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# Boddie v. Connecticut: Whither the Indigent Civil Litigant?

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# RECENT DEVELOPMENTS

## Boddie v. Connecticut: Whither The Indigent Civil Litigant?

The recognition of the rights of the indigent in civil proceedings appears to be following a trail parallel to that blazed in the criminal area. In the recent case of *Boddie v. Connecticut*,[1] the Supreme Court struck down a Connecticut statute[2] which required pre-payment of court and service costs as a prerequisite to access to the court in divorce proceedings. The actual holding of the case was that the due process and equal protection clauses of the fourteenth amendment dictate that where a state exercises complete control over the dissolution of a marriage, due process is thwarted if access to the only forum available for resolution of the dispute is denied merely because of inability to pay. The real significance of this decision lies in its obvious invitation for expansion, and in the fact that this is the first time that the Court has held the right to proceed in forma pauperis in civil cases to be constitutionally guaranteed. This article will attempt to explore the development of the civil in forma pauperis doctrine to date, and the prospects for its expansion in the future.

### *History*

#### *Federal Courts*

In the past, the federal In Forma Pauperis statute has been the only basis for allowing the indigent to so proceed.[3] Prior to the *Boddie* decision, most federal courts construed the statute to mean that the ability to proceed in

1. 401 U.S. 371 (1971). This case was recently discussed in Prisco, *Boddie and Beyond: Rights of the Indigent Civil Litigant*, 18 CATHOLIC LAW 67 (1972). That article deals mainly with the constitutional basis for *Boddie*, vis-a-vis the criminal access to the court doctrine. The instant article will deal mainly with the reaction of state and federal courts to the *Boddie* decision, and the prospects for expansion of the *Boddie* doctrine into hitherto unexplored fields.

2. CONN. GEN. STATS. § 52-259 (1958).

3. 28 U.S.C. § 1915 (1970).

forma pauperis is a privilege, not a right.[4] *Johnson v. United States*[5] was one of the first intimations by the Supreme Court that this "privilege" might indeed be a right. Prior to *Johnson* the rule had been that if the trial court gave a written certification that an attempted appeal was not taken "in good faith" there could be no in forma pauperis appeal.[6] The Court in *Johnson* held that the trial court's certification was not final; the litigant had a right to appeal in forma pauperis the certification itself. Subsequent cases have confirmed that, at least in criminal cases, such a procedure is constitutionally mandated.[7] After the right to proceed in forma pauperis was secured in the criminal context, the lower federal courts were divided as to whether the doctrine should be extended. In habeas corpus cases, technically civil in nature but closely related to criminal actions, the courts were usually willing to recognize the right.[8]

The in forma pauperis principle in civil proceedings has been acknowledged for more than a century but has been referred to only occasionally and has never been applied. For example, the fourteenth amendment was developed from social theory codified in the Civil Rights Act of 1866 (now 42 U.S.C. § 1981) which provides for equal access to all courts, civil or criminal.[9] And in 1884, the Supreme Court said in *Barbier v. Connally*[10] that the fourteenth amendment requires "[t]hat [persons] should have like access to the courts . . . [t]hat no greater burdens should be laid upon one than are laid upon others in the same calling and condition."[11] More than 80 years later, in the 1966 case of *Williams v. Shaffer*,[12] dissenting from a denial of certiorari, Mr. Justice Douglas said: ". . . [T]he Equal Protection clause of the Fourteenth Amendment is not limited to criminal prosecutions. Its protections extend as well to civil matters."[13] However, so far as the fed-

4. Dorsey v. Gill, 80 U.S. App. D.C. 9, 148 F.2d 857 (D.C. Cir. 1945), *cert. denied*, 325 U.S. 890 (1945); Parsell v. United States, 218 F.2d 232 (5th Cir. 1955); Barkeij v. Ford Motor Co., 230 F.2d 729 (9th Cir. 1956); Clough v. Hunter, 191 F.2d 516 (10th Cir. 1951).

5. Johnson v. United States, 352 U.S. 565, 566 (1957).

6. Wells v. United States, 318 U.S. 257 (1943); Dorsey v. Gill, 80 U.S. App. D.C. 9, 148 F.2d 857 (D.C. Cir. 1945), *cert. denied*, 325 U.S. 890 (1945); Bernstein v. United States, 195 F.2d 517 (4th Cir. 1952), *cert. denied*, 343 U.S. 980 (1952).

