpose of protecting resources.<sup>128</sup> This review may place an additional barrier before indigents attempting the already difficult task of obtaining representation. Nevertheless, requiring the review should, by eliminating spurious claims and directing cases to attorneys willing to take them on a contingent fee basis, better ensure that those indigents who need help will receive effective counsel. Additionally, the California statute does not hamstring a legal services organization's ability to pursue its own goals. Organizations that receive funding may give deference to individuals who are members of groups that face discriminatory hurdles in addition to indigency.<sup>129</sup>

### C. *Achieving Effective Representation Services*

Effective representation can be achieved in two ways: first, through integration of pro bono and legal services organization attorneys and, second, through an allocation of attorneys based on local needs and attorney skill.

1. *Division and integration of labor*— Two commentators have argued that “[o]rganized pro bono programs offer the most significant available potential for augmenting the national legal services effort.”<sup>130</sup> They maintain that integration of legal services organization staff attorneys and independent pro bono counsel maximizes the effectiveness of all available attorney ser-

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128. Cf. Swygert, *supra* note 29, at 1292 (noting that the Eighth Circuit has used an administrative panel which “reviews motions for appointment of counsel in civil rights cases and makes recommendations to the court”).

129. CAL. BUS. & PROF. CODE § 6214(b)(3)(B) (Deering Supp. 1984).

130. Palmer & Aaronson, *supra* note 14, at 854.

vices.<sup>131</sup> These two groups reflect different legal backgrounds.<sup>132</sup> If pro bono attorneys offer services in their area of expertise,<sup>133</sup> indigent representation organizations and pro bono attorneys would not waste resources practicing in unfamiliar areas of law.<sup>134</sup> In addition, because attorneys would be practicing in their areas of expertise, this integrated effort would also provide better representation for indigent clients.<sup>135</sup>

2. *Allocating services*—Local fund recipients should first assess the needs of their community and next assess the abilities of both fund recipient attorneys and pro bono attorneys.<sup>136</sup> Attorneys can then produce the greatest benefit by taking cases in which their skills match indigents' legal needs.<sup>137</sup> After a fund-receiving organization determines that an indigent should receive counsel, the organization can next determine whether either a fund recipient attorney or an independent pro bono attorney can better handle the claim and match the client accordingly.<sup>138</sup> The California statute allocates a portion of the fund's resources for administration of the fund.<sup>139</sup> This allocation could cover the cost of integrating legal services organization attorneys and independent counsel, and matching indigents with counsel.

Assigning indigent cases to private attorneys requires finding those attorneys willing to represent these clients. To achieve this, courts and local bar associations should maintain a list of attorneys willing to represent indigent clients without compensation or for a fee.<sup>140</sup> Many attorneys may be willing to represent

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131. *Id.* at 851; see also *infra* notes 136-37.

132. Utton, *The British Legal Aid System*, 76 YALE L.J. 371, 377-78 (1966).

133. Utton suggests that staff attorney programs are better, for instance, at educating local communities in preventive law, contracts, interest rates, repossession, garnishment, and utility rates. Staff attorney programs are likely to be better at identifying and responding to specific community needs. In contrast, generally, pro bono attorneys would probably prove to be better at providing seasoned expertise in specific areas of law. *Id.* at 377.

134. Palmer & Aaronson, *supra* note 14, at 852.

135. *Id.*

136. *Id.* The Los Angeles Legal Aid Foundation estimated that it can reach 10% of the eligible poor who need legal services. That leaves 750,000 eligible poor persons without necessary legal services. *Id.* Palmer and Aaronson suggest that a successful recruitment effort would result in 1,000 volunteer pro bono attorneys. If each pro bono attorney handled five clients per year, less than a 1% increase in representation would result. *Id.* Therefore, Palmer and Aaronson conclude, individual representation by pro bono attorneys is insufficient. *Id.*

137. *Id.* ("To be optimally effective, *pro bono* programs must begin to target for priority attention specific substantive areas and client groups.").

138. *Id.*

139. CAL. BUS. & PROF. CODE § 6216(a) (Deering Supp. 1984).

140. See Swygert, *supra* note 29, at 1293 (finding that "[f]ourteen [of the federal]

indigents without compensation because, for example, of some sense of satisfaction derived from helping the needy. In addition, area legal services organizations should actively recruit attorneys willing to provide such representation.<sup>141</sup>

Assigning cases to these attorneys raises none of the problems associated with court-appointed counsel.<sup>142</sup> If attorneys volunteer to serve without compensation then the motivation for serving will clearly not be money. Consequently, the disincentives of uncompensated appointments will be reduced and the indigent clients will receive more effective representation. Furthermore, the attorney-client relationship escapes intrusion because the relationship of trust and confidence remains protected. Finally, the relationship's voluntary nature avoids the constitutional challenges associated with compelled representation.

Nevertheless, a lack of volunteers willing to serve without compensation poses a potential problem.<sup>143</sup> Many law firms, however, compensate attorneys performing services for indigents.<sup>144</sup> Bar association trust funds or direct public funding can reimburse those attorneys willing to give time but unwilling to bear certain costs, such as office costs or out-of-pocket expenses devoted to a representation.

## CONCLUSION

Forcing attorneys to accept uncompensated court appointment in civil cases places a disproportionate burden of a public good on certain attorneys. Placing this burden on uncompensated attorneys eliminates the incentive that a fee provides and, therefore, may put indigent clients at a disadvantage in the judi-

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courts maintain a list of attorneys willing to take civil rights cases on a pro bono or possibly a contingent-fee basis, and [that] three other districts are attempting to put such a list together").

141. Palmer & Aaronson, *supra* note 14, at 851.

142. See *supra* notes 17-106 and accompanying text.

143. See Swygert, *supra* note 29, at 1293 (noting that several federal courts have difficulty "find[ing] attorneys willing to take civil rights cases on a pro bono basis").

144. NATIONAL ASSOCIATION FOR LAW PLACEMENT, *DIRECTORY OF LEGAL EMPLOYERS*, 1984-85 Academic Year (6th ed. 1984). The following law firms, *inter alia*, reported their treatment of a pro bono obligation: Pepper, Hamilton & Scheetz of Detroit (supporting public interest activities), *id.* at 529; Brobeck, Phleger & Harrison of Los Angeles (encouraging pro bono work and making available full staff support), *id.* at 44; Hughes, Hubbard & Reed of Los Angeles (encouraging public service activities), *id.* at 58; Fried, Frank, Harris, Shriver & Jacobson of New York (encouraging public service activities), *id.* at 648; Lord, Day & Lord of New York (supporting and encouraging voluntary public service activities), *id.* at 675.

cial process. As a result, those groups against which society has traditionally discriminated face an additional discriminatory hurdle. Moreover, this procedure also violates attorneys' constitutional rights. To eliminate these problems, each state should establish a fund financed by the state bar and the state and local governments to compensate attorneys and organizations that voluntarily represent indigent civil litigants. These fund recipients should more efficiently employ funds already available by reducing wasteful claims, and fund recipient organizations should work more closely with individual pro bono attorneys.

—Greg Stevens