COMMENTS

Private Means to Public Ends: Implications of the Private Judging Phenomenon in California

This Comment examines California's private judging procedure. It considers objections to the procedure based on its economic distinctions, possible unfairness and inefficiency, and secrecy. The Comment proposes a model court rule to reconcile the implementation of private judging with California's open court statute.

INTRODUCTION

Over the past fifteen years, a torrent of civil litigation has deluged the courts of California. The courts have coped with this flood only at the price of a severe increase in the time a lawsuit awaits final resolution.[1] The delay, which approaches four years in some superior

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[1] California Superior Court Filings

Fiscal Year	*Total Filings*	*Civil Filings*
1981-82	738,363	532,190
1980-81	735,219	532,556
1979-80	713,476	521,068
1978-79	740,933	551,393
1977-78	726,659	534,686
1972-73	532,563	386,765
1967-68	467,560	---

1983 CAL. JUDICIAL COUNCIL, ANNUAL REPORT 97-98; 1973 CAL. JUDICIAL COUNCIL, ANNUAL REPORT 186.

Median Interval in Months from At-Issue Memorandum to Trial of Civil Jury Cases

	1968	*1973*	*1978*	*1979*	*1980*	*1981*	*1982*
Los Angeles Co.	9	25	31	32.5	35.5	40.5	41.5
San Diego Co.	7	15	21	24	30	40	26
Orange Co.	11	11	22	30	25	33	27

1982 CAL. JUDICIAL COUNCIL, ANNUAL REPORT 118; 1973 CAL. JUDICIAL COUNCIL, ANNUAL REPORT 201.

courts,[2] has profound implications. Persons impatient to resolve a dispute and resume a profitable relationship may find that the delay renders their litigation moot.[3] Delay-induced legal fees may make their litigation costly.[4] For these reasons, nontraditional legal dispute resolution methods are essential.

Arbitration has been the historical solution to the costly delays of traditional courts.[5] California's reference[6] and temporary judging[7] procedures may provide another. Both procedures work in a generally similar fashion. In districts with congested civil calendars, attorneys have retained neutral parties, often retired judges, to hear cases. The judge is paid by the litigants:[8] thus the procedure's popular names of "rent-a-

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The litigation crisis has produced a stream of commentary. *See generally* J. AUERBACH, JUSTICE WITHOUT LAW? (1983) (examining methods of dispute resolution other than litigation); *Dispute Resolution*, 88 YALE L.J. 905 (1979); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); *Reducing Court Costs and Delay*, 16 U. MICH. J.L. REF. 465 (1983); Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983); Hiltzik, *The Litigation Explosion: Cures for Caseload Crisis Prove Elusive*, L.A. Times, Feb. 20, 1984, pt. I, at 1, col. 4; *Problems of Lawsuits Plaguing Courts*, L.A. Times, Aug. 9, 1983, pt. I, at 1, col. 1.

[2] In Los Angeles Superior Court, half of all civil jury cases must wait at least three years before trial. In San Joaquin Superior Court, the wait is 45.5 months. 1983 CAL. JUDICIAL COUNCIL, ANNUAL REPORT 118.

[3] *See, e.g.*, *'Rent-a-Judge' Still Generates Conflict*, CAL. LAW., Feb. 1982, at 17 (commercial leases in a new shopping center); Lewin, *New Alternatives to Litigation: Companies Bypass Courts*, N.Y. Times, Nov. 1, 1982, at D1, col. 3.

[4] *Cf. infra* note 12.

[5] *See generally* M. DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION (1968); F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS (3d ed. 1973); Brown, *Some Practical Thoughts on Arbitration*, 6 LITIGATION, Winter 1980, at 8; Olson, *Dispute Resolution: An Alternative For Large Case Litigation*, 6 LITIGATION, Winter 1980, at 22; Roth, *Choosing an Arbitration Panel*, 6 LITIGATION, Winter 1980, at 13; Willenken, *Discovery in Aid of Arbitration*, 6 LITIGATION, Winter 1980, at 16. For a description of the historical development of arbitration, see Note, *Commercial Arbitration in the Eighteenth Century: Searching for the Transformation of American Law*, 93 YALE L.J. 135 (1983).

[6] CAL. CIV. PROC. CODE §§ 638-645.1 (West 1976 & Supp. 1984). *See generally* Freiberg, *Referees in Superior Court*, 1 L.A. LAW., Nov. 1978, at 34. Reference and temporary judging are described and distinguished in the text following note 17 *infra*.

[7] CAL. CONST. art. VI, § 21.

[8] Myers, *Rent-a-Judge in California*, 1981 NEW L.J. 1042, 1043 ($100 per hour); Weisman, *Shortcut to Trial: Use of Orders of Reference and Judges Pro Tem*, 3 A. BUS. TRIAL LAW. REP. 3 (1980) ($100 per hour, $500 per day minimum); Oliver, *Bitter Divorce Raises Questions About 'Rent-a-Judge'*, L.A. Times, Dec. 22, 1981, pt. I, at 3, col. 3 ($200 per hour); Luther, *Attorneys Find Detour Around Court's Civil*

judge" and "private judging."

The Board of Governors of the California State Bar has recognized that private judging may help to reduce civil calendars.[9] Extending the private judging solution to other states and the federal courts has been advocated.[10] Yet, both the wisdom and the constitutionality of private judging have been questioned.[11] Critics argue that private judging violates due process and equal protection because it is available only to the affluent,[12] that private judging is potentially biased and inefficient,[13] and that the secrecy which some litigants obtain through private judging contradicts the spirit, if not the letter, of the first amendment.[14] Because the elements of private judging which trigger these objections are likely to be found in other nontraditional methods of dispute resolu-

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Suit Traffic Jam, L.A. Times, Aug. 12, 1977, pt. II, at 5, col. 1 ($800 per day or a standard lawyer's fee).

[9] *Bar Rejects Halt to 'Rent-a-Judge'*, L.A. Times, Nov. 21, 1981, pt. I, at 28, col. 1.

[10] *See, e.g.*, Janofsky, *The "Big Case" — A "Big Burden" On Our Courts*, 1980 UTAH L. REV. 719, 725.

Reference in some form is allowed in most states. *See* Note, *The California Rent-a-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts*, 94 HARV. L. REV. 1592, 1593-97 (1981) (categorizing state reference statutes) [hereafter Note, *Pay-As-You-Go*]. However, the reference provisions of only five states other than California presently allow private judging: New York, Oregon, Rhode Island, South Carolina, and Washington. N.Y. CIV. PRAC. LAW. §§ 4301-4321 (McKinney 1963 & Supp. 1983); OR. R. CIV. P. 65; R.I. GEN. LAWS § 9-15-1 to -21 (1969 & Supp. 1983); R.I.R. CIV. P. 53; S.C. CODE ANN. §§ 15-31-10 to -150 (Law. Co-op. 1977 & Supp. 1983); WASH. REV. CODE ANN. §§ 4.48.010 to .100 (1979). The case backlog in these states is apparently not so severe that litigants are using private judging. Myers, *supra* note 8, at 1044.

[11] *See, e.g.*, Note, *Pay-As-You-Go*, *supra* note 10; *'Rent-a-Judge' Still Generates Conflict*, CAL. LAW., Feb. 1982, at 17 (comments of Cal. Supreme Ct. Chief Justice Bird); Hager, *'Rent-a-Judge' Use Examined, Criticized*, L.A. Times, Dec. 22, 1981, pt. I, at 3, col. 1; *Judicial Panel Will Study Rent-a-Judge*, L.A. Times, Nov. 15, 1981, pt. I, at 3, col. 6.

[12] *See, e.g.*, Note, *Pay-As-You-Go*, *supra* note 10, at 1601-08.

Private judging ostensibly costs more because the private judge's fee is an expense which traditional litigants do not incur. However, with the reduction in attorney's fees realized because cases come to trial sooner, private judging can be less expensive overall than a traditional trial. *See, e.g.*, Luther, *Attorneys Find Detour Around Court's Civil Suit Traffic Jam*, L.A. Times, Aug. 12, 1977, pt. II, at 5, col. 1 (private judge trial saved $150,000 in legal fees and other costs). If the private judge's fee must be paid before the trial, or as earned, the nonaffluent, who may only be able to pay fees if they recover, will be unable to use private judging. *See 'Rent-a-Judge' Still Generates Conflict*, CAL. LAW., Feb. 1982, at 17. *But cf. infra* note 95 (less affluent need not be excluded).

[13] Note, *Pay-As-You-Go*, *supra* note 10, at 1610-14.

[14] *Id.* at 1608-10.

tion, analysis of each element should prove generally useful.

This Comment describes the private judging procedure in Part I, then turns to the objections. Part II first discusses the discrimination issue raised by private judging's alleged cost barrier. It concludes that private judging is state action, and therefore subject to the fourteenth amendment, but that the procedure violates neither due process nor equal protection. Part II then evaluates the potential for bias and inefficiency in private judging, but argues that congestion problems in the traditional courts are of a greater magnitude than this potential. Hence, the traditional courts, rather than private judging, should be the initial object of reform. Finally, Part II examines the availability of secret trials through private judging. The first amendment has not yet been interpreted to prohibit secret civil trials. But, a California statute does expressly forbid secret civil trials. However, in contravention of public policy, some users of private judging disregard the open court statute. To aid effective enforcement of the statute, this Comment proposes a model court rule and stipulation. The Comment concludes that once the secrecy prohibition is scrupulously adhered to, private judging may take a valuable place among other methods of dispute resolution.

I. THE CALIFORNIA LAW

Private judging uses the reference[15] and temporary judging[16] procedures which have long been authorized under California law, but does

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[15] California's reference provisions, now CAL. CIV. PROC. CODE §§ 638-645.1 (West 1976 & Supp. 1984), have been a part of the Code of Civil Procedure since its enactment in 1872. Substantially the same procedure was allowed under the Civil Practice Act of 1851, ch. 5, § 182, 1851 Cal. Stat. 51, 79:

> A reference may be ordered upon the agreement of the parties filed with the Clerk, or entered in the minutes:
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> 1st. To try any or all of the issues in an action or proceeding, whether of fact or of law; and to report a judgment thereon.
>
> 2d. To ascertain a fact necessary to enable the Court to proceed and determine the case.

The Act of Apr. 2, 1866, ch. 619, § 3, 1865 Cal. Stat. 843, 844-45 required a "finding and judgment." The reference procedure was incorporated as § 638 in the 1872 Code of Civil Procedure. Act of June 5, 1933, ch. 744, § 107, 1933 Cal. Stat. 1836, 1877 allowed the agreement to be filed with the judge or entered in the docket. The most recent amendment, Act of July 2, 1982, ch. 440, § 1, 1982 Cal. Stat. (forthcoming) explicitly permits the parties to insert a clause requiring reference in written contracts.

[16] Temporary judges were first authorized by CAL. CONST. of 1879, art. V, § 8. The provision was amended in 1910 to confirm the power of a temporary judge to act until final determination of a case, and in 1922 to require approval of the local court before appointment of a temporary judge. Temporary judging was deleted from the constitu-

so with one difference: rather than relying on traditional courts to select a referee or temporary judge, the litigants themselves choose a private judge and settle on suitable compensation.[17] In a reference, a judge assigns a case pending in the traditional courts to a person who will hear all or part of the case as a referee, then report findings back to the court. In temporary judging, a traditional judge appoints a person to serve as a judge to hear a dispute, which need not have been filed in the traditional courts. This appointment is, however, only temporary.

A. Reference

One form of private judging is reference. Most states and the federal courts presently allow some sort of reference,[18] which is a foundation for private judging. California law classifies references as either general[19] or special.[20] Cases referred with the consent of the parties and for the purpose of resolving all issues of law and fact are general references.[21] But if a case is referred on the court's motion without the consent of the parties, or if not all issues of law and fact are to be resolved,

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tion in 1926, apparently as an oversight, because the provision was reinstated in 1928 by inclusion in CAL. CONST. of 1879, art. VI, § 5 (1928). The constitutional revision of 1966 shifted temporary judging to its present location, CAL. CONST. art. VI, § 21.

Both reference and temporary judging have been used since their adoption, but not as private judging. Private judging first surfaced in 1976 and varied from standard reference and temporary judging in that the litigants sought to retain their own judge in order to bypass the crowded civil calendar. *See* Luther, *Attorneys Find Detour Around Court's Civil Suit Traffic Jam*, L.A. Times, Aug. 12, 1977, pt. II, at 5, col. 1.

[17] *See supra* note 8 and accompanying text.

[18] *See* Note, *Pay-As-You-Go*, *supra* note 10, at 1594-97 (listing and classifying state and federal reference provisions).

[19] CAL. CIV. PROC. CODE § 638 (West Supp. 1984).

[20] CAL. CIV. PROC. CODE § 639 (West Supp. 1984).

[21] Holt v. Kelley, 20 Cal. 3d 560, 562, 574 P.2d 441, 442, 143 Cal. Rptr. 625, 626 (1978); Ellsworth v. Ellsworth, 42 Cal. 2d 719, 722, 269 P.2d 3, 5 (1954); Estate of Hart, 11 Cal. 2d 89, 91, 77 P.2d 1082, 1083 (1938); CAL. CIV. PROC. CODE § 638 (West Supp. 1984).