7. Griffin v. Illinois, 351 U.S. 12 (1956); Gardner v. California, 393 U.S. 367 (1969); Roberts v. LaVallee, 389 U.S. 40 (1967); Long v. District Court, 385 U.S. 192 (1966).

8. Ragan v. Cox, 305 F.2d 58 (10th Cir. 1962); Tidmore v. Taylor, 323 F.2d 88 (10th Cir. 1963); Blair v. California, 340 F.2d 741 (9th Cir. 1965); Pembrook v. Wilson, 370 F.2d 37 (9th Cir. 1966).

9. 42 U.S.C. § 1981 (1970).

10. Barbier v. Connolly, 113 U.S. 27 (1885).

11. *Id.* at 31.

12. Williams v. Shaffer, 385 U.S. 1037 (1967) (Douglas, J. dissenting), *denying cert. to* 222 Ga. 334, 149 S.E.2d 668 (1966).

13. *Id.* at 1039.

eral circuit courts of appeal were concerned, the Justice was a "voice crying in the wilderness." They preferred to follow the judicial attitude which had persisted since the turn of the century: that the in forma pauperis proceeding does not apply to civil cases.

*State Courts*

The doctrine of civil in forma pauperis proceedings has been more widely recognized and applied at the state court level than at the federal. This state recognition has been based on statutory, common law, and constitutional grounds and applies to a wide variety of civil situations. Most of the states have considered the in forma pauperis proceeding to be a privilege, but a substantial number have held it to be a right.

A 1968 New York[14] case foreshadowed the Supreme Court's decision in *Boddie* and based its decision on the same constitutional ground. "In this State, a marriage cannot be dissolved except by 'due judicial proceedings'. . . . 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. Such a right is . . . as basic as Griffin's right to appeal and Mrs. Harper's right to vote. It is manifestly discriminatory under Griffin standards to deprive Mrs. Jeffreys of that right while affording it to others with money."[15]

In a recent Maine case,[16] involving a tenant eviction, the indigent defendant was unable to post the bond which a Maine statute required before claimant was allowed to defend title to the property. The court found the statutory requirement to be a denial of due process saying, "[t]he constitutional mandate [of Equal Protection] does not differentiate between civil and criminal cases."[17]

However, most states have not based the ability to proceed civilly in forma pauperis on constitutional grounds, but rather have utilized statutory authorization or the inherent power of the court to implement this doctrine. As early as 1856, the Texas Supreme Court[18] held that it had the power, with or without an applicable statute, to waive costs and fees in a civil assault and battery case. A Pennsylvania court in 1901[19] held that a require-

14. Jeffreys v. Jeffreys, 58 Misc. 2d 1045, 296 N.Y.S.2d 74 (Sup. Ct. 1968). On appeal, the court decided that, while the city was not required to pay costs, the state was so required, 38 App. Div. 2d 431, 330 N.Y.S.2d 550 (1972).
15. 58 Misc. 2d at 1158, 296 N.Y.S.2d at 87.
16. Harrington v. Harrington, 269 A.2d 310 (1970).
17. *Id.* at 314.
18. Hickey v. Rhine, 16 Tex. 577 (1856).
19. Jack v. Adm'rs of McClure, 26 Pa. County Ct. 59 (1901).

ment of security for costs was a denial of justice to a pauper. In *State ex rel. Jennings v. Peacock*,[20] the Florida Supreme Court ruled that a defendant tenant need not post security to recompense jurors because ". . . where a trial by jury may be invoked the right to such trial is absolute and a defendant . . . may look with confidence to the guarantee . . . and demand a trial by jury although he is penniless and without friends."[21]

Cost-free transcripts have long been available to civil indigents in some states, although the courts have generally explained this policy on the basis that court reporters are state officials and required to provide the record, even though they are ordinarily recompensed for their services by the litigants.[22] In Louisiana, transcripts are provided by statute without cost in civil cases.[23]

In *Ferguson v. Keays*,[24] decided just prior to *Boddie*, the California Supreme Court considered whether the state courts of appeal had the power to waive the fees required for filing the record on appeal in a civil case, or for a petition for a writ within their original jurisdiction. The court concluded that they did have such power. A long line of California cases had previously held that the trial courts have the right, derived from the common law, to waive certain fees for indigent litigants.[25] Based on this line of cases, the court found that several English common law decisions extended the power to the courts in appeals cases.[26] Since American courts have traditionally wielded the same powers as their English ancestors,[27] the court found that it was empowered to waive appeals fees; without this power the appellate courts would be powerless to prevent abuse at the trial level.

