Washington and Lee Law Review

Volume 39 | Issue 4 Article 3

Fall 9-1-1982

Should Indigent Civil Litigants In The Federal Courts Have A Right To Appointed Counsel?

Luther M. Swygert

SHOULD INDIGENT CIVIL LITIGANTS IN THE FEDERAL COURTS HAVE A RIGHT TO APPOINTED COUNSEL?

LUTHER M. SWYGERT* **

The problem of providing legal assistance for the poor has a long history.[1] Currently, indigent civil litigants receive free legal services from publicly and privately funded legal aid programs and from attorneys in private practice. Those sources, however, have proven inadequate to meet the existing need.[2] Recently, the Reagan Administration proposed that Congress eliminate federal funding for the Legal Services Corporation (L.S.C.).[3] Congress did not adopt the proposal, but it did cut the funding for L.S.C. by twenty-five percent for the fiscal year 1982.[4] Given the acknowledged need for the provision of legal services to indigent litigants, the question arises whether the government has an

* Senior Judge, United States Court of Appeals for the Seventh Circuit. LL.B. 1927, the University of Notre Dame. Judge Swygert was a judge-in-residence at the Frances Lewis Law Center, School of Law, Washington and Lee University, during October 1981 and March-April 1982. As such, he devoted his time to the research and writing of this article.

** I am indebted to my law clerk, Barbara E. Rook, for her invaluable assistance in the research and writing of this article.

[1] *See* text accompanying notes 20-39 *infra*.

[2] *See* Weinstein, *The Poor's Right to Equal Access to the Courts*, 13 CONN. L. REV. 651, 656 (1981) [hereinafter cited as Weinstein]; LEGAL SERVICES CORPORATION ANNUAL REPORT 18 (1981) [hereinafter cited as LEGAL SERVICES REPORT]. The Legal Services Corporation (L.S.C.) has estimated that in 1981, prior to the reduction in appropriations, it handled 1.5 million cases, which was "[a]t best, . . . less than 20 percent of actual need." LEGAL SERVICES REPORT, *supra*, at 18.

[3] *See Reagan Proposals Detail Further Trims in Budget*, N.Y. Times, Mar. 11, 1981, § B, at 5. The Legal Services Corporation is an independent, federally funded program that Congress created in 1974. The Legal Services Corporation Act, Pub. L. No. 93-355, 88 Stat. 378 (1974) (codified at 42 U.S.C. §§ 2996-2996k (1977)). Congress found that "there is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances" and that "providing legal assistance to those who face an economic barrier to adequate legal counsel will serve best the ends of justice." 42 U.S.C. § 2996(1), (3). Prior to the creation of the L.S.C., federally funded legal services for the poor were provided by the Legal Services Program, which was part of the Office of Economic Opportunity. For a brief history of federally funded legal aid programs, see Stashower, *A Brief History of Legal Services: 10 on the Richter Scale*, 38 NLADA BRIEFCASE 18 (1981); Comment, *President Reagan and the Legal Services Corporation*, 15 CREIGHTON L. REV. 711, 711-21 (1982).

[4] *See* LEGAL SERVICES REPORT, *supra* note 2, at 7. Pub. L. No. 97-92, which the House passed on December 10, 1981, 127 CONG. REC. H9156 (daily ed. Dec. 10, 1981), and the Senate on December 11, 1981, 127 CONG. REC. S15,063 (Dec. 11, 1981), provided the L.S.C. $241 million for fiscal year 1982. In fiscal year 1981, the L.S.C. received $321 million, and it requested $400 million for fiscal year 1982. *See* H.R. REP. No. 97-97, 97th Cong., 1st Sess. 5 (1981).

obligation to furnish counsel to all such litigants for whom free legal services are not available. This article will focus on one aspect of the broader problem: the appointment of counsel by federal courts for indigent plaintiffs in civil rights cases and for indigent petitioners in habeas corpus proceedings. The constitutional basis for such appointments will first be discussed, and then the practical alternatives, such as the present rules and practice of the federal courts and the efforts of the organized bar to furnish *pro bono publico* assistance, will be surveyed.

The courts have long recognized the importance of access to the courts as a means of resolving disputes and vindicating rights. In *Boddie v. Connecticut*,[5] Justice Harlan wrote:

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitely settle their differences in an orderly and predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible . . . . It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement.[6]

In many cases, a court of law is the only forum available to someone seeking to protect his rights or resolve a dispute.[7]

In criminal cases, the sixth amendment gives the accused in federal court the right to be represented by counsel,[8] and the Supreme Court has interpreted this guarantee to include the right to court-appointed counsel if the defendant is too poor to retain counsel.[9] In civil cases, a federal statute gives parties the right to be represented by counsel,[10]

---

[5] 401 U.S. 371 (1971).

[6] *Id.* at 374-75.

[7] *See id.* at 376-77. *See also* NAACP v. Button, 371 U.S. 415 (1963). In *Button*, the Court explained that litigation may sometimes take on a broader role in the quest for the protection of civil rights:

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all governments, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930's, for example, no less is it true of the Negro minority today. And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.

Id. at 429-30 (footnotes omitted).

[8] U.S. CONST. amend. VI.

[9] *See* Johnson v. Zerbst, 304 U.S. 458, 463 (1938); text accompanying notes 52-54 *infra* (discussion of *Johnson*). *See also* Gideon v. Wainwright, 372 U.S. 335, 339-40 (1963).

[10] *See* 28 U.S.C. § 1654 (1977). In Powell v. Alabama, 287 U.S. 45 (1932), the Court stated that "[i]f in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not

and another statute gives federal courts the power to request counsel to represent an indigent litigant,[11] but this power is discretionary only.[12] "There is no constitutional or statutory right for an indigent to have counsel appointed in a civil case."[13]

The courts have acknowledged, in the context of criminal cases, that the due process right to be heard in court may not be meaningful if the defendant is not represented by counsel.[14] There can be no doubt about the importance of effective assistance of counsel. The defense against a criminal charge or the establishment of a substantive right in a civil proceeding often depends upon how the case is presented. Laymen are not usually competent to try their own cases. In speaking about the inability of an accused to defend himself without the aid of counsel, Justice Sutherland in *Powell v. Alabama* defined that deficiency in language that defies improvement:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[15]

Justice Sutherland's statement is equally applicable to civil litigation. Indeed, the factual and legal issues in a civil case are ordinarily more complex than in a criminal prosecution,[16] although admittedly more is at stake in the latter situation.

---

be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." 287 U.S. at 69. But the Court in a later case emphasized that this was dicta and refused to find a constitutional right of counsel for a civil litigant. *See* Maness v. Meyers, 419 U.S. 449, 466 n. 15 (1975). *But see* 419 U.S. at 471 (Stewart, J., concurring in the result) ("More than 40 years ago the Court recognized a due process right to retained counsel in civil proceedings.").

[11] *See* 28 U.S.C. § 1915(d) (1977).

[12] *See* United States *ex rel.* Gardner v. Madden, 352 F.2d 792 (9th Cir. 1965).

[13] Watson v. Moss, 619 F.2d 775, 776 (8th Cir. 1980).

[14] *See* text accompanying notes 47-60 *infra*.

[15] 287 U.S. 45, 68-69 (1932).

[16] *See* Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 548 (1967) [hereinafter cited as *The Indigent's Right to Counsel*].

The need to be represented by counsel takes on even greater significance when considered in the context of our adversary legal system. One of the underlying assumptions of the adversary system is that both parties will have access to at least minimal legal resources. This assumption is destroyed when one of the parties is not represented by counsel.[17] Not only is the *pro se* litigant at a disadvantage at trial, but perhaps more importantly, he is severely handicapped even before he gets to court. In civil cases, the unrepresented party may be overwhelmed by discovery requests and pretrial motions. His inability to respond adequately may result in a judgment against him. Further, the unrepresented party may be unable to settle his claim with the opposing party as long as his opponent has the advantage if the case goes to court.[18]

It is my contention that indigent plaintiffs in some civil actions have the right to appointed counsel. As I shall develop below, I believe that fundamental principles of due process and equal protection, stated by the Supreme Court, support this conclusion.[19] Moreover, recognition of such a right is consistent with the common-law tradition of the Anglo-American judicial system. Therefore, before discussing the constitutional basis for the appointment of counsel in civil cases, I shall first review briefly the development of the right to counsel in civil cases in England.

I. THE RIGHT TO COUNSEL IN CIVIL CASES IN ENGLAND

A. *The Indigent Civil Litigant's Right to Appointed Counsel at Common Law*

In England, the right of indigent civil litigants to government-provided counsel dates back to the ninth century.[20] The English historical record indicates, however, that this right was founded more in rhetoric and statute than in actual practice.

Before 1495, indigents' access to the civil courts and representation by lawyers was limited to the practice of ecclesiastical lawyers to represent poor people in the temporal courts,[21] and royal perogative. By the time of Henry III (1216-1272), it was an accepted practice for the king to send his personal emissaries to right wrongs that the ordinary courts did not or could not correct.[22] This was particularly true after the fee

---

[17] *See* Bounds v. Smith, 430 U.S. 817, 826 (1977) ("Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation.").

[18] *See* Schmertz, *The Indigent Civil Plaintiff in the District of Columbia: Facts and Commentary*, 27 FED. B. J. 235, 243 (1967).

[19] *See* text accompanying notes 61-150 *infra*.

[20] *See* Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 362, 365 (1923) [hereinafter cited as Maguire].

[21] *See id.* at 364-66.

[22] *See id.*

system was instituted in the common law courts.[23] The king's emissaries often heard complaints of poor people who could not pay court or attorney fees or who believed that the common law courts were biased against them. "In 1476 'one John Brown was present to be the presignator of the poor in the Common Pleas . . . and it was said that if any poor man would swear to him that he was not able to pay for the entry of pleas . . . then he ought to enter the pleas without taking anything for his labor . . . .' "[24] One plaintiff sought relief in the king's court because she " 'can get no justice at all, seeing that she is poor and this Thomas is rich.' "[25]

This aspect of the royal perogative was maintained throughout the institutionalization of the legal system, and Chancery continued the practice.[26] One ground of Star Chamber jurisdiction was the poverty of the plaintiff.[27] The Court of Requests was known originally as the Court of Poor Men's Causes.[28] These institutions were, however, imperfect providers of justice to the poor, in part because the royal courts met infrequently and were slow to reach results.[29] Further, over time they became laden with technical and legalistic obstacles too complex for the poor to surmount.[30]

Nevertheless, perhaps the disparity between indigent access to the royal courts and to the law courts explains the seminal 1495 statute, which permitted the poor to sue in the law courts "*in forma pauperis*."[31] The statute, which remained in effect until 1883, empowered the chancellor to assign lawyers to indigent civil plaintiffs

> without any reward taking therefore; and after the said writ or writs be returned, if it be afore the King in his bench, the justices there shall assign to the same poor person or persons, counsel learned, by their discretions, which shall give their counsels, nothing taking for the same; and likewise the justices shall appoint attorney and attornies for the same poor person or persons, and all other officers requisite and necessary to be had for the speed of the said suits to be had and made, which shall do their duties without any reward for their counsels, help and business in the same . . . [and the same shall be done in other courts of record].[32]

---

[23] *See id.*

[24] *Id.* at 366 (quoting Y.B. 15 Edw. IV 26b).