The parties may consent to a reference in a written agreement filed with the court or the stipulation may be made in open court. Harris v. Board of Educ., 72 Cal. App. 2d 43, 48-50, 163 P.2d 883, 886 (1st Dist. 1945) (stipulation in open court); CAL. CIV. PROC. CODE § 638 (West Supp. 1984). A litigant waives objections to a reference if she fails to except and participates in a hearing before the referee. Garland v. Smith, 131 Cal. App. 517, 525, 21 P.2d 688, 691 (4th Dist. 1933) (no objection, submitted evidence); *see also* Joshua Hendy Mach. Works v. Pacific Cable Constr. Co., 99 Cal. 421, 423, 33 P. 1084, 1085 (1893) (nonconsensual reference not reviewed on appeal without exception at trial).

it is a special reference.[22] The distinction is important because a general reference is conclusive but a special reference is not.[23]

All referees must file findings of fact and conclusions of law with the referring court.[24] A decision of a general referee has the same force and effect as a decision of a traditional judge, and the court clerk must enter judgment in accordance with that decision.[25] In contrast, the findings of a special referee are advisory; the parties may object and the court may modify the findings or admit more evidence.[26] Because review of the special referee's findings results in some delay, decreasing the time saved by the reference, general references have been preferred.

The Evidence Code applies to both forms of reference,[27] so a referee must not base findings on evidence which would be inadmissable in a

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[22] Ellsworth v. Ellsworth, 42 Cal. 2d 719, 722-23, 269 P.2d 3, 5 (1954); CAL. CIV. PROC. CODE § 639 (West Supp. 1984).

[23] *See infra* notes 25-26 and accompanying text.

[24] CAL. CIV. PROC. CODE § 643 (West 1976).

[25] CAL. CIV. PROC. CODE § 644 (West 1976).

The findings on a general reference cannot be modified, but can be reversed and a new trial granted. Barker Bros. v. Coates, 211 Cal. 756, 758, 297 P. 8, 8 (1931) (objection prevented a general reference, elaboration of findings by trial court not error); Lewis v. Grunberg, 205 Cal. 158, 162, 270 P. 181, 182 (1928) (trial court without power to modify judgment recommended in general referee's findings); San Diego Fruit & Produce Co. v. Elster, 127 Cal. App. 2d 80, 85, 273 P.2d 70, 73 (4th Dist. 1954) (modification of findings of special, not general, referee not error). The judgment is appealable as if made by the trial court. *See, e.g.*, Ellsworth v. Ellsworth, 42 Cal. 2d 719, 722, 269 P.2d 3, 5 (1954); Lewis v. Grunberg, 205 Cal. 158, 162, 270 P. 181, 182 (1928).

[26] Holt v. Kelley, 20 Cal. 3d 560, 562, 574 P.2d 441, 442, 143 Cal. Rptr. 625, 626 (1978); Ellsworth v. Ellsworth, 42 Cal. 2d 719, 723, 269 P.2d 3, 5 (1954); Clark v. Millsap, 197 Cal. 765, 785, 242 P. 918, 926 (1926) (trial court need not accept special referee's findings as conclusive); Harris v. San Francisco Sugar Ref. Co., 41 Cal. 393, 405 (1871) (construing § 183 of the Civil Practice Act of 1851, quoted *supra* note 15); Bird v. Superior Court, 112 Cal. App. 3d 595, 599, 169 Cal. Rptr. 530, 532 (2d Dist. 1980) (vacating order appointing referee to "hear and determine" all discovery matters, over objection, as implying referee's decision conclusive rather than advisory); Dynair Elecs., Inc. v. Video Cable, Inc., 55 Cal. App. 3d 11, 20, 127 Cal. Rptr. 268, 273-74 (4th Dist. 1976) (trial judge correctly treated special referee's findings as evidence only); Estate of Johnson, 12 Cal. App. 3d 855, 859, 91 Cal. Rptr. 116, 118 (1st Dist. 1970) (trial court did not err when it referred question of fact to special referee, but rejected findings); Estate of Bassi, 234 Cal. App. 2d 529, 537, 44 Cal. Rptr. 541, 545 (1st Dist. 1965) (adversary hearing on special referee's findings not error as findings had no force prior to trial court adoption).

[27] CAL. EVID. CODE § 300 (West Supp. 1984); *see also, e.g.*, Rice v. Brown, 104 Cal. App. 2d 100, 231 P.2d 65 (2d Dist. 1951) (trial court not entitled to consider findings because referee held no hearing, swore no witnesses, and provided no opportunity to introduce evidence).

traditional court. Normally a record is made,[28] as without one the parties lose one advantage private judging has over arbitration: appellate review. A record of the reference hearing is necessary for appeal.[29]

Up to three persons may serve as a reference body. They are chosen by the parties or the referring court[30] and need not be members of the State Bar.[31] A majority decides the case.[32] Alternatively, the referring court may appoint a single court commissioner.[33] If the referee is not an employee of the court such as a court commissioner, any reasonable compensation may be ordered. However, if the parties stipulate in writing to the amount of compensation, the referring court has no choice but to order that amount.[34] Thus, the parties negotiate the fee with a potential referee. The ability to determine the size of the fee, and its apportionment between the parties, distinguishes California's private judging from the reference provisions of other states.[35]

B. Temporary Judging

As an alternative to reference, California allows persons to try their case before a temporary judge.[36] All parties litigant must stipulate to

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[28] Note, *Pay-As-You-Go*, *supra* note 10, at 1598 n.25.

[29] *Cf.* First Nat'l Bank v. Stansbury, 118 Cal. App. 80, 85-86, 5 P.2d 13, 15 (1st Dist. 1931) (review of reference denied for lack of a correctly certified record).

[30] CAL. CIV. PROC. CODE § 640 (West 1976).

[31] *See* CAL. RULE OF COURT 244(b). This rule may be an anachronism from the period when referees were factfinders, such as in an action for an accounting. An accountant was needed, not a lawyer. *See, e.g.*, CAL. CIV. PROC. CODE § 639(b) (West Supp. 1984); *cf.* CAL. CIV. PROC. CODE § 641(1) (West Supp. 1984) (referee should have same qualifications as a juror). Both § 639(b) and § 641(1) originated in the 1872 Code of Civil Procedure.

[32] CAL. CIV. PROC. CODE § 1053 (West 1980).

[33] CAL. CIV. PROC. CODE § 640 (West 1976).

[34] CAL. CIV. PROC. CODE § 645.1 (West Supp. 1984); CAL. CIV. PROC. CODE § 1023 (West 1980). A stipulation for compensation, although usually binding, may be withdrawn under appropriate circumstances if the cost would be excessive. *See, e.g.*, Harris v. Board of Educ., 72 Cal. App. 2d 43, 163 P.2d 883 (1st Dist. 1945) (defendant relieved from stipulation to refer to an accountant, with fees calculated *per diem*, when later estimate showed cost of reference would be $150,000).

[35] *See* Note, *Pay-As-You-Go*, *supra* note 10, at 1595.

[36] In contrast to referees, temporary judges must be members of the State Bar. The stipulation must be in writing, including the name and address of the temporary judge, CAL. RULE OF COURT 244(a), unless a court commissioner will act as the temporary judge, *see, e.g.*, Bill Benson Motors, Inc. v. MacMorris Sales Corp., 238 Cal. App. 2d Supp. 937, 942, 48 Cal. Rptr. 123, 126-27 (1965) (different stipulation requirements), in which case the stipulation may be made in open court, Estate of Kent, 6 Cal. 2d 154, 163, 57 P.2d 901, 906 (1936); CAL. RULE OF COURT 244(b). *See generally* CAL.

the appointment of the temporary judge.[37] Unlike reference, the stipulation may precede filing of the complaint.[38] Within the limits of the cause,[39] the temporary judge has the same power as a traditional judge.

CONST. art. VI, § 22 (authorizing court commissioners); CAL. CIV. PROC. CODE § 259(2), (5) (West Supp. 1984) (powers and duties of court commissioners).

Absent a valid stipulation, the temporary judge has no authority and her actions are void. *See, e.g.*, Rooney v. Vermont Inv. Corp., 10 Cal. 3d 351, 360, 515 P.2d 297, 303, 110 Cal. Rptr. 353, 359 (1973) (vacating judgment without valid stipulation).

As the stipulation for a court commissioner to serve as a temporary judge need not be in writing, a voluntary appearance before a commissioner and participation without objection in the hearing will be deemed a stipulation. *Compare* Estate of Lacy, 54 Cal. App. 3d 172, 182, 126 Cal. Rptr. 432, 439 (2d Dist. 1975) (party who appeared with counsel, participated fully in hearing without objection, examined witnesses and argued law deemed to have stipulated to court commissioner as temporary judge) *with* Lovret v. Seyfarth, 22 Cal. App. 3d 841, 852-53, 101 Cal. Rptr. 143, 150-51 (2d Dist. 1972) (acts without stipulation void, regardless of participation).

[37] A party litigant is a party who has appeared and is actively litigating a case. Sarracino v. Superior Court, 13 Cal. 3d 1, 10, 529 P.2d 53, 60, 118 Cal. Rptr. 21, 28 (1974) (party litigant status forfeited by default in temporary support proceeding, opposing party acting alone could stipulate to temporary judge, although in underlying dissolution action status was retained); Estate of Kent, 6 Cal. 2d 154, 162, 57 P.2d 901, 905 (1936); Lint v. Chisholm, 121 Cal. App. 3d 615, 621, 177 Cal. Rptr. 314, 317 (4th Dist. 1981) (defendant not a party litigant who answered but did not appear at trial).

A defaulter is not a party litigant, so a temporary judge may properly hear a case without that party's stipulation. A distinction should be made between a default and an uncontested proceeding. *Compare* Barfield v. Superior Court, 216 Cal. App. 2d 476, 479, 31 Cal. Rptr. 30, 32 (2d Dist. 1963) (defaulter not a party litigant) *with* Mosler v. Parrington, 25 Cal. App. 3d 354, 357, 101 Cal. Rptr. 829, 831 (2d Dist. 1972) (party who answers, but does not appear at hearing on motion to strike, is party litigant in underlying action, even though answer is stricken). *But cf.* Rooney v. Vermont Inv. Corp., 10 Cal. 3d 351, 366, 515 P.2d 297, 307, 110 Cal. Rptr. 353, 363 (1973) (*Mosler*'s reasoning that party litigant status extends to proceeding in which party defaulted disapproved).

[38] Weisman, *supra* note 8, at 3.

[39] "Cause" refers to proceedings before the court. CAL. CONST. art. VI, § 21. Temporary judges may be appointed to hear causes logically related to, but legally separate from, an underlying principal case. Appointment does not authorize the temporary judge to act in proceedings distinct from the assigned case, even if they are ancillary to it. *See, e.g.*, Sarracino v. Superior Court, 13 Cal. 3d 1, 9, 529 P.2d 53, 59, 118 Cal. Rptr. 21, 28 (1974) (temporary judge could act without stipulation in temporary support proceeding, but not in divorce suit, because defendant, although a party litigant in the former, was not in the latter, and two causes were distinct). Thus, a temporary judge can cite for contempt, but may not adjudicate the contempt charge unless the contemner stipulates that the judge may do so. *See, e.g., In re* Frye, 150 Cal. App. 3d 407, 197 Cal. Rptr. 755 (4th Dist. 1983); Rosenstock v. Municipal Court, 61 Cal. App. 3d 1, 132 Cal. Rptr. 59 (2d Dist. 1976); People v. Nierenberg, 59 Cal. App. 3d 61, 130 Cal. Rptr. 847 (2d Dist. 1976). The authority of the temporary judge continues until final resolution of the dispute; she may hear motions for a new trial. Anderson v.

Once the required stipulation, which confers jurisdiction, has been made and approved, the acts of a temporary judge do not differ from those of a traditional judge. The judgments of temporary and traditional judges are equivalent.[40] The rules of appellate review are the same for both.[41] In contrast to a reference or arbitration, stipulating to a temporary judge does not waive the right to a jury trial,[42] although no jury trials before private temporary judges have been reported.[43] A temporary judge may conclusively resolve pretrial and discovery matters, rather than obtain traditional court approval as is required of referees.[44] The statutes are silent as to compensation,[45] but in practice, the parties negotiate a fee with the temporary judge in the same fashion as with referees.

C. Distinguishing Private Judging from Arbitration

Private judging is not simply a variation of either private[46] or judicial[47] arbitration, although it is superficially similar. Each procedure

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Bledsoe, 139 Cal. App. 650, 34 P.2d 760 (2d Dist. 1934).

[40] Unlike referees, temporary judges do not file findings. Myers, *supra* note 8, at 1043.

[41] *See* CAL. CIV. PROC. CODE § 904.1(a) (West Supp. 1984).

[42] To rectify the deprivation of trial by jury which was a consequence of use of the reference provisions of the Code of Civil Procedure, the Constitution of 1879 instituted temporary judging. CALIFORNIA CONSTITUTIONAL CONVENTION, 1878-1879, DEBATES AND PROCEEDINGS 971-72.

[43] Private judges have probably not used juries for pragmatic reasons. A jury trial would take longer, adding significantly to the cost of private judging. One advantage of private judging, a judge with expertise in the area of the dispute, would be lost. Finally, it is not clear how potential jurors could be obtained.

[44] CAL. CIV. PROC. CODE § 639(e) (West Supp. 1984) specifically authorizes special referees to resolve discovery disputes. However, the issuance of an order is contingent on trial court approval, *cf. supra* note 40, so the added step will cause some delay.

