1970

Appointed Counsel for the Indigent Civil Defendant: A Constitutional Right Without a Judicial Remedy.

Michael Botein
New York Law School, michael.botein@nyls.edu

Recommended Citation
36 Brook. L. Rev. 368 (1969-1970)

APPOINTED COUNSEL FOR THE INDIGENT CIVIL DEFENDANT: A CONSTITUTIONAL RIGHT WITHOUT A JUDICIAL REMEDY?

Michael Botein†

INTRODUCTION

A relatively strong doctrinal basis can be—and has been[1]—constructed for according the indigent civil defendant[2] a right to counsel. The courts have, however, totally failed to respond to the invitation. This seems anomalous, especially in light of the increasing reliance which has been placed, in recent years, upon the judiciary for the protection of basic human rights. Is this judicial reticence due to the insubstantiality of the right asserted? Or is it the product of a judicial inability to implement a substantial constitutional right?

I. STATUS OF THE RIGHT

A. *Doctrinal Basis*

Support for the indigent civil defendant's right to counsel can be found under both the equal protection and due process clauses of the Federal Constitution.

---

† Instructor, Brooklyn Law School. B.A. 1966, Wesleyan; J.D. 1969, Cornell University.

1 See Note, The Indigent's Right to Counsel in Civil Cases, 76 Yale L.J. 545 (1967); Note, The Right to Counsel in Civil Litigation, 66 Colum. L. Rev. 1322 (1966).

2 There are both doctrinal and pragmatic problems in declaring and implementing a right to counsel for the indigent civil plaintiff.

First, the equal protection argument, see p. 369-70 infra, should presumably apply to plaintiffs as well as defendants. Nevertheless, the equal protection argument, grounded as it is on criminal cases, might require too extreme an expansion in order to cover plaintiffs. Moreover, the due process argument seems to be applicable only to defendants, due to its emphasis on the seriousness of possible consequences and inability to defend oneself. P. 369-70 infra. As has been suggested, this distinction between plaintiffs and defendants has an illusory and arbitrary air to it. Note, The Indigent's Right to Counsel in Civil Cases, 76 Yale L.J. 545, 555 (1967). This is not, of course, to say that the indigent plaintiff does not also need help. One commentator found that out of 18,724 District of Columbia cases, judgment was rendered for an indigent plaintiff in only *one*. Schmerz, The Indigent Civil Plaintiff in The District of Columbia: Facts and Commentary, 27 Fed. Bar J. 235, 241 (1967).

Second, the pragmatic problem of implementing the plaintiff's right to counsel seems huge even in comparison to the seemingly insurmountable problems of implementing the defendant's right to counsel. While a court might conceivably be able to protect a defendant against the effects of his own non-appearance, p. 375 infra, it obviously cannot even attempt to do so with a plaintiff, since it has no means of knowing his grievance. Thus the plaintiff can be helped only by an affirmative publicity and education program—action clearly only within legislative capabilities.

The equal protection argument proceeds basically from *Griffin v. Illinois*.[3] There the Court held that an Illinois statute which conditioned appeal in a criminal case on the defendant's ability to buy a trial transcript violated the equal protection clause. The Court reasoned that even though the statute was fair on its face and fairly administered, it was discriminatory in its *effect*, since it denied to a poor man that which was available to a rich man. In so doing, the Court recognized a totally new type of discrimination.[4] The indigent civil defendant is subject to just such a discrimination. The operation of a statute which allows a landlord to evict, or a conditional vendor to recover, discriminates in its effect between a poor man and a rich man; the latter will be able to hire counsel to raise his defenses while the former will not.[5] This discrimination is just as invidious as that involved in *Griffin*.[6]

The due process argument is based on the theory that a de-

---

[3] 351 U.S. 12 (1956). Like the indigent civil defendant, petitioner Griffin was not, in theory, totally barred from appellate review by his lack of funds. Only a bill of exceptions, certified by the trial court, was actually required; this could not, however, usually be drawn up without a transcript. 351 U.S. at 13.

