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BODDIE AND BEYOND: RIGHTS OF THE INDIGENT CIVIL LITIGANT*

Introduction

This case comment shall be concerned with two cases which reflect the growing recognition of the indigent's situation in relation to a civil proceeding. The first of these cases is *Boddie v. Connecticut.* This Supreme Court decision was handed down on March 2, 1971. The case involved welfare recipients and their constitutional challenge of a Connecticut law which required the payment of certain costs, about $60, before an action for divorce could be commenced. These filing fees were an effective bar to the petitioners' action. The Supreme Court, by an eight to one majority, struck down this law as being violative of the fourteenth amendment's guarantee of due process.

The second case, *In re Kras* was decided on September 13, 1971 by the Eastern District Court of New York. It extended the *Boddie* decision into the area of bankruptcy. The petitioner therein had to support his wife, their two children, his mother and her young child on $366 per month. Their only assets were $50 worth of essential household goods. Kras applied for a discharge in bankruptcy of his indebtedness but was effectively barred because he could not pay the necessary filing fee. The court, relying on *Boddie,* decided that the fee requirement was repugnant to the Constitution.

History

The plight of the indigent in relation to the legal system has been recognized down through the ages. Under Roman Law, where it was necessary to provide security before proceeding in the courts, the pauper

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was protected. "The law required of him only such security as he could furnish." 3 There was not, however, either in Roman or early English history, any comprehensive statute to safeguard the poor person's rights. In these times the indigent's "justice appears to have been the King's prerogative..." 4

In England the main barrier to the courts were the writs, which could be obtained at varying prices. While "there were some writs which could be had for nothing... there were others which were only to be had at high prices." 5 Yet, during this time period (circa 1250) "[t]hat the poor should have their writs for nothing, was an accepted maxim." 6 Indeed, the Magna Carta contained a provision whereby no one would be denied justice. 7 And in the mid-fourteenth century, statutes recognizing the right of access to the courts were passed in England. Their general import was that no one could be imprisoned without process of law, 8 but the scope of protection generally was limited to criminal actions.

The cost of the writs was based on the fee system, which was utilized in order to pay the judges, other court officials, and clerical help. 9 The indigent could circum-

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3 Maguire, Poverty and Civil Litigation, 36 HARV. L. REV. 361 (1923).
4 Id. at 366.
6 Id. (footnote omitted).
7 Note, Litigation Costs: The Hidden Barrier to the Indigent, 56 GEO. L.J. 516, 519 (1968) [hereinafter Litigation Costs].
9 Willging, Financial Barriers and the Access of Indigents to the Courts, 57 GEO. L.J. 253, 255 (1968) [hereinafter Willging].
14 4 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 538 (2d ed. 1937).
centuries was expansion of the rights for "assignment of counsel and forgiveness of costs if the litigation proved unsuccess-
ful."\(^\text{16}\)

The statute of 1494 did not encompass the criminal area; its scope was limited to civil litigation.\(^\text{17}\) Also, subsequent to the statute, judges and other officials began receiving a fixed salary. Yet, the fee system continued.\(^\text{18}\)

The fee system was prevalent in the United States throughout the colonial period. After the revolution, state constitutions granted judges and clerks a fixed salary, but they continued to receive additional compensation through the fee system. This condition was evident in the nineteenth century, and remnants of it still persist.\(^\text{19}\) However, efforts were made to help the indigent. By 1801, Virginia, Kentucky, New Jersey and New York had some form of in forma pauperis statute.\(^\text{20}\) However, absent a specific statute, "most courts refused to recognize a right to sue in forma pauperis."\(^\text{21}\) And, even in the states which adopted the statutes, the courts were reluctant to apply them.\(^\text{22}\)

Throughout the years there have been recommendations that the "administration of justice in civil areas be without charge to the litigants."\(^\text{23}\) But, they have had no great effect upon the states. While it is true that the majority of the states do have in forma pauperis statutes\(^\text{24}\) in one form or another, these are subject to a host of exceptions and qualifications.\(^\text{25}\)

In 1892 the federal government adopted an in forma pauperis statute.\(^\text{26}\) This statute is also subject to the same deficiencies present in the state statutes, the main one being that they do not cover the major expense of litigation. It is necessary to first

\(^{15}\) Willging, supra note 9, at 256.


\(^{17}\) Bristol v. United States, 129 F. 87, 88 (7th Cir. 1904); Brunt v. Wardle, 133 Eng. Rep. 1254, 1258, 3 Man. & G. 534, 544 (1841) (concurring opinion).

\(^{18}\) Willging at 255.

\(^{19}\) Silverstein, Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases, 2 VALP. U. L. REV. 21, 28 (1967) [hereinafter Silverstein].

\(^{20}\) Id. at 29. In fact, "[i]n Arkansas . . . some assistant prosecutors are compensated only by fees." Id. at 28.

\(^{21}\) Id. at 31.

\(^{22}\) Id. at 30. This reluctance to apply the statutes may have stemmed from the belief that "there was no critical need for such relief." This attitude also was a factor in causing the American jurisdictions to be slow in enacting the statutes. Proceedings, supra note 13, at 66.

\(^{23}\) Silverstein, supra note 19, at 22.

\(^{24}\) Many of these statutes were enacted due to the increase in litigation caused by urbanization. Proceedings at 66. It would seem that the critical need for such statutes, which was previously believed to be lacking, had now been realized.

\(^{25}\) Silverstein at 33. The indigent's net worth or the type of action that he is attempting to bring may have a bearing on whether or not the statute will apply. For example, Georgia and Louisiana do not allow in forma pauperis proceedings in cases of divorce. Id. at 34-35.

qualify under the terms of the statute before being able to reap its benefits.\textsuperscript{27}

### Constitutional Questions

The presence of \textit{in forma pauperis} statutes and the limitations imposed upon those which have been passed, result in the denial of access to the courts to indigents. This gives rise to constitutional challenges under the due process and equal protection clauses of the fourteenth amendment. "[E]qual protection and due process require the state to provide its poor citizens the services necessary for functioning in modern society with an adequacy which will reasonably insure their capacity for and access to equal opportunity."\textsuperscript{28} There are certain basic principles which support this statement. One such principle is the right to be heard.