[25] Maguire, *supra* note 20, at 367 (quoting 30 Seld. Soc. 3 (1914)).

[26] Maguire, *supra* note 20, at 368.

[27] *See id.* at 369.

[28] *See* 12 Seld. Soc. 21, xii (1898).

[29] *See* Maguire, *supra* note 20, at 371.

[30] *See id.* at 371-72.

[31] 11 Hen. 7, c. 12 (1495).

[32] *Id., quoted* in Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 741 (1980) [hereinafter cited as Shapiro].

The 1495 statute had a variety of shortcomings. First, it did not apply to civil defendants.[33] In addition, it did not exempt the pauper from paying court costs.[34] If the pauper lost and could not pay the prevailing party's costs (including attorney's fees), he could be whipped.[35] Also, there was no provision of legal aid for appeals. Finally, the courts required the indigent to produce a certificate signed by two attorneys attesting to the good cause of the suit.[36]

Even if an indigent civil plaintiff gained access to the courts, judges rarely exercised their power to appoint counsel.[37] Aside from the serjeants-at-law, who were officers of the court in the truest sense, there was substantial doubt about a judge's power to compel an unwilling private lawyer to donate his services.[38] While the basis of objections by

---

[33] *See* Maguire, *supra* note 20, at 377; Shapiro, *supra* note 32, at 745.

[34] *See* Shapiro, *supra* note 32, at 745.

[35] *See id.*; Maguire, *supra* note 20, at 375.

[36] *See* Shapiro, *supra* note 32, at 745.

[37] *See id.* at 746-49.

[38] *See id.* at 746-47. Professor Shapiro found only one reported case, from Ireland, in which a lawyer objected to the pro bono assignment, but the exchange between the lawyer and the trial judge reveals the prevailing attitudes towards the lawyer's duty:

> *Macmeehan* [the counsel asked by the court to serve] replied that he had no objection personally to act, but there was a feeling and opinion existing on the subject among the bar which compelled him to beg that his lordship would excuse him for declining.
>
> . . . .
>
> Sir *Thomas Staples*, Q.C., rose and addressed the court. He said that on the part of the bar he thought it right to state that there was a feeling among them in which he quite concurred, that no counsel could, with propriety, undertake the defense of a prisoner without receiving instructions from an attorney. He also had to say, not on the part of Mr. Macmeehan, but on the part of the bar, that in every case in which counsel was assigned, the Crown should pay him a fee; up to a very recent period it was a rule to do so.
>
> PIGOTT, C.B., said he could make no rule upon the subject of payment of counsels' fee in such cases; but he would certainly recommend that it should be paid by the Crown, and it was his own opinion that the fee ought to be paid. With respect to the assignment of counsel and attorney for a prisoner, it was his opinion that a judge might with propriety call on a barrister to give his honorary services to a prisoner who was unable to employ one; but he thought the case different as regarded an attorney. A case occurred at the Special Commission in Clonmel, before himself and the Lord Chief Justice (*Reg. v. Cody*), in which an attorney had been paid for certain services, and refused to act further without receiving further renumeration; the Chief Justice and himself were of opinion that they had no power to compel him to do so, but they called upon Mr. Roleston to defend the prisoners, and he consented to do so without the assistance of an attorney; and, after as able a defense as ever he (the Chief Baron) had heard in a court of justice, the prisoners were convicted.
>
> *Macmeehan* said he entertained a great respect for Mr. Roleston but he dissented from the propriety of the course taken by him. Perrin, J. had expressed a decided opinion that counsel ought not to act without an attorney.
>
> PIGOTT, C.B., said he could not compel counsel to act; he could do no more than appeal to the sense of feeling of the bar.
>
> *Murphy* (solicitor) having consented to act as attorney for the prisoner,

lawyers to representation of the poor was clearly pecuniary, the failure of the English judiciary to enforce the letter and spirit of the 1495 statute was problematic. Class antagonism may have played some part, but the English trial judges were also concerned about abuses by bad-faith claimants and had an understandable opposition to a greatly increased workload.[39]

B. *The Current British System*

In contrast to both its historical roots and the American system, the modern British legal aid system, established in 1949, is a model of intelligent delivery of legal services to the poor.[40] A poor person obtains legal counsel by contacting any private lawyer whose name appears on a legal aid list. Because most lawyers volunteer their services, a poor person has almost as broad a range of choice as any other person seeking legal advice.[41] A screening committee of private lawyers certifies the case based upon its potential merit and upon whether " 'a man of moderate means . . . would embark on [this] litigation.' "[42] An appeal may be taken from a denial of certification.[43] If the case is certified, the government's legal aid fund pays all litigation costs, generally including 100 percent of the opposing party's costs if he prevails, and 90 percent of the lawyer's fees.[44] Applicant contribution to the cost of representation is assessed in proportion to the applicant's means.[45]

Macmeehan consented to act as counsel.
Regina v. Fogarty, 5 Cox's Crim. Cases. 161, 161-62 (Crown Ct., County Down 1851), *quoted in* Shapiro, *supra* note 32, at 747-48.

[39] *See* Maguire, *supra* note 20, at 378.

[40] *See* Legal Aid and Advice Act, 1949, 12, 13 & 14 Geo. 6, ch. 51; Legal Aid Act, 1960, 8 & 9 Eliz. 2, ch. 28.

[41] *See* Upton, *The British Legal Aid System*, 76 YALE L.J. 371, 373 (1966) [hereinafter cited as Upton].

[42] *See id.* at 372 (quoting E. SACHS, LEGAL AID 82 (1951)).

[43] *See Upton, supra* note 41, at 372. The British position that a denial of a request for counsel is appealable immediately is in marked contrast to the law in the Seventh Circuit. In Randle v. Victor Welding Supply Co., 664 F.2d 1064 (7th Cir. 1981), the court held that a motion denying the discretionary appointment of counsel in a civil action under 28 U.S.C. § 1915(d) (1977) was not immediately appealable, but could be reviewed only after entry of a final judgment. In my dissent, I discussed the problems facing a *pro se* litigant and argued that the denial of a motion to appoint counsel was not effectively reviewable on appeal from the final judgment. I concluded that the possible harm from the erroneous denial of court-appointed counsel, including voluntary dismissal by a plaintiff who feels incapable of pursuing the case on his own or settlement on disadvantageous terms, justified an exception to the general rule that appeals may be taken only from final judgments. *See* 664 F.2d at 1068. The Seventh Circuit is currently in the minority on this issue; only the Tenth Circuit has taken a similar position. *See* Cotner v. U.S. Probation Officer Mason, 657 F.2d 1390, 1391-92 (10th Cir. 1981). Four other circuits disagree. *See* Ray v. Robinson, 640 F.2d 474, 477 (3d Cir. 1981); Hudak v. Curators of the University of Missouri, 586 F.2d 105, 106 (8th Cir. 1978), *cert denied*, 440 U.S. 985 (1979); Caston v. Sears, Roebuck & Co., 556 F.2d 1305, 1308 (5th Cir. 1977); Miller v. Pleasure, 296 F.2d 283, 284 (2d Cir. 1961), *cert. denied*, 370 U.S. 964 (1962).

[44] *See* Upton, *supra* note 41, at 372.

[45] *See id.* at 373.

II. THE CONSTITUTIONAL BASIS FOR THE RIGHT TO COUNSEL

A. *The Sixth Amendment*

The sixth amendment provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."[46] In 1932, the Supreme Court held in *Powell v. Alabama*[47] that the sixth amendment applied to the states through the due process clause of the fourteenth amendment.[48] After *Powell*, therefore, it was clear that defendants in both state and federal criminal proceedings were constitutionally entitled to be represented by counsel. *Powell* also established that, at least in some cases, an indigent defendant was entitled to have counsel appointed for him. The Court stated that "in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law."[49] In *Avery v. Alabama*,[50] another capital case, the Court reaffirmed the holding of *Powell*.[51]

In *Johnson v. Zerbst*,[52] the Court apparently broadened the holding of *Powell* by implying that ignorance, feeble-mindedness, or illiteracy are not prerequisites to a defendant's constitutional right to appointed counsel. Justice Black, writing for the Court, stated:

> The Sixth Amendment embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious.[53]

Although *Johnson* involved a federal conviction, the sixth amendment principles enunciated by the Court in that case would apply to state prosecutions under the holding of *Powell*.[54]

The Supreme Court, however, halted the trend toward recognition of a right to appointed counsel in all state and federal prosecutions in its

---

[46] U.S. CONST. amend. VI.

[47] 287 U.S. 45 (1932).

[48] *Id.* at 66-68.

[49] *Id.* at 71.

[50] 308 U.S. 444 (1940).

[51] *Id.* at 446.

[52] 304 U.S. 458 (1939). *Avery* and *Powell* involved state convictions for capital crimes, while *Johnson* involved a federal conviction for counterfeiting.

[53] *Id.* at 462-63.

[54] 287 U.S. at 66-68.

decision in *Betts v. Brady*.[55] The *Betts* Court held that although "the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental idea of fairness," the amendment does not embody "an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel."[56]

Twenty-one years later, the Supreme Court overruled the *Betts* decision in *Gideon v. Wainwright*.[57] In *Gideon*, the Court held that the state must secure appointed counsel for every indigent felony defendant unless the defendant competently and intelligently waives the right. Justice Black wrote:

> [A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.[58]

Then in 1972, in *Argersinger v. Hamlin*[59] the Court held that the right to appointed counsel extends equally to defendants tried and imprisoned for petty crimes and misdemeanors.[60]

Although the Supreme Court has held that the Constitution does not permit imprisonment of an indigent defendant who was not represented by counsel, the Court has yet to consider whether, and under what cir-

---

[55] 316 U.S. 455 (1942).

[56] *Id.* at 473.

[57] 372 U.S. 335 (1963).

[58] *Id.* at 344.

[59] 407 U.S. 25 (1972).