It is clear that the states have been much more innovative and inclusive than the federal courts in their application of the civil in forma pauperis doctrine. But after *Boddie*, we may see the federal courts begin to seize the initiative in this area.

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20. 126 Fla. 743, 171 So. 821 (1937).
21. *Id.* at 745, 171 So. at 821-22.
22. Sills v. Sills, 51 Idaho 299, 6 P.2d 1026 (1931); Walker v. Burgevin, 220 Ky. 690, 295 S.W. 997 (1927).
23. LA. CIV. CODE art. 5185 (Slovenko 1961).
24. 94 Cal. Rptr. 398 (1971).
25. Martin v. Superior Court, 176 Cal. 289, 168 P. 135 (1917); Isrin v. Superior Court, 63 Cal. 2d 153, 45 Cal. Rptr. 320, 403 P.2d 728 (1965) (jury fees); Majors v. Superior Court, 181 Cal. App. 2d 235, 70 Cal. Rptr. 226 (1968) (bond on appeal); Bank of America v. Superior Court, 255 Cal. App. 2d 757, 63 Cal. Rptr. 366 (1907) (cost bond); County of Sutter v. Superior Court, 244 Cal. App. 770, 53 Cal. Rptr. 424 (1966) (Cost bond).
26. *See, e.g.*, Drennan v. Andrews, 1 Ch. App. 300, 301, n.7 (1866).
27. *See generally* note 24 *supra.*

### *Prospects for Expansion*

Because *Boddie* held that cost-free access to the civil courts can be, under certain circumstances, constitutionally mandated, opportunities for expansion of the doctrine are almost limitless. In light of the *Boddie* reasoning, it can be argued that in any situation in which a court, or similar institution, is the only means of either redress for a grievance or the granting of a right, access to that court or institution is a matter of constitutional guarantee. In the short time which has elapsed since the *Boddie* decision, attorneys have already attempted to expand the doctrine in several areas.

#### *Federal*

In a district court case, *In re Smith*,[28] decided only a few days prior to *Boddie*, the petitioner appealed a decision of a referee in bankruptcy denying her petition to proceed in forma pauperis on the theory that she was being denied equal protection under the fourteenth amendment. The referee had held that the bankruptcy statute[29] expressly required payment of the filing fee as a condition precedent to a discharge in bankruptcy. The district court agreed with the referee but felt that such a statutory requirement was a denial of equal protection. While expressing doubt that the "right" to be declared a bankrupt is as "fundamental" as voting,[30] or the right to a free transcript in a criminal appeal,[31] the court felt that the issue before it was access to the court. On this basis, the court held that a bankruptcy proceeding is more "administrative" than "judicial,"[32] but is the type of proceeding which is ". . . stamped with a judicial imprimatur,"[33] thus falling into the "access to the court" scheme in the broad sense.[34] After the *Boddie* decision, the bankruptcy proceeding appears to be fertile ground for the expansion of the civil in forma pauperis doctrine since it is the only means one has to be declared a bankrupt. This reasoning was followed in *In re Aaron*,[35] where the court based its opinion squarely on *Boddie*. Specifically, the court found that "the government's purely economic justification for bankruptcy filing fees is not a sufficiently compelling interest to make such fees a precondition of access to the courts."[36]

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28. 323 F. Supp. 1082 (D. Colo. 1971).
29. 11 U.S.C. §§ 32(b), (c)(8); 68(c)(1); 95(g) (1970).
30. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
31. Griffin v. Illinois, 351 U.S. 12 (1956).
32. *In re* Garland, 428 F.2d 1185, 1197 (1st Cir. 1970).
33. *In re* Smith, 323 F. Supp. 1082, 1089 (D. Colo. 1971).
34. A year earlier, in *In re* Garland, 428 F.2d 1185 (1st Cir. 1970), the First Circuit dismissed just such an argument.
35. *In re* Aaron, 334 F. Supp. 1150 (D. Ore. 1971).
36. *Id.* at 1151. The court also found the fundamental interest. "I find from the

