# Dependency Hearings: What Rights for the Parents?

## I. INTRODUCTION

### A. THE SCOPE OF THE ARTICLE

This article will examine the impact of a dependency hearing upon indigent parents. Juvenile authorities, operating under Section 600[1] of the California Welfare and Institutions Code, have long had the power either to remove children from the home or establish a wardship situation in which social workers attached to the Juvenile Hall make periodic visits to monitor the family's living conditions.[2] This article will focus on proceedings instituted under subdivision (d): concerning a child "whose home is an unfit place for him by reason of neglect, cruelty, depravity or physical abuse . . . "[3] Although these proceedings are the most serious and the most frequently filed,[4] there is no express statutory or constitutional mandate to provide indigent parents with appointed legal counsel to represent them.

It is the position of this article that because of the close resemblance between a dependency hearing and a criminal action, legal counsel should be appointed for indigent parents. The Supreme Court has clearly held that the distinction between civil and criminal proceedings depends not upon the words of a statute but upon the substance of the action.[5]

From the limited figures available,[6] and the author's interviews with officials in the Department of Social Welfare,[7] it is apparent

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[1]CAL. WELF. & INST. CODE § 600 (West 1972).
[2]CAL. WELF. & INST. CODE § 712 (West 1972). Interview with Mr. Paul Harley, Chief of the Intake Division at Sacramento Juvenile Hall, Nov. 23, 1972: Social workers try to check on the family at least bi-monthly.
[3]CAL. WELF. & INST. CODE § 600(d) (West 1972).
[4]*See* text at notes 23-29, *infra*. In the interview with Mr. Harley, *supra*, note 2, he said that few figures were kept and those did not delineate the subdivision filed under, but that around half of the dependency petitions filed were CAL. WELF. & INST. CODE § 600(d).
[5]*In re Gault*, 387 U.S. 1 (1967); Interview with Mr. Paul Harley, *supra*, note 2.
[6]On a state level: State Department of Social Welfare, Specialized Child Protective Service Quarterly Report; Local county figures for Sacramento County are available from the Juvenile Hall Intake Division.
[7]Interview with Mr. Vern Felker, California State Protective Services Depart-

that several hundred 600(d) petitions are being filed each month in the State of California. The magnitude of the 600(d), *supra*, process is graphically demonstrated by the fact that a minimum of one thousand children (or four every judicial day) will be removed at least temporarily from their homes.[8] This article does not mean to imply that all, or even a majority, of those dependency hearings involve flagrant abuses of parents' rights. However, in the author's opinion, so long as indigent parents remain unrepresented the potential for abuse remains great.[9]

## B. EARLY HISTORY AND RECENT CHANGES IN THE CALIFORNIA JUVENILE COURT LAW

Traditionally, children have had few rights of their own. They have been considered mere objects or property, over whom parents were thought to wield absolute authority to punish or discipline as circumstances dictated.[10] Indeed, many vestiges of this attitude remain in our society today: in addages like "spare and rod and spoil the child,"[11] in allowing corporal punishment in schools, and in state statutes like Penal Code Section 195 which determines that the death of a minor in the course of lawful discipline is justifiable homicide.[12] This social phenomenon of allowing, or perhaps encouraging, controlled violence towards children should itself be a subject for deeper examination into the formulation of laws concerning juveniles.

In the juvenile area, judicial attention has been focused primarily upon delinquency rather than dependency hearings. Consequently, the constitutional rights of minors when charged with a crime have been explored by the courts, with few decisions examining the dependency situation. Around the turn of the century Juvenile Court Acts began to be adopted by the states, under the *parens patriae* theory that the state had the authority to intervene in the family relationship to protect the welfare of the child. This question of a child's best interests was to be decided in special "informal" hear-

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ment, Sacramento, California, Nov. 7, 1972, and Mr. Paul Di Russos, Juvenile Court Officer, Sacramento County, Nov. 9, 1972.

[8]State Department of Social Welfare, Specialized Child Protective Service Quarterly Report, p. 2.

[9]*See, supra*, notes 81-91 and accompanying text.

[10]S.X. RADBILL, *A History of Child Abuse and Infanticide*, in THE BATTERED CHILD (RAY E. HELFER AND C. HENRY KEMPE, eds. 1968).

[11]The disciplining of children has long been recognized within "reasonable" limits, *see* People v. Curtiss, 116 Cal. App. Supp. 771, 300 P. 801 (1931); State v. Pendergrass, 19 N.C. 365, 31 Am. Dec. 416 (1837) held that one could inflict "temporary pain" for the welfare of the child, but not permanent injury. *See also*, Harbaugh v. Commissioner, 209 Va. 695, 167 S.E.2d 329 (1969); People v. Stewart, 188 Cal. App. 2d 88, 10 Cal. Rptr. 217 (1961).