[60] *Id.* at 31. The right to counsel may be implicated whenever a criminal defendant is subject to adversarial proceedings, *see* Kirby v. Illinois, 406 U.S. 682, 688 (1972), and the right applies to all stages of a prosecution, *see* Simmons v. United States, 390 U.S. 377, 382-83 (1967). *See also* Mempa v. Rhay, 389 U.S. 128, 133-36 (1968) (parole hearing); United States v. Wade, 388 U.S. 218, 227-32 (1967) (post-indictment line-up); White v. Maryland, 373 U.S. 59, 60 (1963) (per curiam) (preliminary hearing); Hamilton v. Alabama, 368 U.S. 52, 53-54 (1961) (arraignment). *But see* Scott v. Illinois, 440 U.S. 367, 369 (1979) (the mere possibility of a prison sentence is not enough; no appointed counsel necessary where prison term is an authorized penalty but is not actually imposed); Gerstein v. Pugh, 420 U.S. 103, 130-32 (1975) (no counsel for post-arrest probable cause hearing); Gagnon v. Scarpelli, 411 U.S. 778, 790-91 (no counsel for parole revocation).

cumstances, the Constitution requires appointed counsel for an indigent civil litigant. Some of the Court's prior decisions under the equal protection and due process clauses support my contention that such a right is constitutionally guaranteed.

B. *The Equal Protection Clause*

The equal protection clause of the fourteenth amendment and the due process clause of the fifth amendment require that a governmental classification that impinges on a fundamental right[61] or is premised on a suspect criterion[62], such as race or national origin, will be subjected to strict scrutiny review and struck down unless it is "necessary to promote a *compelling* governmental interest."[63] Classifications that neither affect a suspect class nor implicate a fundamental right will be sustained if "rationally related to a legitimate governmental interest."[64] As a practical matter, under this two-tier system of review, the classification will be upheld unless strict scrutiny is applied.[65] Failure to provide counsel to indigent civil litigants constitutes a governmental classification requiring equal protection analysis. This classification arguably is subject to strict scrutiny review both because it affects a suspect class—the poor—and because it limits a fundamental right—meaningful access to the courts.

1. Wealth as a Suspect Criterion

The language of some Supreme Court cases seemed to support the characterization of wealth as one of the suspect criteria, like race and national origin. In *Harper v. Virginia Board of Elections*,[66] the Court in dictum stated that "[l]ines drawn on the basis of wealth or property, like those of race . . ., are traditionally disfavored."[67] Even stronger wording, although also dictum, appeared a year later in *McDonald v. Board of*

---

[61] *E.g.* Shapiro v. Thompson, 394 U.S. 618, 638 (1969); Harper v. Virginia Board of Elections, 383 U.S. 663, 667 (1966); Skinner v. Oklahoma, 316 U.S. 535 (1942).

[62] *E.g.* Loving v. Virginia, 388 U.S. 1, 11 (1967).

[63] Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis in original).

[64] Department of Agriculture v. Moreno, 413 U.S. 528, 533 (1973).

[65] *See* Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting) ("So far as I am aware, no state law has ever satisfied this ['compelling state interest'] standard. . . ."). There is, however, an intermediate standard of review that the Court has applied to classifications based on gender. To survive a challenge under the equal protection clause, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of these objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). Under this standard, the Court has found many gender-based classifications unconstitutional. *Id.*; Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 273 (1979); Caban v. Mohammed, 441 U.S. 380, 388 (1979); Orr v. Orr, 440 U.S. 268, 279 (1979); Califano v. Goldfarb, 430 U.S. 199, 210-11 (1977).

[66] 383 U.S. 663 (1966).

[67] *Id.* at 668 (citation omitted).

Election Commissioners:[68] "[A] careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, . . . two factors which would independently render a classification highly suspect and therefore demand a more exacting judicial scrutiny."[69]

Despite this seemingly conclusive language, recent equal protection opinions make it clear that the present Court does not consider classifications based on wealth to be suspect. In *United States v. Kras*,[70] the Court held that a statute requiring payment of filing fees for bankruptcy petitions "does not touch upon what have been said to be the suspect criteria of race, nationality, or alienage."[71] The Court reaffirmed its position on weath classifications in *Ortwein v. Schwab*.[72] In both of these cases the Court required only a rational basis to justify wealth classifications and in both upheld the classification at issue.[73]

2. Access to the Courts as a Fundamental Interest

The Supreme Court also will apply the strict scrutiny standard to classifications involving what the Court perceives to be "fundamental" interests. The line of cases supporting this analysis began in 1942 with *Skinner v. Oklahoma*.[74] In *Skinner*, the state statute at issue permitted the state to sterilize certain "habitual criminals." In deciding to review the statutory classification under strict scrutiny, the Court emphasized that the right at issue was "one of the basic civil rights of man."[75]

Some fundamental interests that trigger strict scrutiny review, including voting[76] and access to appellate review of criminal convictions,[77] are interests that the Constitution does not protect directly.[78] For example, states have discretion to appoint many officials rather than to elect them,[79] and the United States Constitution does not require the states to

---

[68] 394 U.S. 802 (1969).

[69] *Id.* at 807 (citation omitted). *See also* Shapiro v. Thompson, 394 U.S. 618, 658-69 (1969) (Harlan, J., dissenting) ("The criterion of 'wealth' apparently was added to the list of 'suspects' as an alternative justification for the rationale in *Harper* . . . ."). The language in *Harper* and *McDonald* was merely dicta, because in both cases the Court was dealing with classifications that allegedly infringed on voting, which the Court held was a fundamental right and on that basis deserving of strict scrutiny review. *See* Harper v. Virginia Board of Elections, 383 U.S. at 667; McDonald v. Board of Education Comm'rs, 394 U.S. at 807.

[70] 409 U.S. 434 (1973).

[71] *Id.* at 446.

[72] 410 U.S. 656, 660 (1973) (per curiam).

[73] United States v. Kras, 409 U.S. at 446; Ortwein v. Schwab, 410 U.S. at 660.

[74] 316 U.S. 535 (1942).

[75] *Id.* at 541.

[76] *See* Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

[77] *See* Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

[78] Classifications that infringe on the exercise of constitutional rights also get strict scrutiny review. *See, e.g.*, Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) (first amendment); Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel).

[79] *See* Sailors v. Board of Education, 387 U.S. 105, 108 (1967).

provide appellate review.[80] This branch of equal protection analysis requires, however, that if governments undertake to provide these rights, they may not do so in a discriminatory manner.

The Supreme Court first held that access to the courts in criminal cases is a fundamental interest in *Griffin v. Illinois*.[81] Illinois law provided that all convicted persons had the right to appeal their convictions. In order to get full appellate review, however, the defendant had to furnish the court with a bill of exceptions or a report of the trial proceedings, and a defendant could not prepare either of these documents without a trial transcript.[82] The defendants in *Griffin* petitioned the trial court for a free transcript because they were "poor persons with no means of paying the necessary fees to acquire the Transcript and Court Records needed to prosecute an appeal."[83] After the trial court denied their request, the defendants unsuccessfully sought post-conviction relief in state court.

Justice Black, writing for a plurality in *Griffin*, began by noting that "[p]roviding equal justice for poor and rich, weak and powerful alike is an age-old problem."[84] After discussing the importance of appellate review in the criminal justice system, Justice Black concluded: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[85]

The Supreme Court extended the reasoning of *Griffin* in *Douglas v. California*[86] to require appointed counsel for indigent criminal defendants for the first appeal as of right. Speaking for the Court, Justice Douglas found that although the equal protection clause does not demand "absolute equality," nevertheless, "where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor."[87] Later decisions, based on the equal protection analysis of *Griffin* and *Douglas*, have established that the states must provide indigent defendants free trial transcripts or the equivalent[88] in appeals

---

[80] *See* Griffin v. Illinois, 351 U.S. 12, 18 (1956).

[81] 351 U.S. 12 (1956).

[82] *Id.* at 13-14.

[83] *Id.* at 13.

[84] *Id.* at 16.

[85] *Id.* at 19.

[86] 372 U.S. 353 (1963).

[87] *Id.* at 357 (emphasis omitted).

[88] In *Griffin*, the Court stated that the state need not always provide an indigent with a complete stenographer's transcript if another available method would provide "adequate and effective appellate review." 351 U.S. at 20. *Accord*, Draper v. Washington, 372 U.S. 487, 495 (1963) (other methods are "permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise.").

from misdemeanor convictions[89] and habeas corpus proceedings,[90] free transcripts of preliminary hearings,[91] waiver of filing fees for appeals, even discretionary review procedures,[92] post-conviction relief,[93] and appeals from denial of post-conviction writs.[94]

The reasoning of *Griffin* and *Douglas* applies equally to indigent civil litigants, as some members of the Court have acknowledged. Justice Douglas, concurring in *Boddie v. Connecticut*,[95] argued that the *Griffin* analysis should be applied to a case in which indigents were denied access to divorce court because of their inability to pay filing fees.[96] Justice Brennan, in a separate concurring opinion, agreed:

> The rationale of *Griffin* covers the present case. Courts are the central dispute-settling institutions in our society. They are bound to do equal justice under the law, to rich and poor alike. They fail to perform their function in accordance with the Equal Protection Clause if they shut their doors to indigent plaintiffs altogether. Where money determines not merely "the kind of trial a man gets," . . . but whether he gets into a court at all, the great principle of equal protection becomes a mockery. A State may not make its judicial processes available to some but deny them to others simply because they cannot pay a fee.[97]

---

[89] Mayer v. Chicago, 404 U.S. 189 (1971). In *Mayer*, the Court stated that "[t]he size of the defendant's pocketbook bears no more relationship to his guilt or innocence in a nonfelony than in a felony case." *Id.* at 196. In applying *Griffin*, the *Mayer* Court found that

> *Griffin* does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way. The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. The State's fiscal interest is, therefore, irrelevant.

Id. at 196-97.

[90] Long v. District Court of Iowa, 385 U.S. 192, 194 (1966).

[91] Roberts v. LaVallee, 389 U.S. 40, 42 (1967) (per curiam).

[92] Burns v. Ohio, 360 U.S. 252, 257-58 (1959).

[93] Smith v. Bennett, 365 U.S. 708, 709 (1961) ("We hold that to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws.").

[94] Lane v. Brown, 372 U.S. 477, 484 (1963).

[95] 401 U.S. 371, 383 (Douglas, J., concurring).

[96] *Id.* at 383.

