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Indigent criminal defendants should pay for their appeals

Criminal appeals are costly, frequently useless and clog up the courts

By Myron Moskowitz

The appellate courts in California now are facing a caseload crisis. Too many appeals are being filed for the number of judges we have. This means that in civil cases, which receive lower priority than criminal cases, people now have to wait for up to three years or more for their appeals to be decided. Chief Justice Rose Bird has called these delays "totally unacceptable." And these appeals cost taxpayers a significant amount of money. According to Ralph J. Gampell, secretary of the state Judicial Council, the state courts of appeal have been allocated \$18 million this year.

The volume of cases also affects the quality of justice. Justice Winslow Christian of the First District Court of Appeal in San Francisco recently stated, "A present-day appellate judge works in an atmosphere not of scholarly deliberation but of anxious response to pressure to produce an ever-increasing volume of dispositions." Christian notes that each appellate judge currently is expected to write more than 100 opinions per year and participate in another 200. A special committee appointed by Bird recently found that "appellate caseload is growing steadily" and that "appellate caseloads per judge are already excessive."

There are many causes for the increase in appeals, but one major cause might be amenable to treatment: indigent criminal

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appeals. In 1963, the U.S. Supreme Court ruled in *Douglas vs. California* ((1963) 372 US 353) that if a state allows an appeal in a criminal case to someone who can afford to pay a lawyer (as all states do), then it must give the same right to an indigent person, and the state must pay for his lawyer. Because most criminal defendants are indigent, this decision has led to a substantial increase in the number of criminal appeals. Here is the breakdown for appeals in California:

	1959-60	1969-70	1979-80
Civil appeals	1,339	1,981	4,249
Criminal appeals	720	2,562	4,586

Of the 4,586 criminal appeals filed in 1979-80, 4,191 (91.4 percent) were filed by indigents. We can expect the number of criminal appeals to keep on rising, as the state Legislature continues to increase sentences and restrict cases in which probation can be granted. These appeals are expensive. For each one:

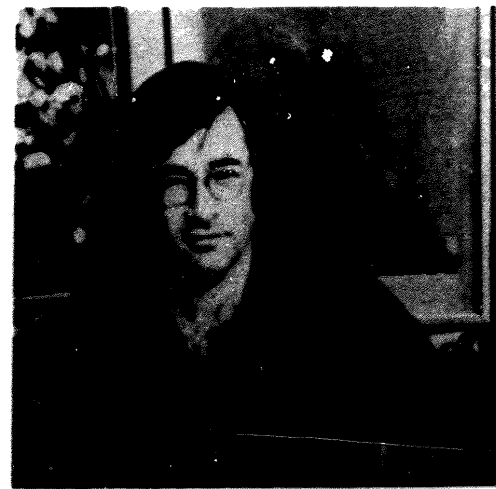
- A transcript of the trial must be prepared, at state expense, costing at least \$1,000.

- The appellant's lawyer costs the state between \$750 (for a private attorney) and \$2,800 (for a state public defender) per case.

- The state attorney general's office must try to uphold the conviction, which costs the state about \$2,100 per case.

- Judges and other appellate court personnel must be paid, at a cost to the state of about \$2,300 per case. One might expect this figure to be lower for nonmeritorious appeals, since there are fewer legal issues to review in such cases. But this savings in work probably is offset by a special burden that the courts must bear only in such cases "to conduct a review of the entire record" to determine for itself whether there are any arguably meritorious issues that were not raised by the appellant's lawyer. *People vs. Wende* (1979) 25 C3d 436.

The money paid by the state for each indigent criminal appeal may be considered well spent when the appeal is based on solid grounds and has a decent chance of success, even if it ultimately loses. A society that values individual freedom cannot afford to take the chance of sending someone to pris-



on who might be innocent or who may have been convicted at an unfair trial. However, it appears that the majority of criminal appeals do not fall into either of these categories. Most appeals by indigent criminal defendants are either hopeless or marginal. In 1978-79, only 11 percent of criminal appeals resulted in reversals, though complex new sentencing laws caused another 12 percent to result in sentence reductions that year. Only nine percent of the criminal appeals resulted in opinions that the court felt were important enough to publish, as compared to 25 percent of the civil appeals.

Former Second District Court of Appeal Justice Macklin Fleming says, "Approximately 50 to 70 percent of these criminal appeals are completely baseless and accomplish nothing but congestion of calendars." Wakefield Taylor, who just retired from the First District Court of Appeal in San Francisco, has noted "the overwhelming number of appeals with little or no merit."

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Why are there so many hopeless and marginal appeals in these cases? Apparently because there is no "cost regulator" at work. A lawyer may tell his nonindigent criminal defendant client that there is a slightly better chance that he will win with a jury than a judge, but the jury will cost him more in the attorney's fees, because the lawyer will then have to spend more hours working on the case. The client then balances these considerations and makes a decision. Thus, the

cost of the procedural device helps to regulate its use. The same process operates on other procedural devices, such as appeals. If a criminal appeal has a 20 percent chance of success, but will cost the client his life's savings, he well might decide to forego the appeal.

When an indigent criminal defendant is deciding whether to appeal, this cost regulator is absent. The indigent criminal defendant has everything to gain and absolutely nothing to lose by appealing, whether his chance of winning is 20 percent, two percent or one in a million. He says to himself — as Christian puts it — "I might as well appeal, because it's free." This is not mere speculation. The California Judicial Council reported that, in 1978-79, only 14 percent of all contested civil trials (where the cost regulator operates) were appealed. The figure for contested criminal trials was an astounding 82 percent.