In *Boyden v. Comm'r of Patent Appeals*,[37] decided two weeks after *Boddie*, the United States Court of Appeals rejected the denial of equal protection argument. In that case, the petitioner, asserting indigence, demanded that his patent appeal be reviewed by the patent commissioner without payment of the statutory filing fee. Boyden claimed that the federal In Forma Pauperis Statute[38] authorized him to appear before the Patent Office without paying the fee. The court noted that the statute applies only to the *courts*, which can only authorize in forma pauperis proceedings "therein" and does not apply to administrative tribunals. The court decided that the Congress has the exclusive power, derived from the Constitution,[39] over patents, and has opened the Patent Office to all with the not unreasonable requirement that all pay the filing fee. It is true there are economic differences among the populace but Congress in its discretion has done nothing to alleviate the plight of the indigent in this area. The court felt that Boyden had asked for what was, in effect, a "reverse discrimination." "This applicant in effect has asked this court to order discrimination in his favor. He asks to be permitted without charge to do what all others must pay for. Thus, where the *law* has not discriminated against him, he would have us say that the Commissioner is bound to discriminate to his advantage."[40]

The court further stated, in dictum, that although the Commissioner had no statutory power to waive the fee, if he did have the power and failed to exercise it the result might be different. The court appears to have based its decision on the fact that in the case at bar Boyden was seeking a "commercial" right (*i.e.* a patent monopoly) whereas in other cases a "fundamental" right was being sought, *e.g.* the right to counsel,[41] the right to a transcript,[42] the right to vote,[43] or the right to a judgment prior to wage garnishment.[44]

The Sixth Circuit has also adopted this "fundamental" right approach. In *Chidsey v. Guerin*,[45] the Secretary of Agriculture issued a reparation order

present record both a prohibitive fee (for the poor), as well as a fundamental interest which the fee requirement denies those who cannot meet it. Even if the wealth barrier is not, alone, suspect enough to warrant application of the compelling-interest test, that test is appropriate when the government seeks to exclude a citizen from the courts because of that person's poverty." *Id. Cf.* Application of Ottman, 336 F. Supp. 746 (E.D. Wisc. 1972); O'Brien v. Trevethan, 336 F. Supp. 1029 (D. Conn. 1972).

37. Boyden v. Comm'r of Patents, 441 F.2d 1041 (D.C. Cir. 1971).
38. 28 U.S.C. § 1915(a) (1970).
39. U.S. CONST. art. I, § 8.
40. Boyden v. Comm'r of Patents, 441 F.2d 1041, 1044 (D.C. Cir. 1971).
41. Gideon v. Wainwright, 372 U.S. 335 (1963).
42. Griffin v. Illinois, 351 U.S. 12 (1956).
43. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
44. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).
45. 443 F.2d 584 (6th Cir. 1971).

against the defendant, whose appeal was dismissed for failure to post the statutorily required bond. The court held that this was not a deprivation of due process and interpreted *Boddie* to hold that only if the interest affected is "fundamental" is the legislature restricted in providing access to the means for adjudication. "If the affected interest is not considered to be a fundamental right, due process demands only that Congressional circumspection of the interest have some 'rational basis'."[46] The court felt that even though the defendant's license would be suspended for two to three years, thereby cutting off his employment opportunities in his profession, this interest was not so fundamental as divorce,[47] interstate travel,[48] voting,[49] a writ of habeas corpus,[50] or appellate review of criminal convictions.[51] This is a position with which, as we shall see, some Supreme Court Justices, notably Messrs. Justice Black and Douglas, do not agree.

Thus, while the federal courts have been reluctant as of yet to expand the civil in forma pauperis doctrine to include administrative proceedings, such as those involved in bankruptcy and patent cases, they may have to reassess past decisions as more and more attorneys press the demands of the indigent in these areas. In accordance with the *Boddie* rationale, it would seem that indigents with fundamental rights, which are capable of being settled only in federal tribunals, whether judicial or administrative, should be allowed cost-free access to those arenas.

*State*

The states appear more willing to adopt and expand the *Boddie* rationale than the lower federal courts.