[12]CAL. PEN. CODE § 195 (West 1970).

ings, which theoretically allowed the parties involved "complete candor and open . . . discussion relative to the best interests of the child or children."[13] The early Juvenile Court reformers were trying to move away from handling children like criminals, with all the stiff formalities of trial procedure that they felt could easily mar the young and impressionable mind. The underlying rationale behind the independent juvenile process movement was the desire to create a separate, flexible court procedure informal enough to give delicate family problems the sensitivity needed in order to avoid forming future criminals. The style was purposely non-adversary. While this has been changing in the delinquency area, it remains the touchstone of the juvenile dependency hearing.

In these early juvenile hearings the minor was not entitled to any of the constitutional safeguards to which an adult charged with the same crime was entitled. During the late 1950's a "hearing" was little more than the whim of a judge. California's Juvenile Court Act had been enacted in 1903, and not revised since 1915. At that time, juveniles, among other things, had no right to a separate notice of the action,[14] and no right to a trial by jury;[15] there was neither a duty on the part of the court to advise the juvenile he had the right to an attorney,[16] nor that he had a privilege against self-incrimination. [17] The Juvenile Court Act of 1961, the product of several years work by a special committee, was a major effort to change some of these procedures. The United States Supreme Court's landmark decisions, *Kent v. United States*,[18] and *In re Gault*,[19] also prompted successive amendments to existing California law, in 1967, 1969 and 1971, establishing the rights of juveniles to many important constitutional safeguards when charged with delinquency.[20]

The above changes, however, did little to touch the area of dependency hearings for neglected and abused children. Courts have consistently adhered to the position that such actions are civil in nature, between two parties (the parents on one hand and the state acting as *parens patriae* on the other) and thus there is no constitutional requirement to provide counsel to represent either the juvenile or the

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[13] E. THOMPSON, N. PADGETT, D. BATES, M. MESCH AND T. PUTNAM, CHILD ABUSE: A COMMUNITY CHALLENGE, p. 63.
[14] *In re* Florance, 47 Cal. 2d 25, 300 P.2d 825 (1956).
[15] *In re* Daedler, 194 Cal. 320, 228 P. 467 (1924).
[16] People v. Fifield, 136 Cal. App. 2d 741, 289 P.2d 303 (1955).
[17] *In re* Dargo, 81 Cal. App. 2d 205, 183 P.2d 282 (1947).
[18] 383 U.S. 541 (1966).
[19] 387 U.S. 1 (1967).
[20] Commenting on this situation, the United States Supreme Court in *Gault*, 387 U.S. 1 (1967), said: "The absence of procedural rules based upon constitutional principal has not always produced fair, efficient and effective procedures." *Id.* at 18. For an analysis of questions remaining unanswered in this area, *see* Gardner, *Gault and California*, 19 HAST. L. J. 527 at 537-539 (1968).

parents.[21] Until 1972, California's Juvenile Court law followed this position, and the appointment of counsel for either parent or child was totally at the discretion of the court.[22]

The 1971 State Legislature instituted some important changes in the Juvenile Court law, amending or reorganizing certain sections of the Welfare and Institutions Code.[23] First, Section 600(b) was divided roughly in half, separating two discrete classes which were formerly lumped together. The destitute and homeless were left in subparagraph (b), while those suffering from neglect, cruelty and depravity were shifted to a newly created subparagraph, (d). Physical abuse was added as a fouth component of (d) reflecting the growing public concern over the phenomenon of violence against children, and culminating a series of laws which began with the Veneman Act establishing Child Protective Service Units.[24] But, this concern with physical harm brought about a new regimen in the law, and the changes made carry over to the much broader categories of "neglect" and "depravity." Second, Section 634.5 was added to the Code. [25] This makes appointment of legal counsel mandatory when a 600(d) petition is filed. Pursuant to Code Section 681[26] the Deputy District Attorney attached to the Juvenile Center is customarily appointed to represent the child.[27] Third, a second paragraph was added to Section 727, requiring that when a child is adjudged a dependent ward of the court, but released into the custody of the parents, that "parent . . . shall be required . . . to participate in a counseling program to be provided by an appropriate agency designated by the courts."[28] Fourth, Section 625.5 was added to allow the social workers to remove from the home any dependent child who appears "to be in need of such action."[29] This is a very broad grant of power with serious practical consequences for families of dependent children. If the social worker determines that the family's living condi-

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[21] *In re* Schubert, 153 Cal. App. 2d 138, 313 P.2d 968 (1957); *In re* K.D. K., 269 Cal. App. 2d 646, 75 Cal. Rptr. 136 (1969); *In re* Robinson, 8 Cal. App. 3d 783, 87 Cal. Rptr. 678 (1970).