[97] *Id.* at 388-89 (Brennan, J., concurring). *See also* Williams v. Shaffer, 385 U.S. 1037 (1967) (Douglas, J., dissenting from denial of certiorari). In *Williams*, a poor tenant was required to post bond in order to contest an eviction proceeding. Because the tenant could not pay the bond, he was summarily evicted. The tenant challenged the bond requirement under the equal protection clause, but the state supreme court held that the eviction rendered the case moot. Justice Douglas, joined by Chief Justice Warren, stated that "[o]n numerous occasions this Court has struck down financial limitations on the ability to obtain judicial review." 385 U.S. at 1039. Justice Douglas referred to *Griffin* and its progeny and continued:

> It is true that these cases have dealt with criminal proceedings. But the Equal

I believe that access to the courts for the purpose of protecting constitutional and other important civil rights should be included in that category of fundamental interests that trigger strict scrutiny review. The pursuit of justice, whatever that term may mean to different people, is a basic value in American society, and equal access to the courts is critical to the struggle for justice. In civil as well as criminal cases, to paraphrase *Griffin*, the kind of justice a person receives should not depend upon the amount of money he or she has.

My own view of the requirements of the equal protection clause notwithstanding, some recent Supreme Court decisions suggest that classifications which restrict equal access to civil courts will not trigger a strict scrutiny review. In *Ross v. Moffitt*,[98] the Court refused to apply *Douglas* to require a state court to appoint counsel for an indigent seeking discretionary review in the state supreme court. Justice Rehnquist, writing for the majority, recognized that "a skilled lawyer . . . would . . . prove helpful to any litigant able to employ him," but concluded that equal protection does not require the government "to duplicate the legal arsenal that may be privately retained."[99]

Other indications of the Court's disinclination to characterize access to the courts as a fundamental interest are the recent decisions refusing to include housing,[100] education,[101] and welfare benefits[102] as fundamental interests under the equal protection clause. In *San Antonio School District v. Rodriguez*,[103] the Court discussed the problem of deciding whether to consider a right fundamental so as to trigger strict scrutiny review:

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether [a right] is "fundamental" . . . lies in assessing whether [the right] . . . is explicitly or implicitly guaranteed by the Constitution.[104]

Protection Clause of the Fourteenth Amendment is not limited to criminal prosecutions. Its protections extend as well to civil matters.

. . . .

. . . This Court of course does not sit to cure social ills that beset the country. But when we are faced with a statute that apparently violates the Equal Protection Clause by patently discriminating against the poor and thereby worsening their already sorry plight, we should address ourselves to it.

385 U.S. at 1039-41.

[98] 417 U.S. 600 (1974).

[99] *Id.* at 616. I cannot agree that appointing a lawyer to represent an indigent litigant is equivalent to "duplicating the legal arsenal" that a wealthy litigant could employ.

[100] Lindsay v. Normet, 405 U.S. 56 (1972).

[101] San Antonio School District v. Rodriquez, 411 U.S. 1 (1973).

[102] Jefferson v. Hackney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1970).

[103] 411 U.S. 1 (1973).

[104] *Id.* at 33-34.

There is a line of Supreme Court cases suggesting that access to the courts is an independently protected constitutional right. In *Johnson v. Avery*,[105] the Court struck down a prison regulation that prohibited inmates from assisting each other in legal matters such as drafting petitions for writs of habeas corpus. In the majority opinion, Justice Fortas emphasized "the fundamental importance of the writ of habeas corpus in our constitutional scheme,"[106] and concluded: "Since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed."[107] In *Wolff v. McDonnell*,[108] the Court extended the *Avery* holding to civil rights actions:

> The right of access to the courts, upon which *Avery* was premised, is founded in the Due Process clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights. It is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the Great Writ. The recognition by this Court that prisoners have certain constitutional rights which can be protected by civil rights actions would be diluted if inmates, often "totally or functionally illiterate," were unable to articulate their complaints to the courts.[109]

In *Bounds v. Smith*,[110] the Court, relying on *Avery*, *Wolff*, and *Griffin* and its progeny, concluded that "[i]t is now established beyond doubt that prisoners have a constitutional right of access to the courts."[111] The Court stressed that inmate access to the courts must be "adequate, effective, and meaningful,"[112] and thus held that the Constitution requires that the states provide prisoners with "adequate law libraries or adequate assistance from persons trained in the law."[113]

Avery, *Wolff*, and *Bounds* can obviously be explained on the ground that the litigant in each case was a prisoner. The Court in *Avery* and in *Wolff* was merely striking down prison regulations that in effect erected barriers to inmate access to the courts. In *Bounds*, the Court imposed on the state an affirmative obligation to provide prisoners with access to law libraries—a right of access non-incarcerated persons possess.

---

[105] 393 U.S. 483 (1969).
[106] *Id.* at 485.
[107] *Id.*
[108] 418 U.S. 539 (1974).
[109] *Id.* at 579.
[110] 430 U.S. 817 (1977).
[111] *Id.* at 821.
[112] *Id.* at 822.
[113] *Id.* at 828.

To read these cases as requiring appointed counsel to ensure meaningful access to the courts would be taking them a step beyond their holdings,[114] but this would be a logical outgrowth when considered in light of other Supreme Court statements about the importance of counsel.[115] At the least, the cases support my contention that access to the courts for purposes of protecting civil rights is as fundamental as such access in criminal cases. I believe that the equal protection clause should be construed to require appointed counsel for all indigent habeas petitioners and civil rights plaintiffs who bring nonfrivolous actions.[116]

C. *Due Process*

The due process clause, which applies to both federal[117] and state[118] governments, provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law."[119] If a state or the federal government implicates a protected interest, the question then becomes, what process is due. According to the Supreme Court in *Mathews v. Eldridge*,[120] a due process analysis involves a balancing of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[121]

Applying this test to a case involving access to the courts would suggest first that we examine the right that the civil litigant is attempting to protect through a lawsuit.[122] A constitutional right, or one of the rights the court deems "fundamental,"[123] would certainly tip the scales in

---

[114] Such an expansive reading of *Avery*, *Wolff*, and *Bounds* would also be contrary to the holding in Ross v. Moffitt, 417 U.S. 600 (1974). *See* text accompanying notes 98-99 *supra*.

[115] *See* pp. 1267-70 *supra*

[116] *See* p. 1300 *infra* (discussion of methods for screening out frivolous claims).

[117] U.S. CONST. amend. V.

[118] U.S. CONST. amend. XIV.

[119] U.S. CONST. amend. V.

[120] 424 U.S. 319 (1976).

[121] *Id.* at 335.

[122] A right of access to the courts is only as important as the underlying right that the litigant is asserting. *See* Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV., 223, 263 (1970).

[123] The Supreme Court appears to apply a similar analysis to fundamental rights under the equal protection and due process clauses. *See id.* at 245; Comment, *The Heirs of* Boddie: *Court Access for Indigents After* Kras *and* Ortwein, 8 HARV. C.R.-C.L. L. REV. 571, 580 (1973). While it is likely that interests deemed fundamental for purposes of due process

favor of the litigant. If the indigent plaintiff will lose the constitutional right at stake unless he has a court-appointed lawyer to assist him in asserting the right in court, then I believe that traditional due process balancing would require the government to provide representation as the process that is due. The indigent plaintiff's interest in judically asserting his constitutional right would outweigh the government's interest in preserving treasury funds and in preventing frivolous litigation for several reasons. First, the Supreme Court has held that "the cost of protecting a constitutional right cannot justify its total denial."[124] Second, there are ways for the government to minimize the financial burden; a recoupment scheme is one possibility,[125] and requiring a pro bono commitment from lawyers as a condition to admission to practice in that court is another.[126] To deal with the problem of frivolous claims, the government could use a screening standard,[127] or establish an independent screening panel.[128] As I pointed out in my discussion of equal protection theory, however, the critical question is not how I would resolve the due process balancing test in such a case, but how the Supreme Court will resolve it.

An analysis of the Supreme Court's treatment of access to the courts under the due process clause must begin with *Boddie v. Connecticut*.[129] The plaintiffs, who were welfare recipients, brought suit to challenge Connecticut's requirement that a party pay filing and service of process fees in order to institute a divorce action. The Court initially emphasized the fundamental nature of marriage,[130] then recognized that it "has seldom been asked to view access to the courts as an element of due process" for plaintiffs because, while a defendant who is brought into court has no choice but to make use of the judicial process, there are usually

---

would always be considered fundamental under equal protection, the reverse is not true. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1130 (1969). For example, under *Griffin*, access to a criminal appeal is fundamental under equal protection analysis so that the state cannot distribute it unequally, but due process does not require states to provide for an appeal from a criminal conviction. *See* Griffin v. Illinois, 351 U.S. 12, 18 (1956).

[124] Bounds v. Smith, 430 U.S. 816, 825 (1977).

[125] State legislatures could enact a recoupment statute, under which an indigent litigant who received court-appointed counsel would have to repay the government for counsel fees if and when he became financially able to do so. *See* Note, *Indigents' Right to Appointed Counsel in Civil Litigation*, 66 GEO. L. J. 113, 129 (1977) [hereinafter cited as *Indigents' Right*].

[126] *See* GENERAL RULES OF THE NORTHERN DISTRICT OF ILLINOIS, Rule 3.31; text accompanying notes 205-07 *infra* (discussion of Rule 3.31).

[127] For example, the court could refuse to appoint counsel if the plaintiff's complaint could not survive a motion to dismiss. *See* text accompanying note 221 *infra*.

[128] *See Indigents' Right*, *supra* note 125, at 129; p. 1300 *infra* (discussion of screening panel alternative).

[129] 401 U.S. 371 (1971).

[130] *Id.* at 376. The *Boddie* Court relied on, *inter alia*, Skinner v. Oklahoma, 316 U.S. 535 (1942). *See* text accompanying notes 74-75 *supra*.

private means of dispute settlement available to potential plaintiffs.[131] Nevertheless, the Court found that the plaintiffs in *Boddie* were entitled to the due process protections normally accorded defendants:

> [A]lthough they assert here due process rights as would-be plaintiffs, we think appellants' plight, because resort to the state courts is the only avenue to dissolution of their marriages, is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one. In this posture we think that this appeal is properly to be resolved in light of the principles enunciated in our due process decisions that delimit the rights of defendants compelled to litigate their differences in the judicial forum.[132]

The Court then considered the state's interests in requiring payment of fees from litigants to conserve fiscal resources and to discourage frivolous claims, and found that these interests were insufficient to justify denying the plaintiffs the opportunity to institute divorce actions. As to the state's financial interest, the Court applied *Griffin* and stated that the state could not "interpose the costs as a measure of allocating its judicial resources."[133] Regarding the problem of frivolous litigation, the Court noted that less restrictive alternatives, including penalties for false pleadings, and suits for malicious prosecution or abuse of process, were available to the state.[134]

In 1971, one year after the decision in *Boddie*, the Supreme Court denied certiorari in a number of cases in which indigents alleged that their states had denied them access to civil courts because of their inability to pay filing fees or penalty bonds, or because of the denial of court-appointed counsel.[135] Justice Black, dissenting from the denial of certiorari in one case, argued that *Boddie* should not be limited to its facts. "In my view, the decision in *Boddie v. Connecticut* can safely rest on only one crucial foundation—that the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, or af-

---

[131] 401 U.S. at 375-76.