Griffin may, to some extent, be based upon both equal protection and due process reasoning. The plurality spoke in terms of "[b]oth equal protection and due process," 351 U.S. at 17, and ten years later the Court treated Griffin as having been decided under both provisions. Rinaldi v. Yeager, 384 U.S. 305 (1966). The holding may technically be based solely on equal protection, since Mr. Justice Frankfurter, who cast the deciding vote, based his concurring opinion solely on equal protection, 351 U.S. 21-22. Nevertheless, some overtone of a due process violation is probably necessary to bring a case within the Griffin formulation. The case of the indigent civil defendant comes within such overtones. See p. 370 infra.

[4] Thus, under the Griffin formulation seemingly innocent government activities, such as highway tolls and water charges, might seem to be invalid. But see, Note, Discriminations Against The Poor and The Fourteenth Amendment, 81 Harv. L. Rev. 435, 438-39 (1967).

[5] Also, the presence of counsel will greatly increase chances of settlement. Schmerz, The Indigent Civil Plaintiff in the District of Columbia: Facts and Commentary, 27 Fed. Bar J. 235, 241 (1967).

[6] The only seemingly legitimate state goal in denying counsel to the indigent would be husbanding its taxpayers' funds. Preventing the poor from exercising their legal rights hardly seems to be a valid exercise of police power. See Escobedo v. Illinois, 378 U.S. 478, 490 (1964). Though the cost to government of recognizing a right is probably an important part of a finding of invidiousness, Note, Discriminations Against the Poor and The Fourteenth Amendment, 81 Harv. L. Rev. 435, 440-41 (1967), the cost involved here does not appear to be exorbitant. Note, the Indigent's Right to Counsel in Civil Cases, 76 Yale L.J. 545, 551 (1967). Conversely, the impact of a judgment on the indigent civil defendant may be severe. Note, The Right to Counsel in Civil Litigation, 66 Colum. L. Rev. 1322, 1332-33 (1966). Moreover, discriminating against defendants on the basis of their financial situation may be inherently invidious. Wealth may be a "forbidden" or at least "suspect" classification, Tussman & TenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 353-56 (1949), and thus invalid. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966). Or a discrimination on the basis of wealth may be likened to a racial discrimination, since the two are so intertwined today. Harrington, The Economics of Protest in Employment, Race, and Poverty 234, at 245-46 (A. Ross ed. 1967).

fendant needs counsel in a civil case just as much as in a criminal case. First, the consequences of losing a civil case may be as severe as those of losing a criminal case;[7] physical incarceration should not be accorded such talismanic status, since economic oppression can equally inflict basic human misery.[8] Second, the average layman can probably conduct his own defense less capably in a civil than in a criminal case.[9] As a result, the indigent civil defendant should fall within the due process guidelines used by the Court in establishing the right to counsel in criminal cases.[10]

B. *Judicial Response*

So far, the courts have seemed somewhat less than anxious to build upon this comparatively sturdy doctrinal foundation. The

[7] Supra note 6. Due process emphasis on the impact upon the individual might require a restriction of the right to "serious" cases—like the restriction once imposed in criminal cases by Betts v. Brady, 316 U.S. 455 (1942). Note, The Indigent's Right to Counsel in Civil Cases, 76 Yale L.J. 545, 553 (1967); Note, The Right to Counsel in Civil Litigation, 66 Colum. L. Rev. 1322, 1332 (1966). Equal protection might require a similar restriction, on the theory that a small recovery, though perhaps discriminatory, would not be invidious. There is probably, in fact, a high degree of congruence between the due process concept of shockingness and the equal protection concept of invidiousness. Note, Discriminations Against the Poor and the Fourteenth Amendment, 81 Harv. L. Rev. 435, 438 (1967).

[8] The Court has shown at least some tendency to disregard traditional distinctions between "civil" and "criminal" cases. In Re Gault, 387 U.S. 1, 41 (1967); Kent v. United States, 383 U.S. 541, 555 (1966) (juvenile delinquency proceedings); Smith v. Bennett, 365 U.S. 708, 712 (1961) (habeas corpus proceedings). According a due process right to counsel to the indigent civil defendant obviously involves the further—and perhaps more involved—step of disregarding the distinction between physical and financial oppression. The Court has very recently made at least a tentative move in this direction. In Goldberg v. Kelly, 38 U.S.L.W. 4223 (1970), the Court held that welfare recipients were entitled, as a matter of procedural due process, to a hearing before termination of their benefits. The Court reasoned that due process guarantees were applicable because of the possible harm to the individual recipient. The Court was, however, deliberately vague as to what type of hearing was required; whether this rationale will be extended to the providing of appointed counsel in other civil proceedings is unclear.