[22] CAL. WELF. & INST. CODE § 634 (West 1972).

[23] [1971] CAL. STATS., Ch. 1748, § 64.5, 3765; [1971] CAL. STATS., Ch. 1729; [1971] CAL. STATS., Ch. 1929, § 4.

[24] CAL. WELF. & INST. CODE, § § 16500-16511 (West 1972). Although these were strictly voluntary, the statute was armed with a very liberal reporting statute designed to offer communities maximum flexibility in dealing with cases of physical abuse. CAL. PEN. CODE, § 11161.5 (West Supp. 1972).

[25] CAL. WELF. & INST. CODE § 634.5 (West 1972).

[26] CAL. WELF. & INST. CODE § 681 (West 1972).

[27] CAL. WELF. & INST. CODE § 634.5 and § 681 (West 1972). Even where the court appoints a private attorney to represent the child under § 681, the District Attorney may come in and present the evidence. CAL. WELF. & INST. CODE, § 681. Also, from an interview with Mr. Dave Badovinac, Associate District Attorney at the Sacramento Juvenile Center (Nov. 23, 1972).

[28] CAL. WELF. & INST. CODE § 727 (West 1972).

[29] CAL. WELF. & INST. CODE § 625.5 (West 1972).

tions have deteriorated he can summarily remove the child, bringing the family immediately back into Juvenile Court.

## II. PROCEDURE IN CALIFORNIA JUVENILE COURTS

Reports concerning child neglect or abuse come from many different sources: neighbors, teachers, doctors and social workers.[30] These reports are usually submitted to either the local police department or the county Department of Social Welfare. Sometimes cases develop that were not reported, but rather were discovered by the police while investigating some other incident.[31] When the police visit the home the officer must decide whether the environment is sufficiently serious to warrant removal of the child or children,[32] or report the situation to the Intake Division of the Juvenile Center.

Some reports are also turned in at the local Child Protective Services Unit in the County Welfare Office.[33] This unit functions entirely on the voluntary submission of the parties involved in their counseling. In addition the unit offers a variety of programs designed to alleviate the economic and social conditions which may be affecting the family relationship.[34] If the family refuses to participate, or the case is one of physical abuse, the social worker must refer action to the authorities at Juvenile Hall, or call the police to remove the child from the home.[35]

Once a child is removed from the home the case must be brought immediately to the attention of the Intake Division of the local Juvenile Hall,[36] where an Intake worker will commence an investigation. Basically, four alternatives present themselves: 1) where the child has not been removed from the home the worker may decide that the environment is not sufficiently serious to require Juvenile Court action, and refer the matter to another agency, such as the Child Protective Services Unit;[37] 2) the family, with the approval of the social worker, may agree to a voluntary supervision program of counseling, which will not require specific Juvenile Court action;[38] 3)

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[30] CAL. WELF. & INST. CODE § 653 (West 1972).
[31] *See, e.g.*, People v. Jackson, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (1971).
[32] CAL. WELF. & INST. CODE § 625 (West 1972).
[33] CAL. WELF. & INST. CODE § 16500-16511 (West 1972).
[34] Thus, Homemaker Services, Volunteer Aides, may be resorted to to try and help the parent work out a solution to the problem. Specialized Child Protective Services Quarterly Report, *supra*, note 8.
[35] Interview with Mr. James Hapgood, Child Protective Services Unit, Sacramento County (Nov. 7, 1972).
[36] Most California counties have proceeded under WELF. & INST. CODE § 576.5 to allow the social workers to assume most of the duties allotted by statute to the probation department.
[37] CAL. WELF. & INST. CODE § 655 (West 1972).
[38] CAL. WELF. & INST. CODE § 654 (West 1972). This could conceivably be any social welfare agency reporting back to the intake worker.

the social worker may decide the situation is sufficiently serious to require the filing of a dependency petition to get official court supervision, but may not want to keep the child in custody until the hearing; or, 4) the worker may decide that the best interests of the child necessitate removal from the home environment until the Juvenile Court has a chance to consider all the circumstances and perhaps impose some kind of supervision.[39]

Whenever a child has been kept in custody more than six hours and released a written explanation must be sent to the parents.[40] If the social worker desires to keep the child in custody until the hearing, he must file a dependency petition within forty-eight hours of the time the juvenile was taken into custody.[41] In addition, there must be a detention hearing held the next judicial day to determine whether or not to keep the juvenile in custody until the jurisdictional hearing.[42] There is no explicit notice provision for the detention hearing, indeed, the statute does not even require that the parents be present at this hearing.[43] The judge or referee can hold the child for fifteen judicial days (realistically a period of three weeks) and the parents are not required to be present or represented at this state of the proceedings.