[45] CAL. CIV. PROC. CODE §§ 645.1, 1023 (West 1980 & Supp. 1984), apply only to reference, except that court commissioners may not receive additional compensation to serve as private judges.

[46] Private arbitration occurs through predispute contracting or through postdispute choice of the parties. Judicial involvement enforces the agreement, rather than enforcing arbitration per se. Although private arbitration varies with the sponsoring organization, in this Comment private arbitration refers to the method of dispute resolution conducted under the auspices of the American Arbitration Association. Because its subject matter is unrestricted, and because it is open to all who wish to use it, this form of arbitration provides the most useful comparison to private judging. *See generally* CAL. CIV. PROC. CODE §§ 1280-1294.2 (West 1982 & Supp. 1984).

[47] To reduce civil trial delay, California now requires some civil actions with an amount in controversy less than $15,000 to go to arbitration. The court oversees the process and assigns a case only after a complaint has been filed: hence the term "judi-

avoids the delay and expense of the traditional trial courts, accommodates the scheduling needs of the litigants, and, under the best of circumstances, allows the litigants to select a person with knowledge of the area of law or factual context of the dispute.[48] But, while arbitration may be quite informal,[49] private judges conduct hearings under the same procedure and with the same formality as traditional judges.[50] The Evidence Code applies to private judging,[51] but not to private arbitration,[52] and only partially to judicial arbitration.[53] Arbitrators may disregard legal precedent and are often expected to resolve disputes according to commercial custom,[54] whereas private judges may not.[55] These differences, while important, are not critical, because parties to private arbitration are free to conduct a proceeding as though it were a traditional trial. The key difference between arbitration and private

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cial" arbitration. Judicial arbitration is an adversary procedure intended to replace trial; it is not a modified settlement conference. *See* CAL. CIV. PROC. CODE §§ 1141.10 to .32 (West 1982 & Supp. 1984). *See generally* Snow & Abramson, *Alternative to Litigation: Court-Annexed Arbitration*, 20 CAL. W.L. REV. 43 (1983).

[48] *See* F. ELKOURI & E. ELKOURI, *supra* note 5, at 8-9 (labor arbitration); Christensen, *Private Justice: California's General Reference Procedure*, 1982 AM. B. FOUND. RESEARCH J. 79, 83-84; Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 859-60 (1961). If the litigants select an experienced private judge, they are able to reduce trial time because they do not have to educate the judge as to the factual background of the dispute.

[49] Mentschikoff, *supra* note 48, at 864.

[50] "[A] trial before a referee should be conducted in the same manner as though it was held before a court." Rice v. Brown, 104 Cal. App. 2d 100, 107, 231 P.2d 65, 68 (2d Dist. 1951) (quoting Goodrich v. Mayor and Common Council of Marysville, 5 Cal. 430, 431 (1855)); *Rent-a-Judge*, TIME, Apr. 20, 1981, at 51.

[51] CAL. EVID. CODE § 300 (West Supp. 1984):

> Except as otherwise provided by statute, this code applies in every action before the Supreme Court or a court of appeal, superior court, municipal court, or justice court, including proceedings in such actions conducted by a referee, court commissioner, or similar officer, but does not apply in grand jury proceedings.

[52] CAL. CIV. PROC. CODE § 1282.2(d) (West 1982).

[53] The Evidence Code is relaxed in a few special areas, generally for written testimony and documentary evidence. CAL. RULE OF COURT 1613.

[54] Legal principles are considered, but will be ignored if they prevent a fair decision. Mentschikoff, *supra* note 48, at 861. Arbitration is ad hoc, so the arbitrators need not consider the precedential value of their decisions. In fact, the American Arbitration Association prefers that arbitrators not write opinions explaining their decisions. Concerned with fairness rather than rule formation, *cf. infra* notes 121-24 and accompanying text, arbitrators may favor personal equities over situational equities in a suit, a luxury in which most judges may not indulge. *See* Mentschikoff, *supra* note 48, at 868.

[55] Appellate review of private judge decisions compels the application of legal precedent. *Cf. infra* note 58.

judging lies in the nature of the decision rendered. An arbitrator's award,[56] unless fraudulently obtained, is final and not appealable, and cannot be enforced until a separate legal action has been filed.[57] In contrast, the private judge's decision is appealable, and corresponds exactly to a traditional civil judgment.[58] For these reasons, private judging is more akin to the traditional courts than to arbitration.[59]

Both reference and temporary judging have been retained without major modification for more than one hundred years.[60] Neither is itself the object of controversy. However, by introducing the element of private payment, private judging has provoked criticism from some legal

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[56] The arbitrator makes an award without explanation. In a sense, this is similar to a jury's general verdict. Mentschikoff, *supra* note 48, at 866. Judicial review, if allowed, might be comparable to review of jury verdicts — is the decision consonant with the evidence? As arbitration proceedings are not usually recorded, *id.* at 864, this task may be impossible. Yet, the possibility of error is not of major importance because unlike traditional judgments, the mistake cannot be multiplied by subsequent judicial reliance on an erroneous decision.

[57] CAL. CIV. PROC. CODE § 1286.2 (West 1982). Because judicial arbitration is compulsory, a trial de novo is available to avoid deprivation of trial by jury. CAL. CIV. PROC. CODE § 1141.20 (West 1982).

[58]
> The finding of the referee or commissioner upon the whole issue [general referee] must stand as the findings of the court, and upon filing of the finding with the clerk of the court, or with the judge where there is no clerk, judgment may be entered thereon in the same manner as if the action had been tried by the court.

CAL. CIV. PROC. CODE § 644 (West 1976); CAL. CIV. PROC. CODE § 645 (West 1976) ("The findings of the referee or commissioner may be excepted to and reviewed in like manner as if made by the Court."); *see* Estate of Kent, 6 Cal. 2d 154, 163, 57 P.2d 901, 906 (1936):

> While a judge *pro tempore* is selected under the stipulation of the parties litigant by the approval and order of a 'regular' judge, still, when acting, the judge *pro tempore* is acting for the superior court. The judgments and orders of the superior court, a judge *pro tempore* presiding, are entitled to the same presumption of regularity as a court with a regular judge presiding.

See also Ellsworth v. Ellsworth, 42 Cal. 2d 719, 722, 269 P.2d 3, 5 (1954); CAL. CIV. PROC. CODE § 904.1(a) (West Supp. 1984) (no distinction made between judgments of traditional judges, court commissioners, referees, and temporary judges).

[59] Precisely because private judging is more akin to the traditional court system, it is subject to criticism which has not been made in the arbitration context. Specifically, although arbitrators charge fees, no wealth discrimination claims have been asserted. *Cf. infra* notes 65-115 and accompanying text. Arbitration does not formulate rules, but no inefficiency objections are made. *Cf. infra* notes 116-29 and accompanying text. Arbitration hearings can be held in private, yet their secrecy has not provoked an outcry. *Cf. infra* notes 130-80 and accompanying text.

[60] *See supra* notes 15-16.

observers.

II. Objections to Private Judging

Private judging can be quite fruitful for the litigants who use it. It provides speedy justice, yet, unlike arbitration, preserves appellate review. For others, however, the private judging system is not so attractive. Critics assert that only the affluent can afford this expedited form of dispute resolution.[61] Because private litigants incur expenses which traditional litigants do not, private judging appears more expensive. Thus, the nonaffluent are ostensibly excluded.[62] This apparently unequal access is said to violate the fourteenth amendment.[63] This Comment begins its analysis of this objection with the issue of state action, then considers, and rejects, extension of federal and California due process and equal protection precedent to encompass private judging.

A second objection to private judging is that it distorts the judicial process. Private judges might be biased as a result of private payment of fees, and the system might be an inefficient use of judicial resources. However, a comparison with the traditional courts suggests that the congestion of the traditional courts, the problem which led to private judging, creates a broader and more serious form of unfairness than does private judging.

A few litigants have used private judging to keep litigation secret from the public,[64] provoking the third objection to private judging. This Comment inquires whether the first amendment prohibits secret civil trials, but finds that such a prohibition, although consistent with the Constitution, finds no expression in current case law. California's open civil trial statute bars secret trials independently, but may be difficult to enforce. Because public policy so strongly demonstrates the desirability of enforcing the statute, a model court rule and stipulation are proposed to conform private judging practice to the demands of the statute.

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[61] *See, e.g.*, Note, *Pay-As-You-Go*, *supra* note 10, at 1601.

[62] *But see supra* note 12.

[63] *E.g.*, Note, *Pay-As-You-Go*, *supra* note 10, at 1601-08.

[64] *See, e.g.*, Myers, *supra* note 8, at 1043 (Johnny Carson's contract dispute with NBC).

A. Distinctions Based on Wealth

1. State Action

The fourteenth amendment[65] does not prohibit purely private conduct abridging individual rights — only when the state is involved will the challenged activity be measured against the Constitution.[66] Therefore, private judging, to be unconstitutional, must be an exercise of state power in violation of the strictures of due process or equal protection.

State action falls into two broad classes. The first class involves some specific act of a branch of government, its agencies or officials.[67] Analysis of this form of state action is usually straightforward because the state participation is overt. The second class involves acts by persons not actually a part of the government, but who nevertheless have sufficient contacts with the state to make it fair to attribute their conduct to the state.[68] Analysis of this form of state action is more difficult, because state participation will rarely be explicit. Private judging is susceptible to both forms of analysis.

a. Conduct by the State

The reference and temporary judging statutes per se are clear examples of the first class of state action: conduct by the state. The enactment of these statutes was an overt act of the California Legislature. But because the challenged discrimination in private judging arises

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[65] "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny any person . . . the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The general civil statute implementing the fourteenth amendment is 42 U.S.C. § 1983 (Supp. V 1981).

[66] *E.g.*, Rendell-Baker v. Kohn, 457 U.S. 922, 936-37 (1982); Shelley v. Kraemer, 334 U.S. 1, 13 (1948) ("the principle has become firmly embedded in our constitutional law that the action inhibited by the . . . Fourteenth Amendment is only such action as may fairly be said to be that of the States"); The Civil Rights Cases, 109 U.S. 3 (1883).

[67] *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("The Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures — Boards of Education not excepted."); Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 228; *cf.* Polk County v. Dodson, 454 U.S. 312, 325 (1981) (public defender performing traditional functions as counsel to criminal defendant not a state actor although employed by state).

[68] *See, e.g.*, Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-37 (1982) (private creditor's prejudgment writ of attachment executed by sheriff; state action).

from the litigants and the private judge rather than the statutes,[69] this conclusion establishes state action but not a constitutional violation. Nothing suggests that California is using a facially neutral statute to intentionally discriminate against the nonaffluent.[70]

The courts have not ruled on the status of private judges, but traditional judges are state actors.[71] Referees and temporary judges are nominal members of the judicial branch of government because they are court-appointed. Hence, the actions of a private judge would seem to be prima facie state action. However, unlike traditional judges, private judges are compensated by the litigants, not the state. Private judges have unfettered discretion to accept or reject profferred cases; in contrast to traditional judges, they need not accept all comers. Because compensation of, and consequently access to, private judges is not identical to traditional judges, the state actor characterization of traditional judges provides a less than compelling analogy. The core issue is whether private compensation by the litigants negates the inference of state action arising from the private judge's role in the judicial system.

b. Conduct by Private Persons

Distinguishing private conduct from conduct attributable to the state may be difficult when the state's involvement is not obvious. Whether any single, comprehensive test for state action can be distilled from the

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[69] *Cf. id.* at 938-39, 941-42 (deprivation of due process not instigated by the state, but state action found in joint participation with state official); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972) (when impetus for discrimination is private, state must have significantly involved itself with invidious discrimination to produce state action).

[70] The state must have intended to discriminate to establish a violation of equal protection. Washington v. Davis, 426 U.S. 229, 239-41 (1976); *cf.* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (facially neutral statute applied in an intentionally discriminatory fashion).

[71] *See* Dennis v. Sparks, 449 U.S. 24, 28 n.5 (1980) (§ 1983 action alleged state court judge conspired with private parties; judge a state actor even though personally immune from damages). 42 U.S.C. § 1983 (Supp. V 1981) has been construed to grant judges immunity from liability for damages for acts committed within their judicial jurisdiction. Stump v. Sparkman, 435 U.S. 349 (1978); Pierson v. Ray, 386 U.S. 547, 553-55 (1967); *cf. Ex parte* Virginia, 100 U.S. 339 (1873) (state court judge had no immunity in action under Act of Mar. 1, 1875, ch. 114, 18 Stat. pt. 3, at 335, a different statute enforcing fourteenth amendment). However, judicial immunity does not extend to injunctive or declaratory relief requested under § 1983. Supreme Court v. Consumers Union, 446 U.S. 719, 734-37 (1980); *see also* Dennis v. Sparks, 449 U.S. 24 (1980).

precedents seems doubtful[72] — resolution of the state action question often demands "sifting facts and weighing circumstances."[73] In practice, three factors seem more important than others: whether the state, because of a symbiotic relationship with the private actor, benefits from or is dependent on the challenged activity,[74] whether the state encourages[75] or coerces[76] the challenged activity, and whether the challenged activity has traditionally been an exclusive government function.[77]

Burton v. Wilmington Parking Authority[78] best exemplifies the symbiotic relationship test. The State of Delaware permitted a private party to operate a segregated restaurant in a public parking structure. Delaware depended on or at least strongly benefitted from the increased revenue the challenged activity made possible.[79] Hence, it had a correspondingly strong interest in continued discrimination. The power and prestige of the state, tied to the segregation through financial interdependence, gave the challenged practice heightened effectiveness and insulated it from forces which might have weakened or abolished it.[80]

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[72] L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1148-49 (1978); Glennon & Nowak, *supra* note 67, at 225-26.