New York, which even prior to *Boddie* had court access decisions favorable to indigents, has expanded the rationale to service of process. In *Dorsey v. City of New York*,[52] a divorce action, the petitioner moved for leave to proceed in forma pauperis and for an order permitting service by publication. Since the whereabouts of the petitioner's husband were unknown, she could not gain access to the court except by service upon him by publication, which she could not afford. The court held that payment for the service by publication must be made from the public purse, for "[i]n the absence of any *sufficient justification* for the State's action, the failure of the community

46. *Id.* at 586.
47. Boddie v. Connecticut, 401 U.S. 371 (1971).
48. Shapiro v. Thompson, 394 U.S. 618 (1969).
49. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
50. Smith v. Bennett, 365 U.S. 708 (1961).
51. Gideon v. Wainwright, 372 U.S. 335 (1963).
52. 321 N.Y.S.2d 129 (Sup. Ct. 1971).

to extend the opportunity to be heard to the indigent is a denial of due process [citation omitted]."[53]

New York also extended the doctrine to abortion cases. In *City of New York v. Wyman*[54] the court, using the "complete state control" approach, expanded the *Boddie* decision to cover medicaid payments. Under the New York statute,[55] the state, upon request of the mother and with the consent of a doctor, freely authorized abortions during the first twenty-four weeks of pregnancy. Respondents in the case were pregnant women contesting the constitutionality of a ruling of the Commissioner of Social Services[56] which "in effect said that there would be no reimbursement by way of medicaid payments for an abortion unless it was 'medically indicated'."[57] Since the indigent women could not afford the abortions without medicaid assistance, the court held that the ruling discriminated against the poor and denied them equal protection.

The court looked to a long line of cases, including *Griffin v. Illinois*[58] and *Douglas v. California*,[59] which held that while a state may not be constitutionally required to extend a right to its citizens, once it does so the right must be extended to all citizens equally. The effect of the Commissioner's ruling in this case was to deny abortions to the poor while allowing them to the rich. Because the state had a monopoly on the means by which the right might be exercised, the indigents had to be afforded an opportunity to exercise their right without cost. Since at least two three-judge federal courts have declared state anti-abortion laws unconstitutional[60] as a denial to women of the "fundamental right," protected by the ninth amendment, to decide whether or not to have children, it would appear that other states may be compelled to afford free abortions to all indigent women.

In a New York landlord-tenant case,[61] the court held that the indigent respondent was constitutionally entitled to service of subpoenae upon wit-

53. *Id.* at 130-31 (emphasis added). It would seem that, in accordance with *Boddie*, there can *be* no sufficient justification for failure to extend the opportunity to be heard, when a determination of fundamental rights is to be made. *See also* Cohen v. Bd. of Supervisors, 20 Cal. App. 3d 238, 97 Cal. Rptr. 550 (1971); Hart v. Superior Ct., 16 Ariz. App. 184, 492 P.2d 433 (1972).

54. 321 N.Y.S.2d 695 (1971).

55. N.Y. PENAL LAW § 125.05 (1965).

56. Order of the Social Service Department of April 8, 1971.

57. City of New York v. Wyman, 321 N.Y.S.2d at 696.

58. Griffin v. Illinois, 351 U.S. 12 (1956).

59. 372 U.S. 353 (1963).

60. Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wisc. 1970) (per curiam), *appeal dismissed*, 400 U.S. 1 (1970); Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam), *appeal docketed*, 39 U.S.L.W. 3151 (1970).

61. Hotel Martha Washington Management Co. v. Swinick, 322 N.Y.S.2d 139 (1971).

nesses, service of subpoenae duces tecum, and attendance of witnesses at trial—all at government expense.