While there have been no studies of cost regulators in the legal system, they have been proved to help curb usage of subsidized medical services. In 1972-73, the state Department of Health conducted an experiment with the Medi-Cal program. (See Brian & Gibbens, "California's Medi-Cal Copayment Experiment," 12 *Medical Care* 56, (special supplement, December 1974).) About 30 percent of those eligible for Medi-Cal were required to pay \$1 for each of their first two visits to a doctor and 50¢ for each of their first two drug prescriptions each month. This payment was required only of people adjudged to be able to afford it. Though these token payments were viewed as "minimal" deterrents, it was concluded they resulted in "lower utilization [of medical services], particularly for less critical services."

The state Legislature recently adopted AB 251, a copayment plan that will require most Medi-Cal recipients to pay \$1 for each doctor visit, \$1 for each drug prescription and \$5 for each hospital emergency-room visit that is determined to be, in fact, not an emergency. This plan, now ch 102 of the Welfare and Institutions Code, is expected to save the state \$45 million in 1981-82.

If the indigent criminal were to pay for a portion of his appeal, the state would realize substantial savings. But how can an indigent contribute toward the cost when, by definition, he has little or no money? About half of California's state prison population does some sort of work for pay. According to the state Department of Corrections, of the state's 29,357 inmates, 10,235 hold "work-support" positions (in kitchens and laundries), 385 work in the "inmate-welfare" positions (e.g., the prison canteen), 3,180 manufacture such items as license plates, flags, and furniture, and 1,865 work in con-

servation camps on forestry projects and firefighting. Pay ranges from 10¢ to 80¢ an hour, depending on the type of program, the skill required and the inmate's seniority. The wages may be spent at the prison canteen on cigarettes, candy, toiletries, and small appliances, such as radios.

If an indigent inmate had to pay a percentage of his prison wages toward the cost of his appeal, that might be concluded to be an effective cost regulator, similar to the one faced by those who are able to pay part of the cost of their appeals. Such a requirement would be constitutional, as prison inmates are provided with all the necessities of life, free of charge. The portion of wages taken could be set at a percentage high enough to make the inmate feel he is giving up something substantial if he appeals, but not so high as to discourage him from working or pursuing a potentially meritorious appeal. Perhaps an appropriate donation would be a third of the inmate's wages for one year.

However, this scheme would probably not work well in the California prison system. Since there is only one job for every two inmates, the newer inmates may have to wait some time for a job opening. In addition, every new inmate initially spends some time at one of the reception centers at Vacaville or Chino, where it is unlikely that he will be able to work. At this time, too, the inmate probably will be considering appeal. The net result of this situation is that the inmate has little or nothing to give up in return for appealing.

Another idea under consideration is a state fund for inmate appeals. This idea was proposed in 1976 by law professors Paul D. Carrington, Daniel J. Meador and Maurice Rosenberg, in their book, *Justice on Appeal*. They say that establishing an inmate-appeal fund "would force the defendant to think about his case as a non-indigent must. The plan would not treat indigents less favorably. Indeed, it would afford them a financial benefit not now available."

Here is how an inmate-appeal fund system might work in California:

- When a defendant is sentenced to state prison, \$200 is deposited by the state into his inmate-appeal fund. Rather than cash, the defendant receives credit at the prison commissary, which, for the time being, he may not spend.

- Before deciding whether to appeal, the defendant is advised by his trial attorney about the appeal's chance of success. If the defendant allows the time for appealing to pass, the \$200 credit becomes his. If he does appeal, a trial-transcripts preparation fee of \$100 will be deducted from his appeal fund.

- If the defendant files an appeal, a lawyer is appointed to represent him. After reading the transcripts, the lawyer discusses

with the defendant the advisability of pursuing the appeal. If the defendant decides to continue, he forfeits the remaining \$100 in the appeal fund.

If the inmate-appeal-fund system induced a mere 10 percent of the state's inmates not to appeal, the state would save a good deal of money. More than one-third of the 11,000 people sent to prison each year file appeals, and each appeal costs the state about \$7,000. The state would have to pay \$2.2 million to provide \$200 in appeal funds to each of the 11,000 inmates. If 10 percent of the 4,000 who would appeal decide not to appeal, then the state would save \$2.8 million. In addition, the state would get back \$720,000 from the 3,600 inmates who forfeit the \$200 by proceeding with their appeals. Thus, the state would come out ahead by more than \$1.3 million every year. If this system discourages more than 10 percent from filing appeals, the state's monetary savings increase dramatically. In addition, the pressure on the appellate court would decrease, resulting in faster appeals for everyone.

A few lawyers have questioned whether providing an inmate-appeal fund is not simply a bribe. One describes his reaction to the concept as a feeling that "defendants are being induced to sell their rights." But proponents note that any nonindigent is "selling his rights" when he decides to forego a hopeless appeal in order to preserve his life savings, and it never has been suggested that the state should resolve his dilemma by paying the attorney's fees for his appeal. Nevertheless, to minimize the charge of "bribery" and the likelihood that inmates who might later change their minds would file *habeas corpus* petitions, the amount paid to any inmate under an inmate-appeal-fund program should not be so high as to induce him to forego an appeal that has a decent chance of success. The inmate also should be advised properly by a lawyer before he decides.

Another objection to the concept surfaced last October at a joint hearing of the Assembly Judiciary and Criminal Justice committees on appellate court efficiency. According to Judiciary Committee Chairman Elihu Harris (D-Oakland), the hearing was held to examine the demands on the appellate court system. While a few proposals were made relating to appellate court efficiency, only an inmate-appeal-fund proposal could reduce substantially the number of appeals.

This political reality may be the highest hurdle the inmate-appeal-fund concept faces. Even hardheaded voters, however, might realize that \$200 or \$300 is not enough to make any inmate well off, and that the alternative to providing this fund may be even more grim for the appellate system and for taxpayers.