[9] The average criminal defendant may, in fact, be better able to understand and defend his case than his civil counterpart. Most laymen have at least a rudimentary acquaintance with the criminal process through the mass media, whereas few have had any real exposure to the often more complex civil process. The average citizen probably knows more about gradations of homicide than about the doctrine of consideration. See Note, The Indigent's Right to Counsel in Civil Cases, 76 Yale L.J. 545, 548 (1967).

[10] Powell v. Alabama, 287 U.S. 45, 68-69 (1932) first laid down the due process analysis. In Betts v. Brady, 315 U.S. 453 (1942) the Court followed this test, though severely restricting the right to counsel. More recently, in Gideon v. Wainwright, 372 U.S. 335 (1963) the Court relied upon the sixth amendment—which confines the right to "all criminal prosecutions"—to an indeterminate degree. The Court never explicitly held, however, that the sixth amendment was incorporated into the fourteenth, but said merely that the former's guarantees were so fundamental as to be a part of the latter. In fact, the opinion in Gideon quoted extensively from the Powell formulation. 372 U.S. at 344-45. But see Pointer v. Texas, 380 U.S. 400, 408-09 (1965) (Harlan, J. concurring).

Supreme Court had the opportunity to pass upon the issue in two cases which presented it somewhat tangentially, but it denied certiorari in both cases.[11] Both cases sparked some disagreement on the Court but produced no clear statement as to the indigent civil defendant's right to counsel.[12]

Perhaps more interesting are the cases in which lower state and federal courts have grappled with different but related issues. In *In Re Chambers*,[13] the court held that where a child was ordered removed from its parents, the parents had a right not only to a transcript but also to counsel on appeal. The court based its decision not on any constitutional mandate, but rather on a close construction of the state appeals statutes, despite the fact that, on its face, the statutory language mandated no such result.[14] The court was, moreover, not unaware of the constitutional dimensions of the issue; it quite explicitly skirted them.[15] Its reasoning on the transcript issue was expressly adopted quite soon thereafter in another state,[16] whose statutes also did not mandate any such result.[17] The approach of both cases is

[11] Williams v. Shaffer, 385 U.S. 1037 (1967); Sandoval v. Rattikin, 385 U.S. 901 (1966).

[12] Neither case explicitly raised the issue. The Williams case challenged the validity of a Georgia statute requiring defendants in eviction actions to post a bond pending the proceedings. Somewhat more in point, the Sandoval case sought to overturn a foreclosure judgment recovered against poor people who were represented by allegedly ineffective county-supplied counsel. The latter case seems to have really involved the issue of whether incompetence of counsel—whether retained or appointed—was grounds for reversal in a civil case. The majority in the Texas court held that defendants' counsel was in fact, effective. Sandoval v. Rattikin, 395 S.W.2d 889, 895 (Tex. Civ. App. 1965), cert. denied 385 U.S. 901 (1966). The lone dissenter explicitly side-stepped the question of whether defendants had a constitutional right to counsel in the first place. Id. at 895, 913 (Sharpe, J. dissenting). And the opinion of Mr. Justice Fortas, dissenting from denial of certiorari, seemed directed more at the question of effectiveness than at the question of the right to counsel. Cf. Note, The Indigent's Right to Counsel in Civil Cases, 76 Yale L.J. 545, 545-46 (1967).

[13] 152 N.W.2d 818 (Iowa 1967).

[14] Iowa Code Ann. ch. 232.28 (West 1969) gave a right to appointed counsel in juvenile proceedings. It did not, however, refer to appellate proceedings, and the context—i.e. trial procedures—appeared to point more towards trial than appellate counsel. Ch. 232.52 provided for "reasonable compensation" for appointed counsel, but only upon "certification of the judge"—once again, pointing in the direction of trial counsel. Ch. 232.32 just required a court reporter, and was totally silent on the transcript issue.