In *Wilson v. Wilson*[62] a Pennsylvania court followed *Boddie* in allowing an indigent plaintiff to proceed in forma pauperis in a divorce proceeding, but felt that *Boddie* did not require the state to furnish legal and investigative assistance as the defendant had requested. The Delaware Supreme Court[63] denied an indigent leave to file an appeal without posting bond in a landlord-tenant case. The court held, over a strong dissent, that once a trial has been afforded the indigent, due process has been satisfied. If *Boddie's* progeny follow the path of the criminal cases this reasoning will not long survive.[64]

A Massachusetts court was influenced by *Boddie* in *Damaskos v. Board of Appeal of Boston*,[65] where residents sought review of a Board of Appeal decision granting a zoning variance. The grantee of the variance moved that the residents be required to post a bond pursuant to the statute.[66] The residents contended that the bond requirement (in this case $50,000) imposed an unconstitutional limitation on open and equal access to the courts. The court said that while bonds are required in other situations, *e.g.* replevin, trusteeships, and appeals, they were required only after some prior judicial, as opposed to administrative, process. In a zoning appeal case, initial access to the court was at stake. However, the court construed the statutory requirement to be somewhat akin to Federal Rule of Civil Procedure 65(c), which requires a bond but allows the court to decide what amount is proper. Accordingly, the case was remanded to the trial court to set the bond amount.

Thus, while the *Boddie* decision itself applied only to divorce proceedings, its rationale can, and should, be applied to any situation in which the court or tribunal is the sole means of settlement. For, it would seem that in any situation in which a plaintiff's fundamental rights are at stake, the *Boddie* decision demands that he be given unrestricted access to the appropriate forum, regardless of his wealth. But, to date courts have been reluctant to extend the doctrine to certain situations without further direction from the Supreme Court. The Court's own attitude toward the extension of *Boddie* has been somewhat ambiguous. Shortly after the *Boddie* decision came down, the Court denied certiorari[67] to a group of cases seeking to extend the

62. 218 Pa. Super. 344, 280 A.2d 665 (1971).
63. State *ex rel.* Caulk v. Nichols, 281 A.2d 24 (Sup. Ct. 1971).
64. *Compare* Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972) *with* Jones v. Aciz, 289 A.2d 44 (1972).
65. 267 N.E.2d 897 (1971).
66. MASS. GEN. LAWS ANN. ch. 665, § 11 (1956).
67. Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954 (1971).

doctrine, yet noted probable jurisdiction in one,[68] and vacated and remanded two others[69] for reconsideration in light of *Boddie*. As to the two cases being remanded, *Frederick v. Schwartz* involved an indigent in a welfare case who could not pay fees necessary to docket an appeal, and *Sloatman v. Gibbons* was a divorce case similar to *Boddie* except that Arizona permits an extension of time for the indigent to pay the statutory fee. In *Lindsey v. Normet,* one of the cases which was granted certiorari, an indigent who could not afford to post the penalty bond required to appeal an adverse judgment in an eviction suit, sought to proceed in forma pauperis.

Of the other cases in which certiorari was denied,[70] four involve situations similar to the cases which were remanded. If the attitude of the Court is that the doctrine of civil in forma pauperis proceedings should be gradually evolved, the Court's action as to these cases is understandable. The surprising case, however, is an indigent mother who was denied court appointed counsel to defend her against a state civil suit to declare her an unfit mother and take away five of her seven children. This case appears to fit exactly into the *Boddie* mold since the separation of mother and child is certainly "fundamental" and the matter rests squarely within state control.

Mr. Justice Douglas expressed the feeling that all the cases under consideration should be reversed outright and the petitioners therein allowed, as of right, to proceed in forma pauperis. Mr. Justice Black, who dissented in *Boddie*, felt that the cases should be set for argument or reversed outright because "[t]here is simply no fairness or justice in a legal system which pays indigents' costs to get divorces and does not aid them in other civil cases which are frequently of far greater importance to society."[71] Since the denial of certiorari should, theoretically, have no bearing on the matter one way or the other it is difficult to define what direction the Supreme Court will take in subsequent cases of this type.

*Federal Courts*

The most frequent criteria used to determine indigency in the federal courts is aptly stated in *Bramlett v. Peterson*:[72]

> The determination of indigency rests in the sound discretion of the

68. Lindsey v. Normet, No. 6158, *cert. denied,* Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 955 (1971).

69. Frederick v. Schwartz, No. 5050; Sloatman v. Gibbons, No. 5067, *cert. denied in* Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 955 (1971).

70. In re Garland No. 5971, *see also* note 30; Borbeau v. Lancaster, No. 5054; Beverly v. Scotland Urban Enterprises, Inc., No. 5208; Kaufman v. Carter, No. 6375, *cert. denied in* Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954 (1971).

71. Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 960 (1971).