A jurisdictional hearing must be held to determine whether or not the juvenile comes within the scope of Section 600.[44] The parents must be served notice of the hearing,[45] either personally or by certified mail.[46] If the petition was filed under subdivision (d), then counsel must be appointed to represent the best interests of the juvenile.[47] As already mentioned, this is usually the District Attorney attached to juvenile hall, who also presents the county's case against the parents for supervision of the child.[48] There is no requirement that counsel be appointed for the parents. This question is left to the discretion of the court.

A dispositional hearing immediately follows the determination of jurisdiction. At this point the social worker's report and recommendations are read by the referee, who must consider all "relevant and material" evidence that the county has to show that the juvenile is in

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[39] CAL. WELF. & INST. CODE § 630 (West 1972).
[40] CAL. WELF. & INST. CODE § 631 (West 1972).
[41] CAL. WELF. & INST. CODE § 653 (West 1972).
[42] CAL. WELF. & INST. CODE § 632 (West 1972).
[43] CAL. WELF. & INST. CODE § 633 (West 1972). There is a rehearing provision which allows a parent to request another hearing and requires the Juvenile Court to hold one within twenty-four hours. CAL. WELF. & INST. CODE § 637 (West, 1972).
[44] CAL. WELF. & INST. CODE § 657 (West 1972).
[45] CAL. WELF. & INST. CODE § 658 (West 1972).
[46] CAL. WELF. & INST. CODE § 659 (West 1972).
[47] CAL. WELF. & INST. CODE § 634.5 (West 1972).
[48] CAL. WELF. & INST. CODE § 681 (West 1972).

need of supervision.[49] If, as a result of the proceedings, the juvenile is made a dependent ward of the court, the case must be reviewed by the court at least annually.[50] If the petition was filed under 600(d), *supra*, some form of counseling program is mandatory. Likewise, any further conditions that the judge or referee feels are necessary in light of the evidence may be required.[51] The overwhelming majority of children are returned to their homes, even in cases of physical abuse.

> Because of the vital importance of a child's own parents, the primary efforts of any community should be to preserve them for him, to assist them in carrying their responsibilities successfully, and to prevent family breakdown.[52]

## III. PARENTS' RIGHT TO APPOINTED COUNSEL

Three districts of the California Court of Appeals have held that dependency hearings are civil actions, thus the parents have no express statutory or constitutional right to the appointment of legal counsel.[53] In *In re Robinson*, the California Court of Appeals held that under the 600(a) rule (parents or guardian incapable of providing the proper care and supervision for the children) parents have no inherent right to the appointment of counsel.[54] The court called this a "true civil case," and decided that the state's being a party in these actions as *parens patriae* is not a controlling factor. The court held that these hearings were not criminal in nature and thus the *Gault* rule did not apply.[55] The California Supreme Court denied a hearing, and the United States Supreme Court denied *certiorari*, with dissents by Justices Black and Douglas.[56] A close reading of these two dissenting opinions suggests that the Supreme Court does not want to decide the broad question of an indigent's right to appointed legal counsel in civil cases at this time.[57]

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[49] CAL. WELF. & INST. CODE § 706 (West 1972).
[50] CAL. WELF. & INST. CODE § 729 (West 1972).
[51] CAL. WELF. & INST. CODE § 701 (West 1972).
[52] National Study Service, Planning for the Protection and Care of Neglected Children in California (Final Report, August 1965) p. 23. I was also told this in conversations with Mr. Badovinac and Mr. Harley, *supra*, notes 27 and 2 (no statistics available). Also, in many cases of physical abuse, the actual abusive party will be in jail and no longer in the home environment, and that will be a consideration in returning the juvenile to the home.
[53] *In re* Robinson, 8 Cal. App. 3d 783, 87 Cal. Rptr. 678 (1970); *In re* George S., 18 Cal. App. 3d 788, 96 Cal. Rptr. 203 (1971); *In re* Joseph T., 25 Cal. App. 3d 120, 101 Cal. Rptr. 606 (1972).
[54] 8 Cal. App. 3d 783, 87 Cal. Rptr. 678 (1970). *See also In re* Joseph T., 25 Cal. App. 3d 120, 101 Cal. Rptr. 606 (1972); *In re* George S., 18 Cal. App. 3d 788, 96 Cal. Rptr. 203 (1971).
[55] *See supra*, note 10.
[56] Kaufman v. Carter, 402 U.S. 964, 961 (1971).
[57] In *In re* David K., 28 Cal. App. 3d 1061, 105 Cal. Rptr. 209 (1972), the