[73] Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

[74] *E.g., id.*

[75] *E.g.*, Norwood v. Harrison, 413 U.S. 455, 466 (1973) (grant aid to segregated private school); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (custom of segregation supported and enforced through state criminal trespass statute).

[76] *E.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1972) (state regulation required compliance with discriminatory club bylaw).

[77] *E.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352-53 (1974) (public utility, no state action); Terry v. Adams, 345 U.S. 461 (1953) (election, state action); Marsh v. Alabama, 326 U.S. 501 (1946) (company town, state action).

[78] 365 U.S. 715 (1961).

[79] *Id.* at 724 ("Neither can it be ignored, especially in view of Eagle's affirmative allegation that for it to serve Negroes would injure its business, that profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency.").

[80] The holding in *Burton* was based on a unique set of circumstances. The segregated restaurant was located in an obviously public facility, and as the Court noted:

> It is irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race, without rights and unentitled to service . . . .

Id. at 724. Whether *Burton* can be extended beyond its facts seems doubtful. In fact, *Burton* has been called the "major spider" in the otherwise seamless web of state action law. L. Tribe, Comments at the Fourth Annual Supreme Court Review and Constitutional Law Symposium (Sept. 24-25, 1982) (available from National Practice Institute).

The Supreme Court, on the facts, found state action which subjected the segregation to constitutional scrutiny.

California gains from the use of private judges, as do the litigants and the public at large. When private judging is employed, the state receives judicial services at no cost to itself and court delay is reduced. But, California neither depends on nor benefits from the wealth discrimination which critics seek to subject to constitutional challenge. Each time a private judge refuses to hear a case, California must provide judicial services through the traditional courts. The benefits to California from private judging increase when the private judge does not discriminate. Hence, the state's interest lies in the termination, not the continuation, of the discrimination. The lack of intertwined state and private interests leads to one conclusion: the symbiotic relationship test does not result in state action.

Challenged practices imbued with state approval also satisfy the state action requirement. When the challenged activity would be impossible but for state support, such as state funding or joint participation of a state official, the fourteenth amendment is applicable.[81] When the challenged practice is the result of state coercion of private parties, there is state action.[82] In both cases, it is only fair to attribute to the state practices of which it is the substantial cause.

State funding can show state encouragement of challenged activity. Given the limited funds available to the state, one may safely assume that the state has funded only those activities which it desires to encourage. The converse is less reasonable. Even assuming a state encourages activities it funds, it does not follow that the state funds all activities it encourages. Some activities do not need funding, others can easily obtain funding from the private sector, and still others the state cannot legally fund. Thus, that California does not compensate private judges provides little support to the inference of state action. An equally reasonable inference to draw from private payment is that the conduct is private. Private payment is consistent with state disapproval of the challenged activity, implying that the state is not using a proxy to engage in activity forbidden to it as a state.

Some constitutional claimants have sought to establish state action

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[81] *E.g.*, Lugar v. Edmondson Oil Co., 457 U.S. 922, 941-42 (1982) (participation of county sheriff state action); Norwood v. Harrison, 413 U.S. 455, 466 (1973) (provision of textbooks at state expense to private schools state action).

[82] *E.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1972) (claim that general liquor license regulation established state action rejected, but particular regulation requiring compliance with discriminatory bylaw accepted as state action).

through state regulation, arguing that because the state coerced private parties into acting in a discriminatory fashion, responsibility is properly charged to the state. *Jackson v. Metropolitan Edison Co.*[83] endorsed this principle, but with severe restrictions, holding that unless state regulation clearly required the private entity to engage in the challenged activity, there could be no state action.[84] The *Jackson* analysis applies to private judging. California regulates private judging, but does not demand discrimination against the nonaffluent. In fact, the compensation statute is as easily satisfied by waived fees as by the customary fees.[85] In the absence of a rule which coerces private parties to discriminate, state regulation of private judging does not support state action.

When purportedly private citizens exercise a traditionally exclusive government function, those citizens become subject to constitutional restraints through the doctrine of state action.[86] The "traditionally exclusive government function" test distinguishes the activities in which truly private citizens can engage from those in which they can not. If the state confers power on nominally private citizens, authorizing them to do what they could not do before, the state thereby becomes involved in the activity *pro tanto*.[87]

California has delegated a traditionally exclusive government function to the private judge, establishing state action. Although many ways exist to resolve private disputes, the ability to conclude a dispute by

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[83] 419 U.S. 345 (1974).

[84] *Id.* at 350-51, 354-57.

[85] CAL. CIV. PROC. CODE § 645.1 (West Supp. 1984):

> The court may order the parties to pay the fees of referees who are not employees or officers of the court at the time of appointment, as fixed pursuant to Section 1023, in any manner determined by the court to be fair and reasonable, including an apportionment of the fees among the parties.

CAL. CIV. PROC. CODE § 1023 (West 1980) (emphasis added):

> The fees of referees are such reasonable sum as the court may fix for the time spent in the business of the reference; but the parties may agree, in writing, upon *any other rate of compensation, and thereupon such rates shall be allowed.*

[86] *See* Flagg Bros. v. Brooks, 436 U.S. 149, 157-63 (1978) (self-help under statutory warehouseman's lien not traditionally exclusive government function); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353-54 (1974) (public utility not traditionally exclusive government function); *cf.* Terry v. Adams, 345 U.S. 461 (1953) (Jaybird primary election subject to fifteenth amendment); Marsh v. Alabama, 326 U.S. 501 (1946) (company town subject to first amendment).

[87] *Cf.* Glennon & Nowak, *supra* note 67, at 233 ("In public function cases the importance and public nature of the challenged practice will tend to maximize the harm done to an individual by the person who controls that activity . . . .").

making an authoritative determination of rights[88] is central to government's role in society.[89] California has chosen to assign part of this judicial function to private tribunals, giving them the authority of the traditional courts to render binding judgments. By requesting the traditional judge to appoint a private judge, the litigants concede that the source of the private judge's power is the state. The stipulation procedure also emphasizes that California, with each instance of private judging, has deliberately chosen to confer a portion of its power. Because the power delegated to the private judge is so intimately associated with our concept of sovereignty, the state action doctrine forbids California to authorize the exercise of that power without the same degree of constitutional protection as would apply in the traditional courts.[90]

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[88] Private judges render binding civil judgments. *See supra* note 58. It is this element which distinguishes state action analysis of private judging from state action analysis of arbitration. Dispute resolution accomplished through the efforts of private citizens has never been a traditionally exclusive government function. The state has usually preferred that parties settle their disputes through private means, such as negotiation, mediation, or arbitration, rather than invoking traditional legal process. These methods are dependent for their effectiveness upon moral suasion rather than legal compulsion. Because they do not invoke the powers of the state if they are instituted without recourse to the courts, they are clearly not state action.

Once the state places its power and prestige behind an arbitration award, the state action analysis changes dramatically. For example, California allows parties to bring an action in the traditional courts to enforce a private arbitration award. CAL. CIV. PROC. CODE § 1285 (West 1982). This state involvement ought to be sufficient to establish state action insofar as the arbitration award affects the substantive rights of the parties. *Cf.* Shelley v. Kraemer, 334 U.S. 1 (1947) (no state action when discrimination enforced by moral force of covenant, but state action when court attempted to enforce discriminatory covenant through legal process).

[89] T. HOBBES, LEVIATHAN 91-92 (1st ed. London 1651); J. LOCKE, TWO TREATISES OF GOVERNMENT 344-45 (P. Laslett ed. 2d ed. 1967) (1st ed. London 1689); *see also* Boddie v. Connecticut, 401 U.S. 371, 374 (1971).

[90] An example of a dispute resolution system which is not subject to the restraints of the fourteenth amendment illuminates the issue. In Person, *Justice, Inc. — A Proposal for a Profit-Making Court*, JURIS DR., Mar. 1978, at 32, a truly private court system is described. The system provides both a trial judge and a panel of three appellate judges to litigants willing to purchase their services. Unlike California's referees and temporary judges, these "private" judges have not been granted power by the state. Instead, the "private" trial is treated by the state as arbitration and the litigants must file a separate legal action to enforce the award. The difference is crucial. California's private judging procedure is state action because the state has delegated its power to make *authoritative* determinations of legal rights. That the California procedure is labeled private judging is of little significance except to characterize the fee arrangement. The "private" court system described by Person, *supra*, is not state action because the state has not delegated the power to render a decision equivalent to a traditional

2. Federal Due Process and Equal Protection

The United States Supreme Court has examined court access for indigents under due process standards: states must provide indigents seeking to assert fundamental rights a meaningful opportunity to be heard.[91] However, the would-be litigant has no right of access to any

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judgment.

[91] In Boddie v. Connecticut, 401 U.S. 371 (1971), a state $45 filing fee and $15 service of process fee prevented two indigents from obtaining a divorce. The Court held that given the importance of the marriage relationship and the state's monopoly of the means of legally dissolving marriage, denying access to the courts violated due process. *Id.* at 374. The Court qualified the holding by suggesting that if an effective, recognized alternative to the courts exists, the legitimacy of the state's court system will be unimpaired, even though it denies access to some. *Id.* at 375-76. Access to the courts was not held to be a right that the Constitution guaranteed in all circumstances. *Id.* at 382.

In United States v. Kras, 409 U.S. 434 (1973), an indigent was denied discharge in bankruptcy because he could not pay the $50 filing fee, either at the time of the application or over a period of nine months. Applying the rational relationship test, *id.* at 466, the Court distinguished *Boddie* on two grounds. First, release from debts could be obtained by negotiation, thus the judicial proceeding was not the only effective means of resolving the dispute. Second, the interest in a discharge in bankruptcy did not rise to the same constitutional level as the associational concerns of marriage. *Id.* at 443-45.

The *Kras* Court had little sympathy for the indigent would-be litigant. Although negotiation might theoretically have been an "effective, recognized alternative" to bankruptcy, practically it was not. Kras' creditors had no incentive to negotiate, as Kras had nothing to offer. To use Justice Stewart's phrase, Kras was "too poor even to go bankrupt." *Id.* at 457 (Stewart, J., dissenting).

In Ortwein v. Schwab, 410 U.S. 656 (1973) (per curiam), welfare recipients were denied appellate review of an administrative ruling which reduced their benefits because they could not pay a $25 filing fee. Applying the rational relationship test, the Court found that the aim of bringing in some small amount of funds to offset costs was sufficient justification for the fee. The Court did not find that the filing fee violated equal protection by discriminating against the poor. *Id.* at 660-61.

Ortwein is problematic. It deals with appellate review, not trial level access, and so may not be applicable to private judging. *See* Christensen, *supra* note 48, at 92-93; Note, *Pay-As-You-Go*, *supra* note 10, at 1605 n.80. Also, *Ortwein* sees "effective, recognized alternatives" when none exist: the Court seems to say that even after an adverse administrative ruling, Ortwein could have negotiated with the state to have the benefits reinstated.

If the two elements of *Boddie*, a fundamental interest and lack of alternative means of resolution, are interdependent, then it is doubtful that *Boddie* poses a serious threat to private judging. The traditional court system will be an effective, recognized alternative in those few cases in which the Court must reach farther than it did in *Ortwein* to deny court access to indigents. *See generally* Note, *The Heirs of* Boddie*: Court Access for Indigents After* Kras *and* Ortwein, 8 HARV. C.R.-C.L. L. REV. 571 (1973).

particular forum unless no other recognized, effective forum exists.[92] Private judging does not violate due process, because a recognized and effective alternative forum exists for the resolution of the fundamental rights of the nonaffluent. Private judging is collateral to the traditional courts; it does not limit them, but merely provides an auxiliary forum.[93] Additionally, California's traditional courts permit indigent litigants to proceed in forma pauperis.[94] The nonaffluent may be denied access to a particular forum, private judging, but have access to the traditional courts. Therefore, the procedure does not violate due process.[95]

Although not the method of analysis chosen by the Supreme Court, equal protection provides an alternative framework for challenging pri-

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[92] Critics of private judging apparently do not regard the three to four year delay in the traditional courts as denying litigants a meaningful opportunity to be heard. In light of the California statute which mandates dismissal of any action which has not come to trial within five years after being filed, CAL. CIV. PROC. CODE § 583(b) (West Supp. 1984), this may not long be the case. *Cf.* Note, *Pay-As-You-Go*, *supra* note 10, at 1606-07.

[93] Other available forums are the small claims court for claims not exceeding $1500, CAL. CIV. PROC. CODE § 116.2 (West 1982), municipal and justice courts for claims not exceeding $15,000, CAL. CIV. PROC. CODE § 86 (West Supp. 1984), and judicial arbitration for claims filed in the superior court with an amount in controversy of $15,000 or less, CAL. CIV. PROC. CODE § 1141.11 (West Supp. 1984) ($25,000 in Los Angeles). Delay is not as severe in the lower courts. The median time from at-issue memorandum to civil jury trial, in June of 1981, was ten months in Los Angeles and five months in San Diego. 1982 CAL. JUDICIAL COUNCIL, ANNUAL REPORT 105. *Cf.* *supra* note 1.