This right is "one of the most fundamental requisites of due process."\textsuperscript{29} It is a settled principle, that a state must afford to all its citizens a meaningful opportunity to be heard.\textsuperscript{30} A person is entitled "upon the most fundamental principles, to a day

\textsuperscript{27} Willging at 256-57. One of the most universal qualifications deals with whether the applicant is poor enough to invoke the statute. Generally, the modern view has been much more lenient than the earlier view. Silverstein at 45. Today's attitude is that a person does not have to be totally destitute in order to invoke the statute. As the Supreme Court stated in \textit{Adkins v. Dupont Co.}, 335 U.S. 331, 339 (1948):

[T]o say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get . . . would be to construe the statute in a way that would throw its beneficiaries into the category of public charges. All that is necessary is a showing that because of extreme poverty it would be impossible to pay the necessary costs. \textit{Proceedings} at 68.

\textsuperscript{28} \textit{Integration of Equal Protection}, supra note 12, at 256.

\textsuperscript{29} Schroeder v. City of New York, 371 U.S. 208, 212 (1962). It existed in the common law also, though mainly in the criminal law area. See \textit{In re Winship}, 397 U.S. 358, 379 (1970). It had been pointed out that no one was condemned without first being given a chance to be heard by being brought before the court. See Hovey v. Elliot, 167 U.S. 409, 415 (1896). Blackstone expressed belief in the "rule of natural reason expressed by Seneca,

\textquote{Qui statuit aliquid, parle inaudita altera;}

\textquote{Aequam licet statuerit, haud aequus fuit.}"

Translated, this means that if a person decides a case without hearing both parties, though his decision might be just, he himself is unjust.


This does not imply that there is any such limitation on the right to due process in the United States. The Constitution provides that no state "shall . . . deprive any person of life, liberty, or property, without due process of law . . ." U.S. Const. amend. XIV, § I. There is no mention of any distinction between due process in criminal cases as opposed to civil actions.

in court... This is based on the underlying theory that if a party's rights are going to be affected, he must be granted the right to be heard. If this is not done, then due process is denied. Therefore, by creating financial barriers to an indigent's cause of action, the state violates his constitutional rights.

The right to obtain entrance to the courts is essential to the right to be heard. It is the "trigger [to] the application of equal protection and due process to certain kinds of civil litigation by indigents." That due process and equal protection apply to "the right to sue or litigate" is a principle that has been recognized by the Supreme Court. This right to litigate increases in significance according to the importance of the right sought to be exercised or protected. The more fundamental the right, the more "classifications which might invade or restrain them must be closely scrutinized and carefully confined." Access to the court may be a fundamental right in itself, in that, if it is denied, such would constitute an abridgment of the first amendment's recognition of the right to petition for redress of grievances, which right is held applicable to the states through the fourteenth amendment.

As was stated previously, the specific right to be protected may determine whether the indigent will be allowed or denied free access to the court. In the criminal area, this has never been considered a stumbling block. The court has been inclined to allow an indigent to proceed when his personal liberty was at stake. This always has been regarded as a fundamental right. The question which now arises is what shall be considered fundamental rights in the civil area?

It should not be inferred that if a fundamental right is involved, an indigent will automatically be granted access to the courts. The presence of a fundamental right, however, necessitates that the state or federal government show a compelling interest in order to abridge that right. In

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34 Id. at 250; Dorsey v. City of New York, 66 Misc. 2d 464, 466, 321 N.Y.S.2d 129, 131 (Sup. Ct. N.Y. County 1971). Integration of Equal Protection at 254.
the civil area, problems as to what is to be regarded as a fundamental right have not arisen, to any great extent, "where personal liberty is involved and there is an imminent threat of confinement as a result of the particular legal proceeding." An example of such a proceeding would be a petition for a writ of habeas corpus. Also, whether or not a fundamental right is involved, the fact that the court is the only vehicle for the exercise of that right will cause the question of free access to take on a "greater significance."

Civil-Criminal Dichotomy

The rights of indigents in the civil area have not been as liberally construed as those of his counterparts involved in a criminal action. It has been recognized that "[t]here are distinctions between the cases involving imprisonment . . . and the ordinary civil actions." There are varying instances in which these distinctions can be seen.

At the outset, there is the question of whether a civil litigant has the right to court-appointed counsel. The answer seems to be no. However, "[p]ublicly supplied

As was stated in this case, "any classification which serves to penalize the exercise of . . . [a fundamental] right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." Id. at 634 (emphasis in original); see In re Kras, No. 71B972 (E.D.N.Y., Sept. 13, 1971).

In Integration of Equal Protection the author recognized that

[t]he fundamental right-compelling state interest rubric . . . is a rule of judgment in which, in the accommodation and balancing employed when state classifications conflict with the exercise of essential constitutional rights, the exercise of the rights is given preference to the realization of legitimate but not absolutely essential state interests.

41 Id. at 244-45; Willging at 270.

44 Litigation Costs, supra note 7, at 254.

The attempts to aid the indigent in this area have not been very successful. Concern has crystallized into three general forms: 1) prohibiting the use of an attorney [this step was taken in some small claims courts]; 2) making the attorney unnecessary [this device has been used by small claims courts, domestic relations courts, administrative agencies, and in arbitration proceedings]; and 3) supplying an attorney or a lay advocate [this procedure has been used in civil courts, administrative agencies, and most importantly, in the development of legal aid and service programs]. Willging at 259.