[132] *Id.* at 376-77.

[133] *Id.* at 382.

[134] *Id.* at 381-82.

[135] *See* Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 955 (1971) (Black, J., dissenting from denial of certiorari).

ford to hire an attorney."[136] Justice Black pointed out what seems obvious to me, that the judicial process is "the ultimate power of enforcement in almost every dispute."[137] Justice Brennan had made the same point in his concurring opinion in *Boddie*: "A State has an ultimate monopoly of all judicial process and attendant enforcement machinery. As a practical matter, if disputes cannot be successfully settled between the parties, the court system is usually 'the only forum effectively empowered to settle their disputes.' "[138]

Regarding the effect of *Boddie* on the right to court-appointed counsel in civil cases, Justice Black later wrote:

> [T]here cannot be meaningful access to the judicial process until every serious litigant is represented by competent counsel .... Of course, not every litigant would be entitled to appointed counsel no matter how frivolous his claims might be .... But the fundamental importance of legal representation in our system of adversary justice is beyond dispute. Since *Boddie* held that there must be meaningful access to civil courts in divorce cases, I can only conclude that *Boddie* necessitates the appointment of counsel for indigents in such cases.[139]

The majority in *Boddie*, although holding that Connecticut's fee requirements violated the due process clause, expressly limited its holding to the facts of that case. "We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause . . . ."[140] As confirmed by subsequent decisions, for due process to require equal access to the courts, the balance of the three *Mathews v. Eldridge* factors must be struck in favor of the litigant, as it was in *Boddie*: the right at issue must be a constitutional right or a right deemed fundamental by the Court, and the litigant must be threatened with loss of the right without the due process protections. In other words, access to the courts must be the only means available for the litigant to protect his fundamental rights.

In *United States v. Kras*,[141] the Court refused to extend *Boddie* to a challenge of the fee requirement for bankruptcy petitions. The Court found that neither of the determinative factors in *Boddie* was present in

---

[136] *Id.* at 955-56. Justice Black apparently changed his mind about *Boddie* by the time he wrote his *Meltzer* dissent. He had dissented in *Boddie*, arguing that civil litigants are entitled to much less constitutional protection than criminal defendants and concluding that "[t]here is . . . no reason why government should in civil trials be hampered or handicapped by the strict and rigid due process rules the Constitution has provided to protect people charged with crime." Boddie v. Connecticut, 401 U.S. at 391 (Black, J., dissenting).

[137] 402 U.S. at 956.

[138] 401 U.S. at 387 (Brennan, J., concurring) (quoting the majority opinion, *id.* at 376).

[139] 402 U.S. at 959 (citations omitted).

[140] 401 U.S. at 382.

[141] 409 U.S. 434 (1973).

Kras. First, the Court held that a discharge in bankruptcy was not a constitutional or fundamental right:

> Kras' alleged interest in the elimination of his debt burden, and in obtaining his desired new start in life, although important and so recognized by the enactment of the Bankruptcy Act, does not rise to the same constitutional level [as marriage] . . . . If Kras is not discharged in bankruptcy, his position will not be materially altered in any constitutional sense. Gaining or not gaining a discharge will effect no change with respect to basic necessities. We see no fundamental interest that is gained or lost depending on the availability of a discharge in bankruptcy.[142]

Second, the Court found that unlike *Boddie*, there were alternative private means for the debtor to resolve his problems with his creditors. Although the majority recognized that in some cases a private solution may be "unrealistic," the Justices said that at least in theory, "a debtor . . . may adjust his debts by negotiated agreement with his creditors."[143]

In *Ortwein v. Schwab*,[144] the Court again refused to extend *Boddie* beyond its facts. The plaintiffs in *Schwab* were seeking appellate review of decisions by the state welfare agency to reduce their welfare benefits, and they alleged that they were unable to pay the $25.00 filing fee required by the state court. The Court found that the plaintiffs' interest in getting the reduced benefits reinstated was not a fundamental interest and emphasized that they had already received an agency hearing on the merits of their claim.[145]

The Supreme Court provided another indication of its current swing away from expanding due process rights for indigents in *Ross v.*

---

[142] *Id.* at 445 (citations omitted).

[143] *Id.* The majority's finding that a debtor has alternatives to a discharge in bankruptcy provoked a vigorous dissent from Justice Stewart, who was joined by Justices Douglas, Brennan, and Marshall. Justice Stewart argued that a discharge in bankruptcy was, like divorce, the only means available to resolve the dispute and was controlled by the courts. He contended that a court-imposed bankruptcy discharge was even more important when the debtor is indigent:

> While the creditors of a bankrupt with assets might well desire to reach a compromise settlement, that possibility is foreclosed to the truly indigent bankrupt. With no funds . . ., the assetless bankrupt has absolutely nothing to offer his creditors. And his creditors have nothing to gain by allowing him to escape or reduce his debts; their only hope is that eventually he might make enough income for them to attach. Unless the government provides him access to the bankruptcy court, Kras will remain in the totally hopeless situation he now finds himself. The government has thus truly pre-empted the only means for the indigent bankrupt to get out from under a lifetime burden of debt.

Id. at 455-56 (Stewart, J., dissenting).

[144] 410 U.S. 656 (1973) (per curiam).

[145] *Id.* at 659-60.

Moffitt.[146] In holding that due process did not require a state to appoint counsel for an indigent who is seeking a discretionary appeal, Justice Rehnquist relied on the distinction between a criminal defendant on trial and one trying to attack his conviction on appeal:

> [Unlike criminal trials,] it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt.[147]

Perhaps it is not surprising that the Court chose not to extend the rationale of *Boddie*, but it is surprising that some of the subsequent decisions demonstrated such insensitivity to the plight of the poor. For example, the majority opinion in *Kras* noted that the litigant could pay the $50.00 bankruptcy filing fee in installments over a six-month period, which would require a weekly payment of $1.92, and could extend payments beyond the six-month period for an additional three months, thus lowering the weekly payment to $1.28.[148] The Court found that if the debtor "really needs and desires that discharge, this much available revenue should be within his able-bodied reach when the adjudication in bankruptcy has stayed collection and has brought to a halt whatever harassment, if any, he may have sustained from creditors."[149] As Justice Marshall said so eloquently in his dissent:

> It may be easy for some people to think that weekly savings of less than $2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. A sudden illness, for example, may destroy whatever savings they may have accumulated, and by eliminating a sense of security may destroy the incentive to save in the future. A pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is almost weekly activity. They have more important things to do with what little money they

---

[146] 417 U.S. 600 (1974); *see* text accompanying notes 98-99 *supra* (discussion of *Ross* in context of equal protection clause).

[147] 417 U.S. at 610-11.

[148] 409 U.S. 434, 449 (1973); *see* text accompanying notes 141-43 *supra* (discussion of *Kras*).

[149] 409 U.S. at 449.

[150] *Id.* at 460 (Marshall, J., dissenting).

> have—like attempting to provide some comforts for a gravely ill child, as Kras must do.
>
> It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.[150]

My purpose in pointing out this insensitivity to the conditions of many of the poor is to suggest that it may be a factor in some of the Supreme Court decisions cutting back on the protections given to indigents under both the due process and equal protection clauses. The overt class bias in the majority opinion in *Kras* may have also been a subtle influence on the Court in *Ross* and *Schwab*. Realistically, the chances are slim that the Supreme Court will ever hold that either the equal protection or the due process clause requires that indigent civil litigants receive court-appointed counsel given the subtle and not-so-subtle influences of class bias or ignorance of the situation of poverty.

III. THE CURRENT PRACTICE IN THE FEDERAL COURTS

A. *Civil Rights Cases*

In 1892, Congress enacted a statute that not only authorized poor persons to bring suits *in forma pauperis*, but also contained a provision allowing federal courts to request attorneys to represent poor litigants.[151] The current statute, now codified at 28 U.S.C. § 1915, provides in part:

> The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.[152]

1. Case Law

In considering the scope of section 1915, the federal courts have consistently held that court-appointed counsel is "a privilege and not a

---

[151] Act of July 20, 1892, ch. 209, 27 Stat. 252 (now codified at 28 U.S.C. § 1915 (1979)).

[152] 28 U.S.C. § 1915(d) (1979). The original codification of the section that is now § 1915(d) contained similar language:

> That the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious.

Act of July 20, 1892, ch. 209, § 4, 27 Stat. 252. Originally, the Act applied only to civil cases, but in 1910 it was amended to apply to civil or criminal actions. Act of June 25, 1910, ch. 435, § 1, 36 Stat. 866.

right,"[153] and that the decision whether or not to appoint counsel is within the broad discretion of the district court.[154] Many of the circuit courts have held that the district courts should appoint counsel for *pro se* civil plaintiffs only in "exceptional circumstances."[155] It is not surprising, therefore, that in most cases the courts of appeals have refused to find that a district court abused its discretion in denying an indigent plaintiff's motion for appointment of counsel.[156] Nevertheless, some circuits have attempted to set out standards to guide the district courts in determining whether to appoint counsel under section 1915.

In *Gordon v. Leeke*,[157] a prisoner brought a section 1983 action against the warden seeking damages for the loss of a watch allegedly stolen during a shakedown. In reversing the district court's dismissal of the plaintiff's *pro se* complaint, the Fourth Circuit stated that "[i]f it is apparent to the district court that a *pro se* litigant has a colorable claim but lacks the capacity to present it, the district court should appoint counsel to assist him."[158]

In *Maclin v. Freake*,[159] a case in which I sat on the panel, the plaintiff, a state prisoner who was a paraplegic, appealed from the district court's dismissal of his complaint alleging that prison officials were deliberately indifferent to his medical needs. The district court also had denied the

---

[153] United States *ex rel.* Gardner v. Madden, 352 F.2d 792, 793 (9th Cir. 1965).