[15] The court said that the due process requirements of In Re Gault, 387 U.S. 1 (1967) might be applicable to other proceedings involving children, 152 N.W.2d at 821-22. It overlooked possible application of the Griffin formulation. See Douglas v. California, 372 U.S. 353 (1963).

[16] In Re Karren, 280 Minn. 377, 159 N.W.2d 402 (1968). Cf. Lee v. McKay, 414 S.W.2d 956 (Tex. Civ. App. 1967), which used similar statutory construction to require a transcript in juvenile delinquency proceedings. The case is particularly interesting in that it was decided only five days before In Re Gault, 387 U.S. 1 (1967), which indicated that providing a transcript might be required as a matter of constitutional right. 387 U.S. at 58.

[17] Minn. Stat. Ann. §§ 260.161(1), 260.041(3) (West Supp. 1969) did not re-

perhaps most interesting in light of one commentator's suggestion that statutory construction could serve as a low risk vehicle for judicial experimentation with the right to counsel.[18]

This technique was, however, rejected in a New York lower court decision, *Jeffreys v. Jeffreys*.[19] The court passed up an easy opportunity to hold that publication costs in a divorce action were covered by the broad language of an *in forma pauperis* statute.[20] Instead, it went on to hold that under *Griffin* the publication requirement discriminated in its effect against poor people, since they could not afford the fees while more affluent people could.[21] The court's action in *Jeffreys* is especially striking in light of the fact that the court had, in a prior hearing, held that plaintiff's claim for fees was within the statute,[22] and that another lower New York court was later to reach the same conclusion.[23]

---

quire a record of any type, but allowed juvenile court judges, at their discretion, to appoint a court reporter. The statutory construction here was thus even more strained than in the Chambers case.

It is interesting to note that though the courts are only now aiding the indigent to acquire necessary litigation aids, they have long struck down, under state constitutional provisions, barriers created by court costs. See, e.g., Lewis v. Smith, 21 R.I. 324, 43 A. 542 (1899) (surety bond for costs on appeal); City of Manitowoc v. Manitowoc and Northern Traction Co., 145 Wis. 13, 129 N.W. 925 (1911) (injunction issued only on condition of posting $5000 bond pending appeal). It is perhaps ironic that the courts have been so quick to remove internal barriers and so slow to attack external ones.

[18] Note, The Indigent's Right to Counsel in Civil Cases, 76 Yale L.J. 545, 557 (1967).

[19] 58 Misc. 2d 1045, 296 N.Y.S.2d 74 (Sup. Ct. 1968).

[20] N.Y. Civ. Prac. L. & Rules § 1102(a) (McKinney 1963) [hereinafter cited as CPLR]. The court reasoned since the statutory language had not been changed, and since it had never been thought to include publication fees, it could not then be read to include such. 58 Misc. 2d at 1048-50, 296 N.Y.S.2d at 79-81.

A grant of counsel under the statute would appear to be subject to certain limitations which might be inappropriate under equal protection. CPLR § 1101(a) (McKinney 1963) requires that the petitioner show a meritorious case. This would seem to be invalid under the equal protection clause, since it would give the rich man a right to pursue frivolous defenses but deny it to the poor man. Cf. Coppedge v. United States, 369 U.S. 338, 348 (1962).

[21] 58 Misc. 2d at 1053-56, 296 N.Y.S.2d at 85-87. This reasoning was rejected in Boddie v. Connecticut, 286 F. Supp. 968 (D. Conn. 1968) in a challenge to a similar Connecticut publication requirement. The court there based its decision on the difference between criminal and civil cases, and on the state's interest in supporting its courts and discouraging frivolous actions.

[22] Jeffreys v. Jeffreys, 57 Misc. 2d 416, 292 N.Y.S.2d 767 (Sup. Ct. 1968). The court had said firmly that: "The statutory authority for the granting of the relief requested is clear. It is therefore unnecessary to rule that denial of access to the court to poor persons, while granting such access to those able to afford the cost of publication, might constitute a denial of equal protection . . ." 57 Misc. 2d at 417, 292 N.Y.S.2d at 768. The court's later position may have been especially anomalous in light of the fact that CPLR § 1102, being in derogation of the common law, had been held to require a strict construction. King Kullen Grocery Co. v. Astor, 249 App. Div. 657, 291 N.Y.S. 487 (2d Dep't 1936).