On March 2, 1971, the Supreme Court decided *Boddie v. Connecticut*, the leading decision in the area of due process rights for indigents in civil cases.[58] Justice Harlan wrote the majority decision which rested on the due process right of appellants to a fair hearing and held that the Connecticut filing fees for divorce court was a denial of due process to indigents who were unable to afford them because it effectively blocked the obtaining of a divorce. " . . . [P]ersons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."[59] Connecticut was interfering with a "fundamental" right, that of the parties to terminate a legal relationship. Justice Douglas concurred, wanting to base the decision on the Equal Protection Clause in that Connecticut's law discriminated against indigents.[60]

These arguments apply with equal force to the dependency area. " . . . [T]his right [to a fair hearing] is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state created matter."[61] Justice Black, in his dissent to *In re Robinson*, argues for a logical extension of the *Boddie* decision:

> In my view the decision in the *Boddie v. Connecticut* case can safely rest on only one crucial foundation — that the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney.[62]

The Supreme Court does not have to reach the question of appointment of counsel in all civil cases in order to decide that it is necessary in dependency actions.[63] The crux of this argument is that dependency hearings are distinguishable from normal civil cases, and

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California Court of Appeals held that in an action under CIVIL CODE § 232, for abandonment the indigent father had a right to appointed legal counsel. The court relies on the fact that an adverse adjudication will result in permanent loss of the child, distinguishing the *Robinson* case. This decision is encouraging because a dependency adjudication may remove the child to a foster home, resulting in a practical loss of the child, perhaps for years. Thus the two cases are very close and the courts may extend it to counsel in a dependency action.

[58] Boddie v. Connecticut, 401 U.S. 371, 376 (1971).

[59] *Id.* at 377.

[60] Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353, 355 (1962) "In either case [Griffin or Douglas] the evil is the same: discrimination against the indigent."

[61] Boddie v. Connecticut, 401 U.S. at 383 (1971).

[62] *In re* Robinson, 8 Cal. App. 3d 783, 87 Cal. Rptr. 678 (1970), *cert denied sub nom.*, Kaufman v. Carter, 402 U.S. 964, 955 (1971). (Justice Black dissenting).

[63] *See*, Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322 (1966) and Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L. J. 545 (1967).

because of their close resemblance to criminal proceedings the parents have a due process right to legal counsel. The Supreme Court in *Boddie* observed the following:

> . . . we think appellants' plight, because resort to the state courts is the only avenue of dissolution of their marriages, is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court.[64]

Dependency hearings follow this dicta very closely. Parents named in a dependency petition are not kept out of court by their poverty, as in *Boddie*, *supra*, and denied access to the judicial system; rather, they are forced to come into court and defend themselves in much the same manner as a criminal defendant. The administering of state law is central to the county's case as it is presented to the judge or referee by the Deputy District Attorney.[65] The county has employed its expert, the social worker, to make a report and general recommendations to the court on the conditions of the family environment.[66] The Deputy District Attorney will present this along with any other evidence the county has, neighbor's affidavits, doctor's testimony, etc., which go to prove that the parents were acting, or failing to act, in such a manner as to be harmful to the welfare of the child. Essentially then, at the hearing the referee is using this information to decide if the conduct of the parents brings them within the scope of the Welfare and Institutions Code and allows the county to impose supervision upon the family.[67] While this in no sense involves any determination of guilt, for which criminal sanctions may be imposed on the parents, the essential characteristics of the dependency petitions and criminal actions are the same. The parents must still answer the charges and face the possibility of probation-like requirements or loss of the child.[68] It must be kept in mind that in those cases where the child was removed from the home by a police officer against the parents' objections, the child is no longer in the home, and is now sitting at another table next to the District Attorney. This certainly makes the threat of loss of the child seem a very plain one to the parents. While this situation is not "exclusion" in the strict sense of the word, it brings to mind Justice Sutherland's famous statement, "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[69]

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[64] Boddie v. Connecticut, 401 U.S. at 376, (1971).
[65] CAL. WELF. & INST. CODE § 681 (West 1972).
[66] CAL. WELF. & INST. CODE § 628 (West 1972).
[67] CAL. WELF. & INST. CODE § 725 and § 727 (West 1972).
[68] CAL. WELF. & INST. CODE § 727(d) (West 1972).
[69] 287 U.S. 45, 68 (1932).