These measures have not, however, accomplished very much. The first has had very limited application. The second has also failed, especially in the small claims courts. These places have become almost a collection point for creditors. The creditor is invariably represented by counsel while the indigent, who may be illiterate or completely unfamiliar with the workings of a court, does not have this benefit. Id. at 259-60. The third measure has also proved to be ineffectual due to the tremendous increase in the number of cases involving indigents, Right to Counsel, supra note 12, at 1323.
counsel may be provided as an adjunct of the right to proceed with a civil case in *forma pauperis* in the federal courts, and in the courts of a few states," including New York. But, since this provision is usually part of the *in forma pauperis* statute, it is subject to the same infirmities.48

Legal aid is not as helpful as one might believe in alleviating the problem. For example, there are restrictions concerning eligibility. One of the most severe is that based on subject matter. The two most commonly restricted areas are divorce and bankruptcy. Silverstein, *Eligibility for Free Legal Services in Civil Cases*, 44 U. Det. J. Urban L. 549, 572, 581 (1967).

Although the restrictions in the divorce area are falling by the wayside there are still some legal aid attorneys who believe "... that a divorce is a luxury, thereby implying that none of the poor, or only the most 'deserving' ones, should be entitled to get a divorce through legal aid." Id. at 574. The attitude regarding bankruptcy also runs the gamut in legal aid offices; some would exclude it altogether and others would accept it with little restrictions. Id. at 581-82.

Inherent in any of these restrictions is the problem of funds. There is just not enough money in legal aid to adequately supply the indigent with counsel. To remedy this the legislature and the courts must begin to act.

For a development of legal aid in England see Dworkin, *The Progress and Future of Legal Aid in Civil Litigation*, 28 Mod. L. Rev. 432 (1965). The Indigent's Right to Counsel, supra note 46, at 546. These states include Arkansas, Illinois, Indiana, Kentucky, Missouri, New York, North Carolina, Tennessee, Texas, Virginia and West Virginia. Id. at 546 n.12. "Even a full right of counsel should not be prohibitively expensive. Most of the industrial nations of the world, less wealthy than the United States, provide free legal services to the poor." Id. at 551.

There are states which specifically recognize the need for counsel in certain civil areas. For example, "In North Carolina an indigent person is entitled to court-appointed counsel or a public defender in a civil arrest and bail proceedings. . . ." CCH [1968-1971 Transfer Binder] Pov. L. Rptr. (New Developments) ¶ 10,093.

One would be subject to all the qualifications and limitations expressed in the statute in order to be eligible. The final decision as to eligibility would then be subject to the court's discretion46 and the court's consent to proceed *in forma pauperis* with a public supplied counsel is usually given "grudgingly."50 The consequence of this is that "the existing *in forma pauperis* procedures are used very little. . . ."51 One must also contemplate the value of such a proceeding if court-appointed counsel is not granted.52

This question is not a real problem in the criminal area, especially in the case of a capital offense.53 In a criminal proceeding the right to counsel is deemed fundamental, and if an indigent is tried without this aid,

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49 Id. at 46-48.  
50 Indigent's Right to Counsel at 546.  
51 Silverstein at 43.  
52 There are two main factors which tend to limit the effectiveness of these statutes. They are: (1) the limitations that are inherent within the statutes, and (2) the conservative attitude of the judges. Judges are recalcitrant "to entertain actions filed in forma pauperis." Id. at 44. There has been, however, some reform in this area. The most widely adopted reforms have been the provisions of the Uniform Reciprocal Enforcement of Support Act (URESA). Id. at 32.  
53 Indigent's Right to Counsel at 559.  
54 In Powell v. Alabama, 287 U.S. 45, 71 (1932), it was stated "that in a capital case, where the defendant is unable to employ counsel . . . it is the duty of the court, whether requested or not to assign counsel for him. . . ." The courts have become considerably more liberal in this view. In a recent New Jersey case, it was held that an indigent defendant is entitled to a court-appointed counsel in any case where imprisonment could result, including prosecutions for petty offenses. Rodriguez v. Rosenblatt, 58 N.J. 281, 277 A.2d 216 (1971).
his fourteenth amendment rights are violated.\(^{54}\)

Possibly a more serious question in the civil area, because it actually bars access to the courts,\(^{55}\) is the question of filing fees and transcript costs. Also, in some types of appellate action there is an equivalent to filing fees in the requirement of posting a bond for security before the appeal can be taken.\(^{56}\) In other cases a bond might be required before a defense can be asserted.\(^{57}\) In actions for replevin or where an "attachment before judgment" is sought, a bond will usually be required.\(^{58}\) Copies of briefs and transcripts necessary to the appellate process may cost hundreds of dollars, and there are counsel fees and other expenses.\(^{59}\)

This system of costs is a substantial barrier to the courts for the indigent; therefore, he may be denied the opportunity to be heard.

The predicament that these costs create in the civil area is more extensive than that which is present in the criminal realm. In a criminal case the trial is initiated by the government, and an attorney is supplied for the indigent's defense. There are no filing fees to be paid or bonds to be posted before a defense can be asserted. However, problems have arisen on the appellate level. It was held early that the \textit{in forma pauperis} statutes were not applicable to criminal appeals.\(^{60}\) Therefore, the cost of transcripts and court records prevented indigent defendants from appealing their convictions. This inequity was finally remedied in the landmark case of \textit{Griffin v. Illinois}.\(^{61}\) Therein, the defendant could not afford a copy of the transcript and court records which were necessary to effectuate an appeal. The United States Supreme Court held that the rights of the indigent were in fact being violated, for the fourteenth amendment guarantees "procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons."\(^{62}\) Moreover, the Court stated that

to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust con-

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\(^{55}\) Indigent's Right to Counsel at 545.

\(^{56}\) Willging at 276.

\(^{57}\) Id. at 275-77.