72. 307 F. Supp. 1311, 1323 (M.D. Fla. 1969).

> court, but it should take into consideration whether the accused has a family or other dependents and how many, if the accused is presently employed or is on welfare, whether he has income . . . , what amount, if any, he has in checking or savings accounts, the extent of any indebtedness, . . . whether he has adequate assets not presently encumbered or otherwise unavailable.[73]

The federal courts have generally followed the dicta in *Adkins v. E. I. DuPont De Nemours & Co.*[74] to the effect that one need not be penniless to proceed in forma pauperis.

While the determination of indigency rests in the "sound discretion of the court," there are limits to the exercise of this discretion. In *Harris v. Harris*,[75] the plaintiff petitioned under the D.C. Code[76] to be allowed to waive the $100 filing fee in a divorce proceeding. In the principal case, Mrs. Harris supported herself and two children on the $70 a week she received from private employment. In the companion case (*Parks v. Parks*) Mrs. Parks supported herself and five children on $220 a month received from the Department of Public Welfare. The lower court, referring to Mrs. Harris' statement that she earned $70 a week take home pay, said that her ". . . allegation of poverty is belied by her own statement," and refused her permission to proceed. The United States Court of Appeals for the District of Columbia circuit felt that such a summary dismissal of Mrs. Parks' claim to poverty was improper and stated that the true test was that laid down by Mr. Justice Black in *Adkins*:

> We cannot agree . . . that one must be absolutely destitute to enjoy the benefit of the statute. We think an affidavit is sufficient which states that one cannot because of his poverty "pay or give security for costs . . . and still be able to provide" himself and dependents "with the necessities of life."[77]

While this statement was an interpretation of the federal In Forma Pauperis Statute,[78] the court gave the D.C. Code provision the same reading.

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73. *Id.* at 1323.
74. 335 U.S. 331 (1948).
75. 424 F.2d 806 (D.C. Cir. 1970).
76. D.C. CODE § 15-712 (1967).
77. Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. at 339.
78. 28 U.S.C. 1915(a). The statutes are similar when read together: D.C. CODE § 15-712. Waiver of prepayment of costs in Court of General Sessions.

When satisfactory evidence is presented to the District of Columbia Court of General Sessions or one of the judges thereof that the plaintiff in a suit is indigent and unable to make deposit of costs, the court or judge may permit the prosecution of the suit without the prepayment or deposit of costs.

28 U.S.C. § 1915(a). Proceedings in forma pauperis.

Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes an affi-

Although the briefs of both appealing parties suggested constitutional issues, the court, deferring to the Supreme Court, which had at that time noted probable jurisdiction in *Boddie*,[79] based its decision solely on statutory construction. Now that *Boddie* is law, it is uncertain how the definition of indigency will be affected. It is possible that some courts, fearing an influx of indigents seeking access to the courts, may be hesitant to define "indigency" as broadly as they have previously done. To date this writer has been unable to find any federal post-*Boddie* decisions indicating a trend in either direction.

*State Courts*

In the state courts, there is some indication that in cases based on the *Boddie* theory the courts will impose a high standard for determination of indigency. In *Wilson v. Wilson*,[80] a divorce case, the Pennsylvania court held that where the husband ". . . (1) has no cash, collateral, or property and is unable to pay the costs of a divorce proceeding, and (2) is confined in a state prison, has only minimal income provided by prison wages" and is able to demonstrate this satisfactorily to the trial court, then it would be a denial of due process to prevent the petitioner from proceeding in forma pauperis. This standard is considerably more strict than Mr. Justice Black's "allegation of poverty" criterion set forth in *Adkins*.[81] The court in *Wilson* also refused to expand *Boddie* by denying the petitioner's request for legal and investigative assistance from the state.