[94] *See, e.g.*, Earls v. Superior Court, 6 Cal. 3d 109, 113, 490 P.2d 814, 815, 98 Cal. Rptr. 302, 303 (1971) (filing fees for divorce); Ferguson v. Keays, 4 Cal. 3d 649, 484 P.2d 70, 94 Cal. Rptr. 398 (1971) (appellate court filing fees); Martin v. Superior Court, 176 Cal. 289, 168 P. 135 (1917) (jury fees).

[95] California makes persons available, at least to a limited extent, to hear civil cases under the same authority as private judging. Court commissioners may serve as referees or temporary judges upon stipulation of the parties. They receive no compensation in addition to that paid by the state, so indigency is not a bar. CAL. CIV. PROC. CODE § 259(5) (West Supp. 1984).

The nonaffluent need not be precluded from using private judging; the statute requires no payment. A person might be willing to serve as a private judge with compensation contingent upon ability to pay. Private judging could be used to open up neighborhood justice centers. However, there appear to be two drawbacks. First, the pool of persons experienced and willing to act as judges without compensation may be small. Second, some litigants have an interest in postponing final adjudication, and would not willingly consent to appearing before a private judge, even if free. *See generally* Hager, *'Rent-a-Judge' Use Examined, Criticized*, L.A. Times, Dec. 22, 1981, pt. I, at 3, col. 1 (delay); Hill, *Rent-a-Judge: California is Allowing its Wealthy Litigants to Hire Private Jurists*, Wall St. J., Aug. 6, 1980, at 1, col. 1 [hereafter Hill].

vate judging.[96] Economic status may distinguish those able to avail themselves of private judging from those who are not.[97] However, classifications based on wealth are neither suspect[98] nor disfavored.[99] Under the applicable unexacting rational relationship test, private judging does not violate equal protection.

The traditional courts provide a system for the resolution of legal disputes. Private judging is not a principal part of that system; rather, private judging is allowed to exist independent of the traditional courts.[100] Because it is independent, the state allocates no funds. To

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[96] *See, e.g.*, Note, *Pay-As-You-Go*, *supra* note 10, at 1601-06. Justices Douglas and Brennan concurred in the result in Boddie v. Connecticut, 401 U.S. 371, 383-86 (1971) (Douglas, J., concurring in the result); *id.* at 386-89 (Brennan, J., concurring in part), but their separate opinions analyzed denial of access under the equal protection principles enunciated in Griffin v. Illinois, 351 U.S. 12 (1956). They dissented in United States v. Kras, 409 U.S. 434, 457-58 (1973), preferring an equal protection analysis, and found access guaranteed. Justice Douglas dissented in Ortwein v. Schwab, 410 U.S. 656, 661-65 (1973), finding that the wealth-based classification required the state to advance a compelling interest to avoid invalidation on equal protection grounds.

[97] The wealth classification challenge is premised on the disparate impact that private judging fees may have on the access of the nonaffluent to private judging. Disparate impact, standing alone, is not enough to sustain an equal protection challenge; the constitutional claimant must show that the disparity was intended by the state. Washington v. Davis, 426 U.S. 229, 239-41 (1976). Intent to discriminate is not established by showing that the state could reasonably have foreseen the disparity, unless no plausible explanation for the action of the state is offered. Personnel Adm'r v. Feeney, 442 U.S. 256 (1979) (veterans' preference rule challenged as having a disparate impact on women). Nothing suggests that exclusion of the nonaffluent from private judging was intended by the state. Although the state might have foreseen that self-supporting courts might not be as available to the poor as to the affluent, this argument proves too much, as it would impute the intent to discriminate to any state actions which involve fees. Thus, the equal protection challenge has little prospect for success.

[98] Harris v. McRae, 448 U.S. 297, 323 (1980) (federal abortion funding); Maher v. Roe, 432 U.S. 464, 471 (1977) (state abortion funding); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973) (school financing); Ortwein v. Schwab, 410 U.S. 656, 660-61 (1973) (per curiam) (court fees); Dandridge v. Williams, 397 U.S. 471 (1970) (welfare benefits).

[99] Poorer litigants might constitute a semisuspect class which heightened scrutiny should protect. *Cf.* Kirchberg v. Feenstra, 450 U.S. 455, 459-61 (1981) (married women); Mathews v. Lucas, 427 U.S. 495, 504-10 (1976) (nonmarital children). However, the Supreme Court has not so recognized the poor. For an interesting discussion of the present status of wealth classifications, see Nelson, *Wealth Classifications and Equal Protection: Quo Vadimus?*, 19 HOUS. L. REV. 713 (1982).

[100] In a zero-sum system, each gain by one is matched by a loss by another, such that there is no overall group gain or loss. Were private judging part of a zero-sum system, it might be reasonable to require it to allocate resources so as to maximize the benefit to society as a whole, rather than the few who use private judging. But private judging is

survive, private judging must be self-supporting — consequently, fees will be high.[101] The affluent are distinguished from the nonaffluent, not as a result of prejudice, but as a matter of economics.[102] Equal protec-

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not. Its benefits do not come at the expense of traditional litigants. In fact, it may benefit them by reducing trial delay. It seems unreasonable to strike down private judging, although it benefits some without depriving others, simply because it does not benefit all equally.

[101] The Supreme Court's court access cases concerned nominal filing fees, payable to the state, which could never make the court system self-supporting and were not intended to do so. Ortwein v. Schwab, 410 U.S. 656 (1973) (per curiam) ($25 filing fee); United States v. Kras, 409 U.S. 434 (1973) ($50 filing fee, payable in installments); Boddie v. Connecticut, 401 U.S. 371 (1971) ($45 filing fee, $15 for service of process). At least one justification for retaining the fees, despite the fact that abolishing them would not impose a major financial burden on the state, is that they discourage frivolous claims. This has not been advanced as a justification for private judging fees.

[102] The refusal to recognize a general right to counsel for indigents in civil matters is analogous. Absent a clear constitutional imperative, and in an era of limited resources, courts have been reluctant to require state funding of free civil counsel. *E.g.*, Hunt v. Hackett, 36 Cal. App. 3d 134, 111 Cal. Rptr. 456 (2d Dist. 1973), *cert. denied*, 419 U.S. 854 (1974); *see also* Johnson & Schwartz, *Beyond* Payne*: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants — Part One: The Legal Arguments*, 11 LOY. L.A.L. REV. 249 (1978) (arguing the courts should not be so reluctant) (part 2 not published). *But cf.* Salas v. Cortez, 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529 (participation by the state and more than financial interests on defendant's part required free counsel for indigent in civil paternity suit), *cert. denied*, 444 U.S. 900 (1979); Payne v. Superior Court, 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976) (indigent prison inmates have a constitutional right to appointed counsel in civil cases). Just how great an expenditure would be required is uncertain as it is difficult to determine the number of civil cases not filed due to indigency. *See generally* Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967) (no logical distinction possible between counsel for indigents in civil and criminal cases except cost). Limited funds might be better employed to provide civil counsel to indigents rather than to duplicate the traditional court system through state-paid private judges.

Similarly, California courts have refused to require that indigent civil litigants be supplied with interpreters at state expense. The state has no money to compensate the interpreters, nor can it waive the fees due third persons. *See* Jara v. Municipal Court, 21 Cal. 3d 181, 578 P.2d 94, 145 Cal. Rptr. 847 (1978), *cert. denied*, 439 U.S. 1067 (1979); County of Sutter v. Superior Court, 244 Cal. App. 2d 770, 53 Cal. Rptr. 424 (3d Dist. 1966). *But cf.* Gardiana v. Small Claims Court, 59 Cal. App. 3d 412, 130 Cal. Rptr. 675 (1st Dist. 1976) (interpreters should be appointed in small claims court because of nature of small claims proceedings). However, if serving as a private judge is a privilege conferred by the state, a provision might be appropriate requiring those who would be private judges to also accept the cases of the nonaffluent, similar to the rule that an attorney must not refuse a case because of a client's inability to pay fees. CAL. BUS. & PROF. CODE § 6068(h) (West 1974); *cf.* County of Fresno v. Superior Court, 82 Cal. App. 3d 191, 146 Cal. Rptr. 880 (5th Dist 1978) (court without power to order state compensation of attorney appointed to represent indigent prison inmate).

tion is not violated.

3. California Due Process and Equal Protection

The California Constitution guarantees due process and equal protection of the laws.[103] Private judging must satisfy the differing federal and state constitutional standards. In particular, some wealth classifications receive more searching scrutiny under state law than under federal law.[104] Under California law, wealth classifications in criminal proceedings are suspect.[105] Whether wealth classifications in civil proceedings such as private judging are similarly suspect remains uncertain.

The courts have avoided the suspect classification path when faced

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Whether indigent civil litigants are entitled to representation by counsel at private expense is unclear. In a recent case, Yarbrough v. Superior Court, 150 Cal. App. 3d 388, 197 Cal. Rptr. 737 (1st Dist. 1983), *hearing granted by the California Supreme Court* (Feb. 23, 1984), an indigent prison inmate was held entitled to appointment of counsel in a wrongful death action, notwithstanding the court's inability to order compensation by the county. Thus, counsel was in effect required to serve without any compensation. Although the court realized that the ruling might very well impose a substantial hardship on counsel, *id.* at 395-97, 197 Cal. Rptr. at 741-43; *id.* at 398-406, 197 Cal. Rptr. at 743-49 (King, J., concurring), it felt constrained by Payne v. Superior Court, 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976). The California Legislature has recently considered the issue of compensating counsel representing indigents in the context of reduced public funding for legal services. *See* CAL. CIV. PROC. CODE § 285.2 (West Supp. 1984). It empowered the court, when an attorney withdraws pursuant to § 285.2, to appoint any member of the bar to serve without compensation. CAL. CIV. PROC. CODE § 285.4 (West Supp. 1984) (also listing factors to determine good cause for appointment).

[103] "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . . ." CAL. CONST. art. I, § 7(a).

[104] CAL. CONST. art. I, § 24. *Compare* Serrano v. Priest, 18 Cal. 3d 728, 764-66, 557 P.2d 929, 949-51, 135 Cal. Rptr. 345, 365-67 (1976) (equal protection challenge to school financing; wealth a suspect classification and education a fundamental interest so state constitution required strict scrutiny), *cert. denied*, 432 U.S. 907 (1977) *with* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (equal protection challenge to school financing; wealth not suspect and education not fundamental so only rational basis required by federal constitution). *See generally* Falk, *The Supreme Court of California — 1971-1972 — Forward: The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 874-79, 934-44 (1976).

[105] *See, e.g.*, Charles S. v. Superior Court, 32 Cal. 3d 741, 750, 653 P.2d 648, 654, 187 Cal. Rptr. 144, 150 (1982); *In re* Antazo, 3 Cal. 3d 100, 112, 473 P.2d 999, 1006, 89 Cal. Rptr. 255, 262 (1970); People v. Wong, 93 Cal. App. 3d 151, 154, 155 Cal. Rptr. 453, 455 (2d Dist. 1979).

with fee waiver for indigents, relying instead on the inherent power of the common law courts to waive fees,[106] or in some cases, on an "alternatives to public payment" test.[107] Neither theory requires that private judge fees be waived. The common law approach is inapposite as the court would be waiving the fees of a third person rather than its own.[108] The alternatives to public payment test does not require fee waiver, because the traditional courts are a viable alternative to private judging.[109] Thus, only if strict scrutiny can be invoked is the invalidation of private judging probable.[110]

Strict scrutiny applies to classifications which are, in most circumstances, irrelevant to any constitutional legislative purpose — the lines drawn frequently reflect historic prejudice rather than legislative rationality.[111] A class saddled with many disabilities, subjected to a history of purposeful unequal treatment, or relegated to a position of political powerlessness, triggers the extraordinary protection from the majoritarian political process which strict scrutiny entails.[112]

Private judging's alleged wealth discrimination and the class it defines have none of these traditional indicia of suspectness. The availability of small claims courts and judicial arbitration, and the speedy resolution of cases in municipal and justice courts[113] belie ill-treatment of nonaffluent litigants. Nor does private judging create a "discrete and insular"[114] minority, relatively powerless to protect its interests in the political process. The nonaffluent share with the entire community an interest in reducing the expense and delay of litigation. Finally, de facto

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[106] *See, e.g.*, Earls v. Superior Court, 6 Cal. 3d 109, 490 P.2d 814, 98 Cal. Rptr. 302 (1971) (reliance on both due process and court's inherent power); Ferguson v. Keays, 4 Cal. 3d 649, 656 n.6, 484 P.2d 70, 74 n.6, 94 Cal. Rptr. 398, 402 n.6 (1971) (inherent power rationale avoided resolution on due process or equal protection grounds).

[107] *See, e.g.*, Jara v. Municipal Court, 21 Cal. 3d 181, 578 P.2d 94, 145 Cal. Rptr. 847 (1978), *cert. denied*, 439 U.S. 1067 (1979). *See generally* Tilman, *The Constitutional Right of Access to the Courts for Indigents: An Inconsistency in California Law*, 8 SAN FERN. V.L. REV. 95 (1980) (discussing California court access cases).

[108] *Cf.* Jara v. Municipal Court, 21 Cal. 3d 181, 578 P.2d 94, 145 Cal. Rptr. 847 (1978) (interpreter's fees not waivable), *cert. denied*, 439 U.S. 1067 (1979).

[109] *See supra* notes 93-95 and accompanying text.