\(^{58}\) Id. at 274, 277.

\(^{59}\) Id. at 279-80.

\(^{60}\) Bristol v. United States, 129 F. 87 (7th Cir. 1904).

\(^{61}\) 351 U.S. 12 (1956).

\(^{62}\) Id. at 17.
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victions which appellate courts would set aside.\(^6\)

Justice Frankfurter, concurring, further noted that “[i]f [the state] has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity.”\(^6\)

In interpreting this decision it must be remembered that the Court was dealing with a fundamental right; a man's liberty was at stake. However, the philosophy of the *Griffin* Court has been extended and has become an important means for safeguarding the rights of indigents in the criminal area.\(^6\)

In the civil area, the development of the rights expressed in *Griffin* has proceeded very slowly. The Supreme Court early made it clear that “an act giving the right to prosecute *in forma pauperis* cannot be extended by implication beyond its terms in conflict with existing provisions in relation to writs of error and appeals.”\(^6\)

Therefore, absent any express statute to proceed *in forma pauperis* on an appeal, an indigent would have to pay for his own transcript and court record. This would be especially relevant in a civil proceeding for a writ of habeas corpus or a writ of error coram nobis. This same general attitude prevailed in the years immediately following the *Griffin* case. For example, in 1958 a California court held that a clerk was not required to prepare transcripts without the payment of the statutory fee.\(^6\)

The first breakthroughs came, predictably, in cases where a civil procedure was necessary in order to attack a criminal conviction. In *Smith v. Bennett*,\(^6\) where an indigent prisoner could not afford a transcript to file for a writ of habeas corpus, it was remarked 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.”\(^6\)

However, the Court limited its decision to this type of civil action.\(^7\) In *Lane v. Brown*,\(^7\) where an indigent could not afford a transcript in order to file for an appeal of a denial of a writ of error coram nobis, the Court stated that “[s]uch a procedure, based on indigency alone, does not meet constitutional standards.”\(^7\)

Consequently, where

\(^{63}\) *Id.* at 19.

\(^{64}\) *Id.* at 24. *See* Burns v. Ohio, 360 U.S. 252, 257 (1959).

the purpose of the civil appeal is to determine the question of liberty, the courts should apply the *Griffin* philosophy.\textsuperscript{73}

Recently, the states have begun to recognize the right of an indigent to a free transcript in civil actions other than those mentioned above. One such area has been child custody cases. In *Chambers v. District Court of Dubuque County*,\textsuperscript{74} an indigent parent's rights in respect to her minor son had been served. The court ordered a free transcript to be issued due to the gravity of the situation. In *Brown v. Chastain*,\textsuperscript{75} the same facts were present as in the *Chambers* case. The court dismissed the complaint for lack of jurisdiction. There was, however, a spirited dissent by Judge Rives, who believed that the court did have jurisdiction and therefore considered the case on its merits. He found the criminal-civil distinction to be particularly repugnant in this case. Judge Rives contended that “[w]e are dealing here with rights just as fundamental as a man’s personal liberty. . . . Indeed, there could hardly be a better case for Fourteenth Amendment protection than this one.”\textsuperscript{76} It was his opinion that this was another area to which the *Griffin* doctrine should be extended.\textsuperscript{77}

Judge Rives reasoned that in this particular area, the right barred from protection is so fundamental as to make the discrimination invidious. From this he concluded that the right should be protected according to the philosophy expressed in *Griffin*. This apparently is the theory that has been used by the courts in extending to indigents waivers of certain fees and costs in civil litigation. As was stated in *Lee v. Habid*, “[i]t is the importance of the right to the individual, not the technical distinction between civil and criminal, which should be of importance to a court.”\textsuperscript{78}

Prior to *Boddie*, the Supreme Court had recognized certain rights to be fundamental in the civil area, even though they did not concern personal liberty. In *Harper v. Virginia Bd. of Elections*,\textsuperscript{79} the Court held voting to be a fundamental right, and therefore found a poll tax, which barred the complainant from exercising this right, to be unconstitutional. The Court stated that the poll tax created an invidious discrimina-


\textsuperscript{74} 261 Iowa 31, 152 N.W.2d 818 (1967). This case also provided that counsel also should be provided at public expense.

\textsuperscript{75} 416 F.2d 1012 (5th Cir. 1969).

\textsuperscript{76} Id. at 1027.

\textsuperscript{77} Id. at 1026.

Statutes, of course, could solve the problems presented in granting a free transcript in a civil appeal. For example, 28 U.S.C. § 753(f) (1965-1969 Supp.), amending 28 U.S.C. § 753(f) (1964), provides that fees for transcripts in civil appeals in *forma pauperis* “shall . . . be paid by the United States if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question).”


\textsuperscript{79} 383 U.S. 663 (1966); see *Reynolds v. Simms*, 377 U.S. 533 (1964); *Integration of Equal Protection* at 237-38.
tion on the basis of wealth and consequently must fall. It also has construed the right to travel as being fundamental, thereby requiring the state to illustrate a compelling interest in order to abridge it.

Why this civil-criminal dichotomy exists is a question that cannot be answered by looking to the Constitution. The fourteenth amendment simply provides that no state "shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It makes no specific reference to either civil or criminal proceedings. Indeed, Justice Douglas has remarked that "the Equal Protection Clause of the Fourteenth Amendment is not limited to criminal prosecutions. Its protections extend as well to civil matters."

Expenses in Civil Litigation

This section will explore those expenses which are predominately civil in nature. They can be as effective an obstacle to the indigent as filing fees and transcript costs. They may effectively infringe upon the paupers' rights to due process and equal protection of the laws.