The Massachusetts Supreme Court, in *Coonce v. Coonce*,[82] considered a case similar to, but decided before, *Boddie*. It is an extreme example of the fate which may befall the progeny of *Boddie*. Mrs. Coonce, the plaintiff, wished to proceed in an action for divorce but maintained that, by reason of indigency, she was unable to pay the $15 filing fee. As proof of her indigency she submitted an affidavit stating that she had five children ranging in age from one to eight, that she receives Aid for Families with Dependent Children in the amount of $158.15 biweekly, and that she would be unable to pay the $15 filing fee without depriving her children of the necessities of life. There were no counter-affidavits presented to the court; indeed, the evidence was not questioned as to its accuracy. However, the lower court

davit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

79. 395 U.S. 974 (1969).
80. Wilson v. Wilson, 218 Pa. Super. 344, 280 A.2d 665 (1971).
81. Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331 (1948).
82. 365 Mass. 690, 255 N.E.2d 330 (1970).

found, and the supreme court affirmed, that the allegations presented were insufficient, as a factual matter, to prove her indigency. "As the recipient of non-taxable support payments at the rate of $79 weekly, together with free medical expenses, the Court finds the petitioner not 'destitute'."[83]

The court admitted that the probate court, in which the case was originally brought, had the power under the statute[84] to waive fees for indigents in this type of a case, but it avoided the issue by the simple expedient of declaring her "not indigent." Yet, the supreme court did not feel bound by the trial court's decision and decided the issue of indigency for itself unfavorably to the plaintiff.[85] The plaintiff contended that since the "authorities" had already declared her to be eligible for AFDC benefits and for receipt of OEO services, she is automatically eligible to proceed in forma pauperis. The court declined to surrender the right to make such a determination for itself. Indeed, it is doubtful that many state courts will allow federal agencies or federal courts to set the standards of indigency to be applied by the state courts.

Now that *Boddie* has raised the ability to proceed in forma pauperis to the dignity, in certain cases at least, of a constitutional right, a restrictive definition of indigency may be the only means of circumvention available to those courts which are reluctant to follow the doctrine.

### *Conclusion*

The Supreme Court's decision in *Boddie v. Connecticut* will most certainly be regarded as a landmark in a long line of decisions expanding the rights of indigents in criminal and civil litigation. Depending on one's point of view, it is either the affirmation of a constitutional principle long in need of recognition, or a decision likely to clog the already overcrowded civil courts with a flood of litigation spurred by its cost free availability. Its importance and impact, however, cannot be denied.

The prospects for the expansion of the *Boddie* rationale are great. If the logic of the *Boddie* decision is carried to its ultimate conclusion it seems inescapable that eventually indigent litigants will be supplied with professional legal assistance, cost free access to all determinative tribunals, free transcripts, and free service of process in most types of civil litigation.

Mr. Justice Black, who dissented in *Boddie*, said in a later Supreme Court decision, ". . . if the decision in that case [*Boddie*] is to continue to be the

83. *Id.* at 691, 255 N.E.2d at 331 (1970).
84. MASS. GEN. LAWS ANN. ch. 208, § 33; ch. 262, §§ 4, 40 (Supp. 1972).
85. Coonce v. Coonce, 365 Mass. at 692, 255 N.E.2d at 332: "We . . . stand where the trial judge stood and consider the same question unaffected by his decision."

law, it cannot be restricted to persons seeking a divorce. It is bound to be extended to all civil cases."[86] Mr. Justice Douglas would extend the doctrine's coverage to administrative procedures as well. "[O]btaining a fresh start in life through bankruptcy proceedings or securing adequate housing and other procedures [are fundamental rights. Refusal to allow an indigent to proceed cost free in these cases would] . . . seemingly violate the Equal Protection Clause."[87]

Presumably it will take years to extend this doctrine to encompass *all* types of civil cases and administrative proceedings. Cost free legal assistance was not directly affected by the *Boddie* decision and, because of the relatively high financial burden it will place upon the states, it is not a viable prospect in the near future. But if the path which the legal rights of the indigent followed in the criminal courts is any guide, once a case like *Boddie* has been decided by the Supreme Court, there can be no retreat from the inevitable.

The late Mr. Justice Black can no longer implement the doctrine of *Boddie*, but his expression of that doctrine is the most eloquent and the one best prophesying the direction it is likely to take in the future:

> In my view, the decision . . . can . . . 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 trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney . . . In my judgment *Boddie* cannot and should not be limited to either its facts or its language, and I believe there can be no doubt that this country can afford to provide court costs and lawyers to Americans who are now barred by their poverty from resort to the law for resolution of their disputes.[88]

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86. Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954 (1971) (Black, J. dissenting).
87. *Id.* at 961 (Douglas, J. dissenting).
88. *Id.* at 955-56 (Black, J. dissenting).