[110] Strict scrutiny, although "strict in theory," is "fatal in fact." Gunther, *The Supreme Court — 1971 Term Forward: In Search of an Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[111] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 105 (1973) (Marshall, J., dissenting).

[112] *Id.* at 28 (majority opinion).

[113] *See supra* note 93.

[114] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

distinctions based on ability to pay are unlikely to represent legislative animosity towards the nonaffluent,[115] especially when such distinctions apply to the supplementary, but not the primary, system for the provision of judicial services. Strict scrutiny should not be applied because private judging displays none of the traits of the condemned forms of discrimination. Consequently, private judging fees violate neither the California nor the United States Constitution.

B. Distortion of the Judicial Process

The litigant's ability to select and pay a private judge may distort the judicial process. Knowledgeable users of private judging might obtain an unfair advantage over uninformed users by selecting judges who are not completely impartial. Because the litigants pay her salary, the private judge may limit her findings, favoring the interests of the litigants over the public interest. Some litigants might manipulate private judging to reach the appellate courts more quickly, procuring favorable precedents and warping the development of the law. This Comment contends that these objections, when balanced against the problems of court delay, are not so substantial as to require the abolition or modification of private judging.

Litigants submit disputes to private judges with the assumption that the judges are not partial to their opponents. One critic of private judging suggests that this assumption may not be well-founded.[116] If a private judge desired to increase her business, she might favor the party who would increase her business. Hence, a litigant whom she might expect to use private judging often, the "repeat user," would receive favorable treatment, inducing that party's return with more judicial business. Obversely, a litigant who appears unlikely to use private judging again, the "one-shot user," might receive unfavorable treatment because the private judge has no incentive to act otherwise. The bias of the private judge need not be overt; it would suffice if the repeat user sensed some slight advantage, as, for example, consistently receiving the benefit of the doubt.

Although this speculation may, in the abstract, seem cause for concern, in practice it is not. Overt bias in the private judge will trigger an

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[115] *Cf. supra* notes 93, 95.

[116] Note, *Pay-As-You-Go*, *supra* note 10, at 1607-08. *See generally* Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (defining general legal problem in terms of "repeat users" and "one-shot users"); Annot., 72 A.L.R.3d 375 (1976) (pecuniary interest disqualifying judge).

appeal, and the time advantage of private judging will be lost. The faintest whiff of partiality may bring a private judging career to an abrupt end, for litigants need give no explanation for rejecting a private judge.[117] Moreover, attorneys, not litigants, are the repeat users who are likely to retain a private judge. Since attorneys are in the business of litigation, the private judge would expect all to be repeat users. Without a distinction between users, nothing would justify favoring one over another. Even if a preference existed, the favored attorney might have difficulty persuading opposing counsel to stipulate to a private judge whom that attorney had repeatedly employed with great success.

Another formulation of the problem avoids the imputation of disreputable motives to private judges: an attorney's ignorance or inexperience might permit her adversary to nominate a private judge whose judicial philosophy is sympathetic to the adversary's case.[118] If the reasonably diligent attorney is unable to become knowledgeable about potential private judges, concern is proper. Open trials,[119] however, should alleviate this problem through widespread dissemination of information concerning the past performance of private judges. Alternatively, local courts might screen potential private judges, then place them on a panel from which litigants could make a selection.[120]

One justification for a formal, precedent-based judicial system rather than ad hoc tribunals, such as arbitration, is that such a system fashions broad rules which aid the resolution and avoidance of similar disputes. One critic suggests that private judges are precluded from producing these socially useful rules because the litigants, their employers, do not need them and will not pay the private judge to craft them.[121] As

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[117] Private judging occurs by consent only. *See supra* notes 21, 36. California has two methods for disqualifying judges: for cause, CAL. CIV. PROC. CODE § 170 (West Supp. 1984), and a peremptory challenge, CAL. CIV. PROC. CODE § 170.6 (West Supp. 1984). Section 170.6 requires only an affidavit stating the party's good faith belief that the judge meets one of the criteria for disqualification, however, it can only be used once. The litigant without an articulable reason for disqualifying a traditional judge risks irritating the judge, a factor to be considered if other proceedings before that judge are foreseeable. Because a person's acceptability as a private judge will, as a rule, be considered before that person is approached, it is unlikely that the same problem will arise in private judging. *Cf.* Shakin v. Board of Medical Examiners, 254 Cal. App. 2d 102, 113-19, 62 Cal. Rptr. 274, 283-87 (2d Dist. 1967) (challenge for cause), *appeal dismissed, cert. denied*, 390 U.S. 410 (1968). *See generally* Burg, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CALIF. L. REV. 1445 (1981).

[118] *See* Note, *Pay-As-You-Go*, *supra* note 10, at 1608.

[119] See the discussion of open trials, *infra* notes 130-80 and accompanying text.

[120] *Cf.* Weisman, *supra* note 8.

[121] Note, *Pay-As-You-Go*, *supra* note 10, at 1610-14.

no general principle is announced, the public is burdened with the cost of repeated litigation. Others view the trial court's role as limited to resolving disputes, with rulemaking appropriate only when required to settle a particular dispute.[122] Under the latter view, it is not cause for concern if the private judge is unable to make broad innovations in the law.[123] Moreover, whether restricted rulemaking can be shown to cause much harm is doubtful. The decisions of California superior courts, unlike federal district courts, are not reported and have no precedential value.[124] Rulemaking of a fundamental, permanent nature occurs only at the appellate level, so trial before a private rather than a traditional judge ought to be irrelevant. Unless private judging can be shown to cause concrete harm, its modification or abolition is unnecessary.

Private judging cases reach appellate courts sooner because trial has not been delayed by court congestion. Early appellate review, standing alone, is not worthy of condemnation. However, critics fear that a party expecting multiple actions might be able to use this shortcut to distort the development of legal rules. The party might select the case with facts most sympathetic to her position, then use private judging to ensure a quick trial and early appellate review. Because the facts are sympathetic to her position, the party may reasonably expect that the legal rule will be favorable to her, or if unfavorable, that the rule's harshness will be mitigated. Another appellate court may be reluctant to disagree with the opinion, even though it might have ruled differently had the issue been one of first impression.[125] The party, it seems,

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[122] An alternative view places primary importance on the judge's rulemaking function, with dispute resolution merely the means through which the rulemaking power is exercised. *See generally* D. HOROWITZ, THE COURTS AND SOCIAL POLICY 264 (1977) (judges are best at dispute resolution); Fiss, *The Supreme Court, 1978 Term — Forward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) (judge's role is to give meaning to public values); Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937 (1975) (conflict resolution and behavior modification).

[123] On those occasions when new rules must be formulated, private judges may produce more thoughtful and informed ones than traditional judges. Experienced judges tend to produce work of better quality, and the retired jurists acting as private judges have this experience. *See* Hill, *supra* note 95. In addition, private judges are often chosen for their familiarity with the legal or factual context of the dispute, *see* Christensen, *supra* note 48, at 83-84, providing for more unified rules than can be made by the generalist traditional courts.

[124] *Compare* Friedman & Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC'Y REV. 267 (1976) (California courts) *with* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (federal courts only).

[125] *Cf. 'Rent-a-Judge' Still Generates Conflict*, CAL. LAW., Feb. 1982, at 17.

has twisted the law to her own ends.

Yet, appearances may be deceiving. The theory attributes an inordinate amount of manipulative skill to the party. She must discover that several cases will raise the same issue, and that the law will develop unfavorably without her intervention. The party must also select a sympathetic case from among those filed, then persuade her opponent to use private judging.[126] To reach the appellate courts, the litigant must manage to lose at trial, hoping to prevail on appeal, or to win at trial, but with a judgment doubtful enough that her opponent will appeal.[127] Pragmatically, this will be extremely difficult. Moreover, the identical scenario could occur without private judging. Civil trial delay varies as much as three years from county to county in California.[128] A litigant could as easily press a sympathetic case in one of the less congested traditional courts as she could in private judging.

The objections to private judging based on distortion of the judicial process arise from perceptions of unfairness. Yet, another, more widespread sort of unfairness arises from the traditional courts — the unfairness of waiting years to vindicate one's legal rights. Critics of private judging are fond of citing the Magna Charta's disapproval of the sale of justice. But the Magna Charta just as strongly condemned the delay of justice.[129] The benefit of greater abstract fairness is not worth the price of decreased accessibility and speed of dispute resolution and consequent unenforceability of legal rights in a wide range of relationships.

C. Objections to Secrecy

For some litigants, the most alluring characteristic of private justice is secrecy.[130] The public may never know more about a privately judged

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[126] Persuading an opponent may be difficult. The opponent is unlikely to agree to private judging if she suspects that she is being manipulated to create a test case or if she learns that other cases may create a precedent favorable to her if they go to trial first and are appealed. Additionally, as the adversaries in a multiple litigation context are unlikely to have an ongoing business relationship, the cooperation necessary to arrange a private judge hearing may be lacking. *Cf.* Weisman, *supra* note 8, at 4.

[127] A judgment can affect other cases even if it is not appealed, such as through collateral estoppel. However, this can be avoided through intervention. CAL. CIV. PROC. CODE § 387 (West Supp. 1984); *cf. infra* note 175 and accompanying text.

[128] 1983 CAL. JUDICIAL COUNCIL, ANNUAL REPORT 118.

[129] *Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam.* MAGNA CHARTA cl. 40 (1215) (To no one will we sell, to no one deny or delay right or justice.).

[130] Myers, *supra* note 8; Hill, *supra* note 95, at 15.

trial than the parties involved, the identity of the private judge,[131] and the final judgment. Whether characterized as private by the litigants or as secret by the public, closed proceedings conflict with the common law tradition of open trials[132] and might be unconstitutional.[133] In addi-

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[131] CAL. RULE OF COURT 244(a).

[132] Before the Norman Conquest, cases were usually brought before an assembly of all the freemen of the community. F. POLLOCK, *English Law Before the Norman Conquest*, in THE EXPANSION OF THE COMMON LAW 139-40 (1904). With the rise of the jury system, attendance was no longer compulsory, though the proceedings were open to all. 2 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 121 (London 1779) (1st ed. London 1644). Support for a common law open civil trial is evidenced by legal literature throughout the past four centuries:

"Evidences of writinges be shewed, witnesses be sworne, and heard before them, not after the fashion of the civill law but openly, that not only the xii [jury], but the Judges, the parties and as many as be present may heare what ech witnesse doeth say . . . ." T. SMITH, DE REPUBLIC ANGLORUM 79 (Alston ed. 1972) (1st ed. London 1583) (describing civil jury trials).

"[T]he evidence on either part, is given . . . in the open court, and in the presence of the parties, their attornies, council and all by-standers." M. HALE, HISTORY OF THE COMMON LAW OF ENGLAND 289 (4th corrected ed. London 1779).

> THAT in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, that justice may not be done in a corner nor in any covert manner . . . .

Concessions and Agreements of West New Jersey, ch. XXIII (1677), *reprinted in* SOURCES OF OUR LIBERTIES 188 (R. Perry ed. rev. ed. 1978).

"[A]ll courts shall be open . . . ." Frame of Government of Pennsylvania, Laws Agreed Upon in England, art. V (1682), *reprinted in* SOURCES OF OUR LIBERTIES 217 (R. Perry ed. rev. ed. 1978).

"[A]ll this evidence is to be given in open court, in the presence of . . . all bystanders" and "in the presence of all mankind." 3 W. BLACKSTONE, COMMENTARIES *372, *373.

> [N]or yet, . . . would it be eligible that the mode of privacy in question should take place, although it were even at the joint solicitation of both parties . . . , as well as with the consent of the judge.
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> The reason is, that . . . there is a party interested (viz. the public at large) whose interest might, by means of the privacy in question, and a sort of conspiracy, more or less explicit, between the other persons concerned (the judge included) be made a sacrifice.

1 J. BENTHAM, RATIONAL OF JUDICIAL EVIDENCE 576-77 (London 1827). Bentham states that private trials are the exception to the general rule of public trials. *Id.* at 513-14.

"[I]t is one of the essential qualities of a Court of Justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on, . . . have a right to be present . . . ." Daubney v. Cooper, 10 B. & C. 237, 240, 109 Eng. Rep. 438, 440 (K.B. 1829).

[133] Closed trials may violate the first amendment. *See infra* notes 144-60 and accompanying text.

tion, closed proceedings violate California's open civil trial statute.[134]

The stipulation to a private judge is a public record, but the documents filed with the private judge apparently are not.[135] Because the complaint, setting forth the dispute, may be filed after the stipulation to a temporary judge has been made, it will not be a public record.[136] The time and place of each hearing are at the discretion of the parties.[137] No public notice is given. The hearings, more often than not, take place in law offices or private rooms.[138] Thus, the public might be excluded from a private judging trial simply because it is unaware of a hearing or unable to find the courtroom. It has been suggested that even if the public were aware of the time and place of the trial, it might be refused admission if the courtroom were on private property.[139] Although a court reporter usually makes a record,[140] as required for an appeal,[141]

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[134] CAL. CIV. PROC. CODE § 124 (West 1982); *see also infra* notes 161-68 and accompanying text.

[135] Myers, *supra* note 8, at 1042-43.

[136] Weisman, *supra* note 8. If reference is used instead of temporary judging, the complaint will be a public record. A case may not be referred until it has been filed with the traditional courts. A case is filed by submission of a complaint.