[23] Brown v. Wyman, 59 Misc. 2d 740, 300 N.Y.S.2d 254 (Sup. Ct. 1969).

Thus the courts have almost consistently attempted to avoid the broad constitutional issue posed by the indigent civil defendant's lack of counsel. Attributing this to a lack of doctrinal support for the right is an incomplete explanation. The right is well within the bounds of precedent, and its recognition would entail only doctrinal change, with no need for the costly overruling or involved distinguishing of prior cases.

Judicial inaction here may at least partially be based upon judicial inability to implement the right. A court would, understandably enough, be loathe to create an unenforceable right.[24] The question, therefore, becomes whether the courts do, in fact, have the ability to implement the indigent civil defendant's right to counsel.

II. Fashioning the Remedy

The cornerstone of any such system must rest upon the proposition that to render a judgment against an indigent defendant who lacks counsel is, in itself, unconstitutional. Judicial action is state action, and thus a judgment which deprives a person of a constitutional right is itself unconstitutional.[25] This, of course, raises a problem as to what steps must be taken in order that counsel will be deemed to have been made available to the indigent—or, stated conversely, what action will be deemed to be a waiver of the right to counsel. On both a doctrinal and a pragmatic level, it would seem reasonable to analogize to criminal cases and require that the defendant be given clear notice of his right to counsel and that he unambiguously waive that right.[26]

---

[24] Note, Discriminations Against The Poor and the Fourteenth Amendment, 81 Harv. L. Rev. 435, 443 (1967).

[25] In Shelley v. Kraemer, 334 U.S. 1 (1948), the Court held that a judge could not enforce a racially discriminatory restrictive covenant, since his action would constitute governmental enforcement of discrimination and thereby violate the equal protection clause. Barrows v. Jackson, 346 U.S. 249 (1953) extended the rule to actions at law. Analytically, these cases differed from the situation here at hand, since they involved a more traditional, express type of discrimination. Their ban on judicial action should, however, apply in this situation, since both situations involve court action which violates a right guaranteed by the equal protection clause.

[26] Infra note 47. The strict criminal law standard for a waiver of counsel, Miranda v. Arizona, 384 U.S. 436, 475 (1966), might have to be relaxed here. Since the main problem with the indigent civil defendant is that he does not appear, it would be quixotic to require such a detailed inquiry into the circumstances of a waiver; it would amount to requiring that the defendant be brought bodily before the court.

This also poses the problem of identifying the stage in the proceedings at which the defendant's right to counsel should be deemed to attach. If, in fact, the right is to have any real value, it would seem necessary that it accrue substantially before

Given this ban on judicial action where an indigent is without counsel, there appear to be three basic ways of vindicating his right to counsel. First, the defendant may simply be allowed to litigate his case again—this time with the assistance of counsel. Second, he may be given an affirmative cause of action to compensate him for his lack of counsel. Third, and obviously the most desirable, the courts may be able to ensure that he is accorded counsel when the action first arises.

In the rare case where a defendant has actually appeared, there should be no problem in giving him a chance to relitigate his case; by analogy to criminal cases, lack of counsel at trial should be grounds for reversal either per se[27] or at least on a showing that counsel was necessary.[28] More commonly, however, the defendant will not appear[29]—or, even be served[30]—thus making it necessary to open a default judgment. In many cases this should be possible on the purely statutory ground of excusable neglect, due to ignorance and lack of counsel.[31] Where this ground is unavailable, it may be possible to argue that the rendering of a judgment in violation of the fourteenth amendment ousts a court of its subject matter jurisdiction and is therefore void.[32]

Secondly, defendant might be given an affirmative cause of action against the parties involved in depriving him of his right to counsel. This could take two possible forms. First, the old but

trial, since counsel is—especially in light of settlement possibilities—perhaps most needed then. Probably the most convenient line of demarcation would be either service of summons or granting of a provisional remedy before service. What is involved, therefore, is in a sense analogous to the attaching of a right to counsel in criminal cases at a "critical stage." Gilbert v. California, 388 U.S. 263, 270 (1967); United States v. Wade, 388 U.S. 218, 237 (1967) (under Powell, counsel necessary at line-up).