[154] *See id.*; United States v. McQuade, 579 F.2d 1180, 1181 (9th Cir. 1978), *cert. denied*, 102 S. Ct. 1470 (1982); Alexander v. Ramsey, 539 F.2d 25, 26 (9th Cir. 1976) (per curiam); Smith v. Blackledge, 451 F.2d 1201, 1203 (4th Cir. 1971); Hudson v. Hardy, 412 F.2d 1091, 1095 (D.C. Cir. 1968); Bowman v. White, 388 F.2d 756, 761 (4th Cir.), *cert. denied*, 393 U.S. 891 (1968); Saylor v. United States Bd. of Parole, 345 F.2d 100, 103 (D.C. Cir. 1965).

[155] Aldabe v. Aldabe, 616 F.2d 1089, 1093 (9th Cir. 1980) (per curiam); Alexander v. Ramsey, 539 F.2d 25, 26 (9th Cir. 1975); Cook v. Bounds, 518 F.2d 779, 780 (4th Cir. 1975); United States *ex rel.* Gardner v. Madden, 352 F.2d 792, 794 (9th Cir. 1965).

[156] Randall v. Wyrick, 642 F.2d 304, 307 n.6 (8th Cir. 1981); Aldabe v. Aldabe, 616 F.2d 1089, 1093 (9th Cir. 1980) (per curiam); Hudak v. Curators of the University of Missouri, 586 F.2d 105, 107 (8th Cir. 1978), *cert. denied*, 440 U.S. 985 (1979); Cook v. Bounds, 518 F.2d 779, 780 (4th Cir. 1975); Bowman v. White, 388 F.2d 756, 761 (4th Cir. 1968). If, however, the district court denied the request for appointed counsel under the mistaken belief that it lacked power to do so, the courts of appeals uniformly have reversed and remanded to the trial court to reconsider in light of section 1915. *See* Ray v. Robinson, 640 F.2d 474, 477-78 (3d Cir. 1981); Peterson v. Nadler, 452 F.2d 754, 757 (8th Cir. 1971); Smith v. Blackledge, 451 F.2d 1201, 1203 (4th Cir. 1971); United States *ex rel.* Gardner v. Madden, 352 F.2d 792, 794 (9th Cir. 1965).

The Supreme Court has never enunciated standards for the courts to apply in ruling on a motion for appointed counsel under section 1915(d). But Justice Blackmun, joined by Justices Brennan and Marshall, has recognized that "[q]uestions concerning the standards by which district courts are to exercise their discretion in appointing counsel under § 1915(d), and the degree to which the exercise of that discretion is to be controlled, are of obvious importance to the administration of justice, and to the enforcement of federal civil rights, particularly in our Nation's penal institutions." Hyman v. Rickman, 446 U.S. 989, 992 (1980) (Blackmun, J., dissenting from denial of certiorari).

[157] 574 F.2d 1147 (4th Cir.), *cert. denied*, 439 U.S. 970 (1978).

[158] *Id.* at 1153.

[159] 650 F.2d 885 (7th Cir. 1981) (per curiam).

plaintiff's request for court-appointed counsel. Although the Seventh Circuit recognized that "the district court has broad discretion to appoint counsel for indigents under 28 U.S.C. § 1915(d), and its denial of counsel will not be overturned unless it would result in fundamental unfairness impinging on due process rights,"[160] the court went on to enunciate four factors the district court should take into account in ruling on a motion for appointment of counsel. First, the claim must have " 'some merit in fact and law.' "[161] Second, the court should consider the nature of the factual issues involved.[162] When the indigent is unable to investigate the facts,[163] as, for example, when the plaintiff is incarcerated or when critical evidentiary issues will involve conflicting testimony,[164] then the district court should probably appoint counsel. Third, the court should consider the ability of the litigant to represent himself.[165] Fourth, the court should consider the complexity of the legal issues; "where the law is not clear, it will often best serve the ends of justice to have both sides . . . presented by those trained in legal analysis."[166]

Applying those factors in *Maclin*, we concluded that the district judge erred in denying the plaintiff's motion to appoint counsel. The plaintiff was incarcerated and was confined to a wheelchair. Further, the plaintiff's initial attempts at litigating *pro se* in the district court demonstrated his inability to proceed without the assistance of counsel. We therefore remanded the case to the district court with instructions to appoint counsel.[167]

In *Hudson v. Hardy*,[168] a prisoner brought an action for declaratory judgment, alleging cruel and inhuman treatment by prison officials. The district court granted the defendant's motion for dismissal or, in the alternative, summary judgment, and the court of appeals reversed and remanded. In dicta, the court discussed the problems faced by inmates attempting to litigate *pro se*:

> It may be that, even if apprised of the need for a factual response to [defendant's] summary judgment motion, [plaintiff] would have lacked sufficient access to sources of proof, understanding of the legal issues involved, or ability to express himself to demonstrate the existence of a question of material fact. In a pro-

---

[160] *Id.* at 886.

[161] *Id.* at 887 (quoting Spears v. United States, 266 F. Supp. 22, 25 (S.D.W.Va. 1967)).

[162] 650 F.2d at 887.

[163] *Id.*

[164] *Id.* at 888.

[165] *Id.* The *Maclin* court cited as an example Hudak v. Curators of the University of Missouri, 586 F.2d 105, 106 (8th Cir. 1978), *cert. denied*, 440 U.S. 985 (1979), in which the Eighth Circuit upheld the denial of a request for counsel by a litigant who was a former law professor. 650 F.2d at 888.

[166] 650 F.2d at 889.

[167] *Id.*

[168] 412 F.2d 1091 (D.C. Cir. 1968) (per curiam).

> ceeding of this kind, the District Court has discretion with respect to appointment of counsel, and we do not suggest that the initial denial of [plaintiff's] motion for counsel constituted an abuse of that discretion. An indigent prisoner, however, may be more greatly disadvantaged by the absence of legal assistance when he is called upon to resist a motion for summary judgment than might otherwise have been the case. When necessary to insure that an indigent prisoner's allegations receive fair consideration, the court's plain duty is to appoint counsel to assist him in defending the motion for summary judgment.[169]

In *Shields v. Jackson*,[170] the Eighth Circuit directed the district court to appoint counsel for an indigent inmate in a section 1983 suit. The court stated: "We take this action because it is clear that Shields is indigent and not in a position to adequately investigate the case, and because we believe that the complaint states a cause of action and that the appointment of counsel will advance the proper administration of justice."[171]

2. Survey of the Federal Courts

As part of the research for this article, I wrote to the clerks of all the circuit courts of appeals[172] and ninety of the district courts[173] to inquire what their practices were regarding appointment of attorneys for indigent plaintiffs in civil rights cases and indigent petitioners in habeas corpus cases.[174] I received responses from all of the circuit courts and from seventy-two out of ninety district courts.

Two of the circuit courts have formal rules dealing with appointment of counsel in civil cases. The Judicial Conference of the Tenth Circuit has adopted a plan to provide counsel for litigants in certain cases. The plan requires that the litigant request appointment of counsel and be financially unable to retain a lawyer. In addition, the case must "present complex and significant legal issues, the outcome of which may have wide impact." The plan also requires that the appointment of counsel be "necessary for the effective presentation of the issues to the Court" and in the interests of justice. The most remarkable feature of the Tenth Circuit's plan is that it provides for compensation of attorneys up to $500,

---

[169] *Id.* at 1095 (footnotes omitted).

[170] 570 F.2d 284 (8th Cir. 1978) (per curiam).

[171] *Id.* at 286. *See also* Peterson v. Nadler, 452 F.2d 754 (8th Cir. 1971) (also ordering district court to appoint counsel for indigent prisoner).

[172] The circuit court survey did not include the Eleventh Circuit, which had not been formed at the time my letters were sent.

[173] This group included all of the districts in the continental United States plus those in Alaska and Hawaii.

[174] For the results of the survey pertaining to habeas corpus procedures, see p. 1296 *infra*.

and reimbursement for out-of-pocket expenses from the court's trust fund.[175]

The Handbook of Practice and Internal Procedures of the District of Columbia Circuit Court of Appeals states only that counsel will generally not be provided for indigent civil litigants, but that the court may refer a party to a legal aid clinic, law school clinic, or a private attorney willing to take such a case.

The Fifth Circuit has written guidelines for staff attorneys to follow in making recommendations to the court on motions for the appointment of counsel for indigent civil parties. It is the Fifth Circuit's policy to appoint counsel whenever the litigant is incarcerated if the case is set for oral argument. When the litigant is not a prisoner, the court will appoint counsel when "the appointment will meaningfully assist [the] Court in resolving the appeal," but counsel will not be appointed "[i]f the issues raised . . . may be readily resolved from the record and applicable case law."

In the Eighth Circuit, an administrative panel reviews motions for appointment of counsel in civil rights cases and makes recommendations to the court. The court maintains a fund to reimburse the attorneys who accept such appointments for their out-of-pocket expenses.

Four of the other circuits do not have formal procedures governing motions for appointment of counsel in civil cases but do maintain lists of local attorneys who have expressed a willingness to take these cases on a pro bono basis.

Only one of the district courts that responded to my letter has any formal guidelines regarding court-appointed counsel for indigents in civil rights cases. Most district courts do not have any standards to guide a judge ruling on such a motion, and the standards or policies given by the other district courts varied greatly.[176] The standards ranged from "only when the case is going to trial" to any case in which the plaintiff is indigent and the case "warrants appointment of counsel" or the complaint presents a "colorable" claim. Some courts considered the complexity of the case, whether it presented "serious constitutional issues" or "substantial issues of law," the plaintiff's ability to investigate the facts and research the law, and the likelihood of success on the merits. In one district, the court will appoint counsel if the case survives a motion to dismiss or a motion for summary judgment.

Six courts required that the plaintiff attempt to get an attorney either on a contingent-fee basis or from a legal aid clinic. In four districts, the courts will not appoint counsel for indigents in civil cases

---

[175] *See* text accompanying notes 208-13 *infra* on the problems with requiring lawyers to serve without compensation.

[176] The clerk of one district court responded that in his court the practice varied depending upon the judge ruling on the motion; one judge often appointed counsel for indigents in civil rights cases, but the other judges never did.

but will refer the parties to private attorneys. In addition to those four courts, three other courts stated that they never appoint counsel in a civil case, and seven more districts said that such appointments were very rare. In one-fourth of the districts, a magistrate reviews motions for appointment of counsel. The rest of the districts either failed to specify how these motions were handled or said that they were reviewed by a judge.