The first of these expenses is bonds. A party may have to put up a bond as a prerequisite to filing suit to appealing or even to defending an action. In the 1921 case of Ownbey v. Morgan, the Supreme Court held that a law which required an indigent defendant to post security, in the amount of the property attached, before contesting the plaintiff's action, was not violative of due process or equal protection. In Williams v. Shaffer, an indigent tenant failed to pay his rent when due. His landlord then sought a dispossessory warrant to evict. The tenant desired to file a counter-affidavit and thereby obtain a jury trial on the issues, but, in order to accomplish this, a bond had to be tendered as security. The Georgia court found this to be constitutional and the Supreme Court denied certiorari. Justice Douglas, dissenting from the denial of certiorari, contended that this bond system was inequitable because "the indigent tenant is deprived of his shelter, and the life of his family is disrupted—all without a hearing—solely because of his poverty."

In State v. Sanks the facts were similar to those in Williams and the Georgia court again found the bond requirement not to be violative of equal protection or due process. The court commented that the payments are reasonable and "[t]he fact that a tenant in a particular case is indigent and unable to furnish a bond does not permit a different conclusion." In most other

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81 U.S. Const. amend. XIV, § 1.
civil actions the usual rule is that there is no bond requirement to defend. 88

Bonds may also be a prerequisite to taking an appeal. "[A] supersedeas bond is an almost universal prerequisite for appeals" stemming from a summary eviction. 89 If the summary eviction does not provide for a hearing, then the posting of the bond will be the only manner in which the indigent will be afforded an “opportunity for a judicial hearing.” 90 The appeal also could be contingent upon the payment of a fee. 91 This too could be an effective bar to the indigents’ use of the appellate system. 92 “The legal system, therefore, is not providing the review of lower court proceedings which is essential for the development of justice and uniformity in the law.” 93

This bond requirement is also present in actions for replevin. This type of bond could actually require “the indigent to be able to pledge property worth double the amount of the goods to be replevied in addition to payment of the other fees. Thus, in practical terms, replevin is a remedy which is unavailable to him.” 94 In this area a Florida court held that absent a specific provision in the statutes for waiver, a writ of replevin, unaccompanied by a bond, was properly dismissed. They determined that the certificate of insolvency was immaterial. 95

For the indigent plaintiff, the cost of filing fees may likewise act as an effective bar to exercising his rights. Without the payment of these fees, he could not commence his action. However, before dealing with filing fees, which were the main issues in Boddie and Kras, it is necessary to first consider the question of auxiliary expenses i.e., those payable by litigants to third persons other than public officers. There are thirty-four jurisdictions including the federal government, which have in forma pauperis relief. 96 The courts and statutes of these jurisdictions, however, “are too often silent about the unofficial costs of civil litigation.” 97 These auxiliary fees consist of the costs incurred for witnesses, expert witnesses, depositions, publication, investigatory services and of course, coun-

88 Willging at 274.
89 Id. at 276. See West Haven Housing Authority v. Simmons, 5 Conn. Cir. 282, 250 A.2d 527 (1968), appeal dismissed, 399 U.S. 510, rehearing denied, 400 U.S. 856 (1970).
90 Willging at 276.
92 Silverstein at 36.
93 Integration of Equal Protection at 233.
94 Willging at 274.
97 Id. at 191.
Without some type of system for the payment of these fees, the courts cease to be accessible to the indigent. The need for a provision to aid the indigent in paying for these expenses "was recognized in the American Bar Committee's Model Poor Litigant's Statute of 1924-25 and the same Committee's recommendation in 1941. . . ."100

One troublesome aspect in this area is the fact that many of these costs are not within the control of the court. And, "[e]ven those expenses which can be controlled by the court are usually surrounded with due process problems which preclude their being waived unless there are funds available to the court to pay for the services rendered the poor."101

Recently, some inroads have been made, but they have not been sufficient to allow a pauper open access to the courts. In a 1967 case it was held that granting leave to proceed in forma pauperis does not mean that the court should give any affirmative assistance to the indigent in securing a discovery deposition.102 In reference to witness fees, however, a recent New York decision declared that "[w]hile no provision of law exempts a poor person from paying a witness his fee . . . , failure to provide for payment of such fees by the city or county would deny an indigent party effective and equal access to the courts."103

In matrimonial actions the cost of publication can prevent the indigent from pursuing his action.104 "Since the largest percentage of litigation by indigents is in domestic relations," application of in forma pauperis would have an "immediate and dramatic impact for the poor."105 Prior to the decision in Boddie, this problem was recognized and dealt with in a New York case.106 The issue was whether these publication costs could be waived and paid for out of the public treasury. The court decided that these fees were not within the poor persons statutes107 and "that unless

98 Id. at 198.
99 Id. at 25.
100 Id. at 36 (footnotes omitted).
101 Civil Litigant, supra note 96, at 198.
102 Beard v. Stephens, supra note 96, 372 F. 2d 685, 690 (5th Cir. 1967). The fact that of an indigent's "inability to pay for a deposition may mean the loss of an essential witness or it may make it impossible to solidify favorable testimony or to impeach an im-
105 Integration of Equal Protection at 231.

The court pointed out that because of the comprehensive poor persons statutes in New York there was never much urgency in connection with auxiliary fees. But, since the adoption of a more liberalized divorce law the problem of publication had now arisen. 58 Misc. 2d 1045, 296 N.Y.S.2d 74 (Sup. Ct. Kings County 1968).
constitutionally mandated the courts do not have the inherent power to direct payment of this category of 'auxiliary expense' out of public funds.\textsuperscript{108} However, the court directed the fees to be paid out of public funds because otherwise the plaintiff's right to equal protection of the laws would be violated.\textsuperscript{109} The court also implied that the plaintiff's right to a divorce in this case was as fundamental as the transcript in the Griffin case or the right to vote in the Harper case.\textsuperscript{110} Influencing the decision was the fact that in order to obtain relief, for the divorce, petitioner was required to go into the courts.\textsuperscript{111} Three years later the New York courts were confronted with the same problem and again decided that these publication fees denied the indigent plaintiff her rights under the equal protection clause, as well as under the due process clause.\textsuperscript{112}