CAL. GOV'T CODE § 69503(c), (e) (West Supp. 1984) provides that each county clerk shall microfilm certain documents filed in civil cases, such as pleadings, orders, and judgments, for the use of the public. California has a public records law, California Public Records Act, ch. 1473, 1968 Cal. Stat. 2943, but its terms do not apply to judicial records. CAL. GOV'T CODE § 6260 (West 1980). *See generally* Estate of Hearst, 67 Cal. App. 3d 777, 136 Cal. Rptr. 821 (2d Dist. 1977) (judicial records).

[137] Christensen, *supra* note 48, at 81.

[138] Myers, *supra* note 8, at 1043.

[139] *See* Hager, *'Rent-a-Judge' Use Examined, Criticized*, L.A. Times, Dec. 22, 1981, pt. I, at 3. Property rights ought to give way. In Robins v. PruneYard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980), the free speech and petition clause of the California Constitution, CAL. CONST. art. I, §§ 2, 3, took precedence over the property rights of a shopping center owner who sought to prevent the peaceful solicitation of signatures for a petition on the premises. A right of access to civil trials on private property, based on the same provisions and Code of Civil Procedure § 124, discussed *infra* at notes 161-68 and accompanying text, is equally cogent. San Jose Mercury-News v. Municipal Court, 30 Cal. 3d 498, 638 P.2d 655, 179 Cal. Rptr. 772 (1982), which declined to find a right to know as applied to preliminary hearings, might indicate otherwise. Yet as that case raised fair trial issues peculiar to criminal proceedings, *id.* at 502, 638 P.2d at 657, 179 Cal. Rptr. at 774, a right to know argument may not be entirely foreclosed.

[140] Note, *Pay-As-You-Go*, *supra* note 10, at 1598 n.25.

[141] *Cf.* First Nat'l Bank v. Stansbury, 118 Cal. App. 80, 85-86, 5 P.2d 13, 15 (1st Dist. 1931) (review of reference denied for lack of a correctly certified record).

the record will be neither transcribed nor deposited with the traditional court system unless an appeal is taken. Even if the record were available to the public, its length and the cost of transcription would make it an unrealistic and unacceptable alternative to public attendance at trial. Finally, if the parties have stipulated to a private judge under the temporary judging provision, the private judge need only file a judgment[142] and not written findings of fact and law.[143]

1. The First Amendment and Closed Trials

Closed privately judged trials may be unconstitutional.[144] Much of past constitutional litigation over secrecy concerned the criminal defendant's right to a public trial guaranteed by the sixth amendment.[145] But when persons not party to the proceedings demanded access to trials over defendants' objections, the sixth amendment proved to be a less than satisfactory justification for trial access.[146] More recent cases[147] de-

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[142] Weisman, *supra* note 8.

[143] CAL. CIV. PROC. CODE § 643 (West 1976).

[144] Because trial closure occurs after the trial judge is appointed, there is state action. *See supra* notes 86-90 and accompanying text.

[145] *E.g.*, Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (rape trial); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (murder trial); Gannett Co. v. DePasquale, 443 U.S. 368 (1979) (preliminary hearing; prosecution for robbery, larceny, and murder); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (gag order in murder prosecution); Sheppard v. Maxwell, 384 U.S. 333 (1966) (prejudicial publicity during murder trial); Estes v. Texas, 381 U.S. 532 (1965) (televised trial for swindling); *In re* Oliver, 333 U.S. 257 (1948) (criminal contempt); Craig v. Harney, 331 U.S. 367, 374 (1947) (constructive criminal contempt by publication) ("A trial is a public event. What transpires in the court room is public property.").

[146] *E.g.*, Gannett Co. v. DePasquale, 443 U.S. 368, 379-87 (1979); *id.* at 410-33 (Blackmun, J., concurring and dissenting).

[147] In Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), the trial court granted a defense motion at the commencement of a fourth trial on a murder charge that the trial be closed to the public. The prosecution did not object. The Court reversed the closure order. Chief Justice Burger, writing for a plurality, relied on the tradition of open trials under the common law to find a right of access in the public to criminal trials. Open trials provide the public with information on the functioning of government, a purpose common to other first amendment freedoms. Hence, the first amendment prohibited "government from summarily closing courtroom doors which had long been open to the public." *Id.* at 576. The Chief Justice did not directly address the public's right to attend civil trials, but noted that "historically both civil and criminal trials have been presumptively open." *Id.* at 580 n.17. Justice Stewart concurred in the judgment, and found a right of access to both civil and criminal trials. *Id.* at 599, 600.

In Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), the Court struck down a state statute compelling trial closure during the testimony of minor rape vic-

rived a public trial access right from the first amendment, with its "core purpose of assuring freedom of communication on matters relating to the functioning of government."[148] This suggests that the Constitution may command a similar right of access to civil trials.

A fundamental tenet of American political theory is that the right to govern derives from the consent of the governed.[149] Accordingly, the first amendment may be interpreted as providing for an informed consent.[150] In the overtly political spheres of government — the legislative and executive branches — periodic elections do much to ensure that the flow of information is substantial. The judiciary has no such incentive to disclose. Some judges do not stand for election.[151] Others are elected to long terms[152] after campaigns which reveal little information.[153] Were it not for judicial opinions and public trials, the stream of information might be reduced to a mere trickle. Yet, private judging's secrecy has exactly this effect. The private judge does not publish opinions and the trials are not public. In consequence, the people, unable to gauge the effectiveness of the government, cannot give informed consent. Hence,

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tims, based on rights arising from the first amendment. After reviewing the benefits of public trials, the Court held that strict scrutiny applied. *Id.* at 606-07. Because the trial judge was without discretion as to closure, the statute was overbroad and violated the first amendment. The Court intimated that closure on a case-by-case basis, balancing the needs of the witness with the constitutional concerns, would be valid. *Id.* at 608.

In Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819 (1984), the Court vacated an order closing *voir dire* in a rape and murder trial. The prosecution opposed public *voir dire*, arguing that juror responses would be less than candid if they were not private. As in *Richmond Newspapers* and *Globe*, the Court relied on the common law tradition of openness, here, the tradition of public selection of jurors. *Id.* at 822-23. Because the trial judge neither made specific findings on the need for closure nor considered alternatives to closure to protect the jurors' privacy interests, the order violated the first amendment. *Id.* at 826.

[148] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980).

[149] *E.g.*, The Declaration of Independence (U.S. 1776).

[150] *See generally* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 35-46 (1982).

[151] Federal judges, for example, serve during "good Behaviour." U.S. CONST. art. III, § 1. This has been treated as life tenure. *See generally* Resnik & Barron, *The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of "During Good Behaviour,"* 35 GEO. WASH. L. REV. 455 (1967).

[152] Justices of the California Supreme Court and the Courts of Appeal serve twelve year terms. Judges of the superior court serve six year terms. CAL. CONST. art. VI, § 16. *See generally* Nelson, *Maintaining an Independent Judiciary*, 54 CAL. ST. B.J. 78 (1979).

[153] *Cf.* MODEL CODE OF JUDICIAL CONDUCT Canon 7-B (1982).

the secrecy of private judging may be unconstitutional.

An open civil trial rule may nonetheless have a shaky foundation.[154] On the whole, courts have not responded enthusiastically to efforts to obtain information under a first amendment right to know rationale.[155] Still, open courts place no affirmative duty of disclosure on government,[156] but merely forbid active concealment. Open courts place no additional burden on government because trials have traditionally been open;[157] a constitutional rule would simply confirm present practice.

However, the scope of an open trial rule derived from the first amendment may not be coextensive with the common law tradition of open trials. Although at common law trials were public, a few well-developed exceptions did exist. Trials could be closed when necessary to take testimony from witnesses concerning sexual matters, to avoid exposure of trade secrets, or in family law matters.[158] These exceptions seem quite reasonable. On the other hand, they deprive the public of information on the functioning of the judiciary just as thoroughly as any closed trial. Because the United States Supreme Court relied to such a significant extent on the common law tradition in formulating the open trial rule,[159] it is difficult to brush aside these exceptions to the rule. For example, in *Globe Newspaper Co. v. Superior Court*,[160] the major-

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[154] *See* BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CALIF. L. REV. 482 (1980) (no constitutional duty on government to disclose to guarantee a well-informed public).

[155] *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1 (1978) (no special press right to inspect county jail); Nixon v. Warner Communications, Inc., 435 U.S. 589, 608-10 (1978) (no press right of access to presidential tapes); Saxbe v. Washington Post Co., 417 U.S. 843 (1974) (no press right to interview specific state prison inmates); *cf.* Herbert v. Lando, 441 U.S. 153 (1979) (no press privilege to refuse to answer questions in libel case); Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (warrant for search of newsroom not constitutionally precluded); Branzburg v. Hayes, 408 U.S. 665, 684 (1972) (no press privilege to refuse to disclose confidential sources to grand jury) ("the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally").

[156] *Cf.* BeVier, *supra* note 154.

[157] *Cf.* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 589 (1980) (Brennan, J., concurring in the judgment) ("the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information"); *see also supra* note 132.

[158] 1 B. WITKIN, CALIFORNIA PROCEDURE 331-32 (2d ed. 1970), 269-70 (Supp. 1983); *see also infra* note 161.

[159] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-74 (1980) (plurality opinion); *id.* at 589-93 (Brennan, J., concurring in the judgment); *id.* at 601 (Blackmun, J., concurring in the judgment).

[160] 457 U.S. 596 (1982).

ity employed strict scrutiny to strike down a trial closure statute which left trial judges without discretion to weigh first amendment interests against the needs of the witnesses, but the dissenters urged that the common law would not have demanded an open trial in the situation at issue. The interest balancing contemplated by the Court may present trial judges with a formidable task — the constitutional concerns may often be nebulous and the participants' needs concrete. No suggestion is intended that a first amendment right of access to civil trials ought not be declared, only that development in this area is unlikely to be rapid. From the express language of the first amendment to a constitutional prohibition of secret civil trials will be a long and arduous journey. At least for the moment, private judging has little to fear from the Constitution.

2. Code of Civil Procedure Section 124 and Closed Trials

Even if the Constitution does not require open civil trials, California has done so by statute: "Except as provided in Sections 226m and 4306 of the Civil Code or any other provision of law, the sittings of every court shall be public."[161] Therefore, if private judge hearings are correctly characterized as the sittings of a court, as they appear to be,[162]

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[161] CAL. CIV. PROC. CODE § 124 (West 1982).

Section 124 applies to "every court" hearing civil matters, with some statutory exceptions: CAL. CIV. CODE § 226m (West 1982) (adoption); CAL. CIV. CODE § 4306 (West 1983) (marriage license examination waiver); CAL. CIV. CODE § 4360 (West 1983) (marital proceedings); CAL. CIV. CODE § 4600(c) (West 1983) (child custody hearings); CAL. CIV. PROC. CODE § 1747 (West 1982) (conciliation court); CAL. WELF. & INST. CODE § 676 (West Supp. 1984) (juvenile court).

Although it has been part of the Code of Civil Procedure since 1872, only a handful of appellate opinions have cited § 124, and even then often in a criminal trial context. United States v. IBM, 67 F.R.D. 40 (S.D.N.Y. 1975) (antitrust, trade secrets); People v. Pompa-Ortiz, 27 Cal. 3d 519, 612 P.2d 941, 165 Cal. Rptr. 851 (1980) (criminal case); Brotsky v. State Bar, 57 Cal. 2d 287, 368 P.2d 697, 19 Cal. Rptr. 153 (1962) (disciplinary proceeding); Swars v. City Council, 33 Cal. 2d 867, 206 P.2d 355 (1949) (civil service hearing); Oxnard Publishing Co. v. Superior Court, 68 Cal. Rptr. 83 (2d Dist. 1968) (depublished; hearing granted by Cal. Supreme Ct., dismissed as moot) (criminal case); Cembrook v. Sterling Drug, Inc., 231 Cal. App. 2d 52, 41 Cal. Rptr. 492 (1st Dist. 1964) (civil action, contention that § 124 required court proceedings to be not merely public, but publicized); Sawdey v. Superior Court, 195 Cal. App. 2d 729, 16 Cal. Rptr. 156 (1st Dist. 1961) (conciliation court proceeding); Wrather-Alvarez Broadcasting, Inc. v. Hewicker, 147 Cal. App. 2d 509, 305 P.2d 236 (4th Dist. 1957) (criminal case); Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163 (3d Dist. 1956) (criminal case). Perhaps the dearth of citations to § 124 stems from the unambiguous language of the statute and that it codifies accepted practice.

[162] *Contra* Note, *Pay-As-You-Go*, *supra* note 10, at 1608 n.93 (asserting, without

the secrecy which private litigants have obtained is illegal.[163]

The California courts have considered what section 124 means by "court" on only one occasion. *Swars v. City Council*[164] held section 124 inapplicable to the hearings of a local civil service commission.[165] Noting that a local ordinance expressly provided for a closed hearing and that Swars was not a criminal defendant, the court concluded that the commission was not a "court of justice,"[166] as previously defined in *Chinn v. Superior Court.*[167] Therefore, section 124 was inapposite. *Chinn* defined a court as a tribunal exercising functions of a strictly judicial character. Other bodies, although they might occasionally act judicially in particular matters, are by virtue of their mixed legislative, ministerial, and judicial functions not to be treated as courts.[168]

A private judge does not hold quasi-judicial administrative hearings. Her actions are, and are intended to be, judicial proceedings in the most complete sense. Private judges exercise the same functions as do traditional judges; the justification for appointing a private judge, rather than an arbitrator, is to secure the benefits of a traditional trial and a traditional judgment. Hence, section 124 requires that private judge trials, as well as traditional trials, be open to the public.