Several of the clerks or judges who responded to my letter indicated that it was often difficult and sometimes impossible to find attorneys willing to take civil rights cases on a pro bono basis. In fourteen of the districts, when the judge wants to appoint counsel either he, the magistrate, or the clerk will contact attorneys informally and ask them to accept an appointment. Fourteen courts maintain a list of attorneys willing to take civil rights cases on a pro bono or possibly a contingent-fee basis, and three other districts are attempting to put such a list together. These lists are usually prepared by the courts but in a few districts the local bar associations are involved. Three courts said that they use the list of lawyers prepared for appointments in criminal cases under the Criminal Justice Act.[177]

The Eastern District of New York was the only one of the responding district courts that has formal procedures for the appointment of counsel under section 1915(d). The plan, only recently developed, came about substantially due to the efforts of Chief Judge Jack Weinstein.[178] Under the new rules, the clerk of the court will maintain a list of attorneys willing to accept appointments on a pro bono basis. The clerk will inform all *pro se* litigants who file *in forma pauperis* affidavits of the opportunity to apply for court-appointed counsel and will assist them in completing the application form. The rules specify four factors to be considered by the judge in ruling on a litigant's application:

> (i) the nature and complexity of the action; (ii) the potential merit of the claims as set forth in the pleadings; (iii) the inability of the *pro se* party to retain counsel by other means; (iv) the degree to which the interests of justice will be served by appointment of counsel, including the benefit the court may derive from the assistance of the appointed counsel . . . .

The rules also contain provisions relating to the responsibilities of an attorney appointed by the court. These provisions set out the attorney's duties in the lawyer-client relationship and in the attorney's relationship to the court. In addition, the rules specify certain grounds

---

[177] *See* text accompanying notes 187-90 *infra*.

[178] Judge Weinstein has long been a forceful proponent for finding a solution for the problem of the poor civil litigant and has written eloquently on the subject. *See, e.g.*, Chubbs v. City of New York, 324 F. Supp. 1183, 1189-91 (E.D.N.Y. 1971); Weinstein, *supra* note 2, *passim*.

on which the court may relieve the attorney from the appointment. Finally, the plan provides for limited reimbursement for out-of-pocket expenses from a non-profit corporation set up for that purpose, the Eastern District Civil Litigation Fund, Inc.

The Northern District of Illinois has taken another approach in attempting to meet the need for counsel for indigent litigants in civil cases. In its new rules, the court has required that "every member of the trial bar[179] shall be available for appointment by the court to represent or assist in the representation of those who cannot afford to hire a member of the trial bar."[180] The rules provide, however, that no attorney be required to accept more than one appointment per year.[181]

B. *Habeas Corpus Cases*

A prisoner convicted in a state court may file a petition for a writ of habeas corpus,[182] which is a civil action.[183] Prisoners convicted in federal court must move for relief from the sentence under 28 U.S.C. § 2255; habeas corpus relief is still available, however, if relief under section 2255 would be inadequate.[184] The Advisory Committee Notes to Federal Rules Governing Procedures Under Section 2255 characterize the motion as "a further step in the movant's criminal case and not a separate civil action,"[185] but the courts have held that a 2255 motion is an independent civil suit.[186]

Despite the label "civil," appointment of counsel for habeas petitioners differs from that of civil litigants in two important respects. First, the Criminal Justice Act was amended in 1970[187] to permit the discretionary appointment of counsel in habeas cases "whenever the United States magistrate or the court determines that the interests of justice so require and such person is financially unable to obtain representation."[188] The Act now authorizes payment for appointed

---

[179] Attorneys who are admitted to practice in the Northern District of Illinois may not appear in trials or other testimonial proceedings unless they are members of the court's trial bar or are appearing in association with a trial bar member. GENERAL RULES OF THE NORTHERN DISTRICT OF ILLINOIS, Rule 3.10. (Rule 3.10 will become effective on Jan. 3, 1983).

[180] GENERAL RULES OF THE NORTHERN DISTRICT OF ILLINOIS, Rule 3.31. (Rule 3.31 became effective on Oct. 4, 1982).

[181] *Id.*

[182] *See* 28 U.S.C. § 2254 (1976).

[183] *See* Harris v. Nelson, 394 U.S. 286, 293 (1969).

[184] 28 U.S.C. § 2255 (1976).

[185] RULES GOVERNING PROCEEDINGS IN THE UNITED STATES DISTRICT COURTS UNDER SECTION 2255 OF TITLE 28, UNITED STATES CODE, Rule 1, Advisory Committee Note.

[186] United States v. Somers, 552 F.2d 108, 110 n.6 (3d Cir. 1977); Ferrara v. United States, 547 F.2d 861, 862 (5th Cir. 1977); Neely v. United States, 546 F.2d 1059, 1066 (3d Cir. 1976) (dictum).

[187] Pub. L. No. 91-447, § 1(a), 84 Stat. 916 (1970).

[188] 18 U.S.C. § 3006A(g) (1976). As the advisory committee notes to the rules governing section 2254 cases point out, "the standards of indigency under this section [of the Criminal

counsel in post-conviction proceedings up to a maximum of $250,[189] and the maximum may be waived by the court if the case required "extended or complex representation."[190]

Second, the rules governing habeas procedures in federal courts for both federal and state prisoners provide that "[i]f an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g)."[191] The rules provide, however, that a court still retains discretion to appoint counsel at an earlier stage in the case.[192]

1. Case Law

As in civil cases, the district court has discretion in deciding whether to appoint counsel in habeas proceedings, and most courts of appeals have refused to find that a district court abused its discretion in denying a petitioner's motion for appointment of counsel.[193] A few courts have attempted to provide some guidelines for the district courts in exercising their discretion to appoint counsel for indigent petitioners. The Fifth Circuit has held that the district court must appoint counsel for an

---

Justice Act] are less strict than those regarding eligibility to prosecute a petition *in forma pauperis*, and thus many who cannot qualify to proceed under 28 U.S.C. § 1915 will be entitled to the benefits of counsel under 18 U.S.C. § 3006A(g)." RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, Rule 8, Advisory Committee Note.

[189] 18 U.S.C. § 3006A(d)(2) (1976).

[190] 18 U.S.C. § 3006A(d)(3) (1976). Section 3006A avoids the potential problems requiring attorneys to serve without compensation would present. *See* text accompanying notes 208-13 *infra*.

[191] RULES GOVERNING PROCEEDINGS IN THE UNITED STATES DISTRICT COURTS UNDER SECTION 2255 OF TITLE 28, UNITED STATES CODE, Rule 8(c); RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, Rule 8(c).

[192] *Id.* The Advisory Committee Notes to the Rules Governing Section 2254 Cases state that:

> If an evidentiary hearing is required the judge must appoint counsel for a petitioner who qualified for appointment under the Criminal Justice Act. Currently, the appointment of counsel is not recognized as a right at any stage of a habeas proceeding . . . . Some district courts have, however, by local rule, required that counsel must be provided for indigent petitioners in cases requiring a hearing. . . . Appointment of counsel at this state is [now] mandatory under subdivision (c). This requirement will not limit the authority of the court to provide counsel at an earlier stage if it is thought desirable to do so as is done in some courts under current practice. At the evidentiary hearing stage, however, an indigent petitioner's access to counsel should not depend on local practice and, for this reason, the furnishing of counsel is made mandatory.

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, Rule 8, Advisory Committee Note.

[193] *See, e.g.*, Williams v. State of Missouri, 640 F.2d 140, 144 (8th Cir. 1981), *cert. denied*, 451 U.S. 990 (1982) (§ 2254); United States v. Degand, 614 F.2d 176, 179 (8th Cir. 1980) (§ 2255); United States *ex rel.* Cadogan v. LaVallee, 502 F.2d 824, 825 (2d Cir. 1974) (§ 2254). *But see* Souder v. McGuire, 516 F.2d 820, 821 (3d Cir. 1975).

indigent habeas corpus petitioner if due process so requires;[194] "fundamental fairness is the test," according to the court.[195] The Ninth Circuit has suggested that it would be "desirable" for a district court to appoint counsel where the petition presents complicated and important constitutional issues.[196]

2. Survey Results

All of the courts responding to my letter maintained a panel of lawyers under the Criminal Justice Act for appointment in habeas corpus cases. In cases not requiring an evidentiary hearing, in which appointment of counsel is discretionary, most courts said that their standard for ruling on motions to appoint counsel was whenever "the interests of justice so require."[197] Only a few courts went beyond the statutory standard in setting policies for discretionary appointments in habeas corpus cases.

The District of Columbia Circuit applies the standard for criminal defendants in appointing counsel for indigent petitioners who were denied habeas corpus relief in the district court. The court should appoint counsel "if the possibility of a meritorious claim exists." In the Eighth Circuit, the district courts routinely appoint counsel for an indigent petitioner if the court certifies that the petitioner filed the appeal in good faith.

In the District of South Carolina, when the court must analyze a voluminous record to determine the existence of a valid federal claim, the court will appoint counsel to review the record. The magistrate for the District of Nebraska stated that he appoints counsel for an indigent habeas corpus petitioner unless the petitioner has failed to exhaust his state court remedies. In the Western District of Tennessee, the magistrates usually recommend that the court appoint counsel if they determine that the petition raises a "substantial issue."

A few districts reported some difficulty in finding attorneys to represent habeas corpus petitioners, at least in part due to the belief of some attorneys that the compensation payable under the Criminal Justice Act is inadequate.

IV. HOW BEST TO MEET THE LEGAL NEEDS OF INDIGENT CIVIL LITIGANTS

Some commentators have suggested that in civil cases indigent plaintiffs with meritorious claims can secure representation through a

---

[194] Norris v. Wainwright, 588 F.2d 130, 133 (5th Cir.), *cert. denied*, 444 U.S. 846 (1979).

[195] *Id.* at 134.

[196] Williams v. Craven, 460 F.2d 1252, 1254-55 (9th Cir. 1972).

[197] The "interests of justice" standard is enunciated in the Criminal Justice Act, 18 U.S.C. § 3006A(g) (1976), *quoted in* text accompanying note 188 *supra*.

contingent-fee arrangement with a private attorney.[198] In addition, the prevailing party in a section 1983 action is entitled to recover attorney's fees.[199] An important finding of my federal court survey, however, is that the marketplace does not always operate to meet the needs of poor litigants in civil rights and habeas corpus proceedings. Most of the courts reported that in some cases the judges or magistrates have had to seek counsel for indigent civil litigants with meritorious or colorable claims.

In addition, the suggestion that contingent-fee arrangements could provide representation for more than a small percentage of civil litigants is unworkable for several reasons. First, many litigants, especially in prisoner civil rights suits, will be seeking injunctive or declaratory relief.[200] Second, even if the plaintiff is asking for damages, the amount of money involved may be too small to interest a private attorney to take the case for a contingent fee.[201] Finally, many indigent litigants, most notably prisoners, lack any real access to lawyers and therefore would have difficulty in securing representation on a contingent-fee basis even with a meritorious claim for a substantial amount of damages.