Consistent with this approach, the right should continue on appeal. Douglas v. California, 372 U.S. 353 (1963).

27 Gideon v. Wainwright, 372 U.S. 335 (1963).

28 Betts v. Brady, 316 U.S. 455 (1942); see Note, The Right to Counsel in Civil Litigation, 66 Colum. L. Rev. 1322, 1339 (1966).

29 At present, for example, less than five percent of the defendants in eviction proceedings appear. Conference on Tenants' Rights, Tenants Rights: Legal Tools For Better Housing 8 (1967).

30 P. Wald, Law and Poverty: 1965 18 (1965).

31 CPLR § 5015(a)(1) (McKinney 1963). Gallo v. Bosco, 13 App. Div. 2d 982, 216 N.Y.S.2d 501 (2d Dep't 1961).

32 CPLR 5015(a)(4) (McKinney 1963). "Jurisdiction to decide is jurisdiction to make a wrong as well as a right decision." Pope v. United States, 323 U.S. 1, 14 (1944). What is involved here however, is not just an erroneous decision, but rather an unconstitutional use of judicial power. The rendering of a judgment will, as in Shelley and Barrows, per se go beyond the court's authority. The situation is distinguishable from that in Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940), which held that a subsequent striking down of a statute under which a court had rendered a decree did not void the decree. In that case the issue was whether the holding of unconstitutionality was retroactive; here any judgment rendered is unconstitutional when rendered.

still vigorous Civil Rights Acts might be invoked.[33] Second, a tort remedy could be created.[34] Though technically a simple matter, this approach may produce unfair results by subjecting good faith plaintiffs to an action and liability for doing no more than attempting to enforce their own legal rights.[35] Moreover, it would be of very questionable utility to the defendant, since people who initially default are unlikely to later retain counsel to prosecute an affirmative action.

Traditional means of implementing personal rights will obviously not be effective here. The core of the indigent civil defendant's problem is that he cannot be relied upon to protect himself. Thus, any system which is to truly protect him must, in effect, operate without him. The issue then becomes whether the courts, without a massive legislative program, are capable of doing so.

Given the fact that a court should recognize its inability to proceed, or at least to render judgment,[36] where the defendant is indigent, the realistic problem is bringing the defendant's indigence to the court's attention. Where defendant appears in the action, this obviously presents little difficulty; the court need only make a speedy inquiry. Since the vast majority of defendants will, however, never appear, it is necessary to create a method whereby the court can, on its own, inquire into the defendant's financial situation.

---

33 42 U.S.C. § 1985(3) (1964) provides an action for damages against anyone who conspires to deprive another of, inter alia, the equal protection of the law. The main problem here is to make out the state action and the conspiracy. Acts of the plaintiff's lawyer do not constitute state action. Meier v. State Farm Mut. Ins. Co., 356 F.2d 504 (7th Cir. 1966). Acts of the judge, however, might be. But this still leaves the question of conspiracy. Although a conspiracy between public officials and private citizens would suffice, United States v. Price, 383 U.S. 787, 794 (1966), a judge, because of his position and traditional immunity, cannot be held as a conspirator for the purposes of the statute. Agnew v. Moody, 330 F.2d 868 (9th Cir. 1964).

34 This could be approached in two ways. First, if a judgment against a defendant who lacks counsel is void, see note 25 supra, any actions under the judgment might cease to be privileged and thus be tortious. Since the judgment would, however, presumably be regular on its face the privilege would probably not be lost.

Second, the courts might simply create a new tort, as was once done in the case of unreasonable searches and seizures. Wolf v. Colorado, 338 U.S. 25, 30 n.1 (1949).

35 This would be especially unfair where defendant did not have a valid defense to begin with. Though the mere denial of counsel might technically be within 42 U.S.C. § 1985(3) (1964), it would seem reasonable to require that defendant show the probability of a valid defense.

36 It is not clear, under Shelley and Barrows, whether the commencement and prosecution of an action are, in themselves, enough to constitute state action; both cases involved discrimination created only by the rendering of a judgment. 334 U.S. at 13. It seems reasonable, however, that all phases of the proceeding should come under the ban, since the right should attach at all times, note 26 supra, and the defendant may be oppressed at all phases.