A more comprehensive system is needed in order to help defray these auxiliary costs if we are to allow the pauper to proceed in a civil action. These fees contribute toward the pauper's present condition. He is, in fact, being exploited because of his status.\textsuperscript{113}

The last area of court costs to be discussed will be those of filing fees. These fees are usually covered by \textit{in forma pauperis} statutes.\textsuperscript{114} Problems arise in states where there is no statute and in certain cases where there is a question as to whether the statute covers the particular subject matter. Whether the fees will be waived is influenced by the presence or absence of a fundamental right. Traditionally, divorce has not carried this weight. As a result, the filing fee requirement in divorce actions has not been considered an abridgement of any constitutional right.\textsuperscript{115} The states also were considered to have legitimate reasons for imposing the fees, \textit{i.e.}, to financially support the courts and to deter frivolous law suits.\textsuperscript{116} For example, in Sloatman v. Gibbons\textsuperscript{117} the court held that filing fees could not be waived in a divorce action but could be paid for in installments. Consequently, absent a statute, it was infrequent that filing fees were waived in a divorce action.

In bankruptcy proceedings the filing fees are much more costly than those for di-

\begin{thebibliography}{9}
\bibitem{108} 58 Misc. 2d at 1051, 296 N.Y.S.2d at 82.
\bibitem{109} Id. at 1056, 296 N.Y.S.2d at 87.
\bibitem{110} Id. at 1054, 296 N.Y.S.2d at 86.
\bibitem{111} Id. at 1056, 296 N.Y.S.2d at 87.
\bibitem{112} The court stated that
[the loss of access to the courts in an action for divorce is a right of substantial magnitude when only through the courts may redress or relief be obtained.]
\textit{Id.}
\bibitem{113} Dorsey v. City of New York, 66 Misc. 2d 464, 321 N.Y.S.2d 129 (Sup. Ct. N.Y. County 1971).
\bibitem{114} The court in this case remarked that if an inequality exists, even if accidental or unintentional, and "if it affects substantial rights of the poor, [it] violates equal protection to the same extent as does intentional, hostile, aggressive and invidious discrimination." \textit{Id.} at 466, 321 N.Y.S.2d at 131.
\bibitem{115} The Integration of Equal Protection, at 234-35.
\bibitem{117} 104 Ariz. 429, 454 P.2d 574 (1969).
\end{thebibliography}
vorce. Yet, they may not be waived. "The best an indigent debtor may hope for is that the fee will be ordered paid in installments." Prior to 1946, this was not the case. An indigent then could have filed and proceeded in forma pauperis if he also presented an affidavit which stated that he could not afford the filing fee.

Thus, these filing fees, bond requirements, transcript costs and auxiliary expenses all face the indigent before he even begins his legal proceeding or even before he has a chance to defend or appeal a legal action brought against him. His only hope is that these fees might be waived or paid for out of the public exchequer.

**Boddie v. Connecticut**

In *Boddie*, the Court was confronted with an indigent who had been denied access to a Connecticut court due to failure to comply with the statutory requirement of a filing fee. Appellant sought to have the fee waived so that she could commence an action for divorce. Connecticut had no *in forma pauperis* statute.

*Boddie* was initially argued in December of 1969 and reargued in November of 1970. At the initial argument, the appellant relied on the *Griffin* line of cases to establish a violation of equal protection. It was contended that *Griffin* was not limited to criminal matters and that the fourteenth amendment is equally applicable to both civil and criminal cases.

Appellants also reasoned that the state’s basis for imposing the fees did not justify its discrimination. It was further contended that since the basis for the discrimination was poverty, a compelling state interest was a precondition to justify the classification. The due process argument also was based on the denial of access to the court. This claim of right was linked to the first amendment’s protection, applied to the states through the fourteenth amendment, “of the right to petition for redress of grievances....”

These two arguments were distinguished in that due process was much narrower, dealing only with “the right to seek a hearing in court,” and that, “[w]hile the equal
protection argument might fail if the interest involved was not significant or serious enough to be constitutionally cognizable, . . . any denial of the right to petition for redress was constitutionally cognizable. . . .”

On reargument the appellants placed the main thrust of their argument on the due process clause. They contended that since the right to marriage had been recognized as constitutionally fundamental by the Supreme Court, the state could not discriminate on the basis of wealth in a divorce proceeding.

The Supreme Court finally handed down the *Boddie* decision on March 2, 1971. By an eight to one majority, they reversed the district court’s decision and found that “due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.”

Justice Harlan wrote the majority opinion for the Court. He stated that due process typically has been concerned with the rights of defendants and not those “seeking access to the judicial process in the first instance.” He believed, however, that “marriage involve[d] interests of basic importance . . .” and noted that the courts were the only legal means if one wished to dissolve a marriage. Therefore, these plaintiffs were put in the same position as the defendant who was “called upon to defend his interests. . . . For both groups this process was not only the paramount dispute—settlement technique, but, in fact, the only available one.”

Justice Harlan further reasoned that due process requires that one must be given, “a meaningful opportunity to be heard,” unless there is an overwhelming state interest to be protected. He could not find such a state interest and therefore concluded that the state’s conduct constituted a denial to the appellants of their right to be heard in violation of due process. Justice Harlan further believed that the *Griffin* philosophy was applicable in this case. He reasoned that since the fees in *Boddie* were imposed as a prerequisite to access to court, and the transcript in *Griffin* “could be waived as a convenient but not necessary predicate to court access,” the principles expressed in *Griffin* certainly should be applicable.

Justice Harlan also made reference to service of process. He stated that “in this case service at defendant’s last known address by mail and posted notice [was] equally effective as publication in a newspaper.” “The implication [of this is] that an indigent plaintiff may effect service by mail if a state declines to arrange it for him.” Mailing was considered a “reliable alternative . . . to service of process by a .