The Constitutional question can be approached in two ways. Justice Douglas, in his dissent to *Robinson* argues for deciding the case on equal protection grounds, in part saying:

> Courts ought not to be a private preserve for the affluent . . . the parent-child relationship is also of sufficient importance to require the appointment of counsel when the state initiates and maintains proceedings to destroy it.[70]

However, to rely on the proposition that indigents as a class would be discriminated against because they could not afford to hire an attorney,[71] and thus their rebuttal to the charges of neglect would be weakened, is not a sufficiently persuasive argument. This reasoning is too broad and inclusive, and would not enable the Supreme Court to distinguish between dependency actions and other civil cases. A more persuasive argument along these lines would be to compare indigents as a class involved in dependency hearings with indigents involved in other state actions. For example, indigents charged with civil contempt are provided with counsel, and if this action is substantively similar to the dependency process denial of counsel would be a violation of the equal protection doctrine. This analogy will be examined at greater length, *infra.*

On March 21, 1973, the United States Supreme Court decided *San Antonio Independent School District v. Rodriguez,*[72] holding that the Texas school financing system did not deny equal protection of the law. This case examines equal protection doctrine and classifications based on wealth at great length, and provides a much more forceful ground for requiring right to counsel in dependency hearings. The basic question to be decided is whether appointment of counsel in these hearings is a fundamental constitutional right, the denial of which operates to shift the burden to the state to show a compelling interest which justifies the statute.[73]

In *Roe v. Wade,*[74] the Supreme Court decided that the right to privacy guaranteed the right to obtain an abortion. The majority began by saying that a personal right of privacy " . . . relating to marriage . . . procreation . . . contraception . . . family relationships

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[70] Kaufman v. Carter, 402 U.S. 964, 961 (1971).

[71] " . . . the rich man . . . enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent . . . is forced to shift for himself." Douglas v. California, 372 U.S. 353, 358 (1962).

[72] San Antonio Independent School District v. Rodriguez, ___U.S.___, 93 S. Ct. 1278 (1973).

[73] The court begins with the two traditional tests, which should be easily satisfied in these cases: (1) that the law operates against a class fairly definable as indigent, and (2) that the lack of personal resources occasion an absolute deprivation of the benefit. *Id.*

[74] ___U.S.___, 93 S. Ct. 705 (1973).

. . . and child rearing and education . . . "[75] exists under their decisions interpreting Constitutional rights. It seems clear that if a parent is allowed a right of privacy with regards to "family relationships" and "child rearing" the courts should examine with strict scrutiny any state statute which restricts that right. *A fortiori*, parents should be adequately represented in order to assure a fair hearing. Since this right of privacy has been determined to be a fundamental right, raising the strict scrutiny doctrine, the state would have to show a compelling interest in order to justify not appointing counsel for indigent parents who stand to lose their children through the dependency process.[76]

The second constitutional argument rests on the procedural due process requirement to a fair hearing. This would more effectively permit the Supreme Court to distinguish dependency hearings from the larger universe of civil cases. The Court would not have to grant the right to counsel on broad grounds, but could confine their decision narrowly to dependency hearings, where certainly the external manifestations (where it is held, what procedures are used, and the possibly severe consequences of an adverse decision) are sufficient to denominate the proceedings quasi-criminal. A recent California Court of Appeals decision says: "The extent to which procedural due process must be afforded is influenced by the extent to which the person affected may be condemned to suffer grievous loss."[77]

The significance of a seemingly minor and nominal classification should be recognized in the way in which courts handle civil contempt hearings. A court may use its power to enter into a personal dispute and require one of the parties to perform in a particular way. Examples of this form of court action are alimony payments and reporters' testimony before grand juries. If the person fails to respond to the court's determination, then he is liable to be confined in jail until he decides to obey the court order. This is because civil contempt actions have been classified as "remedial" in nature and not punitive; therefore, the person involved can "purge" himself of the contempt by obeying the order of the court.[78] Appellate courts

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[75] *Id.* at 726 (citations omitted).

[76] Even if the Court goes so far as to distinguish dependency hearings also, query if the denial of counsel to the parents is rationally related to a valid state purpose. Again, if the purpose is to protect the best interests of the child, is it a rational policy to not represent the parents and possibly worsen the family environment by increasing hostilities toward both the child and the welfare authorities? The more rational state policy is to try and keep the family together, and this may best be accomplished by effective legal representation of all sides.

[77] *In re* David K., 28 Cal. App. 3d 1061, 1063, 105 Cal. Rptr. 209, 210 (1972).

[78] Fenton v. Walling, 139 F. 2d 608 (9th Cir. 1944); U.S. v. Consolidated Production Inc., 326 F. Supp. 603 (C.D. Cal. 1971); *In re* Blaze, 271 Cal. App. 2d 210, 76 Cal. Rptr. 551 (1969); Martin v. Superior Court, 199 Cal. App. 2d 730,

have consistently held that such civil contempt hearings are basically criminal, or quasi-criminal in nature and the accused is entitled to all the same constitutional and procedural safeguards as a man accused of a crime.[79]

The analogy follows explicitly with reference to a dependency hearing. The juvenile court is asserting jurisdiction over a dispute between two parties, the parents and the state (as *parens patriae*). A decision is made by a judge or referee that a particular solution, dependency, is necessary for the social welfare. The parent is not being punished, but made to submit to what the juvenile court has determined to be the correct solution. If the parent does not comply, instead of going to jail the court will remove the child from the home.