Under present law, the only approach seems to be through some form of judicial notice. Plaintiff's return of service will show defendant's address, if that is relied upon for venue,[37] and, in any event, the place where defendant was served.[38] With this information as a starting point, the court should be able to take judicial notice of the character of defendant's neighborhood. First, basic facts about the economic level of an area within the jurisdiction of the court should be considered common knowledge.[39] Second, since the court may take notice of the acts of local governmental bodies,[40] it should be able to observe which neighborhoods have been designated as slums[41] or as areas in need of upgrading.[42] If defendant appears to come from a low-income area, the court could then require plaintiff to show either that defendant was not indigent or that he had been apprised of his right to counsel.

Though perhaps technically feasible, such a system would not only impose unfair burdens on plaintiffs[43] but would also be quite erratic in its operation.[44] To make it work effectively and fairly would require a comprehensive file on each individual's financial status against which each summons could be checked, possibly by computer. Any such system obviously involves large-scale legislative action and is thus beyond the reach of the courts alone.

A more realistic approach would be for the courts to exercise their general rule-making powers[45] to require that all summonses carry an easily understood, perhaps multi-lingual, notice that appointed counsel was available. This would, at least in situa-

---

[37] E.g., CPLR § 305(a) (McKinney 1963).

[38] E.g., CPLR § 306 (McKinney 1963).

[39] C. McCormick, Evidence 690 (1954); see Van Vliet & Place Inc. v. Gaines, 221 App. Div. 538, 542, 224 N.Y.S. 481 (1st Dep't 1927) (notice of prevalence of restrictive covenants in New York City).

[40] E.g., CPLR § 4511(b) (McKinney 1963).

[41] N.Y. Gen. Mun. Law § 504 (McKinney Supp. 1969).

[42] N.Y. Gen. Mun. Law § 505 (McKinney 1965). Fix v. Rochester, 50 Misc. 2d 660, 271 N.Y.S.2d 87 (Sup. Ct. 1966).

[43] Where defendant is not indigent, plaintiff should be able to show that fact fairly easily, since his dealings with defendant will probably have given him some indication of his financial status. Where, however, defendant is indigent, the problem would be more difficult for plaintiff, since he would have to show that defendant had been apprised of his right to counsel. In effect, the latter situation would put plaintiff into the somewhat anomalous position of having to notify the defendant of his rights.

[44] There are two main problems here. First, defendants may reside or be served in a low-income area when he is actually not indigent, or vice versa. Second, the practices of many merchants who deal with the poor are already shoddy enough that falsification of a return of service would probably be minor by comparison. Supra note 30.

[45] CPLR §§ 212(5), 229 (McKinney Supp. 1969).

tions where service is actually made,[46] increase the probability that defendant would seek counsel. Such notice may, in fact, be constitutionally required, by analogy to criminal cases;[47] giving a person a right to counsel makes little sense if he is not clearly informed of it.

CONCLUSION

The courts are, therefore, virtually powerless to implement on their own any meaningful right to counsel for the indigent civil defendant. An abstract recognition of the right might, as one commentator has suggested, encourage both private and legislative legal services programs;[48] It might, however, just end up a mockery. A haphazard system of implementation might pressure the plaintiffs' bar and its clientele into the somewhat anomalous position of lobbying for comprehensive legal services; it might also provoke large-scale rejection of both the courts and their program.

This is not to say that the courts must assume a totally passive role. The basic nature of the judiciary prevents positive action, but the courts can still perform their traditional role of counselling, encouraging, and occasionally even prodding not only their co-ordinate branches, but also the public.

---

[46] This would be just another argument in favor of entrusting service of process solely to court officials.

[47] Such notice would at least partially fulfill the criminal law's requirement that a person be given affirmative notice of his right to counsel. Burgett v. Texas, 389 U.S. 109, 114 (1967); Swenson v. Bosler, 386 U.S. 258, 260 (1967); Miranda v. Arizona, 384 U.S. 436, 471, 473 (1966); Johnson v. Zerbst, 304 U.S. 458, 465 (1938). This requirement apparently must be fulfilled even where a person has some idea of the right. In Re Gault, 387 U.S. 1, 42 (1967).

[48] Note, The Indigent's Right to Counsel in Civil Cases, 76 Yale L.J. 545, 547, 552 (1967).