If the Supreme Court would find that there is a constitutional right to counsel for indigent civil litigants, then it would be up to Congress and the state legislatures to appropriate the necessary funds. Since, as I have noted previously, such a declaration from the Court is unlikely,[202] I will discuss some of the many ideas put forth by lawyers, legislators, and others concerning how best to provide legal services to the poor.

A. *Requiring Pro Bono Work from Lawyers*

One plan proposed by the local bar association in New York City would make pro bono work a mandatory obligation of every lawyer by putting such a duty in the Disciplinary Rules of the American Bar Association's Code of Professional Responsibility.[203] Under the New York proposal, the Code's system of disciplinary processes and sanctions would enforce the pro bono obligation. The ABA, however, has continued to reject such an approach. As stated in the notes to the proposed

---

[198] *See* Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1324-25 (1966) [hereinafter cited as *Right to Counsel*]. *See also* Kraut, *Contingent Fee: Champerty or Champion?*, 21 CLEV. ST. L. REV. 15, 26 (1972) ("The contingent fee system has allowed persons, who otherwise could not afford a lawsuit, to assert their claims and have their day in court.").

[199] 42 U.S.C. § 1988 (1976).

[200] Of course, the provision for attorney fees in 42 U.S.C. § 1988 would also apply to a prevailing party awarded declaratory or injunctive relief.

[201] *See Indigents' Right*, *supra* note 125, at 116.

[202] *See* p. 1288 *supra*.

[203] *See* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, TOWARD A MANDATORY CONTRIBUTION OF PUBLIC SERVICE PRACTICE BY EVERY LAWYER: RECOMMENDATIONS AND REPORT OF THE SPECIAL COMMITTEE ON THE LAWYER'S PRO BONO OBLIGATIONS 1, 7 (1979) [hereinafter cited as NEW YORK BAR RECOMMENDATIONS].

revisions of the Code, the proposed rule concerning pro bono service "continues the nonobligatory professional standard set forth in the current Code."[204]

Another method of imposing a duty to perform pro bono work on all lawyers is to make acceptance of public interest representation a condition of admission to practice in a jurisdiction. The Northern District of Illinois has adopted such a plan,[205] but the pro bono commitment is required only of attorneys who participate in trials or trial-like proceedings.[206] Each trial lawyer practicing in that court must be available for appointment by the court to one case per year.[207]

A mandatory pro bono commitment, however, raises serious constitutional questions.[208] Some courts have held that requiring attorneys to provide uncompensated legal services is a taking of property in violation of the fifth amendment.[209] Recently, a district court refused to appoint counsel on the ground that such an appointment would violate the thirteenth amendment's prohibition against involuntary servitude.[210] Other courts have rejected these constitutional challenges on the theory that the duty to accept court appointments is a permissible condition of a license to practice law.[211]

Beyond any possible constitutional infirmities, an additional criticism of requiring attorneys to serve without compensation is that the requirement is unfair to lawyers as a group:

---

[204] *See* MODEL RULES OF PROFESSIONAL CONDUCT 180 (Final Draft 1981) [hereinafter cited as MODEL RULES]. The proposed Rule 6.1 provides:

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

Id.

[205] *See* GENERAL RULES OF THE NORTHERN DISTRICT OF ILLINOIS, Rule 3.31; text accompanying notes 179-81 *supra*.

[206] *See* GENERAL RULES OF THE NORTHERN DISTRICT OF ILLINOIS, Rule 3.10.

[207] *See* GENERAL RULES OF THE NORTHERN DISTRICT OF ILLINOIS, Rule 3.31.

[208] *See generally* Note, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366 (1981) [hereinafter cited as *Court Appointment*].

[209] *See, e.g.*, Dillon v. United States, 230 F. Supp. 487 (D. Ore. 1964), *rev'd*, 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966); Bedford v. Salt Lake City, 22 Utah 2d 12, 447 P.2d 193 (1968).

[210] *In re* Nine Applications for Appointment of Counsel, 475 F. Supp. 87 (N.D. Ala. 1979).

[211] *See, e.g.*, Dolan v. United States, 351 F.2d 671 (5th Cir. 1965); United States v. Dillon, 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966). *See also* Powell v. Alabama, 287 U.S. 45, 73 (1932) ("Attorneys are officers of the court, and are bound to render service when required by such an appointment."); *Court Appointment*, *supra* note 208, at 390 (concluding that court appointment of counsel is not unconstitutional); NEW YORK BAR RECOMMENDATIONS, *supra* note 203, at 30-32. *But see* MODEL RULES, *supra* note 204, at 180 ("The constitutional validity of a mandatory obligation to perform legal services without compensation is uncertain.").

> It is unfair to put on any working group the burden of providing for the needy out of its stock in trade. No one would suggest that the individual grocer or builder should take the responsibility of providing the food and shelter needed by the poor. The same conclusion applies to the lawyer. The lawyer's stock in trade is intangible—his time fortified by his intellectual and personal qualities, and burdened by his office expenses. To take his stock in trade is like stripping the shelves of the grocer or taking over a subdivision of the builder.[212]

The answer to this criticism, as stated by a committee of the New York City Bar Association, is: "We do not mean to suggest that the legal profession alone bears the responsibility for, or has resources adequate to satisfy, the needs for legal services and reform of justice in our society. What we do assert is that every member of the profession, *as a professional and as an officer of the law*, has a unique responsibility and opportunity to make some contribution to the satisfaction of such needs."[213]

B. *Expanding Government-Funded Legal Services Programs*

Another method of providing legal assistance to the poor would be through a government-sponsored legal aid system, such as the one adopted by Great Britain.[214] The British system, enacted by the Parliament in 1949, is administered by the Law Society rather than by a government agency and covers not only representation in courts but also legal advice.[215] Sources of revenue to fund the system include taxes, costs awarded in successful cases, and contributions from the clients.[216]

Raising revenues to fund legal assistance programs in the United States could be accomplished without raising taxes. One possibility would be to increase the filing fee for the commencement of an action in the federal courts. The courts could use the money generated by such an increase to provide limited compensation and reimbursement for out-of-pocket expenses for court-appointed lawyers. A similar plan, although on a smaller scale, is in operation now in the Tenth Circuit.[217] Given the current trend in government-funded legal assistance programs, as evidenced on the national level by the funding cuts for the Legal Services Corporation,[218] it is unlikely that there will be any proposal made to increase government support for legal aid to the poor in the near future.

---

[212] Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 U.C.L.A. L. REV. 438, 444 (1965).

[213] NEW YORK BAR RECOMMENDATIONS, *supra* note 203, at 9 (emphasis in original).

[214] *See generally* Upton, *supra* note 41.

[215] *Id.* at 371.

[216] *Id.* at 377.

[217] *See* pp. 1291-92 *supra*.

[218] *See* text accompanying notes 3-4 *supra*.

C. *Voluntary Efforts Organized by the Bar*

Beyond merely promulgating ethical standards suggesting that lawyers take on pro bono work, bar associations could actively cooperate with the courts in facilitating an organized voluntary system in cooperation with the courts. A few of the district courts I surveyed reported that local bar associations prepared or maintained the list of attorneys that the courts used in appointing counsel.[219]

To learn the status of current efforts by the organized bar, I wrote to the presidents of the bar associations of the fifty states and Puerto Rico, asking whether their groups made any attempt to encourage their members to accept pro bono work.[220] Of the thirty-three bar association presidents who responded, only two reported that their groups operated a pro bono program. In Maryland, the state bar association has established the Maryland Volunteer Lawyers Service, Inc. In Puerto Rico, the bar operates a referral system for pro bono cases. Two other state bar associations provide the courts with a list of attorneys willing to accept court appointments on a pro bono basis.

It is clear, therefore, that the current efforts of the organized bar are inadequate to marshall the resources of lawyers who are willing to fulfill their ethical obligations by providing free legal assistance for the poor. State and local bar associations could make a significant contribution toward meeting the legal needs of the poor by cooperating with the courts to set up voluntary pro bono programs. In addition, bar associations could reduce the burden on the courts by assisting in the administration of such programs.

A problem that will be encountered regardless of the method chosen to provide increased access to legal services for the poor will be screening out frivolous cases. Currently, the burden of screening prior to a decision on court-appointed counsel generally falls on the judges, magistrates, or staff attorneys of the courts. Another alternative would be a screening panel, perhaps made up of a judge or magistrate and several private attorneys, that would make recommendations to the court. Screening could also be handled without adding to the bureaucracy by assigning every case in which the indigent litigant requested court-appointed counsel to a private attorney for initial screening. The attorney could then present written recommendations to the court.

A de facto screening device might further reduce administrative burdens. Courts might refuse to appoint counsel unless the litigant's *pro se* complaint or petition survived a motion to dismiss. Such a system poses other problems, however. It might be difficult for *pro se* litigants

---

[219] *See* p. 1293 *supra*.

[220] I did not contact local bar associations, but I am aware that some of them are active in this area.

to frame their allegations in a manner that would allow the court effectively to review the merits of the claim. In addition, reviewing *pro se* complaints is quite a task for the court.[221]

V. CONCLUSION

The right of access to courts is of fundamental importance in our society, and the exercise of that right should not depend upon the litigant's wealth. To ensure that indigent litigants receive a meaningful opportunity to be heard in court will in many cases require that the litigant have legal representation. The due process balancing test would allow courts to decide on a case-by-case basis whether a litigant needs representation in order to protect or assert a right.

I have argued that at least in cases involving constitutional or fundamental civil rights, indigent plaintiffs and habeas corpus petitioners should have a right to court-appointed counsel. I recognize that the great majority of indigents' legal problems do not rise to the level of a constitutional issue,[222] and I do not demean the importance of these other legal needs by not advocating a broad right to counsel for indigents in all cases. Perhaps such a broad solution to the problem is down the road. In the meantime, I believe that the federal courts should ensure meaningful access to the courts for litigants asserting violations of constitutional or fundamental rights.

In order to meet the need for lawyer's time that would be created by guaranteeing the right to counsel for indigents in these cases, I have discussed several alternatives. At the least, it would seem that the organized bar, in cooperation with the courts, could take a more affirmative role in the attempt to bring the needed legal resources to indigent litigants. I believe that there are enough lawyers to share the responsibility for meeting the ethical obligations of the bar to provide legal assistance to the poor.[223]

---

[221] *See The Indigent's Right to Counsel, supra* note 16, at 561-62 (on screening).

[222] *See Right to Counsel, supra* note 198, at 1323.

[223] *Cf.* Argersinger v. Hamlin, 407 U.S. 25, 37 n.7 (1972).