The single differentiating factor between the dependency action and the civil contempt action is the presence of a possible jail sentence in the latter and the deprivation of the child in the former. In *Brown v. Chastain*, a mother was arguing that she had a constitutional right to a transcript for an appeal of a juvenile court decree removing her daughter. The Federal District Court dismissed for lack of jurisdiction. In his dissenting opinion Justice Rives recognized the importance of any decision affecting family ties:

> . . . a child custody proceeding also amounts to far more than an ordinary civil action between private parties . . . Actions by the state designed to sever the parental bond must be subjected to the most careful scrutiny. Denominating this action as civil cannot, by some talismanic effect blind us to the fundamental importance of the values at stake here.[80]

To say that losing one's child is sufficiently less severe than the mere possibility of a jail term, or changes the character of the proceedings enough to warrant denying such a procedural guaranty as appointment of counsel is certainly less than persuasive. It is patently apparent that in both areas, through some particular action, or some failure to act, the power of the state is brought to bear upon a particular individual via legal, court proceedings. Indeed, it is the author's opinion that a charge of child neglect or abuse is by far the more serious, in terms of the social stigma surrounding the proceeding, and the potential result of an adjudication adverse to the parents (loss of the child).[81]

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18 Cal. Rptr. 773 (1962).

[79] Martin v. Superior Court, 17 Cal. App. 3d 412, 95 Cal. Rptr. 110 (1972); *In re* Liu, 273 Cal. App. 2d 135, 78 Cal. Rptr. 85 (1969); *In re* Gould, 195 Cal. App. 2d 172, 15 Cal. Rptr. 326 (1961); Culver City v. Superior Court, 38 Cal. 2d 535, 241 P.2d 258 (1952).

[80] Brown v. Chastain, 416 F. 2d 1012, 1025 (5th Cir. 1969) (dissenting opinion). *See*, Note, 4 COLUM. J. OF LAW AND SOC. PROB. 230 (1968).

[81] CAL. WELF. & INST. CODE § 726 (West 1972).

There has been only one major study on the effect of representation in dependency hearings. In proceedings in New York's Family Court in which the parent-respondent was not represented by legal counsel, only 7.9 percent of the petitions were dismissed, while 75 percent resulted in a finding of neglect. In the proceedings in which parents were fully represented, 25 percent of the petitions were dismissed, while 62.5 percent resulted in a finding of neglect.[82] Thus, the author's conclusion (even allowing for the argument that parents who would go to the effort to secure a legal aid attorney cared more and were less likely to be the worst cases) is that representation does make a significant difference in the disposition of a case.

The California Court of Appeals, in *Lois R. v. Superior Court*,[83] held that a referee could not conduct a dependency hearing alone, without anyone from the county present to introduce the evidence and arguments in favor of supervision because the "mental gymnastics" were too great and no person would effectively do both jobs. The court went on to talk about dependency hearings as follows:

> In most dependency matters the focus is against the parent and the prospect faced is the drastic result of loss of his child. Although legal scholars may deemphasize the adversary nature of dependency proceedings and characterize the removal of the child from parental custody as non-punitive action in the best interests of the child, most parents would view the loss of custody as dire punishment. As indicated, the Section 600 petition is, in a sense, brought against the parents to deprive them of a valued right.[84]

This holding was followed by another Court of Appeals decision in *Gloria M. v. Superior Court*,[85] which said that in dependency hearings "not only must there be actual fairness . . . but there must be the appearance of justice."[86]

These two decisions establish that referees no longer may conduct juvenile dependency hearings on their own. "Petitioner had a right to the custody of her child, of which she could not be deprived without an essential ingredient of due process, to wit, a fair hearing."[87] As a necessary corollary, in order for the referee to be an impartial arbitrator and conduct a fair hearing, both sides should be fairly represented in order for "the appearance of justice" to be done. This is not possible when on one side the power of the county is exerted to

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[82] Note, *Representation in Child Neglect Cases: Are Parents Neglected*, 4 COLUM. J. OF LAW. AND SOC. PROB. 230 (1968).
[83] Lois R. v. Superior Court, 19 Cal. App. 3d 895, 97 Cal. Rptr. 158 (1971).
[84] *Id.* at 901, 97 Cal. Rptr. at 162.
[85] 21 Cal. App. 3d 525, 98 Cal. Rptr. 604 (1971).
[86] *Id.* at 527, 98 Cal. Rptr. at 606.
[87] Lois R. v. Superior Court, 19 Cal. App. 3d 895, 902, 97 Cal. Rptr. 159, 163 (1971).

research and bring the case into court, coupled with a legal representative who is familiar with the workings of the special notice and evidentiary requirements, and on the other side is the lone parent, ignorant of the applicable legal provisions.