127 *Id.*
128 *Id.* at 515.
130 401 U.S. at 374.
131 *Id.* at 375.
132 *Id.* at 376.
133 *Id.* at 376-77; See *La France* at 520.
134 401 U.S. at 377.
135 *Id.* at 380-81.
136 *Id.* at 382.
137 *Id.*
138 *La France* at 521.
state-paid sheriff if the State is unwilling to assume the cost of official service."

In *Boddie*, Justice Brennan and Justice Douglas submitted concurring opinions. Justice Douglas would have preferred a decision based more directly on the principles in *Griffin*. He disagreed with the reliance placed on the due process clause and the subjective test involved. As he stated, "[f]ishing may be [as] important [as divorce] to some communities." He contended that there have been formulated equal protection guidelines, *i.e.*, race, poverty, alienage, religion, and class or caste, and implied that *Boddie* was consistent with such guidelines.

Justice Brennan believed that

> [i]f fee requirements close the courts to an indigent he can no more invoke the aid of the courts for other forms of relief than he can escape the legal incidents of marriage. The right to be heard in some way at some time extends to all proceedings entertained by courts.

He did not think that the distinctions drawn by the Court as to marital and other actions would survive. Justice Brennan further contended that the *Boddie* case presented "a classic problem of equal protection of the laws" and should be decided under the rationale of *Griffin*.

The lone dissenter in the case was Justice Black. It was his position that since "marriage and divorce have always been considered to be under state control," the states should have the power to charge this nominal cost in order to initiate such a proceeding. He further believed that *Griffin* should not be extended to the civil area.

**Implications of Boddie: In re Kras**

One month after deciding *Boddie*, the Supreme Court considered several cases which dealt, in varying degrees, with the principles espoused in *Boddie*. Of these cases the Supreme Court denied certiorari to five, remanded two for reconsideration.

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139 401 U.S. at 389-90 (Black, J., dissenting).
140 *Id.* at 390 (Black, J., dissenting).
141 In support of his position Black relied on *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949). This case involved a stockholder's derivative action under which a statute, required stockholders who held less than 5% or $50,000 market value of the stock to post security so that, if unsuccessful, they could pay the reasonable expenses of the trial. The provision of the law was challenged as being violative of due process and equal protection. The Court held that it was not, stating that "it is within the power of a state to close its courts to this type of litigation if the condition of reasonable security is not met." *Id.* at 552. It was Black's contention that the only difference between *Cohen* and *Boddie* was that the latter involved a marriage and that this did not justify a different holding. 401 U.S. at 392-93 (Black, J., dissenting); *La France* at 523.

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143 *La France* at 522.
144 401 U.S. at 387-88 (Brennan, J., concurring).
145 *Id.* at 388.
146 See *La France* at 522.
147 401 U.S. at 382.
148 *Id.* at 383 (Douglas, J., concurring).
149 *Id.* at 385 (Douglas, J., concurring).
150 *Id.* (Douglas, J., concurring); *La France* at 522.
151 401 U.S. at 388-89 (Brennan, J., concurring).
152 *Id.*; see *La France* at 522.
tion in light of *Boddie*,\(^{150}\) and granted certiorari to one.\(^{151}\)

Surprisingly, it was Justice Black, the only dissenter in *Boddie*, who vehemently objected to the Court's failure to take this opportunity to extend it. He would have granted certiorari to all these cases.\(^{152}\) He believed that the *Boddie* case could only rest on one crucial foundation—that the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney.\(^{153}\)

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In a bankruptcy proceeding, was the first extension of the principles advanced in *Boddie*. The federal district court in New York first had to consider whether the indigent petitioner would be allowed to proceed *in forma pauperis* according to section 1915(a) of title 28; and thereby avoid attacked the two criteria, which the majority had established in *Boddie*, that would have to be met before a state must grant open access to its courts. The first of these elements was that the court had to be the only means for resolution of the dispute. He believed this to be “no limitation at all.” It is evident, he continued, that the State holds the ultimate remedy in almost every property dispute. . . Likewise, contracts are valuable only because society will enforce them. . . Thus, the judicial process is the exclusive means through which almost any dispute can ultimately be resolved short of brute force.

*Id.* at 956-57 (Black, J., dissenting).

The second element was that the dispute had to involve a fundamental interest. Black contended that if the Court is extending this fundamental interest to divorces, which “is simply not very ‘fundamental’ in the hierarchy of disputes,” then, “almost every other kind of legally enforceable right is also fundamental to our society.” *Id.* at 957-58 (Black, J., dissenting). Black further contended that *Boddie* should be extended to encompass the costs of appeal and also the right to counsel. *Id.* at 958-59 (Black, J., dissenting).

Douglas also dissented on the denial of certiorari. He believed that this accentuated the difficulties with the position taken by the majority in *Boddie*. Douglas contended that the fundamental interest test which the majority had required, was wrong, and that “[w]hen indigency is involved . . . there is [no] hierarchy of interests.” *Id.* at 961 (Douglas, J. dissenting).

\(^{154}\) No. 71B 972 (E.D.N.Y., Sept. 13, 1971).

In Delaware *ex rel. Caulk v. Nichols*, 2 CCH POV L. REP. ¶ 13,406 (Del. Sup. Ct. 1971), decided after *Boddie*, the court refused to waive an appeal bond in the case of an indigent. “The appeal bond was held to be a jurisdictional requirement governing the right of appeal from a justice court, and therefore, a judge could not waive requiring it.” *Id.*
the filing fee. The court rejected this argument because Congress had eliminated bankruptcy proceedings in forma pauperis. The best that could be hoped for was that the payments be allowed in installments.