Public policy demands that private judging comply with section 124. Because a privately judged trial results in a judgment which the state must enforce,[169] the state has an interest in imposing measures, such as the open trial requirement, which help ensure that the judgment will

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argument or citation of authority, that § 124 does not apply to private judging).

[163] Trials should be open in a common sense fashion, People v. Hartman, 103 Cal. 242, 245, 37 P. 153, 154 (1894), implying that some advance notice of private judge trials must be given. Without notice, the trial is effectively closed whether or not the doors are locked. Holding court in a room other than the normal courtroom is not a violation of the secrecy prohibition if the public can gain admission. People v. Terry, 99 Cal. App. 2d 579, 584, 222 P.2d 95, 99 (3d Dist. 1950) (court held in chambers of board of supervisors). No individual has an absolute right to be present regardless of the size of the room. Openness is served if a sufficient number are allowed to be present. People v. Hartman, 103 Cal. 242, 244, 37 P. 153, 154 (1894).

[164] 33 Cal. 2d 867, 206 P.2d 355 (1949).

[165] *Id.* at 873-74, 206 P.2d at 359.

The dissenters found § 124 controlling. They recognized that a local ordinance provided for a closed hearing, but stated that the ordinance could be of no effect if contrary to state law. Nor did they accept the characterization of the proceedings as nonjudicial, such that § 124 was not pertinent. *Id.* at 875, 206 P.2d at 360.

[166] Until 1971, § 124 read, in part, "every court of justice."

[167] 156 Cal. 478, 105 P. 580 (1909).

[168] *Id.* at 481-82, 105 P. at 581.

[169] The state must enforce private judgments in the same fashion as traditional judgments because there is no legal distinction between the two. *See supra* note 58.

be correct. Open trials further the state's interest in several ways. They aid the search for truth by checking judicial corruption and prejudice. They advance testimonial trustworthiness because witnesses willing to lie when the proceedings are secret and detection improbable may have second thoughts when the proceedings are open and immediate confrontation possible. Hearings open to the public may elicit information, previously unsuspected, which leads to correct resolution of the case.[170] Public proceedings can alert other interested parties that they should intervene[171] to protect their rights. Because the rights of all interested persons are considered, rather than just the rights of the original litigants, intervention produces judgments which are more likely to be correct.

The state has an additional interest in open judicial proceedings because they enhance the judicial system's reputation for fairness.[172] Closed trials arouse suspicion that injustice has occurred. When the public suspects that the judiciary is unjust, the ability of the courts to resolve disputes is impaired: persons will be reluctant to submit disputes to an unfair tribunal and those judgments which are rendered will lack the moral force conferred by impartiality.

Litigants who use private judging to close the doors of the courtroom must value their own interest in secrecy more highly than the state's interest in open trials. However, these private interests do not bear close examination. Although closed trials can protect trade secrets and sensitive financial information, other remedies less drastic than total exclusion are available.[173] Closed trials avoid disclosure of embarrassing personal information, but this interest deserves little weight. The parties have no legitimate expectation of privacy in judicial proceedings.[174] Privacy is obtainable through negotiation or arbitration — if the parties choose to invoke the power of the state to obtain an authoritative deter-

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[170] *See* 6 J. WIGMORE, EVIDENCE § 1834 (J. Chadbourn ed. 1976); *cf.* Estate of Hearst, 67 Cal. App. 3d 777, 784, 136 Cal. Rptr. 821, 824-25 (2d Dist. 1977) (corruption is hidden by nonpublic judicial records).

[171] CAL. CIV. PROC. CODE § 387 (West Supp. 1984).

[172] *Cf.* Offutt v. United States, 348 U.S. 11, 14 (1954) (Frankfurter, J.) ("justice must satisfy the appearance of justice"), *quoted in* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572, 574 (1980) (plurality opinion), 594 (Brennan, J., concurring in the judgment).

[173] *See generally* Annot., 62 A.L.R.2d 509 (1958) (safeguarding trade secrets at trial).

[174] State *ex rel.* Gore Newspaper Co. v. Tyson, 313 So. 2d 777, 783-85 (Fla. App. 1975) (overruled on other grounds by English v. McCrary, 348 So. 2d 293 (Fla. 1977)). *See generally* Christensen, *supra* note 48, at 96.

mination of their mutual rights and obligations, they should defer to the state's interests. Finally, closed trials suppress information which might initiate other lawsuits.[175] Far from supporting closed trials, such a motive for secrecy makes the interest in openness increasingly compelling.

Even if a few cases might conceivably merit closure, private judging is a particularly inappropriate method of discerning them. Private judging would permit the litigants to decide whether or not their own case merits closure. To allow interested private persons to modify the public trial rule for their own convenience and without adequate consideration of the public interest is unwise.

Enforcement of the open court rule may present difficult, although not insurmountable, hurdles. Secrecy is sought by both parties to private judging, or at least sought by one and unopposed by the other. Accordingly, neither party will complain that the closed trial violated section 124. The traditional courts would not be able to enforce the rule sua sponte because a civil judgment may not be reversed or a new trial granted unless a party has suffered a miscarriage of justice.[176] The parties in interest, the public and the press,[177] may be unable to obtain extraordinary relief from a higher court before the trial ends and the issue is moot. Therefore, the obligation to enforce the open trial rule must reside with the appointing court.

Two methods of enforcement seem possible. First, the order appointing a private judge could explicitly require a public trial as a condition of appointment.[178] A secret trial would deprive the private judge

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[175] Information accumulated in one products liability trial may make other suits economically feasible. For example, twenty persons are injured by a product of manufacturer *X*. The first suit against *X* will require factual research costing $10,000, but which is relevant to all twenty plaintiffs. Private trials would make this information unavailable to other plaintiffs. Needless duplication of research would occur: each plaintiff would spend $10,000, and $190,000 would be wasted. In contrast, public trials would allow the parties to share research and costs because they would be aware of multiple suits. Each potential plaintiff would face only a $500 hurdle to recovery (one twentieth of the research cost) rather than $10,000. *Cf.* Darlin, *Lawyers Who Won Verdicts in Rely Trials are Selling Their Evidence, Angering P & G*, Wall St. J., Dec. 20, 1982, at 15, col. 4.

[176] CAL. CONST. art. VI, § 13.

[177] Orders excluding the public from the courtroom have been challenged mainly by the press, not because the press has a right not also held by the public, but because the press has the resources to pursue legal action. Exclusion will rarely damage the ordinary citizen to such an extent that a court challenge will be monetarily worthwhile. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 n.12 (1980).

[178] "A reference *may* be ordered . . . ." CAL. CIV. PROC. CODE § 638 (West Supp. 1984) (emphasis added); "[T]he court *may* order a cause to be tried by a temporary judge . . . ." CAL. CONST. art. VI, § 21 (emphasis added). The use of "may" rather

of jurisdiction and her judgment would be unenforceable. By treating open trials as jurisdictional, the constitutional pitfall is avoided: the "miscarriage of justice" limitation on the power of reviewing courts cannot be used to cure a lack of jurisdiction.[179] A model stipulation and order explicitly requiring a public trial as a condition on the appointment of a private judge is included in Appendix A. Second, the courts could refuse to reappoint persons who have held closed trials as private judges.[180] The model court rule in Appendix B provides a means of doing so. The rule requires the private judge and the litigants to submit a plan to the appointing court explaining how they intend to comply with section 124 and how the public will receive notice of the hearing so that it may exercise its right to attend. Violation of the plan will disable the private judge from further service.

Open trials neither reduce private judging's speed advantage over the traditional courts nor prevent flexible scheduling. The litigants still obtain the benefits of a traditional civil trial without the expense caused by court congestion. Without the possibility of secret proceedings, private judging may be less attractive to some litigants. But for others, private judging will remain a valued means of dispute resolution.

CONCLUSION

California's private judging procedure can offer speedy, flexible, and convenient adjudication of high quality. It uses the resources of retired judges, and in a small way relieves the pressure of large civil calendars. However, its emergence as an alternative to traditional courts, has raised constitutional questions addressed to equal access. The most frequent criticism of private judging is that it denies the nonaffluent an opportunity to be heard. This Comment has shown that no constitu-

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than "shall" implies the exercise of discretion by the trial judge, though no California court has ruled on this point. *Cf.* Morris v. County of Marin, 18 Cal. 3d 901, 909-10, 559 P.2d 606, 611-12, 136 Cal. Rptr. 251, 256-57 (1977) (interpretation should serve legislative intent and public policy). In practice, presiding judges seem eager to assign cases to private judges as a means of reducing civil backlog.

[179] CAL. CONST. art. VI, § 13 would not save the private judge. The "miscarriage of justice" rule cannot be used to cure a lack of jurisdiction. Johnson v. Superior Court, 77 Cal. App. 599, 604, 247 P. 249, 251 (1st Dist. 1926); Cook v. Winklepleck, 16 Cal. App. 2d Supp. 759, 768, 59 P.2d 463, 467 (1936).

[180] The Judicial Council may promulgate court rules not in conflict with statute, CAL. CONST. art. VI, § 6, as may each local court, CAL. CONST. art. VI, § 1. Both the conditional appointment and ban on reappointment proposals could be given effect through such rules. *See generally* CAL. GOV'T CODE § 68070 (West Supp. 1984); 1 B. WITKIN, CALIFORNIA PROCEDURE 389-403 (1970 & Supp. 1981).

tional deprivation occurs — a forum still exists for all. The other access issue, public attendance at private trials, is not as easily resolved. A constitutional right to attend civil trials does not yet exist, but a statutory right does which some litigants have disregarded. Because public policy requires that the courts be open to all who would attend, this Comment has proposed two methods of enforcing the statute, for in attempting to secure secrecy, private judging has gone too far.

Stephen K. Haynes

APPENDIX A

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF _____

_____ Plaintiff,	No. _____
vs.	STIPULATION FOR APPOINTMENT OF A TEMPORARY JUDGE
_____ Defendant.	

It is stipulated and agreed by the parties litigant herein, through their respective attorneys, that _____, a member of the California Bar, be appointed a temporary judge to hear and determine the above entitled cause. The business address of the temporary judge is _____.

Each hearing conducted by the temporary judge shall comport with section 124 of the Code of Civil Procedure, and this Court's order is expressly conditioned thereon. The parties agree that no decision rendered in violation of section 124 shall be valid.

If the hearings have been conducted in conformity with section 124 of the Code of Civil Procedure, the Clerk of this Court shall enter the Judgment of the temporary judge in the same manner as if the action had been tried by this Court.

Dated: _____, 19____ _____
Attorney for Plaintiff

_____
Attorney for Defendant

IT IS SO ORDERED.

Dated: _____, 19____ _____
Judge of the Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF _____

_____ Plaintiff,	No. _____
vs.	STIPULATION FOR ORDER OF GENERAL REFERENCE
_____ Defendant.	

It is stipulated and agreed by the parties herein, through their respective attorneys, that the issue of _____ be referred to _____, as referee to try each and all issues of fact and of law. Each hearing conducted by the referee shall comport with section 124 of the Code of Civil Procedure, and this Court's order is expressly conditioned thereon. The parties agree that no decision rendered in violation of section 124 shall be valid.

The referee shall report her findings and judgment to this Court. If the hearings have been conducted in conformity with section 124 of the Code of Civil Procedure, the Clerk of this Court shall, without further notice to the parties, enter a Judgment thereon in the same manner as if the action had been tried by this Court.

Dated: _____, 19____ _____
Attorney for Plaintiff

_____
Attorney for Defendant

IT IS SO ORDERED.

Dated: _____, 19____ _____
Judge of the Superior Court

APPENDIX B

Model Court Rule

General Referees and Temporary Judges.

§ 1. No person shall be appointed a temporary judge pursuant to article VI, section 21 of the California Constitution, nor shall any person be appointed a general referee pursuant to section 638 of the Code of Civil Procedure, unless:

(a) At the time of appointment, such person serves as a regularly appointed court commissioner and will hold each and every hearing in one of the courtrooms in common use by the Court; or

(b) Prior to appointment, such person and the parties to the action in which a temporary judge or general referee is sought file with the Court a plan of compliance with section 124 of the Code of Civil Procedure. An acceptable plan includes, but is not limited to:

1) the location, date, and time of the proposed hearing or hearings, and the means by which the public may gain admission thereto;
2) the method for changing the location, date, or time of any hearing, and by which the public will be notified of the change; and
3) if any part of any hearing is sought to be closed, other than to exclude witnesses, the method by which notice will be given the public so that interested parties may timely oppose closure.

§ 2. No person who fails to comply with a plan required to be filed with the Court under section 1(b) of this rule shall be appointed a temporary judge or general referee in any subsequent action.

(a) In its discretion, the Court may relieve any person of such disability upon motion, with supporting declarations under penalty of perjury showing in detail that such noncompliance was:

1) insubstantial; or
2) the result of fraud or excusable neglect; or
3) not reasonably avoidable despite the good faith efforts of such person.

(b) When a motion for relief from disability has been filed, the Court shall also consider:

1) whether a pattern or practice of noncompliance exists; and
2) whether any previous noncompliance was wilful and in disregard of the right of the public to attend.