Finally, even after the dependency hearing, the necessity for counsel remains. The parents are subject to at least yearly judicial determination of the status of the child.[88] Without effective legal representation the family may be kept under legal surveillance for years while there may have existed some legal challenge to remove supervision. The lack of legal representation becomes especially significant in these yearly rehearings because of technical complexities of notice and procedure about which an ordinary parent not familiar with the law would know nothing.[89]

If the parents feel that the family situation has improved to the point that dependency is no longer necessary, there is a provision called a petition for termination, which allows for affirmative action to obtain juvenile court determination.[90] Once a child is adjudged a dependent ward of the court, only a judicial hearing under the annual review section or the petition for termination can remove that status.

An example of the problems encountered is best illustrated by *In re D*, a recent California Court of Appeals decision.[91] In this case the children were removed from the home because of the inadequacy of the housing. Within six months appellants found a large enough house and brought this action to terminate dependency status because the original grounds were alleviated. The juvenile court denied the petition solely on the grounds that it could now determine the best interests of the child. The appellate court reversed saying, "... the fact that the status of a minor is one of dependency ... does not deprive a parent ... of the right to due process."[92] If there existed new grounds for dependency the parent had the right to notice and a hearing expressly on the new charges. Without an attorney the parent would not have known that the action by the referee was denying her due process of law.

In order to maintain the balance between the rights of the parents and the interests of the state in the welfare of its citizens, it is the author's opinion that all determinative legal arguments must be pre-

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[88] CAL. WELF. & INST. CODE § 729 (West 1972).
[89] CAL. WELF. & INST. CODE § 778 (West 1972). *See In re* Robinson, 8 Cal. App. 3d 783, 87 Cal. Rptr. 678 (1970) where a child was dependent for five years; *In re* Francecisco, 16 Cal. App. 3d 301, 94 Cal. Rptr. 186 (1971) where a child was dependent for two years.
[90] CAL. WELF. & INST. CODE § 778 (West 1972).
[91] *In re* Neal D., 23 Cal. App. 3d 1045, 100 Cal. Rptr. 706 (1972).
[92] *Id.* at 1048, 100 Cal. Rptr. at 706.

sented and judged fairly. Whenever one party to such an important proceeding is handicapped by an ignorance of the law there is inherent unfairness, sufficient to warrant finding a denial of due process.

## IV. CONCLUSION

The parents' representation by counsel will not alter the juvenile court's authority to inquire into cases of neglect. It must be remembered that in very few of the petitions filed are the parents alleged to be the physically abusive or sadistic child beaters who make the front page news. Still, the courts must necessarily be careful about how they proceed in these situations. What constitutes neglect will change to reflect varying practices and beliefs around the country. Thus, for some it might mean a lack of necessities: food, clothing or shelter, while for others it may be a lack of emotional sustenance, an absence of caring. These complexities of values should lead a court to realize that dependency hearings are not ordinary civil cases, but require great care in handling because the basic unit of society is being dealt with. The courts are adjusting a fundamental human relationship, and this requires tthat the procedures be as fair as the society can make them.

The due process and equal protection clauses compel the juvenile courts to appoint legal counsel for indigent parents brought into court on a dependency petition. This is not to destroy the theory of the juvenile court system, but to accord the parents a fair hearing and the right to raise their children without undue state interference. Justice Black put it very simply in his dissent to *Robinson:* "There is simply no fairness or justice in a legal system which pays indigents' costs to get divorces and does not aid them in other civil cases which are frequently of far greater importance to society."[93]

One suggestion for solving the problem of representation would be the creation of a separate department within the Juvenile Court system which would represent parents before the court. These people would not necessarily have to be lawyers but could be trained in the Juvenile Court Law and be effective advocates for the parents. The Court of Appeals in *Lois R. v. Superior Court* hinted at some similar solution:

> Perhaps the Legislature should consider the advisability of creating a staff of attorneys to assist in the presentation of such matters so as to insure the complete impartiality of the juvenile court and referee both actually and in appearance.[94]

*Albert O. Cornelison, Jr.*

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[93] Kaufman v. Carter, 402 U.S. 964, 961 (1971).
[94] Lois R. v. Superior Court, 19 Cal. App. 3d at 903, 92 Cal. Rptr. at 165 (1971).