The court then considered whether this filing fee violated the indigent's right to due process or equal protection. Judge Travia, who decided the case, was faced with two recent and conflicting decisions in this area. The first of these was In re Garland, wherein the bankruptcy filing fee was upheld as constitutional. The Garland court did not believe that a bankruptcy discharge is a fundamental right. It added that the Congressional requirement of the payment of a $50 fee before receiving a discharge [does] not arbitrarily discriminate, but [bears] a rational relation to the service offered and to the bankrupt's need for that service.

The court also held that to be classified an indigent for bankruptcy purposes, a person had to be "'destitute,' with the exception of assets specifically exempt." The second case was In re Smith. Therein, the court held that the bankruptcy filing fee, when applied to indigents, did violate equal protection. The court did not find bankruptcy to be a fundamental interest in itself, but believed that when it was combined with the question of access to the courts, it took on "greater significance." This required the state to show a compelling interest if the fee was to stand. Since this was not accomplished the fee was waived.

Unlike Garland and Smith, however, the Kras case was decided subsequent to the Boddie decision. Judge Travia, in addition to relying on Boddie, also depended on the dissents of Justices Black and Douglas in the denial of certiorari in the group of cases which arose immediately after Boddie. Judge Travia concluded that a discharge in bankruptcy was a fundamental right. As Black stated, "the need . . . to file for a discharge in bankruptcy seems to me to be more 'fundamental' than a person's right to seek a divorce." Agreeing, Justice Douglas, analogized dissolution of marriage to obtaining a fresh start in life through bankruptcy proceedings. According to this reasoning, any violation of this right would that this claim was not so compelling that the state must grant a free discharge. Id. at 1188.

The court was skeptical of persons that sought waiver of these fees. It did not believe that much was at stake. According to the court, there were only two types of assetless persons who would want a discharge in bankruptcy. The first—deserving of no consideration—were those who had assets and wanted to hide them. The second were those who did not have assets, but wanted to protect future assets from creditors. The court stated

155 No. 71B 972 at 7.
156 Id. at 8.; see note 119 supra.
158 Id. at 1188.
159 Id.
160 Id. at 1187.

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162 Id. at 1087.
163 Id. at 1090-91.
164 402 U.S. at 958.
have been a violation of equal protection of law.\textsuperscript{165}

Consequently, Judge Travia believed that this filing fee did violate the petitioner’s right to due process and equal protection.\textsuperscript{166} He failed to find a countervailing state interest which was of such magnitude as to justify the abridgment of the petitioner’s right,\textsuperscript{167} and, therefore, deemed the filing fee waived.

**Conclusion**

The indigent may suffer substantial damage because of the many financial barriers which impede his access to the courts.

These costs frequently bar [him] from enforcing his rights against substandard housing, retaliatory eviction, unconscionable contracts, usurious loans, foreclosures and repossessions, arbitrary administrative action denying or terminating statutory benefits, invasions of privacy, and the like.\textsuperscript{168}

*Boddie* accomplished two advances for the indigent. The first is that the filing fees in divorce cases must be waived if they are an effective bar to entrance to the court; the second, the provision for an indigent to

data-mail notice to the defendant of an impending divorce action if he cannot afford the cost of publication and if the state has not arranged for it or other suitable notice.\textsuperscript{169} But, further progress must be made, with *Boddie* as the foundation. *Kras* built on this foundation, but only to a limited extent. The Supreme Court had a golden opportunity to extend *Boddie* in the cases which followed it. Yet, they chose not to do so. Do they believe, as Black stated, that the *Boddie* principles “can only be enforced slowly step by step, so that the country will have time to absorb its full import?”\textsuperscript{170}

This would be a painful approach. The indigent cannot afford to wait. Not only may he be hurt individually, but he may also be injured as a member of a class. These litigation “costs may have a substantial impact on the conduct of test litigation and may tend to foreclose broad law reform through law suits.”\textsuperscript{171}

There are, however, areas in which it may be reasonable to expect an extension of *Boddie*. It may find acceptance in cases which concern domestic status, such as legal separations, annulments, child custody and adoption.\textsuperscript{172} It may also be expanded, within a reasonable time, into those areas where the court is the only place in which relief can be sought.

If the *Boddie* and *Kras* decisions are to have real significance, their philosophies must be brought to bear upon the many auxiliary and often extremely costly ex-

\textsuperscript{165} Id. at 961.
\textsuperscript{166} No. 71B 972 at 14.
\textsuperscript{167} The court concluded that the fee was not necessary to the operation of the bankruptcy system and that, in fact, the entire basis of the bankruptcy fee system was unsound. Therefore the government’s interest in the fee was not compelling on this basis. Id. at 18-19.

Lastly the court found that there was no basis for fear of frivolous claims. The bankruptcy system already had an adequate deterrent to this, \ie, the effect of a bankruptcy action bars by res judicata any attempt to satisfy the scheduled debts in any other action. Id. at 21.

\textsuperscript{168} Litigation costs at 517-18 (footnotes omitted).
\textsuperscript{169} La France at 532.
\textsuperscript{170} 402 U.S. 954, 956 (Black, J., dissenting).
\textsuperscript{171} Integration of Equal Protection at 236.
\textsuperscript{172} La France at 534-35.
penses. And, it is essential that the right to counsel be extended to the indigent in a civil action.\footnote{In this respect it should be realized that if all else has been financed, the amount of confusing paper work and the awesome size and appearance of the court may be a substantial deterrent to the indigent. Concern towards giving the indigent a meaningful right to be heard is, therefore, also of great importance in this area.}

In order to accomplish these ends, it will be necessary for the Supreme Court to afford to all persons their constitutional rights to due process and equal protection.\footnote{See generally Michelman, \textit{The Supreme Court 1968 Term, Foreward: On Protecting the Poor Through the Fourteenth Amendment}, 83 \textit{Harv. L. Rev.} 7 (1969).}